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Federal Power, States' Rights, Individual Rights: Mentally Disabled Prisoners and the Supreme Court's New Activism

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FEDERAL POWER, STATES' RIGHTS, INDIVIDUAL RIGHTS: MENTALLY DISABLED PRISONERS AND THE SUPREME COURT'S NEW ACTIVISM

This Note examines the situation of mentally disabled prisoners who seek to assert their rights in federal court. Neither laws affecting the disabled nor laws affecting prisoners receive heightened scrutiny by the judiciary, which, thus far, also refuses to recognize the unique burdens of those who fit both categories. Because mentally disabled prisoners do not qualify for heightened scrutiny under the Equal Protection Clause, recent developments in the federalism doctrine lead the courts to conclude that they are without jurisdiction to hear suits brought by prisoners against state penitentiaries. This Note explores the underpinnings of federalism, separation of powers, and equal protection jurisprudence, arguing that states do not have the extensive sovereign immunity that the Supreme Court claims, that Congress should be permitted to influence the level of scrutiny afforded to claims brought by the disabled, and that the predicament of mentally disabled prisoners warrants heightened scrutiny.

> *"Prejudice, once let loose, is not easily cabined."*
> — Justice Thurgood Marshall[1]

INTRODUCTION

Discrimination lurks at the confused intersection of mental health and criminal justice. Mentally disabled prisoners defy easy definition. When a group of individuals suffers prejudice based on a unique trait, the law can fairly readily justify giving the group special consideration. When a group bears traits that individually are not unique to it, but bears them in a combination that no other group shares, the law has more difficulty recognizing the need for special protection.[2] The plight of mentally disabled prisoners demonstrates the predicament of multi-trait discrimination plaintiffs. In some respects, these individuals fit into the general prisoner category; in others, the general disabled population. When confronted with claims by disabled prisoners, courts consider each trait in turn, but

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[1] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 464 (1985).

[2] *See, e.g.*, DeGraffenreid v. Gen. Motors, 413 F. Supp. 142 (E.D. Mo. 1976) (permitting plaintiffs to pursue separate claims for sex and race discrimination, but holding that black women do not constitute a separate class: "[T]hey should not be allowed to combine statutory remedies to create a new 'super-remedy' which would give them relief beyond what the drafters of [each of] the relevant statutes intended." *Id.* at 143.), *aff'd in part and rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977) (Marshall, J. concurring in part and dissenting in part).

do not take the extra step to consider them in combination.[3] As a result, problems truly unique to the group go unresolved.

When it passed the Americans with Disabilities Act (ADA),[4] Congress provided a beacon of hope. The ADA requires special consideration of the needs of disabled individuals in all walks of life, including those in prison.[5] While Congress generally does not make legislation favorable to inmates,[6] the ADA recognizes that circumstances for the disabled are different.

The Supreme Court, in its recently rediscovered zeal for protecting states' rights from federal intrusion, has whittled away the ADA's protections, with particularly dire consequences for mentally disabled prisoners (MDPs). Although the Court has not specifically addressed the problems faced by MDPs, several decisions over the past half-decade allow the conclusion that for most prisoners, the ADA is not a lifeline into court. At least one federal district court has dismissed a prisoner's ADA claim, citing this line of Supreme Court decisions.[7]

The plight of MDPs presents a stew of jurisprudential quandaries. Federalism springs forth as perhaps the most obvious issue, but typical federalism analysis oversimplifies the matter. Focusing on federal power versus state autonomy obscures the conflict between states' rights and individual rights. Questions remain as to whose rights are superior, and about who is best situated to protect individual rights. The latter question further complicates matters because it involves both federalism and separation of powers doctrine, and requires more than one answer: Are the states best able to safeguard fundamental rights, or is the federal government the most reliable and effective guardian? Even if the federal government would serve as the better steward, does the Constitution permit it to assume that role? Does it mandate it? Furthermore, would legislative action best secure protection, or should the responsibility lie with courts? The very existence of these questions raises yet another, which is perhaps the most important and most complicated: Who is to decide?

Since its earliest years, the Supreme Court has claimed for the judicial branch the power to decide the meaning of laws — including the Constitution.[8] But American jurisprudence has an equally rich history of leaving questions of policy

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[3] *Id.*

[4] 42 U.S.C. §§ 12101-12213 (2001).

[5] *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) (holding that Congress intended the ADA to apply to prisons); 28 C.F.R. § 35.190(b)(6) (1997) (Dep't of Justice regulations implementing the ADA) (making specific references to correctional institutions and inmates).

[6] *See* Prisoner Litigation Reform Act, 42 U.S.C. § 1997e (2001).

[7] Bane v. Va. Dep't of Corr., 110 F. Supp. 2d 469 (W.D. Va. 2000).

[8] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

to Congress.[9] Problems arise when issues can be categorized both as matters of legal interpretation and of policy. Because the Supreme Court traditionally has had the last word, judicial philosophy becomes critical; what the justices believe about the proper roles of the various branches and of government as a whole motivates their decisions. "Every judge approaches decisionmaking with a value-laden view of the role of the courts."[10] Although most judges emphatically deny that their personal priorities play any role in their deliberations, it must necessarily be so: If either categorization would be equally acceptable under law, something other than law alone must influence the choice.[11] By deciding how to characterize an issue, the Court directly selects who will resolve it. When the Court knows how each decision-making body is likely to decide, its selection essentially directs the outcome.

The foundational question for the Court is whether it is better to allow the policy-making branch to make interpretive decisions, or to allow the interpretive branch to make policy decisions. The Court has long maintained that Congress has not only the right, but also the duty, to decide the meaning of the Constitution.[12] Many justices have vehemently opposed judicial policymaking.[13] The current

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[9] *See, e.g.*, Standard Oil Co. of N. J. v. United States, 221 U.S. 1, 102 (1911) (Harlan, J., concurring in part and dissenting in part) ("This court long ago deliberately held . . . [that it] would encroach upon the authority of Congress if, under the guise of construction, it should assume to determine a matter of public policy.").

[10] Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 208 (1984).

[11] *See, e.g., id.* at 203, 207:

> Whether a judge reasons forward from principles or backward from a result, both a rational process and an expression of preferences are involved in varying degrees. . . .
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> . . . .
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> Whether the contending principles are complementary or contradictory, the judge who would reason from principles toward a result is obliged to select from among competing principles, and what is worth considering is not only the process of reasoning from the selected principle, but, more important, the thinking that influenced the initial selection. Values of some sort influenced the judge to believe that one of two competing principles was the more pertinent.

Id. at 207.

[12] *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997) ("In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation . . . James Madison explained that 'it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire.'" (quoting 1 ANNALS OF CONG. 500 (Joseph Gales ed., 1789))).

[13] *See* Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) (Scalia, J., concurring) ("Both the allurement and the vice of [the methodology used by the Court] is that it provides broad

Court, however, has mouthed those refrains while dancing a different step. Using only its own constitutional interpretations, it has dramatically limited Congress' ability to set a national policy course.[14]

The issues surrounding mentally disabled prisoners can be characterized as either law or policy. The minimum standards for treatment are clearly a matter of law, but standards evolve. Deciding when and how much they evolve generates much conflict. The function of each branch colors its view of the matter: Congress sees it as a policy question; the Supreme Court beholds it as law. Of course, both are correct. Whichever branch settles the issue will be making both law and policy. Again, to which answer is the Constitution more amenable?

Mentally disabled prisoners face many hurdles. First, they must surmount the legal barriers that all prisoners meet at the courthouse door. Once inside, they must convince the judge that their dual-trait situation warrants greater scrutiny. Finally, each must present the facts of his or her claim and persuade the court to do justice. Every American with a legal complaint bears the burden of this last step. The first two steps fall only on some. This inequity is the concern of this Note.

Several layers of larger issues underlie the legal difficulties of MDPs. Setting the stage, Part I describes the current situation of MDPs and briefly explains the mechanics of equal protection decisionmaking. Part II questions whether Eleventh Amendment federalism is an appropriate vehicle for shielding state entities from congressional enactments involving equal protection. The remainder of the Note proceeds under the acknowledgement that the Supreme Court has made federalism a centerpiece of current jurisprudence, and is unlikely to change its opinion in the near future. Accordingly, Part III examines the requirements that Congress must meet if it is to overcome the federalism barrier. Part III also discusses past decisions in which the Court allowed congressional involvement in creating equal protection policy. Part IV considers equal protection claims specifically involving disability. This Part argues that the ADA's call for heightened scrutiny does not contradict the Court's initial opinion on the matter. Although it took pains to disclaim heightened scrutiny, that is what the Court actually applied. Part V shifts to the prison setting, briefly discussing prisoner claims in general, before narrowing the focus to examine the difficulties created when courts classify MDPs under current standards.

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scope for judicial lawmaking. We should have resisted that allurement today, as we resisted it in the past.") (citations omitted).

[14] *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 77 (1996) (Stevens, J., dissenting) ("[This decision] prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.").

I. BACKGROUND

A. *Prison and the Mentally Disabled*

Jail time is longer and more difficult for mentally disabled prisoners. Under current standards, states deny access to rehabilitation and treatment programs for a significant number of prisoners with mental health problems.[15] In part, this results when prison officials segregate MDPs from the general prison population, believing that they cannot cope with integrated prison life.[16] Housing in separate facilities "invariably results in a lack of access to prison treatment and rehabilitation programs."[17] In addition to depriving access, segregation actually harms those it is supposed to help. Contrary to prison officials' assumptions, mental problems tend to become worse in a segregated environment, where inmates lack physical and mental stimulation.[18] This also compounds the access problem. Some prison officials make rehabilitation programs available only to the inmates they believe most likely to benefit from them.[19] An injurious cycle results: The prisoners most in need of rehabilitation programs are excluded from participation for the very reason that their needs are higher than others; because they are excluded, they cannot develop their coping skills and, as a consequence of the prison environment, their mental health deteriorates, leaving them even less likely to be admitted to rehabilitation programs.

