Toward a Simpler Standard for Abrogating Sovereign Immunity

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In recent terms, the Supreme Court has repeatedly addressed issues related to the states' sovereign immunity.[1] In particular, the Court has focused on whether Congress, exercising its powers to enforce the Fourteenth Amendment,[2] has validly abrogated the States' sovereign immunity.[3] Yet, despite the fact that the Court has addressed the issue on multiple occasions, the Court's analytical framework for determining the validity of abrogation is becoming more confused and uncertain. For example, the Court has declared that sovereign immunity bars employment discrimination claims based on age[4] or disability,[5] but does not bar a claim based on denial of an employment benefit.[6] Similarly, the Court ruled that Congress' findings of unconstitutional discrimination by the States was insufficient to justify abrogation for some disability discrimination claims,[7] but that those exact same congressional findings justified abrogation for other disability discrimination claims.[8]

This confusion and uncertainty is the direct result of the analytical framework for determining whether sovereign immunity is abrogated. In order to determine whether sovereign immunity has been abrogated, the Court applies the "congruence and proportionality" test established in *City of Boerne v. Flores*.[9] Under this test, the Court decides the validity of legislation intended to enforce the Fourteenth Amendment by making sure that Congress "has identified sufficient constitutional violations to make its remedy congruent and proportional."[10] However, while the "congruence and proportionality" test may be appropriate for determining the validity of legislation that creates new substantive rights, it is inappropriate for determining if sovereign immunity is abrogated.[11] This is so for three reasons. First, the test is designed to assess the validity of a statute that creates new substantive rights, not for determining whether sovereign immunity should apply. Second, in abrogation cases, the Court's interpretations of the various components of the "congruence and proportionality" test are ambiguous, if not contradictory. Third, as used in abrogation cases, the test itself is fundamentally flawed. Because of these ambiguities and flaws, the test has become "a standing invitation to judicial arbitrariness and policy-driven decisionmaking."[12]

The Court should abandon the current "congruence and proportionality test" for determining whether sovereign immunity is abrogated.[13] In its place, the Court should declare that Congress' power to abrogate sovereign immunity is limited to claims of actual Fourteenth Amendment violations.[14] In other words, to the extent that a federal statute provides substantive rights that are the same as those guaranteed by the Fourteenth Amendment,[15] congressional abrogation of sovereign immunity is possible.[16] Conversely, to the extent that a federal statute provides substantive rights that are greater than those provided by the Fourteenth Amendment, congressional abrogation is impossible. As a result, the question of whether sovereign immunity has been abrogated will turn on whether the litigant has stated a claim for a constitutional violation. If so, then the State may be sued for damages.[17] If not, then the claims are barred. Thus, the "Fourteenth Amendment violation" test will provide clarity and certainty.

The remainder of this essay explains why the Court should abandon the "congruence and proportionality test" and should adopt the alternative "Fourteenth Amendment violation" test. This purpose is accomplished in three distinct sections. First, the essay demonstrates that the Court's interpretation of the component parts of "congruence and proportionality" test has been both ambiguous and uncertain. Second, the essay comments on the "congruence and proportionality" test by exposing its fundamental flaws. Third, the essay explains the advantages of the alternative "Fourteenth Amendment violation" test.

I. Overview of the Congruence and Proportionality Test

In *Seminole Tribe v. Florida*,[18] the Supreme Court reaffirmed the basic principle that Congress, acting pursuant to § 5 of the Fourteenth Amendment, may enact legislation that abrogates constitutional sovereign immunity for claims based on a particular statute.[19] However, because the power to effectively nullify constitutional sovereign immunity is so extraordinary, in order to do so Congress must (1) unequivocally express its intent to abrogate in the text of the statute; and (2) act pursuant to § 5 of the Fourteenth Amendment.[20] Unless both conditions are satisfied, Congress' attempt to abrogate the States' sovereign immunity is invalid.[21] Because it is relatively easy for Congress to satisfy the first condition, to express unequivocally its intent to abrogate,[22] the cases inevitably focus on the second condition, whether Congress acted pursuant to § 5 of the Fourteenth Amendment. This question requires application of the "congruence and proportionality" test set forth in *City of Boerne v. Flores*.[23]

The "congruence and proportionality" test involves three questions.[24] First, the Court must "identify with some precision the scope of the constitutional right at issue."[25] Second, after identifying the right at issue, the Court must determine "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States."[26] Third, if there is a pattern of constitutional violations by the States,[27] the Court determines whether the Congress' response is proportionate to the finding of constitutional violations.[28]

However, despite its apparent simplicity, the Court's interpretations of the three parts are ambiguous and, in some instances, contradictory. Thus, it is necessary to examine each of the first components.

