THE SHADOWS OF UNCONSTITUTIONALITY: HOW THE NEW FEDERALISM MAY AFFECT THE ANTI-DISCRIMINATION MANDATE OF THE AMERICANS WITH DISABILITIES ACT

*James Leonard**

I. INTRODUCTION

> "Before I draw nearer to that stone to which you point," said Scrooge, "answer me one question. Are these the shadows of the things that Will be, or are they shadows of the things that May be, only?"[1]

The Americans with Disabilities Act[2] ("ADA") was enacted in 1990 with unusual bipartisan support,[3] reflecting a legislative consensus on the need for a national mandate to forbid discrimination against individuals with disabilities.[4] At nearly the same time, however, the Supreme Court began a process of reducing the power of Congress, a process that continues to the present. The Nineties saw federal preeminence over the states wane as the Supreme Court took an increasingly protective view of the role of the states in our constitutional scheme. The Court also reaffirmed its own role as arbiter of the Constitution, responding to attempts by Congress to establish constitutional standards

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* Professor of Law, The University of Alabama School of Law (B.A., M.S.L.S., J.D., University of North Carolina at Chapel Hill). I'd like to express my gratitude to Dean Kenneth C. Randall for supporting my research through generous summer grants. Thanks also to my secretary Peggy McIntosh for helping with the preparation of the manuscript and keeping my work life in order while I worked on this project. Finally, heartfelt thanks to my former colleague at Ohio Northern University, Joanne C. Brant, for several critical insights on this topic.

1. CHARLES DICKENS, A CHRISTMAS CAROL 56 (Revell Company 1962) (1843).

2. 42 U.S.C. §§ 12101-12213 (1994).

3. The ADA passed by a vote of 377 to 28 in the House, 136 CONG. REC. H4629 (1990), and 91 to 6 in the Senate, 136 CONG. REC S9695 (1990). *See generally* 2 BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW 21:1-3 (1991 & Supp. 1996).

4. 42 U.S.C. § 12101(b)(1).

by legislation.[5] Over the decade, the Court whittled away at Congress' mainstay constitutional authorizations to enact social and economic legislation: Section 5 of the Fourteenth Amendment and the Commerce Clause. In the process, the Court invalidated several federal statutes that regulated state and local governments as well as the general public.[6] While the Court has not issued an opinion on the constitutionality of the ADA thus far, it is unlikely that the ADA will remain off the docket forever.[7] Thus, at the end of the decade, there is great uncertainty about the effects of the Court's renewed federalism on the power of Congress to impose the ADA's non-discrimination mandate on state and local governments. The Court's decisions have cast a shadow of unconstitutionality over the Act. Like Ebenezer Scrooge, I ask whether these shadows are what "Will be," or "May be, only."

There were few shadows of constitutional uncertainty when the ADA was enacted in 1990. The power of Congress to set social and economic policy was taken for granted. Congress' apparent powers included not only the authority to supersede the role of states and localities in matters of social and economic policy, but also to subject them directly to federal regulation. The Tenth Amendment, the provision of the constitution which provides in simple, direct language that "powers not delegated to the United States by the Constitution, nor powers prohibited by it to the States, are reserved to the States . . ."[8] had been reduced to the "truism"[9] that Congress may act whenever proceeding under a

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5. *See infra* Part II.B.

6. *See, e.g.*, Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) (invalidating Age Discrimination in Employment Act ("ADEA") as applied to states); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (invalidating abrogation provisions of Trademark Remedy Clarification Act); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (invalidating abrogation provisions of Patent and Plant Variety Protection Remedy Clarification Act); Printz v. United States, 521 U.S. 898 (1997) (invalidating Brady Handgun Violence Prevention Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act as applied to states and localities); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (invalidating abrogation of state sovereign immunity under the Indian Gaming Regulatory Act); United States v. Lopez, 514 U.S. 549 (1995) (invalidating Gun Free School Zones Act of 1990); New York v. United States, 505 U.S. 144 (1992) (invalidating take title provisions of Low-Level Radioactive Waste Policy Amendments Act of 1985); Gregory v. Ashcroft, 501 U.S. 452 (1991) (invalidating the ADEA as applied to state judges).

7. The Court had granted certiorari in two ADA cases for the current term. *See* Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999), *cert. granted,* 120 S. Ct. 1003 (2000), *and cert. dismissed at request of parties*, 120 S. Ct. 1265 (2000); Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1999), *cert. granted sub nom.* Florida Dep't of Corrections v. Dickson, 120 S. Ct. 976 (2000), *cert. dismissed at request of parties*, 120 S. Ct. 1236 (2000). As the citations indicate, settlements were reached in these cases resulting in dismissals. The Court does not lack opportunities to review the ADA if it so chooses. *See, e.g.*, Garrett v. University of Ala. at Birmingham Bd. of Trustees, 193 F.3d 1214 (11th Cir. 1999), *cert. granted,* 120 S. Ct. 1669 (2000).

8. U.S. CONST. amend. X.

9. United States v. Darby, 312 U.S. 100, 124 (1941).

proper grant of constitutional authority.[10]

In 1990, Congress could count on two expansive grants of power under the Constitution. First, Section 5 of the Fourteenth Amendment, which permits Congress to legislate to protect rights secured by that amendment, was accorded so much deference by the federal courts that it resembled a license to interpret the Constitution and to impose substantive restrictions on state and local governments.[11] State sovereign immunity[12] to suit in federal court, secured by the Eleventh Amendment and general principles of sovereignty, was also subject to abrogation under Section 5.[13] Second, Congress could also count on the Court's deferential interpretations of the Commerce Clause. Since 1937, the Court had given Congress free rein to legislate under its commerce power, and until 1995 had invalidated only one enactment as lying outside of the Commerce Clause (reversing itself nine years later).[14] This deference extended even to direct regulation of the states. The Court approved of Commerce Clause measures which imposed generally applicable rules on the states, such as minimum wage requirements,[15] and, by the plurality decision in *Union Gas*, permitted Congress to abrogate state sovereign immunity to suit by private plaintiffs in federal court under the Commerce Clause.[16]

All of this has changed. Far from remaining subordinate political entities, the states have emerged from the Nineties with renewed authority and independence from national authority. Beginning in 1991, the Court began to issue opinions that shielded states from federal control. In *Gregory v. Ashcroft*,[17] the Court rejected an Age Discrimination in Employment Act ("ADEA") challenge to a provision of the Missouri constitution setting mandatory retirement ages for state judges.[18] In an

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10. *Darby*, 312 U.S. at 124. ("The amendment states but a truism that all is retained that has not been surrendered."); *see also* ERWIN CHEMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.8, at 228 (1997) ("The [*Darby*] Court made it clear that a law is constitutional so long as it is within the scope of Congress' power; the Tenth Amendment would not be used as a basis for invalidating federal laws.").

11. Katzenbach v. Morgan, 384 U.S. 641, 646 (1966); *see also* Stephen L. Mikochik, *The Constitution and the Americans with Disabilities Act: Some First Impressions*, 64 TEMP. L. REV. 619, 626 n.45 (1991) (arguing that ADA was valid exercise of section 5 powers). *See generally infra* notes 189-227 and accompanying text.

12. Local governments and other political divisions of a state do not enjoy sovereign immunity to suit in federal court. Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

13. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

14. National League of Cities v. Usery, 426 U.S. 833 (1976) (invalidating minimum wage requirements of Fair Labor Standards Act as applied to states), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

15. *Garcia*, 469 U.S. at 528.

16. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (plurality), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996).

17. 501 U.S. 452 (1991).

18. *Gregory*, 501 U.S. at 473.

opinion by Justice O'Connor, the Court held that the attempts by Congress to intrude upon core state functions must be phrased in unmistakably clear language.[19] Although the decision in *Gregory* amounted to a rule of construction rather than a Tenth Amendment decision, the importance of independent state sovereigns within the constitutional structure resonated in the Court's opinion.[20]

Gregory also set the tone for the opinions that followed. Justice O'Connor went to great lengths in dictum to extol the virtues of independent and vigorous state governments within the federal system.[21] The neo-federalist decisions of the Nineties seem to represent opportunistic attempts to restore state sovereignty more than a systematic assault on federal power.[22] Nevertheless, these decisions can be conveniently sorted into three groups. First there are the "anti-commandeering" decisions. In *New York v. United States*,[23] decided in 1992, the Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required states either to regulate or take title to certain radioactive wastes.[24] Pointing out that Congress could have regulated producers of radioactive wastes under its commerce power, the Court reasoned that it was impermissible for Congress to commandeer a state legislature to effect a federal policy.[25] The principle of *New York* was extended from state legislative to executive functions in *Printz v. United States*[26] in 1997. The Court held that the interim provisions of the Brady Handgun Violence Prevention Act, requiring local enforcement officers to participate in background checks of gun purchasers, constituted a forbidden commandeering of state officials.[27]

A second category of cases places limits on Congress' power to regulate activities under its commerce power. It is firmly established that the Interstate Commerce Clause empowers Congress to regulate in three areas: 1) the "channels" of interstate commerce; 2) the "instrumentalities" of interstate commerce; and 3) *intrastate* activities which substantially affect interstate commerce.[28] The first two categories remain

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19. *Id.* at 460.

20. *See infra* text accompanying notes 507-12.

21. *See infra* text accompanying notes 507-12.

22. *Cf.* Richard H. Fallon, Jr., *The Supreme Court 1996 Term Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 133 (1997) (noting disagreement by pro-federalist justices on analytical framework).

23. 505 U.S. 144 (1992).

24. *New York*, 505 U.S. at 188.

25. For an extended discussion of the reasoning and political theory underlying *New York v. United States*, see *infra* text accompanying notes 513-22.

26. 521 U.S. 898 (1997).

27. *Printz*, 521 U.S. at 935.

28. *See infra* Part II.A.

uncontroversial. The 1995 decision in *United States v. Lopez*,[29] however, drew into question the Court's longstanding practice of deferring to Congressional use of the Commerce Clause to justify legislative actions based on the *interstate* effects of *intrastate* activities. For the first time since 1937, the Court struck down a measure as not falling within the commerce power.[30] The Gun Free School Zones Act of 1990 criminalized the possession of firearms in school zones.[31] The Court held that gun possession in school zones was not an economic activity and did not have sufficient effects on commerce to justify response under the Commerce Clause.[32] Although *Lopez* did not speak to the matter directly, it did raise implications for federal regulations of state activities. To the extent that many state activities are not sufficiently commercial in nature, the power of Congress to set substantive rules for them under the Commerce Clause may be curtailed.[33]

A third set of decisions treats the question of state sovereign immunity to suit by private individuals. In 1996, the Court handed down the landmark decision in *Seminole Tribe v. Florida*,[34] in which it overruled its still recent decision in *Union Gas* and held that Congress may not abrogate state sovereign immunity to suit in federal court under Article I.[35] The Court left open the possibility that plaintiffs could continue to seek prospective, non-monetary relief under the doctrine of *Ex Parte Young*,[36] so long as Congress did not intend to foreclose that remedy in a particular statute.[37] The *Seminole Tribe* Court also reaffirmed Congress' power to abrogate state sovereign immunity in federal court under Section 5[38] but severely restricted that power the following term in *City of Boerne v. Flores* by holding that Section 5 permitted Congress only to enact measures which remedied or prevented constitutional violations

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29. 514 U.S. 549 (1995).

30. As discussed later, *see infra* text accompanying notes 429-71, the Court struck down the portions of the Fair Labor Standards Act on related Tenth Amendment grounds, but reversed itself later. National League of Cities v. Usery, 426 U.S. 833 (1976) (invalidating minimum wage requirements of Fair Labor Standards Act as applied to states), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

31. 18 U.S.C. § 922(q)(1)(A) (1994).

32. *Lopez*, 514 U.S. at 567-68.

33. *See infra* text accompanying notes 459-71.

34. 517 U.S. 44 (1996).

35. *Seminole Tribe*, 517 U.S. at 66.

36. 209 U.S. 123 (1908).

37. *Seminole Tribe*, 517 U.S. at 73-76. Under the doctrine of *Ex parte Young*, plaintiffs may sue state officials for ongoing violations of federal law in federal court. This exception to state sovereign immunity, which turns on the legal fiction that a state official acts *ultra vires* when violating federal law, is designed to permit the federal courts to vindicate federal law. Federal courts are, however, limited to awarding prospective relief. State sovereign immunity once again applies whenever a plaintiff seeks monetary relief. *See generally* Edelman v. Jordan, 415 U.S. 651 (1974).

38. *Seminole Tribe*, 517 U.S. at 59.

that had been previously identified by the judiciary.[39] During the 1998 Term, the Court signaled an even narrower view of the Congress' power to legislate under Section 5 in the *Florida Prepaid*[40] and *College Savings*[41] cases. *Florida Prepaid* suggested that Congress not only must carefully identify the Fourteenth Amendment right at issue but must also document a pattern of state violations necessitating federal intervention.[42] *College Savings*, in turn, took a narrow view of what constituted a due process violation, as well as holding that there could be no implied waivers of sovereign immunity.[43] In the current term, the Court has ruled that Congress did not act appropriately under Section 5 in abrogating state sovereign immunity to Age Discrimination in Employment Act ("ADEA") against states in federal court.[44] Finally, the Court held in *Alden v. Maine*[45] that Congress has no power under Article I to force state courts to entertain federally created claims for damages against state defendants, even though the federal forum may be closed to plaintiffs under the Eleventh Amendment.[46]

It is impossible even to skim these decisions without appreciating their potential for disrupting the effectiveness of the federal civil rights laws, including the ADA, as they apply to state and local governments. The new jurisprudence of federalism creates an environment in which Congress' power to set standards for state conduct under either its Article I or Section 5 powers is increasingly limited, and its enforcement powers are diminished by the anti-commandeering doctrine and a flourishing state immunity to damages actions in federal and state fora. Now a private plaintiff bringing a federal discrimination claim against a state entity defendant will likely have to overcome arguments that the underlying statute is a flawed exercise of Congress' authority under Section 5 or Article I, that duties imposed have disappeared because state officials have been dragooned contrary to *New York* and *Printz*, or that sovereign immunity has deprived the plaintiff of a damages remedy in federal court, or perhaps of any remedy in state court.

In this Article I examine one aspect of the Court's retrenchment of federal power: Congress' authority to set the ADA's substantive standards that govern state conduct regardless of the forum in which the

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39. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

40. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (invalidating abrogation provisions of Patent and Plant Variety Protection Remedy Clarification Act).

41. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (invalidating abrogation provisions of Trademark Remedy Clarification Act).

42. *See generally infra* text accompanying notes 245-54.

43. *See generally infra* text accompanying notes 255-67.

44. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000).

45. 527 U.S. 706 (1999).

46. *Alden*, 527 U.S. at 730.

claim is tried.[47] Much of the Court's return to a restrictive federalism in the Nineties has turned on the issue of whether Congress can force states to defend federal claims in federal court. *Seminole Tribe* decided that Congress has no such power under the Commerce Clause, and the series of cases beginning with *Flores* has concluded that the power to do so under Section 5 is limited.[48] Though the Court has given special attention to the sovereign immunity issue up to now, I believe that the substantive issues are likely to be more enduring. No matter how the Court resolves the sovereign immunity issue under the ADA, defendants will still have reason to raise constitutional challenges to the substantive provisions of the ADA.[49] First, the ADA applies to state political subdivisions, such as municipalities, that do not have immunity to federal jurisdiction;[50] they are subject to a federal forum but can still raise Section 5 or Commerce Clause arguments against substantive provisions. Second, ADA claims may be tried in state court where federal sovereign immunity is irrelevant.[51] Government defendants who have no immunity under their state's law would still be entitled to bring a constitutional challenge against the ADA itself. Finally, there are situations in federal court where defendants do not have sovereign immunity but should still be able to raise a substantive constitutional challenge, such as in suits against state officials for prospective relief under the doctrine of *Ex Parte Young*[52] or in actions brought against states by the United States.[53] I have reached the conclusion that portions of the ADA are susceptible

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47. I have written elsewhere in depth about the sovereign immunity issue as it affects the ADA. *See* James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After* Seminole Tribe *and* Flores, 41 ARIZ. L. REV. 651 (1999).

48. *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996); City of Boerne v. Flores, 521 U.S. 507 (1997).

49. One might take the position that Section 5's significance is limited to the issue of abrogation since the ADA's substantive rules will be valid under the Commerce power. The Seventh Circuit suggested this result in its recent decision in *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois Univ.*, 207 F.3d 945, 947 (7th Cir. 2000), *petition for cert. filed*, June 26, 2000 ("Congress has power under the Commerce Clause to adopt the ADA's rules"). The court theorized that the ADA would be sustained under the Commerce Clause as generally applicable to public and private parties, and that "[a]ll our holding means is that *private* litigation to enforce the ADA may not proceed in *federal* court." *Erickson*, 207 F.3d at 952. *See generally infra* Part III.B (discussing application of Commerce Clause to statutes regulating states). I would not attribute too much significance to this statement. The Commerce Clause issue was not litigated in *Erickson*. Moreover, the *Erickson* court was concerned only with Title I of the ADA (employment), which I would agree is validly applied to the states under the Commerce Clause, *see infra* Part III.C.2.a, and not the constitutionally more difficult Title II (covering, *inter alia*, facility access and government services). *See infra* Part III.C.2.c-d.

50. Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Lincoln County v. Luning, 133 U.S. 529 (1890).

51. Nevada v. Hall, 440 U.S. 410 (1979).

52. 209 U.S. 123 (1908).

53. *See, e.g.*, United States v. Mississippi, 380 U.S. 128 (1965); United States v. Texas, 143 U.S. 621 (1892).

to constitutional attack.

I elaborate these conclusions as follows. Part II of the Article takes up the issue of the validity of the substantive prohibitions of the ADA as they apply to state entities under Section 5. Here, the shadow of unconstitutionality seems most substantial and unavoidable. I begin in Part II.A by asking the necessary (and obvious) constitutional question: what protections do the disabled get under Section 1, particularly under the Equal Protection Clause? Reading three cases in concert, *Cleburne*,[54] *Heller*,[55] and *Romer*,[56] I argue that the Equal Protection Clause protects disabled individuals from actions that are based on "irrational prejudice"[57] or are "born of animosity,"[58] but not from neutral actions which have an incidental, disparate impact on the disabled. Part II.B then asks what Congress may do to protect these rights. I set out the restrictive scheme of *City of Boerne v. Flores*[59] and subsequent cases which confine Section 5 enactments to remedial measures that are narrowly tailored to address violations identified by the courts and not by Congress. Applying these principles in Part II.C, I conclude that the ADA's prohibitions of intentional discrimination and certain pre-employment inquiries, as well as the integration mandate are problematic, but have some chance of being sustained under *Flores*. I also fear that the reasonable accommodation rules are doomed.

In Part III, I consider the Commerce Clause as a source of authority for the ADA. Here, the shadows are real but faint and blurred, and I am less certain of how they will affect the ADA. I review in Part III.A the commerce power generally, focusing on *Lopez*. While Congress has plenary authority over channels and instrumentalities of interstate commerce, *Lopez* appears to have restricted Congress' control of intrastate activities under the substantial effects test to actions of a commercial character. Subpart B takes up the specific issue of how and to what degree the Tenth Amendment shields the states from the Congressional exercise of the commerce power. I also review the increased protection afforded the states by the anti-commandeering decisions in *New York* and *Printz*. Applying these principles to the ADA in Subpart C, I conclude tentatively that the employment provisions of Title I (but perhaps not of Title II) and the transportation rules are likely to be proper under the Commerce Clause, but that the facility access rules as well as the regulation of government services may not lie within Congress' power.

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54. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
55. Heller v. Doe, 509 U.S. 312 (1993).
56. Romer v. Evans, 517 U.S. 620 (1996).
57. *Cleburne Living Ctr.*, 473 U.S. at 450.
58. *Romer*, 517 U.S. at 634.
59. 521 U.S. 507 (1997).

Part IV examines the use of the Spending Clause as an alternate basis for Congressional authority to impose rules against disability discrimination. Here, the shadows of unconstitutionality are faint and less troubling. As a general matter, Congress has the power to condition grants of federal money on compliance with rules that it could not impose directly under Section 5 or the Commerce Clause. At the same time, there is a risk that Congress might exploit the spending power to escape the limitations on other constitutional grants of power. The Supreme Court in *South Dakota v. Dole*[60] established guidelines to keep the federal spending power within acceptable limits. The most important of these for purposes of disability law is the requirement that there be a sufficient nexus between the purpose of a federal grant and its condition, and the prohibition of conditions that violate independent constitutional protections of the states, especially the Tenth Amendment. I conclude that neither rule is an impediment to use of the Spending Clause for disability discrimination rules.

In conclusion, Part V offers final thoughts about the judicial environment in which the constitutionality of the ADA will be judged as the challenges are raised over the next few years. I point to the Court's agenda of maintaining a meaningful system of checks and balances between the different centers of power in American government. The purpose of these limitations, in the Court's view, is to ensure that no one element of the government accumulates enough power to threaten individual freedoms.[61] This perspective leads me to believe that the present Court will view the ADA primarily through the lenses of federalism and overlook the beneficial social policy which it embodies. For that reason, I am not optimistic about the ability of the ADA to survive every constitutional challenge against it.

II. TITLE II AS SECTION 5 LEGISLATION

A. The Constitutional Status of the Disabled

Section 5 of the Fourteenth Amendment permits Congress to "enforce, by appropriate legislation, the provisions of this article."[62] The first step in assessing Congress' power under Section 5 to protect the rights of the disabled begins by determining what rights the Fourteenth Amendment, in particular the Equal Protection Clause,[63] confers upon

60. 483 U.S. 203 (1987).
61. *See Dole*, 483 U.S. at 210-11.
62. U.S. CONST. amend. XIV, § 5.
63. U.S. CONST. amend. XIV, § 1.

them. Only on two occasions[64] has the Court spoken directly to the issue, first in *City of Cleburne v. Cleburne Living Center* and again in *Heller v. Doe*.[65] The rarity of decisions in this area is not surprising. It was widely assumed until *Seminole Tribe* and *Flores* that Congress had essentially unrestricted powers under both the Interstate Commerce Clause and Section 5 to impose legislative directions upon the states;[66] hence, there was little incentive to challenge the validity of statutes such as the ADA or to be precise about the source of Congressional authority. Nonetheless, the treatment of disability rights in *Cleburne* and *Heller*, with additional guidance from the gay rights case *Romer v. Evans*, does permit us to gauge the degree of protection that the Equal Protection Clause offers the disabled with reasonable approximation.

Equal protection analysis has developed into a three-tiered system of scrutiny by which the federal courts examine classifications made by state actors in light of the interests affected.[67] The fundamental command of the Equal Protection Clause is that persons who are alike should be treated alike.[68] At the same time, governmental actions inevitably classify.[69] The Court has developed three levels of review for state classifications based on the probability that certain types of actions are prejudicial and unrelated to proper government interests. For classifications involving a suspect class, i.e., race, ethnicity, [70] or a fundamental right such as free speech, [71] the Court employs strict scrutiny. Here, the defendant must show that the classification in question is needed to effectuate a compelling state interest and is narrowly tailored to meet that end.[72] Intermediate scrutiny, a.k.a. heightened scrutiny, is employed

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64. The Court skirted the issue in *Schweiker v. Wilson*, 450 U.S. 221 (1981). In *Schweiker*, a class of mentally ill plaintiffs challenged benefit reductions under the Supplemental Security Income ("SSI") program to persons in public institutions. The Court found it unnecessary to decide whether the mentally ill are entitled to heightened scrutiny since the SSI program drew classifications based on residency in institutions and not mental health status. *See Schweiker*, 450 U.S. at 230-34.

65. *Cleburne Living Ctr.*, 473 U.S. at 442-47; *Heller*, 509 U.S. at 321-28.

66. *See* Leonard, *supra* note 47, at 749 n.785.

67. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Heller v. Doe, 509 U.S. 312 (1993).

68. *See* Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

69. Romer v. Evans, 517 U.S. 620, 631 (1996); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 271-72 (1979).

70. *E.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (discussing racial bias in federal contracts); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (shielding minority employees against layoffs); Palmore v. Sidoti, 466 U.S. 429 (1984) (discussing interracial remarriage in custody dispute).

71. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973) (discussing reproductive choices); Dunn v. Blumstein, 405 U.S. 330 (1972) (discussing the right to travel); Loving v. Virginia, 388 U.S. 1 (1967) (discussing marriage).

72. *Wygant*, 476 U.S. at 274.

when important rights or quasi-suspect classes are at issue.[73] Gender classifications[74] are the most prominent trigger for heightened scrutiny; however, illegitimacy[75] will sometimes get intermediate review. The intermediate standard requires the defendant to establish that the classification is substantially related to an important state interest.[76] Both strict and heightened scrutiny are based on a judicial assumption that the triggering classification is unlikely to bear any relationship to a legitimate state goal.[77] The likelihood that race or ethnicity is relevant to any proper government undertakings is so remote that the defendant is forced to meet the extraordinarily high test for strict scrutiny.[78] The assumption of irrelevance for gender and illegitimacy is subject to the same skepticism, though it is not as strong; hence the slightly less demanding test of heightened scrutiny.[79]

A different set of assumptions applies in the areas of social and economic legislation. Generally, there is no reason to presume that state entities have acted prejudicially when utilizing classifications involving non-suspect groups or less than fundamental rights.[80] Here, the burden is on the plaintiff to demonstrate that the challenged measure bears no rational relationship to a legitimate state goal.[81] It is very difficult to understate the degree to which rational basis scrutiny protects government actions. Minimal scrutiny will sustain a state classification for any conceivable legitimate reason, whether the state actor actually relied on that reason or not.[82] In addition, the Court does not require a close fit between actions and interests.[83] States are free to pursue their goals "one

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73. *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

74. *E.g.*, *id.* (discussing male-only admissions to state-run military college); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (discussing female-only nursing program at state university).

75. *E.g.*, Clark v. Jeter, 486 U.S. 456 (1988) (striking down six year statute of limitations to establish paternity of illegitimate child); Mills v. Habluetzel, 456 U.S. 91 (1982) (dealing with state statute barring paternity suits after child is one year old); Mathews v. Lucas, 427 U.S. 495 (1976) (discussing Social Security Act provisions requiring parents to prove residency with or support of illegitimate child).

76. *Mississippi Univ. for Women*, 458 U.S. at 724 (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

77. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

78. *Cleburne Living Ctr.*, 473 U.S. at 440.

79. *Id.* at 440-41.

80. *See, e.g.*, Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 645 (2000) ("Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'") (quoting *Cleburne Living Ctr.*, 473 U.S. at 440).

81. *E.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) ("[T]hose attacking the rationality of the legislative classification have the burden 'to negative every *conceivable* basis which might support it.'") (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)) (emphasis added).

82. *Beach Communications*, 508 U.S. at 315.

83. Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955).

step at a time,"[84] that is, to take seemingly under-inclusive steps toward solving a problem.[85] The Court has been equally tolerant of over-inclusive classifications so long as there is some fit between the solution and the problem.[86] An underlying assumption of rational basis review is that state actors often make distinctions between groups in economic and social matters that are unlikely to reflect bias; hence, they do not require the sort of judicial skepticism that is reserved for suspect and quasi-suspect classes.[87] Minimal scrutiny's presumption of validity also reflects a fear of incompetence by the courts; judgments about the often complex and nuanced area of public policy are better left to the superior resources and fact-finding ability of the legislative and executive branches.[88] Finally, rational basis review expresses a faith that unfair conditions will be corrected by normal political processes.[89] Though there are exceptions,[90] it is fair to say that plaintiffs will lose when forced to argue under the rational basis standard.

Cleburne involved a dispute over the denial of a special permit to operate a group home for the mentally retarded under a municipal ordinance forbidding the operation of a "'hospital[] for the . . . feeble-minded.'"[91] The ordinance at issue permitted the operation of a wide range of other multiple dwelling uses, including hospitals, sanatoria, nursing homes, apartment hotels and even fraternities.[92] Plaintiffs successfully challenged the ordinance as applied to them as a violation of equal protection.[93] The Court's reasoning, however, gave the plaintiffs much less than they sought.[94] Plaintiffs contended that classifications

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84. *Williamson*, 348 U.S. at 489

85. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) ("[E]qual protection [does not require] that all evils of the same genus be eradicated or none at all.") (citing Central Lumber Co. v. South Dakota, 226 U.S. 157, 160 (1912)).

86. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 646 (2000).

> The rationality commanded by the Equal Protection Clause does not require States to match . . . distinctions and the legitimate interests they serve with razorlike precision. As we have explained, when conducting rational basis review "we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational."

Kimel, 120 S. Ct. at 646 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)). *See also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 316 (1976) (per curiam) ("[W]here rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'") (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

87. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985).

88. *Cleburne Living Ctr.*, 473 U.S. at 442-43.

89. *Id.* at 440 ("[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.").

90. *Id.* at 446 (citing Zobel v. Williams, 457 U.S. 55 (1982); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)).

91. *Id.* at 436 (quoting CLEBURNE, TEX., ZONING ORDINANCE, § 8(6)).

92. *Id.* at 447-50.

93. *Cleburne Living Ctr.*, 473 U.S. at 450.

94. *See id.* at 448-50.

touching the mentally retarded should be judged under heightened scrutiny and prevailed on this argument with the court of appeals.[95] The Supreme Court found this approach erroneous, however, and offered four reasons why heightened scrutiny was unnecessary or undesirable.[96] Justice White, writing for the Court,[97] first reasoned that the mentally retarded were a large group with diverse characteristics.[98] State legislatures had to be free to consider these differences when pursuing their legitimate goal of dealing with the mentally retarded.[99] Heightened scrutiny would in effect substitute the "ill-informed opinions of the judiciary"[100] for the highly technical judgments which a legislature makes with the assistance of qualified professionals. Second, the existence of legislative enactments such as the Rehabilitation Act and the Education of the Handicapped Act indicated that the mentally retarded were not the objects of "antipathy or prejudice"[101] and thus, did not require the protection of heightened scrutiny. Third, Justice White raised the overlapping point that the existence of such statutes demonstrates that the mentally retarded are not politically isolated.[102] Finally, Justice White expressed concern that extending heightened scrutiny to the mentally retarded would lead to enhanced scrutiny for other similar groups such as the aged, the disabled, the mentally ill and the infirm.[103] In other words, a different decision in *Cleburne* might open the celebrated floodgates of constitutional litigation by giving a number of "large and amorphous"[104] groups a favorable standard of review. The essence of the Court's reasoning is that there is no reason as a general matter to presume that legislative decisions affecting the mentally retarded will be prejudicial.

