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NOTES

THE AMERICANS WITH DISABILITIES ACT AND STATE PRISONS: A QUESTION OF STATUTORY INTERPRETATION

*Emily Alexander**

INTRODUCTION

In its 1997-98 term, the Supreme Court will decide the case of *Yeskey v. Pennsylvania Department of Corrections*,[1] and determine whether the Americans with Disabilities Act[2] ("ADA") applies to state prisons. The statutory language of the ADA does not address this question, and courts have relied on different methods of statutory interpretation to resolve the issue. This Note examines those decisions and argues that many courts have used an inappropriate method of statutory interpretation to decide whether the ADA applies to state prisons. Specifically, courts' reliance on textualism to find the "plain meaning" of the statute without looking to the purpose and intent behind the ADA is misplaced.

The ADA embodies a national policy of non-discrimination against and reasonable accommodation of people with disabilities. Its purposes are "to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities . . . [and] to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[3] Its reach is vast: The ADA prohibits discrimination on the basis of disability by public and private employers, state and local governments, transportation systems, and by private businesses that provide goods and services to the public.[4]

The ADA was drafted broadly in order to eliminate discrimination in these entities and the programs and services they offer.[5] Such broad statutory language, however, is unable to squarely address every situation which may arise under the statute, creating statutory

* The author would like to thank Professor Katherine Franke, and the editors and staff of the Fordham Law Review, especially Stacey Horth-Neubert, for their insights and comments.

1. 118 F.3d 168 (3d Cir. 1997), *cert. granted*, 118 S. Ct. 876 (1998) (mem.).
2. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).
3. *Id.* §§ 12101(b)(4), 12101(b)(1).
4. *Id.* §§ 12111, 12131, 12161, 12182.
5. For example, Title II of the ADA defines discrimination by a public entity as: "[N]o 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." *Id.* § 12132.

ambiguities left for the courts to decide.[6] To determine how an issue should be resolved under the ADA, a court first looks to the statute, but, because it is possible to disagree on the meaning of almost any statutory language,[7] a court may have to look to other sources for clarification.[8] Which sources the court chooses to look to for guidance will depend on what method of statutory interpretation the court uses.[9] Historically, courts—and judges and scholars—have disagreed over the use of various methods of interpretation to discern the meaning of statutory language.[10] The most common methods are intentionalism[11] and textualism.[12]

In addition, the subject matter or parties covered by certain statutes will also affect how a court interprets the statutory text.[13] The Supreme Court has indicated that specific rules apply in particular instances of statutory interpretation.[14]

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6. Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 117-18 (1990) [hereinafter Sunstein, Rights Revolution] (discussing how the prohibition on discrimination in the Civil Rights Act of 1964 contains gaps and "is uninformative" on issues like the "role of discriminatory effects" and therefore requires "judicial answers").

7. *See, e.g.*, Smith v. United States, 508 U.S. 223, 228, 243 (1993) (construing the phrase "uses or carries a firearm" and disagreeing on the meaning of the word "use"; the majority arguing that to "use" a gun includes using it for barter, and the dissent arguing that the "ordinary meaning" of to "use" a gun in this context is as "a weapon"); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv. L. Rev. 593, 599-603 (1995) (discussing the history of "meaning skepticism" regarding the inability of language to "convey clear and determinate commands"); John Polich, Note, *Ambiguity of Plain Meaning:* Smith v. United States *and the New Textualism*, 68 S. Cal. L. Rev. 259 (1994) (arguing that *Smith v. United States* reveals the weakness of textualism as an interpretive method).

8. Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2106 (1990) [hereinafter Sunstein, *Law and Administration*] ("Statutory ambiguity is common. In the face of ambiguity, outcomes must turn on interpretive principles of various sorts; there is simply no other way to decide hard cases."); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 199 (1983) ("To stop at the purely literal meaning of a word, phrase, or sentence—if indeed the purely literal meaning can be found—ignores reality. In the context of the statute . . . words may be capable of many different meanings, and the literal meaning may be inapplicable or nonsensical.").

9. *See* William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 569-71 (1988) [hereinafter Eskridge & Frickey, Cases and Materials].

10. Sunstein, Rights Revolution, *supra* note 6, at 112.

11. *See infra* notes 100-03 and accompanying text.

12. *See infra* notes 104-11 and accompanying text.

13. Eskridge & Frickey, Cases and Materials, *supra* note 9, at 655-89 (discussing rules of interpretation that are based upon "substantive policy presumptions," such as the rule of lenity in criminal cases, interpreting to avoid constitutional problems, and the strict construction of statutes in derogation of sovereignty).

14. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 598-629 (1992) [hereinafter Eskridge & Frickey, *Quasi-Constitutional Law*] (listing various rules, presumptions, and canons created by the Supreme Court which determine how the Court will approach the statutory language when interpreting statutes that, for example, in-

One such rule is applied when a statute affects states' Eleventh Amendment sovereign immunity.[15] Another is applied when an administrative agency regulation is challenged because it allegedly conflicts with the statute under which it was promulgated.[16] The approaches the Court takes to the statutory language in these situations are known, respectively, as the Eleventh Amendment plain statement rule[17] and the *Chevron* doctrine of judicial deference to agency statutory interpretation.[18] The Eleventh Amendment plain statement rule requires that when Congress intends for a statute to abrogate the states' immunity from private suits in federal court, it must state this intent in unequivocal language.[19] The *Chevron* doctrine of deference says that if the language of a statute is ambiguous or silent on any particular issue, a court interpreting a statute administered by an agency should defer to that agency's reasonable interpretation of the statute.[20] Each doctrine establishes a framework for the court to follow in interpreting the statute.[21] Thus, courts will interpret certain statutes using both these categorical requirements and traditional methods of statutory interpretation.

Courts have used both the Eleventh Amendment plain statement rule and the *Chevron* doctrine to interpret the ADA and determine whether it applies to state prisons.[22] In resolving this question, the Eleventh Amendment plain statement rule requires a court to first find that the statutory language contains an unambiguous congressional abrogation of the states' Eleventh Amendment immunity.[23] If so, a court following *Chevron* must then consider whether the Depart-

volve questions of federalism, separation of powers, international law, Indian tribal immunity, and intergovernmental taxation).

15. *See infra* Part III.A.

16. *See infra* Part III.B.

17. Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 Harv. L. Rev. 1959, 1959-63 (1994) [hereinafter Note, *Clear Statement Rules*].

18. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 976 (1992).

19. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985); *see also* Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 14, at 621 (calling the Eleventh Amendment plain statement rule a "super-strong clear statement rule focusing on statutory language alone and requiring a very clear statement by Congress").

20. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984); *see also* Merrill, *supra* note 18, at 978 ("*Chevron* declared that the agency is the preferred gap filler.").

21. *See* Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 14, at 618-25.

22. Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589 (4th Cir. 1997) (finding that the Eleventh Amendment plain statement rule bars the application of the ADA to state prisons), *petition for cert. filed*, 66 U.S.L.W. 3474 (U.S. Dec. 19, 1997) (No. 97-1113); Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168, 170-71 (3d Cir. 1997) (applying *Chevron* and finding that the Department of Justice regulations make it clear the ADA applies to state prisons), *cert. granted*, 118 S. Ct. 876 (1998) (mem.).

23. *Atascadero*, 473 U.S. at 243; *see infra* note 123 and accompanying text.

ment of Justice regulations[24] detailing the application of the ADA to prisons are a reasonable interpretation of the statute. The *Chevron* doctrine first requires the court to look at the statutory language of the ADA to see if Congress intended it to apply to state prisons.[25] If the court determines that the ADA is ambiguous or silent on the issue, the court, following *Chevron*, should then defer to the agency's interpretation.[26] Both the Eleventh Amendment and *Chevron* doctrines, therefore, depend on whether the court finds the statutory language ambiguous or not, a determination that hinges on the court's use of either intentionalism or textualism.

All courts that have addressed this question agree that the ADA satisfies the requirements of the Eleventh Amendment plain statement rule, and abrogates the states' immunity generally.[27] The Fourth Circuit, however, in *Amos v. Maryland Department of Public Safety and Correctional Services*,[28] construed the Eleventh Amendment plain statement rule to require the ADA to contain an additional abrogation of states' immunity on the specific question of its application to state prisons.[29] The court used textualism to interpret the ADA and found that Congress did not intend to go so far in abrogating the states' immunity as to bring state prisons within the coverage of the ADA.[30] Other Circuits have disagreed with the Fourth Circuit's analysis and used different methods of statutory interpretation to conclude that the ADA applies to state prisons.[31] Much of the divergence among the courts can be traced to the Supreme Court's ongoing disagreement regarding the appropriate methods of statutory interpretation.[32]

This Note argues that, although the language of the ADA clearly indicates that it applies to all aspects of state prison operations, courts that focus solely on the text of the statute fail to interpret the statutory language correctly. Courts that hesitate to apply the ADA to state prisons should not construe the text so narrowly as to misinterpret it, but should look to the statutory purpose and the Department of Jus-

24. *See, e.g.*, 36 C.F.R. § 1191.2, at 342-44 (1997) (reprinting the Americans with Disability Act Architectural Guidelines 12.1 to 12.6.2) (specifying architectural standards for detention and correctional facilities).

25. *Chevron*, 467 U.S. at 842-43; *see infra* note 205 and accompanying text.

26. *Chevron*, 467 U.S. at 842-43; *see infra* notes 206-08 and accompanying text.

27. *See, e.g.*, *Amos*, 126 F.3d at 604 (finding that the ADA generally abrogates states' Eleventh Amendment immunity); *Yeskey*, 118 F.3d at 172-73 (same).

28. 126 F.3d 589 (4th Cir. 1997).

29. *Id.* at 600.

30. *Id.* at 601-02.

31. Armstrong v. Wilson, 124 F.3d 1019 (9th Cir. 1997) (relying on the statutory language of the ADA to find that state prisons are covered by the ADA), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686); *Yeskey*, 118 F.3d 168 (applying the *Chevron* doctrine and deferring to the Department of Justice regulations to find that the ADA applies to state prisons); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997) (same).

32. *See* Sunstein, Rights Revolution, *supra* note 6, at 127-28.

tice regulations for guidance. Part I examines the purpose and design of the ADA. Part II discusses various methods of statutory interpretation. Part III provides background on both the Eleventh Amendment plain statement rule and the *Chevron* doctrine. Part IV delineates the main arguments made by the courts of appeals, demonstrating the effect of the Eleventh Amendment plain statement rule and the *Chevron* doctrine on the issue of whether the ADA applies to state prisons. Part V argues that textualism should not be used to answer the question of whether the ADA applies to state prisons. This Note concludes that the Supreme Court should reject the use of textualism to decide whether Congress intended for the ADA to apply to state prisons, and should instead affirm the use of the *Chevron* doctrine in deciding *Yeskey*.[33]

I. THE AMERICANS WITH DISABILITIES ACT

When President Bush signed the Americans with Disabilities Act[34] in 1990, it was heralded as the "Emancipation Proclamation" for people with disabilities.[35] The ADA is notable in two ways: first, it is the most comprehensive civil rights statute to date for individuals with disabilities,[36] and second, it mandates an individualized remedy for discrimination against individuals with disabilities.[37] Prior to the ADA, the Rehabilitation Act ("Rehab Act")[38] was the most important federal statute for individuals with disabilities.[39] In its most far-reaching provision, section 504,[40] the Rehab Act mandates that recipients of federal funding not discriminate against and implement affirm-

33. 118 F.3d 168 (3d Cir. 1997), *cert. granted*, 118 S. Ct. 876 (1998) (mem.).

34. 42 U.S.C. § 12101-12213 (1994).

35. Glen Elsasser, *Senate OKs Rights Bill for Disabled*, Chi. Trib., Sept. 8, 1989, at 1 (quoting Senator Tom Harkin).

36. Robert L. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev. 413, 414-15 (1991) [hereinafter Burgdorf, *Analysis and Implications*].

37. *Id.* at 413; *see* Chai R. Feldblum, *The (R)evolution of Physical Disability Anti-discrimination Law: 1976-1996*, 20 Mental and Physical Disability L. Rep. 613, 620 (1996).

38. 29 U.S.C. §§ 791, 793, 794 (1994).

39. *See* Bonnie P. Tucker & Bruce A. Goldstein, 1 Legal Rights of Persons with Disabilities § 1:3 (1992). The ADA was not intended to supersede or supplant the Rehab Act, and Congress specifically stated that section 504 of the Rehab Act and Title II of the ADA should be construed to provide the same "remedies, procedures, and rights." 42 U.S.C. § 12133 (1994). Courts have accordingly interpreted the ADA using Rehab Act case law. As stated by the court in *Yeskey*, "Congress has *directed* that Title II of the ADA be interpreted in a manner consistent with Section 504 [of the Rehab Act], and all the leading cases take up the statutes together, as will we." 118 F.3d 168, 170 (3d Cir. 1997), *cert. granted*, 118 S. Ct. 876 (1998) (mem.).

40. 29 U.S.C. § 794 (1994). Section 504 states in part: "No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." *Id.*

ative action programs to benefit individuals with disabilities.[41] Other statutes target more specific sub-groups of those covered by the ADA,[42] and cover only those programs and activities either conducted by the federal government or by an entity receiving federal funds.[43] Furthermore, they focus heavily on education, employment, and vocational rehabilitation, rather than granting the disabled a general right against discrimination.[44] In contrast, the ADA mandates the elimination of discrimination against individuals with disabilities by both public and private entities[45] and demands that these individuals be integrated into all aspects of society.[46] To accomplish this goal, the ADA prohibits discrimination by private employers,[47] state and local governments,[48] transportation systems,[49] and providers of public accommodations.[50]

41. *See* Laura F. Rothstein, Disabilities and the Law § 1.02, at 3 (1992). For example, every federal agency was required to develop a plan for the "hiring, placement, and advancement in employment of individuals . . . with disabilities." 29 U.S.C. § 791(c) (1994).

42. These statutes include the Architectural Barriers Act, 42 U.S.C. §§ 4151-4157 (1994) (mandating access and a barrier-free environment in federally funded buildings), the Education for All Handicapped Children Act, now known as the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491 (1994) (requiring the provision of "special education and related services" designed to meet the needs of children with disabilities), and the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6083 (1994) (describing the rights of individuals with disabilities).

43. *See, e.g.*, 29 U.S.C. § 794 (1994) (limiting discrimination from programs to those which are "receiving Federal financial assistance" or those conducted by the Federal government itself); Burgdorf, *Analysis and Implications*, *supra* note 36, at 428-29.

44. *See, e.g.*, 29 U.S.C. § 706 (1994) (describing an "individual with a disability" as anyone with an impairment that "results in a substantial impediment to employment"); Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. Rev. 1341, 1407 (1993) (calling for society to end its "systematic, stigmatizing, subordination" by allowing full participation of people with disabilities in all areas of society). While the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6083 (1994), attempted to establish substantive rights for individuals with disabilities, the Supreme Court held in *Pennhurst State School and Hospital v. Halderman*, that it did not impose any obligations upon the states and, consequently, did not provide a private right of action for its enforcement. 451 U.S. 1, 18, 27-28 (1981).

45. 42 U.S.C. § 12101(b)(1) (1994).

46. *Id.* § 12101(a)(8).

47. *Id.* § 12111(5).

48. *Id.* § 12131(1)(A).

49. *Id.* § 12161.

50. *Id.* § 12182.

In contrast to prior statutes, the ADA covers public entities.[51] Title II of the ADA[52] states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[53] It further defines "public entity" as "any State or local government [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government."[54] To have a successful claim against a public entity under the ADA, the plaintiff must meet three criteria: (1) the plaintiff must be found to be a "qualified individual[55] with a disability,"[56] (2) who has been discriminated[57] against (3) because of their disability, by a public entity. If an individual with a disability is found to have been unlawfully discriminated against, the public entity must make reasonable accommodations or modifications for that person,[58] unless such accommodation or modification creates an undue hardship for the entity or fundamentally alters the program.[59] While this is the basic framework of the ADA, the next two

51. Other statutes applied to individual agencies of certain state and local governments only if they received federal funds. For example, the Rehab Act applies to employers who have received federal contracts and grants. 29 U.S.C. §§ 793, 794 (1994).

52. 42 U.S.C. §§ 12101-12213 (1994). Title II, applying to public entities including any state agency, is the relevant section to determine whether the ADA applies to prisons.

53. *Id.* § 12132.

54. *Id.* § 12131(1).

55. Under Title II, which covers state and local governments, a qualified individual:

> means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id. § 12131(2).

56. The ADA defines a "disability" as: "(A) a physical or mental impairment that substantially limits one or more of that [individual's] major life activities . . . ; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.* § 12102(2).

57. Title II defines discrimination as the "exclu[sion] from participation in or . . . den[ial] [of] benefits of the services, programs, or activities of a public entity, or . . . subject[ion] to discrimination by any such entity." *Id.* U.S.C. § 12132.

58. The ADA leaves the definitions of reasonable accommodation or modification vague so as not to preclude any type of alteration that may be necessary. *See id.* § 12111(9) (defining "reasonable accommodation" by listing changes that it "may include").

59. Title II, unlike Titles I and III, does not contain any exceptions but, like all other sections of the ADA, contains the term "reasonable accommodation." The regulations promulgated under the ADA provide that reasonable accommodation will not be required for existing facilities of a public entity if it would "result in a fundamental alteration . . . or in undue financial and administrative burdens." 28 C.F.R. § 35.150(a)(3) (1997).

sections examine the structure of the ADA as well as its implementation.

