2000

A Survey of Recent Developments in the Law: Constitutional Law

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CONSTITUTIONAL LAW

CONSTITUTIONAL TRENDS: THE NEW MAJORITY LIMITS CONGRESS' POWER TO ABROGATE STATE SOVEREIGN IMMUNITY

A. Introduction

In the past year, the Supreme Court revisited its interpretation of state sovereign immunity. Only eleven years ago, the Court issued an opinion broadly construing Congress' power to override states' immunity to suit. More recently a new majority has begun to reign in and overrule prior decisions while expounding on the history of federalism. In finding its federalist principles, the Court now narrowly construes Congress' power to override state immunity from suit under the framework of the Constitution and the Fourteenth Amendment.

This paper attempts to give the reader an understanding of how the new majority evaluated state sovereign immunity claims in the past year by first providing the framework the Court utilized and then analyzing the Court's recent decisions. The framework consists of understanding the Court's meaning of federalism under the framework of the Constitution, the effect of the Fourteenth Amendment on immunity, and the enactment and scope of the Eleventh Amendment. Additionally, understanding the Court's prior decisions is helpful to demonstrate the Court's new trend, explained in the next section. Finally, the Eighth Circuit Court of

3. This article does not attempt to provide a full history of sovereign immunity or its numerous aspects. It focuses only on those relevant aspects of the Court's decisions on sovereign immunity in the past year.
4. See infra Part E.
Appeals issued an illuminating decision showing how the circuits may apply the U.S. Supreme Court’s recent decisions.\(^5\)

B. State Sovereign Immunity in the Design of the Constitution and the Fourteenth Amendment

1. Constitutional Design

The essence of American federalism is the concept of divided sovereignty.\(^6\) With the adoption of the Constitution, enumerated powers national in nature were given to the national (federal) government, while the states retained power in areas of local concern.\(^7\) When the federal government exercises those general, or enumerated powers, its acts are supreme over all objects of its lawful government.\(^8\) However, states retain supreme sovereign authority in all other matters not subject to national control.\(^9\) Under federalism, Congress must treat states in a “manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”\(^10\)

Prior to the adoption of the Constitution, the states made clear

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5. See Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999).
6. See Alden, 119 S. Ct. at 2269 (Souter, J., dissenting) (explaining the meaning of federalism).
7. See JAMES MADISON TO THOMAS JEFFERSON, THE CONSTITUTION EXPLAINED AND JUSTIFIED, WITH AN 'IMMODERATE DIGRESSION' ON A DEFEATED PROPOSAL (OCT. 24, 1787), reprinted in THE DEBATE ON THE CONSTITUTION PART ONE, at 193-94 (Bernard Baily ed., Literary Classics of the United States, Inc. 1993) (1787) [hereinafter DEBATE ON THE CONSTITUTION PART ONE] (explaining that the new Constitution was designed to give the federal government "every power requisite for general purposes and leave to the states every power which might be most beneficially administered by them").
8. See THE FEDERALIST NO. 39, at 284-85 (James Madison) (Benjamin Fletcher Wright ed., 1972). In this paper, Madison explains the difference between a "national" and "federal" government. Under a national government, he states, the central government has "indefinite supremacy over all persons and things, so far as they are objects of lawful government." Id. at 284. If the nation were a consolidation of the people, supremacy would be “completely vested in the national legislature.” Id. at 284-85. Under the federal form of government created by the Constitution, “communities united for particular purposes,” part of the sovereignty rests in the central government and part rests in the “local” state government. Id. at 285.
9. See id. at 284-85. Madison explained that the states “form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere.” Id. at 285.
10. Alden, 119 S. Ct. at 2263.
that they retained sovereignty and independence not "expressly delegated to the United States" in the Articles of Confederation. When the new Constitution was proposed, maintaining sovereignty in the new government was a matter of great concern among the states. The members of the Constitutional Convention attempted to allay states' concerns that they would no longer retain any power under the new government. Through the state conventions and

11. U.S. Articles of Confederation, art. II, reprinted in Great Books of the Western World, at 5 (Robert Maynard Hutchins ed., 1952) (1781). This Article states: "[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." Id.

12. See, e.g., Oliver Ellsworth, Connecticut Ratifying Convention (Jan. 7, 1788), reprinted in Debate on the Constitution Part One, at 882-83 (attempting to allay fears about the sovereign relationship between national and state governments by comparing the relationship between state and municipal governments each acting in their own spheres); William Findley, Pennsylvania Ratifying Convention (December 1, 1787), reprinted in Debate on the Constitution Part One, at 818-19 (expressing his belief that state sovereignty will no longer exist if the Constitution is adopted); George Mason, Virginia Ratifying Convention (June 1788), reprinted in Debate on the Constitution Part Two, at 725-26 (Bernard Bailly ed., Literary Classics of the United States, Inc. 1993) (1788) [hereinafter Debate on the Constitution Part Two] (questioning the power of the federal government to bring a state into court at the Virginia Convention); Melancton Smith, New York Ratifying Convention (July 1788), reprinted in Debate on the Constitution Part Two, at 841-42 (questioning how there could be two supreme powers in one government and advocating retained state power); Samuel Spencer, North Carolina Ratifying Convention (July 25, 1788), reprinted in Debate on the Constitution Part Two, at 854 (expressing concern that the state governments would be "swallowed up by the great mass of powers given to Congress").

