Suits Against States

What To Know About the 11th Amendment

Back in the good old days when I went to law school, the 11th Amendment was not discussed in a course on Constitutional Law. You had to take Federal Jurisdiction to learn about that particular amendment, and only a few students opted to take the course. So don't feel apologetic if you have no idea how the 11th Amendment might be relevant to your practice.

Of course, some of you have had occasion to deal extensively with the 11th Amendment, particularly if you work in the area of employment discrimination. It seems that every time you file suit in federal court against a state entity, the defendant moves to dismiss for lack of jurisdiction based on that amendment. That is because since 1996, the United States Supreme Court has said plenty about it.

This article summarizes the case law and gives some guidance about the intricacies of 11th Amendment jurisprudence to lawyers who may be new to this area of constitutional law.

The Language and History of the 11th Amendment

The 11th Amendment to the U.S. Constitution states:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[1]

The Amendment qualifies Article III of the Constitution, which states, in pertinent part, as follows:

> 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…and to Controversies to which the United States shall be party; to Controversies between two or more States; between a State and Citizens of another State; … and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.[2]

The first clause refers to the federal question jurisdiction of federal courts, and the second to what is known as the diversity jurisdiction. If one simply compares the language of Article III with that of the 11th Amendment, one might be forgiven for thinking that the Amendment modifies only the diversity jurisdiction of the federal courts, taking away the jurisdiction given by Article III over suits filed against a state by citizens of other states or citizens or subjects of foreign states. Of course, in legal matters, one's common sense cannot always be trusted, but usually a resort to history answers any questions.

Unfortunately, though, in the case of the 11th Amendment, history is not particularly helpful. In *Chisholm v. Georgia*,[3] the U.S. Supreme Court was confronted by the claims of a citizen of South Carolina who wanted to be paid by the state of Georgia under a contract for materials supplied for the Civil War. A majority of the Court held that Georgia was liable for the debt despite the state's sovereign immunity.

The decision sent shock waves through the states, because there was great fear that the decision would lead to the exhaustion of state treasuries. The Georgia House of Representatives passed a bill declaring any persons who attempted to execute process in the *Chisholm* case to be felons, to "suffer death, without benefit of clergy, by being hanged." Almost immediately, Congress began drafting the amendment, and a resolution was adopted in the next session, ultimately to be ratified as the 11th Amendment.

Nothing happened for the next hundred years with respect to the amendment.

In 1890, however, a citizen of Louisiana sued to recover unpaid interest on bonds issued by the state. Louisiana had issued the bonds in 1874 but amended its constitution six years later to disclaim the obligation to pay interest. Hans alleged that the amendment to the state constitution violated Article I, Section 10 of the U.S. Constitution, the provision that prohibits any state law impairing the obligation of contracts.

Now, of course, *Chisholm* was a diversity suit, whereas Hans' lawsuit involved a federal question.[4] Nevertheless, in *Hans v. Louisiana*,[5] the Court held that there was no distinction between federal question and diversity cases where suits against states were concerned. Furthermore, the Court held that even though the language of the amendment did not prohibit a suit against a state by one of its own citizens, it would be a startling result and an "absurdity on its face" if the state could be sued by one of its own citizens in federal court while citizens of other states or foreign subjects were prohibited from maintaining such suits.[6]

More important, however, the *Hans* Court treated the 11th Amendment as re-establishing the sovereign immunity of the states. Justice Bradley quoted Madison and Hamilton as stating that it was inherent in the nature of sovereignty that a state could not be sued without its consent. Thus, the decision in *Hans* in some sense constitutionalized state sovereign immunity.

The discerning reader already can see why there would be trouble ahead. To people who thought of the federal Constitution as creating a document whereby the people have the ultimate rights, sovereign immunity was something that stank of royal prerogatives, because sovereign immunity began with the idea that the king could do no wrong, whereas, according to Americans, British kings had certainly done a lot of wrong.

On the other hand, to those who feared that the Constitution might not adequately protect states' rights, it was very important to establish that the state could not be hauled into federal court at the whim of mere citizens.

To this volatile mix was added the Civil War and the subsequent ratification of the

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Civil War Amendments. If one took an expansive view of the 11th Amendment, one could not sue states (and by logical extension state officials) in federal court for violating the Constitution. And because state courts had shown themselves to be insufficient protectors of civil rights for at least some of their citizens, barring civil rights actions from federal courts would sound the death knell for the 13th, 14th and 15th Amendments.

The Supreme Court created an accommodation: Suits were permitted in federal court despite the 11th Amendment if the plaintiff sought an injunction against a state official, on the ground that an official had no right to violate the Constitution or to enforce a law that was void under the Constitution, and, therefore, he was stripped of his official or representative character for purposes of the suit.

