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Biting the Hand that Feeds Them—State Prisons and the ADA: Responding to *Amos v. Maryland Department of Public Safety & Correctional Services*

I. INTRODUCTION

President George Bush signed the Americans with Disabilities Act (ADA)[1] into law on July 26, 1990. The Act was meant to be an extension of the Rehabilitation Act[2] which applied only to government contractors and recipients of federal assistance. The language of the two statutes is nearly identical and courts analyze claims under both acts in a similar manner.[3] Proponents of the ADA saw it as a "declaration of independence" for disabled citizens.[4] Critics, however, were not satisfied with the language of the Act as ratified by Congress and predicted a flood of litigation because of the broad language used.[5]

As a result of the Act's broad language and resulting widespread litigation, courts have been forced to define the Act's limits. While most of the litigation has centered around the employment context, which is covered in Title II of the Act, several recent cases have considered whether the ADA applies to state prison facilities. Three cases addressing this precise question were decided during the summer of 1997 alone.[6]

1. 42 U.S.C. §§ 12131-12165 (1994).

2. 29 U.S.C. §§ 701-794 (1994).

3. *See, e.g.*, Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 126 F.3d 589 (4th Cir. 1997); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 483 (7th Cir. 1997); Torcasio v. Murray, 57 F.3d 1340, 1342-56 (4th Cir. 1995); Randolph v. Rodgers, 980 F. Supp. 1051, 1058-63 (E.D. Miss. 1997).

4. *See* Paul V. Sullivan, Note, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law*, 29 SUFFOLK U. L. REV. 1117, 1117 (1995) (noting that advocates for the disabled lauded the Act for attempting to quash discrimination against the handicapped).

5. *See id.* Critics accused the Act of being "ambiguous and too far-reaching." *Id.*

6. *See Amos*, 126 F.3d at 589; Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168 (3d Cir. 1997); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997).

In *Amos v. Maryland Department of Public Safety* the Fourth Circuit held that the ADA simply does not apply to state prison facilities.[7] In contrast, in *Yeskey v. Commonwealth of Pennsylvania Department of Corrections*[8] and *Crawford v. Indiana Department of Corrections*,[9] cases heard in the Third and Seventh Circuits respectively, both courts held that the ADA applies in the state prison context.[10] The primary conflict between the circuits concerns interpretation of the ADA's broad statutory language and whether Congress clearly stated its intention in the ADA to usurp state authority and thus require its application to state prisons. Further, if this was Congress' intent, does Congress have the authority, within our federalist system, to regulate state governments in the manner prescribed in the Act?

In *Amos*, the Fourth Circuit held that the language of the ADA did not unmistakably state whether the statutory provisions apply to state prisons.[11] The court went on to suggest that even if Congress had stated with unmistakable clarity that the ADA applies to state prisons, it doubted that Congress had the power to do so in accordance with principles of federalism.[12] The court justified its result by relying on what it deemed to be the plain and clear text of the ADA.[13] In addition, the court outlined the importance of federalism, specifically in relation to the business of running state correctional facilities.[14]

These issues are important for several reasons. The recent decision in *Amos* caused a split among the circuits, which makes it ripe for a Supreme Court ruling. In addition, the ultimate answer of whether the ADA applies to state prisons will have significant bearing on contemporary understanding of statutory construction/interpretation guidelines and federalism. Finally, applying the ADA to state prisons places a noticeable financial strain on state prison budgets, employees, and facilities.

7. 126 F.3d 589 (4th Cir. 1997).
8. 118 F.3d 168 (3d Cir. 1997).
9. 115 F.3d 481 (7th Cir. 1997).
10. *See Yeskey*, 118 F.3d at 175; *Crawford*, 115 F.3d at 487.
11. *See* 126 F.3d at 594.
12. *See id.*
13. *See id.* at 595.
14. *See id.* at 605.

Part II of this Note outlines the background and development of the law regarding application of the ADA to state prisons. It also summarizes the contours of the debate between the circuits regarding the clear statement doctrine and federalism. These general doctrines and other related issues are set forth according to the current law.

Part III gives the facts of *Amos* and discusses the analysis used by the Fourth Circuit. Part IV explains the court's reasoning and appraises the value of that reasoning in light of recent cases on this and related issues. It suggests that the logic proffered by the *Amos* court is appropriate and imperative in preserving powers retained by the states under the Constitution. Part V concludes that the ADA should not apply to state correctional facilities in compliance with principles of statutory interpretation and federalism.

II. BACKGROUND

A. The Americans With Disabilities Act—History, Purpose and Function

The ADA was passed in 1990 in order to safeguard the disabled from widespread discrimination.[15] Prior to enactment of the ADA, Congress passed the Rehabilitation Act of 1973,[16] which prohibited discrimination by government contractors and the recipients of federal assistance.[17] Advocates for the disabled were dissatisfied with this limited protection and lobbied for an extension which ultimately resulted in the enactment of the ADA.[18]

In outlining the goals of the ADA, Congress stated that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[19] According to Congress, achieving these goals would provide "people with disabilities the opportunity to

15. *See* Sullivan, *supra* note 4, at 1117.

16. 29 U.S.C. §§ 701-794 (1994).

17. *See* Sullivan, *supra* note 4, at 1119 (citing 29 U.S.C. §§ 701-794).

18. *See id.* at 1120 (noting that advocates were dissatisfied because the Rehabilitation Act only covered "federal agencies and departments, federally-funded programs, and private sector employers that contract with the federal government").

19. 42 U.S.C. § 12101(a)(8) (1994).

compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous."[20] In addition to outlining its goals for the ADA, Congress cursorily defined terms useful in interpreting the scope of the Act.[21] Congress delegated the task of implementing Titles II and III of the ADA to the Department of Justice (DOJ).[22] Part of the DOJ's responsibilities in connection with this endowment of power is to interpret the statute and set limitations on its enforcement.[23]

President George Bush issued a statement upon signing the ADA that discussed the virtues and purposes of the Act. Referring to the ADA he stated: "It promises to open up all aspects of American life to individuals with disabilities—employment opportunities, government services, public accommodations, transportation, and telecommunications."[24] He went on to explain the reasons for extending the reach of the Rehabilitation Act and stated that "[m]any of our young people, who have benefited [sic] from the equal educational opportunity guaranteed under the Rehabilitation Act . . . have found themselves . . . shut out of the mainstream of American life."[25] He concluded by stating that the ADA "signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."[26]

B. Development of the Law: ADA in the State Prison Context

The development of mainstream disability law is of recent vintage since the ADA has only been in force since 1990. Further, disability law in the prison context is only now emerging. Several circuits, however, have ruled on the

20. *Id.* § 12101(a)(9).

21. *See infra* Part IV.A.1. for a discussion of relevant terms.

22. "Title II prohibits public entities from discriminating against qualified individuals with disabilities in any service, program, or activity." Sullivan, *supra* note 4, at 1123 (citing 42 U.S.C. §§ 794(a), 12132 (1994)). "Title III prohibits persons who own, lease, lease to, or operate places of public accommodation from discriminating against individuals with disabilities." *Id.* at 1124 (citing 42 U.S.C. § 12182(a) (1994)).

23. *See infra* Part IV.B.3 for a discussion of the DOJ's interpretation and its relevance.

24. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 1990 U.S.C.C.A.N. (104 Stat. 327) 601, 601.

25. *Id.*

26. *Id.* at 602.

applicability of the ADA to state prisons, suggesting the contemporary importance of the issue.