13. See supra note 12; see also James Wilson, Speech at a Public Meeting, Philadelphia, (Oct. 6, 1787), reprinted in Debate on the Constitution Part One, at 66-67 (arguing the Constitution is not calculated, as feared, to reduce state governments to "mere corporations or annihilate them"); The Federalist No. 9, at 128 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1972) ("The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power."); The Federalist No. 14, at 152 (James Madison) (Benjamin Fletcher Wright ed., 1972) (explaining the constitutional convention's creation of a national government was not intended to abolish states governments, but rather the national government is limited to "certain enumerated objects, which concern all the members of the republic" while the states "retain their due authority and activity"); The Federalist No. 32, at 241 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1972) (explaining the proposed Constitution "aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States"); The Federalist No. 33, at 247 (Alexander Hamilton) (Benjamin Fletcher Wright
debates in the press, the Constitution’s creators made clear the national government created by the Constitution could not usurp state power and sovereignty.\(^\text{14}\) In creating a national “federal government” under the Constitution, the states were made “constituent parts of the national sovereignty”\(^\text{15}\) while leaving “in their possession certain exclusive and very important portions of sovereign power.”\(^\text{16}\) One essential attribute of sovereignty the states retained was the right not to be haled into court without consent.\(^\text{17}\)

In The Federalist No. 32, Hamilton explained that the Constitution required states to relinquish sovereignty in only three cases: 1) where the power is expressly granted solely in the national government; 2) where the power is granted to the national government in one section and prohibits the state from exercising like power in another section; and 3) where the authority is granted to the national government and exercise of the same authority would be “absolutely and totally contradictory and repugnant.”\(^\text{18}\) Hamilton stated further that it is only when national government acts pursuant to its Constitutional authority those acts are the supreme law of the land.\(^\text{19}\) Thus, the national government can not legitimately act to usurp state authority or sovereignty.\(^\text{20}\)

2. The Fourteenth Amendment

The Fourteenth Amendment\(^\text{21}\) requires states to surrender part...
of their sovereignty and gives Congress the right to authorize private suits against states under its enforcement power. 22

The Fourteenth Amendment’s explicit limits on states’ powers and the grant of Congressional power to enforce the rights contained therein, “fundamentally altered the balance of state and federal power struck by the Constitution.” 23 When Congress enacts appropriate legislation to enforce this Amendment, federal interests are paramount, and Congress may assert an authority over the states that would be otherwise unauthorized by the Constitution. 24

C. The Eleventh Amendment

Only five years after the Constitution was adopted, and with assurances that states would not have to relinquish sovereign immunity, the Supreme Court held that the literal text of Article III 25 authorized a private citizen of one state to sue another state without its consent. 26 The Court opined in Chisholm v. Georgia 27 that, read literally, Article III gave the judiciary power to hear cases and controversies “between a State and Citizens of another State,” and “between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.” 28 The decision “fell upon the country with a profound shock.” 29 The day after the Court announced the decision, a proposal to amend the Constitution overruling the decision was introduced in the House of Representatives. 30 In the next session, the Eleventh Amendment was introduced in the Senate. 31 After near unanimous passage, the Eleventh Amendment

22. U.S. CONST. amend. XIV, § 5. In this regard, the Court in Alden found federal interests are controlling when Congress enacts appropriate legislation under the Fourteenth Amendment. Therefore, Congress may exercise authority over the states under the Fourteenth Amendment even though it was otherwise unauthorized by the Constitution. See Alden, 119 S. Ct. at 2267.
25. See U.S. CONST. art. III (setting forth the power given to the judiciary under the Constitution).
26. See generally Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
27. Id.
28. Id. at 419-20.
30. See id.
31. See id.
was ratified in 1795.  

As passed, the Eleventh Amendment states "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although the Eleventh Amendment does not literally bar suits against states by a citizen of its own state, the Court in *Hans v. Louisiana* refused to read the amendment literally. Reflecting on the situation under which the Eleventh Amendment was adopted, the Court in *Hans* stated:

Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or the laws of the United States, can we imagine that the States would have adopted it? The supposition that it would is almost an absurdity on its face.  

Rather, the Eleventh Amendment was designed to overrule the Court's decision in *Chisholm* and make clear that state sovereign immunity was inherent in the Constitution. 

**D. Supreme Court Decisions After the Eleventh Amendment Interpreting State Immunity Prior to 1999**

In *Parden v. Terminal Railway of Alabama State Docks Department*, the Court interpreted Congress' Article I enforcement power as Congressional authority to subject states to private suits by its own citizens under the Federal Employer's Liability Act (FELA) and achieve other objectives within the scope of the enumerated

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32. *See id.*  
33. U.S. CONST. amend XI.  
34. 134 U.S. 1 (1890).  
35. *See id.* at 13.  
36. *Id.* at 14-15.  
37. *See Alden*, 119 S. Ct. at 2251.  
The Court held that if a state voluntarily operated a railroad, an act regulated by Congress, it would be subject to suit by injured workers. The Court reasoned that states who chose to enter the railroad business after the enactment of the statute impliedly waived their sovereign immunity from such suits. This was true even though the statute did not specifically refer to states and the state expressly disavowed such waiver. The Court explained:

By enacting the FELA . . . Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

Following Parden, a plurality of the Court in Pennsylvania v. Union Gas Co. concluded "States consented to suits against them based on congressionally created causes of action" when they approved the Constitution's Commerce Clause. The Court placed one restriction on its holding in Parden: It would "find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Following Parden, a plurality of the Court in Pennsylvania v. Union Gas Co. concluded "States consented to suits against them based on congressionally created causes of action" when they approved the Constitution's Commerce Clause. The Court placed one restriction on its holding in Parden: It would "find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

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Article I power\textsuperscript{49} to abrogate states’ sovereign immunity from suits commenced or prosecuted in federal courts.\textsuperscript{50}

Congress may still abrogate state sovereign immunity under the Fourteenth Amendment. Before the Court’s 1997 decision in City of Boerne v. Flores,\textsuperscript{51} this power was substantial. Boerne announced the “congruence” and “proportionality” test to decide whether Congress validly exercised its Fourteenth Amendment power.\textsuperscript{52} To enact “appropriate” legislation under the Boerne test, Congress “must identify unconstitutional conduct protected by the Fourteenth Amendment’s substantive provisions and tailor its legislation to remedy or prevent such conduct.”\textsuperscript{53} With this background, the new majority has now further restricted Congress’ power to subject states to suit under both Article I and the Fourteenth Amendment.