A. Precisely Identify the Right at Issue

First, the Court must "identify with some precision the scope of the constitutional right at issue."[29] This involves not only articulating the constitutional right, but also determining whether that right warrants heightened scrutiny.

That is, whether it involves a fundamental right or a suspect or quasi-suspect classification. If the right warrants heightened scrutiny, then it is easier for Congress to show a pattern of constitutional violations by the States.[30] Conversely, if the right does not warrant heightened scrutiny, the standard for abrogation remains high.[31] To illustrate, in *Lane*, the Court found that the right at issue was "the constitutional right of access to the courts,"[32] a right that is "subject to more searching judicial review" and is "protected by the Due Process Clause of the Fourteenth Amendment."[33] Thus, the Court found that sovereign immunity had been abrogated for ADA Title II claims involving the fundamental right of access to the courts. However, in *Garrett*, the Court found that the claim at issue, discrimination against the disabled in employment, was not subject to heightened scrutiny.[34] Thus, the Court concluded that sovereign immunity had not been abrogated.[35]

B. A History and Pattern of Unconstitutional Conduct by the States

Second, after identifying the right at issue, the Court must determine "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States."[36] Although the inquiry seems straightforward, the Court's opinions are ambiguous and uncertain regarding the significance of legislative history, the exact definition of a constitutional violation, and the number of constitutional violations necessary to establish a pattern.

Initially, the Court has been uncertain and unambiguous about the significance of legislative history. Put another way, it is unclear whether the examination is limited to the actual statutory text of the statute purporting to abrogate sovereign immunity or whether it extends to all materials and testimony considered by some congressional committee. For example, in *Garrett*, the Supreme Court declined to consider "unexamined, anecdotal accounts" of discrimination presented to a congressional task force.[37] Indeed, the Court declared, "Congress' failure to mention States in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action had been documented."[38] However, in *Lane*, the Supreme Court reviewed testimony in congressional committee hearings.[39]

Additionally, the Court has been ambiguous and uncertain about the meaning of a constitutional violation by the State. On the one hand, the Court has repeatedly suggested that unconstitutional conduct by local governmental entities does not constitute a constitutional violation by the State.[40] However, in its most recent pronouncement, the Court held that the conduct of local governmental entities was relevant in determining whether the States had violated the Constitution.[41]

Furthermore, the Court has been inconsistent regarding the meaning of pattern. In *Garrett*, the Court found that the extensive congressional findings regarding unconstitutional discrimination against the disabled were insufficient to justify abrogation.[42] Yet, three years later, in *Lane*, the Court found that this exact same record of congressional findings was sufficient to justify abrogation.[43] This contradiction cannot be explained by simply asserting that *Garrett* was about employment discrimination and *Lane* concerned the fundamental right of access to the courts. As the lower federal courts have recognized,[44] *Lane* explicitly found that there were sufficient congressional findings to justify abrogation in any context.[45]

Moreover, the Court has been ambiguous about what constitutes a pattern of unconstitutional violations. In *Kimel*, the Court has stated that constitutional violations by one State or even several States do not constitute a pattern of constitutional violations.[46] Similarly, Justice Kennedy suggested that if the States had engaged in a pattern of unconstitutional conduct, "one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations."[47] Both of these pronouncements suggest that a pattern must involve a number of States and a number of violations. However, the exact parameters remain unclear.

C. A Proportionate Response to the Constitutional Violations by the States

Third, if there is a pattern of constitutional violations by the States,[48] the Court determines whether Congress' response is proportionate to the finding of constitutional violations.[49] Although any judgment concerning proportionality is vague and somewhat amorphous, the Court has compounded the confusion by rendering inconsistent pronouncements on how the test is applied.

