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STATES' RIGHTS OR CITIZENS WRONGED: AN EXAMINATION OF EXPANSION OF THE ELEVENTH AMENDMENT BAR IN RECENT SUPREME COURT DECISIONS

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I. INTRODUCTION

Federalism – a national government of preeminent but limited authority – is a central concept upon which our nation was founded. Although Congress' power to pass laws is limited by the United States Constitution, the United States Supreme Court (hereinafter "the Supreme Court" or "the Court") has for the last several decades and until recent decisions given expansive reach to this notion. For example, Congress' power to enact legislation under the Commerce Clause[1] was interpreted broadly. Indeed, the Court's decision in *Wickard v. Filburn*[2] seemed to leave little outside of the Commerce Clause reach.[3] For many years, this view obtained in challenges to congressional actions under the Commerce Clause. However, the Court has in recent decisions forcefully declared that congressional authority under the Commerce Clause is not boundless. For example, in *United States v. Lopez*,[4] the Court invalidated the Gun Free School Zone Act of 1990[5] because it exceeded the scope of Congress' power under the Commerce Clause. In a very recent decision, the Court invalidated the Violence Against Women Act[6] as beyond Congress' Commerce Clause and Fourteenth Amendment authority.[7]

Another aspect of federalism involves congressional abrogation of State sovereign immunity from private action under various legislative enactments. A number of cases decided in the past

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[1] U.S. Const. Art. I § 8 cl. 3.
[2] 317 U.S. 111 (1942).
[3] Therein, the Court upheld federal legislation aimed at controlling the wheat supply as applied to production and consumption of home-grown wheat based upon the cumulative effects that all such growth and consumption could have on interstate commerce. *Id.* at 128-29.
[4] 514 U.S. 549 (1995).
[5] 18 U.S.C. § 922 (q)(1)(A). The Act made it a federal crime to knowingly possess a firearm in a school zone. *Id.*
[6] 42 U.S.C. § 13981. The VAWA provided a federal civil remedy for gender-motivated violence. *Id.*
[7] *United States v. Morrison*, __ U.S. __, __ S. Ct. __ (2000).

several years have defined, and in some cases redefined, the contours of Congress' ability to subject the States to private action. Over the past several years, the court has steadily limited Congress' power and strengthened the States' protection under the Eleventh Amendment.[8]

It is now established that Congress may abrogate States' Eleventh Amendment immunity only where it clearly states its intention to do so and where it is empowered to do so.[9] Absent both these elements, the Court will not uphold a congressional attempt to subject the States to private lawsuits. Moreover, it is clear that the only remaining vestige of congressional power to abrogate State immunity lies when Congress acts under its power under the Fourteenth Amendment.[10]

The Court's most recent explication of congressional power addressed Congress' ability to subject States to private suits under the Age Discrimination in Employment Act (ADEA).[11] The Court concluded that Congress had not properly abrogated the States' immunity under the ADEA, notwithstanding its clear intention to do so, because the ADEA was not a proper exercise of congressional power under § 5 of the Fourteenth Amendment.[12] This decision sets the stage for the Court to determine whether Congress properly abrogated the States' immunity under the Americans with Disabilities Act of 1990 (ADA), an issue over which the circuits are currently divided.[13] The Court is poised to answer this question in its next term, having granted certiorari on this issue.[14]

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[8] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Flores v. City of Boerne*, 521 U.S. 507 (1997); *Florida Prepaid Postsecondary Ed. Expense Bd. V. College Savings Bank*, 527 U.S. ___, 119 S.Ct. 2199 (1999); *Alden v. Maine*, 527 U.S. 706 (1999); *Kimel v. Florida Board of Regents*, 120 S.Ct. 631 (2000). These cases are discussed in detail *infra*.

[9] *See, e.g., Seminole Tribe*, 517 U.S. at 55; *See infra* Section II.C.

[10] *See Id.* at 66; *See infra* Section II.C.1.

[11] *Kimel*, 120 S.Ct. 631.

[12] *Id.* at 650; *See infra* Section III.

[13] *See infra* Section IV.C.

[14] *See infra* Section IV.C.3.

This paper will examine the evolution of the Court's Eleventh Amendment jurisprudence. It will also focus particularly on the Court's recent decision regarding the States' immunity under the ADEA. Finally, it will explore Congress' attempted abrogation of state immunity under the ADA and examine the principles of Eleventh Amendment jurisprudence developed thus far as they apply to the ADA.

II. HISTORICAL FRAMEWORK

A. Historical overview of Eleventh Amendment Jurisprudence

The Eleventh Amendment of the United States Constitution states: "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 ... any Foreign State."[15] It was proposed and ratified after the Supreme Court's decision in *Chisolm* v. *Georgia*, which held that a citizen of North Carolina could sue the State of Georgia over an estate matter in federal district court.[16] The language of this Amendment limits Article III federal jurisdiction where a citizen of one state sues another State.[17] Thus, the Amendment literally limits diversity jurisdiction where a State is a party. It says nothing about federal jurisdiction in cases arising under the laws of the United States, another situation in which the Constitution confers jurisdiction in federal courts.[18] However, the scope of State immunity has been interpreted much more broadly than a literal reading of the Eleventh Amendment would warrant.[19] In *Hans*, the Court noted that its prior decisions prohibited citizens of other States from suing a State even

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[15] U.S. Const. Amend. XI.
[16] 2 Dall. 419 (1793); *See also Alden*, 527 U.S. 706, 719-22.
[17] *See* U.S. Const. Art. III § 2 cl. 1, which conferred federal jurisdiction over cases between a state and citizens of another state or a foreign state. The Eleventh Amendment modified this language.
[18] *See* U.S. Const. Art. III § 2 cl. 1.
[19] *See Hans v. Louisiana*, 134 U.S. 1 (1890); *See also Alden*, 527 U.S. 706, 715-22 (discussing common understanding of State immunity).

under federal law.[20] The Court went on to discuss the historical context of sovereign immunity and to conclude that the action could not be maintained.[21]

This broad rule of sovereign immunity has obtained through the years with only limited exceptions.[22] One such exception allows State officials to be sued for injunctive relief.[23] The Court has made clear, however, that such actions could be maintained only for injunctive relief and not monetary damages.[24] In *Jordan*, the plaintiff sued a State official alleging that the state was administering a federal-State program – Aid to the Aged, Blind and Disabled (AABD) – inconsistently with federal regulations and the Fourteenth Amendment.[25] Among the relief requested was retroactive benefits alleged to be due as a result of Minnesota's improper administration of the AABD.[26] The Court, not persuaded by the asserted distinction between an award of money damages and the award of equitable relief in the case at bar, held that an award of retroactive benefits would violate the State's Eleventh Amendment immunity.[27] It should be noted that the Court's assessment of permissible relief versus impermissible relief in such cases has not always been crystal clear. For example, in *Milliken v. Bradley*[28] the Court found that a remedial order requiring Michigan to contribute six million dollars to a program to remedy past racial discrimination in schools was permissible.[29] It distinguished between an order requiring a

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[20] *Hans*, 134 U.S. at 10 (citations omitted). The issue in *Hans* was whether a Louisiana citizen could sue the State under the Contracts Clause of the Constitution over state-issued bonds.
[21] *Id.* at 15-19.
[22] Although broadly construed, the Court has made it clear that Eleventh Amendment immunity can be claimed only by the States and not their political subdivisions – i.e., municipalities. *See Monell v. Dept. of Social Services of New York*, 436 U.S. 658 (1978).
[23] *See Ex Parte Young*, 209 U.S. 123 (1908), where the Court allowed a state attorney general to be named as a defendant in a federal action to enjoin a state prosecution under an allegedly unconstitutional state law regarding railroad tariffs.
[24] *Edelman v. Jordan*, 415 U.S. 651 (1974).
[25] *Jordan*, 415 U.S. at 653.
[26] *Id.* at 655.
[27] *Id.* at 678.
[28] 433 U.S. 267 (1977).
[29] Milliken, 433 U.S. at 291. The case involved a remedial order issued after Michigan and Detroit officials had been found to have operated an intentionally segregated public school system. *Id.* at 272-73.

State to expend funds for prospective relief and one ordering a State to pay money retroactively to "wipe the slate clean."[30] It concluded that the former was permissible under the Eleventh Amendment while the latter was not.[31]

The Eleventh Amendment also does not bar suits against a State where the State consents to such action.[32] Of course, this exception has not played a large part in the Court's Eleventh Amendment jurisprudence because States rarely give such consent.

The final, and for purposes of the present inquiry most significant, exception to State immunity under the Eleventh Amendment is where Congress abrogates (or attempts to abrogate) that immunity. Because this theory of abrogation is the most critical to the issue at hand, it is examined in detail below.

B. Sources of Congressional Power to Abrogate State Sovereign Immunity

The Fourteen Amendment to the United States Constitution provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[33] Section 5 of the Fourteenth Amendment states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."[34]

In addition to congressional action under the Fourteenth Amendment's enforcement power, there have also been attempts to abrogate State immunity under other aspects of congressional authority. These are discussed below.

C. Evolution of the Court's Assessment of Congress' Power to Abrogate State Immunity

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[30] *Id.* at 290.
[31] *Id.*
[32] *See, e.g.* [example cases of where states have consented to suit].
[33] U.S. Const. Amend. XIV, § 1. The Fourteenth Amendment was ratified in 1868.

1. Sources other than the Fourteenth Amendment

It is now settled that congressional attempts to abrogate immunity under the Eleventh Amendment under powers other than the Fourteenth Amendment will fail.[35] In *Seminole Tribe*, the Court considered Congress' authority to abrogate Eleventh Amendment immunity under the Indian Commerce Clause.[36] At issue in the case was the validity of abrogation under the Indian Gaming Regulatory Act.[37] Specifically, the State of Florida challenged the Seminole Tribe's lawsuit to compel it to negotiate over gaming on reservations within the State.[38] The Court's inquiry was whether the Indian Gaming Regulatory Act was "passed pursuant to a constitutional provision granting Congress the power to abrogate" Eleventh Amendment immunity.[39] The Court noted that only one other case, *Pennsylvania v. Union Gas*,[40] had found that Congress could abrogate State immunity under a provision other than the Fourteenth Amendment.[41] The plurality in *Union Gas* concluded that Congress could abrogate State immunity under the Commerce Clause.[42] The Court recognized that the rationale of *Union Gas* – that Congress was empowered to abrogate because the States had granted plenary power to Congress to regulate interstate commerce – would necessarily compel the same result under the Indian Commerce Clause.[43] However, the Court then reconsidered the result of *Union Gas*.[44] It noted that the *Union Gas* decision was the sole instance in which the Court had found Congress empowered to abrogate Eleventh Amendment immunity under any constitutional provision other than the

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[34] U.S. Const. Amend. XIV, § 5.
[35] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).
[36] 517 U.S. at 53.
[37] *Id.* at 47. The Indian Gaming Regulatory Act, 25 U.S.C. § 2710, was passed in 1988 in order to regulate gaming by Indian tribes. *See* 517 U.S. at 48.
[38] *Id.* at 51.
[39] *Id.* at 59.
[40] 491 U.S. 1. This was a plurality opinion, with four Justices joining.
[41] *Seminole Tribe*, 517 U.S. at 59.
[42] 491 U.S. at 22-23.
[43] *Seminole Tribe*, 517 U.S. at 62-63.

