A DAMAGED REMEDY: DISABILITY DISCRIMINATION CLAIMS AGAINST STATE ENTITIES UNDER THE AMERICANS WITH DISABILITIES ACT AFTER *SEMINOLE TRIBE* AND *FLORES*

James Leonard*

I. INTRODUCTION

Like other segments of American society, state governments are forbidden to practice discrimination against the disabled. The principal source of this non-discrimination mandate is Title II of the Americans with Disabilities Act[1] ("ADA") which applies broadly to "services, programs, or activities of a public entity."[2] When acting as employers, state entities may also be subject to Title I of the ADA, which prohibits discrimination in employment.[3] Titles I and II, together with their implementing regulations, establish a clear mandate against discrimination by state entities,[4] define what constitutes discrimination,[5] authorize

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* Professor of Law, The University of Alabama School of Law. B.A., M.S.L.S., J.D., University of North Carolina at Chapel Hill. I would like to thank Dean Kenneth C. Randall of The University of Alabama School of Law for providing a summer research grant that supported this Article. Thanks also to my secretary, Peggy McIntosh, who helped with the preparation of the manuscript. Finally, thanks to my former colleague at Ohio Northern University, Joanne C. Brant, for reading the manuscript and talking me through several difficult points of analysis. *Ex corde uno millia gratiarum.*

1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 to 12132 (1994 & Supp. 1997).

2. 42 U.S.C. § 12132 (1994). *See* Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952 (1998) (ADA Title II applies to state prisons). For a summary of the substantive requirements of Title II, see generally *infra* Part III.B.1.

3. *See infra* Part III.A.

4. Title II forbids discrimination against qualified individuals with disabilities by "public entities." § 12132. *See generally infra* Part III.B.1. Public entities are defined to include, inter alia, "any State or local government[,]" § 12131(1)(A), and "any department, agency, special purpose district, or other instrumentality of a State or States or local government...." § 12131(1)(B). There is no exception for state and local governments from

causes of action in federal and state court, and do away with state sovereign immunity to suits in federal court.[6] Plaintiffs who can make out claims of discrimination under these statutes are generally entitled to a wide range of remedies including equitable relief, attorney fees, and, in some cases, monetary awards.[7] As in other contexts, the availability of monetary relief is critical to fashioning a complete remedy for disability discrimination. Very often a plaintiff cannot be made whole by an order against a state agency to desist from a discriminatory practice. Plaintiffs may incur actual, retrospective losses such as a loss of program benefits, lost wages, or out of pocket expenses. The only way to address these injuries is through a monetary award.

Two recent Supreme Court decisions have cast doubt on the power of the federal courts to provide such monetary awards against state defendants under the ADA. In 1996, the Court held in *Seminole Tribe v. Florida* that Congress has no power to abrogate a state's Eleventh Amendment immunity to suit in federal court when it legislates under the Commerce Clause; abrogation is limited to statutes enacted pursuant to section 5 of the Fourteenth Amendment[8] ("Section 5" or "the Enforcement Clause"). One year later, however, the Court severely restricted the power of the Congress to legislate under section 5. In *City of Boerne v. Flores*, the Court ruled that Congress may act under Section 5 to protect discrete groups only when the Court itself has identified that group as deserving of the Fourteenth Amendment's protection.[9] According to *Flores*, Congress has no power to determine what a substantive constitutional violation is; rather, Section 5 confers only the power to prevent or remedy judicially determined violations.[10]

In combination, these decisions create the potential to deprive plaintiffs of a federal forum that can give complete relief in disability claims against state entities. Before *Seminole Tribe* and *Flores*, plaintiffs could get the full measure of relief authorized by statute against a state defendant in federal court. After the 1989 plurality decision in *Pennsylvania v. Union Gas Co.*,[11] it was generally assumed that Congress, when acting under the Commerce Clause, had the power to abrogate any immunity which a state might assert under the Eleventh Amendment. Likewise, the Court's decisions appeared to give Congress great latitude under Section 5 of the Fourteenth Amendment in identifying equal

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the employment provisions of Title I as there is for the federal government. *See* § 12111(5)(B)(i) (excepting only United States, corporations wholly owned by the United States, and indian tribes). Since local governments do not enjoy Eleventh Amendment immunity, *see infra* note 106 and accompanying text, this Article is concerned only with states and state agencies as defendants.

5. *See, e.g.*, 42 U.S.C. § 12112 (1994) (discriminatory conduct under Title I); 28 C.F.R. § 35.130 (1998) (general prohibitions under Title II).

6. *See* 42 U.S.C. § 12202 (1994).

7. *See infra* Part III.C.

8. *See* Seminole Tribe v. Florida, 517 U.S. 44, 57–73 (1996).

9. *See* City of Boerne v. Flores, 521 U.S. 507, 534–37 (1997).

10. *See id.* at 517–20.

11. 491 U.S. 1 (1989), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

protection violations and in devising legislative solutions.[12] It mattered very little whether Congress was acting under its Commerce Clause or Section 5 powers when fashioning legislation to protect the disabled, as well as other groups such as the aged or women. Either way, Congress could subject the states to suit in a federal court that could offer complete relief. *Seminole Tribe* and *Flores* have changed the situation; now it does matter which constitutional power Congress used in enacting legislation. If it is determined that Congress has acted under its Commerce Clause power, plaintiffs simply may not pursue monetary remedies against unwilling state defendants in federal court. Even if it is agreed that Congress has acted under section 5, its powers are essentially responsive. Abrogation is improper unless Congress is acting to correct or prevent a Fourteenth Amendment violation that the Court itself has already identified. Substantive innovation is not permitted.[13]

A decision by the courts that the ADA is an exercise of the Commerce Clause power rather than Section 5 will not halt federal disability claims. Nothing in *Seminole Tribe* or *Flores* suggests that Congress may not set substantive rules which apply to the states when acting properly under a constitutional grant of power.[14] Nor will plaintiffs be completely shut out of the federal trial courts. Although states are protected from suit in federal courts *eo nomine* in claims lying outside of the Fourteenth Amendment, state sovereign immunity cannot completely oust a plaintiff from a federal forum. In most cases, the rule of *Ex parte Young*[15] will permit plaintiffs to proceed against state officials based on the legal fiction that officials who violate federal law are acting privately and not as the state.[16] Thus, plaintiffs may resort to federal court to enforce disability claims even if they derive from the Commerce Clause. This exception to the Eleventh Amendment is, however, a limited one. Remedies in *Ex parte Young* cases are restricted to prospective relief such as an order to cease discrimination. Any order which requires the payment of money is deemed to run against the state and is therefore barred by sovereign immunity.[17] Thus, even if *Ex parte Young* actions are available for federal disability claims, federal relief may not entail the monetary element that is generally essential for a complete remedy.

Since the decisions in *Seminole Tribe* and *Flores*, lower federal courts have split into two camps on the issue of Congress' power to subject the states to a federal forum for a disability discrimination claim under the ADA. A majority of courts addressing this issue have determined that the ADA represents a valid

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12. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976); Katzenbach v. Morgan, 384 U.S. 641, 650 (1966).

13. *See Flores*, 521 U.S. at 517–20.

14. Recent Supreme Court decisions have shown an increasing tendency to protect state interests against substantive federal regulation. *See infra* notes 580–82 and accompanying text.

15. 209 U.S. 123 (1908). *See generally infra* Part II.A.2.

16. *See* Home Tel. & Tel. v. City of Los Angeles, 227 U.S. 278, 294–95 (1913). *See generally infra* Part II.A.2.

17. *See* Edelman v. Jordan, 415 U.S. 651 (1974). *See generally infra* notes 119–26 and accompanying text.

exercise of congressional power under the Enforcement Clause, although their analytical framework varies.[18] Some, such as the Fifth and Eleventh Circuits, characterize the ADA as remedial or preventative legislation to secure the equal protection rights of the disabled and hence proper under *Flores*.[19] Others, such as the Eighth and Ninth Circuits, uphold the ADA by applying the Court's longstanding test in *Katzenbach v. Morgan* to determine the appropriateness of Enforcement Clause legislation.[20] Similarly, the few opinions which find the ADA to be improper under Section 5 take different analytical paths.[21] One district court, for example, has concluded that the ADA represents substantive legislation that exceeds the *Flores* limitation to remedial measures,[22] while another court has struck down the abrogation provision by application of the *Morgan* test.[23]

This Article attempts to resolve the controversy over the effects of *Seminole Tribe* and *Flores* on ADA-based monetary awards against state defendants by theorizing as follows. As regards the status of the disabled, the Equal Protection Clause forbids only state actions which are prejudicial, meaning actions which reflect bias, hostility, or irrational fear.[24] Neutral state actions that otherwise serve legitimate state interests but have an unintended disparate impact on the disabled do not violate the Fourteenth Amendment. Therefore, any legislation passed under the Enforcement Clause must address intentional discrimination against the disabled. Enactments that directly focus on intentional discrimination easily meet the "remedial" requirement of *Flores*. Portions of the ADA which go beyond regulating prejudicial conduct directly, however, may fail the *Flores* test. Although these provisions must be judged on a rule-by-rule basis, they can survive the *Flores* test only if they are closely linked to preventing intentional discrimination against the disabled. Particular rules which forbid certain kinds of conduct, such as inquiries on applications about disabilities, may pass the *Flores* test since such conduct is often linked with discriminatory conduct.[25] Reasonable accommodation requirements, in contrast, are likely to fail

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18. *See infra* Part IV.A.

19. *See* Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 58 (1998); Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999); *infra* notes 478–97 and accompanying text.

20. *See* Autio v. AFSCME, Local 3139, 140 F.3d 802 (8th Cir. 1998), *aff'd en banc by an equally divided court*, 157 F.3d 1141 (8th Cir. 1998); Clark v. California, 123 F.3d 1267 (9th Cir. 1997), *cert. denied sub nom.*, Wilson v. Armstrong, 118 S. Ct. 2340 (1998). Under the *Morgan* test, Congress acted within its Section 5 powers if an enactment was: (1) regarded as enforcing the Equal Protection Clause; (2) plainly adapted to that end; and (3) not prohibited by and was consistent with the letter and spirit of the Constitution. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). *See generally infra* notes 498–512 and accompanying text.

21. *See generally infra* Part IV.B.

22. *See* Brown v. North Carolina Div. of Motor Vehicles, 987 F. Supp. 451, 459 (E.D.N.C. 1997).

23. *See* Nihiser v. Ohio EPA, 979 F. Supp. 1168, 1176 (S.D. Ohio 1997).

24. *See generally infra* notes 332–43 and accompanying text.

25. *See generally infra* notes 713–20 and accompanying text.

inasmuch as they apply to all covered entities regardless of discriminatory intent.[26] At present, some judicial decisions awarding damages for intentional discrimination in violation of the ADA keep damage awards against state governments within the boundaries of the Enforcement Clause; however, any attempt by Congress to amend the law to permit damage awards for disparate impact injuries or to liberalize damage awards would run afoul of the limitations of *Flores*.

Part II examines the limited power of Congress to subject states to suits in federal court. Part II.A reviews traditional Eleventh Amendment jurisprudence, which permits federal courts to grant prospective relief against the states but not to enter retrospective monetary judgments. Part II.B assesses the effects of the recent *Seminole Tribe* and *Flores* decisions on congressional power to abrogate Eleventh Amendment immunity by statute, and concludes that the power to abrogate under Section 5 of the Fourteenth Amendment is extremely limited. My purpose here is not to criticize these decisions (capable legal scholars have already examined *Seminole Tribe*[27] and *Flores*[28]) but to take them as they are and to determine what leeway they give Congress to hale states into federal court to answer claims of disability discrimination. Part II.C completes the Eleventh Amendment analysis by outlining the severe limitations on congressional power to use Section 5 to protect the disabled. The primary issue is whether and to what degree the Supreme Court has identified the disabled as a group deserving of protection under the Fourteenth Amendment. I conclude that the Court's decisions recognize Equal Protection Clause violations when state actions are based on irrational attitudes such as a dislike or fear, or when they fail to treat the disabled like similarly situated groups, but not when such actions amount to neutral rules which have a "disparate impact" on the disabled. Congress also retains a preventative power under Section 5 to regulate areas of state conduct where Equal Protection violations are likely to occur.

Part III describes the substantive rights created by the ADA and the remedial scheme that Congress set up to enforce them. In light of Eleventh Amendment restrictions, the most pressing remedial issue is the degree to which the ADA creates an action for damages against state entities. I conclude that, as a statutory matter, damages are available only for intentional discrimination under Title I and Title II. Part IV reviews lower court cases that have ruled on the abrogation provision of the ADA, focusing on the lower court opinions which

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26. *See generally infra* notes 722–58 and accompanying text.

27. *See* Vicki C. Jackson, Seminole Tribe, *the Eleventh Amendment, and the Potential Evisceration of* Ex parte Young, 72 N.Y.U. L. REV. 495 (1997); Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1; Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996); Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

28. *See* David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31; Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty after* City of Boerne v. Flores, 1997 SUP. CT. REV. 79; Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997).

have ruled on Eleventh Amendment defenses to ADA claims. The vast majority of these cases, and all court of appeals cases, find no Eleventh Amendment impediment to federal claims against state entities under the ADA.[29]

Part V is the heart of the analysis. Here I first determine the proper analytical standard for determining whether the abrogation provisions of the ADA are proper under the Enforcement Clause. The key issue is whether the deferential approach in *Morgan* survives after the decisions in *Seminole Tribe* and *Flores*. I conclude that it does not. I also address the relevance of the decision in *City of Cleburne v. Cleburne Living Center*[30] in which the Supreme Court decided that equal protection challenges brought by the mentally retarded, and presumably all disabled persons, were to be judged under a rational basis standard rather than heightened scrutiny.[31] Next, I apply the Section 5 standard to the substantive provisions of the ADA. Here I attempt to divide the ADA's substantive rules into four categories: (1) prohibitions on intentional discrimination; (2) rules against specific practices; (3) reasonable accommodation requirements; and (4) the integration mandate. I conclude that statutory prohibitions of intentional discrimination against the disabled, certain prohibitory rules such as bans on pre-employment medical exams, and the integration requirement will be found proper under the Enforcement Clause. Reasonable accommodation requirements, however, are likely to fail the tests set up in *Seminole Tribe* and *Flores*.

Although disability discrimination by state entities is covered by other federal statutes, I chose to confine this Article to claims arising under Titles I and II of the ADA. Section 504 of the Rehabilitation Act ("Section 504"), most notably, forbids disability discrimination by recipients of federal funds[32] and expressly applies to programs and activities operated by "a department, agency, special purpose district, or other instrumentality of a State or of a local government...."[33] Since state agencies receive significant amounts of federal money, programs operated with such funds are subject to a non-discrimination requirement quite apart from any requirement of Title I or II of the ADA. Nevertheless, Section 504 either was or could have been enacted under Congress' Spending Clause power.[34] Congress has wide latitude in fixing the conditions for

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29. *See infra* Part IV.A.

30. 473 U.S. 432 (1985).

31. *See infra* Part V.B.2.

32. 29 U.S.C. § 794(a) (1994). Section 504 provides, in pertinent part:

> 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.

Id.

33. § 794(b)(1)(A).

34. Section 504 was modeled on Title VI of the Civil Rights Act of 1964 which obligated recipients of federal funds to refrain from discrimination based on race, color, or national origin. *See* 42 U.S.C. § 2000d (1994) ("No person... shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be

the voluntary receipt of federal money. In *South Dakota v. Dole*, the Court upheld, over a Tenth Amendment challenge, a provision withholding highway construction funds from states that did not raise their drinking age to twenty-one.[35] The Court stated that "a perceived Tenth Amendment limitation on congressional regulation of state affairs [does not] concomitantly limit the range of conditions legitimately placed on federal grants."[36] The spending power is not unlimited. The *Dole* Court recognized that at some point federal financial pressure might become improper compulsion.[37] Professor Meltzer argues cogently that the conditions in *Dole* also ran counter to the more explicit provisions of the Twenty-First Amendment which gives the states the unquestionable authority to set drinking ages.[38] Such objections, however, are a matter of Spending Clause jurisprudence and do not implicate the Enforcement Clause. The Spending Clause conditions receipt of federal money on a program recipient's promise not to discriminate on the basis of disability and would be unaffected by *Flores'* interpretation of Section 5, which restricts congressional power to subject state entities to damages claims. Titles I and Title II, in contrast, impose direct prohibitions against disability

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subjected to discrimination under any program or activity receiving Federal financial assistance."). Title VI was based at least in part on Congress' Spending Clause power. *See* 110 CONG. REC. 6546 (1964) (statement of Sen. Humphrey) ("[Title VI] is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to fix the terms on which Federal funds shall be disbursed."). *See generally* Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity without Respect to Handicap under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 421–25 (1984) (discussing Section 504 as a Spending Clause measure).

In *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243–44 & n.4 (1985), the Court assumed without deciding that Section 504 represented an exercise of Congress' Section 5 powers. This assumption was facilitated in part by the petitioner's concession to this effect in the lower courts, *see id.*, and on the fact that Congress did not specify its constitutional authority for the Rehabilitation Act, but also by the fact that very little depended upon the characterization. As discussed below, *see infra* notes 216–30, it was widely believed at the time that Congress was free to legislate at its discretion under Section 5. Subsequently, some lower courts, following *Scanlon*, have treated Section 504 as an Enforcement Clause measure. *See* Clark v. California, 123 F.3d 1267, 1270 (9th Cir. 1997); Mayer v. University of Minn., 940 F. Supp. 1474, 1476–80 (D. Minn. 1996). Other courts have treated Section 504 as a Spending Clause enactment. *See* Rivera Flores v. Puerto Rico Tel. Co., 776 F. Supp. 61, 67 (D.P.R. 1991); Shuttleworth v. Broward County, 649 F. Supp. 35, 37 (S.D. Fla. 1986). One court has treated it as both. *See* Armstrong v. Wilson, 942 F. Supp. 1252, 1262–63 (N.D. Cal. 1996). Surely there is no reason why Congress could not have drawn on both powers in enacting Section 504. *See* 42 U.S.C. § 12101(b)(4) (1994) (invoking both Fourteenth Amendment and Commerce Clause as authority for ADA).

35. *See* South Dakota v. Dole, 483 U.S. 203 (1987).

36. *Id.* at 210.

37. *See Dole*, 483 U.S. at 211. *See also* New York v. United States, 505 U.S. 144, 166–67 (1992) (contrasting conditions and coercion). *Cf.* Rust v. Sullivan, 500 U.S. 173 (1991) (upholding funding restriction on abortion counseling over First Amendment challenge).

38. *See* Meltzer, *supra* note 27, at 51–52. *See also* Petty v. Tennessee-Missouri Commission, 359 U.S. 275 (1959) (conditioning creation of bi-state commission under interstate compact on amenability to suit in federal court).

discrimination without reference to the presence of federal funding. Damage awards against state entities will fail unless these provisions were enacted properly under the Enforcement Clause.

II. THE POWER TO CREATE A FEDERAL FORUM

Theoretically it should make no difference whether a plaintiff pursues a federal claim against a state government defendant in state or federal court. The Supremacy Clause[39] imposes on the state courts an obligation to apply federal law whenever it conflicts with state law;[40] moreover, state judges take oaths to uphold the constitution and laws of the United States. The reality is otherwise. State government defendants prefer to litigate in state courts and, to that end, frequently bring motions to dismiss federal claims based on Eleventh Amendment sovereign immunity.[41] I do not intend to suggest that state judges as a group are consciously hostile to federal claims; however, the situation of a state judge can be different from that of a life-tenured Article III judge. State judges are often elected[42] and therefore inevitably subject to political pressures. There is also the possibility that a state judge will be personally familiar with the state's attorney or have a personal political history that leads to deference to certain state officials or to a concern for the state treasury.[43] Biases in favor of state defendants by the state courts are subtle and hence difficult to quantify, much less prove, with certainty. Nonetheless the preference of states to litigate in their own courts indicates at least a perceived, if not an actual, advantage. State defendants may also gain procedural advantages in state court; for example, plaintiffs may be limited to a claims court where jury trials are not available.[44] If state defendants have something to gain in state court, plaintiffs necessarily have something to lose.

An expansive view of Eleventh Amendment sovereign immunity unavoidably poses a risk that federal rights will not be defended.[45] *Seminole*

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39. U.S. CONST. art. VI, §2.

40. *See* Howlett v. Rose, 496 U.S. 356, 367–75 (1990).

41. *See infra* Part IV (collecting cases in which state defendants have moved for dismissal in ADA cases on grounds of sovereign immunity).

42. Judges in a majority of states are subjected to some popular electoral process. As of 1998, 39 states had systems in which judges either stood for election or retention after a term, while only 11 states had strictly appointive systems. *See* 32 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 135–37 (1998).

43. *See* Joanne C. Brant, Seminole Tribe, Flores *and State Employees: Reflections on a New Relationship*, 2 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 175, 178 (1998).

44. *See id.*

45. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.1 n.2 (3d ed. 1999) (citing P. LOW & J. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 808 (2d ed. 1989)). *See also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 248 (1985) (Brennan, J., dissenting); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466–91 (1987); Jackson, *supra* note 27, at 543–44 (1997); Vazquez, *supra* note 27, at 1685. *But see Scanlon*, 473 U.S. at 240, n.2 (Powell, J.) (defending state court role in enforcing federal rights).

Tribe,[46] *Flores*,[47] and other decisions[48] which take this expansive view raise serious questions about the nature of federal-state relations and whether state actions which violate federal law can be subject to effective review. It is an oddity, to say the least, that federal legislative and judicial powers should not be co-extensive. Still, I do not intend to answer these questions in this Article. I accept, grudgingly, the new reality of *Seminole Tribe* and *Flores*, that as a general matter, federal courts have lost jurisdiction to hear federal claims against non-consenting states that stem from Article I legislation.[49] Additionally, an expansive view of Eleventh Amendment immunity may result in a shift of federal claims, at least those asking for monetary relief, to state courts. The question raised by this Article is whether and to what degree the federal courts may still continue to hear ADA claims against state defendants.

Although the decisions in *Seminole Tribe* and *Flores* greatly expanded the reach of state sovereign immunity, there remains a role for Congress and the federal courts in protecting federal rights. Contemporary Eleventh Amendment jurisprudence can be reduced without too much damage to three propositions:

- Non-consenting states are immune to suit *eo nomine* in federal courts by private individuals, foreign citizens, foreign sovereigns, and Indian tribes, but not to suit by other states or the United States;

- Plaintiffs may obtain prospective relief against a continuing violation of federal law by bringing suit against a state official; and

- Congress may abrogate Eleventh Amendment immunity if it legislates properly under section 5 of the Fourteenth Amendment.

Thus Eleventh Amendment immunity is not a complete boon to the states. Plaintiffs still have the option of going to federal court for prospective relief.[50] More importantly, *Seminole Tribe* and *Flores* leave open the possibility that Congress acted properly under Section 5 when it opened the federal courts to claims for retrospective relief under the ADA.[51]

This Part of the Article, considers the extent of congressional power to create a federal forum for ADA claims. Part II.A provides a summary of the present Supreme Court's interpretation of state sovereign immunity. The essence of contemporary Eleventh Amendment jurisprudence is the uneasy co-existence between the Court's firm insistence that states are immune from suits by private individuals and its willingness to tolerate the equivalent of such suits in the form

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46. Seminole Tribe v. Florida, 517 U.S. 44 (1996).

47. City of Boerne v. Flores, 521 U.S. 507 (1997).

48. *See* Principality of Monaco v. Mississippi, 292 U.S. 313 (1934); Hans v. Louisiana, 134 U.S. 1 (1890).

49. The appellate jurisdiction of the Supreme Court to review Article I claims coming from state courts is unaffected. *See* McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation, 496 U.S. 18, 26 (1990); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

50. *See infra* Part II.A.2.

51. *See infra* Part V.

of official capacity suits against public officials for prospective relief. This illustrates the Amendment's compromising and indecisive rule structure, which makes fashioning federal statutes that can be enforced against the states in federal court quite difficult. Part II.B examines Congress' power to set aside Eleventh Amendment immunity when legislating to protect the disabled under the Fourteenth Amendment. Finally, Part II.C attempts to specify the level of protection for the disabled under the Equal Protection Clause.

A. The Eleventh Amendment

1. State Sovereign Immunity

"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."[52]

The Eleventh Amendment was enacted because Alexander Chisholm brought an action against the State of Georgia in a federal court.[53] Chisholm was the executor of Robert Farquhar's estate. Farquhar, a South Carolinian, had supplied war material to Georgia during the Revolutionary War but had not been paid at the time of his death. Farquhar's estate brought an action in the U.S. Supreme Court against Georgia to recover payments, invoking the Court's original jurisdiction over cases to which a state is party.[54] Georgia did not make an appearance before the Supreme Court; it simply denied that the Supreme Court had jurisdiction over a state.[55]

Chisholm won by a 4-1 vote.[56] The pre-Marshall Court followed the English custom of *seriatim* opinions, thus *Chisholm* produced five separate opinions. Four Justices were untroubled by making states amenable to suit in federal court. Justices Blair and Cushing concluded, largely on the basis of the language of Article III,[57] that states were susceptible to suit by citizens of other states in federal court.[58] Justice Wilson and Chief Justice Jay issued more

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52. U.S. CONST. amend. XI.

53. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

54. Article III provides, in part, that "[i]n all Cases...in which a State shall be a Party, the supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2, cl. 2. *Chisholm* represented an exercise of the Court's original, and not appellate, jurisdiction. Chisholm had previously brought an unsuccessful action in the circuit court, presided over by Justice Iredell. Modern notions of res judicata would have barred the second action, leaving Chisholm with only appellate access to the Supreme Court.

55. *See Chisholm*, 2 U.S. at 469 (Jay, C.J., opinion).

56. Chief Justice Jay and Justices Cushing, Blair, and Wilson voted with the majority. Justice Iredell dissented.

57. Article III provides, in pertinent part: "The judicial Power, shall extend to all Cases, in Law and Equity...between a State and Citizens of another State...." U.S. CONST. art. III, §2, cl. 1.

58. *See Chisholm*, 2 U.S. at 450 (Blair, J., opinion); *id.* at 466–69 (Cushing, J., opinion).

extensive opinions in which they argued that the people were sovereign, that governments were artificial contrivances to serve to the people, and that the people were free to create a national government which could subject the states to a national court system.[59] Jay also voiced concerns about the need for an effective federal judiciary which could avoid clashes between state interests and force the states to comply with national obligations under the law of nations.[60] Justice Iredell dissented for statutory reasons. He concluded that the Judiciary Act of 1789 did not authorize actions in assumpsit against states because provisions in the statute authorizing writs "agreeable to the principles and usages of law"[61] were to be read in light of the lack of any such remedy under English common law.[62]

Perhaps the Justices' opinions should have been given more deference as its members had participated in the events which gave birth to the Constitution. Both the Attorney General Randolph, who argued for Chisholm, and Justice Wilson had been members of the Committee of Detail of the Constitutional Convention that drafted the part of Article III[63] permitting suits in controversies "between a State and Citizens of another State."[64] Justice Blair had served as a delegate to the Constitutional Convention.[65] Justice Cushing had presided over the Massachusetts ratification convention.[66] Chief Justice Jay had been a delegate to the New York ratification convention and was a co-author of *The Federalist*.[67] It did not matter; the default judgment entered against Georgia was never executed.[68] Within two years, the Eleventh Amendment was ratified thus overturning the decision in *Chisholm*.

The Eleventh Amendment forbids the federal courts to take jurisdiction over actions against states initiated by citizens of other states or foreigners.[69] Early

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59. *Id.* at 453–66 (Wilson, J., opinion); *id.* at 469–97 (Jay, C.J., opinion).

60. *Id.* at 469–97 (Jay, C.J., opinion). Chief Justice Jay's views were no doubt influenced by his prior role in negotiating treaties with Great Britain which purported to settle claims by British subjects for pre-Revolutionary debts and for confiscation of property. The Treaty of Paris, which ended the Revolutionary War, provided that British creditors should meet with "no lawful impediments" to the recovery of these debts. Treaty of Paris, Sept. 3, 1783, U.S.-Gr. Brit., art. IV, 8 Stat. 80, 82. Flagrant non-compliance by American States induced the British to delay evacuation of forts along the frontier until the United States complied with the Treaty. The standoff led to the negotiation of Jay's Treaty, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116, which called for evacuation of British frontier forts and the creation of a joint commission to settle debts. After the commission broke up in 1802, the United States gave up and paid British claimants over $2.6 million. *See generally* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 16–17 (1987).

61. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

62. *Chisholm*, 2 U.S. at 433–35 (Iredell, J., dissenting).

63. *See* ORTH, *supra* note 60, at 23.

64. U.S. CONST. art. III, § 2, cl. 1.

65. *See* ORTH, *supra* note 60, at 22.

66. *See id.*

67. *See id.*

68. *See Chisholm*, 2 U.S. at 480, n.* [sic].

69. *See* Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996).

on there was no attempt to extend state sovereign immunity beyond the literal provisions of the Amendment. Indeed, until the late Nineteenth Century, the Eleventh Amendment played a relatively unimportant role in federal litigation.[70] Although Article III empowers federal courts to hear "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties[,]"[71] Congress did not permanently confer federal question jurisdiction on the federal courts until 1875.[72] Consequently, Eleventh Amendment issues arose in the relatively narrow ranges of cases that the federal courts could hear such as admiralty cases,[73] appeals of federal issues from state cases,[74] cases within the Supreme Court's original jurisdiction,[75] and specifically authorized federal cases.[76] The most important issue during this period was whether the Eleventh Amendment shielded public officials from suit when they were acting in their official capacities.[77] In spite of an obvious state interest in these situations, the Marshall Court took the position that the Amendment applied only when a state was a party of record.[78]

The defining moment of Eleventh Amendment jurisprudence came in 1890 with the decision in *Hans v. Louisiana*.[79] That case arose during the economic downturns of the post-Reconstruction era, most notably the Panic of 1873. The weak economy made it difficult for states both to maintain public services and fund debt service at the same time. Many state governments in the South attempted to resolve the problem by repudiating public debts.[80] In *Hans*, a citizen of Louisiana sued the state in federal court when it refused to pay money owed on state issued bonds.[81] The plaintiff contended, rightly,[82] that the failure to

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70. *See* ORTH, *supra* note 60, at 41–42.

71. U.S. CONST. art. III, § 2.

72. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

73. *See* United States v. Peters, 9 U.S. (5 Cranch) 115 (1809); United States v. Bright, 24 F. Cas. 1232, 1234 (C.C.D. Pa. 1809) (No. 14,647), *overruled by In re* New York, 256 U.S. 490, 497 (1921).

74. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

75. *See* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838); New Jersey v. New York, 28 U.S. (3 Pet.) 461 (1830).

76. *See* Act of Apr. 10, 1816, ch. 44, § 7, 3 Stat. 266, 269 (granting federal courts original jurisdiction over actions to which the Bank of the United States was party); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

77. *See* ORTH, *supra* note 60, at 30–42.

78. *See Osborn*, 22 U.S. at 857. *See also* ORTH, *supra* note 60, at 40–42; William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction rather than a Prohibition against Jurisdiction*, 35 STAN. L. REV. 1033, 1084–87 (1983).

79. 134 U.S. 1 (1890).

80. *See generally* ORTH, *supra* note 60, at 58–89; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1973–91 (1983).

81. In *Hans*, the State of Louisiana attempted to repudiate bond debt by revoking an annual tax levy, which generate funds for interest payments, and by remitting coupons. *See* Gibbons, *supra* note 80, at 2000.

82. It was already well established the Contract Clause applied to state as well as

pay amounted to an impairment of obligations forbidden by Article I, section 10 of the United States Constitution. Since Hans was a citizen of Louisiana rather that a "Citizen[] of Another State,"[83] his action was not prohibited by the words of the Eleventh Amendment. Instead, jurisdiction in *Hans* was based on the presence of a federal question.[84] Nevertheless, the Supreme Court held that his suit was barred by sovereign immunity.[85]

Conceding that *Hans* did not fall within its terms, Justice Bradley held that the Eleventh Amendment reflected a larger principle of sovereign immunity.[86] He concluded that the federal judicial power in Article III did not embrace actions which were unknown at common law, including suits against unconsenting states by private individuals.[87] In part, Justice Bradley was struck by the anomaly of protecting the states from federal question suits by citizens of other states and foreign nations but not from suits brought by their own citizens.[88] Likewise he appreciated the anomaly of requiring a state to defend a federal question suit by its own citizens when it could assert a sovereign immunity defense to the same claim in state court.[89] More important to Bradley's reasoning, however, was his view of the public reaction to the decision in *Chisholm v. Georgia*. He noted that the decision provoked such a "shock of surprise" that Congress immediately proposed the Eleventh Amendment which the states then quickly ratified.[90]

Hans was not free from analytical difficulties. Although *Hans* is commonly taken as an Eleventh Amendment case, it is actually an interpretation of Article III.[91] As such, the failure to conform to the letter of the Amendment is not troubling. On the other hand, the Court's assertion, that the limitation on federal jurisdiction over states derives from Article III, makes the Amendment surplusage. It seems illogical that the Congress would propose, and that the states would ratify, an Amendment that effected no change in the Constitution. If the purpose of the Amendment was to *clarify* the states' pre-existing sovereign immunity, one would expect a differently worded Amendment. Also, the notion that the Eleventh Amendment recognized a broad sovereign immunity against suits by individuals was at odds with the prevailing mid-Nineteenth Century view

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private contract. *See* New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

83. U.S. CONST. amend. XI.

84. The federal question in *Hans* was whether Louisiana's repudiation of its bond debt violated the Contract Clause. *See Hans*, 134 U.S. at 3 (citing U.S. CONST. art. I, § 10). The Judiciary Act of 1875 had granted the federal courts the power to hear cases arising under the Constitution and laws of the United States. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

85. *See Hans*, 134 U.S. at 10–11.

86. *See id.* at 10.

87. *See id.*

88. *See id.* at 10.

89. *See id.* Interestingly, Justice Bradley seems to assume that a state has no obligation to provide a forum for claims which the federal courts cannot hear because of state sovereign immunity. *See generally infra* notes 785–92 and accompanying text.

90. *Hans*, 134 U.S. at 11.

91. *See* ORTH, *supra* note 60, at 76.

that the Amendment prohibited jurisdiction based on diversity but not federal question or admiralty.[92] A better explanation for *Hans* lies in the political situation at the time. Both Judge Gibbons[93] and Professor Orth[94] have attempted to explain the decision as a concession to the federal courts' inability to enforce judgments against recalcitrant states intending to repudiate bond obligations.

