

## CRITICAL POINT IN THE DISABILITIES MOVEMENT: HOW WILL *TENNESSEE V. LANE* AFFECT CLAIMS BROUGHT UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT?

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### INTRODUCTION

The rights of nearly 50 million Americans living with a disability are in jeopardy.<sup>1</sup> Congress sought to safeguard the rights of disabled individuals with the Americans with Disabilities Act of 1990 (“ADA”).<sup>2</sup> One of the Act’s major goals

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<sup>1</sup> The 2000 U.S. Census estimated the number of Americans living with a disability to be 49.7 million. JUDITH WALDROP & SHARON M. STERN, U.S. CENSUS BUREAU, DISABILITY STATUS: 2000, at 1 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-17.pdf>. The Census Bureau asked two questions to come up with this figure. See U.S. Census Bureau, Definition of Disability Items in Census 2000, available at <http://www.census.gov/hhes/www/disability/disdef00.html> (last visited Nov. 3, 2005). The first asked persons ages five and older whether they suffered from any of “the following long-lasting conditions: (a) blindness, deafness, or a severe vision or hearing impairment, (sensory disability) and (b) a condition that substantially limits one or more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying (physical disability).” *Id.* The second question asked persons ages five and older whether they had difficulty “(a) learning, remembering, or concentrating (mental disability); (b) dressing, bathing, or getting around inside the home (self-care disability);” and also asked persons ages 16 and older if they had difficulty “(c) going outside the home alone to shop or visit a doctor’s office (going outside the home disability); and (d) working at a job or business (employment disability).” *Id.* A person was deemed “disabled” if they (1) were age five or older and identified themselves as having either a “sensory, physical, mental, or self-care disability;” (2) were age sixteen or older and identified themselves as having a “going outside the home disability;” or (3) were between the ages of sixteen and sixty-four and identified themselves as having an “employment disability.” *Id.*

<sup>2</sup> 42 U.S.C. §§ 12101–12213 (2000); 47 U.S.C. §§ 225, 611 (2000).

How one defines the term “disability” is of great importance, and can affect statistical outcomes. See Peter Blanck, *Justice for All? Stories About Americans with Disabilities and Their Civil Rights*, 8 J. GENDER RACE & JUST. 1, 28 (2004) (“[E]mployment rates of persons with disabilities have varied positively and

was to ensure that persons with disabilities received equal access to public services and programs.<sup>3</sup> This right was codified in Title II of the ADA.<sup>4</sup> A recent Supreme Court decision, however, seems to pave the way for the Court to hold in future decisions that Congress overstepped its bounds by creating a general right to sue States under Title II. In *Tennessee v. Lane*,<sup>5</sup> the Court found that Title II claims for money damages were not barred by the Eleventh Amendment's state immunity doctrine.<sup>6</sup> The Court limited its holding, however, to apply only to instances where persons with disabilities are denied access to the courts.<sup>7</sup> The Supreme Court declined to address whether all claims brought under Title II would survive state immunity challenges.<sup>8</sup> The Court's narrow holding is significant because in *Board of Trustees of the University of Alabama v. Garrett*,<sup>9</sup> decided a few years prior to *Lane*, it held that claims for money damages brought under Title I,<sup>10</sup> which addresses employment discrimination, were barred by the Eleventh Amendment.<sup>11</sup>

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negatively, depending on how disability is defined and measured."); Robert F. Rich et al., *Critical Legal and Policy Issues for People with Disabilities*, 6 DEPAUL J. HEALTH CARE L. 1, 3 (2002) ("Slight variations in the definition of disability can mean a difference of millions of potentially eligible people with disabilities using billions of dollars in programs and services."). The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). It is interesting to note that the 2000 U.S. Census appears to have based its figure using a different definition of the term "disability." See NAT'L COUNCIL ON DISABILITY, IMPROVING FEDERAL DISABILITY DATA 9 (2004), available at <http://www.ncd.gov/newsroom/publications/2004/pdf/improvedata.pdf> (recommending that "[t]he U.S. Census Bureau . . . immediately revise Census questions for the Year 2010 Census . . . to reflect the ADA definition").

The ADA does not define any of the terms used in its definition of disability. See Robert L. Mullen, *The Americans with Disabilities Act: An Introduction for Lawyers and Judges*, 29 LAND & WATER L. REV. 175, 181 (1994). Definitions for such terms can be found in the rules of the various agencies charged with enforcing the ADA. See *id.* For a detailed examination of how the Equal Employment Opportunity Commission and the Department of Justice interpret "physical or mental impairment" and "major life activity," see *id.* at 182–83.

<sup>3</sup> See 42 U.S.C. § 12132.

<sup>4</sup> See *id.* §§ 12131–12165.

<sup>5</sup> 541 U.S. 509 (2004).

<sup>6</sup> See *id.* at 533–34.

<sup>7</sup> See *id.* at 531.

<sup>8</sup> See *id.* at 530–31.

<sup>9</sup> 531 U.S. 356 (2001).

<sup>10</sup> 42 U.S.C. §§ 12111–12117 (2000).

<sup>11</sup> See *Garrett*, 531 U.S. at 360.