Denial of access to a generally available program, by virtue of a trait not shared with the general population, is a classic equal rights problem. The harm suffered is evident. Unequal opportunity is not only simply unfair, but these prisoners suffer clear, tangible detriment. In addition to being condemned to the inherent difficulties of a downward mental health spiral, mentally disabled prisoners often serve longer prison sentences than their non-disabled counterparts. Exclusion from rehabilitation programs contributes to this in two ways. First, prisoners with untreated mental disabilities are more likely to have discipline problems,[20] making them less eligible for early parole for good behavior. Second, completion of rehabilitation programs, regardless of actual rehabilitation, is often a factor in a parole board's decision to release.[21] Excluded prisoners miss both the rehabilitation and the formality. In effect, they are punished for being disabled.

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[15] T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, 285 (1997).

[16] *Id.* at 333.

[17] *Id.* at 334.

[18] *Id.* at 333-34.

[19] *Id.* at 334.

[20] *Id.* at 300.

[21] Stone, *supra* note 15, at 319 (citing Cruz v. Beto, 405 U.S. 319 (1972)).

Under the current jurisprudential regime, these individuals are unable to seek effective redress in court. When state courts cannot or will not stop discrimination, the federal government must assume responsibility and direct the states to give all citizens equal protection.[22] The Supreme Court's activism in the realm of federalism and separation of powers effectively obliterates the possibility of federal involvement in rectifying this problem.

B. *Equal Protection Mechanics*

Equal protection of the law entitles similarly situated persons to similar treatment and dissimilarly situated persons to dissimilar treatment.[23] Any judicial examination of legal rights based on the Equal Protection Clause begins with a determination of which class the complainant fits, followed by a determination of what sort of discriminatory treatment of that class the Constitution permits. The process for the former is not well defined, leaving the decision to the discretion of the judge.[24]

Standards do exist to help courts make the second determination. The standards of judicial review serve as a series of progressively finer screens through which government actions must pass in order to receive court approval. The more stringent the review, the more likely that state actions will be held unconstitutional.[25] To determine which standard of review applies, a judge asks whether the challenged action is intentionally discriminatory and invidious, and whether the class being discriminated against is a "discrete and insular" minority — one that historically has been subjected to discrimination and is politically

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[22] *See* U.S. CONST. amend XIV, § 1.

[23] LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1438 (2d ed. 1988).

[24] *See* United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) ("I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it."); DeGraffenreid v. Gen. Motors, 413 F. Supp. 142 at 142 (E.D. Mo. 1976) (refusing to define African American women as a separate class).

[25] Strict scrutiny almost invariably results in government action being ruled unconstitutionally discriminatory. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (invalidating Richmond's plan requiring at least thirty percent of all public construction funding to go to minority-owned businesses); Loving v. Virginia., 388 U.S. 1 (1967) (rejecting prohibition of interracial marriage); Strauder v. West Virginia, 100 U.S. 303 (1880) (striking down statute creating all-white juries). On the other hand, action reviewed under mere rationality is virtually always upheld. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991) (upholding mandatory retirement at age seventy for state judges); Ry. Express Agency v. New York, 336 U.S. 106 (1949) (upholding prohibition of advertising on vehicles except when the vehicle's owner advertised his own products).

powerless.[26] If these factors are present, a court applies strict[27] or intermediate[28] scrutiny; if not, rational basis scrutiny governs.[29] In practice, the Supreme Court has found so few classifications to warrant heightened scrutiny[30] that most lower courts simply check to see if a complainant fits one of the previously elevated classes. If the complainant does not have the necessary characteristics, the court proceeds with rational basis review. How the court characterizes the complainant usually foretells the outcome of the case.[31]

II. A CLOSER LOOK AT THE ELEVENTH AMENDMENT

With *Seminole Tribe of Florida v. Florida*,[32] the Supreme Court cast the die in which it has molded current federalism doctrine. Previously, the Court held that the Eleventh Amendment gives states sovereign immunity from suits brought by individuals in federal court, unless the state waives immunity or Congress abrogates it.[33] The Court has found valid abrogation only when legislation clearly announced that Congress so intended.[34] In *Seminole Tribe*, the Court added a prong to the abrogation test, asking, "[w]as the Act in question passed pursuant to a constitutional provision granting Congress power to abrogate?"[35] The Court held that no such grant had existed until ratification of the Civil War Amendments.[36]

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[26] *See* Lyng v. Castillo, 477 U.S. 635 (1986) (listing factors leading to strict scrutiny).

[27] *Id.*

[28] *See* United States v. Virginia, 518 U.S. 515 (1996) (explaining intermediate scrutiny as applied to gender); Craig v. Boren, 429 U.S. 190 (1976) (listing factors leading to intermediate scrutiny). This Note uses the term "heightened scrutiny" to mean either strict or intermediate scrutiny.

[29] *See* Lindsley v. Natural Carbonic Gas Co., 222 U.S. 61 (1911) (explaining rational basis review).

[30] Only actions based on race, national origin, and sometimes alienage, or that impair a fundamental right, are subject to strict scrutiny. Gender and illegitimacy receive mid-level review. All other classifications are reviewed based on mere rationality — any imaginable justification that does not violate the Constitution, and is related to a legitimate governmental interest.

[31] *See* TRIBE, *supra* note 23.

[32] 517 U.S. 44 (1996).

[33] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985).

[34] *Id.* at 240 (citing Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984)).

[35] *Seminole Tribe*, 517 U.S. at 59 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976)).

[36] *Id.* ("[T]he Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. . . . [T]hrough the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment . . . ."); *see also infra*, text accompanying notes 81-90.

Hence, the Court will uphold abrogation only if enacted pursuant to Section Five of the Fourteenth Amendment, which explicitly gives Congress the power to control state behavior.[37]

Much of the discussion in the courts so far has turned on what sort of congressional action overcomes the restrictions of the Eleventh Amendment. The questions raised may not be as pivotal as is generally assumed. The Eleventh Amendment itself may actually be something of a sheep that the Court has dressed in wolf's clothing. Noticeably absent from the text of the amendment is a prohibition on federal suits against a state by its own citizens. If the amendment's framers did not intend it to be such an expansive font of immunity, federalism doctrine would lose one of its most important justifications. A number of facts suggest that the Framers did not intend the amendment to be read so broadly.

Many of the same people who framed the Constitution also drafted, and later interpreted, the Eleventh Amendment.[38] Congress proposed the amendment in response to the Supreme Court decision in *Chisholm v. Georgia*,[39] which permitted a citizen of South Carolina to sue Georgia.[40] *Chisholm*'s "dissent provided the blueprint for the . . . Amendment."[41] All of the justices in the 4-1 majority had played large roles in the drafting and ratification of the Constitution.[42] The Court held that the language of Article III permitted the suit. Two justices also argued that "the doctrine of sovereign immunity was incompatible with the premises of a democratic republic in which the people placed their government as well as themselves under the rule of law."[43]

The Article III language relied on by the *Chisholm* Court and the language used in the Eleventh Amendment are strikingly similar— and equally striking where the similarity ends. Section Two of Article III defines the scope of federal court jurisdiction:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting

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[37] Section 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Fifteenth Amendment contains a similar enabling provision, U.S. CONST. amend XV, § 2, but because the Amendment deals only with voting, its application is limited, and it is essentially ignored in court and academic discussion of abrogation. Congress' real power over states lies in the Fourteenth Amendment.

[38] Howard P. Fink, et al., Federal Courts in the 21st Century 231 (Michie ed. 1996).

[39] 2 U.S. (2 Dall.) 419 (1791).

[40] FINK, *supra* note 38.

[41] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996) (Stevens, J., dissenting).

[42] FINK, *supra* note 38.

[43] *Id.*

> Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[44]

Of these nine bases for federal jurisdiction, five include situations that at least potentially involve states. The Eleventh Amendment mirrors portions of Section Two, using virtually identical language, but "of the five situations in which federal power had been granted to decide cases involving states, only two were made subject to the Eleventh Amendment."[45] The entire amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[46]

The amendment lends itself to two different readings. One, which Professor Prince terms the "contextual" reading, interprets the amendment in the context of Section Two, essentially splicing the provisions of the amendment into the relevant parts of Section Two.[47] Under this reading, only citizen-state diversity jurisdiction and foreign diversity jurisdiction fall under the new restriction; federal question jurisdiction survives for all plaintiffs. Early Supreme Court cases support the contextual reading. For example, in *Cohens v. Virginia*, Chief Justice Marshall stated that "a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case."[48]

The second, "acontextual," reading "takes the language of the amendment seriously, but it does so without regard for how it fits with the rest of the Constitution, especially Article III."[49] Under this reading, the amendment prohibits federal jurisdiction over *all* suits against states brought by citizens of another state or country, whether based on diversity or on federal questions, but makes no mention whatsoever of suits brought by citizens of the same state.[50] Citizens of the same state are, of course, inherently precluded from asserting diversity jurisdiction, but Article III, by its plain language, permits them to assert federal question

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[44] U.S. CONST. art. III, § 2, cl. 1.