E. Recent Supreme Court Decisions—The New Majority Follows A New Trend

In the past year, the Court has held states are not subject to suit under the Fair Labor Standards Act (FLSA),\textsuperscript{54} the Patent Remedy Act (PRA),\textsuperscript{55} the Trademark Remedy Clarification Act (TRCA)\textsuperscript{56} and the Age Discrimination in Employment Act (ADEA).\textsuperscript{57} Seminole Tribe and Boerne became the springboard for the new majority’s view of state sovereign immunity. Congress may not abrogate a state’s right to be free from suit absent a showing that the suit is for purposes of carrying out the goals of the Fourteenth Amendment.\textsuperscript{58} Even then, the legislative record must contain

\textsuperscript{49} The Court rejected petitioner’s argument in Alden for the same reason. See Alden v. Maine, 119 S. Ct. 2240, 2256 (1999).
\textsuperscript{50} See Seminole Tribe, 517 U.S. at 72-73.
\textsuperscript{51} 521 U.S. 507 (1997).
\textsuperscript{52} See id. at 520 (“There must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).
\textsuperscript{58} See Alden v. Maine, 119 S. Ct. 2240, 2266 (1999) (holding Congress cannot abrogate state sovereign immunity under Article I of the Constitution); see also Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 643 (2000) (stating Congress’ power under the Fourteenth Amendment is limited to enforcing its goals, not defining them).
evidence of widespread unconstitutional conduct committed by the states.59 Finally, unconstitutional conduct is determined in relation to the state's authority to legislate in the particular area covered by the Fourteenth Amendment.60 Following the reasoning laid down in these decisions, the Eighth Circuit recently held Title II of the Americans with Disabilities Act is also an unconstitutional abrogation of state sovereignty.61

1. Alden v. Maine: Congressional Action Under Article I Cannot Subject States to Suits in Their Own Courts

In Alden v. Maine,62 a case of first impression, the Court held that Congress may not use its power under Article I of the Constitution to authorize private suits against states in state court.63 In 1938, Congress passed the FLSA under its Article I Commerce Clause power.64 Congress later amended the Act to include states in the definition of "employer" and thus allowed individuals to sue states for violations of federal wage laws.65 In 1992, a group of probation officers sued their employer, the State of Maine, in federal district court for violations of the FLSA's overtime provisions.66 Maine claimed that the FLSA's provision allowing private suits against states was an unconstitutional attempt to abrogate states' sovereign immunity.67

The district court dismissed the action, holding the Supreme Court's decision in Seminole Tribe68 made it clear that Congress lacked power under the Commerce Clause, or any other Article I power, to abrogate states' sovereign immunity from suits commenced or prosecuted in federal courts.69 The employees then filed suit in Maine's state court asserting the same cause of action.70 The Maine Supreme Court affirmed dismissal of the suit holding sovereign immunity barred the FLSA's provisions authorizing

59. See Kimel, 120 S. Ct. at 645 (explaining widespread evidence is required to meet the proportionality test in City of Boerne v. Flores, 521 U.S. 507 (1997)).
60. See infra note 180.
61. See Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999).
63. See id. at 2246.
66. See Alden, 119 S. Ct. at 2246.
67. See id.
69. See Alden, 119 S. Ct. at 2246.
70. See id.
private actions against states in their own courts, without regard to consent. The probation officers appealed to the U.S. Supreme Court.

The Court first set forth the standard under which it would review state immunity questions. Examining the concept of federalism, the Court concluded the federal balance inherent in the Constitution (which the Eleventh Amendment restored) gives states immunity from civil suits without consent. This presumption in favor of sovereign immunity can only be overcome by showing "compelling evidence" that the design of the Constitution required states to surrender their immunity to Congress.

a. The Supremacy Clause

Alden argued the Supremacy Clause automatically overrides state sovereign immunity when Congress enacts legislation subjecting states to suit. Justice Kennedy, writing for the majority, agreed that legislation enacted by Congress is the supreme law of the land, but explained the Supremacy Clause only gives force to those federal laws that are in accord with the design of the separation of powers in the Constitution. That is, the enactment of a federal law by itself does not override states' sovereign immunity, the federal law must be a "valid exercise of the national power." Substantive federal law only overrides state sovereign

71. See id.
72. See id.
73. See id. at 2254. (finding support for this argument in the text and history of the Eleventh Amendment.) The text of the Eleventh Amendment gives direction to the judiciary, stating its judicial power "shall not be construed to extend" to suits by citizens against states. See id. at 2251 (emphasis added). Thus, the Court argued, the Eleventh Amendment only restores the original federal balance within the Constitution. See id.
74. Id. at 2255.
75. U.S. CONST. art. VI, § 2. The Supremacy Clause provides:

[t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Id.
76. See Alden, 119 S. Ct. at 2255.
77. See id.
78. Id.
immunity when it is implemented "in a manner consistent with the constitutional sovereignty of the states." 79

b. The Necessary and Proper Clause

Next, the Court considered whether Congress could abrogate immunity under the Necessary and Proper Clause. 80 The Court rejected the idea that this clause authorizes Congress to subject states to suit "as a means of achieving objectives otherwise within the scope of the enumerated powers." 81 The Court noted that although some of its decisions endorsed that contention, those cases were overruled. 82 Further, laws enacted to carry out Congress’ Article I power that violate the principle of state sovereignty are not proper or valid laws, but "act[s] of usurpation which deserve to be treated as such." 83 Thus, the Court held, based on the "history, practice, precedent, and the structure of the Constitution... states retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." 84

However, there are limits on state sovereign immunity. 85 States cannot "disregard the Constitution or valid federal law" that "comport[s] with the constitutional design." 86 The Court noted "sovereign immunity bars suits only in the absence of consent" and many states have consented to suits on their own initiative. 87

79. Id. at 2255-56.
80. See id. at 2256. The Necessary and Proper Clause authorizes Congress "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.
81. Alden, 119 S. Ct. at 2256.
84. Id. at 2266.
85. See id. at 2267. (noting that states’ sovereign immunity does extend to governmental entities that are not an “arm of the State”). Nor does sovereign immunity bar all suits against state officers for declaratory or injunctive relief where the real party in question is in fact the individual and not the state. See id.
86. Id. at 2266 (emphasis added).
87. Id. at 2267 (noting that states have "enacted statutes consenting to a wide
Additionally, states have consented to suits brought by other states or the Federal Government by ratifying the Constitution.\(^8\) Further, the Fourteenth Amendment\(^9\) requires states to surrender part of their sovereignty and gives Congress the right to authorize private suits against states under the Amendment’s Enforcement Clause.\(^10\) The FLSA, enacted under the Commerce Clause pursuant to Article I, met none of these exceptions and was therefore an improper exercise of Congress’ power to abrogate state immunity.

