"Preserving Prometheus' Precious Gift[1]: Title II of the Americans with Disabilities Act Imposes Affirmative, Anti-Discrimination Obligations Upon Municipalities, Providing a Seemingly Unwelcome Model for the Enforcement of Traditional Civil Rights Legislation"

by Franklin L. Ferguson, Jr.[2]

I. Keeping the Fire Lit: An Introduction

A. Thesis: Title II of the ADA, with its Emphasis on Proactive Municipal Accommodation, Provides an Appropriate Model for Analysis of Civil Rights Claims of Insular Constituencies

Title II of the Americans with Disabilities Act (hereinafter, "ADA"[3]) is an example of remedial legislation, a Congressional attempt to correct perceived societal injustices, as is 42 U.S.C. §1983, the most prevalently employed civil rights litigation statute. Both statutes purport to abrogate the states' Eleventh Amendment sovereign immunity via the Fourteenth Amendment,

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[1] According to ancient Greek mythology, Prometheus was a titan, one of the ancestors of the Greek "gods." Pitying the mundane and primitive plight of humans, Prometheus "stole" fire from the "gods" and shared it with humans, intending to improve their condition. "[I]n so doing, he transgressed the will of Jupiter, he drew down on himself the anger of the ruler of gods and men. Jupiter had him chained to a rock on Mount Caucasus, where a vulture preyed on his liver, which was renewed as fast as devoured." The ADA's Title II provides a much-needed source of "light," hope and energy to civil rights plaintiffs, a gift from the legislative branch, a.k.a. the Prometheans. In their arrogance, certain members of the United States Supreme Court, culminating in the Garrett decision, have initiated a move to limit the statute's effectiveness.

Similarly, Greek mythology also describes a box containing personifications of "vices." Pandora was entrusted with the box, as well as clear instructions not to release the contents. Stereotypically stricken with "feminine" curiosity, Pandora ultimately opens the box, releasing the vices, as well as the attendant suffering for humankind. The author likens the "vices" (evil is in the eye of the beholder) to equal opportunity. There are many modern "gods" who perceive of the possibility of too much equal opportunity, potentially resulting in (gulp) a redistribution of power. http://www.bulfinch.org/fables/bull2.html. Last visited November 11, 2003.

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§ 5, to the U.S. Constitution. The U.S. Supreme Court has limited the effectiveness of 42 U.S.C. § 1983 via an extremely narrow, increasingly unprincipled series of interpretations. The U.S. Supreme Court's view of the scope of Congressional authority, relative to the remedial powers inherited from the Thirteenth Amendment[4], the Fourteenth Amendment[5], the Fifteenth Amendment[6] and the Interstate Commerce Clause[7], betrays the intent of the Civil War Amendments' drafters[8]. Though these statutes and their foundational amendments were ostensibly designed to remediate discrimination and its impacts[9], the *de facto* evolution of civil rights litigation found civil rights advocates "celebrating" what may only be called the "narrowest of victories" in the 2003 educational affirmative action cases.[10]

Accordingly, only the most ardent, caricature-like racists [11] are effectively vulnerable to

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3 42 U.S.C. §§ 12131, *et seq.*

4 U.S. CONST. amend. XIII.

5 U.S. CONST. amend. XIV.

6 U.S. CONST. amend. XV.

7 U.S. CONST. art. I, 8, cl. 3 ("The Congress shall have Power…to regulate Commerce…among the several States…").

8 The Thirteenth, Fourteenth and Fifteenth Amendments are commonly referred to as the "Civil War Amendments," crafted immediately following that great conflict.

9 Similar to denials concerning both the existence and scope of the European Jewish Holocaust before and during World War II, the U.S. Supreme Court has engaged in a self-appointed cathartic attempt to minimize the extent of the defect (racial discrimination aimed against Blacks) via a narrow view of the Civil War Amendments in general and the Fourteenth Amendment in particular. See, Kenneth Lasson, *Holocaust Denial and the First Amendment: the Quest for Truth in a Free Society*, 6 Geo. Mason L. Rev. 35 (1997); Part III(B)(2)(c), infra. ("The U.S. Supreme Court has Limited Congressional Authority to Abrogate via §5 of the Fourteenth Amendment").

10 Grutter v. Bollinger, 123 S. Ct. 2325 (2003); Gratz v. Bollinger, 123 S.Ct. 2411 (2003); See also, Derrick Bell, "Learning From Living: the University of Michigan Affirmative Action Cases, Jurist Legal Intelligence. ["Diversity as a proxy for affirmative action will prove of value to college administrators anxious to maintain the existing heavy reliance on standardized tests and grade point averages rated based on the quality of the high school where they were earned. That, despite their contrary claims, is their real priority. The fact that in its exercise, whatever affirmative action policies they are practicing are placed in continual jeopardy, is imply an unfortunate risk they are willing to take and minority applicants must be willing to near….We black people do learn from living, but the learning is not always easy to take."]

the remediation efforts the statutes have been interpreted to impose. The vast majority of racially motivated behavior, mainly present on a cultural or "subconscious" level, is allowed to continue, unimpeded, under the guises of "legitimate rationale,"[12] and a presumption of good will, or racial neutrality, is afforded to all American citizens generally and to state actors specifically.[13]

42 U.S.C. §1983 has been interpreted to require either consciously invidious intent or deliberate indifference[14]. A faithful reading of the Civil War Amendments and the statutes themselves reveals that Congress intended the *de facto* impact of these statutes, commensurate with the evil they were crafted to combat, to be far more pervasive.[15]

"The [Americans with Disabilities Act ("ADA")] means access to jobs, public accommodations, government services, public transportation, and telecommunications -- in other

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[11] See, generally, Terry Smith, *Combating Subtle Discrimination in the Workplace Symposium: Everyday Indignities: Race, Retaliation, and the Promise of Title VII,* 34 Colum. Hum. Rts. L. Rev. 529 (2003). ["While obviously different in kind, gender, disability, and age discrimination have also taken on subtle forms, given the increasing awareness of, and penalties attached to, overt discrimination on these grounds." Smith, at p. 534.]

[12] See, generally, Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

[13] Assigning presumption of benevolence to the attitudes held by states, the majority in Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001) stated, "[i]f Congress suspected the states to be likely discriminators, or to have evidenced "a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings. There is none. See 42 U.S.C. § 12101." *Garrett*, at 371.

[14] See generally, Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation,* 60 Geo. Wash. L. Rev. 417 (January, 1992).

[15] See, generally, A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996), at 106 [Judge Higginbotham implied that the ruling in the Civil Rights Cases was improper and that the majority should have heeded the counsel of Justice Harlan, the dissenting voice. Harlan noted that the Fourteenth Amendment was intended to give Congress the power to declare the civil rights of the American public. "The Court's relative disregard of the first section of [the Fourteenth Amendment's] section 1and its focus solely on the second sentence diluted the vitality of the Amendment as a guarantor of universal civil rights." at p. 106.

words, full participation in, and access to, all aspects of society."[16] Under the ADA, Title II's auspices, civil rights plaintiffs are entitled to the affirmative municipal implementation of anti-discrimination polices and accommodations. Cities and states are required to proactively assure access to persons with disabilities. If unimpeded by judicial interpretation, the Title II of the ADA would continue to provide an effective alternative to traditional civil rights statutory avenues of relief.

Unlike predecessor statutes within the civil rights pantheon, including 42 U.S.C. §1983[17], in order to prove discrimination under Title II of the ADA, a plaintiff need only establish the fact that a municipality has failed to provide a reasonable accommodation to a person eligible to receive one. Instead of paying lip-service to equality, Title II of the ADA mandates governmental entities take direct action to integrate disabled Americans into the fabric of society.

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[16] Preamble to Title II of the Americans with Disabilities Act, 1993 Technical Assistance Manual, written by James R. Dunne, Assistant Attorney General, U.S. Department of Justice, Civil Rights Division Office of the Americans with Disabilities Act.

[17] See, Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 Geo. Wash. L. Rev. 417 (January, 1992). [In 42 U.S.C. §1983 cases, the Supreme Court sometimes relies on objective standards to distinguish between torts and constitutional violations, but more often relies on the defendant's state of mind. The Court's approaches to determining whether actions constitute Eighth Amendment, Fourteenth Amendment Due Process claim, or Fourth Amendment violations are similar. Each violation first requires a threshold finding: that there was punishment inflicting a sufficiently "serious" harm, a "deprivation," or a "seizure." Each threshold finding requires some deliberate choice on the part of the governmental actor. If this threshold is crossed, the question becomes whether the action violated a certain standard. Here, the standards clearly vary.

Eighth Amendment and Fourteenth Amendment substantive due process standards examine the officer's subjective state of mind. The Fourth Amendment standard is one of objective reasonableness. The Constitution does not protect against specific results or occurrences, even if a governmental official played a role in bringing about the outcome. The Constitution only protects against conscious governmental action, chiefly action that contains an element of oppression or abuse. To establish a constitutional violation, then, it usually will not be enough for the plaintiff to show that he suffered an injury at the hands of the state.

He must also show that the actor inflicted the injury with the requisite degree of deliberateness -- the degree that evidences the abuse that characterizes the constitutional violation. Even in the most generous tenor, this is not an easy task.]

In recent years, civil rights advocates have employed Title II of the ADA in a manner that has established a series of innovative and far-reaching precedents, benefiting qualified persons with disabilities. These affirmative obligations are illustrated by two cases, recently litigated in the United States District Court, Central District of California and are detailed herein below.[18] These benefits range from the more "traditional" use of the ADA's Title II[19], and the requirement of affirmative municipal accommodation, to the more innovative applications of the statute[20].

Title II of the ADA, in large measure due to the non-racially defined constituency it was targeted to serve[21], has enjoyed several years' worth of a relative "honeymoon period," wherein the statute was allowed to enfranchise the disabled to the full extent of its plain language. Unburdened with the Herculean Labor that is the demonstration of invidious intent[22], the ADA's Title II plaintiffs have been allowed to place affirmative obligations upon governmental-entity defendants: these municipalities must provide accommodations to those qualified to receive them and the failure to do so constitutes discrimination.[23] Even in the context of the rational basis scrutiny that is applied to the disabled[24], Title II of the ADA provides an

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18 The author served as legal counsel with respect to both cases.

19 *Hayes v. Bellflower*, Case No. CV 00-02799 CAS (RCx), illuminated the use of Title II to prohibit selective enforcement of zoning ordinances. The ordinances were being enforced against an autistic child, whose parents had arranged for him to play in the front yard of a "group home," tailored to his needs.

20 *Hood v. City of Los Angeles*, Case No. CV 99-0099 MMM (AJWx), suggests that police officers must be trained to respond to the needs of mentally disabled persons, facilitating mentally disabled persons' right to receive comprehensive services, including psychiatric intake for those class members who display public signs of distress.

21 Its beneficiaries are, ostensibly, disabled persons, living and working in America. Political discourse precludes overt denigrations of this group and legislative bodies have been uniform in showering disability rights statutes with the approval of lip service.

22 Washington v. Davis, 426 U.S. 229, at 239 (1976) ["But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially discriminatory impact."]

23 42 U.S.C. §§ 12131, *et seq.*

example of remediation that is within the power ceded to Congress by the Fourteenth Amendment's §5.[25]

Apparently sensing the potential impact of "too much justice[26]," the result of potential comparisons between 42 U.S.C. §1983 and Title II of the ADA, in 2001 the U.S. Supreme Court fired a "preemptive strike" in the form of the *Board of Trustees of the U. of Alabama v. Garrett*[27] decision. Though *Garrett* interprets Title I of the ADA, several circuits have indicated that they believe the U.S. Supreme Court would similarly interpret Title II of the ADA, issuing *Garrett*-esque decisions of their own, with respect to Title II of the ADA.[28] At the heart of the *Garrett* decision is the majority's determination that Congress had failed to properly abrogate states' Eleventh Amendment immunity, when it enacted Title I of the ADA.[29]

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[24] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 435.

[25] See Part V(A), infra.

[26] "In McCleskey v. Kemp, the Court refused to recognize a claim of systemic racial discrimination in the administration of the death penalty for fear of undermining the criminal justice system itself, a fear dissenting justice William Brennan described as 'a fear of too much justice.'" Juan F. Perea, Richard Delgado, Angela P. Harris and Stephanie M. Wildman, BOOK REVIEW: Thinking About Race and Races: Reflections and Responses Race and Races: Cases and Resources for a Diverse America, 89 Calif. L. Rev. 1653 (October, 2001), quoting McClesky v. Kemp, 481 U.S. 279, at 339 (1987) (Brennan, J., dissenting). Americans can worry about the impact of "too much justice" when and if that sweet day arrives.

[27] Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001).

[28] As described in more detail within Part IV of this article, in those Circuits where it has been determined that Title II of the ADA supports employment claims, an issue that has yet to be addressed by the U.S. Supreme Court, *Garrett's* holding would seemingly "spill over" into the area of ADA, Title II claims. See, Bledsoe v. Palm Beach County Soil & Water Conservation District, Castellano v. City of New York, 142 F.3d 58 (2d Cir. 1998) (applying Title II to an employment benefits discrimination claim); Holmes v. Tex. A & M Univ., 145 F.3d 681 (5th Cir. 1998) (applying Title II to a claim of employment discrimination); and Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995). If Garrett's holding is applied to Title II of the ADA, that provision would meet the same fate as Title I of the ADA, invalidation with respect to claims against states.

[29] Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 370.

Faithful interpretation of legal precedent dictates that the U.S. Supreme Court should allow Title II of the ADA to continue along its current path, burning a trail for increased levels of societal access and ultimately spilling over into the auspices of factual scenarios traditionally governed by 42 U.S.C. §1983. Remediation of pervasive social ills should be unfettered, irrespective of the "redistribution of resources" costs[30]. Title II of the ADA was not intended to support employment claims, whether against states or any other employer. [31] As a result, *Garrett's* harsh holding should not contaminate Title II of the ADA.

B. Analysis Roadmap

This section outlines the various parts of the instant article:

I. Keeping the Fire Lit: An Introduction
   - A. Thesis: Title II of the ADA, with its Emphasis on Proactive Municipal Accommodation, Provides an Appropriate Model for Analysis of Civil Rights Claims of Insular Constituencies
   - B. Analysis Roadmap

II. There are No Bigots Here: *Hayes v. City of Bellflower* and the Traditional Means of Employing Title II of the ADA
   - A. *Hayes v. City of Bellflower* Facts
   - B. Using Title II of the ADA as a Civil Rights Litigation Tool; the Example of *Hayes v. City of Bellflower*
     1. Understanding the ADA's Comprehensive Statutory Scheme
     2. Several Important Distinctions Exist Between Title I and Title II of the ADA
        - a. Title I of the ADA was Designed to Address Barriers Faced by the Disabled within the Employment Arena
        - b. The Focus of Title II of the ADA is Upon the Dissemination of Public Goods, Programs and Services
     3. *Hayes v. City of Bellflower* and the Prima Facie Violation of Title II of the ADA
        - a. Selective Enforcement of the City of Bellflower's Ordinance Provides One Example of Discrimination Prohibited by Title II of the ADA

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[30] See, generally, Nickolai G. Levin, *Constitutional Statutory Synthesis,* 54 Ala. L. Rev. 1281.

[31] See Part IV, infra.

4. The City of Bellflower's Defensive Strategy Focused on the Hayes Family's Non-Existent, Irrelevant, but Traditional 42 U.S.C. §1983 Civil Rights Claim
    a. Elements of a Traditional Defense Against a 42 U.S.C. §1983 Claim
    b. The Poor Success Ratio for 42 U.S.C. §1983 Claims has Resulted from the Statute's Difficult Standard of Proof

III. Returning the Gift Horse Unopened: The Danger Posed by the Potential Application of the *Board of Trustees of the U. of Alabama v. Garre*tt Holding to Title II of the ADA

A. *City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al.* Established the Application of Rational Basis Scrutiny to the Disabled
    1. *City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al.* Majority Holding Improperly Relegated the Disabled to Non-Suspect Classification Status
    2. Justice Marshall's *City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al.* Dissent Foreshadows the Negative Impact the Majority Decision Would Have Upon the Rights of Insular, Minority Groups

B. According to *Atascadero State Hospital et al. v. Scanlon* Abrogation of States' Immunity May be Achieved Via Express State Waiver
    1. *Atascadero State Hospital et al. v. Scanlon* and the Achievement of Abrogation Via State Waiver
    2. In the Absence of State Waiver, Congress Can Unilaterally Abrogate States' Eleventh Amendment Immunity
        a. Congress Must First Unequivocally Express Its Intent to Abrogate
            i. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Governs Statutory Construction, or the Interpretation of Written Legislative Expression
            ii. A Statute's Plain Language is the Primary Interpretive Consideration
            iii. When Congress Places Interpretive Gaps Within Legislation, the Judiciary Must Defer to the Interpretation of Designated Administrative Agencies
        b. States' Eleventh Amendment Immunity Must be Abrogated in a Manner that is Proportionate to the Congressional Authority Vested within the Constitutional Provision Applied
            i. In *Pennsylvania v. Union Gas,* the U.S. Supreme Court Recognized that the Interstate Commerce Clause Provides Congress with the Power to Abrogate
            ii. *Seminole Tribe of Florida v. Florida* Overturned *Pennsylvania v. Union Gas,* Destroying Congress' Ability to Use the Interstate Commerce Clause as a Means of Abrogation.
        c. The U.S. Supreme Court has Limited Congressional Authority to Abrogate via §5 of the Fourteenth Amendment

i. Fourteenth Amendment, §5 Legislation Must be Remedial, in Order to Satisfy the Congruence and Proportionality Requirement

ii. A Series of U.S. Supreme Court Decisions, Narrowly Interpreting the Meaning of Remediation, Have Served to Inappropriately Limit Congress' Ability to Abrogate States' Eleventh Amendment Immunity

C. Through an Unprecedented Challenge of Legislative History, *Board of Trustees of the U. of Alabama v. Garrett* Held that Title I of the ADA is not a Proper Example of Fourteenth Amendment,§5 Legislation

IV. Does ADA, Title II Apply to Employment?

A. The Eleventh Circuit's Bledsoe Decision, Declaring Employment to be within the Penumbra of the ADA's Title II, is Poorly Reasoned

B. The Ninth Circuit's Zimmerman Decision Distinguishes Between State Provision of Employment Opportunities and Public Services, Concluding that Title II of the ADA Does not Support Disabled Persons' Employment Discrimination Claims

1. The Administration of State Employment Opportunities is not the Equivalent of the State's Dissemination of Public Services
2. Title I and Title II of the are Two, Distinct Statutes, Founded Upon Separate Legislative Histories

V. Walking in the Light of the ADA Fire-Innovative Applications of ADA, Title II

A. Title II of the ADA is an Example of Fourteenth Amendment Remedial Legislation, Pursuant to Which Congress Properly Abrogated States' Eleventh Amendment Immunity

1. In the *Alsbrook* Opinion, the Eighth Circuit Incorrectly Concludes that Title II of the ADA Fails the Congruence and Proportionality Test for Remedial Legislation
2. Acknowledging its Distinct Legislative History, the Ninth Circuit's Dare Court, Declared Title II of the ADA to be an Appropriate Example of Abrogation

B. Even Under Cleburne's Rational Basis Standard, Disability Discrimination Under ADA, Title II (i.e. the Failure to Accommodate) Cannot be Justified

C. Hood v. City of Los Angeles

1. Pertinent Facts
2. The Trial Court's Denial of Defendant's Motion for Summary Adjudication of Plaintiff's ADA Claim.
   a. Prima Facie Case
   b. Affirmative Defense of Illegal Drug Use
      i. Illegal Drug Use Potentially Pertinent to Hood's Status as "Qualified Individual With Disability"
      ii. Even Allegations of "Current Drug Use", Via 42 U.S.C. §12210(c), Do not Preclude Hood's ADA Title II Claim;

II. There are No Bigots Here: *Hayes v. City of Bellflower* and the Traditional Means of Employing Title II of the ADA

A. *Hayes v. City of Bellflower* Facts

In *Hayes v. City of Bellflower*[32], Plaintiffs, Timothy Hayes, Cheri Hayes and Jack Hartman, III, the natural child of Cheri Hayes and the adopted son of Timothy Hayes, brought a civil action against the City of Bellflower. The lawsuit was filed in the Central District of California, for the United States District Court. Jack Hartman, twelve years of age at the time the complaint was filed, was afflicted with autism, a person with a disability, as that term is defined by Title II of the ADA.[33]

The City of Bellflower was a California municipality, a "public entity" subject to the jurisdiction of Title II of the ADA[34]. The ADA's Title II prohibits public entities from discriminating against persons with disabilities, relative to the services, programs, or activities of state government.[35] Significantly, the Eleventh Amendment's immunity is inapplicable to units

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32 Case No. CV 00-02799 CAS (RCx).

33 Trial Brief, *Hayes v. Bellflower*, Case No. CV 00-02799 CAS (RCx), hereinafter, "Hayes Trial Brief."

34 42 U.S.C. § 12132

35 Id.

of local government.[36] "These entities are subject to private claims for damages under the ADA without Congress' ever having to rely on § 5 of the Fourteenth Amendment to render them so."[37]

On June 18, 1999 a Municipal Code Enforcement Officer for Bellflower inspected 8715 Walnut Street, in Bellflower, California, the residence of Jack Hartman, III. Via a June 23, 1999 letter, Bellflower communicated notice that the Hayes family was in violation of Bellflower Municipal Code § 19-16.5, pertaining to the height of the chain-link fence surrounding the property's front yard. The Hayes' fence was too high, though the fence had been erected for over three years when Plaintiffs received the notice.[38]

Cheri Hayes was physically unable to care for Jack Hartman without assistance and Timothy Hayes' work responsibilities precluded him from providing the around the clock care that Jack requires. On account of Jack's disability, he qualified to receive protective supervision through In Home Protective Services, a state and federally funded enterprise. In addition to the aforementioned six (6) foot fence, Jack's care and protection was provided by a twenty-four (24) hour caregiver, extensive counseling and behavior modification sessions and assorted adjustments to the physical plant of the 8715 Walnut property. The six (6) foot fence provided a solid barrier of protection against Jack's self-endangerment tendencies. The fence height,

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[36] Lincoln County v. Luning, 133 U.S. 529, 530 (1890). Neither the *Hayes* case, nor the *Hood v. Los Angeles* case (See, Part V, infra) involve state defendants, implicating local municipalities instead. Accordingly, the issue of abrogation (See Part III(B)(2)(b), infra) was not litigated in either case. Issues including the appropriate level of scrutiny, pursuant to Fourteenth Amendment Equal Protection Clause analysis, the affirmative obligations imposed upon governmental entities and the stark discrepancies between interpretation of the ADA relative to traditional civil rights statutes, however, were well-illuminated by these cases. See also, Part III (B), infra.

[37] Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 369.

[38] Hayes Trial Brief, p. _

admittedly in excess of the ordinance's limits served as a reasonable and necessary accommodation of Jack's disability.[39]

The sole purpose for the fence's height was to restrain Jack Hartman, III, to serve as a protection against his self-destructive proclivities. Jack Hartman, III's autism disability, compounded by brain lesions and epilepsy, prevented him from comprehending issues germane to his own safety and to display "elopement tendencies." On more than one occasion, prior to the fence being erected, ostensibly attracted by objects beyond the reach of the residential boundaries, Jack ran into the street abutting the 8715 Walnut property, being struck and injured by passing automobiles. The fence had been erected in order to "slow Jack down," during the occasions when the twelve year old sought to "escape" the confines of the home and to enter the street.[40]

The Hayes family believed that Bellflower was enforcing the fence height ordinance against them in a selectively discriminatory manner, manifesting a bias against Jack Hartman, III's autism disability. At all times relevant to the litigation, there were several houses, within a 0.5 mile radius of the Hayes home, which were also subject to Bellflower Municipal Code § 19-16.5.[41] The ordinance was not uniformly enforced: relative to the several houses within a 0.5 mile radius of the Hayes residence boasting fences "out of code," none besides the Hayes' had been cited for violation of the ordinance.[42] It is constitutionally improper for a municipality to selectively enforce a particular zoning scheme against an individual on account of an immutable characteristic such as autism or any legally cognizable disability[43]. Selective enforcement of a

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39 Hayes Trial Brief, p. _

40 Hayes Trial Brief, p. _

41 Hayes Trial Brief, p. _

42 Hayes Trial Brief, p. _

43 Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir.1982)

statute, regulation or policy violates the Equal Protection clause if it is part of a deliberate and intentional plan to discriminate based on an arbitrary or unjustifiable classification.[44]

The unlawful administration of a statute that is fair on its face, resulting in unequal application to persons who are entitled to be treated alike, denies equal protection if it is the product of intentional or purposeful discrimination.[45] Given the several examples of non-enforcement, in the face of the Hayes' specific request for a variance, or commensurate "non-enforcement," the Hayes family argued that Bellflower had no rational basis[46] for its continued denial of what was ultimately determined by the trial court to be a reasonable accommodation.