A. *The ADA and Agencies*

To effectuate the ADA's ambitious program, Congress delegated the authority to issue regulations to several agencies.[60] Because the reach of the ADA is vast and because it requires an individualized case-by-case approach to identifying and resolving claims of discrimination,[61] it is necessary to have agencies with flexibility, expertise, and adaptability to address the array of issues that arise under the statute.[62] Title II of the ADA grants the Department of Justice ("DOJ") the authority to implement the application of the ADA to state and local governments.[63] The DOJ regulations,[64] mirroring the broad language of the ADA, state that the ADA covers "all services, programs, and activities provided or made available by public entities"[65] without exception, and is meant to "appl[y] to anything a public entity does."[66] Accordingly, the DOJ regulations explicitly identify prisons as among the programs covered under both the Rehab Act and the ADA.[67] Furthermore, the DOJ and the Architectural and Transportation Barriers Compliance Board ("the Board")[68] have created guidelines spe-

60. See *id.* § 35.190 for a list of designated agencies. See also S. Rep. No. 101-116, at 43 (1989), where the Senate Committee on Labor and Human Resources said that: "[t]he [Equal Employment Opportunity] Commission's regulations [under the ADA] will have the force and effect of law."

61. *See supra* notes 45-50 and accompanying text.

62. For a snapshot of what issues arise under the ADA, the DOJ ADA web page provides updates on current suits and settlements. Department of Justice, *Enforcing the ADA: A Status Report From the Department of Justice* (October-December 1997) (visited Mar. 11, 1998) <http://www.usdoj.gov/crt/ada/octdec97.htm>. For example, a recent status report lists the following lawsuits: a suit against the District of Columbia for TDD access for its 911 emergency response system; a suit against a national chain of motels for violations of the ADA Standards for Accessible Design; a suit against a hospital for failing to provide a sign language interpreter and other auxiliary aids to a deaf patient. *Id.*

63. 42 U.S.C. § 12134(a) (1994).

64. The regulations under Title II of the ADA incorporate those from the Rehab Act. Department of Justice, Title II Technical Assistance Manual: Covering State and Local Government Programs and Services II-1.1000, at 1 (1993) [hereinafter Title II Technical Assistance Manual].

65. 28 C.F.R. § 35.102 (1997).

66. *Id.* pt. 35, app. A, subpt. A at 466.

67. *Id.* § 42.540(h) (stating that "program" under the Rehab Act includes a "department of corrections"); *id.* pt. 542 (establishing an Administrative Remedy Procedure for handling inmate grievances under the Rehab Act in Federal penal institutions); *id.* § 35.190(6) (stating that the DOJ is the designated agency under the ADA for "[a]ll programs, services, and regulatory activities relating to law enforcement, . . . including . . . correctional institutions"); Title II Technical Assistance Manual, *supra* note 64, II-6.3300(6), at 35 (outlining the Americans with Disabilities Act Accessibility Guidelines (ADAAG) and Uniform Federal Accessibility Standards (UFAS) requirements for jails and prisons).

68. Congress originally created the Board pursuant to § 502 of the Rehab Act to ensure compliance with the Architectural Barriers Act. 42 U.S.C. §§ 4151-4157

cifically for prisons that address architectural barriers.[69] Under Title II of the ADA, covered entities must now comply with either the ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG") or the Uniform Federal Accessibility Standards ("UFAS").[70] The ADAAG are issued by the Board, which, after a detailed notice and comment period,[71] promulgated regulations specific to architectural barriers in prisons.[72] These guidelines provide standards for entrances, security systems, visiting areas, holding and housing cells, and medical facilities.[73] One notable aspect of the regulations reflects consideration of the nature of jails and prisons—they explicitly provide exceptions for security reasons.[74] Fidelity to the ADA's overall goal of integration, however, led the Board to refuse to allow the prisons to segregate prisoners with disabilities but, rather, to require that they be integrated into the general prison population.[75] Thus, the agency assigned to implement Title II of the ADA found that it applied to prisons for the following reasons: first, the DOJ regulations under the Rehab Act apply the Act to prisons; second, Congress instructed the DOJ to incorporate the Rehab Act regulations into its ADA regulations; and third, applying the ADA to prisons is consistent with the broad mandate of the statutory language, especially that of Title II, which contains no exceptions to the public entities it covers.

B. *Reasonable Accommodation*

The unique problems that arise in discrimination against individuals with disabilities were evident to Congress when it drafted the ADA. For this reason, the ADA does not remedy discrimination in the same manner as other civil rights statutes. For example, under Title VII of

(1994). The Board is responsible for implementing the ADA in all new and altered facilities, and the DOJ enforces the ADA in all existing facilities. 59 Fed. Reg. 31,698 (1994).

69. Title II Technical Assistance Manual, *supra* note 64, II-6.3300(6), at 35 (listing the standards under the ADAAG and UFAS for jails and prisons); 36 C.F.R. § 1191.2, at 342-44 (1997) (reprinting ADAAG 12.1 to 12.6.2) (specifying architectural standards for detention and correctional facilities).

70. 28 C.F.R. § 35.151(c) (1997). The UFAS specifies "jails, prisons, . . . [and] other detention or other correctional facilities" as entities to which the standards apply. 41 C.F.R. subpt. 101-19.6, app. A at 154 (1997) (reprinting UFAS 4.1.4).

71. *See generally* 59 Fed. Reg. 31,698 (1994) (outlining the responses received to the proposed guidelines on architectural and structural requirements).

72. *See* 36 C.F.R. § 1191.2, at 342-44 (1997) (ADAAG 12.1 to 12.6.2).

73. *Id.*

74. *Id.* In addition, for comments made during the notice and comment period for the regulations, *see* 59 Fed. Reg. 31,699 (1994) ("[E]xceptions to certain requirements based on necessary security considerations are stated generally."); *id.* at 31,700 ("Several commenters noted that signage, particularly that which is raised and brailled, can pose a security risk since it can be removed from walls . . . . [T]he exception clarifies that the . . . requirements for accessible signage . . . apply only to public use areas.").

75. *See* 59 Fed. Reg. 31,704 (1994).

the Civil Rights Act of 1964, an employer is not permitted to consider a person's race, or gender, *inter alia*, in evaluating their abilities.[76] Congress enacted this blanket prohibition on discrimination because characteristics such as race or gender have no bearing on an individual's ability. In contrast, an individual's disability may affect their abilities, and[77] special measures may be required to provide that person with equal opportunities. To address this problem, the Department of Health, Education and Welfare ("HEW")[78] passed the following regulation under the Rehab Act: "A recipient [of federal funds] shall make *reasonable accommodation* to the known [disabilities] of an otherwise qualified . . . applicant or employee unless . . . [such] accommodation would impose an *undue hardship*."[79] This regulation, and the concepts of "reasonable accommodation" and "undue hardship" were incorporated wholesale into the ADA.[80] Consequently, the covered entity must consider whether reasonable modifications[81] would allow the individual to meet program requirements when deciding whether the individual is qualified to participate. Even if modifications are possible, the covered entity does not have to comply if such modification will "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."[82] Because of the importance of the rights at stake, the reasonableness inquiry is a high standard, and the burden of proof rests on the public entity to prove that the accommodation would be unreasonable.[83] Thus, if reasonable modification would either not enable the individual with a disability to perform the essen-

76. 42 U.S.C. 2000(e) (1994); Feldblum, *supra* note 37, at 614; Tucker & Goldstein, *supra* note 39, § 1:2.

77. Tucker & Goldstein, *supra* note 39, § 1:2.

78. Now known as Health and Human Services ("HHS"), this agency has the authority to promulgate regulations under the Rehab Act. *See* 29 U.S.C. § 794 (1994). The responsibility for implementing regulations under § 504 of the Rehab Act was transferred from HEW/HHS to the Department of Justice (DOJ) in 1980, and the regulations promulgated by HEW/HHS were adopted by the DOJ. *See* 45 Fed. Reg. 72,995, 72,997 (1980); Rothstein, *supra* note 41, § 1.02, at 5.

79. 34 C.F.R. § 104.12 (1997) (emphasis added).

80. *See* 42 U.S.C. § 12111(9) (1994) (defining "reasonable accommodation"); *id.* § 12111(10) (defining "undue hardship"); *see also* Feldblum, *supra* note 37, at 617 (stating that many sections of the first draft of the ADA were directly lifted from the Rehab Act's § 504 regulations). Under the ADA regulations, this concept of "undue hardship" is also called "undue burden." *See* 28 C.F.R. § 35.150(a)(3) (1997).

81. 42 U.S.C. § 12131(2) (1994). Under Title II of the ADA, any public entity that provides services, programs, or benefits may have to make reasonable modifications "to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services." *Id.* § 12131(2); *see, e.g.*, D'Amico v. New York State Bd. of Law Examiners, 813 F. Supp. 217 (W.D.N.Y. 1993) (holding that to comply with the reasonable accommodation requirement, the defendant must provide the vision-impaired plaintiff with aids and extra time to take the state bar exam).

82. 28 C.F.R. § 35.150(a)(3) (1997).

83. *Id.* pt. 35, app. A at 483; *see* Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052, 1063-65 (5th Cir. 1997) (holding that the defendant had the burden of prov-

tial functions, or would be an undue hardship on the entity, an entity is not required to make the modifications in order to comply with the ADA.[84]

Requiring reasonable accommodation serves the ADA's ultimate goal of integrating individuals with disabilities, as opposed to segregating or institutionalizing them.[85] To achieve this goal, the ADA must enable society to overcome a particular type of discrimination: that which has a "disparate impact,"[86] and is the product of "oversight"[87] and "benign neglect."[88] The ADA requires covered entities to remedy this kind of discrimination—even though it is unintentional—because it is necessary to achieve the ADA's goal of complete integration. Reasonable accommodation is specifically tailored to this kind of discriminatory practice, ensuring that individuals are accommodated to the largest extent possible without imposing changes upon covered entities that may be excessive.[89]

The ADA seeks to highlight the assumptions that underlie societal environments.[90] It is not an accident that much of the ADA and its regulations center on architectural issues[91] and the availability of aids

ing that allowing service and guide dogs on tours would create a health risk and fundamentally alter the operations of the brewery).

84. 42 U.S.C. § 12111(10) (1994).

85. Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409, 513-14 (1997) [hereinafter Burgdorf, *The Special Treatment Model*] (arguing that in order to enable individuals with disabilities to fully participate in society, reasonable accommodation seeks to address the individual's abilities, and discussing how facilities, jobs, services, and programs are generally designed for a participant with full mental and physical abilities).

86. *See* Alexander v. Choate, 469 U.S. 287, 287, 296-97 (1985) (holding that, while a cause of action under Title VI of the Civil Rights Act of 1964 requires intent, the Rehab Act does not, because to require intent would prevent the statute from remedying "disparate-impact" discrimination). Disparate impact discrimination occurs when a practice adversely affects one group more than another, even when it was not intended to do so. *Id.* at 292-94; *see also* Crowder v. Kitagawa, 81 F.3d 1480, 1484 (9th Cir. 1996) (holding that the ADA is "intended to cover both intentional discrimination and discrimination as a result of facially neutral laws").

87. Burgdorf, *The Special Treatment Model*, *supra* note 85, at 517-18.

88. Alexander v. Choate, 469 U.S. 287, 295 & n.12 (1985); Helen L. v. DiDario, 46 F.3d 325, 335 (3d Cir. 1995) (holding that the ADA does not require a showing of discriminatory animus "[b]ecause the ADA evolved from an attempt to remedy the effects of 'benign neglect' resulting from the 'invisibility' of the disabled, [and] Congress could not have intended it to limit the Act's protections and prohibitions to circumstances involving deliberate discrimination").

89. Burgdorf, *The Special Treatment Model*, *supra* note 85, at 526.

90. 42 U.S.C. § 12111 (1994) (defining the requirement of reasonable accommodation in the workplace); *id.* § 12131 (defining the requirement of reasonable accommodation for any service, program, or activity provided by a public entity); *id.* § 12182(2)(A)(ii) (requiring reasonable modifications by public accommodations).

91. *See, e.g.*, *id.* § 12146 (requiring new transportation facilities be accessible to individuals with disabilities including those who use wheelchairs); 28 C.F.R. § 35.163 (1997) (requiring public entities to provide signage directing users to an accessible entrance).

and devices.[92] These barriers can undermine integration regardless of the presence of intentional discrimination, and removing them is intended to place individuals with disabilities in a position equal to those without disabilities.[93] This crucial balancing aspect of the ADA—weighing the needs of the individual with a disability against the effect of the accommodation on the public entity—has, however, either been overlooked or largely misunderstood by both the public and courts.[94] Because the ADA is different from other nondiscriminatory statutes—in that it specifically targets practices that have the effect of denying equal participation to people with disabilities and provides for reasonable accommodation rather than a bright line prohibition—courts should seek guidance in the statutory history, purpose, and in the appropriate agency regulations when interpreting the ADA.

II. STATUTORY INTERPRETATION

Because judges are supposed to interpret—rather than make—the law, judges are limited in the sources they can rely on to interpret statutory language.[95] Traditionally, these sources have been "the language, structure, and history of the relevant act."[96] A revitalized argument about judicial legitimacy,[97] however, has lead the members of

92. *See, e.g.*, 42 U.S.C. § 12102 (1994) (defining auxiliary aids under the ADA as including qualified interpreters and readers, and taped texts).

93. Burgdorf, *The Special Treatment Model*, *supra* note 85, at 528. Burgdorf argues that to see reasonable accommodation as special treatment is to focus on the disability rather than on the discriminatory assumptions and practices of the entities covered under the ADA. *Id.* at 535-36.

94. *See, e.g.*, *Myths and Facts About the Americans with Disabilities Act* (visited Feb. 24, 1998) <http:/www.usdoj.gov/crt/ada/pubs/mythfct.txt> (listing examples of representative myths such as "The Justice Department sues first and asks questions later," and "The ADA requires extensive renovation of all state and local government buildings to make them accessible"); *see also Common Questions About Title II of the Americans with Disabilities Act* (ADA) (visited Mar. 4, 1998) <http://www.usdoj.gov/crt/ada/pubs/t2qa.txt> (listing common questions such as "Are there any limitations on the program accessibility requirement?" and "Is a city required to modify its policies whenever requested in order to accommodate individuals with disabilities?"); Burgdorf, *The Special Treatment Model*, *supra* note 85, at 513.

95. *See* Sunstein, Rights Revolution, *supra* note 6, at 112-13; Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better than Judicial Literalism*, 53 Wash. & Lee L. Rev. 1231, 1237-40 (1996).

96. Sunstein, Rights Revolution, *supra* note 6, at 112; *see also* Stephen Breyer, *On the Uses of Legislative History In Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 845-47 (1992) (defending the use of legislative history when interpreting unclear statutory language and calling it the "classical practice"); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 624 (1990) (describing the "traditional approach" as using the text of the statute to govern its interpretation, "unless negated by strongly contradictory legislative history").

97. Eskridge, *supra* note 96, at 646-48 (linking the advent of textualism to the "revival" of formalism and its argument that intentionalism permits the "judicial usurpation of legislative power").

the Supreme Court to utilize two distinct methods of interpretation.[98] Each method has its own tools, and, more often than not, leads to very different interpretations of the same statute.[99]

Intentionalism[100] looks to the text, legislative history, and statutory purpose to discern the intent of the legislature when it chose the words used in a statute.[101] Intentionalism posits the court's role as "law-declaring" and, if the statutory language is unclear, searches the statute's legislative history to determine how Congress intended the statutory language to be understood.[102] In using this method, courts look to the statute's legislative history, such as congressional floor debates and committee reports, to understand the statute's purpose and context.[103]

Textualism, in contrast, posits that Congress expresses its intent solely through the enacted language.[104] Textualism searches for the ordinary meaning of the statutory text—what it would mean to the "typical lay reader"—because that is the meaning Congress most likely intended the words to have.[105] If the statutory language is too broad or vague to have a clear meaning, textualists rely on the language of the statute, dictionaries,[106] "common sense," "ordinary

98. Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 Colum. L. Rev. 749, 754-62 (1995) [hereinafter Pierce, *Hypertextualism*] (discussing six Supreme Court decisions during the 1993-94 Term interpreting agency-administered statutes and in which the majority and dissent disagreed both on the appropriate method of statutory interpretation to use and on the meaning of the statute).

99. *Id.* at 749-52.

100. Another interpretive method, very similar to intentionalism, is purposivism. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 332-34 (1990) [hereinafter Eskridge & Frickey, *Statutory Interpretation*]. Purposivism looks at the general spirit or purpose of the legislation, especially if congressional intent on the specific issue is unclear. *Id.* Purposivism also assumes "the legislature is filled with reasonable people who will reach reasonable . . . results." *Id.* at 334. Eskridge and Frickey call purposivism "modified intentionalism." *Id.* at 324. Sunstein, agreeing that the two are similar, distinguishes them by describing intentionalism as seeking to discover how the enacting legislature wanted the question to be resolved whereas purposivism looks to the purpose behind the legislation generally. Sunstein, Rights Revolution, *supra* note 6, at 127. This Note follows the Eskridge and Frickey approach and uses "intentionalism" to include "purposivism."

101. Pierce, *Hypertextualism*, *supra* note 98, at 749.

102. Breyer, *supra* note 96, at 847; *see* Sunstein, Rights Revolution, *supra* note 6, at 127.

103. Breyer, *supra* note 96, at 845-48.

104. Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. Cal. L. Rev. 585, 587 (1994).

105. Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 Harv. L. Rev. 1437, 1441 (1994) [hereinafter Note, *Looking It Up*]. Former Congressman Abner Mikva argued that "[w]hen Congress uses a word, the word means what Congress says it means, all the dictionary definitions to the contrary notwithstanding." Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 Duke L.J. 380, 386.