The Court's opinions are contradictory as to exactly what is considered in the proportionally analysis. In *Florida Prepaid*, the Court balanced the abrogation of sovereign immunity against the purported pattern of constitutional violations.[50] In other words, the Court decided, "whether subjecting States and their treasuries to monetary liability at the insistence of private litigants is a congruent and proportional response to a demonstrated pattern of unconstitutional conduct by the States."[51] However, in all subsequent cases, the Court has balanced the substantive rights created by the statute for which abrogation was sought against the supposed pattern of constitutional violations.[52]

Moreover, in those cases where the Court has balanced the substantive rights created by the statute, the Court has contradicted itself as to whether the inquiry is facial or as applied.[53] In *Hibbs, Garrett, Kimel*, and *Florida Prepaid*, the Court "measured the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce."[54] Thus, in *Hibbs*, the Court found proportionality because the substantive statute for which sovereign immunity was being abrogated was limited to "the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship."[55] However, in *Lane*, the Court refused to address the scope of the substantive statute for

which sovereign immunity was being abrogated.[56] Instead, the Court simply declared that the proportionality standard was met because its holding only applied to "the class of cases implicating the accessibility of judicial services."[57]

II. Flaws of the Proportionality and Congruence Test

Although the Court frequently has been ambiguous and uncertain when interpreting the various components of the "congruence and proportionality test," the more significant problem with the test is that it is fundamentally flawed.

First, the test effectively creates a hierarchy of constitutional violations. When a claim involves heightened scrutiny, the Court has suggested that *fewer* constitutional violations are necessary to establish *a pattern of* constitutional violations. If this is what the Court means, then one is forced to ask why this is so. A constitutional violation is a constitutional violation. Why should ten constitutional violations involving race or gender discrimination be more significant than ten constitutional violations involving disability or age discrimination? While it is certainly easier to establish an individual constitutional violation when the claim involves heightened scrutiny,[58] the number of constitutional violations necessary to constitute *a pattern of* constitutional violations should not be any lower—or any higher.

Second, to the extent that it relies on legislative history, the test effectively makes the views of individual legislators equal to the actual statutory text. As the Supreme Court has held, "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[59] Over a century and a half ago, the Court explained:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by . . . the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used . . ..[60]

Although this principle is applicable to statutory interpretation, it is especially compelling when Congress would act to alter the constitutional balance between the States and the National Government by abrogating sovereign immunity. Where Congress makes such an effort, the Court must assure itself that Congress was convinced that the States were engaged in a pattern of unconstitutional activity. It is impossible for the Court to know if those who voted for a law were aware of particular testimony or the contents of a specific committee report the law that was approved that can be known with sufficient certainty.[61]

Third, to the extent that the test considers constitutional violations by local governmental entities in establishing a pattern of constitutional violations, it treats the States unfairly. While state governments do have control over the acts and omissions of state agencies and institutions, they generally have little or no control over the acts or omissions of local governmental entities. If the States are going to lose their immunity because of constitutional violations, then it should be limited to violations that were within the States' control.

Fourth, by emphasizing the substantive rights created by the statute rather than on the abrogation of sovereign immunity, the test focuses on the wrong inquiry.[62] There is a fundamental distinction between enforcing the Fourteenth Amendment by creating new substantive rights and enforcing the Fourteenth Amendment by abolishing sovereign immunity. If Congress is going to enforce the Fourteenth Amendment by creating new substantive rights, then the proportionality inquiry should focus on the substantive rights created by the statute. However, if Congress is enforcing the Fourteenth Amendment by abrogating sovereign immunity, then the inquiry should focus on abrogation of sovereign immunity. The substantive rights created by the statute should be irrelevant.

Fifth, to the extent that the test utilizes an as-applied rather than facial approach, it "eliminates any incentive for Congress to craft § 5 legislation for the purpose of remedying or deterring actual constitutional violations."[63] There is no need for Congress to be narrow and precise when the judiciary will simply justify abrogation using hypothetical situations.[64] Moreover, the as applied approach simply leads to more litigation as plaintiffs and the States seeks to distinguish previous cases.

Sixth, by allowing Congress to abolish the sovereign immunity of *all* States for *all* time, the test fails to differentiate between the individuals States or to place any real limits on congressional power.[65] A State that has not violated the Constitution should not be punished for the wrongs of the other States. As Justice Scalia observed:

> The constitutional violation that is a prerequisite to "prophylactic" congressional action to "enforce" the Fourteenth Amendment is a violation *by the State against which the enforcement action is taken*. There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States.[66]

Before a State's immunity is deemed abrogated, it should be able to "demand that *it* be shown to have been acting in violation of the Fourteenth Amendment."[67] Moreover, if a State violated the Constitution in the 1980's, it should not lose its immunity forever. If the abrogation of sovereign immunity is an appropriate remedy, it should be limited to a specific number of years, not forever.[68]