The Hayes family learned that it would have to pay $400.00 for the right to apply for a variance to the ordinance in question, with no guarantee of approval. Timothy and Cheri Hayes applied for the variance to Bellflower's fence height ordinance. After a public hearing[47], Bellflower denied the application. Bellflower demanded that the fence height be reduced to forty-two (42) inches, or in the alternative, that the fence be moved to a location further from the public easement, which would eliminate over 50% of Jack's, front yard, play environment.[48] The Hayes family administratively appealed Bellflower's decision, but were again denied relief.

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44 Barber v. Municipality of Anchorage, 776 P.2d 1035, 1040 (Alaska 1989), cert. denied, 493 U.S. 922.

45 Snowden v. Hughes (1944) 321 U.S.1, 8.

46 This was a crucial aspect of the case. Through Title II of the ADA, Congress has decided that that mere non-accommodation, in the absence of a demonstration that such accommodation would significantly alter a governmental entity's delivery of services, constitutes irrational behavior, even under a rational basis scrutiny. It does not matter that decisions are made without "invidious" intent, they are still defined by Congress as discriminatory, in the context of the ADA's Title II. See, also, Part II(B)(2)(b), infra.

47 There was testimony at the hearing disavowing the existence of any anti-autism animus. One declarant indicated that he "had an autistic child" of his own, attempting to emphasize the "neutrality" of the decision not to accommodate the Hayes family. Hayes Trial Brief, p. _

48 In pre-trial negotiations, it became evident that the unstated objective was to eliminate the possibility of Jack Hartman playing in the front yard, in an area exposed to the public street and sidewalk. Alternatives proposed by the city consistently suggested the erection of "opaque,"

In denying the variance, Bellflower relied upon its finding that the ordinance solely served the interest of aesthetics and that the 50% reduction of playing space which would result from moving the fence to a location closer to the house would be sufficient. In making their decision, it was patently obvious that the city officials took great pains to express their "non-discriminatory" rationale. Bellflower refused to allow the reasonable accommodation, necessary for Plaintiffs' use and enjoyment of the property, free from discrimination.[49] After a comprehensive glance at the ADA[50], Part II (B)(3) demonstrates the prima facie violation of the ADA, Title II.

B. Using Title II of the ADA as a Civil Rights Litigation Tool; the Example of *Hayes v. City of Bellflower*

1. Understanding the ADA's Comprehensive Statutory Scheme

"Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves. Quite apart from any historical documentation, knowledge of our own human instincts teaches that persons who find it difficult to perform routine functions by reason of some mental or physical impairment might at first seem unsettling to us, unless we are guided by the better angels of our nature. There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice that can stem from indifference or insecurity as well as from malicious ill will."[51]

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more aesthetically pleasing barriers, the removal of Jack's playing space to "more recessive" (out of sight) portions of the property, or the relocation of the home entirely.

[49] Hayes Trial Brief, p. _

[50] See Part II(B)(1) and (2)

[51] Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Kennedy

The ADA contains five titles: Employment (Title I), Public Services (Title II), Public Accommodations and Services Operated by Private Entities (Title III), Telecommunications (Title IV), and Miscellaneous Provisions (Title V).[52] The ADA was drafted in order "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[53] Federal legislators concluded that "society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[54] Congress further concluded that disabled individuals face extraordinary barriers and discrimination by outright intentional segregation and often have "no legal recourse to redress such discrimination."[55] By passing the ADA, Congress hoped to increase employment opportunities for disabled people through prevention of employment discrimination.[56]

When crafting the disability rights legislation, Congress indicated “that it was invoking its powers jurisdiction for a violation of this chapter," under Section 5 and the Commerce Clause.[57] In addition, the Eleventh Circuit has pointed to the fact that the Judiciary Committee intended the “forms of discrimination prohibited by” the ADA’s Title II , 42 U.S.C. § 12132, “be identical to those set out in the applicable provisions of Titles I and III of this legislation.[58]

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concurrence, 374.

[52] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 327-28 (1990).

[53] 42 U.S.C. § 12101(b)(1).

[54] 42 U.S.C. § 12101(a)(2).

[55] 42 U.S.C. § 12101(a)(4) and (5).

[56] 42 U.S.C. § 12101(a)(3), (8), and (9).

[57] See 42 U.S.C. § 12101(b)(4) (listing among the ADA's purposes ‘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 people with disabilities’).” Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) 1006.

[58] Bledsoe v. Palm Beach County, 133 F. 3d 816 (11th Cir. 1998), at 821, quoting H.R. Rep. No. 101-485(II), at 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367.

The advent of the *Seminole* case, however, destroyed such a route to abrogation, leaving only the Fourteenth Amendment as an avenue to remediate state-initiated harms.[59]

The obligation not to discriminate includes the obligation to make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination, unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity."[60] Governmental entities must accommodate the disabled unless such accommodation is unreasonable, or irrational.

2. Several Important Distinctions Exist Between Title I and Title II of the ADA

As a necessary prophylactic between Title II of the ADA and the *Garrett* decision, lie the distinctions between Title I and Title II. Title I was designed to govern employment or "inputs", while Title II was designed to cover programs and services, or "outputs."[61]

a. Title I of the ADA was Designed to Address Barriers Faced by the Disabled within the Employment Arena

The *Garrett* decision deals with Title I of the ADA, the title that is most familiar to the public at large, applying specifically to employment: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[62] Congress defined "covered entity" to include state employers under 42 U.S.C. § 12111 (2). The term "employer" also contemplates a "person engaged in an industry affecting

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59 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996. See, also, Part III(B)(2)(b)(ii).

60 28 C.F.R. Sec. 35.130(b)(7).

61 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999),

commerce who has 15 or more employees.[63] Finally, the statute defines "person" and "industry affecting commerce" to include a governmental "industry, business or activity."[64]

The ADA, Title I prevents all employers, including states, from "discriminating against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[65] The ADA, Title I calls for employers to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business."[66]

Title I of the ADA defines the term, “reasonable accommodation” as the process of “(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[67]

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62 42 U.S.C. § 12112(a).

63 42 U.S.C. § 12111(5)(A).

64 See 42 U.S.C. § 12111(7) ("The terms 'person' . . . and 'industry affecting commerce', shall have the same meaning given such terms in section 2000e of this title."); 42 U.S.C. § 2000e(a) ("The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions . . . ."; 42 U.S.C. § 2000e(h) ("The term 'industry affecting commerce' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes . . . any governmental industry, business, or activity."). Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1173.

65 42 U.S.C. § § 12112(a), 12111(2), (5), (7).

66 42 U.S.C. § 12112(b)(5)(A).

67 42 U.S.C. § 12111(9).

Title I of the ADA also prevents employers from "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability."[68] A "disability" is "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[69] A person with a qualifying disability is deemed "qualified" if he or she, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[70]

b. The Focus of Title II of the ADA is Upon the Dissemination of Public Goods, Programs and Services

The ADA's Title II 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 any such entity."[71] "Public entity" is defined to include "(A) any State or local government; [and] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government;...."[72]

The essence of Title II is the proclamation that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[73] The term "public entity" refers to "any State or local government" or "any

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68 42 U.S.C. § 12112(b)(3)(A).
69 42 U.S.C. § 12102(2).
70 42 U.S.C. § 12111(8).
71 42 U.S.C. § 12132.
72 42 U.S.C. § 12131(1)(A) & (B).
73 42 U.S.C. § 12132.

department, agency, special purpose district, or other instrumentality of a State or States or local government."[74]

"A narrow construction of the phrase 'services, programs, or activities,' doe not comport with the remedial purposes of the ADA."[75] "Courts must construe the language of the ADA broadly in order to effectively implement the ADA's fundamental purpose of 'providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'"[76]"In the Title II context that the ADA's broad language brings within its scope anything a public entity does."[77]

In drafting the ADA, Title II, Congress described the isolation and segregation of individuals with disabilities as a serious and pervasive form of discrimination.[78] Title II of the ADA, which proscribes discrimination in the provision of public services, specifies, *inter alia*, that no qualified individual with a disability shall, "by reason of such disability," be excluded from participation in, or be denied the benefits of, a public entity's services, programs, or activities.[79]

Congress instructed the Attorney General to issue regulations implementing Title II's discrimination proscription.[80] One such regulation, known as the "integration regulation," requires a "public entity [to] administer … programs … in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[81] A further prescription, here called the

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74 42 U.S.C. § 12131(1)(A) & (B).

75 Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir., 1998)

76 Arnold v. United Parcel Serv., Inc., 136 F.3d at 861 (quoting 42 U.S.C. § 12101(b)(1) (1994)).

77 Lee v. City of Los Angeles, 250 F.3d 668, 691 (9th Cir. 2001)

78 42 U.S.C. § 12101(a)(2), (5).

79 42 U.S.C. §12132

80 See, 42 U.S.C. §12134(a).

81 28 CFR § 35.130(d).

"reasonable-modifications regulation," requires public entities to "make reasonable modifications" to avoid "discrimination on the basis of disability," but does not require measures that would "fundamentally alter" the nature of the entity's programs.[82]

3. *Hayes v. City of Bellflower* and the Prima Facie Violation of Title II of the ADA

State and local ordinances and regulatory programs are "activities" or "programs" of local governments subject to the ADA, Title II.[83] Bellflower's aforementioned building ordinance, and the enforcement thereof, constitutes an example of such "programs" or "activities" which are subject to the ADA.

The U.S. Supreme Court has held that the issue of reasonable modifications required an analysis of the particular circumstances presented.[84] In the *Hayes* case, the interests of and benefits which would have flowed toward the Hayes child, as a consequence of the requested accommodation, were significant and far outweighed any inconveniences to Bellflower's program. The particular facts of the Hayes case presented the reality that a disabled boy's life deserves protection through an exception, or ordinance variance. Title II of the ADA required the city to affirmatively act, to bring a disabled child and his family positively into the social compact, via elimination of the ordinance, the barrier to Jack's ability to live in an integrated setting.

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82 28 CFR §35.130(b)(7).

83 See, e.g., Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999) (city zoning ordinance); Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996) (state dog quarantine policy); Heather K. v. City of Mallard, 946 F. Supp. 1373 (N.D. Iowa 1996) (city ordinance regulating trash burning);

84 Southeastern Community College v. Davis, 442 U.S. 397, 412-413 (1979),

For every Title II claim, the prima facie case involves proof by the plaintiff "that he or she is a 'qualified individual with a disability.'"[85] Title II of the ADA defines that requirement as follows: "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[86] Significantly, no mention of "requirements" for acquisition of employment are found within the statute.

To establish a violation of Title II of the ADA, a plaintiff must show that (1) she is a qualified individual with a disability; (2) she was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities, and (3) such exclusion or discrimination was by reason of her disability.[87]

a. Selective Enforcement of the City of Bellflower's Ordinance Provides One Example of Discrimination Prohibited by Title II of the ADA

Bellflower discriminated when it refuses to make reasonable accommodations in rules, policies, practices, or services, when such accommodations were necessary to afford the Hayes family an equal opportunity to use and enjoy a dwelling. Jack Hartman, III was (1) disabled, (2) denied an accommodation via variance that would not have fundamentally altered Bellflower's

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85 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1175, citing 42 U.S.C. § 12132.

86 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1175.

87 Weinreich v. Los Angeles County Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997).

ordinance scheme and (3) the refusal to accommodate was necessarily based upon his disability status, since that was the basis of the Hayes family variance application.[88]

Bellflower's ordinance, although facially neutral[89], discriminated against the Hayes' disabled child because it prevented the maintaining of a safe perimeter fence as an aid to protect this child from wandering away from home due to his disability. The refusal to grant a variance in this particular case then adversely affected the safety of a disabled person. One of the central ADA's purposes, the integration of the disabled into larger society, was accordingly frustrated. By engaging in the aforementioned conduct and refusing to accommodate Jack Hartman, III's disability, Bellflower unduly burdened Plaintiffs' ability to enjoy the home that had been altered to suit his living needs, free from discrimination.[90]

The variance as requested by the Hayes family did not "fundamentally alter" the City of Bellflower's ordinance plan. Congress intended such a competitive balance between aesthetic uniformity and accommodation of a disabled child to be measured in favor of the child. The accommodation would have only allowed a beautiful child to continue to enjoy a safe and healthy "world." Bellflower's ostensible "discomfort" with the presence of the Hayes child playing in his front yard has been addressed by the United States' Supreme Court: Reasonable accommodations, which allow for the integration of persons with disabilities into mainstream society, are mandated by law.[91]

4. The City of Bellflower's Defensive Strategy Focused on the Hayes Family's Non-Existent, Irrelevant, but Traditional 42 U.S.C. §1983 Civil Rights Claim

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88 Hayes Trial Brief, p. _

89 Such "neutrality" would sound the death knell for claims pursuant to 42 U.S.C.§1983.

90 Fix Citation [Reference Dare rationale]

From the outset, counsel for the City of Bellflower approached the Hayes case as if the claim supporting the Hayes' case theory was 42 U.S.C. §1983[92]. This miscalculation, though understandable in light of the fact that the vast majority of civil rights plaintiffs have employed 42 U.S.C. §1983, led to the City of Bellflower's failure to file a motion to dismiss, a motion for summary judgment and the strategy articulated at trial. The essence of the City's defense was that no illegally "conscious" behavior on the part of Bellflower officials had taken place, at least to the extent that such could be proven by the plaintiffs under traditional 42 U.S.C. §1983 analysis. Though it had been the subject of pleadings, meetings and phone conversations, the City of Bellflower never "saw the Hayes' ADA, Title II claim coming," until an adverse jury verdict was read.

a. Elements of a Traditional Defense Against a 42 U.S.C. §1983 Claim

It is important to note that states are not "persons" to be held liable for 1983 actions, since Congress did not intend to abrogate the states' Eleventh Amendment immunity relative to that statute, nor was abrogation effected.[93] In the ADA, Title II context, Congress did intend to abrogate state immunity.[94] State immunity is far more essential to the substantive rights afforded by the ADA, Title II, since the programs and services implicated have a vastly more substantial and practical impact upon the insular group protected. The comparison of 42 U.S.C. §1983 theory with the ADA, Title II theory advanced in the *Hayes* case is included, however, to illustrate the potential civil rights utility of the ADA, Title II, both as a substitute and model for the interpretation of 42 U.S.C. §1983 claims.

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91 Olmstead v. L.C., 119 S. Ct. 2176 (1999).

92 Fix Citation; Hayes Pleadings; See, also Part II(B)(4).

93 Quern v. Jordan, 440 U.S. 332 (1979).

Local governmental entities may be held liable for the actions of their agents, acting in their official capacities under 42 U.S.C. § 1983, where the individuals' "action pursuant to official municipal policy of some nature caused a constitutional tort."[95] The governmental entity's official "'policy or custom' must have played a part in the violation of federal law."[96] The custom or policy of inaction, however, must be the result of a "conscious,"[97] or "deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[98]

To establish a prima facie case under 42 U.S.C. 1983 the plaintiff must allege and prove: (a) that the "conduct complained of was committed by a person;" (b) that the person was "acting under color of state law;" and (c) that "this conduct deprived [the plaintiff] of rights, privileges, or immunities secured by the Constitution or laws of the United States."[99]

42 U.S.C. §1983 establishes "a remedy for deprivations of rights secured by the Constitution and laws of the United States."[100] It does not create substantive rights, but merely creates a cause of action based on preexisting federal constitutional and statutory rights. [101]

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94 Clark v. California, 123 F.3d 1267, 1270-71 (9th Cir. 1997).

95 Monell v. Department of Soc. Servs., 436 U.S. 658, 691 (1978).

96 Kentucky v. Graham, 473 U.S. 159, 166 (1985).

97 City of Canton v. Harris, 489 U.S. 378, 389 (1989).

98 Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986).

99 Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327, 330 (1986); Pitchell v. Callan, 13 F.3d 545, 547 (2d Cir. 1994); Gregory v. City of Rogers, 974 F.2d 1006, 1009 (8th Cir. 1992), cert. denied, 113 S.Ct. 1265 (1993); Harvey v. Harvey, 949 F.2d 1127, 1130 (11th Cir. 1992); Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir. 1991); Quezada v. County of Bernalillo, 944 F.2d 710, 714 (10th Cir. 1991); Christian v. Belcher, 888 F.2d 410, 414 (6th Cir. 1989); Wong v. Stripling, 881 F.2d 200, 202 (5th Cir. 1989).

100 Lugar v. Edmunson Oil Co., 457 U.S. 922, 924 (1982).

101 Albright v. Oliver, 114 S.Ct. 807, 811 (1994); Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979); McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850, 867 (5th Cir. 1993), cert. denied, 114 S.Ct. 1103 (1994); Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir. 1991); Estate of Himelstein v. Fort Wayne, 898 F.2d 573, 575 (7th Cir. 1990).

Thus, 1983 does not make actionable all wrongs inflicted by governmental employers. "Unless a deprivation of some federal constitutional or statutory right has occurred, 1983 provides no redress even if the plaintiff's common law rights have been violated and even if the remedies available under state law are inadequate."[102]

Because of this standard of proof, 42 U.S.C. §1983 plaintiffs must demonstrate an awareness on the part of government officials, rising to some level of hostility towards the insular group. The Hayes family, in order to successfully raise a 42 U.S.C. §1983 claim, would have had to prove that the City of Bellflower officials' decision to deny the variance was motivated by a negative animus directed towards Jack Hartman, III's disability. This would have been a prohibitively difficult, if at all possible, task, one the Hayes family would most probably have declined to shoulder.

b. The Poor Success Ratio for 42 U.S.C. §1983 Claims has Resulted from the Statute's Difficult Standard of Proof

It is a difficult matter to demonstrate that a state actor has consciously acted to deprive a citizen of her Constitutional rights. Juries and judges tend to be biased in favor of police officers, municipalities and government officials.[103] These "persons" are presumed to be acting in the best interests of the public, since that is the very reason for their existence.

The odds of successfully litigating a 42 U.S.C. §1983 claim are very low. 42 U.S.C. §1983 litigation is one of the least successful areas of practice.[104] This reality stems from the

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[102] Lewellen v. Metropolitan Gov't, 34 F.3d 345, 347 (6th Cir. 1994), cert. denied, 115 S.Ct. 903 (1995).

[103] Irving Joyner, Litigating Police Misconduct Claims in North Carolina, 19 N.C. CENT. L.J. 113, 143-44 (1991); See also, Kit Kinports, The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases, 1997 U. Ill. L. Rev. 147; Mark Curriden, When Good Cops Go Bad, A.B.A. J., May 1996, at 62, 64.

[104] See Theodore Eisenberg, Civil Rights Legislation: Cases and Materials 186-87 (4th ed.

fact that litigants must overcome the aforementioned psychological hurdles associated with critique of governmental actors. Plaintiffs must also "read the minds" of municipal actors, proving that their behavior, at a minimum, "shocks the conscious."[105]

ADA, Title II provides a viable alternative theory of relief for plaintiffs who are able to demonstrate a relevant disability and non-accommodation. It is simply a more realistic task to satisfy the elements of an ADA, Title II claim, than to successfully employ 42 U.S.C. §1983.

III. Returning the Gift Horse Unopened: The Danger Posed by the Potential Application of the *Board of Trustees of the U. of Alabama v. Garrett* Holding to Title II of the ADA

Within a system of federal government, the enumeration of limited powers is essential.[106] It is the duty of the Court to determine constitutionality of legislative fiat.[107] In its *Garrett* decision, the U.S. Supreme Court held that Title I of the ADA was not an example of appropriate Fourteenth Amendment §5 legislation, that within the context of the statute, Congress had not properly abrogated states' Eleventh Amendment Immunity.[108] Since Title I of the ADA deals specifically with employment and the Supreme Court expressly left for future consideration whether Title II of the ADA is appropriate Fourteenth Amendment §5 legislation, the viability of ADA, Title II claims against states remains an open question. In Part III, the cases which led to

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1996). See generally Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 Cornell L. Rev. 641 (1987) (reporting the results of an empirical study which suggests that constitutional tort litigation is not exploding); Theodore Eisenberg & Stewart J. Schwab, What Shapes Perceptions of the Federal Court System? 56 U. Chi. L.Rev. 501 (1989)

105 Rochin v. California, 342 U.S. 165, 172 (1952).

106 McCulloch v. Maryland, 17 U.S. 316 (1819).

107 Marbury v. Madison, 5 U.S. 137 (1803).

108 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 371.

the *Garrett* decision, beginning with *City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al.*[109], are analyzed, detailing the requirements of Eleventh Amendment immunity abrogation.

The *Cleburne* majority's decision leaves disabled persons vulnerable to similar legislative attempts to disadvantage them.[110] A legislative, rather than a judicial solution would produce precedent-setting standards and predictability, providing a level of fairness impossible to achieve via judicial, case by case, proclamation. Equal Protection analysis should not be subjected to an as-applied basis.[111]

A. *City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al.* Established the Application of Rational Basis Scrutiny to the Disabled

1. *City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al.* Majority Holding Improperly Relegated the Disabled to Non-Suspect Classification Status

In *Cleburne,* a Texas city denied a special use permit for the operation of a group home for the mentally retarded. The Court of Appeals had determined mental retardation to be a "quasi-suspect" classification, but the United States Supreme Court applied rational basis scrutiny, a far more significant aspect of the decision that the determination that the subject ordinance was "invalid as applied."[112]

In July of 1980 the a private party purchased a building, intending to lease it to Cleburne Living Center, Inc. (CLC), a group home for the mentally retarded. The home was to house 13

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109 473 U.S. 432 (1985).

110 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissent, 474.

111 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 475, 476.

112 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 435.

retarded men and women, who would live under constant supervision, consistent with all applicable state and federal regulations.[113] The home was to be operated as a private Level I Intermediate Care Facility for the Mentally Retarded, or an ICF-MR, pursuant to 42 U. S. C. § 1396d(a).[114]

The City of Cleburne informed CLC that it would have to obtain a special use permit to operate a group home. CLC submitted a permit application. The permit was required for "[hospitals] for the insane or feeble-minded, or alcoholic or drug addicts."[115] Following a public hearing, the Cleburne City Council voted 3 to 1 to deny a special use permit, confirming an earlier vote by Cleburne's Planning and Zoning Commission.[116]

In CLC's suit, the District Court found that but for the potential residents' state of mental retardation, the special use permit would be unnecessary and that the denial of the permit was a function of the residents' disability status. The District Court also held, however, that the application of rational basis scrutiny rendered both the ordinance and its application to be constitutional, rationally related to the city's interests in the fears of local residents.[117] As would the Supreme Court, the District Court legitimized the role of "benign bias against the disabled," as if there are different levels (even some acceptable levels) of discrimination.

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[113] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 435.

[114] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 435.

[115] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 436.

[116] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 436, FN4

[117] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 437

The Fifth Circuit reversed, ruling that mental retardation was a quasi-suspect classification and should be assessed via intermediate-level scrutiny.[118] "The court considered heightened scrutiny to be particularly appropriate in this case, because the city's ordinance withheld a benefit, which although not fundamental, was very important to the mentally retarded. Without group homes, the court stated, the retarded could never hope to integrate themselves into the community."[119] The City's ordinance was invalid on its face because it did not substantially further any important governmental interests. The ordinance was also invalid as applied, since the City "…had failed to justify its apparent view that any other group of 13 people could live under these allegedly 'crowded' conditions, nor had it explained why 6 would be acceptable but 13 not." [120]

The city's 1965 ordinance used language lifted directly from a 1947 ordinance, which lifted verbatim the language of a 1929 statute for neighboring Dallas, TX. This history indicates that the city's reference to the isolation of the "feeble minded" was written in a segregation society. The Supreme Court has held that "extant laws originally motivated by a discriminatory purpose continue to violate the Equal Protection Clause, even if they would be permissible were they reenacted without a discriminatory motive."[121]

The Fourteenth Amendment's Equal Protection Clause commands that people in similar circumstances should be treated the same by the State.[122] No State shall "deny to any person

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118 726 F.2d 191 (1984).