### 2. College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board: The Scope of the Fourteenth Amendment and the Death of the Constructive Waiver Doctrine

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court struck down a provision in the TRCA\(^9\) that permitted suits against states under the Lanham Act\(^9\) for alleged misrepresentation.\(^9\) College Savings Bank (College Savings) marketed and sold CollegeSure certificates of deposit designed to finance college education costs.\(^9\) College Savings held a patent on the administration methodology of its certificates.\(^9\)

Florida Prepaid Postsecondary Education Expense Board (Florida Prepaid), an arm of the State of Florida, also administered a tuition prepayment program.\(^9\)

College Savings Bank sued Florida Prepaid under the TRCA for alleged misstatements about its program and for patent infringement.\(^9\) Florida Prepaid moved to dismiss the complaint

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88. *See id.*
89. U.S. CONST. amend. XIV.
90. *See U.S. CONST. amend. XIV, § 5.* In this regard, the Court found federal interests controlling when Congress enacts appropriate legislation under the Fourteenth Amendment, and Congress may exercise authority over the states otherwise unauthorized by the Constitution. *See Alden,* 119 S. Ct. at 2267.
95. *See id.* at 2223.
96. *See id.*
97. *See id.*
claiming sovereign immunity. College Savings argued that Florida Prepaid constructively waived its immunity by engaging in "interstate marketing and administration" of its program in commerce. College Savings also argued Congress validly abrogated Florida Prepaid's sovereign immunity because Congress enacted the TRCA to enforce the Due Process Clause of the Fourteenth Amendment.

a. Fourteenth Amendment Due Process

College Savings contended the TRCA was enacted to remedy and prevent states from depriving persons of two property rights without due process of law in violation of the Fourteenth Amendment. The Court noted the Fourteenth Amendment provides that no state shall deprive any person of "property... without due process of law" and gives Congress "power to enforce, by appropriate legislation, the provisions of this article." Legislation enacted under the Fourteenth Amendment, the Court held, must be "carefully delimited remediation or prevention of constitutional violations."

The Court's decision turned on the definition of "property" within the Fourteenth Amendment. If the object of the legislation was not "property" within the meaning of the Fourteenth Amendment's Due Process Clause, then that legislation could not be a valid exercise of Congressional power under the Fourteenth Amendment. College Savings contended the TRCA protected its property right to "be free from a business competitor's false advertising about its own product." The Court rejected this argument, finding the right to be free from a business competitor's false advertising concerning its own product is not a property right. Property interests, the court stated, have a common

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99. See Florida Prepaid, 119 S. Ct. at 2224.
100. See id.
101. See id.
102. See id.
103. Id. (quoting U.S. CONST. amend. XIV, § 1).
104. See id. (quoting U.S. CONST. amend. XIV, § 5).
105. See id.
106. See id. at 2224-25.
107. See id.
108. Id. at 2224.
109. See id.
feature of exclusion. Since Florida Prepaid’s statements about its own products did not intrude on any interest over which College Savings had exclusive control, that interest was not a property right protected by the Fourteenth Amendment’s Due Process Clause.

College Savings next claimed its right to be secure in its business interests was a property interest protected by the Fourteenth Amendment’s Due Process Clause. The Court found this argument just as specious. While business assets are property in the ordinary sense of the word, the Court found the activity of doing business is not a property interest. The Court explained the only rights impinged on by false advertising are the activities of doing business or making a profit. Because these interests are not property interests, the Due Process Clause does not protect them. Thus, because this legislation was not “necessary to prevent violation of the Fourteenth Amendment,” Congress did not validly abrogate state sovereign immunity when it enacted the TRCA.

b. Waiver

The Court next considered whether Florida Prepaid waived its sovereign immunity. Waiver, the Court explained, will generally be found “either if the State voluntarily invokes our jurisdiction . . . or . . . if the State makes a ‘clear declaration’ that it intends to submit itself to our jurisdiction.” The Court found that Florida Prepaid did not expressly waive its consent to be sued since it did not voluntarily invoke the Court’s jurisdiction or make a clear declaration that it intended to submit itself to federal jurisdiction.

College Savings then argued that if Florida Prepaid did not expressly waive sovereign immunity, it did so “impliedly” or

110. See id.
111. See id. at 2224-25.
112. See id. at 2225.
113. See id.
114. See id.
115. See id.
116. See id.
117. Id.
118. See id. at 2233.
119. See id. at 2233.
120. See id. at 2225-26.
121. Id. at 2226.
122. See id.
"constructively" under the Supreme Court's decision in *Parden v. Terminal Railway of Alabama Docks Department*. Specifically, College Savings contended that Florida Prepaid should be subject to suit because it engaged in a nonessential and voluntary activity of selling and advertising a for-profit educational investment after being put on notice that it would be subject to suit under the TRCA. Under *Parden* and its progeny, College Savings argued, constructive waiver is appropriate and should be recognized where Congress unambiguously provides the state will be subject to suit if it "engages in certain specified conduct governed by federal regulation" and the state voluntarily elects "to engage in the federally related conduct that subjects it to suit." 

The Court flatly rejected this argument and overruled its prior holding in *Parden*, stating "[w]e think that the constructive-waiver experiment of *Parden* was ill conceived, and see no merit in attempting to salvage any remnant of it." *Parden*, the Court stated, is "an anomaly in the jurisprudence of sovereign immunity" which broke sharply with cases before it and is "fundamentally incompatible with later ones." Because the Court could not harmonize the holding in *Parden* with the requirement set forth in later cases that states' express waiver of sovereign immunity be unequivocal and the finding that no other constitutional right can be surrendered by constructive consent, it expressly overruled whatever remained of *Parden*.

