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Note

The ADA's Abrogation of Eleventh Amendment State Immunity as a Valid Exercise of Congress's Power to Enforce the Fourteenth Amendment

Elizabeth Welter*

In 1996, the Supreme Court took the legal community by surprise in a sharply divided opinion addressing the extent of Congress's power to infringe on states' Eleventh Amendment immunity. *Seminole Tribe v. Florida*¹ held that Congress lacks the authority to abrogate state sovereign immunity under its power to regulate interstate commerce.² The decision reversed an earlier case holding that the Commerce Clause granted such power.³ Given the centrality of the Commerce Clause to Congress's expanding legislative reach,⁴ the inability to abrogate state immunity under it is a serious limitation on federal legislative authority.

By ensuring state immunity from suit in federal court, the Eleventh Amendment limits Congress's ability to regulate state conduct.⁵ Other than the Commerce Clause, the only acknowledged source of power enabling Congress to overcome Eleventh

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2. See infra text accompanying note 36 (describing *Seminole Tribe*).
5. See infra Part I.A (explaining Eleventh Amendment immunity).
Amendment immunity is section 5 of the Fourteenth Amendment, which grants Congress the authority to enforce the Fourteenth Amendment’s provisions. After Seminole Tribe, the Fourteenth Amendment enforcement power stands as Congress’s sole recognized authority to abrogate state immunity. Determining the extent of this authority is therefore essential.

Just a year after Seminole Tribe unexpectedly highlighted the importance of the enforcement power, the Supreme Court issued a significant decision involving the limits of this power. In City of Boerne v. Flores, the Court struck down the federal Religious Freedom Restoration Act (RFRA), which had restricted the application of state laws that burden the exercise of religion as an illegitimate use of Congress’s Fourteenth Amendment authority. Prior to Flores, the Fourteenth Amendment enforcement power was considered quite broad. Some scholars even asserted that it gave Congress the ability to define, and possibly expand, the substantive provisions of the Fourteenth Amendment. While Flores pointedly put an end to this speculation, the effect it has on Congress’s power to enact laws under the Fourteenth Amendment has yet to be determined. Already, under Seminole Tribe, courts have held a number of federal laws unenforceable against states, including the Fair Labor Standards Act, the Equal Pay Act, and the Age Discrimination in Employ-

6. See infra text accompanying note 38 (quoting the Fourteenth Amendment). In Fitzpatrick v. Bitzer, the Supreme Court held that Congress could abrogate state immunity under the Fourteenth Amendment. See 427 U.S. 445, 456 (1976). It did not reach the question whether Title VII is a valid exercise of Congress’s power to enforce the Amendment, however. See id. at 456 n.11 ("Apart from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondent state officials do not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under section 5 of the Fourteenth Amendment."). While other constitutional provisions may enable Congress to abrogate state immunity, prior to Seminole Tribe the Supreme Court had only expressly recognized this power in the Commerce Clause and the Fourteenth Amendment.

9. Id. § 2000bb-1.
10. Flores, 117 S. Ct. at 2171.
11. See infra Part I.B.3 (describing the enforcement power).
12. See infra note 70 and accompanying text.
13. Flores, 117 S. Ct. at 2167.
14. See Mills v. Maine, 118 F.3d 37, 48 (1st Cir. 1997).
15. See Larry v. Board of Trustees of the Univ. of Ala., 975 F. Supp. 1447,
ment Act. Now that *Flores* has articulated a new standard for measuring the boundaries of the Fourteenth Amendment power, the Americans with Disabilities Act (ADA), a comprehensive federal law directed at eliminating discrimination against disabled individuals, is particularly vulnerable under *Seminole Tribe*.

While the ADA's application to private actors is not in doubt, lower courts have begun to split over whether it can be enforced against states. As the Commerce Clause no longer enables Congress to abrogate state sovereign immunity, the enforceability of the ADA against states turns on its validity as an exercise of Congress's Fourteenth Amendment power. Because the ADA protects disabled individuals, a group that the Supreme Court has indicated does not warrant heightened judicial scrutiny under the Fourteenth Amendment, courts disagree over the threshold issue of whether Congress has the authority to create any protection for disabled individuals under the Fourteenth Amendment. Even where courts agree that Congress


20. *See* infra Part I.B.2 (discussing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), in which the Supreme Court held that mental disability is not a suspect class).

21. *Compare* *Brown*, 1997 WL 755010, at *7 (explaining that Congress may not use its Fourteenth Amendment power to protect disabled individuals)
has such an ability, they split over whether the ADA's accommodation requirement may properly apply to states.\textsuperscript{22}

This Note examines whether the ADA is a valid exercise of Congress's power to enforce the Fourteenth Amendment, thus enabling it to be enforceable against states. Part I surveys the development of Eleventh and Fourteenth Amendment jurisprudence. Part II provides an overview of the extent of discrimination against disabled individuals and Congress's attempt to remedy this discrimination in the form of the ADA. Part III analyzes the objections to Congress's use of its Fourteenth Amendment power to enact the ADA. This Note concludes that the ADA is a valid method for Congress to enforce the Fourteenth Amendment and as such is properly enforceable against states.

\section{I. CONGRESSIONAL POWER TO ABROGATE STATE IMMUNITY}

\subsection{A. STATE SOVEREIGNTY UNDER THE ELEVENTH AMENDMENT}

The Eleventh Amendment prohibits "Citizens of another State, or ... Citizens or Subjects of any Foreign State" from suing a state in federal court.\textsuperscript{23} Although the language of the Amendment itself does not bar suits against a state by its own citizens,\textsuperscript{24} the Supreme Court has long held that such suits are prohibited.\textsuperscript{25} This immunity from suit extends to state agents and instrumen-

\begin{itemize}
  \item \textit{with Martin}, 978 F. Supp. at 995 (holding that protecting disabled individuals is a legitimate use of Congress's enforcement power).
  \item \textit{Compare AUTIO}, 968 F. Supp. at 1370 (holding the accommodation requirement valid) \textit{with NIHISER}, 979 F. Supp. at 1174 ("[I]n enacting the accommodation provisions, Congress created a substantive right to preferential treatment where no such right previously existed under the Equal Protection Clause.").
  \item The full text of the Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.
  \item The amendment refers only to citizens of other states and foreign citizens. \textit{See id.}
  \item \textit{See Hans v. Louisiana}, 134 U.S. 1, 21 (1890). Similarly, although the Eleventh Amendment refers only to suits in law and equity, the Court has also held that the Amendment bars suits in admiralty. \textit{See Ex parte New York}, No. 1, 256 U.S. 490, 497 (1921) (barring in personam suit in admiralty); \textit{Ex parte New York}, No. 2, 256 U.S. 503, 511 (1921) (barring in rem suit against vessel owned by the state).
\end{itemize}
talties. There are a number of limitations on Eleventh Amendment immunity, however. The Eleventh Amendment does not apply to political subdivisions of a state, and it does not bar suits brought by the United States or another state. It does not preclude suits seeking only to enjoin a state officer from engaging in conduct that is illegal under federal law or the federal Constitution. States may also waive their immunity. Finally, Congress has limited power to abrogate it.