Fourteenth Amendment. The Court noted that the Fourteenth Amendment, which obviously was ratified after the Eleventh Amendment, altered the balance then existing between State and federal power created both by Article III and the Eleventh Amendment.[45] In overruling *Union Gas*, the Court found the plurality's extension of the power to abrogate beyond that under the Fourteenth Amendment "misplaced."[46]

Seminole Tribe makes clear that the only provision under which the Court will entertain Congress' power to abrogate state immunity is the Fourteenth Amendment. Indeed, the Court has reiterated this view in its subsequent decisions.

In *Alden v. Maine* the Court made clear that the principles of the Eleventh Amendment applied regardless of whether the action was pursued in federal or state court.[47] *Alden* involved a challenge by employees of the State of Maine under the Fair Labor Standards Act (FLSA)[48] for overtime wages that they claimed they were owed.[49] Finding that the FLSA rested only on Congress' power under the Commerce Clause, the Court concluded that abrogation of State immunity was beyond congressional authority.[50]

2. Action Pursuant to the Fourteenth Amendment

As discussed above, congressional action under the Fourteenth Amendment is the only instance in which the Court is currently willing to entertain abrogation of State immunity. Of course, as one might expect, even action putatively taken under the Fourteenth Amendment will not always be sufficient to support a judicial finding of proper abrogation. This section will discuss the Court's development of requirements for effectual abrogation.

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[44] *Id.* at 63-72.
[45] *Id.* at 59 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).
[46] *Id.* at 65.
[47] 527 U.S. 706 (1999).
[48] 29 U.S.C. § 201 et seq.
[49] 527 U.S. at 711-12.
[50] *Id.* at 712.

The Court's decision in *Fitzpatrick v. Bitzer*[51] provides the basic framework for proper abrogation of the Eleventh Amendment. *Fitzpatrick* involved a claim by male employees of the State of Connecticut that the State's statutory retirement plan discriminated against them because of their sex.[52] The District Court granted injunctive relief, but denied the claim for retroactive benefits and attorney's fees, finding that *Edelman*[53] prevented such an award.[54] The issue before the Court was whether Congress had properly abrogated State immunity under Title VII of the Civil Rights Act of 1964.[55] Title VII proscribed discrimination in all aspects of employment based on race, color, religion, sex or national origin.[56] As originally enacted, Title VII did not apply to the States or their political subdivisions.[57] Congress rescinded this exclusion with passage of the Equal Employment Opportunity Act of 1972.[58]

The Court noted that *Edelman* involved a suit under the Social Security Act, a statute that did not contain any pronouncement of congressional intent to abrogate State immunity under Title VII.[59] Conversely, the Court found Congress' intent to abrogate under Title VII clearly evinced by the amendments it made to the Act.[60] Further, the Court stated that Congress acted pursuant to its power under the Fourteenth Amendment when it amended Title VII.[61] The Court noted that the Fourteenth Amendment, ratified by the States after the Civil War, "quite clearly

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[51] 427 U.S. 445 (1976).
[52] 427 U.S. at 448.
[53] 415 U.S. 651. *See supra* Section II.A.
[54] *Fitzpatrick*, 427 U.S. at 450. The court of appeals affirmed as to retroactive benefits, but remanded as to attorney's fees, reasoning that such an award would have only an ancillary effect on the State's treasury, as permitted under *Edelman*. *See Id.* at 451.
[55] *Id.* at 447.
[56] *See* § 703(a), Civil Rights Act of 1964, 78 Stat. 255, codified at 42 U.S.C. § 2000e-2(a).
[57] *See* § 701(b), Civil Rights Act of 1964, 78 Stat. 253, which explicitly excluded the States.
[58] 86 Stat. 103. This Act amended 42 U.S.C. § 701(a) to include States and their political subdivisions within the definition of "employer" and deleted the former exclusion found in § 701(b). *See Id.*
[59] 427 U.S at 451-52.
[60] *Id.* at 452.
[61] *Id.* at 453 n. 9 (citations omitted). The Court distinguished Congress' action here from that under the Commerce Clause, which it had previously found insufficient to abrogate state immunity. *Id.* at 452.

contemplates limitations on their authority."[62] In then quoting relevant language from Sections 1 and 5 of the Fourteenth Amendment, the Court stated that the substantive provisions of the Amendment were directed expressly at the States and created duties upon them regarding their treatment of individuals.[63] It further noted that § 5 empowered Congress to enforce these duties through legislation.[64]

Next, the Court turned to its decision in *Ex Parte Virginia*[65] to examine the impact of the Fourteenth Amendment on the balance of power between the States and the Federal Government.[66] It noted that *Virginia* stated that the Thirteenth and Fourteenth Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress.'[67] The Court then quoted an extensive passage from *Virginia*, some of which bears repeating:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. . . . It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

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[62] *Id.* at 453.
[63] *Id.*
[64] *Id.*
[65] 100 U.S. 339 (1880). This case involved the prosecution of a Virginia state judge under a federal criminal statute that prohibited exclusion from service as a state juror on the basis of race. *Id.* at 340.
[66] *Fitzpatrick*, 427 U.S. at 453.

> The argument in support of the petition for a Habeas corpus ignores entirely the power conferred upon Congress by the Fourteenth Amendment. Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State . . .. But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete.[68]

In assessing the significance of § 5 of the Fourteenth Amendment, the Court noted, "When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."[69]

Thus, *Fitzpatrick* established that Congress could indeed abrogate State immunity when it clearly expressed its intent to do so and it acted pursuant to its authority under the Fourteenth Amendment. Absent in *Fitzpatrick* was any discussion of whether Congress' action under Title VII was properly taken pursuant to § 5 of the Fourteenth Amendment. Indeed, the State of Connecticut did not argue that the provisions of Title VII in question were not a proper exercise of congressional power under §5.[70] The lack of any such challenge is attributable to the fact that Title VII was aimed at the same ills that the Fourteenth Amendment was designed to combat – particularly racial discrimination.[71] Thus, *Fitzpatrick* represents the "easy" case of whether

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[67] *Id.* at 454 (quoting *Virginia*, 100 U.S. at 345 (internal quotation marks omitted).
[68] *Id.* at 454-55 (quoting *Virginia*, 100 U.S. at 346-48 (omissions in original) (internal quotation marks omitted)).
[69] *Id.* at 456.
[70] *See Id.* n. 11.
[71] Reference to legislative history of Fourteenth Amendment.

Congress has properly acted under § 5. The remainder of this paper examines where the lines have been drawn in the cases that have not been so easy.

In *City of Boerne v. Flores*[72] the Court explored the more difficult issue of where the line must be drawn when Congress purportedly acts pursuant to its power under § 5 of the Fourteenth Amendment. *City of Borne* thus answered the question that the Court found it unnecessary to ask in *Fitzpatrick*.

City of Boerne addressed congressional authority to abrogate Eleventh Amendment immunity under the Religious Freedom Restoration Act of 1993[73] (RFRA).[74] In *City of Boerne*, a church in Boerne, Texas challenged a zoning ordinance aimed at historic preservation enacted by the Boerne City Council that resulted in denial of the church's permit for new construction.[75] Ultimately, the Court concluded that the RFRA was not a proper exercise of Congress' power under § 5 of the Fourteenth Amendment.[76] In reaching this conclusion, the Court carefully examined the genesis of the RFRA.[77]

The Court noted that Congress passed the RFRA in response to its decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*,[78] which upheld Oregon's denial of unemployment benefits to members of the Native American Church who were fired because they had used peyote.[79] *Smith* held that neutral, generally applicable laws could be applied to religious practices without a showing of a compelling state interest.[80]

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[72] 521 U.S. 507 (1997).
[73] 42 U.S.C. § 200bb et seq.
[74] *See City of Boerne*, 521 U.S. at 511-12.
[75] *Id.*
[76] *Id.* at 536.
[77] *Id.* at 512 –16.
[78] 494 U.S. 872 (1990).
[79] *City of Boerne*, 521 U.S. at 513.
[80] *Smith*, 494 U.S. at 885. *See City of Boerne*, 521 U.S. at 514.

The Court noted that its *Smith* decision was highly debated and criticized for the burden it placed on members of the Native American Church.[81] It was this debate and criticism that led to passage of the RFRA.[82] The Court discussed Congress' findings under the RFRA,[83] which expressly repudiated *Smith* and noted that neutral laws could burden religious exercise as surely as those intended to interfere with such exercise.[84] It then noted Congress' stated purposes for the RFRA of restoring the compelling interest test set forth in pre-*Smith* case law and guaranteeing application of that test to all cases where free exercise of religion is substantially burdened and to provide a claim or defense to everyone whose exercise of religion is substantially burdened by government.[85] In furtherance of these purposes, the RFRA prohibited all branches of Federal and State government from substantially burdening the exercise of religion, even under a generally applicable rule, unless the government demonstrates that the burden is the least restrictive means of furthering a compelling governmental interest.[86]

The Court next turned to an analysis of Congress' authority to act as it had under the RFRA. It noted that Congress had relied upon its power under the Fourteenth Amendment to pass those portions of the RFRA that applied to the States.[87] The Church (and the United States as amicus) defended the RFRA as a proper exercise of congressional power under § 5 of the Fourteenth Amendment, and the Court addressed this argument.[88] It again acknowledged that the Fourteenth Amendment is "'a positive grant of legislative power' to Congress."[89] The Court

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[81] *Id.* at 514-15. Indeed, four Justices disagreed with the proposition that such a law could survive absent a compelling state interest and narrow tailoring to achieve that interest. *See Id.*
[82] *Id.* at 515.
[83] 42 U.S.C. § 2000bb(a).
[84] *City of Boerne*, 521 U.S. at 515.
[85] *Id.* (citing 42 U.S.C. §2000bb(b)).
[86] *See Id.* at 515-16 (citing 42 U.S.C. §§ 2000bb-1 and 2000bb-2(1)).
[87] *Id.* at 516.
[88] *Id.* at 517.
[89] *Id.* (quoting *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

next quoted from *Ex Parte Virginia*[90] in explaining the scope of congressional power under § 5:

"'Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.'"[91]

The Court then explained that congressional power under § 5 extended to legislation intended to remedy constitutional violations, even where "in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the states.'"[92] To support this point, the Court cited its decisions regarding voting rights. It noted that it had upheld Congress' suspension of literacy tests and other voting requirements in order to address racial discrimination under its enforcement power under the Fifteenth Amendment even though these requirements were facially constitutional under previous decisions.[93] Further, the Court recited additional provisions in voting rights and other areas it had upheld under Congress' constitutional enforcement power.[94] However, in observing that Congress' power was not without limit, the Court referred to the text of § 5, which gives Congress the power "'to enforce' the 'provisions of this article.'"[95] The Court concluded that

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[90] 100 U.S. 339 (1879). *See supra* for further discussion of this decision.
[91] *City of Boerne*, 521 U.S. 517-18 (quoting *Virginia*, 100 U.S. at 345-46).
[92] *Id.* at 518 (quoting *Fitzpatrick*, 427 U.S. 445, 455 (1976)).
[93] *Id.* (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)). Section 1 of the Fifteenth Amendment provides in part that States shall not deny or abridge the right of any United States citizen to vote based on race or color. U.S. Const. Amend. XV, § 1. Section 2 provides that Congress has power to enforce the Amendment by appropriate legislation. *Id.* § 2. This provision is parallel to the enforcement power under § 5 of the Fourteenth Amendment.
[94] *City of Boerne*, 521 U.S. at 518 (citations omitted).
[95] *Id.* at 519.

this enforcement power extended to the fundamental liberties of the First Amendment in accord with its previous holdings.[96]