Analyzed within the context of *Garrett*, it appears that the Court's holding in *Lane* severely limits the rights of persons with disabilities. After *Lane*, it seems as if the only claims based on Title II's remedial provisions that can withstand a state immunity challenge are those that simultaneously allege a violation of a fundamental right, and thus trigger strict scrutiny review.<sup>12</sup>

This Note seeks to examine the rights of disabled individuals after *Lane*. Part I provides a historical perspective of the rights of disabled Americans with an emphasis on the dramatic progress of the disabilities movement in the last half-century. Part II gives a concise overview of the ADA itself and offers a more detailed look at Titles I and II, as both are relevant for a complete analysis of *Lane*. Part III examines the Court's decision in *Lane* within the framework of its current stance on States' rights. Part IV suggests that the existence of a fundamental right, invoking strict scrutiny review, was necessary to *Lane*'s holding. It then surveys some recent lower court decisions addressing the issue. Part V briefly discusses the extent to which the ADA is able to remedy discrimination against disabled Americans today. Finally, this Note interprets the holding of *Lane* to apply to all violations of fundamental rights, and concludes that Title II claims that fail to allege the violation of a fundamental right, and are thus decided under rational basis review, will not survive a state immunity challenge.

## I. A HISTORICAL OVERVIEW OF THE RIGHTS OF DISABLED AMERICANS

Persons with disabilities have long been subject to discrimination.<sup>13</sup> Throughout most of American history,

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<sup>12</sup> It is important to note the distinction between claims based on the remedial provisions of the ADA and those alleging direct violations of the Fourteenth Amendment. Recently, in *United States v. Georgia*, 126 S. Ct. 877 (2006), the Supreme Court held that States could be subject to suit under Title II of the ADA because Section 5 of the Fourteenth Amendment permits Congress to create "private remedies against the States for actual violations" of the Fourteenth Amendment. *See id.* at 881. This differs from Congress's power to create remedial legislation pursuant to the Fourteenth Amendment that permits individuals to bring suits against States. *See id.* The legislation at issue in *Lane* and *Garrett* falls into this latter category, which is the subject of considerable constitutional debate. *See id.* ("[T]he members of this Court have disagreed regarding the scope of Congress' 'prophylactic' enforcement powers under [Section 5] of the Fourteenth Amendment . . .").

<sup>13</sup> *See* 42 U.S.C. § 12101(a)(2) (finding that "historically, society has tended to

legislation that sought to address the rights of disabled Americans was scarce.<sup>14</sup> Then, in the late 1960s and early 1970s, there emerged a disabilities movement that took up such a cause.<sup>15</sup> The culmination of this movement came in 1990 with Congress's passage of the ADA.<sup>16</sup>

Society has traditionally viewed disabled individuals as incompetent and burdensome.<sup>17</sup> A popular response in the early

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isolate and segregate individuals with disabilities”).

<sup>14</sup> See STEPHEN L. PERCY, *DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY* 49 (1989) (stating that in the late 1960s policies addressing the disabled shifted from “services and income supports” to “rights and protections”).

<sup>15</sup> See *id.*

<sup>16</sup> See Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 387–91 (1991) (discussing the history of the ADA and its relation to the disabled rights movement and previous disabled rights legislation).

<sup>17</sup> See Barbara P. Ianacone, *Historical Overview: From Charity to Rights*, 50 TEMP. L. Q. 953, 953–54 (1977). This perception was inherited from English social policy that persisted since the seventeenth century. See *id.* at 953 & n.4 (stating that American perceptions of the disabled were influenced by the English Poor Law system, which viewed the disabled as the government's responsibility).

Prejudice against the disabled went far beyond notions of inferiority. In the mid-nineteenth century, the disabled were widely held as “evolutionary laggards or throwbacks.” See Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 33, 36 (Paul K. Longmore & Lauri Umansky eds., 2001) (“Physical or mental abnormalities were commonly depicted as instances of atavism, reversions to earlier stages of evolutionary development.”). A disturbing illustration of this belief is seen in nineteenth-century “freak shows” that exhibited persons with disabilities as “less-evolved creatures from far off jungles.” See *id.* at 40.

The use of an “evolutionary hierarchy” was also used to justify discrimination against racial minorities. See *id.* at 36, 40. As such, discrimination against persons with disabilities and racism were interrelated. See *id.* For example, Down syndrome was first termed “Mongolism,” because it was “believed . . . to be the result of a biological reversion by Caucasians to the Mongol racial type.” See *id.* at 36. The parallels between race and disability discrimination can be seen throughout American history. See Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 404–05 (1991).

The xenophobic hysteria around the turn of the century, dressed in the power of state authority, focused pervasively against racial minorities (especially black Americans) as well as persons with disabilities. Both groups were seen as unfit, and therefore, official action imposed mandatory exclusion and segregation upon both groups. Government-supported segregation of African-Americans and persons with disabilities evoked, reinforced, and legitimated public and private prejudices and the actions based on those prejudices. . . .

The solution for the then-recognized “common problem” was precisely similar: state imposed segregation of “the Negro” and persons with disabilities.

*Id.* at 404–05 (footnotes omitted).

decades of the nation's history was to segregate persons with disabilities by putting them away in almshouses.<sup>18</sup> The harshest treatment against disabled Americans, however, took place within the last hundred years. With the rise of Social Darwinism and the eugenics movement near the turn of the twentieth century, States began implementing policies of mandatory sterilization and isolation of disabled individuals.<sup>19</sup> Thus, throughout most of American history, persons with disabilities were subject to severe forms of abuse and discrimination.