Before Seminole Tribe, the Supreme Court had held that Congress could abrogate state immunity pursuant to its Commerce Clause power as well as its power to enforce the Fourteenth Amendment, so long as Congress made its intent to abrogate "unmistakable." In Seminole Tribe, the Court held that Congress may not abrogate state immunity under any of its Article I powers, including the Commerce Clause. Thus, after Seminole

26. See Regents of the Univ. of Cal. v. Doe, 117 S. Ct. 900, 903-04 (1997). The immunity applies "when the action is in essence one for the recovery of money from the state, [in which case] the state is the real, substantial party in interest... even though individual officials are nominal defendants." Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945).


30. See Ex parte Young, 209 U.S. 123, 159 (1908). The doctrine of Ex parte Young may ultimately enable many plaintiffs to sue states under the ADA. See Armstrong v. Wilson, 124 F.3d 1019, 1025 (9th Cir. 1997) (allowing an ADA claim to go forward under Ex parte Young). A consideration of this doctrine, however, is beyond the scope of this Note.


33. See U.S. Const. art. I, § 8, cl. 3 (granting Congress the power to "regulate Commerce with foreign Nations, and among the several States"); see also Pennsylvania v. Union Gas Co., 491 U.S. 1, 14-15 (1989) (plurality opinion).

34. See Fitzpatrick, 427 U.S. at 456. Congress has the power to enforce the provisions of the Fourteenth Amendment "by appropriate legislation." U.S. Const. amend. XIV, § 5.


 Tribe, the Fourteenth Amendment enforcement power is the sole recognized source of congressional authority to abrogate state immunity. 37

B. THE FOURTEENTH AMENDMENT

1. The Meaning of “Equal Protection”

The Fourteenth Amendment provides, in relevant part, that no state may “deny to any person within its jurisdiction the equal protection of the laws.” 38 The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.” 39 In other words, the clause limits the ability of legislatures to classify individuals into groups for the purpose of subjecting them to dissimilar treatment under the law. 40 In analyzing equal protection claims, courts focus on the government’s intent. 41 Government action that unintentionally harms one group more than another does not violate the Equal Protection Clause. 42

immunity under this clause, the Court distinguished the Fourteenth Amendment power on the basis that the Fourteenth Amendment was enacted after the Eleventh Amendment. See Seminole Tribe, 116 S. Ct. at 1128.

37. See Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168, 1170 (S.D. Ohio 1997) (“[T]he only currently recognized authority for Congress to abrogate the states’ sovereign immunity . . . consists of Congress’ enactment of legislation pursuant to its enforcement powers under § 5 of the Fourteenth Amendment.”).

38. U.S. CONST. amend. XIV, § 1. The original purpose of the Fourteenth Amendment was to abolish the official practice of racial discrimination. See McLaughlin v. Florida, 379 U.S. 184, 192 (1964).


40. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 1439 n.22 (2d ed. 1988) (noting that legislative classifications are the focus of equal protection).

41. See Washington v. Davis, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”).

42. See id. at 245 (rejecting an equal protection challenge to a qualification test for police officers that had a racially disproportionate impact). Although the Fourteenth Amendment provides no remedy for “disparate impact” employment discrimination, Congress has created such a remedy in Title VII of the 1964 Civil Rights Act. See 42 U.S.C. § 2000e (1994). Title VII forbids discrimination in employment on the basis of race, color, religion, sex, and national origin. See id. § 2000e-2. Prohibited discrimination includes the use of tests or other qualifiers for employment that have a disparate impact along protected class lines, even where intent to discriminate does not exist. See id. § 2000e-2(a)(2), (b)(1)(A)-(B); Griggs v. Duke Power Co., 401 U.S. 424, 431
Because legislation almost always distinguishes between groups of people, courts have developed a set of standards to examine the validity of legislative classifications. Only those classifications considered inherently suspect or quasi-suspect receive heightened judicial scrutiny. All other classifications are considered presumptively valid. To determine whether to treat a classification as suspect, courts examine a number of factors, including whether the disadvantaged group has historically been subject to intentional discrimination, whether the group is par-

(1971) ("[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."). If the employer can establish that the test is related to job performance, however, it is permissible. See id. § 2000e-2(k)(1)(A)(i); Griggs, 401 U.S. at 431.

43. See TRIBE, supra note 40, § 16-2, at 1439 n.22.

44. See Cleburne, 478 U.S. at 439-40 (explaining that "absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation").

45. See, e.g., McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (noting that racial classifications are "constitutionally suspect and subject to the 'most rigid scrutiny'") (citations omitted).

46. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) ("Our decisions... establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification.") (citation omitted).

47. Laws making use of suspect classifications must be narrowly tailored to meet a compelling government interest. See McLaughlin, 379 U.S. at 192. Laws based on quasi-suspect classifications must reasonably tailored to fit an important government interest. See Mississippi Univ. for Women, 458 U.S. at 724.

48. See Cleburne, 473 U.S. at 440. Laws based on non-suspect classifications need only be rationally related to a legitimate government purpose. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Because this rational basis standard presumes the validity of legislation, the state need not support its classification in the record. See Exxon Corp. v. Eagerton, 462 U.S. 176, 196 (1983). Nor will courts inquire whether the legislation is the best possible solution to the problem. See Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1956). This deference stems from the fact that "courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent [legitimate] interests should be pursued." Cleburne, 473 U.S. at 441-42.

49. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) ("[A] suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.') (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1972)).
ticularly politically powerless, and whether the characteristics that set the group apart are immutable.

2. Disability as a Non-Suspect Classification

In City of Cleburne v. Cleburne Living Center, Inc., the Supreme Court addressed whether mental disability is a suspect or quasi-suspect classification. Cleburne involved a city zoning ordinance that required a special use permit to operate a group home for mentally retarded persons. The plaintiffs challenged the city’s denial of their request for a permit on equal protection grounds. Although the Court held that mental disability is not a suspect classification, it found the denial of the permit violative of the Fourteenth Amendment using a rational basis standard. In its analysis, the Court mentioned a series of groups that it also apparently believed did not trigger heightened scrutiny, including the physically disabled. As a result, commenta-

50. See id.
51. See Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) ("[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.") (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)); cf. Massachusetts Bd. of Retirement, 427 U.S. at 313-14 ("[O]ld age does not define a 'discrete and insular' group... [because] it marks a stage that each of us will reach if we live out our normal span.") (citations omitted). The phrase "discrete and insular" originated in a famous footnote in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("Nor need we enquire whether... prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").
53. See id. at 435.
54. See id.
55. See id. at 437.
56. See id. at 442.
57. See id. at 435. In his opinion concurring in part and dissenting in part, Justice Marshall argued that the majority reached this result using a higher level of scrutiny than it acknowledged. See id. at 456 (Marshall, J., concurring in part and dissenting in part). Later commentators have agreed with Justice Marshall’s analysis. See Tribe, supra note 40, § 16-3, at 1444; Gayle Lynn Pettinga, Note, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name, 62 IND. L.J. 779, 793-96 (1987) (discussing the heightened level of scrutiny in Cleburne).
tors have understood Cleburne to establish that disability in general is not a suspect classification.59

3. The Enforcement Power

Section 5 of the Fourteenth Amendment grants Congress the right to enforce the Amendment "by appropriate legislation."60 The leading case defining Congress's enforcement power is Katzenbach v. Morgan,61 which upheld Congress's exercise of its enforcement power to curtail states' use of English literacy requirements to deny the right to vote.62 Several years earlier, the Court had held that such requirements did not violate the Equal Protection Clause.63 The Court explained this apparently anomalous result by describing section 5 as a "positive grant of legislative power" that allows Congress to determine independently what legislative action is necessary to enforce the Fourteenth Amendment.64 In response to the dissent's assertion that this interpretive power would allow Congress to weaken the guarantee of equal protection,65 the Court explained in a famous footnote66 that Congress may only act to enforce, not dilute, the provisions of the Fourteenth Amendment.67 This explanation gave rise to the "ratchet theory"68 that, while Congress may not

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59. See Robert E. Rains, A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications, 11 St. Louis U. Pub. L. Rev. 185, 199 (1992) (asserting that Cleburne "managed to weaken future equal protection claims asserted by, not only mentally retarded persons, but other individuals with disabilities").