In *Ex Parte Young*,[7] the Court held that an injunction proceeding against the attorney general of Minnesota for enforcing unconstitutional state laws fixing railroad rates could be maintained in federal court.[8] *Young* is still good law, and a state official can be sued in federal court for prospective injunctive relief notwithstanding the 11th Amendment.

In addition to neglecting the language of the 11th Amendment, the Court also created other historical fictions in its treatment of the amendment. For example, whereas the Court treated 11th Amendment immunity as a jurisdictional matter that could be brought up for the first time on appeal or *certiorari*, it also held that states could waive their immunity and consent to suit, despite the fact that jurisdiction cannot normally be waived by the parties.[9]

Furthermore, in *Parden v. Terminal Railway Co.*, the Court stated that because the states "had surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce," an action could be maintained against a state-owned railway under the Federal Employers' Liability Act, which had been enacted by Congress under its Commerce Clause powers.[10] However, *Parden* also set forth the doctrine of constructive waiver, whereby states were construed to have waived their immunity by agreeing to participate in federal programs, and the case appears to have been decided solely on that basis.

Twenty-five years later, the Court expressly held in *Pennsylvania v. Union Gas Co.*[11] that Congress had the power to authorize damages actions against states in federal court pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, a statute enacted by Congress under its power to regulate interstate commerce. The *Union Gas* decision defanged the 11th Amendment to a large extent, because Congress could enact any law, it seemed, based on its Commerce Clause powers, and thus could always authorize damages actions against the states.

The Effect of the 14th Amendment

In *Fitzpatrick v. Bitzer*,[12] the Court pointed out that the 14th Amendment represented a "shift in the federal–state balance," and that as a result, Congress could abrogate state sovereign immunity when it acts pursuant to its power under section 5 of the 14th Amendment. Justice Rehnquist, writing for the Court, stated:

> [We] think that the 11th Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the 14th Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the 14th Amendment, which themselves embody significant limitations on state authority.
> . . .
> We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the 14th Amendment, provide for private suits against states or state officials which are constitutionally impermissible in other contexts.[13]

In general, of course, constitutional amendments that were ratified later in time do not necessarily override earlier ones, but once again, the Court had no choice but to resort to that unusual rationale because there seemed to be no other doctrinal way that Congress could have the power to abrogate the states' 11th Amendment immunity in civil rights legislation.

Seminole Tribe of Florida v. Florida

In 1996, a sea change occurred in 11th Amendment jurisprudence.

That year, the Court was faced with the question whether Congress could abrogate the states' 11th Amendment immunity when it legislated under the Indian Commerce Clause, which gives Congress the power to regulate commerce with the Indian tribes. The Indian Gaming Regulatory Act, passed by Congress under that clause, required Indian tribes to conduct gaming activities only in accordance with a compact between the tribe and the state where the activities were to be pursued and imposed a duty on the states to negotiate in good faith with tribes to form such a compact. The Gaming Act also allowed tribes to bring suit in federal court against states that violated the statutory duty.

The Seminole Tribe filed suit against the state of Florida, alleging that the state had failed to enter into good-faith negotiations with the tribe.

In a 5–4 decision, the Court overruled *Union Gas*, reaffirmed the rationale of *Fitzpatrick*, and held that Congress may abrogate the states' 11th Amendment immunity only when it satisfies two conditions: (1) It must "unequivocally [express] its intent to abrogate the immunity," and (2) It must act pursuant to a valid exercise of power under section 5 of the 14th Amendment.[14] Because the Gaming Act had been passed pursuant to the Indian Commerce Clause, the Court held that it

could not be used by Congress to abrogate state immunity.

In vigorous dissents, to be repeated over the next few years, Justices Souter, Stevens, Ginsburg and Breyer challenged the majority's understanding of state immunity. According to the dissenters, *Hans* had been wrongly decided, because "the history and structure of the 11th Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the citizen–state diversity clauses."[15] Furthermore, argued the dissent, *Hans* did not involve the question whether Congress could abrogate the states' immunity.

Appropriate Legislation Under the 14th Amendment

Because it is relatively simple for Congress to state with clarity that it intends to abrogate state immunity, the principal question to be decided in each abrogation case is whether Congress was legislating appropriately under its 14th Amendment powers. Section 5 of that amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this Article."[16]

To understand the contours of that power, one needs to look at the decision in *City of Boerne v. Flores*.[17] There, the Court was considering the constitutionality of the Religious Freedom Restoration Act (RFRA), which forbade state governments from substantially burdening a person's exercise of religion unless the state action could be (1) justified by a compelling state interest and (2) shown to be the least restrictive alternative for furthering that compelling governmental interest. Congress enacted that statute, in part, to overcome the effect of the Court's decision in *Employment Division v. Smith*,[18] where the Court held that the Constitution does not forbid states from enacting neutral laws of general applicability notwithstanding the burden on some people's religious rights. Thus, Native Americans could be denied unemployment benefits when they lost their jobs for ingesting peyote, an illegal drug, as part of their religious ceremonies.