Social policy reflecting the interests of disabled Americans was almost nonexistent before the twentieth century.<sup>20</sup> The first programs of such kind focused on the needs of the disabled but did little to promote their rights.<sup>21</sup> These policy initiatives

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<sup>18</sup> See Ianacone, *supra* note 17, at 954 (stating that almshouses were the “institutional panacea for the maintenance of the dependant”). The use of almshouses as places to keep persons with disabilities was most popular in the first half of the nineteenth century. See *id.* at 954 n.7. During this period, most of the States “had either encouraged or made mandatory the creation of almshouses.” See *id.*

<sup>19</sup> See Cook, *supra* note 17, at 399–400. By 1938, thirty-three States had sterilization statutes. See David Pfeiffer, *Overview of the Disability Movement: History, Legislative Record, and Political Implications*, 21 POL’Y STUD. J. 724, 726 (1993). Such legislation was upheld by the Supreme Court in *Buck v. Bell*, 274 U.S. 200, 207–08 (1927). At issue in *Buck* was a Virginia statute that allowed for “the sterilization of mental defectives.” See *id.* at 205. The plaintiff, Carrie Buck, was an eighteen-year-old woman committed to a Virginia institution and ordered to undergo sterilization against her will. See *id.* The Court found that the statute was a constitutional exercise of state power as it promoted the general welfare of the public. See *id.* at 207. Writing for the Court, Justice Holmes announced that the sterilization of such “imbeciles” was warranted as:

We have seen more than once that the public welfare may call upon its best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.

*Id.* at 207. Although the statute at issue in *Buck* was eventually repealed in 1968, sterilizations continued until 1972. Pfeiffer, *supra*, at 726.

<sup>20</sup> See PERCY, *supra* note 14, at 9 (“With the exception of schools for handicapped children, particularly those serving hearing- and sight-impaired students, and the creation of public institutions providing custodial care, public policy efforts on behalf of persons with disabilities have largely taken place during this century.”).

<sup>21</sup> See *id.* at 9–10, 49. This paradigm has been coined “the medical model.” See Blanck, *supra* note 2, at 3. Its roots date back to the Civil War, when injured soldiers received compensation for their inability to work. See *id.*

consisted of vocational, rehabilitative, and income support programs.<sup>22</sup> Although the rehabilitative programs did attempt to bring persons with disabilities into society, they were aimed at making the disabled “adjust to a society structured around the convenience and interests of the nondisabled.”<sup>23</sup> In response, a political movement that sought to address the rights of disabled Americans was formed.<sup>24</sup>

The disabilities movement of the 1960s and 1970s focused on integrating disabled individuals into society.<sup>25</sup> Persons with disabilities had traditionally been thought of as inferior citizens and burdensome on the rest of the population,<sup>26</sup> so the movement sought an “attitudinal change.”<sup>27</sup> Its efforts were directed at showing the public that disabled individuals could be productive members of society.<sup>28</sup> The movement resulted in many advances for the rights of disabled Americans, including legislation addressing architectural barriers and discrimination on the basis of disability.<sup>29</sup>

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<sup>22</sup> See PERCY, *supra* note 14, at 9–10, 44–45; Blanck, *supra* note 2, at 3. In 1918, the Smith-Sears Veterans’ Rehabilitation Act was enacted to “vocationally rehabilitate disabled veterans.” See PERCY, *supra* note 14, at 44. Two years later in 1920, the Civilian Vocational Rehabilitation Act was passed. See *id.* This marked “the first broad-based federal program to provide vocational assistance” to the disabled. *Id.* Income support programs developed near the middle of the century. In 1956, Social Security Disability Insurance provided “a system of disability payments . . . for workers between the ages of fifty and sixty-four.” *Id.* at 45. A more expansive income support program, Supplemental Security Income, was enacted in 1972. See *id.* at 46. Under this program, disabled individuals received benefits based on “needs.” See *id.*

<sup>23</sup> See Blanck, *supra* note 2, at 3. Although such programs were enacted for the benefit of disabled persons, under them the existence of a disability “precluded equal participation in society.” See *id.*

<sup>24</sup> See PERCY, *supra* note 14, at 49. (“By the late 1960s, the direction of public policies to assist persons with mental or physical disabilities began to take a new direction, one that focused more on rights and protections than on services and income supports.”).

<sup>25</sup> See *id.* (stating that policy goals of the 1960s and 1970s were aimed at eliminating “physical and social barriers that restrict the access of disabled persons to mainstream society”).

<sup>26</sup> See *supra* note 17 and accompanying text (discussing the history of society’s negative perception of individuals with disabilities).

<sup>27</sup> See PERCY, *supra* note 14, at 48 (“Advocates saw the need for an attitudinal change, whereby persons with disabilities would be viewed as individuals with a wide set of abilities as well as one or more physical or mental impairments.”).

<sup>28</sup> See *id.* (discussing the need for persons with disabilities to be viewed as “individuals with a wide set of abilities”).