One might wonder how plaintiffs won in the Supreme Court once saddled with rational basis review. The City offered a number of reasons for its denial of the permit.[105] Some of these "legitimate governmental

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95. Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984).

96. *Cleburne Living Ctr.*, 473 U.S. at 442-46.

97. *Cleburne* is often termed a plurality decision, because only Justices White, Powell, Rehnquist, and O'Connor took the position that heightened scrutiny did not apply. Justice Stevens, joined by Chief Justice Burger, reached the same result but argued that the three-tiered system of scrutiny for equal protection claims should be abandoned in favor of a single rational basis test that considers the nature of the governmental interests and the history of the affected class. *Id.* at 451-55 (Stevens, J., concurring). Justice Marshall expressed a similar view in dissent, though disagreeing with the result. *Id.* at 478 (Marshall, J., dissenting).

98. *Id.* at 442-43.

99. *Id.*

100. *Cleburne Living Ctr.*, 473 U.S. at 443.

101. *Id.*

102. *Id.* at 445.

103. *Id.* at 445-46.

104. *Cleburne Living Ctr.*, 473 U.S. at 445.

105. *Id.* at 448-50.

purpose[s]"[106] were plainly concocted for litigation. Perhaps the most curious and mirth-producing argument was the contention that the denial was necessary because the site in question "was located on 'a five hundred year flood plain.'"[107] Defendant also argued that the denial was necessary to accommodate the negative attitudes of the neighbors.[108] The Court properly rejected this explanation, stating that the accommodation of negative attitudes did not represent proper state goals[109] and that the public could not use government to give effect to private prejudices through electoral or other processes.[110] Justice White, somewhat questionably, characterized other justifications offered by the City as manifestations of irrational fears.[111] For example, the City's stated concern that students at a nearby junior high school would harass the group home residents was dismissed on the grounds that there were thirty mentally retarded students at that school, hence the denial of the permit reflected vague and irrational fears.[112] Though the language is not explicit, Justice White appears to argue that the stated concern of protecting the group home residents is a sham since the defendant does not seem to have similar concerns for the mentally retarded students who are physically closer to the supposedly insensitive junior high school student body.[113] While the point has some intuitive appeal to those of us who attended public junior high schools, the opinion seems to assume that the City has acted inconsistently with two similarly situated groups, hence irrationally. This conclusion appears to rest on the false assumption that the two groups are similarly situated. Mentally retarded students pass their days in the relatively structured and supervised environment of a junior high school where harassment is less likely to occur, and where it does occur, is likely to be corrected. The interaction be-

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106. *Id.* at 446.

107. *Id.* at 449.

108. *Id.* at 448.

109. *Cleburne Living Ctr.*, 473 U.S. at 448 ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently."). *Cf.* Romer v. Evans, 517 U.S. 620 (1996) (finding that the desire to disadvantage gays is not a proper state purpose); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding that racial bias is not a proper consideration in resolution of child custody issue).

110. *Cleburne Living Ctr.*, 473 U.S. at 450.

111. *Id.* at 448-50.

112. *Id.* at 449. The precise relationship between the mentally retarded students enrolled in the junior high school and denial of the permit has never been clear to me. The opinion reads:

> [The city] was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation.

Id.

113. *See id.*

tween harassing students and group home residents in contrast is likely to occur in situations where students are unsupervised, such as those of coming to and going from school. For this reason, I find Justice White's reasoning on this point to be incomplete if not to be unpersuasive.

Even conceding the foregoing, the City offered other justifications for the permit denial which should have been accepted as lying within the police power. These justifications included concerns about: 1) legal responsibility for the residents' actions; 2) overcrowding of the group home; 3) congestion in the neighborhood; 4) fire hazards; 5) the serenity of the neighborhood; and 6) avoiding danger in the neighborhood.[114] One could add to this list a concern for property values.[115] The Court nevertheless rejects these arguments on the grounds that the City failed to justify its tighter control of group homes since it failed to impose like restraints on similar property uses.[116] For example, Justice White noted that floods affect nursing homes,[117] fraternities raise issues of legal responsibilities,[118] and other multiple use dwellings can be overcrowded and contribute to congestion.[119]

It is impossible to square this approach with traditional rational basis review. As Justice Marshall argued in his dissent, application of traditional minimal scrutiny in *Cleburne* should have resulted in the affirmation of the zoning ordinance.[120] Normally, minimal scrutiny raises a heavy presumption of constitutionality and places a burden of disproving *any* conceivable justification for a measure on the plaintiff. By noting the absence of any explanation for the City of Cleburne's actions,[121] the Court effectively shifted the burden of proof to the defendant to justify affirmatively its decisions.

Likewise, the Court's emphasis on the unequal treatment of similar property uses contradicts the Court's established tolerance of underinclusive categories. In *Williamson v. Lee Optical*,[122] for example, the Court blessed an Oklahoma law which had the effect of prohibiting opticians from fitting or duplicating eye glass lenses without a prescription from an ophthalmologist or an optometrist but exempted sellers of

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114. *Cleburne Living Ctr.*, 473 U.S. at 449-50.

115. *See, e.g.*, Texas Manufactured Hous. Ass'n, Inc. v. City of Nederland, 101 F.3d 1095 (5th Cir. 1996), *cert. denied*, 521 U.S. 1112 (1997); CMH Mfg., Inc. v. Catawba County, 994 F. Supp. 697 (W.D.N.C. 1998).

116. *Cleburne Living Ctr.*, 473 U.S. at 450.

117. *Id.* at 449.

118. *Id. Cf.* ANIMAL HOUSE (National Lampoon 1978).

119. *Cleburne Living Ctr.*, 473 U.S. at 449-50.

120. *Id.* at 458 (Marshall, J., concurring in judgment and dissenting in part).

121. *Id.* at 458-59 (Marshall, J., concurring in judgment and dissenting in part); *see also* Heller v. Doe, 509 U.S. 312, 320-21 (1993).

122. 348 U.S. 483 (1955).

ready-to-wear spectacles from the regulation.[123] In light of the Court's reading of the state's legitimate purpose for the regulation—the *possibility* that the Oklahoma legislature thought that eye exams by a qualified medical professional were so useful that each change of lenses should prompt one[124]—the exclusion of the ready-to-wear market makes no sense whatsoever. In fact, common sense tells us that a person who buys spectacles at a department store is more likely than an optician's client to need an eye exam. Still, the Court tolerated the statute's short reach by declaring that the legislature is free to "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others."[125]

By this logic, the under-inclusive steps decried by Justice White in *Cleburne* should have been perfectly acceptable "one step at a time" measures. Justice Marshall, however, termed it a new approach, "second order rational-basis review,"[126] and several commentators remarked that the Court had altered rational basis review.[127] After *Cleburne*, it was plausible to argue that state actors were under an obligation to justify classifications which concerned the mentally retarded and, by implication,[128] the disabled. Eight years later, however, in *Heller v. Doe*, the Court signaled a retreat from *Cleburne*'s enhanced rational basis test.[129] In *Heller*, a class of mentally retarded plaintiffs raised an equal protec-

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123. *Williamson*, 348 U.S. at 489.

124. *Id.* at 487.

125. *Id.* at 489 (citing A.F. of L. v. American Sash Co., 335 U.S. 538 (1948); Semler v. Dental Exam'rs, 294 U.S. 608 (1934)); *see also* New Orleans v. Dukes, 427 U.S. 297 (1976) (banning push cart vendors to preserve historic character of French Quarter but exempting those who had operated for eight or more years); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (sustaining an obviously under-inclusive rule forbidding advertising on the sides of trucks with the purpose of limiting driver distractions but excepting ads for the truck owner's own business).

126. *Cleburne Living Ctr.*, 473 U.S. at 458 (Marshall, J., concurring in judgment and dissenting in part) (internal quotation marks omitted).

127. *E.g.*, Lynn A. Baker, *The Missing Pages of the Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. 387, 406 (1997); David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 801-02 n.22 (1996); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793-96 (1987); Stacy Sulman Kahana, *Crossing the Border of Plenary Power: the Viability of an Equal Protection Challenge to Title IV of the Welfare Law*, 39 ARIZ. L. REV. 1421, 1432 (1997).

128. As noted above, *see supra* text accompanying notes 103-04, one reason given by the *Cleburne* Court for denying heightened scrutiny to the mentally retarded was a fear that it could not be denied to other groups, including "the disabled, the mentally ill, and the infirm." *Cleburne Living Ctr.*, 473 U.S. at 445-46. The Court's reasoning implies that minimal scrutiny applies to the broad category of persons that would be covered by the American with Disabilities Act. The lower courts seem to have accepted this suggestion. *See, e.g.*, United States v. Harris, 197 F.3d 870, 874-76 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 1546 (2000); Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698, 706 (4th Cir. 1999); Lussier v. Dugger, 904 F.2d 661, 671 (11th Cir. 1990).

129. 509 U.S. 312 (1993).

tion challenge to a Kentucky system which permitted the involuntary civil commitment of the mentally retarded under a clear and convincing quantum of proof and which accorded party status to relatives.[130] Comparable provisions for the mentally ill set a beyond a reasonable doubt quantum of proof and denied relatives party status.[131] The Court sustained the Kentucky system under rational basis review, concluding that the separate rules were justified by differences in the ability to diagnose and treat the two groups.[132]

There is no hint in *Heller* of second-order review. Justice Kennedy goes to great lengths to reaffirm the deferential nature of minimal scrutiny.[133] He restates the traditional rule that legislation is presumed to be constitutional, that the burden lies with the challenging party to disprove every conceivable legitimate basis for it, that the state need not compile a record to justify its actions nor articulate a purpose for its classifications, and that under- and over-inclusive categories are usually tolerable.[134] He specifically asserts that *Cleburne* was decided under traditional minimal scrutiny.[135] Of course, it wasn't; the deviations from the traditional test are too obvious to ignore.[136] Justice Kennedy's remarks are better taken as a decision by the Court to signal the end of any arguments about enhanced rational basis review, both generally and specifically in the case of the disabled. Justice Souter's dissent, however, argues that the Court left the status of *Cleburne* uncertain since it neither applied second order review nor repudiated it.[137] While this may be true in a literal sense, there is no question that the Court has recast *Cleburne* as a garden variety rational basis case.

Does *Heller* mean that *Cleburne* would turn out differently if decided anew? I have argued elsewhere that the result would not change even under the more restrictive *Heller* view of minimal scrutiny.[138] I continue to hold that view, though my thinking has evolved somewhat. *Heller*, of course, now deprives the plaintiff of the argument that the City of Cleburne has failed to provide an adequate explanation of its different treatment of the mentally retarded[139] and reaffirms the permissibility of piecemeal approaches to the exercise of the police power.

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130. *Heller*, 509 U.S. at 315.

131. *Id.*

132. *Id.* at 321-30.

133. *Id.* at 319-21.

134. *Id.*

135. *Heller*, 509 U.S. at 321 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)).

136. *See* Leonard, *supra* note 47, at 651, 689.

137. *Heller*, 509 U.S. at 336-37 (Souter, J., dissenting).

138. *See* Leonard, *supra* note 47, at 689-91.

139. *Heller*, 509 U.S. at 320.

Still, even the extremely deferential rational basis test will not save legislation that reflects raw prejudice or is simply irrational.[140] *Cleburne* makes clear that objectives such as "'a bare desire . . . to harm a politically unpopular group' are not legitimate state interests."[141] The same opinion also prohibits states from utilizing classifications "whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[142] In a recent article, Professor Hartley makes a vigorous argument that *Cleburne* creates a prohibition against those state actions which are erroneous as well as those which are motivated by animosity.[143] He reasons that *Cleburne* disallows government actions which are based on erroneous beliefs or which reflect "honestly held but mistaken myths, fears, and stereotypes about persons with disabilities."[144] I agree with this conclusion to the extent that it is difficult to imagine a truly irrational government action which promotes a legitimate state goal. I do not, however, agree with some of Professor Hartley's applications of this principle to the ADA.

For example, Hartley argues that the prohibition of employment practices which have the effect of "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects . . . opportunities or status,"[145] effectuates *Cleburne*.[146] He further notes the EEOC's commentary that the rule is designed to prevent decisions based on stereotype and that capabilities must be determined on a case-by-case basis.[147] I don't believe that this reasoning, including the requirement for individualized consideration, is tenable after the Court's recent decision in *Kimel*, which permits the use of discriminatory categories—such as age—as proxies for achieving state interests.[148]

The principle that disadvantaging unpopular groups for its own sake violates equal protection was reasserted by the recent opinion in *Romer v. Evans*. There, the Court stuck down Colorado's Amendment 2, which prohibited state and local measures that benefited gays or bisexuals.[149]

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140. *See id.* at 321.

141. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-47 (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1975)); *see also* Plyler v. Doe, 457 U.S. 202, 213 (1982); Zobel v. Williams, 457 U.S. 55, 63 (1982).

142. *Cleburne Living Ctr.*, 473 U.S. at 446-47 (citing *Zobel*, 457 U.S. at 61-63; *Moreno*, 413 U.S. at 535).

143. *See* Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity from Private Damage Suits after* Boerne, 24 N.Y.U. REV. L. & SOC. CHANGE 481, 513-516 (1998).

144. *Id.* at 514.

145. 42 U.S.C. § 12112(b)(1) (1994).

146. Hartley, *supra* note 143, at 515.

147. *Id.* (citing EEOC Interpretive Guidance on Title I of the ADA, 29 C.F.R. § 1630.5 app. (1998)).

148. For a discussion of *Kimel*, see *infra* text accompanying notes 268-87. *Heller* said nothing to contradict these baseline principles of equal protection.

149. Romer v. Evans, 517 U.S. 620, 624 (1996).

The effect of the amendment was to force such persons to obtain by constitutional amendment what others could get by ordinary political processes.[150] Purportedly applying rational basis review,[151] Justice Kennedy's majority opinion faulted the Colorado provision on two related grounds. First, the blanket burden imposed on gays and bisexuals was so "broad and undifferentiated"[152] that it was impossible to ascertain a meaningful relationship between the goal and the means.[153] Kennedy explains that even rational basis review does not dispense with the requirement of a "sufficient factual context"[154] that permits a court to perceive some relationship between means and proper end and thus ensure that the classification does not exist for the purpose of harming a group.[155] Amendment 2 failed this requirement by defining one group by a single trait and then imposing a general disability regardless of circumstance.[156]

Kennedy points to the sheer breadth of Amendment 2 as a separate but related failing.[157] He notes that such a broadly framed restriction is so removed from its purported justifications that animosity toward gays and bisexuals is the "inevitable inference."[158] In the case of Amendment 2, the disjunction lay between the purported goals of protecting the associational interests of landlords and employers who had personal or religious objections to accommodating homosexuality and the absolute legal disabilities placed on gays and bisexuals.[159]

Romer's rationale for overturing Amendment 2 has been criticized as being less than clear.[160] It is clear, however, that Kennedy did not

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150. *Romer*, 517 U.S. at 627.

151. *Id.* at 631-32.

152. *Id.* at 632.

153. *Id.* at 623.

154. *Id.* at 632.

155. *Romer*, 517 U.S. at 632-33.

156. *Id.* at 633.

> It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. The guaranty of equal protection of the laws is a pledge of the protection of equal laws.

Id. at 633-34 (citations and quotation marks omitted).

157. *Id.* at 634.

158. *Id.*

159. Romer, 517 U.S. at 635.

160. *See, e.g.*, John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1227-31 (1998); Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 92 (1997); Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 63 (1996). *See generally* Baker, *supra* note 127.

apply the traditional minimal scrutiny of *Williamson v. Lee Optical, Railway Express* or *Heller*. Stifling pro-gay political initiatives, though it hardly dovetails, is still rationally related to the goal of protecting the associational interests of landlords and employers who object to homosexuality: the less political power gays and their supporters have, the less likely that state entities and subdivisions will be able to interfere with private preferences. Moreover, the fact that the general legal disabilities utilized by Amendment 2 achieved overkill should not raise an analytical eyebrow in light of minimal scrutiny's tolerance of overinclusive classifications. However, rather than take the route of traditional analysis, Kennedy instead condemns Amendment 2 directly, using such phrases as: "[i]t is not within our constitutional *tradition* to enact laws of this sort;"[161] "the *principle* that government and each of its parts remain open on impartial terms to all who seek its assistance;"[162] "[r]espect for this *principle* explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare;"[163] and, finally, "a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most *literal* sense."[164] Whatever these phrases mean, they are not the language of traditional minimal scrutiny, which seeks relationships between actions and goals and not conformity to principles.

So what does *Romer* mean for rational basis review? The opaqueness of Kennedy's opinion has already prompted a flurry of commentary attempting to explain the holding in *Romer* as a reflection of an underlying constitutional value,[165] arguing that the Colorado provision was *per se* invalid under equal protection[166] or contending that *Romer* was just plain wrong.[167] *Romer* may well prove to be the first step in the Court's

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161. *Romer*, 517 U.S. at 633 (emphasis added).

162. *Id.* (emphasis added).

163. *Id.* (emphasis added).

164. *Id.* (emphasis added).

165. *See, e.g.*, Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453 (1997) (arguing the Equal Protection Clause requires government to respect principle that people have equal intrinsic worth); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996) (arguing the Equal Protection Clause prohibits states from turning groups into outcasts); Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203 (1996) (arguing Amendment 2 was unconstitutional bill of attainder); Laurence H. Tribe, *Saenz sans Prophecy: Does the Privileges or Immunities Revival Portend the Future–or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 176-78 (1999) (discussing the principle of "non-outlawry").

166. Tribe, *supra* note 165, at 175 n.306.

167. *See, e.g.*, ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 114 (1996) ("There is no logical or constitutional foundation for the majority's decision in *Romer v. Evans.*"); Lino A. Graglia, Romer v. Evans: *The People Foiled Again by the Constitution*, 68 U. COLO. L. REV. 409 (1997); John Daniel Dailey & Paul Farley, *Colorado's Amendment 2: A Result in Search of a Reason*, 20 HARV. J.L. & PUB. POL'Y 215, 242-68 (1996); Louis Michael Seidman, Romer's

progress in a number of directions, such as declaring homosexuality to be a quasi-suspect class;[168] drastically recasting the role of morality in law;[169] creating a property interest in prior political success;[170] or, it may just be a fitful lunge forward from which the Court will later retreat. Since this Article is concerned in large part with Congress' power to enforce judicially *identified* Fourteenth Amendment rights to protect the disabled,[171] I will confine my remarks to what *Romer* means at a minimum, with an eye toward *Cleburne*.

To my mind, *Romer* stands at least for the proposition that purely status-based classifications do not enjoy the presumption of regularity that we assign to other social and economic measures. There is no hint in the text of *Romer* that the fact of homosexuality had much bearing on the outcome.[172] Rather, the key to Kennedy's opinion is that Amendment 2 is a "status-based enactment" that disadvantages a "single named group" identified by a "single trait."[173] Further, his interpretation of *Davis v. Beason*, as denying the vote only to convicted polygamists, suggests a distinction between conduct, which may be the subject of state action, and status, which may not.[174] Though Kennedy's opinion is hardly pellucid, it is obvious that the broad, status-based measure in *Romer* is afforded no presumption of regularity by the Court.[175] The Court's "insist[ence] on knowing the relation between the classification adopted and the object to be obtained" is drastically out of keeping with the usual presumption of regularity.[176]

Similarly, the requirement of a "sufficient factual context" seems odd in light of the acceptability of any *conceivable* justification for state action, whether relied on by the state actor or not.[177] *Romer* can be explained as converting the presumption of regularity to one of animosity when purely status-based classifications are employed, a presumption that the state of Colorado never rebutted. As already noted, some com-

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Radicalism: The Unexpected Revival of Warren Court Activism, 1996 SUP. CT. REV. 67 (1996).

168. *See, e.g.*, Stephen M. Rich, Note, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments after* Romer v. Evans, 109 YALE L.J. 587, 615 (1999); Koppelman, *supra* note 160, at 138; Tobias Berrington Wolff, Note, *Principled Silence*, 106 YALE L.J. 247, 252 (1996).

169. *See, e.g.*, BORK, *supra* note 167, at 114.

170. *See, e.g.*, Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 293 (1997).

171. *See infra* Part II.B.

172. *See* Romer v. Evans, 517 U.S. 620, 633 (1996).

173. *Romer*, 517 U.S. at 632-33, 635.

174. *Id.* at 634. *See* Amar, *supra* note 165, at 228 (discussing status versus conduct); Farber & Sherry, *supra* note 165, at 279 (same).

175. *Romer*, 517 U.S. at 633.

176. *Id.* at 632. *See, e.g.*, Heller v. Doe, 509 U.S. 312 (1992); Williamson v. Lee Optical, 348 U.S. 483 (1955).

177. *Romer*, 517 U.S. at 632.

mentators would read *Romer* more broadly for the proposition that purely status-based classifications are *per se* invalid under the Equal Protection Clause.[178] A *per se* approach would eliminate the need for any presumptions (except perhaps for a conclusive "presumption" that pure status classifications were invalid). There seems, however, to be only limited support for this reading in the text of *Romer*.[179]

In addition, and perhaps independently,[180] *Romer* seems to negate the presumption of regularity when the disjunction between means and end becomes extreme. The Court criticized Amendment 2's breadth as being so far removed from the state's justifications that it was "impossible to credit them."[181] This formulation seems to import a novel minimum credibility requirement into rational basis review that is at odds with the practice of winking at markedly under- and over-inclusive classifications.[182] In the instance of Amendment 2, normal credibility is destroyed by a classification that sweeps so far beyond its supposed goals that it begs to be disbelieved. Unlike the relatively factual issue of whether a state action is status-based, questions of a defendant's credibility in justifying state action become subjective once we abandon the presumption of constitutionality. How does one know when a measure is too broad to be credible? Kennedy's opinion, once again, is of no help here, and perhaps the only available method is to proceed by analogy and to compare an instant matter with the situation in *Romer*. Admittedly, this approach is a constitutional smell test, but perhaps we should

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178. *See supra* text accompanying note 166.

179. Professor Tribe, who coauthored an amicus brief in *Romer* arguing for a *per se* rule with several other constitutional law scholars, reads *Romer* as invalidating Amendment 2 apart from rational basis review. *See* Tribe, *supra* note 165, at 175. He notes that Kennedy's reference to a "denial of equal protection of the laws in the most literal sense," *id.* (quoting *Romer*, 517 U.S. at 632) echoes the language of the amicus brief which argued that Amendment 2 should be deemed a *per se* equal protection violation. *Id.* at n.306 (citing Brief of Laurence H. Tribe, John Hart Ely, Gerald R. Gunther, Philip B. Kurland & Kathleen M. Sullivan as Amici Curiae in Support of Respondents, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039)). I find this to be an optimistic view. While there is language in *Romer* implying that the classification itself was infirm, *see supra* text accompanying notes 172-74, the Court never adopted this approach explicitly. Moreover, it seems odd to speak of the failure to perceive a "sufficient factual context" if the rule is invalid under all circumstances, *i.e.*, is *per se* invalid.

180. The overlap between the Court's two points of analysis is substantial. The first argument, that Amendment 2 was an impermissible status-based restriction, hints at a direct prohibition of such rules, while the second argument seems to treat the gap between means and end as an evidentiary matter. Still, the Court could not separate the two concepts cleanly. Kennedy's discussion of the second point reverts to phrases which seem more appropriate to the first argument. *See, e.g.*, *Romer*, 517 U.S. at 635 ("[Amendment 2] is a *status-based* enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification . . . for its own sake, something the Equal Protection Clause does not permit.") (emphasis added). The language here echoes that of the first argument, which is concerned less with the state's articulation of a purpose than with the infirmity of the status-based rule itself. It remains to be seen whether the Court's reasoning holds true only in cases of purely status-based classifications.

181. *Romer*, 517 U.S. at 635.

182. *See supra* text accompanying notes 83-86.

also not tax such a highly subjective concept as credibility with demands for too much precision. Amendment 2 was palpably extreme in a way that the under-inclusive measures in *Williamson* and *Railway Express* were not.[183]

So how does *Cleburne* come out if decided today? I suggest that the zoning ordinance would not survive rational basis review as enhanced by *Romer*. Granted, the Cleburne ordinance did not subject the mentally retarded in that city to legal disabilities on a scale comparable to Amendment 2. By its terms, it imposed restrictions on property use in particular places, rather than, say, preventing the retarded from owning property.[184] Nevertheless, the ordinance should still fail as a status-based classification. Under the Cleburne ordinance, the following groups were permitted uses in pertinent zones: apartment house or multiple dwellings, boarding houses, fraternities, hotels, hospitals, sanitariums, nursing homes, private clubs, and philanthropic institutions.[185] Much like the political disability in *Romer*, the effect of the ordinance in *Cleburne* is to bar the mentally retarded from enjoying a property use that everyone else is permitted in that zone.[186] Much like gays and bisexuals in *Romer*, the mentally retarded are deprived of rights because of their status as such, which in turn is defined by a single identifying trait. Much like *Romer*, there is no "sufficient factual context" in *Cleburne* to permit a

183. One could fairly object that there is nothing "credible" about the exclusion of ready-to-wear sellers in *Williamson v. Lee Optical* or the exception for driver-owned-business ads in *Railway Express*, even though *Romer* approves these cases as having a "sufficient factual context" to link up means and ends. *Romer*, 517 U.S. at 632-33. It also seems that Amendment 2 had a perfectly clear factual context of disapproval of homosexuality. The emphasis on factual context in *Romer* is unfortunate in that it obscures the main point, that the justifications offered by the state did not satisfactorily dispel the inference of prejudice, whether or not clearly expressed. Kennedy's reference to "sufficient factual context" occurs in a passage where he discusses *Williamson* and *Railway Express* as well as *New Orleans v. Dukes* and *Kotch v. Board of River Port Pilot Commissioner for the Port of New Orleans*. *Romer*, 517 U.S. at 632-33. Kennedy is obviously at great pains to communicate that *Romer* does not threaten rational basis review in the majority of cases. Perhaps a better way to immunize garden variety minimal scrutiny would be to note that the lack of exact fit in most economic or social measures reflects the wide range of possible choices in most economic and social issues and that courts are not well suited to review them, no matter how sharp the factual context that is presented in litigation. Classifications resting on single, immutable group traits are different. It is well within a court's competence to judge as a factual matter whether a measure reflects classification by a single trait; likewise, there are few reasons to presume regularity of state actions based on immutable traits such as homosexuality and many to assume prejudice. I concede that I have just made an argument for treating homosexuals as a quasi-suspect class, and that the Court explicitly refused to proceed on these grounds. Had the Court been more forthright in its approach, it could have provided a clear analytical basis for the result by invoking heightened scrutiny. For whatever reason, the Court was unwilling to speak these words. Nevertheless, it is undeniable that *Romer* requires something exceeding traditional minimal scrutiny when dealing with status-based classifications or extraordinarily over- or under-inclusive categories.

184. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 436 (1985).

185. *Cleburne Living Ctr.*, 473 U.S. at 437 n.3.

186. The ordinance also excluded penal institutions. *Id.* at 437. The exclusion is less troubling than the exclusion of the mentally retarded since the "status" of the affected class is defined by prior conduct rather than a "single trait."

court to discern the link between the exclusion and a proper goal. Indeed, the City's argument that it was accommodating the desires of the neighbors provides a contrary factual context.

Arguments that the *Cleburne* ordinance runs afoul of the second *Romer* consideration, a wide gulf between means and goal, are less obvious but still persuasive. The political disabilities imposed in *Romer* had a tenuous relationship with protecting private associational rights. The Cleburne ordinance of course is a property use rule designed to control the effects of property use and no more. Still, one can argue that the ordinance is so under-inclusive that its purported goals are illusory. An attempt to control neighborhood congestion by regulating only one or two of myriad users is obviously pointless. Wherever the line between acceptable fit and disjunction may lie, the Cleburne ordinance lies beyond it. It is impossible to review the facts of *Cleburne* without coming to the "inevitable inference" that the ordinance singled out the mentally retarded with a pointedly exclusionary purpose.

In sum, the Equal Protection Clause offers a very limited protection to the disabled against state actions. There is no question that actions motivated by raw bias against the disabled are forbidden, as are those that are irrational in the sense of having no apparent relationship to an actual or conceivable proper government purpose. These protections, however, have not been extended beyond state actions for which there is either actual or inferred evidence of bias,[187] or actions which single out the disabled as such without regard to behavior, conduct, or separately defined characteristics. However, as discussed more fully below,[188] the majority of governmental actions which affect the disabled are superficially neutral and generally undertaken without any regard for the disabled. For example, a decision to design a state office building without ramps for wheel chair users reflects neglect at worst or a desire to simplify construction at best. Barring direct evidence of animus, which is notoriously difficult to acquire, this hypothetical decision would be rationally related to the legitimate state goals.

B. Scope of Congressional Authority under Section 5 of the Fourteenth Amendment

1. Introduction

In this Part of the Article, I examine Congress' ever contracting

187. *See* Washington v. Davis, 426 U.S. 229, 246-47 (1976) (holding that the Equal Protection Clause prohibits intentional acts of discrimination but not disparate impacts).

188. *See infra* Part II.C.3.

power under Section 5 to enact the substantive provisions of the ADA as they affect states and their political subdivisions. Although equal protection guaranties for the disabled are limited, Congress is still empowered to enforce them under the authority of Section 5 of the Fourteenth Amendment. Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[189] Congress' power is, importantly, restricted to "appropriate" legislation.[190] After granting Congress broad powers both to define and to fashion remedies for violations in the Sixties case *Katzenbach v. Morgan*,[191] the Court has repented of this view. Since the mid-Nineties, the Court has taken the view that Congress has no power whatsoever to define the level of protection under Section 1 of the Fourteenth Amendment and a highly circumscribed power to remedy such conditions only after they have been defined by the judiciary, or to proscribe prophylactic rules in situations that are tightly linked to the potential for bias.