III. The Advantages of the Fourteenth Amendment Test

Justice Scalia has declared that, with the exception of claims for racial discrimination, he will no longer apply the

"congruence and proportionality" test to Congress' efforts to enforce the Fourteenth Amendment.[69] While Justice Scalia's position applies to *both* statutes that create new substantive rights and statutes that abrogate sovereign immunity, his position is particularly compelling with respect to the attempts at abrogation.[70] As explained above, the Court's interpretation of the test in the abrogation cases is ambiguous and the test is fundamentally flawed when applied in the abrogation cases. Thus, the "congruence and proportionality" test should be abandoned as the standard for determining whether abrogation of sovereign immunity is valid.

Instead, the Court should adopt a new test—the "Fourteenth Amendment violation" test—for determining if sovereign immunity is abrogated. In brief, if Congress has expressed unequivocally its intent to abrogate sovereign immunity for a particular federal statute,[71] then sovereign immunity is *abrogated to the extent that the State has violated the Fourteenth Amendment.* Put another way, the abrogation question turns on whether the plaintiff alleges a violation of the Fourteenth Amendment.[72] If so, then the state cannot claim sovereign immunity.[73] If not, then the claim for damages must be dismissed on sovereign immunity grounds. Such an approach has several advantages.

First and most importantly, there is no ambiguity or uncertainty. Under the "congruence and proportionality" test, the lower federal courts have to decide whether the States violated the Constitution in the past, whether these violations are sufficient to constitute a pattern, what is Congress' response to the violations, and whether this response is proportionate to the pattern of violations. On each of these issues, the Supreme Court's pronouncements are ambiguous, if not contradictory. In contrast, under the "Fourteenth Amendment violation" test, the lower federal courts simply have to determine whether the plaintiff states a claim for a violation of the Fourteenth Amendment. Although there inevitably will be some ambiguity on this issue, the issue is far more clear and certain than a multi-factored balancing test.

Second, because it is essentially a bright line rule, the "Fourteenth Amendment violation" test will constrain the judiciary. Like any judicial balancing test, the "congruence and proportionality" test involves "malleable standards" that are easily transformed into "vehicles for the implementation of individual judges' policy preferences."[74] In other words, the outcome becomes dependent not upon legal principles, but on the whim of a court majority.[75] Yet, while the question of whether a plaintiff has stated a claim for a constitutional violation will involve some ambiguity in some circumstances, the "Fourteenth Amendment violation" test gives little judicial discretion. In the overwhelming majority of cases, the inquiry will turn on legal principles.

Third, the "Fourteenth Amendment violation" test avoids conflicts with Congress. As Justice Scalia explained, the "congruence and proportionality" test. . .

> casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.[76]

In contrast, the "Fourteenth Amendment violation" test requires no review of legislative history or even the statutory text setting out the findings. Rather, if Congress has expressed its intent to abrogate, the only issue is whether the complaint states a claim for a constitutional violation.

Fourth, it does not treat "'the States' as some sort of collective entity which is guilty or innocent as a body."[77] Under the "congruence and proportionality" test, constitutional violation by a few states can cause *all* States to lose their immunity. In other words, constitutional violations by Colorado, Indiana, Kentucky, and Virginia can cause Illinois, Iowa, Massachusetts, and Nevada to lose their immunity. In sharp contrast, under the "Fourteenth Amendment violation" test, a State loses its immunity only if that particular state itself is alleged to have violated the Fourteenth Amendment.

Fifth, it subjects the States to liability for damages in circumstances where the States presently avoid liability. For example, suppose that a State adopts a policy mandating that no disabled lawyer or lawyer over the age of forty may be hired in the Office of the Attorney General. Such a policy is unconstitutional because it irrationally discriminates based on disability and age. Yet, while the *Ex Parte Young* doctrine would allow a federal court to declare the policy unconstitutional and enjoin its further implementation, *Garrett* and *Kimel* preclude any claim for money damages.[78] However, under the "Fourteenth Amendment violation" test, the state is exposed to monetary liability because its policy violates the Constitution. Moreover, because a plaintiff merely has to state a claim for a constitutional violation in order to avoid dismissal, it is likely that the States will have to litigate some claims that are presently decided on a Motion to Dismiss.[79]

Sixth and conversely, it allows the States to escape liability in circumstances where the States presently are exposed to damages. If a federal statute created substantive rights beyond those conferred by the Constitution, the State is immune from those claims. Its liability is limited to claims that are coextensive with the Constitution. To illustrate, *Hibbs* held that sovereign immunity was abrogated for violations of the family care provisions of the Family and Medical Leave Act.[80] Yet, the family care provisions of the Family and Medical Leave Act, while a desirable public policy, are not mandated

by the Constitution. Thus, the States would enjoy sovereign immunity from such claims under the "Fourteenth Amendment violation" test.

