

A HELPING HAND:  
EXAMINING THE RELATIONSHIP BETWEEN (1) TITLE II OF THE  
ADA’S ABROGATION OF SOVEREIGN IMMUNITY CASES AND (2)  
THE DOCTRINE OF QUALIFIED IMMUNITY IN §1983 AND *BIVENS*  
CASES TO EXPAND AND STRENGTHEN SOURCES OF “CLEARLY  
ESTABLISHED LAW” IN CIVIL RIGHTS ACTIONS

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INTRODUCTION

Civil rights litigation is often primarily focused on the statute, 42 U.S.C. § 1983.<sup>1</sup> However, there are a plethora of other statutes and doctrines that apply to protect “civil rights.”<sup>2</sup> For example, Title VII protects people from discrimination in employment on the basis of

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<sup>1</sup> Often § 1983 is the majority of any discussion on civil rights. For example, in John C. Jeffrie’s *Civil Rights Actions: Enforcing the Constitution*, the Chapter on § 1983 runs 328 pages in length. See John C. Jeffries, Jr., Pamela S. Karlan, Peter W. Low & George A. Rutherglen, *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 418 (Robert C. Clark et al. eds., Foundation Press 3d ed. 2013). See Michael G. Collins, *Section 1983 Litigation in a Nutshell* 1 (3d ed. 2011).

<sup>2</sup> See, e.g., 42 U.S.C. § 2000e-2(a) (1991) (“It shall be an unlawful employment practice for an employer—(1)to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2)to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).

“race, color, religion, sex, or national origin.”<sup>3</sup> Section 1981 prohibits discrimination on the basis of race in, *inter-alia*, contracts.<sup>4</sup> The Age Discrimination in Employment Act (ADEA) prohibits age related discrimination.<sup>5</sup> The Rehabilitation Act (RA) prohibits discrimination on the basis of disability in those programs that receive federal funds.<sup>6</sup> The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability and provides for certain affirmative obligations that constitute separate types of discrimination.<sup>7</sup> Finally, the *Bivens* doctrine allows suits to proceed against federal actors for violations of constitutional rights even absent a federal statute authorizing such.<sup>8</sup>

In many instances, the doctrines involved in these situations overlap and are able to give instruction by relation.<sup>9</sup> For example, in many

<sup>3</sup> *Id.* § 2000e-2(a)(2).

<sup>4</sup> *See* 42 U.S.C. § 1981(a) and (b) (1991).

<sup>5</sup> *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621(b) (1991).

<sup>6</sup> *See* Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2015) (“No otherwise qualified individual with a disability in the United States, as defined in section 705(20), shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program of activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.”).

<sup>7</sup> *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2008).

<sup>8</sup> *See* *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (“Having concluded that petitioner’s complaint states a cause of action under the Fourth Amendment . . . we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents’ violation of the Amendment”).

<sup>9</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (“In the limited settings where *Bivens* does apply, the implied cause of action is the ‘federal analog to suits brought against state officials under . . . §1983’”) (quoting *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006) (“‘*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.’ Though more limited in some respects not relevant here, a *Bivens* action is the federal analog to suits brought against state officials under . . . §1983”) (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)); *Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982) (“Damages actions against high officials were therefore ‘an important means of vindicating constitutional guarantees.’ Moreover, we concluded that it would be ‘untenable to draw a distinction for purposes of immunity law between suits brought against state officials under 42 U.S.C. § 1983 and suits brought directly under the Constitution against federal officials.’”); *Ogden v. United States*, No. 4:16-CV-3193, 2018 WL 895472, at \*7 n.7 (D. Neb. Feb. 14, 2018) (“For these purposes, *Bivens* case and § 1983 cases are interchangeable”); *Snyder v. United States*, 990 F. Supp. 818, 844 (S.D. Ohio 2014) (“ . . . the case law that comprises *Bivens* and Section 1983 jurisprudence essentially is interchangeable”); *McDaniels v. Richland Cty. Pub. Def. Off.*, No. 1:12-6-TLW-SLH, 2012 WL 1565618, at \*6 n.2 (D. S.C. March 27, 2012) (“A *Bivens* claim is analogous to a claim brought against state officials under 42 U.S.C. § 1983. Therefore, caselaw involving § 1983 claims and *Bivens* are generally interchangeable”).

cases the same standards applicable in § 1983 cases also apply in *Bivens* actions.<sup>10</sup> Additionally, this learning and referencing between statutes has led to a sort of negation by implication.<sup>11</sup> For example, courts have held that because qualified immunity in the § 1983 context is only applicable to individual capacity suits, then qualified immunity has no application to Title II of the ADA, because Title II does not allow for individual capacity actions, only actions against the entity itself.<sup>12</sup>

One further distinction between § 1983 and the ADA is that Title II of the ADA has been specifically held on numerous instances to be a valid abrogation of State sovereign immunity, meaning that an action for injunctive relief, damages, and declaratory relief may be raised against the States.<sup>13</sup> However, the analysis for determining whether Title II has validly abrogated sovereign immunity is conducted on a case-by-case basis.<sup>14</sup> In many of these cases, the courts determine whether the State action has violated the Constitution or if the conduct was close enough to a constitutional violation to be a valid abrogation of immunity.<sup>15</sup>

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<sup>10</sup> See, e.g., *Ashcroft*, 556 U.S. at 675; *Hartman*, 547 U.S. at 254; *Harlow*, 457 U.S. at 809; *Ogden*, 2018 WL 895472 at \*7 n.7; *Snyder*, 990 F. Supp. at 844; *McDaniels*, 2012 WL 1565618 at \*6 n.2.

<sup>11</sup> “Negation by implication” is my own phrase for this phenomenon.

<sup>12</sup> See *Carter v. Maryland*, No. JFK-12-1789, 2012 WL 6021370, at \*5 (D. Md. Dec. 3, 2012) (“By definition, then, individuals sued in their individual capacities are not public entities [for purpose of Title II]. [This suit] will proceed only against the State of Maryland and the other State Defendants in their official capacities—the latter because an official-capacity suit is effectively a suit against the entity for which the official-capacity defendant serves as an agent. The State defendants have asserted qualified immunity . . . but because they may only be sued in their official capacities, they are not entitled to claim it. Qualified immunity does not apply to suits against individuals sued in their official capacities.”). See also *Gard v. Dooley*, No. 4:14-CV-04023-LLP, 2015 WL 632097 at \*3 (D. S.D. Feb. 13, 2015) (“[Plaintiff] has also pleaded a claim under the ADA, to which the defense of qualified immunity does not apply.”).

<sup>13</sup> See, e.g., *Tennessee v. Lane*, 541 U.S. 509 (2004) (validating abrogation dealing with right of access to the courts); *Bearden v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 234 F. Supp. 3d 1148 (W.D. Okla. Feb. 10, 2017); *Arce v. Louisiana*, No. 16-14003, 2017 WL 5619376 (E.D. La. Nov. 21, 2017) (validating abrogation in the probation context); *Quick v. San Francisco Super. Ct.*, 65 F. Supp. 3d 907 (N.D. Cal. 2014) (explaining the right of access to the courts); *Rivera-Concepción v. Puerto Rico*, 786 F. Supp. 2d 442 (D. P.R. 2010) (applying abrogation to public education case).

<sup>14</sup> See, e.g., *Guttman v. Khalsa*, 669 F.3d 1101, 1117 (10th Cir. 2012); *Reininger v. Oklahoma*, 292 F. Supp. 3d 1254, 1261 (W.D. Okla. 2017); *Trevino v. Woodbury Cty. Jail*, No. C14-4051-MWB, 2015 WL 300267 at \*9 (N.D. Iowa Jan. 22, 2015).

<sup>15</sup> See *United States v. Georgia*, 546 U.S. 151, 159 (2006) (“[O]n a claim-by-claim basis, (1) which aspect of the State’s alleged conduct violated Title II; (2) to what extent such misconduct also violated the *Fourteenth Amendment*; and (3) insofar as such misconduct violated Title II but

This Article discusses an interesting aspect in the relationship between § 1983 qualified immunity and Title II of the ADA's abrogation of sovereign immunity. It argues that litigants in § 1983 cases may, under appropriate circumstances, look to rulings in Title II cases dealing with abrogation of sovereign immunity for sources of clearly established constitutional rights—whether the abrogation case deals with the precise constitutional right or is close enough to that right—in order to defeat assertions of qualified immunity.<sup>16</sup> To make this argument, this Article proceeds in three parts. Part I will deal with the background on qualified immunity and how it has developed under § 1983. In particular, Part I will describe what § 1983 and *Bivens* actions are. Then, it will provide background on government immunity by looking at the original government immunity under sovereign immunity. Next, it will consider the origins and developments of qualified immunity. Part II will give a general overview of the ADA and will place the discussion of this Article in its proper context within the universe of ADA litigation. Part III will discuss the relationship between Title II of the ADA and two types of government immunities: qualified immunity and sovereign immunity. Subsequently, it will relate those doctrines to § 1983 qualified immunity cases, even when the ADA does not apply.

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did not violate the *Fourteenth Amendment*, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.”).

<sup>16</sup> As will be discussed below, government actors sued in their personal capacities may often invoke “qualified immunity” for actions that are alleged to have violated a constitutional right. In order to defeat an assertion of qualified immunity, a plaintiff must show that the constitutional right that was violated was clearly established at the time such that a reasonable officer would have been aware of it. See *Castillo v. Day*, 790 F.3d 1013, 1019 (10th Cir. 2015) (describing the two prongs of the qualified immunity analysis as “(1) the defendant violated [the plaintiff's] constitutional or statutory rights, and (2) the right was clearly established at the time of the alleged unlawful activity.”).

## I. BACKGROUND ON QUALIFIED IMMUNITY

### A. *Introduction to § 1983 and Bivens*

#### 1. 42 U.S.C. § 1983

The statute, 42 U.S.C. § 1983<sup>17</sup>, is one of the earliest civil rights statutes.<sup>18</sup> In fact, when law schools offer courses in civil rights, those courses predominately cover § 1983.<sup>19</sup> Unlike the ADA, § 1983 is nothing more than a cause of action for the deprivation of individual rights.<sup>20</sup> In other words, § 1983 does not itself create a substantive rights protection, but merely offers grounds for a plaintiff to assert his or her rights in federal court.<sup>21</sup>

For § 1983, a plaintiff generally must prove three things.<sup>22</sup> First, that there was a “person.”<sup>23</sup> Second, that this person was acting under color of law (i.e., state action).<sup>24</sup> Third, that person who acted under color of law must have deprived the plaintiff of a right secured by the

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<sup>17</sup> That law states in its entirety:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Civil Rights Act of 1964, 42 U.S.C. § 1983 (1996).

<sup>18</sup> See Daniel J. McDonald, *Primer on 42 U.S.C. 1983*, 12 UTAH B.J. 29, 29-41 (1999).

<sup>19</sup> See The University of Kansas School of Law, <https://law.ku.edu/coursedescriptions> (last visited Sept. 25, 2018) (showing a course description for LAW 886 Civil Rights Action with the course description stating “The focus of the class is litigation under 42 U.S.C. section 1983 . . .”).

<sup>20</sup> *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (“[S]ection [1983] is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes”); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 618 (1979) (“Standing alone, § 1983 clearly provides no protection for civil rights since, as we have just concluded, § 1983 does not provide any substantive rights at all.”).

<sup>21</sup> See *Baker*, 443 U.S. at 144 n.3; *Chapman*, 441 U.S. at 618.

<sup>22</sup> See *Victoria W. v. Larpenter*, 369 F.3d 475, 482 (5th Cir. 2004).

<sup>23</sup> See *id.*; *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450 (5th Cir. 1994).

<sup>24</sup> See, e.g., *Long v. Cty of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2005); *Victoria W.*, 369 F.3d at 482.

U.S. Constitution or by relevant federal statutes.<sup>25</sup> The plaintiff's right can either be a constitutional right or a statutory right.<sup>26</sup> As a brief aside, there are only a few occasions where a plaintiff may assert an implied cause of action directly under other federal statutes.<sup>27</sup> It is

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<sup>25</sup> Like most "prima facie" cases, or cases with elements, this is often described with a varied number of elements. See *Washington v. Hanshaw*, 552 Fed. App'x 169, 171 (3d Cir. 2014) ("To succeed in a § 1983 claim, a plaintiff must prove two essential elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States.") (citation omitted) (internal quotation marks omitted); *Long*, 442 F.3d at 1185 (To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law."); *Victoria W.*, 369 F.3d at 482 ("There are three elements to establish liability through a Section 1983 action. There must be (1) a deprivation of a right secured by federal law (2) that occurred under color of state law, and (3) was caused by a state actor."); *Collins v. Nuzzo*, 244 F.3d 246, 250 (1st Cir. 2001) ("To sustain an action under 42 U.S.C. § 1983, [a plaintiff] must show both: '(i) that the conduct complained of has been committed under color of state law, and (ii) that this conduct worked a denial of rights secured by the Constitution or laws of the United States.'") (quoting *Chongris v. Bd. of Appeals*, 811 F.2d 36, 40 (1st Cir. 1987)); *Chatman v. Slagle*, 107 F.3d 380, 384 (6th Cir. 1997) ("[T]he elements of a §1983 claim in this circuit are clear: 1) [Plaintiff] was deprived of a right secured by the federal Constitution or laws of the United States; 2) the deprivation was caused by a person acting under color of state law; and 3) the deprivation occurred without due process of the law.") (citation omitted) (internal quotations omitted); *Greenwich Citizens Comm., Inc., v. Cts. of Warren and Washington Indus. Dev. Agency*, 77 F.3d 26, 29-30 (2d Cir. 1996) ("In order to recover damages under 42 U.S.C. § 1983, a plaintiff must show that (1) the conduct complained of was committed by a person acting under color of state law and (2) this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States.") (citation omitted) (internal quotation marks omitted); *Schertz v. Waupaca Cty.*, 875 F.2d 578, 581 (7th Cir. 1989) ("The elements of a Section 1983 claim are 1) the plaintiff held a constitutionally protected right; 2) he was deprived of that right in violation of the Constitution; 3) the defendants intentionally caused the deprivation; and 4) the defendants acted under color of state law"); *Dollar v. Haralson Cty.*, 704 F.2d 1540, 1542-43 (11th Cir. 1983) ("In order to sustain a cause of action based on 42 U.S.C. §1983, a plaintiff must make a prima facie showing of two elements: (1) that the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and (2) that act or omission was done by a person acting under color of law.") (citations omitted); *Miller v. Parrish*, No. 3:12CV873-HEH, 2013 WL 1868028, at \*16 (E.D. Va. May 2, 2013) ("[T]o succeed on any of [the § 1983] claims, [a plaintiff] must show that Defendants: (1) acted under color of law (2) while depriving [a plaintiff] of a federal constitutional or statutory right, (3) thereby causing the alleged injury"); *Tyus v. Benca*, No. 4:06-CV-00576 GTE, 2006 WL 3526773, at \*3 (E.D. Ark. Dec. 6, 2006) ("[T]he essential elements of § 1983 liability [are]: (1) violation of a constitutional right, (2) committed by a state actor, (3) who acted with the requisite culpability and causation to violate the constitutional right.") (quoting *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 777 (8th Cir. 2001)).