106. Note, *Looking It Up*, *supra* note 105, at 1441-42.

meaning,"[107] and rules of grammar[108] to find the objective meaning of the text.[109] They oppose the use of traditional extrinsic sources, such as legislative history, because those words and opinions were not enacted and, therefore, are not law.[110] Textualists argue that statutory words are the only legitimate source for meaning, and to go beyond those words transforms "judicial interpretation into judicial 'legislation.'"[111]

Intentionalism and textualism have the same goal: to interpret statutes according to the meaning Congress enacted.[112] They disagree, however, on how best to be faithful to that goal. Although either method should ideally lead to the same conclusion regarding the meaning of a statute, many times they result in vastly different interpretations. In determining whether the ADA applies to state prisons, the courts which use textualism reach a different conclusion than the courts which use intentionalism, because the outcome of the Eleventh Amendment and *Chevron* doctrines—which, as discussed below, are relevant to resolve this inquiry—depend heavily on statutory interpretation. Because of this divergence, it is important to determine which interpretive method a court uses and whether another method would lead to the same conclusion.

III. ELEVENTH AMENDMENT AND *CHEVRON* DOCTRINES

Part III provides background on the concerns and purposes that inform the Eleventh Amendment plain statement rule and the *Chevron* doctrine of deference to agency interpretations. Once invoked, these doctrines direct courts to find that a statute satisfies certain requirements—a task which requires statutory interpretation. Thus, it is important to note how different methods of interpretation may affect the interpreting court's conclusion whether the statute meets the requirements of either doctrine.

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107. *See supra* note 7 (discussing *Smith v. United States*, 508 U.S. 223 (1993), where both the majority and the dissent claimed they had discerned the "ordinary meaning" of "to use a gun").

108. Pierce, *Hypertextualism*, *supra* note 98, at 750.

109. Mank, *supra* note 95, at 1237-39.

110. *Id.*; *see* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (describing looking for congressional intent as "a wild-goose chase"). Typical complaints about utilizing congressional intent include: it assumes (1) that all members of Congress had a single intent; and (2) that such intent would be expressed and discoverable in legislative history. *See* Eskridge, *supra* note 96, at 640-45. Stephen Breyer argues that such problems disappear if one thinks of Congress as an institution and its intent as a "purpose" rather than as a "motive." Breyer, *supra* note 96, at 864-66.

111. Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892, 902 (1982); *see* Sunstein, Rights Revolution, *supra* note 6, at 128.

112. Eskridge & Frickey, *Statutory Interpretation*, *supra* note 100, at 325-26, 340-42.

A. *The Eleventh Amendment Doctrine*

The Eleventh Amendment[113] was passed to overrule the Supreme Court's decision in *Chisholm v. Georgia*,[114] and to reassert the pre-*Chisholm* understanding of federal jurisdiction: that under the Article III state-citizen diversity clause, unconsenting states retained their immunity to lawsuits in federal court.[115] By its own terms, the Amendment bars federal courts from hearing suits brought by out-of-state and foreign citizens against unconsenting states.[116] The Supreme Court has extended the doctrine to prohibit suits brought by citizens against their own state.[117] This jurisdictional bar, however, can be overcome in a number of ways.[118] For one, states can waive their im-

113. "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

114. 2 U.S. (2 Dall.) 419 (1793) (holding that a South Carolina citizen could sue the State of Georgia for assumpsit in federal court, because Article III grants federal courts jurisdiction over controversies between states and citizens of another state).

115. William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of An Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1046-51 (1983). During the ratification of the United States Constitution, the state-citizen diversity clause was argued to either provide only a neutral forum or to apply only when states were plaintiffs, but no one thought it could be applied to expose states to liability. *Id. Chisholm* was the first case decided under the new Constitution. *Id.* at 1054. Whether states' immunity to suits in federal court derives from common law or from the Constitution has recently been debated by the Supreme Court. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44 (1996). *Seminole* held that "the Eleventh Amendment reflects the 'fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III.'" *Id.* at 64 (citations omitted). The dissent disagreed with the majority's conclusion that sovereign immunity mandates the preclusion of "all federal jurisdiction over an unconsenting state," *id.* at 144 (citation omitted), and argued that immunity was a common-law value not meant to be given constitutional status. *Id.* at 130-31 (Souter, J., dissenting). Further, the dissent argued that immunity "reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses." *Id.* at 110 (Souter, J., dissenting). See also the Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), where the majority and dissent disagreed on whether or not the principle of state sovereign immunity is derived from the Constitution. Justice Brennan argued in dissent that "[t]here simply is no constitutional principal of state sovereign immunity." *Id.* at 259 (Brennan, J., dissenting).

116. John E. Nowak & Ronald D. Rotunda, Constitutional Law § 2.11, at 47 (5th ed. 1995).

117. *See* Hans v. Louisiana, 134 U.S. 1 (1890) (holding that the Eleventh Amendment barred a suit by a citizen of Louisiana against the State of Louisiana for the State's violation of federal law arising from its default on interest payments on its bonds); *see also* William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. Chi. L. Rev. 1261, 1261-62 (1989) (asserting that the bar against unconsented suits brought by in-state citizens rests on the principle of the Eleventh Amendment, but not on its text).

118. George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of* Atascadero State Hospital v. Scanlon, 74 Geo. L.J. 363, 366 (1985); Fletcher, *supra* note 117, at 1261-62; Jesse Michael Feder, Note, *Congressional Abrogation of State Sovereign Immunity*, 86 Colum. L. Rev. 1436, 1437-40 (1986).

munity.[119] In addition, the Court held in *Ex parte Young*[120] that the Eleventh Amendment does not bar suits against individual state officers for the prospective enforcement of federal law.[121] Finally, Congress can abrogate the immunity pursuant to section five of the Fourteenth Amendment.[122]

Whether the Eleventh Amendment's jurisdictional bar has been overcome by abrogation in any particular statute is a matter of statutory interpretation. For this question, the Supreme Court has developed the plain statement rule: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention clear in the language of the statute."[123] There has been a shift, however, in methods of statutory interpretation used by the Court to discern congressional intent to abrogate.

In its 1973 decision, *Employees v. Missouri Department of Public Health and Welfare*,[124] the Court stated that congressional intent to abrogate states' sovereign immunity must be "clear."[125] A year later,

119. *See* Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304-09 (1990) (finding waiver when a state accepts federal funds under a statute that clearly indicates that state may be sued in federal court); Edelman v. Jordan, 415 U.S. 651, 672-73 (1974) (finding that a state's receipt of federal funds constitutes a waiver of Eleventh Amendment immunity only where Congress explicitly required a waiver); Feder, *supra* note 118, at 1437-40.

120. 209 U.S. 123 (1908).

121. *Id.* at 160 (holding that a suit challenging the federal constitutionality of a state official's action is not a suit against the state). In addition, in *Hutto v. Finney*, 437 U.S. 678 (1978), the Court held that the Eleventh Amendment did not bar an award of attorney's fees against officers of the state's Department of Corrections in their official capacities for the officers' bad faith failure to cure constitutional violations in prison. *Id.* The Court ruled that the power to impose fines is ancillary to the federal court's power to impose injunctive relief under *Ex Parte Young*. *Id.*; *see also* Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 Yale L.J. 1683, 1686 (1997) (explaining that *Ex Parte Young* "means that the Eleventh Amendment inhibits only retrospective relief for a state's past violations of federal law").

122. Vazquez, *supra* note 121, at 1687-88. In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court held that Congress has the power to abrogate the states' immunity pursuant to the Commerce Clause. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court overruled its holding in *Union Gas* that the Interstate Commerce Clause included the power to abrogate states' immunity under the Eleventh Amendment. The Court found that Congress did not have the power to abrogate under the Indian Commerce Clause, as Article I powers "cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73. Both the Indian and the Interstate Commerce Clauses are Article I powers. *See* U.S. Const. art I, § 8, cl. 3.

123. Dellmuth v. Muth, 491 U.S. 223 (1989). The Court stated:

> To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."

Id. at 227-28 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

124. 411 U.S. 279 (1973).

125. *Id.* at 285.

in *Edelman v. Jordan*,[126] the Court raised the requirement a notch, stating that "we will find waiver only where 'stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'"[127] In *Quern v. Jordan*,[128] however, the Court appeared willing to look at extrinsic sources such as legislative history for congressional intent.[129] Finally, in *Pennhurst State School and Hospital v. Halderman*,[130] the Court said that there must be "an unequivocal expression of congressional intent."[131] It was not until *Atascadero State Hospital v. Scanlon*[132] in 1985 that the Court limited the search for intent to abrogate states' sovereign immunity to the "unmistakable language in the statute itself."[133]

In *Atascadero*, the Court first articulated its current version of the plain statement rule.[134] The plaintiff, diabetic and blind in one eye, sued Atascadero State Hospital, alleging that it refused to hire him as a recreational therapist because of his disability in violation of § 504 of the Rehab Act.[135] The plaintiff argued that the legislative history and the purpose of the statute demonstrated that Congress had intended to abrogate the states' Eleventh Amendment immunity and permit suits against them.[136] The plaintiff relied on prior Supreme Court decisions that found abrogation using this type of evidence.[137] In holding that the Rehab Act did not abrogate the states' Eleventh Amendment immunity, the Court articulated a new standard by which courts should examine statutory language to determine congressional intent to abrogate the states' Eleventh Amendment immunity.[138] Dis-

126. 415 U.S. 651 (1974).
127. *Id.* at 673 (quoting Murray v. Wilson Distilling, Co., 213 U.S. 151, 171 (1909)).
128. 440 U.S. 332 (1979).
129. The Court said:

> neither logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compels, or even warrants, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States.

Id. at 342.
130. 465 U.S. 89 (1984).
131. *Id.* at 99.
132. 473 U.S. 234 (1985).
133. *Id.* at 243.
134. Note, *Clear Statement Rules*, *supra* note 17, at 1962.
135. *Atascadero*, 473 U.S. at 236.
136. *Id.* at 242. The dissent also argued that the legislative history supported finding an intent to abrogate, stating that "[t]he legislative history confirms that the States' were among the primary targets of § 504," and quoting Representative Vanik: "Our Governments tax . . . people [with disabilities], their parents and relatives, but fail to provide services for them . . . ." *Id.* at 249 (Brennan, J., dissenting) (quoting 117 Cong. Rec. 45,974 (Dec. 9, 1971) (statement of Rep. Vanik)).
137. *See supra* notes 124-32 and accompanying text.
138. Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 14, at 621 (calling the Court's new standard a "steroidal transformation" from its previous definition of the plain statement rule); *see also* Note, *Clear Statement Rules*, *supra* note 17, at 1962

regarding the plaintiff's use of legislative history, the Court said that the intention to abrogate must be "unmistakably clear in the language of the statute,"[139] but did not say what language would be sufficient. Because the Court found that the language of the Rehab Act was not "unmistakably clear," the Court held that the Rehab Act did not permit private suits in federal court against states for violations of the Act.[140] Thus, the Eleventh Amendment plain statement rule's original intentionalist test for determining whether Congress meant to abrogate states' Eleventh Amendment immunity statutorily has evolved into a textualist test for determining whether a statute contains such an abrogation.[141]

1. The Plain Statement Rule and Federalism

The plain statement rule seeks to preserve the balance of power between the states and the federal government, by making Congress fully consider and unequivocally state its intention to create private rights of action against states for violations of federal law.[142] The rule reflects the "fundamental constitutional balance between the Federal Government and the States"[143] and the "fundamental principle of sovereign immunity" behind the Eleventh Amendment.[144]

If Congress fails to adopt the language required by the Supreme Court's plain statement rule, the Court will find that the Eleventh Amendment bars suits against states brought by private citizens in federal court under a federal statute.[145] Congress can, however, draft or amend a statute to include the language necessary to abrogate the Eleventh Amendment.[146] Indeed, after *Atascadero*, Congress quickly amended the Rehab Act to include a statement of abrogation.[147] The Supreme Court has since recognized the amended language as sufficient to indicate intent to abrogate states' immunity under the Eleventh Amendment.[148] The ADA also contains the same language as

(describing *Atascadero* as the "leading case in the Court's modern clear statement jurisprudence").

139. *Atascadero*, 473 U.S. at 242.

140. *Id.*

141. Eskridge and Frickey, *Quasi-Constitutional Law*, *supra* note 14, at 621.

142. *Id.* at 633 (asserting that the Court considers norms like federalism to be underenforced and require protection through clear statement rules).

143. *Atascadero*, 473 U.S. at 238.

144. *Id.* (quoting Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 98 (1984)).

145. Brown, *supra* note 118, at 364-65.

146. *See* Note, *Clear Statement Rules*, *supra* note 17, at 1967.

147. The *Atascadero* decision was overruled by amendments to the Rehab Act in 1986. 42 U.S.C. § 2000d-7(a)(1) (1994).

148. *See* Lane v. Pena, 116 S. Ct. 2092, 2099 (1996). The Court described the response to *Atascadero* as an "unambiguous waiver of the States' sovereign immunity." *Id.* at 2100. The language approved by the Court stated: "A State shall not be immune under the Eleventh Amendment . . . from suit in Federal Court for a violation of section 504 of the Rehabilitation Act of 1973 . . . ." 42 U.S.C. § 2000d-7(a)(1)

the amended Rehab Act: "A State shall not be immune under the Eleventh Amendment . . . ."[149] If the plain statement rule's effect is limited by the ability of Congress to "learn the rule" and to comply by using unequivocal language, its effect could mistakenly be seen as inconsequential. The evolution of the textualist doctrine, however, has major implications for Congress's ability to abrogate states' immunity to suits in federal court in light of recent Supreme Court decisions involving the plain statement rule.

2. Extension of the Plain Statement Rule in *Gregory v. Ashcroft*

In *Gregory v. Ashcroft*,[150] the Court applied the Eleventh Amendment plain statement rule in a Tenth Amendment[151] context.[152] The Court held that state judges were not covered by the Age Discrimination in Employment Act[153] ("ADEA") because it was ambiguous whether the statute's exception for appointees "on the policymaking level" included judges.[154] The Court stated that if Congress intended the ADEA to apply to state judges—an area the Court considered at "the heart of representative government"[155] and a "state governmental function"[156]—its intentions must be clear.[157] As Justice White pointed out, this was a significant extension of the plain statement rule previously applied in *Atascadero*.[158] While the Court in *Atascadero* used the plain statement rule to determine whether the statute applied to the states generally, here the Court used the rule to decide the "dis-

(1994). Furthermore, the Court recognized that the amendment was a response to their decision: "Section 1003 was enacted in response to our decision in *Atascadero State Hospital v. Scanlon* . . . . By enacting § 1003, Congress sought to provide the sort of unequivocal waiver that our precedents demand." 116 S. Ct. at 2099.

149. 42 U.S.C. § 12202 (1994).

150. 501 U.S. 452 (1991).

151. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. The *Gregory* court found that the power to determine the required qualifications for ones' own government officials was a "power reserved to the States under the Tenth Amendment." 501 U.S. at 463.

152. *See Gregory*, 501 U.S. at 461 (finding that *Atascadero* was an Eleventh Amendment case, but that a similar approach is applied in other contexts). Although *Gregory* was a Tenth Amendment case, the Court quoted from *Atascadero* for the proposition that "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 460 (citations omitted).

In describing the *Gregory* decision, Eskridge and Frickey state that "[r]ather than relying upon conventional interpretive methods and canons, [Justice O' Connor] created a new super-strong clear statement rule for federal regulation of at least some state functions." Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 14, at 624.

153. 29 U.S.C. §§ 621-634 (1994).

154. 501 U.S. at 465.

155. *Id.* at 463 (quoting Bernal v. Fainter, 467 U.S. 216, 221 (1984)).

156. *Id.* at 470.

157. *Id.* at 467.

158. *Id.* at 476 (White, J., concurring).

pute . . . over the precise details of the statute's application."[159] The *Gregory* majority reasoned that the use of the clear statement rule was necessary in this case because the situation concerned a state's constitutional provision for mandatory retirement as applied to a state judge. The Court termed it a "provision [that] goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through . . . the character of those who exercise government authority, a State defines itself as a sovereign."[160]

These notions of core state principles and traditional government functions are a direct reference to the Court's prior decision in *National League of Cities v. Usery*,[161] which was subsequently overruled by *Garcia v. San Antonio Metropolitan Transit Authority*.[162] The *National League* Court attempted to preserve the state-federal government balance by holding that the Tenth Amendment protected the states' "traditional governmental functions" from federal regulation.[163] The Court soon decided, however, that this inquiry into what were "traditional," or "integral" state functions was "unsound in principal and unworkable in practice."[164] In *Garcia*, the Court held that it no longer would impose its own notions of federalism through a judicial interpretation of the Tenth Amendment.[165] Instead, the Court reasoned that the states had adequate protection through the structure of the federal system,[166] and, therefore, the Court relinquished the authority to maintain the state-federal balance to Congress.[167]

Since *Garcia*, members of the Court who disagreed with its holding[168] have developed means by which to re-establish the *National League* test, thereby re-asserting the Court's role in maintaining the principles of federalism.[169] In *Gregory*, for example, the Court articu-

159. *Id.* In contrast, in *School Board v. Arline*, it was the dissent that argued that the plain statement rule should be used to determine whether Congress meant to abrogate the states' immunity under the Rehab Act as to a specific area of regulation, as opposed to using it merely to determine whether the statute in general abrogated the states' Eleventh Amendment immunity. 480 U.S. 273, 289-93 (1987) (Rehnquist, C.J., dissenting).

160. 501 U.S. at 460.

161. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

162. 469 U.S. 528 (1985).

163. *National League*, 426 U.S. at 852.

164. *Garcia*, 469 U.S. at 546.

165. *See* Note, *Clear Statement Rules*, *supra* note 17, at 1961.

166. 469 U.S. at 550-51. The Court found that the limitations on Congress's Article I power, the role of the states and their citizens in electing the legislative and executive branches, and the equal representative of the states in the Senate all provided adequate protection against congressional overreaching. *Id.*

167. *Id.* at 555-56; Brown, *supra* note 118, at 376-79.