60. U.S. Const. amend. XIV, § 5.


62. See id. at 646-47.


64. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). The Court articulated a standard for analyzing whether legislation is valid under the Fourteenth Amendment enforcement power: "whether [the law] may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" Id. (quoting McCulloch v. Maryland, 17 U.S. 316, 421 (1819)).

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

66. See id. at 651 n.10.

67. See id. (explaining that the Fourteenth Amendment "grants Congress no power to restrict, abrogate, or dilute" its guarantees).

constrict Fourteenth Amendment protections, it may expand them in the exercise of its enforcement power.69

Commentators had long debated the validity of the ratchet theory.70 In City of Boerne v. Flores,71 the Supreme Court's most recent pronouncement on the enforcement power, the Court clearly indicated that Congress may not alter the substantive protections of the Fourteenth Amendment.72 Flores addressed the constitutionality of RFRA,73 which directed courts to apply a strict scrutiny standard to laws that substantially burden an individual's exercise of religion.74 Congress enacted RFRA in response to the Supreme Court's holding in Employment Division v. Smith,75 which upheld a state law criminalizing the use of peyote for any purpose, including religious ceremonies.76 In Smith, the Court held that, absent any intent to discriminate on the basis of religion, state laws of general applicability are valid even when they interfere with religious practices.77

69. See Rains, supra note 59, at 202 (explaining the ratchet theory). Some courts and commentators have used this broad interpretation of the enforcement power as a basis for asserting that Congress can create its own suspect classes. See Rains, supra note 59, at 202 (arguing that Congress has the power to create suspect classes); infra note 105 (citing Martin v. Voinovich, 840 F. Supp. 1175 (S.D. Ohio 1993), which held that the ADA overruled Cleburne).

70. Compare Rains, supra note 59, at 202 ("The Court found [in Morgan] that Congress may, under section 5 of the fourteenth amendment, enact laws to increase equal protection guarantees.") with 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) ("[C]areful parsing of [Morgan]'s abbreviated discussion leads persuasively to the conclusion that it probably stands for nothing more than the proposition that Congress may scrutinize any state regime [such as restrictions on voting] which the Court has found to be constitutionally questionable.").

71. 117 S. Ct. 2157 (1997).

72. See id. at 2167 ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law."). The Court emphasized this point later at the end of its opinion: "When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles... and contrary expectations must be disappointed." Id. at 2172.


74. See id. § 2000bb-1.


76. See id. at 878.

77. See id.
In *Flores*, the Court held that RFRA was beyond Congress's power under the Fourteenth Amendment.\(^7\) Observing that the history of the Fourteenth Amendment supports a narrower interpretation of Congress's enforcement power,\(^7\) the Court disclaimed Morgan's implication that Congress has the power to expand the rights guaranteed by the Fourteenth Amendment.\(^8\) Instead, the Court explained, the enforcement power is remedial, and therefore must be limited to preventing or alleviating actual constitutional violations.\(^9\) Noting that the congressional record cited few instances of purposeful religious discrimination, the Court concluded that RFRA bore little relation to any constitutional injury.\(^10\)

*Flores* reaffirmed the proposition, however, that "[i]legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional."\(^11\) Because "the line between measures that remedy or

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8. See id. at 2164-66 (noting that an earlier draft of the Amendment encountered broad opposition because it granted too much power to Congress).
9. See id. at 2168.
10. See id. at 2164.
11. See id. at 2169-70.
12. 78. Id. at 2163. Although Congress's legislative reach under the Fourteenth Amendment is thus somewhat broader than the Amendment itself, the Supreme Court has not expressly held that Congress's power to enforce the Fourteenth Amendment extends to regulating private conduct. See Jack M. Beermann, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199, 210 n.46 (discussing Congress's Fourteenth Amendment power). The Fourteenth Amendment itself only applies to state action. See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883). In the *Civil Rights Cases*, the Court held that Congress cannot reach private conduct when enacting laws pursuant to the Fourteenth Amendment. See id.

In *United States v. Guest*, however, a majority of the Court opined, in two opinions, that Congress could prohibit private conspiracies to interfere with Fourteenth Amendment rights. See 383 U.S. 745, 782 (1966) (Brennan, J., concurring in part and dissenting in part); see also *District of Columbia v. Carter*, 409 U.S. 418, 424 n.8 (1973) (explaining in dictum that although the Fourteenth Amendment itself does not regulate private conduct, Congress may regulate such conduct under its power to enforce the Fourteenth Amendment). Lower courts have come to different conclusions on the issue. Compare *Brzonkala v. Virginia Polytechnic and State Univ.*, 935 F. Supp. 779, 794 (W.D. Va. 1996), rev'd, 132 F.3d 949 (4th Cir. 1997), ("[T]he idea that Congress can address purely private conduct under § 5 is contrary to both the language of the Fourteenth Amendment and the Civil Rights Cases.") with *Lewis v. Pearson Found., Inc.*, 908 F.2d 318, 322 (8th Cir. 1990), cert. denied, 507 U.S. 908 (1993), (concluding that Congress can regulate private conduct under the Fourteenth Amendment).
prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," the Court cautioned that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Under *Flores*, therefore, the reach of the enforcement power depends on the prevalence of constitutional violations.

II. THE PURPOSE AND OPERATION OF THE ADA

A. DISCRIMINATION AGAINST PERSONS WITH DISABILITIES

In *Cleburne*, the Court observed that no "continuing antipathy or prejudice" exists towards persons with mental disabilities, thereby obviating the need for a heightened level of scrutiny. The Court also implied that physically disabled individuals are not subject to rampant prejudice. During hearings on the ADA, however, numerous disabled individuals testified about widespread discrimination and recounted personal stories of insults, exclusion, and isolation. Such discrimination included exclusion from public schools as well as restaurants and other places of public accommodation. To justify excluding dis-

84. *Flores*, 117 S. Ct. at 2164.
85. See id. at 2169-70. The Court explained:

Preventative measures... may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.

... The appropriateness of remedial measures must be considered in light of the evil presented.... Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

*Id.* (citations omitted). In contrast, RFRA's strict scrutiny standard was too intrusive because the laws affected by RFRA were mostly constitutional. See *id.* at 2170 (noting RFRA's intrusion "at every level of government").
87. *Id.* at 443.
88. By referring to physically disabled individuals as another group unlikely to require an elevated level of scrutiny, the Court implied that disability in general does not normally incite antipathy. See *supra* Part I.B.2 (describing *Cleburne*).
abled individuals, public officials and business owners often referred to safety and liability concerns\(^2\) as well as the potentially disturbing effect that the sight of a disabled person could have on other patrons.\(^3\) Some incidents of harassment, lacking these justifications, apparently arose out of sheer hostility.\(^4\) For persons with mental disabilities in particular, the extensive history of discrimination is even more disturbing.\(^5\)

The isolation that stems from such exclusion continues to be a major problem for disabled individuals.\(^6\) Most persons with disabilities are unemployed.\(^7\) Disabled individuals are also

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\(92\) See id.