[45] John Randolph Prince, *Caught in a Trap: The Romantic Reading of the Eleventh Amendment*, 48 BUFF. L. REV. 411, 421 (2000).

[46] U.S. CONST. amend XI.

[47] *See* Prince, *supra* note 45, at 421-22.

[48] 19 U.S. 264, 383 (1821).

[49] Prince, *supra* note 45, at 418.

[50] *Id.*

jurisdiction: "*all* [c]ases . . . arising under this Constitution, [and] the Laws of the United States."[51]

According to the acontextual interpretation, *Chisholm* was wrongly decided. The contextual reading suggests that *Chisholm* was correct when decided, but, to the extent that it allowed diversity jurisdiction, was overruled by the Eleventh Amendment.[52] Which reading is correct depends on what the Framers of the Constitution actually intended regarding sovereign immunity.

The Framers could have addressed state immunity in one of three ways: by eliminating it entirely, by granting immunity "subject to abrogation as to any matter within . . . [federal] jurisdiction," or by granting total immunity from federal jurisdiction.[53] At the constitutional convention, all discussion of immunity centered on citizen-state diversity jurisdiction, and whether ratification would automatically eliminate immunity or grant it subject to abrogation.[54] No record indicates that anyone ever considered the third option, total immunity.[55] "[T]here was — to say the least — no consensus at the time of the Constitution's ratification as to whether the doctrine of state sovereign immunity would have any application in federal court."[56] At any rate, the issue remained unresolved when the Constitution was ratified. "The . . . [final] draft in fact said nothing on the subject . . . ."[57] One could reasonably conclude that Article III did not eliminate immunity entirely, that because no decision was made, pre-existing immunity remained intact after ratification.[58] However, retaining the status quo also meant that immunity, in any form, did not achieve the status of constitutional law. Instead, it remained a matter of common law. "[T]he Founders' view [was] that common law, when it was received into the new American legal system, was always subject to legislative

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[51] U.S. Const. art III, § 2, cl. 1 (emphasis added).

[52] *See* Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 847 (1824) ("The eleventh amendment of the constitution *has exempted* a State from the suits of citizens of other States, or aliens . . . .") (emphasis added).

[53] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 104 (1996) (Souter, J., dissenting). Justice Souter's lengthy dissent provides an extensive account of the history of sovereign immunity and the framing of the Constitution and the Eleventh Amendment.

[54] *Id.*

[55] *Id.* at 106.

[56] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, at 286 (1985) (Brennan, J., dissenting).

[57] *Seminole Tribe*, 517 U.S. at 104 (Souter, J., dissenting); *accord id.* at 108 (quoting CLYDE EDWARD JACOBS, ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 40 ("The legislative history of the Constitution hardly warrants the conclusion drawn by some that there was a general understanding, at the time of ratification, that the states would retain their sovereign immunity.")).

[58] *Cf.* Chisholm v. Georgia, 2 U.S. (2 Dall.) 401, 437 (1793) (Iredell, J., dissenting) ("[W]e have no other rule to govern us but the principles of the pre-existent laws, which must remain in force till superceded by others . . . .").

amendment."[59] This leads to the conclusion that Congress may abrogate immunity simply by passing appropriate legislation, without the sanction of "an affirmative constitutional grant of authority,"[60] as required by the *Seminole Tribe* Court.

Just as the Framers had various choices in how they dealt with state immunity, so does the Court. And just as the Framers could not settle on a solution, the Court is uncomfortable with each of the possibilities it might choose. The Court refuses to accept the contextualist outcome, which allows broad federal jurisdiction. The acontextual reading also creates a result that the Court finds discomfiting: "[I]f New Jersey violates federal law and hurts two persons, one a citizen of New Jersey and one of Pennsylvania, only the former and not the latter could bring suit in federal court."[61] Justice Scalia addressed this result in his dissent in *Pennsylvania v. Union Gas Company*:

> [T]here is no plausible reason why one would wish to protect a State from being sued in federal court for violation of federal law . . . when the plaintiff is a citizen of another State or country, but to permit a State to be sued there when the plaintiff is citizen of the State itself.[62]

To avoid this anomaly, the Court has two choices: accede to the contextualist reading, and allow both plaintiffs to bring suit, or refuse jurisdiction to both. Neither choice adheres strictly to the language of the amendment — one prohibits more than specified; the other, less — but as Justice Scalia noted, under a literal reading of the text:

> [I]t would unquestionably be *most* reasonable to interpret it as providing immunity only when the *sole basis* of federal jurisdiction is the diversity of citizenship that it describes. . . . Thus, unless some other constitutional principle beyond the text of the Eleventh Amendment confers immunity . . . even if the parties to a suit fell within [the Amendment's] precise terms . . . sovereign immunity would not exist so long as [federal question] jurisdiction existed.[63]

In *Hans v. Louisiana*, the Court rejected the possibility that non-citizens could avoid the Eleventh Amendment by claiming a federal cause of action.[64] Rather than viewing the amendment as having changed Section Two in response to *Chisholm*,

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[59] *Seminole Tribe*, 517 U.S. at 102 (Souter, J., dissenting).

[60] *Id.*

[61] Prince, *supra* note 45, at 418.

[62] Pennsylvania v. Union Gas Co., 491 U.S. 1, 31 (1989) (Scalia, J., dissenting).

[63] *Id.* (first emphasis added).

[64] 134 U.S. 1, 15 (1890).

the *Hans* Court stated that *Chisholm* had misinterpreted the grant of jurisdiction, a mistake that the amendment corrected.[65] To justify rejecting the contextual reading, the *Hans* Court sought, and the current Court reiterates, the "other constitutional principle beyond the text of the Eleventh Amendment" to which Justice Scalia alluded. The Court elevated the amendment's importance beyond its mere words, implying that it reflects the spirit of the Constitution and the age in which it was adopted. According to Justice Scalia:

> [A] consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away. "[T]he cognizance of suits and actions [against unconsenting States] was not contemplated by the Constitution when establishing the judicial power of the United States."[66]

The *Hans* Court stated that *Chisholm* was "startling and unexpected . . . and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment . . . was almost unanimously proposed, and was in due course adopted by the legislatures of the States."[67]

The *Hans* Court inappropriately extended state immunity as a shield against federal question jurisdiction. *Chisholm* was not startling. There was no consensus about sovereign immunity at the time of the Founding — the concept appears nowhere in the Constitution precisely because there was no consensus. The *Hans* Court fabricated the sense of urgency that it claimed surrounded the adoption of the Eleventh Amendment. The Court was technically correct that the amendment was proposed "at the first meeting thereafter," but in fact, Congress was in session when the Court announced *Chisholm*. Although two congressmen proposed versions of the amendment in the days after the announcement, the "almost unanimous" proposal to the states did not come until the "first meeting thereafter" — the following year. The Court also completely ignored the first of the two proposed amendments, which would have embodied the expansive immunity that the Court continues to claim imbued the spirit of the age:

> [No] State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the

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[65] *Id.* at 15 ("[*Chisholm*] is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of.").

[66] *Union Gas Co.*, 491 U.S. at 31-32 (Scalia, J., dissenting) (quoting *Hans*, 134 U.S. at 15).

[67] *Hans*, 134 U.S. at 11.

> United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States.[68]

The second proposal was virtually identical to the Amendment as adopted.[69]

The current Court insists that any congressional abrogation of state immunity must be made pursuant to constitutional authorization, and that the Eleventh Amendment proves that no such authorization existed until the Fourteenth Amendment was ratified. Given the two proposals Congress chose from, the Court's claims of consensus are nearly laughable. "Even if there had been such a consensus, however, the Eleventh Amendment would represent a particularly cryptic way to embody that consensus in the Constitution."[70] The keys to a more appropriate contemporary reading of the Eleventh Amendment lie in the founding document itself. Two "other constitutional principles" offer explicit and plain guidance: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[71] and "the Laws of the United States . . . shall be the supreme Law of the Land."[72]

> Rules for interpreting [Section] 5 that would provide States with special protection . . . run counter to the very object of the Fourteenth Amendment. By its terms, that Amendment prohibits *States* from denying their citizens equal protection of the laws. Hence "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty."[73]

The Civil War Amendments changed the way the country looked at the federal/state relationship, eliminating any uncertainty about immunity. The amendments did not merely provide a grant of authority to abrogate immunity, they defined the spirit of the Constitution, and continue to serve as the lens through which to view the rest

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[68] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 283-84 (1985) (Brennan, J., dissenting) (alteration in original). Justice Brennan noted that "[t]he resolution was not reported in the Annals of Congress, but was reported in contemporary newspaper accounts." *Id.* at n.35 (citing John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983)).

[69] *See id.* at 285.

[70] *Id.* at 286 (Brennan, J., dissenting).

[71] U.S. CONST. amend. XIV, § 1.

[72] *Id.* at art. VI, cl. 2 (Supremacy Clause).

[73] Garrett v. Bd. of Trustees of the Univ. of Ala., 531 U.S. 356, 388 (2001) (Breyer, J., dissenting) (quoting City of Rome v. United States, 446 U.S. 156, 179 (1980)).

of the document. The Eleventh Amendment, read in context, does not bar federal question suits against states by their own citizens. Therefore, Congress' power over the states need not arise solely from the Fourteenth Amendment. That power should properly extend much further than the Court presently permits.