1. Circuits holding that the ADA does not apply to state correctional facilities

a. The Fourth Circuit. The Fourth Circuit has squarely held that the ADA does not apply to state prisons. In *Amos* the court stated that: 1) state prisons are traditionally managed by states; 2) where Congress wants to tread on traditionally state-managed areas, such as state prisons, it must speak with unmistakable clarity; 3) Congress did not speak with unmistakable clarity in the plain language of the statute; and 4) therefore, the ADA does not apply to state prisons.[27] In reaching this conclusion, the Fourth Circuit employed the clear statement rule of statutory construction and referred to traditional federalism principles.

b. Other circuits. The Tenth Circuit has analyzed whether the ADA applies to state prisons in two cases, *White v. Colorado*[28] and *Williams v. Meese*.[29] Notwithstanding the different factual situations, both decisions are consistent with the Fourth Circuit's conclusion that the ADA does not apply to state prisons. The Ninth Circuit has engaged in some judicial gymnastics, originally holding the ADA applicable in *Bonner v. Lewis*[30] and then retreating in *Gates v. Rowland*.[31] Although the

27. *See* Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589, 599-600 (4th Cir. 1997). The court in *Amos* stated that, "Congress must speak clearly in the statutory text when it intends to alter the traditional balance between the states and the federal government." *Id.* at 600 (citing Torcasio v. Murray, 57 F.3d 1340, 1346 (4th Cir. 1995)).

28. 82 F.3d 364, 367 (10th Cir. 1996) (holding that state prisons do not engage in "programs or activities" governed by the ADA).

29. 926 F.2d 994, 997 (10th Cir. 1991) (holding that a federal prisoner cannot invoke the Rehabilitation Act because the Federal Bureau of Prisons does not engage in "programs or activities" regulated by the Rehabilitation Act). In *Amos*, the Fourth Circuit understood this to be a "broad ruling that state prisons, like their federal counterparts, 'are not subject to the Rehabilitation Act because they do not sponsor "programs or activities" as those terms are defined in the Rehabilitation Act.'" 126 F.3d at 597 (quoting *Torcasio*, 57 F.3d at 1350). While noting that the Rehabilitation Act and the ADA are distinct, the Fourth Circuit seems to consider them so alike as to interchange them in terms of interpretation and definition of terms.

30. 857 F.2d 559 (9th Cir. 1988) (holding that the Rehabilitation Act does apply to state prisons).

31. 39 F.3d 1439 (9th Cir. 1994) (considering how the Act is to be applied to state prisons and determining that it is not designed to deal with prisons, but it is

court did not specifically state that the ADA does not apply to state prisons, its refusal to delineate the circumstances under which it would apply suggests a move toward a holding of inapplicability. The Seventh Circuit posed a strong argument for inapplicability in *Bryant v. Madigan*[32] but then left the door open by not definitively deciding the issue.[33] In *Bryant*, Chief Judge Posner stated:

> Could Congress really have intended disabled prisoners to be mainstreamed into an already highly restricted prison society? Most rights of free Americans, including constitutional rights such as the right to free speech, to the free exercise of religion, and to marry, are curtailed when asserted by prisoners . . . . Even if there were (as we doubt) *some* domain of applicability of the Act to prisoners, the Act would not be violated by a prison's simply failing to attend to the medical needs of its disabled prisoners.[34]

Although the court did not definitively rule on the issue, this statement sheds some light on the court's opinion of whether the ADA should apply to state prisons.[35]

2. *Circuits holding that the ADA does apply to state correctional facilities*

The Third and Seventh Circuits have led the crusade to find the ADA applicable to state prisons.[36] The Third Circuit recently held in *Yeskey*[37] that the ADA applies to state prisons.

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intended for general societal application).

32. 84 F.3d 246 (7th Cir. 1996) (holding that there was no cause of action under the ADA for a disabled state prisoner who wanted guardrails on his bed).

33. *See id.* at 249.

34. *Id.* at 248-49.

35. The Seventh Circuit ultimately held that the ADA does apply to state prisons in *Crawford v. Indiana Department of Corrections*, 115 F.3d 481 (7th Cir. 1997). However, *Crawford* did not overrule *Bryant*. Chief Judge Posner's statements in *Bryant* reflect his opinion, at one time, regarding application of the ADA to state prisons.

36. In addition to these two circuits, the Eleventh Circuit briefly mentioned its agreement with the Ninth Circuit's decision in *Bonner*, in *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991) (agreeing with the Ninth Circuit's decision in *Bonner* as to the applicability of § 504 of the Rehabilitation Act to state prisoners). The Eleventh Circuit's accord with the Ninth Circuit is buried in a footnote as dictum and is relevant only in that the circuits agree on the interpretation of some language in the Rehabilitation Act which deals with the scope of its coverage. *See id.* at 1522 n.41.

37. 118 F.3d 168 (3d. Cir. 1997).

The court relied heavily on the regulations set forth by the DOJ, which list "correctional facilities . . . as covered entities."[38] The DOJ's interpretation clearly supports the decision to apply the ADA to state prisons. However, the court conceded that the operation of prisons is a core state function and recognized the menacing "specter of federal court management of state prisons," which will only increase if the ADA applies to state correctional facilities.[39] This suggests some apprehension in applying the ADA for fear of overreaching federal involvement in state functions.

The Seventh Circuit also recently revisited whether the ADA applies to state prisons in *Crawford*.[40] Chief Judge Posner retracted his reservations voiced only one year earlier in *Bryant*, and with several concessions, decided to apply the ADA to state prisons. His struggle to justify this holding is apparent in the opinion where Judge Posner acquiesces that exact application of the statute, "might seem absurd."[41] He goes on to state that "the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment."[42] He acknowledged that "application [of the ADA] to prisoners might produce some anomalies."[43] Despite these qualms, the court held the ADA applicable to state prisons under the language set forth in the statute.[44]

The basic conflict between the circuits deals primarily with statutory interpretation. Circuits holding that the ADA applies to state prisons liberally define the statutory language without considering the consequences of extending the statute in the face of Congressional silence on the issue.[45] Those circuits that deny application take the statutory language at face value because of the balance of powers issues involved and the possible effect that such usurpation of state power would have on this balance.[46]

38. *Id.* at 171-72 (citing 28 C.F.R. § 35.190(b)(6) (1996)).

39. *Id.* at 174.

40. 115 F.3d 481 (7th Cir. 1997) (holding that the ADA does apply to state prisons).

41. *Id.* at 486.

42. *Id.*

43. *Id.*

44. *See id.*

45. *See infra* Part IV.A.1.

46. *See id.*

III. *AMOS V. MARYLAND DEPARTMENT OF PUBLIC SAFETY & CORRECTIONAL SERVICES*

A. The Facts

In *Amos*, thirteen disabled inmates at the Roxbury Correctional Institution (RCI) brought suit claiming that prison officials had violated Title II of the ADA.[47] The inmates specifically claimed that defendants:

> (1) denied them the opportunity to participate in work release and pre-release programs because of their disabilities, resulting in a denial of benefits, training, and rehabilitation, and in longer sentences; (2) denied them equal access to bathrooms, athletic facilities, the "honor tier," and food services at RCI because of their disabilities; (3) denied them adequate medical attention and hygienic facilities; (4) failed to make reasonable accommodations to ensure the safety of disabled inmates; and (5) assigned them to RCI because of their disabilities, thereby depriving them of the opportunity to serve their sentences at available facilities closer to their homes.[48]

The district court granted summary judgment for defendants based on the earlier Fourth Circuit decision in *Torcasio v. Murray*, which held that it was not clearly established that the ADA applies to state prisons.[49] In justifying its decision, the court in *Amos* stated:

> [W]e are (and we believe that the Supreme Court will ultimately find itself) persuaded in no small measure by the extraordinarily circuitous statutory analyses which those

47. *See* Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 126 F.3d 589, 590-91 (4th Cir. 1997). In addition to naming as defendant the Maryland Department of Public Safety and Correctional Services, the plaintiffs also named Richard Lanham, the Commissioner of the Maryland Division of Correction and John P. Galley, the Warden of the Roxbury facility. In addition to the ADA claim, the prisoners also asserted that their rights under § 504 of the Rehabilitation Act were violated and that defendants violated the Eighth Amendment of the United States Constitution. *See id.* at 591. This Note will not discuss the prisoners' constitutional claims.

48. *Id.* at 591. Each inmate also claimed specific harms not outlined here.