Finally, the "Fourteenth Amendment violation" test promotes respect for constitutional values. Although the lay public and many lawyers may view sovereign immunity as unjust, the principle is a constitutional value. It should yield only when it comes into conflict with another constitutional value.[81] That is, it should apply unless and until the state acts contrary to another constitutional value. However, when the State acts consistent with the other constitutional values, then the constitutional value of sovereign immunity should prevail. Thus, unless a state chooses to waive its immunity, the State is immune from common law tort claims, contract claims, and federal statutory claims that do not involve the violation of constitutional rights. Essentially, these principles are embodied in the "Fourteenth Amendment violation" test.

Conclusion

Although the Supreme Court has decided numerous cases involving whether Congress has validly abrogated sovereign immunity, the Court's abrogation jurisprudence remains ambiguous, uncertain, and, largely, unworkable. The reason for this confusion is the "congruence and proportionality" test. In determining whether sovereign immunity has been abrogated, the Court should abandon the "congruence and proportionality" test and replace it with a straightforward bright line "Fourteenth Amendment violation" test.

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Footnotes

[1] *See* Tennessee v. Lane, 541 U.S. 509 (2004); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002); Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999); College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Seminole Tribe v. Florida, 517 U.S. 44 (1996).

[2] *See* U.S. CONST. amend. XIV, § 5.

[3] Not every case has focused on this issue. The Court has also addressed whether the Article I Commerce Clause may be used to abrogate sovereign immunity, *Seminole Tribe*, 517 U.S. at 47, whether sovereign immunity applies to proceedings in state court, *Alden*, 527 U.S. at 712, whether participation in interstate commerce constitutes a waiver of sovereign immunity, *College Sav. Bank*, 527 U.S. at 619, whether sovereign immunity applies in federal administrative proceedings, *Fed. Maritime Comm'n*, 535 U.S. at 747, and whether sovereign immunity bars the bankruptcy discharge of a state-held student loan, *Hood*, 541 U.S. at 443.

[4] *See Kimel*, 528 U.S. at 91.

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

[6] *See Hibbs*, 538 U.S. at 739-40.

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

[8] *See* Tennessee v. Lane, 541 U.S. 509, 529 (2004).

[9] 521 U.S. 507 (1997).

[10] *Lane*, 541 U.S. at 558 (Scalia, J., dissenting).

[11] This Essay does not address the propriety of continuing to use the "congruence and proportionality" test to determine the validity of substantive legislation that is enacted to enforce the Fourteenth Amendment. Rather, it is limited to the propriety of using the test to determine the validity of the abrogation of sovereign immunity.

[12] *Id.* at 557-58.

[13] Of course, there are four other exceptions to sovereign immunity. First, the "States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government." Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 752 (2002); *see also* Virginia v. Maryland, 540 U.S. 56 (2003) (State against State); Chao v. Va. Dep't of Transp., 291 F.3d 276 (4th Cir. 2002) (National Government against State). Second, when a State invokes the jurisdiction of a federal court, it exposes itself to the equivalent of a compulsory counterclaim that does not exceed in amount or differ in kind from the relief sought by the State. *See* Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 509 (1991); United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 511-12 (1940); United States v. Shaw, 309 U.S. 495, 501-02 (1940). Third, under the terms of the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), federal courts generally may enjoin state officers, in their official capacities, to conform their conduct to federal law. *See* Quern v. Jordan, 440 U.S. 332, 337 (1979). Fourth, a State may waive its sovereign immunity. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999). However, this Essay is limited to the abrogation exception, which was first recognized in Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[14] Technically, sovereign immunity is immunity from all aspects of suit. It does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," Hess v. Port

Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994). It also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (internal quotation marks omitted). However, because private parties generally can obtain injunctive relief under the *Ex Parte Young* doctrine, the practical effect of sovereign immunity is largely limited to claims for damages.