In spite of severe criticism,[95] the Court never has retreated from the expansive rule of state sovereign immunity laid down in *Hans*. It consistently has held that sovereign immunity prevents private individuals from suing unconsenting states in federal court. Moreover, the Court has extended state sovereign immunity to suits by foreign states[96] and Indian tribes.[97] At one point in the 1980s, it seemed possible that the Court would overrule *Hans* in favor of the view that the Eleventh Amendment was intended only to eliminate federal jurisdiction over the states based on diversity but not to affect federal question jurisdiction. The primary advocate of this view was Justice Brennan, who argued in his *Atascadero State Hospital v. Scanlon* dissent that *Hans* should be overruled in favor of this interpretation.[98] However, in 1996 the Court reaffirmed the broad view of state sovereign immunity in *Seminole Tribe v. Florida*.[99]

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92. *See* ALFRED CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 4 (4th ed. 1864); BENJAMIN ROBBINS CURTIS, JURISDICTION, PRACTICE AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 14, 18 (George Ticknor Curtis & Benjamin R. Curtis, eds. 1880).

93. Gibbons, *supra* note 80, at 2000–09.

94. ORTH, *supra* note 60, at 77–81.

95. *See* Amar, *supra* note 45, at 1475-84; Martha Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203, 1211–12 (1978); Martha Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 538–46 (1977); Fletcher, *supra* note 78, at 1087–99; Gibbons, *supra* note 80, at 1892–94; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity*, 98 YALE L.J. 1, 4 (1988); Meltzer, *supra* note 27, at 10-13; James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 648–53 (1994). *See also* James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 70 (1984); Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling* Hans v. Louisiana, 57 U. CHI. L. REV. 1260 (1990). *But see* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1346–49 (1989) (criticizing *Hans* but concluding that Eleventh Amendment bans federal question suits by citizens of other states); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989) (defending ideas espoused in *Hans*); Calvin Massey, *State Sovereign Immunity and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 135–51 (1989) (criticizing *Hans* but concluding that Eleventh Amendment bans federal question suits by citizens of other states).

96. *See* Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

97. *See* Blatchford v. Native Village of Noatuk, 501 U.S. 775 (1991).

98. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 301 (1985) (Brennan, J., dissenting). Justices Marshall, Blackmun, and Stevens joined in the dissent.

99. 517 U.S. 44 (1996). *See infra* Part II.B.

There are a number of situations where the Eleventh Amendment does not apply. For example, the Amendment does not: (1) bar suits by one state against another[100] in federal court so long as the state is suing to advance its own interests and not on behalf of its citizens;[101] (2) apply in state courts;[102] hence the Amendment does not forbid suits against a state in its own court or another state's court, although state immunity provisions may apply;[103] (3) apply to appeals from the state courts to the United States Supreme Court on the theory that an appeal is not a suit that has been "commenced or prosecuted"[104] against a state;[105] (4) apply to actions against cities, municipalities, or political subdivisions of a state;[106] or (5) apply to suits in federal court brought by the United States.[107] With the possible exception of the last category, these situations have no relevance to the ADA and similar enactments. Federal civil rights statutes for the most part have been enforced by individuals pursuing private causes of action in federal court. Moreover, even though the federal government is authorized under Title I of the ADA, and other statutes, to proceed on behalf of aggrieved individuals,[108] it does not have the resources to participate in a significant number of cases.[109] It takes little imagination to realize that the rule of state sovereign immunity may threaten the enforcement of the ADA and like statutes unless some exception can be found.

2. An Exception: Prospective Relief Against State Officials

State immunity to suits in federal court has the obvious drawback of making it difficult to vindicate federal rights. In some cases, remitting plaintiffs to the state courts might have the effect of turning federal rights into mere suggestions. The Supreme Court has long recognized this difficulty and has consistently permitted official capacity suits against state officials for injunctive relief. This rule *can* be traced to the Court's decision in *Ex parte Young*,[110] however, the principle is of much older vintage. Suits against public officials for violations of the law were permitted at English common law as an exception to the rule of sovereign immunity.[111] Likewise, the United States Supreme Court early on

100. *See* Colorado v. New Mexico, 459 U.S. 176, 182 n.9 (1982).

101. *See* Maryland v. Louisiana, 451 U.S. 725, 745 n.21 (1981).

102. *See* Nevada v. Hall, 440 U.S. 410 (1979).

103. *See, e.g.*, ALA. CONST. art. I, § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity.").

104. U.S. CONST. amend. XI.

105. *See* McKesson Corp. v. Division of Alcohol Beverages & Tobacco, Dep't of Business Regulation, 496 U.S. 18, 27 (1990); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

106. *See* Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

107. *See* United States v. Mississippi, 380 U.S. 128, 140–41 (1965).

108. *See* 42 U.S.C. § 2000e-5(f) (1994) (permitting EEOC to bring civil action on behalf of complainant); 42 U.S.C. § 12117 (1994) (incorporating prior provision into Title I of the ADA).

109. *See* Brant, *supra* note 43, at 179; Joanne C. Brant, *The Ascent of Sovereignty*, 83 IOWA L. REV. 767, 858 (1998); Jackson, *supra* note 27, at 540.

110. 209 U.S. 123 (1908).

111. *See* ORTH, *supra* note 60, at 40–41.

continued the English practice by permitting suits against state officials for violation of federal law.[112] *Ex parte Young*, however, confirmed that the availability of suits against state officials continued in spite of the expansive notion of Eleventh Amendment sovereign immunity found in *Hans*.[113]

Ex parte Young involved a suit in federal court by railroad interests to enjoin the enforcement of Minnesota rate regulations. Edward T. Young, the attorney general of Minnesota, was held in civil contempt after he violated a preliminary order not to enforce the state regulations. Seeking his release from custody in a habeas petition to the Supreme Court, Young argued that the underlying injunction violated the Eleventh Amendment. The Court denied relief. It reasoned that state officials who violate federal law are not acting in an official capacity since states do not authorize their officials to violate the law; rather, the official is merely using the name of the state in an attempt to violate federal law.[114] He is therefore "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[115] Under such circumstances, the Eleventh Amendment's protection of state entities has no application.

Of course the reasoning in *Ex parte Young* has a surreal quality that should never be taken literally. The purpose of the decision was to permit the federal courts to enforce federal law against the states through equitable relief.[116] Without some method of forcing the states to obey federal commands, the republic would become ungovernable. Statements that the action is brought against the public official rather than the state are pure legal fictions. These fictions raise certain logical difficulties. Say, for example, that a plaintiff brings an action against a public official to enjoin a practice which violates the Equal Protection Clause. How can a plaintiff establish the necessary "state action" requirement if the defendant is stripped of official authority? The Court's response has been to ignore the logical problems. In *Home Telephone & Telegraph v. Los Angeles*, however, the Court simply stated that conduct which is not official for purposes of the Eleventh Amendment may still constitute state action for purposes of the Fourteenth Amendment.[117]

The doctrine of *Ex parte Young* clashes with the rule of state sovereign immunity when state officials are sued for monetary relief. *Ex parte Young* was an easy case in that a federal court merely had to order Young to refrain from taking unconstitutional actions. Modern federal civil rights statutes such as the ADA

112. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); United States v. Peters, 9 U.S. (5 Cranch) 115 (1809). *See generally* David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 150–52 (examining early Court decisions regarding state official immunity from suit).

113. CHEMERINSKY, *supra* note 45, § 7.5, at 412–15.

114. *Ex parte Young*, 209 U.S. at 159–60.

115. *Id.* at 159.

116. *See* CHEMERINSKY, *supra* note 45, § 7.5, at 414–15; CHARLES ALAN WRIGHT ET AL., 13 FEDERAL PRACTICE AND PROCEDURE § 3524, at 151–54 (1984); CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 292 (4th ed. 1983).

117. *See* Home Tel. & Tel. v. Los Angeles, 227 U.S. 278, 285–86, 288 (1913).

present different remedial issues since these statutes place affirmative obligations on state governments to act or to pay money. Such orders often have a direct or indirect effect on the state treasury, the very phenomenon which provoked the Eleventh Amendment and protective interpretations such as *Hans*.[118] The Court has developed a rather difficult-to-apply set of rules to distinguish between orders that are permissible under *Ex parte Young* and those which run against the state. The crux of these rules is that the Eleventh Amendment bars actions to recover money from state officials when the recovery will actually come from the state.[119] In such cases, the public officials are nominal defendants and the state is the real party in interest. In *Ford Motor Company v. Department of the Treasury*, for example, the Supreme Court determined that an action for a tax refund against several Indiana officials was, in essence, against the state since the refund would be paid from the state treasury.[120]

Since any order against a state official may have some impact on the public fisc, the rule in *Ford Motor Company* has the potential to swallow up the doctrine of *Ex parte Young*. The Court has limited this effect by drawing a rather artificial distinction between orders with prospective and retrospective effect. *Edelman v. Jordan* was a suit brought against the Director of the Illinois Department of Public Aid, prompted by the state's failure to process applications for a welfare program within deadlines set by the federal Aid to the Aged, Blind, or Disabled program.[121] The Court disallowed monetary relief for overdue payments on the grounds that they would be paid from the state treasury.[122] It did permit, however, an injunction against the state official to comply prospectively with federal law.[123] At first glance, the distinction between retrospective and prospective relief is peculiar. Future compliance with federal mandates often will prove much more expensive for the state treasury than compensation for accrued wrongs.[124] Moreover, the retrospective-prospective distinction is notoriously difficult to apply to complicated factual settings. For example, in *Milliken v. Bradley*, the Detroit school desegregation case, the Court affirmed an order that

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118. *See supra* Part II.A.1.

119. *See* Edelman v. Jordan, 415 U.S. 651, 663 (1974); Ford Motor Co. v. Department of the Treasury, 323 U.S. 459, 464 (1945).

120. *See Ford Motor Co.*, 323 U.S. at 464.

121. *See Edelman*, 415 U.S. at 653.

122. *See id.* at 664–76.

123. *See id.*

124. *See* CHEMERINKSY, *supra* note 45, § 7.5, at 418 & n.29 (citing Milliken v. Bradley, 433 U.S. 267 (1977)). *See also Edelman*, 415 U.S. at 682 (Douglas, J., dissenting).

> [T]he distinction [between retrospective and prospective relief] is not relevant or material because the result in every welfare case coming here is to increase or reduce the financial responsibility of the participating State. In no case when the responsibility of the State is increased to meet the lawful demand of the beneficiary, is there any levy on state [funds]. Whether the decree is prospective only or requires payments for the weeks or months wrongfully skipped over by the state officials, the nature of the impact on the state treasury is precisely the same.

Id.

Michigan expend millions of dollars on compensatory education programs.[125] According to Chief Justice Burger, the order operated prospectively to eliminate the continuing effects of past discrimination.[126] Although it is easy to dismiss this reasoning as sophistry,[127] the Court should not be taken too literally. The rule permitting prospective relief is simply a compromise which permits the federal courts to enforce federal law. It is no more shocking than the legal fiction of *Ex parte Young* that public officials are acting *ultra vires* when they violate federal law.

Two other refinements on the doctrine of *Ex parte Young* should be noted. First, the Court has permitted certain forms of "ancillary" relief.[128] The most important form of such relief is the award of attorney fees. The Court held in *Hutto v. Finney* that states could be subjected to attorney fee awards, even though they would be paid from the state treasury, on the theory that the fees were ancillary to prospective injunctive relief.[129] The Court seems willing to tolerate invasions of the state treasury so long as the state is subject to an otherwise proper prospective injunctive order. In *Quern v. Jordan*, a latter phase of *Edelman*, the Court upheld an order that Illinois send notice to the plaintiff class informing them of remedies to collect payments that had been wrongly denied to them.[130] In *Green v. Mansour*, however, the Court held that the Eleventh Amendment prohibited an order to notify members of a class that welfare benefits might have been denied improperly.[131] The distinction seems to be that in *Green* the state had voluntarily discontinued its illegal practices; hence, there was no prospective order to which the notice requirement could be ancillary.[132] Second, the Eleventh Amendment has no effect on suits against public officials in their private capacities.[133] Such suits are viewed as having no effect on the state treasury, even if there are indemnification provisions in effect,[134] and do not trigger the Eleventh Amendment's purpose of protecting state treasuries.

Recently, the Supreme Court has shown signs of wariness over *Ex parte Young*. In *Seminole Tribe*, the Court held that relief under *Ex parte Young* was not available to enforce federal statutory rights when Congress had set up a comprehensive and detailed remedial scheme in the statute.[135] In *Seminole Tribe*, the plaintiffs complained that the State of Florida had failed to comply with the

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125. *See* Milliken v Bradley, 433 U.S. 267, 290 (1977).

126. *See id.* at 289–90.

127. *See* Currie, *supra* note 112, at 162 (criticizing Milliken v. Bradley, 433 U.S. 267 (1977)).

128. *Edelman*, 415 U.S. at 667–80.

129. *See* Hutto v. Finney, 437 U.S. 678, 700 (1978).

130. *See* Quern v. Jordan, 440 U.S. 332, 349 (1979).

131. *See* Green v. Mansour, 474 U.S. 64, 71 (1985).

132. *See id.* at 73. *See generally* CHEMERINSKY, *supra* note 45, § 7.5, at 421.

133. *See* Hafer v. Mello, 502 U.S. 21, 30 (1991). *See generally* HAROLD S. LEWIS, CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW § 2.22 (1997).

134. CHEMERINSKY, *supra* note 45, § 7.5, at 422–23. The distinction seems to be that indemnity provisions are accepted voluntarily by the state. *See id.*

135. *See* Seminole Tribe v. Florida, 517 U.S. 44, 73–76 (1996).

provisions of the Indian Gaming Regulatory Act[136] ("IGRA") requiring good faith negotiation of regulatory pacts between states and Indian Tribes for the establishment of gambling facilities on tribal territory. As explained more fully below,[137] the Court determined that the State of Florida enjoyed sovereign immunity to the tribe's action in federal court to enforce IGRA.[138] In the alternative, the tribe argued that it could proceed under the doctrine of *Ex parte Young* for a prospective order against the Governor to comply with the federal law. The Court rejected this argument, though not on Eleventh Amendment grounds.[139] As a result, a state which fails to negotiate with a tribe merely loses its opportunity to influence the tribe's gaming operations and the Secretary of the Interior prescribes the gaming regulations.[140] The Court feared that an *Ex parte Young* action might subject a public official to remedies such as contempt which were far more severe than those available under the statutory scheme.[141]

It seems unlikely, however, that the Court will retreat significantly from the principle of *Ex parte Young* in the near future. In the 1997 case of *Idaho v. Coeur d'Alene Tribe*, the Court held that an Indian Tribe's action in federal court to determine ownership of certain submerged lands was in essence a quiet title action against a state barred by the Eleventh Amendment.[142] Justice Kennedy expressed an opinion that *Ex parte Young* actions should be available on a case-by-case basis.[143] He would balance a state's interest in litigating in its own forum against factors such as the lack of a viable state forum or the need for federal courts to interpret federal law.[144] Only Chief Justice Rehnquist joined this part of Kennedy's opinion, while all other Justices wrote or joined opinions expressly rejecting this restriction on *Ex parte Young*.[145] Thus, in spite of some uneasiness about an unfettered *Ex parte Young* doctrine, it seems that the Court is dedicated to a system of prospective relief against state officials whose actions violate federal law.[146]

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136. Pub. L. No. 100-497, 102 Stat. 2374 (1988) (codified at 25 U.S.C. § 2701 to 2721 (1994)).

137. *See infra* Part II.B.2.

138. *See Seminole Tribe*, 517 U.S. at 72.

139. *See id.* at 76.

140. *See* 25 U.S.C. § 2710(d)(7)(B)(vii) (1994).

141. *See* 25 U.S.C. § 2710(d)(7) (statutory enforcement scheme).

142. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 268–69 (1997).

143. *See id.* at 280.

144. *See id.*

145. *See id. passim.*

146. *See* Brant, *supra* note 43, at 239 (predicting that *Coeur D'Alene* will have little effect on availability of *Ex parte Young* remedies).

3. Another Exception: Waiver

It is well established that a state may waive its sovereign immunity to suits in federal court.[147] This rule stands at odds with the text of the Eleventh Amendment, which provides that federal judicial power "shall not be construed to extend to any suit...commenced or prosecuted against one of the United States by Citizens of another State...."[148] Taken literally, the Amendment seems to say that suits by private citizens against states are not within the subject matter jurisdiction of the federal courts. Subject matter jurisdiction of course cannot be waived.[149] However, the text of the Eleventh Amendment has little influence on its interpretation.[150] The Court has taken the approach that waiver is another aspect of sovereign immunity that the Eleventh Amendment reflects.[151] Once a state waives its immunity, it is subject to the full range of remedies that a federal court may grant, including retrospective monetary awards.

Waivers can be divided into two categories: explicit and constructive. Explicit waivers are found only when a state specifically and unmistakably expresses its willingness to be sued in federal court.[152] Neither a general waiver of sovereign immunity[153] nor consent to be sued in state court[154] are adequate expressions of waiver. Rather, the state must specifically express an intention to be sued in federal court.[155] Constructive waivers are rarely recognized. The typical argument is that a state implicitly waives its Eleventh Amendment immunity when it participates in a federal program. The Court's current view is that participating in a federal program or engaging in a federally regulated activity by itself does not create a constructive waiver; Congress must unequivocally express its desire to subject the states to a federal forum.[156] The Court specifically ruled that receipt of federal funds was insufficient to waive state sovereign immunity to suits under section 504 of the Rehabilitation Act.[157] Congress responded by amending the Rehabilitation Act to include a highly specific waiver provision.[158] The lesson to

147. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); Edelman v. Jordan, 415 U.S. 651, 664 (1974); Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284 (1906); Clark v. Barnard, 108 U.S. 436, 447 (1883).

148. U.S. CONST. amend. XI.

149. *See* Sosna v. Iowa, 419 U.S. 393, 398 (1975).

150. *See supra* Part II.A.1.

151. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 267–68 (1997). *See generally* ORTH, *supra* note 60, at 122–26.

152. *See* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 303 (1990).

153. *See* Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 578–80 (1946).

154. *See* Florida Dep't of Health & Rehabilitative Services v. Florida Nursing Home Ass'n, 450 U.S. 147, 149–50 (1981).

155. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985); *Florida Nursing Home Ass'n*, 450 U.S. at 150.

156. *See* Welch v. Texas Dep't of Highways & Pub. Trans., 483 U.S. 468, 474 (1987); Edelman v. Jordan, 415 U.S. 651, 673 (1974).

157. *See Atascadero State Hosp.*, 473 U.S. at 247.

158. Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (1986) (codified at 42 U.S.C. § 2000d (1994)).

those who wish to maintain a federal forum is that Congress appears to have the power to place jurisdictional conditions on program participation under its Spending Clause powers so long as it speaks clearly.[159]

B. Abrogation of State Sovereign Immunity to Suit in Federal Court

1. Introduction

Among the several ways around the Eleventh Amendment, "abrogation" of sovereign immunity is conceptually distinct. Other exceptions to state sovereign immunity are framed as instances where the Eleventh Amendment does not apply. For example, the Court has said the Amendment does not apply when the United States[160] or another state[161] initiates an action in federal court, or when the Supreme Court exercises its appellate jurisdiction.[162] Abrogation refers to an attempt by Congress through legislation to open the federal courts to claims against states. Hence, abrogation is different because it is an act of the legislature, not the judiciary, and because abrogation purports to annul sovereign immunity in situations where the courts would find immunity available.

Ultimately abrogation is an issue of Congress' power to undo by legislation the barriers to a federal forum established by the Constitution in the Eleventh Amendment. Until the *Seminole Tribe*[163] decision in 1996, the weight of judicial authority[164] and scholarly commentary[165] favored the position that Congress could abrogate state sovereign immunity when exercising any enumerated power. The primary issue was whether a congressional enactment had met the Court's requirement that overrides of sovereign immunity be "unmistakably clear."[166] This liberal view of Congress' power to abrogate rested

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159. *See generally* Kit Kinports, *Implied Waivers after Seminole Tribe*, 82 MINN. L. REV. 793, 822–27 (1998).

160. *See supra* note 107 and accompanying text.

161. *See supra* note 100 and accompanying text.

162. *See supra* note 105 and accompanying text.

163. *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

164. *See* Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 475 (1987) (citing County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 252 (1985)) (assuming but not deciding that congressional power to abrogate is not limited to Section 5). *See generally* Meltzer, *supra* note 27, at 29 & n.133 (citing *In re* Merchants Grain, 59 F.3d 630, 635–36 (7th Cir. 1995), *vacated*, Ohio Agric. Commodity Depositors Fund v. Mahern, 517 U.S. 1130 (1996) (surveying judicial treatment of abrogation issues)).

165. *See* Meltzer, *supra* note 27, at 16–20.

166. *See* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 101–02 (1989). *See also* Dellmuth v. Muth, 491 U.S. 223 (1989) (holding that Education for all Handicapped Children Act lacked unequivocal statement of congressional intent to abrogate sovereign immunity); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (indicating general authorization for Rehabilitation Act suit in federal court insufficient). *See generally* CHEMERINKSY, *supra* note 45, § 7.7, at 414–19.

primarily on two Supreme Court decisions, *Fitzpatrick v. Bitzer*[167] and *Pennsylvania v. Union Gas Co.*[168]

Fitzpatrick established the proposition that the Congress may, when legislating under Section 5, override any immunity that a state would enjoy under the Eleventh Amendment.[169] *Fitzpatrick* involved a Title VII[170] action by a male employee against the State of Connecticut alleging gender discrimination in the operation of a retirement system fund. In the lower courts, Connecticut successfully defended the claim[171] by arguing that a monetary award would come from the state treasury and hence was barred under the rule of *Edelman v. Jordan*.[172] The Supreme Court rejected the defense. Justice Rehnquist's majority opinion concluded that Congress had been empowered by Section 5 to abrogate state sovereign immunity. Rehnquist reasoned that the Fourteenth Amendment had been adopted long after the Eleventh and was intended to alter the balance of power between national and state governments.[173] He further reasoned that Section 5 permitted Congress to subject states to private suits in federal court to enforce the other provisions of the Fourteenth Amendment.[174] This view has not been questioned since, although subsequent decisions have insisted that congressional intent to abrogate sovereign immunity be made clear.[175]

Union Gas expanded the abrogation power to legislation enacted under the Interstate Commerce Clause.[176] The plaintiff brought a third party claim against Pennsylvania to recover clean up costs that had been assessed under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"). At issue was whether Congress had the power to abrogate Pennsylvania's Eleventh Amendment immunity when it enacted CERCLA[177] under the Commerce Clause. A plurality opinion authored by Justice Brennan and joined by Justices Marshall, Blackmun, and Stevens argued that the Commerce Clause had the same effect on state sovereignty as the Fourteenth Amendment.[178] The crux of Brennan's reasoning was that the Interstate Commerce Clause constituted a "'plenary' grant of authority" to the national government at the

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167. 427 U.S. 445 (1976).

168. 491 U.S. 1 (1989).

169. *See Fitzpatrick*, 427 U.S. at 444–45.

170. *See* 42 U.S.C. § 2000e-2(a) (1994) (forbidding discrimination by covered employers on grounds of race, color, religion, sex, or national origin).

171. *See Fitzpatrick*, 427 U.S. at 449–50 (citing Fitzpatrick v. Bitzer, 390 F. Supp. 278, 285–88 (D. Conn. 1974); Fitzpatrick v. Bitzer, 519 F.2d 559, 565 (2d Cir. 1975)).

172. 415 U.S. 651 (1975).

173. *See id.* at 456. *See also* Seminole Tribe v. Florida, 517 U.S. 44, 65–66 (1996).

174. *See Fitzpatrick*, 427 U.S. at 456.

175. *See Seminole Tribe*, 517 U.S. at 55–56; Dellmuth v. Muth, 491 U.S. 223, 227–28 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985).

176. Pennsylvania v. Union Gas, 491 U.S. 1 (1989); U.S. Const. art. I., §8, cl. 3.

177. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (1994 & Supp. 1996).

178. *See Union Gas*, 491 U.S. at 1–23 (1979) (plurality opinion).

expense of state sovereignty.[179] To the extent that the Eleventh Amendment reflected a pre-existing sovereign immunity which the Constitution presumed, the states ceded this immunity when they ratified the Constitution. Brennan also noted that the authority to regulate interstate commerce would be incomplete without the power to hold the states liable for damages.[180] Although *Union Gas* dealt only with the Commerce Clause, Brennan's reasoning applied with equal facility to other legislative powers found in Article I.[181] Justice White wrote separately and agreed with Brennan's conclusion that Article I implicitly authorized Congress to abrogate state immunity. He then added, without further explanation, that he did "not agree with much of [Brennan's] reasoning."[182]

In combination, the decisions in *Fitzpatrick* and *Union Gas* appeared to endow the Congress with broad authority to create a federal forum where private citizens could bring actions against state governments. After *Union Gas* it appeared to make little difference whether Congress was acting under Section 5 or under an Article I power. This broad view of the abrogation power is reflected in the legislative findings section of the ADA, which states that one purpose of the statute is "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce"[183] to address disability discrimination. In either case, it seemed that Congress was free to abrogate state sovereign immunity so long as it did so expressly. Had this position held, there would now be no question about the validity of provisions in the ADA overriding state sovereign immunity. The expansive view of Article I powers in *Union Gas*, however, was never secure. Justice White's cryptic concurrence in the result but not in "much of [the] reasoning" of the lead opinion deprived it of the authority that stare decisis requires.[184]

2. Abrogation After Seminole Tribe *and* Flores

In 1996, *Seminole Tribe* brought an abrupt end to the expansive view of abrogation. The Seminole Tribe of Florida brought an action in federal court against the State of Florida and the Governor for failure to comply with the provisions of the Indian Gaming Regulatory Act ("IGRA").[185] IGRA grew out of the Supreme Court's decision in *California v. Cabezon Band of Mission Indians*, which held that states had no power to regulate gambling on Indian reservations unless Congress so provided.[186] In response, Congress enacted IGRA in 1988. The

179. *Id.* at 17.

180. *See id.* at 19–20.

181. *See* Meltzer, *supra* note 27, at 15.

182. *Union Gas*, 491 U.S. at 57 (White, J., concurring in judgment in part and dissenting in part).

183. 42 U.S.C. § 12101(B)(4) (1994).

184. *Union Gas*, 491 U.S. at 28 (White, J., concurring in part and dissenting in part)).

185. Seminole Tribe v. Florida, 517 U.S. 44 (1996); Pub. L. No. 100-497, 102 Stat. 2374 (1988) (codified at 25 U.S.C. § 2701 to 2721 (1994)).

186. *See* California v. Cabezon Band of Mission Indians, 480 U.S. 202, 202 (1987).

Act recognized three classes of gambling.[187] At issue in *Seminole Tribe* was Class III gaming, which included "slot machines, casino games, banking card games, dog racing, and lotteries."[188] Indian tribes were permitted to maintain such games so long as they: (1) were authorized by the governing body of the tribe itself; (2) satisfied certain statutory requirements; and (3) were conducted under a tribal-state compact.[189] IGRA erected a complicated scheme under which Indian tribes and states were to negotiate a compact,[190] imposed on states the obligation to negotiate with Indian tribes in good faith,[191] and conferred jurisdiction on the federal courts to hear claims by tribes relating to a failure by a state to enter into negotiations with a tribe or to negotiate in good faith.[192] When Florida refused to negotiate, the Seminole Tribe brought suit in federal court under this provision.

By a bare majority, the Supreme Court held that the Seminole Tribe's claim against the state was barred by the Eleventh Amendment and, in the process, overruled its decision in *Union Gas*.[193] Chief Justice Rehnquist's majority opinion established a two-part test for abrogation of state sovereign immunity. First, Congress must establish its intent to abrogate with a clear legislative statement;[194] moreover, such intention must be made "unmistakably clear in the language of the statute."[195] Second, any attempt by Congress to abrogate state sovereign immunity must be made "pursuant to a valid exercise of power."[196] The Court had no difficulty in finding that the text of IGRA expressly subjected states to suit in federal court in spite of any Eleventh Amendment immunity.[197] The controversy lay in the second requirement that Congress act under a valid grant of power.

Congress, Rehnquist concluded, has no power under Article I to override a state's Eleventh Amendment immunity. To Rehnquist, the fault of the abrogation theory in *Union Gas* was that it was irreconcilable with the broad view of state sovereign immunity that underlay the decision in *Hans v. Louisiana* and subsequent cases.[198] His opinion reads more like a proclamation than a carefully

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187. Class I gaming consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6) (1994). Bingo and certain non-banking card games comprise Class II gaming. *See* §§ 2703(7)(A)(i)–(ii). Class III covers all gaming not covered by Classes I and II. *See* § 2703(8).

188. *Seminole Tribe*, 517 U.S. at 48 (citing 25 U.S.C. § 2703(8)).

189. *See id.* (citing 25 U.S.C. § 2710(d)(1)).

190. *See id.* at 49–50 (describing negotiation requirements and citing 25 U.S.C. §§ 2710(d)(7)(B)(ii)–(vii)).

191. *See* 25 U.S.C. § 2710(d)(3)(A).

192. *See* 25 U.S.C. § 2710(d)(7)(A)(i).

193. *See Seminole Tribe*, 517 U.S. at 63. Although IGRA was enacted under the Indian Commerce Clause and CERCLA, the subject of *Union Gas*, was enacted under the Interstate Commerce Clause, the Court saw no distinction between the two provisions so far as abrogation was concerned.

194. *See id.* at 56.

195. *Id.*

196. *Id.* at 58 (quoting Green v. Mansour, 474 US. 64, 68 (1985)).

197. *See id.* at 56–58.

198. *See id.* at 64–65.

reasoned legal argument. He characterizes *Union Gas* as a "deeply fractured decision"[199] which deviated from the Court's established Eleventh Amendment jurisprudence and sowed confusion among the lower courts.[200] He reaffirmed the view of Justice Bradley in *Hans* that the Eleventh Amendment should not be confined to its terms, that the Framers did not intend that Article III override state sovereign immunity,[201] and that the decision in *Chisholm* created such a "shock of surprise"[202] that the Eleventh Amendment was quickly proposed and ratified. These jurisdictional limits applied, Rehnquist went on, even when the activity in question was under exclusive federal control.[203] *Union Gas* was an aberration that simply had to go. Rehnquist was careful to point out that abrogation under Section 5 was not affected by the decision in *Seminole Tribe.*[204] He reiterated the reasoning of *Fitzpatrick v. Bitzer*[205] that the Fourteenth Amendment was intended to alter the balance between state and federal power.[206] Thus, after *Seminole Tribe,* Congress' power to override Eleventh Amendment immunity is limited to legislation passed under Section 5.

Justice Souter wrote the principal dissent which challenged the majority opinion on several points. The essence of his argument was that the Eleventh Amendment forbids federal jurisdiction based on diversity but not on the presence of a federal question, that *Hans* was incorrectly decided, that at any rate the immunity which *Hans* recognized was a common law immunity which could be altered by the legislature, and that the Constitution presumed that federal jurisdiction was necessary to redress abuse of federal law by the states.[207] For the most part, Rehnquist ignored these arguments. He dismissed the dissent's arguments as "a theory cobbled together from law review articles and its own

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199. *Id.* at 64.

200. *See id.*

201. *See id.* 64–65.

202. *Id.* at 69 (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1934)).

203. *See id.* at 72–73.

> In overruling Union Gas today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. 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.

Id.

204. *See id.*

205. 427 U.S. 445 (1976).

206. *See Seminole Tribe*, 517 U.S. at 65–66.

207. *See id.* at 100–30 (Souter, J., dissenting).

version of historical events"[208] and credits the *Hans* court with a closer historical view of *Chisholm* and the Eleventh Amendment.[209]

What remained of Congress' power to abrogate was significantly restricted the following term when the Court decided *City of Boerne v. Flores*.[210] In 1993, Congress enacted the Religious Freedom Restoration Act ("RFRA")[211] in an attempt to overturn the Supreme Court's holding in *Employment Division v. Smith*.[212] In *Smith*, the Court held that neutral laws of general applicability did not violate the Free Exercise Clause in spite of resulting burdens on religious practices.[213] RFRA provided that federal, state, and local governments could burden religious practices only if the government acted to further a compelling governmental interest and utilized the least restrictive means of doing so.[214] In effect, Congress attempted to use its Section 5 powers to expand the scope of the Fourteenth Amendment, into which the Free Exercise Clause had been incorporated.[215]

At the time, it was reasonable to think that Congress had the power to expand the scope of the Fourteenth Amendment. In *Katzenbach v. Morgan*, the Court upheld section 4(e) of the Voting Rights Act of 1965,[216] which restricted the use of English literacy requirements as a voter qualification,[217] as a valid exercise of Section 5. The statutory provision was intended to protect residents of New York who had been educated in Puerto Rico.[218] However, seven years earlier the Court had ruled that literacy tests did not *per se* violate the Fourteenth Amendment.[219] Justice Brennan's opinion explicitly rejected the argument that Congress was limited to correcting judicially identified violations of the Fourteenth Amendment.[220] Rather, the standard for determining what is appropriate legislation under Section 5 to enforce the Equal Protection Clause was to judge what is "necessary and proper" to carry out Congress' Article I powers, the same standard adopted in *McCulloch v. Maryland*.[221] The measure must: (1) be regarded as an enactment to enforce the Equal Protection Clause; (2) be plainly

208. *Id.* at 68. Chief Justice Rehnquist did address the problem of the literal limitation of the Eleventh Amendment on suits brought against a state by citizens of other states. He reasoned that the text was cast in these term because the federal courts at the time had no general statutory authorization to hear federal question cases. *See id.* at 69–71.

209. *See id.* at 69.

210. 521 U.S. 507 (1997).

211. Pub. L. No. 103-141, 107 Stat. 1488, 1489 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)).

212. 494 U.S. 872 (1990).

213. *Id.*

214. *See* 42 U.S.C. § 2000bb-1 (1994).

215. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating Free Exercise Clause into Fourteenth Amendment).

216. *See* Katzenbach v. Morgan, 384 U.S. 641, 646 (1966).

217. *See* 42 U.S.C. § 1973b(e) (1994).

218. *See Morgan*, 384 U.S. at 647 n.3.

219. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

220. *See Morgan*, 384 U.S. at 648–49.