119 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 438.

120 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 438-439, FN 7.

121 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 465, FN 17. See also, Hunter v. Underwood, 471 U.S. 222, 233 (1985).

122 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 439.

within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike.[123]

The *Cleburne* Court next laid the foundation for its decision to cede legislative power from Congress: “Section 5 of the Amendment empowers Congress to enforce the Equal Protection mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”[124] The stated rational is that the United States Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.[125]

Though this proclamation on one hand indicates that the Supreme Court has afforded state legislatures wide latitude to govern “legitimate” classifications, it provided an opportunity for the U.S. Supreme Court to define for itself the meaning of central principles, such as “discrimination.” The U.S. Supreme Court has ruled that race, alienage, or national origin, as classifications, are seldom relevant to any legitimate state interest and that “laws grounded in such considerations are deemed to reflect prejudice and antipathy.”[126]

As seen in the paragraphs immediately proceeding, the U.S. Supreme Court’s discrimination jurisprudence is, at best, a study of inconsistency. By devising various levels of

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123 Plyler v. Doe, 457 U.S. 202, 216 (1982).

124 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 439-440, citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981); United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174-175 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979); New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

125 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 440

126 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 440

"scrutiny," however, the U.S. Supreme Court has effectively created for itself a "gatekeeping" role, able to decide, on an ad hoc basis, what does and does not constitute discrimination. In the best case scenario, laws which are subject to strict scrutiny are sustained only if they are suitably tailored to serve a compelling state interest.[127]

When statutes classify along gender lines, the Supreme Court has developed a heightened standard of scrutiny. Gender generally provides no legitimate basis for differential treatment and laws parsing benefits and responsibilities between men and women often reflect outmoded notions of the relative capabilities of the sexes. A gender classification fails unless it is substantially related to a sufficiently important governmental interest.[128]

Illegitimacy beyond the individual's control and official discriminations resting on that characteristic are also subject to somewhat heightened review: such statutes will be declared valid only if substantially related to a legitimate state interest."[129]To date, age classifications have not been afforded intermediate scrutiny review. According to the U.S. Supreme Court, older people have not experienced a history of overt discrimination (as if covert discrimination is any less damaging) nor have they "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[130] In so declaring, the U.S. Supreme Court ignored the weight of history, particularly the stereo-typical treatment of the disabled, not based upon actual interaction.

In a blatant demonstration of law-making, the U.S. Supreme Court has determined that if an insular group's unique characteristics are deemed relevant to state-controlled interests, states

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[127] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 440.

[128] Craig v. Boren, 429 U.S. 190 (1976).

[129] Mills v. Habluetzel, 456 U.S. 91, 99 (1982).

are allowed to choose whether, how, and to what extent those interests should be pursued. As long as rational means to serve a legitimate end are chosen, the federal courts will not interfere.[131] This cannot be the case, especially when Congress expressly determines that an insular group warrants the protection of the law. Such protection is not an abstract principal of interpretation, but is a function of the time, as determined by the legislative branch.

In *Cleburne*, the U.S. Supreme Court did not agree with the Court of Appeals' decision to render mental retardation a quasi-suspect classification. In doing this, the Supreme Court manifested its own ignorance and bias. The U.S. Supreme Court declared on a carte blanche basis that the mentally retarded have a reduced ability to cope and function in society; that they possess individual ranges of disability and are accordingly they are thus immutably different. Instead, however, of recognizing these differences as affording a basis for past present and future discrimination against the mentally disabled, resulting in the need for heightened protection, or recognizing that these differences were "mutable" in the context of reasonable accommodations, the U.S. Supreme Court narrowly declared that the "States' interest in dealing with and providing for them is plainly a legitimate one."[132] In this decision, the Supreme Court validated years of discrimination against the disabled, indicating that it was a function of necessity, bred by inherent differences. Such a decision was born either of ignorance or malice, as the future decisions would make evident.

Speaking out of turn, the U.S. Supreme Court expressed its belief that action by state legislators suggests that state governmental involvement, when dealing with the class that is the

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130 Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976).

131 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 441-442

132 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 442.

disabled, has been positive. “Special treatment reflects that a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable.”[133] Especially given the wide variation in the abilities and needs of the mentally disabled themselves, the U.S. Supreme Court opined that governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts.[134] The Court claimed further that legislative response, with public support, negates any claim that the mentally retarded are politically powerless.[135]

The U.S. Supreme Court failed, however, to examine the de facto impact of these state schemes, to determine whether or not specific instances of the legislation reflected an understanding for the condition of the disabled or was a patronization of the enfranchisement efforts of the disabled. The U.S. Supreme Court indicated its belief that states were not treating the disabled unfairly, based on the fact that these states had passed laws concerning the disabled. No scrutiny, however, was given to the manner in which these laws were interpreted, or the impact of the laws to stem or promulgate discrimination against the disabled.

Against this backdrop, the U.S. Supreme Court deemed it appropriate for state legislatures to negatively impact the mentally disabled in a wide range of instances. Like children, or Blacks at the turn of the twentieth century, the fate of the disabled was determined by a U.S. Supreme Court with a patronizing perspective about the “best interests” of the group. Made with the U.S. Supreme Court’s own bias and preference given to the interests of the

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[133] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 444.

[134] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 445.

[135] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985),

enfranchised, who would ultimately have to relinquish their advantage if the disabled were to gain fair treatment. “Mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.”[136] The rejection of this presumption is without justification and flies in the face of the weight of history.

In tossing the interests of the disabled to the lion’s den of rational basis scrutiny, the Supreme Court tossed the disabled a bone. The “State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”[137] By stating that the “asserted goal” cannot be arbitrary, the Supreme Court avoided the reality presented by state laws having a de facto negative impact on the disabled. Once again, only overt discrimination is precluded: Some objectives which are "a bare . . . desire to harm a politically unpopular group,"[138], are not legitimate state interests.[139]

In *Cleburne*, the City did not require a special use permit for “apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the

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at 446

[136] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 446.

[137] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 446.

[138] U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, at 534.

[139] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 446-447.

insane or feebleminded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses," but did require one for the mentally retarded.[140]

The U.S. Supreme Court's relegation of the disabled to the "desert" of rational basis scrutiny manifested its belief that it is able to circumvent the Equal Protection Clause in a manner that is not available to any other political entity: "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause."[141]

The U.S. Supreme Court rejected additional objections to the group home permit, since none were inextricably linked to the condition of mental retardation: that the home would be located across the street from a junior high school with the potential that students might harass the occupants; that the school itself is attended by about 30 mentally retarded students; that the potential location is on a flood plain. Denying a permit based on such vague, undifferentiated fears would permit "some portion of the community to validate what would otherwise be an equal protection violation."[142]

"[A] tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship -- other than pure prejudicial discrimination -- to the stated purpose for

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[140] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 447-448.

[141] Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964).

[142] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 448.

which the classification is being made."[143] Here, in the name of egalitarianism, the U.S. Supreme Court "winks" at would be discriminators, advising them to avoid certain "identifying" behaviors, cloaking their discriminatory intent within legally acceptable means.

2. Justice Marshall's *City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al.* Dissent Foreshadows the Negative Impact the Majority's Decision Would Have Upon the Rights of Insular, Minority Groups

In his *Cleburne* dissent, Justice Thurgood Marshall predicts the Supreme Court's increasingly narrow interpretation of Congressional ability to enforce the Fourteenth Amendment, resulting in an evisceration of that essential legislative act. The disabled deserve a heightened level of scrutiny and the U.S. Supreme Court unjustly deprived them of such protection.[144]

By establishing the strict scrutiny, quasi-suspect and rational basis categories, the Court uni-laterally placed the focus of discrimination law on overt actions. Besides placing an emphasis on the "wrong end" of the discrimination continuum, this process has made proving discrimination, in any context, one of the most difficult tasks of litigation. In this context, the Cleburne majority's decision to apply rational basis scrutiny created the subjective "breathing room" necessary to create for itself a "gatekeeping" role, unpredictably determining which fact patterns would be deemed fit to survive. As Justice Marshall suggests in his dissent, the Court's

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143 Mathews v. Lucas, 427 U.S. 495, 520-521 (1976) (STEVENS, J., dissenting). See also New York Transit Authority v. Beazer, 440 U.S. 568, 593 (1979).

144 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 456-478 (Marshall, J., dissenting)

decision reveals a rather nefarious agenda. Like Esau, the Supreme Court has effectively cheated disabled plaintiffs out of their birthright.[145]

Justice Marshall forewarns of the difficult times that would be follow the U.S. Supreme Court's lip service to Equal Protection doctrine. "I cannot agree, however, with the way in which the Court reaches its result or with the narrow, as-applied remedy it provides for the city of Cleburne's equal protection violation. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation."[146] Rational basis analysis, under most circumstances, is not strong enough to afford protection to interests Congress deems meritorious of enfranchisement under Equal Protection doctrine. The resultant subjectivity of the Cleburne majority's approach encourages a results-oriented, piecemeal analysis. The majority are then able to act as gatekeepers within the exercise of redistributing power. As long as the enfranchised "play by the rules" they may fearlessly maintain their disproportionate share of societal resources.

Justice Marshall correctly points out that the Supreme Court majority, similar to the zeal expressed by Justice Taney in the Dred Scott decision, decides constitutional issues which were not placed before it by the facts of the case. The high court should "never [] anticipate a question of constitutional law in advance of the necessity of deciding it [and should] never [] formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."'[147]

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145 Genesis 25:32-35.

146 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 456.

147 Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985) (WHITE, J.); City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 456-457

Underlying the shallow nature of its analysis, the Cleburne majority's "rational basis" decision was actually made with a heightened scrutiny analysis.[148] In dissent, Justice Marshall pointed out that the majority's analysis would have been unnecessary under the rational basis standard and warned against selective application of heightened scrutiny principles, under the rational basis label. The majority indicates that the facts do not support a determination that the subject ordinance satisfies rational basis scrutiny, "but under the traditional standard we do not sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation…. In normal circumstances, the burden is not on the legislature to convince the Court that the lines it has drawn are sensible; legislation is presumptively constitutional, and a State 'is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference' to its goals."[149]

The city's ordinance distinctions can be invalidated only via resort to more powerful scrutiny than the minimal rational-basis test used. Without heightened scrutiny, the distinctions raised within the statute would be non-fatal.[150]

Without a precedent setting foundation for its analysis, the *Cleburne* majority provides no principled foundation for determining when more searching inquiry is to be invoked. The rules are made to be manipulated by a majority, free to engage in results-oriented judicial decision-making.[151]

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148 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 458.

149 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 458-459

150 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 459.

151 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), Marshall dissenting, 459.

The specific scrutiny applied to an Equal Protection analysis is a function of "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[152] “When a zoning ordinance works to exclude the retarded from all residential districts in a community, these two considerations require that the ordinance be convincingly justified as substantially furthering legitimate and important purposes.”[153] The higher the scrutiny, the more favorable the balancing test will be for the group to be enfranchised. “Power concedes nothing without struggle. It never has and it never will.”[154]

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[152] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 99 (1973) (MARSHALL, J., dissenting).

[153] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 460.

[154] “Let me give you a word of the philosophy of reform. The whole history of the progress of human liberty shows that all concessions yet made to her august claims, have been born of earnest struggle. The conflict has been exciting, agitating, all-absorbing, and for the time being, putting all other tumults to silence. It must do this or it does nothing. If there is no struggle there is no progress. Those who profess to favor freedom and yet depreciate agitation, are men who want crops without plowing up the ground, they want rain without thunder and lightening. They want the ocean without the awful roar of its many waters."

"This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will. Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them, and these will continue till they are resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress. In the light of these ideas, Negroes will be hunted at the North, and held and flogged at the South so long as they submit to those devilish outrages, and make no resistance, either moral or physical. Men may not get all they pay for in this world; but they must certainly pay for all they get. If we ever get free from the oppressions and wrongs heaped upon us, we must pay for their removal. We must do this by labor, by suffering, by sacrifice, and if needs be, by our lives and the lives of others."

Source: Douglass, Frederick. [1857] (1985). "The Significance of Emancipation in the West Indies." Speech, Canandaigua, New York, August 3, 1857; collected in pamphlet by author. In *The Frederick Douglass Papers*. Series One: Speeches, Debates, and Interviews. Volume 3: 1855-63. Edited by John W. Blassingame. New Haven: Yale University Press, p. 204.

The interests of the retarded in establishing group homes is substantial, one of the fundamental liberties protected by the Fourteenth Amendment's Due Process Clause.[155] The disabled in general and the mentally retarded in particular have a "lengthy and tragic history," of segregation and discrimination that can only be called grotesque.[156] This history flies in the face of the *Cleburne* majority's determination that state legislation in the area is indicative of an absence of state-generated animus.

The mentally disabled have experienced state-sponsored discrimination on par with that experienced by Blacks on the basis of Race. In fact, some "state laws deemed the retarded 'unfit for citizenship.'"[157] As opposed to the majority's reflection upon state-sponsored litigation reflecting "benign" intent towards the disabled, Marshall pointed out that "…lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long has plagued them. n16"[158]

Justice Marshall importantly addresses the majority's minimalization of historical discrimination suffered by the retarded, by pointing to recent legislative action that is said to "[belie] a continuing antipathy or prejudice" and declaring that the retarded are not "politically powerless." "The import of these conclusions, it seems, is that the only discrimination courts may remedy is the discrimination they alone are perspicacious enough to see."[159]

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155 Meyer v. Nebraska, 262 U.S. 390, 399 (1923)

156 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 461

157 n11 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 463 (quoting Act of Apr. 3, 1920, ch. 210, § 17, 1920 Miss. Laws 288, 294.)

158 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 464, quoting G. Allport, The Nature of Prejudice (1958)

159 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 465-466.

The argument that the presence of state legislation in a given area indicates that discrimination in that area ceases to exist is baseless. "The Court, for example, has never suggested that race-based classifications became any less suspect once extensive legislation had been enacted on the subject."[160] "Heightened judicial scrutiny of action appearing to impose unnecessary barriers to the retarded is required in light of increasing recognition that such barriers are inconsistent with evolving principles of equality embedded in the Fourteenth Amendment."[161]

The majority's claim that heightened scrutiny is inapplicable where individuals in a group have distinguishing characteristics which legislatures properly may take into account in some circumstances and that heightened scrutiny does not apply when many classifications impacting a group are otherwise valid.[162] The fact that age does not trigger strict scrutiny says nothing about whether heightened scrutiny ought to be applied.[163] Women are hardly alike in all their characteristics, but heightened scrutiny applies to them because the Supreme Court has indicated that legislatures can rarely use gender itself as a proxy for these other characteristics. "Permissible distinctions between persons must bear a reasonable relationship to their relevant characteristics and gender is almost never so relevant.[164]

"Heightened but not strict scrutiny is considered appropriate in areas such as gender, illegitimacy, or alienage because the Court views the trait as relevant under some circumstances but not others. That view -- indeed the very concept of heightened, as opposed to strict, scrutiny

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160 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 467, quoting Palmore v. Sidoti, 466 U.S. 429 (1984).

161 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 467.

162 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 468.

163 Vance v. Bradley, 440 U.S. 93, 97 (1979).

-- is flatly inconsistent with the notion that heightened scrutiny should not apply to the retarded because 'mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions.' Because the government also may not take this characteristic into account in many circumstances, such as those presented here, careful review is required to separate the permissible from the invalid in classifications relying on retardation."[165]

Once Congress determines that a given classification has constitutional irrelevancy in certain instances, heightened scrutiny should be triggered. Congress need not demonstrate a threshold percentage of scenarios wherein a characteristic is invalidly invoked before determining whether heightened scrutiny is appropriate. "[H]eightened scrutiny has not been 'triggered' in our past cases only after some undefined numerical threshold of invalid 'situations' has been crossed. Whenever evolving principles of equality, rooted in the Equal Protection Clause, require that certain classifications be viewed as potentially discriminatory, and when history reveals systemic unequal treatment, more searching judicial inquiry than minimum rationality becomes relevant."[166] Justice Marshall could not have more accurately predicted the majority's 2001 *Garrett* decision.

A more searching judicial inquiry is triggered whenever legally created caste systems along gender, or illegitimacy lines, where history teaches us that they have been systematically victimized by discrimination.[167] "The government must establish that the classification is substantially related to important and legitimate objectives, see, e. g., Craig v. Boren, 429 U.S. 190 (1976), so that valid and sufficiently weighty policies actually justify the departure from

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164 Zobel v. Williams, 457 U.S., at 70 (Brennan, J., Concurring).

165 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 469.

166 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 470.

equality. By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment."[168]

The *Cleburne* issue should have been framed accordingly: whether the city may require a permit pursuant to a blunderbuss ordinance drafted many years ago to exclude all the "feebleminded," or whether the city must enact a new ordinance carefully tailored to the exclusion of some well-defined subgroup of retarded people in circumstances in which exclusion might reasonably further legitimate city purposes.[169] A judicial determination in the negative should then have been based upon the application of heightened level scrutiny.

B. The Abrogation of States' Eleventh Amendment Immunity is a Central Component of all Civil Rights Legislation

In the wake of the *Cleburne* decision, the U.S. Supreme Court reviewed several Congressional efforts to abrogate states' Eleventh Amendment immunity. Reviewing several of these cases, Part III(B) lends a perspective regarding the required elements of abrogation.

In the absence of Congressional immunity, the United States' Constitution "does not provide for federal jurisdiction over suits against nonconsenting States."[170] The Eleventh Amendment provides: "Judicial power shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The fundamental principle of sovereign

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167 United States v. Carolene Products co, 304 U.S. 144. 153, FN 4 (1938).

168 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 472.

169 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 474.

170 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at quoting College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 667, 669-670 (1999).

immunity limits the grant of judicial authority to hear suits, found in Art. III of the Constitution.[171] "In Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), the Court held that the Eleventh Amendment barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide."[172]

Well-established exceptions to Eleventh Amendment immunity exist, including those instances wherein a state waives its immunity and consents to suit.[173] "Moreover, the Eleventh Amendment is 'necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment,' that is, by Congress' power 'to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment.'"[174] "As a result, when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States' consent."[175]

The question of whether Congress has properly abrogated states' Eleventh Amendment immunity itself is a function of two issues: first, whether Congress has unequivocally expressed its intent to abrogate and, second, whether Congress has acted "pursuant to a valid exercise of power."[176]

Intent to abrogate must be obvious, made manifest by means of a clear legislative statement. "To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have

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171 Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 98, (1984) (Pennhurst II)

172 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234, 238 (1985)

173 Clark v. Barnard, 108 U.S. 436, 447 (1883).

174 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) 238, quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 456, (1976).

175 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) 238.

176 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 55, citing Green v. Mansour, 474 U.S. 64, 68 (1985).

applied a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'"[177]

It is "clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment."[178] Eleventh Amendment immunity is not designed solely to protect states from federal-court judgments which must be paid out of a state's treasury coffers.[179] Eleventh Amendment immunity also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."[180]

Looking at the long-established exception to Eleventh Amendment immunity carved out by *Ex Parte Young*[181], it may be said that the "Eleventh Amendment does not bar suits for prospective injunctive relief brought against state officers in their official capacities, to enjoin an alleged ongoing violation of federal law."[182] The U.S. Supreme Court's *Ex parte Virginia* holding also explains the scope of Congress' Fourteenth Amendment, § 5 power: "Whatever legislation is adapted to carry out the objects, whatever tends to enforce submission to secure to all persons perfect equality of civil rights and the equal protection of the laws against State denial, if not prohibited, is brought within the domain of congressional power."[183]

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177 Dellmuth v. Muth, 491 U.S. 223, at 227-228.

178 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 58.

179 Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 48 (1994);

180 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 58, quoting Puerto Rico Aqueduct and Sewer Authority, 506 U.S. at 146 (internal quotation marks omitted).

181 209 U.S. 123 (1908).

182 Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1045 (9th Cir. 2000).

183 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 517-518, quoting Ex parte Virginia, 100 U.S. 339, 345-346 (1880).

1. According to *Atascadero State Hospital et al. v. Scanlon,* Abrogation of States' Immunity May be Achieved Via Express State Waiver

The Eleventh Amendment immunity may not be exchanged for a congressional grant of some other power, or benefit.[184] The issue in *Atascadero* was whether States and state agencies may be sued in federal court for retroactive monetary relief § 504 of the Rehabilitation Act of 1973, or whether such suits are proscribed by the Eleventh Amendment.[185] In *Atascadero*, Respondent suffered from diabetes mellitus and has no sight in one eye. A hospital denied employment to the Respondent and he charged that Hospital's discriminatory refusal to hire him violated § 504 of the Rehabilitation Act of 1973.[186]

The U.S. Supreme Court ruled that the Eleventh Amendment barred the claims. To prove discrimination under § 504 a plaintiff must allege that the primary objective of the federal assistance given to the employer is to provide employment, and the employee did not so allege. The District Court granted Petitioners' motion to dismiss the suit via the Eleventh Amendment. The Ninth Circuit Court of Appeals affirmed, on the ground that respondent failed to allege an essential element of a claim under § 504, primary objective of the federal assistance given the employer is to provide employment.[187]

The U.S. Supreme Court granted certiorari, vacated the judgment of the Ninth Circuit and remanded the case for further consideration in light of Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), in which the Supreme Court held that § 504's bar on employment discrimination is not limited to programs that receive federal aid for the primary purpose of

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184 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 58-59, quoting Cf. Atascadero, 473 U.S., at 246-247, 105 S.Ct., at 3149-3150 ("[T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court").

185 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) 235

186 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) 236.

providing employment. On remand, the Court of Appeals reversed itself, stating that the Eleventh Amendment ultimately did not bar the action because the state implicitly consented to be sued as a recipient of federal funds. Finding that § 504 did not expressly abrogate the States' Eleventh Amendment immunity, the Court of Appeals reasoned that the state's consent to suit in federal court could be inferred in light of the fact that the Act provided remedies, procedures, and rights against recipients of federal assistance, while the implementing regulations expressly defined the class of recipients to include the States. The Supreme Court reversed the decision of the Court of Appeals.[188]

States may effect waiver of their constitutional immunity via legislation, constitutional provision, or specific action, waiving its immunity to suit in the context of a particular federal program. Unequivocal indication is necessary; waiver cannot be effected via constructive consent.[189]

"A State will be deemed to have waived its immunity 'only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' "[190] When determining whether Congress has abrogated state immunity in order to exercise its Fourteenth Amendment powers, the Supreme Court requires an unequivocal expression of congressional intent to overcome state Eleventh Amendment immunity.[191]

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187 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985), at 237

188 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985), at 237

189 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985), at 238.

190 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985), at 239, quoting Edelman v. Jordan, supra, 415 U.S., at 673.