[15] Of course, the Fourteenth Amendment guarantees numerous rights. Both the Equal Protection Clause and Privileges or Immunities Clause guarantee a right to be free from various forms of discrimination. *See* Johnson v. California, 125 S. Ct. 1141, 1146 (2005) (Equal Protection); Saenz v. Roe, 526 U.S. 489, 503-04 (1999) (Privileges or Immunities). Moreover, although the Bill of Rights originally did not apply to the States, Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833), the Court has held that the Due Process Clause incorporated most of the provisions of the Bill of Rights. *See* 2 David M. O'Brien, Constitutional Law and Politics 310-11 (5th ed. 2003) (listing cases and specific provisions of the Bill of Rights); *cf.* Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986) (arguing that the Privileges or Immunities Clause incorporates all provisions of the Bill of Rights).

[16] At present, there is no mechanism for private parties to recover money damages from the States or state agencies for violations of federal constitutional rights. Although 42 U.S.C. § 1983 allows private parties to recover damages from individuals who, acting under color of state law, violate constitutional rights, § 1983 liability cannot be imposed upon the States themselves. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 70 (1989).

[17] Although the States would not have a defense of sovereign immunity in such circumstances, the States should have a defense of qualified immunity. The doctrine of qualified immunity, which was created in the context of 42 U.S.C. § 1983 litigation, allows individuals to escape monetary liability for constitutional violations unless the law is clearly established. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, the States would be liable for money damages only if there were a constitutional violation and the law was clearly established. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

[18] 517 U.S. 44 (1996).

[19] *Id.* at 58-65.

[20] *Id.* at 55-59.

[21] *See* Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822, 824 (8th Cir. 1998).

[22] Indeed, in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the Supreme Court found unmistakable intent to abrogate only after piecing together three statutes comprising part of the Age Discrimination in Employment Act, which incorporated by reference remedies available under the Fair Labor Standard Act and which were enacted at different times. Hence, while the intent must be clear, courts will at least look beyond the absence of a single unequivocal statement.

[23] 521 U.S. 507 (1997).

[24] *See generally* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 365-74 (2001).

[25] *Id.* at 365.

[26] *Id.* at 368.

[27] If there is no pattern of constitutional violations by the States, then Congress has not acted properly and the inquiry ends. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999). In such a situation, sovereign immunity has not been abrogated.

[28] Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 646 (1999).

[29] *Garrett*, 531 U.S. at 365.

[30] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

[31] *See* Erwin Chemerinsky, *Unanswered Questions: October Term 2003*, 7 Green Bag 2d 323, 328 (2004) ("Together *Lane* and *Hibbs* establish that Congress has more authority to act under section five of the Fourteenth Amendment, and thus to authorize suits against state governments, when it is dealing with claims of discrimination or violations of rights which receive heightened scrutiny.").

[32] Tennessee v. Lane, 541 U.S. 509, 530-31 (2004).

[33] *Id.* at 522-23.

[34] *Garrett*, 531 U.S. at 366.

[35] *Id.* at 374.

[36] *Id.* at 368.

[37] *Id.* at 370-71.

[38] *Id.* at 372.

[39] *See* Tennessee v. Lane, 541 U.S. 509, 530-31, 524-29 (2004).

[40] *Garrett*, 531 U.S. at 368-69; Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 640 (1999).

[41] *Lane*, 541 U.S. at 527 n.16.

[42] *Garrett*, 531 U.S. at 374.

[43] *Lane*, 541 U.S. at 528-29.

[44] *See* Constantine v. Rector & Visitors of George Mason Univ., 411 F.3d 474, 487 (4th Cir. 2005) ("After *Lane*, it is settled that Title II was enacted in response to a pattern of unconstitutional disability discrimination by States and nonstate government entities with respect to the provision of public services. This conclusion is sufficient to satisfy the historical inquiry into the harms sought to be addressed by Title II."); Miller v. King, 384 F.3d 1248, 1272 (11th Cir. 2004) ("*Lane* considered evidence of disability discrimination in the administration of public services and programs generally, rather than focusing only on discrimination in the context of access to the courts, and concluded that Title II in its entirety satisfies Boerne's step-two requirement that it be enacted in response to a history and pattern of States' constitutional violations. We are bound to that conclusion as to step two."); *see also* Cochran v. Pinchak, 401 F.3d 184, 191 (3rd Cir. 2005) (agreeing with *Miller*).

[45] *Lane*, 541 U.S. at 528-29.