\(93\) See id. Particularly egregious examples of such incidents include a zookeeper excluding children with Down's Syndrome because he was concerned they would agitate the animals; a college refusing to hire a severely arthritic woman because "college trustees [thought] normal students shouldn't see her"; proprietors of an auction house attempting to remove two disabled women by force because they were "disgusting to look at"; and a court excluding a child with cerebral palsy from public school because, according to his teacher, his appearance "produced a nauseating effect" on the other students. See id. (quoting from personal testimony at congressional hearings, court cases, and other sources documenting incidents of discrimination against individuals with disabilities).

\(94\) For example, one individual told the story of a police officer pointing a gun at his head and pretending to shoot. See Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of the Comm. on Educ. and Labor, 100th Cong. 167 (1989) (statement of Cynthia L. Miller). The officer apparently found it amusing that his victim could not run away. See id. A similar incident took place in St. Paul recently, suggesting that such hostility is not unique. See Mary Ellen Egan, Taken for a Ride, CITY PAGES (Minneapolis), Oct. 22, 1997, at 6 (describing an incident in which police officers beat a quadriplegic man because he could not raise his hands above his head).

\(95\) See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 461-64 (1985) (Marshall, J., concurring in part and dissenting in part) (summarizing history of purposeful discrimination against individuals with mental disabilities); ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA 353 (2d ed. 1949) (noting that at the turn of the century "the feebleminded person was looked upon as a parasite on the body politic who must be mercilessly isolated or destroyed for the protection of society").


\(97\) See id. at 47 (reporting that "[t]wo-thirds of all disabled Americans between age 16 and 64 are not working"). Of the group of disabled people not working, two-thirds wanted to work, suggesting that access to employment is a dominant concern for disabled individuals. See id. at 50. But see WILLIE V. BRYAN, IN SEARCH OF FREEDOM: HOW PERSONS WITH DISABILITIES HAVE BEEN DISENFRANCHISED FROM THE MAINSTREAM OF AMERICAN SOCIETY 42-43 (1996) (arguing that focusing exclusively on enhancing work opportunities
poorer than the general population," socialize less often," and tend to be less educated than people without disabilities.'

Prejudice is not the sole cause of the disparity in wealth, education, and social participation between disabled and nondisabled individuals, however. In a nationwide survey, the majority of persons with disabilities cited their disability itself as a major limitation on their ability to work.° When asked to identify barriers to greater participation in community life, persons with disabilities most often referred to fear that their disability would cause them to become hurt, sick, or victimized by crime." Thus, while intentional discrimination is a factor, the physical limitations that disability imposes also play a role in creating the discrepancy in the quality of life between disabled and non-disabled individuals.'

B. THE AMERICANS WITH DISABILITIES ACT

In response to the obstacles disabled individuals face in society, Congress enacted the Americans with Disabilities Act in 1990.° In its legislative findings set forth in the ADA, Congress discounts the concerns of disabled individuals who will never be able to work).

98. See LOUIS HARRIS AND ASSOCIATES, INC., supra note 96, at 23-24.
99. See id. at 33-43.
100. See id. at 25.
101. See id. at 70-71 (reporting that 78% of disabled individuals cited their disability as a major limitation on their ability to work, 47% cited employers' negative attitudes, 28% cited lack of transportation, and 23% cited lack of equipment).
102. See id. at 63.
103. It is possible to characterize environmental barriers as a form of purposeful discrimination. See CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT 5 (1988) ("[D]isability is a result of the various social constructions that force handicapped individuals into a position of deviance.... Consequences of even minor physical impairments may thus be determined by socially created imperatives."). But see Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168, 1174 (S.D. Ohio 1997) ("[I]t is difficult to understand, in light of traditional notions of what constitutes discriminatory animus, how the failure to modify a building constructed fifty years earlier can constitute discrimination when the original builders had no intent whatsoever of impeding the disabled from gaining access to the building.").
104. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified primarily at 42 U.S.C. §§ 12101-12213 (1994)). Congress set forth its findings in the text of the statute that individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services,
asserted that disabled individuals are a "discrete and insular minority who have been...subjected to a history of purposeful unequal treatment...based on characteristics that are beyond the control of such individuals." To eradicate this discrimination, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce." The ADA is divided into several titles and governs a broad range of activities, including employment, government services, public accommodations, and communications. Title II of the ADA covers public entities, including states.

1. The Scope of the Title II’s Coverage

The protections of Title II apply to every "qualified individual with a disability." A disability is defined as a "physical or men-
tal impairment that substantially limits one or more... major life activities of [an] individual, including "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." The definition of "disability" also includes individuals who have "a record of... an impairment" or who are "regarded as having... an impairment." In addition, Title II protects nondisabled people who associate with disabled people. In contrast to other antidiscrimination statutes, the breadth and complexity of this protection ensures that a significant amount of litigation will focus on the threshold question of whether the individual bringing suit is even a member of the protected class.

114. Id. § 12102(2)(A). Physical and mental impairments include:

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.


(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). The regulations also list a number of factors to consider in determining whether a major life activity is substantially limited: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." Id. § 1630.2(j)(2).

115. 28 C.F.R. § 35.104.


117. Id. § 12102(2)(C). Individuals may meet the "regarded as" disabled in one of three ways: having an impairment that does not substantially limit a major life activity but is treated as if it did; having an impairment that substantially limits a major life activity because of the attitudes of others; or being treated as having an impairment where no such impairment exists. See 29 C.F.R. § 1630.2(i) (1997).

118. See 42 U.S.C. § 12112(b)(4) (applying to employment); 28 C.F.R. § 35.130(g) (applying to public entities).

119. See Steven S. Locke, The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act, 68 U. COLO. L. REV. 107, 114-15 (1997) (noting that the ADA requires a greater threshold showing that the plaintiff is a member of the protected class than other antidiscrimination statutes).
2. The Requirements of Title II

Title II protects qualified individuals with disabilities from discrimination on the basis of disability. In addition to prohibiting intentional exclusion, Title II requires public entities to operate their programs and services in a manner readily accessible to disabled individuals. Public employers must, like private employers, provide accommodations to disabled employees and applicants. Individuals may enforce the provisions of Title II through private suits.

While Title II imposes its conditions on all public entities, regardless of size, public entities can be excused from some of the requirements if they can show that compliance would create an undue financial and administrative burden, cause a fundamental alteration in the service, or destroy the historic significance of a building. In the employment context, public entities may avoid the requirements of Title II by demonstrating that

120. See 42 U.S.C. § 12132 ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in, or be denied the benefits of, programs, services, or activities of a public entity, or be subjected to discrimination by any such entity."). Title II incorporates the provisions of Title I, which governs private employers with fifteen or more employees. See 28 C.F.R. § 35.140(b)(1). For public entities with fewer than fifteen employees, Title II adopts the requirements of section 504 of the Rehabilitation Act. See id. § 35.140(b)(2). As Congress has since amended section 504 to incorporate the requirements of Title I of the ADA, there is no difference between the standards applicable to the two groups of employers. See 29 U.S.C. § 794(d) (1994); see also Cheryl L. Anderson, Damages for Intentional Discrimination by Public Entities Under Title II of the Americans with Disabilities Act: A Rose by Any Other Name, But Are the Remedies the Same?, 9 BYU J. PUB. L. 235, 239 (1995) ("Regardless of whether the coverage falls under Title I, Title II, or section 504, employment discrimination based on disability is now governed by Title I substantive standards.").