221. 17 U.S. (4 Wheat.) 316, 426 (1819).

adapted to that end; and (3) not be prohibited by, but be consistent with, the letter and spirit of the Constitution.[222]

Justice Brennan's opinion offered two rationales for why section 4(e) of the Voting Rights Act met this standard. First, he stated that Congress could have decided that protecting voting rights was necessary to give the Puerto Rican community sufficient political power to ensure nondiscriminatory treatment in the provision of public services.[223] This explanation is essentially a remedial view of Section 5. It holds that Congress may act under Section 5 to remedy or prevent violations of the Fourteenth Amendment that have been judicially recognized.[224] As noted below, this view of Section 5 was not generally affected by *Flores*.[225] Brennan offered a second justification, that Section 5 permits Congress to determine independently that certain activities constitute "invidious discrimination"[226] and respond legislatively.[227] Reacting to criticism that such an approach would also permit Congress to dilute Fourteenth Amendment protections,[228] Brennan noted that Congress was free to increase but not to decrease the level of available protection. Otherwise, Section 5 might undermine the Court's role as the final interpreter of the Constitution.[229] This approach has been derisively labeled as the "ratchet" theory.[230]

Brennan's assertion that Congress was free to define substantive violations of the Fourteenth Amendment was controversial both in the scholarly community[231] and within the Court itself.[232] This debate was put to rest in *City of*

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222. *See Morgan*, 384 U.S. at 651. *McCulloch* had established a rather lenient test for what legislation is "necessary and proper" to carry out legislative powers under Article I. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.2 (1997). The *Morgan* Court imported this test verbatim when it stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution are constitutional." *Morgan*, 384 U.S. at 650 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

223. *See Morgan*, 384 U.S. at 652.

224. *See* Note, *Section 5 and the Protection of Nonsuspect Classes After* City of Boerne v. Flores, 111 HARV. L. REV. 1542, 1544 (1998).

225. *See infra* notes 233–35 and accompanying text.

226. *Morgan*, 384 U.S. at 654.

227. *See id.* at 651 (stating that Section 5 is a "positive grant of legislative power").

228. *See Morgan*, 384 U.S. at 668 (Harlan, J., dissenting).

229. *See id.* at 651 n.10.

230. William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975).

231. *Compare* Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1996) (favoring congressional power to identify constitutional harms), *and* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14, at 349–50 (2d ed. 1988) (same), *with* Jessee H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 308–09 (1982) (arguing for narrow interpretation of congressional power under *Morgan*'s definitional branch), *and* Cohen, *supra* note 230, at 606 (arguing that *Morgan*

Boerne v. Flores.[233] Justice Kennedy's opinion explicitly rejected the ratchet theory of *Morgan* by holding that the enforcement power of Section 5 does not permit Congress to determine the nature of constitutional violations.[234] Rather, the "enforcement power" of Section 5 permits Congress to enact legislation which remedies or prevents judicially determined violations of the Fourteenth Amendment.[235] The Court did leave Congress with some room to operate. Congress may regulate conduct even if it is not *per se* unconstitutional or if such regulation intrudes into the realm of activities normally reserved to the states, so long as the regulation deters or remedies a constitutional violation.[236] The Court also afforded Congress wide latitude, since it often would be difficult to distinguish between substantive and remedial legislation. Nevertheless, the Court held that there must be a "congruence and proportionality between the injury to be

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stands "*Marbury v. Madison* on its head by judicial deference to congressional interpretation[s] of the Constitution").

232. The Court visited the issue of congressional power under Section 5 four years later in *Oregon v. Mitchell*, 400 U.S. 112 (1970). At issue were the Voting Rights Acts Amendments of 1970 which had lowered the minimum voting age from 21 to 18 in federal and state elections. Pub. L. No. 91-285, 84 Stat. 314 (1970) (codified at 42 U.S.C. § 1973 (1994)). By a 5-4 margin, the Court struck down the portions of the act that lowered the minimum voting age in state and local elections, though no opinion commanded a majority. Justice Black felt that principles of federalism restrained congressional interference with state elections, *see Mitchell*, 400 U.S. at 125, while Justice Stewart argued against permitting Congress to interpret the Fourteenth Amendment. *See id.* at 294–96 (Stewart, J., joined by Chief Justice Burger & Justice Blackmun, concurring in part and dissenting in part). Justices Douglas, Brennan, White, and Marshall concluded that Congress had acted properly in light of evidence that age restrictions were unrelated to a legitimate state purpose. *See id.* at 141–44 (Douglas, J., concurring in part and dissenting in part); *id.* at 239–81 (Brennan, J., joined by Justices White & Marshall, concurring in part and dissenting in part). Finally, Justice Harlan believed that an expansive view of congressional power under Section 5 contradicted the normal process for amending the Constitution. *See id.* at 201–09 (Harlan, J., concurring in part and dissenting in part). The effect of *Mitchell* was to cut back on *Morgan*'s expansive view of congressional power under Section 5, but the lack of a controlling rationale made it difficult to know the limits. The Court did not take up the Section 5 issue again until *Seminole Tribe*.

233. 521 U.S. 507 (1997).

234. *See id.* at 519.

> The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

Id. (quoting U.S. CONST. amend. XIV, § 5.)

235. *See id.*

236. *See id.* at 518 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

prevented or remedied and the means adopted to that end."[237] Otherwise, legislation is impermissibly substantive.

Justice Kennedy's reasons for striking down RFRA, as it applies to the states,[238] give some indication of where the border between remedial and substantive legislation lies. He found that the strict scrutiny provision of RFRA[239] lacked proportionality to any pattern or practice of Free Exercise violations by the states.[240] In *Smith,* the Court had determined that the incidental burdens of neutral, generally applicable laws did not breach the Free Exercise guarantee; rather, the Free Exercise clause comes into play when a state actor behaves with animus towards religious belief.[241] Kennedy found the lack of any instance in the legislative history of a law passed within the last 40 years out of religious bigotry significant,[242] although he did not consider this failure dispositive.[243] More important was the lack of any congruence between RFRA and Free Exercise violations. Kennedy noted that preventative measures are permissible if the state laws affected "have a substantial likelihood of being unconstitutional."[244] RFRA failed this test since by its terms it applied to all state (as well as federal) enactments and actions regardless of subject matter, had no termination date, and required a level of scrutiny which would be difficult for the state to meet.[245] Kennedy seemed particularly bothered by RFRA's "compelling governmental interest" and "least restrictive means" requirements.[246] Calling it the "most demanding test known to constitutional law,"[247] he argued that states would have a difficult time meeting the burden of proving a compelling interest and a narrowly tailored rule whenever a plaintiff meets the minimal burden of showing a burden on religious beliefs.[248] Consequently, laws that were perfectly valid under *Smith* would be invalidated under RFRA even in the absence of animus.[249]

Kennedy contrasted RFRA with the *Voting Rights Cases*[250] in which the Court had sustained the literacy test bans and other requirements of the Voting

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237. *Id.* at 520.

238. RFRA also applies to activities of the federal government. *See* 42 U.S.C. §§ 2000bb-2(1), 2000bb-3(a) (1994).

239. 42 U.S.C. § 2000bb-1 (1994).

240. *See Flores*, 521 U.S. at 534.

241. *See* Employment Div. v. Smith, 494 U.S. 872, 887 (1990).

242. *See Flores*, 511 U.S. at 535.

243. *See id.* This lack of support in the legislative record, however, is not RFRA's most serious shortcoming. Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles, but "on due regard for the decision of the body constitutionally appointed to decide." Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (Harlan, J., concurring in part and dissenting in part). As a general matter, it is for Congress to determine the method by which it will reach a decision. *See id.*

244. *Flores*, 521 U.S. at 532.

245. *See id.* at 532–35.

246. *Id.* at 534.

247. *Id.*

248. *See id.* at 533–34

249. *See id.* at 534.

250. *See id.* at 525–27 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308

Rights Act of 1965[251] as a valid exercise of section 5 of the Fourteenth Amendment as well as section 2 of the Fifteenth Amendment,[252] in spite of an earlier ruling that literacy tests were not *per se* unconstitutional.[253] He noted the limited reach of the Voting Rights Act. Its provisions were limited to areas of the country where discrimination was most rampant.[254] It affected only state voting laws.[255] It was subject to time limitations.[256] Finally, Congress had compiled an extensive legislative history detailing abuses of voting rights.[257] RFRA had none of these characteristics.[258]

Kennedy's comparison of RFRA to the Voting Rights Act gives a fair amount of guidance about when legislation is remedial or preventive rather than substantive. Granted, the Court offered no precise test, but the touchstone of *Flores* is the requirement of "congruence and proportionality"[259] between wrong and remedy. So far as preventive measures are concerned, *Flores* appears to demand a showing that the area of state activity to be regulated is likely to involve constitutional violations.[260] Once it was determined that Congress merely has a remedial role under Section 5, *Flores* became an easy case. In addition to contending that Section 5 was not limited to remedial legislation, the plaintiff argued that RFRA was remedial because it dispensed with proof of deliberate discrimination and concentrated on effects.[261] Yet it was the very lack of proof of such discrimination that was fatal to RFRA. Indeed, there was so little evidence of

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(1966) (upholding ban on racially discriminatory literacy tests); City of Rome v. United States, 446 U.S. 156, 182 (1980) (upholding seven year pre-clearance requirement); Oregon v. Mitchell, 400 U.S. 112, 132 (1970) (upholding five year ban on literacy tests); Katzenbach v. Morgan, 384 U.S. 641, 656 (1966) (upholding ban of literacy tests for graduates of Puerto Rican schools)).

251. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1994)).

252. The Fifteenth Amendment provides:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

253. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959).

254. *See Flores*, 521 U.S. at 532–33.

255. *See id.* at 533.

256. *See id.*

257. *See id.* at 530.

258. *See id.* at 531–32.

259. *Id.* at 519.

260. *See id.* at 532 ("Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.").

261. *See id.* at 517.

generally applicable law motivated by religious bigotry that the Court would have rejected even a statute using the less intrusive heightened scrutiny standard.[262]

Flores sets up red flags for future Section 5 litigation. Sweeping enactments such as RFRA will be problematic. Conversely, the Court views enactments which are limited in scope as more likely to be remedial.[263] The virtues of the Voting Rights Act to the Court were its time limits, geographical limitations, and focus on a narrow class of state laws. Of course, there is nothing inherently remedial about these statutory limitations, and the Court did not insist on them.[264] Rather, it noted that such limitations tend to ensure the proportionality which is absent when a congressional enactment "pervasively prohibits constitutional state action"[265] in order to prevent unconstitutional activity. A more colloquial rendering is that Congress may not swat a fly with a croquet mallet. *Flores*, however, provides no precise guidance as to when a statute has been sufficiently narrowed. In fact, the Court stated that the absence of time and place limitations is not fatal under Section 5 analysis.[266] Thus, every purported exercise of Section 5 powers must be judged on its particular facts and circumstances.

Similarly, *Flores* appears to regard intrusions into traditional areas of state regulation as suspicious at the very least. Justice Kennedy observed that RFRA was a "considerable...intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[267] He further noted the burden that would be placed on the states by heavy litigation costs as well as the interference with traditional regulatory activities.[268] Kennedy's concern over federal encroachment into areas of state autonomy seems out of place with the rest of the opinion. His immediate point is that such burdens "far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."[269] It makes some sense to say that Free Exercise violations, as construed in light of *Smith*, are unlikely to occur when states act under their police powers. However, Kennedy's emphasis appears to be on the burden itself.[270] Why should it matter that the states are burdened? The same Court

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262. *See id.* at 534.

> Even assuming RFRA would be interpreted in effect to mandate some lesser test, say one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

Id.

263. *See id.* at 532–33.

264. *See* cases cited *supra* note 250.

265. *See Flores*, 521 U.S. at 533.

266. *See id.*

267. *Id.* at 534.

268. *See id.*

269. *Id.*

270. Justice Kennedy's comments do reflect the Court's recent willingness to favorably consider federalism arguments. *See* Printz v. United States, 521 U.S. 898 (1997) (finding that provisions of Brady Act requiring state compliance violate Tenth

in *Seminole Tribe* reaffirmed that the Fourteenth Amendment was intended precisely to enlarge the federal domain at the expense of state prerogatives.[271] Moreover, the issue under Section 5 is whether federal legislation is sufficiently remedial. Kennedy's concern with interference in state functions seems to suggest that the Court may employ something resembling the equitable defense of undue burden when measuring the appropriateness of Section 5 legislation.

Finally, a failure to establish remedial needs in the legislative history may well augur against a finding that Congress has acted within Section 5, but is probably not determinative. RFRA was an extreme example of this shortcoming since its history, so far as the Court was concerned, contained no findings of constitutional violations as defined by the Court. It is important, however, not to make too much of this factor. The Court stated that the lack of a proper legislative record was not RFRA's "most serious shortcoming."[272] More important, Justice Kennedy commented that judicial deference is based not on the legislative record, but "on due regard for the decision of the body constitutionally appointed to decide,"[273] implying further that the issue of legislative history is subordinate to the issue of congressional authority. When paired with the Court's other comments, that the Constitution assigns to the judicial branch the task of interpreting the Constitution,[274] it would appear that no amount of fact finding by Congress could rescue an act of Congress that the Court considers substantive.

Amendment); United States v. Lopez, 514 U.S. 549 (1995) (finding that statute regulating firearms on school grounds exceeds Commerce Clause power); New York v. United States, 505 U.S. 144 (1992) (finding that "take title" provisions of Low-Level Radioactive Waste Policy Amendments Act of 1985 violate Tenth Amendment). *Cf.* McConnell, *supra* note 28, at 166 (comparing substantial impact analysis of *Lopez* with congruence and proportionality approach of *Flores*).

271. *See supra* notes 204–06 and accompanying text. *See also* McConnell, *supra* note 28, at 193 ("By its very text, however, the Fourteenth Amendment rejects the idea that the rights of citizens should vary from state to state and group to group.").

272. *Flores*, 521 U.S. at 531.

273. *Id.* (quoting Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (Harlan, J., concurring in part and dissenting in part)).

274. *See id.* at 535–36.

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Id. (citation omitted).

One commentator, however, suggests the Court may only require that Congress establish some factual basis for its actions when exercising its remedial powers.[275]

It appears that the Court will show little deference to Congress in assessing the "remedial character" of legislation. The *Flores* Court backed away from the deferential approach of *Katzenbach v. Morgan*.[276] Brennan's opinion in *Morgan* made much of Congress' ability to identify the extent of violation, to evaluate alternate solutions, to assess the effectiveness of a remedy and to gauge its effects upon state interests,[277] but there is no comparable respect for congressional judgment in *Flores*. Professor McConnell argues that the *Flores* Court made an independent assessment of the extent of Free Exercise violations in state laws of general applicability.[278] He compares the approaches in *Morgan* and *Flores* to rational basis and intermediate scrutiny, respectively.[279] The Court's apparent desire to preserve the principle of *Marbury v. Madison*[280] indicates that Congress will have little leeway to influence the Court's evaluation of these "red flag" issues by shaping the legislative record.

C. The Constitutional Status of the Disabled

In light of the decisions in *Seminole Tribe* and *Flores*, Congress' power to create a federal forum for disability claims against state defendants now requires a conclusion that the ADA is proper under Section 5 since it remedies or prevents violations of section 1 of the Fourteenth Amendment. *Flores* also established that Congress' enforcement power under Section 5 must have a "congruence and proportionality" to constitutional violations identified by the judicial branch.[281] Thus, in order to assess whether the ADA bears such a relationship to the Court's pronouncements, we first must determine the level of protection afforded to the disabled under the Fourteenth Amendment. The fact that the Court has said relatively little about the constitutional status of the disabled complicates the analysis. The dearth of constitutional decisions is not surprising because, until *Seminole Tribe*, it was assumed that Congress had wide powers, either under Section 5 or the Interstate Commerce Clause, to regulate state conduct and to abrogate state sovereign immunity.[282] Reflecting this assumption of broad power, the ADA imposed significant duties on state entities that exceeded a simple rule against intentional discrimination. For example, states must provide protected individuals with reasonable accommodations.[283] Under the statute, plaintiffs with good claims can get equitable relief, attorney fees, and, in some cases, monetary

275. Note, *supra* note 224, at 1550.
276. 384 U.S. 641 (1966). *See* McConnell, *supra* note 28, at 165–67.
277. *See Morgan*, 384 U.S. at 653.
278. *See* McConnell, *supra* note 28, at 166–67.
279. *See id.*
280. 5 U.S. (1 Cranch) 137 (1803). *Marbury* established the power of the federal courts to interpret the Constitution. *See generally* CHEMERINSKY, *supra* note 222, § 2.2.1.
281. *Flores*, 521 U.S. at 519.
282. *See supra* notes 163–83 and accompanying text.
283. *See infra* notes 375–86 and accompanying text.

relief.[284] Hence, until *Seminole Tribe* and *Flores*, there was no need for plaintiffs to litigate, or for the courts to decide, the precise level of protection available under section 1 of the Fourteenth Amendment.

On two occasions[285] the Supreme Court has addressed the constitutional standard to be applied in disability cases, once in *City of Cleburne v. Cleburne Living Center, Inc.*[286] and again in *Heller v. Doe*.[287] In each case, the plaintiffs argued that the defendants' actions violated the Equal Protection Clause. The Fourteenth Amendment's prohibition against the denial of "the equal protection of the laws" amounts to a rule that persons who are similarly situated should be treated alike.[288] The Court has developed a three-tier system of scrutiny to determine whether classifications made by state actors violate the Equal Protection Clause.[289] Whenever a classification involves a suspect class,[290] such as race or ethnicity, or a fundamental right,[291] such as free expression, the Court applies strict scrutiny—the defendant must demonstrate that the classification is necessary to achieve a compelling state interest and is narrowly tailored to this end.[292] Intermediate or heightened scrutiny is used when important rights or quasi-suspect classes are affected. Gender is the primary example under intermediate scrutiny,[293]

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284. *See infra* notes 389–69 and accompanying text.

285. The Court had declined to decide whether classifications based on mental illness deserve heightened scrutiny in *Schweiker v. Wilson*, 450 U.S. 221, 231 (1981). In *Schweiker*, a class of plaintiffs had challenged reduced benefits under the Supplemental Security Income (SSI) program for persons committed to public institutions. The Court held that Congress had distinguished according to residency in public institutions and not according to mental health status. *See id.* at 230–34.

286. 473 U.S. 432 (1985).

287. 509 U.S. 312 (1993).

288. U.S. CONST. amend. XIV, § 1. *See* Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

289. *See Cleburne Living Ctr.*, 473 U.S. at 437–38. The three tier system has been criticized as inappropriate, *see id.* at 460 (Marshall, J., concurring in judgment in part and dissenting in part) (advocating sliding scale of scrutiny in light of importance of right in question); Craig v. Boren, 429 U.S. 190, 210 (1976) (Stevens, J., concurring) (same), and as difficult to apply and understand. *See* Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397 (1998); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984). Fortunately, we need not enter this debate, as the level of scrutiny afforded to the disabled is minimal and rather easy to apply.

290. *See generally* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (racial bias in awarding federal contracts); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (protection against layoffs for minority employees); Palmore v. Sidoti, 466 U.S. 429 (1984) (judicial consideration of interracial remarriage in awarding custody of child from prior marriage).

291. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (reproductive choices); Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Loving v. Virginia, 388 U.S. 1 (1967) (marriage).

292. *See Wygant*, 476 U.S. at 274.

293. *See generally* United States v. Virginia, 518 U.S. 515 (1996) (military college for males only); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (male denied enrollment in state-supported nursing school).

although somewhat heightened review has been applied in cases of illegitimacy.[294] The government must establish that its actions are substantially related to important state interests or functions.

Most economic and social legislation, however, is judged under a rational basis standard. Here, legislation or other government action is presumed to be constitutional.[295] The burden lies with the plaintiff to prove that the government's classification bears no rational relationship to any legitimate state goal. The rational basis standard is extraordinarily protective of state actions because it accepts any conceivable justification for a measure, whether or not the state actually relied on it.[296] The Court also does not require a tight fit between a classification and the government interests. States are free to approach problems "one step at a time" without attempting to match the scope of legislation to the scope of a problem.[297] Conversely, over-inclusive legislation is often tolerated on the grounds that states may make rational distinctions "with substantially less than mathematical exactitude."[298]

Different levels of scrutiny reflect the likelihood that certain types of classifications are relevant to governmental purposes. Classifications based on race or ethnicity are unlikely to bear any relationship to a legitimate interest; hence, strict scrutiny forces a state to meet an exceedingly high level of justification.[299] In effect, strict scrutiny presumes that racial and ethnic classifications are based on prejudice. Heightened scrutiny makes a similar presumption, although it is not as strong.[300] Rational basis review takes the contrasting view that state classifications in social and economic matters are normally based on meaningful distinctions between groups that are relevant to state interests.[301] The presumption of regularity that underlies rational basis review also reflects an admission by the judiciary of institutional incompetence to make complicated social and economic decisions. Courts do not share the legislature's resources or fact finding ability and therefore are reluctant to second guess legislative decisions about the reasonableness of classifications and the propriety

294. *See generally* Mills v. Habluetzel, 456 U.S. 91 (1982) (Texas statute barring paternity suits after child is one-year-old); Mathews v. Lucas, 427 U.S. 495 (1976) (provisions of Social Security Act requiring showing that parent of illegitimate child was living with or contributing to child's support).

295. *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985); Hodel v. Indiana, 452 U.S. 314, 323 (1981); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

296. *See* Heller v. Doe, 509 U.S. 312, 320 (1993).

297. Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (stating that government may take "one step at a time").

298. *Dukes*, 427 U.S. at 303.

299. *See Cleburne Living Ctr.*, 473 U.S. at 440.

300. *See id.* at 440–41.

301. *See id.* at 446 ("[W]e should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us.").

of governmental goals in the area of general economic or social legislation.[302] Minimal scrutiny is a way of deferring to the legislature in "legislative" matters. Finally, rational basis review accommodates the view that the democratic process will eventually produce fair results.[303] As a practical matter, it should be clear from the preceding description that plaintiffs tend to prevail when strict or heightened scrutiny is applied, and to lose when faced with rational basis review.

At issue in *Cleburne Living Center* was a zoning ordinance which required a special use permit to operate hospitals for the "insane or feeble-minded."[304] The plaintiffs intended to establish a group home for the mentally retarded. The city treated the plaintiffs' application for a special permit as a proposal to operate a hospital for the feebleminded and denied the permit.[305] The Court held that the ordinance as applied to the plaintiffs violated the Equal Protection Clause.[306] The Court's reasoning, however, is more important than the result. Plaintiff had argued that the mentally retarded were a quasi-suspect class and that the ordinance should be reviewed under heightened scrutiny. The Court refused to extend heightened scrutiny to the mentally retarded. It offered four reasons that the mentally retarded should not get heightened scrutiny. First, the mentally retarded are a large and diverse group.[307] State legislatures, which have a legitimate interest in assisting the mentally retarded, must be able to consider their different characteristics. Heightened scrutiny would force the courts to review legislative judgments that were technical and beyond judicial competence. Second, legislative enactments such as the Rehabilitation Act and the Education of the Handicapped Act indicated that the mentally retarded were not subject to such "antipathy or prejudice"[308] as to need the protections of heightened scrutiny.[309] The Court was also fearful that the higher burden of justification would discourage legislative action.[310] Third, the same legislative response indicated that the mentally retarded were not politically powerless.[311] Finally, the Court feared that applying heightened scrutiny to the mentally retarded would lead to the same scrutiny for other "large and amorphous" groups, such as "the aging, the disabled, the mentally ill and the infirm."[312] In short, the Court felt that legislative classifications based on mental retardation were not so likely to be prejudicial that rational basis review was inadequate.

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302. *See id.* at 442–43 (stating that legislators are better positioned than courts to make decisions about the disabled). *See generally* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.3 (2d ed. 1992).

303. *See Cleburne Living Ctr.*, 473 U.S. at 440 ("[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes....").

304. *Id.* at 436.

305. *See id.* at 432.

306. *Id.* at 447–50.

307. *See id.* at 442–43.

308. *Id.* at 443.

309. *See id.* at 443–45.

310. *Id.*

311. *See id.* at 445.

312. *Id.* at 445–46.

Application of the rational basis standard in *Cleburne Living Center* was peculiar at the very least. Ultimately, the Court found no rational basis for requiring a special use permit for the group home while not requiring one for other multiple-dwelling facilities such as hospitals, sanitariums, and nursing homes.[313] This conclusion, notably, appears to stem from the failure of the city to offer an adequate justification for its system. The Court rejected out of hand the city's argument that accommodate the negative attitudes of neighbors was sufficient justification for the special use permit requirement. It declared that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently...."[314] The city presented several other justifications for the permit denial including: a desire to protect the residents from harassment by students at a nearby junior high school, questions about legal responsibility for the actions of the residents, the location of the group home on a 500 year flood plain, and a desire to control occupancy levels.[315] The Court dismissed these arguments as either equally applicable to other multiple-use dwellings or as irrational prejudice, stating that "[a]t least this record does not clarify how...the characteristics of the intended occupants of the...home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes."[316]

Regardless of the label, the Court was not applying the traditional rational basis test. Justice Marshall, who concurred in the judgment and dissented in part, suggested that the Court's technique be called "'second order' rational-basis review."[317] Several commentators have also remarked that the Court was applying something other than the traditional method of analysis.[318] Under normal rules, government actions are presumed constitutional. The burden of proof is on the plaintiff to establish that there is no conceivable legitimate purpose for the actions of a state actor; conversely, there is no requirement that a legislative body record a proper basis for its actions.[319] In *Cleburne Living Center*, the Court effectively shifted the burden to the defendant by noting the absence of a record that supported the City's denial of a permit.[320] Also, the Court's concern for unequal

313. *See id.* at 447–50.
314. *Id.* at 448.
315. *See id.* at 449.
316. *Id.* at 450.
317. *Id.* at 458 (Marshall, J., concurring in judgment and dissenting in part).
318. *See* Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387, 407 n.81 (1997); David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 916 n.22 (1996); Stacy Sulman Kahana, *Crossing the Border of Plenary Power: The Viability of an Equal Protection Challenge to Title IV of the Welfare Law*, 39 ARIZ. L. REV. 1421, 1432 (1997); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793–96 (1987).
319. *See* Heller v. Doe, 509 U.S. 312, 320–21 (1993); *Cleburne Living Ctr.*, 473 U.S. at 458–59 (Marshall, J., concurring in judgment in part and dissenting in part).
320. *See Cleburne Living Ctr.*, 473 U.S. at 448.

treatment of the group home and other multiple-use dwellings seems out of place. Rational basis review tolerates underinclusive categories. *Williamson v. Lee Optical* made clear that state actors could approach problems "one step at a time."[321] Thus, there should have been no objection to the City addressing problems of neighborhood tranquility or overcrowding in the context of group homes alone.[322]

A fair interpretation of *Cleburne Living Center* might have been that Equal Protection requires state actors to actively justify any rule which disadvantages the mentally retarded, and by extension, the disabled. *Heller v. Doe* cast great doubt on the enhanced rational basis interpretation of *Cleburne Living Center*.[323] At issue were the different procedures for the mentally ill and the mentally retarded under Kentucky's system of civil commitment. The plaintiffs, a class of mentally retarded committees, argued that the commitment statute violated the Equal Protection Clause since it set a lower quantum of proof for the mentally retarded (clear and convincing evidence versus beyond a reasonable doubt for the mentally ill) and gave party status in commitment proceedings to their guardians or relatives. The Court applied rational basis review and concluded that the distinctions were supported by differences in ability to diagnose and treat the two groups.[324]

Heller bears little sense of the "second order" rational review seen in *Cleburne Living Center*. Justice Kennedy's opinion emphasized the deferential character of rational basis review and reiterated the traditional rules that legislative classifications must be upheld if there is any conceivable basis for them, and that the state has no obligation to develop a record which supports the rationality of a measure.[325] Indeed, the Court found a justification for the different quanta of proof in an argument which the Commonwealth never made,[326] that the legislature *may* have considered the more invasive treatment received by mentally ill committees when applying the more protective quantum of proof to them.[327] This reasoning is all the more remarkable in that the Commonwealth conceded in its brief[328] that the higher quantum of proof for the mentally ill might have been inappropriate in light of *Addington v. Texas*.[329]

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321. Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

322. *See Cleburne Living Ctr.*, 473 U.S. at 458–60 (Marshall, J., concurring in judgment in part and dissenting in part).

323. *See Heller*, 509 U.S. at 320–21.

324. The Court declined to address arguments for heightened scrutiny as they were raised for the first time in respondents' merits brief. *See id.* at 318–19.

325. *See id.* at 319–21.

326. *See* Brief for Petitioner, Heller v. Doe, 509 U.S. 312 (1993) (No. 92-351).

327. *See Heller*, 509 U.S. at 326.

328. Brief for Petitioner at 29–30, Heller v. Doe, 509 U.S. 312 (1993) (No. 92-351) (citing Addington v. Texas, 441 U.S. 418 (1979)).

329. *See* Addington v. Texas, 441 U.S. 418, 425–33 (1979). In *Addington*, the Court held that due process required the state, in civil commitment proceedings for mental illness, to offer evidence which exceeds the usual preponderance standard of most civil cases but not the criminal standard of proof beyond a reasonable doubt. *See id.*

Does *Heller* implicitly overturn the implicit "second order" rational basis scrutiny for classifications relating to the mentally retarded, or more generally, to the disabled? Even the phrasing of the question indicates how awkward the Court's guidance is on this point. Justice Kennedy's opinion skirts the issue. He cited *Cleburne Living Center* (as well as *Schweiker v. Wilson*) stating that the Court utilized traditional rational basis analysis there.[330] Justice Kennedy's quick treatment of *Cleburne Living Center* is certainly disingenuous. He ignores the obvious deviations from the traditional tests in that opinion. Justice Souter's dissent notes that the Court neither applied the approach in *Cleburne Living Center* nor repudiated it.[331] As a result, Souter claims, the status of *Cleburne Living Center* is uncertain after *Heller*.[332] This statement, however, is unduly optimistic. The Court's discussion of rational basis review in *Heller* is a ringing endorsement of traditional, deferential review. While the Court may have been reluctant to directly overrule a precedent, there is little doubt that it disfavored the enhanced vision of rational basis review.

After *Heller*, the status of *Cleburne Living Center* is more than an arcane dispute over the wavering line of minimal scrutiny. Rational basis review is a decision by the judiciary to defer to the expertise of the legislative and executive branches of state government in matters of social and economic regulation. Its requirement that plaintiffs negate all conceivable bases for a law also reflects an assumption by the judiciary that classifications which do not affect suspect (or quasi-suspect) classes or fundamental rights are likely to be constitutional. But the three-tier system of scrutiny also provides a system of substantive constitutional rules. By denying heightened scrutiny to the mentally retarded, the *Cleburne Living Center* Court significantly contracted the realm of constitutional violations which Congress can address under its remedial Section 5 powers. Congress' powers necessarily contract again if *Heller* represents the correct application of rational basis review in matters concerning the disabled.

Does the Equal Protection Clause still continue to place any limitations on the dealings of state actors with the disabled? Perhaps the best approach is to ask whether or how the result in *Cleburne Living Center* would have changed if the more restrictive *Heller* rule had been applied. The plaintiffs could no longer prevail by pointing to the absence of any justification for the city's discriminatory zoning ordinance in the record; they would carry the more onerous burden of disproving any and all conceivable justifications for treating group homes differently. Nevertheless, I believe that they would still win. Although traditional rational basis review permits the city to exercise its police powers in short, under-inclusive steps, the disparity of treatment between the mentally retarded and other groups which utilize multiple-use structures was so glaring it created the inference that the City acted out of fear and irrational prejudice. It is too difficult to take

330. *See Heller*, 509 U.S. at 321 (citing Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Schweiker v. Wilson, 450 U.S. 221 (1981)) ("In neither case did we purport to apply a different standard of rational basis review....").

331. *See id.* at 336–37 (Souter, J., dissenting).

332. *See id.* at 337 (Souter, J., dissenting).

seriously the City's argument that its group home rule contributed to neighborhood tranquility when the ordinance would permit fraternity houses to operate at the same location. The argument that the proposed group home lay on a 500 year flood plain was so silly that it never should have been raised.[333] In sum, even after *Heller*, plaintiffs should be able to establish Equal Protection claims when the relationship between state action and proper state goals is so attenuated that fear or prejudice is the only reasonable explanation.[334]

A "fear and prejudice" approach also finds support in the Court's recent decision in *Romer v. Evans*.[335] In *Romer*, the Court applied rational basis review to void a Colorado constitutional amendment which forbade enactments at the state or local level that were protective of homosexuals or bisexuals. The amendment, in essence, subjected homosexuals to the heavy burden of constitutional amendment to obtain results which other groups could secure through the normal legislative process.[336] Justice Kennedy, who also wrote the majority opinion in *Heller*, concluded that the amendment bore so little relationship to any legitimate state interest that it violated the Equal Protection Clause. Kennedy compared the "broad and undifferentiated" legal disability imposed by the amendment with the purported state goals of protecting the associational rights of employers and landlords who might have personal or religious objections to employing or renting to homosexuals.[337] He concluded that the disparity between the amendment's burdens and the articulated state goals was so great that it lead to an "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[338] Further, Justice Kennedy says, "a bare...desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[339] Even the deferential rational basis test of *Heller* does not require the Court to accept blindly any reason proffered by a state actor. *Romer* permits a court to infer an impermissible bias when the disparity between claimed state interest and a class rule is so flagrant that it can be explained only by hostility. The effect is to place a burden of justification on a state defendant when its conduct is otherwise inexplicable.