Because Florida Prepaid did not waive immunity by engaging in activity regulated under the TRCA and Congress did not validly abrogate state sovereign immunity by enacting the TRCA, the Supreme Court found the federal courts lacked jurisdiction to hear

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122. See id. (citing *Parden v. Terminal Ry. of Ala. Docks Dep't.*, 377 U.S. 184 (1964)).
123. See id. at 2228.
124. Id.
125. Id.
126. Id.
127. See id. (noting that "requiring a 'clear declaration' by the State of its waiver... to be certain that the State in fact consents to suit" is inconsistent with an unequivocal declaration by Congress of its intention to subject a State to suit if that State takes certain action).
128. See id. at 2229 (finding state sovereign immunity is a constitutional right and noting no other constitutional rights have ever been held to be impliedly or constructively waived).
129. See id. at 2228.
the matter and affirmed the dismissal.\textsuperscript{130}

3. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank: Defining “Appropriate” Legislation Under the Fourteenth Amendment

In a companion case, \textit{Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank},\textsuperscript{131} the Supreme Court rejected the notion that Florida Prepaid could be sued under the PRA.\textsuperscript{132} Congress passed the PRA in 1990 to make it clear that states were subject to suit in federal court for “infringement of patents and plant variety protections.”\textsuperscript{133} College Savings owned a patent for the financing methodology it used in its CollegeSure certificates of deposit\textsuperscript{134} and alleged Florida Prepaid infringed on that patent in connection with its tuition prepayment program.\textsuperscript{135}

The Court noted Congress passed the PRA under three sources of constitutional authority: of the Patent Clause;\textsuperscript{136} the Interstate Commerce Clause;\textsuperscript{137} and section five of the Fourteenth Amendment.\textsuperscript{138} Relying on its previous decisions, the Court stated Congress may not abrogate states’ sovereign immunity under Article I of the United States Constitution.\textsuperscript{139} Thus, it dismissed College Saving’s arguments that Congress validly exercised its power under the Patent Clause and the Interstate Commerce Clause.\textsuperscript{140} College Savings instead argued Congress validly exercised its power under section five of the Fourteenth Amendment “to secure the Fourteenth Amendment’s protections against deprivations of property without due process of law.”\textsuperscript{141}

The Court first stated Congress can only enact legislation that is “appropriate” under the Enforcement Clause of the Fourteenth Amendment.\textsuperscript{142} “Appropriate” legislation under the Enforcement Clause must be evaluated considering the Court’s prior holding in

\begin{enumerate}
\item[130.] See id. at 2233.
\item[131.] 119 S. Ct. 2199 (1999).
\item[132.] See id. at 2202; see also 35 U.S.C. § 271 (1994).
\item[133.] See \textit{College Sav. Bank}, 119 S. Ct. at 2203.
\item[134.] See id. at 2202.
\item[135.] See id.
\item[136.] U.S. CONST. art. I, § 8, cl. 8.
\item[137.] U.S. CONST. art. I, § 8, cl. 3.
\item[138.] See \textit{College Sav. Bank}, 119 S. Ct. at 2205.
\item[139.] See id.
\item[140.] See id. (citing Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996)).
\item[141.] See id.
\item[142.] See id. at 2206.
\end{enumerate}
Boerne. To enact legislation under the Enforcement Clause using the Boerne test, Congress “must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.”

a. Substantive Due Process

In the context of whether Congress validly enacted the PRA under the substantive provisions of the Fourteenth Amendment, the Court questioned whether the PRA could be “viewed as remedial or preventative legislation aimed at securing the protections of the Fourteenth Amendment for patent owners.” The Court stated its first step was to “identify the . . . ‘evil’ or ‘wrong’ that Congress intended to remedy.” It reasoned the conduct Congress attempted to redress by the PRA was the “unremedied patent infringement by the States” for which patent owners were denied compensation.

The Court then looked to the legislative record to find any evidence that “unremedied patent infringement by states had become a problem of national import.” When Congress enacted the PRA, it did not identify a pattern of patent infringement or constitutional violations by the states. Rather, the House of Representatives could only come up with two examples of patent infringement suits against states, and the bill’s sponsor conceded there was no “evidence of massive or widespread violation of patent laws by the States either with or without this State immunity.” Noting “states are willing and able to respect patent rights” the Court found the PRA was neither remedial nor preventative.
College Savings next asserted the PRA was also designed to safeguard procedural due process under the Fourteenth Amendment. It argued that when states infringe on a patent and then plead immunity to a patent infringement suit, it "deprives the patentee of property without due process of law." Unlike the trademark property rights asserted by College Savings in the TRCA action, the Court acknowledged that patents are property within the meaning of the Due Process Clause.

Congress may legislate against deprivation of patent interests under the Fourteenth Amendment's procedural due process clause. However, the Court stated Congress may only enact legislation "where the State provides no remedy, or only inadequate remedies, to injured patent owners for... infringement of their patent" because only then "could a deprivation of property without due process result." In other words, if the state has an adequate remedy no due process violation will result. Therefore, to abrogate state sovereign immunity under procedural due process, Congress must first find states provide no remedy or the remedies provided are inadequate.

Here, the Court found Congress "barely considered the availability of state remedies for patent infringement . . . ." Under either substantive or procedural due process, the Court found the PRA did not respond to a history of "widespread and persisting deprivation of constitutional rights" of the type Congress

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153. See id. at 2208.
154. See id. The Court ignored College Saving's argument that state immunity from suit also violated the Just Compensation Clause of the Fourteenth Amendment because the state "takes" the property in patent without providing just compensation. See id.
155. See id. ("Patents ... have long been considered a species of property."). The Court rejected the argument that patents are merely property created by virtue of Article I of the Constitution and thus not subject to protection under section five of the Fourteenth Amendment. See id.
156. See id. ("[I]f the Due Process Clause protects patents, we know of no reason why Congress might not legislate against their deprivation without due process under § 5 of the Fourteenth Amendment.").
157. See id.
158. See id.
159. See id.
160. Id. at 2209. The Court noted several different causes of action may be available against states in state courts, such as suits for deceit, unfair competition, restitution, tort claims, conversion, takings or legislative remedies. See id. at 2208 nn.8, 9.
previously faced in enacting legislation under the Fourteenth Amendment’s Enforcement Clause. Noting Congress’ conclusion that states were depriving patent owners of property without due process was based only on scant support in the record, the Court ruled the indiscriminate scope of the PRA is “so out of proportion to a supposed remedial or preventive object [it] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”