In *City of Boerne*, the Court held that the RFRA was an unconstitutional exercise of Congress' section 5 power.

First, whereas Congress could lawfully prevent or remedy constitutional violations, it could not redefine the substantive limits of constitutional rights.[19] And even though Congress could legislate prophylactically and target some state actions that did not rise to the level of unconstitutionality, it was required to identify practices that had a significant likelihood of being unconstitutional before it could make attempts to prevent or remedy those practices. And to prevent attempts at remediation from swallowing up the distinction between remedies and redefinitions of substantive rights, "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[20]

Using that standard, the Court held that Congress had exceeded its powers when it subjected all state actions burdening religious rights to the rigorous compelling interest test, without investigating whether the states were indeed violating First Amendment rights by their actions. According to the Court, because no pattern or practice of constitutional violations had been identified, the remedies enacted by Congress were neither congruent nor proportional to the injury. Accordingly, the RFRA was not appropriate legislation under section 5 of the 14th Amendment.[21]

The decision in *Seminole Tribe* that Congress could not abrogate state immunity unless it was legislating pursuant to the 14th Amendment, taken together with the "congruence and proportionality" test of *City of Boerne*, has wrought a complete reworking of the area of congressional abrogation of state immunity.

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[22] the Court held that states could not be sued in federal court for patent infringements despite explicit congressional abrogation of the states' immunity in the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act). The Court acknowledged that patents were a form of property protected by the due process clause of the 14th Amendment, and that Congress could lawfully abrogate the states' 11th Amendment immunity if the Patent Remedy Act constituted "appropriate" section 5 legislation. According to the Court, the question to be answered was whether "the Patent Remedy Act [could] be viewed as remedial or preventive legislation aimed at securing the protections of the 14th Amendment for patent owners."[23]

The answer was a resounding "No." The Court first noted that the procedural due process rights of injured patent owners would be violated only if the states provided them no remedy, or inadequate remedies, for infringement of their patents. The Court found, however, that Congress had not sufficiently considered the availability of state remedies:

> The legislative record thus suggests that the Patent Remedy Act does not respond to a history of widespread and persisting deprivation of constitutional rights of the sort Congress has faced in enacting proper prophylactic § 5 legislation. Instead, Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution. Though the lack of support in the legislative record is not determinative, identifying the targeted constitutional wrong or evil is still a critical part of our § 5 calculus because strong measures appropriate to address one harm may be an unwarranted response to another, lesser one. … Because of this lack, the provisions of the Patent Remedy Act are so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.[24]

Once again, Justices Stevens, Souter, Ginsburg and Breyer dissented from the "Court's aggressive sovereign immunity jurisprudence."[25] The dissenters also argued that there was precise congruence between the means used (abrogation of the state's immunity) and the ends to be achieved (ensuring that all patent holders receive due process).

Kimel v. Florida Board of Regents

In *Kimel v. Florida Board of Regents*,[26] the Court held that the Age Discrimination in Employment Act (ADEA) was not appropriate legislation under section 5.

In a 5–4 opinion authored by Justice O'Connor, the Court reasoned as follows: Because the aged do not constitute a suspect class, courts are required to apply the rational basis test in evaluating age discrimination, and most state actions are upheld under that test.[27] On the other hand, the

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ADEA prohibits employers from considering an employee's age unless age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[28] That requirement is considerably more stringent than what the Constitution requires, and, therefore, the ADEA prohibits substantially more state employment decisions than would likely be held irrational and thus unconstitutional.

By enacting the ADEA, Congress effectively made heightened scrutiny the standard for analyzing age discrimination. Therefore, the ADEA was subject to the same defect that had doomed the RFRA in *City of Boerne*. Furthermore, Congress could not point to patterns of unconstitutional age discrimination by public entities. For that reason, the ADEA could not be justified as a prophylactic attempt to respond to or prevent unconstitutional behavior.

Board of Trustees of the University of Alabama v. Garrett

In *Garrett*, the Court held that Title I of the Americans with Disabilities Act (ADA)[29] was not a "congruent and proportional" remedy for discrimination against the disabled by states and state agencies.