Even though the zoning restriction in *Cleburne Living Center* was not so sweeping as the Colorado amendment, the disjunction between purported goal and means was so great that a court could have reached the "inevitable inference" that the City had acted out of a constitutionally prohibited bias against the mentally retarded.[340] The same reasoning should apply to other categories of the disabled. Thus, for purposes of Section 5, Congress should be permitted to enact legislation which remedies or prevents state actions which are motivated by hostility toward

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333. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 449 (1985).
334. *See id.* at 446.
335. *See* Romer v. Evans, 517 U.S. 620 (1996).
336. *See id.* at 631.
337. *Id.* at 632.
338. *Id.* at 634.
339. *Id.* (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
340. *Id.*

the disabled. Section 5 legislation which goes beyond controlling hostility toward the disabled is problematic. In the absence of an inference of hostility, moreover, the strong presumption that state actions relating to social and economic conditions are valid is likely to control. The *Romer* Court cited approvingly to several decisions upholding laws that were narrow in scope and grounded in sufficient facts to dispel any inference that the resulting burdens placed on the disabled arose from hostility.[341] This unwillingness to redress the incidental burdens of proper state actions is also consistent with the Court's view that the Equal Protection Clause reaches only intentional encroachments on the rights of groups. In the context of racial discrimination, *Washington v. Davis* established that state actions which have a disparate impact on particular racial or ethnic groups do not trigger the Equal Protection Clause although they may give rise to statutory claims.[342] This distinction between intentional and incidental effects places a significant limitation on Congress' power to act under Section 5. Attempts to address instances of disparate impact, i.e., those not motivated by hostility toward the disabled, may not have the "congruence and proportionality" which *Flores* requires of such measures.[343]

III. RIGHTS AND REMEDIES UNDER THE ADA

A. Titles I and II Generally

In 1990, Congress, through the Americans with Disabilities Act,[344] established a comprehensive mandate against disability discrimination in most aspects of public and private life. Enactment of the ADA followed extensive hearings in which scores of disabled individuals told stories of exclusion from employment, governmental services, public accommodations and commercial establishments, and transportation.[345] In part, the legislative history of the ADA marks a rejection by Congress of the conclusion in *City of Cleburne v. Cleburne Living Center*[346] that the mentally retarded and other disabled groups do not suffer from significant societal discrimination.[347] Justice White's opinion in *Cleburne Living Center* suggested that, in line with the pre-*Flores* spirit,[348] Congress was

341. *See id.* at 632 (citing New Orleans v. Dukes, 427 U.S. 297 (1976); Williamson v. Lee Optical, 348 U.S. 483 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Kotch v. River Port Pilot Comm'rs, 330 U.S. 552 (1947)).

342. *See* Washington v. Davis, 426 U.S. 229, 239, 246–47 (1976).

343. City of Boerne v. Flores, 521 U.S. 507, 508 (1997). There is an argument that Congress may not act at all under Section 5 to protect classes of persons who are not subject to heightened scrutiny. *See infra* Part V.B.2.

344. Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101 to 12213 (1994)).

345. *See generally* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 407–14 (1991) (describing legislative history of ADA).

346. 473 U.S. 432 (1985).

347. *See supra* notes 308–11 and accompanying text.

348. *See supra* notes 163–83 and accompanying text.

free to respond to the holding by acting under Section 5.[349] Congress apparently took the invitation at face value. The hearings record a parade of horrors in which the disabled were subjected to mistreatment based on hostility as well as exclusion resulting from failures to make changes in routines and practices, failures to remove barriers to accessibility, and paternalistic attitudes.[350]

Congress took pains to clarify its legislative findings and intentions in the text of the statute itself.[351] It noted that there were 43 million persons with disabilities who constituted a "discrete and insular minority"[352] and that the

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349. *See Cleburne Living Ctr.*, 473 U.S. at 439–40. ("Section 5 of the Amendment empowers Congress to enforce this mandate, but absent *controlling* congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection." (emphasis added)).

350. *See* 42 U.S.C. § 12101 (1994). *See also* Autio v. AFSCME, Local 3139, 140 F.3d 802 (8th Cir. 1998), *aff'd by an equally divided court*, 157 F.3d 1141 (8th Cir. 1998) (en banc).

Unlike RFRA, the ADA clearly chronicles and directly addresses the discrimination people with disabilities have experienced and the "evils" those with disabilities continue to experience in modern day America. For example, the ADA and its legislative record illuminate the fact that approximately 43 million Americans have disabilities, that disability discrimination is still a pervasive problem in our society, that people with disabilities face isolation and segregation in all aspects of life, including employment, and that such discrimination costs the United States billions of dollars in lost productivity and dependency each year. *See* 42 U.S.C. §§ 12101(a)(1)–(9); *Autio*, 140 F.3d at 804–05.

Before enacting the ADA, Congress conducted exhaustive fact finding as to the level of disability discrimination in the United States. *See* S. REP. NO. 101-116, at 6 (1989) (quoting testimony of Timothy Cook of the National Disability Action Center, concerning the adverse and pervasive effects of disability discrimination); *id.* at 7 (quoting the testimony of Judith Heumann, Assistant Secretary of the Office of Special Education and Rehabilitative Services for the United States Department of Education, detailing the significant discrimination she faced because of her disabilities); *id.* at 8 (citing the testimony of a Kentucky parent who was fired from her job because the son with whom she lived had AIDS); *id.* at 12 (citing testimony regarding inaccessibility issues faced by those with disabilities). In total, in addition to conducting numerous hearings, both the House and Senate cited seven reports or studies that clearly detailed the pervasive and serious effects of disability discrimination in modern day America. *See id.* at 6; H.R. REP. NO. 101-485, at 28, *reprinted in* 1990 U.S.C.C.A.N. 267, 309–10. *See also Autio*, 140 F.3d at 805 n.4.

351. 42 U.S.C. §§ 12101(a)(1)–(9) (1994).

352. 42 U.S.C. § 12101(a)(7). The ADA's use of the "discrete and insular minority" terminology, as well as references to the political powerlessness of the disabled, a history of discrimination against them, and the immutability of their conditions, is an invocation by Congress of the *Carolene Products* language. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). In *Carolene Products*, Justice Stone attempted to identify with such terms classes of persons entitled to heightened scrutiny under the Equal Protection Clause. *See generally*, NOWAK & ROTUNDA, *supra* note 302, § 14.3 at 602 (discussing *Carolene Products*). One pre-*Flores* case did find that Congress had successfully altered the level of scrutiny assigned to the disabled by *Cleburne Living Center*. *See* Martin v. Voinovich, 840 F. Supp. 1175, 1209 (S.D. Ohio 1993). The idea also received some support outside of the courts. *See* James B. Miller, Note, *The Disabled, the ADA, and Strict Scrutiny*, 6 ST. THOMAS L. REV. 393 (1994). This position is untenable

disabled had experienced a history of purposeful discrimination based on characteristics beyond their control.[353] Congress specifically invoked its powers under the Commerce Clause and the Fourteenth Amendment[354] to establish a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[355] The ADA is divided into several Titles which address particular facets of life that affect the disabled. Title I covers employment discrimination; Title II governs state and local governmental activities; Title III pertains to privately owned and operated public accommodations; and Title IV addresses telecommunications. Title V includes general rules of construction which are applicable to Titles I through IV. Since state governments are in the business of providing public services and employing thousands of workers, nearly all ADA claims against state entities are brought under Title I or II.

The ADA protects individuals who meet the statutory definition of disabled. An individual is disabled if he or she has a "physical or mental impairment which substantially limits one or more major life activities."[356] The definition of disabled also includes those who have a record of a substantially limiting impairment[357] as well as those who are regarded as such.[358] The ADA likewise extends protection to persons who suffer discrimination because they are associated with the disabled.[359] A claimant under Title II must also establish that he or she is a "qualified individual with a disability."[360] The latter phrase refers to someone who meets the "essential eligibility requirements" for receipt of services or participation in a public program, with or without a reasonable modification of practices or policies, removal of architectural barriers, and so forth.[361] For many

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after *Flores*. *See* Bartlett v. New York State Bd. of Law Examiners, 970 F. Supp. 1094, 1134 (S.D.N.Y. 1997), *cert. granted, vacated on other grounds*, 119 S. Ct. 2388 (1999) (stating that Congress may not alter level of scrutiny through the ADA); Brown v. North Carolina Div. of Motor Vehicles, 987 F. Supp. 451, 457 (E.D.N.C. 1997) (invoking discrete and insular minority language from *Carolene Products* will not raise level of scrutiny).

353. 42 U.S.C. § 12101(a)(7).

354. 42 U.S.C. § 12101(b)(4). The ADA, enacted in 1990, was a pre-*Seminole Tribe* enactment. At the time it was presumed that Congress could abrogate state sovereign immunity under either the Commerce Clause or the Fourteenth Amendment. Hence there was little need to identify carefully which provisions of the ADA were enacted pursuant to each constitutional provision. *See supra* notes 163–83 and accompanying text.

355. 42 U.S.C. § 12101(b)(1).

356. 42 U.S.C. § 12102(2)(A) (1994).

357. *See* 42 U.S.C. § 12102(2)(B).

358. *See* 42 U.S.C. § 12102(2)(C).

359. *See* 28 C.F.R. § 35.130(g) (1998). *See, e.g.*, Saladin v. Turner, 936 F. Supp. 1571 (N.D. Okla. 1996) (waiter discharged for association with HIV-positive partner).

360. 42 U.S.C. § 12131(2) (1994).

361. *Id.* Title II's definition of disability is awkwardly constructed. By requiring that a plaintiff establish eligibility for participation in a program with or without reasonable modifications, the Act imports the substantive prohibitions against discrimination into the definition stage. As noted below, a failure to make a reasonable accommodation to a disabled individual constitutes a discriminatory act under the ADA. *See infra* notes 375–86 and accompanying text. Thus in many cases, a conclusion that a plaintiff is a "qualified

public services, the burden of eligibility will be rather light.[362] For example, the essential eligibility requirement for many public services is a simple request for service,[363] the payment of a small admission fee, or residency within the city limits. Other services may have significant eligibility requirements. Public universities, for example, may have high admissions standards and onerous tuition charges, especially for out-of-state enrollees. Title II applies to all state and local governmental units regardless of size.[364]

Title I, which applies to state and local governments that employ more than fifteen workers, defines its protected class in terms appropriate to an employment context.[365] There, a "qualified individual with a disability" is "an individual...who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[366] For example, a waitress with a panic disorder might not be able to perform the essential job functions of interacting with the public and keeping orders straight. If so, such an individual might be disabled under the Act but not a qualified individual with a disability.[367] Likewise, disabled workers who cannot meet regular attendance requirements often fail the qualified individual test.[368]

B. Substantive Rights

Titles I and II collectively embody substantive rules that regulate or touch on a wide range of activities and affect most aspects of governmental functions such as employment, public transportation, schools, public facilities, benefit programs, and licensing operations.

1. Title II (Governmental Services)

Unlike Titles I and III, Title II has only a general prohibition against discrimination and lacks a specific rule structure. Instead, Congress instructed the

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individual with a disability" is also a conclusion that a discriminatory act has occurred.

362. *See* DEPT. OF JUSTICE, CIVIL RIGHTS DIV., ADA TITLE II TECHNICAL ASSISTANCE MANUAL § II-2.8000 (1992) (establishing minimal eligibility requirements for many public services).

363. *Id.*

364. *See* 2 BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW 25:2 (1998).

365. *See* 42 U.S.C. § 12111(5) (1994). Title II also prohibits employment discrimination by all state and local government employers. *See* 28 C.F.R. § 35.140(a) (1998). If the employer is also covered under Title I, then the Title II regulations apply the Title I regulations by reference. *See* § 35.140(b)(1) (referring to 29 C.F.R. pt. 1630 (1998)). Government employers not covered under Title I are subject to regulations implementing Section 504 of the Rehabilitation Act. *See* § 35.140(b)(2) (referring to 28 C.F.R. pt. 41 (1998)).

366. 42 U.S.C. § 12111(8).

367. *See* Johnston v. Morrison, Inc., 849 F. Supp. 777 (N.D. Ala. 1994).

368. *See* Tyndall v. National Educ. Ctr., Inc. of Calif., 31 F.3d 209 (4th Cir. 1994) (teacher failed to meet attendance requirements); Gore v. GTE South, Inc., 917 F. Supp. 1564 (M.D. Ala. 1996) (telephone operator with unpredictable attendance and tardiness).

Attorney General to promulgate regulations to implement Title II.[369] Congress further instructed the Attorney General to make these rules consistent with the coordination regulations for Section 504.[370] Regulations relating to program accessibility, existing facilities, and communications, however, must be consistent with the guidelines for federal activities conducted under section 504.[371] The Department of Justice issued implementing regulations for Title II in 1991.[372] Departmental commentary indicates that the Title II regulations were generally intended to duplicate the anti-discrimination rules of Section 504.[373]

The implementing regulations set forth a series of general[374] and specific prohibitions against disability discrimination. Specific prohibited practices include: (1) denial of opportunities to participate in regular programs when permissible separate programs are offered;[375] (2) use of criteria or methods of administration that have the purpose or effect of discrimination; (3) selection of inaccessible sites for services; (4) use of discriminatory selection criteria for procurement contractors; (5) administration of licensing or certification programs in a discriminatory manner; (6) failure to make reasonable modifications in practices, policies, and procedures necessary to avoid discrimination; and (7) use of eligibility criteria that either do or tend to screen out the disabled unnecessarily.[376] Compliance with the regulations is excused when a public entity can demonstrate that the Act's requirements would impose an undue financial or

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369. *See* 42 U.S.C. § 12134(a) (1994).

370. *See* 42 U.S.C. § 12134(b) (referring to 28 C.F.R. pt. 41). The coordination regulations are intended to avoid inconsistencies among the agency rules that implement Section 504 of the Rehabilitation Act. They were originally promulgated by the Department of Health, Education and Welfare ("HEW") in 1978. 43 Fed. Reg. 2121 (1978) (codified at 42 C.F.R. pt. 85 (later redesignated as 28 C.F.R. pt. 41)) (implementing Exec. Order No. 11,914, *reprinted in* 3 C.F.R. 117 (1976)). The Justice Department assumed responsibility for the coordination regulations after HEW split into separate departments of Health and Human Services and Education. *See* Exec. Order No. 12,250, *reprinted in* 3 C.F.R. 298 (1980), 46 Fed. Reg. 40,686 (1981).

371. *See* 42 U.S.C. § 12134(b) (referring to 28 C.F.R. pt. 39 (1998)).

372. *See* 28 C.F.R. pt. 35 (1998).

373. *See* 28 C.F.R. pt. 35, app. A ("Because Title II of the ADA essentially extends the antidiscrimination prohibition embodied in section 504 to all actions of State and local governments, the standards adopted in this part are generally the same as those required under Section 504 for federally assisted programs.").

374. *See* 28 C.F.R. § 35.130(a) (1998). The general prohibition contains a number guidelines, including rules against exclusion of qualified individuals from benefits, offering benefits or opportunities to participate that are unequal or less effective, providing unnecessarily different or separate benefits, assisting other agencies or organizations that practice discrimination, denying qualified individuals the opportunity to participate on planning and advisory boards, or otherwise denying participation in a benefit or program. *See* §§ 35.130(b)(1)(i)–(vii).

375. *See* 28 C.F.R. § 35.130(b)(2). Separate programs for the disabled are permissible when necessary to provide qualified individuals with a disability an equal opportunity to gain a benefit. *See* 28 C.F.R. § 35.130(b)(1)(iv).

376. *See* 28 C.F.R. §§ 35.130(b)(3)–(8).

administrative burden,[377] work a fundamental alteration in the nature of a service,[378] or significantly affect an historic building.[379] Title II regulations specifically address matters of employment,[380] program and facility accessibility,[381] and communications.[382] Finally, Title V of the ADA states clearly that the ADA should not be construed to provide less protection than Section 504.[383] Thus, Title II must be read to incorporate the highly subject-specific rules issued by federal funding agencies for grantees.[384]

2. Title I (Employment)

Title I has a more specific rule structure. The statute, together with implementing regulations, governs the entire employment relationship from the application stage to the terms and conditions of employment. Title I contains a general prohibition of discrimination against qualified individuals with disabilities in matters of job application, hiring, advancement, discharge, compensation, training, and any other terms and conditions of employment.[385] Title I then fleshes

377. *See* 28 C.F.R. § 35.150(a)(3) (1998) (requiring changes to existing facilities only when they do not result in an undue financial or administrative burden).

378. *See* 28 C.F.R. § 35.130(b)(7) (providing defense for failure to modify procedures); § 35.130(b)(8) (establishing defense for use of eligibility criteria which tend to screen out the disabled).

379. *See* 28 C.F.R. § 35.151(d) (1998).

380. *See* 28 C.F.R. § 35.140 (1998). Title II rules concerning employment practices suffer from ambiguity over procedural requirements. Although Title II makes no specific reference to employment, regulations promulgated by the Department of Justice include employment practices within the scope of Title II. *See id.* The regulations, moreover, incorporate the employment standards of Title I for public entities that would also be covered under Title I. *See* 28 C.F.R. § 35.140(b)(1) ("For purposes of this part, the requirements of Title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subjected to the jurisdiction of title I."). Unlike Title I, *see infra* notes 456–59 and accompanying text, Title II has no administrative exhaustion requirement. One could argue from the incorporation of Title I standards into Title II that plaintiffs bringing employment-based claims under the latter title should meet the administrative exhaustion requirements of the former title. Most courts have rejected this position and place no such obligation on Title II claimants. *See* Petersen v. University of Wis., 818 F. Supp. 1276 (W.D. Wis. 1993). *See generally* Mark C. Weber, *Disability Discrimination Litigation and Institutions of Higher Education*, 25 J.C. & U.L. 53, 55–56 (1998) (discussing employment claims under Title II).

381. *See* 28 C.F.R. §§ 35.149–.151 (1998).

382. *See* 28 C.F.R. §§ 35.160–.163 (1998).

383. *See* 42 U.S.C. § 12201 (1994).

384. For example, the Department of Education has issued Section 504 regulations governing the conduct of higher education programs. *See* 34 C.F.R. pt. 104 (1998). These rules provide specific guidance on admissions practices, the general treatment of students, housing, financial and employment assistance, and non-academic services (e.g., physical education and athletics, counseling and placement services, and social organizations). *See* 34 C.F.R. §§ 104.42–.47.

385. *See* 42 U.S.C. § 12112(a) (1994).

out the concept of discrimination in employment with certain rules of construction that resemble those in the Title II regulations. Employment discrimination includes: (1) limiting, segregating, or classifying applicants or employees so as to adversely affect them; (2) participating in contractual arrangements with third parties that produce a discriminatory effect on applicants or employees; (3) using employment standards or criteria that have a discriminatory effect; (4) denying jobs or benefits based on an individual's association with a disabled person; (5) failing to make reasonable accommodations to qualified individuals unless such accommodations would impose an undue burden; (6) using qualification standards that tend to screen out the disabled unless such criteria are job-related and consistent with business necessity; and (7) failing to administer tests in a way that measures skill and aptitude rather than disability.[386] A separate section of Title I generally prohibits pre-employment medical exams and inquiries about disabilities.[387] Employers are permitted, however, to make offers of employment conditioned on a medical examination, but only if it is required of all employees.[388]

C. Remedies Under the ADA

1. Title II (Governmental Services)

a. Generally

Enforcement of Title II is linked to the Rehabilitation Act. Rights enforceable under Title II are to be pursued using the "remedies, procedures and rights set forth in section 794a of Title 29"[389]—in other words, section 505 of the Rehabilitation Act.[390] Section 505(a)(2) of the Act, in turn, provides that the general non-discrimination mandate of Section 504[391] is to be enforced through the

386. *See* 42 U.S.C. §§ 12112(b)(1)–(7).
387. *See* § 12112(d)(2).
388. *See* § 12112(d)(3)–(4).
389. 42 U.S.C. § 12133 (1995).
390. 29 U.S.C. § 794(a) (1994).
391. Section 504(a) is the general mandate against discrimination by federal recipients. *See id.* Section 505(a)(1) of the Act, 29 U.S.C. § 794a (1994), provides a separate mechanism for enforcing rights under section 501, which requires affirmative action by federal agencies in hiring the disabled. *See* 29 U.S.C. § 791 (1999). In these instances, aggrieved individuals must utilize the enforcement scheme of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994). The Title II provision incorporating the enforcement procedures of the Rehabilitation Act is thus ambiguous since it does not distinguish between the two remedial schemes in section 505 of the Rehabilitation Act. This ambiguity has potentially serious consequences inasmuch as the Title VII enforcement scheme referenced by section 505(a)(1) entails an administrative exhaustion requirement. *See infra* notes 456–59 and accompanying text. The weight of judicial authority, however, is that actions based on the Title VI scheme referenced by section 505(a)(2) do not. *See generally* LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW § 1.13, at 43–45 (2d ed. 1997) (describing enforcement scheme). Thus far courts have applied the rule of section 505(a)(2) to non-employment Title II ADA claims. *See* Tyler v. City of Manhattan, 118 F.3d 1400 (10th Cir. 1997); Johnson-Goeman v. Michigan Dep't of Commerce, No. 5:93-CV-119,

remedial mechanism of Title VI of the Civil Rights Act of 1964, which forbids discrimination on the basis of race, color, or national origin by any entity receiving federal funds.[392] Title VI, however, makes no specific provision for enforcement other than the withdrawal of federal funds.[393] Consequently, remedies under Section 504 and Title II have developed as a matter of judicial decision.

There has never been any serious doubt that a private cause of action is available to enforce Section 504,[394] even though the statute makes no explicit provision and the Supreme Court has never ruled directly on the issue. Neither is there any doubt that courts may award equitable relief in a Section 504 action. In *Consolidated Rail Corp. v. Darrone*, for example, the Supreme Court had no difficulty in affirming an equitable award of back pay to a victim of intentional discrimination.[395] Other examples of equitable relief include orders to make a building accessible, to install curb cuts in sidewalks, or to make modifications in practices or eligibility criteria.[396] The one significant area of controversy is whether a court has the power to award legal damages.

b. Availability of Damages

The Supreme Court has never issued a majority opinion settling the availability of damages under Title VI or Section 504,[397] much less Title II of the ADA. As a general matter, the Court takes the position that a federal court has broad powers to fashion remedies to correct wrongful conduct under a federal statute, even when the statute does not specify a remedial scheme. In *Franklin v. Gwinnett County Public Schools*, the Court held that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to federal statute."[398] The

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1995 WL 313707, at *4–5 (W.D. Mich. Jan. 18, 1995); Noland v. Wheatley, 835 F. Supp. 476, 483 (N.D. Ind. 1993). *Cf.* Rodgers v. Magnet Cove Pub. Sch., 34 F.3d 642, 643–44 (8th Cir. 1994) (applying Title VI remedies in an employment case under the Rehabilitation Act); Waldrop v. Southern Co. Servs., Inc., 24 F.3d 152, 155 (11th Cir. 1994) (same); Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 827, 829–30 (4th Cir. 1994) (same); Eastman v. Virginia Polytechnic Inst. and State Univ., 939 F.2d 204, 206 (4th Cir. 1991) (same).

392. *See* 42 U.S.C. § 2000d (1994) ("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.").

393. *See* § 2000d-1.

394. *See* Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1373 (10th Cir. 1981) (recognizing implied right of action); Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981) (same); Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980) (same). *See generally* ROTHSTEIN, *supra* note 391, § 1.13, n.17 (collecting cases).

395. *See* 465 U.S. 624, 637 (1984).

396. *See* ROTHSTEIN, *supra* note 391, § 1.14, at 44.

397. A plurality opinion did find that compensatory damages were not appropriate for instances of unintentional discrimination under Title VI. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (plurality opinion).

398. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 70–71 (1992).

Court emphasized the traditional presumption in favor of complete relief unless Congress specifies otherwise,[399] even if the cause of action is implied rather than specifically authorized by Congress.[400] *Franklin* suggests a three-step analysis[401] in judging the availability of a particular remedy under a federal statute. First, is the presumption that all appropriate remedies are available if the statute provides for a private cause of action.[402] Second, the court must determine if Congress has indicated a desire to limit remedies under the statute.[403] Finally, the proposed remedy must be "appropriate."[404]

Franklin involved a claim brought under Title IX of the Education Amendments of 1972.[405] Title IX prohibits gender discrimination by educational institutions which receive federal money.[406] The plaintiff alleged that she had suffered discrimination because of sexual harassment and abuse by a high school coach.[407] Since the Court had already found an implied private cause of action under Title IX,[408] it applied the traditional presumption in favor of all appropriate remedies, and further found that Congress had expressed no intent to limit remedies under Title IX.[409] Finally, the *Franklin* court found that a damages remedy was appropriate.[410] Rejecting the argument that Title IX remedies should be limited to back pay and prospective relief, the Court noted that back pay was useless to the plaintiff since she was never an employee and that prospective relief had become meaningless after the plaintiff's graduation.[411]

The *Franklin* Court, however, placed a significant restriction on recovery of compensatory damages under Title IX. Justice White's opinion distinguished between intentional and unintentional violations of federal statutes enacted under the Spending Clause.[412] In line with his plurality opinion in *Guardians Association*

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399. *See id.* at 66 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)). In concluding that Congress had not indicated an intention to restrict remedies under Title IX, the Court relied on the fact that Congress had amended Title IX since the Court had recognized an implied right of action, *see* Cannon v. University of Chicago, 441 U.S. 677 (1979), without restricting a damages remedy. *See Franklin*, 503 U.S. at 72–73.

400. *See Franklin*, 503 U.S. at 66 (citing Bell v. Hood, 327 U.S. 678, 684 (1946)).

401. *See id. See also* Tafoya v. Bobroff, 865 F. Supp. 742 (D.N.M. 1994) (discussing analytical framework of *Franklin*).

402. *See Franklin*, 503 U.S. at 66.

403. *See id.* at 71–73.

404. *Id.* at 73–76.

405. *See id.* at 60. *See generally* 20 U.S.C. §§ 1681 to 1688 (1994).

406. *See* 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....").

407. *See Franklin*, 503 U.S. at 60.

408. *See* Cannon v. University of Chicago, 441 U.S. 677 (1979).

409. *See Franklin*, 503 U.S. at 71–73.

410. *See id.* at 76.

411. *See id.* at 75–76.

412. *See id.* at 61–62.

v. Civil Service Commission of New York,[413] Justice White reasoned that federal recipients must have clear notice of the conditions that accompany federal funds.[414] Intentional violations are carried out with a knowledge that the federal recipient is failing to meet a clearly specified obligation under a statute.[415] In contrast, unintentional violations, such as occur in disparate impact claims, are undertaken without notice that such conduct is wrongful. To award damages under the latter circumstances would subject a federal recipient to liability when the nature of its obligation was not clear at the time it acted.[416] Since defendant school officials in *Franklin* were aware of the teacher's conduct and failed to act, the intent requirement was easily met.[417] Justice White went further, adding that intentional violations should support a damages award regardless of the constitutional source of an enactment.[418] In other words, intentional violations should give rise to damage remedies whether the authority for the statute was derived from the Spending Clause, the Commerce Clause, or the Fourteenth Amendment.

Although *Franklin* was a Title IX case, its reasoning applies equally to Title VI and Section 504. Prior to *Franklin*, the Court had noted in *Cannon v. University of Chicago* that Congress modeled Title IX after Title VI and "intended to create Title IX remedies comparable to those available under Title VI...."[419] The *Franklin* Court's reliance on an earlier Title VI case, *Guardians Association v. Civil Service Commission of New York*,[420] and a Section 504 case, *Consolidated Rail Corp. v. Darrone*,[421] for the proposition that the Court had consistently adhered to the "all appropriate remedies" standard,[422] likewise suggests a remedial equivalence among the three statutes.[423] In fact, the Court went to great lengths in dicta to make Titles IX and VI consistent. The decision in *Guardians* was badly

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413. 463 U.S. 582 (1983) (plurality opinion).

414. *See Franklin*, 503 U.S. at 74–75.

415. *See id.* For a discussion of the various approaches to defining intent under Titles I & II, see Part V.C.2.

416. *See Franklin*, 503 U.S. at 74–75. It is not clear whether Justice White thought that compensatory damages under these circumstances were not "appropriate" or whether the traditional presumption did not apply. *See* Leonard J. Augustine, Jr., Note, *Disabling the Relationship Between Intentional Discrimination and Compensatory Damages under Title II of the Americans with Disabilities Act*, 66 GEO. WASH. L. REV. 592, 602–03 (1998).

417. *See Franklin*, 503 U.S. at 63–64.

418. *See id.* at 75 n.8.

419. *See* Cannon v. University of Chicago, 441 U.S. 677, 694–96, 703 (1979). *See also* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1997 (1998) ("The two statutes [i.e., Title IX and Title VI] operate in the same manner....").

420. 463 U.S. 582 (1983).

421. 465 U.S. 624 (1984).

422. *Franklin*, 503 U.S. at 71.

423. *See* Rogers v. Magnet Cove Pub. Sch., 34 F.3d 642, 644–45 (8th Cir. 1994) (applying *Franklin* rule to Title VI and section 504); DeLeo v. City of Stamford, 919 F. Supp. 70, 73 (D. Conn. 1995) (same); Ali v. City of Clearwater, 807 F. Supp. 701, 704–05 (M.D. Fla. 1992) (same).

fragmented and produced only a plurality opinion.[424] At issue was whether plaintiffs could get damages for a Title VI violation based on a disparate impact theory.[425] The *Guardians* plurality concluded that compensatory damages were not available for plaintiffs without proof of discriminatory intent.[426] The *Franklin* Court concluded that a majority of Justices in *Guardians* agreed that damages were available for intentional violations of Title VI.[427]

Since the 1992 decision in *Franklin*, the lower courts have consistently permitted compensatory damages only for intentional violations of Title II or Section 504. There is, however, some variation among the cases. One group of opinions expressly construes *Franklin* to permit damages for intentional violations and to exclude them for unintended conduct.[428] *Tyler v. City of Manhattan*[429] is typical. The plaintiff sought declaratory, injunctive, and monetary relief against the defendant for failing to comply with Title II in the provision of a wide range of municipal services and programs.[430] The trial court simply stated that, under *Franklin*, money damages were not appropriate without a showing of intentional discrimination.[431] The court distinguished another decision permitting compensatory damages as involving intentional discrimination.[432] A second group of opinions recognizes damage awards for intentional violations without specifically reaching the issue of awards for unintentional conduct.[433] A third

424. Justice White's plurality opinion, *see Guardians*, 463 U.S. at 584–607, was joined only in part by Justice Rehnquist, who wrote a separate concurrence in the judgment. *See id.* at 612 (Rehnquist, J., concurring in judgment). Justices Powell and O'Connor also wrote separate concurrences in the judgment, *see id.* at 607–11 (Powell, J., concurring in judgment); *id.* at 612–15 (O'Connor, J., concurring in judgment), while Justices Marshall and Stevens dissented, *see id.* at 615–34 (Marshall, J., dissenting); *id.* at 634–45 (Stevens, J., dissenting).

425. The plaintiff's theory was that a first hired, last fired policy had a disparate impact on minority employees. *See id.* at 585.

426. *See Guardians*, 463 U.S. at 597.

427. *See Franklin*, 503 U.S. at 70.

428. *See* Wood v. President and Trustees of Spring Hill College, 978 F.2d 1214, 1219 (11th Cir. 1992); Tyler v. City of Manhattan, 849 F. Supp. 1442, 1444 (D. Kan. 1994), *aff'd*, 118 F.3d 1400 (10th Cir. 1997); Adelman v. Dunmire, No. Civ. A. 95-4039, 1996 WL 107853, at *4 (E.D. Pa. 1996); Tafoya v. Bobroff, 865 F. Supp. 742, 748 (D.N.M. 1994); United States v. Forest Dale, Inc., 818 F. Supp. 954, 970 (N.D. Tex. 1993); Outlaw v. City of Dothan, No. CV-92-A-1219-5, 1993 WL 735802, at *5 (M.D. Ala. 1993).

429. 849 F. Supp. 1442, 1444 (D. Kans. 1994), *aff'd*, 118 F.3d 1400 (10th Cir. 1997).

430. *See* Tyler v. City of Manhattan, 118 F.3d 1400, 1402 (10th Cir. 1997).

431. *See Tyler*, 849 F. Supp. at 1444. The Court also attempted to distinguish the award of damages in *Franklin* on the grounds that equitable remedies would have been inadequate there but that injunctive relief would be adequate for the instant plaintiff. *See id.* The *Tyler* court did not offer an opinion on the appropriateness of damages when defendant's conduct was unintentional but equitable relief inadequate.

432. *See id.* (citing Tanberg v. Weld County Sheriff, 787 F. Supp. 970, 972–73 (D. Colo. 1992)).

433. *See* Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 830 (4th Cir. 1994); Hernandez v. City of Hartford, 959 F. Supp. 125, 133–34 (D. Conn. 1997); Whitehead v. School Bd., 918 F. Supp. 1515, 1520–22 (M.D. Fla. 1996); Zaffino v. Surles, No. 91 CIV

group of cases assumes, for the sake of argument, that intentional conduct is required to support damages, then finds that the plaintiff has properly pleaded or proved such conduct.[434] No post-*Franklin* case appears to award damages for unintentional discrimination.[435]

Franklin did not consider the issue of what level or type of intent was necessary to support a claim under Title IX or related statutes. During the past term the Court addressed this issue in *Gebser v. Lago Vista Independent School District*.[436] Superficially, the facts were similar to those in *Franklin*—the plaintiff alleged that she had been sexually abused by a high school teacher and sought damages. Unlike the situation in *Franklin*, however, school officials in *Gebser* were unaware of the sexual relationship between the plaintiff and the teacher until a late stage, and fired the teacher upon learning of the sexual relationship.[437] The Court disallowed a damages remedy, holding that in cases not involving official policy of a recipient, damages are available under Title IX only on a showing of actual knowledge of discrimination on the part of an official of the federal recipient who has the authority to take corrective measures and fails to do so.[438] In other words, a plaintiff must establish deliberate indifference by the defendants.[439]

Justice O'Connor's majority opinion reasons as follows. First, Congress does not appear to have contemplated unlimited recovery when it enacted Title IX in 1972 since none of the principal civil rights statutes at that time provided expressly for recovery of monetary damages.[440] Second, civil rights statutes which condition receipt of federal funds on non-discrimination are contractual in nature and thus are unlike outright, unconditional prohibitions of discrimination such as Title VII.[441] Title VII applies regardless of receipt of federal funds and seeks to provide compensation for victims of discrimination.[442] Title IX, in contrast, has the more general goal of protecting individuals from discrimination by federal fund recipients.[443] The contractual nature of Title IX indicates that a grantee should not

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1637 (MGC), 1995 WL 146207, at *3 (S.D.N.Y. 1995); Miller v. Spicer, 822 F. Supp. 158, 166–68 (D. Del. 1993); Kraft v. Memorial Med. Ctr., Inc., 807 F. Supp. 785, 790 (S.D. Ga. 1992); Ali v. City of Clearwater, 807 F. Supp. 701, 704–05 (M.D. Fla. 1992); Doe v. District of Columbia, 796 F. Supp. 559, 571 (D.D.C. 1992).