191 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) 240

At issue in *Atascadero*, was whether by enacting the Rehabilitation Act, Congress properly abrogated the constitutional immunity of the States and whether, by accepting federal funds under the Rehabilitation Act, a particular state has consented to suit in federal court.[192]

State waiver will be found in only the most precise circumstances. General waiver will only be relevant to state suits; Art. III, § 5, of the California Constitution did not constitute a waiver of the State's constitutional immunity, since the "provision does not specifically indicate the State's willingness to be sued in federal court."[193]

The Rehabilitation Act provides remedies for violations of § 504 by "any recipient of Federal assistance." "There is no claim here that the State of California is not a recipient of federal aid under the statute. But given their constitutional role, the States are not like any other class of recipients of federal aid."[194] Since the Rehabilitation Act classifies defendants to include federal fund recipients and states are within the class of federal recipients, the question presented to the Supreme Court was whether state participation in Rehabilitation Act programs and receipt of funds therefrom constitutes implicit consent to be sued.[195]

"Mere receipt of federal funds cannot establish that a State has consented to suit in federal court. Various provisions of the Rehabilitation Act are addressed to the States. The Rehabilitation Act does not evince an unmistakable congressional purpose, pursuant to § 5 of the Fourteenth Amendment, to subject unconsenting States to the jurisdiction of the federal courts." In rendering its analysis, the Supreme Court avoids a plain reading of the term "any recipient," construing states to be beyond the reach of the word. It is not clear that Congress could have expressed its intent to abrogate state immunity more clearly than specifically including them in

192 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985)
193 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) 241.
194 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) 245-246.

the class of potential defendants, as federal fund recipients. “The Act likewise falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.”[196]

Section 504 imposes an obligation not to discriminate against the handicapped in "any program or activity receiving Federal financial assistance." This language is general and unqualified, and contains no indication whatsoever that an exemption for the States was intended.[197] In his *Atascadero* dissent, Justice Brennan also predicts the *Garrett* court’s unprincipled departure from precedent. The language employed by the Rehabilitation Act ("any program or activity receiving Federal financial assistance") “has long been used to impose obligations on the States under other statutory schemes.”[198]

“Given the unequivocal legislative history, the Court's conclusion that Congress did not abrogate the States' sovereign immunity when it enacted § 504 obviously cannot rest on an analysis of what Congress intended to do or on what Congress thought it was doing. Congress intended to impose a legal obligation on the States not to discriminate against the handicapped. In addition, Congress fully intended that whatever remedies were available against other entities--including the Federal Government itself after the 1978 amendments--be equally available against the States. There is simply not a shred of evidence to the contrary.”[199]

“These special rules of statutory drafting are not justified (nor are they justifiable) as efforts to determine the genuine intent of Congress; no reason has been advanced why ordinary

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195 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) 246.

196 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) 247.

197 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) Brennan dissent, 248.

198 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) Brennan dissenting, 250.

199 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) Brennan dissenting, 252

canons of statutory construction would be inadequate to ascertain the intent of Congress. Rather, the special rules are designed as hurdles to keep the disfavored suits out of the federal courts."[200] Justice Brennan thus predicts the gatekeeping role that the *Garrett* majority would ultimately carve for itself.

"These intricate rules often create manifest injustices while failing to respond to any legitimate needs of the States. A damages award may often be the only practical remedy available to the plaintiff, and the threat of a damages award may be the only effective deterrent to a defendant's willful violation of federal law. Cf. id., at 691-692, 94 S. Ct., at 1369-1370 (MARSHALL, J., dissenting)."[201] By interpreting state waiver of Eleventh Amendment immunity in such an exacting manner, the U.S. Supreme Court manifests a desire to increase the difficulty with which Congress may perform its legislative function. This increased difficulty serves no legitimate interest that is not addressed by the political process associated with the legislature.

2. In the Absence of State Waiver, Congress Can Unilaterally Abrogate States' Eleventh Amendment Immunity

"When Congress both expresses unequivocal intent to abrogate immunity and also acts pursuant to its § 5 powers, a state's immunity is waived."[202] The issue, however, seems to center on whether Congress is deemed to have acted within power ceded to it by the U.S. Constitution. Whether a particular judge understands the purpose of the Fourteenth Amendment, §5 is determinative of whether she will read that great expression in a narrow or proper fashion.

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200 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985), Brennan dissenting 254.

201 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) 256-257.

202 Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1174, quoting Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55.

a. Congress Must First Unequivocally Express Its Intent to Abrogate

i. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Governs Statutory Construction, or the Interpretation of Written Legislative Expression

In *Chevron*, several states had specifically been deemed to be offenders of the Clean Air Act. A federal agency was assigned the task of setting standards, an aspect of remediation.[203] The Clean Air Act Amendments of 1977, Pub.L. 95-95, were administered by the Environmental Protection Agency (EPA). Certain goals for air quality were established and "nonattainment" States were required to establish permit programs, aimed at remediating the discrepancies.[204]

Permits for stationary sources of pollution required permits, obtained under stringent conditions. An “existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant.” The essential question raised by the case was: whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source." The question of whether an entire manufacturing plant could be considered a “stationary source” was important to the question of the comprehensive costs associated with compliance with the CAA.[205]

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[203] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at ___.

[204] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 839-840.

[205] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 840.

"Stationary source" referred to a building, structure, facility, or installation, which emits any air pollutant. "Building, structure, facility, or installation" was defined as the "same industrial grouping on one or more contiguous or adjacent properties, except the activities of any vessel."[206] The EPA regulations containing the plantwide definition of stationary source, dated October 4, 1981, were set aside by the Court of Appeals.[207] There was no specific definition provided within the statute itself for the term, "stationary source." The U.S. Supreme Court was to decide, via a look at the legislative history and the plain language of the statute, whether or not to defer to the EPA's "bubble concept."[208]

The principle legal error of the Court of Appeals, according to the U.S. Supreme Court was in the adoption of a judicial definition of the term "stationary source," when it had decided that Congress itself had not provided a solid definition.[209] "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. Whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the

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206 40 CFR Sections 51.18 (j)(1)(i) and (ii) (1983). Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 840.

207 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 840-841.

208 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 841-842

209 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 842.

question for the court is whether the agency's answer is based on a permissible construction of the statute."[210]

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[211] When a federal court applies traditional tools of statutory construction, determines that the federal legislature has expressed its intent regarding the precise question at issue, that interpretation is the controlling law.[212] The role of federal administrative agencies is to fill in gaps left by Congress. "The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[213] These Congressional interpretations regulations are given controlling weight unless they are "arbitrary, capricious, or manifestly contrary to the statute."[214] "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[215]

The only time the federal court should disturb a federal administrative agency's interpretation would be in the event that the agency's decision to resolve a policy conflict is not

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[210] n 11 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 842, 843

[211] F.E.C. v. Democratic Senatorial Campaign Committee, 453 U.S. 27, 32 (1981)

[212] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 843.

[213] Morton v. Ruiz, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974).

[214] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 843.

[215] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 843.

one that Congress would approve.[216] Unless the decision is capricious, the court should defer to a federal agency, doing the job Congress created it to perform.[217]

In *Chevron*, the Court of Appeals was deemed to have misconstrued its role. "Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is 'inappropriate' in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one." Though the Supreme Court agreed with the Court of Appeals that Congress had not specifically defined the "bubble concept," the Court of Appeals should not have rejected the EPA's incorporation of that term, since it was a "reasonable policy choice for the agency to make."[218]

The federal agency may reasonably change its interpretation of a policy or definition, if such changes reflect an evolving understanding of the subject matter the agency was created to administer. "The fact that the agency has from time to time changed its interpretation of the term [] does not… lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the

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216 United States v. Shimer, 367 U.S. 374, 382, 383 (1961)

217 ***Fix citation Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at

218 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 846.

definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute."[219]

ii. A Statute's Plain Language is the Primary Interpretive Consideration

Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.[220] "It is also significant that in determining whether Congress has abrogated the States' Eleventh Amendment immunity, the courts themselves must decide whether their own jurisdiction has been expanded. Although it is of course the duty of this Court 'to say what the law is.'"[221] The judiciary has an obligation to interpret a statute in accord with the plain meaning of the language chosen.

iii. When Congress Places Interpretive Gaps Within Legislation, the Judiciary Must Defer to the Interpretation of Designated Administrative Agencies

According to Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, (1984), interpretive regulations are subject to a two-pronged analysis. First, the court determines whether Congress' intent is clear from the language of the statute. If so, the plain reading of the statute trumps all other interpretations. If Congress has intentionally left a "gap" to be filled by the administrative agency, the second prong provides for the adherence to the administrative regulation, unless it is "arbitrary, capricious, or manifestly contrary to the

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219 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 863-864.

220 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) 242.

221 Atascadero State Hospital, et al., v. Scanlon, 473 U.S. 234 (1985) 243, quoting Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

statute."[222]

b. States' Eleventh Amendment Immunity Must be Abrogated in a Manner that is Proportionate to the Congressional Authority Vested within the Constitutional Provision Applied

The U.S. Supreme Court has discussed the thin line that exists between remedial legislation and attempts to change the meaning of Constitutional rights, the latter being beyond Congressional authority. Despite Congress' "wide latitude" to approach this line, the concepts of "congruence and proportionality" between the harm to be averted and the manner chosen to accomplish this goal, which dictate the instances when that line has been breached.[223] By so acting, the U.S. Supreme Court supplanted its own subjective view of "congruence and proportionality" for that exercised by Congress, though, as Justice Marshall had warned in *Cleburne*, the Constitution has provided the latter branch with far better capabilities for the task. "[L]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's [articulated] 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.'"[224]

Congress has the duty to interpret the law, particularly judicial proclamations of the Constitution.[225] When this interpretation incorrectly broadens Congressional power, the

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[222] Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1173, quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), at 844.

[223] City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 519-520.

[224] City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 518, quoting Fitzpatrick v. Bitzer, 427 U.S. at 455.

[225] City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 535.

judiciary's responsibility is to check that power.[226]The first aspect of the congruence and proportionality test is the illumination of the "Fourteenth Amendment 'evil'… Congress intended to remedy."[227] The second prong consists of asking whether the mechanisms of the statute in proportion to their remedial or preventive purposes.[228]

In *Boerne*, an age discrimination suit, the United States Supreme Court rejected, for the purpose of abrogation of states' Eleventh Amendment Immunity, Congressional contemplation of a 1966 report prepared by the State of California on age discrimination in its public agencies.[229] The Court criticized the dearth of constitutional violations contained in the report and stated that even "if the California report had uncovered a pattern of unconstitutional age discrimination in the State's public agencies at the time, it nevertheless would have been insufficient to support Congress' 1974 extension of the ADEA to every State of the Union," since the report does not evidence a national phenomenon.[230] In the event that Congress is able in the future to rely upon the converse of this position, the Court's declaration seems imminently legitimate.

In *Kimel*, the U.S. Supreme Court declared that the legislative history must be directed toward state behavior and not that of the private sector. Though this argument presupposes a distinction between private and public discrimination, it does appear that a Congressional

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226 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 535-536.

227 Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999)

228 Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, at 2210 (quoting City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 521 U.S. at 532). [Fix citation] (1999)

229 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 90, quoting . See Hearings on H. R. 3651 et al. before the Subcommittee on Labor of the House of Representatives Committee on Education and Labor, 90th Cong., 1st Sess., pp. 161-201 (1967).

230 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 90.

determination relative to state patterns of discrimination would carry a great deal of weight with the Court.[231]

Given the prospect of unequivocally expressed congressional intent to abrogate, abrogation essentially boils down to one question: "Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?"[232] Traditionally, the power to abrogate has been found to exist under only two sections of the U.S. Constitution: the Fourteenth Amendment and the Commerce Clause.[233]

i. In *Pennsylvania v. Union Gas,* the U.S. Supreme Court Recognized that the Interstate Commerce Clause Provides Congress with the Power to Abrogate

The Commerce Clause was the source of congressional power that was deemed to unmistakably lead to the conclusion that Congress may permit suits against the States for money damages. "The States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce," id., at 191, and that "[b]y empowering Congress to regulate commerce, . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation."[234]

"[I]n 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. Every addition of power to the general government involves a corresponding diminution of the governmental

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231 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 90.

232 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 59.

233 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 59.

234 Pennsylvania v. Union Gas, 491 U.S. 1 (1989), at 14, quoting Parden v. Terminal Railway of Alabama Docks Dept., 377 U.S. 184 (1964). (See also, Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S., at 286)

powers of the States. It is carved out of them."[235] *Union Gas* equates the language acknowledging congressional power to abrogate via the Fourteenth Amendment with congressional power found within the Commerce Clause: "Each of these points is as applicable to the Commerce Clause as it is to the Fourteenth Amendment. Like the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States."[236]

In *Union Gas*, the question before the U.S. Supreme Court was whether the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (hereinafter, "CERCLA") permits a suit for monetary damages against a State in federal court and, if so, whether Congress had the authority to create such a cause of action via the Commerce Clause. The Court answered both questions in the affirmative.[237]

Union Gas filed a third-party complaint against the state of Pennsylvania. The District Court dismissed the complaint, pursuant to its application of the Eleventh Amendment, finding a condition of abrogation to be lacking: that there had been no clear expression of congressional intent to hold States liable for monetary damages under CERCLA.[238]

Under the doctrine set out in Hans v. Louisiana, 134 U.S. 1 (1890), Eleventh Amendment sovereign immunity provides to the States immunity from federal suits for monetary damages. Congress has the power to abrogate this immunity via § 5 of the Fourteenth Amendment, but the *Union Gas* court was faced with deciding whether Congress possesses the same power of

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235 Pennsylvania v. Union Gas, 491 U.S. 1 (1989), quoting Ex parte Virginia, 100 U.S. 339, at 346 (1880), quoted in Fitzpatrick, supra, at 454-455.

236 Pennsylvania v. Union Gas, 491 U.S. 1 (1989), at 16

237 Pennsylvania v. Union Gas, 491 U.S. 1 (1989), at 5.

238 Pennsylvania v. Union Gas, 491 U.S. 1 (1989), at 6.

abrogation under the Commerce Clause.[239] Justice Brennan's *Union Gas* opinion relies upon Congress' plenary power to regulate interstate commerce, when carving out Congressional authority to abrogate states' Eleventh Amendment immunity.[240]

In the event that ADA Title II abrogation is deemed to rest upon the shoulders of the Commerce Clause, the requirement of proportionality would seem to fall away. "Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not 'unconsenting'; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis."[241]

"In approving the commerce power, the States consented to suits against them based on congressionally created causes of action. The Fourteenth Amendment does not purport to expand or even change the scope of Article III." Neither does the Commerce Clause.[242] Thus, Commerce Clause jurisdiction both displaces and pre-empts state authority, even when the power has yet to be exercised by Congress.[243] Since the States are not allowed to craft laws within these scenarios, Congress must be allowed to create monetary causes of action versus

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239 Pennsylvania v. Union Gas, 491 U.S. 1 (1989), at 7.

240 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 61.

241 Pennsylvania v. Union Gas, 491 U.S. 1 (1989), at 19-20

242 Pennsylvania v. Union Gas, 491 U.S. 1 (1989) 22.

243 Gibbons v. Ogden, 9 Wheat. 1(1824); Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493 (1989); Philadelphia v. New Jersey, 437 U.S. 617, 621, n. 4, 628-629 (1978).

states or else it would be impossible for such suits to be brought in any instance. The award of monetary damages are required to fulfill the legitimate congressional purposes of the Commerce Clause.[244]

Like environmental harms, the general problem of discrimination against the disabled, particularly in places of public accommodation, is often not susceptible of a local solution.[245] Also like pollution, discrimination against the disabled had been the subject of previous congressional remediation attempts.[246] The Commerce Clause, in the absence of the *Seminole* holding detailed in the immediately proceeding section, would appear to be the perfect tool to implement resource redistributive legislation.

ii. *Seminole Tribe of Florida v. Florida* Overturned *Pennsylvania v. Union Gas,* Destroying Congress' Ability to Use the Interstate Commerce Clause as a Means of Abrogation

In *Seminole*, the U.S. Supreme Court was to determine whether the IGRA was passed "pursuant to a valid exercise of power."[247] Before addressing that crucial issue, the Supreme Court first attempted to "define the scope of its inquiry," acting essentially to re-write the applicable rules in the results-oriented jurisprudence that has been characteristic of the Rehnquist court majority.[248]

The Indian Gaming Regulatory Act, 25 U.S.C. §2710, provides an opportunity for the creation of Indian tribe gaming activities, under valid compacts between tribes and the host

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244 Pennsylvania v. Union Gas, 491 U.S. 1 (1989), at 20

245 Pennsylvania v. Union Gas, 491 U.S. 1 (1989), at 20.

246 [cite efforts to improve the Rehabilitation Act]. Pennsylvania v. Union Gas, 491 U.S. 1 (1989), at 21.

247 Green v. Mansour, 474 U.S., at 68.

states. The Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, mandates that the states negotiate in good faith with these tribes, authorizing the tribes to bring suit in federal court against a State in order to compel performance of this responsibility. In spite of Congress' clearly expressed intent to abrogate the states' sovereign immunity, the Supreme Court declared that the Indian Commerce Clause lacks the ability to confer such power to Congress. The Indian Gaming Regulatory Act was accordingly held to have no ability to maintain federal jurisdiction over a non-consenting states.[249]

The Indian Gaming Regulatory Act (IGRA) was passed in 1988. *Seminole* dealt with Class III gaming, including slot machines, casino games, banking card games, dog racing, and lotteries, the most heavily regulated o the classes of gaming authorized by the statute. Class III gaming is legal only where "(1) authorized by a statute that is (a) accepted by the Indian tribe's governing body, (b) conforms with statutory requirements and (c) is sanctioned by the National Indian Gaming Commission; (2) in a state that allows such gaming and (3) in complicity with a Tribal-State compact.[250]

In §2710(d)(3) of the IGRA concerns the process by which a State and an Indian tribe begin negotiations toward a Tribal-State compact. Essentially, the Indian tribe first made a request to the State to enter into negotiations for Tribal-State compact. The state in turn was directed to negotiate in good faith to enter into such a compact.[251] One issue that was clear from the outset was the fact that the Seminole Tribe had sued the State of Florida and that Florida did not consent to the suit.[252]

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[248] Fix citation

[249] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 47.

[250] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 48.

[251] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 49.

[252] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 55.

The "obligation to 'negotiate with the Indian tribe in good faith' is made judicially enforceable by § §2710(d)(7)(A)(i) and (B)(i)," providing that the federal district court would have jurisdiction over actions initiated by Indian tribes over the failure of states to enter negotiations, or to conduct the negotiations in good faith.[253] The Tribal-State compact is ultimately formed if the State consents. States have a great deal of flexibility under the IGRA; good faith is a condition of state negotiation posture, but is not mandated by the statute and monetary damages are not expressly allocated by the statute.[254]

In September of 1991, Florida's Seminole Tribe sued the State of Florida under 25 U.S.C. § 2710(d)(7)(A), charging that the state had "refused to enter into any negotiations concerning the establishment of certain gaming activities, in the form of a tribal-state compact, in violation of the good faith negotiation requirement. The state of Florida moved to dismiss the complaint, arguing that the suit violated the Florida's sovereign immunity, pursuant to the Eleventh Amendment. The District Court denied the motion.[255]

"The Court of Appeals for the Eleventh Circuit reversed the decision of the District Court, holding that the Eleventh Amendment barred petitioner's suit against respondents."[256] Congress intended the IGRA's § 2710(d)(7) to serve as the means by which abrogation of the States' sovereign immunity would be accomplished and the Act was passed pursuant to Congress' power under the Indian Commerce Clause. The Eleventh Circuit Court of Appeals determined, however, that the Indian Commerce Clause grants Congress the power to abrogate a State's Eleventh Amendment immunity from suit.[257]

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253 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 50.
254 Fix citation
255 Fix citation
256 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 52.
257 Fix citation

The Supreme Court was posed with the following issue: Does the "Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause?"[258] The Seminole Court criticized the fact that only in Union Gas had the Supreme Court found abrogation power outside the scope of the Fourteenth Amendment. In that case, the United States' Supreme Court held that the "Interstate Commerce Clause, Art. I, § 8, cl. 3, granted Congress the power to abrogate state sovereign immunity," reasoning that the ability of Congress to regulate interstate commerce was incomplete in the absence of the power to obtain monetary judgments against states.[259]

The seminal issue in *Seminole* was "whether the Indian Commerce Clause, like the Interstate Commerce Clause, is a grant of authority to the Federal Government at the expense of the States."[260] The majority credited the Indian Commerce Clause with more power over the states than that possessed by Congress via the Interstate Commerce Clause. The majority's rationale was that states maintain some level of control in the area of interstate trade, while these same states have virtually no authority with respect to Native American commerce and the ay to day affairs of Native American tribes.[261] The majority essentially determined that any argument basing abrogation upon the Indian Commerce Clause would only fail in the context of the destruction of the principal established in Union Gas: that the Eleventh Amendment could be abrogated by application of the Interstate Commerce Clause.[262]

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258 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 53.
259 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 59.
260 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 62.
261 Ponca Tribe of Oklahoma v. Oklahoma, 37 F.3d 1422, 1428 (C.A.10 1994).
262 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 62-63.

Stare decisis preserves confidence in the consistency of judicial decisions[263], and weigh strongly, according to the *Seminole* majority, against reversals, though the overturning of cases is not an impossible outcome.[264] Constitutional interpretation cases have lent themselves to reversal wherever the Court has determined that legislative correction would be inadequate.[265]

According to the *Seminole* majority, *Union Gas* was problematic because it increased the scope of Article III jurisdiction.[266] *Union Gas* had been the only case to expand Article III, outside of the Fourteenth Amendment.[267] The *Seminole* majority overruled *Union Gas*, stating that it was "wrongly decided."[268] In making this decision, the *Seminole* majority determined that the Commerce Clause had not been crafted to serve as acknowledgment of any "surrender" of authority, by the states and to the federal government.[269]

In an act of ostensibly unprincipled convenience[270], the *Seminole* majority refused to apply the plain language of the Constitution: "We long have recognized that blind reliance upon the text of the Eleventh Amendment is " 'to strain the Constitution and the law to a construction

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263 Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991)

264 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 63, quoting Payne, 501 U.S., at 828, 111 S.Ct., at 2609.

265 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 63, quoting Payne, supra, at 828, 111 S.Ct., at 2600 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting)).

266 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 63.

267 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 65.

268 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 66.

269 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 67-68.

270 Fix Citation See, "The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication," by William S. Consovoy. "Many have argued that the Rehnquist Court is result-oriented and unprincipled. Although this conclusion is doubtful as to the Court's entire body of jurisprudence, for its stare decisis decisions, this conclusion is inescapable. The Court has reiterated that stare decisis is not an "inexorable command." However, what we now understand is that it is no command at all. Supreme Court decisions do not result from application of stare decisis. Rather, stare decisis is merely another "tool" in the Court's adjudicative "toolbelt."

never imagined or dreamed of.'"[271] "The text dealt in terms only with the problem presented by the decision in Chisholm; in light of the fact that the federal courts did not have federal question jurisdiction at the time the Amendment was passed (and would not have it until 1875), it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States." [272]

The *Seminole* majority seemingly offered condolences to the disappointed respondents, indicating that states' compliance with federal law could be guaranteed by suits initiated by the federal government and individual suits against state officers.[273] Although the *Seminole* majority acknowledged that under the Fourteenth Amendment, Congress' authority to abrogate is undisputed,[274] the opinion removed the Commerce Clause as a source of relief, though the rationale supporting abrogation under either constitutional provision is indistinguishable.[275]

The *Seminole* majority indicated that even Congressional plenary power does not impede Eleventh Amendment immunity with respect to unconsenting states being sued by private parties. Though the Fourteenth Amendment may, by application of similar logic, increase Article III's scope, the *Seminole* majority removed the Commerce Clause as a vehicle to achieve the

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271 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 69, quoting Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

272 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 69.

273 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 71, quoting United States v. Texas, 143 U.S. 621, 644-645, 12 S.Ct. 488, 493, 36 L.Ed. 285 (1892) and Ex parte Young, 209 U.S. 123, (1908).

274 Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 71 See, e.g., Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979).