121. See 28 C.F.R. § 35.150(a).

122. See 29 C.F.R. § 1630.9.


124. See supra note 112 (defining "public entity").

125. See 28 C.F.R. § 35.150(a)(3) (applying to the modification of existing facilities); id. § 35.164 (applying to the procurement of communications devices); 49 C.F.R. § 37.151 (1997) (applying to paratransit services).

126. See 28 C.F.R. § 35.150(a)(3) (applying to the modification of existing facilities); id. § 35.164 (applying to the procurement of communications devices).

127. See id. § 35.150(a)(2) (qualifying the requirement that public services be readily accessible to disabled individuals).
providing an accommodation would impose an undue hardship or create a direct threat to health or safety. In addition, accommodations must be reasonable and while employers may have to consider the disabled individual's suggestions, the final choice is left to the employer.

III. THE ADA'S ABROGATION OF STATE SOVEREIGN IMMUNITY

In order to abrogate states' Eleventh Amendment sovereign immunity, the ADA must represent a valid exercise of Congress's power to enforce the Fourteenth Amendment. While the ADA, like all congressional enactments, is presumptively constitutional, states have advanced two primary arguments as to why it is not valid under the Fourteenth Amendment and thus fails to abrogate state immunity. First, states assert that the ADA in effect imposes heightened scrutiny on classifications based on disability. Because Cleburne held that mental disability, and by implication disability in general, is not a suspect classification, states argue that the Fourteenth Amendment does not authorize Congress to legislate protections for disabled individuals. If this argument is correct, Congress cannot prohibit states from intentionally discriminating against disabled

128. See 29 C.F.R. § 1630.15(d). "Undue hardship" means "significant difficulty or expense." Id. § 1630.2(p)(1). To determine whether an accommodation imposes significant expense, courts must consider the cost of the accommodation and the employer's financial resources. See id. § 1630.2(p)(2).

129. See id. § 1630.15(b)(2).

130. See Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (holding that to present a prima facie case of discrimination under the ADA for failure to provide an accommodation, an employee "must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs").

131. See 29 C.F.R. § 1630.2(o)(3).

132. See id. app. § 1630.

133. See supra note 37 and accompanying text.

134. See City of Boerne v. Flores, 117 S. Ct. 2157, 2171-72 (1997) (noting that the Court presumes that congressional legislation is constitutionally valid).

135. See Autio v. Minnesota, 968 F. Supp. 1366, 1371 (D. Minn. 1997) (describing the state's argument). By emphasizing that disability is subject to the rational basis test, the state implied that the ADA embodies a higher level of scrutiny than rational basis. See id.

136. See supra notes 87-88 and accompanying text.

137. See Autio, 968 F. Supp. at 1371.
individuals, much less require states to accommodate them. As applied to states, therefore, the ADA would be completely invalid.

Second, states note that the Equal Protection Clause prohibits states from engaging in irrational discrimination. Where a state treats individuals equally, the requirements of the clause are satisfied. Insofar as the ADA requires states to accommodate disabled individuals, states argue that it bears no relation to the purpose of the Equal Protection Clause. Because, under Flores, Congress’s Fourteenth Amendment power is limited to preventing constitutional violations, states assert that this lack of a connection between any potential constitutional violation and the ADA’s accommodation requirement renders the requirement unconstitutional as applied to states. Additionally, states argue that the burdensome cost of accommodating disabled individuals renders the requirement invalid. Several courts have agreed with these arguments.

While courts differ regarding the validity of the ADA’s accommodation provisions under the Fourteenth Amendment, they generally agree that it is within Congress’s Fourteenth Amendment power to prohibit states from intentionally discriminating against disabled individuals. In Brown v. North Carolina Divi-

140. See id.
141. See supra note 81 and accompanying text (describing City of Boerne v. Flores, 117 S. Ct. 2157 (1997)).
142. See Nihiser, 979 F. Supp. at 1176.
143. See id. at 1174.
145. See Nihiser, 979 F. Supp. at 1173 (explaining that the ADA’s prohibition of intentional discrimination against disabled individuals is an appropriate exercise of Congress’s Fourteenth Amendment power); Autio v. Minnesota, 968 F. Supp. 1369, 1371 (D. Minn. 1997) (explaining that disabled individuals have a right to equal protection).
sion of Motor Vehicles,"146 however, the court reasoned that if the Supreme Court has not recognized a particular classification as either suspect or quasi-suspect, Congress cannot use its Fourteenth Amendment power to protect members of the class.147 The plaintiffs in Brown challenged the state's requirement that disabled individuals pay an extra fee to acquire parking placards that permit them to use disabled parking spaces.148 While the court did not indicate whether it considered the state action intentionally discriminatory, its reasoning suggests that the ADA is entirely invalid as applied to states, even where it operates to prohibit intentional discrimination against disabled individuals.

Because the Equal Protection Clause prohibits intentional discrimination,149 Congress's ability to prohibit intentional discrimination using its enforcement power should be most secure. If Congress lacks the power to prohibit states from intentionally discriminating against disabled individuals, it can hardly have the authority to require states to accommodate them. An analysis of the validity of the ADA as an exercise of Congress's power to enforce the Fourteenth Amendment must therefore begin with an inquiry into the nature of Congress's power to prohibit intentional discrimination against disabled individuals.

A. CONGRESSIONAL POWER TO PROHIBIT INTENTIONAL DISCRIMINATION UNDER THE FOURTEENTH AMENDMENT

Because Cleburne established that mental disability is not a suspect or quasi-suspect classification,150 states argue that Congress lacks the ability to enforce the equal protection rights of disabled individuals. By declining to require heightened scrutiny of state action that treats mentally disabled individuals unequally, Cleburne implied that all disabilities, both mental and physical,151 are normally a sound basis for distinguishing between individuals.152 Although in specific instances, as Cleburne demonstrates, such classifications may fail the rational basis

147. Id. at *7.
148. Id. at *2.
149. See supra note 41 and accompanying text (quoting Washington v. Davis, 426 U.S. 229 (1976), which held that a disparate impact does not constitute discrimination unless done intentionally).
150. See supra text accompanying note 56.
151. See supra note 58 and accompanying text.
152. See supra note 48 and accompanying text (noting that congressional classifications are presumptively valid).
test,\textsuperscript{153} they enjoy the presumption of validity to which legislative classifications are customarily entitled.\textsuperscript{154} If, as the rational basis standard implies, classifications based on disability are generally constitutional,\textsuperscript{155} a law that prohibits them in most circumstances would be disproportionately intrusive in relation to the extent of the constitutional injury.\textsuperscript{156} For that reason, such laws would be invalid as an exercise of Congress’s Fourteenth Amendment power.\textsuperscript{157}

1. Congressional Power to Define Suspect Classes: An Unsatisfactory Solution

Because \textit{Cleburne} seems to limit Congress’s ability to protect disabled individuals, some commentators argue that Congress has the power to deem a classification suspect even when the Court has declined to recognize it as such.\textsuperscript{158} If this were the case, Congress could overrule \textit{Cleburne} and require courts to apply a higher level of judicial scrutiny to classifications based on disability.\textsuperscript{159} Indeed, some courts and legal scholars believe that this is exactly what Congress has done.\textsuperscript{160} Congress defined disabled individuals in terms that echo the Supreme Court’s formula for defining suspect classifications,\textsuperscript{161} suggesting that it consciously sought to overturn the implication in \textit{Cleburne} that disability is not deserving of heightened scrutiny.