<sup>29</sup> See *id.* at 49–62. The most noteworthy of these laws are the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151–4157 (2000), and the Rehabilitation Act of

Despite the many successes of the disabilities movement, persons with disabilities were not fully protected from discrimination in the areas of employment and public services, and there remained a negative stigma that accompanied disability.<sup>30</sup> To address these issues, Congress authorized the National Council on the Handicapped (the “Council”),<sup>31</sup> an independent federal agency, to “review all federal laws and programs that affected individuals with disabilities.”<sup>32</sup> In its report to the President and Congress in 1986, entitled *Towards Independence*, the Council made a specific recommendation for a “comprehensive law requitting [sic] equal opportunity for individuals with disabilities.”<sup>33</sup> Such a law came in the form of the ADA.<sup>34</sup>

## II. THE AMERICANS WITH DISABILITIES ACT

Congress enacted the ADA “to provide a clear and comprehensive national mandate for the elimination of

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1973. Pub. L. No. 90-480, 82 Stat. 718 (1968) (codified as amended in scattered sections of title 29 of the United States Code).

<sup>30</sup> See Weicker, *supra* note 16, at 389 (“Despite the myriad of civil rights legislation on the books, people with disabilities remained unprotected in many contexts in which federal laws prohibited other types of discrimination—private employment, public accommodations, transportation, and state and local activities and services.”); cf. Dick Thornburgh, *The Americans with Disabilities Act: What it Means to All Americans*, 64 TEMP. L. REV. 375, 377 (1991) (“The ADA overcomes our past failure to eliminate attitudinal, architectural, and communication barriers in employment, transportation, public accommodations, public services, and telecommunications.”). One proposal to combat these gaps in disabilities rights legislation called for an amendment to the Civil Rights Act of 1964 to include disabled persons as a protected group. See Weicker, *supra* note 16, at 389. No such action was ever taken, however. See *id.*

<sup>31</sup> Today, the Council’s authorizing statute names the agency as the National Council on Disability. See 29 U.S.C. § 780 (2000).

<sup>32</sup> Weicker, *supra* note 16, at 389–90. The Council was originally part of the Department of Health, Education, and Welfare. *Id.* at 389. In 1984, Congress reestablished the Council as an independent federal agency. See *id.* at 389–90.

<sup>33</sup> See NAT’L COUNCIL ON DISABILITY, TOWARDS INDEPENDENCE 11 (1986), available at <http://www.ncd.gov/newsroom/publications/1986/pdf/toward.pdf>. Additionally, the Council found that “[f]ederal disability programs reflect[ed] an overemphasis on income support and an underemphasis of initiatives for equal opportunity, independence, prevention, and self-sufficiency.” See *id.* at 7. It also recommended that “[m]ore emphasis . . . be given to [f]ederal programs encouraging and assisting private sector efforts to promote opportunities and independence for individuals with disabilities.” See *id.* at 8.

<sup>34</sup> See *supra* note 16 and accompanying text.

discrimination against individuals with disabilities.”<sup>35</sup> The Act seeks to combat the “major areas of discrimination faced day-to-day by people with disabilities.”<sup>36</sup> The Act’s legislative findings identify such “critical areas” as “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”<sup>37</sup> Thus, the Act’s scope is quite broad.<sup>38</sup> The focus of this discussion is on Title II *and* Title I of the ADA. Although *Lane* only addressed the constitutionality of Title II,<sup>39</sup> a proper analysis of the Court’s decision requires knowledge of the protections of both Titles.

Title II pertains to the denial of public services and programs on the basis of disability.<sup>40</sup> Title II covers the services and programs of state and local governments<sup>41</sup> and their “instrumentalit[ies],” including departments and agencies.<sup>42</sup>

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<sup>35</sup> 42 U.S.C. § 12101(b)(1) (2000).

<sup>36</sup> *Id.* § 12101(b)(4).

<sup>37</sup> *Id.* § 12101(a)(3).

<sup>38</sup> The Act’s significance can be attributed to its enormous breadth. *See* Mullen, *supra* note 2, at 179 (stating that the ADA “has been described as the ‘Emancipation Proclamation’ for people with disabilities, the most comprehensive federal civil rights legislation since the Civil Rights Act of 1964, and ‘the most sweeping piece of civil rights legislation since the Civil War era’” (citing *Hearings on H.R. 2273 before the Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, H.R.*, 101st Cong. 201–12 (1989); *Americans with Disabilities Act of 1989: Hearings before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped on S. 9333, U.S. S.*, 101st Cong. 500 (1989); 135 CONG. REC. 14, 19801 (1989) (statement of Sen. Harkin); 135 CONG. REC. 14, 19804 (1989) (statement of Sen. Hatch)).

<sup>39</sup> *See supra* note 6 and accompanying text.

<sup>40</sup> *See* 42 U.S.C. § 12132. Title II’s predecessor, section 504 of the Rehabilitation Act of 1973, addressed discrimination by public services, but it applied to only those programs and services receiving federal funds. *See* Marc Charmatz & Antoinette McRae, *Access to the Courts: A Blueprint for Successful Litigation Under the Americans with Disabilities Act and the Rehabilitation Act*, 3 MARGINS 333, 337 (2003). Title II applies to the state programs regardless of whether they are federally funded. *See id.* *But see* Cook, *supra* note 17, at 417 (stating that the purpose of the ADA was not to extend coverage, as “the vast majority of governmental entities in this country were already subject to section 504 as recipients of federal assistance” and that “the problem was the mandate [of section 504] and the standards for enforcing that mandate”).

<sup>41</sup> *See* 42 U.S.C. § 12131(1)(A).