434. *See* Bartlett v. New York State Bd. of Bar Examiners, 970 F. Supp. 1094, 1147–52 (S.D.N.Y. 1997), *cert. granted, vacated on other grounds*, 119 S. Ct. 2388 (1999); McKay v. Winthrop Bd. of Educ., No. CIV. 96-131-B, 1997 WL 816505, at *3 (D. Me. 1997); Naiman v. New York Univ., No. 95 CIV. 6469 (LMM), 1997 WL 249970, at *5 (S.D.N.Y. 1997).

435. For a discussion of the various definitions of intent applied by the lower courts, see *infra* Part V.C.2.

436. 118 S. Ct. 1989 (1998).

437. *See id.* at 1993.

438. *See id.* at 1995.

439. For a discussion of the deliberate indifference standard, see *infra* notes 690–94.

440. *See Gebser*, 118 S. Ct. at 1997.

441. *See id.*

442. *See id.*

443. *See id.*

be held to a monetary remedy for discrimination unless it had notice that its conduct would create such liability.[444] Third, it is unlikely that Congress intended to create a damages remedy under Title IX since to do so would frustrate the purpose of Title IX.[445] Title IX's only express remedy is the withdrawal of funding through an administrative process.[446] That process, significantly, requires notice to the recipient and a chance to rectify violations voluntarily before funds may be curtailed. One obvious purpose of these requirements is to ensure that funds are not diverted from educational uses when a recipient is willing to correct discriminatory problems.[447] It would be anomalous, therefore, to permit unlimited damages in a judicially implied claim without a showing of deliberate indifference when the express statutory remedy requires notice and an opportunity to comply.[448]

Due to the close relationship of Title IX to Title VI and Section 504,[449] *Gebser* seems to have set a clear "deliberate indifference" threshold for recovering monetary awards under these three Spending Clause statutes. *Gebser*, however, creates nothing but confusion about the requirements for Title II of the ADA. On the one hand, Title II expressly incorporates the enforcement schemes of Section 504 and indirectly that of Title VI.[450] One could argue that Congress' decision to link Title II to the established mechanisms of Section 504 and Title VI likewise demands that damage awards under Title II meet a deliberate indifference standard. To do otherwise would be to ignore the congressional mandate for an equivalence of remedies under similar statutes. On the other hand, Title II is simply not a Spending Clause measure. It is, at best, a measure under section 5 of the Fourteenth Amendment and, at worst, a Commerce Clause enactment. Like Title VII, it applies regardless of the presence of federal funding and is phrased as an outright, not a conditional, prohibition of discrimination. Moreover, Title II does not have an administrative scheme for the termination of funding which might be compromised by the existence of a damages remedy given on less than a showing of deliberate indifference. The resolution of this issue lies beyond the scope of this Article. As noted in Part V,[451] however, monetary awards based on anything less than actual animus by the defendant may fail to meet the standards of the Enforcement Clause as interpreted by the *Flores* decision.[452]

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444. *See id.* at 1998 (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74–75 (1992)); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 596–603 (1982) (White, J.); Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 28–29 (1981). Perhaps another way of expressing this point is that federal recipients agree not to discriminate knowingly.

445. *See Gebser*, 118 S. Ct. at 1998 (citing 20 U.S.C. § 1682; 34 C.F.R. § 100.7(d)).

446. *See id.*

447. *See id.* at 1999.

448. *See id.*

449. *See supra* notes 419–27 and accompanying text.

450. *See supra* Part III.C.1.a.

451. *See infra* Part V.C.2.

452. Justice O'Connor's distinction between conditional Spending Clause measures and outright prohibitions such as Title VII, *see Gebser*, 118 S. Ct. at 1999,

There are other differences among the lower courts as to the availability of damages under Title II or Section 504. For example, some courts will not award damages for emotional distress, while most will.[453] There is similar disagreement over the availability of punitive damages.[454] These differences, however, are matters of statutory interpretation which do not directly bear on the issue of state sovereign immunity. In contrast, setting an intent threshold for recovery of damages does touch on the one factor which, as a matter of constitutional law, may permit the Congress to abrogate state sovereign immunity. As noted above,[455] state conduct toward the disabled that is based on fear and prejudice may fail the rational basis test under the Equal Protection Clause. Because Title II only creates a damages remedy against states for conduct that is deemed irrational after *Romer*, this remedy is more likely to survive the new strictures of *Seminole Tribe* and *Flores*.

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appears to be at odds with Justice White's dicta in *Franklin* that intentional violations should support damages whether the constitutional authority for a statute is the Spending Clause, the Commerce Clause, or Section 5, *see supra* note 418 and accompanying text. One could construe Justice White's remarks as a bland statement that Congress has the authority to address the problem of intentional discrimination through damages awards under a variety of constitutional authorizations. Justice O'Connor, however, draws a clear distinction between federal grants of money conditioned on non-discrimination and direct federal prohibitions of discrimination; she thus implies that damage awards under Spending Clause measures must meet a higher standard of intent than damage awards under Commerce Clause or Section 5 enactments. Hence damages for disability discrimination under Title II might be subject to a lesser intent requirement than damages under Section 504 for the same discriminatory behavior. This position may eventually prevail as a matter of statutory interpretation. A different calculus, however, should govern the Enforcement Clause issues. As developed at greater length in Part V, the *Flores* decision limits congressional enactments under Section 5 to those which address irrational prejudice against the disabled. Permitting damage awards on anything less than a showing of animus may fail the *Flores* test; thus even the deliberate indifference test of *Gebser* may be insufficient to rescue a Title II damages award against a state entity from an Enforcement Clause challenge. *See infra* Part V.C.2.c.

453. *Compare* Johnson v. City of Saline, 151 F.3d 569 (6th Cir. 1998) (damages for emotional distress available under Title II), *and* Doe v. District of Columbia, 796 F. Supp. 559 (D.D.C. 1992) (damages for emotional pain in section 504 claim), *and* Tanberg v. Weld County Sheriff, 787 F. Supp. 970, 972–73 (D. Colo. 1992) (compensatory damages for mental anguish and pain and suffering are available for intentional violation of Section 504), *with* Rivera Flores v. Puerto Rico Tel. Co., 776 F. Supp. 61 (D.P.R. 1991) (no damages for pain and suffering), *and* ADAPT, Salt Lake Chapter v. Skywest Airlines, Inc., 762 F. Supp. 320, 325 (D. Utah 1991) (no damages for emotional distress or mental anguish).

454. *Compare* Burns-Vidlak v. Chandler, 980 F. Supp. 1144, 1152 (D. Haw. 1997) (finding punitive damages available under Section 504 and therefore under Title II, too), *with* Moreno v. Consolidated Rail Corp., 99 F.3d 782, 790 (6th Cir. 1996) (en banc) (finding punitive damages unavailable under Section 504), *and* Harrelson v. Elmore County, 859 F. Supp. 1465, 1468–69 (M.D. Ala. 1994) (finding punitive damages unavailable under Title II).

455. *See supra* Part II.C.

2. Title I (Employment)

a. Generally

Compared to the judicially created remedies of Title II, the Title I remedial system is spelled out in the statute and is refreshingly straightforward. Envisioning enforcement by public authorities and individual plaintiffs, Title I makes the enforcement mechanisms of Title VII of the Civil Rights Act of 1964 available to the Equal Employment Opportunity Commissions (EEOC), the Attorney General, or a private claimant.[456] Individual plaintiffs alleging discrimination must first file a charge with the EEOC within 180 days after a claim arises or within 300 days with a state agency which has jurisdiction over the claim.[457] The agency then has 180 days to seek conciliation between the parties or to commence a judicial action.[458] If the EEOC does not achieve conciliation or begin a court proceeding, it must then issue a "right to sue letter" to the complainant, who then has 90 days to commence his or her own judicial action.[459] Complaints against governmental units are handled by the Attorney General rather than the EEOC.[460]

b. Availability of Damages

As originally enacted, Title I provided only equitable remedies to a successful plaintiff, such as reinstatement after discharge or back pay awards,[461] and attorneys fees.[462] The Civil Rights Act of 1991[463] introduced damages provisions into Title I of the ADA. Plaintiffs may recover compensatory and punitive damages from employers for *intentional* unlawful discrimination.[464] The Act does, however, place a strict cap on compensatory and punitive damages.[465] Compensatory damages included within the damages cap are: future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of

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456. *See* 42 U.S.C. § 12117(a) (1994).

457. *See* 42 U.S.C. §§ 2000e-5(c), (e) (1994).

458. *See* 42 U.S.C. § 2000e-5(b).

459. *See* 42 U.S.C. § 2000e-5(f).

460. *See id.*

461. *See generally* 2 TUCKER & GOLDSTEIN, *supra* note 364, at 22:78 (listing various remedies employed in Title I cases).

462. *See* 42 U.S.C. § 12205 (1994).

463. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072 (codified at 42 U.S.C. § 1981a (1994)).

464. *See* 42 U.S.C. § 1981a(a)(2) (1994).

465. Compensatory and punitive damages may not exceed a total of $50,000 when the defendant has between 15 and 100 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000 if between 101 and 200 such employees, $200,000 if between 201 and 500 such employees, and $300,000 if over 500 such employees. *See* § 1981a(b)(3)(A)–(D). The caps do not apply to monetary equitable remedies such as back pay awards. The Civil Rights Act excludes back pay, interest on back pay and any other remedies that were previously available, from the definition of compensatory damages. § 1981a(b)(2). *See generally* 2 TUCKER & GOLDSTEIN, *supra* note 364, at 22:81 (discussing damage awards).

enjoyment of life, and other nonpecuniary losses.[466] Compensatory damages are available in addition to equitable remedies available under Title I.[467] Punitive damages notably are not available against governmental defendants.[468]

Disparate impact claims were unaffected by the Civil Rights Act of 1991 and still offer only equitable remedies. Indeed, the Civil Rights Act specifically addressed certain disparate impact claims for failure to provide reasonable accommodations. Damages may not be assessed against employers who act in good faith, consult with disabled plaintiffs who have informed the employer of the need for an accommodation, and attempt to make accommodations that give the plaintiff an equally effective opportunity short of imposing an undue burden on a business.[469] Thus, short of bad faith on the part of an employer, a plaintiff will be limited to the baseline equitable remedies for disparate impact claims.

D. Waiver of Sovereign Immunity

Title V of the ADA specifically abrogates state sovereign immunity defenses to claims under the Act. Section 502 of the Act provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State Court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of [the ADA], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.[470]

The ADA provision tracks a similar sovereign immunity waiver for the Rehabilitation Act and other federal civil rights statutes included in the Rehabilitation Act Amendments of 1986.[471] The latter legislation was a response to

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466. *See* § 1981a(b)(3).
467. *See* § 1981a(a)(2).
468. *See* § 1981a(b)(1).
469. *See* § 1981a(a)(3).
470. 42 U.S.C. § 12202 (1995).
471. Pub. L. No. 99-506, 100 Stat. 1807 (1986) (codified at 42 U.S.C. § 2000d-7 (1994)).

> Civil rights remedies equalization
> (a) General provision
> (1) 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 1975, 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.
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are

the decision in *Atascadero State Hospital v. Scanlon* in which the Supreme Court held that a general authorization to bring suit in federal court was insufficiently unequivocal to waive state sovereign immunity and that receipt of federal funds did not constitute consent to be sued.[472] The 1986 amendments effectively expressed Congress' unequivocal desire to waive state sovereign immunity.[473] It is difficult to think that Congress could have been more explicit about its intention. Likewise, the equalization provisions[474] of section 502 which put State defendants on an equal footing with other public and private defendants illustrate Congress' intent to strip the states of any special immunity to suit. Courts treating the abrogation issue after *Seminole Tribe* have uniformly decided that Congress expressed its intent in the ADA to abrogate state sovereign immunity with sufficient clarity.[475]

IV. LOWER COURT OPINIONS REGARDING ABROGATION OF STATE SOVEREIGN IMMUNITY UNDER THE ADA

Since the decisions in *Seminole Tribe* and *Flores*, state entity defendants have raised Eleventh Amendment defenses to Title II and other ADA claims. The attempts have generally been unsuccessful. Most lower federal courts have sustained the waiver of sovereign immunity under the Americans with Disabilities Act as a proper exercise of Congress' Section 5 powers. This Part analyzes the lower court decisions dealing with this issue.

A. Cases Finding Abrogation Proper

So far the Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have rejected sovereign immunity defenses to ADA claims raised by state defendants,[476] as have a handful of federal district courts in circuits which have not generated controlling decisions.[477] Perhaps the most extensively reasoned case dealing with

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available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7 (1994).

472. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246–47 (1985). *See also supra* notes 147–59 and accompanying text.

473. *See* Lane v. Peña, 518 U.S. 187, 200 (1996).

474. *See id.* (Congress unambiguously indicated intent to remove State's sovereign immunity when enacting equalization provisions).

475. *See infra* Part IV.A–B (collecting cases).

476. *See* Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998), *cert. denied.*, 119 S. Ct. 58 (1998); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997); Autio v. AFSCME Local 3139, 140 F.3d 802 (8th Cir. 1998), *aff'd by an evenly divided court*, 157 F.3d 1141 (8th Cir. 1998) (en banc); Clark v. California, 123 F.3d 1267 (9th Cir. 1997); Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998).

477. *See* Johnson v. State Tech. Ctr., 24 F. Supp. 2d 833 (W.D. Tenn. 1998); Thrope v. Ohio, 19 F. Supp. 2d 816 (S.D. Ohio 1998); Lamb v. John Umstead Hosp., 19 F. Supp. 2d 498 (E.D.N.C. 1998); McGarry v. Director, Dep't of Revenue, 7 F. Supp. 2d 1022 (W.D. Mo. 1998); Muller v. Costello, 997 F. Supp. 299 (N.D.N.Y. 1998); Martin v. Kansas,

the abrogation question is the Fifth Circuit's opinion in *Coolbaugh v. Louisiana*.[478] The plaintiff in *Coolbaugh*, a paraplegic, challenged a requirement of the Louisiana Office of Motor Vehicles that he submit a special medical form and pass a road test in a hand-controlled vehicle.[479] A majority of judges on the *Coolbaugh* panel concluded that Congress had acted properly in abrogating Eleventh Amendment immunity under the ADA.[480]

Coolbaugh represents an attempt to fit the abrogation provisions of the ADA neatly into the analytical framework of *Seminole Tribe* and *Flores*—that is, to establish that Congress made explicit its intention to abrogate state sovereign immunity and that it acted under a proper grant of authority. Judge Davis' majority opinion quickly established that Congress meant what it said in 42 U.S.C. § 12202, and then moved on to the less obvious issue of whether Congress had acted properly under Section 5. Judge Davis concluded that the abrogation provisions are valid. His reasoning can fairly be reduced to a three-step process. First, he established that the disabled are protected by the Equal Protection Clause of the Fourteenth Amendment. Citing *Cleburne Living Center*, Judge Davis noted that any state legislation that distinguishes between the disabled and all others must have some rational relationship to a legitimate government purpose.[481] Locating a source of rights within the Fourteenth Amendment, of course, links the ADA with the one section of the Constitution that *Seminole Tribe* identifies as proper authority for a congressional override of state sovereign immunity.[482]

Next, the *Coolbaugh* majority addressed the scope of Congress' power under Section 5 after *Flores*. Judge Davis emphasized that, under *Flores*, Congress is empowered by Section 5 not only to correct Fourteenth Amendment violations but also to prevent them.[483] He also drew on the Supreme Court's decision in *South Carolina v. Katzenbach*, in which the Court upheld provisions of the Voting Rights Act banning the use of literacy tests in spite of a prior decision of the Court holding that such tests were not *per se* unconstitutional, to illustrate Congress' preventative powers under Section 5.[484]

The third and critical point in the chain of reasoning is that the ADA meets the "congruence and proportionality" test that *Flores* imposed on exercises of Section 5 powers. *Coolbaugh* treats proportionality as a two-fold inquiry: 1) what constitutional evil is present or threatened; and 2) what steps the statute takes

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978 F. Supp. 992 (D. Kan. 1997); Williams v. Ohio Dep't of Mental Health, 960 F. Supp. 1276 (S.D. Ohio 1997).

478. 136 F.3d 430 (5th Cir. 1998).

479. *See id.* at 432.

480. *See id.* at 432. For a discussion of the *Coolbaugh* dissent, see *infra* notes 533–35 and accompanying text.

481. *See Coolbaugh*, 136 F.3d at 433–34 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985)).

482. *See supra* notes 204–06 and accompanying text.

483. *See Coolbaugh*, 136 F.3d at 434.

484. *See id.* at 434–35 (citing City of Boerne v. Flores, 521 U.S. 507 (1997), in turn citing South Carolina v. Katzenbach, 383 U.S. 301 (1966)). *See also supra* notes 250–57 and accompanying text.

to address these evils.[485] Judge Davis concluded that the rule structure of the ADA, unlike the flawed Religious Freedom Restoration Act, was sufficiently tailored to address actual constitutional violations or situations where they are likely to occur.[486] He emphasized the ADA's statutory findings about the prevalence of disability discrimination and the extensive legislative history which included reviews of extensive, scholarly studies of discrimination as well as testimony and other anecdotal information.[487] He also emphasized that the broad non-discrimination mandate of the ADA is tempered by limitations in specific circumstances, for example, the undue burden defense for a failure to make an accommodation.[488] He concluded that the ADA's provisions are not disproportionate to the harms identified.[489]

A most striking aspect of *Coolbaugh* is the high level of deference given to congressional judgments about the extent of discrimination against the disabled in American society and congressional solutions to this problem. Relying principally on the Court's decision in *Turner Broadcasting System*, but also on *Flores* and *Cleburne*, Judge Davis set up an extremely deferential approach to appraise congressional attempts to tailor a remedy to a constitutional wrong.[490] The standard seems to be thus: the judicial role is to verify that Congress has drawn reasonable inferences about constitutional violations or threats based on substantial evidence.[491] This "bedrock principle" of deference is bolstered by the passages in *Flores* that "[i]t is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment" and its conclusions are entitled to deference.[492] The *Coolbaugh* court found support for such deference in the *Cleburne* decision's invitation: "'How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.'"[493]

Using the deferential *Turner* standard made the result in *Coolbaugh* a forgone conclusion. The effect of this approach is to sustain congressional judgments about the proper use of Section 5 so long as Congress laces the legislative history with some factual basis for legislative actions. Applying this standard, the *Coolbaugh* court reviewed the congressional findings in the ADA and found an ample basis for them in the legislative history.[494] The legislative

485. *See Coolbaugh*, 136 F.3d at 435.
486. *See id.* at 437–38.
487. *See id.* at 436–37.
488. *See id.* at 437 (citing 42 U.S.C. § 12112(b)(5)(A) (1994)).
489. *See id.* at 438 ("We cannot say...in light of the extensive findings of unconstitutional discrimination made by Congress, that these remedies are too sweeping to survive the *Flores* proportionality test....").
490. *See id.* at 436 (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997)).
491. *See id.* at 435–36.
492. *Id.* at 436.
493. *Id.* (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–43 (1985)).
494. *See id.* at 436–37.

history included references to "seven substantive studies" which documented the pervasiveness of disability discrimination, as well as to the testimony of victims and others.[495] Moreover, the various legislative compromises, such as the undue burden or fundamental alteration defenses available to defendants, give the ADA the feel of a statute that was carefully crafted to solve or prevent constitutional violations after careful investigation, but which stopped short of the sort of congressional innovation of rights which *Flores* forbade.

Other decisions upholding the ADA's abrogation of sovereign immunity tend to follow the reasoning of *Coolbaugh*, in whole or part, although the emphasis and depth of analysis varies. The controlling opinion in the Eleventh Circuit's decision in *Kimel v. State Board of Regents*[496] tends to track *Coolbaugh*. The Seventh Circuit's opinion in *Crawford v. Indiana Dept. of Corrections*[497] is little more than a cursory statement that Congress acted properly in abrogating state sovereign immunity.

Another set of cases attempts to analyze the abrogation issue under the framework of *Katzenbach v. Morgan*.[498] In *Autio v. AFSCME, Local 3139*, for example, the Eighth Circuit determined that the ADA properly abrogated Minnesota's sovereign immunity.[499] Unlike *Coolbaugh*, the *Autio* court analyzed the Section 5 issue using the *Morgan* factors,[500] which require that the enactment be: (1) regarded as a measure to enforce the Equal Protection Clause; (2) plainly adapted to furthering that end; and (3) consistent with the letter and spirit of the Constitution.[501] The court concluded that the "regarded as" factor was easily met by the explicit statement in the statute invoking Congress' power under the Fourteenth Amendment.[502]

Autio next concluded that the ADA was "plainly adapted" to enforcing the Equal Protection Clause. Over Minnesota's argument that the ADA prohibited conduct that was not *per se* unconstitutional, the Court reasoned that the *Flores* decision permitted preventative as well as strictly remedial rules.[503] Pointing to the extensive legislative record documenting discrimination against the disabled,[504] and according great deference to Congress' judgment, the *Autio* court concluded that the ADA met the *Flores* proportionality and congruence requirement for preventative measures under Section 5.[505]

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495. *Id.* at 436.
496. 139 F.3d 1426 (11th Cir. 1998).
497. 115 F.3d 481, 487 (7th Cir. 1998).
498. 384 U.S. 641 (1966).
499. *See* Autio v. AFSCME, Local 3139, 140 F.3d 802, 806 (8th Cir. 1988), *aff'd by an evenly divided court*, 157 F.3d 1141 (8th Cir. 1998) (en banc). *See also* Clark v. California, 123 F.3d 1267 (9th Cir. 1997) (utilizing *Morgan* factors).
500. As noted *infra* the viability of the *Morgan* test after *Flores* is dubious. *See infra* Part V.B.1.
501. *See supra* notes 216–30 and accompanying text.
502. *See Autio*, 140 F.3d at 804.
503. *See id.* at 804–05.
504. *See id.* at 804–05 & n.4.
505. *See id.* at 805 (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997)).

Finally, the *Autio* court determined that the ADA did not run afoul of the third *Morgan* factor, that an enactment not be inconsistent with the letter and spirit of the Constitution. Minnesota had argued that the ADA exceeded the parameters of Section 5 by attempting to protect the interests of a class of persons which were not suspect or quasi-suspect.[506] The court quickly dismissed this point as inconsistent with the holding in *Cleburne Living Center* that the mentally retarded are protected by the Equal Protection Clause.[507] The court also noted that other federal enactments dealing with non-suspect classes have been upheld against constitutional challenges.[508]

Even though *Autio* maintains the analytical framework of *Morgan*, the result is not significantly different from *Coolbaugh*.[509] Indeed, *Autio* seems to have recast much of the *Morgan* test in terms of *Flores* and *Seminole*. The "plainly adapted" factor is analyzed as an issue of whether Congress acted to remedy or prevent constitutional violations which the Supreme Court had identified.[510] Likewise, consistency with the "letter and spirit of the Constitution" becomes an issue of whether Congress may act under Section 5 to protect non-suspect classes.[511] In effect, neither the substance of the *Autio* analysis nor the result is significantly different from *Coolbaugh*. The Ninth Circuit's decision in *Clark v. California*[512] is to the same effect.

B. Cases Finding an Abrogation Improper

A few cases have concluded that the ADA's waiver of sovereign immunity exceeds Congress' powers under the Enforcement Clause. All come from federal district courts. As with opinions taking the opposite viewpoint, their reasoning varies somewhat. The most extensively reasoned of these cases is Judge Graham's opinion in *Nihiser v. Ohio Environmental Protection Agency*.[513] The specific issue in *Nihiser* was the reasonable accommodation provisions of Title I of the ADA.[514] The plaintiff claimed that his employer, the Ohio E.P.A., had failed

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506. *See id. See generally supra* Part II.C (discussing the rational basis standard of review as applied to the disabled as a non-suspect class).

507. *See Autio*, 140 F.3d at 806.

508. *See id.* at 805 & n.5 (collecting cases rejecting *Flores* challenges to Age Discrimination in Employment Act and the Individuals with Disabilities Education Act).

509. For a discussion of the viability of the *Morgan* factors after *Flores*, see *infra* Part V.B.1.

510. *See infra* notes 583–601 and accompanying text.

511. Katzenbach v. Morgan, 384 U.S. 641, 656 (1966). *See infra* notes 549–82 and accompanying text.

512. 123 F.3d 1267 (9th Cir. 1997).

513. 979 F. Supp. 1168 (S.D. Ohio 1997).

514. *See id.* at 1169. *See generally* 42 U.S.C. § 12112(b)(5)(A) (1994) (establishing failure to make reasonable accommodation to employee as a discriminatory act); § 12112(b)(5)(B) (addressing denial of employment opportunities based on need for reasonable accommodation). *Nihiser* also involved a claim under the Rehabilitation Act. *See Nihiser*, 979 F. Supp. at 1169.

to make reasonable accommodations for his back injury.[515] After establishing that the ADA met the first requirement of the *Seminole Tribe* test that Congress explicitly state its intention to abrogate state sovereign immunity, Judge Graham analyzed the issue of whether Congress acted under a proper grant of power by applying the "*Morgan* factors" of *Katzenbach v. Morgan*.[516] Judge Graham quickly concluded that the first *Morgan* factor, that the ADA be regarded as an exercise of Congress' Section 5 powers, was easily satisfied by Congress' explicit statutory statement that it was acting to enforce the Fourteenth Amendment.[517] The ADA, however, failed to measure up to the second and third factors.

Judge Graham concluded that the reasonable accommodation rules of the ADA were not "plainly adapted" to enforcing the Equal Protection Clause. Like the *Autio*[518] court, but with the opposite result, *Nihiser* analyzed the second *Morgan* factor in terms of the *Flores* congruence and proportionality requirement. While conceding that Congress has broad powers under Section 5 to enact not only remedial but also prophylactic rules and that the disabled are protected by the Equal Protection Clause, Judge Graham emphasized that Congress may not use the Enforcement Clause to work substantive changes in the nature of the Fourteenth Amendment.[519] Thus, congressional actions to protect the disabled from intentional discrimination would pass muster under Section 5, but reasonable accommodation requirements would not. Judge Graham viewed the latter as calling for "unequal treatment" for disabled employees.[520] In other words, they created "positive rights to entitlement" and demanded "not equal treatment but special treatment."[521] To Judge Graham, the obligation to provide accommodations in situations where no discriminatory animus comes into play, such as the failure to modify an old building, is too far removed from the protections of the Equal Protection Clause to meet the *Flores* congruence test. He concluded that the reasonable accommodation provision was instead a cost-shifting device to further the goal of integrating the disabled into the workforce, notwithstanding the lack of discrimination.[522]

Finally, the *Nihiser* opinion concluded that the ADA failed to comply with the third *Morgan* factor, that the enactment be consistent with the letter and spirit of the Constitution. Relying on *Gregory v. Ashcroft*, Judge Graham reasoned that the reasonable accommodation provisions interfere with a state's prerogatives in dealing with its own employees in a way that the Constitution does not

515. *See Nihiser*, 979 F. Supp. at 1169.
516. *See id.* at 1170 (citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).
517. *See id.* at 1171 (citing 42 U.S.C. § 12101(b)(4) (1994)).
518. *See supra* notes 499–512 and accompanying text.
519. *See Nihiser*, 979 F. Supp. at 1171–73 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446–47 (1985)).
520. *Id.*
521. *Id.* (quoting Pierce v. King, 918 F. Supp. 932 , 940 (E.D.N.C. 1996)).
522. *See id.* at 1175.

contemplate.[523] The gist of his analysis was that the ADA interferes with state authority to set job descriptions and imposes a financial burden on state employers. It would appear that this theory no longer has any force after the recent Supreme Court decision in *Pennsylvania Department of Corrections v. Yeskey*, a case in which Title II was applied to a state prison in spite of arguments that operation of a penal system was a core state function beyond the reach of the ADA.[524]

Brown v. North Carolina Division of Motor Vehicles[525] represents a different analytical approach. There, a class of mobility-impaired plaintiffs instigated a Title II challenge of a North Carolina program which charged a special fee for the issuance of placards for accessible parking spaces.[526] Like *Nihiser*, *Brown* concluded that the abrogation provisions of the ADA were improper.[527] Unlike *Nihiser*, Judge Boyles' opinion does not attempt to apply the *Morgan* factors to the Section 5 issue. Rather, *Brown* turns on the matter of what level of scrutiny is appropriate in evaluating equal protection challenges to state actions affecting the disabled. According to *Brown*, the proper inquiry is whether Congress is "legislating to protect a class cognizable under § 1 of the Fourteenth Amendment."[528] Citing *Cleburne*, Judge Boyle reasoned that the ADA does not reach a class that is entitled to strict or heightened scrutiny.[529] He went on to note that Congress' explicit invocation of the Fourteenth Amendment and its use of the *Carolene Products* catchphrase "discreet and insular minority" are insufficient to confer heightened scrutiny on classifications reaching the disabled.[530] Apparently trying to cast Congress' finding in the best possible light, Judge Boyle opined that in declaring the disabled thus, Congress was merely using its fact finding power to suggest to the Supreme Court that it reconsider its position denying the disabled heightened scrutiny.[531] Judge Boyle then determined that the "special, advantageous treatment" afforded the disabled by the ADA is not remedial since it

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523. *Id.* at 1175–76 (citing Gregory v. Ashcroft, 501 U.S. 452, 468 (1991)). For a discussion of the effects of *Gregory* on Enforcement Clause analysis, see *infra* notes 561–79 and accompanying text.

524. *See* Pennsylvania Dep't of Corrections v. Yesky, 118 S. Ct. 1952, 1956 (1998) (Title II applies to state prisons).

525. 987 F. Supp. 451 (E.D.N.C. 1997), *aff'd* 166 F.3d 698 (4th Cir. 1999).

526. *See id.* at 453.

527. *See id.* at 455–59.

528. *Id.* at 457.

529. *See id.* (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445 (1985)).

530. *Id.* (citing United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938)). For a discussion of *Carolene Products*, see generally *supra* note 352 and accompanying text.

531. *See Brown*, 987 F. Supp. at 457–58. *Cf.* Stephen L. Carter, *The* Morgan *'Power' and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 851–82 (1986) (arguing that *Morgan* promotes dialog between the Court and Congress).

goes beyond the minimal protections offered under rational basis review, freedom from "invidious, arbitrary or irrational" classifications.[532]

A more thorough exposition of the "levels of scrutiny" approach appears in the dissent in *Coolbaugh*.[533] Judge Smith explained that the effect of the reasonable accommodation rules is to heighten scrutiny. He noted that the reasonable accommodation requirement of the ADA forces state entities to provide such benefits unless it can prove that doing so would constitute an undue burden.[534] In essence, according to Judge Smith's argument, the ADA creates a level of scrutiny that is inconsistent with rational basis review. It places a burden on state entity defendants to meet a higher standard of proof than what is required under traditional rational basis review.[535]

A final argument against abrogation under the ADA is noted in dissent in *Kimel*. Judge Cox contended that the legislative history of the ADA contains no findings that the disabled required prophylactic measures to protect them against violations of their constitutional rights.[536] He noted that the legislative history itself bears no mention of any congressional intent that the ADA remedy Fourteenth Amendment violations.[537] To Judge Cox, rather, the committee reports emphasized that the ADA was intended to combat the social costs of discrimination.[538] Statements in the statute that the disabled "often had no legal recourse" emphasize the lack of any intent to vindicate an existing constitutional right.[539]

V. ABROGATION OF SOVEREIGN IMMUNITY UNDER THE ADA

A. Introduction

Abrogation of Eleventh Amendment Immunity is ultimately an issue of whether a federal court may award monetary relief against a state entity. For purposes of Eleventh Amendment analysis, it makes no difference whether we term monetary relief as "legal," e.g., a judgment for damages, or "equitable," e.g., a back pay order. After *Edelman v. Jordan*,[540] there is not a constitutional distinction between these two terms. At stake, instead, is the power of the federal

532. *Brown*, 987 F. Supp. at 459.

533. *See* Coolbaugh v. Louisiana, 136 F.3d 430, 440–41 (5th Cir. 1998) (Smith, J., dissenting), *cert. denied*, 119 S. Ct. 53 (1998). *See also* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1449 (11th Cir. 1998) (Cox, J., dissenting), *cert. denied*, 119 S. Ct. 901 (1999).

534. *See Coolbaugh*, 136 F.3d at 441 (Smith, J., dissenting).

535. *See id.*

536. *See Kimel*, 139 F.3d at 1449 (Cox, J., dissenting).

537. *See id.* Presumably Judge Cox excluded the statutory "findings" from this category. *Cf.* 42 U.S.C. § 12101(a)(5) (1994) (finding intentional discrimination); § 12101(b) (invoking Fourteenth Amendment powers).

538. *See Kimel*, 139 F.3d at 1449 (citing H.R. REP. NO. 101-485, at 41–47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 323–29).

539. *Id.* (citing 42 U.S.C. § 12101(a)(4)).

540. 415 U.S. 651 (1974). *See generally supra* notes 119–27 and accompanying text.

district courts to give complete relief when a monetary award is necessary to make an ADA plaintiff whole. Non-monetary equitable orders, for the most part, should be unaffected by the decisions in *Seminole Tribe* and *Flores*. Such orders seem to fit nicely into the *Ex Parte Young* fiction permitting prospective orders against state officials.[541] For example, an order against a state university official to provide

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541. Use of the *Ex parte Young* doctrine to obtain prospective relief under the ADA so far has been uncontroversial. *See* Armstrong v. Wilson, 124 F.3d 1019, 1025–26 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998) (*Ex parte Young* appropriate to secure prospective relief under ADA); Emma C. v. Eastin, 985 F. Supp. 940 (N.D. Cal. 1997) (same). *Cf.* Brown v. North Carolina Div. of Motor Vehicles, 987 F. Supp. 451, 459 (E.D.N.C. 1997), *aff'd*, 166 F.3d 698 (4th Cir. 1999) (*Ex parte Young* not available when claim is brought against state entity defendant rather than public official). The lack of controversy may be in part because *Seminole Tribe* and *Flores* were decided so recently. Until these decisions created substantial doubt about Congress' power to abrogate state sovereign immunity, there was little need to consider the use of the *Ex parte Young* exception in ADA claims. Prospective relief could be sought directly against the state entity. Any such orders, moreover, would be enforceable against state officials. *See* FED. R. CIV. P. 65(d) (binding "agents, servants, employees, and attorneys" to injunctions issued against parties).