If the enforcement power gives Congress the ability to create suspect classes, the ADA’s abrogation of state immunity would not be in question. This theory is a poor tool with which to defend the validity of the ADA, however. In \textit{Flores}, the Court invalidated Congress’s attempt to mandate strict scrutiny of laws

\begin{itemize}
  \item \textsuperscript{153} See supra note 57 and accompanying text.
  \item \textsuperscript{154} See supra note 134 and accompanying text.
  \item \textsuperscript{155} See supra note 48 and accompanying text (noting that since disability laws involve non-suspect classes, they are presumptively valid).
  \item \textsuperscript{156} See supra notes 84-85 and accompanying text (quoting City of Boerne v. Flores, 117 S. Ct. 2157 (1997)).
  \item \textsuperscript{157} See supra note 84 and accompanying text.
  \item \textsuperscript{158} See supra note 70 and accompanying text (discussing the broad explanation of the enforcement power in \textit{Katzenbach v. Morgan}, 384 U.S. 641, 651 (1966)).
  \item \textsuperscript{159} See supra notes 46-47 (describing the increased standards of review for suspect and quasi-suspect classifications).
  \item \textsuperscript{160} See supra note 105.
  \item \textsuperscript{161} See supra text accompanying note 105 (quoting the ADA); supra notes 49-51 and accompanying text (describing the Court’s suspect class criteria).
\end{itemize}
that burden religious practices where the Court had already determined that a lower standard of scrutiny was sufficient. In so doing, the Court pointedly noted that its own precedents interpreting the Constitution control over conflicting congressional enactments. While the Court was concerned primarily with the intrusive nature of RFRA and did not focus on whether Congress may ever mandate a particular level of scrutiny, at a minimum Flores demonstrates that Congress cannot impose strict judicial scrutiny on behavior that is generally constitutional. Like RFRA, the ADA was enacted in spite of prior Supreme Court precedent indicating that the state action at issue is generally valid under the Fourteenth Amendment. Justifying the ADA on the basis that Congress has the power to create suspect classes, therefore, renders it vulnerable under Flores.

Because Flores calls into question Congress's power to create suspect classifications, this explanation of Congress's power to protect disabled individuals from state discrimination is weak at best. But the alternative notion that Congress is confined to legislating with respect to previously defined suspect classes is an overly restrictive view of Congress's power to enforce the Fourteenth Amendment. Because the Amendment protects individuals, not groups, limiting Congress's power to protecting only judicially defined suspect classes would deprive Congress of its full enforcement power. Yet if Congress cannot create suspect classes, how can it protect disabled individuals from discrimination under the Fourteenth Amendment?

162. See supra notes 74-78 and accompanying text.
163. See supra note 77 and accompanying text (explaining the lower standard of scrutiny applied by the Court in Employment Division v. Smith, 496 U.S. 913 (1990)).
164. See supra note 72.
165. See supra note 85.
166. See supra note 85.
167. See supra note 48 and accompanying text.
170. See supra text accompanying note 38 (quoting the Fourteenth Amendment, which prohibits states from denying equal protection to "any person").
2. The Fourteenth Amendment Enforcement Clause: Understanding the Nature of Legislative Power

To understand the scope of Congress's Fourteenth Amendment power, it is essential to recognize that the Supreme Court's practice of defining distinct suspect classifications and applying heightened review is a judicial, not a legislative, framework.\(^\text{171}\) Suspect classifications are triggers that indicate the level of judicial scrutiny to apply.\(^\text{172}\) In the absence of a compelling reason to scrutinize a legislative classification, courts defer to legislative judgments.\(^\text{173}\) This deference does not derive from the Fourteenth Amendment, but from the Supreme Court's respect for the legislature and its desire to preserve the distinction between legislative and judicial power.\(^\text{174}\)

Unlike a court's power, congressional power is legislative in nature. While the deferential nature of the rational basis test may be necessary to prevent courts from overreaching their judicial function, such a limitation has no application to congressional enactments under the Fourteenth Amendment. Instead, Congress's role as a legislative body permits it to scrutinize every problem it addresses as carefully as it chooses. In the context of enforcing the Fourteenth Amendment, Congress is free to assess the constitutionality of state action that would be shielded from heightened judicial scrutiny by the application of the rational basis test. In this respect, the Fourteenth Amendment gives Congress the ability to prohibit constitutional violations directly, even where the rational basis test would hinder a court's ability to discover a violation.

Properly understood, Congress's power to legislate under the Fourteenth Amendment thus has little connection to the levels of review articulated by the Supreme Court.\(^\text{175}\) Because the Equal Protection Clause invalidates all irrational discrimi-

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171. See supra note 44 and accompanying text (discussing the standards of review and quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985), that these standards were developed "absent controlling congressional direction").

172. See supra notes 45-48.

173. See supra note 48.

174. See supra note 48.

175. The court in Martin v. Kansas came to a similar conclusion. See 978 F. Supp. 992, 995 (D. Kan. 1997) ("Congress, in enacting the ADA, has provided the direction absent in Cleburne, thus making distinctions between the judicial standards of review meaningless.").
nation,176 disabled individuals, like anyone else, have the right to be free from it. Cleburne's holding that irrational discrimination against mentally disabled individuals violates the Fourteenth Amendment simply restates, in a particular context, the essence of the protection that the Equal Protection Clause affords all individuals. Where the rational basis test might prevent a court from determining when such discrimination is irrational, the ADA provides a detailed scheme for determining when it is justified.177 Indeed, the statute's complex definition of "disability" attests to the care with which Congress crafted the ADA.178

Because Congress's legislative ability to examine the rationality of state action is not limited by the rational basis test, Cleburne presents no barrier to Congress's ability to prohibit irrational discrimination based on disability. In light of the presumption of constitutionality that congressional enactments traditionally merit,179 the carefully balanced legislative scheme of the ADA is entitled to judicial respect as an exercise of Congress's Fourteenth Amendment power to guide courts in determining the rationality of state action that discriminates on the basis of disability. As an appropriate exercise of Congress's Fourteenth Amendment power, the ADA's prohibition of intentional discrimination is valid as applied to states.

B. REASONABLE ACCOMMODATION

In addition to arguing that the ADA's abrogation of state immunity is generally ineffective because Congress is without power to enact any form of protection for disabled individuals, states also urge that the ADA's accommodation requirement, in particular, is invalid as applied to them.180 Several courts have agreed, reasoning that, under Flores, Congress cannot require states to treat disabled individuals more favorably than other groups.181 Courts have also identified the cost of accommodating disabled individuals,182 and the fact that failure to accommodate is not by itself a constitutional violation,183 as reasons why the

176. See supra note 48.
177. See supra Part II.B (describing the ADA).
178. See supra Part II.B (describing the ADA).
179. See supra notes 113-117 and accompanying text.
180. See supra notes 134 and accompanying text.
181. See supra note 22 and accompanying text.
182. See supra note 144.
183. See supra notes 143-144 and accompanying text (describing cost as a factor).
ADA's accommodation requirement fails under *Flores*. A careful application of the *Flores* Court's analysis to the ADA's accommodation requirement, however, reveals that these and other objections are not constitutionally significant under *Flores*.