<sup>42</sup> *See id.* § 12131(1)(B). “Essentially, everything that these public entities do or are involved with is addressed.” Mullen, *supra* note 2, at 196.

Those protected under Title II are disabled individuals who are eligible to receive such services.<sup>43</sup>

Title I is directed at employment discrimination against the disabled.<sup>44</sup> The statute protects any “qualified individual with a disability,” defined as any person who can successfully fulfill the tasks required of the position they either hold or are seeking to fill.<sup>45</sup> An employer cannot deny employment to an applicant because the hiring would require the employer to bear the costs of such accommodations.<sup>46</sup> The statute does exempt employers, however, if they demonstrate “undue hardship.”<sup>47</sup> There are a number of factors to consider when determining whether an accommodation creates an undue hardship.<sup>48</sup> These factors include the cost of the accommodation, the financial resources of the facility or employer, the size of the employer, and the type of work involved.<sup>49</sup>

Titles I and II clearly serve different purposes, as each seeks to address different forms of discrimination against the disabled. One aspect of the ADA that Congress intended Title I and II (and all sections of the ADA) to share was their applicability to discrimination by the States.<sup>50</sup> The statute expressly provides that “State[s] shall not be immune under the [E]leventh [A]mendment . . . for a violation” of its provisions.<sup>51</sup> The issue as to whether Congress had such power has been the subject of constitutional debate, and constitutes the remainder of this Note’s discussion.

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<sup>43</sup> See 42 U.S.C. § 12131(2).

<sup>44</sup> See *id.* § 12112(a). Title I applies not only to hiring but “job application procedures, . . . advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *Id.* Prior to its enactment, federal laws only protected persons working for the federal government. See Thornburgh, *supra* note 30, at 377 (“Without the ADA, federal law would continue to provide no protection against discrimination for most individuals with disabilities working outside the federal government.”). Discrimination by an employer or prospective employer includes, among other practices, classifying on the basis of disability “in a way that adversely affects the opportunities or status” of those protected under that statute, “excluding or otherwise denying equal jobs or benefits” to the disabled, and failing to make “reasonable accommodations” for a qualified individual. 42 U.S.C. §§ 12112(b)(1), 12112(b)(4), 12112 (b)(5)(A).

<sup>45</sup> See *id.* § 12111(8).

<sup>46</sup> See *id.* § 12112(b)(5)(B).

<sup>47</sup> See *id.* § 12112(b)(5)(A).

<sup>48</sup> See *id.* § 12111(10)(B).

<sup>49</sup> See *id.*

<sup>50</sup> See *id.* § 12202.

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

III. ELEVENTH AMENDMENT CHALLENGES TO THE ADA:  
*TENNESSEE V. LANE* AND THE ROAD TO ITS DECISION

In the past decade, the Supreme Court has handed down a number of decisions reaffirming state immunity under the Eleventh Amendment.<sup>52</sup> The ADA has itself been the subject of such litigation. In *Board of Trustees of the University of Alabama v. Garrett*, the Court held that States were immune from claims for money damages brought under Title I.<sup>53</sup> Three years later, in *Tennessee v. Lane*, the Supreme Court was faced with a similar challenge to Title II.<sup>54</sup> This Part examines the Supreme Court's Eleventh Amendment jurisprudence and its influence in *Garrett*. It then discusses the factual background of *Lane*, and explores the *Lane* Court's analysis of an Eleventh Amendment challenge to Title II of the ADA.

A. *The Supreme Court's Eleventh Amendment Jurisprudence and the ADA*

The Eleventh Amendment grants immunity to the States for unconsented suits brought by citizens from another State.<sup>55</sup> Supreme Court case law has also repeatedly interpreted the Eleventh Amendment to hold States immune from suits brought by their own citizens.<sup>56</sup> Such state immunity can be abrogated by

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<sup>52</sup> See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding States immune from suits brought under the Age Discrimination in Employment Act of 1967); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (“[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.”); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (holding States immune from suits brought under the Trademark Remedy Clarification Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999) (holding States immune from suits brought under the Patent Remedy Act); *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (holding States immune from suits under the Religious Freedom Restoration Act of 1993).

<sup>53</sup> See *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001).

<sup>54</sup> See *Tennessee v. Lane*, 541 U.S. 509, 513 (2004).

<sup>55</sup> Read literally, the Eleventh Amendment only applies to “suit[s] 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.

<sup>56</sup> See *Lane*, 541 U.S. at 517 (“Even though the Amendment ‘by its terms . . . applies only to suits against a State by citizens of another State,’ our cases have repeatedly held that this immunity also applies to unconsented suits brought by a State’s own citizens.” (citing *Garrett*, 531 U.S. at 363; *Kimel*, 528 U.S. at 72–73) (omission in original)).