<sup>26</sup> By in terms the statute applies to both in that it says: "Constitution and laws." Civil Rights Act of 1964, 42 U.S.C. § 1983 (1996).

<sup>27</sup> See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008); *Thompson v. Thompson*, 484 U.S. 174, 179 (1988).

often easier to make out a claim under § 1983 for constitutional violations than for statutory violations.<sup>28</sup> However, it is still easier to assert a statutory right under § 1983 than to argue that there is an implied right of action under a statute.<sup>29</sup> Courts have generally held that the rights protected by the ADA cannot be enforced through § 1983 because the ADA has its own enforcement scheme.<sup>30</sup> Under color of

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<sup>28</sup> This is so because, in order to make out a claim for a statutory violation, a litigant must show that the statutory provision does not have its own comprehensive enforcement mechanism—a mechanism so comprehensive that it must be presumed that Congress did not intend for it to be enforced under § 1983. *See Suter v. Artist M.*, 503 U.S. 347, 360 n.11 (1992); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21 (1981); *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 806 (3d Cir. 2007). Applying the Supreme Court's rules in these cases, the Circuits and lower courts have stated it differently, sometimes expressly referring to it as a burden shifting matter. *See BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 823 (7th Cir. 2017); *Colon-Marrero v. Vélez*, 813 F.3d 1, 16 (1st Cir. 2016); *Tankersley v. Almand*, 837 F.3d 390, 405 (4th Cir. 2016) (Davis, J., dissenting); *Lankford v. Sherman*, 451 F.3d 496, 508 (8th Cir. 2006); *Harris v. Olszewski*, 442 F.3d 456, 462 (6th Cir. 2006); *Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356, 365-66 (5th Cir. 2006) (citing *Blessing v. Freestone*, 520 U.S. 329, 341 (1997)); *Arrington v. Helms*, 438 F.3d 1336, 1343 (11th Cir. 2006); *Southwest Air Ambulance, Inc. v. City of Las Cruces*, 268 F.3d 1162, 1174 (10th Cir. 2001) (“In sum, Congress can foreclose resort to § 1983 either expressly, *i.e.* by so stating in the text of the statute itself, or alternatively, it can do so by implication.”). As to how a plaintiff may show a statute creates an enforceable right under § 1983, the Court in *Tankersley* noted it requires the plaintiffs show (1) Congress must have intended the provision in question to have benefited the plaintiff (2) the plaintiff must demonstrate that he right protected is not so vague and amorphous that its enforcement would strain judicial competence and (3) the statute must unambiguously impose a binding obligation on the States. *Tankersley*, 837 F.3d at 404-05. (“In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.”) (quoting *Blessing*, 520 U.S. at 341).

<sup>29</sup> *Stoneridge Inv. Partners, LLC*, 552 U.S. at 164 (“[I]t is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one.”). The difficulty of finding such an implied cause of action was perhaps nowhere more perfectly described than in *Thompson v. Thompson*. *See Thompson*, 484 U.S. at 179 (1988). In that case the Court stated, “The intent of Congress remains the ultimate issue, however, and ‘unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.” *Id.* (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981)).

<sup>30</sup> *Wong v. Minn. Dep't of Human Servs. and Pub. Health Dep't*, 820 F.3d 922, 936 (8th Cir. 2016) (“[T]he comprehensive enforcement mechanisms provided under §504 [of the RA] and the ADA suggest Congress did not intend violations of those statutes to be also cognizable under §1983.”) (quoting *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1011 (8th Cir. 1999)); *Vinson v. Thomas*, 288 F.3d 1145, 1155, 1156 (9th Cir. 2002); *Garcia v. State Univ. of N.Y. Health Scis. Ctr.*, 280 F.3d 98, 107 (2d Cir. 2001); *Pena v. Bexar Cty.*, 726 F. Supp. 2d 675, 690 (W.D. Tex. 2010) (stating, “Because the remedies, procedures, and rights under the Americans with Disabilities Act are the same as those under the Rehabilitation Act, there is likewise no individual liability for claims of violations under the ADA.”) (citing *DeLeon v. City of Alvin Police Dep't*, No. H-09-1022, 2009 WL 3762688 at \*4 (S.D. Tex. Nov. 9, 2009)); *Bostick v. Elders*, No. 2:02-CV-

law means roughly the same thing as “state action.”<sup>31</sup> Additionally, one can be acting under color of state law even if he or she is acting in violation of state law.<sup>32</sup>

Finally, the concept of “person” under § 1983 is rather complex. For example, states are not persons for purposes of § 1983, even in those cases where the state has waived its sovereign immunity.<sup>33</sup> Next, state officials who are sued in their official capacities for damages are not amenable to suit under § 1983 as this is taken to be a suit against the state.<sup>34</sup> However, state actors who are sued in their official capacities for *injunctive* relief are persons for purposes of § 1983.<sup>35</sup> Addi-

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0291, 2003 WL 1193028, at \*1 (N.D. Tex. Jan. 10, 2003) (“Because Title II relief under the ADA relies entirely upon the same statutory provision [as the Rehabilitation Act] for enforcement, it appears plaintiff cannot sue the defendants in their individual capacities for relief, and cannot utilize Title 42 United States Code, section 1983 as an avenue to establish individual liability”) (citations omitted).

<sup>31</sup> See *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009) (“Under color of law and state action are interpreted identically under the *Fourteenth Amendment*.”) (quotations omitted); *Bass v. Parkwood Hosp.*, 180 F.3d 234, 241 (5th Cir. 1999) (“[W]here state action caused deprivation, actors were necessarily acting under color of law.”) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)); *A.P. & V.P. v. Medina*, No. 17-13794 (SDW) (LDW), 2018 WL 3546195 at \*3 (D. N.J. July 24, 2018) (“Under color of law and state action are interpreted identically under the *Fourteenth Amendment*.”) (citing *Kach*, 589 F.3d at 646); *Roebuck v. Diamond Detective Agency*, No. 3:10CV331TSL-MTP, 2011 WL 4737583, at \*7 (S.D. Miss. Oct. 6, 2011); *Shaefer v. Wilcok*, 676 F. Supp. 1092, 1110 (D. Utah 1987) (“In cases involving *fourteenth amendment* violations, the ‘under color of’ law and state action requirements are substantially the same.”) (quoting *Lugar*, 457 U.S. at 935 n.18).

<sup>32</sup> See *Monroe v. Pape*, 365 U.S. 167 (1961) (holding that plaintiffs could sue city police officers even though officers’ actions were in violation of state laws as well), *overruled on other grounds* by *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658 (1978) (holding that municipalities were “persons” for purposes of § 1983 but leaving intact other portions of *Pape*); *Azar v. Conley*, 456 F.2d 1382, 1390 (6th Cir. 1972) (“The Supreme Court has made clear that official misconduct which amounts to a deprivation of civil rights may be found to be ‘under color of law’ within the meaning of *Section 1983* even though the misconduct violates state law or constitutes an abuse of authority.”) (quoting *Lucarell v. McNair*, 453 F.3d 836, 838 (6th Cir. 1972)).

<sup>33</sup> See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (“We hold that neither a State nor its officials acting in their official capacities are “persons” under §1983.”); *Moore v. City of Harriman*, 272 F.3d 769, 771-72 (6th Cir. 2001) (“[S]tates and state employees sued in their official capacities were not “persons” under § 1983, and therefore could not be held liable for money damages.”).

<sup>34</sup> See *Will*, 491 U.S. at 71; *Moore*, 272 F.3d at 771-72.

<sup>35</sup> This notion is obviously in tensions with what was described in footnote 33. However, the Supreme Court took care of such problems in *Will*, by stating, “Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as actions against the State.’” *Will*, 491 U.S. at 71 n.10 (citing *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1989); *Ex parte Young*, 209 U.S. 123, 159-60 (1908)).



tionally, state actors who are sued in their individual capacities for damages are also persons for purposes of § 1983.<sup>36</sup> At the local level, local entities are persons for purposes of § 1983<sup>37</sup> as are local officials who are sued in either their individual or official capacities.<sup>38</sup>

## 2. *Bivens v. Six Unknown Named Agents*

*Bivens* is the federal corollary to the damages suits available under § 1983.<sup>39</sup> It does not involve injunctive relief, as this is generally allowed directly under the jurisdictional statute, 28 U.S.C. § 1331.<sup>40</sup> In *Bivens*, the Supreme Court recognized that the Constitution held

<sup>36</sup> See *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (“A government official in the role of personal-capacity defendant thus fits comfortably with the statutory term “person.”); *Hardin v. Straub*, 954 F.2d 1193, 1199 (6th Cir. 1992).

<sup>37</sup> *Bd. of Cty. Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997) (“[M]unicipalities and other local government bodies are “persons” within the meaning of § 1983. We also recognized that a municipality may not be held liable under § 1983 solely because it employs a tortfeasor.”).

<sup>38</sup> *Huminski v. Corsones*, 396 F.3d 53, 70 (2d Cir. 2004) (“On the other hand, local government officials sued in their official capacities are ‘persons’ under 42 U.S.C. § 1983”) (internal quotation marks omitted); *Weathersbee v. Baltimore City Fire Dep’t.*, 970 F. Supp. 2d 418, 425-26 (D. Md. 2013) (“[L]ocal government officials sued in their official capacities are ‘persons’ under § 1983 in those cases in which . . . a local government would be suable in its own name,” and are subject to suit in both their official and individual capacities.”) (quoting *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.55 (1978)); *Megargee v. Wittman*, 550 F. Supp. 2d 1190, 1207-08 (E.D. Cal. 2008).

<sup>39</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Feldman v. Lyons*, 852 F. Supp. 274, 278 (N.D. N.Y. 2012) (“*Bivens* actions, although not precisely parallel, are the federal analog to § 1983 actions against state actors.”).

<sup>40</sup> See *Simmat v. United States Bureau of Prisons*, 413 F.3d 1225, 1232 (10th Cir. 2005) (explaining that § 1331 is the jurisdictional basis for asserting the “equitable” powers of the courts to enforce constitutional rights). In practical terms, then, § 1331 is the cause of action for injunctive relief—regardless of how courts phrase it. The exact quote from the Court puts the convoluted doctrine as this:

There was not much scope for exercise of equitable powers by federal courts, however, until enactment of general federal question jurisdiction—the precursor of 28 U.S.C. § 1331—in 1875. *Judiciary Act of 1875, ch. 137 § 1, 18 Stat. 470*. That Act granted jurisdiction to federal district courts over “all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made . . . under their authority.” *Section 1331* thus provides jurisdiction for the exercise of the traditional powers of equity in actions arising under federal law. No more specific statutory basis is required.

*Id.* (internal citations omitted).

Other courts have described it as follows, “In other words, the statute that gives federal courts subject matter jurisdiction to decide cases involving federal law, (i.e., § 1331), necessarily authorizes federal courts to grant injunctive relief to implement their decisions.” *Taylor v. Rice*, No. 10-4746 (SRN/JJG), 2012 WL 246014, at \*23 (D. Minn. Jan. 6, 2012).

implied rights of action for the violation of constitutional rights.<sup>41</sup> Nevertheless, the Supreme Court and other federal courts have been increasingly hostile to *Bivens* claims to the point of applying it in very narrow circumstances.<sup>42</sup>

Two points of interest relate to both § 1983 and *Bivens*.<sup>43</sup> First, constitutional rights that are enforceable under *Bivens* are also enforceable under § 1983.<sup>44</sup> Second, the courts and scholars are unanimous in holding that *Bivens* and § 1983 rulings on qualified immunity are interchangeable and can help resolve cases in either situation.<sup>45</sup>

## B. *The Development of Qualified Immunity*

### 1. Original Immunity was Sovereign Immunity

In *Chisholm v. Georgia*, the Supreme Court ruled that citizens of one state could sue another state in federal court.<sup>46</sup> Subsequently, the United States adopted the Eleventh Amendment which says, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state . . .”<sup>47</sup> By its express terms,

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<sup>41</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009); *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006); *Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982); *Ogden v. United States*, No. 4:16-CV-3193, 2018 WL 895472, at \*7 n.7 (D. Neb. Feb. 14, 2018); *Snyder v. United States*, 990 F. Supp. 818, 844 (S.D. Ohio 2014); *McDaniels v. Richland Cty. Pub. Def. Off.*, No. 1:12-6-TLW-SLH, 2012 WL 1565618, at \*6 n.2 (D. S.C. March 27, 2012).

<sup>42</sup> *Duxbury Trucking, Inc. v. Mass. Highway Dep’t*, No. 04cv12118-NG, 2009 WL 1258998 (D. Mass. April 29, 2009) (“Since 1971, the *Bivens* case law has moved dramatically and in one direction, narrowing the availability of this claim more and more. The outcome is surely troubling, but the law seems clear.”).

<sup>43</sup> Of course, people may say that there are many more interesting points to be made about both of these doctrines.

<sup>44</sup> Though not necessarily vice versa. *See, e.g., Bivens*, 403 U.S. 388.

<sup>45</sup> *Anderson v. Creighton*, 483 U.S. 635, 649 n.2 (1987) (Brennan, J., dissenting) (“This theme also pervades our pre-*Harlow* opinions construing the scope of official immunity in suits brought under 42 U.S.C. § 1983. Those precedents provide guidance for causes of action based directly on the Constitution, for it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.”) (internal quotations omitted).

<sup>46</sup> *Chisholm v. Georgia*, 2 U.S. 419, 430-31 (1793).