1. The *Flores* Test

The *Flores* Court recognized that the Fourteenth Amendment enforcement power enables Congress to prohibit actions that are not themselves unconstitutional. To alleviate the risk that Congress might use this power to enact general legislation that has no connection to enforcing the Fourteenth Amendment, the Court announced that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." In so doing, the Court recognized that there exists no easily identified categorical difference between legislation that prevents Fourteenth Amendment violations and legislation that creates new rights not found in the Constitution. Rather, *Flores* imposes a balancing test that requires a comparison between two factors: the extent of the constitutional injury a law is meant to address and the level of intrusion that the law imposes on states.

2. The Constitutional Injury

In *Flores*, the Court noted that the congressional record contained little mention of state laws enacted for the purpose of discriminating on religious grounds. Not surprisingly, the Court concluded that Congress was not primarily concerned about intentional discrimination when it enacted RFRA. Instead, the Court determined that Congress's principal desire was to alleviate the incidental burdens on religious practice that otherwise valid laws may impose. Because RFRA was not a response to a history of purposeful discrimination and did not primarily address intentional discrimination, it lacked any connection to a constitutional injury. Lacking such a connection, the Court concluded that the right created by RFRA, to be free from the

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979 F. Supp. 1168 (S.D. Ohio 1997)).
184. *See supra* text accompanying note 83.
186. *See supra* text accompanying note 84.
187. *See supra* text accompanying note 82.
188. *See Flores*, 117 S. Ct. at 2169.
189. *See id.*
190. *See id.* at 2170.
application of burdensome state laws, was a new right not found in the Constitution.\footnote{191}

In contrast to RFRA, the purpose and structure of the ADA indicate that its primary goal is to eradicate the effects of intentional discrimination. The ADA includes Congress's finding that "individuals with disabilities continually encounter various forms of discrimination."\footnote{192} The ADA's legislative history cites numerous examples of the type of purposeful, invidious discrimination that is without rational justification.\footnote{193} In addition to prohibiting discrimination against disabled individuals, the ADA prohibits discrimination against individuals who associate with disabled persons\footnote{194} as well as individuals who are regarded as disabled,\footnote{195} measures clearly intended to eradicated intentional discrimination. Most importantly, however, the ADA focuses on intentional discrimination as the central injury it is meant to address. Because the ADA's prohibition of intentional discrimination operates to identify and prohibit conduct in violation of equal protection,\footnote{196} its accommodation requirements are related to the underlying constitutional injury of intentional discrimination.

Because the ADA regulates private conduct as well as state action,\footnote{197} however, it raises an issue that was not present in Flores. To apply the Flores test, it is necessary to gauge the extent of the constitutional injury that a law is meant to address.\footnote{198} The greater the extent of the injury, the more expansive the reach of Congress's power.\footnote{199} Because the Fourteenth Amendment does not reach private conduct,\footnote{200} it could be argued that the history of private discrimination against disabled individuals would not

\footnote{191. Id.}
\footnote{192. 42 U.S.C. § 12101(a)(7) (1994). Although Congress defined "discrimination" to include "the discriminatory effects of architectural, transportation, and communication barriers," Congress's definition of discrimination also includes more traditional examples of purposeful conduct such as "outright intentional exclusion, . . . overprotective rules and policies, . . . [and] segregation." Id. § 12101(5).}
\footnote{193. See supra notes 89-94 and accompanying text.}
\footnote{194. See supra note 118 and accompanying text.}
\footnote{195. See supra notes 116-117 and accompanying text.}
\footnote{196. See supra Part III.A.2.}
\footnote{197. See supra notes 107-110 and accompanying text (identifying the scope of the ADA's coverage).}
\footnote{198. See supra note 85 and accompanying text.}
\footnote{199. See supra note 85 and accompanying text.}
\footnote{200. See supra note 83.}
alter the Flores balance. Flores did not address this issue, however, because RFRA did not regulate private conduct.201

Because general societal prejudice against a particular group makes it more likely that classifications based on that group's status are invidious,202 a proper application of the Flores test should include a consideration of the entire range of practices, both public and private, that contribute to the unequal status of disabled individuals in society. If Congress's Fourteenth Amendment enforcement power includes the ability to regulate private conduct for the purpose of preventing constitutional violations,203 Congress should be permitted to take into account the pervasiveness of private discrimination when weighing the need for a law that controls state conduct. The extensive history of private discrimination against disabled individuals, therefore, further justifies the ADA's regulatory reach.

3. The Extent of the ADA's Intrusion on the States

Because the ADA is Congress's response to irrational intentional discrimination against disabled individuals, an injury that Congress can properly address using its Fourteenth Amendment power, the next task under Flores is to gauge the extent of the ADA's intrusion on states.204 In light of the demonstrated societal bias against disabled individuals, Congress ought to have wide latitude, under Flores, in the exercise of its enforcement power.205 Nevertheless, some courts have concluded that the ADA's accommodation requirement, as applied to states, is beyond the scope of Congress's authority because it mandates "special treatment" of disabled individuals and because it may be costly.206 An examination of these objections reveals that they are based on a misapprehension of the scope of Congress's enforcement power.

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201. See supra text accompanying note 74 (describing RFRA).
202. See supra text accompanying note 87 (discussing Cleburne's implication that the lack of "continuing antipathy" against mentally disabled individuals renders heightened judicial scrutiny unnecessary).
203. See supra note 83 (noting that Congress's Fourteenth Amendment power could reach private conduct).
204. See supra note 84 and accompanying text.
205. See supra note 85 and accompanying text.
206. See supra note 144.
a. Congressional Authority to Mandate Unequal Treatment

Several courts have compared the ADA to other antidiscrimination statutes, noting that where other laws simply forbid unequal treatment, the ADA creates a positive entitlement to accommodation.\textsuperscript{207} The courts criticize this aspect of the ADA on two grounds. First, they reason that because the Fourteenth Amendment does not allow individuals with disabilities to demand accommodation,\textsuperscript{208} the accommodation requirement is unrelated to a constitutional injury.\textsuperscript{209} Second, they maintain that requiring different treatment, rather than identical treatment, contravenes the purpose of the Equal Protection Clause, which is to mandate "equality of treatment."\textsuperscript{210}

The first basis for criticizing the accommodation requirement, that the Fourteenth Amendment does not require accommodation, ignores the fact that Congress can legislate beyond the requirements of the Equal Protection Clause for the purpose of preventing constitutional injury.\textsuperscript{211} For example, Title VII prohibits employers from using tests and other selection criteria that disproportionately affect a protected class, even when no intent to discriminate exists.\textsuperscript{212} Without intentional discrimination, there is no constitutional injury.\textsuperscript{213} Yet Congress can still prohibit state action that has a disparate impact because of the danger that such action is a subterfuge for intentional discrimination. The fact that accommodations are not constitutionally required, therefore, does not conclusively demonstrate that Congress cannot require them.