275 Fix citation [Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at Stevens dissenting, p. X, Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at Souter dissenting, p. X]]

same ends. “Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.”[276]

c. The U.S. Supreme Court has Limited Congressional Authority to Abrogate via §5 of the Fourteenth Amendment

Having eliminated the very powerful tool of the Commerce Clause, within the context of abrogation, the U.S. Supreme Court turned its attention to the emasculination of Congressional power to remediate social wrongs via §5 of the Fourteenth Amendment.

i. Fourteenth Amendment, §5 Legislation Must be Remedial, in Order to Satisfy the Congruence and Proportionality Requirement

The Fourteenth Amendment prohibits certain actions by the States and § 5 expressly provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Fourteenth Amendment served as the vehicle through which federal power trumped the Eleventh Amendment’s immunity protection.[277]

Congressional power to enforce the Equal Protection Clause via §5 is broader than that applied to suspect classifications.[278] Congress has the responsibility to eliminate discrimination where it lives, even if the “hiding places” potentially include “every state law, policy, or program.”[279] “Congress’ §5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which

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[276] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 72-73.
[277] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), at 59.
[278] Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) 1008.

is not itself forbidden by the *Amendment's text*." [Emphasis in original][280]

When statutory declarations are drafted pursuant to Congress' "Fourteenth Amendment powers, they do not conflict with powers reserved to the states under the Tenth Amendment."[281] Congress' power to enforce the law is no stronger than when applied to the task of fixing problems under the umbrella of the Fourteenth Amendment's Equal Protection clause. This means that Congress can interfere with constitutional state action, if such is an aspect of the necessary repair work.[282] Congress need not demonstrate that the legislative history meets a scientific formula. Congress can and does "routinely draw general conclusions – for example---of likely motive or of likely relationship to legitimate need -- from anecdotal and opinion-based evidence."[283]

The Supreme Court, significantly has not traditionally required some threshold demonstration that the legislative history has to meet. "Instead, the Court has merely asked whether Congress' likely conclusions were reasonable, not whether there was adequate evidentiary support in the record. Nor has the Court traditionally required Congress to make findings as to state discrimination, or to break down the record evidence, category by category."[284]

The seminal *Washington v. Davis* decision, ironically, invited the very Congressional Definition of discrimination found within the ADA, Title II. Interpretation of the Equal

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279 Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) 1009.

280 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at quoting Boerne, 521 U.S. at 518.

281 Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1177, quoting Ex parte Virginia, 100 U.S. 339, 344-47 (1879)

282 Florida Prepaid, at 2206 [Fix citation]

283 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer dissenting, 380.

284 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer

Protection Clause via the application of a disparate impact standard "should await legislative prescription."[285] “There is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its § 5 authority, to adopt rules or presumptions that reflect a court's institutional limitations. Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy….Unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification.”[286]

Fitzpatrick v. Bitzer stands for the proposition that Congress is entitled to subject States to federal money damages via § 5 of the Fourteenth Amendment, since Congress can override States' immunity under § 5.[287] "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."[288]

Congress is entitled to negatively impact what would otherwise be considered constitutional behavior and may even trespass traditional areas of state jurisdiction, if such is necessary to enforce the Fourteenth Amendment: “Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the

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dissenting, 380.

285 Washington v. Davis, 426 U.S. 229, 248 (1976)

286 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer dissenting, 384.

287 Pennsylvania v. Union Gas, 491 U.S. 1 (1989), at 15.

288 Fitzpatrick v. Bitzer, 427 U.S. 445, at 456.

process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[289]

Though acknowledging the congressional right to enforce the Free Exercise Clause of the First Amendment, via the Fourteenth Amendment's Due Process Clause, the *Boerne* Court emphasized the fact that this enforcement power is limited.[290] The limitation, according to the *Boerne* Court, is embodied in the concept that the legislation must be remedial in its scope. Congress could, therefore, not change the meaning of the Free Exercise Clause, but could address behavior that negatively impacted Free Exercise, as interpreted by the Court.[291]

The *Boerne* Court labeled the Fourteenth Amendment's history as being "remedial, rather than substantive," as determined by the nature of the Enforcement Clause. The Court pointed to the original, rejected version of the Fourteenth Amendment. "In February, Republican Representative John Bingham of Ohio reported the following draft Amendment to the House of Representatives on behalf of the Joint Committee: '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.'"[292]

This version of the Amendment was rejected, giving "Congress too much legislative power…" The fear was that all state legislation could be voided by the Amendment, as worded. Power would be given to Congress to legislate in areas impacting every sphere of life. The

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289 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 518, quoting Fitzpatrick v. Bitzer, 427 US 445, 455.

290 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 519.

291 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 519, quoting South Carolina v. Katzenbach, supra, at 326, 86 S.Ct., at 817-818.

292 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 520, quoting Cong. Globe, 39th Cong., 1st Sess., 1034 (1866).

Boerne Court, however, mistakenly equated the rejection of this version of the Fourteenth Amendment with the rejection of the entirety of the debated concepts. Apparently, "giving Congress primary responsibility for enforcing legal equality would place power in the hands of changing congressional majorities."[293]

The *Boerne* Court characterized the new version of the Amendment, reported to Congress on April 30, 1866, as giving to Congress powers which were "no longer plenary but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective." The Court did not choose to characterize Congressional enforcement power under the Fourteenth Amendment as "plenary remedial power," or power necessary to overcome the inertia of racial discrimination, the primary focus of the Amendment. "Representative Stevens described the new draft Amendment as 'allow[ing] Congress to correct the unjust legislation of the States.'"[294]

After revisions, the new measure passed both Houses and was ratified in July 1868 as the Fourteenth Amendment.[295] Attempting to distinguish the "remedial" Fourteenth Amendment from the "first eight Amendments to the Constitution," the Supreme Court labeled the Bill of Rights as enumerating "self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions." The revised Fourteenth Amendment, the Supreme Court wrote, rendered the Court and not Congress as the arbiter of whether privileges and immunities were secured to citizens the laws of the respective states.

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[293] City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 521, quoting generally Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L.Rev. 1, 57 (1955); Graham, Our "Declaratory" Fourteenth Amendment, 7 Stan. L.Rev. 3, 21 (1954).

[294] City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 522, quoting Cong. Globe, 39th Cong., 1st Sess., at 2286.Id., at 2459

[295] City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 522, quoting Cong. Globe, 39th Cong., 1st Sess., at 2286.Id., at ___.

"The power to interpret the Constitution in a case or controversy remains in the Judiciary."[296] The Court's opinion was silent, however, with respect to the fact that Congress must engage in interpretation of state action, whenever it considers whether remediation is necessary. It is in these "pre-controversy" instances that Congress is specifically supposed to "correct" state sponsored Equal Protection affronts, choosing the most effective manner of doing so.[297] What is "corrective legislation" but an attempt to stop a pattern of behavior that impedes an insular minority from enjoying the equal protection of the federal constitution. How is it possible to correct behavior without interpreting it as being unconstitutional?

The U.S. Supreme Court proceeded to carve a narrow path for remedial legislation. In determining "whether § 5 legislation can be considered remedial," the *Boerne* Court turned to *South Carolina v. Katzenbach*, which had emphasized that "[t]he constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience ... it reflects."[298] The Court pointed to the existence of blatant, overt discrimination, "noted evidence in the record reflecting the subsisting and pervasive discriminatory--and therefore unconstitutional--use of literacy tests," in its continued attempt to limit Congressional interpretation of discrimination to this narrow realm.[299]

In *Katzenbach v. Morgan*, the constitutionality of § 4(e) of the Voting Rights Act of 1965 was measured. The *Katzenbach* Court determined that denial of the voting franchise based upon the fact of being educated in the Commonwealth of Puerto Rico and a commensurate inability to read or write English was contrary to the Equal Protection Clause. Congress was

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296 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 524.

297 Marshall, City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at __.

298 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 525, quoting South Carolina v. Katzenbach, 383 U.S., at 308, 86 S.Ct., at 808.

deemed empowered to give Puerto Ricans enhanced political clout, that would itself assist Puerto Ricans in averting discriminatory treatment in both the general receipt of public services and the establishment of voter registration requirements. Congress was here allowed to interpret a factual predicate to make the determination that remediation was necessary. Congress was not deemed to be creating substantive constitutional rights.[300]

South Carolina v. Katzenbach[301] answered in the affirmative the question of whether the Voting Rights Act was "appropriate" abrogation of states' immunity. Not surprisingly, the Supreme Court approved the rationale supporting Congress' use of § 2 of the Fifteenth Amendment, since the federal legislature had "explored with great care the problem of racial discrimination in voting."[302] The Voting Rights Act was, to the *Garrett* majority, an acceptably limited "remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified."[303] The question that must be addressed is, "from whose perspective must the determination of the precise quantum of 'abundant evidence' be made?"

ii. A Series of U.S. Supreme Court Decisions, Narrowly Interpreting the Meaning of Remediation, Have Served to Inappropriately Limit Congress' Ability to Abrogate States' Eleventh Amendment Immunity

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299 Fix citation

300 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 528, quoting Katzenbach 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

301 383 U.S. 301, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966),

302 383 U.S. 301, at 308

303 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 373, quoting 383 U.S. 301, at 308

In *Boerne*, a local zoning authority's decision to reject the application of a church for a building permit implicated the Religious Freedom Restoration Act of 1993 ("RFRA").[304] At issue was Congressional authority to create RFRA.[305] *Boerne* involved a city council that had legislatively determined that a Historic Landmark Commission would "preapprove construction affecting historic landmarks."[306]

When a religious entity applied for a building permit, city authorities invoked a local ordinance, designating the subject area an historic district and denied the application. At the District Court level, the judge concluded that RFRA represented an improper application of congressional remedial enforcement power, via § 5 of the Fourteenth Amendment. The Fifth Circuit Court of Appeals reversed the district curt, ruling that RFRA was a constitutional exercise of Fourteenth Amendment remedial enforcement power. The United States Supreme Court reversed the Court of Appeals, siding with the District Court in determining that RFRA was an example of legislation in excess of Congressional authority to remediate Equal Protection Clause violations.[307]

RFRA was a congressional response to Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In *Smith*, the Supreme Court determined that a Free Exercise Clause claim, instituted by representatives of the Native American Church, "denied unemployment benefits when they lost their jobs" in connection with the use of a controlled substance, peyote.[308] The Supreme Court decided not to use the balancing test it had created in Sherbert v. Verner, 374 U.S. 398: asking whether the Oregon

304 42 U.S.C. § 2000bb et seq.
305 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 511.
306 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 512.
307 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 512.
308 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 512-513.

statute "substantially burdened a religious practice and, if it did, whether [such burden was] justified by a compelling government interest."[309]

The U.S. Supreme Court had employed the *Sherbert* test in considering free exercise challenges to state unemployment compensation rules on three occasions where the balance had tipped in favor of the individual. "Where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason."[310] "By contrast, where a general prohibition, such as Oregon's, is at issue, 'the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to [free exercise] challenges."[311] In *Smith*, the Supreme Court decided that laws of general application may interfere with insular religious practices in the absence of governmentally compelling interests being demonstrated by the state. [312]

The RFRA was born out of congressional displeasure with the *Smith* decision. *Boerne* serves as a poignant reminder that Congress will not be allowed to merely "tamper" with *Garrett*, in order to have the ADA Title I declared properly abrogated. The RFRA followed congressional debate regarding constitutional interpretation. The RFRA expressed congressional ideology, that "governments should not substantially burden religious exercise without compelling justification and that the "compelling interest test is a workable test for striking sensible balances between religious liberty."[313] The RFRA's stated purpose was to guarantee the application of the application of the compelling interest test in "all cases where free exercise of religion is substantially burdened," unless the government can demonstrate the burden, "is the

309 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 513.
310 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 514, quoting *Smith* at 884.
311 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 514, quoting Smith, at 885
312 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 514.
313 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 515.

least restrictive means of furthering that compelling governmental interest."[314] The RFRA was expressly made applicable to the states, calling into question whether, by passage of the bill, Congress had properly abrogated Eleventh Amendment immunity.[315]

The RFRA was premised on congressional reliance upon the Fourteenth Amendment's remedial Equal Protection enforcement power, as that statute was to apply to the States. The question of whether Congress had exceeded this authority, via passage of the act was before the Supreme Court.[316]

The *Boerne* Court next decided whether the RFRA can be properly considered enforcement legislation under § 5 of the Fourteenth Amendment. It is important to note that the denial of governmental services bears a far more pervasive, intimate relationship to citizenship rights than does employment privileges. The means chosen to combat a particular manifestation of discrimination must be proportionate to the "evil presented."[317] A particularly effective remedy may be inappropriate, according to the Court, when applied to a less virulent problem. The Court, by adopting such a standard betrays its hidden purpose: the protection of the property interests of those persons who control the most powerful vestiges of government.

The U.S. Supreme Court next expressed its belief that Congress may only interpret behavior and preventatively remedy same when the evil to be corrected is sufficiently narrow to satisfy its gatekeeper mentality. Only the most gross, overt forms of racial discrimination will pass such a test; i.e. the Voting Rights Act, dealing with expressed bigotry and rejecting RFRA, ostensibly because the Court was unsatisfied with the legislative findings: "It is difficult to

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314 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 515, quoting 42 U.S.C.§ 2000bb(a).

315 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) at 516.

316 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 516-517.

317 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 530, quoting South Carolina v.

maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. Congress' concern was with the incidental burdens imposed, not the object or purpose of the legislation."[318]

With these considerations in mind, the Supreme Court deemed Congress, in enacting the RFRA, to have gone too far. RFRA was not "considered remedial, preventive legislation, if those terms are to have any meaning….Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional," pointing to "purposeful discrimination in City of Rome, 446 U.S., at 177, as a counter-example.[319]

In striking the RFRA, the U.S. Supreme Court accordingly voiced its narrow definition of discrimination, seeking to prevent Congress from addressing any broader, more subtle forms of discrimination. Where a specific, overt act of discrimination, or a like pattern, has taken place, Congress can "react" to the problem, prohibiting only in those circumstances, actions which might have a discriminatory impact in these specific jurisdictions. Congress has, however, repeatedly recognized that some "forms of discrimination do not lend themselves to the invidious/non-invidious characterization."[320]

Katzenbach, 383 U.S., at 308.

[318] City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 530-531, quoting See House Report 2; Senate Report 4-5; House Hearings 64 (statement of Nadine Strossen); id., at 117-118 (statement of Rep. Stephen J. Solarz); 1990 House Hearing 14 (statement of Rep. Stephen J. Solarz).

[319] City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 532.

[320] Fix citation [Examples, such as Title II, of Congressional recognition of "subtle discrimination."]

The RFRA was deemed to be too invasive, interfering with state government authority. This was considered by the Supreme Court to be problematic, due to the pervasiveness with which the statute would impede constitutional state action.[321]

The RFRA was deemed to be simply too difficult for states to negotiate. The Court pointed to the fact that a state would have to show a compelling interest, applied in the least restrictive means, the "most demanding test known to constitutional law, " and, as applied, would result in far too many exemptions, interfering with state government function.[322] The Court considered crucial the potential elimination of the intent to stifle or punish free exercise.

"If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive."[323] The RFRA's "substantial-burden test, however, is not even a discriminatory effects or disparate-impact test. "When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens…because of their religious beliefs." The "least restrictive means" requirement was, in the Court's view, superfluous, "broader than is appropriate if the goal is to prevent and remedy constitutional violations."[324]

The U.S. Supreme Court rendered its *Boerne* conclusion in the face of language that seemingly contradicted the rationale for much of its holding: "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the

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321 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 533.

322 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 534.

323 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 535, quoting Cf. Washington v. Davis, 426 U.S. 229, 241(1976).

324 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 535.

Fourteenth Amendment,' and its conclusions are entitled to much deference."[325] "The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed."[326]

Unlike the deficiencies of the RFRA, expounded upon by the U.S. Supreme Court in *Boerne*, Congress made more specific findings on behalf of the ADA's Title II, documenting a severely pervasive "problem of discrimination against the disabled."[327]

The Age Discrimination in Employment Act of 1967[328] proscribes discrimination in employment decisions, when age is the motivating factor.[329] Via the *Kimel* decision, the U.S. Supreme Court sided with the Eleventh Circuit Court of Appeals, stating that the ADEA is not an example of validly abrogated state immunity and that Congress exceeded its authority under §5 of the 14th Amendment.[330] The issue in *Kimel* was the determination of the validity of the Eleventh Circuit's decision.[331]

There are several exceptions to the ADEA's general prohibition against age discrimination. Employers may use age when it is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business"[332] or if the employer renders discipline to an employee "for good cause."[333] The presence of these exceptions constitutes evidence of Congressional recognition that age is a "different" consideration than certain "more serious" classifications.

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325 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 536, quoting Katzenbach v. Morgan, 384 U.S., at 651, 86 S.Ct., at 1723-1724.

326 City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 536.

327 Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) 1007.

328 (ADEA or Act), 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq. (1994 ed. and Supp. III),

329 29 U.S.C. §623(a)(1).

330 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 67.

331 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 71-72.

332 29 U.S.C. § 623(f)(1)

333 29 U.S.C. § 623(f)(3).

Originally, the ADEA dealt only with private employers.[334] In 1974, "Congress extended application of the ADEA's substantive requirements to the States, via the Fair Labor Standards Amendments of 1974 (1974 Act), § 28, 88 Stat. 74.[335] In the *Kimel* case, plaintiff turned to the ADEA for relief against their employer, the University of Montevallo, an agent of the State of Alabama. Defendant state employer brought a motion to dismiss, claiming that the action was barred by the Eleventh Amendment.[336]

Importantly, the *Kimel* Court ruled that Congress had failed to effectively extend the ADEA under its Fourteenth Amendment § 5 enforcement power, distinguishing the ADEA from the ADA.[337] The Eleventh Circuit Court of Appeals ultimately determined that when it enacted the ADEA, Congress did not properly abrogate the States' Eleventh Amendment immunity. The ADEA "clearly provides for suits by individuals against States…"[338] since the "plain language of [the ADEA's] provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees."[339]

In EEOC v. Wyoming, 460 U.S. 226 (1983), the Supreme Court determined that the ADEA was a proper example of Congressional power to regulate Commerce.[340] Since it had been decided that the ADEA was valid under Congress' Commerce Clause power, the Supreme Court did not determine whether the ADEA represented a valid example of Congressional abrogation by means of § 5 of the Fourteenth Amendment.[341]

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334 See 29 U.S.C. § 630(b) (1964 ed., Supp. III)
335 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 68.
336 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 68-69.
337 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 69.
338 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 73.
339 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 74.
340 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 78.
341 EEOC v. Wyoming, 460 U.S. 226, 243 (1983)

Following S*eminole*, however, the Supreme Court declared that Congress lacks the power to abrogate states' immunity under Article I and that "if the ADEA rests solely on Congress' Article I commerce power, the [ADEA] petitioners …cannot maintain their suits against their state employers."[342] This statement underscores the vital nature of the Seminole decision. After Seminole, the only way that the ADEA could be deemed a valid exercise in abrogation would be a determination that "the ADEA is appropriate legislation under § 5" of the Fourteenth Amendment.[343]

When the ADEA was subjected to the congruence and proportionality test, the ADEA was declared to have similar deficiencies, as demonstrated present within the RFRA. The Supreme Court looked at its prior contemplations of age discrimination under the Equal Protection Clause: Gregory v. Ashcroft, 501 U.S. 452 (1991); Vance v. Bradley, 440 U.S. 93 (1979); and Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, (1976) (per curiam). "In all three cases, we held that the age classifications at issue did not violate the Equal Protection Clause."[344] The *Kimel* Court next declared that age discrimination is sometimes relevant to "the achievement of …legitimate state interest[s and] that laws grounded in such considerations" are not deemed to reflect prejudice and antipathy.[345]

Departing from its role as interpreter of the law, the Court next declared that the aged "have not been subjected to a 'history of purposeful unequal treatment.'"[346] Old age also does not

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342 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 79.

343 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 80.

344 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 83.

345 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 440.

346 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 83, citing Murgia, supra, at 313 (quoting San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973)).

define a discrete and insular minority because all persons will experience it. Like disability, age was then summarily declared beyond the scope of suspect classifications.[347]

"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…. rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razor like precision.[348] "In contrast, when a State discriminates on the basis of race or gender, we require a tighter fit between the discriminatory means and the legitimate ends they serve."[349]

"Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests.--- That age proves to be an inaccurate proxy in any individual case is irrelevant."[350] The Constitution, according to the *Kimel* Court, permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it "is probably not true" that those reasons are valid in the majority of cases.[351] This does not relate, however to the proportionality test, since Congress may still choose to regulate certain behavior, defining it to be contrary to the best interests of the United States people. The congruence and proportionality test cannot be soundly interpreted to require the Supreme Court's recognition of a suspect classification. Congress ought to be able to "remediate" even in those instances where the classification is subject to rational basis scrutiny. What once was not a problem (age discrimination) may become

347 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 83.
348 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 83.
349 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)
350 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 84.
351 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 86.

a problem, as more persons move into the working environment and remain for longer periods of time.

The *Kimel* Court neglects consideration of the central question: whether the conduct proscribed and targeted by the ADEA is properly remediated. Why should discrimination have to meet a certain threshold, prior to Congressional remediation? Why should discrimination itself be deemed, in the absence of a legitimate rational, irrational? "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."[352]

Without explanation as to the connection between the two considerations, the *Kimel* Court indicated that "Congress, through the ADEA, has effectively elevated the standard for analyzing age discrimination to heightened scrutiny."[353] No Congressional mention, however, of the appropriate level of scrutiny to be applied to consideration of age discrimination appears within the language of the ADEA. There is no explanation for the Court's conclusion that the ADEA cannot address age discrimination, even if the problem of bias against the elderly is les pronounced than that applied against other insular groups. Instead, the *Kimel* Court labels the ADEA as "an attempt to substantively redefine the States' legal obligations with respect to age discrimination."[354] What was perhaps an appropriate analysis in *Smith*, has been distorted by the United States Supreme Court, to fit the facts *Kimel*.

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352 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 86.

353 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 88.

354 Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), at 88.

C. Through an Unprecedented Challenge of Legislative History, *Board of Trustees of the U. of Alabama v. Garrett* Held that Title I of the ADA is not a Proper Example of Fourteenth Amendment,§5 Legislation

In *Garrett*, the Supreme Court was faced with the question of whether suits brought for monetary damages under Title I of the ADA, by state employees, are barred by application of the Eleventh Amendment.[355] The Court specifically reserved the question of whether Title II f the ADA had properly abrogated state immunity. Most importantly, the *Garrett* Court acknowledged that Title II "has somewhat different remedial provisions from Title I," and may, accordingly be deemed appropriate legislation under § 5 of the Fourteenth Amendment, irrespective of the determination concerning Title I.[356]

In *Garrett*, at the District Court level, the state of Alabama moved for summary judgment, claiming that Title I of the "ADA exceeds Congress' authority to abrogate the State's Eleventh Amendment immunity."[357] In a single opinion, the District Court granted the state's motions, as to both cases.[358]… The Eleventh Circuit Court of Appeals reversed, relying upon its circuit precedent, which had declared that "the ADA validly abrogates the States' Eleventh Amendment immunity."[359] Finally, in a 5-4 opinion, the Eleventh Circuit was reversed by the U.S. Supreme Court in *Garrett*.

In one of the consolidated cases which constitute *Garrett*, a registered nurse who had been diagnosed with breast cancer underwent several necessary medical treatments. When she returned to work, she was forced to relinquish her Director position and accept a transfer to

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355 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 360.
356 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 360.
357 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 362.
358 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 363.
359 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 363.

"another, lower paying position as a nurse manager."[360] In the second case, a security officer who worked in the Alabama Department of Youth Services was diagnosed with chronic asthma and sleep apnea, told to avoid carbon monoxide and cigarette smoke, and requested that his employer "modify his duties to minimize his exposure to these substances.[361] When this gentleman asked for a daytime shift reassignment, in order to accommodate his condition, his request was denied and he received lowered performance evaluations. The security guard thereafter filed a charge of discrimination with the Equal Employment Opportunity Commission.[362]

The ADA's Title I contains a clear Congressional expression of intent to abrogate. "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."[363] The central issue in Garrett, however, is whether Congress "acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the ADA."[364]

Abrogation of states' immunity cannot be founded upon Article I, but must be established via §5 of the Fourteenth Amendment, which is contemplated under the ADA's abrogation scheme.[365] The Garrett Court looked to Cleburne to establish the proper scope of any consideration of the constitutional discrimination rights of the disabled. This "legislation incurs only the minimum 'rational-basis' review applicable to general social and economic legislation."

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360 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 362.
361 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 362.
362 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 362.
363 42 U.S.C. § 12202
364 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 364.
365 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 364. See, also 42 U.S.C. §12101(b)(4)

At the heart of it decision is this statement by the Garrett Court: "Thus, the result of Cleburne is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. They could quite hard headedly -- and perhaps hardheartedly -- hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."[366] If Congress determines that barriers placed in front of the disabled, in the face of cost-effective modification possibilities, is irrational, it really does not matter what level of scrutiny id thereafter applied by the Court. Congress has the right to express the will of the people, while the Court has the obligation to interpret the meaning of the words chosen by Congress. There are times, of course, when Congressional intent and action are incongruous, but these instances do not create license for the Court to create substantive legal doctrine.