2. City of Boerne v. Flores *and Its Progeny*

Before Flores, the Court had addressed the scope of Congressional authority under Section 5 only twice. The 1965 opinion in *Katzenbach v. Morgan*[192] took a decidedly deferential view of Congress' powers. Here, the Court upheld the part of the Voting Rights Act of 1965[193] which restricted the use of English literacy requirements as a voter qualification.[194] Section 4(e) of the Act was intended to protect residents of New York who had been educated in Puerto Rico.[195] Upholding the statute, however, did not fit cleanly with the prior holding in *Lassiter* that literacy tests were not a *per se* constitutional violation.[196] Justice Brennan steered around this problem by explaining that Congress could cast its net beyond the Court's findings of Fourteenth Amendment violations.[197] Brennan adopted the *McCulloch v. Maryland*[198] test for "necessary and proper" under Article I as the standard for "appropriate legislation" under Section 5.[199] The measure must be 1) regarded as an enactment to enforce the Equal Protection Clause; 2) be plainly adapted to that end;

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189. U.S. CONST. amend. XIV, § 5.

190. *Id.*

191. 384 U.S. 641 (1966).

192. *Morgan*, 384 U.S. at 658.

193. 42 U.S.C. § 1973b(e) (1994).

194. *Morgan*, 384 U.S. at 658.

195. *Id.* at 645 n.3.

196. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53-54 (1959) (holding that the Fourteenth Amendment does not prohibit literacy tests *per se*).

197. *Morgan*, 384 U.S. at 648-49.

198. 17 U.S. (4 Wheat.) 316, 421 (1819).

199. *Morgan*, 384 U.S. at 650.

and 3) not be prohibited by but consistent with the letter and spirit of the Constitution.[200]

Brennan found that the Voting Rights Act met this test for two reasons. First, he viewed the statute as a remedial device to respond to violations of the Fourteenth Amendment.[201] He argued that Congress might have perceived a link between bolstering the political power of the Puerto Rican community and ensuring nondiscriminatory treatment in the provision of public services.[202] Brennan here was offering a remedial view of Section 5 in which the Congress responds to actions that the Court has already deemed illegal. Brennan's approach also entailed a presumption of regularity on the part of Congress. He even went outside of the legislative history of the Act and speculated that Congress *might* have perceived that relationship between political power and nondiscriminatory treatment.[203] Thus viewed, Brennan's remedial approach resembles rational basis review.[204]

Had Brennan's analysis stopped there, *Morgan* might not have been terribly controversial.[205] Brennan offered a second reason: Congress is permitted by Section 5 to make independent judgments as to the constitutionality of actions under the Fourteenth Amendment.[206] This reasoning constitutes the definitional branch of *Morgan*. Responding to Justice Harlan's criticism that such reasoning would permit Congress to overrule by legislation the Court's constitutional decisions,[207] Brennan ar-

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200. The *McCulloch* test for "necessary and proper" legislation was remarkably lenient. *Morgan* adopted the *McCulloch* test verbatim: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution are constitutional." *Morgan*, 384 U.S. at 650 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

201. *Morgan*, 384 U.S. at 652.

202. *Id.*

203. *Id.* at 669 (Harlan, J., dissenting) (stating that the legislative history is devoid of findings of constitutional violation).

204. *Id.* at 653 (stating "[i]t is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did"); *see also* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 167-68 (1997) (comparing *Employment Division v. Smith*, 494 U.S. 872 (1990), to minimal scrutiny).

205. *See Morgan*, 384 U.S. at 666-71 (Harlan, J., dissenting). "The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement. . . . That question is one for the judicial branch." *Id.* at 667. *Cf.* Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1996) (favoring Congressional power to identify constitutional injuries); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14 at 349-50 (2d ed. 1988) (same); Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 308-09 (1982) (arguing for narrow interpretation of Congressional power under *Morgan's* definitional branch); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975) (*Morgan* turns *"Marbury v. Madison* on its head by [giving] judicial deference to congressional interpretation of the Constitution.").

206. *Morgan*, 348 U.S. at 651.

207. *Id.* at 666-71 (Harlan, J., dissenting).

gued that Congress was free to increase but not to decrease the level of available protection.[208] Otherwise, Section 5 might undermine the Court's role as the final interpreter of the Constitution.[209] Brennan's response has been given the rather derisive label of "ratchet theory."[210] The Court took up the Section 5 issue four years later in *Oregon v. Mitchell*[211] and produced a badly fragmented decision.[212] The issue then lay dormant for nearly three decades.

The Court returned to the Section 5 issue in 1997 in *City of Boerne v. Flores*. Congress attempted in 1993 to overturn legislatively the Supreme Court's holding in *Employment Division v. Smith*[213] that the Free Exercise Clause does not require a compelling state interest to justify generally applicable laws which incidentally burden religious beliefs.[214] The Religious Freedom Restoration Act ("RFRA")[215] provided that federal, state and local government actions could burden religious practices only if they furthered a compelling governmental interest and utilized the least restrictive means of doing so.[216] Congress' intent was clearly to expand on the narrow judicial reading of the Free Exercise Clause. *Morgan*, though tarnished by *Mitchell*, seemed to give Congress the authority to do so. Justice Kennedy's majority opinion in *Flores* accepted the remedial prong of *Morgan* but squarely rejected an interpretation of Section 5 that permitted Congress to expand, define or ratchet up the level of protection under the Fourteenth Amendment.[217] While not expressly overruling *Morgan*,[218] *Flores* took the view that Congress had

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208. *Id.* at 651 n.10.

209. *Id.*

210. Cohen, *supra* note 205, at 606.

211. 400 U.S. 112 (1970).

212. The issue in *Mitchell* was whether the provisions of the Voting Rights Acts Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified at 42 U.S.C. § 1973 (1994)), which lowered the voting age to 18 in both federal and state elections were constitutional. *Mitchell*, 400 U.S. at 117. The Court struck down the provisions as applied to state elections by a 5-4 vote without getting a majority for any rationale. *Id.* at 118-19. Three Justices (Burger, Blackmun, Stewart) would not have permitted Congress to construe the Fourteenth Amendment. *Id.* at 294-96. One Justice (Harlan) thought that excessive Congressional power under Section 5 was incompatible with the proscribed process for amending the Constitution. *Id.* at 201-09. One Justice (Black) argued that principles of federalism protected state elections from Congressional interference. *Id.* at 125. Four Justices (Douglas, Brennan, White, and Marshall) concluded that Congress had reached a proper decision that the age restrictions were insufficiently related to a legitimate state purpose. *Mitchell*, 400 U.S. at 141-44.

213. 494 U.S. 872 (1990).

214. *Smith*, 494 U.S. at 886.

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

216. 42 U.S.C. § 2000b–2000b-4.

217. Katzenbach v. Morgan, 384 U.S. 641, 648 (1966).

218. Justice Kennedy, in fact, attempts to harmonize the holdings in *Flores* and *Morgan*. Conceding that there is "language in our opinion in *Katzenbach v. Morgan* which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment," City of Boerne v. Flores, 521 U.S. 507, 527-28 (1997) (citation

no power to define constitutional violations. Rather, Congress' role under Section 5 was limited to devising legislation to enforce Section 1 rights as the courts determined them.[219] This ruling effectively eliminated the definitional prong of *Morgan*. *Flores* did leave Congress some flexibility: Section 5 permits enactments which are preventative in nature. Such measures may regulate behavior that are not of themselves unconstitutional so long as they are likely to deter actions that are illegal.[220] While conceding that the line between proper remedial and impermissible substantive legislation is difficult to perceive at times, and noting that Congress must thus be given latitude to operate, the Court imposed a strict test for preventative enactments.[221] There must be a "congruence and proportionality" between the legislation and the constitutional injury to be prevented.[222] Enactments exceeding that limitation represent attempts by Congress to intrude upon the judicial role of interpreting the Constitution.

Under *Flores*, the key issue is how to discern the line between remedial or preventative and substantive legislation. Legislation which is strictly limited to the enforcement of rights proclaimed by the court would be uncontroversial. Civil rights statutes, however, tend to be more

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omitted), he argues that both of Brennan's justifications for the Voting Rights Act are remedial. *Flores*, 521 U.S. at 528. He specifically argues that the second justification (*i.e.*, the supposedly definitional prong) amounted to an attempt by Congress to address discrimination in voter qualifications rather than the provision of public services. *Id.* Further elaboration would have been helpful in deciphering this statement, but Kennedy's references to Justice Stewart's opinion in *Oregon v. Mitchell*, *see id.* (citing Oregon v. Mitchell, 400 U.S. 112, 296 (1970) (opinion of Stewart, J.)) (stating that Congress may not use Section 5 to interpret the Constitution), imply that Kennedy viewed Section 4(e) as effecting a remedy for judicially discovered violations.

This reading of *Morgan* is difficult to reconcile with its text:

> The Attorney General of the State of New York argues that an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that § 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides--even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by § 4(e) is forbidden by the Equal Protection Clause itself. We disagree.

Morgan, 384 U.S. at 648.

219. *Flores*, 521 U.S. at 519.

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

Id.

220. *Id.* at 518.

221. *Id.* at 520.

222. *Id.*

ambitious than the constitutional floor.[223] Thus, the issue becomes whether statutory provisions can be characterized as deterrents to illegal activity or as impermissible attempts to define the Constitution. Kennedy's analysis of RFRA under the exclusively remedial view of Section 5, as well as the Court's subsequent opinions in *College Savings*,[224] *Florida Prepaid*,[225] and *Kimel*,[226] suggest that preventative Section 5 legislation must be targeted at violations of a specific and judicially identified Fourteenth Amendment right, be narrowly tailored toward that end and be supported by Congressional findings of wide scale violations.[227] The cases further suggest that Congressional findings will receive scant deference by the Court.

Flores established the need to tailor Section 5 enactments to judicially identified Fourteenth Amendment violations. In *Flores*, the Court found that RFRA's compelling state interest standard[228] was so far removed from the free exercise right as defined by *Smith* that the statute was substantive, not remedial.[229] *Smith* had held that neutral, generally applicable laws do not breach the Free Exercise guarantee in spite of incidental effects on religious practices, and that the Free Exercise Clause is triggered only when a defendant acts with animosity towards religious belief.[230] RFRA's provisions left too wide a gulf between the statute and the free exercise right. Kennedy, reasoning that preventative measures must be judged in light of the evil they target, was willing to accept only measures which prohibit laws or actions that have a "significant likelihood of being unconstitutional."[231] RFRA was unacceptable because the enforcement mechanism was so out of proportion to any free exercise violation.[232] The compelling state interest and least restrictive alternative tests ensured that many laws valid under *Smith* were now actionable regardless of a lack of religious bigotry.[233] RFRA applied to all laws and every agency or official of federal, state and local

223. *See, e.g.*, Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 644 (2000) (holding that the ADEA provisions against mandatory retirement exceed protections of Fourteenth Amendment).

224. College Sav. Bank v Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672 (1999).

225. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 633-37 (1999).

226. *Kimel*, 120 S. Ct. at 644.

227. *College Sav. Bank*, 527 U.S at 672; *Florida Prepaid*, 527 U.S. at 633-37; *Kimel*, 120 S. Ct. at 644-48.

228. 42 U.S.C. § 2000b-1 (1994).

229. City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997).

230. *Flores*, 521 U.S. at 529; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (holding that laws targeting religious beliefs are improper).

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

232. *Id.*

233. *Id.* at 534-35.

government.[234] RFRA, moreover, had no termination date.[235] In sum, RFRA's provisions swept so broadly that it was not confined to state actions which were likely to be unconstitutional.

Kennedy provided further guidance by his approving references to the *Voting Rights Cases*.[236] Here, the Court sustained bans on literacy tests and other voter disqualifications under Section 5 as well as Section 2 of the Fifteenth Amendment,[237] in spite of an earlier ruling in *Lassiter* that literacy tests were not *per se* unconstitutional.[238] To Kennedy, the application of the law only to regions of the country where voter discrimination was most prevalent,[239] the limitation to state voting laws,[240] an expiration provision in the statute,[241] as well as the existence of an extensive legislative history documenting violations,[242] gave the Voting Rights Act the narrow tailoring necessary to meet the congruence and proportionality standard. RFRA had none of these characteristics.

Flores also turned on the inadequacy of RFRA's legislative history to justify action under Section 5. Kennedy points to the lack of findings by Congress of any instances occurring within forty years of RFRA's enactment of generally applicable laws that were inspired by religious animosity.[243] This failure, though, did not seem to be decisive. Kennedy goes on to note that its flawed legislative history was not RFRA's chief failing, since judicial deference is based primarily "on due regard for the decision of the body constitutionally appointed to decide."[244] In other words, the Court's role in declaring the law supersedes any interpretations which Congress may offer; RFRA under any explanation did not meet the congruence requirement since its provisions reached conduct that was not likely to be unconstitutional.

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234. *Id.* at 532.

235. *Id.*

236. *Flores*, 521 U.S. at 532-33 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (upholding ban on racially discriminatory literacy tests)); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding five year ban on literacy tests); City of Rome v. United States, 446 U.S. 156, 161 (1980) (upholding seven year preclearance requirement); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding ban of literacy tests for graduates of Puerto Rican schools).

237. U.S. CONST. amend. XV. The Fifteenth Amendment provides:

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

Id.

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

239. *Flores*, 521 U.S. at 532-33.

240. *Id.* at 533.

241. *Id.* at 532.

242. *Id.* at 530-32.

243. *Id.* at 530.

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

The parameters of *Flores* were sharpened by two companion cases decided during the last term of Court. Both involved claims brought by College Savings Bank, which held a patent on its method of structuring annuity contracts for financing college expenses, against the State of Florida's prepaid tuition plan. In *Florida Prepaid,*[245] plaintiffs asserted a patent infringement action against the state agency.[246] Although the precise issue was waiver of sovereign immunity, the Court's reasoning for sustaining defendant's motion to dismiss is broad enough to apply to all Section 5 analysis. Writing for the Court, Chief Justice Rehnquist conceded that patents are property interests that are protected from state interference without due process of law.[247] He then carefully defined the due process violation as the intentional infringement of property interests without offering an adequate state remedy.[248] Congress, Rehnquist noted, offered scant evidence that states were infringing patents, much less doing so intentionally.[249]

There are three notable developments or refinements of the general principles of *Flores* in Rehnquist's analysis. First, he stated specifically that Congress must not only tailor its Section 5 legislation to meet Fourteenth Amendment violations but must also affirmatively identify conduct by the state that violates the Constitution.[250] This formulation spells out what was at best implicit in *Flores*. It also seems to say that the Court will not comb the legislative record for justifications of Section 5 enactments if Congress fails to state its justification explicitly. A second difference is that *Florida Prepaid* appears to require that Congress document a "'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation."[251] The internal quotation refers to the section of *Flores* discussing the massive violations of voter rights in the *Voting Rights Cases*.[252] The clear implication of Rehnquist's wording is that Congress

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245. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999).

246. *Florida Prepaid*, 527 U.S. at 631.

247. *Id.* at 635-36, 642.

248. *Id.* at 636-37.

249. *Id.* at 639-40 ("Congress came up with little evidence of infringing conduct on the part of the States.").

250. *Id.* at 639. The statement that Congress "*must* identify conduct transgressing the Fourteenth Amendment[]," *Florida Prepaid*, 527 U.S. at 639 (emphasis added), seems at odds with the later statement that "the lack of support in the legislative record is not determinative." *Id.* at 646 (citing City of Boerne v. Flores, 521 U.S. 507, 531 (1997)). Rehnquist makes the latter statement, however, in the context of comments that the legislative identification of "the targeted constitutional wrong or evil is still a critical part of our § 5 calculus," *id.* at 646, and that the failure by Congress to offer an explanation for its statute leaves the Court with no choice but to assume that provisions of a far reaching statute like the Patent Remedy Act are out of proportion to the underlying Fourteenth Amendment violations. *Id.*

251. *Id.* at 645 (citing *Flores*, 521 U.S. at 526).

252. *See Flores*, 521 U.S. at 526.

must not only identify transgressing behavior, but must also meet a test to ensure that Section 5 measures are preventative and not substantive.[253] Finally, Rehnquist seems to restrict the reach of preventative legislation by noting that the Patent Act failed to confine itself to cases of "arguable constitutional violations [or] . . . certain types of [unconstitutional] infringement, . . . or [by not] providing for suits only against States with questionable remedies or a high incidence of infringement."[254] Although this formulation is hardly precise and does not lend itself easily to generalization, the emphasis on actual constitutional violations does suggest that the Court will take a narrow view of what constitutes prophylactic legislation.

College Savings involved the plaintiff's claims against the Florida agency under the Lanham Act for false advertising.[255] The Court's opinion, by Justice Scalia, accepted the proposition that Congress could act under Section 5 to protect property rights secured by the Due Process Clause.[256] College Savings argued that Section 43(a) of the Lanham Act remedied and prevented state deprivation of two property interests, the right to be free from false advertising and the right to be secure in business interests.[257] The Court rejected both arguments on the grounds that the Fourteenth Amendment protects only property interests which give the owner the right to exclude others from use.[258] The property rights argued by College Savings did not entail a right to exclude others, hence they fell outside of the Due Process Clause.[259]

Of the four recent Section 5 cases, *College Savings* is the most difficult to pigeon-hole. At one level, Scalia's opinion can be taken as a simple warning that in the future Congress should restrict its Section 5 attempts to well established constitutional violations. The provisions of the Lanham Act at issue were enacted before *Flores*; thus, plaintiffs were put in the trying position of having to characterize the false advertising prohibition retrospectively as an attempt by Congress to protect property interests under the Due Process Clause. Particularly troubling about *College Savings*, though, is Scalia's decision simply to ask whether the rights *asserted* by the plaintiffs fall under the tent of the Fourteenth Amendment. He reasoned that since plaintiffs had shown no deprivation of property as defined by the Court, there was no need to

253. *See Florida Prepaid*, 527 U.S. at 646.

254. *Id.* at 646-47.

255. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999).

256. *College Sav. Bank*, 527 U.S. at 672.

257. *Id.*

258. *Id.* at 675.

259. *See id.*

consider whether the challenged statute was a prophylactic measure.[260] As in *Florida Prepaid*, this resolution seems to go subtly beyond *Flores*. Under the logic of the latter decision, Section 5 litigation can regulate otherwise constitutional state actions so long as there is some nexus to illegal behavior.[261] *Flores* should have permitted the additional question of whether Section 43(a) of the Lanham Act prevented the deprivation of some protected property right, had the argument been raised.[262]

Perhaps we can explain the Court's unwillingness in *College Savings* to purse the prophylaxis issue by the fact that the Due Process Clause has such minimal content that any attempts at preventative legislation would overshoot the meager constitutional protections. But the same failing applies to *Flores*. In *Flores*, the respondent raised the unsuccessful argument that Congress was empowered to supplement by statute the protections of the Free Exercise Clause but did not argue that RFRA secured the free exercise right as defined by *Smith*.[263] Arguments in both cases were based on interpretations of the Fourteenth Amendment which the Court rejected.[264] Neither argument attempted to justify the Section 5 statute as preventing a violation of a narrowly construed constitutional right.[265] Yet the Court opted to review the legislative history in *Flores* to determine whether RFRA had a preventative effect while in *College Savings* it did not bother.[266] At minimum, *College Savings* stands as a warning to plaintiffs to explicitly argue a preventative relationship between a Section 5 statute and an established constitutional violation; additionally, it stands as general notice that the Court will no longer practice a brand of deference that compels it to look for unargued justifications for a Section 5 measure.[267]

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260. *Id.* ("Finding that there is no deprivation of property at issue here, we need not pursue the follow-on question that *City of Boerne* would otherwise require us to resolve: whether the prophylactic measure taken under the purported authority of § 5 . . . was genuinely necessary to prevent violation of the Fourteenth Amendment.").

261. *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 646 (1999).

262. *See* Brief for Petitioner at 13-35, College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (arguing that business interests are property protected by the Due Process Clause but not addressing the issue of exclusivity).

263. City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

264. *See College Sav. Bank*, 527 U.S. at 672-75; *Flores*, 521 U.S. at 529.

265. *Id.*

266. *See Flores*, 521 U.S. at 530-31.

267. Professor Colker, in a recent article (so recent that I must address it in a footnote), takes the position that minimal scrutiny when applied to Due Process based arguments results in negligible substantive content. Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 673 (2000). Thus, she would explain the results in *College Savings* and *Florida Prepaid* as a matter of Congress having relatively few rights on which to base a Section 5 measure; hence, the failure to create a proper legislative record was beside the point. *Id.* at 672. She contrasts the Due Process Clause cases with minimal scrutiny for equal protection challenges. *Id.* at 662-77. Her argument is that Congress enjoys significant enforcement powers when legislating to protect suspect classes as well as non-suspect classes. *Id.* As to the latter (which would of course include the disabled), she

Kimel, the Court's most recent venture into Section 5 jurisprudence, concerned the validity of the Age Discrimination in Employment Act of 1967 ("ADEA").[268] As with *Florida Prepaid* and *College Savings*, *Kimel* is a state sovereign immunity case, but the analysis turns exclusively on the failure of the ADEA's substantive provisions to affect constitutional

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reasons as follows. First, the Court was required to "consider thoughtfully" the age discrimination claim in *Murgia*, even though plaintiffs ultimately lost on the merits. *Id.* at 674; *see* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam) (reviewing age claims under minimal scrutiny). Second, the plaintiffs in *Romer v. Evans* had standing to bring their equal protections claims even though heightened scrutiny was not used. Colker, *supra*, at 674. Third, the plaintiffs in *Cleburne* had a right to go forward with their claim even under minimum scrutiny. *Id.* Finally, Professor Colker suggests a textual distinction in the Fourteenth Amendment. *Id.* at 674-75. She argues that the Equal Protection clause applies to *all* persons, thereby suggesting that all persons are entitled to bring equal protection claims and that Congress, in turn, enforces the Fourteenth Amendment even when it addresses non-suspect classes. *Id.* The Due Process Clause, in contrast, has no such broadening language. *Id.* Professor Colker finds support for her thesis in *Kimel*. *Id.* at 675. She argues that *Kimel* supports an argument that the Court will show greater deference to Congress when it legislates to protect equal protection rights. *Id.* Her reasoning turns on an observation that *Kimel* is the first time the Court has struck down a Section 5 measure to enforce the Equal Protection Clause, that the Court noted that Section 5 permitted Congress to prohibit a "broader swath of conduct" than what was forbidden by the Section 1, and that Congress failed to provide proper legislative findings. *Id.*

I respectfully disagree with this analysis, at least as far as it attempts to explain the Court's recent cases. The fact that plaintiffs in *Murgia*, *Romer*, and *Cleburne* had standing has nothing to do with the merits of a Section 5 argument. Had they lacked standing, the order of dismissal could have been based, for example, on the failure to allege an actual injury and not on the legal merits of the Section 5 claim. The fact that the Equal Protection Clause applies to all persons also seems to be beside the point. Professor Colker's point that Section 5 permits Congress to legislate on behalf of non-suspect classes is, of course, well taken. Otherwise, *Kimel* might have been decided on the much simpler basis that non-suspect classes are not protected under the Fourteenth Amendment (an argument that is at odds with the holding in *Cleburne*). I don't believe that the text makes any further difference. While it may be that the Due Process Clause does less for the average plaintiff than the Equal Protection Clause, the Court's cases are not about the comparative strength of the particular Section 1 rights that Congress attempts to enforce under Section 5. Rather, *Flores* and its progeny are about whether Congress remains faithful to those rights, whatever they may be, *i.e.*, these cases are about the separation of powers. RFRA failed because Congress encroached on the Court's role and attempted to dictate the content of the Free Exercise Clause—which had been incorporated into Section 1—and not because of the minimal content of that provision. To argue that the Equal Protection Clause confers greater rights does not answer the question of how far Congress may go in effectuating them.

The Court's decision in *Kimel* would seem to support this interpretation. Justice O'Connor's opinion is based in large part on the gap between the limited rights created in favor of the aged by the Equal Protection Clause and the sweeping measures of the ADEA. *See* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 640-50 (2000). In this respect, *Kimel* is not different from *Florida Prepaid* and *College Savings*, the two due process cases. Professor Colker is correct that *Kimel* acknowledges the importance of Congressional findings. *See Kimel*, 120 S. Ct. at 645-50. *Kimel* does so, however, in asking whether the provisions of the ADEA which exceeded the parameters of minimal scrutiny might serve a prophylactic function. *Id.* at 648. The key to the Court's analysis, notably, is still the relationship between the statute and the underlying constitutional violation. If I read *Kimel* correctly, preventative measures are valid only when they bear a congruent and proportional relationship to well documented equal protection violations. *Id.* at 645. Fact finding *per se* does not alter this requirement. The same should also be true of the due process cases. The logical inference is that proper findings of state patent infringement might have saved the statute in *Florida Prepaid*. I concede that the due process protections for property interests are so narrow that no amount of Congressional findings could have saved the Lanham Act provisions in *College Savings*.

268. *See id.* at 636-37.

rights.[269] *Kimel* is particularly important to the analysis of the ADA since disability classifications, like age categories, are subject only to rational basis review under the Equal Protection Clause. Justice O'Connor's majority opinion concludes that the ADEA cannot be considered to effectuate the protections of the Equal Protection Clause.[270] She notes that as an equal protection matter, states are free to engage in age discrimination that is rationally related to a legitimate state interest.[271] She further notes that age classifications need not match the interest they serve with "razorlike precision;"[272] rather, a state is permitted to use age as a proxy for other characteristics, such as productivity.[273] Given the minimal restraints on age classifications under the Equal Protection Clause, O'Connor argues, the ADEA's much broader prohibitions against age discrimination deprive it of a remedial character, since the statute prohibits far more state employment actions than would be prohibited under rational basis review.[274]

O'Connor's treatment of the ADEA's exceptions may also prove important to the analysis of the ADA's exceptions, such as the undue burden and fundamental alteration defenses.[275] Plaintiffs had argued that the Act's exception for "bona fide occupational qualification[s] reasonably necessary to the normal operation of the particular business" sufficiently narrowed the reach of the statute such as to make it remedial.[276] O'Connor rejected the argument on two grounds.[277] First, she noted that the ADEA's "reasonably necessary" standard is significantly higher than the rational basis test.[278] Second, age discrimination under the ADEA is prima facie illegal.[279] The bona fide occupational qualification ("BFOQ") exception for age, moreover, is narrow and available only when the employer can demonstrate that all or nearly all employees above a certain age lack a certain qualification or that individual testing is impractical.[280] Thus, she reasoned, the ADEA, even as qualified by the BFOQ defense, imposed obligations on the state that resembled

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269. *See, e.g., id.* at 645 ("Initially, the *substantive* requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act.") (emphasis added).

270. *Kimel*, 120 S. Ct. at 645.

271. *Id.* at 646.

272. *Id.*

273. *Id.* at 646, 648 (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993).

274. *Id.* at 647.

275. *See generally infra* note 399 and accompanying text.

276. *Kimel*, 120 S. Ct. at 647 (quoting 29 U.S.C. § 623(f)(1) (1994)).

277. *Id.*

278. *Id.* (citing Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985), *cert. denied*, 489 U.S. 1066 (1989)).

279. *Id.*

280. *Id.* at 647-48.

heightened scrutiny instead of rational basis review.[281] O'Connor also addressed the ADEA exception for age discrimination "where the differentiation is based on reasonable factors other than age."[282] This exception, she argued, makes clear that the ADEA prohibits the state from using age as a proxy, as it may under the equal protection analysis.[283]

Having concluded that ADEA does not reach conduct which is likely to be unconstitutional, O'Connor asked the final question of whether the ADEA represents prophylactic legislation.[284] She reviewed the legislative history of the ADEA for evidence of a "widespread pattern of age discrimination by the States"[285] and, finding nothing except "isolated sentences clipped from floor debates and legislative reports,"[286] concluded that Congress could not have believed that there was a need for prophylactic legislation.[287]

In summary, it should be apparent from the preceding discussion that the line of cases from *Flores* to *Kimel* has crimped Congress' powers to legislate under Section 5. What sort of packaging must a Section 5 statute now have to survive review by the Court? Although the cases hardly represent a comprehensive treatment of the issues, a set of guidelines is beginning to emerge. First, there is the rather obvious point that Congress must identify clearly what Fourteenth Amendment rights it seeks to vindicate. Second, the legislative history of the act must document a pattern of ongoing conduct by the states violating that right. Third, such misconduct must be widespread and significant. Fourth, legislation must be narrowly tailored to fit the violation, either remedially or preventively. Finally, when dealing with equal protection rights governed by minimal scrutiny, legislation must not prevent a state from doing what it might be permitted to do under the rational basis test, unless the restrictions serve a clear preventative purpose and are narrowly drawn.

Perhaps an example would be useful. Let us ask what Congress would have to do to legislate protection of gays and lesbians in light of *Romer v. Evans*. First, the text or legislative history of such an act should specifically mention the Equal Protection Clause as the targeted right, and probably should focus on the decision in *Romer*. Specificity here avoids the problems that occurred in *College Savings* of attempting justification by hindsight. Second, following the command of *Florida Prepaid*, the legislative history would need to document a pattern of

281. *Kimel*, 120 S. Ct. at 648.

282. *Id.* (quoting 29 U.S.C. § 631(f)(1)).

283. *Id.*

284. *Id.*

285. *Id.* at 649 (citing Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 635 (1999)).

286. *Kimel*, 120 S. Ct. at 649.

287. *Id.*

anti-gay conduct by states. The documentation, moreover, would need to focus on the type of actions prohibited under *Romer*, those based on animosity and a bare desire to disadvantage. Third, to meet the requirements of *College Savings* and *Kimel*, Congress would have to demonstrate that such conduct was widespread and persistent. Next, as strongly suggested by *Flores*, *Florida Prepaid*, and *Kimel*, the resulting legislation would have to be tailored to meet the actual scope of the problem. This narrowing might take the form of limiting the statute's provisions to geographic areas of the nation where anti-gay sentiment is highest, restricting the anti-discrimination mandate to types of government services where bias is likely to occur (employment or health services, for example), or including a sunset provision. Finally, since homosexuality leads only to rational basis review, the resulting legislation should not cut too deeply into the discretion which minimal scrutiny assigns to state actors. Sound tough? It is.