Congress, however, if it satisfies a two-pronged test.<sup>57</sup> First, Congress must “unequivocally express[] its intent to abrogate [state] immunity.”<sup>58</sup> Second, Congress must act “pursuant to a valid grant of constitutional authority,”<sup>59</sup> or within the bounds of its power under Section 5 of the Fourteenth Amendment.<sup>60</sup> The first prong of the test is met when a statute under review explicitly provides that States are not immune from its provisions.<sup>61</sup> The second prong is met when that statute “exhibits ‘a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’”<sup>62</sup>

This second prong can best be understood as a three step analysis. The first step is to identify the constitutional right sought to be protected by Congress and the level of review afforded to such a right.<sup>63</sup> The second step is to look at the

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<sup>57</sup> See *id.* at 517 (citing *Kimel*, 528 U.S. at 73).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *id.* at 518 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)). Section 5 gives Congress the power to enforce the Equal Protection Clause “by enacting ‘appropriate legislation.’” See *Garrett*, 531 U.S. at 365 (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)). The power of Congress to abrogate state immunity was not always confined to its Section 5 powers. In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court announced that abrogation of state immunity could be based on either Congress’s power under Section 5 or the Commerce Clause. See *id.* at 19. This decision, however, was overruled in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), where the Court held that Congress could not rely on any of its powers enumerated in Article I to abrogate state immunity. See *id.* at 72.

<sup>61</sup> See *Lane*, 541 U.S. at 517–18 (finding an intention to abrogate state immunity once a statute explicitly provides for a State not to be immune); *Garrett*, 531 U.S. at 363–64 (finding no dispute as to whether there was an intention to abrogate state immunity because of statute’s explicit language).

<sup>62</sup> *Lane*, 541 U.S. at 520 (citing *Boerne*, 521 U.S. at 520).

<sup>63</sup> See *id.* at 522; *Garrett*, 531 U.S. at 365. At this point the Court must ascertain what level of scrutiny is required: strict scrutiny, intermediate scrutiny, or rational basis review.

Under strict scrutiny, a State’s action will be upheld only if it is “narrowly tailored to serve a compelling state interest.” See *Hill v. Colorado*, 530 U.S. 703, 748 (2000). Strict scrutiny applies when a state law draws classifications based on race, alienage, or national origin, or infringes upon a fundamental right. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). The Supreme Court has identified as fundamental rights the right to access the courts, the right to vote, and the right of interstate travel. See *Lane*, 541 U.S. at 533–34; *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807–09 (1969), *aff’d*, 394 U.S. 802 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 630 n.8 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974).

The intermediate level of scrutiny applies to discrimination based on “quasi-suspect” classifications. See *Cleburne*, 473 U.S. at 441, 446. The most commonly cited example of a classification subject to this form of review is classification on the

statute's legislative record to determine whether there is a "history and pattern" of unconstitutional behavior.<sup>64</sup> In the last step of the analysis, a court must ensure that the remedy provided by the statute is "an appropriate response to this history and pattern of unequal treatment."<sup>65</sup> The Court first applied this analysis to the ADA in *Garrett*.

At issue in *Garrett* was whether Congress had validly abrogated state immunity with respect to Title I of the ADA.<sup>66</sup> The Court began its analysis by noting that Congress had clearly intended to abrogate state immunity, thus satisfying the first prong of the test.<sup>67</sup> The Court then turned to step one of the congruence and proportionality analysis, finding the constitutional right protected under Title I to be the equal treatment of persons with disabilities.<sup>68</sup> As such, the scope of this protection was limited to rational basis review, meaning that States can discriminate against disabled individuals if there is a rational relationship between such disparate treatment and "some legitimate government purpose."<sup>69</sup>

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basis of gender. *See id.* at 441 (citing *Miss. Univ. v. Hogan*, 458 U.S. 718, 721 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976)). Under this form of review, a State's classification is upheld only if it is "substantially related to a legitimate state interest." *Id.* (quoting *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982)).

The lowest level of scrutiny is rational basis review. *See id.* at 439–40. State laws subject to this form of review are presumed valid and will be upheld if they are "rationally related to a legitimate state interest." *See id.* at 440. Laws commonly held to this standard are those addressing social or economic issues. *See id.*

<sup>64</sup> *See Lane*, 541 U.S. at 523–25, 530; *Garrett*, 531 U.S. at 368.

<sup>65</sup> *Lane*, 541 U.S. at 530; *Garrett*, 531 U.S. at 372.

<sup>66</sup> *See Garrett*, 531 U.S. at 360. *Garrett* involved two consolidated claims against the State of Alabama for employment discrimination. *See id.* at 362–63. One plaintiff alleged that she was not permitted to continue as Director of Nursing at the University of Alabama in Birmingham Hospital because she took leave to seek cancer treatment. *See id.* at 362. The other claimed that the Alabama Department of Youth Services failed to alter his work schedule and duties to accommodate his chronic asthma and sleep apnea. *See id.*

<sup>67</sup> *See id.* at 363–64 (citing 42 U.S.C. § 12202 (2000)).

<sup>68</sup> *See id.* at 365; *see also Lane*, 541 U.S. at 522 (stating that in *Garrett* the Court "identified Title I's purpose as enforcement of the Fourteenth Amendment's command that 'all persons similarly situated should be treated alike'" (quoting *Cleburne*, 473 U.S. at 439)).

<sup>69</sup> *See Garrett*, 531 U.S. at 366–67 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)); *see also Lane*, 541 U.S. at 522 (reaffirming that "classifications based on disability violate [the Fourteenth Amendment] if they lack a rational relationship to a legitimate governmental purpose").