III. CONGRESSIONAL INVOLVEMENT IN THE REGULATION OF STATE BEHAVIOR AND THE SUPREME COURT'S NEW ACTIVISM

Although the Supreme Court has made efforts to define equal protection standards for inmates in general, Congress has also acted where disabled inmates are concerned. The ADA injected new vigor into questions about the appropriate standard of review. The final answer rests with the Court, but Congress, whether intentionally or not, has influenced the debate. Several cases from the last two decades illustrate how the judiciary deals with input from the legislative branch. These decisions prepared the way for the answer to whether Congress may constitutionally require state adherence to federal discrimination statutes.

A. *The Court Approves, then Disapproves . . .*

In *EEOC v. Wyoming*, the Court held that the Commerce Clause enables Congress to extend discrimination protection to state employees, but articulated Tenth Amendment concerns about state sovereignty.[74] Despite those concerns, the Court held that the Age Discrimination in Employment Act[75] (ADEA) applied to state and local governments.[76] The ADEA allowed those entities to discriminate based on age only if they could "demonstrate that age is a 'bona fide occupational qualification'" for a specific job.[77]

The Commerce Clause rationale met rejection in 1996 when the *Seminole Tribe* Court restricted Congressional abrogation of state immunity to legislation enacted under the Fourteenth Amendment.[78] By restricting federal court jurisdiction over suits against states, *Seminole Tribe* paved the way for a number of cases in which the Court has further cemented the move toward state immunity from federal action.

A year after *Seminole Tribe*, the Court decided *City of Boerne v. Flores*,[79] narrowing the scope of Congress' Fourteenth Amendment authority. In 1993, Congress passed the Religious Freedom Restoration Act (hereinafter RFRA)[80] in

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[74] 460 U.S. 226, 236-37 (1983) (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)), *overruled by* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

[75] 29 U.S.C. § 621.

[76] *EEOC*, 460 U.S. at 229.

[77] *Id.* at 240 (citations omitted).

[78] *See supra* notes 32-37 and accompanying text.

[79] 521 U.S. 507 (1997).

[80] 42 U.S.C. § 2000bb (2001).

response to *Employment Division, Department of Human Resources of Oregon v. Smith.*[81] *Smith* held that "neutral laws of general applicability"[82] may curtail religious practices, even if lacking a compelling governmental interest.[83] Congress sought to restore the compelling interest requirement,[84] and expressly made RFRA applicable to all state statutes and common law.[85] The *Boerne* Court held that RFRA exceeded the enforcement power granted to Congress by Section Five of the Fourteenth Amendment.[86]

The Court stated that Section Five only permits Congress to enforce the Fourteenth Amendment — to remedy or prevent discrimination — not to "determine what constitutes a constitutional violation,"[87] a task the Court reserved to itself.[88] According to the Court, RFRA attempted to supersede the Court's decision in *Smith*.[89] Using the Fourteenth Amendment as justification for the law implied that, in Congress' opinion, such government action violates the Constitution. This view directly contradicts the Court's opinion on the matter. Jealously guarding its role as constitutional interpreter, the Court invalidated the Act.[90]

The Court again invalidated an express congressional abrogation of state immunity in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank.*[91] Congress had amended the patent laws, intending to make clear that state entities are subject to suit in federal court for patent infringement.[92] Refusing to dismiss the suit on *Seminole Tribe* sovereign immunity grounds, the federal circuit court of appeals "reasoned that patents are property subject to the protections of the Due Process Clause, and that Congress' objective in enacting the Patent Remedy Act was permissible because it sought to prevent States from depriving patent owners of this property without due process."[93] The Supreme Court agreed that patents are property subject to congressional action under the

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[81] 494 U.S. 872 (1990).

[82] *Id.* at 901 (O'Connor, J., dissenting).

[83] *Id.* at 885-86.

[84] 42 U.S.C. § 2000bb-1 (2001).

[85] *Id.* at § 2000bb-2(1).

[86] City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

[87] *Id.* at 519.

[88] *Id.* at 536.

[89] *Id.* at 515-16.

[90] *Id.* at 536.

[91] 527 U.S. 627 (1999). *Florida Prepaid* had a companion case of the same name, 527 U.S. 666 (1999), in which the Court declared that states do not waive their sovereign immunity by engaging in commerce.

[92] Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271(h), 296(a) (2001).

[93] *Florida Prepaid*, 527 U.S. at 633.

Fourteenth Amendment,[94] but reversed the circuit court on due process grounds. The Court held that "a State's infringement of a patent . . . does not by itself violate the Constitution. Instead, only where the State provides no remedy, or only inadequate remedies, to injured patent owners . . . could a deprivation of property without due process result."[95] Finding that Congress had established no record of inadequate state remedies, the Court held that the Patent Remedy Act was a disproportionate response to the behavior Congress intended to remedy, and so was not proper remedial Section Five legislation.[96]

With this set of precedents in place, the Court revisited the ADEA. In *Kimel v. Florida Board of Regents*,[97] the Court rejected its earlier Commerce Clause justification, citing *Seminole Tribe*.[98] It then stated, pursuant to *Boerne*, that Congress could not determine the substance of Fourteenth Amendment protection: Congress cannot decide what is constitutional and what is not. The Court professed that only it may do so, noting that in *Gregory v. Ashcroft*[99] it had stated that courts need only a rational connection to a legitimate state interest to justify age discrimination.[100] Finally, the Court held that the ADEA exceeds the scope of congressional action permitted by the Fourteenth Amendment.[101] Therefore, Congress did not validly abrogate state immunity.[102]

Kimel neatly summarized the Court's requirements for legislation affecting the ability of citizens to sue their state government under federal law. A valid statute must explicitly state Congress' intent to abrogate the Eleventh Amendment. Such a statute may seek to remedy and deter the infringement of individual rights, but may not decree what those rights are. Congress must identify a pattern of state violations that require federal remedial action. Finally, a valid statute must reasonably tailor the remedy to the violations it seeks to redress.

The Court came one step closer to addressing disabled prisoners' rights when it decided *Board of Trustees of the University of Alabama v. Garrett*.[103] The case specifically dealt with the ADA's application to state entities. *Garrett* combined the claims of two Alabama state employees who suffered job discrimination.[104] A state hospital did not permit Patricia Garrett to resume her job as the director of

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[94] *Id.* at 642.
[95] *Id.* at 643.
[96] *Id.* at 646.
[97] 528 U.S. 62 (2000).
[98] *Id.* at 78.
[99] 501 U.S. 452 (1991).
[100] *Kimel*, 528 U.S. at 83.
[101] *Id.* at 91.
[102] *Id.*
[103] 531 U.S. 356 (2001).
[104] *Id.* at 362-63.

nursing after taking substantial leave following cancer surgery and treatment.[105] Instead, she "applied for and received a transfer to another, lower paying position as a nurse manager."[106] At the time he was hired, Milton Ash requested that his duties be modified to accommodate his asthma, and later asked to change shifts when he was diagnosed with sleep apnea.[107] The state honored neither request, and after Ash filed a claim with the Equal Employment Opportunity Commission, "he noticed that his performance evaluations were lower than those he had received on previous occasions."[108] Both employees filed ADA claims in federal court seeking money damages.[109] The Eleventh Circuit consolidated the cases and, asserting that the ADA was a valid abrogation of immunity, reversed the trial court's grants of summary judgment for the state.[110] The Supreme Court affirmed the district court holding, extensively citing *Seminole Tribe*, *Boerne*, *Florida Prepaid*, and *Kimel*.[111] In his opinion for the Court, Chief Justice Rehnquist also frequently cited *City of Cleburne v. Cleburne Living Center, Inc.*,[112] the Court's 1985 decision purportedly holding that disability warrants only rational basis review.[113] The Chief Justice assembled these cases into a rejection of the *Garrett* claims, contending that the ADA does not bind the states because Congress did not validly abrogate the Eleventh Amendment.[114] He based this holding on the evidence, gathered by Congress, that states engaged in disability discrimination, evidence he found inadequate:[115] "[T]hese incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which [Section] 5 legislation must be based."[116] As such, Congress did not establish the kind of state behavior that the Fourteenth Amendment allows it to regulate.[117]

These cases demonstrate the Court's ongoing effort to curb federal power over the states. The Court has strengthened the federalist position with each decision, insulating the states from Congress' reach with successive layers of new precedent,

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[105] *Id.* at 362.

[106] *Id.* (citation omitted).

[107] *Id.*

[108] *Id.*

[109] *Garrett*, 531 U.S. at 362.

[110] *Id.* at 363.

[111] *Id., passim.*

[112] 473 U.S. 432 (1985).

[113] *Id.* at 442; *see also infra* Part IV.

[114] *See Garrett*, 531 U.S. at 374.

[115] *Id.*

[116] *Id.* at 370 (citations omitted).

[117] The Court's argument seems to invalidate all ADA application to the states. Curiously, the Court limited its decision to individuals seeking money damages from states. "[ADA] standards can [still] be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*." *Id.* at 374 n.9.

each time making it more difficult for Congress to influence how states treat individuals. Disabled state prisoners' ability to find shelter in the ADA has become an increasingly distant possibility as the Court has plotted its course away from federal involvement.

B. . . . *But Disapproval is Qualified*

Garrett and its predecessors drew sharp lines dividing the constitutional decision-making roles of Congress and the Supreme Court. The opinions dismissed the part Congress is to play, occasionally paying lip service to the legislative branch's capacity to make constitutional judgments,[118] but in the end disregarded those judgments. The roles of the two branches have not always been so segregated. Congress has had an active leadership function in other developments of similar constitutional import, which set a precedent for its participation in dealing with disability discrimination. In enacting the ADA, Congress carried its traditional involvement forward. The Court's position has ignored that precedent.