168. Chief Justice Burger, Justice Rehnquist, Justice O'Connor, and Justice Powell dissented in *Garcia*. *See* 469 U.S. at 557.

169. The *Garcia* dissent saw the majority's decision as an abandonment of judicial review in determining whether Congress has transgressed the "constitutional limits on

lated a new means to restrict the reach of federal legislation.[170] *Gregory* was, however, not a wholesale reversal of *Garcia*. First, the *Gregory* Court found the case to be one that went beyond being just a traditional state function because it involved the right to choose the qualifications for elected officials.[171] Furthermore, the Court specifically noted that although the "principles of federalism . . . are attenuated when Congress acts" pursuant to its section five powers, the "States' power to define the qualifications of their officeholders has force . . . against the proscriptions of the Fourteenth Amendment."[172] Moreover, although the *Gregory* Court said Congress must make its intent "plain," it also said that Congress was not required to create a comprehensive list of all the traditional state functions to which it intends the federal law to apply.[173] What exactly *Gregory* requires, however, and how it will be applied is unclear.[174]

3. The Effect of Textualism and the Plain Statement Rule

Atascadero established that the question of whether Congress intended to abrogate states' immunity generally is a textualist inquiry. Although the Court hesitated to make the *Gregory* test a textualist one, it did not refer to legislative history.[175] Textualism could prevent

its power." *Id.* at 566-67 (Powell, J., dissenting); *see also* James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 Vand. L. Rev. 1251, 1287-91 (1994) (arguing that the decisions in *Gregory* and *New York v. United States* represent post-*Garcia* judicial limitations on federal power which do not disturb the "analytical framework of *Garcia*," but are "nonetheless at odds with the prevailing normative view in *Garcia*"); Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 14, at 634-35 (arguing that *Gregory* threatens to re-establish the same unprincipled standards the Court disavowed in *Garcia*); Edward L. Rubin & Malcom Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 903-04 (1994) (stating that the Court, a "mere six years after its brave declaration that it had sworn off federalism for good," had "suffered a relapse" in deciding *Gregory* on principles of federalism).

170. *See* Note, *Clear Statement Rules*, *supra* note 17, at 1973.

171. 501 U.S. 452, 460 (1991).

172. *Id.* at 468.

173. *Id.* at 467.

174. *See Quasi-Constitutional Law*, *supra* note 14, at 633-34. *But see* Michael P. Lee, Comment, *How Clear is "Clear"?: A Lenient Interpretation of the* Gregory v. Ashcroft *Clear Statement Rule*, 65 U. Chi. L. Rev. 255, 265-66 (1998) (arguing that a "lenient" reading of *Gregory* yields two conditions that must be met in order to satisfy the plain statement rule: (1) the plain meaning of the statutory language includes the core state function at issue; and (2) that there is no exception in the statute which creates ambiguity regarding whether the core function was meant to be included); *The Supreme Court, 1990 Term—Leading Cases*, 105 Harv. L. Rev. 177, 202 (1991) [hereinafter *Leading Cases*] (claiming that *Gregory* created a "two-tier" inquiry: (1) Congress must abrogate the states' Eleventh Amendment immunity to have its legislation apply to the states generally; and (2) Congress must then also clearly state which state governmental functions it intends the law to include).

175. Justices Blackmun and Marshall dissented because "the structure and legislative history of the policymaker exclusion make clear that judges are not the kind of policymakers whom Congress intended to exclude from the ADEA's broad reach." 501 U.S. *Gregory* at 486 (Blackmun, J., dissenting). The dissent further stated that

the application of a statute to core state functions by requiring specific statements of Eleventh Amendment abrogation. This practice, however, may contradict other constitutional principals, particularly when applied to legislation passed pursuant to the Fourteenth Amendment.

a. *Textualism and Its Limited Sources for Determining Congressional Intent*

One significant effect of *Atascadero*'s[176] clear statement rule is to limit the search for congressional intent to the explicit language of the statute.[177] Prior to *Atascadero*, the Court had found congressional intent to abrogate the Eleventh Amendment by looking at both the text and legislative history.[178] Post-*Atascadero*, the Court's plain statement rule reflects a textualist approach to statutory interpretation, because the Court requires the intent to abrogate to be clear from "unmistakable language in the statute itself."[179]

As explained above, in *Gregory v. Ashcroft* the Court further extended the reach of the plain statement rule.[180] This extension potentially implements a textualist method of interpretation on the question of whether Congress intended to abrogate states' immunity as to a specific state function.[181] Thus, the Eleventh Amendment plain statement rule has, in essence, been transformed into a two-pronged test for cases dealing with what is perceived to be a "core state function." First, under the *Atascadero* prong, the court asks whether Congress intended to generally abrogate the states immunity. Next, if the court finds *Gregory*'s version of the plain statement rule applicable, it asks whether Congress intended to abrogate states' immunity as applied to specific areas of state governance. This transformation has greater consequences than the plain statement rule's original incarnation in *Atascadero*.[182] As seen with the amendment to the Rehab Act, Congress can fairly easily satisfy prong one by inserting the necessary lan-

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when a "statutory term is ambiguous or undefined, a court . . . should defer to a reasonable interpretation of that term proffered by the agency entrusted with administering the statute." *Id.* at 493 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)).

176. 473 U.S. 234 (1985).

177. Note, *Clear Statement Rules*, *supra* note 17, at 1959.

178. *See supra* notes 124-33 and accompanying text.

179. *Atascadero*, 473 U.S. at 243. Four years later in *Dellmuth v. Muth*, the Court said:

> Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is 'unmistakably clear in the language of the statute' . . . recourse to legislative history will be unnecessary; . . . because by definition the rule of *Atascadero* will not be met.

491 U.S. 223, 230 (1989) (quoting *Atascadero*, 473 U.S. at 242).

180. *See supra* Part III.A.2.

181. *See Leading Cases*, *supra* note 174, at 202-04.

182. *See* Lee, *supra* note 174, at 266-67.

guage when needed to abrogate state immunity generally.[183] It is an entirely different matter, however, if to satisfy prong two, Congress has to explicitly enumerate every state function covered by a statute. Either Congress will have to anticipate all areas likely to be labeled "core state functions" or amend the statute every time a court so determines.[184]

The problem is compounded, moreover, by the Court's use of textualism on the abrogation question.[185] Thus, when determining whether Congress intended a statute to apply to what is arguably a core state function, the *Gregory* decision may bar consideration of legislative history, the structure of the statute, and the statutory purpose, as a means to discern congressional intent for specific questions of statutory application. How textualism may result in a misinterpretation of congressional intent is illustrated by the Court's use of the plain statement rule in *Atascadero* to determine whether the states' Eleventh Amendment immunity was abrogated generally. Had the Court been looking for congressional intent in *Atascadero*, using ordinary tools of statutory interpretation--legislative history in particular—the Court would likely have found an intent to abrogate. After looking at this kind of evidence, both the lower court in *Atascadero*[186] and Justice Brennan in dissent[187] concluded that Congress intended to abrogate the states' Eleventh Amendment immunity. Even more convincing are the later statements made by members of Congress when passing the amendment to the Rehab Act. Members of Congress specifically commented on how the Court, by focusing on the text of the statute, had misinterpreted congressional intent.[188]

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183. *See supra* note 147 and accompanying text.

184. *See* Lee, *supra* note 174, at 266 (stating that the negative consequences of requiring specific enumeration are (1) wasted legislative resources; (2) "legislative paralysis" due to "the impracticality" of drafting lists of state functions; (3) the unwillingness of courts to find anything a core state function unless it is explicitly listed as covered by the statute; and (4) increased inflexibility of statutes and increased difficulty in adapting statutes to changing circumstances).

185. *See* Note, *Clear Statement Rules*, *supra* note 17, at 1960.

186. By relying on Supreme Court precedent, the lower court in *Atascadero* inferred that the states were included in the authorization of a general class of defendants, as the Rehab Act "contains extensive provisions under which states are the express intended recipients of federal assistance." Scanlon v. Atascadero State Hosp., 735 F.2d 359, 360 (9th Cir. 1984), *rev'd*, 473 U.S. 234 (1985).

187. In *Atascadero*, Brennan found congressional intent to abrogate by examining legislative history, the text, and Senate-approved regulations which defined "recipient" to include state and local governments. 473 U.S. at 249-51.

188. S. Conf. Rep. No. 99-388, at 27-28 (1986) ("The Supreme Court's decision misinterpreted congressional intent. Such a gap in Section 504 coverage was never intended. It would be inequitable for Section 504 to mandate state compliance . . . and yet deny litigants the right to enforce their rights in Federal courts . . . ."); 132 Cong. Rec. 28,623 (Oct. 3, 1986) (statement of Sen. Cranston) ("These provisions would reverse the holding in *Atascadero* by providing that . . . a Federal suit for damages would now be available against a state or a State agency."). Similar statements were also made regarding the Court's decision in *Dellmuth v. Muth*, 491 U.S. 223 (1989),

b. *The Eleventh Amendment Plain Statement Rule and the Fourteenth Amendment*

The ADA, an anti-discriminatory statute, was enacted pursuant to Congress's authority under section five of the Fourteenth Amendment[189] and should be interpreted broadly to accomplish its remedial purposes.[190] Yet this principle collides with the Eleventh Amendment's limit on Congress's power to provide for a private remedy for

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that Congress, in enacting the Education of the Handicapped Act, 20 U.S.C. §§ 1400-1491 (1994), did not abrogate the states' Eleventh Amendment Immunity. *See* H. Rep. No. 101-544, at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723-34 ("The Committee has determined that the Supreme Court misinterpreted congressional intent .... It would be inequitable for EHA to mandate State compliance with its provisions and yet deny litigants the right to enforce their rights in Federal courts when State or State agency actions are at issue.").

189. 42 U.S.C. § 12101(b)(4) (1994) ("It is the purpose of this chapter ... to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment ... in order to address the major areas of discrimination faced day-to-day by people with disabilities."). Section one of the Fourteenth Amendment prohibits the states from "abridg[ing] the privileges or immunities of citizens of the United States; ... depriv[ing] any person of life, liberty, or property, without the due process of law; ... [ ]or deny[ing] to any person ... equal protection of the laws." U.S. Const. amend. XIV, § 1. Section five grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. The Fourteenth Amendment—"specifically designed as an expansion of federal power and an intrusion on state sovereignty"—shifted the enforcement and definition of civil rights from the states to the federal government. City of Rome v. United States, 446 U.S. 156, 179 (1980).

The Supreme Court refused to give individuals with disabilities protected class status in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). Protected class status means that the court will judge the legitimacy of a law with varying degrees of scrutiny depending on the classifications the legislature used. Nowak & Rotunda, *supra* note 116, § 14.3, at 601-06. In *Fitzpatrick v. Bitzer*, even though at that time the Court had not yet found gender to be a protected class under the Fourteenth Amendment, the Court found that Congress, through section five's grant of authority, had the power to create a statutorily protected class. *See* 427 U.S. 445, 456 (1976). Six months later, in *Craig v. Boren*, 429 U.S. 190 (1976), the Court found that gender classifications merited "intermediate scrutiny," thereby making gender a constitutionally protected class. In the ADA, Congress appropriated language from the Supreme Court's equal protection jurisprudence to describe the discrimination faced by individuals with disabilities as a class and made explicit findings in the ADA which suggest that individuals with disabilities are entitled to suspect class status under the Fourteenth Amendment. *See* 42 U.S.C. § 12101(a) (7) (1994).

Currently, however, the lower courts disagree about whether the ADA is a valid use of Congress's power under the Fourteenth Amendment. *Compare* Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997) (applying the *Seminole* test and finding that the ADA was created to remedy discrimination under the Fourteenth Amendment), *and* Clark v. California, 123 F.3d 1267, 1270 (9th Cir. 1997) (same), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686), *with* Pierce v. King, 918 F. Supp. 932, 940 (E.D.N.C. 1996) (holding that the ADA was not a valid use of Congress's Fourteenth Amendment power because the ADA demands "special treatment ... and entitlement in order to achieve its goals"), *aff'd per curiam*, 131 F.3d 136 (4th Cir. 1997), *petition for cert. filed*, (U.S. Mar. 10, 1998) (No. 97-8246).

190. *See* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (stating that it is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes").

states' civil rights violations. The Supreme Court recently addressed the interaction of the two Amendments in *Seminole Tribe v. Florida*.[191] The Court reiterated the *Atascadero* test to determine whether a statute abrogated a states Eleventh Amendment immunity: "[W]e ask . . . first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,'" and added "second, whether Congress has acted 'pursuant to a valid exercise of power.'"[192] On the second question, the court held that Congress lacked the power to abrogate pursuant to its Article I powers,[193] and indicated that Congress's only source of authority to abrogate the Eleventh Amendment is the Fourteenth Amendment.[194] This proposition reaffirmed *Fitzpatrick v. Bitzer*,[195] where the Court held that as legislation passed pursuant to Congress's section five power under the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964 abrogated states' Eleventh Amendment immunity.[196] The Court said: "When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."[197] Thus, the Court has recognized that it is contradictory to allow states to assert their sovereign immunity and limit the reach of legislation passed pursuant to a constitutional amendment whose very purpose is to expand federal authority over the states.[198] The presumption that such remedial legislation should be interpreted broadly aids anti-discriminatory legislation like the ADA in effectuating its goals. A textualist version of the *Gregory* plain statement rule, however—would contradict both the purpose of the legislation and the presumption that it is to be interpreted generously—because it would limit the reach of statute to only those core functions enumerated in a statute enacted pursuant to the Fourteenth Amendment.

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191. 517 U.S. 44 (1996).

192. *Id.* at 55 (citations omitted).

193. *Id.* at 72-73 (stating that Article I powers "cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction").

194. *Id.* at 65; *see also* Erwin Chemerinsky, *Federalism Not As Limits, But As Empowerment*, 45 U. Kan. L. Rev. 1219, 1222 (1997) ("[I]n *Seminole Tribe v. Florida*, the Court held that the Eleventh Amendment precludes suits . . . against states pursuant to federal laws except for those adopted under section five of the Fourteenth Amendment."); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Sup. Ct. Rev. 1, 6 ("Although Chief Justice Rehnquist's opinion reaffirmed that Congress does have power, when legislating under section five of the Fourteenth Amendment, to abrogate sovereign immunity and thus subject states to federal court suits, the Court ruled that Congress lacks such power when acting under its Article I grant of legislative authority.").

195. 427 U.S. 445 (1976).

196. *Id.* at 456.

197. *Id.*

198. *See id.*

Were it not for *Gregory*, it would seem that Congress used both the language and the authority necessary to abrogate the Eleventh Amendment in the ADA—in accordance with *Atascadero* and *Seminole*. The application of the *Gregory* rule remains an active debate within the Supreme Court, however.[199] Picking up on the Supreme Court's internal dispute, it is *Gregory*'s version of the plain statement rule that defendant prisons use to challenge the ADA's application to state prisons.[200] The prisons argue that prison management is a core state function, and that *Gregory* requires specific abrogation of Eleventh Amendment immunity in order to permit private suits in federal court for violations of the ADA which occur in prison.

B. *The* Chevron[201] *Doctrine*

The ADA delegates much of the fleshing-out of the statute to administrative agencies, including the DOJ which has the authority under Title II to promulgate regulations regarding the application of

199. The Court has applied the *Gregory* plain statement rule only once in a five-four decision. *See* BFP v. Resolution Trust Corp., 511 U.S. 531 (1994). On the question of whether a provision of the federal bankruptcy law meant to adopt or displace state law, the Court found the language of the statute inconclusive. *Id.* The Court's holding relied on two presumptions: (1) that statutes invading common law must be read to favor long-established principles absent evident statutory purpose to the contrary; and (2) in this case, the *Gregory*-enhanced version of the clear statement rule required clearer congressional intent to preempt. *Id.* at 543-45.

Dissenting justices have argued for the application of the *Gregory* plain statement rule in four instances, claiming core state interests were implicated. *See* United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 879 (1995) (Thomas, J., dissenting) (opinion joined by Rehnquist, C.J., & O'Connor & Scalia, JJ.) (citing to *Gregory* to support the argument that states have the power to set additional qualifications, like term limits, for their elected officials over what the Constitution requires); City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 743-44 (1995) (Thomas, J., dissenting) (opinion joined by Scalia & Kennedy, JJ.) (citing to *Gregory* to support the statement that zoning laws are areas traditionally regulated by the states); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 292-93 (1995) (Thomas, J., dissenting) (opinion joined by Scalia, J.) (citing to *Gregory* to argue that the Federal Arbitration Act does not apply to state courts); Evans v. United States, 504 U.S. 255, 291-92 (1992) (Thomas, J., dissenting) (opinion joined by Rehnquist, C.J., & Scalia, J.) (arguing that the *Gregory* plain statement rule mandates a narrow construction of the Hobbs Act to include the common-law definition of extortion by public officials). The Court has also cited to *Gregory* in other cases for its general federalism propositions. *See, e.g.*, Printz v. United States, 117 S. Ct. 2365, 2376 (1997) (citing to *Gregory* for the proposition that the Constitution established a system of "dual sovereignty"); New York v. United States, 505 U.S. 144, 161-62 (1992) (holding that the Tenth Amendment prevents the federal government from "commandeering" state governments).

200. *See, e.g.*, Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589, 607 (4th Cir. 1997) (holding that the *Gregory* plain statement rule bars the ADA's application to state prisons), *petition for cert. filed*, 66 U.S.L.W. 3474 (U.S. Dec. 19, 1997) (No. 97-1113); Torcasio v. Murray, 57 F.3d 1340, 1344-46 (4th Cir. 1995) (suggesting that the *Gregory* plain statement rule prohibits the application of the ADA to state prisons).

201. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

the ADA to public entities. The *Chevron* doctrine reflects principles regarding the appropriate roles of the judicial and executive branches for interpreting statutory language. *Chevron* sets up a two-step standard to establish the appropriate amount of deference a court should give an agency interpretation of a statute.[202] As with the Eleventh Amendment plain statement rule, the conclusions that the reviewing court reaches at each step depend on statutory interpretation, thereby raising the question whether another method would lead to a different conclusion.

1. The Court, Agencies, and the *Chevron* Doctrine

The Supreme Court's decision in *Chevron* created a new doctrine of statutory interpretation.[203] The rule of *Chevron* requires a court to defer to an administrative agency's "reasonable" interpretation of a gap or ambiguity in the statute under which the agency has express lawmaking authority.[204] In applying *Chevron*, the court must go through two steps. First, it must ask whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[205] If Congress's intent is not clear because the statute is silent or ambiguous on the particular issue, the Court must defer to the agency's interpretation of the statute if it is "permissible," and does not conflict with the statutory language.[206] The agency's interpretation will be deemed permissible "[w]hen Congress expressly delegates to an administrative agency the authority to make specific policy determinations, . . . unless it is 'arbitrary, capricious, or manifestly con-

202. *Id.* at 842-43.

203. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 623-25 (1996) ("*Chevron* adopted a generic norm of construction, a new default presumption that Congress implicitly assigns agencies authority to resolve ambiguities in the statutes the agencies administer. *Chevron* therefore significantly revised the interpretive background against which Congress legislates."). The doctrine states that: "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron*, 467 U.S. at 866.

204. *See Chevron*, 467 U.S. at 843-44.

205. *Id.* at 842-43. This prong of the *Chevron* rule, therefore, parallels the plain statement rule in that both the plain statement rule and the *Chevron* step-one question ask whether or not the statutory language is clear. *See supra* notes 124-48 and accompanying text.

206. *Chevron*, 467 U.S. at 843; David M. Gossett, Comment, Chevron, *Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. Chi. L. Rev. 681, 688 (1997).

trary to the statute.'"[207] This includes when Congress purposefully leaves a "gap for the agency to fill."[208]

One practical basis for the *Chevron* rule is an agency's expertise; due to the agency's greater experience in what can be the highly technical and specialized nature of regulation, the court should refrain from substituting its judgement for that of the agency.[209] Another justification for the *Chevron* doctrine's deference to interpretations by an administrative agency is the agency's greater political accountability, especially as compared to unelected judges.[210] The Court recognized that ambiguous statutory language requires a choice between interpretations, a discretionary exercise better suited to accountable agencies.[211] The *Chevron* doctrine further presumes that Congress, by expressly delegating rulemaking power, intended for the agency to be responsible for discerning the policy choices reflected in the statutory language and for choosing between competing interests.[212] Thus, *Chevron* reconciles the complexity of the modern administrative state with the constitutional commitment to the electoral accountability of policymakers.[213]

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207. ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324 (1994) (quoting *Chevron*, 467 U.S. at 844).

208. *Chevron*, 467 U.S. at 843. Such a gap has been described as a direction to "promulgate regulations [to] transform[ ] the generalities [of a statute] into specifics." Russell L. Weaver, *Some Realism About* Chevron, 58 Mo. L. Rev. 129, 134 (1993). It has been argued, however, that the theory that Congress has, by leaving a gap or ambiguity, implicitly delegated the authority to the agency is a "fiction." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) [hereinafter, Breyer, *Judicial Review*].

209. *See* Breyer, *Judicial Review*, *supra* note 208, at 368; Schacter, *supra* note 7, at 615. The "deferential" model was earlier articulated in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), where the Court relied on the agency's interpretation of a broad statutory term because "its experience in the administration of the statute gives it familiarity." 322 U.S. at 130 (citing Grey v. Powell, 314 U.S. 402, 411 (1941)).

210. Manning, *supra* note 203, at 626 (claiming that "*Chevron* makes sense of original constitutional commitments to electoral accountability by presuming that Congress has selected agencies rather than courts to resolve serious ambiguities in agency-administered statutes"); Merrill, *supra* note 18, at 978-79; Schacter, *supra* note 7, at 617. Although agency officials themselves are not elected, they are appointed and supervised by the President, and Congress has the power to veto regulations with which it disagrees. *See* Merrill, *supra* note 18, at 978; *see also* Eskridge & Frickey, Cases and Materials, *supra* note 9, at 495-96 (discussing legislative vetoes).

211. Manning, *supra* note 203, at 625.

212. *Chevron*, 467 U.S. at 865-66; *see also* Mank, *supra* note 95, at 1278-84 (arguing that agencies are better equipped than courts to interpret statutes because agencies have a closer relationship to the political branches and legislative process); Sunstein, *Law and Administration*, *supra* note 8, at 2088 (stating that "Chevron reflects a[n] . . . understanding that . . . judgements of policy . . . should be made by administrators rather than judges").

213. Manning, *supra* note 203, at 626.

2. The Effect of Textualism On the *Chevron* Doctrine

Because step one of the *Chevron* doctrine requires the court to decide whether the text is ambiguous, and thus whether or not to defer to the agency's regulations, the choice of interpretive method can have a dramatic effect upon the manner in which a statute is implemented. For example, if the court is looking to the legislative history to determine whether Congress clearly spoke to a very specific issue, it is not likely to find such intent because Congress usually expects agencies to address narrow issues implicated by the statute.[214] If the court looks at the statutory language, without considering the policies and the congressional purpose behind it, the court can decide, without the aid of a statute's context, what constitutes the "ordinary meaning" of the words, and therefore disregard the agency's interpretation.[215] Textualism ends the inquiry once the court finds that a term has a "plain meaning."[216] In contrast, by using intentionalism, the court may find an ambiguity as to the meaning of a statutory term, not because the term is itself unclear, but because it is unclear how Congress intended the word to be understood in the larger context of the statutory purpose.[217] Such a determination would trigger the *Chevron* rule and require a court to defer to agency interpretations. In practice, because the Justices disagree on what tools of statutory interpretation to use to determine whether congressional intent is clear or not, the Court has applied *Chevron* irregularly.[218]

Originally, the Court used an intentionalist approach to discern whether Congress had spoken to a particular issue.[219] The Court, however, has transformed the original *Chevron* question of whether Congress had "specific intentions on" or "clearly spoken to" a statutory issue into a question of whether the statutory language was "ambiguous,"[220] or whether it had a "plain meaning."[221] Previously, the

214. *See* Merrill, *supra* note 18, at 991.

215. Scalia, *supra* note 110, at 521.

> One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.

Id.

216. Merrill, *supra* note 18, at 991-92.

217. *See id.* at 991.

218. *See* Weaver, *supra* note 208, at 154.

219. *See* Young v. Community Nutrition Inst., 476 U.S. 974, 975-84 (1986) (applying an intentionalist version of the *Chevron* step-one question to find that Congress did not unambiguously express its intent regarding the FDA's discretion in setting tolerance levels for substances added to foods); Merrill, *supra* note 18, at 990-92 (tracking the shift in how the Court has articulated the step-one ambiguity question).

220. *See* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225-30, 236-43 (1994) (applying a textualist version of the *Chevron* question and finding that the statutory term "modify" was not sufficiently ambiguous to defer to FCC regulations, thereby disregarding both conflicting dictionary definitions of the term and a provision allowing

Court looked for an indication of congressional intent on the specific issue and if none existed, permitted an agency's reasonable interpretation to prevail. Now the Court will only defer to an agency's interpretation if no other possible construction of the statute will yield an answer to the issue before the court. This shift mirrors the Court's internal disagreement over what interpretive tools to use; whether the Court interprets the statutory language with the aid of legislative history depends on whose view gains the majority.[222]

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the FCC to "modify" its regulations in response to changes in the industry); Pierce, *Hypertextualism*, *supra* note 98, at 754-56 (listing cases from the 1993-94 Term that exemplify this shift from intentionalism to what Pierce calls "hypertexualism").

221. *See* Merrill, *supra* note 18, at 990-91; *see also* K Mart Corp. v. Cartier, 486 U.S. 281, 291 (1988) (describing the *Chevron* step-one question as an inquiry into the "plain meaning of the statute").

222. Exemplifying the debate between the methods of statutory interpretation are two Supreme Court decisions, *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994), and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). In *City of Chicago*, the Court addressed the question of whether a regulation promulgated under Section 3000(i) of the Solid Waste Disposal Act properly defined hazardous waste to exclude ash generated by an exempted household waste facility. 511 U.S. at 330-32. Justice Scalia, for the majority, rejected the Solicitor General's "plea for deference to the EPA's interpretation" of the statute and rejected consideration of the legislative history which included a statement that the "generation" of waste was intended to be exempted. *Id.* at 337-39. Instead, by looking only to the "plain meaning" of the statutory language, the Court held that the ash generated by the facility was not exempt from regulation as a hazardous waste. *Id.* at 334-35. Justice Stevens dissented, however, arguing that the "relevant statutory text is not as unambiguous as the Court asserts," and, moreover, that the legislative history supported the EPA's conclusion. *Id.* at 346-48 (Stevens, J., dissenting). Justice Stevens further stated that this was a "question[ ] of policy that we are not competent to resolve. [This] question[ ] [is] precisely the kind that Congress has directed the EPA to answer." *Id.* at 348 (Stevens, J., dissenting).

One year later in *Sweet Home*, Justice Stevens wrote for the majority, and Justice Scalia dissented, tracking their previous disagreement in *City of Chicago*. The Court upheld a regulation promulgated by the Secretary of the Interior under the Endangered Species Act (ESA) that defined the statutory term "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife." *Sweet Home*, 515 U.S. at 690-92. Finding that the statutory language of the ESA was ambiguous, and that the agency had latitude in enforcing the ESA according to its expertise, the Court deferred to the agency's interpretation. *Id.* at 703. Dissenting, Justice Scalia argued that it was inappropriate to resort to legislative history when "the enacted text was as clear as this," *id.* at 726 (Scalia, J., dissenting), and that "legislative history [cannot] be summoned forth to contradict, rather than clarify, what is in its totality an unambiguous statutory text." *Id.* at 730 (Scalia, J., dissenting).

These two cases highlight the breadth of the inconsistent applications of *Chevron*. They are inconsistent because a different method of interpretation is applied in each case to *Chevron*'s step-one question regarding whether the statutory text is ambiguous on how Congress intended the statute to apply to the specific issue before the court. Whether the language was found ambiguous depended on how much weight, if any, Justices were willing to give non-textual information and concerns. Justice Stevens, using intentionalism, looked to the larger statutory context, and both times advocated deferring to the agency regulation. Justice Scalia used textualism and focused on the plain language of the statute, both times finding an unambiguous statutory meaning different from that found by the agency.

This disagreement regarding how to determine ambiguity under step-one of the *Chevron* doctrine[223] is reflected in the lower court decisions that find the ADA applies to state prisons: Some defer to the DOJ regulations, while other courts do not. Even though the only question before these courts is whether a state prison is a covered entity under the ADA, the courts that do not defer to the regulations express doubt about the wisdom of applying the ADA to state prisons and whether Congress intended to extend this right to prisoners. The next part examines how courts that find the statutory text of the ADA ambiguous—either on the question of whether Congress intended to abrogate the states' immunity for state prisons, or under step-one of the *Chevron* doctrine—could find guidance in the ADA's purpose and the regulations promulgated under it.

IV. CURRENT CIRCUIT SPLIT OVER WHETHER THE ADA APPLIES TO STATE PRISONS

Despite the clarity of the language of Title II of the ADA[224] and despite the pre-existing Rehab Act case law[225] and regulations,[226] six circuit courts disagree about whether the ADA applies to state pris-

223. Within the context of the ADA, courts currently disagree regarding whether to apply a textualist or an intentionalist interpretive method to the text. On whether the ADA creates liability for architects, the district court in *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997), held that the DOJ regulation and interpretation of the ADA finding liability for architects was consistent with the "remedial purpose of the ADA" and "entitled to deference." *Id.* at 1266. The court based its decision on legislative history and the statutory purpose and further said that had congressional intent not been clear, it would have deferred, following *Chevron*. *Id.* at 1266-67 & n.4. In contrast, the court in *Paralyzed Veterans of America v. Ellerbe Becket Architects & Eng'rs, P.C.*, 945 F. Supp. 1 (D.D.C. 1996), *aff'd* 117 F.3d 579 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 1184 (1998), found that the "*plain language* of the statute makes clear that architects are not covered by . . . the ADA." *Id.* at 2 (emphasis added).

On the issue of whether the ADA applies to local zoning laws, the court in *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222 (S.D.N.Y. 1996), held that the text, purpose, and legislative history all "confirms that it was intended to sweep widely." *Id.* at 232. Furthermore, the DOJ regulations, which interpreted the ADA to reach "all actions by public entities, including zoning enforcement actions," were entitled to deference pursuant to *Chevron*. *Id.* at 232 & n.3. The court in *United States v. City of Charlotte*, 904 F. Supp. 482 (W.D.N.C. 1995), however, found the statutory language of the ADA to be "unambiguous," in that it did not encompass zoning decisions, and to find that it did "would stretch [the] meaning[ ] beyond sensible proportion." *Id.* at 484. Consequently, the court did not reach the question of whether to defer to the regulations.

224. *See supra* notes 52-54 and accompanying text.

225. *See, e.g.*, Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994) (holding that the Rehab Act applies to prisons); Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988) (same); Harris v. Thigpen, 727 F. Supp. 1564 (M.D. Ala. 1990) (same), *aff'd* 941 F.2d 1495 (11th Cir. 1991); Sites v. McKenzie, 423 F. Supp. 1190 (N.D. W.Va. 1976) (same).

226. 28 C.F.R. § 39.170(d)(1)(ii) (1997) (providing procedure for inmate claims under the Rehab Act); *id.* § 42.540(h) (using "department of corrections" as an example of a "program" under the Rehab Act); *id.* § 42.540(j) (defining "benefit" under the Rehab Act as including a "disposition" such as "confinement").

ons. This disagreement revolves around a doctrinal conflict over whether to consider this question as one involving Eleventh Amendment abrogation or one triggering *Chevron* deference to administrative interpretation.

All of the courts that have considered the issue agree that in the ADA Congress has met the requirements of the *Atascadero* plain statement rule and abrogated the states' Eleventh Amendment immunity—at least generally.[227] They disagree, however, on whether the *Gregory* plain statement rule, requiring specific abrogation on core state functions, applies to the question of whether the ADA applies to state prisons. Additionally, the courts holding that the ADA applies to state prisons vary in their application of *Chevron*, and the extent to which the ADA covers prison operations.

This part first looks at the decisions that concluded that the *Gregory* plain statement rule bars the application of the ADA to state prisons. It then compares the decisions that found *Gregory* inapplicable and held that the ADA does apply to state prisons with respect to their application of the *Chevron* doctrine. Finally, this part examines how the courts' analyses reflect consideration of the unique circumstances that arise in prisons.

A. *How Courts Rely on* Gregory v. Ashcroft *and Textualism to Conclude that the ADA Does Not Apply to State Prisons*

Until the Fourth Circuit's 1995 decision, *Torcasio v. Murray*,[228] no court had questioned the applicability of the ADA to prisons on Eleventh Amendment grounds,[229] and courts had previously held that the Rehab Act applied to state prisons that received federal funds.[230] The *Torcasio* court proposed that the broad, all-inclusive language of the ADA did not include prisons, and it reached its decision by applying the *Gregory* plain statement rule.[231] Since *Torcasio*, the Fourth Circuit, in *Amos v. Maryland Department of Public Safety and Correctional Services*,[232] again found that the "profound consequences" of

227. *See, e.g.*, Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589, 604 (4th Cir. 1997) (finding that the ADA contains general abrogation of states' Eleventh Amendment immunity), *petition for cert. filed*, 66 U.S.L.W. 3474 (U.S. Dec. 19, 1997) (No. 97-1113); Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168, 172-73 (3d Cir. 1997) (same), *cert. granted*, 118 S. Ct. 876 (1998) (mem.).

228. 57 F.3d 1340, 1344 (4th Cir. 1995) (suggesting that the ADA does not apply to state prisons).

229. *See* Laura E. Walvoord, *A Critique of* Torcasio v. Murray *and the Use of the Clear Statement Rule to Interpret the Americans with Disabilities Act*, 80 Minn. L. Rev. 1183, 1217 (1996) (calling the *Torcasio* court's analysis "unprecedented").

230. *See, e.g.*, Bonner v. Lewis, 857 F.2d 559, 560-64 (9th Cir. 1988) (holding that Bonner, a deaf inmate, had stated a claim under the Rehab Act for not being provided with American Sign Language interpreters or communication devices while incarcerated in a state prison which received federal funds).

231. *Torcasio*, 57 F.3d at 1344-45.

232. 126 F.3d 589 (4th Cir. 1997).

holding prisons to the requirements of the ADA and Rehab Act demand that Congress "speak with unmistakable clarity," and held that Congress had not done so.[233]

The courts in *Amos*[234] and *Callaway v. Smith County*[235] conducted the most comprehensive analyses in support of their positions that the

233. *Amos*, 126 F.3d at 600. Lower courts in the Fourth and other circuits have followed suit holding that the ADA does not apply to state prisoners. *See* Callaway v. Smith County, No. CIV.A.6:97 CV834, 1998 WL 25627 (E.D. Tex. Jan. 21, 1998); Boblett v. Angelone, 957 F. Supp. 808 (W.D. Va. 1997); Pierce v. King, 918 F. Supp. 932, (E.D. N.C. 1996), *aff'd per curiam*, 131 F.3d 136 (4th Cir. 1997), *petition for cert. filed*, (U.S. Mar. 10, 1998) (No. 97-8246).