49. 57 F.3d 1340 (4th Cir. 1995). This decision was rendered in an action determining if qualified immunity would apply. One factor in qualified immunity claims is whether the law is clearly established.

> courts reaching the contrary conclusion have undertaken and the considerable extra-interpretive energies that those courts have been forced to expend in order to limit the systemic chaos that would otherwise have followed on their holdings that these statutes apply to the Nation's myriad state prisons.[50]

B. The Court's Reasoning

In affirming summary judgement, the Fourth Circuit revisited its decision in *Torcasio* which suggested, in dicta, that the ADA does not apply to state prisons.[51] In addition, the court carefully evaluated the post-*Torcasio* decisions of other circuits addressing the issue, and meticulously analyzed the arguments for and against application of the ADA to state prisons.[52]

The court engaged in two veins of analysis in rejecting application of the ADA to state prisons, namely a careful scrutiny of the language of the statute (statutory interpretation), buttressed by a discussion of federalism issues.[53]

1. The language of the ADA

In analyzing the language of the ADA, the court relied on the clear statement doctrine and its role in statutory construction. The clear statement rule provides that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[54]

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50. *Amos*, 126 F.3d at 591.

51. *See* Torcasio v. Murray, 57 F.3d 1340, 1352 (4th Cir. 1995).

52. *See Amos*, 126 F.3d at 591. The court noted that "[n]othing in the opinions of those courts holding to the contrary even begins to refute the careful analysis we undertook in *Torcasio*." *Id*.

53. *See id*. at 594-95.

54. United States v. Bass, 404 U.S. 336, 349 (1971); *see also* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (finding that federal courts must be sure of "Congress' intent before finding that federal law overrides" state law); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (stating that Congress must make its intention to alter the balance between the Federal and State governments "unmistakably clear"); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (stating that Congress must make its meaning "clear and manifest" if it intends to usurp state powers). While all of the above cases, except for *Gregory*, were decided on the basis of 11th Amendment immunity, the Fourth Circuit nonetheless applies the clear statement doctrine espoused in those cases to the ADA to determine

The court concluded that the ADA is so broadly written as to appear "all-encompassing."[55] Accordingly, the court based its reluctance to extend application of the ADA to state prisons on the absence of a clear expression of congressional intent to abrogate state powers in the prison context.[56] The Fourth Circuit realized that federalism concerns are the basis for the clear statement doctrine. Without the clear statement rule, courts would be confronted with a constitutional issue regarding Congress' power to regulate state-run facilities. In *Amos*, the court required Congress to speak with unmistakable clarity before it would engage in the highly controversial practice of apportioning state and federal powers.[57]

2. Federalism

Perhaps the strongest and most compelling argument proffered by the *Amos* court is the importance of safeguarding the delicate balance between states and the federal government. *Torcasio* cited *Procunier v. Martinez*[58] and asserted that "the management of state prisons is a core state function."[59] *Amos* adopted this reasoning and concluded that the ADA encroaches on the states' power to oversee their prisons. Furthermore, the Fourth Circuit recognized the staggering effect that application of the ADA would have on state prison budgets and security procedures.[60] These effects, combined with traditional notions of distinctive state and federal powers, form the basis of *Amos*' federalism argument.

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whether the Act applies to state prisons. *See Amos*, 126 F.3d 589, 594-95 (4th Cir. 1997).

55. *See Amos*, 126 F.3d at 594 (citing Torcasio v. Murray, 57 F.3d 1340, 1344 (4th Cir. 1995)).

56. *See id.*

57. *See id.* at 595.

58. 416 U.S. 396, 412 (1974) ("One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task."), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989).

59. *Torcasio*, 57 F.3d at 1345.

60. *See Amos*, 126 F.3d at 596 (citing *Torcasio*, 57 F.3d at 1346). See *infra* note 122 for specific effects of application.

IV. ANALYSIS

The ADA provides that people with disabilities should be given the same employment, educational, and recreational opportunities as those who are not similarly situated. As such, it operates to eradicate discrimination against disabled persons. However, the scope of the statute is not clear. The language itself is broad and overreaching. Therefore, it is difficult to determine just how far the regulatory arm is meant to reach. This ambiguity is problematic for many reasons. State prison management is considered to be a core state function.[61] As a result, if Congress intends to usurp this state power, it must speak with indisputable clarity.[62] For this reason, statutory interpretation is an important aspect of the conflict between the circuits when applying the ADA. In addition, because state prison management is a fundamental state power, the principle of federalism cannot be understated.

A. Statutory Interpretation

Four canons of statutory interpretation are integral in determining whether the ADA applies to state prisons. These include the plain language or textual canon, legislative history, Congress' action or inaction/silence against the backdrop of the law before its passage,[63] and the federalism canon/clear statement doctrine.

1. Plain language of the statute

Nowhere in the plain language of the ADA does Congress refer to, or even suggest, that state prisons fall under any of the categories that the Act was intended to reach.[64] As further evidence that Congress did not intend to apply the ADA to state prisons or prisoners, one must look no further than the language itself. Courts do not agree as to the clarity of the

61. *See Procunier*, 416 U.S. at 396; and discussion *supra* note 58.

62. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984).

63. This canon deals specifically with the state of disability law under the Rehabilitation Act.

64. Education and employment are two examples of categories that the ADA is meant to reach. Inasmuch as Congress has delegated the task of implementing the ADA to the DOJ, a discussion of whether deference to an administrative agency is proper—including a review of the *Chevron* doctrine—will be discussed later. *See infra* Part IV.B.3.

ADA's language. The Third, Seventh, and Ninth Circuits have held that the statutory language establishes that the ADA applies to state prisons.[65] The Fourth and Tenth Circuits assert that the language of the ADA is vague and ambiguous.[66]

The ADA 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."[67] This language is a prime example of the terms that must be scrutinized in order to decipher the scope of the statute. The statute defines "public entity" to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government."[68] At first blush it would appear that state prisons could fit under this definition. However, this broad definition is more of a blanket statement than a clear declaration of intent, it is devoid of any specification. Hence, it alone cannot be considered to hold states responsible for applying the ADA to state prison facilities.[69] In addition, Title II of the ADA is entitled "Public Services." This title suggests that Congress intends to bar discrimination in services provided to the general public. Simply speaking, prisoners are not members of the general public. In fact, the very purpose of a prison facility is to remove convicted criminals from the general public.

65. *See supra* Part II.B.2 for a discussion of these decisions.

66. *See supra* Part II.B.1 for a discussion of these decisions.

67. 42 U.S.C. § 12132 (1994).

68. *Id.* § 12131(1).

69. *See* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). With regard to statutory language, the Court stated "it is the duty of the courts . . . to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute." *Id.* at 472. In the case at issue a literal reading of the statute could suggest application, however, *Holy Trinity* suggests that the language in the statute might not always be interpreted correctly. The Court goes on to say:

> The language of the act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed.

Id. at 460; *see also* United Steelworkers of Am. v. Weber, 443 U.S. 193, 201 (1979).

Additionally, under the statute, Congress defined a "qualified individual with a disability" as an individual who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[70] Prisoners are not commonly considered as such. Those who apply the ADA to state prisons argue that prisoners are engaged in rehabilitation activities and programs—which are protected by the ADA. However, prisons do not offer "programs or activities" as these terms are ordinarily understood. The Seventh Circuit noted in *Bryant* that "incarceration, which requires the provision of a place to sleep, is not a 'program' or 'activity.' Sleeping in one's cell is not a 'program' or 'activity.'"[71] In *Torcasio*, the court noted that "[t]he terms 'eligible' and 'participate' 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."[72] *Amos* asserts that "'most prison officials would be surprised to learn that they were' required by the ADA . . . to provide 'services,' 'programs,' or 'activities' as those terms are ordinarily understood.'"[73] The plain language of the ADA is not so plain. It is at least arguable that one must stretch to read prisons into the terminology set forth in the statute.