As the district court for the Western District of Virginia pointed out, Congress sought to place disability among those attributes that trigger a heightened level of court scrutiny.[119] Congress used specific language when drafting the ADA, making this intention clear:

> [I]ndividuals with disabilities are a *discrete and insular minority* who have been faced with restrictions and limitations, subjected to a *history of purposeful unequal treatment*, and relegated to a position of *political powerlessness* in our society, based on *characteristics that are beyond the control* of such individuals and resulting from *stereotypic assumptions* not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[120]

This language mirrors that used by the Supreme Court to justify elevating other classifications above rational basis review. The distinction is critical: If disability discrimination is subject to rational basis review, the only unconstitutional state behavior would be that which has no imaginable rational connection to a legitimate state goal. Any rational state discrimination would fall outside the reach of the ADA and the courts. If disability discrimination is subject to heightened review, a significant number of state discriminatory policies and programs might not pass

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[118] *See, e.g., id.* at 365 ("Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence.").

[119] Bane v. Va. Dep't of Corr., 110 F. Supp. 2d 469, 476 (W.D. Va. 2000).

[120] 42 U.S.C. § 12101(7) (emphasis added).

constitutional muster; states would bear the burden of showing that discrimination is justifiable.

The Court's repeated assertions that it alone has "the power to determine what constitutes a constitutional violation"[121] belie the reality that in the past Congress has played an important role in making that determination. Before 1971, courts reviewed gender discrimination cases under the rational basis test. That year, the Court decided *Reed v. Reed*, in which a woman challenged an Idaho law favoring men as administrators of estates.[122] The Court presumed to decide the case under rational basis, but held that the law's preference was impermissibly arbitrary, despite observing that "the objective . . . is not without some legitimacy."[123] The decision signaled a willingness to examine gender discrimination cases more closely than traditional rational basis review would permit.

Two years later, the Court revisited the issue in *Frontiero v. Richardson*, making explicit the "departure from 'traditional' rational-basis analysis," which it deemed was "clearly justified."[124] The Court listed numerous criteria supporting the decision, including the history of discrimination suffered by women and the stereotyped distinctions that pervaded the law, drawing analogies between gender and race.[125] Significantly, the Court also cited Congress' efforts and attitude as support for elevating gender to strict scrutiny review:

> We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In [Title] VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, *sex*, or national origin." Similarly, the Equal Pay Act of 1963 provides that no employer covered by the Act "shall discriminate . . . between employees on the basis of *sex*." And §1 of the Equal Rights Amendment, passed by congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and *this conclusion of a coequal branch of Government is not without significance* to the question presently under consideration.[126]

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[121] *See Boerne*, 521 U.S. at 519.

[122] 404 U.S. 71 (1971).

[123] *Id.* at 76.

[124] 411 U.S. 677, 684 (1973).

[125] *Id.* at 685.

[126] *Id.* at 687-88 (last emphasis added) (citations omitted).

This acknowledgement has not held considerable weight in the more recent Court opinions discussing equal protection. Although it has not gone unnoticed in the words of the opinions, it holds no precedential sway in their conclusions. Justice Kennedy, writing for the Court in *Boerne*, noted that Congress has "not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[127] This very duty allows acts of Congress to take effect without undergoing constitutional scrutiny until brought to the courts by a party alleging injury therefrom. Despite his acknowledgement, Justice Kennedy disregarded Congress' "informed judgment," noting that "[w]hen the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is."[128] Justice Kennedy stated that "[o]ur national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches."[129] It seems the Court has not learned the lessons of this national experience very well. When the Court asserts the superiority of its own constitutional decisionmaking as acting "within the province of the Judicial Branch," it implies that when Congress interprets the Constitution, it unjustifiably intrudes into the Court's exclusive domain. In fact, when Congress interprets the Constitution, it acts within the province of the legislative branch, which, as Justice Kennedy himself noted, embraces the duty to say what the Constitution means. The duties of the branches are not identical. Congress' power under Section Five of the Fourteenth Amendment is "corrective or preventative."[130] The power of the judiciary is "to interpret the Constitution in a case or controversy . . . ."[131] The ADA set out to make official policy of Congress' desire to correct and prevent disability discrimination. The Court's decision not to allow that policy to take shape demeans Congress' constitutional role.

C. *The Dissents*

Justice O'Connor, dissenting in *Boerne*, agreed that "Congress lacks the ability independently to define or expand the scope of constitutional rights by statute," but went on to say that "[t]his recognition does not, of course, in any way diminish

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[127] *Boerne*, 521 U.S. 507, 535.

[128] *Id.* at 536 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). Note that Justice Kennedy relied on the famous proclamation by Chief Justice John Marshall in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* Chief Justice Marshall's little-disguised purpose in rendering that decision was to enlarge the power of the federal government over the states.

[129] *Boerne*, 521 U.S. at 535-36.

[130] *Id.* at 525.

[131] *Id.* at 524.

Congress' obligation to draw its own conclusions regarding the Constitution's meaning. Congress, no less than this Court, is called upon to consider the requirements of the Constitution and to act in accordance with its dictates."[132] This suggests a more appropriate method for dealing with constitutional questions, a cooperative approach in which the past decisions of both Congress and the Court inform the subsequent conclusions of both branches. Justice Stevens endorsed this approach in his *Florida Prepaid* dissent, concluding that the Court incorrectly overruled the Patent Remedy Act's abrogation of the Eleventh Amendment: "Congress decided, and I agree, that the Patent Remedy Act was a proper exercise of this power."[133]

Justice Stevens also dissented from the Court's diminution of congressional power in *Kimel*. Noting that "the ancient judge-made doctrine of sovereign immunity . . . is supposedly justified as a freestanding limit on congressional authority," he nonetheless rejected the Court's assumption of the role as "guardian of those state interests."[134] Rather than interposing the Court between Congress and the states, the Founders intended that the structure of the federal government would keep Congress' power in check. James Madison wrote:

> The State governments may be regarded as constituent and essential parts of the federal government .... The Senate will be elected absolutely and exclusively by the State legislatures .... Thus, [it] will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them.[135]

Justice Stevens noted that when Congress abrogates state sovereign immunity, "we can safely presume that the burdens the statute imposes on the sovereignty of the several States were taken into account during the deliberative process leading to the enactment of the measure."[136]

Differences in the processes of the two branches figured strongly in Justice Breyer's dissent in *Garrett*. Justice Breyer chided the Court for holding Congress to judicial evidentiary standards, rather than allowing it to draw its conclusions using legislative information-gathering methods.[137] Justice Breyer noted that

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[132] *Id.* at 545 (O'Connor, J., dissenting).

[133] *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 652 (1999) (Stevens, J., dissenting).

[134] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 93 (2000) (Stevens, J., dissenting).

[135] THE FEDERALIST NO. 45, at 291 (James Madison) (C. Rossiter ed., 1961). Note that the states no longer elect the Senate. The Seventeenth Amendment gave that power directly to the people. U.S. CONST. amend XVII, § 1.

[136] *Kimel*, 528 U.S. at 93 (Stevens, J., dissenting).

[137] *Garrett*, 531 U.S. 356, 377-78 (Breyer, J., dissenting).

Section Five of the Fourteenth Amendment "'empowers *Congress* to enforce [the equal protection] mandate,'" warranting Court deference to its decisions in that area of law.[138] In order to avoid giving that deference, the Court subjected the ADA's legislative history to an unprecedented level of scrutiny. Writing for the Court, the Chief Justice stated that Congress' evidence was inadequate reason to abrogate state immunity, that individual instances of discrimination reported by Congress did not carry sufficient weight where state behavior was concerned.[139] Arriving at this conclusion required the Court to subject those findings to evidentiary standards better suited to judicial inquiry.[140] Requiring more voluminous evidence departs from past Court practice, which "never required the sort of extensive investigation of each piece of evidence that the Court appears to contemplate."[141] Traditionally, the Court has deferred to the conclusions drawn by Congress. In *U.S. Railroad Retirement Board v. Fritz*, then-Justice Rehnquist wrote, "[w]here, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute."[142]

Until very recently, the Supreme Court has acted in accordance with its protestations of respect for the separation of powers. Previously, it has shown deference for congressional opinion on matters of constitutional import. As the evolution of gender discrimination doctrine demonstrated, the Court took very seriously legislative conclusions about what sorts of discrimination rational basis review cannot adequately address. This is a far cry from the Court's position in *Boerne*:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.[143]

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[138] *Id.* at 383 (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (alteration in original)).

[139] *Id.* at 370 (opinion of the Court).

[140] *Id.* at 382 (Breyer, J., dissenting).

[141] *Id.* at 380 (citing Katzenbach v. Morgan, 384 U.S. 641, 652-56 (1966)) ("Congress might well have questioned . . . . Congress might well have concluded . . . . Since Congress undertook to legislate so as to preclude the enforcement of the state law, and it did so in the context of a general appraisal . . . it was Congress' prerogative to weigh these competing considerations.").

[142] 449 U.S. 166, 179 (1980) (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).

[143] *Boerne*, 521 U.S. at 536.

Here the Court purported to show great deference for its own precedent, but *stare decisis* is the only settled principle it appears to have considered when weighing how much respect was due. This is especially peculiar in light of the fact that, only two sentences later, the Court invoked another settled principle: "It is for Congress *in the first instance* to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference."[144] The primary consideration seems to be, "Which branch got there first?" This might be justifiable if the Court applied it consistently. The Court drew its conclusion about disability claims in 1985, in *Cleburne*, and Congress did so in 1990, in the ADA, whereas the *Frontiero* Court deferred to congressional conclusions that were made before the Court decided on the standard of review for gender discrimination claims. However, the *Frontiero* Court did not have only Congress' work to consider. It had to confront its own prior holding in *Reed*, that gender was subject only to rational basis review. The Court managed to disregard that precedent, yet claims to be bound by *Cleburne*.