Under Title I, an employer can discriminate against a disabled employee either by disparate treatment or by failure to make reasonable accommodation.[30] An ADA plaintiff must show (1) that she is disabled; (2) that she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) that the employer took an adverse job action against her because of her disability or failed to make a reasonable accommodation. And it is a defense to an ADA claim that an employment criterion that adversely affects disabled persons is "job related and consistent with a business necessity."[31]

Like the ADEA, the ADA protects a non-suspect class.[32] More important, the ADA places significant affirmative obligations on employers to make reasonable accommodations that would permit disabled employees to fulfill the essential requirements of the job that they hold or seek, unless the employer can show undue hardship. As the *Garrett* Court pointed out, under rational basis review, "the burden is upon the challenging party to negative any reasonably conceivable set of facts that could provide a rational basis for the classification"; the ADA's requirement that the employer make reasonable accommodations for disabled employees unconstitutionally shifted that burden from the plaintiff–employee to the defendant–employer.[33]

Finally, according to the Court, the ADA could not be sustained as reasonable prophylactic legislation, because the legislative record of the ADA failed to show that Congress had identified a pattern of irrational employment discrimination against the disabled on the part of the states.

After *Florida Prepaid*, *Kimel* and *Garrett*, it seemed that the 11th Amendment juggernaut would roll over all employment discrimination actions against state entities in federal court. Then came a case involving the Family and Medical Leave Act, and it seemed that the Court might indeed be sympathetic to congressional abrogation in some antidiscrimination laws.

Nevada Department of Human Resources v. Hibbs

Hibbs involved a suit for damages by a state employee who claimed he had been discharged in violation of the Family and Medical Leave Act (FMLA).[34] In a 6–3 decision, the Court upheld the statute against 11th Amendment attack.[35]

First, the Court held that Congress had clearly abrogated state immunity when it enacted the FMLA. Second, the Court reiterated that Congress could enact section 5 legislation that went beyond section 1's actual guarantees, as long as the prophylactic legislation did not substantively redefine the 14th Amendment rights at issue. According to the Court, the FMLA's purpose was to protect the right to be free from gender-based discrimination in the workplace, and the Court found that when Congress enacted the FMLA, it had before it evidence that "states continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits."[36]

Chief Justice Rehnquist, writing for the majority, distinguished *Kimel* and *Garrett* on the ground that age and disability discrimination were subject to rational basis scrutiny, whereas the FMLA involved gender discrimination, which was subject to intermediate scrutiny. For a gender-based classification to withstand constitutional scrutiny, it must "serve important governmental objectives" and "the discriminatory means employed [must be] substantially related to the achievement of those objectives."[37] The Court continued, "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than [the] rational-basis test, … it was easier for Congress to show a pattern of state constitutional violations."[38]

Significantly, the *Hibbs* Court pointed to the many limitations contained in the FMLA to demonstrate that the remedy chosen by Congress was congruent and proportional to the violation. For example, the FMLA requires only unpaid leave, and it applies only to employees who have worked for the employer for at least one year. Employees are required to give advance notice when they foresee the need for leave. In addition, high-ranking employees as well as elected officials and their staff are ineligible for FMLA leave, and the 12-week floor protects the legitimate needs of employers and allows states to give greater family or medical leave rights.[39]

Justices Scalia, Thomas and Kennedy dissented. Justice Scalia observed, for the first time in 11th Amendment jurisprudence, that not only did Congress have to have evidence that states had engaged in gender discrimination, but the evidence would have to show that the particular state against which enforcement action was to be taken had violated the Constitution. "There is no guilt by association," Justice Scalia said, "enabling the sovereignty of one State to be abridged under Section 5 of the 14th Amendment because of violations by another State, or by most other states, or even by 49 other states.[40] He pointed out that unlike the FMLA, the provisions of the Voting Rights Act of 1965 were restricted to states "with a demonstrable history of intentional racial discrimination in voting."[41]

Justice Kennedy's dissent, joined by Justices Scalia and Thomas, pointed out that the relevant evidence would have to show not only that there was employment discrimination directed at women, but that states "engaged in widespread discrimination on the basis of gender in the provision of family leave benefits."[42] The dissenters found the evidence of gender-based stereo-

types to be "too remote to support the required showing."[43]

Like Justice Scalia, Justice Kennedy contrasted the FMLA with the Voting Rights Act, which, according to him, was an appropriate measure to eradicate racial discrimination in voting. It was congruent insofar as it "aimed at areas where voting discrimination was the most flagrant." And it was proportional because it was necessary to "banish the blight of racial discrimination in voting, which has infected the electoral process in our county for nearly a century."[44]

The dissents of Justices Kennedy and Scalia restrict Congress' fact-finding procedures to a large extent. To survive an 11th Amendment attack, Congress may now be required to enact laws abrogating immunity only for those states that engaged in constitutional violations, requiring it to find its facts state-by-state. Congress also may be required to identify exactly which narrow right is the subject of discrimination and find facts relevant to that particular right. Finally, the facts must be found while keeping in mind the kind of scrutiny the Court has mandated for the particular class of persons involved.

Given the congressional processes for fact-finding, it is not exactly clear how all those needs would be met and whether, indeed, such close judicial oversight of the fact-finding process violates the doctrine of separation of powers. On the other hand, whenever Congress is contemplating new legislation, the plaintiffs' bar could at least be proactive in bringing to Congress' attention facts and figures that would meet the criteria suggested by Justices Scalia, Kennedy and Thomas.