Traditionally, the *Ex parte Young* exception was available to parties wishing to challenge ongoing violations of federal constitutional and statutory rights. *Ex parte Young* itself is a good example of the vindication of constitutional provisions. The underlying issue was whether the Minnesota railroad regulations violated the Due Process, Equal Protection, and Commerce Clauses. *Ex parte* Young, 209 U.S. 123, 144–45 (1908). *Ex parte Young* has also been used to obtain relief from violation of federal statutory rights. *See, e.g.*, *Edelman*, 415 U.S. at 663–64 (finding available prospective relief from continuing violations of rights). *Seminole Tribe* added a new wrinkle to the *Ex parte Young* exception. Justice Rehnquist's opinion introduced the concept that the exception is inappropriate to enforce federal statutory rights when the statute has a comprehensive and detailed remedial scheme. *See supra* notes 135–41 and accompanying text. The opinion creates unnecessary confusion over the nature of the *Ex parte Young* exception. *Ex parte Young* actually serves two functions. First, it serves as a limited grant of federal jurisdiction over instances of ongoing violations of federal law by state entities. *See supra* notes 110–34 and accompanying text. Second, *Ex parte Young* stands for the proposition that there is an implied cause of action for violations of federal law by state entities. *See* Jackson, *supra* note 27, at 37–41; Meltzer, *supra* note 27, at 37–41. *Seminole Tribe* fails to distinguish between these separate functions.

There is little doubt that the jurisdictional aspect of *Ex parte Young* is compatible with permitting suits for prospective relief against state entities to proceed under the ADA. The application of the remedial aspect of *Ex parte Young* is now more subtle. The question after *Seminole Tribe* is whether the ADA's remedial scheme is sufficiently "comprehensive" to warrant the inference that Congress did not intend to permit a separate *Ex parte Young* remedy for ADA violations. I would argue that it is not. *Seminole Tribe*, granted, provides no definition of complexity or comprehensiveness beyond the example of the Indian Gaming Regulatory Act. Nonetheless IGRA and the ADA are sufficiently different to allow a conclusion that the latter does not fall under the *Seminole Tribe* complexity exception. Justice Rehnquist seemed most troubled not by the comprehensiveness of IGRA but by the possibility that an *Ex parte Young* action would permit a federal court to hold a state official in contempt when an action directly against the state under IGRA would provide less drastic enforcement measures. *See supra* note 141 and accompanying text. The same disparity of remedies does not exist under the ADA. The enforcement mechanisms for

Titles I and II, which ultimately are those for Title VII and Title VI, respectively, *see supra* Part III.C.1–2, embody a wide range of remedies such as equitable orders and, when necessary, contempt proceedings. *See* Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3rd Cir. 1998) (en banc) (injunctive relief and contempt under Title I of ADA); EEOC v. Goodyear, 813 F.2d 1539, 1544 (9th Cir. 1987) (injunctive relief and contempt under Title VII); Callicotte v. Cheney, 744 F. Supp. 3, 5 (D.D.C. 1990) (attorney fees under Rehabilitation Act); Lelsz v. Kavanagh, 673 F. Supp. 828, 864 (N.D. Tex. 1987), *aff'd*, 983 F.2d 1061 (5th Cir. 1993) (contempt power under Section 504). The legislative history of the ADA likewise emphasizes that equitable relief is available to enforce rights under Titles I and II. *See, e.g.*, H.R. 101-485(III), at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 472 (equitable remedies of injunction and back pay in Title I claims); *id* at 52, 1990 U.S.C.C.A.N. at 475 (stating that "full panoply" of remedies are available under Rehabilitation Act and therefore Title II). Thus there are no remedial limitations in the ADA comparable to IGRA.

A separate issue is whether official capacity suits against state officials are *authorized* by the ADA. *Seminole Tribe* treats the availability of *Ex parte Young* actions as a matter of statutory interpretation as well as jurisdiction. By way of footnote, the *Seminole Tribe* majority reasoned that Congress could authorize *Ex parte Young* jurisdiction even for statutes with limited remedial schemes; in the case of IGRA, Congress simply did not intend to do so. *See* Seminole Tribe v. Florida, 517 U.S. 44, 75 n.17 (1996). The Court emphasized that duties under IGRA run specifically against the state as opposed to state officials. *See id.* Significantly, the Court did not suggest that a plain statement is required to authorize *Ex parte Young* actions. Rather, the Court inferred a lack of intent from frequent references to "the State" rather than individual state officers in IGRA. *See id.* The Court also noted that negotiation on behalf of a state is not something that individuals or small groups of officers were likely to do. *See id.*

If the key to the *Ex parte Young* question is legislative intent, then it is difficult to argue that Congress did not intend that the ADA be enforced against the states by orders against state officials. It is true that, like IGRA, Titles I and II of the ADA place obligations directly on state entities rather than state officials. Nonetheless, the ADA is fundamentally different from IGRA. Enforcement of ADA provisions can normally be accomplished by ordering a single public official, or no more than a few, to perform a statutory duty, such as not applying a discriminatory policy. Such simple actions are quite different from the relatively complicated tasks of negotiating agreements with Indian tribes that were at issue in *Seminole Tribe*. Hence there is no reason to assume that Congress would not have intended for injunctive relief to run against individual officers. Second, and more importantly, Congress was not working from a clean slate when it enacted the ADA. As just noted, Congress chose to utilize existing civil rights enforcement mechanisms for Titles I and II which had often resulted in orders issuing against state officials for perform certain statutory obligations. *See, e.g.*, Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981) (ordering admission of psychiatrist to residency program). It would not be reasonable to insist that Congress envisioned injunctive relief when the state is named as a party but not when an public official is named in an official capacity. It is true that the *Seminole Tribe* Court refused to guess what Congress would have wanted vis-à-vis official capacity suits had it known that abrogation was not permitted under the Commerce Power. *See Seminole Tribe*, 517 U.S. at 75. But again, the ADA is sufficiently different from IGRA to avoid that result. The Court's reluctance to second guess Congress' wishes in such a complicated matter as negotiations between sovereigns is at least defensible. It is not certain how Congress would want to structure relief against state officials who refuse to negotiate. In contrast, the ADA presumes enforcement, among other means, through a system of discrete equitable orders targeting illegal conduct. It is difficult to imagine that Congress

an interpreter for a hearing impaired student or even to admit a student constitute the type of prospective relief contemplated by *Ex parte Young*.

Part IV analyzes the abrogation issue as follows. Subpart B specifies the proper analytical standard for determining whether abrogation is proper under Section 5. The critical issue here is what remains of the deferential approach in *Katzenbach v. Morgan* after the decisions in *Seminole Tribe* and *Flores*. Subpart B also addresses the relationship between the constitutional level of scrutiny afforded to government actions classifying persons based on disability and Enforcement Clause analysis. Then, Subpart C applies the proper Section 5 standard to the substantive provisions of the ADA. Here, the ADA's substantive rules are divided into four categories: (1) prohibitions of intentional discrimination, (2) rules against specific practices, (3) reasonable accommodation requirements, and (4) the requirement that services be provided in the most integrated setting that is appropriate. This division reflects my view that the likelihood of a proper abrogation depends upon the nature of the substantive rule.

B. The Extent of Section Five Power After Flores

1. The Morgan *Factors After* Flores

The first step in determining whether the ADA, or parts of it, represents a proper exercise of congressional power under the Enforcement Clause is to determine the scope of that power. Part II.B detailed the extremely restrictive view of Section 5 power set forth in the *Flores* decision and suggested that it constricted the rather liberal approach found in *Katzenbach v. Morgan*.[542] Nonetheless, many of the lower courts that have reviewed Eleventh Amendment challenges to the ADA continue to utilize the *Morgan* factors. Moreover, there does not seem to be a uniform view of the effects regarding *Flores* on *Morgan*, at least in the ADA context. As illustrated in Part IV, some of the decisions rely on *Morgan*, others apply *Morgan* in light of *Flores*, and still others ignore *Morgan*.[543] Therefore, it is necessary to resolve the issue of what role the *Katzenbach v. Morgan* decision now plays in Enforcement Clause analysis.

As explained in Part II.B, *Katzenbach v. Morgan* established a three-factor test for Enforcement Clause measures: The legislation must be: (1) regarded as enforcing the Fourteenth Amendment, (2) plainly adapted to that end, and (3) otherwise consistent with the letter and spirit of the Constitution.[544] There appears to be little conflict between *Seminole Tribe* and the first *Morgan* factor, at least as far as the ADA is concerned. *Seminole Tribe* requires that Congress express its desire to abrogate Eleventh Amendment immunity unequivocally.[545]

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would not have provided for prospective relief if it had formally considered the availability of relief based on the *Ex parte Young* exception. Hence, I conclude that permitting *Ex parte Young* actions to secure rights under the ADA is consistent with congressional intent.

542. *See supra* notes 233–80 and accompanying text.

543. *See supra* Part IV.

544. *See* Katzenbach v. Morgan, 384 U.S. 641, 652 (1966).

545. *See Seminole Tribe*, 517 U.S. at 56–57.

The first *Morgan* factor is met when Congress explicitly states that it is acting to enforce the Fourteenth Amendment.[546] Congress met both requirements in the ADA. It specified in the text of the Act that the ADA was intended to protect the Fourteenth Amendment rights of the disabled,[547] and explicitly abrogated state sovereign immunity in Title V of the Act.[548] Hence, neither requirement is an impediment to finding that Congress acted properly under the Enforcement Clause when enacting the ADA. Moreover, even if Congress had failed to meet either condition, the deficiency could be corrected by more carefully drafted legislation.

I also argue that the third *Morgan* factor should not be read to be in conflict with the *Seminole Tribe/Flores* paradigm, nor should it have any present effect on the constitutionality of the ADA. *Morgan* required that Enforcement Clause measures be consistent "with the letter and spirit of the Constitution."[549] It would be misleading to suggest that the Court has settled the meaning of the third *Morgan* factor. Indeed, the Court said little about *Katzenbach v. Morgan* until the *Flores* decision.[550] One commentator has theorized that the expansive pre-*Seminole Tribe* view of the Commerce Power avoided any need for the Court to determine the scope of Section 5 powers.[551] The discussion of the third factor in *Morgan* itself does, however, give some guidance as to its meaning. The plaintiff in *Morgan* argued that the provision of the Voting Rights Act which prohibited use of English literacy tests to disqualify persons educated in American-flag schools[552] violated the implied equal protection guarantee[553] of the Fifth Amendment as to persons educated in non-American-flag schools.[554] It is significant that this argument, which the Court rejected on the merits,[555] concerned a constitutional provision that was extraneous to the Fourteenth Amendment. It is thus reasonable, and certainly convenient, to construe the third *Morgan* factor as pertaining to constitutional provisions outside of the Fourteenth Amendment.[556]

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546. *See Morgan*, 384 U.S. at 652. *See also* Autio v. AFSCME, Local 3139, 140 F.3d 802, 804 (8th Cir. 1998), *aff'd by an evenly divided court*, 157 F.3d 1141 (8th Cir. 1998) (en banc); Wilson-Jones v. Caviness, 99 F.3d 203, 210 (6th Cir. 1996) (FLSA case); Nihiser v. Ohio EPA, 979 F. Supp. 1168, 1171 (S.D. Ohio 1997).

547. *See* 42 U.S.C. § 12101(b)(4) (1994).

548. *See* 42 U.S.C. § 12202 (1994).

549. *Morgan*, 384 U.S. at 656.

550. *See supra* note 232.

551. *See* John M.A. DiPippa, *The Death and Resurrection of RFRA: Integrating* Lopez *and* Boerne, 20 U. ARK. LITTLE ROCK L.J. 767, 770 (1998).

552. *See supra* notes 216–30 and accompanying text (discussing *Morgan*).

553. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (finding equal protection component in Fifth Amendment Due Process Clause).

554. *See Morgan*, 384 U.S. at 656–67.

555. *See id.* at 657 (citing Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955)).

556. One decision noted in Part IV does not observe my distinction. *Autio v. AFSCME, Local 3139*, 140 F.3d 802, 805 (8th Cir. 1998), *aff'd by an evenly divided court*, 157 F.3d 1141 (8th Cir. 1998) (en banc), reviews the Equal Protection Clause issue of levels of scrutiny under the third *Morgan* factor. Given the paucity of guidance on the *Morgan* factor, it is impossible to say that *Autio* is wrong. I argue that treating the level of

Only one court so far has used the third *Morgan* factor to determine that the ADA has exceeded the bounds of the Enforcement Clause. *Nihiser v. Ohio Environmental Protection Agency* reasoned that the employment discrimination provisions of Title I impinged on the state's authority to define job descriptions and job qualifications for its employees.[557] Relying on the Supreme Court's decision in *Gregory v. Ashcroft*, the *Nihiser* court reasoned that congressional power under Section 5 was limited by state constitutional powers.[558] Thus *Nihiser* reasoned that Title I created substantive rights (as opposed to being a proper remedial measure[559]) which imposed substantial costs upon the states and interfered with traditional state prerogatives without creating a counterbalancing prevention or remedy of a constitutional violation.[560]

At best, the analysis of the third *Morgan* factor in *Nihiser* seems superfluous. To the extent that the ADA creates new substantive rights, Congress has exceeded its mandate under *Flores*. No further analysis should be necessary. But what about situations where Congress legislates remedially under Section 5 and, at the same time, encroaches on traditional areas of state authority? *Nihiser* takes the view that state interests may be sufficient to nullify a Section 5 measure.[561] Its reliance on *Gregory v. Ashcroft* to sustain this point, however, is misplaced. In *Gregory*, concerns about federalism became the basis for a prudential rule of statutory construction but not a rule directly restricting federal power over the states. The *Gregory* plaintiffs challenged a mandatory retirement rule for state judges in the Missouri Constitution.[562] The action was based, in pertinent part, on the federal Age Discrimination in Employment Act.[563] Justice O'Connor's opinion began by acknowledging that the power to set qualifications for high state officials is a core state right.[564] She then reasoned that because of the significant state interests, attempts by Congress to "upset the usual constitutional balance" must be made "unmistakably clear in the language of the statute."[565] Justice O'Connor concluded that state judges are not employees under the statute since they fit into the exception for high ranking officials.[566] Although there was reasonable disagreement as to whether an appointed state judge was an "appointee

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scrutiny issue under the second *Morgan* factor, i.e., whether the statute is plainly adapted to enforce the Fourteenth Amendment, is a more natural application of *Morgan*. This classification should not ultimately affect the analysis of how *Flores* affects *Morgan*.

557. *See* Nihiser v. Ohio EPA, 979 F. Supp. 1168, 1176 (S.D. Ohio 1997).

558. *See Nihiser*, 979 F. Supp. at 1176 (quoting Gregory v. Ashcroft, 501 U.S. 452, 468 (1991) ("[T]he Fourteenth Amendment does not override all principles of federalism....")).

559. *See infra* notes 210–62 and accompanying text (discussing *Flores*).

560. *See Nihiser*, 979 F. Supp. at 1176.

561. *See id.*

562. *See* Gregory v. Ashcroft, 501 U.S. 452, 456–57 (1991).

563. *See id.* (citing Age Discrimination in Employment Act, 29 U.S.C. §§ 621 to 634 (1994 & Supp. 1997)).

564. *See id.* at 460.

565. *Id.* at 460–61 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

566. *See id.* at 469–70.

on the policymaking level,"[567] the plain statement rule required a construction which did not encroach on state prerogatives if the statute was ambiguous.[568]

In its best light, *Gregory v. Ashcroft* stands for the proposition that, at some distant point, federal enactments under Section 5 may run afoul of federalism. Granted, there is language in *Gregory* indicating a concern about an overreaching federal presence which destroys the integrity of states as sovereign units. Justice O'Connor indicated plainly that some state interests are so important that they are inviolate when Congress legislates under the Commerce Clause.[569] She also noted that the Court has never ruled that the Fourteenth Amendment can be applied with "complete disregard for a State's constitutional powers."[570] These statements, though, are dictum and are diluted seriously by her concession that federalism concerns are "attenuated" when Congress acts under the Civil War Amendments.[571]

Unlike the ADEA provisions which govern policymaking appointees, the ADA is sufficiently explicit about its application to state government to meet the plain statement requirement. In *Pennsylvania Department of Corrections v. Yeskey*, the Supreme Court rejected a *Gregory*-based challenge to the application of Title II to state prisons, holding that Congress had spoken to the issue with the requisite clarity and that prisons fit within the Act's definition of a public entity.[572] There are few aspects of state government more "sovereign" than the operation of a penal system.[573] Once it is decided that Title II applies to a core government function such as maintaining a prison, it becomes difficult to argue that the ADA does not apply to other government activities. *Yeskey* expressly reserved the issue of whether the application of the ADA to a state prison was a valid exercise under either the Commerce Clause or Section 5 on the grounds that these issues were not properly preserved.[574]

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567. 29 U.S.C. § 630(f) (1994).

568. *See Gregory*, 501 U.S. at 467.

569. *See id.* at 463–64. The Court ruled in *EEOC v. Wyoming*, that Congress had properly enacted the ADEA under the Commerce Clause, but reserved the issue of whether the ADEA was proper under the Section 5. *See* EEOC v. Wyoming, 460 U.S. 226, 243 & n.18 (1983).

570. *Gregory*, 501 U.S. at 468. Justice O'Connor offers as an example the "political function cases" involving state and local restrictions against aliens. *Id.* (citing Sugarman v. Dougall, 413 U.S. 634 (1973) and progeny). Here the Court applies a less rigorous scrutiny than is normally required for alienage classifications because of the state interest in establishing qualifications for governmental positions. *See id.*

571. *See Gregory*, 501 U.S. at 468. *See also EEOC v. Wyoming*, 460 U.S. at 243 n.18 ("We...reaffirm that when properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers.").

572. *See* Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1954–55 (1998) (citing 42 U.S.C. §§ 12131(1)(A)–(B) (1994 & Supp. 1997)).

573. Procunier v. Martinez, 416 U.S. 396, 412 (1974) ("One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task.").

574. *See Yeskey*, 118 S. Ct. at 1956.

Nor does the present state of the law permit a substantive federalism argument against the application of the ADA to the states. The notion that the Tenth Amendment provides a bulwark against federal regulation of the states has had little influence lately. From 1937 though 1991, the Court sustained only one challenge[575] to a federal statute on Tenth Amendment grounds, and later overruled that decision.[576] The prevailing attitude was that the Tenth Amendment represented a truism that Congress may legislate only where it has authority to do so.[577] Even if the analysis is confined to the Commerce Clause, it is difficult to imagine that the ADA imposes a greater burden on states than other federal legislation that has been sustained against federalism challenges. *Garcia v. San Antonio Metropolitan Transit Authority*, for example, sustained the application of the Fair Labor Standards Act's[578] ("FLSA") minimum wage and overtime provisions as a valid exercise of congressional power under the Commerce Clause and inoffensive to the Tenth Amendment.[579] Surely the burden of having to pay all workers a minimum wage is a much greater intrusion on state authority than the burden of providing accommodations for a small number of employees. The FLSA, moreover, has no provision similar to the ADA's undue burden defense. If Congress attempts to act under the Fourteenth Amendment, then even the pro-federalism views of *Gregory* should concede that federalism concerns are attenuated, and that the burden on state entities is acceptable.

I acknowledge that the Court has begun to limit the Commerce Clause power[580] and to expand Tenth Amendment protections[581] during the Nineties. More to the point, there is no inconsistency between the *Morgan* and *Flores* decisions on this point. Defendants should be able to raise neo-federalism defenses whether addressing the third *Morgan* factor or relying directly on *Flores*. The later decision does not limit the power to raise these objections; moreover, Justice Kennedy's brief, suspicious remarks in *Flores* about RFRA's intrusions into traditional areas of state authority[582] imply that the Court still invites federalism challenges after *Flores*.

The true clash between *Morgan* and *Flores* lies in the second *Morgan* factor. *Morgan* required that Section 5 enactments be plainly adapted to the

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575. *See* National League of Cities v. Usery, 426 U.S. 833, 851–52 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

576. *See* CHEMERINSKY, *supra* note 222, § 3.8.

577. *See* United States v. Darby, 312 U.S. 100, 124 (1941). *See also* CHEMERINSKY, *supra* note 222, § 3.8.

578. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 to 219 (1994).

579. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976).

580. *See* United States v. Lopez, 514 U.S. 549, 567 (1995) (prohibiting gun possession on or near school grounds exceeds Commerce Clause powers).

581. *See* New York v. United States, 505 U.S. 144 (1992) (Low-Level Radioactive Waste Policy Amendments Act "take title" provision violates Tenth Amendment). *Cf.* Printz v. United States, 521 U.S. 898 (1997) (finding that federal requirement of background checks performed by states violates constitutional division of power between states and federal government).

582. *See* City of Boerne v. Flores, 521 U.S. 507, 509 (1997).

Fourteenth Amendment purpose identified by Congress.[583] The *Morgan* Court took an extremely deferential view of what was "plainly adapted." As noted in Part II.B,[584] *Morgan* posited two reasons why section 4(e) of the Voting Rights Act was plainly adapted to enforcement of the Fourteenth Amendment. First, the Act was remedial in the sense that the guarantee of voting rights was necessary to ensure that the Puerto Rican community received equal treatment in the provision of public services.[585] Second, Congress was empowered to define what constitutes a Fourteenth Amendment violation independently of the Court.[586] Under either theory, the *Morgan* Court gave nearly complete deference to Congress' judgment. In the case of remedial legislation, the Court required only that it "perceive a basis upon which the Congress *might* resolve the conflict as it did."[587] As to the substantive branch of *Morgan*, the Court speculated as to Congress' reasons for section 4(e) and again perceived some possible bases for its action.[588] *Morgan* implies that the courts should assume that Congress has a basis for any Enforcement Clause legislation unless such an assumption is "rationally impossible."[589] Indeed, as Justice Harlan points out in dissent, the legislative history of the Voting Rights Act is devoid of any legislative facts that would justify either a remedial or a substantive enactment.[590]

Flores changed all that. Justice Kennedy's opinion makes it crystal clear that Congress has no power whatsoever to define constitutional violations.[591] Hence, the definitional prong of *Morgan* is no longer a valid theory of congressional action under the Enforcement Clause.[592] While the remedial theory of *Morgan* survives, it is significantly curtailed. *Flores* limits Section 5 legislation to measures which either remedy or prevent Equal Protection Clause violations.[593] Of course, legislation which prohibits particular conduct that the courts have found to be unconstitutional is uncontroversial. Preventive legislation, however, must meet a stricter standard than the "perceive a basis" test of *Morgan*. While Congress may forbid conduct that is not *per se* unconstitutional, *Flores* requires that such legislation demonstrate a "congruence and proportionality" between the

583. *See* Wilson-Jones v. Caviness, 99 F.3d 203, 210 (6th Cir. 1996).

584. *See supra* notes 221–30 and accompanying text.

585. *See* Katzenbach v. Morgan, 384 U.S. 641, 652–53 (1966).

586. *See id.* at 653–56.

587. *Id.* at 653 (emphasis added).

588. *Id.* at 654–55. Among the reasons given that Congress might have been motivated to forbid the literacy tests were: (1) the many exemptions in the law; (2) evidence of prejudice behind the enactment of the New York law; (3) the inappropriateness of denying a fundamental right in order to encourage English literacy; and (4) the availability of Spanish-language resources which would inform voters sufficiently about election issues. *Id.*

589. Cox, *supra* note 231, at 106. *See also* DiPippa, *supra* note 551, at 774.

590. *See Morgan*, 384 U.S. at 669 (Harlan, J., dissenting).

591. *See supra* notes 233–79 and accompanying text.

592. *See* Jesse H. Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996–1997 Term*, 19 CARDOZO L. REV. 2259, 2294 (1998).

593. *See* City of Boerne v. Flores, 521 U.S. 507, 518 (1997).

constitutional injury to be avoided and the means of redress.[594] Justice Kennedy's opinion gives some guidance here when he says that laws affected by Section 5 measures must have a "significant likelihood of being unconstitutional."[595] In addition, a fair reading of *Flores* leads to the conclusion that Congress may be well-advised, even if it is not actually so required,[596] to document a pattern of unconstitutional behavior in either the text or the history of an Enforcement Clause enactment. Finally, *Flores* evidences no appreciable willingness on the part of the Court to defer to congressional judgments. *Morgan* went outside of the legislative record of the Voting Rights Act and speculated on possible reasons for Congress' actions.[597] *Flores*, in contrast, performed a rather searching review of RFRA's legislative history and found it lacking.[598]

To state the question differently, what criteria must a statute meet to conform to the *Flores* decision? While the contours of the *Flores* ruling are not completely clear,[599] it appears that valid Section 5 legislation must meet each of two criteria.[600] First, the legislation must remedy a judicially determined Fourteenth Amendment violation. Second, in the case of statutes designed to prevent violations, the legislation must be congruent and proportional to the illegal conduct redressed.[601] Statutes will tend to meet the latter requirement when they regulate conduct that is likely to be unconstitutional and have a legislative history documenting the violations at issue; otherwise, the risk of creating substantive Fourteenth Amendment rights by legislation may become too great.

2. Levels of Scrutiny

An issue separate from *Morgan* is the significance of levels of scrutiny for Equal Protection claims after *Flores*. As already noted, the lower courts have disagreed on this issue. Judge Boyle's opinion in *Brown v. North Carolina Division of Motor Vehicles* concluded that the Supreme Court's refusal to apply heightened or strict scrutiny in Equal Protection challenges involving the disabled effectively bars Congress from acting under Section 5.[602] The vast majority of opinions find the Court's failure to apply heightened scrutiny irrelevant.[603] I argue

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594. *Id.* at 508.

595. *Id.* at 532.

596. *See supra* notes 272–75 and accompanying text.

597. *See supra* note 223 and accompanying text.

598. *See supra* note 272 and accompanying text.

599. *See generally* Brant, *supra* note 43, at 199–200 (discussing possible narrowing interpretations of *Flores*); Eisgruber & Sager, *supra* note 28, at 95–96 (interpreting *Flores* to permit congressional expansion of rights).

600. *See* Coolbaugh v. Louisiana, 136 F.3d 430, 435 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 58 (1998) (recognizing two-step process of identifying constitutional wrong and judging proportionality of legislative action).

601. *See* City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

602. Brown v. North Carolina Div. of Motor Vehicles, 987 F. Supp. 451, 457 (E.D.N.C. 1997). *See supra* notes 525–32 and accompanying text.

603. *See* Martin v. Kansas, 978 F. Supp. 992, 995 (D. Kan. 1997). *See also supra* Part IV.A (collecting cases finding ADA's abrogation provision valid).

that the Court's decision to apply rational basis review to statutes touching the disabled does not limit Congress' power to act under Section 5, but only the scope of permissible legislation.

The genesis of the argument limiting Section 5 powers to the protection of classes protected by heightened scrutiny is Chief Justice Burger's dissenting opinion in *EEOC v. Wyoming*, in which the Court struck down an age-based involuntary retirement system for certain state employees.[604] A majority of the Court upheld the Age Discrimination in Employment Act ("ADEA")[605] as a valid exercise of Congress' Commerce Clause power and expressly did not reach the Section 5 issue.[606] Burger, however, argued that the ADEA was improper under both the Commerce Clause and Section 5. As to the latter, Burger anticipated the holding in *Flores* by arguing that Congress has no authority to define equal protection rights independent of the Court's decisions.[607] He noted that prior decisions dealing with age classifications had refused to apply heightened scrutiny and had actually upheld mandatory retirement schemes under rational basis review in the past.[608] Since the Court had yet to find that age classifications offended the Equal Protection Clause, Burger reasoned, Congress had no authority under Section 5 to impose rules against state use of mandatory retirement schemes.[609]

There is some merit to the contention that rational basis review precludes legislation under Section 5. After all, a decision to apply minimal scrutiny raises a presumption that a particular state action is constitutionally proper. Attempts by Congress to legislate in these areas, so the logic goes, necessarily lack the remedial character that *Flores* demands.[610] Specifically, they seem to run afoul of Justice Kennedy's observation that preventative measures are most appropriate when they regard areas of state activity where constitutional violations are likely.[611] Still, limiting Section 5 legislation to groups entitled to heightened scrutiny is inappropriate. Minimal scrutiny involves more than a probability that legislation does not offend the Equal Protection Clause. As already noted,[612] it also embodies judicial deference to legislative competence in areas of economic and social regulation. It seems odd that a doctrine of judicial deference to the legislature could become a reason to disable congressional action.[613] Indeed, none of the

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604. *See* EEOC v. Wyoming, 460 U.S. 226, 251 (1983) (Burger, C.J., dissenting).

605. 29 U.S.C. §§ 621 to 624 (1994 & Supp. 1997).

606. *See EEOC v. Wyoming*, 460 U.S. at 243 & n.18.

607. *See id.* at 262 (Burger, C.J., dissenting).

608. *See id.* at 260 (Burger, C.J., dissenting) (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Vance v. Bradley, 440 U.S. 93 (1979)).

609. *See id.* at 259–63 (Burger, C.J., dissenting).

610. *See* Elizabeth Welter, Note, *The ADA's Abrogation of Eleventh Amendment State Immunity as a Valid Exercise of Congress's Power to Enforce the Fourteenth Amendment*, 82 MINN. L. REV. 1139, 1159 (1998).

611. *See* City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

612. *See supra* notes 301–03 and accompanying text.

613. *See* Welter, *supra* note 610, at 1162–63.

reasons for judicial deference behind the rational basis test have any relevance to legislative processes.[614]

More importantly, a "heightened scrutiny" limitation on Section 5 would leave Congress powerless to address situations which fail rational basis review. Chief Justice Burger's Section 5 arguments in *EEOC v. Wyoming* were premised on the absence of successful challenges to age classifications under minimal scrutiny. Subsequent opinions by the Court illustrate that state actions sometimes violate the Equal Protection Clause under rational basis review.[615] Even if *Heller v. Doe* has put an end to "second order" rational review,[616] *Cleburne Living Center* and *Romer* still stand for the proposition that classifications based on animosity toward a non-suspect class violate equal protection principles. It would be odd to say that Congress may not exercise its "positive grant of legislative power"[617] under Section 5 to address the same concerns that private plaintiffs could litigate against a state official or a municipality under section 1983.[618] The Court has never said or even implied that Section 5 does not reach distinctions that the Court reviews with minimal scrutiny. In *Cleburne Living Center*, the Court's opinion emphasized the role of Congress in enforcing the Fourteenth Amendment through Section 5 legislation.[619] It noted that the multi-tier system of scrutiny was a judicially devised system for judging equal protection challenges of state actions and was to be used "absent controlling congressional direction."[620] *Flores* may have narrowed the range of Section 5, but it said nothing about rational basis review. The restriction to remedial or preventative measures has no necessary effect on Congress' power to protect non-suspect classes. Hence, the better reasoning is, Congress may act under Section 5 to prevent or remedy state actions which impermissibly discriminate against the disabled, subject only to the *Flores* requirement that such legislation be proportional.

C. Section Five and the ADA

1. Generally

The ADA is not a monolith. Titles I and II contain a variety of non-discrimination rules which are quite distinct from one another. A detailed review of all these provisions is impossible in an Article of this scope and, fortunately,

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614. *See id.*

615. *See* Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).

616. *See supra* notes 323–32 and accompanying text.

617. *Flores*, 521 U.S. at 517 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

618. As a matter of statutory interpretation, states are not considered "persons" under section 1983. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989).

619. *See Cleburne Living Ctr.*, 473 U.S. at 439–40.

620. *Id.* at 439.

exceeds the needs of this Article.[621] For purposes of the sovereign immunity analysis, it is useful to characterize the substantive rules of the ADA as falling into four categories: (1) prohibitions of intentional discrimination or bias; (2) rules requiring that a covered entity refrain from specific practices; (3) affirmative obligations placed upon covered entities to provide accommodations for qualified individuals with disabilities; and (4) the mandate to provide services in the most integrated, appropriate environment. These categories are, of course, somewhat artificial. There may be reasonable disagreement over where a particular rule belongs. For example, does a requirement that public employers not utilize pre-offer medical exams of applicants require the employer to refrain from action or does it require the employer to affirmatively change its procedures? Fortunately, nothing legally significant turns on how we categorize the ADA rules here. The scheme is offered, rather, as a useful organizational device. As a general matter, rules which prohibit intentionally discriminatory conduct,[622] prohibit specific practices,[623] and forbid unnecessary segregation of the disabled are likely to survive the *Flores* analysis,[624] while those requiring reasonable accommodations are unlikely to do so.[625]

Like any other civil rights statute, the ADA prohibits intentional discrimination against its protected class. The "findings and purposes"[626] section of the ADA makes note of the "outright intentional exclusion"[627] of the disabled, and courts have found liability based on intentional discrimination.[628] Prohibitions against outright bias are most likely to be proper under the Enforcement Clause. The majority of ADA prohibitions, however, concern practices which have an unintended impact upon the disabled. The legislative findings regarding disparate impact are quite clear; Congress specifically expressed its concern that the disabled were disadvantaged by indifference as well as by hostility.[629] Indeed,

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621. For a more detailed analysis of Title II, see generally John J. Coleman III & Marcel L. Debruge, *A Practitioner's Introduction to ADA Title II*, 45 ALA. L. REV. 55 (1993).

622. *See infra* Part V.C.2.

623. *See infra* Part V.C.3.

624. *See infra* Part V.C.5.

625. *See infra* Part V.C.4.

626. Americans with Disabilities Act § 2, 42 U.S.C. § 12101 (1994).

627. § 12101(a)(5).

628. *See* Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach, 846 F. Supp. 986, 992 (S.D. Fla. 1994).

629. *See* 42 U.S.C. § 12101(5).