<sup>47</sup> U.S. CONST. amend. XI. *See also* Vicki Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L. L. REV., 521 529-30 (2003) (“The first Supreme Court case in which issues of sovereign immunity received extensive discussion is *Chisholm v. Georgia*, where the question was whether a citizen of South Carolina could sue the State of Georgia on a contractual debt in the Supreme Court. Although the case was within the literal language of Article III of the Constitution, which described the judicial Power

the Eleventh Amendment does not apply to suits commenced by a citizen of one state against his or her own state.<sup>48</sup> However, the Supreme Court has expanded the scope of the Eleventh Amendment to cover even those actions where a citizen of one state has sued his or her own state.<sup>49</sup> By the same token, the Supreme Court has held that for purposes of the Eleventh Amendment, the general rule of sovereign immunity still applies to state court proceedings when the suit is based on federal law.<sup>50</sup> Litigants frequently refer to sovereign immunity as Eleventh Amendment immunity; but the immunity actually exists outside the Eleventh Amendment, thus allowing it to apply to state court proceedings.<sup>51</sup> Lastly, to be complete, sovereign immunity can be applied in both equitable and legal relief situation—i.e., it can be asserted in cases seeking injunctive, declaratory, or monetary relief.<sup>52</sup>

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as extending to Controversies . . . between a State and Citizens of another State, Georgia refused to appear, and the question of jurisdiction was discussed by the Justices in several opinions. All but one of the Justices concluded that the Court had and constitutionally could exercise jurisdiction over the case. In response to the Court's decision in *Chisholm*, the Eleventh Amendment was enacted to provide that the judicial power should not be construed to extend to any suit in law or equity, commenced or prosecuted against one state by Citizens of another State, or by Citizens or Subjects of any Foreign State.") (internal quotation marks omitted).

<sup>48</sup> *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472 (1987) ("Accordingly, as discussed more fully in Part V of this opinion, the Court long ago held that the Eleventh Amendment bars a citizen from bringing suit against the citizen's own State in federal court, even though the express terms of the Amendment refer only to suits by citizens of another State.") (citing *Hans v. Louisiana*, 134 U.S. 1, 10 (1890)).

<sup>49</sup> *See Hans*, 134 U.S. at 11-12.

<sup>50</sup> *Alden v. Maine*, 527 U.S. 706, 712-13 (1999) ("The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.") (quoting U.S. CONST. amend. XI).

<sup>51</sup> *See id.* at 713.

<sup>52</sup> *See Erwin v. Oregon*, 231 F. Supp. 2d 1003, 1007 (D. Or. 2001) (citing *Cory v. White*, 457 U.S. 85, 90-91 (1982)).

There are exceptions to the Eleventh Amendment and sovereign immunity.<sup>53</sup> For example, states may waive their sovereign immunity by consent to suit.<sup>54</sup> There are several ways a state may consent to suit. First, it may remove a case to federal court, which operates as waiver.<sup>55</sup> Second, it may voluntarily waive its immunity for suit in any way it chooses—such as Louisiana who has waived its immunity for state court cases only.<sup>56</sup> Third, it may waive its immunity in exchange for receipt of federal funds.<sup>57</sup>

Another exception to sovereign immunity is the often-invoked “fiction” of *Ex Parte Young*.<sup>58</sup> *Ex Parte Young* stands for two propositions.<sup>59</sup> First, there is a right to sue a state actor for *injunctive* relief absent any congressional authorization.<sup>60</sup> Second, a plaintiff may sue a state actor for injunctive relief and avoid challenges on the basis of sovereign immunity.<sup>61</sup>

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<sup>53</sup> See *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1021 (11th Cir. 1994). However, there should be no need for “exceptions” to the Eleventh Amendment. Instead the Amendment should be limited to its express terms. However, that is merely an opinion and supporting it is far outside the scope of this paper.

<sup>54</sup> *Seminole Tribe*, 11 F.3d at 1021 (“More specifically, the states are not immune from suit if the circumstances indicate consent, abrogation, or the fiction of *Ex parte Young*.”).

<sup>55</sup> See *Lapides v. Bd. of Regents of the Univ. System of Ga.*, 535 U.S. 613, 619-20 (2002).

<sup>56</sup> See LA. CONST. ANN. ART. 12 § 10(A) (1995) (“Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.”). *But see* LA. STAT. ANN. § 13:5106(A) (2005) (“No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court.”).

<sup>57</sup> *Doe v. Nebraska*, 345 F.3d 593, 597 (8th Cir. 2003) (“A state may waive its immunity either by explicitly specifying its intention to subject itself to suit or by voluntarily participating in federal spending programs where Congress expressed a clear intent to condition receipt of federal funds on a state’s consent to waive its sovereign immunity.”) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985); *Koslow v. Pennsylvania*, 302 F.3d 161, 171 (3d Cir. 2002) (“Therefore, if a state accepts federal funds for a specific department or agency, it voluntarily waives sovereign immunity for Rehabilitation Act claims against the department or agency—but only against that department or agency.”).

<sup>58</sup> *Jeffries et al.*, *supra* note 1 at 418. See also *Ex parte Young*, 209 U.S. 123 (1908).

<sup>59</sup> See *Jeffries et al.*, *supra* note 1 at 418.

<sup>60</sup> See *id.* at 417 (“[T]he complainants in *Ex Parte Young* sued to prevent violation of their constitutional rights without the aid of any statute specifically authorizing such an action. Where did the cause of action come from? Though the answer to this question is not entirely clear, *Ex Parte Young* has come to be cited for the proposition that a cause of action for equitable relief to prevent violation of constitutional rights exists independent of explicit congressional authorization.”). See also *Ex parte Young*, 209 U.S. 123 (1908).

<sup>61</sup> See *Jeffries et al.*, *supra* note 1 at 417. This prong is often referred to as the “fiction of *Ex parte Young*.” See *Brennan v. Stewart*, 834 F.2d 1248, 1252 (5th Cir. 1988) (“The “fiction” of *Ex parte Young* is its underlying image of the state as a discrete entity separate from its agents, ready and willing to obey federal law under the Supremacy Clause but thwarted by the bad acts

The final major exception to sovereign immunity is congressional enforcement under the reconstruction amendments.<sup>62</sup> Congress has the power to enforce all three reconstruction amendments; however, only the Fourteenth Amendment has been explicitly held to allow for the abrogation of state sovereign immunity.<sup>63</sup> Yet, the primary amendment involved in civil rights litigation is the Fourteenth Amendment. This is likely because the Fourteenth Amendment is the source of the Bill of Rights' application to the states.<sup>64</sup> To be valid abrogation under the Fourteenth Amendment, the following analysis must be conducted on a case-by-case basis:<sup>65</sup>

- (1) One must determine if the governmental action was a violation of the relevant statute.<sup>66</sup> If it was a violation, one goes on to the next step.
- (2) If the statutory violation was also a constitutional violation, it is valid enforcement/abrogation.<sup>67</sup>
- (3) If the violation of the statute was not a constitutional violation, is the exercise of congressional power through the statute still valid as a merely prophylactic measure?<sup>68</sup> To decide this one must ask:

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of its recalcitrant officials; whatever the power of this image, the fiction has long been thought necessary to preserve the supremacy of federal law. *Ex parte Young* creates the well-recognized irony that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment. Although the Supreme Court has sometimes implied otherwise, *Ex parte Young* is a gaping hole in the shield of sovereign immunity created by the Eleventh Amendment and the Supreme Court.") (citations omitted) (internal quotation marks omitted).

<sup>62</sup> *In re Flonase Antitrust Litigation*, 879 F.3d 61, 68 (3d Cir. 2017) ("A suit may avoid the Eleventh Amendment's broad prohibition in three ways. 'First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance.'" (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); *Usery v. Louisiana ex rel. La. Dep't of Health & Hosps.*, 150 F.3d 431, 434 (5th Cir. 1998)).

<sup>63</sup> See U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.") *c.f.* U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.") and U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

<sup>64</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 763-64 (2010) (describing the history of the incorporation of the Bill of Rights through the doctrine of substantive due process under the Fourteenth Amendment).

<sup>65</sup> See *United States v. Georgia*, 546 U.S. 151, 159 (2006).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* The first three prongs were spelled out by the Supreme Court in *U.S. v. Georgia* ("It is therefore unclear whether Goodman's amended complaint will assert Title II claims premised

- (a) the nature of the constitutional right at issue;
- (b) the extent to which Congress's remedial statute was passed in response to a documented history of relevant constitutional violations; and
- (c) whether the congressional statute is "congruent and proportional" to the specific class of violations at issue, given the nature of the relevant constitutional right and the identified history of violations.<sup>69</sup>

(4) Finally, and in addition to the above, the statement by congress to abrogate sovereign immunity must be clearly expressed.<sup>70</sup> The above analysis is the same analysis that is used to determine whether congressional action was valid enforcement of the Fourteenth Amendment.<sup>71</sup> The only difference between the valid enforcement angle and the further valid abrogation of immunity angle is the question of

on conduct that does *not* independently violate the Fourteenth Amendment. Once Goodman's complaint is amended, the lower courts will be best situated to determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid."). *Id.*

<sup>69</sup> The congruence and proportionality test is from other cases, such as *City of Boerne*. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) ("The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."). Other courts have described the third question as having three subparts. *See Toledo v. Sanchez* 454 F.3d 24, 34-35 (1st Cir. 2006) ("(1) the constitutional right or rights that Congress sought to protect when it enacted the statute; (2) whether there was a history of constitutional violations to support Congress's determination that prophylactic legislation was necessary; and (3) whether the statute is a congruent and proportional response to the history and pattern of constitutional violations."); *Bearden v. Oklahoma ex rel. Bd. of Regents Univ. of Okla.*, 234 F. Supp. 3d 1148, 1151 (W.D. Okla. 2017) ("To determine the validity of Congress' action the court must consider: "(1) the nature of the constitutional right at issue; (2) the extent to which Congress's remedial statute was passed in response to a documented history of relevant constitutional violations; and (3) whether the congressional statute is "congruent and proportional" to the specific class of violations at issue, given the nature of the relevant constitutional right and the identified history of violations.") (quoting *Guttman v. Khalsa*, 669 F.3d 1101, 1117 (10th Cir. 2012)).

<sup>70</sup> *See Calvin Massey, Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 4 (2007).

<sup>71</sup> *See Boerne*, 521 U.S. at 516-18. In *Boerne* there was no requirement of a clear expression; the court only considered its valid enforcement against the City. *See id.* A discussion of the distinction between abrogation and simple enforcement under the Fourteenth Amendment can be found at Calvin Massey's *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*. *See Massey, supra* note 70.

whether congressional intent to abrogate immunity was clearly expressed.<sup>72</sup>

A great many cases have been decided discussing Title II of the ADA and valid abrogation.<sup>73</sup> While abrogation under Title I of the ADA has been decided as blanketedly impossible,<sup>74</sup> Title II abrogation is generally found to be valid, though in some instances abrogation and enforcement is not valid.<sup>75</sup>

## 2. Then Came Qualified Immunity

Qualified immunity is the bane of many civil rights lawyers' lives and is frequently attacked in legal academia.<sup>76</sup> Luckily, it applies only in damages cases and has no application where one seeks declaratory

<sup>72</sup> *Torres v. Puerto Rico Tourism Co.*, 175 F.3d 1, 3 (1st Cir. 1999) (“First, there must be a ‘clear legislative statement’ of Congress’s intent to [abrogate]”) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)). The ADA has, of course, made such a statement in 42 U.S.C. § 12202 (1990) (“A State shall not be immune under the *eleventh amendment to the Constitution of the United States* from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.”).

<sup>73</sup> See, e.g., *United States v. Georgia*, 546 U.S. 151 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Shaikh v. Tex. A&M Univ. Coll. of Med.*, No. 16-20793, 2018 WL 3090415 (5th Cir. June 20, 2018); *King v. Marion Circuit Court*, 868 F.3d 589 (7th Cir. 2017); *Baxter v. Pa. Dep’t of Corr.*, 661 Fed. App’x 754 (3d Cir. 2016); *Klinger v. Dep’t of Revenue*, 455 F.3d 888 (8th Cir. 2006).

<sup>74</sup> See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). While *Garrett* may appear to totally foreclose the possibility of valid abrogation under Title I, the case should not be viewed in such a restrictive way.

<sup>75</sup> See, e.g., *Georgia*, 546 U.S. 151; *Tennessee*, 541 U.S. 509; *Shaikh*, 2018 WL 3090415; *King*, 868 F.3d 589; *Baxter*, 661 Fed. App’x 754; *Klinger*, 455 F.3d 888. This is likely due to the nature of the inquiry that the Supreme Court has mandated. Rather than allowing Title II of the ADA to stand in its entirety as valid abrogation, the Courts have required this near back breaking analysis that, quite frankly, has no basis in the text of the Constitution itself. A full listing of cases wherein courts have found or denied valid abrogation is far outside the scope of this article; however, one reading the cases cited will see the breath of such cases and the myriad of situations in which the question arises.

<sup>76</sup> See William Baude, *Is Qualified Immunity Unlawful?* 106 CAL. L. REV. 45, 46 (2018) (“The unlawfulness of qualified immunity is of particular importance now. Despite its shoddy foundations, the Supreme Court has been formally and informally reinforcing the doctrine of immunity. In particular, the Court has given qualified immunity a privileged place on its agenda reserved for habeas deference and few other legal doctrines. Rather than doubling down, the Court ought to be beating a retreat.”).

or injunctive relief.<sup>77</sup> Qualified immunity is born out of an alleged necessity: the courts must balance the fear that officers will abuse their power against the fear that harassing litigation will inhibit exercise of official duties.<sup>78</sup> Therefore, we will allow reasonable mistakes and the courts will not hold government actors—sued in their individual capacities—accountable unless their conduct fails the qualified immunity test.<sup>79</sup> To defeat qualified immunity, a plaintiff must establish that the government actor (1) violated a constitutional right, (2) that was clearly established at the time.<sup>80</sup> Moreover, many courts will excuse the unlawful conduct if it is “objectively reasonable” in light of the circumstances.<sup>81</sup> Due to this, qualified immunity is more often than not invoked to protect police officers with heavy success.<sup>82</sup>

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<sup>77</sup> *Grantham v. Trickery*, 21 F.3d 289, 295 (8th Cir. 1994) (“There is no dispute that qualified immunity does not apply to claims for equitable relief”); *Stanley v. Magrath*, 719 F.2d 279, 284 n.9 (8th Cir. 1983) (“The defendants, in addition, argue that they are immune under the doctrine of qualified or good-faith immunity. This defense is of no avail. Qualified immunity applies only to damages, not to equitable relief, and plaintiffs here seek only an injunction.”) (citations omitted).

<sup>78</sup> *See Anderson v. Creighton* 483 U.S. 635, 638 (1987) (“When government officials abuse their offices, ‘action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.’ On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.”) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

<sup>79</sup> *See id.*

<sup>80</sup> *Perez v. Tedford*, No. SA-13-CV-429-XR, 2013 WL 6835234, at \*2 n.1 (W.D. Tex. Dec. 23, 2013) (“If the answer to either of these questions is “no,” qualified immunity applies and the government official is immune from suit.”).

<sup>81</sup> *See, e.g., Saucier v. Katz*, 533 U.S. 194, 205 (2001) (“If the officer’s mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.”), *superseded on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). *See also Inouye v. Kemna*, 504 F.3d 705, 712 n.6 (9th Cir. 2007) (explaining that the “objectively reasonable” prong is just part of the second step in the qualified immunity test).