Previously, the Tenth Circuit, in *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991), and more recently in *White v. Colorado*, 82 F.3d 364 (10th Cir. 1996), gave little weight to the larger anti-discriminatory policies behind the ADA and the Rehab Act. Moreover, the Tenth Circuit narrowly interpreted both statutes to find that "employee" does not include prisoners working in prison and, more surprisingly, that prisons are not "programs or activities." *Williams*, 926 F.2d at 997; *see also White*, 82 F.3d 367 (explaining—solely by referencing *Williams*—that the ADA does not apply to prisons). Whether an inmate is an "employee" is a consideration under Title I of the ADA, whereas whether prisons are a "public entity" is a Title II question. *See* 42 U.S.C. §§ 12111, 12131 (1994). The Tenth Circuit does not make this distinction. *See White*, 82 F.3d at 367 (explaining that "prison employment situations" are not covered under the ADA because the *Williams* court found that prisoners were not employees under the ADA). Prison employment situations, however, should be analyzed under Title II coverage of "programs" of any public entity, not under Title I, which covers employment practices. Courts have held that prisoners are not "employees" entitled to either the minimum wage under the Fair Labor Standards Act (FLSA), *see* Nicastro v. Reno, 84 F.3d 1446 (D.C. Cir. 1996); Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992), or the protections of the "whistleblower" provisions of the Clean Air Act and the Toxic Substance Control Act, Coupar v. Department of Labor, 105 F.3d 1263 (9th Cir. 1997). In *Coupar*, the court distinguished the prisoner-prison work relationship from that of other employee-employer relationships, saying "the economic reality of the relationship between the worker and the entity for which work was performed lies in the relationship between the prison and the prisoner. It is penological, not pecuniary." *Id.* at 1265 & n.1 (citing Hale v. Arizona, 993 F.2d 1387, 1393 (9th Cir. 1993) (en banc). Similar analysis should have led the court in *Williams* to find that prison employment is covered by Title II of the ADA, as part of the prison program provided by the state.

234. The *Amos* plaintiffs alleged a range of discriminatory practices, including denial of participation in a work-release program, and the inaccessibility of bathrooms, athletic facilities, and food services. *Amos*, 126 F.3d at 590-91. In examining the Fourth Circuit's argument, this Note primarily relies on that court's decision in *Amos* for two reasons. First, in *Torcasio*, the issue of whether prisons are covered by the ADA was not before the court and its opinion on the matter is dicta. *See Amos*, 126 F.3d at 593. Second, the *Amos* opinion literally adopts the *Torcasio* opinion almost in its entirety before going on to make its own very similar argument. *See Amos*, 126 F.3d at 594 ("[W]e begin our analysis with a full statement of what we decided in [*Torcasio*].").

235. No. Civ.A.6 CV834, 1998 WL 25627 (E.D. Tex. Jan. 21, 1998). The *Callaway* court did not specify the ADA claim involved in *Callaway*, but the inmate alleged generally unfair treatment because of his HIV positive status. *Id.* at *1-2. Although the plaintiff in *Callaway* alleged inadequate medical treatment and the other cases were concerned with questions of access, the Callaway court analyzed the issues in the same manner. This is notable given that the question of whether infection with the HIV virus is a "disability" under the ADA is an open question, which the Supreme Court will resolve this Term. *Compare* Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997)

ADA does not apply to state prisons. Although they found that the ADA contains a general abrogation of states' Eleventh Amendment immunity, they questioned whether Congress intended that abrogation to give prisoners the right to sue states for violations of the ADA.[236] The *Amos* court acknowledged the ADA's language of abrogation, but found that it only "suggests that Congress intended for [the ADA] to apply to states generally," not that Congress intended for prisons to be covered under the ADA.[237] The court specifically adopted the *Gregory* Eleventh Amendment plain statement rule to determine "whether the statute applies in the particular matter claimed."[238] To apply the *Gregory* plain statement rule, there must be ambiguity in the statutory language as to whether Congress intended to abrogate on the specific question at issue.[239] The *Amos* court said that when the statutory language is so broad, "the breadth of [it] renders it ambiguous. We therefore decline to attribute to Congress an intent to intrude on a core state function in the face of statutory ambiguity."[240] As stated by the *Callaway* court: "[T]he issue here is . . . whether the sweep of the statute necessarily encompasses . . . prisons, a core function of state government, absent a clear and plain statement by Congress . . . ."[241] The courts found that prison management is an "area of historic state control,"[242] "a core function uniquely within the authority of the State,"[243] an area particularly unsuited to the interference of the federal judiciary,[244] and to apply the ADA and Rehab Act to prisons would alter the "usual constitutional balance between the States and the Federal Government."[245] In concluding

(holding that asymptomatic HIV infection is a disability under the ADA), *cert. granted*, 118 S. Ct. 554 (1997) (mem.), *with* Runnebaum v. NationsBank, 123 F.3d 156 (4th Cir. 1997) (holding that plaintiff with asymptomatic HIV infection was not disabled under the ADA).

236. *See Amos*, 126 F.3d at 604-05; *Callaway*, 1998 WL 25627, at *3.

237. *Amos*, 126 F.3d at 604.

238. *Id.* (quoting Riley v. Virginia Dep't of Educ., 106 F.3d 559 (4th Cir. 1997), *superceded by* IDEA Amendments of 1997, Pub. L. No. 105-17, § 612, 111 Stat. 37, 60 (codified as amended at 20 U.S.C.A. § 1412 (West Supp. 1998)) (citing Gregory v. Ashcroft, 501 U.S. 452 (1991)).

239. Gregory v. Ashcroft, 501 U.S. 452, 470 (1991).

240. *Amos*, 126 F.3d at 605.

241. *Callaway*, 1998 WL 25627, at *6.

242. *Amos*, 126 F.3d at 600.

243. *Callaway*, 1998 WL 25627, at *7.

244. Torcasio v. Murray, 57 F.3d 1340, 1345-46 (4th Cir. 1995). Consider also the sentiments behind the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat., *reprinted in* 1996 U.S.C.C.A.N. 1321, 1321-66 (codified at 18 U.S.C.A. § 3626 (West Supp. 1998), 28 U.S.C.A. § 1915 (West Supp. 1998), and 42 U.S.C.A. § 1997(e) (West Supp. 1998)), which drastically limits inmates' access to the courts and the relief they may receive. *See generally*, Catherine G. Patsos, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. Sch. L. Rev. 205 (1998) (reviewing the provisions of the PLRA and arguing that it is unconstitutional).

245. *Torcasio*, 57 F.3d at 1344 (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985))); *see* Callaway, 1998 WL 25627, at *7.

that the *Torcasio* decision was sound, the *Amos* court stated: "Most importantly, *Torcasio* recognized the profound consequences that would result if the [ADA and Rehab Act] were applied to state prisons."[246]

Perhaps acknowledging that the *Gregory* plain statement rule did not require the statute to include a list of every core state function Congress intended it to cover, but only to make it "plain,"[247] the *Amos* and *Callaway* courts looked to the statutory language. On the question of whether Congress intended to abrogate the states' immunity as to state prisons, the *Amos* court took a textualist approach to the statutory language[248] and invoked textualism's search for the "ordinary meaning."[249] In particular, the court argued that because prisoners are involuntarily incarcerated, they are not covered by the ADA,[250] because Title II of the ADA prohibits discrimination against individuals with disabilities who meet the "*eligibility* requirements . . . for the *participation* in programs or activities."[251] The *Amos* court interpreted those terms to inherently "imply voluntariness on the part of an applicant who seeks a benefit from the state; they do not bring to mind prisoners who are being held against their will."[252] The *Callaway* court similarly reasoned "that inasmuch as prisoners are not voluntarily 'participating' in the prison routine, they are not qualified individuals within the meaning of the Act."[253] The *Callaway* court also argued that Title II of the ADA cannot apply to prisons because the statute refers to "'[p]ublic Services' and speaks of bans on discrimination in services provided to the public, but the public is excluded

246. *Amos*, 126 F.3d at 600. The court finds that applying the ADA to state prisons will have two consequences that support its decision that Congress did not intend prisons to be covered. First, application of the ADA "would have serious implications for the management of state prisons, in matters ranging from cell construction and modification, to inmate assignment, to scheduling, to security problems." *Id.* (quoting Torcasio v. Murray, 57 F.3d 1340, 1346 (4th Cir. 1995)). The second and related concern is that holding that the ADA applies to state prisons would involve the federal judiciary in managing and overseeing state prison operations. *Id.* at 595 ("[A]bsent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons or to substitute their judgement for that of trained penological authorities charged with the administration of such facilities." (quotations and citations omitted)).

247. Gregory v. Ashcroft, 501 U.S. 452, 467 (1991).

248. *See supra* notes 52-59 and accompanying text for the language of Title II of the ADA.

249. *See supra* notes 104-11 and accompanying text.

250. *Amos*, 126 F.3d at 596, 601 (citing Torcasio v. Murray, 57 F.3d 1340, 1347 (4th Cir. 1995)).

251. 42 U.S.C. § 12131(2) (1994) (emphasis added).

252. *Amos*, 126 F.3d at 601 (quoting Torcasio v. Murray, 57 F.3d 1340, 1347 (4th Cir. 1995)). As noted by a different court, however, the ADA is uncontroversially assumed to cover other compulsory state programs and benefits, like public education. *See* Armstrong v. Wilson, 124 F.3d 1019, 1024 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686).

253. Callaway v. Smith County, No. Civ.A.6 CV834, 1998 WL 25627, at *5 (E.D. Tex. Jan. 21, 1998).

from prisons."[254] Further, the *Callaway* court noted "the absurdity of defining 'benefit' in such a broad and general way as to include sentencing and confinement."[255]

The plaintiffs argued that the court should not apply the *Gregory* plain statement rule, and because the court found that the statute contained gaps and ambiguities, the court should have followed *Chevron* and deferred to the regulations. The *Amos* and *Callaway* courts both found that federalism counseled against deference to the regulations. The *Amos* court responded that it found the regulations to be "minute" in detail, "byzantine," "intricate[ ]," "intrusive[ ]," and to "consume" pages of the Code of Federal Regulations.[256] Essentially, the court used the depth and detail of guidance on how the ADA would affect prison services, construction, and design to conclude that state prisons are the type of core state function that required the court to be "absolutely certain that Congress intended such an exercise."[257] The *Callaway* court also found that federalism was implicated by the detailed regulations, and to give ambiguous federal law "state-displacing weight" on the basis of agency regulations would be to avoid the very political process *Garcia* said should protect the states against "intrusive exercises" of Congress's powers.[258]

B. *The Reasoning of the Courts that Find the ADA Applies to State Prisons*

The Third,[259] Seventh,[260] and Ninth[261] Circuits have upheld the application of the ADA and the Rehab Act to state prisons, and the

254. *Id.* at *4.
255. *Id.* at *7.
256. 126 F.3d at 606.
257. *Id.* at 605 (quoting Gregory v. Ashcroft, 501 U.S. 452, 464 (1991)).
258. 1998 WL 25627, at *7 (citing Gregory v. Ashcroft, 501 U.S. 452, 464 (1991)).
259. *See* Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168 (3d Cir. 1997) (finding that the ADA applies to prisons), *cert. granted*, 118 S. Ct. 876 (1998) (mem.). Prior to *Yeskey*, the Third Circuit had held that the ADA applied to state prisons, but withdrew that opinion because rehearing en banc was granted and the opinion vacated. Inmates of the Allegheny County Jail v. Wecht, 93 F.3d 1124 (3d Cir. 1996), *vacated* and *withdrawn*, No. 95-3402, 1996 WL 474106 (3d Cir. Sept. 20, 1996). Due to the confusion, the court in *Rouse v. Plantier*, 987 F. Supp. 302 (D.N.J. 1997), held that the application of the ADA to state prisons was not sufficiently clear and granted qualified immunity to state prison officials.
260. *See* Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997) (finding that the ADA applies to prisons); Love v. Westville Correctional Ctr., 103 F.3d 558 (7th Cir. 1996) (assuming the ADA applies to state prisons); Hanson v. Sangamon County Sheriff's Dep't, No. 97-3175, 1998 WL 34773 (C.D. Ill. Jan. 28, 1998) (holding that the ADA applies to state prisons).
261. *See* Armstrong v. Wilson, 124 F.3d 1019 (9th Cir. 1997) (explicitly joining the Third and Seventh Circuits in finding that both the ADA and the Rehab Act apply to prisons), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686); Clark v. California, 123 F.3d 1267 (9th Cir. 1997) (same), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686); Duffy v. Riveland, 98 F.3d 447 (9th Cir. 1996) (holding that both the Rehab Act and the ADA apply to prisons); Gates v.

Sixth,[262] Eleventh,[263] and Eighth[264] have assumed without discussion that those statutes do apply. All recognized that the purpose of the ADA is to eliminate discrimination on the basis of disability, and that this right to be free from discrimination is "among the few rights that prisoners do not park at the prison gates."[265] They unanimously agree that Congress abrogated the states' Eleventh Amendment immunity and that *Gregory* is inapplicable,[266] because its holding was limited to "core state functions" related to government representation and close analogies, a category that does not include state prisons,[267] a "mere provision of public services."[268] Further, as a matter of statutory construction, the decision to apply the plain statement rule in *Gregory* was premised on the ambiguity regarding whether the statutory exception for policymakers included judges.[269] The *Yeskey* court, for example, found the ADA and Rehab Act to "speak unambiguously of their application to state and local governments."[270] Therefore, in holding that the ADA does apply to state prisons, these opinions focused on both the extent and manner of the application of the ADA to state prisons, and on the exact contours of the right afforded to prisoners. The courts' methods of statutory interpretation, particularly regarding whether they apply the *Chevron* doctrine and consider the agency regulations in their analysis, vary. First this section will examine the method of statutory interpretation used by the courts which did apply

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Rowland, 39 F.3d 1439 (9th Cir. 1994) (holding that the Rehab Act applies to prisons); Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988) (same).

262. Wagner v. Jett, No. 94-5522, 1994 WL 532930 (6th Cir. Sept. 30, 1994) (holding that the plaintiff inmate did not state a claim under the ADA, without discussing whether the ADA applied to state prisons).

263. Onishea v. Hopper, 126 F.3d 1323, 1328 (11th Cir. 1997) (stating that prisoners can state a claim under the Rehab Act), *vacated and reh'g granted*, 133 F.3d 1377 (11th Cir. 1998); Harris v. Thigpen, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991) (same).

264. Aswegan v. Bruhl, 113 F.3d 109 (8th Cir.) (holding that cable television in prison is not a "public service, program, or activity" under the ADA), *cert. denied*, 118 S. Ct. 383 (1997); Lue v. Moore, 43 F.3d 1203, 1205-06 (8th Cir. 1994) (stating that the Rehab Act applies to prisons).

265. *Crawford*, 115 F.3d at 486; *see also* Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168, 174 (3d Cir. 1997) (quoting *Crawford*, 115 F.3d at 486), *cert. granted*, 118 S. Ct. 876 (1998); *see* Niece v. Fitzner, 941 F. Supp. 1497, 1509-10 (E.D. Mich. 1996) (recognizing the remedial purpose of the ADA).

266. *Armstrong*, 124 F.3d at 1024 (finding the *Gregory* rule to only apply when the statutory language is ambiguous), *Yeskey*, 118 F.3d at 172-73 (concluding that *Gregory* required Congress to make its intent "plain," and that the language of the ADA satisfied that requirement); *Crawford*, 115 F.3d at 487 (finding that the Eleventh Amendment does not bar the application of the ADA to state prisons because Congress has the authority under the Fourteenth Amendment to provide for enforcement of the ADA in federal court).

267. *Armstrong*, 124 F.3d at 1024-25; *Yeskey*, 118 F.3d at 172-73; *Crawford*, 115 F.3d at 485.

268. *Yeskey*, 118 F.3d at 173 (quoting *Crawford*, 115 F.3d at 486).

269. Gregory v. Ashcroft, 501 U.S. 452, 465 (1991).

270. *Yeskey*, 118 F.3d at 173.

Chevron, and then examine the approach used by decisions that did not.

1. Courts That Apply *Chevron*

In 1988, the Ninth Circuit decided *Bonner v. Lewis*,[271] and was the first court to find that the Rehab Act applied to state prisons. In reaching its conclusion, the *Bonner* court looked to the DOJ regulations, the broad language of the Rehab Act, and the purpose of the statute.[272] The prison officials argued that "it is unlikely that Congress ever intended that [the Rehab Act] apply to prisoners."[273] The court, however, found that "the plain language of the Justice Department's implementing regulations, and the Act itself . . . belies their argument."[274] Despite the *Bonner* court's clear deference to the DOJ regulations, only one other appellate court has followed its reasoning in deciding whether the ADA applies to state prisons.

In *Yeskey v. Pennsylvania Department of Corrections*,[275] the plaintiff was denied admission to the prison boot camp program because of his history of hypertension.[276] In *Yeskey*, the Third Circuit found that the statutory language was "all-encompassing,"[277] and that the regulations "make it clear" that the Rehab Act and the ADA apply to prisons.[278] Although the court doubted that state prisons "would not fall within th[e] broad definition" of "program" under the ADA, in light of the statute's silence on the issue, the court recognized Congress's express delegation of rule-making authority to the DOJ, and deferred to its regulations under *Chevron*.[279] Although the plaintiff's claim centered on access to a program, the court, through a lengthy investigation into the regulations, demonstrated that the ADA was "intended to appl[y] to anything a public entity does."[280] Looking to the Rehab Act regu-

271. 857 F.2d 559 (9th Cir. 1988).

272. *Id.* at 562. The court specifically noted that the Rehab Act's goals of "independent living and vocational rehabilitation should in fact mirror the goals of prison officials as they attempt to rehabilitate prisoners and prepare them to lead productive lives once their sentences are complete." *Id.*

273. *Id.*

274. *Id.* (citations omitted).

275. 118 F.3d 168 (3d Cir. 1997), *cert. granted*, 118 S. Ct. 876 (1998) (mem.).