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

Id. (emphasis added). *See also* H.R. REP. NO. 101-485(II), at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310–11 (finding that discrimination occurs from indifference as well as animosity).

rules for new construction and building alterations[630] regulate the purest form of unintentional discrimination. It would be difficult to imagine that an architect designed an inaccessible building to spite the disabled.[631]

Disparate impact rules in the ADA can be further divided into three sub-groups. One very small sub-group of rules and regulations requires that covered entities refrain from certain actions or practices. The clearest examples of this sort are the prohibition on making pre-employment inquiries about the existence of disabilities[632] and the ban on pre-offer medical exams.[633] Such rules have a good chance of being deemed "preventive," even under the restrictive analysis of *Flores*. Second, there are rules which impose affirmative, direct, and sometimes onerous obligations. The primary example is the requirement that a covered entity provide a reasonable accommodation for a disabled person. For example, employers under Title I may sometimes have to provide workers with auxiliary aids and services (such as interpreters or readers), alter work schedules, or restructure jobs.[634] Similarly, Title II imposes accessibility requirements on buildings used in governmental services,[635] and forbids the use of criteria or methods of administration which have the "purpose or *effect*"[636] of defeating program goals with respect to the disabled. Title II also forbids the use of eligibility requirements that "*tend* to screen out"[637] the disabled from the full enjoyment of any public service unless the criteria are necessary to the provision of the program. Rules falling into this category are least likely to survive a proper application of the *Flores* test.[638] Finally, the ADA imposes a general mandate that covered entities provide services or benefits in the most integrated setting appropriate to the underlying activity.[639] An example of a practice violating this rule is a separate municipal recreational league for HIV-positive persons. I argue that this mainstreaming requirement should survive a challenge under *Flores*.

2. Intentional Discrimination

a. Generally

Intentional discrimination against the disabled is a central concern of the ADA.[640] The findings section of the statute refers to a history of "outright

630. *See* 28 C.F.R. § 35.151 (1998).

631. *See* Crowder v. Kitagawa, 81 F.3d 1480, 1483 (9th Cir. 1996) ("Few would argue that architectural barriers to disabled persons such as stairs, or communication barriers such as the preference for the spoken word, are intentionally discriminatory.").

632. *See* 42 U.S.C. § 12111(d)(2)(A) (1994).

633. *See id.*

634. *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ADA TITLE I TECHNICAL ASSISTANCE MANUAL § I-3.10 (1992) (describing workplace accommodations).

635. *See* 28 C.F.R. §§ 35.150–.151 (1998).

636. 28 C.F.R. § 35.130(b)(3)(ii) (1998) (emphasis added).

637. § 35.130(b)(8) (emphasis added).

638. *See infra* Part V.C.4.

639. *See infra* notes 759–65 and accompanying text.

640. *Cf.* Alexander v. Choate, 469 U.S. 287, 294–97 (1985) (holding that Section 504 claims are not limited to discriminatory animus).

intentional exclusion"[641] of the disabled from social institutions as well as to "overprotective rules" and "purposeful unequal treatment" of the disabled.[642] Many prohibitions of the ADA apply to conduct which intentionally discriminates against the disabled. Title I's general prohibition of discrimination against a qualified individual with a disability in employment matters[643] obviously covers intentional discrimination;[644] the same is true for Title II's prohibition against discrimination in the provision of state and local governmental services.[645] Certain Title II regulations, moreover, specifically refer to intentional discrimination. For example, the regulations prohibit criteria or methods of administration which have the "*purpose* or effect"[646] of defeating or impairing a public program's objectives with respect to the disabled; likewise, the selection of service sites and locations which have the "*purpose* or effect"[647] of defeating or substantially impairing program objectives is prohibited.

Curiously, the majority of Title II rules do not refer to purposeful discrimination and instead prohibit effects and results. For instance, the regulations prohibit criteria or methods of administration which "have the *effect* of subjecting qualified individuals with disabilities to discrimination," without any reference to purpose.[648] The failure to mention intentional discrimination in this rule and others is of no consequence and amounts to no more than questionable drafting.[649] Discriminatory acts motivated by animus obviously fit within the "effects" language of the rules[650] and should lead to liability whenever a disparate impact claim would also succeed.

At first glance, the ADA's provisions for monetary remedies for intentional discrimination against the disabled would seem to fall within Congress' Section 5 powers even after *Flores*. The argument is fairly straightforward: (1) Congress may waive state sovereign immunity and impose a monetary remedy

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641. 42 U.S.C. § 12101(5) (1994).

642. 42 U.S.C. § 12101(7).

643. *See* 42 U.S.C. § 12112 (1994).

644. 2 TUCKER & GOLDSTEIN, *supra* note 364, at 22:12–13 (1991 & Supp. 1996).

645. *See* 42 U.S.C. § 12132 (1994). *See, e.g.*, Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach, 846 F. Supp. 986, 992 (S.D. Fla. 1994) (discriminatory intent to reduce recreational services to disabled).

646. 28 C.F.R. § 35.130(b)(3)(ii) (1998) (emphasis added).

647. § 35.130(b)(4)(ii) (emphasis added).

648. § 35.130(b)(3)(i) (emphasis added).

649. One court takes the view that Congress deliberately avoided drawing to distinction between intentional discrimination and disparate impact to avoid in order to focus on the overriding issue of whether disabled plaintiffs had been provided "'meaningful access' to state-provided services." Crowder v. Kitigawa, 81 F.3d 1480, 1484 (9th Cir. 1996) (quoting Alexander v. Choate, 469 U.S. 287 (1985) (interpreting Rehabilitation Act, 29 U.S.C. § 794 (1994))).

650. Department of Justice commentary on 28 C.F.R. § 35.130(b)(3) indicates that this paragraph prohibits "both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate." 28 C.F.R. pt. 35, app. A at 449 (citing Alexander v. Choate, 469 U.S. 287 (1985)).

under Section 5 to enforce judicially recognized Fourteenth Amendment rights; (2) the Court in *Cleburne Living Center* determined that the mentally retarded (and by extension the disabled)[651] have a right under the Equal Protection Clause to be free of state actions which reflect fearful or prejudicial attitudes; and (3) provisions of the ADA forbidding intentional discrimination against the disabled are therefore proper attempts to enforce the Equal Protection Clause within the guidelines of the *Flores/Seminole Tribe* rules.[652] The argument is valid, however, only to the extent that the type of intentional conduct envisioned by Title I and judicial decisions interpreting Title II are related to the sort of irrational or prejudicial conduct forbidden by *Cleburne Living Center.*

No definition of intentional discrimination appears in the ADA. The Civil Rights Act of 1991 authorizes compensatory damages against defendants under Title I of the ADA only for "unlawful *intentional* discrimination (not an employment practice that is unlawful because of its disparate impact)"[653] but provides no further definition.[654] It is obvious from the plain language of the latter provision both that Congress wanted to deny damages in disparate impact cases and that disparate impact alone cannot constitute intentional discrimination. Neither the text of the statute nor the legislative history give any clue as to the threshold of intentional discrimination, nor has the Supreme Court resolved the issue. In the absence of guidance, the lower courts have adopted a variety of approaches to the question of intent.[655] All of these cases discuss intent in the context of the availability of damages as a matter of statutory interpretation.[656] The statutory nature of the cases, nonetheless, should have little effect on the constitutional analysis, as the defendant's state of mind is the key factor in identifying Equal Protection violations against the disabled.[657]

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651. *See supra* note 312 and accompanying text.

652. *See supra* Part II.B.2.

653. 42 U.S.C. § 1981a(a)(2) (1994) (emphasis added).

654. For a discussion of Title I's remedial provisions, see *supra* Part III.C.2.

655. One commentator, addressing the related issue of availability of damages under Title II of the ADA, identifies six levels of intent that the courts have utilized: animus, deliberate indifference, knowledge, motivating factor, disparate treatment burden shifting, and requests for accommodations. *See* Augustine, *supra* note 416, at 612–17. As indicated by my own analysis, *see infra* notes 658–12 and accompanying text, I see an interrelationship between these factors.

656. *See supra* notes 428–52 and accompanying text.

657. *See supra* note 332–43 and accompanying text. It is more than a little ironic that the standards for intent at issue here are judicial creations. The essence of *Flores* is the Supreme Court's decision to subordinate congressional action under the Enforcement Clause to judicial direction. One might argue that the Court's restrictive view of Section 5 serves no "separation of powers" purpose when the courts act to elaborate a statutory scheme rather than to implement express provisions of a statute. Still, it would be incorrect to view the intent requirement as more judicial than legislative. The ADA was enacted against a backdrop of existing civil rights legislation and enforcement mechanisms of which Congress was aware. The decision, for example, to utilize for Titles I and II of the ADA the same remedial processes as Title VII and Title VI of the Civil Rights Act of 1964 confirms a congressional intent to apply the judicial standards that had developed under the latter

b. The Animus Standard

The most rigid standard of intent is the requirement that a defendant be inspired by animus or bad will directed toward the plaintiff because of his or her disability. *Hoekstra v. Independent School District No. 283* is a good example, requiring that the plaintiff demonstrate bad faith or gross misjudgment.[658] Similarly, *Tafoya v. Bobroff* requires an "intent to adversely affect disabled persons."[659] The essence of the discriminatory animus standard is conduct which is based solely on the plaintiff's status as a disabled person.

There are two other approaches that can be fairly characterized as variants of the animosity standard. First, there is the familiar burden shifting technique of *McDonnell Douglas*[660] and *Burdine*[661] used in the employment context to gauge the subjective intent of an employer. Under this method, a plaintiff makes out a prima facie case of discrimination by establishing the presence of a disability as defined by the ADA, that he or she is otherwise qualified with or without a reasonable accommodation, and that an adverse employment decision was made on the basis of disability.[662] Normally, the last point is established by offering evidence that a similarly qualified person without a disability received favorable treatment.[663] Once the prima facie case is made out, a presumption of illegal discrimination arises.[664] The presumption, however, is slight and is rebutted if the defendant articulates a non-discriminatory reason for its actions.[665] The plaintiff ultimately bears the burden of proof and persuasion on the matter of discrimination.[666] In some cases plaintiffs will meet the burden of

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statutes. *Cf.* Helen L. v Didario, 46 F.3d 325, 332–33 (3rd Cir. 1995) (finding that ADA gives Section 504 regulations the force of law by requiring that ADA regulations be modeled on them). The search for a definition of intent, moreover, is a matter of determining what Congress wished. If a court decides that Congress sought to employ a level of intent that falls short of the *Cleburne Living Ctr.* and *Romer* standard, then the definition would seem to fail the *Flores* test. Hence the intent standard is ultimately a matter of statutory interpretation.

658. *See* Hoekstra v. Independent Sch. Dist. No. 283, 916 F. Supp. 941, 948–49 (D. Minn.), *aff'd* 103 F.3d 624 (8th Cir. 1996).

659. *See* Tafoya v. Bobroff, 865 F. Supp. 742, 750 (D.N.M. 1994), *aff'd mem.*, 74 F.3d 1250 (10th Cir. 1996).

660. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

661. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

662. *See* Barnett v. U.S. Air, Inc., 157 F.3d 744, 748 (1st Cir. 1998) (Title I); Clarkson v. Coughlin, 898 F. Supp. 1019, 1037 (S.D.N.Y. 1995) (Title II); Tyler v. City of Manhattan, 857 F. Supp. 800, 817 (D. Kan. 1994), *aff'd*, 118 F.3d 1400 (10th Cir. 1997) (Title II). *See generally* Rothstein, *supra* note 391, § 4.23, at 346.

663. *See* Monnette v. Electrical Data Sys. Corp., 90 F.3d 1173, 1179 (1996).

664. *See McDonnell Douglas*, 411 U.S. at 802–03.

665. *See Burdine*, 450 U.S. at 254–55. The defendant's burden is the rather minimal one of production rather than persuasion. The burden is met by articulating a reason for defendant's conduct which, if believed, permits a conclusion of non-discriminatory conduct. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993). Credibility is not a factor at this stage. *See id.*

666. *See Hicks*, 509 U.S. at 507–08 (1993).

persuasion by establishing that a defendant's explanations were false or insufficient,[667] though a court is not obligated to conclude that discrimination has occurred from the falsity of the defendant's stated reasons.[668]

Second, there is the motivating factor approach as illustrated in *Innovative Health Systems, Inc. v. City of White Plains*.[669] There the court found that a zoning decision to exclude a substance abuse program was motivated in part by animosity toward a class of disabled persons.[670] The court pointed to the defendants' unreasonable interpretation of the ordinance, the failure to give customary deference to a local building commissioner, and the political pressure on local authorities to reach discriminatory results as evidence that discriminatory intent was a motivating factor.[671] According to *Innovative Health Systems*, discrimination need only be one of many factors, not the predominant one.[672] The court also permitted intent to be inferred from the circumstances of an action, such as the political background of a decision and departures from ordinary procedures.[673] The effect of the motivating factor approach is to lower the burden of proof on plaintiffs to establish discriminatory intent. Plaintiffs need only cobble up enough circumstantial proof that a decision was tainted by impermissible motive to support a claim for damages.[674] Such an approach is more likely to result in findings of intentional discrimination than a rule which requires plaintiffs to prove by a preponderance that an action in question would not have occurred but for the discriminatory mind set of the defendant.[675]

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667. *See id.* at 511.

668. *See id.*

669. 931 F. Supp. 222 (S.D.N.Y. 1996), *aff'd in part*, 117 F.3d 37 (2d Cir. 1997). *See also* Pack v. Clayton County, No. 1:93-CV-836-RHH, 1993 WL 837007 (N.D. Ga. Aug. 27, 1993), *aff'd* 47 F.3d 430 (11th Cir. 1995) (unpublished table decision); Steward B. McKinney Found., Inc. v. Town Plan and Zoning Comm'n, 790 F. Supp. 1197, 1211 (D. Conn. 1992) (disability discrimination under Fair Housing Act).

670. *See Innovative Health Systems*, 931 F. Supp. at 243.

671. *See id.* at 243.

672. *See id.* at 241.

673. *See generally* Augustine, *supra* note 416, at 615 (discussing *Innovative Health Systems*) (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 428 U.S. 252, 265–86 (1977)).

674. It should be noted that the finding of discriminatory intent in *Innovative Health Systems* occurred in the context of a motion for a preliminary injunction and not a judgment for damages. The particular issue was whether there was sufficient evidence of discrimination for plaintiffs to demonstrate a likelihood of success on the merits. *See Innovative Health Systems*, 931 F. Supp. at 241. One could argue that the level of intent necessary to sustain a damages award should be higher than that for equitable relief A prospective order not to discriminate in the application of zoning rules will often have a less serious effect on the public fisc than a monetary award. Nonetheless, the *Innovative Health Systems* opinion speaks in terms of the level of intent necessary to make out a claim without reference to the type of relief sought. *See id.*

675. Title I also accommodates employment discrimination claims based on mixed motives. The Civil Rights Act of 1991 amended Title VII to provide that plaintiffs may establish discrimination by proving that actions were taken on the basis of membership in a protected class "even though other factors also motivated the practice." 42 U.S.C.

The strict animosity standard and its variants appear to fit within the *Flores* limitations on the Enforcement Clause. To the extent that Title I or Title II permits damages for conduct that is based on ill will toward the disabled without legitimate explanation, i.e., the strict animosity standard, the statute reaches state actions which would be objectionable under the Equal Protection Clause as construed by *Cleburne Living Center*.[676] At the same time, the availability of undue burden and fundamental alteration defenses[677] creates a protective sphere for state actions that makes the statutory claims proportional to the constitutional harm of irrational fear and prejudice against the disabled. The burden shifting approaches also seem to fit comfortably within the *Flores* guidelines of a judicially identified wrong and a proportional response. The burden shifting test used in disparate treatment claims is simply a minuet of evidence which permits an inference of irrational discrimination against defendants who are subject to the rebuttal requirement, and yet not smart enough to articulate legitimate rationalizations for their conduct.

Rarely does the *McDonnell Douglas* scheme result in a judgment as a matter of law for plaintiffs under Federal Rules of Civil Procedure 50(a)(1) or 52(c).[678] *St. Mary's Honor Center v. Hicks* makes clear that such judgments are to be given only when any rational person would find by a preponderance of evidence that the plaintiff has made out a prima facie case and the defendant has failed to articulate a non-discriminatory reason for its actions.[679] Once the defendant articulates an explanation, the *McDonnell Douglas* framework melts away and the plaintiff must affirmatively prevail on the issue of discriminatory intent.[680] Thus, as a constitutional matter, there is little practical difference between a strict animosity standard and the burden shifting approach. Both focus on unconstitutional activity and permit claims that are proportional to those wrongs. I argue that a judgment based on an unrebutted prima facie case meets the *Flores* standard. Any situation in which an employer cannot explain why it has treated a disabled individual less favorably than a similarly situated non-disabled person creates a strong inference of illegal conduct. Such situations meet the *Flores* requirement that Section 5 measures regulate areas where constitutionally wrongful conduct is likely to occur.[681]

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§ 2000e-2(m) (1994). Since Title I of the ADA incorporates the enforcement mechanism of Title VII, *see supra* notes 456–60 and accompanying text, Title I plaintiffs should make out a good claim by demonstrating that disability played any role in an employer's decision making. However, if the employer then demonstrates that it would have reached the same result had it not considered the impermissible factor, then the plaintiff is limited to declaratory and injunctive relief, attorney fees and cost but not damages or any orders for reinstatement, hiring, promotion, or payment. § 2000e-5(g)(2)(A).

676. *See supra* notes 332–43 and accompanying text.

677. *See supra* notes 377–79, 386 and accompanying text.

678. FED. R. CIV. P. 50(a)(1) (providing for judgment as a matter of law in jury trial); FED. R. CIV. P. 52(c) (providing for judgment as a matter of law in bench trial).

679. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509–10 (1993).

680. *See id.* at 510–11.

681. *See supra* note 260 and accompanying text.

Instances in which the plaintiff is permitted to carry the burden of proof by merely demonstrating the falsity of a defendant's proffered explanations are more questionable. The Court's opinion in *Hicks* created unfortunate confusion about the level of proof necessary for a plaintiff to prevail once a defendant has met its burden of production. At one point, the Court stated that the factfinder's disbelief of the defendant's explanations plus elements of the prima facie case may be sufficient to prove intentional discrimination, and that the disbelief of the defendant may sustain a finding of discrimination.[682] At another point, the Court stated: "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation was not believable."[683] The lower courts have reached inconsistent results on the issue of whether a plaintiff must demonstrate more than the falsity of a defendant's reasons.[684]

Does an evidentiary standard which permits judgments based on proof of pretext alone fit within *Flores*? The question is a close one; moreover, it regards a situation where common sense does not help much. The overarching question under *Flores* is whether a legislative enactment serves a preventive function by controlling an area or circumstance where unconstitutional conduct is likely to occur.[685] At first glance, it seems reasonable to infer that defendants who offer false reasons for their actions are covering up discrimination, at least often enough to justify a generalization. This inference becomes less compelling, however, when we consider that the typical defendant in a Title I claim is a business entity,[686] or more to the point of this Article, a government entity. Such entities depend on employees to give testimony about motivations for particular actions. Employees may have reasons for false statements that have nothing to do with an irrational prejudice against the disabled. For example, a supervisor may falsely claim to have acted in a certain way or with a particular motivation to avoid a penalty for deviating from work rules. Under such circumstances, a false explanation for a defendant's actions does not necessarily indicate conduct that would run afoul the standards of *Cleburne Living Center* or *Romer*. It is impossible to quantify how many false explanations offered by defendants are truly indicative of a discriminatory motive. This lack of certainty, moreover, leads to a plausible conclusion that a proof of pretext only standard fails to meet the *Flores* requirement that preventive measures focus on situations where constitutional violations are likely to occur.[687]

The motivating factor test is the most questionable application of the animus test in that it accepts a low threshold for discriminatory intent and, unlike the other intent approaches, may impose liability in spite of the presence of

682. *See Hicks*, 509 U.S. at 511 & n.4.

683. *Id.* at 514–15.

684. *See generally* 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 22–37 (3d ed. 1996) (collecting cases).

685. *See supra* note 260 and accompanying text.

686. *See Hicks*, 509 U.S. at 520–21.

687. *See supra* Part II.C.

legitimate concerns that may actually drive decision making. Nonetheless, the triggering event for liability is still a judicially determined unconstitutional bias against the disabled. Moreover, permitting a damage award for conduct that is only partially ill-motivated seems compatible with the rule that Section 5 legislation may regulate otherwise constitutional conduct if it also serves a preventive function. Conceptually, there is little difference between imposing liability for actions borne of mixed motives, and prohibiting voter registration practices that are not *per se* discriminatory but related to illegal practices. The *Flores* Court explicitly approved of the latter result, thus reaffirming the prior holding in *City of Rome v. United States*[688] and *South Carolina v. Katzenbach*.[689] In either case, the nexus between the regulated and illegal conduct is fairly tight.

c. The Deliberate Indifference Standard

A few decisions borrow the less rigorous deliberate indifference standard from section 1983 claims.[690] For example, in *Bartlett v. New York State Board of Law Examiners*, involving a failure to provide accommodations on the New York bar exam to an applicant with a reading disorder, the Second Circuit declined to adopt a personal animosity standard for ADA and Rehabilitation Act claims.[691] The court instead ruled that intentional discrimination could be inferred from "deliberate indifference to the strong likelihood that a violation of federally protected rights will result from the implementation...of [a] policy [or] custom."[692] *Ferguson v. City of Phoenix* is to the same effect.[693] Deliberate indifference

688. *See* City of Boerne v. Flores, 521 U.S. 507, 533 (1997) (discussing City of Rome v. United States, 446 U.S. 156 (1980)).

689. *Id.* at 525–26 (discussing South Carolina v. Katzenbach, 383 U.S. 301 (1966)).

690. Use of the deliberate indifference standard from section 1983 claims is difficult to explain. Section 1983 claims do not require a showing of any particular state of mind on the part of the defendant. *See* Parratt v. Taylor, 451 U.S. 527, 534 (1981). Plaintiffs are merely required to demonstrate that defendant acted under color of state law and deprived the plaintiff of a federal constitutional or statutory right. *See id.* at 535. Certain constitutional deprivations, however, occur when a defendant acts with a certain state of mind. Allegations of Eighth Amendment violations require that the plaintiff demonstrate deliberate indifference on the part of defendant. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976). The same is true for "failure to train" claims against municipal governments. *See* City of Canton v. Harris, 489 U.S. 378, 388 (1989). Equal protection claims brought under section 1983, however, require a demonstration of actual intent to discriminate. *See* Massachusetts v. Feeney, 442 U.S. 256 (1979) (gender discrimination). *Cf.* Washington v. Davis, 426 U.S. 229, 240 (1976) (racial discrimination claim). It is therefore difficult to justify the use of the lesser deliberate indifference standard with a statute that is designed to enforce the equal protection rights of the disabled.

691. 156 F.3d 321, 331 (2nd Cir. 1998), *cert. granted, vacated on other grounds*, 119 S. Ct. 2388 (1999) (citing Canton v. Harris, 489 U.S. 378, 385 (1989)).

692. *Id.* at 331 (quoting Ferguson v. City of Phoenix, 931 F. Supp. 688, 697 (D. Ariz. 1996), *aff'd*, 157 F.3d 668 (9th Cir. 1998)).

693. *See* Ferguson v. City of Phoenix, 931 F. Supp. 688, 697 (D. Ariz. 1996), *aff'd* 157 F.3d 668 (9th Cir. 1998) (affirming lack of intent under either discriminatory animus or deliberate indifference test).

connotes actual awareness on the part of a defendant of discriminatory conduct and a conscious decision not to remedy the violation, with or without animus.[694]

At least in the context of disability discrimination, deliberate indifference falls short of the constitutional threshold for an Equal Protection claim, as defined by *Cleburne Living Center* and *Romer*.[695] As already noted, those decisions required ill-will or irrationality on the part of defendants. A standard based on awareness of effects does not rise to that level. In *Massachusetts v. Feeney*, plaintiffs challenged veterans' preferences within a civil service appointment system as gender discrimination.[696] Rejecting the claim, the Supreme Court reasoned that discriminatory purpose requires more than awareness of the consequence of an action; rather, such purpose requires that the decision maker take a particular action because of its adverse effects upon a group.[697] Using a deliberate indifference threshold for awarding monetary damages may be a proper application of the *Franklin* and *Gebser* decisions to Title II as a statutory matter;[698] nevertheless, such a standard is, at best, questionable as an Enforcement Clause matter. A monetary claim for "deliberately indifferent" state conduct does not strictly focus on a judicially identified Equal Protection violation. In *Bartlett*, for example, the Board of Law Examiners practiced deliberate indifference by utilizing a reading diagnostic test which was untimed (unlike the bar exam), a test which failed to identify one third of adult readers with dyslexia.[699] There were no findings that the Examiners acted with malice.

One can argue that controlling deliberately indifferent conduct serves a permissible preventive function inasmuch as indifference is closely associated with animus, and that the lower indifference standard merely facilitates proof of constitutionally forbidden animosity. The problem with the argument is twofold. First, it simply is not obvious that indifference is closely linked to animus. Consider again the facts of *Bartlett*, where the indifference of using a bad diagnostic standard bore no hint of bias. Second, there are no legislative findings addressing this matter, much less the question of the necessary level of intent.[700]

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694. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1999 (1998) (Title IX claim); Farmer v. Brennan, 511 U.S. 825, 837 (1994) (Eighth Amendment claim). *See generally* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, § 6.13 (1991 & Supp. 1996) (discussing various courts' requirements for proof of intentional discrimination).

695. *See supra* Part II.C.

696. *See* Massachusetts v. Feeney, 442 U.S. 256, 259 (1979).

697. *See id.* at 279 ("'Discriminatory purpose'...implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker,...selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (citation omitted)).

698. *See supra* notes 397–52 and accompanying text.

699. *See* Bartlett v. New York State Bd. of Bar Exam'rs, 156 F.3d 321, 331 (2d Cir. 1998), *cert. granted, vacated on other grounds*, 119 S. Ct. 2388 (1999).

700. *See supra* notes 272–75 and accompanying text. It is unclear from the opinion in *Flores* whether appropriate legislative findings are a necessary component of valid Section 5 legislation.

Even after *Flores*, well documented and reasonable legislative findings are likely to be given some deference by the courts.[701] A want of legislative history is less important under an animosity standard since the constitutional and statutory prohibitions would be co-extensive, and the intent requirements for damages are essentially the same. In cases of deliberate indifference, however, the statutory threshold is lower than the equal protection requirement of intentional misconduct.

d. Imputed Intent

Some courts have permitted damage awards in situations where the defendant's state of mind does not rise to the level of animus or deliberate indifference. In general, these cases impute intent to the defendant on the basis of actual or constructive awareness of certain facts.

Miller v. Spicer, a Section 504 claim, represents a constructive knowledge approach to intent.[702] That court found sufficient intent to justify a monetary remedy where defendant hospital's employees "knew or should have known" that an HIV-positive patient had been transferred to another facility for discriminatory reasons.[703] The *Miller* court emphasized that the hospital's employees (and therefore the hospital) had direct knowledge that the transfer decision of the treating physician was made for discriminatory purposes and not based on medical knowledge.[704] *Love v. McBride* seems to use an even weaker standard.[705] In *Love*, a quadriplegic inmate made repeated requests for services to prison authorities who were aware of his disability. The court held that actions were intentional if they are done "knowingly, that is,...voluntarily and deliberately

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701. *See* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1996) ("[T]he line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern[] and Congress must have wide latitude in determining where it lies....").

702. *See* Miller v. Spicer, 822 F. Supp. 158, 164 (D. Del. 1993) (Section 504 claim).

703. *Id.* The distinction between the imputed intent and deliberate indifference standards seems to be that the latter requires actual awareness while the former tolerates constructive knowledge. The result in *Miller* is questionable after *Gebser*. As explained above, *see supra* notes 436–52 and accompanying text, recovery of damages under a Spending Clause enactment requires a showing of deliberate indifference, i.e., actual knowledge of discrimination on the part of an official with authority to take corrective action. Constructive knowledge, which is acceptable under the *Miller* approach, does not meet this standard. It is unclear whether the same limitation applies to similar claims brought under Title II. *See supra* notes 450–52 and accompanying text.

704. *See Miller*, 822 F. Supp. at 166. It is important to note that *Miller* is not a case of respondeat superior. The treating physician in *Miller* was a independent contractor whose actions could not be attributed to the defendant hospital. *See id.* at 164. It was necessary for the plaintiff to establish that defendant committed discriminatory acts in its own right. The combination of the defendant's knowledge of the physician's discriminatory actions and its failure to countermand them was sufficient to meet this requirement in *Miller*. *See id.*

705. *See* Love v. McBride, 896 F. Supp. 808, 809–10 (N.D. Ind. 1995), *aff'd sub nom.*, Love v. Westerville Correctional Ctr., 103 F.3d 558 (7th Cir. 1996).

and not because of mistake, accident, negligence or another innocent reason."[706] Under the *Love* approach, specific knowledge of the reasonable accommodations provisions of the ADA is irrelevant.[707] It was sufficient that the defendant acted on the basis of the plaintiff's disability.[708] Finally, some courts have held that a request for accommodation is sufficient to establish intent.[709] In *Naiman v. New York University*, for example, the plaintiff's allegation that he had requested a sign language interpreter at a hospital was deemed a sufficient allegation of intent to avoid dismissal for failure to state a claim.[710]

The essence of these decisions is that a defendant has failed to recognize a situation in which discrimination might occur and has failed to act to avert discrimination. A failure to respond to clues about discrimination, even obvious ones, is hardly the equivalent of the irrational prejudice needed to make out an Equal Protection claim under *Cleburne Living Center* or *Romer*. If the use of a deliberate indifference standard is questionable under the Enforcement Clause, then an award of damages under any variant of imputed intent is surely inappropriate. There is nothing *per se* unconstitutional about taking action on the basis of a known disability (the situation in *Love*), or simply acting with a notice of a disability (the situation in *Naiman*). Nor does constructive knowledge of another's discrimination (the situation in *Miller*) amount to the sort of prejudicial conduct condemned by *Cleburne Living Center*.[711] It is also difficult to perceive how such a standard could be viewed as a permissible preventive measure under *Flores* as there is no particular nexus between knowledge of a disability and discriminatory conduct. Surely no court would agree that mere knowledge of a disability is likely to lead to discrimination. If so, then we would have to impute a discriminatory intent to any defendant who has dealt with anyone who has a visible disability. In the absence of a legislative history that illustrates a fit between awareness and purely prejudicial conduct, permitting a damages award for mere knowledge of a disability would seem to fail the "congruence and proportionality" requirement of *Flores*,[712] and instead constitute substantive legislation.

3. Specific Prohibitory Rules

Very few specific, prohibitory rules appear in the ADA. Most provisions are broadly worded and require covered entities to alter their practices and procedures to achieve non-discriminatory results, such as the prohibition against

706. *See id.* at 809.

707. *See id.* at 811; Love v. Westerville Correctional Ctr., 103 F.3d 558, 560 (7th Cir. 1996).

708. *See Love*, 896 F. Supp. at 810.

709. *See* Naiman v. New York Univ., No. 95CV. 6469 (LMM), 1997 WL 249970 (S.D.N.Y. May 13, 1997); Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 WL 735802 (M.D. Ala. Apr. 27, 1993). *Cf. Love*, 896 F. Supp. at 809–10 (plaintiff's request for services is evidence of defendant's knowledge).

710. *See Naiman*, 1997 WL 249970, at *5.

711. *See supra* Part II.C.

712. *See supra* notes 259–62 and accompanying text.

using "criteria or methods of administration that have the effect of subjecting [the disabled] to discrimination."[713] The best and perhaps only examples of specific prohibitions are the Title I rules against pre-hiring inquiries into the disability status of a job applicant and pre-employment physical exams.[714] Employers may not conduct pre-employment medical examinations or ask a job applicant about the existence of a disability; they are only permitted to ask whether or how the applicant will be able to perform a job.[715] Title I permits employers to condition employment on a post-offer medical examination.[716] Such examinations, though, must be given to "all entering employees" and all resulting medical records and examinations must be kept confidentially in separate files.[717] Examinations must also be "job-related and consistent with business necessity."[718]

Pre-employment restrictions on inquiries and medical examinations fit comfortably within the *Flores* guidelines. They address the problem of prejudicial and irrational denial of employment opportunities to persons who may well be capable of performing a job. Congress specifically addressed this problem in the legislative findings section of the ADA. In addition to the general finding that the disabled had suffered, among other things, "outright intentional exclusion"[719] and discriminatory effects of "overprotective rules and policies," Congress found that the disabled had encountered discrimination in employment and were relegated to "lesser...jobs."[720] Prohibitions on pre-employment inquiries and medical

713. 28 C.F.R. § 35.130(b)(3)(i) (1998). *See generally supra* Part III. B.1–2.

714. There are a few requirements under Title II which, like Title I's restrictions on inquiries and medical exam, are relatively specific though not prohibitory. Regulations implementing Title II require that public entities conduct self-evaluations of their operations to ensure compliance with the non-discrimination mandate of the ADA. *See* 28 C.F.R. § 35.105 (1998). Public entities are obligated to give notice to all interested persons regarding the applicability of Title II regulations to their operations, and in the case of public entities employing over 50 persons, must designate an employee to coordinate compliance activities. *See* 28 C.F.R. §§ 35.106 to 35.107 (1998). One can argue convincingly that these provisions are the sort of proportional, preventative measures permitted under *Flores* in that they encourage self-policing by public entities and assertion of rights by individuals and place relatively minor burdens on public entities. It is difficult to imagine, however, that an intentional violation of these provisions would lead to a damages award that would implicate sovereign immunity concerns. For instance, the failure to conduct a self-evaluation is injurious only if a discriminatory practice goes unnoticed and therefore uncorrected. A public entity's failure in this regard, however, adds nothing to a plaintiff's underlying claim based directly on the undiscovered misconduct. The same could be said for a failure to comply with the notice and coordinator designation requirements. *Cf.* Tyler v. Kansas Lottery, 14 F. Supp. 2d 1220, 1225 (D. Kan. 1998) (denying permanent injunction for lack of connection between failure to conduct self-evaluation and harm to plaintiff); McCready v. Michigan State Bar Standing Comm., 926 F. Supp. 618, 622 (W.D. Mich. 1995), *aff'd*, 100 F.3d 957 (6th Cir. 1996) (same).

715. *See* 42 U.S.C. §§ 12112(d)(2)(A)–(B) (1995).

716. *See* 42 U.S.C. § 12112(d)(3).

717. *See* 42 U.S.C. §§ 12112(d)(3)(A)–(B).

718. 42 U.S.C. § 12112(d)(4)(A).

719. 42 U.S.C. § 12101(5).

720. 42 U.S.C. §§ 12101(a)(3), (5).

examinations lessen the real possibility that employers will make prejudicial decisions by limiting information about disabilities at the decision making stage. The limited nature of these restrictions also brings them well within the *Flores* congruency and proportionality requirement; employers are free to secure information, without reference to disability, about an applicant's ability to perform a job and are free to subject applicants to uniform medical examination before hiring.[721] Permitting a monetary award against a state entity for violation of these rules should therefore be permissible under *Flores*.