<sup>82</sup> Karen M. Blum, *Section 1983 Litigation: The Maze, The Mud, and the Madness*, 23 WM. & MARY BILL OF RTS. J 913, 947 n.233 (2015) (“The Supreme Court’s tendency to rarely deny qualified immunity to public officials has not gone unnoticed by judges and scholars . . . ‘The Supreme Court’s recent case law illustrates the substantial protection that qualified immunity affords police officers. Although each case is decided based on its specific facts, the reality is that the Supreme Court in the recent past has rarely denied qualified immunity to police officers. As one scholar has observed, before the recent reversal of a grant of qualified immunity in *Tolan*, 134 S. Ct. 1861, the Court had not ruled against a police officer in a qualified immunity case since *Groh v. Ramirez*, 540 U.S. 551 (2004), decided nearly a decade earlier.”) (quoting C.B. v. City of Sonora, 769 F.3d 1005, 1038 n.5 (9th Cir. 2014) (Smith, J., concurring in part and dissenting in part)).



First, as to the requirement that one must identify the right, in the context of qualified immunity that right cannot be defined by mere recitation of the constitutional guarantee, but it is not required to be the exact facts of the case at hand.<sup>83</sup> For example, the notion that the Eighth Amendment requires that prison officials not be deliberately indifferent to serious medical needs would be sufficient.<sup>84</sup> Second, to be clearly established, a litigant must be able to point to prior Supreme Court or circuit precedent; however, absent prior binding precedent, courts should also look to other sources to see if the right was clearly established such that a reasonable officer could have known about it.<sup>85</sup> The primary issue involved in the “clearly established analysis” is deciding when the facts of a prior decision are “close enough” to the plaintiff’s claims. Fortunately, several circuits use a “sliding scale” where the more egregious the conduct, the less similar a prior case must be.<sup>86</sup> However, the Supreme Court has allowed a suit to proceed against claims of qualified immunity where the conduct was sufficiently bad and where neither that circuit nor any other court had decided the issue.<sup>87</sup> In that case, the alleged violation of the right was tying an inmate to a hitching post.<sup>88</sup>

Perhaps the most unnerving fact about qualified immunity is the order of decisions. As the prior paragraph noted, there are two steps

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<sup>83</sup> *Anderson*, 483 U.S. at 639-40 (noting that the application of qualified immunity relies on the level of generality applied to determining what the “right is”, and that a litigant need not show that the exact same facts happened before).

<sup>84</sup> See *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995).

<sup>85</sup> See *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (“Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of “legal facts.” That question of law, like the generality of such questions, must be resolved *de novo* on appeal. A court engaging in review of a qualified immunity judgment should therefore use its full knowledge of its own and other relevant precedents.”) (citations omitted) (quotation marks omitted).

<sup>86</sup> See *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (“The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.”) (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (2004)). *But see* *Lowe v. Raemisch*, 864 F.3d 1205, 1211 n.10 (10th Cir. 2017) (“But our sliding-scale approach may arguably conflict with recent Supreme Court precedent on qualified immunity. The possibility of a conflict arises because the sliding-scale approach may allow us to find a clearly established right even when a precedent is neither on point nor obviously applicable.”) (citations omitted).

<sup>87</sup> See *Hope v. Pelzer*, 536 U.S. 730, 747 n.13 (2002) (Thomas, J., dissenting) (“There are apparently no decisions on similar facts from other Circuits, presumably because Alabama is the only State to authorize the use of the hitching post in its prison system.”).

<sup>88</sup> See *id.* at 733.

in analyzing whether an officer is entitled to qualified immunity.<sup>89</sup> The question becomes which step comes first. Prior to 2009, courts were required under Supreme Court precedent to decide whether a constitutional right had been violated first, and then decide if it had been clearly established.<sup>90</sup> After 2009, courts are no longer bound by any specific order of decision; they are allowed to simply decide if the right was “clearly established” without ever having to determine if the right had been violated.<sup>91</sup> This lack of a required order results in a vicious circle: once a court simply declines to address whether something was a constitutional right, the case cannot be used in the future to support a finding of a clearly established right.<sup>92</sup>

Thus, it is perfectly logical that one would want to have more cases to reference to show that a right was “clearly established.” Additionally, litigants clearly want a way to find more decisions that can avoid the “circle” described above.

## II. A BRIEF OVERVIEW OF THE ADA

The ADA is the culmination of decades of advocacy from various groups.<sup>93</sup> It was intended to sweep away the social ills and stigmas that surrounded the notion of disabilities.<sup>94</sup> To accomplish this goal, the ADA invoked the entire sweep of congressional authority including the full force of the Commerce Clause and the power to enforce the Fourteenth Amendment.<sup>95</sup>

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<sup>89</sup> See *Elder*, 510 U.S. at 516; *Anderson v. Creighton* 483 U.S. 635, 638 (1987); *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995).

<sup>90</sup> *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

<sup>91</sup> See, e.g., *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 579 (5th Cir. 2009) (“Until recently, we resolved government officials’ qualified immunity claims under the strict two-part test mandated by the Supreme Court in *Saucier v. Katz*, deciding (1) whether facts alleged or shown by plaintiff make out the violation of a constitutional right, and (2) if so, whether that right was clearly established at the time of the defendant’s alleged misconduct. However, the Supreme Court has revisited this rule and determined that the rigid two-step structure is no longer mandatory. Accordingly, as the Court did in *Pearson*, we will first consider whether the officer’s conduct violated clearly established law. If we determine that the answer is no, qualified immunity will shield Knoblauch from suit.”) (citations omitted).

<sup>92</sup> See generally, Alan K. Chen, *Qualified Immunity Limiting Access to Justice and Impeding Development of the Law*, 41 HUMAN RIGHTS MAGAZINE, 8, 9 (2015).

<sup>93</sup> Jamelia N. Morgan, *One Not Like the Other: An Examination of the Use of the Affirmative Action Analogy in Reasonable Accommodation Cases Under the Americans with Disabilities Act*, 46 CAP. U. L. REV. 191, 191 (2018).

<sup>94</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b) (2008).

<sup>95</sup> 42 U.S.C. § 12101(b)(4) (2008).

The ADA is divided into five titles with three being the most often discussed.<sup>96</sup> Title I deals with disability discrimination in employment situations.<sup>97</sup> Title II discusses discrimination by public entities.<sup>98</sup> Title III deals with discrimination in places of public accommodations.<sup>99</sup> Title IV covers disability related issues in telecommunications.<sup>100</sup> Finally, Title V concerns miscellaneous provisions including the abrogation of State Sovereign immunity.<sup>101</sup>

There is a great deal of interesting interplay between the titles. Several courts have ruled that because Title I deals with employment, Title II does not control employment situations in the public sector.<sup>102</sup> Others have taken a different view.<sup>103</sup> Although Title II itself does not have a reasonable accommodation provision, its regulations do have a reasonable modification provision, and courts have universally used that regulation to apply the “reasonable accommodation” provision of Title I into Title II.<sup>104</sup> Further, while Title III does not allow for dam-

<sup>96</sup> Those are Title I, Title II, and Title III.

<sup>97</sup> See Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 (2008).

<sup>98</sup> See Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 (1990).

<sup>99</sup> See Americans with Disabilities Act of 1990, 42 U.S.C. § 12181 (1990).

<sup>100</sup> See Communications Act of 1934, 47 U.S.C. § 225 (2010).

<sup>101</sup> See Americans with Disabilities Act of 1990, 42 U.S.C. § 12202 (1990).

<sup>102</sup> See, e.g., *Taylor v. City of Shreveport*, 798 F.3d 276, 282 (5th Cir. 2015); *Brumfield v. City of Chicago*, 735 F.3d 618, 622 (7th Cir. 2013).

<sup>103</sup> See *Bledsoe v. Palm Beach Cty. Soil and Water Conservation District*, 133 F.3d 816, 820 (11th Cir. 1998).

<sup>104</sup> See 28 C.F.R. § 35.130(b)(7) (2016) (describing the reasonable modification in Title II’s regulation). See also *Robertson v. Las Animas Cty. Sheriff’s Dep’t*, 500 F.3d 1185, 1195 n.8 (10th Cir. 2007) (“Title II’s use of the term “reasonable modifications” is essentially equivalent to Title I’s use of the term “reasonable accommodation.”); *McGary v. City of Portland*, 386 F.3d 1259, 1266 n.3 (9th Cir. 2004) (“Although Title II of the ADA uses the term ‘reasonable modification,’ rather than ‘reasonable accommodation,’ these terms create identical standards”); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 n.7 (2d Cir. 2003) (“[D]iscrimination,’ which is not defined in Title II, may take its meaning from Title I.”) (citation omitted); *Washington v. Ind. High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840, 848 (7th Cir. 1999) (“Congress clearly intended the failure-to-accommodate method of proving discrimination to apply to Title II.”). The Fifth Circuit recognized this and summarized the development of this sharing from Title I of the ADA in *Windham v. Harris County, Texas*:

Windham attempts to satisfy the third prong on a theory of “failure to accommodate.” That theory is expressly codified in Title I of the ADA (governing employment), which defines discriminat[ion] . . . on the basis of disability” to include “not making reasonable accommodations [for a disabled employee’s] known physical or mental limitations. Although Title II contains no similarly explicit definition, our cases recognize that a public entity’s failure reasonably to accommodate the known limitations of persons with disabilities can also constitute disability discrimination under Title II. We have also recognized Title II claims in the specific context of police officers who fail reasonably to accommodate the known limitations of disabled persons they detain.

ages, both Titles I and II do allow for damages.<sup>105</sup> Finally, although Title I does not contain building requirements or certain specified measurements that are required for buildings, Title II and Title III do.<sup>106</sup> This has led some to point out that much of the ADA appears to be incongruent with significant overlap among the Titles.<sup>107</sup> Additionally, there are a host of regulations pertaining to each title.<sup>108</sup> In addition, the relevant federal body charged with issuing regulations also issues compliance manuals.<sup>109</sup>

For purposes of this article, I will focus on Title II of the ADA. While Title II of the ADA begins with 42 U.S.C. § 12131, the operative anti-discrimination mandate is found in 42 U.S.C. § 12132, which states, “[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>110</sup>

It is important to note that this proscription on discrimination is actually two components. The first prohibits discrimination in the provisions of government “services, programs, or activities, of a public entity.”<sup>111</sup> The second provision is “or be subjected to discrimination by any such entity.”<sup>112</sup> Therefore, even if a plaintiff is alleging a government action that does not constitute a “service, program, or activity,” illegal discrimination may still occur.<sup>113</sup>

Windham v. Harris, Cty., Tex., 875 F.3d 229, 235-36 (5th Cir. 2017) (citations omitted).

<sup>105</sup> See Americans with Disabilities Act of 1990, 42 U.S.C. § 12117 (1990). See also Americans with Disabilities Act of 1990, 42 U.S.C. § 12133 (1990).

<sup>106</sup> Compare Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189 (1990) with Americans with Disabilities Act of 1990, 42 U.S.C. § 12134(c) (1990) and Americans with Disabilities Act of 1990, 42 U.S.C. § 12186(a)(3) and (b) (1990).

<sup>107</sup> See *Alberti v. City and Cty. of San Francisco Sheriff's Dep't*, 32 F. Supp. 2d 1164, 1170 (N.D. Cal. 1998), *overruled on other grounds by Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1175 (9th Cir. 1999).

<sup>108</sup> See *Alberti*, 32 F. Supp. 2d at 1170. See also Americans with Disabilities Act of 1990, 42 U.S.C. § 12116 (1990).

<sup>109</sup> See U.S. DEP'T OF JUST., C.R. DIV., INFORMATION AND TECHNICAL ASSISTANCE ON THE AMERICANS WITH DISABILITIES ACT, ADA.gov, <https://www.ada.gov/ta-pubs-pg2.htm> (last visited September 27, 2018).

<sup>110</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (1990).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> However, the Ninth Circuit has also pointed out the relevance of the word “or” in that proscription in a different context. See *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996) (“Due to the insertion of ‘or’ between exclusion from/denial of benefits on the one hand and

Like most civil rights statutes, this language has borne out various theories of discrimination. The three primary theories of discrimination under Title II of the ADA are as follows: disparate treatment, disparate impact, and failure to make reasonable accommodation.<sup>114</sup> No matter what theory a party is trying to prove, he or she, must prove the following:

- (1) That he or she was an “otherwise qualified individual”;
- (2) That he or she has or (at the time of the illegal conduct had) a disability;
- (3) That he or she was discriminated against;
- (4) That such discrimination was done by a public entity;
- (5) And that such discrimination was “by reason of” disability.<sup>115</sup>

This article divides the *prima facie* case into five separate parts for more clarity. However, it is usually stated as three or four prongs.<sup>116</sup>

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discrimination by a public entity on the other, we conclude Congress intended to prohibit two different phenomena. Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public services disproportionately due to their disability.”). The Ninth Circuit also rejected the interpretation proposed above squarely in *Zimmerman v. Oregon Department of Justice*. See *Zimmerman v. Or. Dep’t of Justice*, 170 F.3d 1169, 1175 (9th Cir. 1999).

<sup>114</sup> See *Leskovisek v. Ill. Dep’t of Transp.*, 305 F. Supp. 3d 925, 933 (C.D. Ill. 2018) (“Under the ADA, a plaintiff can bring a claim of discrimination alleging disparate treatment, disparate impact, or a failure to accommodate.”) (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003); *Valencia v. City of Springfield, Ill.*, 883 F.3d 959, 967 (7th Cir. 2018)).

<sup>115</sup> *Windham v. Harris Cty., Tex.*, 875 F.3d 229, 235 (5th Cir. 2017) (“To make out a *prima facie* case under Title II, a plaintiff must show ‘(1) that he is a qualified individual within the meaning of the ADA; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability.’”) (quoting *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 671-72 (5th Cir. 2004)).