276. *Id.* at 169.

277. *Id.* at 170.

278. *Id.* at 170-71.

279. *Id.* ("[T]he DOJ's regulations should be accorded 'controlling weight unless [they are] arbitrary, capricious, or manifestly contrary to the statute.'" (citing Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 708 (1995) (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)) (alterations in original)). The court also defers to the preamble and commentary to the regulations "since both are part of the DOJ's official interpretation of the legislation." 118 F.3d at 171 (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 510-12 (1994)).

280. *Id.* (alterations in original) (quoting 28 C.F.R. pt. 35, app. A, subpt. A at 456 (1997)).

lations for guidance, the court found that a "benefit" and a "program"—the terms that gave other courts difficulty[281]—are adequately defined in the regulations.[282] A benefit is a "provision of services, . . . or disposition (i.e. treatment, handling, decision, sentencing, *confinement* or other prescription of conduct)."[283] This shows that the ADA covers all of the operations of a prison, not just the educational or work programs it offers. The court found that the ADA regulations also unequivocally specify that the ADA mandates comprehensive accommodation when the regulations state that correctional facilities are required to provide "assistance in toileting, eating, or dressing" to inmates with disabilities.[284] In sum, the court found the ADA clearly abrogated the states' Eleventh Amendment immunity, and found that *Gregory* did not apply because its holding was limited to core state functions like determining the qualifications for elected officials. In construing the ADA, the court found that it was silent on whether it was to apply to state prisons, and deferred to the regulations, recognizing both the express delegation to the DOJ and that the agency's expertise made the agency better suited for determining the specifics of the ADA's application to prisons. This court's analysis was consistent with the remedial purposes of the ADA and Congress's intent that the DOJ, and not courts, make the policy choices regarding the statute's application.

2. Courts that Did Not Apply *Chevron*

The courts in both *Crawford v. Indiana Department of Corrections*[285] and *Armstrong v. Wilson*[286] looked to the language of the ADA and found it "expansive"[287] and "doubt[ed] . . . that Congress could speak much more clearly than it did."[288] Although they had decided that a state prison was a "public entity" as defined by the ADA,[289] and despite their claim regarding the clarity of the statutory language, both courts then questioned whether incarceration was a "program" under the ADA.[290] Rather than deciding that Congress continued to be "expansive," and intended all prison operations to be covered by the ADA, the courts decided that the prison itself provided programs which may be covered under the ADA. The *Craw-*

281. *See supra* notes 252-53 and accompanying text; *see infra* notes 290, 294 and accompanying text.
282. 118 F.3d at 171 (quoting 28 C.F.R. §§ 42.540(h), 42.540(j) (1997)).
283. *Id.* (quoting 28 C.F.R. § 42.540(j)).
284. *Id.* (quoting 28 C.F.R. pt. 35, app. A, subpt. A at 468 (1996)).
285. 115 F.3d 481 (7th Cir. 1997).
286. 124 F.3d 1019 (9th Cir. 1997).
287. *Id.* at 1023.
288. *Crawford*, 115 F.3d at 485.
289. 42 U.S.C. § 12131(1) (1994); *see supra* note 52 and accompanying text.
290. *Armstrong*, 124 F.3d at 1023 (quoting *Crawford*, 115 F.3d at 483); *Crawford*, 115 F.3d at 483.

ford court went down the list of areas the plaintiff, a blind man, was suing to get access to, and found each one "a little less clearly"[291] a program under the ADA.[292] The *Armstrong* plaintiffs claimed the prison provided limited work and educational programs to disabled inmates which, in turn, denied them the ability to earn sentence reduction credits.[293] Following the reasoning in *Crawford*, the *Armstrong* court focused on the meaning of "program" and found those in question to be "program[s] . . . to which *a disabled person* might *wish access*."[294] Both of these courts questioned how the ADA covers state prisons. Moreover, rather than construing a prison as a program that a state provides as a public entity under the statute, these courts indicated that the ADA applies to the individual programs or services a prison provides. Under Title II of the ADA, however, there are no exceptions to the programs, activities, or services to which the statute applies. Indeed, the DOJ regulations provide that the only defense is that a modification to a program is unreasonable as an undue hardship or fundamental alteration.[295]

What is most striking about the *Crawford* and *Armstrong* decisions is that, while they admitted to questioning the interpretation that the ADA applies to state prisons, they did not refer to the agency regulations promulgated by the DOJ, the agency given the authority to administer regulations under Title II. Had they found the language clear on whether the ADA applied to prisons, *Chevron* would not require even a cursory examination of the agency regulations, let alone deference.[296] But even in the face of the "expansive" language[297] of the ADA, both courts found it doubtful that the ADA applied to all aspects of prison operations. This created an ambiguity—as to whether the ADA covered only programs provided by the prison, or the prison itself—that should have triggered the *Chevron* analysis.[298] The *Armstrong* court's failure to follow *Chevron* and defer to the regulations is even more striking in light of the lower court's favorable consideration of the regulations and their applicability.[299]

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291. 115 F.3d at 483.

292. The programs at issue were the prison education program, use of the prison library, and the use of the prison dining hall. *Id.*

293. 124 F.3d at 1021.

294. *Id.* at 1023 (quoting *Crawford*, 115 F.3d at 483 (emphasis added)).

295. *See supra* note 59.

296. *See supra* Part III.B.1.

297. 124 F.3d 1019, 1023 (1997).

298. *See supra* Part III.B.1.

299. *See* Armstrong v. Wilson, 942 F. Supp. 1252, 1257-60 (N.D. Ca. 1996), *aff'd*, 123 F.3d 1019 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686). In *Armstrong*, the lower court construed both the Rehab Act and the ADA, and stated that "[t]he broad language of the statute . . . imparts to . . . the DOJ[ ] the task of defining the term, 'any program.'" 942 F. Supp at 1257-58. Furthermore, the court cited *Chevron* for its holding that when Congress has left a "gap for the agency to fill, the agency's regulations 'are given controlling weight.'" *Id.* at 1257.

C. *The* Turner *Question and Textualism*

Further complicating the analysis in the prison context is the Supreme Court's decision in *Turner v. Safely*,[300] which held that a prison regulation that infringes on a prisoner's constitutional rights will be valid if it is reasonably related to legitimate penological interests.[301] All courts that have addressed the question of the ADA's application to state prisons have noted the special circumstances of prisons, and some courts have found *Turner* relevant on this issue.[302] Although the issue before these courts was whether a prisoner could state a claim under the ADA, many courts opined as to the practical effects of such an application.[303] Most of these courts see *Turner* as validating their "common sense" conclusion that the ADA does not, or was not meant to, cover state prisons.

The *Turner* "reasonableness test" establishes the appropriate level of deference that courts should give prison management decisions that infringe on prisoners' constitutional rights.[304] In *Gates v. Rowland*,[305]

300. 482 U.S. 78 (1987) (holding that a regulation restricting marriage by prison inmates violated the Fourteenth and First Amendments, but that a regulation restricting who inmates could write to did not violate the Constitution).

301. *Id.* at 89.

302. Only one court has applied *Turner* to an ADA claim, *see* Gates v. Rowland, 39 F.3d 1439, 1446-47 (9th Cir. 1994), but most courts considering the issue have been ruling on summary judgement motions. The *Amos* court found that the *Gates* decision supported its conclusion that the ADA did not apply to state prisons. *See* Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589, 607 (4th Cir. 1997). The *Crawford* court also made a number of statements that expressed disbelief at successfully applying the ADA to prisons. The court said "the plaintiff has stated a claim under [the ADA]. It might not be a good claim." Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 483 (7th Cir. 1997). The court further addressed the circumstances under which a court can legitimately create an exception to a statute which has no basis in the text, including when it "is necessary to save the statute from generating absurd consequences." *Id.* at 485. The court went on to say that "[i]t might seem absurd to apply [the ADA] to prisoners," and "[o]f course the failure to exclude prisoners from the Act may well . . . have been an oversight." *Id.* at 486-87. Finally, citing *Turner*, the court said that the different circumstances of prisons have been "emphasized in the parallel setting of prisoners' constitutional rights." *Id.* at 487. The court in *King v. Edgar* went further than the *Crawford* court, and said that "it is so unlikely that Congress envisioned mandating equal participation for disabled prisoners that an exception should be inferred." No. 96 C 4137, 1996 WL 705256, at *4 (N.D. Ill. Dec. 4, 1996).

303. This is despite the fact that the application of the ADA and the determination of the reasonableness of a proposed accommodation is a fact-intensive, case-by-case consideration, and is "generally a fact question not amenable to summary determination." Heather K. v. City of Mallard, 946 F. Supp. 1373, 1389 (N.D. Iowa 1996) (denying a motion for summary judgement to consider the reasonableness of the plaintiff's requested accommodation of limiting leaf burning in the municipality to certain hours because the smoke and particles caused by the burning aggravated her severe respiratory and cardiac conditions, making her unable to breathe).

304. The court reviewing a prison regulation should look to four factors: (1) whether there is a valid and rational connection between the regulation and the legitimate governmental interest; (2) whether there are any alternative means for prisoners to exercise the right under consideration; (3) the impact that accommodation of the

the court applied the *Turner* test to a Rehab Act claim, even though *Turner* had previously only been applied to prison regulations that affected prisoners' constitutional rights.[306] The *Gates* court employed *Turner* because, although there was no explicit textual indication regarding congressional intent to have the Rehab Act cover prisons, "[i]t is highly doubtful that Congress intended a more stringent application of the prisoners' statutory rights created by the Act than it would the prisoners' constitutional rights."[307]

The *Amos* and *Callaway* courts found that the *Gates* decision supported their contention that state prisons are a state function that requires a congressional, rather than a judicial, decision that they are covered under the ADA. These courts argue that, even if the ADA does apply to prisons, the *Turner* test is "the functional equivalent of the decision that the [ADA] does not apply,"[308] and would "effectively eviscerate[ ] the [ADA] in the prison context,"[309] because its four-prong test will prevent most applications of the ADA in prisons. Even if Congress had intended the ADA to cover state prisons, these courts further assume that Congress would have restricted the rights the ADA grants. The lower court in *Crawford*, using reasoning similar to that in *Amos* and *Callaway*, found that the uniqueness of the prison environment as indicated by the Supreme Court's previous deference to prison management[310] created a "common sense" presumption that the Rehab Act and the ADA were not intended to apply to prisons.[311] In evaluating the other circuit courts' conclusions that the ADA applies to prisons, the *Amos* court characterized their recogni-

asserted right will have on security, the allocation of prison resources and prison staff, and the general inmate population; and (4) whether ready alternatives exist for the prison officials to accomplish their objectives without infringing on inmates' rights. Turner v. Safley, 482 U.S. 78, 89-91 (1987); *see also* Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison*, 15 Yale L. & Pol'y Rev. 49, 93-97 (1996) (discussing *Turner* as applied to constitutional and ADA claims).

305. 39 F.3d 1439 (9th Cir. 1994).

306. Robbins, *supra* note 304, at 96.

307. *Gates*, 39 F.3d at 1447.

308. *Callaway*, 1998 WL 25627, at *4.

309. Amos v Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589, 607 (4th Cir. 1997).

310. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 224-27 (1990) (holding that a prison policy to administer drugs to mentally ill patients against their will was legitimate under the *Turner* test and did not violate the Due Process Clause); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) ("[T]he problems of prisons . . . are not readily susceptible of resolution by decree. . . . [C]ourts are ill equipped to deal with . . . problems of prison administration and reform . . . . Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.").

311. Crawford v. Indiana Dep't of Corrections, 937 F. Supp. 785, 791 (N.D. Ind. 1996), *rev'd*, 115 F.3d 481 (7th Cir. 1997). Although the circuit court ultimately reversed this decision, it nevertheless expressed similar sentiments. See *supra* note 302 for statements expressing similar sentiments made by the circuit court in its decision to reverse.

tion of the possible difficulties arising from the application of the ADA to prisons as "acknowledg[ements] of the chaos that will likely result from their holdings."[312]

Because all of these courts based their holdings on a "common sense," textualist reading of the statute, they failed to acknowledge the flexibility and adaptability inherent in the ADA through its unique reasonable accommodation and undue burden inquiries.[313] For this reason, in *Niece v. Fitzner*,[314] the court argued that the ADA's provision for "reasonable accommodation" rebuts the Fourth Circuit's claim that the complexity of applying the ADA to prisons means it is barred by the Eleventh Amendment.[315] To refute the "horrors portended" by the *Torcasio* court, the *Niece* court concluded that if "a modification . . . would seriously jeopardize the security of other inmates or of prison officials, [then it] would not be 'suitable under the circumstances,' and would therefore not by [sic] 'reasonable.'"[316]

312. 126 F.3d at 600. The *Crawford* court stated that the "security concerns that the defendant rightly emphasizes . . . are highly relevant." 115 F.3d at 487. The court in *Yeskey v. Pennsylvania Department of Public Safety and Corrections*, acknowledged "the specter of federal court management of state prisons," and that "[a]pplication of the ADA to . . . prison management would place nearly every aspect of prison management into the court's hands." 118 F.3d 168, 174 (3rd Cir. 1997).

313. For a discussion of the "reasonable accommodation" provision in the ADA, see *supra* Part I.B.

314. 941 F. Supp. 1497 (E.D. Mich. 1996). Coming to a similar conclusion, one court has found *Turner* to be limited to security concerns. In *Purcell v. Pennsylvania Department of Corrections*, No. CIV. A. 95-6720, 1998 WL 10236 (E.D. Pa. Jan. 9, 1998), the court held the state prison to the reasonable accommodation standard defined in the ADA regulations. 1998 WL 10236, at *8. On whether *Turner* applied, the court further found that if the challenged prison policies concerned security issues, "then they 'are peculiarly within the province and professional expertise of corrections officials.'" *Id.* (citing Turner v. Safely, 482 U.S. 78, 86 (1987) (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)). Because the prison officials "made no allegations [that] any of the actions taken regarding Purcell were occasioned by prison security concerns . . . the special deference . . . described in Turner is not warranted here." *Id.* Thus, this court limited *Turner*'s reach to those occasions where prison officials themselves raise security as an issue. *Id.*; *see also* Pargo v. Elliott, 49 F.3d 1355, 1357 (8th Cir. 1995) (stating that *Turner* does not apply to prisoner's constitutional claims if the basis for prison regulation was "general budgetary and policy choices").

315. *Niece*, 941 F. Supp. at 1511.

316. *Id.* at 1510 (quoting Black's Law Dictionary 1265 (6th ed. 1990)). Although the *Niece* court relied on the DOJ regulations to first conclude that the ADA applies to prisons, it referred to a dictionary, a traditional textualist tool, to support its claim that the *Turner* test is not necessary. *Id.* at 1506-07, 1510. If the *Niece* court again thought that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," it would have found that the DOJ regulations define in detail what considerations should be made in the reasonable accommodation inquiry. *Id.* at 1506-07 (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). The regulations indicate that the "reasonable" prong takes the nature of the "service, program, or activity" into account. 28 C.F.R. § 35.150(a)(3) (1997). Furthermore, unlike the dictionary definition, the regulations include examples of how compliance may be achieved. *Id.* § 35.150(b)(1). The regulations state:

Other courts have found *Turner* completely inapplicable on the basis of the plain language of the ADA or Rehab Act.[317] In *Onishea v. Hopper*,[318] the court held that *Turner* did not apply on the grounds that "rights under the [Rehab Act] emanate from [the legislative and administrative] branches, and thus ought not be subject to *Turner*'s requirements without a congressional indication to that effect."[319] Second, the court found the *Turner* test and the Rehab Act's reasonable accommodation inquiry to be "in some ways duplicative."[320] Third, the court relied on precedent that had not subjected prisoners' statutory claims to the *Turner* test.[321] In *Raines v. Florida*,[322] the district court also rejected the application of *Turner* to a prisoner's ADA claim, recognizing the difference between the statutory rights granted by the ADA and constitutional rights, which "depend[ ] entirely upon judicial decisions to determine [their] scope."[323] The *Raines* court approved of the *Onishea* court's reasoning as a "faithful adherence to the plain language of the statute . . . [and an] understanding that the ADA is a statute which should be implemented without added judicial gloss."[324] Courts that hold that the ADA and Rehab Act do not apply to state prisons, and even some of the courts that find prisons covered under those statutes, look to *Turner*; none of these courts defers to the regulations. Even if the *Turner* test and the ADA's reasonable accommodation inquiry lead to the same result in some instances, courts should not ignore Congress's express intent regarding the DOJ's authority to implement these statutory rights and instead rely on a judicially created test for judicially construed rights.

> A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings . . . . A public entity is not required to make structural changes in existing facilities where other methods are effective . . . . In choosing among available methods . . . a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

Id. This section of the regulations applies to existing facilities only. Different factors are considered when the ADA is applied to new construction. *See id.* § 35.151. Note that the only mandatory portion—where Congress used the word "shall"—of this regulation is the requirement that the entity choose the option that will result in the most integration. Otherwise, the list is illustrative—using the word "may"—not exclusive.

317. Onishea v. Hopper, 126 F.3d 1323 (11th Cir. 1997), *vacated and reh'g granted*, 133 F.3d 1377 (11th Cir. 1998); Raines v. Florida, 987 F. Supp. 1416 (N.D. Fla. 1997).

318. 126 F.3d 1323 (11th Cir. 1997).

319. *Id.* at 1336.

320. *Id.*

321. *Id.*

322. 987 F. Supp. 1416, 1416 (N.D. Fla. 1997).

323. *Id.* at 1420.