The Court first announced that discrimination against the disabled was subject to rational basis review in *Cleburne*. *See Cleburne*, 473 U.S. at 435. The Court gave a number of reasons for its conclusion. First, given the wide range of persons that fall

Turning to step two in the analysis, after examining the legislative record of the ADA, the Court found that Congress had failed to “identify a pattern of irrational [S]tate discrimination in employment against the disabled.”<sup>70</sup> The Court noted at the outset that it would not rely on instances of discrimination against persons with disabilities by local governments because the issue of immunity under the Eleventh Amendment only applies to the States.<sup>71</sup> Looking at the record of employment discrimination by state actors, the Court found that Congress had only assembled “minimal evidence” of such discrimination.<sup>72</sup> Additionally, the Court noted that Congress failed to specifically address employment discrimination by the States in the ADA’s legislative findings.<sup>73</sup>

Although the Court could have ended its inquiry here, it went on to address the third step in the analysis, stating that even if there was a history and pattern of employment discrimination by the States, the legislative response taken would have been inappropriate.<sup>74</sup> According to the Court, the statute’s requirement that employers spend money on accommodations went too far because it would be reasonable, and thus constitutional, for an employer to refuse to hire a person

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under the classification as having a disability, “from those whose disability is not immediately evident to those who must be constantly cared for,” courts lack the knowledge to make informed decisions pertaining to policies affecting the disabled. *See id.* at 442–43. A decision as such should be left to the legislature. *See id.* Second, because both the States and the federal government were addressing the “plight” of the disabled “in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary,” a higher standard of review would not be warranted. *See id.* at 443. Third, given that the States and the federal government have responded shows that the disabled are not “politically powerless in the sense that they have no ability to attract the attention of the lawmakers.” *See id.* at 445. Finally, if disabled individuals were classified as a quasi-suspect class, the judiciary would have a hard time distinguishing “the aging, the disabled, the mentally ill, and the infirm.” *See id.* at 445–46.

The plaintiffs prevailed despite the Court’s application of rational basis review. The *Cleburne* Court held that requiring a special use permit for a home for persons with mental disabilities was based on an “irrational prejudice.” *See id.* at 450.

<sup>70</sup> *See Garrett*, 531 U.S. at 368.

<sup>71</sup> *See id.* at 368–69. Local governments can be sued under the ADA “without Congress’ ever having to rely on [Section 5] of the Fourteenth Amendment to render them so.” *See id.*

<sup>72</sup> *See id.* at 370.

<sup>73</sup> *See id.* at 372.

<sup>74</sup> *See id.*

with a disability to avoid added costs.<sup>75</sup> As a consequence, the Court held States immune from suits brought by citizens under Title I.<sup>76</sup> It should be noted that the Court's holding only applies to claims brought by citizens against a State for money damages. In a footnote, Chief Justice Rehnquist added that the federal government could still sue the States under the ADA for money damages, and that private citizens could seek injunctive relief against state officials.<sup>77</sup> For example, a state employee fired on the basis of disability can seek a court order forcing the State to reinstate his job. The Court declined to address whether Title II was a valid exercise of Congress's power under the Fourteenth Amendment.<sup>78</sup> Three years later, the Court was presented with the opportunity to take up the issue in *Lane*.

In a dissenting opinion, Justice Breyer argued that Title I was an "appropriate" remedy for employment discrimination against the disabled by the States.<sup>79</sup> Justice Breyer first disagreed with the Court's conclusion that there was not ample evidence of such discrimination.<sup>80</sup> According to Justice Breyer, the Task Force on the Rights and Empowerment of Americans with Disabilities' finding of numerous instances of discrimination by state officials,<sup>81</sup> and evidence of societal discrimination against the disabled, "implicates" state governments because

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<sup>75</sup> *See id.*

[W]hereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to "mak[e] existing facilities used by employees readily accessible to and usable by individuals with disabilities." The ADA does except employers from the "reasonable accommodatio[n]" requirement where the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." However, even with this exception, the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an "undue burden" upon the employer.

*Id.* (second and third alterations in original) (citations omitted).

<sup>76</sup> *See id.* at 360.

<sup>77</sup> *See id.* at 374 n.9

<sup>78</sup> *See id.* at 360 n.1. Although the plaintiffs alleged violations of both Titles I and II, they failed to brief the Court on Title II violations. *See id.* As such, the Court dismissed the portion of the complaint pertaining to Title II. *See id.*

<sup>79</sup> *See id.* at 377 (Breyer, J., dissenting).

<sup>80</sup> *See id.* at 377-82.

<sup>81</sup> *See id.* at 379.

“state agencies form part of that same larger society.”<sup>82</sup> As to the Court’s application of the congruence and proportionality test, Justice Breyer argued that the Court’s use of the test was too harsh in that it failed to defer to Congress.<sup>83</sup>

*B. Tennessee v. Lane: An Eleventh Amendment Challenge to Title II*

The plaintiffs in *Lane* claimed that they were denied state services on account of their disabilities.<sup>84</sup> George Lane, who was a paraplegic and had to use a wheelchair to get around,<sup>85</sup> was scheduled to go to court to answer a set of criminal charges.<sup>86</sup> The courthouse, however, did not have any elevators.<sup>87</sup> To make his appearance, Lane was forced to crawl up two flights of stairs.<sup>88</sup> When he was scheduled to make a second appearance, Lane would not crawl up the stairs again, and refused to be carried by a court officer.<sup>89</sup> He was arrested for failing to appear.<sup>90</sup> The second plaintiff, Beverly Jones, was a court reporter and also a paraplegic.<sup>91</sup> Jones claimed that a number of courthouses were inaccessible because of her disability.<sup>92</sup> The district court denied the State’s motion to dismiss.<sup>93</sup> The court of appeals affirmed on the ground that the plaintiffs alleged the violation of a fundamental right, access to the courts.<sup>94</sup> The Supreme Court affirmed.<sup>95</sup>

As in *Garrett*, the Court noted that Congress had expressly intended to abrogate state immunity.<sup>96</sup> It then applied the three-step analysis used in *Garrett* to determine whether Congress had such power. Addressing step one, the Court found that Title II was enacted, not only to guarantee the equal protection of

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<sup>82</sup> *See id.* at 378.