In further delineating the boundaries of Congress' power, the Court stated:

> Congress' power under § 5, however, extends only to "enforc [ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." [*Katzenbach, supra*, at 326] 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]."[97]

The Court noted that the distinction between actions that remedy or prevent constitutional violations and those that make a substantive change in the law is not easily discernable.[98] Further, it declared that Congress "must have wide latitude in determining" where the line is to be drawn.[99] The Court then stated its test for assessing which side of the line congressional action has fallen: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[100]

Next, the Court turned to a historical exposition on the evolution of the Fourteenth Amendment, concluding that history confirms the remedial nature of the enforcement clause of § 5.[101] The Court noted that the first proposal for the Fourteen Amendment was criticized as

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[96] *Id.* (citations omitted).
[97] *Id.* (emphasis added).
[98] *Id.*
[99] *Id.* at 520.
[100] *Id.* This test later proved to be the downfall of Congress' attempt to abrogate State immunity under the ADEA. *See infra* Section III.
[101] 521 U.S. at 520.

giving Congress too much legislative power.[102] That proposal, offered by Representative John Bingham, read: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."[103] The Court observed that this draft was criticized from all quarters because it would allow Congress to intrude into areas that had traditionally been the responsibility of the States and be contrary to the Constitution's scheme of federalism.[104] Typical of the comments in opposition was Nevada Senator William Stewart's observation that under the Amendment "there would not be much left for the State legislatures" and that the proposal "would work a change in our entire form of government."[105]

The resounding opposition to the original draft led to its being tabled in the House.[106] Because this action was tantamount to a defeat of the proposal, the Joint Committee considering the matter undertook the drafting of an entirely new Amendment.[107] The new proposal, which with minor revisions would ultimately be ratified as the Fourteenth Amendment, imposed self-executing limits on the States in § 1 and placed congressional enforcement power in § 5.[108] This design was widely accepted and seen as correcting the ills perceived in the Bingham proposal.[109]

The Court next observed that the design of the Fourteenth Amendment, as it was finally accepted, has been significant "in maintaining the traditional separation of powers between

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[102] *Id.*
[103] *Id.* (quoting Cong. Globe, 39th Cong., 1st Sess., 1034 (1866) (internal quotation marks omitted)).
[104] *Id.* at 521 (citations omitted).
[105] *Id.* (quoting Cong Globe, supra at 1082) (internal quotations omitted). This viewpoint was shared by many other members of Congress. *See Id.*
[106] *Id.* (citations omitted).
[107] *Id.* at 522.
[108] *Id.* (citation omitted).
[109] *Id.* at 523.

Congress and the Judiciary."[110] The Court noted that it has had "primary authority to interpret" the self-executing prohibitions contained in the first eight constitutional Amendments and that some observers saw the Bingham proposal as vesting authority in Congress to interpret the proposed Amendment's limits through legislation.[111] It concluded that the wording of the Amendment as ratified, which like the provisions of the Bill of Rights contained self-executing limits, was for the courts to interpret.[112]

The Court next exposited the limits of congressional power as reflected in its prior decisions.[113] It pointed out that it had invalidated criminal sanctions under the Civil Rights Act of 1875 for denying anyone full enjoyment of public accommodations or conveyances because Congress had exceeded its enforcement power under the § 5 by attempting to regulate private conduct.[114] In the *Civil Rights Cases*, the Court stated that § 5 "did not authorize Congress to pass 'general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment [sic] they are prohibited from'" making.[115]

The Court further observed that more recent cases have confirmed the remedial nature of Congress enforcement power under the Fourteenth Amendment.[116] In *South Carolina v. Katzenbach*[117] the Court declared that "'[t]he constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience ... it reflects.'"[118] As discussed above, the Court in *South Carolina* upheld portions of the Voting

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[110] *Id.* at 523-24.
[111] *Id.* at 524.
[112] *Id.*
[113] *Id.*
[114] *Id.* at 524-25 (citing *Civil Rights Cases*, 109 U.S. 3 (1883)).
[115] *Id.* at 525 (quoting *Civil Rights Cases*, 109 U.S. at 13-14).
[116] *Id.*
[117] *Supra*, 383 U.S. at 308.
[118] 521 U.S. at 525 (quoting *South Carolina*) (alterations and omission in original).

Rights Act of 1965 as valid congressional action under the Enforcement Clause of the Fifteenth Amendment.[119] The legislative ban on literacy tests was held to appropriate remedial action under the Fifteenth Amendment because of evidence in the record supporting the Act "reflecting the subsisting and pervasive discriminatory – and therefore unconstitutional – use of literacy tests."[120] The Court also noted that decisions subsequent to *South Carolina* "continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination."[121]

To reinforce the historical treatment of congressional enforcement power as remedial rather than substantive, the Court then turned to a case in which it had found that Congress had bounded over the remedial/substantive line the Court had previously drawn.[122] It noted that it had found that Congress exceeded its enforcement power in legislation that lowered the minimum voting age from 21 to 18 in state and local elections.[123] The *Oregon* majority observed that the legislation "intruded into an area reserved by the Constitution to the States."[124] The Court also observed that four of the five Justices in the majority "were explicit in rejecting the position that § 5 endowed Congress with the power to establish the meaning of constitutional provisions."[125]

The Court concluded its review of the nature of congressional power under the Fourteenth Amendment by observing:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer

[119] *Id.* (citing *South Carolina*, 383 U.S. at 315).
[120] *Id.* (citing *South Carolina*, 383 U.S. at 333-34).
[121] *Id.* at 526 (citations omitted).
[122] *Id.* at 527.
[123] *Id.* (citing *Oregon v. Mitchell*, 400 U.S. 112 (1970)).
[124] *Id.* (citing *Oregon*, 400 U.S. at 125).
[125] *Id.* (citing *Oregon*, 400 U.S. at 209).

> would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it." Marbury v. Madison, 1 Cranch at 177. Under this approach, it is difficult to conceive of a principle that would limit congressional power. ... Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.[126]

Having explicated the nature of Congress' power to legislate under the Enforcement Clause of the Fourteenth Amendment, the Court then turned to apply these principles to the RFRA.[127] It noted the Respondent's assertion that the RFRA was an appropriate exercise of Congress' remedial power because it remedies laws enacted to target religious beliefs and practices.[128] According to the Respondent's argument, Congress could, as a proper exercise of its authority, prohibit any law that substantially burdened a religious practice unless narrowly drawn to achieve a compelling state interest because of the difficulty of proving intentional violations.[129] The Court responded that such rules may be appropriate remedial measures, but that "there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."[130]

The Court next turned to a comparison of the RFRA and the Voting Rights Act of 1964.[131] It contrasted the record upon which the Voting Rights Act was based and that upon which the RFRA rested, noting that the former was replete with evidence in support of the need for the legislation while the latter "lacks examples of modern instances of generally applicable laws

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[126] *Id.* at 529.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at 530 (citations omitted).
[131] *Id.*

passed because of religious bigotry."[132] The Court further noted that the comments in the record indicated that Congress' real concern was with incidental burdens placed on religious practices by generally applicable laws rather than actions taken out of hostility or religious animus.[133] Notably, the Court concluded its review of the legislative record by observing that the lack of support therein "is not RFRA's most serious shortcoming."[134] The Court added that judicial deference does not derive from the legislative record but from "due regard for the decision of the body constitutionally appointed to decide" the matter.[135]

The Court went on to explain that RFRA – regardless of the state of the legislative record – could not be considered to be remedial or preventive legislation "if those terms are to have any meaning. RFRA is so out of proportion to any supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[136] The Court stated that RFRA instead appeared to be an attempt to change the substantive law of religious protection under the First Amendment.[137] The Court then observed that prohibitions of 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."[138] The Court then concluded that RFRA "is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[139] The Court

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[132] *Id.*
[133] *Id.* at 531.
[134] *Id.*
[135] *Id.* (citing *Oregon v. Mitchell*, 400 U.S. at 207)(internal quotation marks omitted).
[136] *Id.* at 532.
[137] *Id.*
[138] *Id.* (citing *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (upholding legislation prohibiting changes that would have discriminatory impact in jurisdiction with history of intentional racial discrimination).
[139] *Id.*

contrasted the RFRA with other measures passed under § 5 of the Fourteenth Amendment.[140] For example, the provisions of the Voting Rights Act challenged in *South Carolina v. Katzenbach*[141] applied only in those regions of the country where racial discrimination "had been most flagrant."[142] Further, the Voting Rights Act provided that its requirements would terminate at a State's request where there was no evidence of discrimination in voting over the preceding five years.[143]

"The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interests."[144] The Court noted that laws valid under its decision in *Smith* would not survive under the RFRA, regardless of whether their objective was to burden or punish free exercise of religion.[145] "Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry."[146]

The Court concluded its opinion by elucidating the respective spheres of responsibility for Congress and the Judiciary under the Constitution.[147] On this subject, the Court observed that "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. ... Were it otherwise, we would not afford Congress the presumption of validity its enactments now

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[140] *Id.*
[141] 383 U.S. at 315.
[142] *City of Boerne*, 521 U.S. at 533. *See also City of Rome*, 446 U.S. at 177.
[143] *City of Boerne*, 521 U.S. at 533 (citing *South Carolina*, 3838 U.S. at 331).
[144] *Id.* at 533-34.
[145] *Id.* (citing *Smith*, 494 U.S. at 888) (O'Connor, J., concurring in judgment).
[146] *Id.* at 534-35.

enjoy."[148] The Court continued by stating that "the Constitution is preserved best when each part of government respects both the Constitution and the proper actions and determinations of the other branches."[149] The Court further noted that when it interprets the Constitution, it acts "within the province of the Judicial Branch, which embraces the duty to say what the law is."[150] Thus, the Court's prior interpretation of the Constitution – not later legislative attempts to alter that interpretation – is controlling in subsequent cases involving that constitutional issue.[151]

The Concluding paragraph of the Court's opinion poignantly encapsulates the Court's pronouncement:

> It is for Congress in the first instance go "determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled to much deference. [citing *Katzenbach v. Morgan*, 384 U.S. at 651] Congress' discretion is not unlimited, however, and the Courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.[152]

The Court's decision in *City of Boerne* is significant not only for its immediate impact on the validity of the RFRA, but also for its clear statement that the Court will closely guard congressional efforts to change the landscape of its decisions in the constitutional arena. Thus, while Congress may act to "correct" the Court's interpretations of its legislation,[153] it enjoys no such authority to "correct" the Court's constitutional interpretations. This is certainly not a

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[147] *Id.* at 535.
[148] *Id.*
[149] *Id.* at 535-36.
[150] *Id.* at 536 (citing *Marbury v. Madison*, 5 U.S. 137, (1803).
[151] *Id.*
[152] *Id.*
[153] For example, a portion of the Civil Rights Act of 1991, Pub. Law 102-166, 105 Stat. 1071, amended 42 U.S.C. § 703(k) to require the employer to bear the burden of proving business necessity of a practice having a disparate impact, effectively nullifying the Court's decision in *Ward's Cove Packing v. Antonio*, 490 U.S. 642 (1989).

new concept, inasmuch as the Constitution is not amenable to change through legislation. However, the breadth of the Court's explanation of its powers relative to Congress' and its application of those powers in *City of Boerne* can be seen as sweeping. The Court's subsequent application of these rules to the ADEA seems to reinforce this conclusion.[154]