<sup>116</sup> See, e.g., *Anderson v. City of Blue Ash*, 798 F.3d 338, 357 (6th Cir. 2015); *Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011); *Melton*, 391 F.3d at 671-72. This test applies to all theories of discrimination, yes; but proving a failure to accommodate automatically proves the *prima facie* case. See *Windham*, 875 F.3d at 236 n.9. In other words, while a failure to accommodate claim requires a plaintiff to prove this test; so long as the plaintiff can show a failure to engage in the accommodation process he or she has already proven the *prima facie* case. See *id.* This was explained by the Fifth Circuit in *Windham v. Harris County, Texas*. *Id.* (“We have recently described a failure-to-accommodate claim under Title II as requiring the plaintiff to prove: (1) he is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the [public] entity; and (3) the entity failed to make reasonable accommodations. Proof of these elements suffices to establish a *prima facie* case”) (citations omitted). See also *Isaac v. La. Dep’t of Children and Family Servs.*, No. 15-00013-SDD, 2015 WL 4078263 at \*3

Being an “otherwise qualified individual” in the context of Title II is often a very low bar to meet.<sup>117</sup> Much of the qualification simply comes from being a citizen.<sup>118</sup> For example, a person is qualified to use the sidewalks and is thus “otherwise qualified” to be free from discrimination by illegally maintained sidewalks.<sup>119</sup> A person is qualified to receive medical treatment in prison by the very nature of being an inmate, is thus, otherwise qualified not to be subject to discrimination from the provision of such care.<sup>120</sup> A person by being a citizen wishing to view court proceedings is qualified for such an action and is thus otherwise qualified to be free from discrimination posed by architectural barriers to entry.<sup>121</sup>

The next prong, is that a disability is a condition that has a substantial limitation on a major life activity.<sup>122</sup> It may be long term or temporary,<sup>123</sup> or episodic.<sup>124</sup> At this point, any argument that a disability must amount to years in suffering is both knowingly wrong and

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(M.D. La. July 6, 2015) (“If modifications are necessary to avoid discrimination, the ADA and [RA] ‘impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals. Where a defendant fails to meet his affirmative obligation, the cause of that failure is irrelevant.’ Moreover, ‘[t]he accommodations must be sufficient to provide a disabled person meaningful access to the benefit or service offered by a public entity.’ In order to establish a reasonable accommodation theory of discrimination, the second and third prongs of the disability-based discrimination *prima facie* case are slightly modified. ‘Specifically, a plaintiff can satisfy the second and third prongs of the *prima facie* case of disability discrimination by establishing that the public entity has failed to make reasonable accommodations for a disabled person who uses the services provided by the public entity.”) (quoting *Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 752 (N.D. Tex. 2014)).

<sup>117</sup> *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011).

<sup>118</sup> *See id.*

<sup>119</sup> *See id.* at 225 n.30.

<sup>120</sup> *See United States v. Georgia*, 546 U.S. 151, 153-56 (2006).

<sup>121</sup> *See Tennessee v. Lane*, 541 U.S. 509, 516-17 (2004).

<sup>122</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(1)(A) (2009).

<sup>123</sup> The issue of a temporary impairment has some debate around it. One court summarized the source of the debate as “Prior to the ADAAA, temporary, non-chronic impairments of short duration, with little or no longer term impact fell outside of the scope of the ADA. This language, however, was removed after the ADAAA was enacted, and the ADAAA now specifies: [t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting. Although duration is still a relevant factor in considering whether an impairment is substantially limiting, the Fifth Circuit has not addressed whether temporary impairments now merit protection under the Act.” *Dottin v. Tex. Dep’t of Criminal Justice*, No. 1:13-CV-710, 2014 WL 11498078, at \*8 (E.D. Tex. Nov. 25, 2014) (citations omitted) (internal quotation marks omitted).

<sup>124</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(4)(D) (2009) (“An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”).

possibly bad faith.<sup>125</sup> Fortunately, the ADA gives us a listing of matters that may be considered “major life activities.”<sup>126</sup>

With the notion of who is protected from discrimination under the ADA in full view, it is important to briefly consider the theories and types of discrimination for which plaintiffs may sue. In the context of Title II, there are three main theories of discrimination under which a plaintiff may sue. First, there is the theory of “disparate treatment.”<sup>127</sup> This theory of discrimination is what it sounds like—there are policies and practices that treat people with disabilities differently than those without disabilities. Although disparate treatment is often described as “intentional discrimination,” this is actually a misnomer.<sup>128</sup> Under the ADA, a plaintiff need not prove intentional discriminations unless he or she is seeking damages.<sup>129</sup> Granted, facially discriminatory laws are considered to amount to deliberate indifference.<sup>130</sup> The second theory of discrimination that courts have allowed to operate under the ADA is the “disparate impact” theory of dis-

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<sup>125</sup> See *id.* Typically, claims that episodic impairments are not disabilities are view as near bad faith. This is so because the statute specifically lists them as qualifying as disabilities.

<sup>126</sup> See Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2)(A) (2009).

<sup>127</sup> See *Dunlap v. Ass’n of Bay Area Gov’t*, 996 F. Supp. 962, 965 (N.D. Cal. 1998) (“A disability discrimination claim may be brought either on the theory that defendant failed to make reasonable accommodations or on a more conventional disparate treatment theory, or both. This is because the ADA not only protects against disparate treatment, it also creates an affirmative duty in some circumstances to provide special, preferred treatment, or reasonable accommodation.”) (internal quotation marks omitted).

<sup>128</sup> See, e.g., *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 373 (D. Md. 2011) (“However, “intentional discrimination” and “disparate treatment” in this context are “synonymous.”).

<sup>129</sup> See *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 268 (3d Cir. 2014) (“To establish claims under § 504 of the RA and the ADA, a plaintiff must demonstrate that: (1) he has a disability, or was regarded as having a disability; (2) he was “otherwise qualified” to participate in school activities; and (3) he was “denied the benefits of the program or was otherwise subject to discrimination because of [his] disability.” Where, as in the instant case, a plaintiff seeks compensatory damages as a remedy for violations of the RA and the ADA, it is not enough to demonstrate only that the plaintiff has made out the prima facie case outlined above. He or she must also demonstrate that the aforementioned discrimination was intentional. A showing of deliberate indifference satisfies that standard.”) (citations omitted); *Phipps v. Sheriff of Cook Cty.*, 681 F. Supp. 2d 899, 917 (N.D. Ill. 2009) (“Rather, they contend, they need only show that, but for their disabilities, they would not have been discriminated against. The plaintiffs are incorrect. It is true that not all ADA claims require a showing of intentional discrimination . . . However, it is necessary to show intentional discrimination in order to recover compensatory damages (as opposed, say, to injunctive relief.”).

<sup>130</sup> See *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002) (“[T]his case involves *facial discrimination*, in the form of a categorical exclusion of disabled persons from a public program. In such a case, the public entity is, at the very least, “deliberately indifferent;” by its very terms, facial discriminating is intentional.”).

crimination.<sup>131</sup> This theory holds that a plaintiff may show discrimination by pointing to a facially neutral policy that has a disparate impact on persons with disabilities.<sup>132</sup>

Third and finally, there is the theory of discrimination known as the “failure to make reasonable accommodations” theory of discrimination.<sup>133</sup> Doctrinally speaking, this theory is incongruent with the ADA, though, it is no doubt a valid theory.<sup>134</sup> Title II of the ADA does not contain an express requirement of accommodation like the one found in Title I.<sup>135</sup> Nevertheless, Title II does contain a regulatory provision that requires government entities to “modify” their policies and practices in order to “avoid discrimination.”<sup>136</sup> Courts have used this regulatory provision as the basis for expanding the Title I “failure to make reasonable accommodation” theory into Title II.<sup>137</sup> Some courts were initially suspicious of finding a separate theory of “accommodation” in Title II outside of situations where failure to accommodate results in discrimination.<sup>138</sup> However, courts have largely ignored the requirement that the “modification” or “accommodation” be necessary to avoid discrimination.<sup>139</sup> This is especially true in the “arrest” situation. In those situations, a plaintiff may prove a failure to accommodate claim where the lack of accommodation has led to embarrassment over that found by others, which does not in and of itself prove standard discrimination.<sup>140</sup>

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<sup>131</sup> See *J.V. & M.Q. v. Albuquerque Pub. Sch.*, 813 F.3d 1289, 1295, 1298 (10th Cir. 2016); *Reg'l Econ. Cmty. Action Program v. City of Middletown*, 294 F.3d 35, 48 (2d Cir. 2002) (noting disparate impact as being one of the three theories).

<sup>132</sup> See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-55 (2003).

<sup>133</sup> See *Windham v. Harris, Cty., Tex.*, 875 F.3d 229, 235-36 (5th Cir. 2017); *Isaac v. La. Dep't of Children and Family Servs.*, No. 15-00013-SDD, 2015 WL 4078263 at \*3 (M.D. La. July 6, 2015).

<sup>134</sup> *Windham*, 875 F.3d at 235. See also *Americans with Disabilities Act of 1990*, 42 U.S.C. § 12112(b)(5)(A) (2008).

<sup>135</sup> *Windham*, 875 F.3d at 235.

<sup>136</sup> See 28 C.F.R. § 35.130(b)(7)(ii) (2016).

<sup>137</sup> See, e.g., *Windham*, 875 F.3d at 235-36; *Roberston v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1195 n.8 (10th Cir. 2007); *McGary v. City of Portland*, 386 F.3d 1259, 1266 n.3 (9th Cir. 2004); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 n.7 (2d Cir. 2003).

<sup>138</sup> See *Wis. Cmty. Servs. v. City of Milwaukee*, 465 F.3d 737, 750-51 (7th Cir. 2006).

<sup>139</sup> See, e.g., *Cleveland v. Gautreaux*, 198 F. Supp. 717, 737-38 (M.D. La. 2016); *McCoy v. Tex. Dep't of Criminal Justice*, No. C-05-370, 2006 WL 2331055 at \*7 (S.D. Tex. Aug. 9, 2006).

<sup>140</sup> See, e.g., *Cleveland*, 198 F. Supp. at 737-38; *McCoy*, 2006 WL 2331055 at \*7.



In addition to these general theories of discrimination, there are other various types of discrimination.<sup>141</sup> These types of discrimination can be largely found in the regulations and some are mere repeats of the theories of discrimination listed above. While there may be repeats and some overlap between the regulations and the general theories of discrimination, it is useful to think of the regulations separately. The following are some of the most popular types of discrimination under Title II and its regulations:

- Failure to modify policies in order to avoid discrimination<sup>142</sup>
- Methods of administration discrimination<sup>143</sup>
- Failure to remove architectural barriers<sup>144</sup>
- Failure to treat individuals in the most integrated setting<sup>145</sup>
- Charging a surcharge on services<sup>146</sup>

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<sup>141</sup> See, e.g., 28 C.F.R. § 35.130(b)(7) (2016); 28 C.F.R. § 35.130(b)(3) (2016); 28 C.F.R. § 35.150 (2012); 28 C.F.R. § 35.151 (2011); 28 C.F.R. § 35.152 (2010); 28 C.F.R. § 35.130(d) (2016); 28 C.F.R. § 35.130(f) (2016). I refer to these as being “types” of discrimination because it is easier than saying “obligation imposed on the public entities failure to abide by which leads to liability under Title II.”

<sup>142</sup> See 28 C.F.R. § 35.130(b)(7)(i) (2016) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”).

<sup>143</sup> See 28 C.F.R. § 35.130(b)(3) (2016) (“A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; (ii) [t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities; or (iii) [t]hat perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.”). As to the private enforceability of methods of administration discrimination, see *Dunn v. Dunn* 318 F.R.D. 652, 664 (M.D. Ala. 2016) (“Indeed, there is another—privately enforceable—ADA regulation which makes clear that policies and practices (or their absence) which result in discrimination against people with disabilities are actionable under the ADA, even if the policies and practices . . . are not themselves required by the statute.”).

<sup>144</sup> This is actually taken up in to separate regulations. One addresses “existing facilities” and the other addresses “new constructions or alterations.” See 28 C.F.R. § 35.150 (2012). See also 28 C.F.R. § 35.151 (2011). There is still another regulations dealing specifically with correctional facilities. See 28 C.F.R. § 35.152 (2010).

<sup>145</sup> See 28 C.F.R. § 35.130(d) (2016) (“A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”).

<sup>146</sup> See 28 C.F.R. § 35.130(f) (2016) (“A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to

Moreover, some forms of discrimination do not fit neatly within this framework but are nonetheless valid forms of discrimination under the ADA.<sup>147</sup> For example, the *Olmstead* ruling held that unjustified institutionalization of persons with disabilities constituted discrimination by reason of disability.<sup>148</sup> Although the court certainly relied on the integration mandate in part, that mandate did not end its analysis.<sup>149</sup> Indeed, the court, needed to rely on various clauses within the ADA including: (1) the introductory clauses, (2) the purposes of the ADA, and (3) the history of disability discrimination in order to reach its ruling.<sup>150</sup> It is important to note that, since the ruling in *Olmstead*, the ruling has taken on a life and theory of its own wherein plaintiffs do not even need to prove any of the three standard theories; instead, it has become its own prima facie case.<sup>151</sup>

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provide that individual or group with the nondiscriminatory treatment required by the Act or this part.”).

<sup>147</sup> See *Olmstead v. L.C.*, 527 U.S. 581 (1999).

<sup>148</sup> *Olmstead*, 527 U.S. at 597.

<sup>149</sup> See *Olmstead*, 527 U.S. at 589.

<sup>150</sup> See generally, *Olmstead*, 527 U.S. at 581. See also *id.* at 600 (noting how unjustified institutionalization continues pre-ADA social stigma).

<sup>151</sup> See *Martin v. Taft*, 222 F. Supp. 2d 940, 971-72 (S.D. Ohio 2002) (“Hence, to prevail on an ADA claim under *Olmstead*, a plaintiff must show: 1. The plaintiffs have a mental disability satisfying the ADA’s disability requirement. 2. The plaintiffs are institutionalized, or the plaintiffs are in need of services that are offered in the community-based program but would have to submit to institutionalization to receive them. 3. The plaintiffs are qualified to participate in an existing, less restrictive state program for community-based care, giving due deference to the reasonable eligibility assessment of the state’s own professionals. 4. The plaintiffs’ request for community-based services can be reasonably accommodated. 5. The plaintiffs do not oppose participation in the state’s existing program for community-based care. 6. The plaintiffs have nonetheless been excluded from participation in the program for community-based care.”). For a thorough discussion on the *Olmstead* ruling, I direct the reader to: Rosemary L. Bauman, *Disability Law—Needless Institutionalization of Individuals with Mental Disabilities as Discrimination Under the ADA—Olmstead v. L.C.* 30 N.M. L. REV. 287 (2002); Carol Beatty, *Implementing Olmstead by Outlawing Waiting Lists*, 49 TULSA L. REV. 713 (2013-2014); Harriet McBryde Johnson & Lesly Bowers, *Civil Rights and Long-Term Care: Advocacy in the Wake of Olmstead v. L.C. Ex Rel Zimring*, 10 ELDER L.J. 453 (2002); Michael L. Perlin, *Their Promises of Paradise: Will Olmstead v. L.C. Resuscitate the Constitutional “Least Restrictive Alternative” Principle in Mental Disability Law?*, 37 HOUSTON L. REV. 999 (2000); Micheal L. Perlin, “What’s Good is Bad, What’s Bad is Good, You’ll Find Out When You Reach the Top, You’re on the Bottom.”: *Are the Americans with Disabilities Act (and Olmstead v. L.C.) Anything More than Idiot Wind*, 35 U. MICH. J.L. REF. 235 (2002); Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After Olmstead v. L.C.*, 24 HARV. J.L. & PUB. POL’Y 695 (2001); Loretta Williams, *Long Term Care After Olmstead v. L.C.: Will the Potential of the ADA’s Integration Mandate be Achieved?* 17 J. CONTEMP. HEALTH L. & POL’Y 205 (2000).