2. Legislative history

Under the ADA, Congress described the intent of the statute in this way: "[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[74] Congress then outlined the possible effects that this statute could have and found that the statute would afford "people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous."[75]

70. 42 U.S.C. § 12131(2).

71. Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996). *See supra* Part II.B for a discussion of *Bryant* and *Crawford*.

72. Torcasio v. Murray, 57 F.3d 1340, 1347 (4th Cir. 1995).

73. Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589, 601 (4th Cir. 1997) (quoting *Torcasio*, 57 F.3d at 1347).

74. 42 U.S.C. § 12101(a)(8).

75. *Id.* § 12101(a)(9).

While incarcerated, prisoners do not have equal opportunity as that term is normally defined in mainstream society, they do not live independently, and they are not economically self-sufficient. Likewise, prisoners do not live in our free society which necessarily prohibits them from "compe[ting] on an equal basis . . . for which our free society is justifiably famous."[76]

The statement made by President George Bush upon signing the Act into law intimates that this statute was not intended to apply to state prisons.[77] On that occasion, he lauded Congress for passing a law with such positive, far-reaching effects for disabled Americans. However, he communicated the limited scope of the statute when he stated on two occasions that the Act is meant to integrate disabled citizens into "mainstream American life."[78] While this statement is not determinative of the statute's intent, clearly the primary purpose of incarceration is to punish offenders by removing them from mainstream society. They are allowed some rehabilitation activities, but to classify state prisons as mainstream is more of a stretch than any court should be willing to make. This looming question of intent would not be so if Congress had simply made its intent clear. As a result of its omission of clear intent, courts must delve into dangerous waters and interpret the statute according to its ambiguous language.

Whether or not legislative history is the proper standard by which to interpret statutory language and intent was debated

76. *Id.*

77. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 1990 U.S.C.C.A.N. (104 Stat. 327) 601, 601. Although presidential statements are not usually considered to be determinative of the intent of a statute, some courts have used them in determining intent. *See* Gomez v. Immigration & Naturalization Serv., 947 F.2d 660, 664-65 (2d Cir. 1991) (using the President's statement upon signing § 303 of the Immigration and Nationality Act into law to show its intent); Main Cent. R.R. Co. v. Brotherhood of Maintenance of Way Employees, 813 F.2d 484, 491 (1st Cir. 1987) (referencing the relevant legislative history to determine Congress' intent in passing the Railway Labor Act, including the President's statement made when he signed the Act into law); Missouri v. Andrews, 787 F.2d 270, 281 (8th Cir. 1986) (agreeing with the district court's ruling which included a discussion of the legislative history and presidential statements upon passage of the Flood Control Act); Finley v. Cowles Bus. Media, No. 93CIV5051 (PKL), 1994 WL 273336, at *3 (S.D.N.Y. June 20, 1994) (using the President's statement upon signing the Americans With Disabilities Act into law to define some of its terminology).

78. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 1990 U.S.C.C.A.N. (104 Stat. 327) 601, 601.

in *Atascadero State Hospital v. Scanlon*.[79] There, the Supreme Court deemed reliance on the "'legislative history of [an] Act'" to interpret a statute in a way that potentially usurps state power to be improper and voiced great hesitancy to allow "'inferences from general statutory language'" when employing the clear statement test.[80] Fewer courts are relying on legislative history, especially in delicate federalism areas, because of their desire to require Congress to evince its intent on the face of the statute.[81] By doing so, there are fewer questions for courts to adjudicate with respect to statutory interpretation. Broad, overreaching terminology and concepts should not suffice to convey intent such that Congress usurps powers traditionally reserved to the states.

3. Congressional action or inaction/ silence against the backdrop of the Act before its passage

The Third Circuit argues that *because* the language is "all-encompassing" and "broad," state prisons are brought within the statute.[82] This is problematic because under this reasoning, Congress can pass a statute and then apply it along the way to whomever it wishes to include without having to declare its intent.[83] Furthermore, courts should not be saddled with the responsibility of reading the minds of lawmakers every time someone protests a statute. In *Yeskey*, the Third Circuit read Congress' silence as an implied approval of application of the ADA to state prisons. The court stated:

> [T]he legislative history does not inveigh against this conclusion. When the ADA was enacted in 1990, the Rehabilitation Act had been law for seventeen years and a

79. 473 U.S. 234 (1985).

80. Robert T. Smith, Note, *The Eleventh Amendment's Clear Statement Test After* Dellmuth v. Muth *and* Pennsylvania v. Union Gas Co., 1990 BYU L. REV. 1157, 1166 (quoting *Atascadero*, 473 U.S. at 242).

81. *See generally* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), *overruled on other grounds by* Seminole Tribe of Fl. v. Florida, 517 U.S. 44 (1996); *Atascadero*, 473 U.S. at 234.

82. *See* Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168, 170 (3d Cir. 1997).

83. One might argue that Congress intended the Act to be broad so as to make application easy. This is problematic considering the effects that applying the ADA would have on state prison budgets, not to mention the federalism issues involved. *See infra* note 122.

> number of cases had held it applicable to prisons and prisoners, yet Congress did not amend that Act or alter any language so as to extirpate those interpretations.[84]

The court seems to look for the back door here by suggesting that since Congress did not say that the ADA does not apply to state prisons, it should be applicable. However, Congress may not have been aware of the cases interpreting the Rehabilitation Act. Accordingly, congressional silence cannot be a substitute for actual language when interpreting a statute.[85] The Supreme Court has spoken to this issue in *Girouard v. United States*[86] where it stated, "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."[87] Even Judge Murnaghan, the dissenting judge in *Amos*, agrees that silence must not be construed as acquiescence.[88] In *EEOC v. Gilbarco, Inc.*,[89] he had difficulty with the suggestion that congressional silence or inaction in reenacting a statute constitutes endorsement of prior interpretation of the statute.[90] Judge Murnaghan reasoned that Congress cannot possibly know of the various interpretations circulating about each statute. In essence, he stated, "they do not in fact approve what they know nothing about."[91]

Amos employed the Fourth Circuit's analysis from *Virginia Department of Education v. Riley*[92] where it applied the clear statement rule and stated that "not 'a single word from the

84. *Yeskey*, 118 F.3d at 174 n.7.

85. The Court in *Amos* stated, "Congressional silence in the ADA's legislative history regarding the applicability of the statute to state prisons, however, provides no basis for inferring congressional approval of one Circuit's . . . interpretation of the Act." Amos v. Maryland Dep't. of Pub. Safety and Correctional Servs., 126 F.3d 589, 602 (4th Cir. 1997). *See also* United States v. Wells, 117 S. Ct. 921, 929 (1997) (rejecting congressional inaction as tacit approval); United States v. Dion, 476 U.S. 734, 738 (1986) (In dealing with Indian rights the Court stated "[w]e have required that Congress' intention to abrogate Indian treaty rights be clear and plain."); N.L.R.B. v. Plasterer's Local Union No. 79, 404 U.S. 116, 129-30 (1971) (noting the danger of adopting silence as congressional intent).

86. 328 U.S. 61 (1946).

87. *Id.* at 69. The argument rejected by the Court here is similar to that argument proffered with respect to the Rehabilitation Act.

88. *See* EEOC v. Gilbarco Inc., 615 F.2d 985 (4th Cir. 1980).

89. *Id.*

90. *See id.* at 1013-15.

91. *Id.* at 1015.

92. 106 F.3d 559 (4th Cir. 1997) (en banc).

statute or from the legislative history of [the Individuals with Disabilities Education Act (IDEA)] evidence[s] that Congress even considered' requiring states to continue providing educational services to disabled children after their expulsion for misconduct unrelated to their disabilities."[93] The court is essentially saying that silence is silence, and the statute can only be applied where Congress has spoken to the issue. The court in *Riley* quoted the Supreme Court's reasoning in *Gregory v. Ashcroft*[94] and stated:

> [T]he Age Discrimination in Employment Act, which covered employees of 'a State or political subdivision of a State,' . . . did *not* apply to state judges because the provision did not unambiguously reveal that Congress intended such a result. In reaching this conclusion, the Court reasoned that a clear statement is required not simply in determining whether a statute applies to the States, but also in determining whether the statute applies in the particular manner claimed.[95]

As this discussion has shown, the ADA lacks any indicia of congressional intent strong enough to support application of this statute to state prisons.