One of the key policies supporting *stare decisis* addresses the reliance placed on precedent by states and individuals when structuring their behavior.[145] Justice Scalia has said:

> I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence .... The freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once.[146]

Congress concluded that *Cleburne's* purported use of rational basis review[147] was inadequate to deal with the problems faced by the disabled, and it passed the ADA in response. As a five-year-old precedent, the case had not acquired the respect of a "long-established practice."[148] Neither had society adjusted itself to *Cleburne's* existence. In fact, just the opposite occurred: Congress, the representative branch, codified society's growing distaste for this sort of discrimination.

The Court's claim to be bound by precedent grows increasingly feeble upon further examination of the supposedly binding case. *Cleburne* itself states that "Section Five of the [Fourteenth] Amendment empowers *Congress* to enforce [the

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[144] *Id.* (emphasis added).

[145] Payne v. Tennessee, 501 U.S. 808, 852 (1991) (Marshall, J., dissenting).

[146] South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting).

[147] *See infra* Part IV (disputing the rational basis label).

[148] *Cf.* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 98 (2000) (Stevens, J., dissenting) ("It cannot be credibly maintained that a State's ordering of its affairs with respect to potential liability under federal law requires adherence to *Seminole Tribe*, as that decision leaves open a State's liability upon enforcement of federal law by federal agencies.").

equal protection] mandate."[149] The judiciary sometimes sets the standard, but only "absent controlling congressional direction."[150] The Court engages in absurdity when it refuses to grant deference to a congressional conclusion, and does so based on a decision that it was forced to make only because a congressional conclusion was absent. The Court's refusal, in *Garrett* and other cases,[151] to revise the label placed on the *Cleburne* standard does not comport with *stare decisis*. Instead, it sets new, erroneous precedent on which the judiciary relies as it continues on the present course away from individual rights.

The Court's desire to prevent Congress from regulating state behavior has led it to intrude on the constitutional domain of the legislative branch. *Garrett* and its predecessors have shifted the balance of power in America. They have augmented the authority of the states and the Court, and diminished the power of Congress and the people.

IV. *CLEBURNE* AND THE CONSTITUTIONALITY OF DISCRIMINATING AGAINST THE DISABLED

Just as the *Frontiero* Court acknowledged congressional involvement in gender discrimination doctrine, Justice Marshall recognized Congress' equal protection role in disability discrimination. In his *Cleburne* dissent, he urged that discrimination legislation reflects "evolving standards of equality [and that] courts should look to the fact of such change as a source of guidance on evolving principles of equality."[152] Like the *Frontiero* Court, Justice Marshall saw the inadequacy of the rational basis test in dealing with certain types of discrimination, and like that Court, he called the standard of review what he saw it to be. The *Cleburne* majority followed the model of the *Reed* Court, claiming to use rational basis analysis, but invalidating the law in question despite the existence of a plausible rationale.[153] Justice Marshall dissented not from the judgment, but from the majority's claim that it was able to reach that judgment using nothing more than rational basis.[154]

The ordinance at issue in *Cleburne* required the plaintiff, Cleburne Living Center, Inc. (hereinafter CLC), a prospective group home for the mentally retarded, to obtain a special use permit to locate its facilities on the property proposed for the home. The city counsel held public hearings and subsequently denied the permit.

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[149] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (emphasis added).

[150] *Id.*

[151] *E.g.*, Heller v. Doe, 509 U.S. 312 (1993). For a discussion of *Heller*, see *infra* text accompanying note 174.

[152] *Cleburne*, 473 U.S. at 466 (Marshall, J., dissenting) (citing Frontiero v. Richardson, 411 U.S. 677 (1973)).

[153] *Id.* at 450 (opinion of the Court).

[154] *Id.* at 456 (Marshall, J., concurring in part and dissenting in part).

CLC filed suit against the city, alleging violation of CLC's and its potential residents' rights under the Equal Protection Clause.[155] The district court upheld the ordinance, but the Fifth Circuit reversed the decision, finding that mental retardation warrants the same protection as gender.[156] Examining the ordinance with heightened scrutiny, the appellate court held the ordinance facially invalid for lack of an important governmental purpose.[157] The Supreme Court reversed that holding, but affirmed the judgment. It stated that heightened scrutiny is inappropriate,[158] but that even under the less restrictive standard, the ordinance violated the plaintiffs' rights.[159] The Court rendered a detailed explanation opposing heightened scrutiny, but then proceeded to analyze the facts in a manner remarkably similar to heightened scrutiny.[160] The Court's most serious break from traditional rational basis review came when it assigned the burden of proof. Ordinarily, courts presume government actions to be valid unless the party challenging the action shows cause for finding otherwise.[161] The Court repeated the phrases "rational basis"[162] and "rationally justify"[163] throughout its discussion, but with equal frequency recited "in our view the record does not reveal . . ."[164] and "the City never justifies . . . ."[165] Under a true rational basis analysis, the Court would not have required the City of Cleburne to assert any justification, and the Court would not have "sift[ed] through the record to determine whether policy decisions are squarely supported by a firm factual foundation."[166] Courts normally reserve this level of analysis for heightened scrutiny.[167]

The Court's so-called rational basis analysis is particularly striking considering the unambiguous tone of prior opinions, and the vigor with which some justices joining the opinion had previously asserted the minimal nature of rational basis review. For example, in *United States Department of Agriculture v. Moreno*, then-Justice Rehnquist dissented from a decision to invalidate a congressional limitation on food stamp eligibility.[168] He stated his disbelief that "asserted congressional concern with the fraudulent use of food stamps is, when interpreted in *the light most*

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[155] *Id.* at 437 (opinion of the Court).
[156] *Id.* at 437-38.
[157] *Id.* at 438.
[158] *Cleburne*, 473 U.S. at 442.
[159] *Id.* at 450.
[160] *Id.* at 442-50.
[161] *Id.* at 459 (Marshall, J., dissenting).
[162] *Id.* at 448.
[163] *Id.* at 450.
[164] *Cleburne*, 473 U.S. at 448.
[165] *Id.* at 450 (opinion of the Court).
[166] *Id.* at 458 (Marshall, J., dissenting).
[167] *See id.* at 459-60.
[168] Id. at 528.

favorable to sustaining the limitation, quite as irrational as the Court seems to believe."[169] He went on to say, "[t]he fact that the limitation will have unfortunate and perhaps unintended consequences beyond this does not make it unconstitutional."[170] Nine years later in *Zobel v. Williams*, Justice Rehnquist again dissented emphatically from a decision to invalidate a regulation on equal protection grounds:

> This Court has long held that state economic regulations are presumptively valid, and violate the Fourteenth Amendment only in the rarest of circumstances: "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . [O]ur decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude."[171]

The contrast between Justice Rehnquist's language and that of the Court in *Cleburne* indicates either a relaxing of the minimalist interpretation advocated by Justice Rehnquist or an abandonment of rational basis inquiry in all but name.[172] Justice Marshall expressed his opinion — and approval — that the Court actually decided *Cleburne* using heightened scrutiny, chiding the decision primarily for failure to state the true nature of the analysis.[173]

The question remains officially unresolved. Unlike *Reed* and *Frontiero*, *Cleburne* did not find a clarifying companion to lift disability discrimination doctrine out of its confused state. Instead, the Court later heard *Heller v. Doe*, another claim of state discrimination against the mentally retarded.[174] Rather than delivering a reprise of *Cleburne's* unanimous grant of relief to the plaintiffs, the *Heller* Court split 5-4 in favor of letting the discriminatory conduct stand.

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[169] 413 U.S. at 546 (1973) (Rehnquist, J., dissenting) (emphasis added).

[170] *Id.* at 547.

[171] 457 U.S. 55, 81-82 (Rehnquist, J., dissenting) (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (citations omitted)).

[172] *Compare* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357 (discussing "heightened rationality"), *with* TRIBE, *supra* note 23, at 1594-95 n.20 ("[T]he Court apparently applied heightened review in the guise of minimum rationality.").

[173] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459-60 (1985) (Marshall, J., dissenting).

[174] 509 U.S. 312 (1993).

Eschewing the example set in *Frontiero*, the Court retreated from *Cleburne's* more probing analysis, citing support from a number of cases that implemented the highly deferential standard called for by Justice Rehnquist in *Moreno* and *Zobel*.[175] Indeed, the majority opinion cited *Cleburne* only a single time, neither overruling it nor reaffirming its validity. That the majority even mentioned *Cleburne* at all could almost go unnoticed. The citation came at the end of a paragraph with more than a dozen other citations, and did not occasion any discussion specifically addressing its decision or analysis.[176] Lumping *Cleburne* with another case, the Court spared two sentences by way of comment: "We have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill. In neither case did we *purport* to apply a different standard of rational-basis review from that just described."[177]

The focus of legal analysis is properly on practical workings, not on formal classifications.[178] Whereas the *Frontiero* Court adopted the spirit of *Reed*, essentially changing the doctrine in name only, the *Heller* Court did the opposite, using the semantics of *Cleburne* to justify a result not supported by the true meaning. Because the Court did not offer any sort of justification for doing so, instead of clarifying the issue, *Heller* only served to cloud matters. The Court should have seized the opportunity to deliver needed protection.[179]

V. EQUAL PROTECTION GOES TO PRISON

Within the confines of the American penal system, equal protection doctrine has also evolved. As outside the prison walls, change has been neither constant nor consistent. The tortuous relationship between law and policy has vacillated, first enhancing, then diminishing, prisoners' rights.