III. APPLICATION OF FRAMEWORK TO THE ADEA: *KIMEL V. FLORIDA*

Congress enacted the Age Discrimination in Employment Act of 1967[155] to remedy perceived harmful employment discrimination against older workers. It made specific findings regarding the arbitrary use of age by employers to discriminate against older workers and concluded that such discrimination burdened commerce.[156] The purpose of the ADEA was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.[157] The Act's specific prohibitions based on age largely mirror those under Title VII of the Civil Rights Act of 1964 for race, color, sex, religion and national origin.[158]

The requirements of the ADEA were putatively made applicable to the States in 1974, when the definition of "employer" was amended to include a State and its political subdivisions, as well as an instrumentality thereof.[159] Apparently energized by the Court's decisions in other cases, particularly *Seminole Tribe* and *City of Boerne*, State defendants began to mount a challenge to congressional power to abrogate sovereign immunity under the ADEA. This led to a split among the Circuits as to whether Congress properly abrogated Eleventh Amendment

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[154] *See infra* Section III.
[155] Pub. Law 90-202, 81 Stat. 602, codified at 29 U.S.C. § 621 *et seq.*
[156] *See* 29 U.S.C. § 621(a).
[157] 29 U.S.C. § 621(b).
[158] *See*
[159] *See* Pub. L. 93-259 § 28(a)(2), 88 Stat. 74; 29 U.S.C § 630(b).

immunity under the ADEA.[160] The Court set about to resolve this split when it granted certiorari in *Kimel v. Florida Board of Regents.*[161]

In *Kimel*, the United States Court of Appeals for the Eleventh Circuit considered Congress' authority to abrogate State immunity under the ADEA and the ADA.[162] A majority of the court of appeals concluded that Congress had not properly abrogated State immunity under the ADEA.[163] Judge Edmondson based his conclusion on the fact that Congress had not clearly stated its intent to abrogate state immunity.[164] Judge Cox, in constituting a majority of the three-judge panel, concurred in the judgment that State immunity was not abrogated under the ADEA, but he based his conclusion on Congress' lack of authority to abrogate state immunity under the ADEA.[165]

The Court granted certiorari and considered only the issue of congressional abrogation of State immunity under the ADEA.[166] Ultimately, the Court affirmed the Eleventh Circuit's holding that Congress had not properly abrogated State immunity under the ADEA.[167] However, it based its decision on Congress' lack of authority to abrogate rather than its failure to clearly state its intention to do so.[168] Indeed, the Court first determined that Congress had clearly stated

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[160] *Compare Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2nd Cir. 1998); *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998); *Coger v. Board of Regents of the State of Tennessee*, 154 F.3d 296 (6th Cir. 1998); *Keeton v. Univ. of Nevada System*, 150 F.3d 1055 (9th Cir. 1998); *Scott v. Univ. of Mississippi*, 148 F.3d 493 (5th Cir. 1998); and *Goshtasby v. Board of Trustees of the Univ. of Illinois*, 141 F.3d 761 (7th Cir. 1998) (all holding that Congress validly abrogated State immunity under the ADEA) *with Humenansky v. Regents of the Univ. of Minnesota*, 152 F.3d 822 (8th Cir. 1998) (holding that the ADEA does not validly abrogate State immunity).

[161] ___ U.S. ___, 120 S. Ct. 631 (2000).

[162] 139 F.3d 1426 (11th Cir. 1998). The Court of Appeals actually consolidated the appeals of two other cases with that of Kimel.

[163] 139 F.3d at 1428.

[164] *Id.* at 1430-31.

[165] *Id.* at 1444 (Cox, J, concurring in part and dissenting in part).

[166] *Kimel*, 120 S.Ct. 631.

[167] *Kimel*, 120 S.Ct. at 650.

[168] *Id.*

its intention to abrogate Eleventh Amendment immunity before determining that it was not authorized to do so.[169]

Having found that Congress clearly evinced its intent to abrogate State immunity under the ADEA, the Court then turned to a discussion of its authority to do so.[170] The Court first noted that it had previously found that the ADEA was a valid exercise of Congress' power under the Commerce Clause and that it did not violate the principles of the Tenth Amendment.[171] It noted that it had not considered whether the ADEA was supported under Congress' power under § 5 of the Fourteenth Amendment in *Wyoming*.[172] Referring to its holding in *Seminole Tribe*, the Court reiterated the lack of congressional power to abrogate State immunity under the Commerce Clause.[173] The Court then recited its more recent holdings confirming that Congress cannot abrogate State sovereign immunity under Article I noting that, "if the ADEA rests solely on Congress Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers."[174]

The Court next turned to a discussion of the Fourteenth Amendment.[175] It began by restating that Congress is empowered to abrogate States' immunity under the thereunder.[176] After reciting provisions of §§ 1 and 5 of the Fourteenth Amendment, the Court cited heavily from *City of Boerne*, both for the proposition that § 5 is an affirmative grant of power to Congress and that such power is not without limit.[177] It noted that the RFRA failed as appropriate remedial legislation under § 5 of the Fourteenth Amendment both because the evidence of record upon

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[169] *Id.* at 640-642. Because this portion of the opinion is not critical to the Court's holding and is irrelevant to the issue of Congress' power to abrogate under the Fourteenth Amendment, it will not be discussed further.
[170] *Id.* at 643-50.
[171] *Id.* at 643 (citing *EEOC v. Wyoming*, 460 U.S. 223 (1983).
[172] *Id.*
[173] *Id.* (citing *Seminole Tribe*, 517 U.S., at 72-73).
[174] *Id. See supra* for further discussion of Court's decisions on Congress lack of power to abrogate under Article I.
[175] *Id.* at 644.
[176] *Id.* (citing *Fitzpatrick*, 427 U.S. 445).

which the Act was based "did not reveal a widespread pattern of religious discrimination" and because the Act was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as ... designed to prevent unconstitutional behavior."[178]

The Court also referenced its recent holding in *Florida Prepaid*, where it invalidated a congressional attempt to abrogate Eleventh Amendment immunity under the Patent and Plant Variety Protection Remedy Clarification Act.[179] In *Florida Prepaid*, the Court declined to uphold Congress' attempt to subject the States to private action for patent infringement because the action did not satisfy the congruence and proportionality test required under § 5 of the Fourteenth Amendment.[180] The Court based this conclusion on the lack of evidence of any pattern of patent infringement, much less those rising to constitutional violations, by the States.[181] While acknowledging that Congress' apparent objective of providing a uniform remedy for patent infringement – even as against the States – was proper under Article I, it concluded that it was insufficient to trigger the congressional power to abrogate State immunity under § 5 of the Fourteenth Amendment.[182]

Having completed its prelude of explaining how its recent decisions had limited congressional attempts at abrogating the Eleventh Amendment, the Court next applied its congruence and proportionality test to the ADEA, concluding that it was "not 'appropriate legislation' under § 5 of the Fourteenth Amendment."[183] It then outlined its treatment of age under the Constitution, noting that it had rejected challenges under the Equal Protection Clause

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[177] *Id.* (citing *City of Boerne*, 521 U.S. 507).
[178] *Id.* at 645 (quoting *City of Boerne*, 521 U.S. at 531-32) (internal quotations omitted).
[179] *Id.* (citing *Florida* Prepaid, 527 U.S. __, 119 S.Ct. 2199 (1999)).
[180] 120 S.Ct. at 645 (citing *Florida Prepaid*, 119 S.Ct. at 2207).
[181] *Id.* (citing *Florida Prepaid*, 119 S.Ct. at 2207).
[182] *Id.* (citing *Florida Prepaid*, 119 S.Ct. at 2211).
[183] *Id.*

based on age discrimination in all three cases in which it had considered them.[184] The Court then stated, "Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'"[185] The Court further observed that older persons did not have a "history of purposeful discrimination and that "[o]ld age does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it."[186] The Court therefore concluded that age – unlike race and gender – was not a suspect classification under the Equal Protection Clause.[187]

Following from its conclusion that age is not a suspect classification, the Court observed, "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[188] The rational relationship test, the Court continued, does not require the States to act with "razorlike precision" in devising age classifications to meet their legitimate interests.[189] The espoused test under rational relationship is one that accords great deference to the states, with the Court overturning State action only if "so unrelated to the achievement of any combination of legitimate purposes" as to compel the conclusion that such action was irrational.[190] The Court's decisions in *Murgia*, *Bradley* and *Gregory* illustrate the deference it affords age classifications under the Equal Protection Clause.[191] In those cases, the Court upheld mandatory retirement ages for Massachusetts State Police Officers, federal Foreign Service officers and Missouri State judges,

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[184] *Id.* (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam)).
[185] *Id.* (quoting *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)).
[186] *Id.* (quoting *Murgia*, 427 U.S. 313-14 (internal quotations omitted)).
[187] *Id.* at 646 (citing *Gregory*, 501 U.S. at 470).
[188] *Id.*
[189] *Id.*
[190] *Id.* (quoting *Bradley*, 440 U.S. at 97 (internal quotations omitted)).
[191] *Id.*

respectively, notwithstanding that there were clearly individuals fully capable of continued service that would be forced into retirement in each situation.[192]

Having reviewed and reaffirmed its deferential treatment of age classifications, the Court then summarized why the ADEA could not overcome the Eleventh Amendment:

> Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." [*City of Boerne*, 521 U.S. at 532] The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard. The ADEA makes unlawful, in the employment context, all "discriminat[ion] against any individual ... because of such individual's age." 29 U.S.C. § 623(a)(1).[193]

The Court further rejected assertions that the Act's exceptions have the effect of prohibiting only arbitrary age discrimination, as does the Equal Protection Clause.[194] The Court noted that the ADEA's bona fide occupational qualification (BFOQ) defense under § 623(f)(1) – permitting the use of age as a proxy for other qualifications in limited circumstances – is a "far cry from the rational basis standard we apply to age discrimination under the Equal Protection Clause."[195] The Court continued by noting that State discrimination based on age – even if ultimately defensible as a BFOQ – would make conduct that would be permissible under the Equal Protection Clause prima facie unlawful.[196] It also noted that the BFOQ defense – as interpreted by its prior decisions – was quite narrow, requiring the employer to demonstrate either "a substantial basis for believing that all or nearly all employees above an age lack the qualifications required for the position [or that] it is highly impractical for the employer to insure

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[192] *Id.* (citations omitted).
[193] *Id.* at 647.
[194] *Id.*
[195] *Id.*
[196] *Id.* (citing *Western Airlines v. Criswell*, 472 U.S. 400, 422 (1985)).

by individual testing that its employees will have the necessary qualifications for the job."[197] "Measured against the rational basis standard of our equal protection jurisprudence, the ADEA plainly imposes substantially higher burdens on state employers."[198] Thus, the Court concluded that the ADEA's requirements as applied to state employers, while not absolute, impose standards "akin to [the Court's] heightened scrutiny [ ] under the Equal Protection Clause."[199]

The Court did not stop at finding that the ADEA "prohibit[ed] very little conduct likely to be held unconstitutional," noting that "[d]ifficult and intractable problems often require powerful remedies." The Court reiterated that Congress was not limited simply to reaching unconstitutional conduct under § 5, but that "reasonably prophylactic legislation" was within the congressional purview.[200] It remained, the Court said, to determine whether the ADEA represented such legislation.[201] Noting that one way to make that determination is to examine the legislative record upon which the action was based, the Court found the record that served as the basis for extension of the ADEA to the States wanting.[202] The Court observed that Congress did not identify a pattern of age discrimination by the States, nor any discrimination of a constitutional dimension and it labeled application of the ADEA to the States "an unwarranted response to a perhaps inconsequential problem."[203] Moreover, the Court described Congress' finding of substantial age discrimination in the private sector as "beside the point" in assessing the validity of the Act as against the States.[204]