4. Federalism canon

While the Fourth Circuit amply provides logical counter arguments regarding the plain language, legislative history, and congressional action or inaction/silence against the backdrop of the Act before its passage, the court's strongest argument and the ultimate solution to the broad statutory language is the clear statement doctrine. By employing this doctrine, the court essentially bypasses a hyper-technical reading of the Act for a simple one which ultimately reveals that there is no clear statement of intent to apply the ADA to state prisons on the face of the statute.

a. Clear statement doctrine. In describing the clear statement doctrine, the Supreme Court has held that for Congress to usurp state power, such as would occur here, it

93. Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589, 603 (4th Cir. 1997) (quoting *Riley*, 106 F.3d at 567).

94. 501 U.S. 452 (1991).

95. *Riley*, 106 F.3d at 567-68 (citing *Gregory*, 501 U.S. at 460-70).

must make its intent "unmistakably clear."[96] In *United States v. Bass*,[97] the Court explained the rationale for such a rule as follows: "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[98] There is no evidence in the language or legislative history of the ADA that Congress intended to apply it to state prisons.

Even circuits disagreeing with *Amos* concede that the language is to some extent unclear in the prison context. The court in *Crawford* stated that "[i]ncarceration itself is hardly a 'program' or 'activity' to which a disabled person might wish access."[99] The court conceded that "the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment [and] . . . application [of the ADA] to prisoners might produce some anomalies."[100] The *Crawford* court argued that Congress could not have been more clear in the statute, hence there is no need to use the clear statement rule. One of *Crawford*'s rebuttals to the clear statement doctrine results from the fact that in Illinois, the ADA applies to state prison employees, hence, the Court reasons that it should naturally apply to state prisoners as well. This is attenuated reasoning considering that the employees are free, law-abiding citizens while prisoners are convicted offenders being punished for their actions.

b. Effect and import of the clear statement rule. The clear statement rule mandates more precise statements from Congress in the actual statutory text including statements regarding scope, procedural guidelines, and enforcement rules. This rule aids courts in statutory interpretation in that it "'foreclose[s] inquiry into extrinsic guides,'" such as "structure,

96. *See Gregory*, 501 U.S. at 452; Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984); United States v. Bass, 404 U.S. 336 (1971).

97. 404 U.S. 336 (1971).

98. *Id.* at 349.

99. Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 483 (7th Cir. 1997) (citing Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996)).

100. *Crawford*, 115 F.3d at 486.

purpose, or history of a statute."[101] In addition, courts consider these rules imperative to "'the protection of weighty and constant values, be they constitutional, or otherwise.'"[102] The requirement of a clear statement of intent in statutes is gaining popularity among many judges throughout the country.[103] More and more judges are concerned with their roles as interpreters of the law. Hence, they are reluctant to impute intent where none is clearly stated.

Critics of the clear statement rule might argue that it is overly conservative to strictly apply statutes according to the plain language. They might also say that the clear statement rule is burdensome and time consuming on the judicial system. However, in many ways it seems that this rule makes it easier for courts to determine the scope of a statute by relying on the actual language without being required to research legislative history and administrative agency interpretations. In addition, it is important to clarify and carry out Congress' intent, especially when the proposed regulation usurps state powers, such as the ADA does with state prisons.

Courts are raising the bar of statutory construction and requiring Congress to be more specific so that some statutory interpretation questions never make it to court in the first place. With employment of the clear statement rule, the days of Congress' passing the buck to courts to resolve issues more easily dealt with at the congressional level seem to be over. The Supreme Court has deemed the clear statement doctrine to be a logical way of dealing with the ongoing problem of statutory interpretation in light of its decision in *Atascadero*. As a result,

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101. John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 772 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 263 (1991) (Marshall, J., dissenting)).

102. *Id.* at 773 (quoting Astoria Fed. Sav. & Loan Ass'n, v. Solimino, 501 U.S. 104, 108 (1991)); *see also* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 546 (1992) (Scalia, J., concurring in part and dissenting in part) ("[O]ur jurisprudence abounds with rules of 'plain statement,' 'clear statement,' and 'narrow construction' designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied. (*see, e.g.*, Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989)." (citation omitted)).

103. *See generally* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 921-22 (1992) ("[J]ustices of the Supreme Court are attempting with missionary zeal to narrow the focus of consideration to the statutory text and its 'plain meaning.'").

in order for Congress to infringe on state rights, they must make their intention to do so "unmistakably clear" on the face of the statute.[104] The ADA fails to do this; hence, states should retain exclusive control.

5. A draw?

The issue of statutory interpretation is definitely not cut and dry on either side. It is at least arguable that courts *could* and have read the plain language of the statute to include state prisons. In addition, many courts use legislative history and/or congressional silence/inaction to interpret statutes even though the Supreme Court has voiced reservations against doing so. However, the clear statement doctrine is an established canon of statutory interpretation which provides the Fourth Circuit with its strongest argument against application in the statutory interpretation context. This Note concedes that with respect to the statutory interpretation aspect of this issue, the arguments proffered by both sides arguably amount to a draw. However, since application of the ADA to state prisons would usurp a power traditionally reserved to the states, the Fourth Circuit is clearly correct in asserting that above and beyond the issue of statutory interpretation, principles of federalism mandate a clearer expression of intent if not complete abrogation of power to the states to manage their prisons.

B. Federalism

1. State prison management is a core state function

It is firmly established that the operation of state prisons is a core state function.[105] In *Procunier* the court stated, "One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task."[106] Prisons are a necessary evil in a society where an in

104. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

105. *See* Procunier v. Martinez, 416 U.S. 396 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989); *see also* Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973).

106. *Procunier*, 416 U.S. at 412. The court went on to identify some of the governmental interests that are at stake; such as "the preservation of internal order and discipline, the maintenance of institutional security against escape or

creasing number of individuals are finding their way into such facilities for violating the law. State prisons are established by and for the states in the exertion of their constitutionally reserved powers, and in furtherance of their duty to punish those who show no regard for the law.[107] *Amos* relied on the Fourth Circuit's conclusion in *Harker v. State Use Industries*[108] that the operation of state prisons is a core state function.[109] Relying on the same reasoning, the Ninth Circuit denied application of the Fair Labor Standards Act (FLSA) to state prisoners in *Gilbreath v. Cutter Biological Inc.*[110] where the court stated:

> It is equally plausible, indeed more so, that in view of the manifest purpose of Congress in enacting the FLSA, it did not cross any member's mind—even for a moment—that felons serving hard time in prison and working in the process would be covered by this economic protection. I reject as almost whimsical the notion that Congress could have intended such a radical result as bringing prisoners within the FLSA without expressly so stating. There are obvious policy considerations in such a result that should be openly addressed by Congress, not the courts.[111]

While the FLSA is different in many aspects from the ADA, the reasoning behind nonapplication to state prisons is quite similar because both concern the federal government's attempt to regulate a traditional state power. Management of state

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unauthorized entry, and the rehabilitation of the prisoners." *Id.* (footnote omitted).

107. *See generally* Georgia Penitentiary Co. v. Nelms, 65 Ga. 499 (1880); Jones Hollow Ware Co. v. Crane, 134 Md. 103 (1919); Shenandoah Lime Co. v. Governor of Va., 115 Va. 865 (1914).

108. 990 F.2d 131, 133 (4th Cir. 1993). The Fourth Circuit held that state prisoners enrolled in an "employment skills development program" while incarcerated did not qualify for minimum wage under the Fair Labor Standards Act. The court stated: "Even with a broad reading of this term ['employee'], we see no indication that Congress provided FLSA coverage for inmates engaged in prison labor programs." *Id.* The court went on to proclaim: "If the FLSA's coverage is to extend within prison walls, Congress must say so, not the courts." *Id.* at 136.