Tennessee v. Lane and Due Process Considerations

Whereas Title I of the ADA, which was involved in *Garrett*, prohibits employment discrimination against the disabled, Title II of the ADA provides, "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."[45] Almost every federal circuit court of appeals that has considered the question has held that Title II does not constitute a valid abrogation of state sovereign immunity under Section 5 of the 14th Amendment because Congress failed to identify a history and pattern of unconstitutional discrimination by the states against the disabled.[46]

Once again, because state discrimination against the disabled is viewed under the rational basis standard, these courts have found that although incidents of discrimination by state agencies demonstrate bad conduct, such conduct is not necessarily irrational. Thus, for example, one court has stated, "While it may be hardhearted and hardheaded … for the state to refuse to provide special access for the disabled to courtrooms and public meetings," such a failure is not necessarily unconstitutional because in many cases, "the cost of renovating older buildings will provide a rational basis for failing to create access."[47]

However, the 14th Amendment contains the Due Process Clause as well as the Equal Protection Clause. Recently, some federal courts of appeal have begun to make a distinction between congressional abrogation of state immunity in statutes enacted pursuant to Congress's powers under those two clauses.

In *Garrett*, the Court noted that Title I of the ADA was limited to employment discrimination against the disabled and that the "scope of the constitutional rights at issue" was simply "equal protection" and that "Title I does not encompass claims based on substantive rights under the Due Process Clause."[48] By contrast, Title II of the ADA involves certain substantive as well as procedural rights that are protected by the Due Process Clause: the right of access to public facilities, which includes the right of access to courts; the right to vote; the right to travel; the right to fair hearings; and the right to make personal decisions in matters such as parenting, procreation and family relationships.

As indicated previously, plaintiffs alleging Title II violations involving due process rights against state entities have recently begun to fare somewhat better than plaintiffs alleging equal protection violations.

Thus, in *Popovich v. Cuyahoga County Court of Common Pleas*,[49] the plaintiff, who was hearing-impaired, brought an action in federal court under Title II of the ADA against a state court for failing to provide him with adequate hearing assistance in his child custody case. The court held that the action was barred by the 11th Amendment insofar as the action relied on the Equal Protection Clause, but it was not barred insofar as it relied on congressional enforcement of the Due Process Clause. The court noted that the U.S. Supreme Court had recognized the special nature of parental rights and set forth certain due process safeguards in child custody and termination proceedings, which, in turn, required a balancing of the "private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."[50] Where a father could not meaningfully participate in custody proceedings, obvious due process concerns were raised, and Congress was within its express authority under Section 5 to require states to accommodate parental disability because Congress was enforcing the due process right rather than expanding it.

According to the Sixth Circuit:

> This broad balancing standard under due process—unlike the flat rule giving only rational basis analysis under equal protection in disability matters—is open to interpretation by Congress as well as the courts, for otherwise the Court's admonition in *Garrett* that Congress may seek to deter a broader swath of conduct than the courts have themselves identified as unconstitutional would have no real meaning or effect.[51]

Because the participation right of Title II protects the disabled plaintiff's right to a meaningful hearing, Congress was well within its express authority under Section 5 of the 14th Amendment to require states to accommodate the disability.[52]

In *Lane v. Tennessee*, the plaintiffs were denied access to the court because of their disabilities.[53] Lane was a paraplegic and had to crawl up two flights of stairs to reach the courtroom, where he was being tried on two misdemeanor charges, and Jones was a court reporter who lost work because she could not get to the courtroom without an elevator, which the State had failed to provide. Both plaintiffs sought money damages for humiliation and embarrassment, and Jones also sought damages for lost work.

The district court denied Tennessee's motion to dismiss the plaintiffs' ADA claims, and the Sixth Circuit affirmed, holding that Congress could abrogate 11th Amendment immunity as to due process

claims even where it could not do so for equal protection claims:

> Based on the record before Congress in considering the ADA, it was reasonable for Congress to conclude that it needed to enact legislation to prevent states from unduly burdening constitutional rights, including the right of access to the courts. States have myriad ways to unburden these rights, from the major step of renovating facilities to the relatively minor step of assigning aides to assist in access to the facilities. The record demonstrated the public entities' failure to accommodate the needs of qualified persons with disabilities might result directly from unconstitutional animus and impermissible stereotypes. Title II ensures that the refusal to accommodate an individual with a disability is genuinely based on unreasonable cost or actual inability to accommodate, not on inconvenience or unfounded concerns about costs.[54]

Because there was an insufficient factual record about whether due process rights were involved, the Sixth Circuit affirmed the district court's refusal to grant Tennessee's motion to dismiss.