4. Kimel v. Florida Board of Regents: Congress Cannot Redefine States’ Legal Obligations Under the Fourteenth Amendment

In a consolidated suit in the current term, the Court held the ADEA did not abrogate states’ sovereign immunity. Roderick MacPherson and Marvin Narz sued their employer, the University of Montevallo, in federal district court claiming age discrimination in violation of the ADEA. Daniel Kimel, Jr., and a group of current and former faculty and librarians also sued their employer, Florida State University, in federal district court for an alleged violation of the ADEA. Finally, Wellington Dickson sued his employer, the Florida Department of Corrections, in federal district court alleging age discrimination because his employer failed to promote him. All three defendants moved to dismiss contending the Eleventh Amendment barred suit against them as arms of the state.

One district court found that “although the ADEA contains a clear statement of Congress’ intent to abrogate the states’ Eleventh Amendment immunity, Congress did not enact or extend the ADEA under its Fourteenth Amendment § 5 enforcement power” and thus “did not abrogate the States’ Eleventh Amendment immunity.” The other two district courts held Congress expressed its intent to abrogate the States’ Eleventh Amendment immunity when it enacted the ADEA, and the ADEA was a proper

161. Id. at 2210 (quoting City of Boerne v. Flores, 521 U.S. 507, 526 (1997)).
162. Id. (quoting Boerne, 521 U.S. at 532).
163. 120 S. Ct. 631 (2000).
165. See id. at 638 (alleging the employer’s refusal to allocate funds to adjust salaries had a disparate impact on the pay of older employees).
166. See id.
167. See id. at 639.
168. See id. at 638-39.
169. Id. at 638.
exercise of Congress' authority under the Fourteenth Amendment. All three cases were appealed to the Court of Appeals for the Eleventh Circuit and consolidated.

In a divided opinion, one Eleventh Circuit judge found the ADEA "does not abrogate the States' Eleventh Amendment immunity" under the Fourteenth Amendment because it lacked "unmistakably clear language evidencing Congress' intent" to do so. Another judge found Congress lacked power under section five of the Fourteenth Amendment to abrogate state immunity under the ADEA because "the ADEA confers rights far more extensive than those the Fourteenth Amendment provides" and was not enacted as a "proportional response to any widespread violation of the elderly's constitutional rights." Finding a conflict among the federal appellate courts on the question of "whether the ADEA validly abrogates the States' Eleventh Amendment immunity," the U.S. Supreme Court granted certiorari.

a. Intent to Abrogate Must be Unequivocally Expressed

In deciding the issue, the Court determined it must answer two questions. First, it considered whether Congress "unequivocally expressed its intent" to abrogate states' immunity when it made the ADEA applicable to the states. The Court easily answered this question, applying a "simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" Because Congress included state governments and their political subdivisions in the definitions of "employer" and "public agency" to which the statute applied, the Court found Congress clearly expressed its intent to subject states

170. See id. at 638-39.
171. See id. at 639.
172. Id. (explaining Judge Edmondson's decision in Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1430 (11th Cir. 1998), aff'd, 120 S. Ct. 631 (1999)).
173. See id. (explaining and quoting Judge Cox's decision).
174. See id. (surveying the cases and finding that while the Second, Fifth, Sixth, Seventh, Ninth and Tenth Circuits have held the ADEA does validly abrogate states' Eleventh Amendment immunity, the Eighth and Eleventh Circuits have held it does not).
175. See id. at 640.
176. See id. When enacted, the ADEA did not apply to the states. A 1974 Amendment to the FLSA, applicable to the ADEA, however, changed the definition of "employer" to expressly include states. See id. at 637.
177. Id. at 640 (citations omitted).
CONSTITUTIONAL LAW

b. The Fourteenth Amendment Analysis

The Court next turned to the question of whether Congress "acted pursuant to a valid grant of Constitutional authority." If Congress enacted the ADEA solely pursuant to its Commerce Clause power, the Court held it would not have been a valid exercise of power since Article I powers "do not include the power to subject States to suit at the hands of private individuals." If the ADEA was also enacted pursuant to Congress' Fourteenth Amendment power to abrogate states' sovereign immunity, the question is whether the ADEA is appropriate legislation under the Fourteenth Amendment. The Court examined only the Fourteenth Amendment power.

Congress has the power to determine whether and what legislation is needed to secure rights guaranteed by the Fourteenth Amendment, including authority to remedy and deter violations of rights the Fourteenth Amendment guarantees. This power includes prohibiting broader conduct than that forbidden by the text of the Fourteenth Amendment to remedy and deter violations of rights guaranteed by the Amendment. Although Congress' conclusions on whether and what conduct must be prohibited to secure Fourteenth Amendment rights are entitled to much deference, its power is limited in some important respects. Most notably, Congress cannot determine the substance of the Fourteenth Amendment, "[i]t has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." The interpretation and determination of substantive provisions of

178. See id.
179. Id.
180. See id. at 643. The Court recognized that it previously upheld the constitutional validity of the 1974 extension of the ADEA as applicable to state and local governments under Congress' Commerce Clause power. See id. at 643 (citing EEOC v. Wyoming, 460 U.S. 226, 243 (1983)). The Court then reviewed its more recent decisions and stated "[u]nder our firmly established precedent . . . , if the ADEA rests solely on Congress' Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers." Id. at 643 (emphasis added).
181. See id. at 644.
182. See id.
183. See id.
184. See id.
185. Id. (quoting City of Boerne v. Flores, 521 U.S. 507, 519 (1996)).
the Fourteenth Amendment are only for the judiciary to decide.\textsuperscript{186}