Finally, the Court stated that its review of the legislative record revealed that "Congress had virtually no reason to believe that state and local governments were unconstitutionally

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[197] *Id.* at 648 (quoting *Criswell*, 477 U.S. at 422-23 (internal quotations omitted)).
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.* (citations omitted).
[203] *Id.* at 648-49.

discriminating against their employees on the basis of age."[205] Because Congress did not find any pattern of unconstitutional discrimination based on age, it "had no reason to believe that broad prophylactic legislation was necessary in this field."[206] "In light of the indiscriminate scope of the Act's substantive requirements and the lack of evidence of widespread unconstitutional age discrimination by the States," the Court held that Congress was not authorized to abrogate State immunity under § 5 of the Fourteenth Amendment.[207]

IV. DISABILITY AND ABROGATION OF STATE IMMUNITY UNDER THE ADA

A. Prior Constitutional Treatment of Disability

The Court has considered disability in the context of a challenge under the Equal Protection Clause only once in *City of Cleburne v. Cleburne Living Center*.[208] In *Cleburne*, a group home for mentally retarded residents sought to locate in an area of Cleburne, Texas that was zoned R-3 for residential use.[209] A City ordinance required a special use permit for, inter alia, "hospitals for the insane or feeble-minded."[210] The City classified the group home as a hospital for the feeble-minded, and the City Council voted to deny a special use permit after a hearing on the matter.[211]

The plaintiff then sued the City in Federal District Court, alleging that the ordinance was facially invalid under the Equal Protection Clause because it discriminated against the mentally retarded.[212] The District Court – notwithstanding its conclusion that the City treated the group home differently than any other similar arrangement because its residents would be mentally

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[204] *Id.*
[205] *Id.*
[206] *Id.* at 650.
[207] *Id.*
[208] 473 U.S. 432 (1985).
[209] *Cleburne*, 473 U.S. at 435. The R-3 zone permitted most multiple occupancy residences, including apartments, boarding houses, fraternity and sorority houses and apartment hotels. *Id.* at 436 n. 3.
[210] *Id.* at 436.
[211] *Id.* at 437.
[212] *Id.*

retarded – found that the ordinance was valid both on its face and as applied.[213] In reaching this conclusion, the District Court applied rational basis review because it determined that no fundamental right was implicated and that mental retardation was not a suspect or quasi-suspect classification.[214]

The Court of Appeals reversed the District Court.[215] It determined that mental retardation was a quasi-suspect classification, warranting heightened scrutiny.[216] That court concluded that the ordinance "did not substantially further any important governmental interests."[217]

The Supreme Court affirmed the Court of Appeals' finding that the ordinance violated the Equal Protection Clause.[218] In doing so, however, it declined to recognize the mentally retarded as either a suspect or quasi-suspect class and applied a nominal rational basis standard of review.[219]

The Court began its exposition with a discussion of the Equal Protection Clause of the Fourteenth Amendment, noting its mandate that States treat similarly situated persons alike.[220] Noting Congress' enforcement power under § 5, the Court stated that absent congressional actions the courts determine the validity of official actions when challenged under equal protection.[221] The Court then recited the "general rule" that such official action is presumptively valid and will be upheld if it is rationally related to a legitimate state interest.[222] The Court particularly referenced the "wide latitude" afforded to social and economic legislation, stating

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[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.* at 450.
[219] *Id.* at 442.
[220] *Id.* at 439 (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).
[221] *Id.* at 440
[222] *Id.* (citing *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)).

that "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."[223]

The Court next addressed the major exception to the general rule – classifications based on race, alien status or national origin.[224] "These factors are so seldom deemed relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others."[225] Because of this, the Court noted, actions based on such classifications are subjected to strict scrutiny and will be sustained only if "suitably tailored to serve a compelling state interest."[226] The Court also noted that strict scrutiny applies when a fundamental constitutional right is implicated.[227]

The Court next discussed the other area in which it had applied heightened scrutiny – gender based classifications – noting that gender "generally provides no sensible ground for differential treatment.[228] "What differentiates sex from such nonsuspect statuses as intelligence or physical disability ... is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."[229] Because classifications based on gender "likely reflect outmoded notions of the relative capabilities of men and women" they will be upheld only where "substantially related to a sufficiently important governmental interest."[230]

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[223] *Id.* (citations omitted).
[224] *Id.*
[225] *Id.*
[226] *Id.* (citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham v. Richardson*, 403 U.S. 365 (1971)).
[227] *Id.* (citing *Kramer v. Union Free School Dist.* 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969)).
[228] *Id.*
[229] *Id.* at 440-41 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973 (purality opinion) (omissions in original)(internal quotations omitted)).
[230] *Id.* at 441 (citing *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976)). The Court also made passing reference to its application of "somewhat heightened scrutiny" to classifications based on illegitimacy. *Id.* (citing *Mills v. Habluetzel*, 456 U.S. 91 (1982)).

The court next contrasted classifications based on age – a category in which it did not apply a test of heightened scrutiny.[231] The Court quoted *Murgia*[232] in explaining its assessment of age classifications: While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[233] In explaining its rationale, the Court observed, "[W]here individuals in the group affected by the law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with respect to the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued."[234]

Applying these principles, the Court concluded that the Court of Appeals erred in labeling mental retardation as a suspect classification.[235] Because mental retardation does affect the ability of those so afflicted to function in the world and because those who fall into the category of mentally disabled are a diverse group, the Court observed that how they as a group should 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."[236]

The Court further observed that the national and State legislative response to the concerns of the mentally retarded showed that lawmakers have been "addressing their difficulties in a

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[231] *Id.*
[232] 427 U.S. 307, 313.
[233] 473 U.S. at 441 (quoting *Murgia*, 427 U.S. at 313).
[234] *Id.* at 441-42.
[235] *Id.* at 442.
[236] *Id.* at 443.

manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[237] The Court noted the passage of federal legislation, including the Rehabilitation Act of 1973,[238] the Developmental Disabilities Bill of Rights[239] and the Education of the Handicapped Act,[240] all of which evinced an intention to assist the mentally retarded rather than to discriminate against them.[241] The State of Texas also adopted legislation protecting the mentally disabled and giving them certain rights, including the right to live in a group home.[242] The Court observed that such state and federal measures "indicates that that governmental consideration of [the differences of the mentally retarded] in the vast majority of situations is not only legitimate but also desirable."[243]

The Court rejected the argument that legislation designed to benefit the mentally retarded would withstand heightened scrutiny, noting that the proper inquiry was whether "heightened scrutiny is mandated in the first instance."[244] The Court further observed that legislation designed to benefit the mentally retarded could in some instances be perceived to disadvantage them, and it refused to jump into that inquiry under heightened scrutiny.[245]

The Court also pointed out that the legislative enactments benefiting the mentally disabled would not have occurred absent public support, negating the claim that such persons are

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[237] *Id.*
[238] 29 U.S.C. § 794. This provision prohibits discrimination against the disabled, including the mentally retarded, by programs that receive federal funds.
[239] 42 U.S.C. §§ 6010 (1) and (2). Mandates appropriate treatment, services and habilitation in the least restrictive appropriate setting for the mentally retarded.
[240] 20 U.S.C. § 1412(5)(B). Conditions receipt of federal education funds on requirement that children with disabilities, including mental retardation, receive an education integrated to the maximum extent possible with nondisabled children. This is now titled as the Individuals with Disabilities in Education Act (IDEA).
[241] 473 U.S. at 443.
[242] *Id.* (citing the Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat. Ann., Art. 5547-300, § 7 (Vernon Supp. 1985)).
[243] *Id.* at 444.
[244] *Id.*
[245] *Id.*

politically powerless.[246] This distinguished the mentally retarded from other groups that had merited heightened scrutiny.[247] The Court also deemed it significant that if it were to apply heightened scrutiny to mental disability, "it would be difficult to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large."[248] Citing as examples of such groups "the aging, the disabled, the mentally ill and the infirm," the Court espoused its reluctance to "set out on that course."[249]

Having determined that classifications based on disability warranted only rational review the Court turned to the ordinance in dispute.[250] The Court noted that if denial of the special use permit in this case deprived the home's residents of the equal protection of the laws it would not inquire into the facial validity of the ordinance.[251] It then framed the issue as whether the City could require a special use permit in an R-3 zone when it did not require such a permit for any other healthcare or multiple-dwelling facilities.[252] While noting its previous acknowledgment that the mentally retarded are different from those who would occupy the facilities allowed in the R-3 zone without restriction, the Court labeled the difference as "largely irrelevant unless the [ ] home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses, such as boarding houses and hospitals, would not."[253] Finding no evidence in the record to support such a threat, the Court affirmed the finding that the ordinance was

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[246] *Id.* at 445.
[247] *Id.*
[248] *Id.*
[249] *Id.* at 446.
[250] *Id.* at 447
[251] *Id.*
[252] *Id.* at 448.
[253] *Id.*

invalid as applied.[254] The Court rejected the City's advanced reasons for the ordinance, which included the negative attitude of owners of adjacent property to the home and fears of elderly neighborhood residents, noting that such unsubstantiated fears did not justify different treatment.[255] It added that the "City may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic."[256] The Court also rejected the City's concerns about the location of the home across the street from a junior high school and concomitant fears that students would harass the residents.[257] Noting that the school was attended by "about 30 mentally retarded students," the Court refused to rely "on such vague, undifferentiated fears" to justify what would otherwise violate equal protection.[258] The Court dismissed out of hand the City's other expressed concern with the home's proposed location – that it was on a five hundred year flood plain – noting that that concern would apply equally to nursing and convalescent homes and other such facilities that did not require a special use permit under the ordinance.[259]

The Court addressed the City's final concern – the size of the facility and the number of residents – by stating that it was irrational to differentiate this facility from one that was the same in every other respect except that it did not house the mentally disabled and would therefore be allowed without restriction.[260] The Court also noted that the home would be subject to state and federal standards for such homes and that there was no evidence in the record to indicate that its proposed size was problematic.[261]

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[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.* at 449.
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.*

The Court summarized its assessment of the ordinance in question like this: "The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the [ ] facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law."[262]

In a concurring opinion, Justice Stevens expressed his disapproval of tiered-scrutiny under the Equal Protection Clause and stated that "the word 'rational'—for me at least – includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially."[263] He rather favored approaching all equal protection challenges by asking the same questions – what class is harmed; has that class been historically disfavored; what is the purpose of the law; and do characteristics of the class in question justify their disparate treatment – and recognizing that class differences sometimes will justify distinctions and sometimes not do so.[264]

Three Justices – Marshall, Brennan and Blackmun – dissented from the portion of the opinion that concluded that classifications based on mental retardation warranted only rational basis review.[265] The dissent criticizes the Court even for reaching the standard of review where it affirms the Court of Appeals' holding that the ordinance was invalid.[266] Further the dissent found "the Court's heightened-scrutiny discussion ... even more puzzling given that [the] ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny."[267] According to the dissent, the rational-basis test

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[262] *Id.* at 450.
[263] *Id.* at 452 (Stevens, J., concurring). Chief Justice Burger joined this opinion.
[264] *Id.* at 453-54.
[265] *Id.* at 456 (Marshall, J., concurring in the judgment in part and dissenting in part).
[266] *Id.* at 456-57.
[267] *Id.* at 458.

employed by the court was "most assuredly" not the same rational-basis review theretofore utilized.[268] After a lengthy review of the historical discrimination the mentally retarded have been subjected to, the dissent concludes, "heightened scrutiny is surely appropriate."[269]

As the dissenters indicate, *Cleburne* is a departure from the Court's usual application of rational basis review. Some commentators have described the Court's review in *Cleburne* as one of "heightened rational review.[270] Although *Cleburne* dealt only with classifications based on mental retardation, it seems likely that its principles would apply likewise to any classification based on disability generally. Thus, at least the Court's stated standard of review for disability classifications appears to be rational basis review. This may well play into the Court's ultimate assessment of the ADA's attempt to abrogate State immunity.