On May 17, 2004, in a 5–4 decision, the Court affirmed the decision of the Sixth Circuit.[55] Justice Stevens, writing for the majority, agreed that Title II of the ADA not only seeks to prohibit irrational disability discrimination but also to enforce a variety of other basic constitutional guarantees, such as the right of access to courts, the right to be present at all stages of a criminal trial and to a meaningful opportunity to be heard, and the right of access to criminal proceedings for the public. He argued that there was no requirement that Title II be considered in its entirety, and when access to courts was considered, Title II was valid Section 5 legislation.[56] The Court left open the question whether Title II exceeded what the Constitution required in terms of equal protection.[57]

The *Lane* Court gave short shrift to the argument that Congress' fact-finding had somehow fallen short of the mark, observing, "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights," such as voting, marriage and jury service.[58] In particular, states often had excluded the disabled from court proceedings. Given "the sheer volume of evidence," some of it demonstrated by the Court's own pronouncements in the area of discrimination against the disabled, the Court seemed puzzled that anyone would contend that the record was insufficient to justify congressional action.[59]

Justices Rehnquist, Kennedy, Scalia and Thomas dissented. Justice Rehnquist's dissent took issue with the as-applied approach, arguing that Title II was "not susceptible of being carved up in this manner."[60] Furthermore, he argued, Congress had failed to identify a history and pattern of violations of the right of access to courts, and the wide-ranging variety of societal discrimination against the disabled that had been cited by the majority simply could not even sustain its as-applied inquiry.

Justice Scalia's dissent was more far-ranging. He rejected "malleable standards" such as the "congruence and proportionality" test of *Boerne,* concluding categorically that Section 5 does not authorize prophylactic measures that prohibit primary conduct that is not itself forbidden by the 14th Amendment.[61] However, for reasons of *stare decisis,* he would permit Congress to impose prophylactic legislation in the area of racial discrimination, provided the states targeted by the legislation were those where there was an "identified history of relevant constitutional violations."[62] In areas other than racial discrimination, such as discrimination against the disabled, Justice Scalia would consider prophylactic legislation to be *ultra vires.*[63]

Conclusion

Though *Hibbs* and *Lane* appear to signal a shift away from the Court's protection of states' rights in the 11th Amendment context, the as-applied analysis of the *Lane* Court raises as many questions as it answers. The decisions of the highest court in the land fail completely to meet the requirements of predictability that is so vital to the rule of law. It appears that the only sure way for plaintiffs to be able to sue state agencies in federal courts for violations of federal law is to pressure state legislators to waive the state's 11th Amendment immunity.[64]

endnotes

1. U.S. CONST. amend. XI.
2. U.S. CONST. art. III, § 2.
3. 2 U.S. (2 Dall.) 419 (1793).
4. The Judiciary Act of 1875 conferred federal question jurisdiction on the lower federal courts.
5. 134 U.S. 1 (1890).
6. *Id*. at 10.
7. 209 U.S. 123 (1908).
8. *Id*. at 127.
9. *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). The State usually needs legislative action to effect a waiver of its sovereign immunity.
10. *Parden v. Terminal Ry. Co*., 377 U.S. 184, 190-91 (1964), *overruled by College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd*., 119 S. Ct. 2219, 2241 (1999).
11. 491 U.S. 1 (1989), *overruled by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996).
12. 427 U.S. 445 (1976).
13. *Id*. at 456. *Fitzpatrick* is still good law. Federal courts have consistently held that both the discrimination and retaliation provisions of Title VII properly abrogate state immunity. *See, e.g., Warren v. Prejean*, 301 F.3d 893, 899 (8th Cir. 2002) (finding that the fact that Congress did not specifically note a widespread pattern of retaliatory discharge is not dispositive); *Crumpacker v. Kan. Dep't of Human Resources*, 338 F.3d 1163, 1170 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 2416 (2004); *Lewis v. Smith*, 255 F. Supp. 2d 1054, 1067-68 (D. Ariz. 2003). The question whether the disparate impact provisions of Title VII were properly enacted under Section 5 is a little more complex, however, because even though the 14th Amendment requires purposeful discrimination, the disparate impact provisions of Title VII do not require a showing of intention or purpose. Therefore, in applying the disparate impact provisions of Title VII to the states, Congress may not have made a sufficient showing that states discriminated in a manner that violated the Constitution. So far, all the courts that have considered the question have held that the discriminatory impact provisions of Title VII also abrogate state immunity. *Okruhlik v. University of Ark*., 255 F.3d 615, 626-27 (8th Cir. 2001); *Crum v. Alabama*, 198 F.3d 1305 (11th Cir. 1999). In *Okruhlik*, the court pointed out that acts that have a discriminatory impact have the same effect as intentional discrimination, and in enacting the discriminatory impact provisions of Title VII, Congress enacted a prophylactic ban in order to achieve equality of opportunity for minority applicants. 255 F.3d at 627. However, in *Nanda v. University of Illinois*, 303 F.3d 817, 829 n. 6 (7th Cir. 2003), the court made specific note of the fact that discriminatory impact provisions were not at issue. *See also Varner v. Illinois State Univ*., 226 F.3d 927, 931-32 (7th Cir. 2000) (pointing out that the disparate impact provisions of the ADA exceeded the constitutional protections provided by the Equal Protection Clause but finding that the defendants waived their Section 5 claims with respect to Title VII). The Seventh Circuit is a fairly conservative court, and I don't think it would have specifically mentioned discriminatory impact provisions unless it intended to herald a different result for those provisions.
14. *Seminole Tribe of Fla*., 517 U.S. at 55.