The Court recognized that the line between enacting legislation to secure the Fourteenth Amendment's guarantees and determining the substance of the Fourteenth Amendment is a fine one, and Congress has wide latitude to decide where the line lies. The Court nevertheless examined the legislation to determine if "congruence and proportionality" existed between the injury to be prevented by the legislation and the means adopted toward that end as dictated by \textit{Boerne}.\textsuperscript{187} The "congruence and proportionality" test requires the Court to determine first if there is evidence of a widespread pattern of constitutional violation by the states that the legislation purports to remedy.\textsuperscript{188} If Congress identifies a problem in the legislative record, the next question is whether the purported legislation imposes disproportionate substantive requirements on the states as compared with the unconstitutional conduct targeted by the legislation.\textsuperscript{189}

In other words, Congress can only act under the Fourteenth Amendment if it shows a widespread pattern of constitutional violation by the states exists.\textsuperscript{190} Congress and the courts must assess the alleged "constitutional violation" under the same standard of review used to measure the legitimacy of state action.\textsuperscript{191} Where the discriminatory basis of the state action is not a suspect classification under the Equal Protection Clause, states may discriminate without offending the Fourteenth Amendment if the states rationally relate the classification to a legitimate state interest.\textsuperscript{192} Congress cannot prohibit substantially more state practices under the Fourteenth Amendment than would likely be upheld under the applicable standard of review.\textsuperscript{193} This is because Congress could then target constitutional conduct by the state, a broader power than forbidding and preventing states from acting in an unconstitutional manner.\textsuperscript{194}

\textsuperscript{186} See id. at 644-45.
\textsuperscript{187} See id. at 645.
\textsuperscript{188} See id. (explaining how the test was applied in \textit{Boerne}, 521 U.S. at 531).
\textsuperscript{189} See id.
\textsuperscript{190} See id.
\textsuperscript{191} See id. at 646 (explaining age is not a suspect classification under the Equal Protection Clause and must be reviewed on a rational basis test, while state discrimination on the basis of race or gender requires "a tighter fit between the discriminatory means and the legitimate ends they serve").
\textsuperscript{192} See id.
\textsuperscript{193} See id. at 647.
\textsuperscript{194} See id.
With respect to the ADEA, the Court found the substantive requirements it imposed on state and local governments were disproportionate to any unconstitutional conduct Congress could conceivably target. The Court first noted that under prior case law, age is not a suspect classification under the Fourteenth Amendment’s Equal Protection Clause. Therefore, states may discriminate on the basis of age if such classification is “rationally related” to a legitimate state interest. The Court reasoned that because the ADEA “prohibits substantially more state employment decisions... than would likely be held unconstitutional under the applicable equal protection, rational basis standard,” it is out of proportion to a remedial objective and cannot be understood to be responsive to or designed to prevent unconstitutional behavior. Congress may still enact “reasonably prophylactic legislation” under section five of the Fourteenth Amendment, but that legislation must appropriately remedy a defined evil among the states, not “merely an attempt to substantively redefine the states’ legal obligations....”

Looking at the legislative history of the ADEA, the Court noted Congress did not identify a pattern of age discrimination by the states, or any discrimination that would rise to the level of a constitutional violation. The Court found the legislative record contained only a few statements regarding states’ discriminatory practices on the basis of age, not enough to infer a national problem. Therefore, Congress did not have any reason to believe the ADEA was necessary to remedy age discrimination in state government. The lack of such evidence led the Court to hold Congress did not validly exercise its power under section five of the Fourteenth Amendment when it made the ADEA applicable to states.

195. See id. at 645.
196. See id. at 646.
197. See id.
198. See id. at 647.
199. See id. at 648.
200. Id.
201. See id. at 649.
202. See id.
203. See id. at 649-50.
204. See id. at 650.
F. Eighth Circuit Interpretation: Whether or not Congress Makes Findings of Pervasive Discrimination, Its Actions Under the Fourteenth Amendment are Limited to the “Mischief and Wrong” that Amendment was Intended to Prevent

In Alsbrook v. City of Maumelle,205 the Eighth Circuit ruled that Congress did not validly abrogate state immunity when it enacted Title II of the Americans with Disabilities Act (ADA).206 Alsbrook sued the City of Maumelle, the State of Arkansas, and the Arkansas Commission on Law Enforcement Standards and Training (ACLEST) for violating Title II of the ADA.207

ACLEST, an agency of the State of Arkansas, regulates the hiring and certification of law enforcement officials within Arkansas.208 Applicants who want certification as law enforcement officers in Arkansas must meet ACLEST’s minimum standards, including demonstrating that they possess “visual acuity that can be corrected to 20/20 in each eye.”209 Alsbrook wished to become certified by ACLEST and obtain a job in law enforcement.210 However, Alsbrook had a congenital condition that prevented him from meeting the minimum visual acuity standard because the vision in his right eye could only be corrected to 20/30.211 Because of this condition, Alsbrook was denied employment as a law enforcement officer with the City of Little Rock Police Department.212

Alsbrook sued under Title II of the ADA arguing that the defendants failed to certify him because of his disability or because they regarded him as disabled.213 Title II of the ADA provides that

205. 184 F.3d 999 (8th Cir. 1999). On January 25, 2000, the Supreme Court granted certiorari to determine whether Congress effectively abrogated state sovereign immunity. See Alsbrook v. Arkansas, 120 S. Ct. 1003 (2000) (mem.). However, the case settled and was dismissed before briefs were filed. See Alsbrook v. Arkansas, 120 S. Ct. 1265 (2000) (mem.).
206. See Alsbrook, 184 F.3d at 1002.
207. See id.; see also 42 U.S.C. § 12132 (1994).
208. See id.
209. See id.
210. See id.
211. See id. Alsbrook suffered from amblyopia. See id.
212. See id. at 1003. Alsbrook later obtained a waiver and, by the time the case was decided, obtained employment as a law enforcement officer with the City of Little Rock Police Department. See id. Therefore, the Eighth Circuit considered only his claim for money damages. See id. at 1005 n.5.
213. See id. at 1003. Alsbrook also sued the individual ACLEST commissioners
public entities may not exclude "qualified individuals" with disabilities from participation in or denying benefits of the services, programs or activities of a public entity and further forbids "discrimination by any such entity." The defendants moved for summary judgment, arguing Congress did not validly abrogate their Eleventh Amendment immunity. In an en banc decision, the Eighth Circuit agreed. Because Congress' power to abrogate states' Eleventh Amendment immunity is limited, the court noted it need "exercise care before finding abrogation." The court then employed the two-prong analysis set forth in Seminole Tribe v. Florida.