B. Congressional Abrogation under the ADA

The Americans with Disabilities Act of 1990[271] could easily be characterized as the most sweeping piece of civil rights legislation since the Civil Rights Act of 1964. The ADA was the first integrated congressional effort to provide protection to the disabled, following a long period in which such legislation could appropriately be described as piecemeal.[272] The ADA expanded coverage to sectors that had theretofore not been subjected to prohibitions of discrimination based on disability. The ADA is divided into five titles. Title I addresses discrimination in employment.[273] Title II covers public services and transportation.[274] Title III applies to public accommodations and services operated by private entities.[275] Title IV addresses

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[268] *Id.*
[269] *Id.* at 473.
[270] References to such descriptions
[271] 42 U.S.C. § 12101 et seq.
[272] *See, e.g.* [various acts relating to disability].
[273] *See* 42 U.S.C. §§ 12111 – 12117.
[274] *See* 42 U.S.C. §§ 12131 – 12150.
[275] *See* 42 U.S.C. §§ 12181 – 12189.

telecommunications services for the hearing and speech impaired[276] and Title V contains miscellaneous provisions of the Act.[277]

Congress expressed its intent to cover States under the ADA under two of its titles. First, the definition of "employer" under Title I means "a person engaged in an industry affecting commerce.[278] Further, "person" is to be accorded the same meaning it has under 42 U.S.C. § 2000e, which defines person to include "one or more individuals, governments, governmental agencies [or] political subdivisions."[279] Moreover, the "United States, a corporation wholly owned by the government of the United States, or an Indian tribe" are excluded from the Act's coverage, but no similar exclusion is given to the States.[280] Thus, it is clear that Congress intended to include the States as employers under the ADA. The other area that Congress intended to apply to the States is Title II. Under Title II of the ADA, a public entity includes "any State or local government and "any other department, agency, ... or other instrumentality of a State or States or local government."[281] The Act then states that no "qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a *public entity*, or be subjected to discrimination by such entity."[282]

Because Congress meant to make the States subject to private lawsuits under Titles I and II of the Act, it is worth noting in more detail the requirements imposed by these Titles. Title I prohibits employers from discriminating against a qualified individual with a disability.[283] A qualified individual with a disability is defined as someone who is disabled and can perform the

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[276] *See* 42 U.S.C. § 225.
[277] *See* 42 U.S.C. §§ 12201 – 12213.
[278] 42 U.S.C. § 12111(5)(A).
[279] 42 U.S.C. §§ 12111(7), 2000e.
[280] 42 U.S.C. § 12111(5)(B)(i).
[281] 42 U.S.C. §§ 12131(1)(A) and (B).
[282] 42 U.S.C. § 12132 (emphasis added).

essential functions of the job, with or without reasonable accommodation.[284] The Act defines discrimination in § 12112(b). In addition to the more "traditional" forms of discrimination – such as limiting segregating or classifying employees or applicants based on disability,[285] using standards or criteria that screen out or tend to screen out the disabled (unless job related and required by business necessity),[286] and denying benefits or opportunities to an person based on their association with a disabled person[287] - the Act also defines discrimination as failure to make reasonable accommodation.[288] This requirement is subject to undue hardship – an affirmative defense of the employer.[289]

Title II contains similar requirements for public entities. The Department of Justice Regulations define discrimination by public entities.[290] While the requirements set forth in the Regulations as somewhat more intricate, they also prohibit various forms of "traditional" discrimination.[291] Additionally, they define discrimination as failure to "make reasonable modifications in policies, practices or procedures" unless the entity demonstrates that such modification would "fundamentally alter" the program in question.[292]

Congress clearly intended to include States within the Act's coverage as outlined above. This does not resolve, however, congressional intent to subject States to private suits.

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[283] 42 U.S.C. § 12112.
[284] 42 U.S.C. § 12111(8). "Essential functions" is not precisely defined in the Act, but the EEOC regulations, 29 C.F.R. § 1630.2(n), list factors to consider in determining which functions are essential. At bottom, it means those tasks that must be performed by the incumbent in that job. 42 U.S.C. § 12111(9) defines reasonable accommodation as modification to facilities to make them accessible and changes in policies, schedules or equipment to allow the person to do the job.
[285] 42 U.S.C. § 12112(b)(1).
[286] 42 U.S.C. § 12112(b)(3), (6).
[287] 42 U.S.C. § 12112(4).
[288] 42 U.S.C. § 12112(5).
[289] Id. Undue hardship is defined in § 12111(10) of the Act as requiring "significant difficulty or expense" based on factors set out thereunder relating to the size and resources of the entity in question.
[290] 28 C.F.R. § 35.130.
[291] *Id.*
[292] 28 C.F.R. § 35.130(b)(7).

Recognizing this, Congress went much further in crystallizing its intent on this issue by including the following provision in Title V of the ADA:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a 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.[293]

It is difficult to imagine a clearer expression of congressional intent to abrogate State immunity under the ADA. Perhaps Congress considered the Court's earlier pronouncements to craft what it considered to be a "bullet proof" expression of its intent. Certainly, it seems that it has done so. Of course, a clear statement of congressional intent is but one component necessary to achieve valid abrogation under the Court's decisions.[294] The other element – valid authority pursuant to § 5 of the Fourteenth Amendment – will certainly be the focus of the Court's ultimate assessment of abrogation under the ADA.[295]

Congress undoubtedly saw itself as acting under its proper authority to abrogate State immunity under the ADA. It is worth noting, however, that the ADA was enacted after *Union Gas*[296] and before *Seminole Tribe*.[297] Thus, at that time the Court had at least arguably endorsed congressional power to abrogate under the Commerce Clause. *Seminole Tribe* clearly repudiated even the argument that Congress could abrogate Eleventh Amendment immunity under any Article I power, leaving as a practical matter its power under § 5 of the Fourteenth

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[293] 42 U.S.C. § 12202.
[294] *See supra* Sections II and III.
[295] *See, e.g., City of Boerne*, 521 U.S. 507. *See also supra* Sections II and III.
[296] 491 U.S. 1 (1989).
[297] 517 U.S. 44 (1996).

Amendment.[298] This does not compel the conclusion, however, that Congress did not satisfy what would later become the Court's plumbline of abrogation. Indeed, Congress was careful to call upon the broadest reach of its power, stating its intent "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by [the disabled]."[299]

Congress made extensive findings in enacting the ADA and included them within the Act's provisions.[300] Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and ... such forms of discrimination ... continue to be a serious and pervasive societal problem.[301] It found further that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, ... and access to public services."[302] Congress found further that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination" and that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, ... exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."[303] Congress continued by finding that various evidence "documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."[304] Congress next found that the disabled "are a discrete and

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[298] 517 U.S. at 65.
[299] 42 U.S.C. § 12101(b)(4).
[300] *See* 42 U.S.C. § 12101(a).
[301] 42 U.S.C. § 12101(a)(2).
[302] 42 U.S.C. § 12101(a)(3).
[303] 42 U.S.C. §§ 12101(a)(4) and (5).
[304] 42 U.S.C. § 12101(a)(6).

insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness within our society, based on characteristics that are beyond [their] control ... and resulting from stereotypic assumptions" about their abilities.[305] Finally, Congress found that "the Nation's proper goals" for the disabled "are to assure equality of opportunity, full participation, independent living, and economic self sufficiency" for them and that continued discrimination denies the disabled "the opportunity to compete on an equal basis" and "costs the United States billons of dollars."[306]

Congress also stated its purpose for enacting the ADA: "[T]o provide a clear and comprehensive national mandate for the elimination of discrimination" against the disabled, "to provide clear, strong consistent, enforceable standards addressing discrimination" against the disabled, and "to ensure that the Federal Government plays a central role in enforcing [those] standards."[307] As referenced above, Congress also stated its purpose to invoke the full extent of its constitutional authority.[308]

C. Application of Eleventh Amendment Jurisprudence to the ADA

1. Prior Decisions

Prior to the Court's ruling in *Kimel*, six Courts of Appeal had upheld abrogation of State immunity under the ADA.[309] Additionally, a panel of the First Circuit had indicated in *dicta* that it would have upheld the validity of abrogation under the ADA if the issue were properly before

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[305] 42 U.S.C. § 12101(a)(7).
[306] 42 U.S.C. §§ 12101(a)(8) and (9).
[307] 42 U.S.C. § 12101(b).
[308] 42 U.S.C. § 12101(b)(4).
[309] *See Muller v. Costello*, 187 F.3d (2nd Cir. 1999); *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998); *Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481 (7th Cir. 1997); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997); *Martin v. Kansas*, 190 F.3d 1120 (10th Cir. 1999); *Kimel v. Florida Board of Regents*, 138 F.3d 1426 (11th Cir. 1998).

it.[310] Conversely, the Fourth[311] and Eighth[312] Circuits had held that Congress exceeded its authority in attempting to abrogate Eleventh Amendment immunity under the ADA.

The Eighth Circuit initially held that Congress did not validly abrogate Eleventh Amendment immunity under Title II of the ADA in *Alsbrook v. City of Maumelle*.[313] The facts of the case relevant to the Eleventh Amendment question involved a claim by an individual who wanted to be a law enforcement officer against the State of Arkansas and the Arkansas Commission on Law Enforcement Standards and Training (ACLEST) – a state agency.[314] ACLEST set standards for certification of law enforcement officers within the State, and the plaintiff challenged ACLEST's requirement that officers have visual acuity correctable to 20/20 in each eye.[315]

The district court denied the State's motion for summary judgment on the ADA claim, holding that the ADA was properly enacted pursuant to congressional authority under the Fourteenth Amendment, and a three-judge panel affirmed that decision on appeal.[316] The Circuit Court then vacated the panel's decision, granted rehearing en banc and reversed.[317] The Court of Appeals recited the general rule of the Eleventh Amendment and then turned to whether the ADA satisfies the two-prong test of *Seminole Tribe* – expression of clear intent to abrogate and a valid exercise of power to abrogate.[318] The Court of Appeals quickly dispensed with the first prong by noting that Congress "unequivocally expressed" its intent to abrogate.[319]

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[310] *See Torres v. Puerto Rico Tourism Co.*, 175 F.3d 1, 6 n. 7 (1st Cir. 1999).
[311] *See Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999). This decision addressed the issue of charging the disabled for handicapped parking placards and may have limited applicability generally because it involved a taxation issue.
[312] *See Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. Granted in part, 120 S.Ct. 1003, cert dismissed, 120 S.Ct. 1265 (2000).
[313] 184 F.3d 999. The Court of Appeals later extended its holding to Title I of the ADA, adopting the same reasoning, in *DeBose v. Nebraska*, 186 F.3d 1087 (8th Cir. 1999).
[314] *Alsbrook*, 184 F.3d at 1002.
[315] *Id.*
[316] *Id.* at 1004.
[317] *Id.*
[318] *Id.* at 1005-06 (citations omitted).
[319] *Id.* at 1006.