C. The ADA as Section 5 Legislation

1. Introduction

Titles I and II of the ADA, which apply to state and local governments, contain a wide range of anti-discrimination rules. For purposes of Section 5 analysis, I propose to divide these rules into four categories. First, there is the prohibition on intentional discrimination or outright bias. Next, there is the Act's requirement that covered entities provide qualified individuals with a disability a reasonable accommodation. Third, the ADA mandates that services be provided in the most integrated environment that is appropriate to the individual. Finally, the ADA has a specific rule prohibiting pre-employment inquiries into the existence of a disability. These groupings reflect my thinking that after the *Flores* and *Cleburne* lines of cases, certain provisions of the ADA are more likely to survive Section 5 analysis than others. Nevertheless, I have come to the conclusion that much of the ADA as it applies to state and local entities will fail Section 5 analysis. In a previous article, I concluded that the intentional discrimination, pre-employment inquiry, and mainstreaming requirements were likely to pass muster under Section 5 but that the reasonable accommodation provisions would likely fail.[288] After *Florida Prepaid*, *College Savings*, and *Kimel*, I am convinced that the reasonable accommodation rules are doomed and am not sanguine about the other provisions.

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288. *See* Leonard, *supra* note 47, at 726.

2. *Intentional Discrimination*

Intentional discrimination against the disabled is forbidden by the ADA.[289] Congress made an explicit finding in the text of the Act that the disabled had suffered from a history of "outright intentional exclusion"[290] and subjection to "overprotective rules"[291] and "purposeful unequal treatment."[292] Specific sections of the Act target biased behavior. Title I, for example, has a general prohibition of discrimination against qualified individuals with disabilities, which covers biased employment actions.[293] Title II has a comparable general rule against discrimination in the provision of state and local governmental services.[294] Title II regulations, moreover, cover intentional discrimination in particular instances.[295] It is true that the majority of Title II rules refer only to the discriminatory results or effects without mentioning purposeful conduct,[296] but the concept of discriminatory effects is broad enough to include those created by biased conduct.[297]

After *Romer*, there is little question that the Equal Protection Clause forbids states to commit a biased act against the disabled for its own sake. The issue is whether Congress has met the requirements of the Court's Section 5 cases for legislating against such unconstitutional acts. I am now skeptical, though not hopeless, that the Court would regard the requirements as having been met. There is little argument that Congress viewed the ADA as enforcing the rights of the Fourteenth Amendment. The "Findings and Purposes" section of the Act says plainly that the purpose of the ADA is to "invoke the sweep of congressional authority, including the power to enforce the Fourteenth amendment and to regu-

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289. *Cf.* Alexander v. Choate, 469 U.S. 287, 299 (1985) (finding that § 504 claims are not limited to discriminatory animus).

290. 42 U.S.C. § 12101(a)(5) (1994).

291. *Id.*

292. *Id.* § 12101(a)(7).

293. *Id.* § 12112. *See generally* 2 TUCKER & GOLDSTEIN, *supra* note 3, at 22:12-14 (1991 & Supp. 1996).

294. 42 U.S.C. § 12132. *See, e.g.*, Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 846 F. Supp. 986, 992 (S.D. Fla. 1994) (finding discriminatory intent to reduce recreational services to disabled in Title II claim).

295. 28 C.F.R. § 35.130(b)(3)(ii) (1999) (prohibiting criteria or methods of administration which have the "*purpose* or effect" of defeating or impairing a public program's objectives with respect to the disabled) (emphasis added); *id.* § 35.130(b)(4)(ii) (selection of service sites and locations which have purpose or effect of defeating or substantially impairing program objectives).

296. *See, e.g., id.* § 35.130(b)(3)(i) (forbidding criteria or methods of administration with effect of defeating program objectives as related to the disabled).

297. Department of Justice commentary on 28 C.F.R. § 35.130(b)(3) indicates that this paragraph prohibits "both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but den[ies] individuals with disabilities an effective opportunity to participate." 28 C.F.R. Part 35, app. A at 477 (citing Alexander v. Choate, 469 U.S. 287 (1985)).

late commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."[298] Thus, Congress has made clear that it was invoking its Section 5 power as well as the commerce power.

I am uncertain whether Congress has met the requirement for identifying a widespread pattern of unconstitutional behavior by the states, as now apparently required by *Florida Prepaid* and *Kimel*. There are statements in the findings section of the Act that the disabled have faced "outright intentional exclusion"[299] and have been "subjected to a history of purposeful unequal treatment."[300] These legislative statements do raise the issue of discrimination, but they do not necessarily relate to the sort of treatment forbidden by *Cleburne* and its progeny. In fact, the findings section does not refer directly to discrimination by state actors. For that proposition, we must turn to legislative history of the ADA.

The best sources of legislative history for Section 5 purposes are the "Findings and Purposes" section of the statute and the reports of the House Committee on Education and Labor[301] and of the Senate Committee on Labor and Human Resources.[302] The two reports are nearly identical; there is considerable overlap between the witnesses appearing before the committees and the language of each report tracks the others' to a remarkable degree. For convenience, I will refer only to the House report. Other committees issued reports.[303] These sources, however, give detailed analysis of the effects of the ADA on areas within each committee's purview but lack the extensive review of hearings and findings as to the existence of discrimination in American society.[304]

The House report was issued after six days of hearings involving scores of witnesses.[305] The report speaks directly to the need for the legislation and specifically to the "nature and extent of discrimination on the basis of disability in general."[306] The gravamen of the report is the disadvantaged position held by the disabled because of segregation and isolation from the mainstream of social and economic life.[307] By my

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298. 42 U.S.C. § 12101(b)(4).

299. *Id.* § 12101(a)(5).

300. *Id.* § 12101(a)(7).

301. H.R. REP. NO. 101-485 (II) (1990).

302. S. REP. NO. 101-116 (1989).

303. *See, e.g.*, H.R. REP. NO. 101-485 (I) (1990) (Public Works and Transportation Committee); H.R. REP. NO. 101-485 (III) (1990) (Judiciary Committee); H.R. REP. NO. 101-485 (IV) (1990) (Energy and Commerce Committee).

304. *See* reports cited *supra* note 303.

305. H.R. REP. NO. 101-485 (II), at 24-28.

306. *Id.* at 28.

307. *See, e.g., id.*

Testimony presented to the Subcommittees on Select Education and Employment Opportunities, two recent reports by the National Council on Disability (*Toward Independence* (1986) and *On the Threshold of Independence* (1988)), a report by the

count there are only five references to instances of intentional discrimination in the House report that might meet the post-*Romer* definition of bias: 1) The exclusion of a child with Down Syndrome from a New Jersey zoo for fear that she would upset the chimpanzees;[308] 2) a court decision finding that an academically talented child with cerebral palsy could be excluded from a public school classroom;[309] 3) an arthritic woman denied a job at a college because the trustees thought that normal students should not see her;[310] 4) a woman fired from her job after a son with AIDS came home to live with her;[311] and 5) a woman in a wheelchair who had suffered from a number of insulting experiences, including one experience in which a high school principal attempted to keep her off the graduation stage and another in which she was asked to leave an auction house because she was "disgusting to look at."[312] Although we can debate the number and characterization of such examples in the House report, it is obvious that relatively few examples of pure animosity against the disabled appear in the report.

There are also a number of problems with the above examples from the House report. Congress, as just noted, must first document a widespread pattern of Fourteenth Amendment violations, in this case a pattern of intentional discrimination against the disabled by state actors as described in *Cleburne* and progeny. The paucity of examples of this particular behavior cuts against a finding that such discrimination is wide-

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U.S. Civil Rights Commission (*Accommodating the Spectrum of Individual Abilities* (1983)), polls taken by Louis Harris and Associates (*The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream*" [sic] (March, 1986) and *The ICD Survey II: Employing Disabled Americans* (1987)), a report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988), and the report by the Task Force on the Rights and Empowerment of Americans with Disabilities all reach the same fundamental conclusions:

> (1) historically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society;
>
> (2) discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications;
>
> (3) current Federal and State laws are inadequate to address the discrimination faced by people with disabilities in these critical areas;
>
> (4) people with disabilities as a group occupy an inferior status socially, economically, vocationally, and educationally; and
>
> (5) discrimination denies people with disabilities the opportunity to compete on an equal basis with others and costs the United States, State and local governments, and the private sector billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

Id.

308. *Id.* at 30.

309. H.R. REP. NO. 101-485 (II), at 30 (citing 117 CONG. REC. 45974 (1971)).

310. *Id.* (citing 118 CONG. REC. 36761 (1972), *quoted in* School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987)).

311. *Id.*

312. *Id.* at 29-30 (Statement of Judith Heumann).

> looked it up and found out that it was "because of." So it was obviously because of my disability that I was discriminated against.
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> At the age of 25, I was told to leave a plane on my return trip to my job here in the U.S. Senate because I was flying without an attendant. In 1981, an attempt was made to forcibly remove me and another disabled friend from an auction house because we were "disgusting to look at." In 1983, a manager at a movie theater attempted to keep my disabled friend and myself [sic] out of his theater because we could not transfer out of our wheelchair.[316]

While no person of normal sensibilities can fail to be moved by this statement, it is also true that it does little to justify the ADA as a Section 5 law. Congress had no notion when it undertook the legislative process that it would be held to the standard later imposed by *Flores* for Section 5 measures.[317] Consequently, the report is not focused on documenting patterns of state violations of the Equal Protection Clause. Heumann's testimony is offered by the Committee as an illustration of the various forms that discrimination can take.[318] The denial of a teaching credential and the actions of the public school principal were obviously state actions, but the other actions were not necessarily committed by state actors. And even if the latter were, many could be justified under rational basis review. As repulsive as the logic may seem, many forms of discrimination against the disabled serve some purpose.[319] A rule forbidding students in wheelchairs at a particular facility could be justified as facilitating emergency evacuation plans.[320] In most cases, it would not matter that such a rule was under-inclusive, because it ignored other persons who would also pose difficulties in an emergency.[321] After *Kimel*, moreover, the ability of an individual to evacuate a building safely would not matter, since state actors can employ categories as proxies for state interests.[322]

Even if we move from the report itself to the grist of the legislative

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316. H.R. REP. NO. 101-485 (II), at 29-30.

317. *See, e.g.*, 136 CONG. REC. E1913-01 (June 13, 1990) (extended remarks of Rep. Hoyer) (noting that Congress was acting under Section 5 of the Fourteenth Amendment and citing Katzenbach v. Morgan, 384 U.S. 641 (1966)).

318. H.R. REP. NO. 101-485 (II), at 29.

319. For a discussion of rational basis review, see generally *supra* text accompanying notes 80-89.

320. *Cf.* Erickson v. Board of Governors of State Colleges and Univs. for Northeastern Illinois Univ., 207 F.3d 945, 949 (7th Cir. 2000), *petition for cert. filed*, June 26, 2000 (discussing whether a university's decision to hire scholars with good vision is rational since faster readers can absorb more academic literature).

321. *See supra* text accompanying notes 85-87.

322. *See supra* note 86 and accompanying text.

spread or conforms to a pattern (if the latter term means systematic occurrence). The examples are few and isolated. Second, of the examples that I have identified, it is unclear how many involved state action. The college refusing to hire the arthritic woman, for example, might have been a private school. It's an open question whether one can infer discrimination in the public sector from evidence of private discrimination, but the scarcity of evidence regarding intentional discrimination in the text of the report in general makes the inquiry unnecessary.[313] The report doesn't seem to establish the widespread existence of intentional discrimination.[314] Taken as a whole, the report seems to run afoul of Chief Justice Rehnquist's complaint in *Florida Prepaid* that Congress had documented only a "handful of instances of state patent infringement that do not necessarily violate the Constitution."[315]

Typical of the evidence is the statement of Judith Heumann, which I set out here to illustrate the difficulties in meeting the standards of Section 5 analysis:

> When I was 5 my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard. I was forced to go into home instruction, receiving one hour of education twice a week for 3½ years. My entrance into mainstream society was blocked by discrimination and segregation. Segregation was not only on an institutional level but also acted as an obstruction to social integration. As a teenager, I could not travel with my friends on the bus because it was not accessible. At my graduation from high school, the principal attempted to prevent me from accepting an award in a ceremony on stage simply because I was in a wheelchair.
>
> When I was 19, the house mother of my college dormitory refused me admission into the dorm because I was in a wheelchair and needed assistance. When I was 21 years old, I was denied an elementary school teaching credential because of "paralysis of both lower extremities sequelae of poliomyelitis." At the time, I did not know what sequelae meant. I went to the dictionary and

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313. *See* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 649 (2000).

> Although we also have doubts whether the findings Congress did make with respect to the private sector could be extrapolated to support a finding of unconstitutional age discrimination in the public sector, it is sufficient for these cases to note that Congress failed to identify a widespread pattern of age discrimination by the States.

Id.

314. Another problem, which I have discussed elsewhere in the context of sovereign immunity, is that the courts will impose liability on defendants on a showing of something less than bias or animosity. Permitting recovery for conduct that falls short of the intent standard is problematic under *Cleburne*, its progeny, and the Section 5 cases. *See* Leonard, *supra* note 47, at 727-37.

315. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 645-46 (1999).

process, support for the ADA as a Section 5 enactment is still modest. In light of *Flores* and its progeny, the "ideal" legislative record would focus explicitly on Section 5 and would present evidence of ongoing constitutional violations by state actors that the ADA would actually remedy or prevent.[323] The ideal record would also carefully document a pattern of state laws or actions that conflict with the judicial definition of constitutional violations. Such evidence would include references to typical state and local laws or policies, now in force, which disadvantage the disabled without any conceivable justification (i.e., failed minimal scrutiny) or would document the fact of commonly occurring mistreatment of the disabled by public officials or employees for irrational or spiteful reasons.

Noticeably absent from the ADA's legislative history are instances of current constitutional misconduct by the states. There is documentation of historical practices[324] which would unquestionably fail under the Equal Protection Clause or some other constitutional provision if litigated today, such as forced sterilization[325] or inappropriate institutionalization,[326] but no picture emerges of current systematic discrimination, *de jure* or *de facto*, by state actors. I suggest that this is so for two reasons. First, the unifying themes of the testimony presented at the ADA hearings were the need to lower barriers to participation in society and the economy for the disabled[327]and the countervailing need to keep the costs of such efforts within manageable bounds for covered entities,[328] as well as the politically controversial provisions such as inclusion of alcoholism in the definition of disability.[329] The emphasis of the hearings, therefore, was not unconstitutional disparate treatment but its opposite: the need for American society to treat the disabled differently—

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323. *Cf.* 145 CONG. REC. S8952-53 (July 21, 1999) (statement of Sen. Hatch) (discussing the need for federal legislation to reflect constitutional limitations in Supreme Court decisions such as *Flores* and *Lopez*).

324. For a discussion of historical discrimination as a justification for the reasonable accommodation requirement of the ADA under Section 5, see *infra* text accompanying notes 349-54.

325. Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (discussing the fundamental right to procreate).

326. *E.g.*, O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (finding that a non-dangerous person who can survive safely in a community has a liberty interest in avoiding institutionalization).

327. *See, e.g., Americans with Disabilities Act of 1989: Hearings before the Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong. 191 (1989) (statement of Dick Thornburgh, U.S. Attorney General) (discussing need to lower barrier to participation) [hereinafter House Judiciary Committee Hearings].

328. *See, e.g., Joint Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing before the Subcomm. on Select Educ. and Employment Opportunities of the Comm. on Educ. and Labor*, 101st Cong. 57 (1989) (testimony of Justin Dart) (noting opposition to ADA because of costs).

329. *See, e.g.*, House Judiciary Committee Hearings, *supra* note 327, at 53 (discussing the inclusion of alcoholism in the definition of disability).

to accord reasonable accommodations in the terminology of the ADA—to assist in their integration into the mainstream. There are examples in the hearing transcripts of state actors discriminating against individuals with disabilities for irrational reasons or out of spite,[330] but these are relatively few. There is, in contrast, a considerable amount of information about the effects of prejudice on the disabled.[331] This testimony, however, treats discrimination as a general societal condition and does little to relate it to the judicially defined concept of Fourteenth Amendment violations: intentional discrimination against the disabled by state actors. Moreover, witnesses in the hearings approached discrimination in a broad, multi-faceted way that is at odds with the more restrictive definition that emerges from the Court's equal protection jurisprudence.[332]

Second, documenting constitutionally infirm instances of disparate treatment would have been a difficult task even if the Congress had been operating under the *Flores* rules in 1990. State laws forbidding minorities from obtaining driver's licenses, for example, would fail any level of scrutiny, even rational basis review, in the blink of an eye. Moreover, any such law could reliably be deemed unconstitutional just by reading its text. The same is not true for laws dealing with disability status. In a touching section from one of the joint hearings held by Senate and House subcommittees, then Congressman Tony Coelho testified that during his senior year in college he decided to become a Catholic priest.[333] He was denied admission to the priesthood when a physical examination confirmed that he suffered from epilepsy. He soon after lost his driver's license. The fact that a state law disqualifies epileptics from driver's licenses, however, is constitutionally meaningless. One possible and sufficient justification for such a rule would be highway safety. Hence, there is difficulty in meeting the *Flores* standards even when the rules are clear.

The House report also notes that the Committee on Education and Labor relied on several reports and studies about the history and condi-

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330. *See, e.g.*, House Judiciary Committee Hearings, *supra* note 327, at 48 (statement of Peter Adesso) (paraplegic Vietnam veteran denied use of municipal pool); *id.* at 418 (testimony of James W. Ellis) (laws prohibiting marriage of mentally retarded reflect eugenic theories).

331. *See, e.g., Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Employment Opportunities and Select Educ. of the Comm. on Educ. and Labor*, 101st Cong. 79 (testimony of Arlene B. Mayerson) (discussing the effects of prejudice on employment opportunities).

332. *See, e.g.*, House Judiciary Committee Hearings, *supra* note 327, at 57 (testimony of Chai Feldblum) (discussing various forms of discrimination).

333. *Americans with Disabilities Act of 1988: Joint Hearing Before the Subcomm. on the Handicapped of the Comm. on Labor and Human Resources, United States Senate, and the Subcomm. on Select Educ. of the Comm. on Educ. of the Comm. on Educ. and Labor, House of Representatives*, 100th Cong. 11-12 (1988) (testimony of Rep. Coelho).

tion of the disabled within American society.[334] While these reports provide a systemic treatment of the status of the disabled within American society, they suffer from the same lack of focus on ongoing Section 1 violations that characterizes the testimony recited in the House report and is embodied in the hearings. The Civil Rights Commission's *Accommodating the Spectrum of Individual Abilities* provides a good illustration. In reviewing the history of discrimination against the disabled, the report details the shifting history of treatment of persons with disabilities in American society. Part of that history involves a period in the late Nineteenth to early Twentieth Century in which society, in the throes of a eugenics movement, wished to isolate the disabled from society through such devices as forced sterilization, prohibitions against marriage, and even euthanasia.[335] But at other periods, according to the report, society's treatment of the disabled, though isolationist, was motivated by protective urges.[336] The report does not document a significant number of current constitutional violations, much less a pattern, by state actors. In another section, the report analyzes prejudice against the disabled as taking several forms, including discomfort in interactions, patronization and pity, stereotyping, and stigmatization.[337] What the Civil Rights Commission's report does not do is relate these observations to the judicial definition of bias against the disabled: state action reflecting meanness, a bare desire without more to harm a group, or a singling out of that group for irrational or otherwise inexplicable reasons.[338] The references to discrimination reflect a broad concept of dis-

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334. *See* H.R. REP. NO. 101-485 (II), at 28 (1990) (citing NATIONAL COUNCIL ON DISABILITY, TOWARD INDEPENDENCE (1986); NATIONAL COUNCIL OF DISABILITY, ON THE THRESHOLD OF INDEPENDENCE (1988); UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983) [hereinafter "ACCOMMODATING THE SPECTRUM"]; LOUIS HARRIS AND ASSOCIATES, INT'L CTR. FOR THE DISABLED, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986) [hereinafter "THE ICD SURVEY OF DISABLED AMERICANS"]; LOUIS HARRIS AND ASSOCIATES, INT'L CTR. FOR THE DISABLED, THE ICD SURVEY II: EMPLOYING DISABLED AMERICANS (1987) [hereinafter "THE ICD SURVEY II"]; PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, REPORT (1988); REPORT OF THE TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES).

335. ACCOMMODATING THE SPECTRUM, *supra* note 334, at 19-21; *see also id.* n.5 (collecting sources describing mistreatment of the disabled).

336. *Id.* at 19 (describing protective isolation model used between 1870 and 1890); *id.* at 21 (describing recent legislative responses to assist disabled persons).

337. *Id.* at 22-27.

338. H.R. REP. NO. 101-485 (II), at 28 (citations omitted); *see supra* Part II.A. The House report's summary of these reports, as well as the entire record, confirms the lack of focus on Section 1 rights.

> Testimony presented to the Subcommittees on Select Education and Employment Opportunities, two recent reports by the National Council on Disability . . . a report by the U.S. Civil Rights Commission . . . polls taken by Louis Harris and Associates . . . and . . . a report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic . . . and the report by the Task Force on the Rights and Empowerment of Americans with Disabilities all reach the same fundamental con-

ability that is not tied to the judicial concept, and the conclusions seem primarily focused on the socially and economically disadvantaged position of the disabled. Hence, the link to Section 1 violations is implicit at best. Likewise, the Report of the President's Commission on the Human Immunodeficiency Virus Epidemic concludes that persons who are HIV-positive experience discrimination but does not connect its observation to state action.[339] Parts of the studies can even be construed to support the proposition that discrimination is a diminishing problem.[340]

Taken as a whole, the legislative record for the ADA provides limited support for the Act's prohibition of intentional discrimination as a Section 5 measure. It is true that Chief Justice Rehnquist complained in *Florida Prepaid* that Congress acted on the basis of a "handful of instances of state patent infringement that do not necessarily violate the Constitution"[341] and that Justice O'Connor dismissed the legislative record in *Kimel* as "isolated sentences clipped from floor debates and legislative reports."[342] It is also true that the ADA has a much more extensive legislative record than the statutes at issue in *Florida Prepaid* and *Kimel*. Still, I am skeptical that the Court would vindicate the ADA on the basis of the relative quantity of information in the legislative record

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clusions:

> (1) Historically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society;
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> (2) discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications;
>
> (3) current Federal and State laws are inadequate to address the discrimination faced by people with disabilities in these critical areas;
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> (4) people with disabilities as a group occupy an inferior status socially, economically, vocationally, and educationally; and
>
> (5) discrimination denies people with disabilities the opportunity to compete on an equal basis and costs the United States, State and local governments, and the private sector billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

H.R. REP. NO. 101-485 (II), at 28-29.

339. REPORT OF THE PRESIDENT'S COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, *supra* note 334, at 119-26. The Report is very unspecific about the nature and extent of discrimination against persons with the HIV virus. It notes that the New York City Commission on Human Rights' HIV-related caseload increased from 3 in 1983 to 600 in 1987. *Id.* at 120. It also recognizes ignorance as a primary cause of discrimination and gives as an example the picketing of a school that admitted a child with the HIV infection. *Id.* The report provides few details beyond these. Its finding of discrimination is conclusary and says little about how widespread the phenomenon is.

340. *See, e.g.*, THE ICD SURVEY OF DISABLED AMERICANS, *supra* note 334, at 18 (majority of disabled persons surveyed felt that conditions for the disabled had improved); *id.* at 75 (majority thought that their disability was a greater obstacle to employment than employer attitudes). One might argue that such statistics are taken out of context. While I would have a difficult time specifying the context of the Louis Harris survey, I can confidently say that the context is not Section 5 analysis.

341. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 645-46 (1999).

342. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 649 (2000).

apart from its content. Extensive witness statements and references to numerous studies do not necessarily provide the Court with enough information to discern a relationship between the Act and the Court's own definition of the equal protection violations. While there are elements in the record that may point toward this conclusion, they are by no means the emphasis of the legislative process. I do not doubt that Congress could have compiled a more effective legislative record had it anticipated *Flores*. The failure to do so is understandable given the then prevailing assumption of Congress' powers to enact protections for the disabled; however, the Court, as illustrated by *Flores* and its progeny, does not seem to be concerned with changing the rules in mid-game.

To sustain the Act, the Court would have to proceed largely by inference. The legislative record would seem to be sufficient only if the Court adopts a lenient and deferential approach to Section 5 review. There are hints in Justice O'Connor's *Kimel* opinion that the Court might take a deferential view of the wider record of the ADA. In judging whether the ADEA served a prophylactic purpose, she noted that one means of making this assessment is to check the legislative record for Congress' reasons for an action.[343] This approach does suggest that the Court is at least willing to search the legislative proceeding for guidance.[344] It is a short step from that proposition to a conclusion that ADA's record, which is unquestionably much more complete than the meager records in *College Savings* (Lanham Act), *Florida Prepaid* (Patent Act), and *Kimel* (ADEA) should have more influence on the Section 5 analysis.

I am not prepared, however, to predict that the Court will accept the existence of other examples of illegal conduct in the legislative history and the conclusions reached by the studies to validate the intentional discrimination rules of the ADA. O'Connor refers to the legislative record as a means of determining Congress' *reasons* for an action. Testimony and studies are raw information and evidence, and do not of themselves establish Congress' reasons for the ADA. Motivations for enacting the ADA are expressed primarily in the House and Senate reports. Those documents, as just noted, do very little to elucidate Congressional thoughts about judicially determined intentional discrimination. Of course, it is possible that the Court will simply credit the testimony in the hearings and the studies. But to do so, it would have to return to the highly deferential "perceive a basis" test used in *Morgan* and later effectively abandoned in *Flores*. The Court would also have to give up an

343. *Kimel*, 120 S. Ct. at 648.

344. This willingness does not, to my mind, indicate that the Court will necessarily give deference to these findings. *Cf.* Ruth Colker, *supra* note 267, at 667-69 (arguing that the Court will give deference to Congressional fact-finding).

important means for enforcing the separation of powers at the federal level—affirmative justification by legislative record—which seemed so important in *Flores* and its progeny.

Even if the Court accepts the legislative record as adequate, there is a more serious problem with the ADA: its nearly limitless breadth. The anti-discrimination rules under Title II apply to all state and local government entities,[345] while the employment discrimination rules in Title I bind all such entities with more than 15 employees.[346] One can, of course, make an argument that the breadth of the ADA's rules is necessary to catch the difficult-to-detect occurrences of intentional discrimination against the disabled. But it would be unlikely that the Court would find that such an imbalance meets the test of proportionality and congruence required by *Flores*.[347] The nationwide breadth of the ADA is too similar to the situations in *Flores*, *Florida Prepaid*, and *Kimel*. In all three opinions, the Court faulted Congress for failing to tailor the legislation remedy to the scope of the problem by, for example, limiting the reach of the statute to areas of the country (*Flores*) or particular states (*Florida Prepaid*) where violations are occurring or by providing an expiration date for the statute (both). It is therefore likely that the Court would regard the ADA as too broad to be preventative and instead as an attempt to legislate the substance of the Equal Protection Clause.

In sum, the record left by Congress to justify the only form of discrimination against the disabled forbidden by the Equal Protection Clause is of questionable utility. The House and Senate reports may not establish a sufficient evidentiary foundation from which the Court can discern a widespread pattern of intentional discrimination against the disabled by state actors; the other pieces of the legislative record also are of questionable value. Perhaps it is unfair to tax a pre-*Flores* enactment with these requirements retroactively, but the Court showed the same lack of sympathy for RFRA and the ADEA in *Flores* and *Kimel*.

3. *Reasonable Accommodations*

Most of the anti-discrimination rules within the ADA can be classified as "reasonable accommodation" requirements. By reasonable accommodation, I refer to the provisions of the Act which impose an obligation on covered entities to change their policies, practices, procedures,

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345. 42 U.S.C. § 12131(1)(A) (1994) ("The term 'public entity' means *any* State or local government.") (emphasis added).

346. *Id.* § 12111(5)(A) ("The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees . . . ."). The Act further excludes the U.S., U.S. owned corporations, and Indian tribes from the definition of employer but not state and local governments. *Id.* § 12111(5)(B).

347. City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

or rules to permit a disabled person to participate or benefit, short of an undue burden or a fundamental alteration in the nature of the service or benefit.[348]

Title II and its regulations lack a separate, unitary definition of reasonable accommodation. Several individual provisions contain reasonable accommodation requirements.[349] Title II also incorporates the rules structure of Section 504 of the Rehabilitation Act as a floor.[350] The effect is to incorporate rules issued by federal funding agencies for their grantees, including their reasonable accommodation requirements.[351] This requirement, notably, applies even in the absence of proof of bias.[352] The accommodations implement Congress' desire, well documented in the legislative history, to eliminate conditions with "discriminatory effect"[353] that prohibit the integration of the disabled into society.

After *Kimel*, it is implausible to argue that the reasonable accommodations provisions of the Act serve a strictly remedial purpose. *Kimel* made clear that statutes purporting to effect the protections of the Equal Protection Clause must be evaluated in view of the rather light restrictions imposed on state actors by rational basis review. *Kimel* also made clear that state actors may use classifications such as age as proxies for other "qualities, abilities, or characteristics that are relevant to the State's legitimate interests."[354] Since disability classifications are governed by rational basis review, there is nothing to prevent a state actor as an equal protection matter from taking actions which have an impact upon the disabled so long as there is some plausible reason for doing so. Take the example of an inaccessible building. A failure to include ramps

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348. Title I defines "reasonable accommodation" expansively:

> The term "reasonable accommodation" may include:
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> 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 . . . examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

349. *See, e.g.*, 28 C.F.R. § 35.130(b)(7) (1999) (stating that public entities shall make reasonable modifications in policies, practices or procedures unless doing so would alter the nature of the program in question); *id.* § 35.130(b)(3)(ii) (forbidding criteria and methods of administration which have purpose or effect of defeating a public program's objectives).

350. *See* 42 U.S.C. § 12201 ("[N]othing in this Act shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title").