109. *See id.* at 136.

110. 931 F.2d 1320 (9th Cir. 1991).

111. *Id.* at 1325. Other circuits that have been unwilling to apply the FLSA to state prison inmates include the Seventh Circuit in *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992), and the First Circuit in *Miller v. Dukakis*, 961 F.2d 7 (1st Cir. 1992). The reasons for not applying the FLSA to state prisoners vary among the circuits but include the lack of intent expressed by Congress and policy issues connected with such a statute. *See generally Harker*, 990 F.2d at 131; *Gilbreath*, 931 F.2d at 1325.

prisons is a power traditionally left to the states because of the policy concerns inherent in regulating a core function and because they are *state* prisons.

Many circuits have found that state prisons are the responsibility of the states alone. In *Taylor v. Freeman*,[112] the Fourth Circuit concluded that "absent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons or substitute their judgment for that of the trained penological authorities charged with the administration of such facilities."[113] The District of Columbia Circuit similarly stated in *Inmates of Occoquan v. Barry*[114] that "in carrying out their remedial task, courts are not to be in the business of running prisons. The cases make it plain that questions of prison administration are to be left to the discretion of prison administrators."[115] It is evident from circuit precedent that state prison management is reserved for the states.

This logic is similarly upheld in a long line of Supreme Court decisions. The Court addressed concerns of comity and competence in the context of state prison management in *Procunier v. Martinez*[116] where the Court stated:

> Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration . . . . [T]his attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention . . . . Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree . . . . Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.[117]

This statement affirms the importance of leaving state prison management to the states because of policy considerations and the delegation of duty to those who possess the requisite

112. 34 F.3d 266 (4th Cir. 1994).
113. *Id.* at 268.
114. 844 F.2d 828 (D.C. Cir. 1988).
115. *Id.* at 841.
116. 416 U.S. 396 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989).
117. *Id.* at 404-05.

knowledge necessary to effectively manage prisons in accordance with the goals of each state.

The decision in *Procunier* came on the heels of yet another Supreme Court decision that spoke to this issue. In *Preiser v. Rodriguez*[118] the Court stated: "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons."[119] Thus, the highest court of the land and numerous circuits recognize the imperative role of states in the prison context, and have continually upheld state power when challenged by federal intrusion.[120]

There are numerous factors that affirm the importance of states in the operation of state correctional facilities. State taxpayers pay for the operation of its prisons. Registered voters of a state elect state officials who oversee the management of state facilities such as prisons.[121] Inasmuch as each state has different procedures, budgets, goals, and problems regarding prison facilities, it is difficult to imagine delegating this power to the federal government for all of the fifty states. As a result, it is important to reserve this power for the states so they can effectively carry out the jobs they have been elected to do.

2. Effects of applying the ADA to state prisons

There are several possible negative consequences that would result from applying the ADA to state prisons, not the least of which is the financial burden that will confront states forced to re-fit current structures and build new facilities to comply with the standards set forth in the ADA.[122] The cost to

118. 411 U.S. 475 (1973).

119. *Id.* at 491-92.

120. *See id*; *see also Procunier*, 416 U.S. at 396; Harker v. State Use Indus., 990 F.2d 131 (4th Cir. 1993); Inmates of Occoquan v. Barry, 844 F.2d 828 (D.C. Cir. 1988).

121. These elected officials often run for office on platforms centered around crime and issues dealing with prisons directly.

122. One California Department of Corrections spokesperson estimated the cost of re-fitting and building new structures to be over 50 million dollars. *See Obey Law, and Common Sense: Not Every Prison Can Meet the Needs of Every Disabled Convict*, L.A. TIMES, Sept. 24, 1996, at B6. This would include adding things such as strobe light alarms for deaf inmates, signs and books for inmates who are visually impaired, interpreters for the deaf, and special education programs for inmates with learning

bring existing state facilities into compliance would undoubtedly be significant. Circuits that have held that the ADA applies to state prisons concede that some serious security concerns exist, such as cell construction, inmate pairings, and work release.[123] While recognizing that application of the ADA to state prisons will have far-reaching repercussions, these circuits do not outline ways to deal with such problems.[124] For example, the *Crawford* court conceded that:

> Prisoners are not a favored group in society; the propensity of some of them to sue at the drop of a hat is well known; prison systems are strapped for funds; the practical effect of granting disabled prisoners . . . rights of access that might require costly modifications of prison facilities might be the curtailment of educational, recreational, and rehabilitative programs for prisoners, in which event everyone might be worse off.[125]

Interestingly enough, even after all of these concessions, the court decided to apply the Act to state prisons. It is evident that there are many problems connected with this decision, problems that have no solutions because those courts willing to apply the statute are unwilling to define how to carry out the regulations in the prison context.[126]

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disabilities. *See id*; *see also* Dan Morain, *State's Prisons Told to Follow Disabilities Act*, L.A. TIMES, Sept. 21, 1996, at A1; Dan Morain, *Judge Says Calif. Prisons Must Comply with Disabilities Law: Deaf Inmates Could Get Interpreters, Others Special Education*, SEATTLE TIMES, Sept. 21, 1996, at A2.

123. *See* Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168, 174 (3d Cir. 1997).

124. *See* Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997) (noting that "security concerns . . . are highly relevant to determining the feasibility of the accommodations that disabled persons need in order to have access to desired programs and services," but not defining the meaning of "reasonable accommodation" and "undue burden" in the state prison context).

125. *Crawford*, 115 F.3d at 486; *see also* Aswegan v. Bruhl, 113 F.3d 109 (8th Cir. 1997) (overruling a state district court decision that allowed an elderly prisoner to have cable television in his cell under the ADA because he was too feeble to walk fifty feet to the activity room in the prison). This is only one example of the frivolous law suits that are possible if the ADA is applied to state prisons.

126. *See Yeskey*, 118 F.3d at 174-75. The court stated: "[O]ur holding does not dispose of the controversial and difficult question [of] whether principles of deference to the decisions of prison officials in the context of constitutional law apply to statutory rights. We are not sure of the answer and need not address that question now." *Id*. (citations omitted).

3. DOJ interpretation

Circuits holding that the ADA applies to state prisons rely, in part, on the DOJ's administrative interpretation of the statute to justify their position.[127] While deferring to the administrative agency's interpretation is usually warranted and even encouraged, in a situation where the statute could upset the balance of power between states and the federal government, the Supreme Court held that it is important to employ the clear statement test as described earlier.[128] In the situation at bar, the DOJ would apply the ADA to state prisons.[129] However, this is not conclusive because there is a serious question of whether or not it is even proper to defer to the DOJ in this area. Historically, courts have given great weight to administrative agency interpretations of statutes.[130] However, there is case law that suggests that administrative agency interpretation is not binding on a court if it is arbitrary or otherwise unsupported.[131]

In *Chevron v. Natural Resources Defense Council*, the Court suggested that when a court reviews an administrative agency's interpretation of a statute, it is confronted with two questions. The first question is "whether Congress has directly spoken to the precise question at issue."[132] If Congress has, the court's analysis is over; the court must give effect to congressional intent. Congress has not even hinted at applying the ADA to state prisons in the statutory text.[133] Therefore, this prong of the analysis is bypassed in favor of the second question. If

127. *See Yeskey*, 118 F.3d 168, 170-71; *see also* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984) (holding that administrative agencies should be accorded the greatest possible weight and deference in interpreting statutes).

128. *See* Gregory v. Ashcroft, 501 U.S. 452, 493 (1991) (Blackmun, J., dissenting) (arguing unsuccessfully that *Chevron* deference, not the clear statement rule, is appropriate); *supra* Part III.B.1.

129. *See supra* Part II.B.2.

130. *See Chevron*, 467 U.S. at 837.