Turning to the second prong, the court noted Congress' recitation that it was acting pursuant to its powers under the Fourteenth Amendment in enacting the ADA.[320] Noting that such a statement was not sufficient, the court reframed the issue as: "[D]oes Title II of the ADA represent a proper exercise of Congress's Section 5 powers 'to enforce' by 'appropriate legislation' the constitutional guarantees of the Fourteenth Amendment, in particular, the Equal Protection Clause?"[321] The court then recited the Supreme Court's principles of abrogation outlined in *City of Boerne*.[322] Specifically, the court referred to the admonitions that Congress' powers under § 5 are broad but not unlimited and that legislation enacted under that Section must be remedial.[323] According to the Eighth Circuit, the ADA failed the Court's "congruence and proportionality" test.[324] In response to the assertion that Congress made detailed findings of a serious and pervasive problem of discrimination against the disabled in passing the ADA, the court replied that "the state of the legislative record, alone, cannot suffice to bring Title II within the ambit of Congress's Section 5 powers if Title II is not 'adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against.'"[325]

Referencing the Supreme Court's holding in *Cleburne* that classifications based on mental retardation were to be evaluated only for a rational basis, the court concluded that Title II of the ADA did not "enforce" the Supreme Court's "rational relationship standard."[326] While acknowledging that the § 5 enforcement power is not limited only to suspect classifications, the court nevertheless observed that "Title II does far more than enforce [Cleburne's] rational

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[320] *Id.* (citing 42 U.S.C. § 12101(b)(4)).
[321] *Id.* (citing *City of Boerne*, 521 U.S. 507, 517 (1997)).
[322] *Id.* at 1007.
[323] *Id.* (citing *City of Boerne*, 521 U.S. at 518, 521).
[324] *Id.* (citing *City of Boerne*, 521 U.S. at 520).
[325] *Id.* at 1008 (quoting *City of Boerne*, 521 U.S. at 532).
[326] *Id.*

relationship standard."[327] The court noted that a State's program, even if rationally related to a legitimate State interest, would not survive under Title II if it did not make reasonable modifications for the disabled, subject to the fundamental alteration defense.[328] The court further observed that Title II did not comport with the Supreme Court's intent to endow governmental bodies with "flexibility and freedom" to "shape remedial efforts" for the disabled under *Cleburne*.[329] In response to the argument that the Supreme Court recognized Congress' ability to prohibit conduct that is not itself unconstitutional in an effort to remedy constitutional violations, the court responded that such efforts were limited to rectifying existing constitutional violations, as it did with voting rights.[330] The Circuit continued, "We do not think that the legislative record of the ADA supports the proposition that most state programs and services discriminate arbitrarily against the disabled. Indeed, all states in this circuit have enacted comprehensive laws to combat discrimination against the disabled, many of them [before] the ADA."[331] Based upon these findings, the Eighth Circuit concluded that congress had exceeded its enforcement power under the Fourteenth Amendment when it attempted to abrogate the Eleventh Amendment in Title II.[332]

Four judges dissented from the Circuit Court's finding that Congress did not properly abrogate State immunity under the ADA.[333] Even accepting the premise that Congress could not expand the guarantees of the Fourteenth Amendment, the Dissent asserted that Congress did not exceed its authority under § 5 when it enacted Title II of the ADA because "protection against disability-based discrimination is a well-established Fourteenth Amendment equal protection

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[327] *Id.* at 1009.
[328] *Id.* (citing 42 U.S.C. § 12131(2); 28 C.F.R. § 35.130(b)(7)).
[329] *Id.*
[330] *Id.* (citing *Fitzpatrick*, 427 U.S. at 455).
[331] *Id.* at 1009-10 (citations omitted).
[332] *Id.*
[333] *Id.* at 1012 (McMillian, J., concurring in part and dissenting in part).

guarantee."[334] The dissent also contested the Circuit's assertion that Title II does more than merely enforce the rational relationship standard for disability discrimination outlined in *Cleburne*.[335] The Dissent then referenced the same language from *City of Boerne* that the majority had cited: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power ... even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[336] Finding the majority's interpretation of that reference too circumscribed, the dissent expressed its confidence that the "Supreme Court's reference to deterrent legislation was both intentional and meaningful because [*City of Boerne*] is replete with references to Congress's authority to deter or prevent constitutional violations."[337] The dissent then turned to the "congruence and proportionality" test as it relates to Title II.[338] It contrasted the Supreme Court's assessment of the RFRA's lack of support in the legislative record in *City of Boerne* with the legislative record supporting the ADA.[339] Reciting the congressional findings included in the ADA,[340] the dissent noted the undisputed "extensive legislative record" upon which the Act was based.[341]

Outlining the requirement of Title II that public entities make reasonable modifications to rules, policies or practices in their programs or activities where an individual with a disability would meet the eligibility requirements of such programs or activities with such modifications,

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[334] *Id.*
[335] *Id.* at 1013.
[336] *Id.* (quoting *City of Boerne*, 521 U.S. 507, 518).
[337] *Id.* (quoting language from *City of Boerne*, 521 U.S. at 519 ("the line between [remedial measures] and measures that make a substantive change in the governing law is not easy to discern"); at 530 (" preventive rules are sometimes appropriate remedial measures").
[338] *Id.* at 1014.
[339] *Id.* at 1014-15.
[340] *See* 42 U.S.C. § 12101(a).
[341] 184 F.3d at 1015.

the dissenters found this requirement permissible.[342] "These remedial provisions bear a congruent relationship to the constitutional injury to be remedied or deterred because they specifically address discriminatory treatment toward individuals with disabilities."[343] Finally, the dissent rejected the majority's assertion that the legislative record did not "support[] the proposition that most state programs and services discriminate arbitrarily against the disabled."[344] The dissent disputed the notion that Congress was required to include in the record evidence that "most state programs or services" were the cause of the targeted constitutional injury. Moreover, the dissent cited the congressional finding of persistent discrimination against the disabled in "such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[345] In the view of the dissent, the fact that each of these areas is controlled to some extent by state and local government is sufficient to for the inference that Congress found these entities to some degree responsible for the "constitutional injury the ADA is designed to remedy and deter."[346]

2. Post-*Kimel*

The Seventh Circuit was the first Court of Appeals to infer from *Kimel* that the Supreme Court's announced principles regarding the ADEA applied equally to the ADA.[347] In *Erickson*, a three-judge panel with one judge dissenting held that Congress' attempted abrogation under the ADA was not a proper exercise of its Fourteenth Amendment authority under *Kimel*.[348]

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[342] *Id.* (citing 42 U.S.C. § 12131).
[343] *Id.*
[344] *Id.* at 1016 (citing Id. at 1009-10).
[345] *Id.* (citing 42 U.S.C. § 12101(a)(3)).
[346] *Id.*
[347] *See Erickson v. Bd. of Governors of State Colleges and Universities for Northeastern Illinois,* 207 F.3d 945 (7th Cir. 2000).
[348] *Erickson*, 207 F.3d at 952.

Erickson involved a State university employee who was fired for repeated absences in conjunction with her failed efforts to conceive through medical treatment.[349] She sued the university under both the Pregnancy Discrimination Act[350] and the ADA, and the university appealed the circuit court's denial of its motion to dismiss the ADA claim based on the Eleventh Amendment.[351]

The court noted that it had rejected an Eleventh Amendment challenge to Title II of the ADA shortly before *City of Boerne* in an opinion that analogized the ADA to the ADEA.[352] "*Kimel* shows that if our analogy to the ADEA is precise, then *Crawford* is no longer authoritative."[353] The court observed two propositions established by *Kimel* on the issue of whether the ADA is legislation that enforces the Fourteenth Amendment – that where a classification is reviewed for equal protection violations under a rational basis test the requirements of the Act largely go beyond the constitutional requirements, and that there is no need for prophylactic legislation to catch violations of the rational basis test.[354] The court noted that these principles – true of the ADEA – were true of the ADA as well.[355]

Next, the court referenced *Cleburne* for the proposition that "[a] rational-basis test applies to distinctions on the ground of disability, just as to distinctions on the ground of age."[356] Again citing *Cleburne*, the court said, "Consideration of an employee's disabilities is proper, so far as the Constitution is concerned."[357] The court then observed, "it is rational for a university to prefer someone with good vision over someone who requires the assistance of a reader. The

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[349] *Id.* at 947.
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[351] *Id.*
[352] *Id.* at 948 (citing *Crawford v. Indiana Dept of Corrections*, 115 F.3d 481 (7th Cir. 1997)).
[353] *Id.*
[354] *Id.*
[355] *Id.* at 949.
[356] *Id.* (citation omitted).

sighted person can master more of the academic literature ... improving his chance to be a productive scholar, and is also less expensive (because the university need not pay for the reader)."[358] While noting that a comparison of the ADA's "undue hardship" defense to the BFOQ defense in the ADEA was "an interesting question," the court declined to undertake such a comparison because "both statutes presumptively forbid consideration of attributes that the Constitution permits states to consider" and shift the burden to the State to prove that such consideration is legitimate.[359] This effort to make distinction upon a characteristic that is constitutionally permissible "prima facie unlawful" causes the ADA to suffer the same defect observed by the *Kimel* Court in the ADEA.[360]

The court next characterized the "main target" of Title I of the ADA as "an employer's rational consideration of disabilities" and stated that such rational discrimination is wholly permissible under a constitutional scheme that "condemns only irrational distinctions based on disabilities."[361] The court declined to give any weight to the *Kimel* Court's observation that heightened scrutiny for age-based discrimination was unwarranted because everyone, if they lived long enough, would experience it.[362] Rather, the court observed that the ADA was sweeping legislation addressing all manner of disabilities, regardless of their duration or prognosis: "One can imagine an argument under § 5 for a federal law dealing with discrimination against persons with life-long disabilities, but the ADA is not such a law—not

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[357] *Id.* (citing *Cleburne*, 473 U.S. at 444 ("governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable")).
[358] *Id.*
[359] *Id.*
[360] *Id.*
[361] *Id.*
[362] *Id.* at 950 (citing *Kimel*, 120 S.Ct. at 645).

only because it extends beyond permanently disabled persons, but also because 'discrimination' as the ADA defines it ... has little in common with 'discrimination' in constitutional law."[363]

Next, the court declared the ADA a "cousin to the RFRA" because both "replace the Constitution's approach with a prohibition on disparate impact and jetties on neutrality in favor of accommodation."[364] Further, the court declared that the ADA is the "more adventuresome" of the statutes because the Equal Protection Clause does not prohibit rational discrimination against the disabled while the Free Exercise Clause prohibits all discrimination against religious practices.[365] This, the court said, made the ADA "harder to justify than the RFRA" because it is "outside the boundaries of constitutional discourse in a way that the RFRA was not."[366]

In addressing whether the ADA could be upheld as prophylactic legislation, the court noted that the Act's requirement for accommodation, prohibition on disparate impact, and disregard of an employer's intent make it "harder than the ADEA to characterize as a remedial measure."[367] The court concluded that Congress' findings in support of the ADA, just as those for the ADEA, did not include any State-sponsored discrimination in the constitutional sense. The court compared the record to that in *Kimel*, stating that it failed to show "that states have been able to disguise forbidden discrimination as the permissible kind," as was the case with the record supporting the Voting Rights Act.[368]

In conclusion, the court stated that the ADA does not enforce the Fourteenth Amendment and that abrogation of State immunity is therefore not appropriate. [369]