Courts also criticize the accommodation requirement because it is not a measure designed to apply equally to all. As such, they conclude that it is unrelated to the purpose of the Equal Protection Clause. The Supreme Court's Fourteenth Amendment jurisprudence makes clear, however, that the Equal Protection Clause does not mandate absolutely equal treat-

\textsuperscript{207} See supra note 144.
\textsuperscript{209} See Nihiser, 979 F. Supp. at 1174.
\textsuperscript{210} Id.
\textsuperscript{211} See supra note 83 and accompanying text.
\textsuperscript{212} See supra note 42.
\textsuperscript{213} See supra notes 41-42 and accompanying text.
For Congress to take notice of the different needs of disabled individuals is not constitutionally forbidden. In attacking irrational discrimination against disabled individuals, Congress should not be required to turn a blind eye to the danger that minor barriers to access could create an excuse to discriminate. Rather than risking the possibility that some discrimination may go unredressed, Congress chose to remove this possibility by requiring reasonable accommodation. Because the Equal Protection Clause does not preclude this choice, it is within Congress’s discretion to make it.

b. *Imposing an Affirmative Duty to Enforce the Fourteenth Amendment*

The objection that the accommodation requirement is “special treatment” not required by the Constitution, therefore, is not relevant to determining whether Congress may impose it. In choosing to compare Title VII and the ADA, however, courts have brought a unique aspect of the accommodation requirement into focus. Unlike Title VII, which operates to forbid actions that are not otherwise unconstitutional, the ADA imposes affirmative duties that are not constitutionally required. As both of these measures are a response to a constitutional injury, the only possible distinction under *Flores* would be that prohibiting behavior is somehow less intrusive than imposing an affirmative duty.

Because the Fourteenth Amendment is a limitation on state power, it is not surprising that Congress would often enforce it by further limiting state action, rather than by requiring states to act. On a practical level, however, both measures have the potential to interfere significantly with a state’s ability to choose the manner in which to conduct its affairs. For example, many accommodations cost no money, and those that do may include such inexpensive measures as a headset to replace a telephone receiver or a timer equipped with an indicator light. Further-

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215. See supra text accompanying notes 101-103 (noting that physical barriers to access, as well as discrimination, combine to harm disabled individuals).
216. See supra note 64.
217. See Tucker, supra note 123, at 25-26 (citing a survey of federal contractors, which found that nearly a third of accommodations they provided their employees required no expenditure).
218. See Tucker, supra note 123, at 25 (describing the use of such a head-
more, accommodations such as minor modifications of equip-
ment are one-time interventions into the relationship between
the disabled individual and the state. Such accommodations will
not likely have a serious impact on anyone else, and they do not
affect the state on a policy level. In contrast, a Title VII dispa-
rate impact claim can intrude into the manner in which a state
selects all its employees, thus having a greater potential to af-
fect a broad group of people and interfere with a state's policy
objectives. While not all accommodations will be as modest as a
headset, this comparison demonstrates that it is not inherently
more invasive to require a state to act than it is to restrict a state's
ability to act. Thus Congress should be free to choose either
method in exercising its Fourteenth Amendment power.

c. The Cost of Providing Accommodations

The affirmative nature of the accommodation requirement
thus does not categorically bar Congress from implementing it
under its enforcement power. Like any other exercise of this
power, however, the accommodation requirement could poten-
tially be too intrusive in relation to the constitutional injury. As
one court noted, providing accommodations may impose a finan-
cial burden on states, and most commentators opposed to
the ADA criticize its cost. Because RFRA did not directly im-
pose costs on states, the Flores Court had no need to consider
whether the cost of complying with legislation could render it
disproportionate to the injury. Thus, it is not clear whether fin-
nancial considerations are relevant under Flores.

There are a number of reasons why the costs of complying
with a statute should be a factor under Flores. The allocation of
dollars is an important part of state responsibility, and requiring
that they be spent in a particular way interferes with state
power. Additionally, the amount of money available to spend is
not without limit, and mandating the expenditure of funds will
necessarily have an affect on state priorities. On the other hand,

219. See supra note 42 (describing Title VII's prohibition of disparate im-
pact discrimination).

220. See Tucker, supra note 123, at 26 (noting that nearly 40% of accom-
modations cost more than $500 per worker).

221. See supra notes 142-143 and accompanying text (discussing Nihiser v.
Ohio Envtl. Protection Agency, 979 F. Supp. 1168 (S.D. Ohio 1997)).

222. See, e.g., John J. Coleman, III & Marcel L. Debruge, A Practitioner's
Introduction to ADA Title II, 45 ALA. L. REV. 55, 55-56 (1993) (citing cases il-
lustrating the potential financial impact of the ADA).
however, allowing the cost of compliance to affect whether a law is constitutional raises the uncomfortable possibility that the validity of Congress's actions could depend on circumstances that are unknowable at the time Congress acts. For example, in passing the ADA Congress relied on studies and testimony indicating that the cost of implementing reasonable accommodations would in most cases be quite small.223 If, contrary to this evidence, it turns out that accommodating disabled individuals is extremely costly, the statute could then become unconstitutional. While cost is a valid concern, it is a difficult factor to take into account when examining the constitutionality of a law under Flores.

Critics who fault the ADA for imposing excessive costs, however, ignore that the ADA does not impose unlimited financial liability. The ADA requires accommodations only to the extent that they are reasonable.224 To be reasonable, an accommodation must be cost-effective in relation to what the employer can afford.225 The ADA itself thus tempers the costs it imposes on states. This cost-benefit structure suggests a standard courts can use in other contexts to decide whether the costs imposed by a law render it unconstitutional under Flores. Rather than trying to guess whether the ultimate cost of complying with a law is disproportionate to the constitutional injury, courts can look to the law to determine whether it includes a method for alleviating excessive cost. If the law imposes potentially overwhelming unlimited financial liability, it would be overly intrusive in relation to the injury it is intended to remedy and thus would not be valid under Flores. In this manner, courts can acknowledge that the cost of compliance is an important concern while avoiding the uncertainty and subjectivity inherent in trying to judge whether a law imposes inordinate costs. Because the ADA allows cost to be a factor in determining whether and what accommodations are required, it is not excessive in relation to the injury it is intended to prevent.

CONCLUSION

After Cleburne indicated that disability is not a suspect class, courts and commentators analyzing the ADA have mistak-

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223. See Tucker, supra note 123, at 25-26, 26 n.69 (summarizing studies and testimony regarding the cost of accommodations).
224. See supra note 130 and accompanying text.
225. See supra note 130.
enly focused on whether Congress could create suspect classes. Because Congress possesses the independent ability to determine when intentional discrimination lacks a rational basis, however, it is not confined by the deference inherent in the rational basis test. As an exercise of Congress's Fourteenth Amendment enforcement power, the ADA properly provides guidance to courts in uncovering equal protection violations against disabled individuals.

The enforcement power enables Congress to go further than simply prohibiting constitutional violations, however. As the Supreme Court has noted, Congress may prohibit otherwise constitutional conduct in order to prevent constitutional violations from occurring. The existence of societal discrimination against disabled individuals thus provides the justification for Congress to use its enforcement power to require states to accommodate disabled individuals. While some courts reason that the imposition of a duty to accommodate sets the ADA apart from other antidiscrimination statutes, in practical effect this affirmative duty need not be any more intrusive than other measures Congress has the right to implement under *Flores*. By mandating accommodations only to the extent that they are reasonable, the ADA avoids the problem of disproportionality present in *Flores* and is therefore a proper exercise of the Fourteenth Amendment enforcement power. As such, the ADA's abrogation of state sovereign immunity is valid and the Eleventh Amendment presents no barrier to the ADA's enforcement against the states.