131. *See id*. *See generally* Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth., 464 U.S. 89 (1983); Long v. Dick, 347 P.2d 581 (Ariz. 1959); Hope Evangelical Lutheran Church v. Iowa Dep't of Revenue & Fin. 463 N.W.2d 76 (Iowa 1990), *cert. denied*, 499 U.S. 961 (1990).

132. *Chevron*, 467 U.S. at 842.

133. *See supra* Part IV.A. Some courts say that Congress has spoken clearly enough to include state prisons. As discussed earlier, the issue of statutory interpretation is largely a wash.

Congress has not addressed the precise issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[134] The agency's interpretation and regulations will be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[135] While the DOJ's interpretation is not *facially* "arbitrary, capricious, or manifestly contrary to the statute," as a result of the delicate federalism issues involved here, deference to administrative agency interpretation is not appropriate.

In *Amos*, the prisoners and the Justice Department argued that if there is an ambiguity in a statute, the court must defer to the administrative agency's interpretation, in this case the DOJ. In response, the *Amos* court stated that the prisoners and DOJ "make this contention 'as if we were interpreting a statute which has no implications for the balance of power between the Federal Government and the States.'"[136] However, because the possible consequences of applying the statute to state prisons are far-reaching and potentially damaging to the federal and state balance of power, the *Amos* court declined to defer to the DOJ's interpretation and followed the Supreme Court's reasoning in *Gregory*.[137]

It is plausible to give the DOJ some limited deference in interpreting and applying the ADA. However, complete deference is not appropriate here because to do so would, in essence, allow an administrative agency (composed of nonelected officials) to upset the balance of power between state and federal governments. Inasmuch as state prison management is a core state function, allowing an administrative agency to usurp this power by interpreting congressional silence is at the very least inappropriate if not unconstitutional.

134. *Chevron*, 467 U.S. at 843.

135. *Id.* at 844.

136. Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 126 F.3d 589, 606 (4th Cir. 1997) (quoting Commonwealth of Va. Dep't of Educ. v. Riley, 106 F.3d 559, 567 (4th Cir. 1996)).

137. *See infra* Part IV.B.4.

4. If Congress clearly manifests its intent, does it have the power to apply the ADA to state prisons? The status of federalism today

The Framers of the Constitution did not intend for the federal government to usurp state powers. James Madison stated that "[i]nterference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States."[138] The Framers did not delineate any specific state powers in the Constitution itself, but left all powers not given to the federal government to the states.[139] The extent of federal power has been the topic of debate throughout much of our history. While there are differing opinions on where to draw the line between state and federal power, for purposes of this question, all sides agree that management of state prisons is a core state function. Having said this, just how far can Congress go in regulating state prisons?

In 1976, the Supreme Court decided in *National League of Cities v. Usery*[140] that "Congress may not exercise [its Commerce Clause] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[141] The Court based its decision on the fact that the federal minimum wage and overtime rules handicapped the states' ability to

138. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985) (citing 2 ANNALS OF CONG. 1897 (1791)).

139. *See* THE FEDERALIST NO. 45, at 313 (James Madison) (J. E. Cooke ed., 1961). James Madison stated in THE FEDERALIST NO. 45 that:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

Id. James Madison specifically states that power which concerns "internal order" will be left to the states, suggesting that state prison management should be left to the states.

140. 426 U.S. 833 (1976), *overruled by Garcia*, 469 U.S. at 528. The Court held that the Tenth Amendment prevented Congress from applying federal minimum wage and overtime statutes applicable to state employees.

141. *National League of Cities*, 426 U.S. at 855.

function efficiently, and divested the states of certain integral powers. Eight years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,[142] the Supreme Court overruled *National League of Cities*. In *Garcia*, the Court held that "[s]tate sovereign interests, . . . are more properly protected by procedural safeguards inherent in the structure of the federal system, than by judicially created limitations on federal power."[143]

Justice Powell wrote a dissenting opinion in this case. He argued that not only was *National League of Cities* correctly decided, but it also outlined when and if Congress has overstepped its bounds. He criticized *Garcia* for rendering Congressional power limitless.[144] As a result of *Garcia*, there is a great deal of confusion and controversy regarding the limits of Congress' power. This lack of direction has proven to be problematic for the Court, and in subsequent decisions, the Court has retreated from its position and the seemingly harsh effect of *Garcia*. Appellees in *Amos* did not argue that Congress does not have the power to apply the ADA to state prisons in light of the decision in *Garcia*. However, a careful examination of subsequent case law suggests that *Garcia* may be on its way out. Justice Rehnquist also wrote a dissenting opinion in *Garcia*, stating that the principles described in *National League of Cities* will "again command the support of a majority of this Court."[145] The first indication of the Court's intention to clarify its position with regard to Congress' powers came when they revisited *Garcia* in *Gregory v. Ashcroft*.[146] There, the Court noted that *Garcia* limits "our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause," and stated that "[a]pplication of the plain statement rule thus may avoid a potential constitutional problem."[147]

142. 469 U.S. 528 (1985). This case presents essentially the same issue as *National League of Cities*, but the court found that the federal minimum wage and overtime statutes were applicable to a mass transit system.

143. *Id.* at 552.

144. *See id.* at 557-79 (Powell, J., dissenting).

145. *Id.* at 580 (Rehnquist, J., dissenting).

146. 501 U.S. 452 (1991).

147. *Id.* at 464.

The first case to effectively begin whittling away at *Garcia* was *New York v. United States*.[148] Justice O'Connor wrote the majority opinion and summed it up by stating that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[149] This decision suggests that Congress cannot compel state officials to carry out certain administrative tasks—such as, in this case, application of the ADA to state prisons. By applying the Act to state prisons, the federal government would be "commandeering" state prison resources and, in effect, directing their allocation.

Recently, the Court has extended the rule from *New York* even further by not allowing Congress to compel a state government's executive branch to perform certain administrative functions in *Printz v. United States*.[150] The situation in *Printz* is somewhat similar to the application of the ADA to state prisons. In *Printz*, the Supreme Court realized that through the Brady Bill, Congress is essentially telling states how to use their law enforcement resources. If the officers were required to do the background checks required by the Brady Bill, there would undoubtedly be an increase in paperwork, states would need to hire more officers to offset those doing the checks, and it would require reallocating officers according to needs around each state. These consequences directly effect how and where states use their law enforcement resources. In applying the ADA to state prisons,

148. 505 U.S. 144 (1992). Congress enacted the Low-level Radioactive Waste Policy Amendments, which attempted to force each state to make its own arrangements for disposing of the low-level radioactive waste it generated. The act tried to force compliance through three different incentives. The state of New York attacked the statute as being violative of the Tenth Amendment. The court found that the "take title" incentive did violate the Tenth Amendment, hence, Justice O'Connor's statement above. Although *Garcia* deals with applying a generally applicable federal statute (FLSA), and *New York* deals with a state regulatory function, the Court's discussion of the issues is similar if not identical regardless of this difference.

149. *Id.* at 161 (alteration in original) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981).

150. 117 S. Ct. 2365 (1997). This case dealt with the Brady Bill's provision requiring local law enforcement officials to conduct background checks on gun purchasers. The county sheriff in Ravalli County, Montana objected to this requirement claiming that under *New York*, the government could not force them to do these background checks. In a five-to-four decision, the Supreme Court held that local officials do not have to perform these checks for the federal government.

Congress is essentially doing the same thing. State correctional officials would have to reallocate funds, guards, and maybe even prisoners to accommodate the guidelines of the statute.

The strongest argument posed by Justice Scalia, writing for the majority in *Printz*, deals with the separation and balance of powers between the federal and state governments. In analyzing the nature of this separation, Justice Scalia stated:

> [T]he Framers rejected the concept of a central government
>
> that would act upon and through the States [as had the Articles of Confederation], and instead designed a system in which the state and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, "the only proper objects of government,". . . . The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."[151]

Hence, the federal government is limited to its enumerated powers and must not encroach on state power in order to effectuate its goals. In light of the Court's recent decision in *Printz* it appears that core state functions, such as prison management, should be left completely to the states.