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[363] *Id.* Indeed, the court noted that the plaintiff in the case at bar would eventually no longer be "disabled" in her ability to bear children because either the fertility treatments would succeed or she would pass her child-bearing years. *Id.*
[364] *Id.* at 951.
[365] *Id.*
[366] *Id.*
[367] *Id.*
[368] *Id.* at 952 (citations omitted).
[369] *Id.*

Judge Wood dissented, challenging the majority's assertion that *Kimel* compelled the conclusion that abrogation under the ADA exceeds Congress' authority.[370] Referencing the Supreme Court's decision in *Florida Prepaid*, the dissent noted the Court's observation that the line between remedial measures and measures that work a substantive change "is not easy to discern" and that Congress is given "wide latitude in determining where the distinction lies."[371] Judge Wood found disagreed with the majority's assessment that *Kimel* meant that "virtually all discrimination that is subject to rational-basis review for equal protection clause (sic) purposes is outside the scope of Congress's section 5 powers."[372] She pointed out that the *Kimel* Court "took pains to analyze the ADEA in detail" before finding that Congress exceeded its authority.[373] Judge Wood noted that the *Kimel* Court examined the language of the ADEA and legislative record to determine whether the Act's requirements were "proportionate to any unconstitutional conduct that the statute could have targeted."[374] She continued that the Court examined its decisions regarding age classifications under equal protection, finding it significant that all such classifications had been upheld.[375] In addition, the *Kimel* Court reviewed the ADEA's legislative record for either a "pattern of age discrimination committed by the states" or "any discrimination whatsoever that rose to the level of constitutional violation."[376] Because the Court found no such evidence in the record, there was no support for abrogation.[377]

The dissent pointed out that the majority failed to acknowledge that the *Cleburne* Court, notwithstanding its conclusion that classification based on mental retardation merited only

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[370] *Id.* at 953 (Wood, J., dissenting).
[371] *Id.* at 954.
[372] *Id* at 955 (citing *ante* 948).
[373] *Id.*
[374] *Id.* (citing *Kimel*, 120 S.Ct. at 645).
[375] *Id.* (citations omitted).
[376] *Id.* (citing *Kimel*, 120 S.Ct. at 648-50).
[377] *Id.*

rational-basis review, struck down the ordinance in question as unconstitutional.[378] Judge Wood then took the majority to task for its conclusion that a university could "rationally" refuse to hire a blind professor because he could not absorb material as quickly as his sighted counterparts.[379] Disability, according to the dissent, indeed is different from age because not everyone will become disabled and because Congress did find that the disabled are subjected to the same type of discrimination experienced by women and racial minorities.[380] This, Judge Wood concluded, justified the broad sweep of the ADA, in contrast to the ADEA – where the record did not support that its sweep was a proportional response to the problem of age discrimination.[381] The dissent, unlike the majority, also saw the requirements of the ADA as "more nuanced" than those of the ADEA – allowing an employer to refuse to hire a disabled person if no reasonable accommodation will allow her to do the job, as contrasted with the more stringent BFOQ defense in the ADEA.[382]

Turning to the second issue, Judge Wood examined the record for evidence of either a pattern of disability discrimination by the States or "any discrimination whatsoever that [rises] to the level of constitutional violation."[383] While noting that the legislative record on State discrimination against the disabled was "admittedly sparse," the dissent referenced highlighted congressional findings of discrimination in areas – education, health services and transportation, for example – controlled by State and local governments.[384] "Congress's specific attention to

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[378] *Id.*
[379] *Id.* at 956 n2.
[380] *Id.* (citing 42 U.S.C. § 12101).
[381] *Id.* at 957.
[382] *Id.*
[383] *Id.* (citing *Kimel*, 120 S.Ct. at 649 (internal quotations omitted)).
[384] *Id.* at 957-58 (citing 42 U.S.C. § 12101(3)).

sectors with such a substantial state and local governmental presence indicates that it knew that government action at the state level was an important part of the problem it was addressing."[385]

Judge Wood further observed that a record of discrimination indicative of constitutional violations, found lacking in the ADEA in *Kimel*, was "present in abundance in the ADA."[386] In the record supporting the ADA, unlike those for the ADEA and RFRA, Congress found that "the severity and pervasiveness of discrimination against people with disabilities [was] well documented."[387]

Unwilling to divine from the Supreme Court's prior cases that Congress could not abrogate State immunity, the dissent concluded that State immunity was properly abrogated under the ADA pursuant to congressional enforcement power under the Fourteenth Amendment.[388]

3. Resolving the Uncertainty: *Garrett v. The University of Alabama at Birmingham Board of Trustees*

The Supreme Court will soon settle whether abrogation is proper under the ADA, having recently granted certiorari in *Garrett v. The University of Alabama at Birmingham Board of Trustees*.[389] The Court had granted certiorari in Alsbrook and Dickson, but those cases were subsequently settled. Barring a similar outcome in *Garrett*, the Court will resolve this open issue in its next term.

Garrett, ironically an Eleventh Circuit decision like *Kimel*, was a consolidation of two cases against Alabama State agencies – The University of Alabama at Birmingham (UAB) and the Alabama Department of Youth Services – under Title I of the ADA, § 504 of the Rehabilitation

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[385] *Id.* at 958.
[386] *Id.*
[387] *Id.* (quoting H.R. 101-485(II), USCCAN at 312 (alteration in original) (internal quotations omitted)).
[388] *Id.* at 961.
[389] 193 F.3d 1214 (11th Cir. 1999), *cert. granted* No, 99-1240 (Apr 17, 2000).

Act of 1973, and the Family and Medical Leave Act of 1994 (FMLA).[390] The Circuit Court concluded that Alabama was not immune from private suit under either the ADA or the Rehab Act, but that the Eleventh Amendment barred suit under the FMLA.[391]

The court briefly outlined the Supreme Court's prior decisions in *City of Boerne* and *Florida Prepaid* for the principles relevant to proper abrogation.[392] Turning to the ADA, the court relied on its decision in *Kimel*[393] to quickly conclude that the Congress validly exercised its power under the Fourteenth Amendment in enacting the ADA.[394] Of course, this decision was issued before the Supreme Court decided *Kimel*. Thus, it is not possible to know whether that decision would have changed the Circuit Court's analysis as to the ADA. Recall that a majority of the circuit court in *Kimel* concluded that Congress did not clearly express its intent to abrogate state immunity under the ADEA.[395] The tenor of the opinions indicates that a majority would have concluded that Congress was empowered to abrogate under the ADEA.[396]

The court also relied upon *Kimel* to conclude that abrogation under § 504 of the Rehab Act was a proper exercise of congressional enforcement power under the Fourteenth Amendment.[397] Because the Supreme Court declined to grant certiorari on this issue, Congress' authority to abrogate State immunity under the Rehab Act is likely to remain a matter of debate.

V. CONCLUSION

It seems likely that the Court will conclude that Congress' attempted abrogation of the Eleventh Amendment under the ADA is improper. *Kimel*, while not making this outcome a forgone conclusion, certainly leans strongly in this direction.

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[390] 193 F.3d at 1216.
[391] *Id.*
[392] *Id.* at 1217.
[393] 139 F.3d 1426 (11TH Cir. 1998).
[394] 193 F. 3d at 1217.
[395] 139 F.3d at 1433.
[396] 139 F.3d 1426 (fair reading of all opinions).

Congress made its intent to abrogate State immunity under the ADA abundantly clear.[398] The issue is whether it acted pursuant to its enforcement power under § 5 of the Fourteenth Amendment. Congress' extensive findings in the ADA facially support its recitation that it acted under both the Commerce Clause and the Fourteenth Amendment.[399] It remains to be seen how much weight the Court will accord those findings. Congress found that those with disabilities represent a "discrete and insular minority" who "have been subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."[400] This finding contradicts the Court's pronouncement in *Cleburne* that the mentally retarded (a subset of the disabled) are a "large and amorphous class" and that the history of State and federal protective legislation "negates any claim that the mentally retarded are politically powerless."[401] The Court has made it quite clear that it will not abide any congressional attempt to alter the landscape of its constitutional jurisprudence, most recently in *City of Boerne*.[402] Thus, Congress is impotent to declare that the disabled are entitled to heightened scrutiny under the Equal Protection Clause in light of *Cleburne*. The more interesting question then, is the significance of Congress' findings as they relate to its authority to enforce the Fourteenth Amendment. If, as one certainly could infer from *Kimel*,[403] classifications that would receive only rational basis review for equal protection purposes cannot be the target of Congress' Fourteenth Amendment enforcement power, then the ADA's attempted abrogation must fail.

One could frame the issue as determining where disability discrimination falls on the spectrum between age discrimination and discrimination based on race, gender and national

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[397] 193 F.3d. at 1218.
[398] *See* 42 U.S.C. § 12202.
[399] *See* 42 U.S.C. § 12101 and discussion *supra*.
[400] 42 U.S.C. § 12101(a)(7).
[401] *Cleburne*, 473 U.S. 432, 445.
[402] 521 U.S. 507 (1997). *See supra* Section II.C.2.
[403] 120 S.Ct. 631 (2000). *See supra* Section III.

origin. If it is more akin to the former, then Congress exceeded its enforcement power. If, on the other hand, disability discrimination can be properly analogized to invidious discrimination based on race or sex, then Congress should be authorized to act pursuant to the Fourteenth Amendment.

Part of the difficulty in decoding the proper analysis to apply to disability discrimination arises from the Court itself. While *Cleburne* declared that only rational basis review was appropriate for classifications based on mental retardation, the Court went on to apply a much more exacting review that the rational basis ordinarily connotes and struck down the ordinance in question.[404] Thus, *Cleburne* can be cited on both sides of the issue.

Another difficulty is in assessing the significance of the ADA's requirements. Specifically, both Title I and Title II of the Act require an affirmative act" – reasonable accommodation and reasonable modification, respectively – for otherwise qualified individuals, and they make failure to do so a form of discrimination.[405] If one believes that the ADA thus mandates "special rights" for the disabled – i.e., requiring employers or public programs to compensate for an individual's traits – rather than mere equal treatment of those with a disability, then the ADA does seem to go much further than any other anti-discrimination ever penned. If, on the other hand, one views the ADA only as requiring equal opportunity for the disabled – removing irrelevant and arbitrary barriers to their success – the Act can be said to do for disability discrimination no more than Title VII did for racial discrimination. Under this view, the ADA appears much more like a valid exercise of congressional power.

Regardless of the Court's decision, it is worth noting what the ultimate impact of that decision will be. It is settled that Congress can validly apply the strictures of the ADA to the

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[404] 473 U.S. 432. *See* discussion *supra*.
[405] *See supra* Section IV.B.

States, irrespective of the Eleventh Amendment.[406] The Eleventh Amendment issue reaches only whether private individuals can sue the States under the ADA.[407] Even if that question is answered in the negative, there remains at least theoretical recourse under the ADA because the United States can enforce the Act against the States.[408] Additionally, the Court's refusal to grant certiorari on the issue of whether Congress validly abrogated State immunity under § 504 of the Rehab Act leaves all State programs that receive federal funds subject to suit thereunder. Moreover, the States remain both bound by and subject to action under there own disability discrimination statutes. Thus, regardless of the Court's ruling in *Garrett*, the disabled will continue to have some measure of recourse against the States when they are discriminated against. Nevertheless, *Garrett* promises to be an important decision both because it will affect the ease with which the disabled may sue the States, and it will answer whether there is any area outside of racial and gender discrimination under which the Court will permit Congress to act under its § 5 enforcement power.

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[406] Supporting cases
[407] *See*
[408] *See*