15. *Id.* at 80 (Souter, J., dissenting). As stated earlier in this article, a comparison of the language of the 11th Amendment with the diversity clause of Article III leads logically to the conclusion that the amendment was meant only to apply in diversity actions. And, of course, *Chisholm*, the nullification of which was the object of the amendment, was a diversity action.
16. U.S. CONST. amend. XIV, § 5.
17. 521 U.S. 507 (1997).
18. 494 U.S. 872 (1990).
19. *City of Boerne*, 521 U.S. at 532.
20. *Id.* at 520.
21. *Id.* at 532-34.
22. 527 U.S. 627 (1999).
23. *Id.* at 639.
24. *Id.* at 645-46 (internal quotations and citations omitted).
25. *Id.* at 664 (Stevens, J., dissenting).
26. 528 U.S. 62 (2000).
27. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (holding that classifications based on age must satisfy rational basis review under the Equal Protection Clause of the 14th Amendment); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (upholding rational basis review for classifications based on mental disabilities). Under the rational basis test, the state action need only be related rationally to a legitimate state interest. The test is highly deferential. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-3, at 1443 (2nd ed. 1988). Thus, rational basis review will uphold classifications based on age or disability for any reason relevant to the state's legitimate interests, including the costs involved.

    The only wrinkle in this analysis comes from the fact that the *Cleburne* Court, using rational basis review, nevertheless struck down the municipal requirement of a special use permit for operation of a group home for the mentally retarded. *Cleburne*, 473 U.S. at 455. Similarly, in *Romer v. Evans*, 116 S. Ct. 1620 (1996), the Court used rational basis review but struck down an amendment to the Colorado Constitution that prohibited any legislative, judicial or executive action to protect homosexuals. It is unclear whether there exists a subclass of rational basis review that has "bite" or whether the Court simply uses "traditional equal protection standards as an occasional, ad hoc interventionist tool," making it impossible to anticipate what it is going to do in a particular case. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW, at 652 (13th ed. 1997).
28. 29 U.S.C. § 623(f)(1).
29. 42 U.S.C. §§ 12111-17.
30. *See* 42 U.S.C. § 12112(b)(5)(A) (defining discrimination to include failure to accommodate).
31. 42 U.S.C. § 12113; *Stevens v. Illinois Dep't of Transp.*, 210 F.3d 732, 735 (7th Cir. 2000).
32. *See, e.g., City of Cleburne*, 473 U.S. at 439-42; *Dare v. California*, 191 F.3d 1167, 1174 (9th Cir. 1999).
33. *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001) (internal cites omitted).
34. The FMLA entitles eligible employees to take up to 12 weeks of unpaid leave annually for several reasons, including the "onset of a serious health condition" in an employee's spouse, child or parent. 29 U.S.C. § 2612 (a)(1)(c).
35. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972 (2003).
36. *Hibbs*, 123 S. Ct. at 1979.
37. *Id.* at 1978, *citing United States v. Virginia*, 518 U.S. 515, 533 (1996).
38. *Id.* at 1982.
39. *Id.* at 1984.
40. *Id.* at 1985 (Scalia, J., dissenting).
41. *Id.* (quoting *City of Rome v. United States*, 446 U.S. 156, 177 (1980)).
42. *Id.* at 1987 (Kennedy, J., dissenting).
43. *Id.* at 1989.
44. *Id.* at 1993 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 315 (1966)).
45. 42 U.S.C. § 12132. A state must make "reasonable modifications in its programs, services or activities unless the state can establish that the modification would work a fundamental alteration in the nature of the program, service or activity." 42 U.S.C. § 12131(2). The burden of proof is on the state to defend the absence of accommodation.
46. *See, e.g., Garcia v. SUNY Health Sci. Ctr. of Brooklyn*, 280 F.3d 98, 110-12 (2nd Cir. 2001); *Wessel v. Glendening*, 306 F.3d 203, 215 (4th Cir. 2002); *Reickenbacker v. Foster*, 274 F.3d 974, 981-83 (5th Cir. 2001); *Popovich v. Cuyahoga Cty. Ct. of Common Pleas*, 276 F.3d 808, 812 (6th Cir. 2002) (en banc); *Walker v. Snyder*, 213 F.3d 344, 346-47 (7th Cir. 2000); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1007 (8th Cir. 1999); *Thompson v. Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001). *But see Hason v. Medical Bd. of Cal.*, 279 F.3d 1167, 1171 (9th Cir. 2002) (holding that because *Garrett* only involved Title I of the ADA, the decision in *Garrett* did not overrule the decision in *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999), that Title II of the ADA validly abrogated state immunity); *Miranda v. Kitzhaber*, 328 F.3d 1181, 1185 (9th Cir. 2003) (reaffirming the decision in *Hason*).