One distinction that warrants notice is that in *Garcia* and *Printz*, the issues dealt with Congress' power under the Commerce Clause. The ADA was passed under Congress' Commerce Clause power and under § 5 of the Fourteenth Amendment.[152] Recently, in *City of Boerne v. Flores*,[153] the Supreme Court de-cided that § 5 power is not unlimited. The Court reasoned that the Religious Freedom Restoration Act of 1993 (RFRA), "is not a proper exercise of Congress' § 5 enforcement power because it contradicts vital principles necessary to maintain separation of powers and the federal-state balance."[154] In the majority opinion, Justice Kennedy

151. *Id.* at 2377 (quoting THE FEDERALIST NO. 15 (Alexander Hamilton) and U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995)).

152. U.S. CONST. amend. XIV, § 5. Section 5 of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.*

153. 117 S. Ct. 2157 (1997). The Supreme Court held that Congress cannot use its Fourteenth Amendment enforcement powers to deter local governments from unintentionally burdening religious freedom.

154. *Id.* at 2159.

reasoned that "[t]he judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'"[155] Inasmuch as the management of state prisons is a core state function, Congress' power to abrogate this function under the ADA is limited. *City of Boerne* reinforces this conclusion in the § 5 context.[156]

In light of the recent decisions in *Printz* and *City of Boerne*, it seems as though the Supreme Court is limiting the federal government's power with regard to state functions and entities. This is significant in the state prison context because it suggests that the Supreme Court will be hard pressed to allow application of the ADA under either Commerce Clause powers or under § 5 of the Fourteenth Amendment.

a. Application of the Constitution and other federal statutes. One might argue that the ADA does not usurp state power anymore than does compliance with the Constitution or other federal statutes that may be applied to state prisons. While this is a laudable argument, the case law either does not squarely address it (as in the case of federal statutory law) and/or it does not strip state power (as with constitutionally protected powers). It is well-settled that a person does not check his constitutional rights at the prison gate.[157] However, it is also well-established that "lawful incarceration results in the necessary limitation of many privileges and rights of the ordinary citizen."[158] For example, a prisoner's First Amendment rights may be infringed upon for the sake of prison safety regulations.[159] The Supreme Court has stated that prison regulations that infringe on a prisoner's constitutional rights will be upheld when "it is reasonably related to legitimate

155. *Id.* at 2162 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)).

156. *See id.*

157. *See* Bethea v. Crouse, 417 F.2d 504 (10th Cir. 1969).

158. Hill v. Estelle, 537 F.2d 214, 215 (5th Cir. 1976) (dealing with claims by prisoners wherein they alleged deprivation of their civil rights).

159. *See* Brooks v. Wainwright, 428 F.2d 652, 653 (5th Cir. 1970) (stating that haircut and shaving regulations in a state prison do not violate a prisoner's right to free exercise of religion, freedom of expression, or due process of law). The *Hill* court justified this holding by noting that "[t]he grooming regulations . . . were applied to all prisoners, regardless of religion or race, and thus there was no denial of equal protection." *Hill*, 537 F.2d at 215.

penological interests."[160] Further, in *Morrissey v. Brewer*, the Supreme Court outlined the standard for applying Fourteenth Amendment privileges to prisoners.[161] The Court reasoned that due process applies only if the questioned government action is likely to cause the plaintiff to suffer a "grievous loss."[162] This application of the Fourteenth Amendment seems watered down compared to that afforded to the general public. Although prisoners are afforded their constitutional rights, albeit to a limited extent comparatively, one cannot argue that the ADA fits into this same category. The ADA is not a constitutional right, hence, it cannot be treated as such and applied automatically.

Federal statutes do not enjoy the same broad scope of application as constitutional rights. Hence, one must look to the language of the statute to determine when and to whom it is applicable. One of the federal statutes that has been reviewed in the prison context is the Fair Labor Standards Act (FLSA).[163] The FLSA, among other things, sets the federal minimum wage standard. Many of the complaints filed by prisoners deal with this aspect of the Act. The main issue before the courts is whether the FLSA applies to prisoners. In *Henthorn v. Department of Navy*[164] the court noted that "[t]he Act provides generally unhelpful definitions of its critical terms."[165] However, the court attempts to mesh theories from other decisions and decides to draw the line at public versus private contracts. This means that if the prisoner "has freely contracted with a non-prison employer to sell his labor," then he does have employee status under the FLSA.[166] However, if the "inmate's labor is compelled and/or where any compensation he receives is set and paid by his custodian, the prisoner is barred from

160. Turner v. Safely, 482 U.S. 78, 89 (1987). One example of "penological interests" includes limited visitation rights afforded prisoners. In *Bazzetta v. McGinnis*, 902 F. Supp. 765 (E.D. Mich. 1995), the court stated, "[c]onvicted prisoners . . . have no absolute, unfettered constitutional right to unrestricted visitation with any person, regardless of whether that person is a family member or not." *Id*. at 769. (citing Bellamy v. Bradley, 729 F.2d 416, 420 (6th Cir. 1984)).

161. 408 U.S. 471 (1972).

162. *See id*. at 481.

163. 29 U.S.C. §§ 201-219 (1994).

164. 29 F.3d 682 (D.C. Cir. 1994).

165. *Id*. at 684.

166. *Id*. at 686.

asserting a claim under the FLSA, since he is definitely not an 'employee.'"[167] The court does not specify whether this applies to state prisoners. Even if this statute applies to state prisoners, the outcome does not usurp state authority. Furthermore, it does not upset the balance of power between the state and federal government. State prison officials can set the wages at whatever they deem necessary and appropriate according to their budgets.

V. CONCLUSION

The Court in *Amos* correctly held that the ADA does not apply to state prisons. Their reasoning is sound and supported by case law or key concessions throughout the circuits and in the Supreme Court. The clear statement doctrine invoked in *Amos* operates to avoid serious constitutional questions such as whether or not Congress has the power to apply the ADA to state prisons. As such, it is an integral part of statutory construction in that it facially identifies Congress' intent so there is no confusion as to the scope or application of a statute. There is no explicit mention of state prisons in the ADA—suggesting that Congress never intended for it to apply in that context. Notwithstanding the ambiguous language of the ADA with regard to state prisons, application of this statute to state correctional facilities in light of recent decisions regarding federalism would usurp a power traditionally reserved to states, namely the operation and management of state prisons. This abrogation of power would go against the Framers' intent to strike a balance between state and federal powers.

As this issue is one of great import and debate throughout the circuits, it will most likely be granted certiorari by the United States Supreme Court. In the event that it does, if the Court continues to return to the roots of the Constitution, as in *Printz*, the only conclusion that will suffice is to uphold the states' powers and to not apply the ADA to state prisons. If,

167. *Id.* at 686-87; *see also* Gambetta v. Prison Rehabilitative Indus. & Diversified Enter., 112 F.3d 1119, 1124 (11th Cir. 1997) (stating that "inmates who work for state prison industries are not covered by the FLSA"); Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992); Miller v. Dukakis, 961 F.2d 7 (1st Cir. 1992); Gilbreath v. Cutter Biological Inc., 931 F.2d 1320 (9th Cir. 1991).

however, the Court reverts back to its *Garcia* line of reasoning, the only way that the ADA could possibly apply to state correctional facilities is if Congress clearly states its intent to effectuate this end. Should this occur, one would hope that Congress would also appropriate funds to assist states in complying with the regulations so as not to burden states who are already struggling to find innovative and cost-effective ways to house and rehabilitate prisoners.

The ADA is a laudable attempt to assist those who are disabled in living normal lives, inasmuch as this is possible. However, it cannot be read or interpreted to include those people who have no respect for society and find themselves incarcerated because of their disregard for the law. Our funds and attention are more rightfully spent on those who deserve a hand in life, and not those who continually bite the hand that feeds them.

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