A. *The History of Equal Protection and Prisoners*

The Supreme Court began to establish clear standards concerning prisoners' rights in 1974, when it decided *Procunier v. Martinez*.[180] The case involved prison regulations concerning inmate mail and the visitation rights of investigators

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[175] *Id.* at 321 (citing Schweiker v. Wilson, 450 U.S. 221 (1981); Dandridge v. Williams, 397 U.S. 471 (1970); Metropolis Theater v. Chicago, 228 U.S. 61 (1913)).

[176] *Heller*, 509 U.S. at 321.

[177] *Id.* (emphasis added).

[178] *Cf.* North Carolina v. Alford, 400 U.S. 25, 37 (1970) ("[T]he Constitution is concerned with the practical consequences, not the formal categorizations, of state law.").

[179] *See* TRIBE, *supra* note 23, at 1594-95 n.20 ("The most obvious case for heightened judicial scrutiny is governmental action which, on its face, distinguishes between the disabled and the nondisabled to the detriment of the former.").

[180] 416 U.S. 396 (1974).

employed by inmates' lawyers. The Court upheld the right of inmates to communicate with their attorneys via investigators.[181] The Court held that prison officials may not infringe attorney access, a fundamental right, by means of blanket regulations.[182] Because mail censorship involves the rights of both inmates and non-inmates, infringement must further "one or more of the substantial governmental interests of security, order, and rehabilitation [and] must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[183] If those standards are met, the decision "must be accompanied by minimum procedural safeguards."[184]

This decision set the framework for future cases in three important ways: first, by requiring that regulation be based on a genuine governmental interest, rather than allowing arbitrary infringement of fundamental rights; second, by requiring that prison officials establish procedures by which decisions are made; and third, by requiring that restrictions be tailored to specific situations where infringement is necessary.

In 1987, the Court refined these rules in *Turner v. Safley*.[185] The case again involved prisoner correspondence, this time between inmates at different institutions, and also examined a virtual ban on inmate marriage. The district court had applied strict scrutiny to the regulations, invalidating both.[186] After the Eighth Circuit affirmed, the Supreme Court held that strict scrutiny was inappropriate when a regulation does not involve the rights of non-inmates. It held that regulations are valid if "reasonably related to legitimate penological interests."[187] As such, the mail censorship regulation at issue was valid because the Court found it reasonably related to security interests.[188] The marriage ban, however, failed because it was an "exaggerated response to . . . security objectives" and did not contribute to the rehabilitation of prisoners, as prison officials claimed.[189]

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[181] *Id.* at 398.

[182] *Id.* at 419-20.

[183] *Id.* at 413.

[184] *Id.* at 417.

[185] 482 U.S. 78 (1987).

[186] *Id.* at 83.

[187] *Id.* at 89. Reasonableness depends on several factors: (1) the regulation and the justifying interest must have a "valid, rational connection" that is not "so remote as to render the policy arbitrary or irrational"; *Id.* at 89-90 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)) (2) if "alternative means of exercising the right" at issue are available, regulation is more likely to be found reasonable; (3) on the other hand, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns;" finally (4) "the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally" must be considered. *Id.* at 90.

[188] *Id.* at 91.

[189] *Id.* at 98.

The Court justified the departure by noting that the "*Martinez* Court based its ruling . . . on the First Amendment rights of those who are not prisoners."[190] Because the mail in that case was either to or from a non-inmate, *Martinez* was not truly a prisoners' rights decision.[191] *Turner* called for the less stringent standard because:

> Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.[192]

This decision made explicit the Court's desire to minimize judicial involvement in the administration of prisons.[193] The key difference between *Martinez* and *Turner* is the level of restriction permitted. *Martinez* required that infringement be "no greater than necessary."[194] *Turner* does not require such extensive tailoring so long as regulations are reasonable.

B. *Applying the ADA to Disabled Prisoners*

With the Americans with Disabilities Act, Congress sought to require increased tailoring of restrictions on disabled individuals. In light of the regulatory latitude that penal authorities have under *Turner*, questions arose as to whether Congress intended to include prisoners under the Act's protective umbrella. In 1998, the Supreme Court announced a unanimous opinion in *Pennsylvania Department of Corrections v. Yeskey*, affirming that Congress had clearly stated its intention to cover state entities, including prisons.[195] Ronald Yeskey, a Pennsylvania prisoner, alleged exclusion from a rehabilitation program that would have led to early parole.[196] Prison officials denied him entrance to the program because he had a

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[190] *Id.* at 85.

[191] Turner v. Safley, 482 U.S. 78, 85 (1987).

[192] *Id.* at 89.

[193] *But see id.* at 100-01 (Stevens, J., dissenting) (objecting that a standard requiring a mere logical connection between regulation and any legitimate concern is "virtually meaningless," and noting that "there is a logical connection between prison discipline and the use of bullwhips on prisoners").

[194] Procunier v. Martinez, 416 U.S. 396 (1974).

[195] 524 U.S. 206 (1998).

[196] *Id.* at 208.

medical history of hypertension.[197] Yeskey claimed this was a violation of the ADA.[198] The Department of Corrections argued that Congress did not clearly state a desire to include state prisons among those it regulates.[199] The Court held that "the statute's language unmistakably includes State prisons and prisoners within its coverage."[200] Title II of the ADA explicitly states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[201] The Department of Corrections argued that language in the ADA such as "participation" implies that an applicant for benefits must apply voluntarily, and thus does not clearly include prisoners because they are held against their will.[202] The Court disagreed. First, it concluded that the statutory language does not necessarily imply voluntariness.[203] Second, even if voluntariness were required, many prison programs are in fact voluntary. The Court cited the very program to which Yeskey had applied as an example of permitting prisoners to elect whether to apply for admission.[204]

The question presented in *Yeskey* addressed only the issue of Congress' intent. The Court declined to decide "whether application of the ADA to state prisons is a constitutional exercise of Congress's [sic] power under either the Commerce Clause . . . or [Section] 5 of the Fourteenth Amendment."[205] *Garrett* seems to have answered that question, although it did not specifically address prisons. Lower courts have considered that context. In *Bane v. Virginia Department of Corrections*, the district court for the Western District of Virginia dismissed the ADA claim of a prisoner, holding that Congress exceeded its Section Five authority.[206] Foretelling *Garrett*, and borrowing heavily from the language in *Boerne*, the court held that Congress had created a new substantive right rather than enforcing an existing one.[207] The court found that Congress did not specify the type of discrimination it sought to prohibit.[208] Noting that statutes only enforce the Fourteenth Amendment to the extent that they address unconstitutional behavior, the court stated that Congress' legislative findings had not distinguished between

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[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.* at 209.

[201] 42 U.S.C. § 12132 (1990).

[202] *See Yeskey*, 524 U.S. at 210.

[203] *Id.* at 211.

[204] *Id.*

[205] *Id.* at 212. Note that Justice Scalia left open the possibility that the Commerce Clause might be a proper justification.

[206] 110 F. Supp. 2d 469 (W.D. Va. 2000).

[207] *Id.* at 476.

[208] *Id.* at 473.

permissible discrimination against disabled persons, as defined in *Cleburne*, and unconstitutional discrimination.[209] As such, the ADA appears to prohibit both varieties. The court stated that "the ADA [does not have] particular congruence with the unconstitutional conduct it was designed to prohibit."[210] The court went on to find that "the ADA is unlimited in its scope, has the potential to affect all state employers and programs, and in fact, is likely to prohibit significantly more employment decisions and programs than would be found unconstitutional."[211]

Yeskey affirmed Congress' intention to protect disabled prisoners. *Bane* and *Garrett* have denied the will of the elected branch by using federalist principles that the Founders never intended. Only heightened scrutiny cases can escape the death knell sounded in *Bane*. So long as the judiciary confines mentally disabled prisoners' claims to rational basis review, official discrimination will have no foe in court.

C. *Defining Mentally Disabled Prisoners as a Class*

Mentally disabled prisoners fit more than one class. A court could find that they belong in the disabled class,[212] the prisoner class, or a combination of these. The classification may dictate the outcome of a case.

A claim brought on the basis of prisoner status would restrict court jurisdiction to government action which does not meet the standard set forth by the Supreme Court in *Turner v. Safely*:[213] "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[214] This standard applies to all prisoner equal protection claims, and does not take into account additional circumstances such as disability.[215] As such, disabled prisoners do not receive the same level of protection available to non-prisoners with the same disabilities.

> This level of review for inmates' constitutional claims, together with the Supreme Court's position that persons with mental disabilities are not politically powerless nor subject to discriminatory treatment for which classifications based upon mental disability should receive courts' strict

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[209] *Id.*

[210] *Id.* at 474.

[211] *Id.* at 477.

[212] Under the ADA, mental disability is considered part of the general disabled class, rather than a distinct subset. *Cf.* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (considering mental retardation as a classification).

[213] 482 U.S. 78 (1986).

[214] *Id.* at 89.

[215] *See* Stone, *supra* note 15, at 319.