Further still, the states and governmental entities have various other affirmative obligations found in the relevant regulations. Two that are often discussed are:

- (1) The requirement that public entities have an ADA coordinator; and<sup>152</sup>
- (2) The requirement that public entities have a transition plan.<sup>153</sup>

### III. THE ADA AND GOVERNMENTAL IMMUNITIES

#### A. *Governmental Immunities in General*

The ADA provides that the States shall not be immune from suit under the Eleventh Amendment to the United States Constitution.<sup>154</sup> During the early years of the ADA it was a generally excepted principle of constitutional law that the Federal Government could abrogate state sovereign immunity by resort to the Commerce Clause.<sup>155</sup> It was also generally understood that the federal government's enforcement powers under the Fourteenth Amendment, need not be mere recitations of the Supreme Court's Constitutional decisions.<sup>156</sup> To be a valid enforcement, and thus allowing for abrogation, under the Fourteenth Amendment, a law needed only to meet the liberal one way ratchet

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<sup>152</sup> See 28 C.F.R. § 35.107(a) (1991) (“A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.”).

<sup>153</sup> See 28 C.F.R. § 35.150(d)(1) (2012) (“In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.”).

<sup>154</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12202 (1990). See also 28 C.F.R. § 35.178 (1991).

<sup>155</sup> See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (holding that, contrary to prior understanding, the commerce clause does not grant Congress authority to abrogate state sovereign immunity under Article I powers.).

<sup>156</sup> See *Katzenback v. Morgan*, 384 U.S. 641, 650-51 (1966) (finding that enforcement provisions in § 4 of the Voting Rights Act of 1965 were a valid use of Congressional enforcement power under the Fourteenth Amendment).

test—meaning the Congress could increase the scope of rights protections beyond what the Supreme Court said but could not shrink them.<sup>157</sup>

All of this began to change with the Rehnquist revolution.<sup>158</sup> The Court slowly began deconstructing much of what had been understood.<sup>159</sup> For example, the Court overruled any notion that state sovereign immunity could be abrogated by means of the Commerce

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<sup>157</sup> *Varner v. Ill. State Univ.*, 150 F.3d 706, 715 (7th Cir. 1998) (“This analysis clarified what had been an unsettled question in regard to Congress’s authority to enforce the Fourteenth Amendment. The Court rejected the substantive, or “ratchet” theory, expressed most forcefully in *Katzenbach v. Morgan*, 384 U.S. 641, 653–56, 86 S. Ct. 1717, 16 L.Ed.2d 828 (1966), which maintained that Congress could expand the substantive rights contained in § 1 of the Fourteenth Amendment even when the courts had explicitly refused to recognize the existence of such rights. In rejecting this theory, the Court explained, “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”) (quoting, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)).

<sup>158</sup> For more discussion on the so-call “Rehnquist Revolution”, see Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 1 (2004) (“When historians look back at the Rehnquist Court, without a doubt they will say that its greatest changes in constitutional law were in the area of federalism. Over the past decade, and particularly over the last five years, the Supreme Court has dramatically limited the scope of Congress’ powers and has greatly expanded the protection of state Sovereign Immunity. Virtually every area of law, criminal and civil, is touched by these changes. Since I began teaching constitutional law in 1980, the most significant differences in constitutional law are a result of the Supreme Court’s revival of federalism as a constraint on federal power.”); Robert J. Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93, 94-96 (2004) (“A revolution now being waged in the Supreme Court promises to alter the relationship between the federal government and the states for the next generation. The birth date of this revolution can best be identified with President Ronald Reagan’s elevation of Justice William H. Rehnquist to the Court’s leadership as the sixteenth Chief Justice of the United States. The Chief Justice’s federalism, like pre-New Deal federalism, insists on the categorical expression and judicial enforcement of the idea of dual sovereignty in American law. By appointing jurists who share the Chief Justice’s constitutional commitments, the current President, George W. Bush, is now deftly poised to institutionalize this revolution in American government for decades.”) (citations omitted); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1097 (2006) (“Previous commentators on the Rehnquist Court’s history, seeking an overarching explanation for the Court’s cases, have focused their attention primarily on a revitalized ‘federalism,’ an agenda-driven ‘conservatism,’ and a constitutionally fixated ‘judicial supremacy.’ While each of these themes is undoubtedly present in the Court’s later jurisprudence, this Article argues that one cannot understand the Rehnquist Court’s complicated intellectual matrix without taking account of its profound hostility toward the institution of litigation and its concomitant skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice.”).

<sup>159</sup> See *Seminole Tribe*, 517 U.S. at 47; *Katzenbach*, 384 U.S. at 650-51.

Clause.<sup>160</sup> The Commerce Clause legislation can still be enforced by resorting to the doctrine of *Ex Parte Young*.<sup>161</sup>

Then, in *City of Boerne v. Flores*, the Supreme Court dramatically cut back on the one-way ratchet rule.<sup>162</sup> Fourteenth Amendment legislation can only be proper where it is “congruent and proportional”

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<sup>160</sup> See *Seminole Tribe*, 517 U.S. at 47. See also *Rodgers v. La. Bd. of Nursing*, 665 Fed. App'x 326, 329 (5th Cir. 2016) (“Congress may not abrogate states’ sovereign immunity through federal legislation under the Commerce Clause.”); *Burlington Northern & Santa Fe Ry. Co. v. Burton*, 270 F.3d 942, 945 (10th Cir. 2001) (discussing both Circuit and Supreme Court precedent dealing with enforcement and abrogation of sovereign immunity). While *Seminole* did rule that Congress could not abrogate state sovereign immunity under any Article I powers, many academics took the view that Congress could still abrogate it under the bankruptcy clause. See Hon. Randolph J. Haines, *Getting to Abrogation*, 75 AM. BANKR. L.J. 447, 470-71 (2001). This view ultimately proved correct. See *In re Soileau*, 488 F.3d 302, 307 (5th Cir. 2007) (“Applying Hood and Katz to the instant case, we conclude that the State here has no claim to sovereign immunity. Whatever uncertainty there may be as to the outer limits of the holdings of *Katz* and *Hood*, at the very least they together establish beyond cavil that an in rem bankruptcy proceeding brought merely to obtain the discharge a debt or debts by determining the rights of various creditors in a debtor’s estate—such as is brought here—in no way infringes the sovereignty of a state as a creditor.”).

<sup>161</sup> See *Coleman v. Court of Appeals*, 566 U.S. 30, 64-65 (2012) (Ginsburg, J., dissenting) (“Finally, the plurality’s opinion does not authorize state employers to violate the FMLA, although it does block injured employees from suing for monetary relief. The self-care provision remains valid Commerce Clause legislation, Maryland concedes, and consequently binds the states, as well as the private sector. An employee wrongly denied self-care leave, Maryland also acknowledges, may, pursuant to *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), seek injunctive relief against the responsible state official. Moreover, the U.S. Department of Labor may bring an action against a State for violating the self-care provision and may recover monetary relief on an employee’s behalf.”) (citations omitted); *Randolph v. Rodgers*, 253 F.3d 342, 347-48 (8th Cir. 2001); *V-1 Oil Co. v. Utah State Dep’t of Pub. Safety*, 131 F.3d 1415, 1421 (10th Cir. 1997) (“In *Ex parte Young*, the Supreme Court held that individuals may sue state officials in their official capacities for prospective injunctive relief, establishing an exception to the Eleventh Amendment immunity doctrine. Insofar as V-1 seeks prospective injunctive relief from Utah’s alleged ongoing violation of the Commerce Clause, Utah state officials do not enjoy immunity under the Eleventh Amendment.”) (citations omitted); *Santiago v. Conn. Dep’t of Transp.*, No. 3:12CV132 (JBA), 2012 WL 5398884, at \*3 (D. Conn. Nov. 5, 2012) (“The self-care provision remains valid Commerce Clause legislation, Maryland concedes, and consequently binds the states, as well as the private sector. An employee wrongly denied self-care leave, Maryland also acknowledges, may, pursuant to *Ex parte Young*, 209 U.S. 123 (1908), seek injunctive relief against the responsible state official. It is this distinction that Plaintiff relies on for his claims for injunctive relief against Rossi.”) (citations omitted) (internal quotation marks omitted).

<sup>162</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997). Technically, this case only dealt with whether the federal legislation was valid under the Fourteenth Amendment. See *id.* It did not answer the question as to whether the law was valid abrogation. See *id.* However, because the two analyses are essentially the same as described above, *Boerne’s* test is properly discussed in the topic of abrogation.

to the enforcement of a Constitutional right.<sup>163</sup> This quickly led to a great deal of confusion.<sup>164</sup> However, at present, courts have begun to get a better grasp on the doctrine, due in large part to two Supreme Court ADA Title II rulings—*Tennessee v. Lane* and *United States v. Georgia* discussed below.<sup>165</sup>

Qualified immunity as applied to the ADA is a much easier matter. The ADA, specifically Title II of the ADA, deals explicitly with government conduct, and specifically calls out the unlawful actions of “public entities.”<sup>166</sup> When Title II was in its formative years within the federal courts, some courts had difficulties dealing with the question of whether qualified immunity applied to the ADA.<sup>167</sup> This was so because litigants, mistakenly, sued government entities for damages in their individual capacities.<sup>168</sup>

### B. *The Development of Title II and Sovereign Immunity Constitutional Holdings*

As noted above, for congressional enforcement legislation to be valid, it must *at least* bear a close relationship to the constitutional right that it seeks to enforce.<sup>169</sup> To conduct this analysis courts look at

<sup>163</sup> *Id.* at 520.

<sup>164</sup> See *Madison v. Ritter*, 240 F. Supp. 2d 566, 569 (W.D. Va. 2003).

<sup>165</sup> See *United States v. Georgia*, 546 U.S. 151, 159 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004). See also *Maliandi v. Montclair State Univ.*, 845 F.3d 77, 82 (3d Cir. 2016) (“Our Eleventh Amendment jurisprudence has wound its way through a number of variations—both subtle and significant—over the past decades.”); Joseph M. Pellicciotti & Micheal J. Pellicciotti, *Sovereign Immunity & Congressionally Authorized Private Party Actions Against the States for Violation of Federal Law: A Consideration of the U.S. Supreme Court’s Decade Long Decisional Trek, 1996-2000*, 59 BAYLOR L. REV. 623, 665-66 (2007) (summarizing the Supreme Court’s confusing jurisprudence on the issue of valid enforcement and abrogation and noting how it became “less predictable”).

<sup>166</sup> See Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 (1990).

<sup>167</sup> See *Gorman v. Bartch*, 152 F.3d 907, 915-16 (8th Cir. 1998).

<sup>168</sup> See 1 Americans with Disab.: Pract. & Compliance Manual § 2:187 (May 2018) (West) (“Whether qualified immunity is available at all in suits brought pursuant to ADA Title II is an open question since the defense is available only in individual capacity suits, but the recent trend is for courts to hold that individual capacity suits are not cognizable under Title II, which is directed at public entities. Despite this trend, an individual defendant may be held personally liable under the ADA’s anti-retaliation provision where the underlying conduct opposed by a private plaintiff was made unlawful by ADA Title II.”) (citations omitted).

<sup>169</sup> I say “at least” because in those cases where the conduct complained of under the Statute actually does violate the constitution there is no need to look at how close of a relationship there is. See generally, *United States v. Georgia*, 546 U.S. 151 (2006).

each claim of abrogation on a case by cases basis.<sup>170</sup> This means, courts ask, (1) whether the state conduct violated the federal law at hand, and (2) whether the conduct also violated the constitution—if so there is valid enforcement and if the intent to abrogate was clearly stated, the abrogation is valid.<sup>171</sup> Otherwise, it will still be valid enforcement legislation, though no abrogation.<sup>172</sup> However, if the conduct did not also violate the Constitution, courts must then (3) look to whether the congressional action identified a history of discrimination or constitutional violation, and (4) if so, they must ask whether such action in the case before the court was a congruent and proportionate response to that history.<sup>173</sup>

The development around sovereign immunity abrogation can best be explained by reference to two Supreme Court decisions: *Tennessee v. Lane* and *U.S. v. Georgia*.<sup>174</sup> In *Lane*, the plaintiffs sought to gain access to a courthouse.<sup>175</sup> When they were unable to do so because the courthouse building was inaccessible, the plaintiffs filed suit for damages.<sup>176</sup> Additionally, the regulations enforcing Title II contain rather specific requirements as to buildings.<sup>177</sup> The dissent by Justice Rehnquist attempted to use, in part, the Court's prior decision in *Garrett v. Board of Trustees*<sup>178</sup> to defeat the plaintiff's assertion that Title II and its regulations validly allowed for damages suits against

<sup>170</sup> *Georgia*, 546 U.S. at 159.

<sup>171</sup> *See id.*

<sup>172</sup> However, that rule is not very important to our analysis here, since this article focuses on abrogation.

<sup>173</sup> *Georgia*, 546 U.S. at 159.

<sup>174</sup> *See Tennessee v. Lane*, 541 U.S. 509 (2004). *Lane* focused very heavily on the “fact finding” conducted by Congress in the area of public discrimination against persons with disabilities. *See id.* I am of the opinion that the fact of systemic disability discrimination is so well entrenched in public knowledge now that congressional findings should be unnecessary. Perhaps the best discussion of the court's inquiry into congressional fact finding in Fourteenth Amendment legislation was conducted in a law review article published at New York Law a few years ago. *See William D. Araiza, Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878 (2013). *See also Georgia*, 546 U.S. 151.

<sup>175</sup> *See Lane*, 541 U.S. at 513-14. Indeed, not only were plaintiffs seeking to gain access to the courthouse to observe the process (one was a reporter) but the Lane himself was attempting to get to his own criminal court date. *See id.*

<sup>176</sup> *Id.* at 514. Technically, they sought “damages and equitable relief” but equitable relief, as noted above, is generally available under *Ex parte Young*. *Id.*

<sup>177</sup> *See Lane*, 541 U.S. at 538, 548-50, 553 (Rehnquist, C.J., dissenting).