The *Garrett* Court also addressed "whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled…[since the Fourteenth Amendment can only be used] in response to state transgressions."[367] The most crucial determination made by the *Garrett* Court, however, was to assert that the "legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[368] In making this determination, the Court continued a tradition of infusing substance through the guise of interpretation. No Congressional expression can be fairly read to limit discrimination to the

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366 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 367-368.

367 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 368, quoting Florida Prepaid, 640.

368 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 368.

narrow class of intentional, overt actions. More importantly, the Court cites no authority for its purported limitation of Equal Protection doctrine to actions, as opposed to attitudes.

The *Garrett* Court criticized Congress' "general" finding in the ADA that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[369] Consistent with *Kimel*, the *Garret*t majority pointed to the fact that specific state decisions had not been sufficiently chronicled. Once again, the U.S. Supreme Court made no attempt to support its ostensible conclusion that attitudes prevalent in the public sphere do not permeate the public sector.

The Court seems to base its argument, that the legislative record supporting Title I of the ADA is insufficient to establish a pattern of unconstitutional discrimination against the disabled, on an intractable view of what may be deemed rational. The Court also states that "even if it were to be determined that each incident upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based."[370] Can't Congress deter future conduct, believing societal mores to have shifted to the point of precluding such conduct as being rational? Why should a pattern of past behavior play such a crucial role in the prophylactic function of Equal Protection doctrine? Such a view is stifling to any perspective that would include a change in societal mores, to enfranchise a previously disfavored, insular group.

The *Garrett* majority also criticized the accounts of disparate treatment made by state officials, submitted by the Task Force on the Rights and Empowerment of Americans with

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369 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 369, citing 42 U.S.C. § 12101(a)(2).

370 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 370.

Disabilities, which made no findings on the subject of state discrimination in employment: "[H]ad Congress truly understood this information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings. There is none. See 42 U.S.C. § 12101."[371]

The *Garrett* majority cites no authority which limits the nature or scope of the Congressional record necessary for Congress to determine that discrimination exists against a particular, insular minority, triggering Equal Protection remedial authority. Most importantly, however, the *Garrett* Court admits that Congress made a determination that "Discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications."[372] A similar conclusion was expressed by the House Committee on Education and Labor: "After extensive review and analysis over a number of Congressional sessions, . . . there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of employment in the private sector, public accommodations, public services, transportation, and telecommunications."[373]

The Court's reticence and ultimate rejection of Title I did not extend to Title II of the ADA: "The overwhelming majority of these accounts pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA."[374]

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371 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 371.

372 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 371, citing S. Rep. No. 101-116, p. 6 (1989).

373 H. R. Rep. No. 101-485, pt. 2 p. 28 (1990)

374 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 372, FN7.

By claiming that “it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities,” the *Garrett* majority would improperly preclude Congressional movement to define rational conduct in an ever-evolving society.[375] Congress, accordingly, with the appropriate legislative history, ought to be able to re-visit the *Cleburne* determination and define the disabled as a class of persons warranting specific protection. Short of this, Congress should not be precluded from defining rational conduct.

Congress simply should be allowed to define societal mores. The ADA’s Title I requires employers to "make existing facilities used by employees readily accessible to and usable by individuals with disabilities."[376] Title I also exempts employers from the "reasonable accommodation" requirement where the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[377]

The *Garrett* majority betrays its own misunderstanding of the ADA, Title I. Since the Act equates failure of providing “reasonable accommodations,” short of the creation of an “undue burden” as being irrational. It should be of no consequence, accordingly, that “the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an ‘undue burden’ upon the employer.”[378] Congress can raise the level of humanity, as it necessarily does with each remedial action.

Read in this light, empty is the *Garrett* majority’s proclamation, “Congress is the final authority as to desirable public policy.” The pattern of discrimination to be remediated can

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375 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 372.
376 42 U.S.C. § § 12112(5)(B), 12111(9).
377 42 U.S.C. § 12112(b)(5)(A).

properly be identified by Congress prior to the point at which it becomes a national epidemic. An ounce of prevention….

Relative to the issues presented in *Garrett*, the correct view seems to have been articulated by Justice Breyer: "Congress reasonably could have concluded that [ADA, Title I] remedy … constitutes an "appropriate" way to enforce this basic equal protection requirement. And that is all the Constitution requires."[379]

When it decided the question of its authority to abrogate states' immunity under Title I, "a more than adequate legislative record was relied upon by Congress. In addition to the information presented at 13 congressional hearings (see Appendix A, infra), and its own prior experience gathered over 40 years during which it contemplated and enacted considerable similar legislation (see Appendix B, infra), Congress created a special task force to assess the need for comprehensive legislation. That task force held hearings in every State, attended by more than 30,000 people, including thousands who had experienced discrimination first hand. See From ADA to Empowerment, Task Force on the Rights and Empowerment of Americans with Disabilities, 16 (Oct. 12, 1990) (hereinafter Task Force Report). The task force hearings, Congress' own hearings, and an analysis of "census data, national polls, and other studies" led Congress to conclude that 'people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.' 42 U.S.C. § 12101(a)(6)."[380]

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[378] Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 372.

[379] Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer dissenting, 377.

[380] Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer dissenting, 377-378.

The ADA's Title I was supported by an extensive legislative history. At the time it was adopted, approximately two-thirds of working-age disabled Americans were, against their will, unemployed.[381] Congress specifically determined that discrimination against the disabled was a function of stereotype assumptions[382], a well as "purposeful unequal treatment."[383]

IV. Does Title II of the ADA Apply to Employment Discrimination Against the Disabled?

Part IV includes an interpretation of the *Bledsoe*[384] and *Zimmerman*[385] Circuit Court of Appeals decisions, examining the question of whether Title II of the ADA should be extended to cover employment discrimination. Concluding that Title II does not properly extend to employment cases, Part VI concludes that the *Garrett* holding should not influence the ultimate determination of the central issue: whether Title II of the ADA is appropriate Fourteenth Amendment §5 legislation, readily available for innovative applications, as detailed by the *Hood v. City of Los Angeles* decision that is depicted in Part V.

A. The Eleventh Circuit's *Bledsoe* Decision, Declaring Employment to be within the Penumbra of the ADA's Title II, is Poorly Reasoned

In *Bledsoe*, a motion for summary judgment was granted, against the interests of the plaintiff. The issue to be decided by the Court of Appeals was "whether Title II of the ADA encompasses employment discrimination."[386]

Bledsoe involved a resource technician, laboring manually for defendant county. While was performing his regular duties, he was suffered a knee injury. The technician requested an

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381 S. Rep. No. 101-116, at 9.

382 Stereotype assumptions are most likely to evolve into subconscious discriminatory acts.

383 42 U.S.C. § 12101(a)(7).

384 Bledsoe v. Palm Beach County, 133 F. 3d 816 (11th Cir. 1998)

385 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999)

accommodation for his injury, but was denied. Immediately thereafter, the employer, a municipal entity, terminated the technician.[387]

The plaintiff in *Bledsoe* brought suit in District Court, originally alleging violation of Title I of the ADA. Ultimately, plaintiff was granted leave to amend his claim to include Title II of the ADA. The District Court found that Title II does not encompass employment claims and granted defendant's motion for summary judgment.[388] In reversing the District Court, the Eleventh Circuit indicated that its "review of the statutory language of Title II, the Department of Justice's ("DOJ") regulations, our circuit's reference to the issue, and other courts' resolution of the issue, persuade us that Title II of the ADA does encompass public employment discrimination."[389]

The *Bledsoe* tribunal rested its conclusion, that Title II of the ADA supports employment claims, upon a Report of the United States House of Representatives Judiciary Committee, which stated, "in the area of employment, title II incorporates the duty set forth in the regulations for Sections 501, 503 and 504 of the Rehabilitation Act to provide a "reasonable accommodation' that does not constitute an "undue hardship."'[390] As will be shown, especially in the wake of Garrett, such an extension of Title II does not ultimately "help" ADA plaintiffs.

The Report further notes: "The Committee intends that title II work in the same manner as Section 504."[391] The Eleventh Circuit continued this analysis by pointing to the fact that "Section 504 was so focused on employment discrimination that Congress enacted subsequent

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386 Bledsoe v. Palm Beach County, 133 F. 3d 816 (11th Cir. 1998), at 817

387 Bledsoe v. Palm Beach County, 133 F. 3d 816 (11th Cir. 1998), at 818.

388 Bledsoe v. Palm Beach County, 133 F. 3d 816 (11th Cir. 1998), at 818.

389 Bledsoe v. Palm Beach County, 133 F. 3d 816 (11th Cir. 1998), at 820

390 Bledsoe 821, quoting H.R. Rep. No. 101-485(III), at 50 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 473.

391 Bledsoe v. Palm Beach County, 133 F. 3d 816 (11th Cir. 1998), at 821, quoting 1990

legislation to clarify that Section 504 applied to other forms of discrimination in addition to employment discrimination."[392]

The Eleventh Circuit separates "the final clause of the section, which protects qualified individuals with a disability from being "subjected to discrimination by any such entity," from the remainder of Title II's proclamation. This protection, as conclusively stated by the Eleventh Circuit, without reference to legislative history, "is not tied directly to the 'services, programs, or activities' of the public entity."[393] The Eleventh Circuit also concluded that "the language of Title II's antidiscrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of [a public entity]. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context,...."[394] There is no reference, however, to the language of Title II being included as a "catch all," particularly with the varied structures of Title I and Title II.

"Congress specifically provided in the ADA statute that the DOJ should write regulations implementing Title II's prohibition against discrimination."[395] The Department of Justice regulations, 28 CFR Part 41, provide that all defendant entities which are not subject to Title I would be subject to Section 504 of the Rehabilitation Act.[396] According to the D.O.J. Regulations, "the requirements of section 504 …apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction

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U.S.C.C.A.N. at 472-73.

[392] Bledsoe v. Palm Beach County, 133 F. 3d 816 (11th Cir. 1998), at 821.

[393] 42 U.S.C. § 12132.

[394] Bledsoe v. Palm Beach County, 133 F. 3d 816 (11th Cir. 1998), at 821-822.

[395] Bledsoe v. Palm Beach County, 133 F. 3d 816 (11th Cir. 1998), at 822, citing 42 U.S.C. § 12134.

[396] 28 C.F.R. §35.140.

of title I."[397] A fair reading of this language however, makes it evident that, if indeed the D.O.J. regulations are to be afforded weight at all, they stand for the proposition that a claim against a governmental entity may be sustained only if said entity is immune to the auspices of Title I.

The Court of Appeals rested its conclusion, that Title II of the ADA supports employment claims, upon a Report of the United States House of Representatives Judiciary Committee, which stated, "in the area of employment, title II incorporates the duty set forth in the regulations for Sections 501, 503 and 504 of the Rehabilitation Act to provide a "reasonable accommodation' that does not constitute an "undue hardship.'"[398] As will be shown in the immediately proceeding section, especially in the wake of *Garrett*, such an extension of ADA, Title II to employment is unsupported by the Legislative History of ADA, Title II and, due to the potential impact of *Garrett*, would not ultimately "help" ADA plaintiffs.

B. The Ninth Circuit's *Zimmerman* Decision Distinguishes Between State Provision of Employment Opportunities and Public Services, Concluding that Title II of the ADA Does not Support Disabled Persons' Employment Discrimination Claims

In *Zimmerman v. Oregon Department of Justice*[399], the Ninth Circuit determined that Title II of the ADA does not apply to the employment provisions of the ADA (title). Instead, "Congress intended for Title II to apply only to the 'outputs' of a public agency, not to such 'inputs' such as employment."[400] Plaintiff brought ADA Title II action that was dismissed by the

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397 Bledsoe v. Palm Beach County, 133 F. 3d 816 (11th Cir. 1998), at 822, citing 28 C.F.R. § 35.140.

398 Bledsoe 821, quoting H.R. Rep. No. 101-485(III), at 50 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 473.

399 170 F. 3d 1169 (9th Cir., 1999)

400 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), 1184, 1173-1179.

district court. The Ninth Circuit Court of Appeal affirmed the district court, reasoning that Title II of the ADA does not apply to employment.[401]

On January 21, 1995, a child support agent was hired on a trial basis. Suffering from a disabling eye condition, the agent asked defendant to reasonably accommodate his disability. Defendant, a state entity, refused the accommodation and retaliated against plaintiff in manner that included termination.[402]

The district court dismissed the Title I claims, since agent had "failed to file a timely charge with the Equal Employment Opportunity Commission (EEOC)," a jurisdictional defect.[403] Next, the district court dismissed plaintiff's Title II claim, holding that Title II does not apply to employment.[404]

1. The Administration of State Employment Opportunities is not the Equivalent of the State's Dissemination of Public Services

The exemption afforded to federal employees under Title I emphasizes the fact that Congress intended to bind state and local governmental entity employers by that provision.[405] Title I's administrative requirement, that a claim first be timely made with the EEOC, is not repeated in Title II.[406]

The Department of Justice has issued regulations which suggest the ADA's Title II can support employment discrimination claims.[407] The Department of Justice's regulations indicate

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401 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1171.

402 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1171

403 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1171.

404 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1171.

405 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1172, citing 42 U.S.C. § 12111(5)(B).

406 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1172, citing 42 U.S.C. § 12117(a).

407 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1172-

that Title II does apply to employment.[408] Applying the *Chevron* test, however, the Ninth Circuit decided that Title II presented an unambiguous intent, that said provision not be applied to employment. This determination allowed the Ninth Circuit to disregard the Department of Justice Regulations concerning the applicability of the ADA's Title II to employment.[409]

The Ninth Circuit also emphasized the importance of looking at entire sentences, phrases ands paragraphs, as opposed to words out of context, when interpreting statutes.[410]
To be "excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity" is a reference to public entity outputs, or products.[411] The reasons for this characterization include the fact that "employment by a public entity is not commonly thought of as a 'service, program, or activity of a public entity.'"[412]

The Ninth Circuit convincingly turned to the hypothetical of a municipal Parks Department: If the Parks Department were asked, "'What are the services, programs, and activities of the Parks Department?' It might answer, 'We operate a swimming pool; we lead nature walks; we maintain playgrounds.'" It would not answer, "We buy lawnmowers and hire people to operate them." The latter is a means to deliver the services, programs, and activities of

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1173, citing 42 U.S.C. § 12134(a).

[408] Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1173, citing 28 C.F.R. § 35.140(a) (1998).

[409] Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1173, quoting National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 118 S. Ct. 927, 938-39, 140 L. Ed. 2d 1 (1998).

[410] Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1173, quoting Sanchez v. Pacific Powder Co., 147 F.3d 1097, 1099 (9th Cir. 1998).

[411] Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1174, quoting Decker, 970 F. Supp. at 578.

[412] Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1174.

the hypothetical Parks Department, but it is not itself a service, program, or activity of the Parks Department."[413]

2. Title I and Title II of the are Two, Distinct Statutes, Founded Upon Separate Legislative Histories

Criticizing the *Bledsoe* decision, the *Zimmerman* Court indicated, "[u]nder that interpretation, Title II would be broad enough to include employment discrimination by a public entity…however [this interpretation by the Eleventh Circuit] takes the key phrase out of context…. Initially, the placement of the second clause in the single sentence that forms 42 U.S.C. § 12132 suggests that the second clause relates back to the same 'services, programs, or activities' of a public entity that the first clause covers."[414]

"The second clause of § 12132 therefore must relate to a government service, program, or activity," since "[o]btaining or retaining a job is not 'the receipt of services,' nor is employment a 'program[ ] or activity provided by a public entity.'"[415] In the final analysis, "the second clause of 42 U.S.C. § 12132, like the first, prohibits discrimination only in a public entity's 'outputs.' Thus, the wording of 42 U.S.C. § 12132 does not permit an inference that Congress intended for [ADA,]Title II to apply to employment."[416]

In Title I of the ADA, Congress painstaking laid out an elaborate employment-specific scheme. There was simply no mention whatsoever of employment in ADA, Title II, suggesting that effect be given to the disparate wording of the two statutes.[417] Applying ADA, Title II to

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413 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1174.

414 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1175.

415 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1175-1176.

416 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1176.

417 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1177, citing Russello v. United States, 464 U.S. 16, 23 (1983).

employment, in addition to ADA, Title I's jurisdiction would render the specific language distinctions between ADA, Title I and ADA, Title II as superfluous. Most problematically, public employees "could avoid the procedural requirements of ADA, Title I by pursuing all their claims under ADA, Title II."[418]

With respect to the *Bledsoe* Circuit Court's reliance upon ADA, Title II's incorporation of section 504 of the Rehabilitation Act, the Ninth Circuit had this to say: "42 U.S.C. § 12133 incorporates only one section of the Rehabilitation Act: 29 U.S.C. § 794a. That section includes the Rehabilitation Act's procedural rights, not its substantive rights. Congress' choice to incorporate one section of the Rehabilitation Act, which provides certain procedures, does not demonstrate that Congress also intended to incorporate the rest of the Rehabilitation Act's substance."[419] The Ninth Circuit went on to declare that the specific act of "lifting" one particular segment of the Rehabilitation Act indicates a desire to incorporate only that portion referenced.[420] "Congress did not expressly incorporate the substantive employment provisions of the Rehabilitation Act into [ADA,]Title II."[421]

Although Congress modeled Title II on the Rehabilitation Act, the new provision took certain parts and rejected other aspects of the older statute.[422] "Unlike the Rehabilitation Act, Title II applies to all public entities, whether or not they receive federal financial assistance," broadening the impact of the Rehabilitation Act in this sense. The again, while the Rehabilitation

418 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1177.
419 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1179.
420 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1179.
421 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at __.
422 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1180.

Act applied to private entities, "Congress did not make private entities subject to Title II," accordingly limiting the reach of the Rehabilitation Act, within Title II.[423]

"Before the enactment of the ADA, the Supreme Court had held that § 504 applies to employment."[424] In response to the Eleventh Circuit's *Bledsoe* conclusion, that 504's relation to employment binds Title II, the Ninth Circuit stated, "The answer is not so simple, for four reasons. (1) Textually, Congress did not borrow the wording of § 504 verbatim when it drafted Title II, although the phrasing of the two statutes is similar. (2) Contextually, surrounding sections of the Rehabilitation Act relate explicitly to employment, whereas no section of Title II relates to employment. (3) The Congressional purpose to cover employment could not be carried out under the Rehabilitation Act except by construing its sole operative provision, § 504, to encompass employment, whereas the Congressional purpose to cover employment is carried out in a separate operative provision of the ADA (Title I). (4) Congress has linked the Rehabilitation Act to Title I, but not Title II, of the ADA."[425]

In response to the courts which have followed the Eleventh Circuit's *Bledsoe* decision, the *Zimmerman* court stated, "most courts have held that Title II applies to employment…. However, those courts generally have ignored the wording of Title II altogether, including the definition of 'qualified individual with a disability' from that Title and the surrounding words in 42 U.S.C. § 12132. Instead, they have: (1) assumed without analysis that Title II applies to employment, (2) relied only on the Attorney General's regulation and the legislative history of the ADA, without discussion of the statutory text and context, (3) relied on the Rehabilitation

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423 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1180.

424 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1180, citing Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 631-34, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (1984).

425 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1180-

Act without analyzing whether Congress intended to incorporate its prohibition against employment discrimination into Title II, or (4) relied solely on the foregoing precedent without independent consideration of the problem. Because of the limited analysis performed in those cases - in particular, their failure to consider the statutory text and context carefully - we simply do not find them persuasive."[426]

"Titles I and II of the ADA incorporate their remedies and procedures from different acts: Title I incorporates provisions of Title VII of the 1964 Civil Rights Act, as amended, while Title II incorporates provisions of the Rehabilitation Act.[427] ADA, Title I requires the EEOC to issue regulations interpreting that title.[428] ADA, Title II, on the other hand, gives that power to the Attorney General.[429] If both Title I and II apply to disability discrimination in employment, then it is possible for state and local governments to be subjected to conflicting regulations.[430]

There is an autonomy that exists in the context of an employer, when dealing with an employee, that does not exist in other segments of society. The judiciary should not enter the business of "second-guessing" the business owner, who ostensibly acts out a pure interest in turning a profit and not in irrelevant considerations, such as race and gender, which have nothing to do with the dealings of the business. It is essential to distinguish cases dealing with the employment sector from those dealing with the dissemination of services to the public.

V. Walking in the Light of the ADA Fire-Innovative Applications of ADA, Title II

A. Title II of the ADA is an Example of Fourteenth Amendment Remedial

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1181.

426 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1183.

427 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1178, citing 42 U.S.C. §12117(a), 42 U.S.C. §12133.

428 42 U.S.C. § 12116.

429 42 U.S.C. § 12134(a).

430 Zimmerman v. Oregon Department of Justice, 170 F. 3d 1169 (9th Cir. 1999), at 1178

Legislation, Pursuant to Which Congress Properly Abrogated States' Eleventh Amendment Immunity

The U.S. Supreme Court has held that "extant laws originally motivated by a discriminatory purpose continue to violate the Equal Protection Clause, even if they would be permissible were they reenacted without a discriminatory motive."[431] This position suggests that Congress may re-visit social institutions, such as those dealing with the disabled, re-defining where necessary the parameters of acceptable conduct."'Negative attitudes' or 'fear'… may often accompany irrational (and therefore unconstitutional) discrimination."[432] The *Garrett* Court then suggested that the presence of these factors "alone does not a constitutional violation make." Why not? Even if the Court applies rational basis scrutiny, can't Congress define the scope of discrimination, detailing the contours of "irrational" behavior? Logic dictates this to be so.

The Ninth Circuit has consistently held, in enacting Title II of the ADA, that Congress validly abrogated state sovereign immunity, and thus states and their agencies may be sued pursuant to ADA, Title II.[433] The rationale presented in *Zimmerman* is convincing, at least relative to the suggestion that Congress has crafted two very distinct statutes, aimed towards different aspects of the public goal of eradicating barriers against the disabled.

1. In the *Alsbrook* Opinion, the Eighth Circuit Incorrectly Concludes that Title II of the ADA Fails the Congruence and Proportionality Test for Remedial Legislation

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[431] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 465, FN 17. See also, Hunter v. Underwood, 471 U.S. 222, 233 (1985).

[432] Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at 367.

[433] Dare v. California, 191 F.3d 1167, 1175 (9th Cir. 1999); Clark v. California, 123 F.3d 1267, 1270-71 (9th Cir. 1997); see also Patricia v. Lemahieu, 141 F. Supp. 2d 1243, 1248 (D.

In *Alsbrook*, a disabled plaintiff filed suit against his employer, the State of Arkansas, for refusing to certify him as a law enforcement officer, solely on account of his having a disability, or their regarding him as a person disabled. Alsbrook's claims were brought pursuant to under Title II of the Americans with Disabilities Act (ADA) and 42 U.S.C. § 1983.[434]

In determining whether or not the states' Eleventh Amendment Immunity was properly abrogated under the Fourteenth Amendment's §5, the Eighth Circuit indicated that Extension of Title II of the ADA to the State exceeds Congress's authority under Section 5 of the Fourteenth Amendment.[435]

The Eighth Circuit framed the issues in *Alsbrook* as "whether Congress has unequivocally expressed its intent to abrogate the immunity--which is obvious in this case. Section 12202 of the ADA provides that '[a] State shall not be immune under the eleventh amendment ... from an action in Federal or State court of competent unequivocally expressed' its intent to abrogate Eleventh Amendment immunity…Second…whether Congress has acted pursuant to a valid exercise of … a constitutional provision granting Congress the power to abrogate."[436]

The Eighth Circuit went on to hide behind the "gatekeeping" provision that had been earlier established in *Cleburne*: "In City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985), the Supreme Court held that under the Equal Protection Clause of the Fourteenth Amendment, state classifications on the basis of mental retardation need only satisfy rational basis review. n15 We do not think that Title II of the ADA

Haw. 2001).

434 Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) 1002 and 1003

435 Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) 1002.

436 Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) 1005-1006.

'enforces' the rational relationship standard recognized by the Supreme Court in Cleburne."[437] This interpretation of rational basis is too static, precluding the evolutionary perspective that must characterize Congressional powers.