In the first prong of the analysis, the Eighth Circuit easily found Congress "unequivocally expressed its intent to abrogate the immunity . . . " The ADA itself provides that "[a] State shall not be immune under the eleventh amendment . . . from an action in Federal or State court of competent jurisdiction for a violation of this chapter."

The court next considered the second prong of the analysis—whether Congress acted pursuant to a valid exercise of power. The essence of the question, the court determined, is whether "Title II of the ADA represents a proper exercise of Congress' Section 5 powers 'to enforce' by 'appropriate legislation' the constitutional guarantees of the Fourteenth Amendment, in particular, the Equal Protection Clause." If Title II exceeds Congress' enforcement powers under the Fourteenth Amendment, Congress does not have jurisdictional effect and cannot under 42 U.S.C. § 1983 for violating his rights under Title II of the ADA. See id. The Court determined that because Alsbrook could not sue the individuals under Title II of the ADA, he could not maintain an action against them under 42 U.S.C. § 1983. See id. at 1012.

214. See 42 U.S.C. § 12132 (1994); see also Alsbrook, 184 F.3d at 1003 n.4.
215. See Alsbrook, 184 F.3d at 1003.
216. See id. at 1004. (vacating the panel's decision found at 156 F.3d 825 (8th Cir. 1998) and reversing the district court's denial of summary judgment).
217. See id. at 1005 (stating the Supreme Court has cautioned care be exercised in reading its decision in Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985)).
218. See id. (stating it must engage a two-prong analysis to determine the validity of Congress' abrogation of immunity and citing Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996)).
219. See id.
220. See id. (quoting 42 U.S.C. § 12202 (1994)).
221. See id. at 1006.
222. Id. (quoting City of Boerne v. Flores, 521 U.S. 507, 517 (1996)).
constitutionally abrogate states’ immunity.  

The Eighth Circuit explained that under *Boerne*, Congress’ enforcement power under the Fourteenth Amendment is limited to enacting remedial legislation, and Congress has no authority to enact substantive legislation defining the scope of the Fourteenth Amendment. In determining whether Title II of the ADA is remedial legislation, the Eighth Circuit considered Alsbrook’s argument that “Congress made detailed findings... of a serious and pervasive problem of discrimination against the disabled,” which the ADA was designed to remedy. The court did not disagree, but stated that “the legislative record, alone, cannot suffice to bring Title II within... Congress’ Section 5 [enforcement] powers....” Instead, even if the legislative record contains detailed findings, Congress may still not pass legislation that “attempts to expand, enhance or add to the guarantees of the Fourteenth Amendment” because it “only has the power to prohibit that which the Fourteenth Amendment.. ., prohibits. The court opined that “congressional enforcement of equal protection rights under [the Fourteenth Amendment] is not limited to suspect classifications,” and the court must look to “what kind of discrimination the Constitution prohibits, and whether the ADA was aimed at that kind of discrimination.” The Supreme Court in *City of Cleburne v. Cleburne Living Center, Inc.*, held that state classifications based on mental retardation need only satisfy rational basis review under the Equal Protection Clause. Therefore, disability discrimination under the Fourteenth Amendment 

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223. See *id.* (quoting *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 703 (4th Cir. 1999)).

224. See *id.* at 1007 (citing *Boerne*, 521 U.S. at 519).

225. *Id.*

226. *Id.* at 1008. Later in the opinion, the court acknowledged that “Congress may prohibit conduct which itself is not necessarily unconstitutional, if to do so would rectify an existing constitutional violation.” *Id.* at 1009. However, it found the legislative record inadequate to support the “proposition that most state programs and services discriminate arbitrarily against the disabled.” *Id.* Thus, the court concluded that Title II was not enacted to counteract state laws or state actions that violate the Constitution. See *id.*

227. *Id.* at 1008.

228. *Id.*

229. *Id.* It is interesting to note that the Eighth Circuit applied this methodology before it was enunciated by the Supreme Court in *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000).


231. See *Alsbrook*, 184 F.3d at 1009.
Amendment must satisfy only the lower rational basis review, allowing states to discriminate on the basis of disability if the distinctions it makes are based on legitimate governmental objectives. 232 Title II of the ADA, the court stated, imposes a higher standard of conduct on states than the Fourteenth Amendment requires. 233 Because Title II applies a higher standard, in adopting Title II of the ADA, Congress did not act to enforce equal protection guarantees for the disabled as defined by the Supreme Court, but to define them substantively. 234 Thus, Congress exceeded its authority when it passed Title II of the ADA under the Fourteenth Amendment enforcement clause and did not effectively abrogate state sovereign immunity. 235

G. Conclusion

The current majority has applied their federalism principles narrowly to construe Congress’ power to override state immunity from suit. Legislation enacted under Article I to abrogate state sovereign immunity (in either federal or state court) is invalid. Nor can Congress stretch the substantive limits of the Fourteenth Amendment. For the first time, the Court is applying the same standard in determining whether state law violates the Fourteenth Amendment and determining whether Congressional legislation is “appropriate” when it attempts to subject states to suit under Fourteenth Amendment legislation. The majority has stated its new precedence is “firmly established.” 236 However, the Court’s majority is narrow and the area is unsettled. Further changes in the makeup of the Court may result in more unsettled law in this area. Stay tuned.

Mary L. Senkbeil

232. See id.
233. See id. Title II requires states to provide modifications to its services, programs and activities unless they would fundamentally alter the nature of the service, program or activity. See id. This is more than is required under the rational basis review standard for Fourteenth Amendment Equal Protection Claims, which requires only a legitimate governmental objective. See id.
234. See id. at 1010.
235. See id.