<sup>178</sup> To be fair, there was a great deal of confusion as to the validity of Title II abrogation after *Garret. Bd. of Trs. of Univ. of Al. v. Garrett*, 531 U.S. 356 (2001). *See also Panzardi-Santiago v. Univ. of Puerto Rico*, 200 F. Supp. 2d 1, 10-11 (D. Puerto Rico 2002) (discussing the chaotic nature of court decisions on the subject).

the states.<sup>179</sup> The majority, however, quickly distinguished Title I and Title II by stating:

Taken together, the historical record and the broad sweep of the statute suggest that Title I's true aim was not so much to enforce the Fourteenth Amendment's prohibition against disability discrimination in public employment as it was to "rewrite" this Court's Fourteenth Amendment jurisprudence. . . . In view of the significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' § 5 enforcement power.<sup>180</sup>

In evaluating the situation, the majority noted that congressional findings discovered a long history of discrimination against people with disabilities.<sup>181</sup> It also found that Title II, at least under the facts in *Lane*, aimed at addressing the right of access to the courts—which is a fundamental right that had been traditionally denied to persons with disabilities.<sup>182</sup> Having identified the historical denial of such a fundamental right, the Court lastly considered whether Title II's enforcement in this circumstance was "congruent and proportional response" to that history of discrimination.<sup>183</sup> The Court found that it was a "congruent and proportional response" because (1) other efforts to end such discrimination had failed<sup>184</sup>; (2) the remedy is narrow because even the architectural regulations set forth different

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<sup>179</sup> *Lane*, 541 U.S. at 538 (Rehnquist, C.J., dissenting).

<sup>180</sup> *Id.* at 522.

<sup>181</sup> In total, the Supreme Court stated, "The ADA was passed by large majorities in both House of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities. In the years immediately preceding the ADA's enactment, Congress held 13 hearings and created a special task force that gathered evidence from every State in the Union. The conclusions Congress drew from this evidence are set for in the task force and Committee Reports, described in lengthy legislative hearings, and summarized in the preamble to the statute. Central among these conclusion was Congress' finding that 'individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society.'" *Id.* at 516 (citing Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (a)(7) (2008)).

<sup>182</sup> *See id.* at 529.

<sup>183</sup> *Id.* at 531.

<sup>184</sup> *Id.* at 511.



methods of compliance for buildings that are older and harder to make totally compliant<sup>185</sup>; and (3) the duty accommodate by making buildings accessible is perfectly consistent with the well-established due process principle that, “within the limits of practicability, a State must afford to all individual a meaningful opportunity to be heard in courts.”<sup>186</sup> After *Lane*, some courts believed that only rights such as the right of access to the courts could validly abrogate state sovereign immunity.<sup>187</sup> Fortunately, two years later, the Court began to undo that problem in *United States v. Georgia*.<sup>188</sup>

In *United States v. Georgia*, an inmate at a Georgia prison sued for damages under § 1983 (against state actors in their individual capacities) and Title II of the ADA.<sup>189</sup> The question was whether the prison’s failure to accommodate him could lead to damages under Title II even though it did not affect the fundamental right of access to the courts.<sup>190</sup> In this case, the Court finally expanded its analysis of abrogation outside the right of access to the courts.<sup>191</sup> Finding that the complaint also stated causes of action for violations of the Eighth

<sup>185</sup> *Tennessee v. Lane*, 541 U.S. 509, 531 (2004).

<sup>186</sup> *Id.* at 532.

<sup>187</sup> See *Bill M. ex rel. William M. v. Neb. Dep’t of Health and Human Servs. Fin. & Support*, 408 F.3d 1096, 1100 (8th Cir. 2005) (“We conclude that *Alsbrook* has been modified by *Lane* to the extent that a discrete application of Title II abrogation—related to claims of denial of access to the courts—has been deemed by the Court to constitute a proper exercise of Congress’ power. Other applications of Title II abrogation, like the one at issue here, continue to be governed by *Alsbrook*.”); *Cochran v. Pinchak*, 401 F.3d 184, 193 (3d Cir. 2005) (refusing to extend *Lane* to the prison context); *Miller v. King*, 384 F.3d 1248, 1273 (3d Cir. 2004) (declining to extend *Lane* to non-fundamental rights cases).

<sup>188</sup> See *United States v. Georgia*, 546 U.S. 151 (2006). The importance of Georgia in this context cannot be overstated. In all of the cases I listed above, the Supreme Court vacated the judgements and remanded the cases back to the circuit courts for consideration in light of Georgia. See *United States v. Neb. Dep’t of Health and Human Servs. Fin. & Support*, 547 U.S. 1067 (2006); *Cochran v. Pinchak*, 412 F.3d 500 (3d Cir. 2005) (“It appearing that the Supreme Court has before it the consolidated cases of *United States v. Georgia*, and *Goodman v. Georgia*, cert granted May 16, 2005, that are appeals from the Court of Appeals for the Eleventh Circuit which discuss *Miller v. King*, a case relied on by the majority opinion in the within case, it is ORDERED that the Petitions for Panel Rehearing be and are hereby GRANTED, that the opinion and judgment in the within case be VACATED and that the matter be held C.A.V. until such time as the Supreme Court decides the consolidated cases of *United States v. Georgia*, and *Goodman v. Georgia*.”) (citations omitted). See also *Miller v. King*, 449 F.3d 1149, 1150 (11th Cir. 2006) (“In light of the Supreme Court’s decision in *United States v. Georgia*, we vacate in full our prior opinion in *Miller v. King*”) (citations omitted).

<sup>189</sup> *Georgia*, 546 U.S. at 154-55.

<sup>190</sup> See *id.* at 151.

<sup>191</sup> See *id.* at 158-59 (noting that the abrogation power extends to all constitutional rights under the Fourteenth Amendment).

Amendment, the Court held that there was proper abrogation of sovereign immunity.<sup>192</sup> Some specific facts bare mentioning here. The plaintiff, Tony Goodman, had paraplegia and used a wheelchair to get around.<sup>193</sup> However, because of his disability, the prison held him in his cell for 23 hours a day—again, ostensibly, this was due to his disability, not due to any infraction of prison rules.<sup>194</sup> Additionally, as a result of this treatment he was denied access to much needed medical attention<sup>195</sup> and even injured himself when trying to move from his chair to the toilet or to his shower because no one was there to offer him assistance—i.e., there was no accommodation for his disability.<sup>196</sup> Moreover, the prison was not in compliance with the ADA's building requirements.<sup>197</sup> This in turn caused him even more turmoil because he was unable to access other programs within the prison, such as medical treatment, and more.<sup>198</sup>

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<sup>192</sup> See *id.* at 157, 158 (“Therefore, Goodman’s claims for money damages against the State under Title II were evidently based, at least in large part, on conduct that independently violated the provisions of § 1 of the Fourteenth Amendment . . . While the Members of this Court have disagreed regarding the scope of Congress’s prophylactic enforcement powers under § 5 of the Fourteenth Amendment . . . no one doubts that § 5 grants Congress the power to enforce . . . the provisions of the Amendment by creating private remedies against the States for *actual* violations of those provisions. Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights . . . This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States . . . Thus, insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.”) (citations omitted) (internal quotation marks omitted).

<sup>193</sup> See *id.* at 154.

<sup>194</sup> *Id.* at 155.

<sup>195</sup> *United States v. Georgia*, 546 U.S. 151, 155 (2006).

<sup>196</sup> *Id.* at 157 (“In fact, it is quite plausible that the alleged deliberate refusal of prison officials to accommodate Goodman’s disability-related needs in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs constituted ‘exclu[sion] from participation in or . . . deni[al] of’ the benefits of the prison’s ‘services, programs, or activities.’”) (quoting Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (1990)).

<sup>197</sup> See *id.* at 155 (“He alleged that the lack of accessible facilities rendered him unable to use the toilet and shower without assistance, which was often denied.”).

<sup>198</sup> *Id.* (“On multiple occasions, he asserted, he had injured himself in attempting to transfer from his wheelchair to the shower or toilet on his own, and, on several other occasions, he had been forced to sit in his own feces and urine while prison officials refused to assist him in cleaning up the waste. He also claimed that he had been denied physical therapy and medical treatment, and denied access to virtually all prison programs and services on account of his disability.”).

Relying on the Supreme Court's prior decisions in cases such as *Garrett v. Board of Trustees*,<sup>199</sup> the State of Georgia argued that Congress had exceeded its authority under the enforcement clause of the Fourteenth Amendment.<sup>200</sup> Additionally, the State attempted to limit the application of the Court's decision in *Lane* to instances of rights as fundamental as the right of access to the courts.<sup>201</sup> Although these arguments were particularly intricate, it would have been nearly impossible for an untrained litigant to make them. Thus, it is relevant to note that the original petition was a *pro se* petition with little chance of success, that is, until the United States intervened to defend the constitutionality of a federal statute.<sup>202</sup>

The Supreme Court in *Georgia* did not actually state that all of these claims were violations of the Eighth Amendment.<sup>203</sup> However, it did assume that the lower court's assertions that there were Eighth Amendment violations was correct.<sup>204</sup> The Supreme Court went further and, without much discussion, concluded:

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<sup>199</sup> As noted above, *Garrett* dealt with Title I of the ADA and expressly reserved the question of whether Title II had validly abrogated sovereign immunity. Therefore, even I admit, the defendants were justified in at least initially trying to justify their argument on the basis of *Garrett*.

<sup>200</sup> See *Georgia*, 546 U.S. at 157-58. While, I do appreciate and support the Court's ruling in *Lane*, I also admit that the Court could have easily avoid all of this by simply rationalizing the decision on grounds that Title II is valid as to all conduct that violates the Constitution and then some. Instead the court simply stated, "Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further." *Tennessee v. Lane*, 541 U.S. 509, 531 (2004).

<sup>201</sup> See Oral Argument at 30, *United States v. Georgia*, 546 U.S. 151 (2006) (No. 04-1203), <https://www.oyez.org/cases/2005/04-1203> ("First of all, this case is not anything like *Tennessee versus Lane*. It doesn't involve the very important civil right of access to courts, access to voting booths, or anything like that.").

<sup>202</sup> See *Georgia*, 546 U.S. at 155. See also 28 U.S.C. § 2403(a) (1976) ("In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.").

<sup>203</sup> See *Georgia*, 546 U.S. at 159.

<sup>204</sup> *Id.* ("From the many allegations in Goodman's *pro se* complaint and his subsequent filings in the District Court, it is not clear precisely what conduct he intended to allege in support of his Title II claims. Because the Eleventh Circuit did not address the issue, it is likewise unclear to what extent the conduct underlying Goodman's constitutional claims also violated Title II. Moreover, the Eleventh Circuit ordered that the suit be remanded to the District Court to per-

While the Members of this Court have disagreed regarding the scope of Congress's "prophylactic" enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to enforce the provision of the Amendment by creating private remedies against the States for *actual* violations of those provisions.<sup>205</sup>

Additionally, the Court went further and made explicitly clear that the power of abrogation was not simply limited to the right of access to the courts by stating, "This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States [for all actions that also violate the constitution]." <sup>206</sup>

Finally, the Court set forth three of the factors in the abrogation scenario to determine if abrogation had been proper, requiring that lower courts determine:

on a claim by claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.<sup>207</sup>

Ultimately, one may look at Georgia and ask the following question—"insofar as locking a person in a wheelchair without accommodations violated both the ADA and the Eighth Amendment can he not sue the individual guards who did so under § 1983?"<sup>208</sup> To be sure, the claims that Goodman made did allege some aspects of § 1983, though they certainly did not allege that the failure to accommodate him were part of a constitutional right; neither did they allege that the

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mit Goodman to amend his complaint, but instructed him to revise his factual allegations to exclude his "frivolous" claims—some of which are quite far afield from actual constitutional violations (under either the Eighth Amendment or some other constitutional provision), or even from Title II violations. It is therefore unclear whether Goodman's amended complaint will assert Title II claims premised on conduct that does not independently violate the Fourteenth Amendment.").

<sup>205</sup> *Id.* at 158.

<sup>206</sup> *Id.* at 158-59.

<sup>207</sup> *Id.* at 159.

<sup>208</sup> The Supreme Court noted that his complaint was not precisely clear as to which conduct he alleged violated statute and the constitution. *Id.* ("[I]t is not precisely clear what conduct he intended to allege in support of his Title II claims.").

building requirements under the ADA were.<sup>209</sup> But suppose that the failure of the prison to address these building requirements, and lack of accommodations in services, amounted to an actual Eighth Amendment violation. In this instance, it would seem perfectly reasonable to sue the entity for damages,<sup>210</sup> and the individual prison guards who have otherwise failed to ease the cruel and unusual punishment imposed by the failure to maintain accessible facilities or accommodate the individual.<sup>211</sup>

Now many courts have recognized that even instances of rational basis constitutional equal protection may serve as a valid basis to abrogate sovereign immunity, it is simply more difficult to show “congruence and proportionality.”<sup>212</sup> The difficulty of finding congruence and proportionality can best be demonstrated in the handicap placard

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<sup>209</sup> See *United States v. Georgia*, 546 U.S. 151, 154-55 (2006). Indeed, several of his claims were not constitutional in nature at all.

<sup>210</sup> Of course, suing the entity for damages under § 1983 could only be done against a local entity. *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). The individual could sue state actors in their individual capacities under § 1983 in the appropriate circumstance. *Id.*

<sup>211</sup> Indeed, at that point it may be perfectly reasonable to sue the Warden of the prison for failure to maintain accessible facilities in his individual capacity insofar as that failure amounted to an Eighth Amendment violation.