In what may only be described as a precursor to the Rehnquist Court's expansion of its judicial role, at the expense of Congress, the Eighth Circuit proclaimed that "the legislative record of the ADA suffers from …an absence of a showing of widespread discrimination on the part of the states."[438] This statement can only be valid if the Court limits Congressional ability to define discrimination in comprehensive measures, including the auspices of disparate impact, within the context of harms suffered by the particular class of the disabled.

"The Cleburne Court emphasized that a rational basis standard of review would best allow governmental bodies the flexibility and freedom to shape remedial efforts towards the disabled."[439] ADA, Title II's provisions "detract from this notion, by preventing states from making decisions tailored to meet specific local needs and instead imposing upon them the amorphous requirement of providing reasonable modifications in every program, service, and activity they provide."[440] It is difficult to understand how a requirement that governments act reasonably constitutes a burden that exceeds rationality, particularly a requirement that forbids significant alteration of the governmental program itself.

Trying to stuff Congress into the narrow box of invidious, overt discrimination, the *Alsbrook* court outlined a potential path for the Rehnquist Court: "We do not think that the legislative record of the ADA supports the proposition that most state programs and services

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437 Fix citation [Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999)]

438 Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) 1010.

439 See City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 473 U.S. at 446.

440 Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) 1009.

discriminate arbitrarily against the disabled. Indeed, all states in this circuit have enacted comprehensive laws to combat discrimination against the disabled, many of them adopted prior to the effective date of the ADA."[441]

Continuing to criticize ADA, Title II, the *Alsbrook* majority stated that the term "reasonable modification" "is not defined anywhere in the statute."[442] Taking the *Alsbrook* Majority to task, the *Alsbrook* Dissent, however, states that although the term "reasonable modifications" is not defined by the ADA, "the relevant term has been defined in the applicable federal regulations.[443]

The "injury to be prevented or remedied and the legislative means to achieve those goals must bear both a congruent and a proportional relationship to one another. It is this 'congruence and proportionality' standard which allows the courts to identify legislation which exceeds Congress's § 5 authority because the legislation is, in effect, substantive in nature.[444]

2. Acknowledging its Distinct Legislative History, the Ninth Circuit's *Dare* Court, Declared Title II of the ADA to be an Appropriate Example of Abrogation

Even the *Alsbrook* dissent recognized that the ADA's "remedial provisions bear a congruent relationship to the constitutional injury to be remedied or deterred because they

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441 Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) 1010.

442 Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) 1009.

443 See 28 C.F.R. § 35.130(b)(7) (1998) (defining 'reasonable modifications' to mean modifications that are 'necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity being offered') (cited and interpreted, in the context of discussing the states' responsibilities vis-à-vis the mentally disabled, in Olmstead v. Zimring, 144 L. Ed. 2d 540, 119 S. Ct. 2176, 1999 WL 407380, at 12-13 (U.S. 1999))."

444 Dissent from Part IIA of the Alsbrook Majority, by McMillan, joined by Richard, Arnold, Fagg and Murphy, 1014.

specifically address discriminatory treatment toward individuals with disabilities."[445] "Unlike RFRA, these statutory provisions are not 'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.' City of Boerne, 521 U.S. at 532."[446] ADA, Title II does not represent a Congressional attempt to do anything other than to define discrimination in a manner that will have real impact, on behalf of the persons for whom the statute was drafted.

"The ADA is thus an appropriate exercise of § 5 powers if Congress enacted it in response to a widespread problem of unconstitutional discrimination that includes state programs and services and if the ADA's provisions are proportional to the scope of that discrimination.N6"[447] In footnote 6 of the *Dare* decision, the Ninth Circuit stated that it disagreed with "the Eighth Circuit that the ADA's legislative record must "support the proposition that 'most state programs and services discriminate arbitrarily against the disabled' for abrogation of immunity to be appropriate."[448] Such a requirement would improperly Congressional remedial power. In the view of the Ninth Circuit, it is wholy acceptable for Title II of the ADA to hinder a certain percentage of State conduct that would otherwise pass the application of rational basis scrutiny. This is because ADA, Title II's "focus is on eliminating the discrimination outlined in the factual findings."[449]

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[445] Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) Dissent from Part IIA of the Majority, by McMillan, joined by Richard, Arnold, Fagg and Murphy, 1015.
[446] Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) Dissent from Part IIA of the Majority, by McMillan, joined by Richard, Arnold, Fagg and Murphy, 1015.
[447] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1175.
[448] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1175.
[449] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1175.

In *Dare,* California's $6 biennial fee for disability parking placards was challenged under Title II of the ADA.[450] The fees were deemed by a class of plaintiffs as an impermissible surcharge upon measures necessary to provide the nondiscriminatory treatment of individuals and groups required by the ADA, under 28 C.F.R. § 35.130(f).[451] Partial summary judgment was granted in favor of the plaintiff and the state appealed to the Ninth Circuit. California was of the opinion that its fee did not breach the provisions of the ADA and that, to the extent that Title II of the ADA was a general bar to such nominal fees, the statute itself was unconstitutional. The Ninth Circuit disagreed with the Golden State, holding that California's comprehensive priority parking program for qualified disabled persons, pursuant to California's Vehicle Code. § § 295.5, 295.7, requires non-discriminatory enforcement and that the placard fees failed to satisfy this requirement.[452]

The state's priority parking system created reserved parking spaces and parking meter exemptions. The only persons entitled to take advantage of these privileges were persons in vehicles displaying state-issued license plates or placards, subject to the imposition of monetary fines.[453] The central issue in *Dare* was whether the fact that the $6 placard fee, a violation of Title II of the ADA, illustrated Title II as a valid exercise of its power under § 5 of the Fourteenth Amendment to abrogate California's Eleventh Amendment immunity.[454] A related

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[450] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1169

[451] The regulation provides that "a public entity may not place a surcharge on a particular individual or any group to cover the costs of measures, that are required to provide that individual with the nondiscriminatory treatment." Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1170.

[452] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1169-1170.

[453] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1170.

[454] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1171.

question was whether "Public Law 100-641, 23 U.S.C. § 402 (West Supp.1999), which contemplates a fee for disabled parking placards as part of a uniform system for disabled parking, limit states' Title II obligations?"[455]

Under California's priority parking scheme, the members of the privileged class were identified by disability license plates, obtained at the same fee as non-disabled plates. This class included disabled car owners or persons who employed their vehicles "to transport disabled individuals at least 51% of the time…."[456] Disability parking placards, transferable between vehicles, could be obtained for an additional $6 fee, renewable every two years. California attempted to justified the placard fee as a means to underwrite the priority parking program.[457] The primary consideration with which the court grappled was the relationship of California's placard fee to that states comprehensive obligation to provide nondiscriminatory services to the disabled, under the ADA.[458]

First, the *Dare* court dealt with the issue of whether the measure for which the fee is "required to provide nondiscriminatory treatment" on the level mandated by the ADA. The federal regulation, 28 C.F.R. § 35.130(f) only forbids surcharges for "required" measures and charges levied for amenities which are not mandated by Congress are not proscribed.[459] Next, in the context of required amenities, the court must ask whether the charge is born by non-disabled

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455 Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1171.

456 Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1170.

457 Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1170.

458 28 C.F.R. § 35.130(f); Dare1171.

459 Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1171.

persons. States are allowed to charge for disabled plates, as long as they recoup the same fee from the non-disabled class.[460]

Since surcharges constitute "facial discrimination, the meaningful access test formulated by the U.S. Supreme Court in *Alexander v. Choate*,[461] does not apply. According to *Choate*, courts determine whether the subject statute prevents "meaningful access to the benefit that the [recipient of federal funds] offers."[462] In the Ninth Circuit, the court has applied the *Choate* test when considering facially neutral laws and their potential violation of Title II of the ADA.[463]

Following the express language of Title II of the ADA, then Ninth Circuit determined that the meaningful access, or reasonable modifications test should not be applied to facially discriminatory statutes. In the face of such provisions, Title II of the ADA bans qualified persons being "subjected to discrimination by any [public] entity." As a result, application of the meaningful access test to facially discriminatory statutes would focus merely upon exclusions and denials, and would fail to address completely the discrimination clause. The Ninth Circuit simply held that "when states apply charges to required measures, we consider whether these fees constitute a surcharge forbidden under the ADA."[464]

Two years prior to passing the ADA, the federal legislature passed Public Law 100-641, 23 U.S.C. § 402, a mandate for the issuance of regulations establishing a uniform, state-wide, safety-conscious handicapped parking system. Pursuant to this statute, the Department of Transportation (DOT) created a set of regulations, providing that "special license plates,

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460 Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1171.

461 Alexander v. Choate, 469 U.S. 287 (1985)

462 Alexander v. Choate, 469 U.S. 287, at 301 (1985)

463 Hunsaker v. Contra Costa County, 149 F. 3d 1041, 1042-1043 (9th Cir., 1998)

464 Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1171-1172.

removable windshield placards, or temporary removable windshield placards…shall be the only recognized means of identifying vehicles permitted to utilize parking spaces reserved for persons with [ambulatory] disabilities.[465] The DOT regulations themselves were promulgated eight months after the passage of the ADA.[466]

The DOT regulations specifically indicate that fees associated with disability plates may not exceed those for non-disabled plates.[467] Regulations applicable to the ADA, contrastingly, "bind states so long as the regulations are not arbitrary, capricious, or contrary to the ADA."[468] 28 C.F.R. § 35.130(f) represents the applicable ADA regulation and meets the *Chandler* standard.[469]

Since the disabled parking spaces which allow qualified individuals "equal access to public buildings in which California provides services, programs, and activities," the ADA, Title II mandates provision of these parking spaces.[470] California's parking enforcement policies require the disabled to display disability placards or license plates, in order to take advantage of them. California's compliance with the ADA's "requirement for nondiscriminatory access to public buildings" is ensured by the distribution of disability license plates and placards.[471] Upon pain of being penalized for a discriminatory action, states must proactively bring their schemes,

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[465] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1172, citing 28 C.F.R. §1235.6.

[466] 28 C.F.R. 1225.6.

[467] 28 C.F.R. 1235.3.

[468] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1172, quoting Does 1-5 v. Chandler, 83 F. 3d 1150, 1153 (9th Cir., 1996).

[469] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1172.

[470] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1172.

[471] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1172.

whether or not relating to the disabled, into compliance with the ADA, a marked departure from the process that is generally attributed to anti-discrimination law.

According to *Dare*, California could not have opted to rely solely upon disability license plates, when acting to bring itself into compliance with the ADA's mandate of providing nondiscriminatory access to public places. Since a portion of "disabled people may not own cars or may sometimes have to use other vehicles, rent cars or drive with another person," some provision was necessary for the disabled to be able to move between vehicles and yet maintain their ability to utilize the disabled designated parking. "To require designated car restricts them far more in accessing public places than people who lack their disabilities."[472]

The provision of the disability placards is an irreplaceable aspect of California's chosen method of providing non-discriminatory access to public facilities. "Charging disabled people for parking that would otherwise be free constitutes discrimination in the provision of access to public buildings…. California's fee for handicapped parking placards violates the ADA."[473] "If the [state] wants to pass on the costs of providing placards, rather than absorbing the costs itself, it must pass the cost on to all parkers, and not just those disabled individuals protected by the ADA."[474]

The ADA's Title II is an example of valid, Congressional abrogation of state sovereign immunity.[475]. The majority of courts which have examined this issue have followed the Ninth Circuit's approach, as first explained in *Clark.*[476] The ADA's Title II is supported by an ample

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472 Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1173.

473 Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1173.

474 Duprey v. State of Conn., Dept. of Motor Vehicles, 28 F. Supp. 2d 702, 708.

475 Clark v. California, 123 F.3d 1267, 1270-71 (9th Cir.1997)

476 Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at

record, more than enough to demonstrate the remedial nature of the statute: "Congress's findings were sufficiently extensive and related to the ADA's provisions that the provisions can 'be understood as responsive to or designed to prevent, unconstitutional behavior.' Florida Prepaid, 119 S. Ct. at 2210 (quoting City of Boerne, 521 U.S. at 532). Therefore, we hold that the ADA was a congruent and proportional exercise of Congress's enforcement powers under § 5 of the Fourteenth Amendment that abrogated Eleventh Amendment immunity."[477]

The ADA's Title II is intended to propel the disabled to a condition of entitlement, to be able to enjoy the identical "public services, programs, and activities as those who are not disabled."[478] It is simply unfair to have the disabled pay for the ability to enjoy equal access to public facilities. "Once loosed, liberty is an idea that is not easily cabined."[479] "If public entities place a surcharge on measures that help disabled people achieve this parity, disabled people then are paying fees others do not and so are not being treated equally."[480]

C. Even Under *Cleburne's* Rational Basis Standard, Disability Discrimination Under ADA, Title II (i.e. the Failure to Accommodate) Cannot be Justified

Though rational basis scrutiny is improperly applied to the disabled via *Cleburne*, the legislative history supporting the ADA is different relative to "outputs," or state-provided services. Accordingly, actions violative of ADA, Title II should be deemed irrational as a matter of law, and avoid entirely the irrelevant *Garrett* holding. There is simply no reason to allow a

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1173.

[477] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at 1175.

[478] 42 U.S.C. § 12132.

[479] Kennedy, Randall, Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott, 98 Yale L.J. 999 (1989), at p. 1001, quoting Cox, *The Supreme Court, 1965 Term -- Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91 (1966).

[480] Dare v. California Department of Motor Vehicles, 191 F. 3d 1167 (9th Cir. 1999), at

state to continue to deny access to a particular service, in light of a demonstration that a reasonable modification, providing access, would not alter the state's ability to provide the service.

The U.S. Supreme Court characterized the fact that state legislators have addressed the disabled via legislation as evidence that "continuing antipathy or prejudice" against the disabled had been eliminated, eradicating the "corresponding need for more intrusive oversight by the judiciary." Pointing to § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794, providing the retarded with the right to receive "appropriate treatment, services, and habilitation" in a setting that is "least restrictive of [their] personal liberty." The U.S. Supreme Court seemingly believes that such statutory developments of and by themselves have changed the social compact and the way the disabled are treated within it.[481]

The differences presented by mentally retarded, when living in group home, are irrelevant in the absence of some relation to a threat to legitimate interests of the city not presented by other group home occupants. In that particular case, under that set of facts, the U.S. Supreme Court determined that the "record does not reveal any rational basis for believing that the [mentally retarded group] home would pose any special threat to the city's legitimate interests," holding the ordinance invalid as applied.[482] The decision did nothing, however, to assist future disabled persons to define the parameters of their right to accommodation measures.

The bases of the U.S. Supreme Court's factually specific holding in Cleburne included the following considerations: negative attitude of the majority of property owners and the fears

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1176.

[481]***Fix this citation!)(See also, . Developmental Disabilities Assistance and Bill of Rights Act, 42 U. S. C. §§ 6010(1), (2).)

[482] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 448.

of elderly residents of the neighborhood, unsubstantiated by factors which are properly cognizable in a zoning proceeding.[483]

The disadvantages of being cast into the rational basis scrutiny den may point to the need to eliminate the various levels of scrutiny, as suggested by Justice Rehnquist's Cleburne concurrence. Both Justice Rehnquist and Justice Marshall would eliminate the categories, though for divergent rationale. Justice Rehnquist would relegate all of Equal Protection analysis to rational basis scrutiny, while Justice Marshall would have strict scrutiny as the default position. Disadvantaging a group singled out for protection by Congress should be deemed, as a matter of law, "irrational." First, the categories have been inconsistently determined under equal protection principles.[484] When looking specifically at the intermediate standard of review in his dissent in Craig v. Boren, 429 U.S. 190, 220-221 (1976), Justice Rehnquist wrote: "How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' relative to the achievement of such objective, rather than related in some other way to its achievement?"[485]

Justice Rehnquist always looks for a "rational basis" to support a distinction in treatment, made via statute. "[T]he 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.[486] "If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that

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483 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 448.

484 United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 176-177.

485 Craig v. Boren, 429 U.S. 190, 220-221 (1976).

486 Lehr v. Robertson, 463 U.S. 248, 265 (1983), Hampton v. Mow Sun Wong, 426 U.S. 88.

that cost should be incurred."[487]

Just as "[i]t would be utterly irrational to limit the franchise on the basis of height or weight [and] it is equally invalid to limit it on the basis of skin color," denial of access to the disabled, in the face of reasonable alternatives (the availability of reasonable modifications) is utterly irrational.[488] Congress is perfectly able to make this determination.

"In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a 'tradition of disfavor' by our laws? n6 What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? n7 In most cases the answer to these questions will tell us whether the statute has a 'rational basis.' The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage, n8 gender, n9 or illegitimacy. n10 But that is not because we apply an 'intermediate standard of review' in these cases; rather it is because the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve. n11"[489]

This assessment presumes a proper analysis of the phenomenon that is racial discrimination. By narrowly interpreting this concept, focusing solely on invidious expressions of overt discrimination, the U.S. Supreme Court has been able to dilute the impact of the Civil

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100 (1976).

[487] United States Railroad Retirement Board v. Fritz, 449 U.S., at 180-181 (STEVENS, J., concurring in judgment).

[488] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Rehnquist concurring, 452.

[489] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 453, 454.

War Amendments. This narrow focus has also limited the extension of the enfranchisement principles espoused within the Civil War Amendments, to other categories, including gender and disability. Due to the fundamental interest at stake and the historical discrimination suffered by the victimized group, "the Equal Protection Clause requires us to do more than review the distinctions drawn by Cleburne's zoning ordinance as if they appeared in a taxing statute or in economic or commercial legislation.n17 The searching scrutiny [Marshall] would give to restrictions on the ability of the retarded to establish community group homes leads [him] to conclude that Cleburne's vague generalizations for classifying the 'feeble-minded' with drug addicts, alcoholics, and the insane, and excluding them where the elderly, the ill, the boarder, and the transient are allowed, are not substantial or important enough to overcome the suspicion that the ordinance rests on impermissible assumptions or outmoded and perhaps invidious stereotypes."[490] The fact of the existence of state legislation touching upon this area alone does nothing to adequately address these concerns. Accordingly, "[n]o single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny; experience, not abstract logic, must be the primary guide."[491]

Groups warranting heightened scrutiny are discrete and insular relative to social, political and cultural, as guided by historical perspective. When will society ostracize a group, assign them to a particular caste and treat them accordingly? "Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of

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[490] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 464-465.

[491] City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at Marshall dissenting, 472, FN 24.

unequal treatment requires sensitivity to the prospect that its vestiges endure."[492] In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, "a page of history is worth a volume of logic."[493]

In spite of itself, pointing to 42 U.S.C. § 12131(2), the *Alsbrook* Court indicated that the ADA's Title II exceeds what is necessary to meet rational basis scrutiny. Since states violating ADA, Title II may only be deemed rational if they can show that the reasonable accommodation or modification would "fundamentally alter" the nature of the service, program, or activity, could a court uphold the state's policy, 28 C.F.R. § 35.130(b)(7) actually supports the notion that it is irrational to violate the ADA's Title II.[494] The harm that Congress intended to address within the context of the ADA "cannot be described as mere 'incidental burdens' on the rights of the disabled.[495]

"Discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services…"[496] Congress clearly meant to envelope a comprehensive spectrum of discrimination, as relating to the disabled. "Individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and

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492 ***Fix citation

493 New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.).

494 Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) 1009.

495 See 42 U.S.C. § 12101(a)." Dissent from Part IIA of the Alsbrook Majority, by McMillan, joined by Richard, Arnold, Fagg and Murphy, 1014.

496 42 U.S.C. § 12101(a)(3).

criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities…"[497]

The following statement from the *Alsbrook* Dissent seems to represent the most logical approach to the ultimate determination of Title II's constitutionality. Judge McMillan indicated that it cannot be assumed that "in order for Congress to abrogate the states' Eleventh Amendment immunity through an exercise of legislative authority under § 5 of the Fourteenth Amendment, there must be evidence in the legislative record supporting the proposition that 'most state programs and services' are responsible for the constitutional injury to be remedied or deterred…. no such requirement is constitutionally imposed. Congress found the states to be partly responsible for the 'various forms of discrimination' suffered by individuals with disabilities. 42 U.S.C. § 12101(a)(5)." [498]

Though the disabled are not considered a suspect class, the Equal Protection Clause prohibits irrational and invidious discrimination against them.[499] Significantly, "when it enacted the ADA, Congress made specific factual findings of arbitrary and invidious discrimination against the disabled."[500] § 12101(a)(7) Viewing the specific instances of discrimination within the context of the affirmative provision of public services, Congress specifically crafted the ADA as a "necessary legislative response to a long history of arbitrary and irrational discrimination against people with disabilities."[501]

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497 42 U.S.C. 12101 (a)(5).

498 Alsbrook v. City of Maumelle, 184 F. 3d 999 (8th Cir. 1999) Dissent from Part IIA of the Majority, by McMillan, joined by Richard, Arnold, Fagg and Murphy, 1016.

499 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 439 & 446.

500 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985), at 439, 446 and See §12101(a)(7).

501 See 42 U.S.C. § 12101(b).

Title II of the ADA prohibits "utilizing standards, criteria, or methods of administration" that disparately impact the disabled."[502] Congress has specifically defined such behavior to be without a rational basis, where no undue burden is demonstrated. The Court's real "problem" is with the fact that Congress has properly shifted the burden upon the shoulders of the state, to demonstrate the specific reason that the public policy of accommodation and equal access cannot be met in a specific circumstance.

It is unfair to saddle the ADA, Title II with the interpretive strains which have applied to racial classifications. Disparate impact alone has been deemed inadequate by the Supreme Court, and not Congress, as a basis for proving discrimination.[503] Congress should not, however, forever be disabled by the Supreme Court's limited understanding of the nature of discrimination. If Congress' views about discrimination have evolved, it should not be limited to the Court's antequated interpretation of discriminatory proof.[504] This is true even in race-based cases, but certainly with respect to the disabled. Congress ought to be able to revisit the issue that is the quantum of proof necessary for a legal declaration that unconstitutional state-sponsored discrimination has taken place. No "mens rea" has been attached to the act of placing shackles upon citizens, resulting in the Thirteenth Amendment being left to the auspices of disparate impact. The emphasis is upon the effect that such shackles have on the citizen, separate and apart from the intent motivating the conduct. There is no principled basis upon which to

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502 42 U.S.C. § 12112(b)(3)(A).

503 Washington v. Davis, 426 U.S. 229, 239 (1976).

504 The Court has unnecessarily "infused" a purposeful discrimination component into the racial discrimination equation: "Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." Washington v. Davis, 426 U.S. 229, 239 (1976).

distinguish Equal Protection analysis, except via reliance on the Supreme Court's "revisionist" history.

Remediation can be prospective. Congress is precisely the appropriate body of persons to declare the legal duties which are appurtenant to behavior. Congress can indeed mandate acceptance of certain groups, insular minorities, into the larger society. The "law can be a teacher. So I do not doubt that the Americans with Disabilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society."[505]

In his *Garrett* concurrence, Justice Kennedy, is plainly wrong when he asserts, "States can, and do, stand apart from the citizenry. States act as neutral entities, ready to take instruction and to enact laws when their citizens so demand. The failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause."[506] Again, there is no legitimate reason that discrimination, in any context, must be limited to the realm of the intentional, or even the conscious. Exhaustive research and scholarship has been dedicated to demonstrating the realities associated with subconscious racism.[507]

States are not immune from discriminatory behavior, particularly that characterized as being subconscious. The "substantive obligation that the Equal Protection Clause creates applies to state and local governmental entities alike."[508] The legislative history relied upon by Congress

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505 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Kennedy concurrence, 375.

506 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Kennedy concurrence, 375, generally citing Washington v. Davis, 426 U.S. 229.