351. *See, e.g.*, 34 C.F.R. pt. 104 (1999) (higher education rules relating to admissions practices, the general treatment of students, housing, financial and employment assistance, and non-academic services).

352. *See, e.g.*, 28 C.F.R. § 35.130(b)(3) (public entity may not use criteria or methods of administration which have *effect* of discrimination).

353. 42 U.S.C. § 12101(a)(5).

354. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 646 (2000).

or other accessibility features can be explained as a legitimate strategy to simplify construction. Work rules that disabled persons may be less likely to meet, such as attendance requirements or physical performance standards, can likewise be explained as promoting workplace efficiency. Under *Kimel*, these state actions, with their implied disqualification of the disabled, should be viewed as proper governmental actions.

The reasonable accommodations provisions of the ADA commit the same sin that the ADEA did in *Kimel*: they impose on state and local governments substantive obligations that are "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[355] It is also implausible now to say that the undue burden, fundamental alteration, and necessity defenses in the statute narrow its reach to constitutionally offensive state actions. Generally speaking, covered entities are not required to afford accommodations, if doing so would impose an undue administrative or financial burden.[356] Covered entities are not required to create fundamental alterations in the nature of their programs.[357] Certain ADA provisions include exceptions for practices that are necessary to the performance of a job or conduct of a program.[358] Still, these exceptions are so narrowly phrased that they fail to limit the reach of the ADA to the constitutional ceiling. They are also constitutionally suspect in their own right, because they have the effect of altering rational basis review. To take advantage of these defenses, the governmental defendant must raise these defenses and sustain the burden of proof.[359] Putting the government in a defensive posture contradicts the presumption of regularity and assignment of the burden of proof to the plaintiff under rational basis review. Thus, like the BFOQ defense under the ADEA, the ADA's defenses are a "far cry from the rational basis standard."[360] At the same time, the ADA's defenses are sufficiently challenging that many state practices will not be able meet their tests. Hence, we are left with a substantial range of governmental practices that are permitted under the Equal Protection Clause but not under the ADA. Such an imbalance is hardly remedial.

There remains the matter of whether the reasonable accommodation

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355. *Kimel*, 120 S. Ct. at 645.

356. *See, e.g.*, 28 C.F.R. § 35.150(a)(3) (changes to existing facilities not required if resulting in an undue financial or administrative burden).

357. *See, e.g., id.* § 35.130(b)(7) (fundamental alteration defense to failure to modify procedures); *id.* § 35.130(b)(8) (defense to use of eligibility criteria which tend to screen out the disabled.).

358. *See, e.g.*, 42 U.S.C. § 12112(b)(6) (prohibiting qualification standards that tend to screen out the disabled unless such criteria are job-related and consistent with business necessity); 28 C.F.R. § 35.130(b)(8) (prohibition on eligibility criteria which screen out the disabled unless necessary for the provision of services).

359. *See generally* 2 TUCKER & GOLDSTEIN, *supra* note 3, 22:14-16 (1991 & Supp. 1996).

360. *Kimel*, 120 S. Ct. at 647.

rules could be treated as prophylactic measures. It is reasonable to assume that some actions adverse to the disabled are motivated by sufficient animosity to meet the *Cleburne* test for illegality and likewise reasonable to think that accommodation rules promote equal protection by substituting an effects test for the often elusive proof of bias. Nonetheless, it is likely that the current Court would view the ADA as too expansive to play a genuinely preventive role. Both in *Flores* and *Florida Prepaid*, the Court emphasized the necessity of keeping a Section 5 statute within sight of the constitutional violations that it targets. RFRA failed as a prophylactic measure because Congress made no attempt to bend its provisions, which applied potentially to every government action everywhere in the country, to the contours of the constitutional problem. The same imbalance between remedy and scope of problem doomed the Patent and Plant Variety Protection and Remedy Clarification Act in *Florida Prepaid*. To my mind, there is no significant difference between the ADA and the situation in *Flores* and *Florida Prepaid*.

Similarly, one could argue that the reasonable accommodation rules are necessary to correct the lingering effects of past governmental discrimination against the disabled. The legislative record does establish a record of past, wide-scale violations of the rights of the disabled, such as unnecessary institutionalization, forced sterilization, and prohibitions on marriage.[361] In the area of racial discrimination, the Court has recognized a broad remedial power in the federal courts to eliminate the vestiges of racial discrimination in public institutions.[362] These cases, moreover, place the burden on the defendant to establish that the effects of discrimination have been eliminated to the maximum extent feasible.[363] Reasonable accommodation rules, so the argument might go, are the functional equivalent of injunctions that mandate school zone redistricting and busing; they serve the remedial function of eliminating the current effects of past discrimination by state actors. Moreover, implementation of such remedies by statute carries out one of the underlying functions of Section 5: to vindicate constitutional rights efficiently through legislation rather than rely on the federal courts' necessarily

361. ACCOMMODATING THE SPECTRUM, *supra* note 334, at 19-21; *see also id.* at n.5 (collecting sources describing mistreatment of the disabled). *See generally* Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment*, 15 SANTA CLARA LAW. 855, 861-68 (1975) (describing history of unequal treatment of disabled). The Burgdorfs note that a substantial number of states have had statutes imposing legal and other disabilities on the disabled, including sterilization, prohibitions on marriage, denial of the right to enter into contracts and denial of the vote. *Id.* at 861-64.

362. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation"); Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968) (elimination of racial discrimination "root and branch").

363. *See, e.g.*, United States v. Fordice, 505 U.S. 717, 731 (1992), *cert. denied*, 522 U.S. 1084 (1998).

piecemeal approach.[364]

As a strategic matter, this argument should have great appeal to ADA plaintiffs. It excuses them from the rather difficult and perhaps impossible task of finding widespread, judicially defined equal protection violations that are ongoing; instead, these plaintiffs may focus on past mistreatment of the disabled, such as disqualifications from voting or marriage, sterilization, or the hideous conditions of institutions.[365] Moreover, Congress' power under Section 5 to regulate conduct that is *per se* constitutional for preventative purposes certainly gives it a greater remedial power than the courts', which is confined to relief that restores plaintiffs to the position they would have occupied had the wrongful conduct not occurred.[366]

Does the lingering effects argument work? In spite of the superficial appeal, I am doubtful. I have no quarrel with the proposition that past practices by the states, such as forced sterilization and institutionalization have contributed to negative attitudes that still work to the decided disadvantage of the disabled. One might object that it is inappropriate to use Section 5 to correct the lingering effects of state actions which were deemed constitutional at the time.[367] That argument is difficult to maintain, however, in light of the Court's decision in *Brown v. Board of Education*[368] to overturn the separate but equal standard of *Plessy v. Ferguson*.[369] There is no serious suggestion that Congress may not act under Section 5 to respond to the lingering effects of once legal racial segregation; the same should be true for the effects of disability discrimination.

A more serious issue is how Titles I and II actually relate to these negative attitudes that the states have caused or perpetuated over time. Common sense indicates that lingering biases are general to society and not unique to government entities; as noted above,[370] the legislative record of the ADA also treats discrimination as a general social condition rather than the result of current government actions or policies. The disadvantages that the disabled encounter on a daily basis result from a

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364. Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966).

365. *See, e.g.*, Burgdorf & Burgdorf, Jr., *supra* note 361, at 861-68 (describing history of unequal treatment of disabled by sterilization, prohibition of marriage, etc.).

366. *Swann*, 402 U.S. at 16 ("judicial powers may be exercised only on the basis of a constitutional violation").

367. *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1927) (sanctioning sterilization of "imbeciles"). A curious note: Carrie Buck was still alive in 1980, living with a sister who had also been sterilized. She was found to have normal intelligence. *See* Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENT. 331, 336 (1985). Professor Gould concludes that Buck was originally institutionalized to cover up an illegitimate pregnancy. *Id.* at 337.

368. 347 U.S. 483 (1954) (holding that racial segregation is inherently unequal).

369. 163 U.S. 537 (1896) (finding separate but equal facilities permissible), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

370. *See supra* text accompanying note 361.

pervasive attitude that the disabled are less capable than others of participating in ordinary activities.[371] Title III of the ADA, which covers public accommodations, and Title I, which regulates private (as well as public) employers with fifteen or more employees, confront these attitudes in large part by forcing private entities to make reasonable accommodations to otherwise qualified disabled individuals. But Title I (as applied to private employers) and Title III are Commerce Clause enactments regulating the commercial activities of private parties and thus are not subject to the heightened legislative justification requirements of Section 5.[372] Presumably, government decisions and actions will also be affected by the attitudes of its policymakers, officials and workers. The legislative history of the ADA, however, treats attitudinal barriers as a unitary phenomenon and does not neatly distinguish between the effects of lingering bias in the public and private sectors. Is this imprecision in the legislative record significant? Perhaps. It is reasonable to argue that Title II and Title I (as applied to state actors) are components of the ADA's overarching scheme to eradicate the effects of past discrimination against the disabled. On the other hand, Justice O'Connor's reluctance in *Kimel* to impute private biases to the public sector[373] raises the possibility that the Court might refuse to apply the lingering effects theory to the ADA, at least without specific Congressional findings that state and local government actions are tainted with the vestiges of discrimination.

Ultimately, the greatest problem with the lingering effects theory is once again the statute's sheer breadth of application to practically all state and local activities. The Court's insistence on proportionate and congruent responses to constitutional violations implies that a Section 5 measure designed to eliminate the effects of past practices should be tailored to the effects of those practices. A federal statute regulating state sterilization practices, for example, would more likely survive a Section 5 challenge. I rather doubt, however, that the current Court would accept the proposition that past unconstitutional practices by the states have resulted in a social environment so pervasively hostile to the disabled that they justify across the board regulation of state activities. Such an approach would be fundamentally at odds with the conclusion in *Cleburne* that the mentally retarded (and by implication the larger category of the disabled) do not require heightened scrutiny.[374]

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371. Olmstead v. L.C., 527 U.S. 581, 600 (1999).
372. *See generally infra* Part III.A.
373. Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 649 (2000).
374. *See supra* text accompanying notes 96-104.

4. The Integration Mandate

Integration of the disabled into American society is one of the overarching goals of the ADA. The Act explicitly identifies segregation as a form of discrimination against the disabled: "[H]istorically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[375] There are similar statements in the legislative history regarding the need to achieve the integration of the disabled into American economic and social life.[376] The clearest expression of the mainstreaming goal is found in the Title II regulation which requires that a "public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[377] There is also a prohibition of different or separate services unless necessary to provide benefits that are as effective as those provided to others.[378] Title I also has elements of the mainstreaming philosophy, for example, the rule that prohibits "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee."[379] In construing the Title II integration mandate last term in *Olmstead v. L.C.*, a case involving the institutionalization of mentally disabled patients, the Supreme Court posited two reasons for the rule.[380] First, the integration mandate attempts to combat the unwarranted assumption that persons who are isolated are incapable of participating in the life of the community.[381] Second, confinement diminishes the quality of life and the opportunities available to the disabled.[382] *Olmstead*, notably, reserved judgment on the constitutional validity of the integration rules.[383]

While there is not a constitutional mandate that the disabled be incorporated into society, one can construct a fairly convincing argument that the integration mandate has a prophylactic force. Unlike the reason-

375. 42 U.S.C. § 12101(a)(2) (1994); *see also id.* § 12101(a)(5) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including . . . segregation . . . .").

376. *See, e.g.*, S. REP. NO. 101-116, at 20 (1989) (need for "clear and comprehensive" mandate to integrate the disabled into the "economic and social mainstream of American life"); H.R. REP. NO. 101-485 (III), at 26 (1990) (ADA intended to end exclusion and segregation of handicapped); H.R. REP. NO. 101-485 (III), at 50 (rejecting separate-but-equal approach to public services to the disabled).

377. 28 C.F.R. § 35.130(d) (1990).

378. *Id.* § 35.130(b)(1)(iv).

379. 42 U.S.C. § 12112(b)(1) (emphasis added).

380. Olmstead v. L.C., 527 U.S. 581, 600-01 (1999).

381. *Olmstead*, 527 U.S. at 600.

382. *Id.* at 601.

383. *Id.* at 592 ("We recite these regulations with the caveat that we do not here determine their [constitutional] validity.").

able accommodation rules, which attempt to effect changes in superficially neutral requirements or practices, the integration mandate addresses situations where the disabled are subjected to a different rule or result. The facts of *Olmstead*, a Title II action where plaintiffs sought community based treatment instead of institutionalization, illustrate this distinction nicely.[384] The Court specifically noted that persons without mental illnesses could receive medical services without enduring the sacrifice of institutionalization.[385] This situation is conceptually different from, say, a Title II claim seeking as an accommodation the waiver of a generally applicable work rule. Segregating rules or results are suspicious in ways that general rules are not.[386] It is tempting to accept the legislative findings in the Act that "historically, society has tended to *isolate and segregate* individuals with disabilities"[387] and that they have been "subjected to a history of *purposeful* unequal treatment . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals,"[388] as well as similar statements in the legislative history.[389]

One can reconcile these two approaches to the remedy question by saying that a Section 5 statute must meet two tests. First, the provisions of the statute must refer to state actions which have been condemned by the judiciary and, second, must be supported by findings of a pattern of violations. Is the distinction significant? I think so. Under this interpretation, Congress would not be able to enact Section 5 legislation prohib-

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384. *Id.* at 588-96.

385. *Id.* at 601.

386. *Cf.* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that racial segregation is inherently unequal).

387. 42 U.S.C. § 12101(a)(2) (1994) (emphasis added).

388. *Id.* § 12101(a)(7) (emphasis added).

389. There seems to be a difference in analysis between Rehnquist's opinion in *Florida Prepaid Postsecondary Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999), and O'Connor's approach in *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000), that may or not be significant. O'Connor seems to separate the questions of whether the ADEA remedies or prevents constitutional violations. Her analysis of the remedy question is done without recourse to the legislative history. She concludes that the ADEA is disproportionate to any unconstitutional acts that "conceivably could be targeted by the Act." *Kimel*, 120 S. Ct. at 645. Her technique on this point is to compare the text of the ADEA to the principles enunciated in the Court's equal protection cases dealing with age classification. She considers the legislative record only on the question of prevention and does so there to determine whether Congress had reason to believe that preventative measures were necessary. She appears to be using a subjective test, *i.e.*, the reasonable Congress standard.

Rehnquist's opinion in *Florida Prepaid* observes a nominal distinction between remedial and preventive measures, but his approach is different. *See Florida Prepaid*, 527 U.S. at 639 ("Congress . . . must tailor its legislative scheme to remedying *or* preventing such conduct.") (emphasis added). The analysis does not neatly separate the remedy and prevention as does *Kimel*. *See, e.g.*, *id.* at 646 ("provisions of the Patent Remedy Act . . . are . . . 'out of proportion to a supposed remedial *or* preventative object . . . .'") (emphasis added) (citations omitted). Rehnquist asks not whether the Patent Remedy Act targets conceivably illegal conduct but whether violations are actually occurring. *Id.* at 639-40. Thus, he seems to say Congress cannot act remedially unless violations are actually occurring. *See id.*

iting purely prejudicial state actions against the disabled, even after *Cleburne* and *Heller*, without also finding an existing pattern of such conduct. This leads us to the conclusion that actions which separate the disabled from everyone else are tinged with prejudice.

The viability of the integration mandate under Section 5 depends upon how much significance we attach to the paucity of legislative findings of intentional discrimination against the disabled. Justice O'Connor's opinion in *Kimel* gives us some guidance on this point. She noted that the fact that the ADEA prohibits very little that is unconstitutional does not end the analysis, but that the analysis must go on and consider separately whether a statute has prophylactic effect.[390] She then focused on the legislative record for Congress' reasons for enacting the ADEA, stating that one means of approaching the prophylaxis question is to review the record for evidence of Congress' motivations.[391] She concluded that Congress had enacted an "unwarranted response to a perhaps inconsequential problem," because it never identified any pattern of discrimination by the states, much less illegal discrimination.[392] She added that the evidence of the pertinent discrimination consisted of "isolated sentences clipped from floor debates and legislative reports."[393] The mainstreaming rules may not survive this analysis. As already noted, the legislative record of the ADA is problematic in establishing the widespread pattern of intentional discrimination by state actors that is required by the interaction of *Florida Prepaid* and the *Cleburne* lines of cases.[394] Moreover, the legislative history appears to lack statements that would establish that Congress viewed the mainstreaming requirement as a means of preventing intentional discrimination.

If the mainstreaming rules fail on this account, it will be a genuine pity, since they are some of the few provisions of the ADA that otherwise meet the congruence and proportionality requirement of the *Flores* line. The specific requirement of the Act is that services be delivered in "the most integrated setting *appropriate* to the needs of qualified individuals with disabilities."[395] As such it seems closer to the narrowly fashioned restrictions of the Voting Rights Act that the Court noted approvingly in *Flores*. The integration mandate does not apply to all actions by state or local government, nor does it dictate the content of services. It kicks in only when services or employment opportunities can take place appropriately in an unsegregated environment.

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390. *Kimel*, 120 S. Ct. at 648.
391. *Id.* at 648-49.
392. *Id.*
393. *Id.* at 649.
394. *See supra* text accompanying notes 299-344.
395. 28 C.F.R. § 35.130(d) (1999) (emphasis added).

There is an argument that the integration mandate encroaches too deeply into the prerogatives that rational basis review assigns to the states and their units. *Cleburne* made much of the need to allow the legislature, under professional guidance, to make the highly technical judgments that the widely varying circumstances of the mentally retarded required.[396] The integration mandate, however, as it is structured, preserves the ability of state actors to address the complexities of the various subgroups of disabled persons. The rule applies only when services or opportunities can be delivered in a more integrated setting.[397] Nothing in the mandate requires that the covered entity provide a benefit which is inappropriate or ignore professional judgment.[398] The rule comes into play only when comparable benefits could be offered in more integrated situations, hence the decision to utilize the more restrictive setting is suspicious. To the extent that the less restrictive placement has an economic impact, the regulations provide a separate fundamental alteration defense.[399]

5. *Pre-Employment Inquiries*

Title I contains a prohibition against pre-hiring inquiries into the disability status of a job applicant, as well as a prohibition against pre-employment physical exams. Employers are forbidden to conduct pre-employment medical examinations of job applicants or to inquire into the existence of a disability.[400] Employers may only ask how the applicant will perform a job.[401] It is permissible, however, to condition an employment offer on successful completion of post-offer medical examinations so long as the examination is given to all entering employees[402] and so long as all resulting medical records and examinations are kept confidentially in separate files.[403] The examination must also meet the standard of "job-related and consistent with business necessity."[404]

The validity of the inquiry ban under Section 5 would appear to rise and fall on the prophylactic force of such a rule. Of course, there is

396. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442-43 (1985).

397. Olmstead v. L.C., 527 U.S. 581, 602 (1999) (citing 28 C.F.R. § 35.130(d)).

398. *Olmstead*, 527 U.S. at 601-02.

399. The Title II integration regulation does not contain an explicit undue burden defense. The Court in *Olmstead*, however, considered the state's excess cost arguments under the fundamental alteration defense for modifications of policies and practices. *See id.* at 603-04 (applying 28 C.F.R. § 35.130(b)(7)). The Court indicated that the cost of relief for plaintiffs in a particular case had to be balanced against the resources available and the state's obligation to provide similar services to others. *Id.*

400. 42 U.S.C. § 12112(d)(2)(A) (1994).

401. *Id.* § 12112(d)(2)(B).

402. *Id.* § 12112(d)(3)(A).

403. *Id.* § 12112(d)(3)(B).

404. *Id.* § 12112(d)(4)(A).

nothing *per se* unconstitutional about inquiring into disability status in an employment interview or on an application form; thus, the inquiry ban can serve no strictly remedial purpose. We also face the problem, as set out more fully in the previous subsections, that the legislative history does not document well a pattern of intentionally biased actions against the disabled, much less intentional misuse of pre-employment information by state actors. But if these problems are not fatal to the ADA, admittedly a big "if," then the preventative power of the inquiry-ban is self-evident. There is simply no doubt that reducing the information about disabilities will lessen the likelihood that such information will be misused in hiring decisions. The limitation of the ban to the pre-hiring stage, in conjunction with permitting post-offer medical exams, gives this provision of the ADA the narrowness that is required to meet the tailoring requirements of *Flores*, *Florida Prepaid*, and *Kimel*.

III. THE ADA AND THE COMMERCE CLAUSE

One might argue that the significance of Section 5 for the ADA is strictly jurisdictional. The logic here would be that once the abrogation issue is resolved, then the substantive provisions of the ADA apply to state and local defendants as Commerce Clause enactments, whether the claim is brought in federal or state court. The Seventh Circuit suggested this result in its recent decision in *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University*.[405] In holding that the abrogation of state sovereign immunity in the ADA was invalid under Section 5, the court stated in dicta that "Congress has power under the Commerce Clause to adopt the ADA's rules."[406] The court theorized that the ADA would be sustained under the Commerce Clause as a regulation that was generally applicable to public and private parties,[407] and that "[a]ll our holding means is that *private* litigation to enforce the ADA may not proceed in *federal* court."[408] Rather than confirming the validity of the ADA, however, the Seventh Circuit's opinion illustrates the danger of relying on dicta.[409] The Commerce Clause issue was not litigated in *Erickson*. Had it been litigated, the parties and the panel would have been forced to consider the narrowing effects of the Supreme Court's recent Commerce Clause cases.[410]

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405. 207 F.3d 945 (7th Cir. 2000).

406. *Erickson*, 207 F.3d. at 947.

407. *Id.* at 948-52. *See generally infra* Part III.B (discussing application of Commerce Clause to statutes regulating states).

408. *Erickson*, 207 F.3d at 952.

409. *See id.* at 947.

410. *Erickson* was brought under Title I of the ADA (employment). *Id.* at 946. As I argue below, Title I is likely to be found proper under the Commerce Cause, since it applies generally to

Commerce Clause jurisprudence is presently in flux and perhaps always has been. Any history of the Supreme Court's attempts to set boundaries between permissible and forbidden attempts by Congress to regulate the states under the commerce power is likely to seem confusing at worst and cyclical at best. At times, the Court has favored vigorous Congressional use of the Commerce Clause, and, at others, it has protected the States as sovereign entities. At the moment, we are technically in a pro-federal phase. The combined effects of the Court's liberal definitions of interstate commerce and its 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*[411] established a theoretical basis for permitting extensive federal regulation of states as an aspect of Congress' broad power to regulate anything with a whiff of interstate commerce about it.[412] Subsequent decisions such as *New York v United States*,[413] *United States v. Lopez*,[414] and *Printz v. United States*,[415] however, have chipped away at *Garcia*'s carte blanche for federal regulation of states to the point that it is uncertain whether the federal commerce power allows Congress to impose many parts of the ADA on the states.

Indeed, this term the Court has an opportunity to clarify the reach of the Commerce Clause enactments. On January 11th, the Court heard arguments in *Unites States v. Morrison*.[416] At issue in *Morrison*, in pertinent part,[417] is whether the Violence Against Women Act ("VAWA"), which creates a private cause of action in favor of women who are victims of *intrastate* gender motivated violence and provides remedies for lost earnings, medical expenses and other pecuniary and non-pecuniary losses, is valid under the Commerce Clause.[418] *Morrison* may give some indication of how far the Court is willing to retract the commerce power as a general matter. *Morrison* also gives the Court the specific opportu-

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public and private entities. *See infra* Part III.C.2.a. I part company with the *Erickson* court over the assertion that the ADA, in its entirety, is valid under the commerce power. As discussed below, the application of Title II to governmental activities regarding facility access and certain uniquely governmental functions may fall outside of the Congress' commerce powers. *See infra* Part III.C.2.c-d. In such cases, the validity of the substantive provisions of the ADA becomes critical.

411. 469 U.S. 528 (1985).

412. *Garcia*, 469 U.S. at 537.

413. 505 U.S. 144 (1992).

414. 514 U.S. 549 (1995).

415. 521 U.S. 898 (1997).

416. 169 F.3d 820 (4th Cir. 1999), *cert. granted*, 527 U.S. 1068 (Sept. 28, 1999).

417. In *Morrison*, the Court also granted certiorari on a Section 5 question. The novel issue in *Morrison* is whether Congress may use its Section 5 powers to create a cause of action against private individuals. The United States has raised the arguments that the failure of state justice systems to respond to gender bias crimes constitutes state action and an equal protection violation and that Congress is permitted to address this situation though the creation of private causes of action against offenders that supplements the state process. *See* Brief for the United States, United States v. Morrison, 120 S. Ct. 1740 (2000) (No. 99-5, 99-29).

418. *See* 42 U.S.C. § 13981(c) (1994) (creating private cause of action for gender motivated crimes and authorizing compensatory and punitive damages, injunctive and declaratory relief).

nity to clarify its apparent holding in *Lopez* that the Commerce Clause permits Congress to regulate only activities of a commercial character.[419] VAWA, though, is unusual in that it contains extensive Congressional findings of the effects of violence against women on interstate commerce. Such clarity may or may not distinguish it from the Gun Free School Zones Act of 1990, at issue in *Lopez*, or from the ADA. At any rate, the decision will come after this Article has been published. Such are the realities of discussing rapidly evolving areas of law in symposium issues of law reviews.

My goal in this Part is to raise the issue of whether the ADA is a proper Commerce Clause enactment. Although my preliminary conclusion is that many, though not all of the ADA's sections pass Commerce Clause muster, I think that it is more important for the reader to appreciate the growing potential for challenges to the ADA on a constitutional theory that has so far been lightly litigated. I also think it important that the reader realize that the substantive provisions of the ADA will not be automatically vindicated by the Commerce Clause once the sovereign immunity issues are resolved. In Part III.A, I briefly set out Congress' commerce powers as a general matter. Here, I deal with the apparent, and significant, holding in *Lopez* that Congress' power to regulate intrastate activities with interstate effects is limited to activities of a commercial character.[420] In subpart B, I review the Court's decisions relating to regulation of the states under the Commerce Clause, focusing on *Garcia*, the anti-commandeering decisions of *New York* and *Printz*, and the recent decision of *Reno v. Condon*.[421] Finally, in Part III.C, I try my hand at applying these principles to the ADA.

A. Congressional Regulation of Interstate Commerce Generally

Since the Court's 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.*,[422] Congress has perhaps enjoyed more authority under the Commerce Clause than any other grant of power in Article I. Prior to that year, the Court had generally taken a narrow view of what constituted interstate commerce and had shown little deference to Congressional judgments about the desirability of federal regulation of an increasingly interrelated and nationalized economy.[423] To the Court of that era, for

419. *Lopez*, 514 U.S. at 558-68.

420. *Id.*

421. *See infra* Part III.B.

422. 301 U.S. 1 (1937).

423. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4, at 808-11 (3d ed. 2000). Professor Tribe notes that the restrictive approach to the Interstate Commerce Clause abandoned the initial view of *Gibbons v. Ogden*, in which Chief Justice Marshall, in dictum, took a broad view of the federal power to regulate any commercial activities with an impact, even an indirect

example, commerce constituted the trade or exchange of goods and did not include manufacturing. A quotation from *United States v. E.C. Knight Co.*[424] illustrates how archaic and hide-bound the Court's mentality was: "Commerce succeeds to manufacture, and is not a part of it."[425] From *Jones & Laughlin* in 1937 until *Lopez*[426] in 1995, no doubt in reaction to the political realities of the Great Depression and a growing awareness of the interconnectedness of the American economy,[427] the Court abandoned its restrained view of what was commerce and elaborated an extremely deferential Commerce Clause jurisprudence. During this period, the Court only once struck down a congressional enactment as exceeding the commerce power but then changed its mind nine years later.[428]

As explained in the *Lopez* decision, the essence of the post-1937 scheme is that Congress may regulate interstate commerce in three areas.[429] First, Congress may regulate the "channels" of interstate commerce.[430] An example of this type of regulation is found in *United States v. Darby,*[431] where the Court sustained the Fair Labor Standards Act of 1938.[432] It reasoned that Congress had the power under the Commerce Clause to condition the movement of goods in interstate commerce on compliance with wage and hour requirements.[433] Significantly, Congress' power over the channels of commerce does not depend upon showing that the activity in question has a substantial effect on interstate commerce.[434] The channels of commerce theory was the basis in *Heart of Atlanta Motel v. United States*[435] for sustaining the application of Title II of the Civil Rights Act. There the Court confirmed the power of Congress to control the channels of interstate commerce even for the social purpose of defeating racial discrimination in public accommodations.[436]

Second, Congress has an equally broad power to protect the instru-

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one, on interstate commerce. *See id.* § 5-4 at 808 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

424. 156 U.S. 1 (1894).

425. *Knight*, 156 U.S. at 12.

426. 514 U.S. 549 (1995).

427. *See* TRIBE, *supra* note 423, § 5-4 at 811-12.

428. National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (invalidating minimum wage requirements of Fair Labor Standards Act as applied to states).

429. *Lopez*, 514 U.S. at 558.

430. *Id.*

431. 312 U.S. 100 (1941).

432. *Darby*, 312 U.S. at 125.

433. *Id.* at 114.

434. *See* United States v. Robertson, 514 U.S. 669, 671 (1995) (stating that the substantial effects requirement applies only to intrastate activities that have substantial interstate effects).

435. 379 U.S. 241 (1964).

436. *Heart of Atlanta Motel*, 379 U.S. at 256-62.

mentalities of interstate commerce, even if the threat arises only from intrastate activities.[437] Examples here include the regulation of railroad rates, even of intrastate railroads that serve interstate passengers[438] and laws restricting the destruction of aircraft.[439] The dynamics of this area are essentially the same as those that govern the channels of commerce.[440] Here, there is also no requirement that the regulated activity have a substantial impact on interstate commerce.[441] *Lopez* also included in this category two other concepts. First, Congress may regulate "persons or things in interstate commerce."[442] An example of a "person" in commerce would be the corporate operator of a mining operation that receives workers or equipment from other states.[443] An example of a "thing" in interstate commerce would be lottery tickets that are sold across state lines[444] or motor vehicle records sold to marketers.[445] Second, Congress may regulate activities with a jurisdictional link to interstate commerce.[446] An example would be a regulation prohibiting mislabeling of drugs that have previously been shipped in interstate commerce.[447]

Finally, and most important, Congress may control purely *intrastate* activities that have a substantial impact on interstate commerce.[448] Over the period in question, the Court went out of its way to find that practically any intrastate activity had a substantial impact on commerce. In the inaugural case of *Jones & Laughlin*, the Court abandoned its prior distinction between manufacturing and commerce, finding that Congress could regulate labor relations in a plant because of the possibility that work stoppages would have a serious effect on interstate commerce.[449] While continuing to observe the terminology, the Court devised means by which any Congressional enactment regulating intrastate activities

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437. United States v. Lopez, 514 U.S. 549, 558 (1995).