4. Reasonable Accommodations

Most of the anti-discrimination provisions of Title I and Title II consist of requirements that a qualified individual with a disability be provided with a "reasonable accommodation." I use the term here as a rather general label for the statutory and regulatory provisions that require covered entities to alter their normal rules and procedures short of an undue financial burden or a fundamental alteration,[722] and to permit a disabled person to participate in or receive benefits from a program, even in the absence of a showing of bias.[723]An even more specific rule structure for Title II is provided by regulations promulgated under Section 504 of the Rehabilitation Act. As already noted, Title V of the ADA provides that it should not be construed to provide a lesser level of protection than Section 504. The effect is to incorporate highly specific rules issued by federal funding agencies for their particular grantees. The important point for constitutional analysis is not so much the particular provision as the fact that the ADA requires covered entities, including state agencies, to implement changes in neutral

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721. *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

722. *See supra* notes 377–79 and accompanying text.

723. Title I defines "reasonable accommodation" in very broad terms.

> The term "reasonable accommodation" may include:
> (A) making existing facilities readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification...of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9) (1995).

Neither Title II nor its implementing regulations have a separate definition of reasonable accommodation. Title II regulations do, however, contain a number of specific applications of the reasonable accommodation requirement. Some of these provisions are worded as affirmative requirements. For example, a public entity "shall make reasonable modifications in policies, practices or procedures" to avoid discrimination unless doing so would alter the nature of the program in question. 28 C.F.R. § 35.130(b)(7) (1998). Other rules are phrased as prohibitions. *See* § 35.130(b)(3)(ii) (forbidding use of criteria and methods of administration which have the purpose or effect of defeating a public program's objectives). The choice of affirmative or negative phrasing is insignificant. Prohibition of discriminatory methods of administration, for instance, is the equivalent of a requirement to use non-discriminatory methods.

operating procedures. In other words, the reasonable accommodation rules apply even in the absence of discriminatory intent or irrational prejudice against the disabled. Indeed, the legislative findings section makes clear that Congress was attempting to address situations of "discriminatory effect" of policies as well as "outright intentional discrimination."[724] So far, all Eleventh Amendment challenges to the ADA have involved disputes over reasonable accommodations.[725]

There is great difficulty in arguing that monetary awards for violation of the accommodations rule are viable after *Seminole Tribe* and *Flores*. The crux of the matter is that such claims lack any state-of-mind requirement and provide a remedy even for some innocent failures to comply.[726] An absence of any focus on irrational prejudice tends to take the reasonable accommodation rules of Titles I and II outside of the confines of Equal Protection Clause violations as defined by *Cleburne Living Center* and *Romer*.[727] There is simply no constitutional requirement that a public entity provide a reasonable accommodation to a disabled person.[728] Consequently, the accommodations rules are proper under the Enforcement Clause only if they serve a prophylactic function against likely violations of the Equal Protection Clause and meet the "congruence and proportionality" requirement of *Flores*. I argue that the accommodations provisions do not meet this requirement.

Accommodation requirements in Titles I and II undoubtedly have some prophylactic force. It is a fair assumption that some failures to make accommodations, alter procedures, provide auxiliary aids and services, and so forth, are motivated by raw prejudice. Therefore, one could argue that, in the case of public entities, the accommodation rules serve to regulate unconstitutional behavior. A general requirement for accommodations, so the argument goes, permits victims of unconstitutional discrimination to seek compensation freed from the always difficult burden of proving an illegal motive on the part of a defendant. True, such a broadly crafted rule structure embraces both legal and illegal behaviors, but over-inclusiveness is not necessarily fatal, even under the relatively stringent guidelines of *Flores*.[729]

The problem with this argument is that the link between the accommodation rules and unconstitutional bias is too tenuous to meet a meaningful congruence requirement. *Flores* permits preventative measures which

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724. 42 U.S.C. § 12101(a)(5).

725. *See supra* Part IV (collecting cases).

726. The Civil Rights Act of 1991 set up a limited good faith defense in Title I employment claims based on a failure to provide accommodations. Damages are not available if the defendant demonstrates a good faith effort to provide accommodations that do not constitute an undue burden after consultation with the plaintiff. *See* 42 U.S.C. § 1981a(a)(3) (1994).

727. *See supra* Part II.C.

728. *See* Welsh v. City of Tulsa, 977 F.2d 1415, 1420 (10th Cir. 1992) (finding no constitutional requirement that employers provide accommodations).

729. *See* City of Boerne v. Flores, 521 U.S. 507, 533–34 (1997).

govern situations that "have a significant likelihood of being unconstitutional."[730] The ADA's accommodation requirements resemble the RFRA provisions which the Court struck down in *Flores*.[731] Like the comprehensive RFRA, Titles I and II of the ADA apply to practically all government services and employment activities. The ADA like RFRA has no termination date. More important, the legislative history of the ADA shares with RFRA a failure to connect the proposed statutory remedy with a judicially recognized constitutional violation. In enacting the sweeping rights and remedies of RFRA, the *Flores* Court reasoned, Congress failed to establish any link to the relatively limited view of the Free Exercise Clause of the *Smith* decision.[732] The ADA is little different. Its legislative history does not identify Equal Protection violations of the sort forbidden by *Cleburne Living Center*, failures to alter superficially neutral policies for prejudicial reasons.[733] Instead, the legislative record focuses generally on the isolation of the disabled within society and the resulting personal, social, and economic costs of such segregation.[734] Committee reports do not suggest that the ADA was intended to address Fourteenth Amendment violations.[735]

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730. *Id.* at 532.

731. *See supra* notes 233–62 and accompanying text.

732. *See supra* notes 239–49 and accompanying text.

733. *See supra* notes 332–34 and accompanying text; *supra* Part II.C.

734. *See* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1449 (11th Cir. 1998) (Cox, J., dissenting); *see* H.R. REP. No. 101-485(III) at 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 454 ("The underlying premise of [Title I] is that persons with disabilities should not be excluded from job opportunities unless they [are] actually unable to do the job."); *id.* at 49–50, 1990 U.S.C.C.A.N. at 472–73 ("The purpose of title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life."); H.R. REP. NO. 101-485(II) at 40–47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 322–29 (explaining effects of discrimination on the disabled and society).

735. *See Kimel*, 139 F.3d at 1449. There are many examples of prejudicial or irrational behavior against the disabled in the legislative record, including the exclusion of a wheelchair-bound woman from various situations and an academically competitive child with cerebral palsy from public school because of complaints that his appearance was nauseating. *See* H.R. REP. NO. 101-485(II) at 29–30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310–11; *id.* at 30, 1990 U.S.C.C.A.N. at 312. What is lacking, however, is any statement linking these discriminatory acts to violations of the Fourteenth Amendment. For example, one can read the sections of the Report of the House Committee on Education and Labor entitled "Need for the Legislation," *id.* at 28–36, 1990 U.S.C.C.A.N. at 310–18, "Public Services," *id.* at 37, 1990 U.S.C.C.A.N. at 318–19, "Current Federal and State Laws are Inadequate; Need for Comprehensive Federal Legislation," *id.* at 47–48, 1990 U.S.C.C.A.N. at 329–30, and "Reasonable Accommodation," *id.* at 57–76, 1990 U.S.C.C.A.N. at 339–58, without getting the slightest hint that Congress is concerned with the Equal Protection Clause. The Report of the House Committee on the Judiciary is to the same effect. *See, e.g.*, H.R. REP. NO. 101-485(III) at 25–26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 447–49 (background and need for ADA); *id.* at 34, 1990 U.S.C.C.A.N. at 457 (reasonable accommodations under Title I); *id.* at 39 (same), 1990 U.S.C.C.A.N. at 462; *id.* at 50, 1990 U.S.C.C.A.N. at 473 (reasonable accommodations under Title II). I have no doubt that Congress would have compiled the record differently had it been able to foresee the *Flores* decision, but sympathy for

Certainly, the ADA's accommodation rules are not as onerous as the strict scrutiny required by RFRA. As Justice Kennedy noted in *Flores*, strict scrutiny is the "most demanding test known to constitutional law."[736] The ADA permits covered entities to refuse accommodations on the relatively easier grounds of undue financial or administrative burden or fundamental alteration of a program.[737] Still, the parallels between the statutes are undeniable. RFRA prohibited facially neutral conduct which burdens religious practices in the absence of a compelling interest and a narrowly fashioned rule.[738] Religiously neutral practices such as zoning or drug laws were subject to challenge. Similarly, the reasonable accommodation rules of the ADA prohibit certain types of facially neutral conduct which has an unintended effect upon the disabled unless the covered entity can demonstrate an undue burden or threat to program integrity. In either case, a governmental entity is held to a higher standard than is constitutionally required.

Lower court opinions that find that Congress acted within its Section 5 powers in enacting the ADA do not offer a satisfactory explanation for the gap between the target of the accommodation rules and the constitutional rights at issue. *Autio v. AFSCME, Local 3139* is typical in stressing the fact that Congress compiled a thorough legislative record of discrimination against the disabled in American society.[739] Such a record, the Eighth Circuit concluded, was enough to distinguish the ADA from RFRA, whose legislative record contained no recent examples of laws passed out of religious bigotry.[740] This argument misses the point, however, that the ADA also lacks examples of prejudicial conduct by state entities in denying accommodations to the disabled, the only conduct that the Court has recognized as violative of the Equal Protection Clause.[741] In the absence of legislative findings documenting the extent of unconstitutional behavior by state entities, it is impossible to conclude that the accommodation rules meet the *Flores* requirement that preventative rules regulate situations where violations are *likely* to occur.[742] The deference shown to congressional findings by these courts is also inconsistent with Justice Kennedy's approach in *Flores*.[743] While it is true that the Supreme Court in *Cleburne Living Center* invited Congress to make legislative

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Congress' understandable lack of prescience does nothing to meet the requirements of *Flores*.

736. City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

737. *See supra* notes 377–79 and accompanying text.

738. *See supra* notes 211–15 and accompanying text.

739. *See* Autio v. AFSCME, Local 3139, 140 F.3d 802, 805 (8th Cir. 1998). *See also Kimel*, 139 F.3d at 1442–43 (Hatchett, J., concurring in part and dissenting in part); Coolbaugh v. Louisiana, 136 F.3d 430, 435–38 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 58 (1998).

740. *See Autio*, 140 F.3d at 805–06 & n.4

741. *See supra* Part II.C.

742. *See supra* note 260 and accompanying text.

743. *See Autio*, 140 F.3d at 805 (citing Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 195 (1997)) ("We must afford congressional findings great deference."); *Kimel*, 139 F.3d at 1442 (Hatchett, J., concurring in part and dissenting in part); *Coolbaugh*, 136 F.3d at 436.

decisions concerning the treatment of the disabled,[744] and *Flores* indicated limited tolerance for congressional judgments over what is a remedial measure,[745] judicial deference after *Flores* simply does not extend to actions which cross the line into substantive changes in the level of constitutional protections.[746]

In effect, the accommodations provisions of the ADA attempt what was fatal to RFRA; congressional alteration of the judicially selected level of scrutiny for Equal Protection analysis. Most successful claims for accommodations under the ADA would fail in a section 1983 suit based on an equal protection rationale. The rational basis test begins with a presumption of constitutional validity and forces plaintiffs to convince a court that a policy or action by the defendant furthered no conceivable legitimate purpose.[747] As discussed above, this standard is nearly impossible to meet without a showing of ill will.[748] For example, the Title II regulations may require an art museum that has a "no touching" rule to permit limited handling of art objects by visually impaired patrons.[749] As a constitutional matter, the museum can easily defend a decision not to do so on the grounds that touching might damage the objects or that it would cost too much to supervise the touching, or that the monies would be better spent on acquiring art. Likewise, Title II regulations require that public entities refrain from selecting inaccessible facility locations for programming.[750] Yet the rational basis test would permit a city to chose an inaccessible location for a program on the grounds that it was centrally located and thus more convenient to most persons attending the program.

Titles I and II raise the level of scrutiny in two ways. First, state defendants must meet a higher level of justification for their actions and policies that concern the disabled. State of mind notwithstanding, state entities may properly refuse to grant accommodations only when the latter reach the threshold of an undue burden or a fundamental alteration of the program in question.[751] In the employment context, certain "rational" actions such as requiring a post-offer medical examination must now be job-related and consistent with business

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744. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–43.

745. *See* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

746. *See id.*

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

Id. See generally supra notes 276–79 and accompanying text.

747. *See supra* note 295 and accompanying text.

748. *See generally supra* notes 332–43 and accompanying text.

749. DEPARTMENT OF JUSTICE, ADA TITLE II TECHNICAL ASSISTANCE MANUAL § II-3.4100 (1992).

750. *See* 28 C.F.R. § 35.130(b)(4)(i) (1998).

751. *See supra* notes 377–79 and accompanying text.

necessity.[752] Second, state entities now shoulder a higher burden of proof in defending claims. The ADA is antithetical to the "any conceivable basis"[753] approach of rational basis review. Defendants in ADA claims have the burden of raising and proving issues such as undue burden, program alteration, and business necessity as affirmative defenses.[754] In sum, the ADA's approach to reasonable accommodations claims is the very thing forbidden by *Flores*; a legislative alteration of the level of scrutiny in equal protection matters.

Refusal by the lower courts to award monetary relief under the ADA absent a showing of intentional discrimination[755] has made moot some of the constitutional controversy. Once monetary awards are taken out of play, it is possible to fashion equitable relief through orders against state officials under the doctrine of *Ex parte Young*[756] in a way that is compatible with state sovereign immunity. Still, the restrictions on damage awards have not effectively sidestepped the constitutional issues. As already noted, certain standards for intent are so low that they may fall below the "fear and prejudice" standard of *Cleburne Living Center*.[757] Thus a damage award based on the knowledge or request for accommodation standards of intent would be susceptible to an Enforcement Clause challenge.[758] There is also no assurance that the intent threshold for damage awards will not change since the Supreme Court has yet to address the issue. Further, Congress could amend the statute to define intent or to clarify the requirements for damage awards.

5. The Integration Mandate

In enacting the ADA, Congress evidenced great concern over the unnecessary segregation and isolation of the disabled. The ADA's legislative findings state pointedly that "historically, society has tended to isolate and segregate individuals with disabilities, and,...such forms of discrimination against individuals with disabilities continue to be a serious and pervasive problem."[759] Likewise the legislative history contains several statements expressing the need to integrate the disabled into the mainstream of American economic, public, and

752. *See* 42 U.S.C. § 12112(d)(4)(A) (1998).

753. *See supra* notes 295–98 and accompanying text.

754. *See* Gorman v. Batch, 152 F.3d 907, 912 (8th Cir. 1998); Gaul v. Lucent Technologies, 134 F.3d 576, 581 (3d Cir. 1998); Den Hartog v. Wastach Academy, 129 F.3d 1076, 1087 (10th Cir. 1997); Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052, 1058 (5th Cir. 1997).

755. *See supra* notes 428–35 and accompanying text.

756. *See supra* notes 110–17 and accompanying text.

757. *See supra* Part II.C.

758. *See supra* Part V.C.2.d.

759. 42 U.S.C. § 12101(a)(2) (1994). *See also* § 12101(a)(5) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including... segregation....").

social life.[760] The integration philosophy is seen most clearly in the Title II regulation which requires that a "public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[761] Title II also forbids different or separate services unless they are necessary to provide benefits that are effective as those provided to others.[762] Title I lacks a comprehensive integration rule, but does define discrimination to include: "limiting, *segregating*, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee...."[763] *L.C. v. Olmstead*[764] is a good example of the application of the integration mandate. Plaintiffs, psychiatric patients who had a history of institutionalization, successfully argued that community-based treatment was required under Title II's integration rules, so long as there was no fundamental alteration in the program.[765]

I contend that the ADA's integration mandate is a proper exercise of legislative power under the Enforcement Clause. In some respects, the integration rules resemble the reasonable accommodation requirements, in that they force covered entities to alter policies and procedures. In *L.C.*, for example, defendants may have to change a number of policies and procedures regarding hospital admission, treatment strategies, funding plans, and so forth to enable community-based treatment. Like the reasonable accommodations rules, the ADA's mainstreaming rules have no state-of-mind requirements. The similarity to the reasonable accommodation rules, however, runs shallow. Reasonable accommodation rules are troubling under the Enforcement Clause because they: (1) regulate superficially neutral conduct which does not of itself violate the Equal Protection Clause; (2) subject a state entity to a higher level of scrutiny than the rational basis standard; and (3) serve no likely preventive function.[766] State actions which segregate the disabled are different. Most obviously, they are not superficially neutral. A state program of psychiatric institutionalization, for example, is a service designed for the mentally ill and not for the general public. Another example might be a separate table or lunchroom for the mentally retarded at a public school cafeteria. A Title II claim against these situations in essence is a demand that the offending entity apply a general rule without regard to disability. I find this approach to be conceptually distinct from a reasonable accommodation. A request for an altered work schedule, for instance, is really a request that a general rule be modified on account of a disability.

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760. *See* S. REP. NO. 101-116, at 20 (1989); H.R. REP. NO. 101-485(III), at 26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 448–49; *id.* at 50, *reprinted in* 1990 U.S.C.C.A.N. 445, 473.

761. 28 C.F.R. § 35.130(d) (1998).

762. *See* § 35.130(b)(1)(iv).

763. 42 U.S.C. § 12112(b)(1) (1994) (emphasis added).

764. 138 F.3d 893 (11th Cir. 1998), *aff'd in part, vacated in part*, 119 S. Ct. 2176 (1999). The Eleventh Circuit remanded for a consideration of the fiscal effects of community-based care on the integrity of defendants' program. *See id.* at 905.

765. *See id.* at 905. *See also* Helen L. v. Didario, 46 F.3d 325 (3d Cir. 1995).

766. *See supra* Part V.C.4.

More important, segregation of the disabled is suspicious in a way that facially neutral policies are not. In racial matters, segregation has been condemned as being inherently unequal since *Brown v. Board of Education*.[767] The same suspicion should attach to state actions which have a segregating effect upon the disabled. Unlike RFRA, whose legislative history failed to identify significant violations of the Free Exercise Clause as defined by *Smith*,[768] the ADA's legislative history addresses the deleterious effects of unnecessary isolation and separation of the disabled from the mainstream.[769] The findings section states that "historically, society has tended to *isolate and segregate* individuals with disabilities"[770] and that the disabled have been "subjected to a history of *purposeful* unequal treatment...resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals...."[771] Similar statements appear in the legislative record.[772] Taken together, these findings establish a legislative record of a history of segregation motivated by irrational and prejudicial reasons that would fail rational basis analysis under *Cleburne Living Center* and *Romer*. On this particular point, the ADA's legislative history is more like that of the Voting Rights Act, which the *Flores* Court approved as properly documenting a history of abuses of voting rights by local officials.[773]

One might argue that many state actions which treat the disabled separately are often rational. After all, Justice White's opinion in *Cleburne Living Center* justifies a refusal to extend heightened scrutiny to classifications based on mental retardation, in part, on the grounds that the states have a legitimate interest in providing for persons who have a reduced ability to function in society.[774] He also notes variations among the mentally retarded which are appropriately dealt with by legislators guided by qualified professionals.[775] It is a short analytical hop from Justice White's reasoning to a conclusion that separate programs for the disabled merely reflect a rational and legitimate government purpose of providing

767. 347 U.S. 483 (1954).

768. *See supra* note 242 and accompanying text.

769. *See* H.R. REP. NO. 101-485(III), at 25–27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 447–49. The House Judiciary Committee's Report notes that a critical purpose of Title II is to "break down barriers to the integrated participation of people with disabilities in all aspects of community life." *Id.* at 49–50, 1990 U.S.C.C.A.N. at 472–73. Tracking the language of *Brown*, the Committee reports goes on to say that "[s]eparate-but-equal services do not accomplish this central goal and should be rejected." *Id.* at 50, 1990 U.S.C.C.A.N. at 473.

770. 42 U.S.C. § 12101(a)(2) (1994) (emphasis added).

771. § 12101(a)(7) (emphasis added).

772. *See* H.R. REP. NO. 101-485(III), at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 447 ("[M]any of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply embedded prejudices toward people with disabilities.").

773. *See* City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (discussing South Carolina v. Katzenbach, 383 U.S. 301 (1966)).

774. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 432–33, 442 (1985).

775. *See id.* at 442–43

for a segment of society that requires help to cope with life, and not the irrational prejudice that is necessary to constitute an Equal Protection violation.

Such reasoning might be persuasive with a differently worded rule. The Title II regulation, however, is rather narrow. It requires provision of services in "the most integrated setting *appropriate* to the needs of qualified individuals with disabilities."[776] Thus, by its terms, the integration mandate is subordinated to the purpose of providing a particular service or benefit. Public entities are given a free hand to design programs that reflect the needs of the disabled or subgroups of them. Only when appropriate services can be delivered in a more integrated setting does the rule apply.[777] Hence, the rule has a limited scope that tends to bring it within the congruence and proportionality requirement of *Flores*. More important, the integration mandate operates only in situations where prejudice is hard to explain away. Why would a mental health agency, to take one example, maintain a program of institutionalization if equally effective treatment can be delivered in community-based programs at the same or less cost? The likely inference is that the agency is accommodating the prejudicial attitudes of the public, or that it has some other illegitimate motive. In light of the legislative findings that American society has purposefully and irrationally segregated the disabled, it is easy to conclude that the integration mandate of the ADA meets the *Flores* standard of regulating situations in which constitutional violations are likely to occur.

The same reasoning should also justify the Title II rule forbidding separate services unless necessary to provide benefits that are effective as those provided to others.[778] In the absence of a need to alter service methods to achieve an effective result, there is a strong inference that separate services reflect no rational purpose and therefore fail rational basis review under *Cleburne Living Center* and *Romer*. Similarly, there is little justification for employment practices which segregate or classify disabled workers. Title I protects qualified individuals with a disability, which it defines as disabled individuals who can perform the essential functions of a job with or without reasonable accommodations.[779] There can be little reason to treat differently a worker who by definition is performing a job adequately.

VI. CONCLUSION

Titles I and II of the ADA emerge from the new Enforcement Clause analysis as damaged civil rights statutes. A rigorous application of the congruence and proportionality standard of *Flores*, coupled with the limiting Equal Protection holding in *Cleburne Living Center*, leaves a federal damages remedy intact for instances of intentional discrimination that are based, in whole or part, on animosity toward the disabled. Also left intact is the prohibition of certain pre-

776. 28 C.F.R. § 35.130(d) (1998) (emphasis added).

777. *See* L.C. v. Olmstead, 138 F.3d 893, 903 (11th Cir. 1998), *aff'd in part, vacated in part*, 119 S. Ct. 2176 (1999) (mainstreaming requirement applies only after patient's treating physician determines that community-based placement is appropriate).

778. *See* § 35.130(b)(1)(iv).

779. *See* 42 U.S.C. §§ 12112(a), 12111(8) (1994).

employment inquiries and medical exams, and the integration mandate of the statute. For these types of discrimination, the ADA should be interpreted to have abrogated state sovereign immunity. Plaintiffs alleging these types of harm should, on successful proof, be entitled to a complete remedial package including a monetary award against state entity defendants. Abrogation should fail in other situations. Allegations of discrimination based on deliberate indifference and imputed intent are likely to fail the *Flores* test. Most important, claims based on the failure to make a reasonable accommodation are unlikely to meet the Enforcement Clause's standard for abrogation. The last category is particularly significant, since the vast majority of ADA cases involve purported failures to make reasonable accommodations.

I shall leave to another time and perhaps another scholar the task of working out in detail the strategies that are left to an ADA claimant who wants a damages remedy against a state. A brief review of the possibilities here should serve to illustrate the practical effects of *Seminole Tribe* and *Flores* on federal disability law claims. As a general matter, plaintiffs with good substantive claims over accommodation failures and other forms of discrimination that fail the *Flores* test now have limited options to pursue complete relief in federal court. One possible strategy is to bring a claim under Section 504 of the Rehabilitation Act. As noted above, a violation of the ADA will normally constitute discrimination under Section 504.[780] If viewed as a Spending Clause enactment, Section 504 does not depend on Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity; rather, it does so as a condition of federal funding.[781] The effectiveness of this approach, however, goes no further than the presence of federal money. Moreover, limitations on damages under Section 504 make such claims a poor alternative to ADA claims. The Civil Rights Act of 1991 explicitly authorizes damages for intentional violations of section 501 of the Rehabilitation Act,[782] which regards federal employment actions, but says nothing about Section 504, which would govern actions against state employers. Claims under the latter section would be limited by the holding in *Gebser* that damages should be available under Spending Clause statutes with implied causes of action only when plaintiffs can prove that defendants acted with at least deliberate indifference.[783] This limitation seems to disallow compensation for disparate impact claims, and to leave a plaintiff no better off than under the ADA; only equitable relief granted under the *Ex parte Young* exception would be available.[784]

Monetary awards may be available in state court against state entities. Of course a state cannot be subjected to substantive liability on equal protection grounds any more than to an abrogation of sovereign immunity if a congressional act exceeds the bounds of Section 5. One could argue that Titles I and II are

780. *See supra* notes 370–73 and accompanying text.
781. *See supra* note 34 and accompanying text.
782. 42 U.S.C. § 1981a(a)(2) (1994).
783. *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998). *See also supra* notes 436–52 and accompanying text.
784. *See supra* Part II.A.2.

Commerce Clause enactments which properly bind the states.[785] As a general matter, state courts have concurrent jurisdiction over such federal claims unless it is forbidden to them, and indeed have authorization to hear claims arising under Titles I and II. The critical question is whether they must do so. The Eleventh Amendment does not apply in states courts, but many states enjoy sovereign immunity under state law.[786]

So far the Supreme Court has not resolved the issue of whether state courts must hear claims against state entities in spite of state law sovereign immunity, or whether they must provide a forum for such claims. On several occasions in the early Nineties, the Court appeared to nudge the law in this direction. In 1991, in *Hilton v. South Carolina Public Railway Commission*, the Court ruled as a matter of statutory construction that the Federal Employers' Liability Act ("FELA") authorized claims against state-owned railroads in state courts.[787] The prior year in *Howlett v. Rose* the Court rejected, on Supremacy Clause grounds, the proposition that state law could confer immunity on a municipal entity in a section 1983 action brought in a state court when federal law considered a municipality a "person" under the statute.[788] The *Howlett* Court held, also on Supremacy Clause grounds, that immunity would inappropriately disfavor a federal claim when a municipal defendant could have been sued without immunity in federal court, when the federal claim is brought in a state court of general jurisdiction, and when the municipal defendant would be subject under

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785. *See supra* notes 575–81 and accompanying text. Professor Rotunda argues that Title II of the ADA was enacted under Section 5 and not the Commerce Clause, in spite of Congress' statement, *see* 42 U.S.C. § 12101(b)(4) (1994), that it was drawing upon both powers. *See* Ronald D. Rotunda, *The Powers of Congress under Section 5 of the Fourteenth Amendment after* City of Boerne v. Flores, 32 IND. L. REV. 163, 171 n.48 (1998). He reasons that Congress must have been utilizing its Section 5 powers because the related provisions of the Act abrogating state and local government immunity could only be accomplished under section 5. I disagree. At the time of the ADA's enactment, *Union Gas* had not yet been overruled by *Seminole Tribe*, and it is reasonable to conclude that Congress assumed a power to abrogate under the Commerce Clause. *See supra* notes 176–83 and accompanying text.

786. *See supra* note 103 and accompanying text.

787. *See* Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197, 198 (1991). The *Hilton* decision was motivated by a fear that workers would effectively be denied their federal rights under the FELA if the Act was not construed to authorize state court actions. Previously the Court had held that Congress had not effectively abrogated state immunity to FELA suits in federal court. *See* Welch v. Texas Dep't of Highways and Pub. Trans., 483 U.S. 468 (1987), *overruling* Parden v. Terminal Ry. of Alabama Docks Dep't, 377 U.S. 184 (1964). The *Hilton* Court referred to "the most vital consideration of our decision today, which is that to confer immunity from state-court suit would strip all FELA and Jones Act protection from workers employed by the States...." *Hilton*, 502 U.S. at 203. The Court made plain, though, that its decision was a matter of "an ordinary rule of statutory construction" and not constitutional law. *Id.* at 205 (citing Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989)).

788. *See* Howlett v. Rose, 496 U.S. 356, 357 (1990). *See also* Testa v. Katt, 330 U.S. 386 (1947).

state law to similar claims.[789] More recently, in *Reich v. Collins*, the Court held on due process grounds that a state must offer a post-deprivation remedy in its own courts for improperly collected state taxes when taxpayers had relied on its availability to pursue claims.[790] Yet none of these decisions squarely addresses the question of whether a state may assert a sovereign immunity defense when sued *eo nomine* on a federal statutory claim in its own courts. Moreover, the Court has expressly reserved the issue of whether a state must create a forum which is competent to hear federal claims against a state.[791] Indeed, the Court hinted in *Seminole Tribe* that state courts might not be required to hear federal claims. While discussing the means available to promote state compliance with federal law, the Court noted that it was "empowered to review a question of federal law arising from a state court decision, where a State has *consented to suit*."[792]

Even assuming that damages are available in state court, plaintiffs will still be put to difficult choices about how to proceed. The situation is strikingly similar to that created by the Court's decision in the *Pennhurst* case.[793] There the Court held that the Eleventh Amendment barred federal courts from ordering state officials to comply with state law, even though the matter otherwise fell within the court's pendent jurisdiction.[794] In other words, it refused to extend the principle of *Ex parte Young* beyond federal law. After *Pennhurst*, plaintiffs with federal and state claims were faced with several unattractive options. First, a plaintiff could

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789. *See Howlett*, 496 U.S. at 378–81.

790. *See* Reich v. Collins, 513 U.S. 106, 106–07 (1994).

791. *See Howlett*, 496 U.S. at 372.

> The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. 'The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'

Id. (quoting Henry M. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

792. Seminole Tribe v. Florida, 517 U.S. 44, 71 n.14 (1996) (emphasis added). Some of these issues may be resolved in the current term of the Court. Recently, the Court agreed to review a state court decision recognizing a sovereign immunity defense to a federal claim in a state forum. *See* Alden v. State, 715 A.2d 172 (Me. 1998), *aff'd*, 119 S. Ct. 2240 (1999). In *Alden*, the Maine Supreme Court determined that the state could assert its sovereign immunity to a claim for overtime payments brought in state court under the federal Fair Labor Standards Act. The plaintiff had originally commenced his action in federal court. While the claim was pending, the Supreme Court decided *Seminole Tribe*; the federal trial court then dismissed the case on the grounds that Congress could not abrogate the state's immunity to federal suit under Article I. *See* Mills v. State, No. 92-410-P-H, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd* 118 F.3d 37 (1st Cir. 1997). The crux of the Maine Supreme Court's reasoning was that *Seminole Tribe* should be read to recognize a broad state immunity from suit by private parties without state consent.

793. Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89 (1984).

794. *See id.* at 89–90; 28 U.S.C. § 1367 (1994) (supplemental jurisdiction over state claims sharing a common nucleus of operative fact with a proper federal claim).

opt to bring all claims in a state court and forgo the federal forum,[795] hardly attractive if one perceives an advantage in the federal forum. Second, a plaintiff could bring the state and federal claims in state and federal courts simultaneously.[796] The risk here is that the state court will enter judgment first; an unfavorable judgment might bar further action in the federal court under principles of res judicata or collateral estoppel.[797] Third, plaintiffs might file claims sequentially, first in federal, then in state court.[798] Claim splitting is obviously more expensive than a single proceeding. Fact finding in federal court would also have a preclusive effect in state court;[799] however, a plaintiff's preference for an initial federal forum would normally reflect a preference for federal fact-finding. Finally, plaintiffs might simply seek federal relief and forgo a state proceeding. This last approach might be attractive when plaintiffs have inadequate resources to pursue two claims and are satisfied with the partial relief offered by a federal court.

ADA plaintiffs whose claims fail to meet the *Flores* test for abrogation occupy essentially the same undesirable position as the plaintiff with a related state claim after *Pennhurst*. The former have the same option to bring all claims in state court. They may also bring simultaneous federal and state proceedings, with the same attendant risks of an early state judgement. Like *Pennhurst* plaintiffs, ADA claimants who perceive an advantage in a federal forum may still proceed there first against a state entity for prospective relief under Title I or Title II, in conformity with the doctrine of *Ex parte Young*, and also be awarded attorney fees. ADA plaintiffs taking the initial federal route, like *Pennhurst* plaintiffs, could then either quit, or move on to a state proceeding for damages; in the latter case, they would also be able to assert collateral estoppel on favorable factual determinations reached by the federal court in the state proceeding. Of course it is questionable how many plaintiffs have the time, resources, and will to commence a completely separate, second proceeding to round out a remedy. Thus, like the *Pennhurst* plaintiff, the ADA plaintiff may be forced by economic pressure to confine all claims to a state court.

Seminole Tribe and *Flores*, in short, will have the effect of preventing the federal court from giving monetary relief in many meritorious claims against state entities under Title I and Title II of the Americans with Disabilities Act. There seems little that Congress can do about it now that the Court has decided to take

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795. *See* CHEMERINSKY, *supra* note 45, § 7.5, at 426.

796. *See id.*

797. *See* Migra v. Warren City Sch. Dist., 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90 (1980). A judgment by the state court on state claims alone might have the ironic effect of halting federal proceedings on federal claims. Res judicata bars litigation of claims that might have been brought in a prior proceeding. *See* Kremer v. Chemical Const. Corp., 456 U.S. 461, 466–67 n.6 (1982). If the federal claim arises from the same operative facts as the state claim, and thus could have been brought joined with the state claim in state court, then rendering the state judgment first should result in dismissal of a pending federal action on grounds of res judicata. *See Migra*, 465 U.S. at 83–85.

798. *See* CHEMERINSKY, *supra* note 45, § 7.5, at 426.

799. *See id.*

Marbury v. Madison seriously, reserve to itself the power to declare the meaning of the Constitution, and clip Congress' Section 5 powers. In reply Congress could utilize its considerable powers under the Spending Clause[800] to pressure state recipients of federal money to waive their sovereign immunity to federal disability actions. Congress could also expressly authorize damages under the ADA, or the Rehabilitation Act for that matter. But the solution would be only partial. Those parts of the public sector that avoid federal money would remain untouched. Congress, moreover, may never have the will to act. And there the matter lies.

800. *See supra* note 34 and accompanying text.