[46] *Kimel*, 528 U.S. at 90.

[47] *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring).

[48] If there is no pattern of constitutional violations by the States, then Congress has not acted properly and the inquiry ends. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999). In such a situation, sovereign immunity has not been abrogated.

[49] Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 646 (1999).

[50] *Id.* at 646-48.

[51] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 744 (2003) (Kennedy, J., dissenting).

[52] Tennessee v. Lane, 541 U.S. 509, 531-33 (2004); *Hibbs*, 538 U.S. at 737-39; *Garrett*, 531 U.S. at 372; Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000).

[53] *See Lane*, 541 U.S. at 556-57 (Scalia, J., dissenting).

[54] *Lane*, 541 U.S. at 551-52 (Rehnquist, C.J., dissenting); *see also Garrett*, 531 U.S. at 372; *Kimel*, 528 U.S. at 83; *Fla. Prepaid*, 527 U.S. at 648.

[55] *Hibbs*, 538 U.S. at 738.

[56] *Lane*, 541 U.S. at 530-31.

[57] *Id.* at 531.

[58] For example, imposing different income tax rates for rich and poor is constitutional, but imposing different tax income rates for African-Americans and whites is clearly unconstitutional.

[59] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998).

[60] Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845). As Justice Scalia noted in another context:

> [I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. . .. Government by unexpressed intent is similarly tyrannical. It is the law that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.

Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 17 (1997).

[61] Thus, statutory text should be the sole touchstone for determining that a majority of both Houses of Congress, and the President who signed the bill into law, were convinced that the States were acting with the requisite disregard for the Federal Constitution.

[62] As explained above, every case after *Florida Prepaid* has focused on the substantive rights created by the statute rather than on the abrogation of sovereign immunity.

[63] Tennessee v. Lane, 541 U.S. 509, 552 (2004) (Rehnquist, C.J., dissenting).

[64] *Id.*

[65] *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 647-48 (1999).

[66] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 741-42 (2003) (Scalia, J., dissenting).

[67] *Id.* at 743 (Scalia, J., dissenting).

[68] This approach is best illustrated by the Voting Rights Act, 42 U.S.C. §§ 1971-1973o, which was passed pursuant to Congress' power to enforce the Fifteenth Amendment. *See* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 373 n.8 (2001) ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment"). The Voting Rights Act does not apply to *all* States or even to *all* jurisdictions within a particular State. *See* 42 U.S.C. § 1973b(b). Rather, it applies only to those States, or jurisdictions within a state, which have been identified by Congress as having violated voting rights. *See id.* In other words, those States that have not been identified as acting in violation of the Constitution are not subject to its remedial terms. Moreover, the restrictions imposed by the Voting Rights Act are limited in duration. The statute allows jurisdictions to seek removal from its coverage. *See* 42 U.S.C. § 1973k. Once the violations have been corrected, and there is no likelihood of further violations, the State's sovereignty over its elections may be restored.

[69] *Lane*, 541 at 565 (Scalia, J., dissenting).

[70] While many of the criticisms of the test are equally applicable when the test is applied to statutes that create new substantive rights, it must be emphasized that a statute that creates new substantive rights is fundamentally different from a statute that simply abrogates sovereign immunity.

[71] The requirement that Congress express its intent unequivocally is separate and distinct from the "congruence and proportionality" test or the "Fourteenth Amendment violation" test.

[72] If the trial court determines that sovereign immunity has been abrogated, then the State should have the right to appeal immediately the denial of immunity. *See* Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 141-47 (1993).

[73] However, as explained *supra* note 17, the States should have a defense of qualified immunity.

[74] *Lane*, 541 U.S. at 556 (Scalia, J., dissenting).

[75] Arguably, this is exactly what happened in *Garrett* and *Lane*.

[76] *Lane*, 541 U.S. at 558 (Scalia, J., dissenting).

[77] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 742 (2003) (Scalia, J., dissenting).

[78] *See* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001); *Kimel*, 528 U.S. at 91-92.

[79] While this additional litigation certainly will be a disadvantage to the States, it is outweighed by the advantage of having a clear certain rule that allows the States to assert immunity for all federal claims that do not involve constitutional violations.

[80] *Hibbs*, 538 U.S. at 724, 740.

[81] Of course, the Supremacy Clause is also a constitutional value. Yet, when a state's statute or policy violates the Supremacy Clause, the *Ex Parte Young* doctrine ensures that state officials obey the Constitution.