<sup>212</sup> For example, in *Toledo v. Sanchez*, the First Circuit Court of Appeals held that the rational basis test applied to the treatment of children with disabilities in public schools. See *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006). It further held that the plaintiff failed to properly allege a violation of the rational basis test. See *id.* at 34. However, the court nonetheless found that the abrogation in that case was a “congruent and proportional response” to the history of equal protection violations that persons with disabilities encountered. See *id.* See also, *Ass’n for Disabled Americans, Inc. v. Fla. Int’l Univ.*, 405 F.3d 954, 957, 958 (11th Cir. 2005); *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005); *Tri-Cities Holdings LLC v. Tenn. Health Servs. & Dev. Agency*, No. 2:13-CV-305, 2014 WL 12705227 at \*5 (E.D. Tenn. April 10, 2014) (noting that prior to *United States v. Georgia*, several courts had held that Title II was valid abrogation for due process claims, but not for rational basis equal protection claims but where a plaintiff also alleges that the conduct actually violated the equal protection clause’ rational basis-disability analysis, then abrogation was proper) (“In a 2010 published opinion, a panel of the Sixth Circuit distinguished between cases where plaintiffs allege unequal treatment and misconduct which allegedly violates both the Fourteenth Amendment and Title II independently by looking to the level of scrutiny to be applied. In *Mingus*, a state prisoner alleged that he was being discriminated against as a result of his disability by being denied a single occupancy room while other able-bodied prisoners and other prisoners with different disabilities were provided with single occupancy rooms. He further alleged that there is no rational basis for the classification. Noting that *Mingus* did not claim to deserve heightened scrutiny and that he made a traditional equal protection claim and not an “equal protection-type claim of discrimination,” the Sixth Circuit found that *Mingus* had alleged conduct that independently violated both Title II and the Fourteenth Amendment.”) (citing *Mingus v. Butler*, 591 F.3d 474, 483 (6th Cir. 2010)).

cases.<sup>213</sup> Over the past two decades several circuits have addressed the problem of whether enforcement of the so-called “surcharge provision” can validly abrogate state sovereign immunity.<sup>214</sup> The Ninth Circuit addressed this problem in 1999,<sup>215</sup> the Fifth Circuit addressed it in 2000,<sup>216</sup> and the Eighth Circuit addressed it in 2006.<sup>217</sup>

The Ninth Circuit discussed this issue in *Dare v. California*.<sup>218</sup> In that case the Court of Appeals held that (1) a fee charged for a handicap parking permit constituted a “surcharge” for purposes of Title II of the ADA and its implementing regulations<sup>219</sup> and (2) that because this facial discrimination was a form of irrational discrimination against people with disabilities the regulation constituted a congruent and proportional response to the history of disability discrimination.<sup>220</sup> At least two other circuits have decided differently; but only on the ground that the surcharge regulation was not congruent and proportional to enforcing the equal protection clause.<sup>221</sup> Nevertheless, in the Ninth Circuit, one would be justified in asserting that charging individuals with disabilities a surcharge constitutes an irrational discriminatory government act, which in turn constitutes a violation of the equal protection clause.<sup>222</sup> Therefore, it would seem perfectly reasonable that an individual with a disability may wish to sue the actual state official for damages that forced him or her to pay this fee.<sup>223</sup>

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<sup>213</sup> See *Klinger v. Director, Dep’t of Revenue, State of Mo.*, 433 F.3d 1078, 1082 (8th Cir. 2006), *supplemented on other grounds by Klinger v. Director, Dep’t of Revenue, State of Mo.*, 455 F.3d 888 (8th Cir. 2006); *Neinast v. Texas*, 217 F.3d 275 (5th Cir. 2000); *Dare v. Cal., Dep’t of Motor Vehicle*, 191 F.3d 1167 (9th Cir. 1999); *Duprey v. Conn., Dep’t of Motor Vehicles*, 28 F. Supp. 2d 702 (D. Conn. 1998); *Thrope v. Ohio*, 19 F. Supp. 2d 816 (S.D. Ohio 1998).

<sup>214</sup> See, e.g., *Klinger*, 433 F.3d at 1082; *Neinast*, 217 F.3d at 275; *Dare*, 191 F.3d at 1167. I leave a full discussion of the surcharge provision and its applicability in the sovereign immunity context for another article.

<sup>215</sup> *Dare*, 191 F.3d at 1170.

<sup>216</sup> *Neinast*, 217 F.3d at 277.

<sup>217</sup> *Klinger*, 433 F.3d at 1082.

<sup>218</sup> See *Dare*, 191 F.3d at 1170.

<sup>219</sup> See *id.* at 1172-73 (noting that this is a charge used to help fund a program required by the ADA—because the state uses these placards to meet its parking requirements—constitutes a surcharge).

<sup>220</sup> See *id.* at 1174-75.

<sup>221</sup> See *Klinger*, 433 F.3d at 1082; *Neinast*, 217 F.3d at 275.

<sup>222</sup> This is so because the Ninth Circuit held the surcharge provision to validly abrogate state sovereign immunity on an equal protection basis. See *Dare v. Cal., Dep’t of Motor Vehicle*, 191 F.3d 1167, 1174-75 (9th Cir. 1999).

<sup>223</sup> While the Ninth Circuit did not use the *Georgia* method, as *Georgia* had not yet been decided, the Ninth Circuit appears to have simply assumed that such conduct did constitute irrational discrimination against persons with disabilities. *Id.*

C. *Application of These Holdings to § 1983 Cases and Consequences*

Now comes the large question—could these constitutional holdings be used to defeat assertions of qualified immunity by state actors sued in their individual capacities? Note that in all of the above cases, the ADA was used to sue state entities; thus, qualified immunity was not at issue.<sup>224</sup> Recall also that in order to defeat qualified immunity a litigant must show that the right violated was clearly established such that a reasonable officer would be aware of it.<sup>225</sup>

To begin to answer this question, however, it must be shown that the question of qualified immunity can be answered by resorting to other types of lawsuits other than § 1983 cases. This can be done from two equal lines of argument. First, a similar action is already done for multiple areas of the law.<sup>226</sup> Second, the nature of constitutional law requires it.<sup>227</sup>

As to the first line of argument, noted above, there is an interrelationship between the *Bivens* doctrine and § 1983 litigation.<sup>228</sup> Many courts have asserted legal rules along the lines of “[f]or purposes of immunity, we have not distinguished actions brought under 42 U.S.C. § 1983 against state officials from *Bivens* actions brought against federal officials.”<sup>229</sup> Therefore, since Title II of the ADA seeks to enforce substantially the same rights as § 1983, and because courts have long applied the same immunity defenses to § 1983 and *Bivens*, it would seem that courts should be willing to accept matters from other types

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<sup>224</sup> See *Carter v. Maryland*, No. JFK-12-1789, 2012 WL 6021370, at \*5 (D. Md. Dec. 3, 2012) (“By definition, then, individuals sued in their individual capacities are not public entities [for purpose of Title II]. [This suit] will proceed only against the State of Maryland and the other State Defendants in their official capacities—the latter because an official-capacity suit is effectively a suit against the entity for which the official-capacity defendant serves as an agent. The State defendants have asserted qualified immunity . . . but because they may only be sued in their official capacities, they are not entitled to claim it. Qualified immunity does not apply to suits against individuals sued in their official capacities.”). See also *Gard v. Dooley*, No. 4:14-CV-04023-LLP, 2015 WL 632097 at \*3 (D. S.D. Feb. 13, 2015) (“[Plaintiff] has also pleaded a claim under the ADA, to which the defense of qualified immunity does not apply.”).

<sup>225</sup> *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

<sup>226</sup> See *Antoine v. Byers*, 508 U.S. 429 (1993).

<sup>227</sup> See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>228</sup> See *supra* Part I, Section A.

<sup>229</sup> *Antoine*, 508 U.S. at 433 n.5 (citing *Butz v. Economou*, 438 U.S. 478, 503-04 (1978)).

of cases—dealing with establishing constitutional rights—to address immunity issues in § 1983 contexts.<sup>230</sup>

As to the second line of argument, one would recall that the Constitution is an affirmative restraint on government power and often forces the government to provide something.<sup>231</sup> These rules apply to all government conduct that falls under each provision of the Constitution where and when appropriate.<sup>232</sup> Thus, every time an officer of the law arrests someone he must do so without excessive force lest he violate the Fourth Amendment.<sup>233</sup> Consider now a situation where Congress has actually enacted two versions of § 1983.<sup>234</sup> The traditional version does not abrogate sovereign immunity.<sup>235</sup> The new version does and only does so for actual constitutional violations.<sup>236</sup> Now assume that a state officer arrests someone by using excessive force under a new fact scenario never before seen, and the litigant in that case uses the “New § 1983” against the state directly. In that situation

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<sup>230</sup> In other words, they already look to rights that have been established in *Bivens* cases to evaluate § 1983 cases. Thus, it would seem absurd not to also look at Title II cases establishing constitutional rights to help evaluate claims of constitutional rights in § 1983 or *Bivens* cases.

<sup>231</sup> See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (requiring to obtain a transcript for free); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring of a lawyer).

<sup>232</sup> Of course, there is one provision of the Constitution that applies to individuals as well. See U.S. CONST. amend. XIII.

<sup>233</sup> See U.S. CONST. amend. IV. (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

<sup>234</sup> This is, of course, merely a hypothetical used to illustrate a point.

<sup>235</sup> There are no serious objections to the notion that Congress could have abrogated state sovereign immunity. See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1999) (“That Congress, in passing § 1983, had no intention to disturb the States’ Eleventh Amendment immunity and so to alter the federal–state balance in that respect was made clear in our [prior] decision . . .”); *Quern v. Jordan*, 440 U.S. 332, 341 (1979) (noting that congress did not clearly intend § 1983 to abrogate immunity; thus if it had, then § 1983 would have been valid abrogation).

<sup>236</sup> Of course an argument can be made on these lines: the ADA cases where the conduct does not actually violate the constitution but is nevertheless congruent and proportional to a constitutional right may still help defeat qualified immunity because such cases could be “close enough” to both the constitutional right and facts asserted in § 1983 cases to have put the government on notice—i.e., those cases are so close that they qualify as having made a constitutional right “clearly established” for purposes of qualified immunity. Such an argument would comport with the idea that absent prior circuit decision directly on point, the courts should look to all relevant precedents, including those from the Supreme court, all other circuits, the district courts, and state courts; and also look to whether the Supreme Court or the relevant circuit would decide the issue in favor of the person asserting the right. See *Hope v. Pelzer*, 536 U.S. 730, 739–40 (2002); *Elder v. Holloway*, 510 U.S. 510, 512, 516 (1994); *Dunn v. Castro*, 621 F.3d 1196, 1203 (9th Cir. 2010) (noting that courts may look to precedents from other circuits); *Osolinski v. Kane*, 92 F.3d 934, 936, 938 n.2 (9th Cir. 1996).



the court (say court of appeals) would not even consider qualified immunity, as it would not apply to the State as an entity. Thus, the court would determine in that instance that the alleged facts scenario did violate the constitution. Now, suppose that a year after this precedent came down a person was arrested with excessive force under the same facts, but was suing a local police officer (who say is actually extremely wealthy and is just a police officer for the thrill) and did not want to sue the parish or county. In that instance could the litigant use the constitutional rule established in the New § 1983 case to defeat qualified immunity in the standard § 1983 case? The answer is yes. This is so for two reasons. First, the constitutional rule is the constitutional rule regardless of the statute seeking to enforce it.<sup>237</sup> Second, neither *Bivens* nor § 1983 qualified immunity require resorting to prior decisions under those doctrines to defeat assertions of qualified immunity.<sup>238</sup>

Therefore, much like the “New § 1983,” the ADA also seeks to enforce constitutional rights. As such, it would appear that litigants in § 1983 or *Bivens* cases could look to Title II abrogation cases to defeat assertions of qualified immunity. The arguments in those cases would go as follows: in that prior circuit ADA precedent the court ruled that X was a constitutional violation for purpose of abrogation of sovereign immunity; the facts in this non-ADA case are similar enough to that ADA case to meet the requirement that a litigant show a constitutional right was clearly established such that a reasonable officer would be aware of it.

Recognizing the usefulness of Title II abrogation cases to qualified immunity contexts would have tremendous consequences. First, and foremost, it would dramatically broaden the field of facts to which litigants can resort to show that a constitutional right was clearly

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<sup>237</sup> To say that a constitutional right were to change based on the statute used to enforce it, would be tantamount to saying that congress can change a constitutional rule by legislation. Such an assertion is anathema to our constitutional system. See *Marbury v. Madison*, 5 U.S. 137 (1803) (holding that the courts are to determine what is or is not constitutional).

<sup>238</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In no opinion has it been asserted that a plaintiff in a § 1983 cases must assert only prior § 1983 cases. Indeed, the very notion that courts construe *Bivens* and § 1983 together whenever possible teaches that § 1983 cases need not cite only § 1983 cases. See *Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982) (internal quotation marks omitted).

established.<sup>239</sup> Not only would such litigants have the standard § 1983 cases to establish the right and clarity; but they would also have a massive pool of Title II cases. Second, it would allow the principles of the ADA to protect individuals even where they are not protected under the ADA. For example, some people have serious temporary conditions; though for one reason or another their condition is too temporary to amount to a disability under the ADA.<sup>240</sup> Take for example *United States v. Georgia*.<sup>241</sup> Suppose the plaintiff's legs were just broken, though he was suffering from the same type of conduct. The ruling that the ADA validly enforced the Eighth Amendment did not depend on whether the individual had a disability—it depended on whether the facts alleged amounted to cruel and unusual punishment. An individual could still face the factual scenario that the plaintiff in *United States v. Georgia* felt if he or she had broken legs.

Therefore, and interestingly enough, not only would the ADA be a helping hand to litigants in the § 1983 context fighting claims of qualified immunity, but § 1983 would be a helping hand to the ADA by helping to cover individuals that barely miss coverage under Title II.

## CONCLUSION

The Americans with Disabilities Act is a paradigm shifting statute with sweeping implications. It sought to help fill the gap in protections for people with disabilities that had been left open by previous civil rights laws. Furthermore, Title II of the ADA has helped fill the gap left by § 1983. Although § 1983 is the most prevalent civil rights statute, it often runs up against the problem of qualified immunity. To defeat assertions of qualified immunity a plaintiff must show that a constitutional right was violated and that such right had been clearly established. However, qualified immunity does not apply in ADA Title II cases, which deal with suits against the States. In those cases, litigants do face the issue of “sovereign immunity.” To defeat claims of sovereign immunity, ADA litigants must show that either a constitutional right was violated or that abrogation of such immunity in the

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<sup>239</sup> A full listing of ADA and abrogation cases is far outside the scope of this article. However, with every passing year, and with every new case filed on those grounds, the number of scenarios only continues to increase.

<sup>240</sup> See Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(1)(A) (2009).

<sup>241</sup> See *United States v. Georgia*, 546 U.S. 151, 159 (2006).

specific case at hand was in essence close enough to enforcing that right. In either case, a constitutional right must be identified under the facts of the case. It does not matter that the findings of a constitutional right would be under different statutes, litigants may refer to cases under either to find that a right was clearly established. This is so because (1) no case under either *Bivens* or § 1983 have held they are the exclusive mechanisms for establishing such rights—and indeed they themselves refer to each other frequently; and (2) the very nature of constitutional law is such that it does not matter which statute is used to enforce the constitution—i.e., the government action complained of is still unconstitutional whether under the ADA or § 1983. Therefore, litigants in § 1983 may unabashedly resort to cases under Title II of the ADA, dealing with abrogation of sovereign immunity, to show that a constitutional right was clearly established to defeat assertions of qualified immunity in non-ADA § 1983 cases. The effects of such a theory are clear: (1) it will expand the precedential body from which litigants can draw clearly established law, and (2) it will allow litigants whose rights would otherwise be protected by the ADA, save for minor faults, to resort to § 1983 to assert constitutional rights previously established in ADA abrogation cases.