438. The Shreveport Rate Cases, 234 U.S. 342 (1914).

439. Perez v. United States, 402 U.S. 146, 150 (1971) (citing 18 U.S.C. § 32).

440. Professor Tribe asserts that the instrumentalities prong tends to involve fewer cases of using the commerce power as a hook to accomplish social goals; rather, it is employed as authority for measures that keep the local components of the interstate system in working order. TRIBE, *supra* note 423, § 5-5, at 828.

441. *Id.* at 831.

442. *Lopez*, 514 U.S. at 558.

443. TRIBE, *supra* note 423, § 5-5, at 829 (citing United States v. Robertson, 514 U.S. 669 (1995)).

444. *Id.* (citing Champion v. Ames, 188 U.S. 321 (1903)).

445. Reno v. Condon, 528 U.S. 141 (2000).

446. TRIBE, *supra* note 423, § 5-5, at 829.

447. *Id.* (citing United States v. Sullivan, 332 U.S. 689 (1948)).

448. United States v. Lopez, 514 U.S. 549, 558 (1995).

449. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-42 (1937); *see generally* TRIBE, *supra* note 427, § 5-4, at 811-12.

would meet the substantial effects test.[450] The effects test was applied specifically to intrastate commerce in *United States v. Darby*.[451] There, the Court sustained the Fair Labor Standards Act, which regulated minimum wages and maximum hours and imposed record keeping requirements on employers, on a theory that Congress was justified in controlling intrastate activities that affect interstate commerce.[452] The Court took this approach a step further in *Wickard v. Filburn*.[453] In *Filburn*, the Court held that Congress could control wheat production by regulating a farmer who raised a crop in part for home consumption.[454] Even though Farmer Filburn was not bringing all his wheat to market and would not have caused a ripple in the market had he done so, the Court held that in the aggregate, private crops could have a significant effect on supply and demand that would disrupt the government's attempts to regulate the market.[455] The Court's willingness to promote Congressional regulation of commerce was bolstered by the Court's nearly complete deference to Congressional findings of a need for legislation,[456] even inferring findings when Congress had made none.[457] In short, the Court appeared content to allow Congress complete freedom to act under the Commerce Clause through its liberal interpretation of the substantial effects rule, the aggregation principle, and unquestioning deference to the legislative branch.

Categories one and two appear to be uncontroversial for the Court.[458] Congress' power to act under the substantial effects test, however, was restricted with the Court's 1995 opinion in *United States v. Lopez*.[459] The *Lopez* Court concluded that the Gun Free School Zones Act of 1990, which criminalized the possession of firearms in school zones, exceeded Congress' power under the Commerce Clause.[460] The Court's opinion is noteworthy in two respects. First, Chief Justice Rehnquist's majority opinion gave no deference to Congress' judgment on the need for legislation. In place of the old respect for Congressional choices, he spoke now of an "independent evaluation of constitutionality under the Commerce Clause"[461] and of the Court's willingness to *consider* legisla-

450. TRIBE, *supra* note 423, § 5-5 at 812.
451. 312 U.S. 100, 118-19 (1941).
452. *Darby*, 312 U.S. at 118.
453. 317 U.S. 111 (1942).
454. *Filburn*, 317 U.S. at 127-29.
455. *Id.* at 127-28.
456. TRIBE, *supra* note 423, § 5-4, at 814-15.
457. *Id.* at 815-16; *see generally* Perez v. United States, 402 U.S. 146, 146-57 (1971).
458. TRIBE, *supra* note 423, § 5-5; *see also, e.g.*, Reno v. Condon, 120 S. Ct. 666 (2000) (applying "thing" in commerce theory by unanimous vote).
459. 514 U.S. 549, 558-68 (1995).
460. *Lopez*, 514 U.S. at 551.
461. *Id.* at 562.

tive findings and committee reports for guidance when the link between a statute and interstate commerce does not appear to the "naked eye."[462]

Second, and perhaps more important, the *Lopez* Court restored an effective substantial effects test to Commerce Clause analysis. Rehnquist ultimately dismissed the link between possession of guns on school grounds and interstate commerce as inadequate.[463] Given the application of the ADA to many government functions that are not normally viewed as commerce, much less interstate commerce, Rehnquist's reasoning is worth examining in some detail. Since the Gun Free School Zones Act had no jurisdictional element to link it to interstate commerce, such as a requirement that the gun traveled through interstate commerce, the issue for Rehnquist was whether the presence of guns in school yards had a tight enough relationship with interstate commerce.[464] The United States had argued that the link lay in the effects of school violence on economic activity: 1) the substantial costs of violent crime were spread generally by insurance mechanisms;[465] 2) the existence of violent conditions discouraged travel to unsafe areas;[466] and 3) disruptions in the learning environment reduced the productivity of the citizenry.[467] The United States persuaded Justice Breyer, who dissented along these lines, but not the five-justice majority.[468] To Rehnquist, the problem with this reasoning was that it had no limitation, and effectively wrote the Commerce Clause as a limitation on federal power out of existence.[469] He pointed out that the same relationship could be found between each state's family or child custody laws and national productivity or the costs of crime.[470] Thus, Justice Breyer's reasoning would have permitted Congress to intrude on areas of traditional state authority at will.[471]

Although the Court spoke in terms of finding a "substantial" link to interstate commerce at the outset of its analysis[472] and referred approvingly to instances where Congress regulated economic activities with substantial effects on commerce, the gravamen of the analysis was that

462. *Id.* at 563.
463. *Id.* at 567.
464. *Id.* at 561.
465. *Lopez*, 514 U.S. at 563-64.
466. *Id.* at 564.
467. *Id.*
468. *Id.* at 615-44 (Breyer, J., dissenting).
469. *Id.* at 564.
470. *Lopez*, 514 U.S. at 564.
471. *See id.*
472. *Id.* at 559 ("[A]dmittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect" interstate commerce. . . . We conclude . . . that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.").

these activities were economic in character.[473] Rehnquist faulted the Gun Free School Zones Act as a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise."[474] He concluded that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[475] Under the aggregation principle of *Wickard v. Filburn*, however, the cumulative effects of these activities should have been sufficient to meet the substantiality test.[476] A conclusion that the total effects of gun possession do not meet the substantial relation test must be based on the character and not the level of the activity.[477] Justice Kennedy's concurring opinion, joined by Justice O'Connor, construed the Court's opinion as based on the fact that neither the actors nor conduct involved were commercial, and that the statute itself had no evident commercial nexus.[478]

The now pending case of *United States v. Morrison* gives the Court the opportunity to clarify the holding in *Lopez*. In *Morrison*, the plaintiff brought a civil action under the Violence Against Women Act[479] against two Virginia Tech football players who, she alleged, sexually assaulted her. Her claim was dismissed by the District Court, in pertinent part, as lying beyond the commerce power.[480] The Fourth Circuit affirmed.[481] At first blush, VAWA does not seem to be significantly different from the Gun Free School Zones Act. Both are attempts to use the Commerce Clause to regulate actions which are typically crimes under state law. If *Lopez* really meant that the Commerce Clause stops where noncommercial activity begins, then VAWA should fail as a Commerce Clause enactment.

Both the United States and the petitioner in *Morrison* attempted to distinguish *Lopez* by arguing that the Gun Free School Zones Act failed because Congress made no findings as to the effects of gun possession in schools on interstate commerce. VAWA, in contrast, makes extensive findings as to the effect of gender-based violence on interstate commerce and the failure of the states to act against this problem.[482] Predic-

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473. *Id.* at 559-60.

474. *Id.* at 561.

475. *Lopez*, 514 U.S. at 567.

476. *Id.* at 616 (Breyer, J., dissenting).

477. *See id.* at 580 (Kennedy, J., concurring).

478. *Id.*

479. The VAWA creates a substantive right to be free of gender motivated violence, 42 U.S.C. § 13981(b) (1994), enforceable through a private cause of action for compensatory and punitive damages, injunctive, and declaratory relief. *Id.* § 13981(c).

480. Brzonkala v. Virginia Polytechnic and St. Univ., 935 F. Supp. 779 (W.D. W. Va. 1996).

481. Brzonkala v. Virginia Polytechnic Inst. and St. Univ., 169 F.3d 820 (4th Cir. 1999), *aff'd sub nom.* United States v. Morrison, 120 S. Ct. 1740 (2000).

482. Brief for the United States at 20-30, United States v. Morrison, 120 S. Ct. 1740 (2000)

tions about pending cases are a risky business. It is of course possible that the Court will credit Congress' painstaking attempts to justify VAWA as a Commerce Clause measure and recast *Lopez* as a warning to Congress to be explicit about its constitutional authority. Such a shift, however, would be at odds with the *Lopez* Court's emphasis on the need for independent judicial review of Commerce Clause enactments. More important, the Court could not do so without abandoning the neat distinction between commercial and other activities which lurked below the surface of Rehnquist's opinion in *Lopez*[483] and was taken up explicitly in Kennedy's concurrence.[484] The Court's overriding concern in *Lopez* was to place some limit on Congress' power to exploit the Commerce Clause to achieve a general police power.[485] A conclusion in *Morrison* that Congress may create a civil action for victims of gender-based violence would indicate that the Court no longer entertains such concerns. Given the Court's deliberate efforts to protect the states as sovereign entities, I doubt that this is the case. On the other hand, an explicit holding by the Court that the substantial effects test is confined to economic activities should have far reaching effects for statutes such as the ADA.

B. The Commerce Power and the States

To understand Congress' power to regulate the states under the Commerce Clause, we must address the issue of whether and how state sovereignty serves as a limitation on the federal power. In essence, this is a question of whether and how the Tenth Amendment[486] constrains the federal commerce power. The Court has taken shifting positions on this matter over the years. In the early Nineteenth Century, the Court viewed the Tenth Amendment as standing for the proposition that Congress did not violate state sovereignty, so long as it acted within its commerce power.[487] By the early Twentieth Century, however, a more protective view emerged. The Court of that era viewed the Tenth Amendment as creating an enclave of state sovereignty into which the federal powers

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(No. 99-5 & 99-29); Brief for Petitioner, *id.* at 26-29. The legislative record for VAWA is remarkably specific. Congress found, for example, that violent crimes against women had a substantial effect on interstate commerce because it discouraged women from participation in economic activities because of an unwillingness to travel to certain crime-prone areas, H.R. REP. NO. 711 (1994), and that such violence cost three billion dollars per year, S. REP. No. 545 (1990).

483. *See Lopez*, 514 U.S. at 551-68.

484. *Id.* at 580-81.

485. *See id.* at 558-68.

486. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

487. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) ("[T]he power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government.").

could not encroach. A typical holding was *Hammer v. Dagenhart*,[488] where the Court invalidated rules against the shipment in interstate commerce of goods made with child labor.[489] The Court read the commerce power narrowly to preserve the states' police power to regulate local trade and manufacturing.[490] By mid-Century, the Court had come full circle to the belief that the Amendment was a reflection that the Constitution assigns some powers to the federal government and preserves others in the states. As Justice Stone said in *United States v. Darby*, the Tenth Amendment is simply a truism that the states retain what has not been surrendered.[491] The *Darby* view prevailed until the Nineties. A temporary deviation, however, came in *National League of Cities v. Usery*.[492]

National League of Cities took the position that state sovereignty constituted a restriction on federal legislative power that was independent of the limits in the Commerce Clause.[493] Overruling its prior decision in *Maryland v. Wirtz*,[494] the Court held that the Fair Labor Standards Act's wage and hour provisions could not be applied to state and local governments.[495] The Court reasoned that while such regulations were proper under the Commerce Clause, the FLSA's wage and hour rules impermissibly encroached on traditional governmental functions that were beyond Congress' powers.[496] To the *National League of Cities* Court, the power to set the wages and hours of persons who carried on governmental functions was an attribute of sovereignty; moreover, such determinations were essential to the separate and independent existence of the states.[497] As elaborated by a later decision, *National League of Cities* protected state governments and subdivisions when the federal legislation: 1) regulated states as states; 2) addressed matters that were indisputably attributes of state sovereignty; 3) directly impaired a state's ability to structure integral operations in areas of traditional government functions; and 4) did not require state submission to a federal interest.[498]

Even a cursory glance at the *National League of Cities* test should leave the reader with the impression of how vague such concepts are and how difficult they are to apply. Nine years later in *Garcia v. San Anto-*

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488. 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).
489. *Hammer*, 247 U.S. at 259.
490. *Id.* at 276.
491. *Darby*, 312 U.S. at 124.
492. 426 U.S. 833 (1976).
493. *National League of Cities*, 426 U.S. at 840.
494. 392 U.S. 183 (1968).
495. *National League of Cities*, 426 U.S. at 854.
496. *Id.* at 841-42.
497. *See id.* at 840-56.
498. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287-88 (1981).

nio Metropolitan Transit Authority, the Court overruled *National League of Cities*.[499] Justice Blackmun's[500] opinion for the Court emphasized how unworkable and elusive the concept of "traditional government functions" had been.[501] It also recanted *National League of Cities*' underlying theory of state sovereignty.

Though Blackmun acknowledged that states were an essential ingredient in the federal system, he argued that state sovereignty was not to be protected by *a priori* definitions of the attributes of state sovereignty.[502] Instead, he reasoned that the states' protection inhered in the structure of the federal government as a whole, which protected states from federal overreaching by such devices as the selection of presidential electors or senators.[503] He concluded that the "fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."[504] As proof of his point, Blackmun offered the fact that the wage and hour provisions of the FSLA simply applied to states the same rules that it applied to private employers.[505] Justice Rehnquist filed a terse, provocative dissent in *Garcia*, stating that the Court would revisit *Garcia* sooner or later and correct its error.[506]

The Court has yet to overrule *Garcia*, but it has backed away from *Garcia*'s theory of structural protections of federalism. Indeed, state sovereignty was ascendant during the Nineties. The pro-state trend began in 1991 with *Gregory v. Ashcroft*.[507] The Court rejected an Age Discrimination in Employment Act ("ADEA") challenge to a Missouri constitutional provision setting mandatory retirement ages for state judges.[508] Justice O'Connor's opinion held that the attempts by Congress to intrude upon core state functions must be phrased in unmistakably clear language.[509] Although the decision in *Gregory* amounted to a rule

499. 469 U.S. 528 (1985).

500. Justice Blackmun, notably, concurred with the majority in *National League of Cities*. He indicated that he was troubled by some of the implications of the decision, but understood it to permit a balancing of the federal and state interests involved. *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring).

501. *Garcia*, 469 U.S. at 539-47.

502. *Id.* at 547-48.

503. *Id.* at 550-52.

504. *Id.* at 554.

505. *Id.* Subsequently, *Garcia* appears to be viewed primarily by the Court as a rule that Congress may impose rules of general application on the states. *See, e.g.*, South Carolina v. Baker, 485 U.S. 505 (1988) (validating application of Tax Equity and Fiscal Responsibility Act of 1982 to state and local governments as law of general applicability); New York v. United States, 505 U.S. 144, 160 (1992) (*Garcia* permits rules of general application which incidentally regulate states); Printz v. United States, 521 U.S. 898, 932 (1997) (same).

506. *Garcia*, 469 U.S. at 579-80 (Rehnquist, J., dissenting).

507. 501 U.S. 452 (1991).

508. *Gregory*, 501 U.S. at 452.

509. *Id.* at 460.

of construction rather than a Tenth Amendment decision, and could not have been otherwise without overruling *Garcia*,[510] the contrast with *Garcia* was palpable. While *Garcia* trusted the federal political process to protect state interests, *Gregory* turns on skepticism of the political process. O'Connor emphasized that the chief benefit of the federal system is to protect fundamental liberties by preventing the accumulation of power in any one locus of government and thereby lessening the chance of abuse and tyranny.[511] Since the establishment of mandatory retirement ages for judges is a fundamental decision for a sovereign entity[512] and might upset the delicate balance between state and national power, Congress must first state its intentions clearly.

Gregory also set the tone for the opinions that followed. Two significant state sovereignty decisions followed in the Nineties concerning the power of the federal Congress to require state or local officials to perform duties under federal legislation. In *New York v. United States*,[513] decided in 1992, the Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 which required states either to regulate or take title to certain radioactive wastes. Pointing out that Congress could have regulated producers of radioactive wastes directly under its commerce power, O'Connor reasoned that it was impermissible for Congress to commandeer a state legislature to effect a federal policy.[514] She pointed to statements of the Framers that the Constitution contemplated direct federal regulation of its constituents, as opposed to the system of national government through the states that had failed under the Articles of Confederation.[515] She also justified her holding by reference to the structure of the federal system. Echoing her opinion in *Gregory*, O'Connor argued that the Constitution provides for a system of dual sovereignty in which the states retain substantial powers independent of federal authority.[516] The federal power, in contrast, is supreme but only within its narrowly drawn and enumerated confines. Either government, moreover, is accountable to its constituents

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510. *See id.* at 464 ("Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.").

511. *See id.* at 458-59. Or, in Lord Acton's commonly recited phrase: "Power tends to corrupt and absolute power corrupts absolutely." Letter from Lord Alfred Acton to Mandell Creighton (April 5, 1887), *reprinted in* LORD ACTON, ESSAYS ON FREEDOM AND POWER 335 (Gertrude Himmelfarb ed., 1957).

512. *Gregory*, 501 U.S. at 460.

513. 505 U.S. 144 (1992).

514. *New York*, 505 U.S. at 159-60.

515. *Id.* at 163-66.

516. *Id.* at 167.

within its constitutionally assigned domain.[517] The constitutional flaw of commandeering is that it skews accountability. Federal directives to states, such as the Low-Level Radioactive Waste Policy Amendments, threaten to destroy the accountability of both federal and state governments by confusing the voters as to the source of the action.[518] The electorate, in short, cannot rein in government if it does not understand the source of authority for the actions.[519] The principle of *New York* was extended from state legislative to executive functions in 1997 in *Printz v. United States*.[520] There the Court held that the interim provisions of the Brady Handgun Violence Prevention Act,[521] requiring local enforcement officers to participate in background checks of gun purchasers, constituted a forbidden commandeering of state officials.

The Court's most recent foray into the state sovereignty issue came this year in *Reno v. Condon*.[522] At issue were the provisions of the Drivers Privacy Protection Act of 1994 ("DPPA").[523] The DPPA imposed restrictions on the release of information customarily held by a state's department of motor vehicles: name, address, telephone, social security information, and so forth.[524] States tend to sell Department of Motor Vehicle ("DMV") lists to marketers for significant amounts of money.[525] In *Condon*, South Carolina challenged the DPPA on the theory that the restriction violated the Tenth Amendment.[526] The Court rejected South Carolina's argument in a two-step response. First, it labeled the sale of the DMV records a "thin[g] in interstate commerce."[527] By thus categorizing the DMV lists, the Court placed the controversy within an area that is unquestionably within the federal commerce power. The remaining step was to determine the relevance of the anti-commandeering decisions in *New York* and *Printz*. South Carolina argued that the DPPA commandeered the legislative and executive processes by forcing state legislative action to comply and by burdening state officials with the

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517. *Id.* at 168-69.

518. *Id.*

519. *See Gregory*, 501 U.S. at 458-59 (quoting THE FEDERALIST NO. 28, at 180-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

520. 521 U.S. 898 (1997). The anti-commandeering rule does not apply with equal force to judicial functions. *See id.* at 905-08 (discussing differences between judicial and executive and legislative powers).

521. 107 Stat. 1536 (1993).

522. 120 S. Ct. 666 (2000).

523. 18 U.S.C. § 2721-2725 (1994).

524. *Condon*, 120 S. Ct. at 668.

525. *See, e.g.*, Travis v. Reno, 163 F.3d 1000, 1002 (7th Cir. 1998) (discussing the fact that the Wisconsin Department of Transportation receives $8,000,000 per year from the sale of driver registration information).

526. *Condon*, 120 S. Ct. at 670.

527. *Id.* at 671 (alteration in original).

administration of the federal mandate.[528] The Court refused to extend the commandeering concept to the facts of *Condon*.[529] The key element in its analysis was that the DPPA regulated states as owners of databases and not as sovereigns. Specifically, it found that South Carolina was not required to enact any particular laws or regulations to comply, nor did the DPPA force state officials to assist the federal government in the regulation of private persons.[530] Finally, echoing *Garcia* but not citing to it, the Court noted that the DPPA was not directed toward the states but was generally applicable to all handlers of DMV records.[531]

C. The Commerce Power and the ADA

1. Generally

An application of the preceding principles to Titles I and II of the ADA convinces me that many of the ADA's provisions will sustain Commerce Clause challenges but that others may not. Given the applicability of the ADA to most phases of American life and society, I have no illusions about my ability to conduct a comprehensive survey of the ADA as a Commerce Clause measure. Commerce Clause analysis, moreover, is a fact sensitive inquiry; the results in the cases seem to turn on such factual matters as whether something is a thing in commerce or whether the state is acting in a commercial manner. Thus, I propose the more modest goal of sampling four major areas that the ADA touches: employment, transportation, facility access, and government services. These categories are different from the ones used to analyze the ADA as a Section 5 measure. There, however, the issue was the proximity of a provision to the type of action forbidden the Fourteenth Amendment: intentional bias. The issue under the Commerce Clause, in contrast, turns on the character of the activity involved rather than the actors' intentions, thus the need to use an activity-based approach.

Before moving on to the individual areas, however, I think it useful to comment on four issues which affect the ADA generally. First, there is the issue of the ADA's legislative record as it relates to the Commerce Clause. References to commerce in the ADA are conspicuous. The Act

528. *Id.* at 671-72.

529. *Id.*

530. *Id.* at 672. As a factual matter, the Court's statement that compliance with the DPPA required no state legislative action is questionable. The Fourth Circuit concluded that differences between the existing South Carolina rules and the DPPA "would impose substantial costs and effort on the part of the Department in order for it to achieve compliance." Condon v. Reno, 155 F.3d 453, 457 (4th Cir. 1999), *reversed sub. nom.* Reno v. Condon, 120 S. Ct. 666 (2000).

531. The Court declined to reach the issue of whether laws that regulate the states exclusively violate the Tenth Amendment. *See infra* text accompanying notes 559-61.

explicitly invokes the Commerce Clause as a source of authority.[532] The definition of employer in Title I is one who employs fifteen or more persons and is "engaged in an industry affecting commerce."[533] Public accommodations in Title III are also subject to a requirement that their "operations . . . affect commerce."[534] While the Findings and Purposes section of the Act does not explicitly state that disability discrimination has an effect on interstate commerce, it implies such by finding discrimination to be continuing and pervasive,[535] with the result that the disabled occupy an economically inferior position in society and that billions of dollars are lost to their dependency and non-productivity.[536] The legislative history, moreover, provides additional legislative findings regarding the effects of disability discrimination on the economy. The report of the House Committee on Education and Labor concludes that disability discrimination creates unnecessary shortages in the labor pool while costing the government billions of dollars in unnecessary welfare programs.[537]

The findings in the ADA's legislative record are not as specific as those of VAWA, but they nonetheless identify discrimination's effect on interstate commerce. The significance of these findings will depend in large part on the decision in *Morrison*. In the event that *Morrison* holds that legislative findings in a Commerce Clause enactment are entitled to the Court's deference, then there is a good possibility that the extensive legislative record of the ADA will shield it from constitutional attack. For reasons expressed above, however, I do not think this is likely.

A second global issue is whether the ADA violates the rule against commandeering set out in *New York* and *Printz*. To make such an argument, one would need to expand the concept of commandeering beyond the situations found in those cases. Both the Low-Level Radioactive Waste Policy Amendments Act of 1985 (*New York*) and the Brady Handgun Violence Prevention Act (*Printz*) attempted to use state legislatures and officials, respectively, as surrogates for federal action in regulating third parties. There are few instances in Title I or II of the ADA of requiring the states to enact specific legislation or requiring

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532. 42 U.S.C. § 12101(b)(4) (1994).

533. *Id.* § 12111(5)(A).

534. *Id.* § 12181(7).

535. *Id.* § 12101(2-3, 5,7,9).

536. *Id.* § 12101(6, 9).

> [T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

Id.

537. H.R. REP. NO. 101-485 (II), at 43-47 (1990).

state officials to perform certain acts. Such regulation is accomplished directly by the federal government through a system of private or EEOC actions under Title I (employment) and private causes of action under Title III (public accommodations). There is no state involvement in this process except, perhaps, as a defendant.[538] The question, rather, is whether the legislative and administrative changes that state and local governments must make to comply with the ADA represent a commandeering of the legislative or executive process.

To my knowledge, this specific issue has not been litigated. *Reno v. Condon* is only so helpful in resolving this issue. In *Condon*, the anti-commandeering issue was raised in a context of direct regulation of the states (that is, restrictions on their uses of DMV records) as opposed to the *New York* and *Printz* situation of affirmatively requiring the states to regulate third parties on behalf of the federal government or to enact particular laws. South Carolina's objection to the DPPA was that it violated the anti-commandeering rule by placing a burden on its officials to comply with the requirements of the DPPA and inevitably required a legislative response by the state to facilitate compliance.[539] Relying on its decision in *South Carolina v. Baker*,[540] the Court held that states wishing to engage in activities that are properly regulated by the federal government must assume the burdens of compliance. Moreover, a choice to enter the marketplace and subject the state to federal rules is clearly a local political choice subject to review by a state's electorate.[541] Thus in such cases, the lack of a requirement that the states enact particular laws or that its officials perform specified acts was enough to distinguish it from *New York* and *Printz*.[542]

In one salient respect, the ADA is different from the DPPA. The latter statute amounts to a conditional command to the states. *Condon* emphasizes that the DPPA regulates the states not in their sovereign capacities but as owners of databases.[543] The distinction is that the states have the option of entering the marketplace. If they do so, they must

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538. A possible exception is the requirement that entities covered by Title II and having more than 50 employees designate an employee to coordinate compliance activities. *See* 28 C.F.R. § 35.107 (1999).

539. *Condon*, 120 S. Ct. at 671-72.

540. 485 U.S. 505 (1988). In *Baker*, the Court upheld a statute that prohibited states from issuing unregistered bonds, because it regulated the states directly instead of requiring them to regulate third parties. *Baker*, 485 U.S. at 514-15. The Court rejected arguments that the states would be burdened by having to amend state laws and otherwise implement the federal system on the grounds that states must accept the burden of federal regulation when they voluntarily engage in regulated activity. *Id.*

541. *See* New York v. United States, 505 U.S. 144, 167-68 (1992) (finding that state decisions to accept conditional grants of federal money or to regulate at federal invitation are reviewable by electorate).

542. *Condon*, 120 S. Ct. at 671-72.

543. *Id.* at 672.

accept the burden of federal regulation but need not do so unwillingly: as owners of databases they may opt to do nothing with the information or to use it strictly for internal purposes. The ADA, in contrast, regulates the states in their sovereign and not proprietary capacities. The states have no meaningful option to avoid inclusion in the ADA's zone of regulation (unless we wish to indulge the technically true but unrealistic assumption that governments may barricade sidewalks and unplug street crossing signals), and their activities there are hardly commercial. Thus, there is an argument that the ADA, in the language of *Printz*, forces the states to "address particular problems,"[544] and in the language of *Condon*, "to enact a particular kind of law."[545]

Rehnquist's opinion in *Condon* gives only limited guidance as to how the Court might react to a commandeering argument in the ADA context. *New York* and *Printz* are also of limited help in that the statutes there were federal commands to states to regulate third parties in set ways. The underlying concern of *New York* and *Printz* does, however, seem to outrun the facts of those cases and to apply also to direct federal regulation of the states. The Court's primary concern in the anti-commandeering cases, as noted above, was that the electorate will misunderstand federal commands as local choices and thus skew political accountability. With the ADA, there is no choice that can be shaped by anticipating the local electorate's response. Moreover, many actions required by the ADA do not have an obvious federal label. In the ideal case, state and local governments comply with the ADA's requirements routinely and without comment, for example, by providing an assisted hearing device at municipal theaters. People could reasonably assume that accommodation represents a local decision.

Kinney v. Yerusalim[546] illustrates sharply the danger that the ADA presents to the accountability principle. In *Kinney*, the Third Circuit held that the City of Philadelphia was obligated to install curb ramps in sidewalks when it resurfaced streets.[547] The Third Circuit held that resurfacing streets constituted an alteration under the Title II regulations which was not subject to any undue burden defense.[548] At the time, Philadelphia was running titanic budget deficits and was on the verge of bankruptcy.[549] It would be naive to argue that the voters of Philadelphia will

544. Printz v. United States, 521 U.S. 898, 935 (1997).

545. *Condon*, 120 S. Ct. at 671.

546. 9 F.3d 1067 (3d Cir. 1993).

547. *Kinney*, 9 F.3d at 1075.

548. *Id.* at 1071.

549. Seth J. Elin, Comment, *Curb Cuts Under Title II of The Americans with Disabilities Act: Are They Bringing Justice or Bankruptcy to Our Municipalities?*, 28 URB. LAW. 293, 300 (1996). The figures were staggering. In 1990, Philadelphia faced a $206,000,000 municipal budget deficit and diminishing tax revenues. *Id.*

somehow discount for the federal nature of the obligation when assessing local officials' budget decisions. It does seem that the federal interest in Philadelphia's streets is greater than the situations in *New York* and *Printz*, where Congress had the option of regulating third parties directly. Nonetheless, in *New York*, the Court rejected the proposition that a sufficiently important federal interest could justify commandeering.[550]

Meaningful differences between the facts of *New York* and *Printz* and situations such as *Kinney* are hard to find. Technically, yes, the former cases involved commands to regulate third parties, while in *Kinney* the command ran against the government itself. But in both cases the federal government is directing the local entity to perform acts in its governmental capacity. Enacting state statutes or local ordinances, a sheriff's background checks on gun purchasers, and maintaining streets are all functions that we expect to be performed by state or local authorities and not by private counterparts or the federal government. The danger of mistaking federal for state decision making seems equally great in the commandeering and the direct regulation areas, thus making the separation of these categories artificial.