324. *Id.*

V. WHY TEXTUALISM SHOULD NOT BE USED TO DETERMINE WHETHER THE ADA APPLIES TO STATE PRISONS

Although intentionalism and textualism have the same goal—to interpret statutes according to congressional intent—their disagreement over how to be faithful to that intent can lead to different interpretations of a statute. The courts' uses of textualism has limited the application of the ADA in two ways: (1) some use textualism to find that the ADA does not apply to state prisons; and (2) the courts which reach the opposite conclusion often rely on textualism and avoid deferring to the appropriate agency regulations.

Following the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*,[325] the Eleventh Amendment plain statement rule has become a textualist test for determining whether Congress intended states' Eleventh Amendment immunity to be abrogated.[326] If the statutory language—notwithstanding any legislative history—is at all ambiguous as to whether Congress intended to abrogate the states' Eleventh Amendment immunity, the Supreme Court has found that federal courts do not have jurisdiction to hear private suits against states for violations of that statute. In the cases addressing the ADA's application to state prisons, however, no court doubts that Congress has satisfied the textualist *Atascadero* test. It is only when a court finds prisons to be a core state function, and thus deems *Gregory v. Ashcroft*[327] to be applicable, that the abrogation question becomes an issue.

Finding that *Gregory* extends the plain statement rule to require Congress to unequivocally specify what state functions it intends for a statute to reach is, however, not a foregone conclusion. First, the Court applied the plain statement rule in *Gregory* because of the federalism concerns raised by applying a federal law to deny state citizens the ability to determine the length of service for state judges.[328] It is unclear what other state functions would involve similar issues of federalism that could overcome Congress's power under the Fourteenth Amendment.

Second, while the *Gregory* Court said Congress must make its intent "plain," it also said that Congress was not required to create a comprehensive list of all the traditional state functions to which it intended the federal law to apply.[329] Therefore, even if the *Gregory* plain statement rule is found to apply, courts should not require Congress to identify every state function to which the ADA would apply to avoid a finding of ambiguity on the abrogation question. Title II of

325. 473 U.S. 234 (1985).
326. Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 14, at 621.
327. 501 U.S. 452 (1991).
328. *Id.* at 467.
329. *Cf. id.* ("This does not mean that the Act must mention [state] judges explicitly . . . .").

the ADA satisfies the *Gregory* standard that it must be "plain to anyone reading the [statute]"[330] that Congress intended the statute to cover every state function. Title II does not contain a single exception to its coverage of every program, service, or activity provided by state and local governments.[331] In other words, in addition to the overwhelming evidence of a congressional intent to abrogate, as demonstrated in the express language and broad purpose of the statute, there is no evidence of an intent not to abrogate.[332] The *Amos*, *Torcasio*, and *Callaway* courts, however, searched the language of the ADA for a textualist abrogation that meets the standard of the *Atascadero* plain statement rule, not that of the *Gregory* rule. This textualist version of the *Gregory* rule requires Congress to, in essence, explicitly express its intent to abrogate regarding state prisons, or any other traditional state function. This is precisely the type of comprehensive list that *Gregory* said was not required. Without ambiguity, the *Gregory* plain statement rule cannot be applied and, if a court remains true to the *Gregory* rule, it would find the statute unambiguous as to the intent that the ADA cover all public entities, even those considered to be "core state functions," as evidenced both by the text and purpose of the statute. Indeed, the courts which find it "unlikely" or "absurd" that terms like "program" and "benefit" include prisons are not relying on the text but on what the courts regard as the *ordinary* meaning of these words. Once they decide upon the ordinary meaning, they do not need to look further for other indications regarding the words' *intended* meaning. The language of the statute, however, makes the broad focus of the ADA clear—indeed, it is difficult to read it narrowly. Furthermore, as a remedial statute, it should be read as broadly as possible in keeping with congressional intent.

Textualism, because it searches for the statute's "ordinary meaning," can create ambiguity because it prevents courts from looking to the purpose of the statute for guidance on its meaning.[333] Even within the language of the statute, the *Amos* and *Callaway* courts could have

330. *Id.*

331. *See* 42 U.S.C. § 12131 (1994). Furthermore, the ADA, in its entirety, contains very few, highly specific exceptions. For examples, see *id.* § 12208 (providing that the term "disability" will not apply solely because someone is a transvestite); *id.* § 12211 (providing that homosexuality and bisexuality are not disabilities under the ADA); and *id.* § 12114 (providing that the ADA does not apply to a current user of illegal drugs but will apply to someone who is currently in or has successfully completed a rehabilitation program). In interpreting Title II, the court in *Kaufman v. Carter* stated that "[a]ttempting to demonstrate that 'any' [public entity], . . . in fact means 'any' is like attempting to prove a negative." 952 F. Supp. 520, 529 (W.D. Mich. 1996). The court further found that "[s]ince Congress obviously considered whether transvestites were or were not to be considered disabled, no reason exists to believe it simply overlooked the presumably far larger prisoner population." *Id.*

332. *See* Raines v. Florida, 983 F. Supp. 1362, 1370-71 (N.D. Fla. 1997) ("There is no ambiguity in the statute . . . . It is inescapable, therefore, that Congress intended the ADA to apply to state prisoners.").

333. Merrill, *supra* note 18, at 1002.

discovered that the ADA was passed pursuant to Congress's authority under section five of the Fourteenth Amendment,[334] a power which the Supreme Court has recognized as able to abrogate states' Eleventh Amendment sovereign immunity.[335] As one court said: "There is no room for doubt that Congress specifically intended to alter the federal-state balance in enacting the ADA . . . . [It] specifically invokes the Fourteenth Amendment as a basis for the legislation."[336] Thus, Congress clearly meant the ADA to reach even the public entities that are traditionally within the states' control; a broad range of other traditional areas of state responsibility, like schools, police and fire departments, and the court system, have all been held to be covered by the ADA and Rehab Act, and the text of the ADA must be read to include state prisons.

If a court disagrees with this broad textualist analysis, however, and finds the statute ambiguous regarding congressional intent to abrogate, the statute will not cover that state function and will create a gap in the ADA's coverage, which otherwise applies to almost every other entity, public or private. Congress's comments that the Court in *Atascadero*, by focusing on the text of the statute, had misinterpreted congressional intent regarding another disability law, the Rehab Act, illustrates how textualism can result in a reading of a statute that is contrary to Congress's intent and the statute's goal of "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[337] Thus, applying textualism in this way would result in a gap in coverage in a statute Congress clearly and explicitly intended to have broad applicability; in other words, textualism leads courts to reach conclusions obviously contrary to Congress's explicit intent.

The courts that concluded that the ADA applies only to certain programs offered by state prisons, like textualists, misread the language of the statute and created further opportunity for litigation regarding

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> [I]f courts do the gap filling at step one [of *Chevron*] under the 'plain meaning' nostrum by applying dictionary definitions, rules of grammar, and canons of construction, then the content of national policy will be determined by courts without any consideration of the substantive values at issue in the policy disputes—either those that animated Congress or those articulated by the agency charged with the administration of the statute.

Id.

334. 42 U.S.C. § 12101(b) (1994) ("It is the purpose of this chapter . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities.").

335. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

336. *Kaufman*, 952 F. Supp. at 531; *see also* Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997) (stating, with regard to the provision in the ADA that says Congress enacted it pursuant to the Fourteenth Amendment, "we give great deference to congressional statements"), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686).

337. 42 U.S.C. § 12101(b)(1) (1994).

whether specific aspects of prison operations are "programs" under the ADA. While education and work programs will probably be found to be covered, accessible bathrooms, dining halls, and recreational rooms do not fit the "ordinary meaning" of "program" as easily. This piecemeal interpretation—which is contrary to the broad goals of the ADA—would be avoided if the prison itself is seen as the "program" provided by the state as a public entity under the ADA.[338] The courts' hesitation to apply the ADA across the board should have led them to apply *Chevron* and the regulations, which cover all aspects of prison operations. The regulations further provide that if it would be an undue burden or a fundamental alteration for the prison to provide reasonable accommodation to the prisoner—a case-by-case, fact-dependant inquiry—then the prison would have no obligations under the statute.

Courts that used intentionalism interpreted the ADA to apply to all prison operations and thereby were faithful to congressional intent. Intentionalism used to discern whether Congress intended the ADA to cover state prisons—either under the *Gregory* plain statement rule or the *Chevron* step-one question—should lead courts to find an unqualified application of the ADA. Intentionalism, moreover, unlike textualism, would also find answers for the courts that questioned the wisdom and manner of the ADA's application to state prisons. A court questioning Congress's intent to subject state prisons to private suits under the ADA, by applying *Gregory*, should look to the statutory purpose, the nature of the anti-discriminatory right, and the legislative intent expressed in the findings of the statute. Those sources indicate that the ADA's coverage was intentionally broad, and that private rights of action are necessary to ensure the most comprehensive implementation possible. If a court then finds congressional intent ambiguous as to whether a prison is itself a "program," or instead only provides "programs," intentionalism should direct it, under *Chevron*, to defer to the regulations. Congress delegated the authority to issue regulations to the DOJ, and those regulations state that, without exception, the ADA covers "all services, programs, and activities provided or made available by public entities,"[339] and is meant to "appl[y] to anything a public entity does."[340] The purpose of *Chevron* is not simply to aid a court when it cannot discern the meaning of a statutory term, but to establish a hierarchy for determining which branch of government is best suited for policy-making. When Congress explicitly delegates rule-making authority to the DOJ, and further says that the ADA regulations should follow those under the Rehab Act, this express intent is also directed at courts. Otherwise,

338. *See id.* § 12131.

339. 28 C.F.R. § 35.102 (1997).

340. *Id.* pt. 35, app. A, subpt. A at 466.

this delegation would be meaningless because courts would never defer to the expertise of the DOJ.

Furthermore, not only does deferring to the regulations resolve any ambiguity on whether Congress intended the ADA to apply to state prisons, but it also brings the reasonable accommodation and undue burden inquiries to the court's attention. As the regulations clearly state, the covered entity does not have to comply if reasonable accommodation will "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."[341]

Because the language of the ADA is unequivocal, either intentionalism or textualism should lead a court to find that the ADA applies to all aspects of prisons and prison management. The *Amos* and *Callaway* courts found that Congress did not intend for the ADA to apply to state prisons because they misapplied *Gregory* to require the ADA to contain a specific abrogation as to state prisons. The *Crawford* and *Armstrong* courts rested their interpretations of the ADA solely on the text of the statute, but misread the text and brought in extra-textual issues—security concerns and the *Turner* test—without looking to extra-textual sources for answers. The standards these courts set for the ADA are extraordinarily high, in that only express statements that Congress intended the ADA to cover state prisons, to give prisoners the right of reasonable accommodation of their disabilities, and not to judicially restrict that right by the *Turner* test, would result in prisoners having a right to be free from discrimination guaranteed by the ADA.

Reasonable accommodation and undue burden are concepts central to the ADA's goal of integration. To ignore these concepts and look to *Turner* is counter-majoritarian[342] and is yet another way to insert federalism issues into the ADA's application to state prisons, for those courts that find the *Gregory* argument too attenuated.[343] The *Turner* test may duplicate some of the issues that will arise when a prisoner with a disability requests reasonable accommodation. The Supreme Court, however, created the *Turner* test to restrict judicially construed constitutional rights. To restrict the ADA, a statutory right, on a textualist reading, without any indication that Congress intended such a restriction, oversteps the line between interpretation and legislation.

341. *Id.* § 35.150(a)(3).

342. Justice White, in his concurrence in *Gregory v. Ashcroft*, argued that for the Court to impose a clear statement rule "fashion[s] a restraint on *Congress*' legislative authority .... [It] is both counter-majoritarian and an intrusion on a coequal branch of the Federal Government." 501 U.S. 452, 477 (1991). To apply the *Turner* test—like the plain statement rule—is to superimpose a judicially construed standard onto rights statutorily created by Congress, like the ADEA and ADA.

343. Onishea v. Hopper, 126 F.3d 1323, 1336 n.23 (11th Cir. 1997) ("Of course, *Turner* also serves federalism concerns by keeping federal authority out of state prison management ...."), *vacated and reh'g granted*, 133 F.3d 1377 (11th Cir. 1998).

To look to *Turner* and consider its application to the ADA, is, in effect, a finding of textual ambiguity—a conclusion that Congress did not clearly intend that all public entities, including state prisons, to comply with the statutory rights at issue—and should therefore trigger the *Chevron* doctrine. The courts that rely on a textualist reading of the ADA, do not reach their conclusions as a result of finding the statutory language ambiguous. Rather, they say their interpretations of the statute are based on the plain language of the ADA. Courts influenced by textualism, however, can claim that their hesitation to find that the ADA applies to prisons is the result of the "ordinary" meaning of a term and, therefore, there is no ambiguity. Intentionalism, on the other hand, does not look for the ordinary meaning of a word, but for what Congress intended the word to mean. To claim that the unique concerns of state prisons raise the question of whether *Turner* should apply means that the court is questioning the congressional intent on this issue, but if a court finds the statutory language ambiguous as to what Congress intended, it should look to other sources.

The reluctance to find the ordinary or plain meaning of the language of the ADA to include state prisons and prisoners stems from assumptions about the incompatibility of reasonable accommodation and incarceration and punishment. *Turner* and other prison constitutional rights cases, however, are an inappropriate background upon which to interpret the ADA. For example, a prisoner claiming the circumstances of her confinement constitutes cruel and unusual treatment under the Eighth Amendment must prove the prison official's culpable state of mind.[344] In contrast, a deaf prisoner who alleges discrimination under the ADA because he was not provided with a sign language interpreter for prison disciplinary procedures[345] has to prove only that he is a qualified individual with a disability, that he could be reasonably accommodated, and that the prison is a covered entity under the ADA.[346] There are, however, no requirements for intent. The ADA was specifically conceived to eliminate this kind of unintentional discrimination which has a "disparate impact" on individuals with disabilities.

Another barrier may be that courts regard reasonable accommodation as special treatment, a notion that contradicts the nature of incar-

344. Wilson v. Seiter, 501 U.S. 294 (1991). The Supreme Court has explained that "[i]f the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify" as cruel and unusual punishment. *Id.* at 300.

345. Randolph v. Rodgers, 980 F. Supp. 1051 (E.D. Mo. 1997); *see also* Hanson v. Sangamon County Sheriff's Dep't, No. 97-3175, 1998 WL 34773 (C.D. Ill. Jan. 28, 1998) (holding that a profoundly deaf plaintiff had stated a claim under the ADA because he was not provided with a TDD telephone to call family after being arrested).

346. *See supra* notes 56-59 and accompanying text.

ceration. To provide reasonable accommodation to prevent prisoners with disabilities from enduring more punishment than non-disabled prisoners is not special treatment. For example, a bilateral amputee inmate claimed that because there were no handrails in the shower and toilet area, he repeatedly fell and hurt himself while trying to use the facilities.[347] To provide accommodations to remedy this problem only ensures that the disabled prisoner does not suffer psychologically or physically more than non-disabled prisoners.

Furthermore, integration should not be considered foreign to the goals of incarceration. The court in *Saunders v. Horn*[348] found the policies of the ADA to "mirror" those behind incarceration,[349] and that the ADA could serve to implement the goals of incarceration. The agency that administers the ADA, and many in the corrections community,[350] recognize that the ADA and incarceration are compatible.

CONCLUSION

Prisoners with disabilities, like anyone else, deserve the right the ADA provides: the right to have their disabilities reasonably accommodated. The plain language of the ADA contains no exceptions regarding which public entities it applies to, nor any limitations on the extent of the application of the ADA, except for the defenses of undue burden and fundamental alteration. Instead of creating unnecessary complications, courts should defer to the DOJ regulations which take the broad statutory mandate and balance it with the unique, but not necessarily more complex, issues that prisons present. Applying the *Gregory* plain statement rule and relying solely on a textualist

347. Kaufman v. Carter, 952 F. Supp. 520, 523-24 (W.D. Mich. 1996).

348. 960 F. Supp. 893 (E.D. Penn. 1997).

349. *Id.* at 898 (quoting Bonner v. Lewis, 857 F.2d 559, 562 (9th Cir. 1998).

350. *Corrections Today*, published by the American Correctional Association, has published an issue devoted to the application of the ADA to prisons, entitled ADA, Construction and Corrections. Corrections Today, April 1995. One author states that "integration into mainstream society—even a prison or jail 'society'—is a cornerstone of the ADA." Paula N. Rubin, *The Americans with Disabilities Act's Impact on Corrections*, Corrections Today, April 1995, at 119. Another states that "[f]ears that complying with the ADA will break the bank are greatly exaggerated." Darlene Van Sickle, *Avoiding Lawsuits: A Summary of ADA Provisions and Remedies*, Corrections Today, April 1995, at 104, 106. In new facilities built in compliance with the ADA, the additional cost of compliance was 3.6% and .83% of the total. Alan Appel, *Requirements and Rewards of the Americans with Disabilities Act*, Corrections Today, April 1995, at 84, 85. Another article discusses the Pennsylvania Department of Corrections negotiations with the ADA board on the percentage of housing that had to be accessible. Curtiss Pulitzer & Jacob Bliek, *Making the Transition to Meet ADA Requirements Systemwide,* Corrections Today, April 1995, at 90. The Architectural and Transportations Barriers Compliance Board, which promulgates rules and regulations in those areas, proposed rules in a special section for detention and correctional facilities, for which there were public hearings and almost 7,000 pages in commentary. *Id.* at 92.

reading prevents courts from recognizing that the ADA's ambitious purpose is matched by a detailed implementation scheme.

The Supreme Court should affirm *Pennsylvania Department of Corrections v. Yeskey*, and uphold the *Yeskey* court's use of *Chevron* to defer to the DOJ regulations. Not only will this provide prisoners with disabilities with a right against discrimination, it will also aid in the enforcement of the broad mandate of the ADA. Furthermore, an affirmance will clarify the limitations of *Gregory*, eliminating unnecessary challenges like the one that gave rise to *Yeskey*.