    The overwhelming judicial support for the invalidity of congressional abrogation in Title II of the ADA has come despite the Court's acknowledgment in *Garrett* that as compared to Title I, Title II was predicated on a more substantial record pertaining to discrimination by states in the provision of public services. *Garrett*, 531 U.S. at 317 n. 7.

    Some plaintiffs have brought their disability claims under Section 504 of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, which prohibits discrimination by state agencies or departments that receive federal funds. Some courts have held that Congress may require waiver of immunity as a condition of receiving federal funds, and that a state waives its immunity when it accepts federal funding. *See, e.g., Koslow v. Pennsylvania*, 302 F.3d 161, 170-71 (3rd Cir. 2002); *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000). However, other courts have held that the abrogation analysis should be the same for both Title II of the ADA and Section 504 of the Rehabilitation Act, because both statutes offer virtually identical protections. *Garcia*, 280 F.3d at 113-15; *Reickenbacker*, 274 F.3d at 977 n. 17, 983-84.

    It should be noted that states remain bound by the ADA and other such laws, because Congress has the power to bind the states when it legislates pursuant to the commerce clause, and the ADEA, the ADA and the FMLA constitute good Commerce Clause legislation. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Recently, however, a few states have attempted to argue that Title II of the ADA is not valid Commerce Clause legislation. *See, e.g., Thompson*, 278 F.3d at 1025 n. 2. In *Department of Highway Safety v. Rendon*, 832 So. 2d 141 (Fla. Dist. Ct. App. 2002), the plaintiffs alleged that the state violated a federal regulation promulgated under Title II by charging for parking placards for the handicapped. The court held that the federal regulation was invalid, pointing out that the regulation raised "grave concerns" about the constitutionality of federal power used exclusively to regulate state governments acting in their governmental capacities. *Id.* at 146 n. 5, citing *New York v. United States*, 505 U.S. 44 (1992).
47. *Wessel*, 306 F.3d at 212.
48. *Garrett*, 531 U.S. at 365.
49. 276 F.3d 808 (6th Cir. 2002) (en banc).
50. *Id.* at 814 (quoting *Lassiter v. Department of Social Serv.*, 452 U.S. 18, 27 (1981)).
51. *Id.*
52. *Id.* at 815.
53. 315 F.3d 680, 683 (6th Cir. 2003), *aff'd*, No. 02-1667, 2004 LEXIS 3386 (U.S. May 17, 2004).
54. *Id.* at 682-83.
55. *Tennessee v.* Lane, No. 02-1667, 2004 U.S. LEXIS 3386 (U.S. May 17, 2004).
56. *Id.* at *38.
57. *Id.* at *42.
58. *Id.* at *28.
59. *Id.* at *28-29, 35, *citing Jackson v. Indiana*, 406 U.S. 715 (1972) (unjustified commitment), *Youngberg v. Romeo*, 457 U.S. 307 (1982) (abuse of persons committed to state mental health hospitals), and *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (irrational discrimination in zoning).
60. *Id.* at *76 (Rehnquist, J., dissenting).
61. *Id.* at *84 (Scalia, J., dissenting).
62. *Id.* at *91-92.
63. *Id.* at *101.
64. In Illinois, beginning this year, a state employee who has a claim under Title VII, ADA, ADEA, FMLA or FLSA against a state entity may file suit in either federal or state court. 745 ILCS 5/1.5 (2004). The State Lawsuit Immunity Act, as it is called, waives the state's 11th Amendment immunity for the enumerated claims and represents the culmination of a struggle by activists and the plaintiffs' bar to get the state to waive its immunity in civil rights matters. In Arizona, the Arizona Civil Rights Act, A.R.S. § 41-1401 *et seq.*, gives the state courts jurisdiction over employment discrimination claims; however, there is no guarantee that the situation will always remain the same, or that there will be no future legislation that removes certain kinds of cases from the jurisdiction of the courts of the state. If there is a federal statute covering the same subject, and if Congress has not validly abrogated state immunity in such legislation, the question will arise whether lawsuits against state entities alleging violations of the federal statute can be brought in state court.