The Court's emphasis on political accountability also dovetails with its apparent holding in *Lopez* that the substantial effects test permits Congress only to regulate intrastate activities that are commercial in character. Many of the obligations imposed directly on the states and localities by the ADA relate to non-commercial activities whose relationship to interstate commerce is too tenuous to pass the post-*Lopez* substantial effects test. A decision by the Court in *Morrison* to confirm this interpretation of *Lopez* would have the same effect in many instances as extending the anti-commandeering rules to situations of direct regulation of the states. This would not be necessarily true in *Kinney*, since the basis for congressional regulation of Philadelphia's streets could be their status as instruments of commerce as well as their substantial effect on interstate commerce. But the formal distinction may not be enough to preserve congressional regulation if the Court continues to insist on political accountability as the lynchpin of federalism on the one hand, and on the other strives to keep the Commerce Clause from giving the Congress a general police power.

The continuing significance of the *Garcia* decision is the third global Commerce Clause issue for the ADA. Unless there is a shift in the personnel or the philosophy of the Court, it is likely that *Garcia* will eventually be overruled. The effectiveness of *Garcia* as a license to

550. New York v. United States, 505 U.S. 144, 177-78 (1992).

Congress to regulate the states has already been severely undercut.[551] In *Seminole Tribe*, the Court ruled that Congress has no power under Article I to abrogate state sovereign immunity to claims arising under Commerce Clause statutes.[552] Although *Seminole Tribe* recognized that private claimants could proceed against state officials for prospective relief in a proper case,[553] the effect of *Seminole Tribe* was to foreclose the federal courts from giving monetary awards to private plaintiffs. The Court later held in *Alden v. Maine*[554] that states could also assert sovereign immunity to Article I claims brought in state courts.[555] The combined effect of these decisions is to exempt non-consenting states from monetary remedies for the violation of Commerce Clause and other Article I enactments and to limit enforcement to prospective relief. In other words, if a state gets caught with its hand in the cookie jar, it must take its hand out of the jar but may keep the cookies already tucked away in its pocket.

Likewise, *New York* and *Printz* appear to undermine *Garcia*'s theoretical structure. *Garcia* finds adequate protection for the states in the national political process, while *New York* and *Printz* create a safe harbor against federal legislation. From either side of the issue, it is useful to ask why the presumably protective political processes that enacted the Low-Level Radioactive Waste Policy Amendments Act and the Brady Bill failed in those instances. Justice O'Connor in *New York* attempted to distinguish commandeering from cases such as *Garcia* on the grounds that the latter involved generally applicable laws.[556] While the distinction is true, it is also incomplete. There is nothing in the logic of *Garcia* that should make federal legislative processes less protective of the states when the resulting law is targeted at them rather than at a wider group. After all, Blackmun's opinion states that the state's protection "is one of process rather than one of result."[557] Also, the general applicabil-

551. *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) (arguing that *Garcia* has been effectively overruled).

552. Seminole Tribe v. Florida, 517 U.S. 44 (1996); *see generally* Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767 (1998).

553. *Seminole Tribe* recognized the continuing validity of the *Ex Parte Young* exception to sovereign immunity, which permits private plaintiffs to seek prospective relief against state officials. *Seminole Tribe*, 517 U.S. at 73 (citing *Ex parte* Young, 209 U.S. 123 (1908)). The *Seminole Tribe* majority declined to apply that exception to the statute at issue, the Indian Gaming Regulatory Act ("IGRA"), on the grounds that Congress had established a detailed remedial scheme in the statute that precluded availability of *Ex Parte Young* relief. *See id.* at 73-76. I have argued elsewhere that *Ex Parte Young* relief remains available after *Seminole Tribe*. *See* Leonard, *supra* note 47, at 715 n.541.

554. 527 U.S. 706 (1999).

555. *Alden*, 527 U.S. at 712.

556. New York v. United States, 505 U.S. 144, 160-61 (1992); *see also* Printz v. United States, 521 U.S. 898, 932 (1997) (holding that an application of general law to states is permissible under *Garcia*).

557. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985).

ity language in *Garcia* was a minor part of the analysis. The essence of *Garcia* was that the national legislative process provided adequate protection for the states. Justice Blackmun's comments on generally applicable laws were offered as an afterthought to establish that the process resulting in the FLSA had protected the states from undue interference.[558] Theoretically, then, state interests should have been respected when Congress enacted the Low-Level Radioactive Waste Policy Amendments Act and the Brady Bill.

But even if *Garcia* holds true for generally applicable laws, the implication is that Congress may not regulate the states in a less than generally applicable manner.[559] I do not wish to convey the impression that the law or even the trends are clear on this point. While *Garcia* may be moribund, the lack of an overturning decision leaves us without a firm notion of what will replace it. The Court could return to the core government functions test of *National League of Cities*, or it could reconstitute *Garcia* by drawing a sharp distinction between federal legislation which applies generally and that which regulates the states exclusively. The Court was offered the chance to draw a bright line between general laws and those that regulate the states exclusively in *Condon* but did not take the bait. South Carolina had argued that the DPPA was unconstitutional since it regulated the states exclusively and did not fall into the category of generally applicable laws.[560] The Court avoided the issue by saying that the DPPA regulated individual as well as state use of databases; therefore, there was no need to resolve the issue.[561] South Carolina's argument appeared to be an attempt to repackage *Garcia* by reasoning that federal regulations that are focused only on the states are unconstitutional. Had South Carolina prevailed on this argument, Tenth Amendment jurisprudence would have reverted to a position somewhere between *National League of Cities* and *Garcia*, permitting Congress to impose burdens on states which encroached on core state functions unless those regulations applied exclusively to the states.

What are the implications of the ongoing narrowing of *Garcia* for

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558. *See supra* text accompanying notes 500-05.

559. This position was taken by the Fourth Circuit's opinion in *Condon*. *See* Condon v. Reno, 155 F.3d 453 (4th Cir. 1998), *rev'd on other grounds sub nom.*, Reno v. Condon, 120 S. Ct. 666 (2000). In the Fourth Circuit opinion, Judge Williams asserted that "Congress may *only* 'subject state governments to generally applicable laws,'" *Condon*, 155 F.3d at 461 (citing New York v. United States, 505 U.S. 144, 160 (1992) (emphasis added)), and that "Congress may only subject the States to legislation that is also applicable to private parties." *Id.* Note how the word "only" falls outside of the internal quotations marks in the first quote. Justice O'Connor's opinion in New York did not say that Congress could "only" subject states to generally applicable rules. She said that Congress may do so. There is a difference. Judge Williams' assertion is an inference that takes the holding in *New York* a step further. It may well be a logical and compelling inference, but that exact issue has not been resolved by the Court. *See infra* text accompanying notes 560-61.

560. *Condon*, 120 S. Ct. at 672.

561. *Id.*

the ADA? They appear to be serious. A reversion to the traditional core functions test of *National League of Cities* would create widespread confusion. Presumably the subject matter of Title I, employment, would fall into this category since *National League of Cities* reached that result. Many of the activities covered by Title II, such as the operation of a court system or elections, would also fit under the core functions rubric; other functions, such as a municipal recreational league, would present the federal courts with difficult decisions as explained in *Garcia*.[562] Even a narrowed *Garcia*, limiting federal legislation to general rules that apply incidentally to states, would be extraordinarily disruptive. The effect would be to render much of Title II unconstitutional inasmuch as many governmental activities have no private counterparts.

Finally, there is the question of how the Court's movement toward confining the substantial effects test to commercial activities will affect the ADA. Since I have already reviewed the Court's decision in *Lopez* and speculated on the outcome in *Morrison*, I will refrain from repeating my analysis here.[563] The potential for this development to affect the ADA is significant. The ADA regulates a mix of government activities, some being commercial in character and others being uniquely governmental activities with no commercial content at all. Title I's employment rules apply to an activity which is unquestionably commercial in character and should be immune to any potential outcome in *Morrison* (though they may be affected by other Commerce Clause developments such as an overruling of *Garcia*). Maintenance of transportation systems should also be immune to any attempts to draw a bright line at commercial activity since it falls under Congress' plenary power over the instrumentalities of interstate commerce, which does not have a substantial effects requirement.[564] The ADA's rules for facility access and for non-discrimination in government services, however, may be threatened by a commercial activity test. Many government services and facility uses are strictly governmental and do not have the faintest smell of commerce. Holding local elections or running a court system are simply not economic activities. In these cases, the commercial activity bright line would cut off, in a clean and simple fashion, Congress' power to regulate state and local activities without the need to resort to complicated Tenth Amendment analyses. I leave the details to the following sections.

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562. *See infra* notes 584-85 and accompanying text.

563. For a discussion of *Lopez* and *Morrison*, see *supra* text accompanying notes 459-78, 479-85.

564. *See infra* Part III.C.2.b.

2. *Areas of Application*

a. *Employment*

Until such time as *Garcia* is given a decent burial, the substantive rules of Title I should be treated as valid under the commerce power. *Garcia* rejected *National League of Cities*' contention that employment decisions were a core function of state sovereignty on which the federal commerce power could not tread. As discussed above, *Garcia*'s interpretation of the Commerce Clause permits Congress to regulate the national labor pool by imposing wage and hour rules on work places. We should get this result whether we view workers as persons in interstate commerce, whom Congress is empowered to regulate even in the absence of a substantial effect on interstate commerce, or whether we view wage and hour rules as actions which have a substantial effect on interstate commerce (certainly they do in the aggregate).[565] The issue is whether the imposition of these federal work rules diminishes state sovereignty. The logic of *Garcia* is that they do not. Like the FLSA, Title I was enacted under a presumptively state-friendly legislative process and is a general scheme which regulates the states incidently. Title I covers all employers, public and private, who have more than 15 employees.[566] A decision by the Court to narrow *Garcia* to proscription of rules that regulate states exclusively would not disturb Title I as it is generally applicable. Only a return to the *National League of Cities* core functions test could do so.

I am less certain that the employment rules of Title II are proper under the Commerce Clause. The Title II regulations also impose a rule of non-discrimination on public employers.[567] There are two differences, however, that distinguish Title II from Title I. First, there is no administrative exhaustion requirement in Title II; employees proceeding under Title I must file a timely complaint with the EEOC before pursuing a judicial claim.[568] Title II plaintiffs may go directly to court. Second, Title II applies to all state and local employers regardless of the number of employees; thus, it covers state and local governments that employee fewer that fifteen employees while exempting their private sector counterparts. These differences seem to impose a greater burden on the public entities and thus make it more difficult to characterize Title II as a

565. *Cf.* United States v. Robertson, 514 U.S. 669, 671-72 (1995) (mining operation seeks workers from other states).

566. 42 U.S.C. § 12111(5)(A) (1994).

567. 28 C.F.R. § 35.140(a) (1999).

568. *See* 42 U.S.C. § 12117(a).

law of general applicability.[569] If *Garcia* means that non-general regulation of the states is invalid, then the Title II employment rules are as good as gone, much as they would be under a core functions test.

b. Transportation

Transportation rules within the ADA would also seem to fall within the scope of the commerce power. Title II has an extensive rule structure that requires accessibility in public transportation systems.[570] Again, it makes little difference as to which subcategory of the Commerce Clause we assign these rules. Transportation systems easily fall within the concept of instruments of commerce.[571] Moreover, the fact that a public transportation system operates solely intrastate should have no effect on the commerce power, due to the inevitable linkages with the interstate system.[572] Additionally, there is no requirement that there be a substantial impact on interstate commerce when proceeding under the instruments of commerce prong. But even if we shifted the analysis to the substantial effects prong, the result would not change. The aggregate effect of state and local transportation decisions undoubtedly has a substantial effect on interstate commerce. Since private transportation systems are similarly regulated under Title III,[573] the Title II rules would seem to be unaffected by a rule forbidding non-general regulation of state or local governments. They would also have a good chance of falling outside of the traditional government functions zone, since private entities have a long history of providing transportation services.

c. Facility Access

Facility access rules are problematic. Title II requires that states and localities not exclude qualified individuals with disabilities from programs and services because of inaccessible facilities.[574] Existing facilities are held to a program accessibility standard: the program, when

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569. The Title II regulations impose the Title I requirements on public employers who are subject to Title I. 28 C.F.R. § 35.140(b)(1). Employers who are not subject to Title I, that is, those with fewer than 15 employees, are made subject to the employment rules of Section 504 of the Rehabilitation Act. *Id.* § 35.140(b)(2).

570. *See* 42 U.S.C. § 12141-12165.

571. *Cf.* The Shreveport Rate Cases, 234 U.S. 342 (1914) (discussing railroads as instruments of interstate commerce).

572. *Cf.* Southern Ry. Co. v. United States, 222 U.S. 20 (1911) (finding that the intrastate railroad is part of the interstate system); United Transp. Union v. Long Island R.R. Co., 455 U.S. 678 (1982) (finding that federal regulation of state-owned railroad does not interfere with ability of states to structure governmental operations).

573. 42 U.S.C. § 12184-12186.

574. 28 C.F.R. § 35.149.

viewed as a whole, must be accessible.[575] This standard does not require that every existing facility be brought up to standard, nor does it require that covered entities threaten the value of an historic property, incur undue financial or administrative burdens, or fundamentally alter a program.[576] New construction and alterations, however, must comply with the Uniform Federal Accessibility Standards ("UFAS") or the Americans with Disabilities Act Accessibility Guidelines ("ADAAG").[577] Public (i.e., privately operated) accommodations under Title III are subject to somewhat different rules. New construction and alterations under Title III must comply with ADAAG, thus making that rule essentially the same as the Title II rule. Hence, the latter is a rule of general applicability.[578]

Should the Court ultimately narrow the commerce power to exclude measures that target the states, however, other parts of the facility access rules may be invalidated. Title III rules for existing facilities, one can argue, impose significantly different requirements on public and private entities. A public accommodation is required to remove all architectural and communications barriers if "readily achievable,"[579] that is, if "easily accomplishable and able to be carried out without much difficulty or expense."[580] The ADA goes on to list several factors in making the readily achievable calculation, factors which turn on the overall financial resources of the covered entity.[581] The program accessibility standard for existing facilities is different. In one sense it imposes a lighter burden.

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575. *Id.* § 35.150(a).

576. *Id.* § 35.150(a)(1-3).

577. *See id.* § 35.151(b)(1).

578. *See* 42 U.S.C. § 12183; 28 C.F.R. § 36.406(a) (1999).

579. 42 U.S.C. § 12182(b)(2)(A)(iv).

580. *Id.* § 12181(9).

581. *Id.*

> The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include:
>
> (A) the nature and cost of the action needed under this chapter;
>
> (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
>
> (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

Id.

There is no requirement that all facilities be made accessible,[582] even under the modest readily achievable standard. The obligation runs against programs. Thus, a Title II entity could theoretically operate accessible programs while leaving a substantial number of its buildings untouched. In another sense, the burden is greater. Covered entities under Title II must meet the tougher undue burden standard to avoid compliance.[583] The Title II regulations do not directly define undue burden;[584] departmental commentary, however, indicates that Congress intended the undue burden standard to be significantly higher than the readily achievable standard of Title III.[585] However, we resolve the balance of burdens placed on public and private entities, the issue is not the balance itself but the fact that the obligations are different. And if they are indeed different, they run the risk of failing a general applicability test. A return to the core functions standard of *National League of Cities* would probably require a case-by-case analysis of the particular use of facility. Facilities used for courthouses might be deemed more "core" than a municipal arena that competes with private facilities.

Another troubling aspect of the Title II program access rules is the lack of an obvious connection between the use of government facilities and commercial activity. A building used for a county's social services department, for example, has no more relation to commerce than the possession of guns in school zones. Public accommodations covered by Title III, such as a retail establishment or a restaurant or a lawyer's office, in contrast, are obviously commercial in nature and well within the reach of the commerce power. One could argue that state and local buildings are potentially subject to commercial use; governments sometimes sell their buildings to commercial enterprises.[586] Perhaps this approach supports the imposition of the new construction rules under the Title II regulations. We might reason that buildings are things or instrumentalities of commerce and that such rules assure accessibility in a

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582. *See* 28 C.F.R. § 35.150(a)(1) (stating that public entities are not required to make "each of its existing facilities accessible to and usable by individuals with disabilities").

583. *See id.* § 35.150(a)(3).

584. *Cf. id.* § 36.104 (Title III regulation defining undue burden as a "significant difficulty or expense").

585. *Id.* pt. 35, app. A, at 492 ("Congress intended the 'undue burden' standard in [T]itle II to be significantly higher than the 'readily achievable' standard in [T]itle III. . . . [T]he program access requirement of [T]itle II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases."); *see also* Kilcullen v. New York State Dep't of Transp., 33 F. Supp. 2d 133, 148 (N.D.N.Y 1999), *vacated*, 205 F.3d 77 (2d Cir. 2000) (discussing difference in undue burden and readily achievable standard); Civic Ass'n of the Deaf of New York City v. Giuliani, 915 F. Supp. 622, 636 (S.D.N.Y. 1996) (same).

586. *Cf., e.g.*, United States v. Serang, 156 F.3d 910, 913-14 (9th Cir. 1998), *cert. denied*, 525 U.S. 1059 (1998) (stating that a federal arson statute is valid as to commercial buildings due to substantial effects on interstate commerce).

building's successive uses. The Title II regulations for existing facilities, however, simply do not take this approach. They refer instead to program accessibility and attempt to ensure that state or local activities are open to all, regardless of a disabling condition. In this light, it is difficult to discern the commercial character of the regulated activity.

d. Government Services

Finally, there is a broad yet difficult-to-define area of government "services" which often lacks counterparts in the private sector. Examples of such activities might include social services, recreational programs, and libraries. I suspect that many government services will not be able to meet a commercial content requirement if *Morrison* confirms this interpretation of *Lopez*. Perhaps it is better to proceed here by example. *Concerned Parents to Save Dreher Park Center v. City of West Palm Beach*,[587] a pre-*Lopez* case, involved a challenge by a group of parents to a city's decision to balance its recreation budget by eliminating programming for the disabled. The court concluded that this result violated the Title II rules against criteria and methods of administration which have the effect of discriminating against the disabled or which have the purpose or effect of defeating a program's objectives with respect to the disabled.[588] While the resolution of *Concerned Parents* was proper as a statutory matter, it is difficult to see what relationship a municipal recreation league has to interstate commerce. Recreation leagues involve neither channels nor instrumentalities of interstate commerce by any stretch of a lawyerly imagination; thus, federal regulation under the commerce power would have to be based on the substantial effects justification. But what is commercial about operating a soccer league? It is true that recreational leagues purchase equipment that is produced for a national market and hire employees, but the same was no doubt true of Edison High School in *Lopez*. The ADA's rules against discriminatory criteria of administration as applied in *Concerned Parents* in essence attempt to promote participation in a municipal recreation league and not to control any action which might fall within the zone of economic activities which, individually or in the aggregate, affect interstate commerce. Much the same can be said about the operation of public libraries, public assistance programs, bookmobiles, public parks, and many other municipal services. These activities seem to have the same attenuated relationship to interstate commerce and non-commercial character as did the schools and educational process in *Lopez*.

587. 846 F. Supp. 986 (S.D. Fla. 1994).
588. *Id.* at 991 (citing 28 C.F.R. § 35.130(b)(3)).

Even if we were willing to attribute a commercial character to a given government program, or if the Court declines in *Morrison* to establish a commercial activities test for the Commerce Clause, Title II's application to many government programs would run afoul of a rule forbidding measures that regulate the states exclusively. Many traditional government activities have private counterparts. Schools, kindergartens to secondary institutions, easily come to mind. Private entities such as the YMCA run recreation leagues (in a non-commercial fashion, of course). But many governmental services have no private counterparts. I would emphasize here again that the breadth of the ADA makes anything but generalizations impossible in an Article of this scope, but a few examples of this imbalance should make the point. There are no private equivalents to court systems, election rules, welfare programs, jails,[589] the institutionalization of the mentally ill, public health rules, laws setting eligibility for marriage, or rules of decision for child custody disputes. The ADA unquestionably applies to these activities, but I am hard pressed to find any similar restrictions in Title III that would give rise to an argument that the ADA here is a rule of general applicability. As in the case of facility access, the restoration of the *National League of Cities* core functions test would probably require a case-by-case evaluation of the government activity involved.

One could argue that the ADA as a whole reflects a unitary rule of non-discrimination on the basis of disability, or in the language of the statute, "a clear and *comprehensive* national mandate for the elimination of discrimination against individuals with disabilities."[590] The division of the Act into separate titles for public services and public accommodations, so the argument goes, simply reflects an adaptation of a single mandate to individual circumstances. I doubt that the present Court would accept this argument. Finding an equivalence between Titles II and III requires a level of abstraction that runs counter to the Court's desire in *Lopez* to interpret the Commerce Clause in a way that maintains the federal presence as one of enumerated and limited powers. The *Lopez* Court was explicitly concerned that a lenient test for substantial effects would permit Congress to regulate many areas traditionally reserved to the states because of an undeniable though tenuous link to the economy. Child custody disputes, the Court theorized, might be subject to Congressional dictate on the theory that children from broken homes were less productive.[591] I suspect that the Court's desire to confine the

589. There are, of course, jails operated for governments by private concerns. *See, e.g.*, Richardson v. McKnight, 521 U.S. 399 (1997) (holding that a guard in a privately operated prison does not enjoy qualified immunity).

590. 42 U.S.C. § 12101(b)(1) (1994) (emphasis added).

591. United States v. Lopez, 514 U.S. 549, 564 (1995).

commerce power to predictable limits argues against a liberal interpretation of what constitutes a rule of general applicability.

e. The Commerce Clause and Section 5

The Court's increasingly restrictive Commerce Clause jurisprudence threatens to untie the constitutional underpinnings of the ADA as it applies to the state and local government. Of course, we cannot divorce the Commerce Clause questions from the Section 5 issues. It is much more likely that the Court will rule on the sovereign immunity abrogation provision of the ADA before it takes up the Commerce Clause question.[592] If the Court sustains that provision, either generally or in reference to a particular section of the ADA, it must do so on the basis that the statutory mandate protects rights secured by Section 1 of the Fourteenth Amendment. In that case, the statute would be vindicated and the Commerce Clause arguments would become superfluous. But if my analysis in Part II proves correct, i.e., that many sections of the ADA will fail Section 5 standards, then the Commerce Clause arguments become pivotal.

As noted at the beginning of this Part,[593] the Seventh Circuit's recent decision in *Erickson*[594] contained dicta stating that the Supreme Court's Section 5 cases denied private plaintiffs a federal forum but did not alter the substantive requirements that the ADA imposes on state and local governments.[595] Judge Easterbrook's reasoning was that these standards were validly imposed under the authority of the Commerce Clause,[596] hence that "[a]ll our holding means is that *private* litigation to enforce the ADA may not proceed in *federal* court."[597] Judge Easterbrook's dicta seem to ignore the Court's progressive constrictions of Congress' commerce power and its expansive protection of state sovereignty. While the Court might still sustain the application of Title I to state employers on the theory of general applicability,[598] other sections of the ADA involve the regulations of non-commercial government activities or regulate states and localities as such and not as part of a more general scheme. As I hope that this Part has demonstrated, such regulations are now questionable. Take the example of the ADA's requirement that a state

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592. *See supra* text accompanying notes 49-53.

593. *See supra* text accompanying notes 405-10.

594. Erickson v. Board of Governors of State Colleges and Univs. for Northeastern Ill. Univ., 207 F.3d 945 (7th Cir. 2000), *petition for cert. filed*, June 26, 2000.

595. *Erickson*, 207 F.3d at 952.

596. *Id.*

597. *Id.*

598. *See supra* Part III.C.2.a.

operated museum provide a sign language interpreter for a tour.[599] The state entity defendant can raise credible defenses to the ADA claim, even in state court, by arguing: 1) that the reasonable accommodation rules fell outside of Congress' Section 5 powers since there was a rational basis for denying the accommodation, and 2) that the rule fell outside of the commerce power because the operation of a museum was not commercial in character, perhaps because there was no admission fee. While I am not certain that these defenses will prevail, I am certain that they cannot be dismissed out of hand in a way that lets the Commerce Clause sanitize all the substantive provisions of the ADA.

IV. THE SPENDING CLAUSE ALTERNATIVE

Section 5 and the Commerce Clause do not exhaust the possibilities for Congressional authority to enact the ADA. The Spending Clause provides a partial alternative. Article I, Section 8 empowers Congress to "provide for the . . . general welfare of the United States."[600] This power has been interpreted as giving Congress the power to condition federal grants of money on complying with demands that Congress does not have the power to impose otherwise.[601] Hence, the Spending Clause may support imposition of the ADA's non-discrimination mandate on recipients of federal money even when Congress does not have the authority to impose these rules under the Commerce Clause or Section 5. In this instance, there would be no need for Congress to re-legislate the ADA to create a spending hook. Congress has already done this with Section 504 of the Rehabilitation Act[602] by creating a nearly identical[603] non-discrimination mandate for all recipients of federal grants and monies. The issue, then, is whether the substantive provisions of Section 504 can be applied to states and local governments.

The power to condition federal grants carries with it a threat that Congress could subvert the limitations on its Commerce Clause and Section 5 powers and regulate indirectly when it could not do so directly. The Court has recognized this possibility and, in *South Dakota v.*

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599. *See, e.g.*, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL § II-3.4400 (1993).

600. U.S. CONST. art. I, § 8.

601. United States v. Butler, 297 U.S. 1, 66-67 (1936) (stating that Congress may use Spending Power to impose conditions not within its enumerated powers so long as purposes are general, not local). Professor Tribe notes that the Court has generally accorded deference to Congress' judgments of what constitutes public purposes. *See* TRIBE, *supra* note 423, § 5-6, at 837 (citing South Dakota v. Dole, 483 U.S. 203, 207 (1987)).

602. 29 U.S.C. § 794 (1994).

603. 28 C.F.R. pt. 35, app. A, at 475 (1999) ("[T]itle II . . . essentially extends the antidiscrimination prohibition embodied in section 504 to all actions of State and local governments . . . .").

Dole,[604] set four limitations on Spending Clause measures. First, the conditions must be for the general welfare, though courts must also show considerable deference to Congressional judgment in these matters.[605] Second, the conditions imposed by Congress must be unambiguous.[606] Third, they must related to the federal interest in the particular project or program at issue.[607] Finally, the conditions must not run afoul of independent constitutional provisions or prohibitions.[608]

Section 504 is clearly a measure designed to promote the general welfare. The legislative findings section of the ADA declares that 43 million Americans were disabled when the ADA was enacted in 1990.[609] Presumably, that number was also significant when the Rehabilitation Act became law in 1973. Furthermore, the integration of the disabled into the social and economic mainstream of American life is unquestionably a general public purpose. There is also nothing unclear in the Rehabilitation Act about a recipient's duty to comply with the non-discrimination mandate once the federal money is accepted.[610] The true issues are: 1) whether there is a sufficient nexus between the funding conditions of Section 504 and the purposes of individual federal grants and 2) whether the Tenth Amendment raises an independent bar to the federal conditions under Section 504.

As to the first question, I would argue that there is a proper nexus between the Section 504 non-discrimination mandate and the grant of federal monies. *South Dakota* confirmed this requirement, though it did not elaborate, no doubt due to the lack of any dispute that the drinking age requirements were germane to the federal program.[611] Justice O'Connor reiterated the requirement in *New York v. United States*,[612] theorizing that the lack of a nexus test might permit the spending power to swallow up all other limitations on the national government.[613] Justice Scalia also stated the requirement in dictum in *College Savings*.[614] Pro-

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604. 483 U.S. 203 (1987).

605. *Dole*, 483 U.S. at 207.

606. *Id.*

607. *Id.*

608. *Id.* at 208.

609. 42 U.S.C. § 12101(a)(1) (1994).

610. *See* 29 U.S.C. § 794(a) (1994) ("No otherwise qualified individual with a disability . . . [shall be discriminated against] under *any* program or activity receiving Federal financial assistance . . . .") (emphasis added). It may at times be unclear whether a program should be deemed as receiving financial assistance, *see, e.g.*, Department of Transp. v. Paralyzed Veterans of America, 477 U.S. 597 (1986) (finding that indirect benefits to airlines provided by federal air traffic control system does not impose Section 504 obligations on airlines), but once that threshold is crossed, the obligation is obvious.

611. South Dakota v. Dole, 483 U.S. 203, 208 (1987).

612. 505 U.S. 144, 167 (1992).

613. *New York*, 505 U.S. at 167.

614. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 627,

fessor Tribe has observed that O'Connor's observations in *New York* may be off the mark, in that coercion can occur even when the funding conditions are germane to the funding purpose.[615] Tribe's observation is correct as far as it goes, but O'Connor may have been making the related but distinct point that the nexus requirement serves as a hedge against the federal government overstepping its powers, regardless of coercion.

Do Section 504 conditions have a tight enough nexus to programmatic purposes? To my knowledge, the issue has been litigated only once. In *Bradley v. Arkansas Department of Education*,[616] plaintiffs alleged that defendants had failed to follow proper procedures in establishing a special education placement for their son. One of the issues in *Bradley* was the validity of Section 504's waiver of state sovereign immunity to suit in federal court. The Eighth Circuit panel held that there was an insufficient connection between the funding condition (waiver of sovereign immunity) and the purpose of the funding grant (the provision of special education services). Specifically, the court noted that the conditions were overly broad, since the Section 504 conditions (there, the waiver of sovereign immunity) apply to all operations of a state department or agency,[617] rather than being limited to the those activities related to the purposes of the Rehabilitation Act.[618] To avoid the federal conditions, the court reasoned, Arkansas would have to renounce all federal funding; such a choice is coercive.[619] The imbalance between the reach of the conditions and the purpose of the funding, according to *Bradley*, exceeded the normal *quid pro quo* in the proper use of the spending power and robbed the funding conditions of the necessary voluntary character.[620]

Bradley amounts to a holding that Spending Clause conditions are limited to the nature and purpose of a funded program. *Bradley* does not set an exact test for how much of a relationship is required. We can infer, however, from its approval of the Individuals with Disabilities Edu-

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687 (1999). For a discussion of Justice Scalia's possible interpretation of the nexus requirement, see *infra* text accompanying notes 647-58.