> scrutiny, appears to relegate to obscurity inmates' equal protection claims that allege discrimination based upon mental disability.[216]

By viewing mentally disabled prisoners merely as prisoners, the *Turner* standard allows valid claims to go unanswered. Unequal treatment goes unchecked. Prisoners with mental disabilities are often denied access to programs, including rehabilitation and training programs that improve their participants' chances for early release.[217] Without the opportunity to participate, these prisoners frequently spend more time in prison than their non-disabled counterparts.[218] They also leave prison less equipped to cope, resulting in a higher recidivism rate.[219] Classifying mentally disabled prisoners as mere prisoners marks them with tangible and detrimental effect. The same label yields distinct treatment.

Mentally disabled prisoners also experience a different predicament than disabled non-inmates. One could argue that the disabled as a general group are no longer politically powerless.[220] Legislation, primarily the ADA, has opened the door to legal recourse for disabled people, creating publicity and, inevitably, greater political power for those affected.[221] Although many might argue that this power is as yet insufficient, the proverbial ball has begun rolling. The present Supreme

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[216] *Id.* (citing *Cleburne,* 473 U.S. at 442-45).

[217] *Id.* at 334 ("[S]ome prison officials 'reserve' rehabilitation programs for inmates that prison officials believe will benefit from the most, almost categorically excluding participation by inmates with mental disabilities.").

[218] *Id.* at 286.

[219] *Id.*

[220] *See, e.g., Cleburne,* 473 U.S. at 443 (1985) ("[T]he distinctive legislative response [demonstrates that] lawmakers have been addressing their difficulties in a manner that belies a . . . need for more intrusive oversight by the judiciary."). Note that the courts will not enforce the legislative response if the defendant is a state.

[221] *See, e.g.,* Kathi Wolfe, *Things are Looking Up: Some Progress is Evident in Media Depictions of People With Disabilities; ADA and the Media: The Good News & the Bad News About Changing Attitudes,* PARAPLEGIA NEWS, Jan. 1997, at 51:

> When asked if media depictions of people with disabilities have improved since ADA's passage, [Media Access Awards co-producer Tari Susan] Hartman says some progress is evident. . . . Pat Pound, interim director of the Texas Governor's Committee on People With Disabilities, [says,] "Here's another example. A small-town official got upset over a curb cut [for wheelchair access] . . . and tried to have it removed. This caused a furor in the community. People used the media to express their opinions about this. . . . Because of the publicity in the media, the official backed off.

Id.

Court prefers to let that ball take its natural course without undue — in its view — judicial influence.

As a subgroup, mentally disabled prisoners are a different story. Prisoner's rights in general are not a popular political topic, at least not when it comes to enforcing or enhancing rights.[222] Many credit increasingly strict incarceration policies with declining crime rates.[223] Prisoners have few champions in the public, let alone the political arena. The public and politicians have turned a deaf ear to claims of unfair treatment in the belief, perhaps correct to a degree, that prisoners sue because they have nothing better to do.[224] Consequently, those with valid claims cannot hail that deaf ear.[225]

Because many mentally disabled prisoners have no voting power of their own,[226] and they are unable to summon any significant political power from the public, they are a discrete and insular minority. One might argue that prisoners are *supposed* to have less rights and reduced power, but that is by virtue of their status as prisoners. Disabled prisoners sustain a double detriment: a position (incarceration) worsened by disability without sharing in the developing political

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[222] Restricting rights, on the other hand, meets with favor:

> The Prison Litigation Reform Act (PLRA), passed in 1995, ensured that in most cases involving prisoner's rights the federal courts would no longer be able to use consent decrees — the most common and effective vehicles for correcting unconstitutionally brutal conditions in state prisons. Like most court-stripping measures, the PLRA does not deprive people of their constitutional rights in theory; it simply deprives them of their remedies when rights are violated. The stated purpose of this law was to curb frivolous suits by prisoners; its primary effect will be to facilitate their brutalization. Still, the PLRA was a popular law, perhaps because many people believe that prisons are like motels with good gym facilities and color TVs, or because prisoners are not generally considered deserving of human rights.

Wendy Kaminer, *Taking Liberties: The New Assault on Freedom*, THE AMERICAN PROSPECT, Jan. 1999-Feb. 1999, at 33 (citing Prison Litigation Reform Act, 18 U.S.C.A. § 3626 (1996)).

[223] *See, e.g.*, Andrew Peyton Thomas, *More Time, Less Crime*, THE WEEKLY STANDARD, Nov. 1998-Dec. 1998, at 20.

[224] *See* 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole) (describing an inmate suing over a bad haircut); 141 CONG. REC. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyle) (describing inmate lawsuits as "recreational activity").

[225] *See, e.g.*, William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in Federal Courts*, 92 HARV. L. REV. 610, 625 (1979) (stating that a study of five federal districts found "no assurance that meritorious cases were sorted out from frivolous ones. There are many indications that cases were bureaucratically processed rather than adjudicated.").

[226] *See, e.g.*, VA. CONST. art. II, § 1 (eliminating right to vote for convicted felons).

attention, and a position (disability) worsened by incarceration without benefit of therapeutic treatment. Individually, the detriments are either mitigated or justified, one by political power, the other by desertion. Put together, each circumstance negates the other. Political power is eliminated at the prison gate. Deserved punishment is made worse for the disabled than it is for the non-disabled. Mentally disabled prisoners are not similarly situated to either disabled non-inmates or non-disabled inmates. Equal protection requires that disabled prisoners receive, at the very least, the same level of protection and rights enjoyed by other prisoners. Requiring heightened scrutiny would not mean that greater numbers of undeserving prisoners would secure increased rights. Under a heightened scrutiny standard, courts will still reject frivolous cases, but meritorious claims will secure the hearing they warrant.

CONCLUSION

The decades-old "war on crime" in America has made convicts a popular bogeyman. While few would dispute that most criminals justly deserve punishment, the emotional response to crime should not overwhelm a sense of fairness. A significant number of American inmates do not belong in jail. Some are there merely for the fact that they are mentally disabled, having committed no crime at all.[227] Many have engaged in antisocial behavior that might have been averted by appropriate preventative treatment.[228] Even if Americans are unwilling to excuse responsibility for such behavior, the current approach to dealing with these individuals is inappropriate. Treating mentally disabled inmates like other inmates, by subjecting them to an environment with which they are less able to cope, is ineffective if rehabilitation is truly a goal of the penal system. Treating these inmates differently from the rest, by denying equal opportunities and thereby causing longer sentences, is unfair if retribution is the goal.

The resulting quandary will not be resolved by politicians uninterested in appearing sympathetic to prisoners' rights, nor by a public uninformed about the nature of the problem. Prison officials, who must work with limited resources and ever-increasing numbers of prisoners, are unable to solve the problem. With no effective political force animating a move toward a realistic and decent solution, mentally disabled prisoners have no choice but to seek help in court. The Supreme Court must recognize the right and responsibility of the federal government to protect the most basic rights of this isolated class. The power to do justice must be freed from the fetters wrought upon Congress and the judiciary by cases like *Turner* and *Seminole Tribe*.

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[227] Stone, *supra* note 15, at 292 ("[A] nationwide survey of 1,391 jails disclosed that twenty-nine percent of the jails sometimes incarcerate persons with mental disorders who have no criminal charges against them." (citation omitted)).

[228] *Id.* at 291.

Justice Marshall's dissent in *Cleburne* demonstrates the Court's uncomfortable relationship with rational basis review.[229] Justice Souter's dissent in *Seminole Tribe* exposes the dubious nature of total sovereign immunity.[230] With its ongoing efforts to redistribute power among the various governmental entities, the Court has shifted rights in a way that is perhaps not recognized by all and is (hopefully) unintended: In an effort to ensure that federal actions do not diminish states' rights, the Court has elevated states' rights above individual rights.

The Supreme Court's zeal for states' rights is misguided. With the passage of the Civil War Amendments, the federal government asserted the prerogative to protect the civil rights of its citizens. In ratifying those Amendments, the states consented to federal adjudication of civil rights disputes between citizens and states. Protection for the states against congressional overreaching inhabits the structure of our government. Congress is elected by the people. If the people do not want federal controls on state behavior, they hold the ultimate check on Congress' power: the ballot. If Congress oversteps its authority, the political process will rectify its mistakes. The Supreme Court engages in a new brand of activism when it intervenes in this process. Unlike previous generations of the Court that bore the label "activist," this Court is not stepping in to ensure that disadvantaged individuals are not lost at the fringes of the political process, trampled by majority rule. The Bill of Rights should protect those lacking the political power to secure their rights by other means. In conflicts between state sovereignty and individual rights, the spirit of the Constitution demands error on the side of individuals: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[231]

Equal protection offers equal opportunity. Heightened scrutiny does not mean every claim brought will be successful. Allowing a greater level of court probing will not result in special benefits for undeserving prisoners. It will allow prisoners with valid complaints to go to court and have a realistic chance at relief. Heightened scrutiny will cast a much needed ray of hope into the lives of individuals whose situation calls not for harsher punishment, but for the mercy that a decent society ought to be capable of delivering.[232] "[T]he literature and cases

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[229] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 455 (1985).

[230] *Id.*

[231] U.S. CONST. amend. IX.

[232] Winston Churchill observed a century ago:

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal... measure[s] the stored-up strength of a nation and [is] sign and proof of the living virtue in it.

demonstrate that persons with severe mental disorders remain the forgotten disabled, relegated to second class citizenship by operation of the disorders, and literally punished for being ill. It is long past time that such inequities were corrected."[233]

Tim Kollas

Quoted in Anthony Lewis, *Abroad at Home; A Test of Civilization*, N.Y. TIMES, Apr. 21, 2001, at A15.

[233] Stone, *supra* note 15, at 308.