507 Fix citation [Lawrence, et al.]

508 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Beyer dissenting, 378, citing Richmond v. J. A. Croson Co., 488 U.S. 469, (1989).

cited "300 examples of discrimination by state governments themselves."[509] In addition, "State-imposed barriers also frequently made it difficult or impossible for people to vote, to enter a public building, to access important government services, such as calling for emergency assistance, and to find a place to live due to a pattern of irrational zoning decisions."[510]

In accordance with *Cleburne*, Congress found that "the adverse treatment of persons with disabilities was often arbitrary or invidious in this sense, and thus unjustified."[511] Congress reasonably believed that the failure to accommodate was irrational. Tellingly, the *Garrett* majority's "failure to find sufficient evidentiary support may well rest upon its decision to hold Congress to a strict, judicially created evidentiary standard, particularly in respect to lack of justification."[512] Congress simply does not have to weigh burdens of proof, when crafting legislations.[513] The standards of review, rational, intermediate and strict scrutiny, are paradigms of judicial restrain, or tools for the Court.[514]

The *Garrett* majority used the pretext of the "rational basis " analysis to deem the legislative record inadequate.[515] Disparate impact standards can be established by Congress.[516]

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509 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer dissenting, 379.

510 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer dissenting, 379.

511 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer dissenting, 381.

512 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer dissenting, 382.

513 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer dissenting, 383, citing Oregon v. Mitchell, 400 U.S. 112.

514 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer dissenting, 383, citing FCC v. Beach Communications, Inc., 508 U.S. 307, 314, (1993)

515 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer dissenting, 385.

516 Compare Griggs v. Duke Power Co., 401 U.S. 424, 432, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971), with Washington, supra, at 239, and City of Rome v. United States, 446 U.S. 156, 172-173, 64 L. Ed. 2d 119, 100 S. Ct. 1548 (1980), with Mobile v. Bolden, 446 U.S. 55, 62, 64 L. Ed.

The *Garrett* majority serves as a gatekeeper, often preventing the advent of "too much justice," or a re-distribution of resources. "The legislation before us, however, does not discriminate against anyone, nor does it pose any threat to basic liberty. And it is difficult to understand why the Court, which applies 'minimum 'rational-basis' review' to statutes that burden persons with disabilities…, subjects to far stricter scrutiny a statute that seeks to help those same individuals."[517] Avoiding the implications of Garrett is feasible, as long as the U.S. Supreme Court is willing to cease the pursuit of its legislative agenda.

D. Hood v. City of Los Angeles

If the U.S. Supreme Court steps back from Congress and allows the federal legislature to remediate in accord with the times, the ADA, Title II can be applied in innovative fashion, serving to alleviate the burden thrust upon the less-than-broad shoulders of 42 U.S. C. §1983.

1. Hood v. City of Los Angeles[518]- Pertinent Facts

On November 15, 1997, decedent Darryl Hood was shot and killed by Officers Brent Houlihan, Miguel Perez, and/or other unknown officers of the Los Angeles Police Department (hereinafter, "LAPD").[519] Ginger Hood, Darryl Hood, Jr., Dashawn Hood, Kevin Darnell Hood, Katie Marie Hood and Howard Bo Keemont Hood were the sole successors in interest and heirs of decedent Darryl Hood.[520] Darryl Hood had a documented history of mental illness, an illness which was separate and apart from his use of illegal drugs, including PCP.[521]

2d 47, 100 S. Ct. 1490 (1980) (plurality opinion).

517 Board of Trustees of the U. of Alabama v. Garrett, 531 U.S. 356 (2001), at Breyer dissenting, 387-388.

518 Case No. CV 99-00099 MMM (AJWx)

519 Hood Complaint, par. 12

520 Hood Complaint, par. 3

521 Declaration of Dr. C. Boyd James, Hood Pleadings

The LAPD failed to respond in a reasonable manner to the November 15, 1997 situation involving decedent, Mr. Hood. Instead of providing Mr. Hood with the intervention that is part of a comprehensive treatment plan, for his patent mental and emotional disability, the involved officers immediately and without necessity resorted to the use of deadly force, killing Mr. Hood and precluding him from his right to non-discriminatory access to public mental health treatment facilities. The officers involved knew or should have known that Mr. Hood was mentally and emotionally disturbed and that Mr. Hood presented neither an immediate nor a remote threat to the safety of the officers themselves. Mr. Hood's actions of November 15, 1997 also did not threaten the safety of any member of the public.[522]

In response to the Hood family allegations, the City of Los Angeles suggested that Mr. Hood was not qualified as a persons with a disability on account of his recent use of the drug PCP. Decedent Darryl Hood, was excluded from ADA relief neither by 42 U.S.C. §12114(a) nor 42 U.S.C. §12210(a), since Defendants did not subject Mr. Hood to the discriminatory treatment of which Plaintiffs have complained "on the basis of" his allegedly current use of illegal drugs. On November 15, 1997, when Defendants engaged Mr. Hood, they could not have acted on the basis of Mr. Hood's alleged current illegal drug use, because they did not in fact know that Mr. Hood had ingested illegal drugs within a relatively recent, though precisely indeterminable, timeframe.

According to the Americans with Disabilities Act's Title II Technical Assistance Manual, as well as 42 U.S.C. §12210(c), the "ADA does prohibit denial of health services, or services provided in connection with drug rehabilitation, to an individual on the basis of current illegal

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[522] Hood Complaint, par. 12

use of drugs, if the individual is otherwise entitled to such services."[523] Decedent, Darryl Hood, was an individual qualified to receive mental health services from Defendant City of Los Angeles. Importantly, Darryl Hood was not an employee of Defendants, in possession of job performance obligations, nor an in-patient resident of a public drug rehabilitation center. Instead, Mr. Hood was an individual eligible to receive mental health services from the City of Los Angeles.

Just as a hospital emergency room may not refuse to provide emergency services to an individual, on the basis of current illegal drug use, pursuant to either 42 U.S.C. §12114 or 42 U.S.C. §12210. Under the precedent established in Hood, Defendants were unable to escape the responsibility to provide non-discriminatory access to mental health services, based upon the distinct, though related, condition of decedent's alleged illegal drug use.[524]

Because he had cut himself with a sharp object and, at the urging of his family, Darryl Hood first went to a mental health practitioner in 1994.[525] It was Ginger Hood, decedent's wife, who first spoke to a psychiatrist or psychologist, in order to learn the reason that her husband would deliberately harm himself.[526] In January of 1994, in response to his ingestion of ammonia, Ms. Hood took Darryl Hood to the Augustus F. Hawkins Comprehensive Community Medical Health Center, believing him to be mentally ill.[527]

There were several manifestations, prior to November 15, 1997, of Darryl Hood's mental illness. After 1994, Mr. Hood often took Ginger Hood outside of their home in order to speak

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523 Title II of the Americans with Disabilities Act, 1993 Technical Assistance Manual, II-3.8000, "Illegal use of drugs."

524 Title II of the Americans with Disabilities Act, 1993 Technical Assistance Manual, II-3.8000, "Illegal use of drugs," Illustration 1.

525 Deposition of Ginger Hood, hereinafter "GH Depo.," 80:11-13; 81:1-3; 23:25

526 GH Depo., 82:21-83:10

527 GH Depo., 84:4-85:18.

because he thought people from within the television would otherwise hear their conversation.[528] On another occasion, also in 1994, Mr. Hood inflicted sharp object wounds to his stomach, chest and under his chin.[529] Ginger Hood believed that Mr. Hood stabbed himself because of the mentally ill state that he was in; she also believed that during the periods wherein his mental illness was most manifest, Darryl Hood could not understand the things that she said to him.[530] After this stabbing incident, Mr. Hood was taken by Los Angeles Police officers to Augustus Hawkins.[531] After this stabbing incident, Mr. Hood would speak neither in front of the television, nor over the telephones within the house, saying that he believed these phones were "bugged."[532] In another incident, Mr. Hood cut his ear, swallowed rat poison and was again taken to Augustus Hawkins, where he was treated and evaluated for approximately one week.[533] In a separate incident, Mr. Hood set the Hood family home garage on fire.[534]

Due to his aberrant behavior, the result of his medically diagnosed mental illness, Darryl Hood was prescribed medication. The medication, designed to address his mental disorders seemed to help to improve Mr. Hood's condition a great deal, when taken.[535] The aforementioned ear cutting and rat poisoning incident took place in November of 1994, when Mr. Hood had neglected to take his medicine.[536] Ms. Hood believed Darryl Hood needed the assistance of

528 GH Depo., 86:10-16; 86:21-87:15
529 GH Depo., 87:23-88:6.
530 GH Depo., 89:5-17.
531 GH Depo., 89:18-91:12.
532 GH Depo., 97:8-98:1
533 GH Depo., 102:13-104:10.
534 GH Depo., 109:1-110:20.
535 Fix Citation [Declaration of Dr. C. Boyd James.]
536 GH Depo., 106:10-20

mental health professionals because she did not believe drinking ammonia and engaging in self-mutilation were indicative of normal mental functioning.[537]

Ms. Hood did not think that her husband actually wanted to kill himself but believed that he possessed a particular mental illness, the cause of his self-destructive behavior.[538] Though Ms. Hood felt he needed professional mental help, she was not concerned he would hurt her or her children, only that he would continue to hurt himself.[539] Even on the day before he was killed, Ms. Hood attempted to get help for her husband.[540] Realizing that his mental health would not improve independent of professional care, during the week preceding November 15, 1997, Ms. Hood was not prepared to let Darryl Hood come back into their family home unless and until he received treatment.[541]

As a result of his family's concerns and the aforementioned mental health evaluations performed by mental health care professionals at the Augustus Hawkins Center, Mr. Hood was diagnosed, by all legitimate standards of medical and miscellaneous diagnostic evaluations, not to be of sound mind, to be categorically psychotic, schizophrenic or otherwise neurologically impaired and, consequently, was unable to interpret legal commands as might have been issued under any stressful and extreme circumstances. Said diagnosis was rendered prior to November 15, 1997 and represents Mr. Hood's mental condition on November 15, 1997.[542] Further, Mr. Hood's psychiatric and psychological conditions predated his use of any and all narcotics and were in fact contributing factors for his use of narcotic substances. Based upon the

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537 GH Depo., 93:24-94:2.
538 GH Depo., 112:4-19; 113:2-3, 19-20.
539 GH Depo., 120:23-121:25.
540 GH Depo., 123:8-126:12.
541 GH Depo., 127:20-23.
542 Declaration of Dr. C. Boyd James.

aforementioned mental health records, Mr. Hood's mental illness was not the result of his use of such narcotic substances.[543]

2. The Trial Court's Denial of Defendant's Motion for Summary Adjudication of Plaintiff's ADA Claim.

U.S. District Court Judge Margaret Morrow agreed with the Hoods: both the facts in this matter, as well as the permissible inferences which could be drawn from them raised material genuine issues of fact. Defendants did not act on the basis of Mr. Hood's alleged drug use, as necessitated by both 42 U.S.C. §12114(a) and 42 U.S.C. §12210(a). Further, consistent with 42 U.S.C. §12210(c), The Hoods' decedent specifically could not be denied mental health services for which he was qualified on the basis of current illegal drug use. The Hoods argued that 42 U.S.C. §12210, as opposed to 42 U.S.C. §12114, were applicable, since the Hoods' decedent was not an employee of the covered entity, but a person eligible to receive public mental health services.

Congress intended that the ADA, Title II would be construed in accord with the Rehabilitation Act.[544] Cases interpreting the Rehabilitation Act make clear that public entities must do more than offer services to disabled persons; they must take affirmative steps to make programs and services accessible to the disabled.[545] The ADA, Title II requires that public entities take such affirmative steps, such as the protective and interventive detention as necessary in the instant case, to ensure that the access they provide is meaningful, i.e. sufficient to ensure that the disabled actually derive the benefits of the government programs and services.[546] This

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543 Declaration of Dr. C. Boyd James.

544 Collings v. Longview Fibre Co., (9th Cir. 1995) 63 F.3d 828, 832, n.3, cert. denied 516 U.S. 1048, 116 S.Ct. 711.

545 Alexander v. Choate, (1985) 469 U.S. 287, 301, 105 S.Ct. 712, 720.

546 Fix Citation [See Dare rationale as to comprehensive schemes]

articulation of the ADA's purposes further supports the interpretation of 42 U.S.C. §12114(a) and 42 U.S.C. §12210(a) promulgated by the Hood family: that Defendants did not in fact act on the basis of Mr. Hood's alleged current drug use, since they did not know, to any degree of legal certainty, of said use on November 17, 1995.

In the *Hood* matter, the City of Los Angeles failed to make its mentally and emotionally disabled persons evaluation procedures available to Darryl Hood on a non-discriminatory basis. Mr. Hood's exclusion from needed mental health services came about largely because of the policies of the LAPD. These policies make such evaluation and treatment procedures and services inaccessible to the mentally ill. The City of Los Angeles' failure to provide badly needed mental health services to Darryl Hood was also unreasonable, discriminatory and violative of the ADA. But for the LAPD's discriminatory policies, relative to the mentally and emotionally disabled, Darryl Hood would not have been fatally wounded by the persons charged to provide the first line of treatment, or protective detention.

1. Defendants Did Not Act on the Basis of Mr. Hood's Illegal Drug Use.

The police did not have specific knowledge, prior to shooting Darryl Hood and being privy to the information gathered pursuant to the battery of blood tests, mental and physiological health records and expert analytical reports, that Darryl Hood had in fact ingested PCP. Even had the officers been in possession of definitive information verifying the presence of PCP in Darryl Hood's system, prior to encountering Mr. Hood, the City of Los Angeles could simply not argue that it was acting on the basis of such use by shooting Mr. Hood. Shooting an individual who has ingested PCP is not, short of this individual engaging in criminal behavior beyond the fact of such ingestion, an act in which the City of Los Angeles is authorized. Each of the cases

supporting the proposition of a covered entity acting on the basis of an individual's drug use involves the covered entity penalizing an individual for such illegal drug use.

Acceptable forms of "punishment," according to these examples, include banishment from drug rehabilitative services, but do not include death by gunfire. The use of deadly force is beyond the scope of mental health care services; in its capacity as mental health services provider, the City of Los Angeles cannot claim to have acted on the basis of Mr. Hood's use of PCP since at the time of the encounter it could not have known with any degree of certainty that PCP was in Mr. Hood's system and Mr. Hood's mental illness was distinct from the presence of PCP, rendering Mr. Hood "otherwise entitled" to mental health services.

Los Angeles Police Officers Miguel Perez, who fired several rounds at Darryl Hood on November 15, 1997, and Berzon Distor responded to an "attempt suicide" call in the Jordan Downs housing project on November 15, 1997, the result of a report of one person stabbing himself in the head.[547] Officer Brent Houlihan, who also fired rounds at Mr. Hood on November 15, 1997, was on the scene of the ultimate shooting in response to the same attempted suicide call heard by Officer Perez.[548] Officer Perez' goal with respect to his initial interaction with Mr. Hood was suicide intervention, to save Mr. Hood's life.[549] Officer Perez' first thoughts, upon hearing a radio call concerning the attempted suicide, were to assist the victim in an effort to save the attempted suicide victim's life.[550] Officer Perez did not know whether Darryl Hood's self-destructive behavior was a manifestation of a mental illness, the result of the influence of drugs or alcohol, or some combination thereof. Officer Perez did not "act on the basis of" Mr.

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547 Deposition of Officer Miguel Perez3, hereinafter "Perez Depo.," 26:14- 27:5.
548 Deposition of Brent Houlihan4, hereinafter, "Houlihan Depo.," 13:2-11, 20-23.
549 Perez Depo., 42:13-17; 45:24-46:5.
550 Perez Depo., 34:13-20.

Hood's alleged current illegal drug use.[551] Like Officer Perez, Officer Houlihan could not have been acting on the basis of Mr. Hood's alleged current use of illegal drugs, since he did not know, on November 15, 1997, whether or not Mr. Hood had in fact been under the influence of any illegal drug.[552]

2. Even Allegations of "Current Drug Use", Via 42 U.S.C. §12210(c), Do not Exclude Plaintiffs' ADA Claim.

In the world of the delivery of health services to the mentally ill, however, reality suggests that illegal drug use and severe mental illness exist together in a somewhat symbiotic relationship.[553] The exceptions to the exceptions that are 42 U.S.C. §12114(a) and 42 U.S.C. §12210(a) and (c), indicate that Congress recognized this to be the case and made allowance for the constituency to be served by public provision of mental health care. A prime example of this Congressional consideration exists with respect to Illustration 2 of the Technical Assistance Manual's II-3.8000, "Illegal use of drugs,": A municipal medical facility that specializes in care of burn patients may not refuse to treat an individual's burns on the grounds that the individual is illegally using drugs.[554] Besides the fact that Defendants cannot argue that they acted on the basis of Mr. Hood's alleged illegal drug use, Mr. Hood falls under the ambit of 42 U.S.C. §12210(c). Apart from any alleged drug use, Mr. Hood was "otherwise entitled" to receive mental health services.

When he arrived to the scene of the incident, Officer Perez was not acting in the capacity of a state drug rehabilitation facilitator, or "on the basis of" any alleged drug use by Darryl Hood,

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551 Perez, Depo., 27:20 -29:15.

552 Houlihan Depo., 115:14-19.

553 Declaration of Dr. David V. Foster, M.D.

554 Title II of the Americans with Disabilities Act 1993 Technical Assistance Manual, II-3.8000, "Illegal use of drugs."

but rather in an effort to prevent Mr. Hood from committing suicide. In order to act "on the basis of" current illegal drug use, the covered entity must first have reason to believe that the individual was in fact engaging in illegal drug use, to the exclusion of all other possible rationales for said individual's behavior. The officers who responded to Jordan Downs housing project on November 15, 1997 had no way of discerning the precise cause or causes of Darryl Hood's aberrant behavior on November 15, 1997, short of a blood-level analysis, psychiatric or psychological evaluation, which could only be conducted significantly subsequent to the fact of their response.

The City of Los Angeles was not allowed to attribute, in an "ex post facto" manner, the information subsequently gained about Mr. Hood via blood tests and review of mental and physical health records, to the states of mind possessed by the involved police officers on November 15, 1997. Cases and regulations interpreting 42 U.S.C. 12210 make it clear that the section, excluding from ADA Title II coverage those persons currently engaging in the use of illegal drugs, is limited to those situations wherein the covered entity has discernible knowledge of the individual's illegal drug use, as opposed to mere suspicion thereof, and specifically acts to enforce a particular policy relative to such illegal drug use. When the covered entity is engaged in providing non-drug rehabilitative health services, including the identification of persons in need of mental health services, it may not withhold said services on the basis of illegal drug use when such use is extraneous to the service being provided by the covered entity.

The issue, therefore, concerning whether or not Mr. Hood was a "current" drug user was irrelevant in the face of the fact that the majority of the population for whom the implicated service is intended also suffers from current drug use. There is no performance owed by the mentally ill constituencies which would be compromised by current drug use. As the Technical

Assistance Manual examples demonstrate, with respect to Title II, the ADA does not require its beneficiaries to be perfect; only in the context of drug rehabilitative services does the necessity to refrain from current illegal drug use become an issue, as absenteeism from current drug use may in fact be a necessary requirement in the in-patient setting.[555]

D. The Ninth Circuit's Hason v. Medical Board of California Case , Provides an Additional Example of the Innovative Applications Available Under Title II of the ADA

In *Hason*, a physician appealed to the Ninth Circuit Court of Appeals the dismissal of his pro se complaint alleging discrimination based on disability in violation of the United States Constitution and Title II of the ADA.[556]

The physician had been denied a license to practice medicine in the state of California. The California Medical Board denied the license due to the fact that the physician had been diagnosed with mental illness.[557] The basis for the dismissal against the named state entities was the District Court's determination that the immunity provided by the Eleventh Amendment had not been properly abrogated under Title II of the ADA.[558]

The issue to be decided in Hason was specifically whether the *Garrett* decision invalidates Ninth Circuit precedent relating to Title II of the ADA. Since, however, "the Garrett Court expressly declined to decide whether Congress validly abrogated state sovereign immunity in enacting Title II of the ADA,"[559] the Ninth Circuit held in *Hason* that *Garrett* does not

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555 Title II of the Americans with Disabilities Act 1993 Technical Assistance Manual, II-3.8000, Illustration 2.

556 Hason v. Medical Board of California, et al., 29 F. 3d 1167 (9th Cir. 2002), at 1169.

557 Hason v. Medical Board of California, et al., 29 F. 3d 1167 (9th Cir. 2002), at 1169-1170.

558 Hason v. Medical Board of California, et al., 29 F. 3d 1167 (9th Cir. 2002), at 1170.

559 Hason v. Medical Board of California, et al., 29 F. 3d 1167 (9th Cir. 2002), at 1171.

overrule either *Clark* or *Dare*, and that the Eleventh Amendment does not bar" ADA Title II claims.[560]

The District Court dismissed Dr. Hason's complaint when the magistrate judge concluded that "(1) the denial of a medical license cannot be challenged under Title II of the ADA because a medical license does not constitute 'services, programs, or activities of a public entity' and (2) Dr. Hason is not a 'qualified individual with a disability' within the meaning of Title II of the ADA."[561]

Finally, however, the *Hason* Court determined that "medical licensing is an output of a public agency, not an input such as employment. The act of licensing involves the Medical Board (i.e. a 'public agency') providing a license (i.e. providing a 'service') to an applicant for a medical license. Although medical licensing does occur within the employment context, medical licensing is not equivalent to employment. The Medical Board does not make employment decisions, and the Board's grant of a license is not tantamount to a promise or guarantee of employment as a physician."[562]

VI. Conclusion-Effective Remediation Measures Require Proactive Legislation

A. The ADA's "Failure to Accommodate" Standard is the Proper Measure of Discrimination"

Congress is in the best position to determine when constitutional principles cease to be served by events, customs and practices which were at one point acceptable societal practices. "Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency

560 Hason v. Medical Board of California, et al., 29 F. 3d 1167 (9th Cir. 2002), at 1171.
561 Hason v. Medical Board of California, et al., 29 F. 3d 1167 (9th Cir. 2002), at 1171.
562 Hason v. Medical Board of California, et al., 29 F. 3d 1167 (9th Cir. 2002), at 1172.

legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality."[563]

B. ADA's Title II Should be Preserved, in Order that its Impact be Expanded, Serving as a Supplement to the Depleted Arsenal of Civil Rights Plaintiffs.

Title II of the Americans with Disabilities Act ("ADA") is remedial federal legislation, designed to benefit disabled persons. Like 42 U.S.C. §1983, Title II of the ADA represents Congressional attempt to correct social inequalities. Unlike §1983, Title II of the ADA is not saddled with a "conscious discrimination" standard of proof. Instead, Title II of the ADA requires public entities to provide proactive, reasonable accommodations, empowering the disabled to assume an equal position in society. Because of this favorable standard, Title II of the ADA has become a viable supplement and, at times, alternative to 1983 as a tool of civil rights litigation.

Illustrating the power and potential of the ADA's Tile II are two cases, litigated by the author, which apply Title II of the ADA to the zoning variance and police shooting contexts. Without Title II of the ADA, neither of these cases would have been litigated, to let alone disposed of in positive fashion.

This article suggests that the ADA, Title II should be allowed to continue to serve in its role as a progressive tool of remediation. The *Garrett* decision threatens to jeopardize that role. Though *Garrett* interprets Title I of the ADA, several circuits have indicated that they believe the U.S. Supreme Court would similarly interpret Title II of the ADA, issuing *Garrett*-esque decisions of their own, with respect to Title II of the ADA. At the heart of the *Garrett* decision

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563 City of Cleburne, TX, et al. v. Cleburne Living Center, Inc., et al., 473 U.S. 432 (1985),

is the majority's determination that Congress had failed to properly abrogate states' Eleventh Amendment immunity, when it enacted Title I of the ADA.

This article suggests that, even assuming the legitimacy of the rationale presented by *Garrett*, the legislative histories and purposes of Title I and Title II of the ADA are distinct. The two statutes warrant separate, divergent interpretations. By looking closely at several cases, in which the U.S. Supreme Court has interpreted the scope of Congressional authority to remediate via §5 of the Fourteenth Amendment, this article suggests that the Court has too narrowly defined that power.

Remediation of pervasive social ills should be unfettered, irrespective of the "redistribution of resources" costs. Title II of the ADA was not intended to support employment claims, whether against states or any other employer. As a result, *Garrett's* harsh holding should not contaminate Title II of the ADA. Faithful interpretation of legal precedent dictates that the U.S. Supreme Court should allow Title II of the ADA to continue along its current path, burning a trail for increased levels of societal access and ultimately spilling over into the auspices of factual scenarios traditionally governed by 42 U.S.C. §1983.

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at Marshall dissenting, 466.