615. TRIBE, *supra* note 423, § 5-6, at 840 n.29.

616. 189 F.3d 745 (8th Cir. 1999), *vacated in part sub nom.* Jim C. v. Arkansas Dep't of Educ., 197 F.3d 958 (8th Cir. 1999) (vacating panel decision on Spending Clause issue and directing for en banc hearing).

617. *Bradley*, 189 F.3d at 757 (citing 29 U.S.C. § 794(b)(1)(A) (1994) (defining programs and activities)).

618. *Id.*

619. *Id.*

620. As a statutory matter, there is no requirement of a correlation between a funded program's primary objective and a Section 504 claim. *See* Consolidated Rail Corp., v. Darrone, 465 U.S. 624 (1984) (holding that a Section 504 claim lies for employment discrimination even if primary objective of program is not employment). The issue in *Bradley*, however, is the constitutional requirement of a sufficient nexus.

cation Act ("IDEA"),[621] not only that the relationship must be fairly tight but also that conditions must fall within the subject matter of the funded program. The IDEA was acceptable in *Bradley*, since the purpose of the program and the conditions both related to the provision of special educational services.

There are many difficulties with *Bradley*. First, it is impossible to square the result with the Supreme Court's view of the states as free agents who may or may not choose to enter into funding contracts with the federal government.[622] It is true that the states must make a choice between foregoing all federal funds or complying with Section 504. The fact that a choice must be made, however, does not of itself render that choice involuntary or unknowing. If the point is that the choice has been made more difficult by applying the condition to all activities of a department or an agency rather than at a project level, then I still fail to see how the choice amounts to coercion rather than garden variety temptation. The choice for the potential recipient is not the drastic one foreseen by *Bradley* of giving up all federal funding flowing to an institution.[623] Presumably a recipient has already made a decision to accept the Section 504 conditions (and other conditions such as those under Title IX) attached to its existing federal funds. When it considers additional funds there is no additional burden. Conversely, if the recipient is considering its first federal grant, then there are no other funds in jeopardy.

Finally, *Bradley* turns on the facile assumption that the Rehabilitation Act has a narrow purpose, such as protecting individuals from disability discrimination.[624] I suggest that the opposite is true. In *Gebser v. Lago Vista Independent School District*,[625] the Court held that Title IX had two primary purposes: the avoidance of using federal money for discriminatory purposes as well as the protection of individuals from gender discrimination.[626] This characterization is significant. Instead of viewing the denial or withdrawal of funds as ancillary to a primary purpose of preventing gender discrimination, the Court viewed it as an independent goal of the statute. This view of Title IX would seem to justify letting the non-discrimination mandate follow the money into the whole institution, as opposed to erecting an artificial wall at the project

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621. The IDEA conditions federal grants for special education on a state's agreement to provide appropriate educational programming for an eligible child and to comply with procedural safeguards in placement decisions. *See* 20 U.S.C. § 1401-1491(o) (1994).

622. *See infra* text accompanying notes 637-44.

623. *Bradley*, 189 F.3d at 757.

624. *Id.* ("[Section] 504 mandates that Arkansas waive its Eleventh Amendment immunity to all claims arising under § 504 if it receives any federal funding, even *funding unrelated* to the state's obligations to comply with § 504 . . . .") (emphasis added). It is noteworthy that the *Bradley* opinion does not attempt to specify what that purpose is.

625. 524 U.S. 274 (1998).

626. *Gebser*, 524 U.S. at 286.

level. The same is true of Section 504. One of the obvious statutory purposes behind Section 504 is to avoid the use of federal money for discriminatory practices. Another obvious and related purpose of the Rehabilitation Act is to ensure that federal recipients make their entire operations available to all otherwise qualifying persons, regardless of disability and regardless of the specific uses of the federal money. Congress amended the Rehabilitation Act and three other civil rights statutes in the Civil Rights Restoration Act of 1987 ("CRRA").[627] In reaction to the Supreme Court's decision in *Grove City College v. Bell*,[628] the CRRA amended the Rehabilitation Act to define "Program or activity" as all the operations of state departments, agencies and instrumentalities.[629] Given the breadth of the federal definition, it is not reasonable to argue that the application of the Section 504 mandate to the range of a recipient's operations lacks a nexus. To take a narrower view of program goals would be unfaithful to the purposes of Section 504.

As to the independent constitutional bar issue, the Court, in *South Dakota v. Dole*, made clear that in certain cases funding conditions may be improper when they require violation of the Constitution but appeared to set a high threshold for invalidating spending conditions.[630] In *South Dakota*, the defendant argued that the federal funding condition, that states raise their drinking age to twenty-one violated the Twenty First Amendment's assignment to the states of decision-making about alcohol.[631] The Court rejected this argument by saying (without further elaboration) that limitations under the Spending Clause are less exacting than those on Congress' powers to regulate directly.[632] While this brief pronouncement gives no guidance as to when the conflict between independent provisions becomes unconstitutional, it must mean that conflict *per se* does not void a Spending Clause measure, and that in some cases a recipient may waive its constitutional rights by accepting federal money.

There is nothing superficially unconstitutional about Section 504. It does not, for example, require that grantees begin all program activities with a prayer or require them to submit to warrantless searches of their offices. Therefore, a defendant challenging the validity of the Section 504 regulations, like the defendants in *South Dakota*, would be forced

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627. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28-32.

628. 465 U.S. 555 (1984). In *Grove City*, the court had held that only the recipient of federal funds and not the entire institution was subject to Title IX rules. *Grove City*, 465 U.S. at 569-70.

629. *See* 29 U.S.C. § 794(b)(1)(A) (1994).

630. South Dakota v. Dole, 483 U.S. 203, 208 (1987). *Cf.* FCC v. League of Women Voters, 468 U.S. 364 (1984) (voiding on First Amendment grounds the statutory ban on editorializing by non-commercial broadcasters receiving federal funds).

631. *Dole*, 483 U.S. at 209.

632. *Id.*

back to the more difficult argument that the Tenth Amendment serves as an independent constitutional limit on the spending power. The Court's opinion in *South Dakota*, however, rejected the argument that funding conditions in the federal highway program violated state sovereignty *per se*. The Court noted that even though Congress had no authority to interfere directly with the actions of state officials, it might do so with funding conditions.[633] State sovereignty is not implicated since the state may adopt the simple expedient of not yielding to federal coercion, that is, refusing the money.[634] Thus, the existence of an independent and contradictory constitutional limitation on direct federal action does not necessarily prohibit the same result by indirection. At some point, the Court states, the financial inducement dangled by Congress in front of the money-starved states may amount to coercion.[635] That was not the case with the federal highway program, since a non-compliant state would lose only five percent of its allotment.

What about the theoretical possibility under Section 504 that all federal funds could be lost?[636] Is that coercion? To argue that such a loss is coercive, and therefore a Tenth Amendment violation, puts the proponent in an untenable position of saying that federal recipients have a right to receive funds without conditions. Given the baseline observation in *South Dakota* that Congress may condition its grants of money, a suit claiming that a state or local governmental entity has a right to an original, unconditioned grant of money would be dismissed rather quickly. There is no conceptual distinction between the latter scenario and a claim that a recipient's funds should not be terminated or recouped after a failure of compliance. It also seems that any "coercive" elements in the Section 504 scheme are accepted voluntarily by governmental recipients. In *South Dakota*, as just noted above, the Court stated that the states could simply avoid coercion by refusing grants, and that "[w]ere South Dakota to succumb to the *blandishments* offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone."[637] This "Just Say No" approach seems to be an equally effective strategy to protect state sovereignty, whether the threatened loss of funds is absolute or just five per cent. In *Steward Machine Co. v. Davis*,[638] the Court made the point that all government incentives are in some sense a temptation, but that to equate temptation with coercion would be to recognize a determinism that

633. *Id.* at 210.

634. *Id.*

635. *Id.* at 211.

636. *See* 28 C.F.R. § 42.108(a) (1999) (stating that a funding agency may suspend or terminate a federal grant).

637. *Dole*, 483 U.S. at 211 (emphasis added).

638. 301 U.S. 548 (1937).

makes choice impossible.[639] Such an assumption would be at odds with the law's longstanding assumption that problems may be solved by free will.[640]

The Court's faith in states to protect themselves through self-interested choices is also reflected in the contract view of the spending power. The Court has, on several occasions, analogized conditional federal grants to a contract. Most recently in *Gebser*, a Title IX case, the Court stated that conditional federal grants are contractual in nature,[641] contrasting them with direct, unconditional attempts at regulation such as Title VII.[642] The focus in *Gebser* was the scope of remedies available under a Spending Clause enactment. Since Title IX was contractual in nature, *Gebser* reasoned, a damages remedy for gender discrimination should be available only if the recipient, that is, the contracting party, had notice that it was at risk of such liability.[643] Still, the underlying reasoning is applicable to the Tenth Amendment issue under the Spending Clause. *Gebser*'s notice requirement is ultimately a rule for protecting the integrity of the states' bargains and the bargaining process with the federal funding authority. We do not hold the states to an intrusive remedy that was not within the contemplation of both contracting parties. But the reverse must also be true, that we should bind the funding recipient to bargained for conditions. To the extent that the state has a meaningful opportunity to opt out of the funding conditions by declining the contract, there is no Tenth Amendment problem.[644]

Setting a low threshold for coercion, as in *Bradley*, also seems to run counter to the spirit of federalism which the Court has espoused in the Nineties. The ultimate effect of an easily met coercion standard that lets recipients weasel out of their funding conditions may well be a drastic reduction in federal grants. Congress might become reluctant to issue federal grants for free.[645] To someone who regards state dependence on the United States Treasury as unhealthy, this would be a positive development. The Court's federalism, however, turns not so much on a rigid fiscal separation of state and national governments as on assigning the two levels of government to clearly delineated spheres where political choices can be made and then reviewed by the electorate. Allowing state

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639. *See Steward Machine Co.*, 301 U.S. at 589-90.

640. *Id.* at 590.

641. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286-87 (1998); *see also, e.g.*, Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981); Guardians Ass'n v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 599 (1983) (opinion of White, J.).

642. *Gebser*, 524 U.S. at 286-87.

643. *Id.* at 287-90.

644. TRIBE, *supra* note 423, § 5-6, at 840.

645. *Cf.* DIRE STRAITS, *Money for Nothing*, *on* BROTHERS IN ARMS (WEA/Warner Brothers 1987) ("money for nothing and chicks for free") (naive view of rock star life).

or local recipients to bargain for federal money and then renounce the conditions skews political accountability for these actions. In a way, it constitutes the opposite of the threat in *New York* and *Printz*. There, federal legislators or officials were fobbing accountability for unpopular regulations off on state and local officials. An easy coercion standard flips the coin by forcing the federal government to take the heat for unpopular funding conditions which later become unenforceable. That is, the states may shunt political responsibility to federal officials for actions beyond the latter's control.[646]

I would, frankly, have more confidence in my argument were it not for dictum appearing in *College Savings*. One issue in *College Savings* was whether a state entity can constructively waive its sovereign immunity to suit in federal court by engaging in certain activities regulated by the Lanham Act.[647] Justice Scalia's opinion held firmly and unequivocally that there were no constructive waivers of state sovereign immunity.[648] The Court offered a number of reasons for its decision. It noted that a decision by a state to engage in certain activities did not necessarily signal the required unequivocal consent to be sued in federal court, even if Congress' intentions were perfectly clear.[649] The Court also feared that revitalizing the constructive waiver doctrine might permit Congress to do an end run around the decision in *Seminole Tribe* that Congress lacked the power under the Commerce Clause to abrogate sovereign immunity.[650] Finally, the Court reasoned that the voluntariness of the state's decision to enter into a regulated field was irrelevant. Even though there are activities which a state could realistically abandon—such as the provision of services which are traditionally performed by private entities or actions as a market participant—the Court noted that the voluntariness of such actions had never been relevant to prior sovereign immunity cases.[651]

Justice Scalia then engaged in an interesting comparison of constructive waivers and Spending Clause enactments. Referring to *South Dakota v. Dole*, Scalia stated that Congress may establish funding conditions which exceed its powers to regulate directly.[652] The difference with constructive waivers, he argued, is that money given out under the Spending Clause is a "gift"[653] which Congress is under no obligation

646. I will let others decide whether "reverse commandeering" should enter the English language.

647. *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 627, 675-87 (1999).

648. *College Sav. Bank*, 527 U.S. at 680-82.

649. *Id.* The clarity of Congress' intentions would of course only be relevant to the issue of abrogation.

650. *Id.* at 683.

651. *Id.* at 685-87.

652. *Id.* at 686 (citing South Dakota v. Dole, 483 U.S. 203 (1987)).

Spending Clause is a "gift"[653] which Congress is under no obligation to provide. Justice Breyer's dissent challenged this easy distinction between federal compulsion and largess, arguing that in some cases it will be oppressive for states to forego federal money in order to preserve their right to engage in lawful activities.[654] Scalia answered that *South Dakota* indeed recognized this possibility when it said that some federal financial inducements might be so great as to be coercive.[655] He did not identify, nor, for that matter, has the Court ever found, the point at which a spending condition becomes coercive. Scalia then set out the crucial difference between conditional grants and constructive waivers: the latter impose sanctions, that is, the exclusion of a state from otherwise permissible activity if it chooses to avoid the waiver of sovereign immunity.[656] Where sovereign immunity is involved, Scalia argued, the "point of coercion is *automatically* passed"[657] when the state is excluded from otherwise lawful activity.

I wonder about the implications of *College Savings* on Spending Clause analysis. Scalia's opinion is a superficial endorsement of Spending Clause measures on the theory that the states have no right to the money and therefore are not forced to forgo anything that is lawfully theirs. But if an inducement to forgo otherwise permissible behavior is automatically coercive in the context of constructive waivers, why would it be different for Spending Clause purposes? It strikes me that constructive waivers and funding conditions both require a state entity recipient to forgo activities that are otherwise permissible. In *College Savings*, a constructive waiver would have forced Florida to give up legal for-profit activities to maintain sovereign immunity. Under the Rehabilitation Act, a state funding recipient must forgo whatever constitutionally protected power it has to discriminate against the disabled under Fourteenth Amendment minimal scrutiny and the Tenth Amendment.

Federal recipients, of course, have no right to receive money from the U.S. Treasury; whereas they do have at least a general right to engage in for-profit activities. Another distinction is that *College Savings* concerned state sovereign immunity, which may rank as a higher order state right.[658] Perhaps these lines will be distinct enough to keep the two

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653. *College Sav. Bank*, 527 U.S. at 687.

654. *Id.* at 696-97 (Breyer, J., dissenting).

655. *Id.* at 687 (citing *Dole*, 483 U.S. at 211).

656. *Id.*

657. *Id.* (emphasis added).

658. *Cf. College Sav. Bank*, 527 U.S. at 687 ("[W]e think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is *automatically* passed . . . when what is attached to the refusal to waive is . . . otherwise lawful activity.") (emphasis added); *Dole*, 483 U.S. at 209 ("[C]onstitutional limitations on Congress when exercis-

categories separate. My fear is that the Court may reduce the threshold for finding that submission to federal funding conditions is involuntary. Scalia's response to Breyer's objection that large government grants were inherently coercive was delivered with suspicious eagerness and apparent agreement. It may be that the Court is ready to entertain an argument that the stick is bigger than the carrot. If so, then it doesn't take much effort to reach the next step in the analysis: that any requirement that a state forfeit its constitutionally protected rights to receive federal monies is, just as in the situation of constructive waivers, inherently coercive and therefore violative of the Tenth Amendment. Any steps in this direction will certainly run counter to the contract theory of federal spending grants, and would threaten to upset the one currently reliable basis for the federal mandate against disability discrimination.

Even if the Court decides not to expand the doctrine of coercive conditions beyond its current vague confines, the use of the Spending Clause is not a complete substitute for authority under Section 5 or the Commerce Clause. One of the obvious limitations of Section 504 was its failure to reach the segments of American Society that did not receive federal funds. Many smaller municipalities and state licensing authorities, for example, simply do not receive federal funds or receive them inconsistently. The gaps in federal funding create highly undesirable instances in which similarly situated plaintiffs with otherwise good claims either get or are denied relief because of the fortuity of federal funding. Fortunately, though, federal funding is ubiquitous in our society. The majority of major employers, governmental units, educational institutions and so forth receive federal funds. Restricting the anti-discrimination mandate to this group would represent a retraction of coverage, but the mandate would still continue at a significant level.

V. CONCLUSION

At the beginning of the ADA's second decade there is substantial doubt about its constitutional status. Congressional power has ebbed during the Nineties as the Court has undertaken to restore the integrity of the states as sovereign units within the constitutional scheme and to reassert its own role as interpreter of the Constitution. Congress' power to utilize Section 5 of the Fourteenth Amendment to legislate in favor of groups who command only rational basis review has been stripped away, and its license to justify any social or economic legislation by simply nodding at the Commerce Clause has been canceled. As a result, many parts of the ADA are now constitutionally suspect. Only the spending

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ing its spending power are less exacting than those on its authority to regulate directly").

power seems to have emerged from the Nineties intact. There will no doubt be challenges to Section 504 rules in the next few years; voluntary acceptance of Spending Clause conditions, however, simply does not have the same potential to alter the federal-state equilibrium as do the mandatory provisions of the ADA.

It is a mistake to view the Court's rediscovered federalism as a veil covering hostility toward civil rights measures such as the ADA. As noted intermittently throughout this Article, the Nineties Court has dedicated itself to enforcing what it perceives as the structural limitations on Congressional power in the Constitution. Perhaps the clearest explanation of this philosophy comes from the pen of Justice O'Connor. In *Gregory v. Ashcroft*,[659] she detailed the justifications for federalism, noting that decentralized government ensures greater sensitivity to the needs of a diverse population, increases citizen involvement, promotes innovation and experimentation, and forces governments to be responsive to the wants of a mobile citizenry.[660] Most importantly, however, she stated that the principal benefit of federalism is to protect individual liberties from government predations by limiting the accumulation of power in any branch or level of government.[661] Accordingly, over the Nineties, the Court's opinions have echoed the philosophy of limited federal power consistently and loudly.

And at what price liberty? The present Court appears to place a very high value on maintaining the structural limitations of the Constitution. Justice O'Connor's opinion in *New York* acknowledged the immediate costs of a restrictive view of Congressional and federal power. As discussed above, *New York* invalidated the Low-Level Radioactive Waste Policy Amendments Act on grounds that it commandeered the state legislative process.[662] Only a very strange person would argue that Congress did not have a pressing interest in providing for the proper disposition of partially spent nuclear materials. But as *New York* suggested, need or even desirability does not suffice to compromise the structural limitations of the Constitution.[663] Justice O'Connor emphasized the preeminence of constitutional structure over the substance of legislation in the closing words of her *New York* majority opinion. She stated that the Constitution is concerned in large part with the form of government, and that the courts have traditionally invalidated legislation that deviates

659. 501 U.S. 452, 458-59 (1991).

660. *Gregory*, 501 U.S. at 458.

661. *Id.* at 458-59.

662. *See supra* text accompanying notes 513-19.

663. *See* New York v. United States, 505 U.S. 144, 177-78 (1992) (federal interest in legislation does not justify commandeering of state legislative process).

from that form.[664] She conceded that the result may often appear formalistic and have the effect of striking down legislation that embodies the "era's perceived necessity."[665] But the loss of beneficial legislation did not phase her. "[T]he Constitution protects us from our own best intentions,"[666] she reasons, and disallows the "expedient solution to the crisis of the day"[667] at the cost of accumulation of power in any one place.

This decade-long, unswerving dedication to maintaining the structural limitations on congressional power leaves me with only limited optimism about the constitutional challenges that will be raised against the ADA's substantive provisions over the next few years. To the present majority of the Court, it is not enough that a federal enactment reflects wise social policy or is an act of simple caring and decency. The Court perceives a grave danger to the fabric of American government and society, and to individual liberties, from a power imbalance between Congress and other centers of power. Yes, it is possible to construct arguments from the texts of the Court's decisions that the ADA is different from other statutes that have been struck down. The ADA's legislative record, for example, certainly does a better job of documenting a pattern of discrimination by state actors than did the meager record of the ADEA (though it is debatable whether it is adequate).[668] But the Court does not judge these arguments in a theoretical vacuum. If it follows its current pattern, the Court will judge federal legislation touching the states, including the ADA, for its effect on the constitutional scheme and not solely by a comparison with other statutes. Therefore, I am not optimistic that the good done by the ADA will be sufficient to save it from the Court's larger agenda of restoring the balance of federal and state power.

664. *New York*, 505 U.S. at 187.
665. *Id.*
666. *Id.*
667. *Id.*
668. *See supra* text accompanying notes 285-87.

POSTSCRIPT

On May 15 of this year, the Court issued its decision in *United States v. Morrison*.[669] The decision conformed generally to my predictions in Part III.A of this Article, striking down the private civil action provisions of the Violence Against Women Act ("VAWA") as a Commerce Clause enactment as well as a Section 5 measure.[670] The Court's treatment of VAWA, in my opinion, makes it less likely that it will sustain the Title II of the ADA as a Section 5 measure or certain parts of Title II as proper Commerce Clause enactments.

Morrison addresses the Commerce Clause issue first. Chief Justice Rehnquist's majority opinion notes that four factors were critical to the decision in *Lopez*: the non-commercial character of the regulated conduct, the Gun Free School Zones Act's ("GFSZA") lack of a jurisdictional element linking the regulations to interstate commerce, the lack of any meaningful legislative history, and the attenuated relationship between gun possession on school grounds and interstate commerce.[671] He then reasons, in a straightforward and predictable way, that VAWA is not materially different from GFSZA in that both statutes focus on non-commercial activity, neither has a jurisdictional limit, neither has a satisfactory legislative history, and both regulate conduct that bears the most tenuous relationship to interstate commerce.[672] The Court's reasoning in *Morrison* is significant since it removes any doubts that the present Court will approach Commerce Clause issues conservatively with little deference to Congress.

Some points in the opinion are more significant that others. The Court's observations that VAWA lacked a jurisdictional element add little to the holding in *Lopez* except reinforcement. Rehnquist's conclusion that there is only an attenuated link between violence against women and commerce again emphasizes *Lopez*'s fears that multiple link causal chains (e.g., violence deters woman from traveling to certain places, therefore fewer women will find employment, therefore productivity will lag) might justify federal regulation of traditionally state matters such as family law. This analysis, though, does not significantly alter the reasoning in *Lopez*. The Chief Justice's discussion of the commercial activity and legislative findings factors, however, does seem to extend the Court's protective view of federalism.

Chief Justice Rehnquist notes that both statutes focus on activities which are criminal under state law and are in no sense commercial.

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669. 120 S. Ct. 1740 (2000).

670. *See supra* text accompanying notes 479-85.

671. *Morrison*, 120 S. Ct. at 1749-51.

672. *Id.* at 1751-52.

While refusing to adopt a categorical rule against aggregating the effects of noncommercial intrastate activity to demonstrate a substantial effect on interstate commerce, he notes that the Court's aggregation cases have only concerned economic activities.[673] Rehnquist goes to great lengths to argue that the lack of a commercial nexus was critical to the result in *Lopez*; furthermore, he notes that the commerce power was intended to promote the development of a unified national economy but that an extension of that power beyond commercial activities threatens to disrupt the boundaries between state and national authority.[674] The effect of this commentary of course is to elevate Justice Kennedy's concurring views in *Lopez* to a statement of the Court. In fact, one gets the impression that the Court avoided a categorical rule only for fear of laying a trap in some unforeseeable circumstance.

Rehnquist's treatment of VAWA's legislative history also takes *Lopez*'s skeptical views a step further. The Gun Free School Zones Act was devoid of legislative explanations of its relationship to interstate commerce.[675] Not so VAWA. As already noted, VAWA's legislative history contained extensive findings that violence against women had significant commercial impacts.[676] Nevertheless, the Court found the legislative history wanting. In *Lopez*, the Court established that the propriety of a statute under the commerce power was ultimately a judicial matter, and that legislative findings could be useful (but no more) in elucidating a relationship to interstate commerce that was not apparent to the "naked eye."[677] *Morrison* adds to that skeptical approach a pronouncement that detailed congressional findings should receive no particular deference. Chief Justice Rehnquist quickly discounts VAWA's intricate findings as based on constitutionally "unworkable"[678] reasoning. In VAWA's case, the bad reasoning was the assumption that Congress might regulate activities with tenuous relationships to interstate commerce and thus encroach on areas of traditional state concern.[679] *Morrison* in effect requires that Congress connect its legislative findings to the proper constitutional standard as enunciated by the Court. One can read into this holding a fear of ceding back to Congress too much of Court's status as the ultimate interpreter of the Constitution, a status which decisions such as *Morgan* threatened and *Flores* reasserted. It may not be too harsh to say that the Court will defer to Congressional

673. *Id.* at 1751.
674. *Id.* at 1752.
675. *Id.* at 1750.
676. *See supra* note 482 and accompanying text.
677. *Morrison*, 120 S. Ct. at 1751 (quoting United States v. Lopez, 514 U.S. 549, 563 (1995)).
678. *Id.* at 1752.
679. *Id.* at 1752-53.

justifications that it deems to be correct, i.e., pay Congress no deference at all.

Morrison, in my opinion, confirms fears that parts of the ADA may not be valid as Commerce Clause enactments. As noted in Part III.C.2.d, many government services covered by Title II, such the operation of recreation leagues, courts or welfare systems, have little commercial content. Certainly an imaginative mind can find links between non-commercial government activities and the economy. For example, one could argue that participation in junior recreation leagues develops skills of competition and interaction that improve an adult worker's performance. Municipal recreations collectively buy a lot of equipment as well. The *Morrison* Court, no doubt, would reject that reasoning on the grounds that such activities were not commercial and had a remote relationship to interstate commerce.

Morrison also suggests that legislative history may not contribute much to the defense of the ADA as a Commerce Clause enactment. Rehnquist's opinion reiterates the *Lopez* position that legislative history at most may be helpful to the Court in carrying out the ultimately judicial function of assessing commerce clause challenges.[680] *Morrison*, however, goes a step further by requiring that Congress justify its measures under the correct legal standard. Assertions by Congress that disability discrimination costs the economy billions of dollars is unlikely to meet this elevated standard. Presumably the Court would prefer for Congress to address specifically and thoroughly the issues of whether certain government activities are commercial and whether they bear a close relationship to interstate commerce. The failure of the ADA Congress to do so seems significant after *Morrison*.

Morrison's Section 5 holding also bodes ill for Title II. The Court's analysis here begins with the now familiar litany that Section 5 is a "positive grant of power"[681] which permits Congress to "prohibit conduct which is not itself unconstitutional"[682] but that "a[s] broad as the congressional enforcement power is, it is not unlimited."[683] The essence of Rehnquist's analysis is that: 1) the Fourteenth Amendment applies only to state actors or actions;[684] and 2) VAWA's provision of a civil action against private parties, i.e., perpetrators of violence against women, does not respond to state action and, therefore, fails the congru-

680. *Id.* at 1751.

681. *Id.* at 1755 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

682. *Morrison*, 120 S. Ct. at 1755 (quoting City of Boerne v. Flores, 521 U.S. 507, 518 (1997)).

683. *Id.* (quoting Oregon v. Mitchell, 400 U.S. 112, 128 (1970)).

684. *Id.* at 1755-58.

ence and proportionality test of *Flores*.[685] The Court specifically rejected the argument that the failure of state and local officials to prosecute gender-based crimes justified the creation of a private action.[686] The link, the Court asserted, was too remote since the private actions visited no consequences on public officials unlike that statutes approved in *Katzenbach v. Morgan*[687] and *South Carolina v. Katzenbach*.[688]

Up to this point, *Morrison* has little to say about the ADA since Title II is directed at state and local governments and not at private individuals. *Morrison*, however, offers an additional and critical justification. Rehnquist faults VAWA as a statute that applies "uniformly throughout the nation"[689] without any indication in the legislative history that the problem of gender motivated violence exists "in *all* States."[690] Then he compares VAWA to the geographically limited remedies approved in the *Voting Rights Cases*.[691] On its face this analysis is astonishing. Common sense says that gender-based violence is a problem in New York, North Dakota, and every other state even though Congress may have failed to review the status of gender-violence in every jurisdiction.[692] The Court's approach makes it difficult to take seriously Justice Kennedy's statement in *Flores* that failures in the legislative history are not decisive.[693] When coupled with *Florida Prepaid*'s and *Kimel*'s insistence that Congress failed to demonstrate widespread violations of due process and equal protection violations, respectively, *Morrison*'s "all states" language suggests that the present Court has erected a strong presumption against nationwide Section 5 remedies that Congress must convincingly rebut. It may not be too far-fetched to say that the law of Section 5 has become a byzantine procedural code that Congress can never quite master. As for Title II, even a legislative record of widespread equal protection violations against the disabled, leavened by common sense, may not meet this emerging standard. Would it be sufficient to comb the legislative record and find instances equal protection

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685. *See generally supra* text accompanying notes 228-42.

686. *Morrison*, 120 S. Ct. at 1758.

687. *Id.* (citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (statute directed at state officials administering state election laws)).

688. *Id.* (citing South Carolina v. Katzenbach, 383 U.S. 301 (1966) (statute directed at state official administering state election laws)).

689. *Id.* at 1759.

690. *Id.* (emphasis added).

691. *See supra* text accompanying notes 236-42.

692. The Court says specifically: "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States." *Morrison*, 120 S. Ct. at 1759. There is a certain ambiguity in this statement. I assume that it means that Congress failed to document problems in a majority of states. If the assertion is that Congress affirmatively found that such violence does not exist in most states, then it would be absurd.

693. *See supra* text accompanying note 224.

violations in all states and territories? I don't know, but I wouldn't wager my paycheck on it.