<sup>83</sup> *See id.* at 387–89.

<sup>84</sup> *See Tennessee v. Lane*, 541 U.S. 509, 513 (2004).

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 513–14.

<sup>87</sup> *See id.*

<sup>88</sup> *See id.* at 514.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *See id.* at 513–14.

<sup>92</sup> *See id.* at 514.

<sup>93</sup> *See id.*

<sup>94</sup> *See id.* at 514–15.

<sup>95</sup> *See id.* at 534.

<sup>96</sup> *See id.* at 517–18 (citing 42 U.S.C. § 12202 (2000)).

persons with disabilities, but also to ensure “basic constitutional guarantees.”<sup>97</sup> At issue in *Lane* was the fundamental right of access to the courts.<sup>98</sup> Consequently, the Court applied a higher standard of review than it did in *Garrett*; discrimination would only be upheld in the face of a compelling state interest.<sup>99</sup>

Turning to step two, the Court found ample evidence of state discrimination against persons with disabilities relating to unequal access to the courts.<sup>100</sup> In addition, the Court stated that it could rely on proof of discrimination by local governments because when administering “judicial services” local governments are treated as “‘arm[s] of the State.’”<sup>101</sup> Moreover, the Court went beyond the limited facts of the case and noted the “sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services.”<sup>102</sup> Finally, Congress listed in the findings of the ADA itself the denial of “‘access to public

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<sup>97</sup> *See id.* at 522. Some of these “basic constitutional guarantees” include the right of access to the courts, the right of criminal defendants to be present at all stages of a criminal trial, the right of civil litigants to be heard, the right of a criminal defendant to have a fair jury trial, and the public’s right of access to criminal proceedings. *See id.* at 522–23.

<sup>98</sup> *See id.* at 529.

<sup>99</sup> *See id.* at 528–29, 532 (stating that because Title II applied to “a variety of basic rights, including the right of access to the courts,” its standard of review would be “at least as searching, and in some cases more searching” than the intermediary level of review).

<sup>100</sup> *See id.* at 527.

Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs might be restructured or relocated to other parts of the buildings. Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities.

*Id.* (citations omitted).

<sup>101</sup> *See id.* at 527 n.16 (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)) (alteration in original).

<sup>102</sup> *See id.* at 528.

services’ ” as a “ ‘critical area[]’ ” of discrimination.<sup>103</sup> The Court’s analysis then turned to the congruence and proportionality of Title II.<sup>104</sup>

In the final step of the analysis, addressing the appropriateness of Title II, the Court stated that it only needed to consider whether Title II was an appropriate response to the denial of the rights at issue in the case before the Court.<sup>105</sup> The Court found that Title II was an appropriate response to disabled individuals being denied equal access to the courts given that the problem “has persisted despite several legislative efforts to remedy the problem of disability discrimination.”<sup>106</sup> Further, because the case dealt with a due process violation, the Court stated that “ordinary considerations of cost and convenience alone cannot justify a State’s failure to provide individuals with a meaningful right of access to the courts.”<sup>107</sup> As a result, the Court held that Congress validly abrogated state immunity as a response to the denial of the fundamental right of access to the courts.<sup>108</sup>

In a dissenting opinion, Chief Justice Rehnquist found the Court’s holding to be “irreconcilable with *Garrett*.”<sup>109</sup> According

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<sup>103</sup> See *id.* at 529 (emphasis omitted) (quoting 42 U.S.C. § 12101(a)(3) (2000)).

<sup>104</sup> See *id.* at 530–31.

<sup>105</sup> See *id.* at 530 (stating that “nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole”). The State argued that the protections afforded under Title II far exceeded that which Congress could validly grant because they applied “not only to public education and voting-booth access but also to seating at state-owned hockey rinks.” *Id.* The Court responded by stating that:

[T]he question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under [Section 5] to enforce the constitutional right of access to the courts.

*Id.* at 530–31.

<sup>106</sup> *Id.* at 531.

<sup>107</sup> See *id.* at 532–33. It is important to note the Court’s discussion of “ordinary considerations of cost and convenience,” as it signals that any argument founded on a rational basis would not be sufficient to justify discrimination against the disabled by denying them access to the courts.

<sup>108</sup> See *id.* at 533–34.

<sup>109</sup> See *id.* at 538 (Rehnquist, C.J., dissenting). A second dissent was filed by Justice Scalia, who felt that the congruence and proportionality test was unworkable and suggested “one that provides a clear, enforceable limitation supported by the text of [Section 5].” See *id.* at 558 (Scalia, J., dissenting). Justice Thomas also filed a dissent. Agreeing with Chief Justice Rehnquist, he reiterated his belief that *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), where the court

to the Chief Justice, the Court failed to show “widespread violations of the due process rights of disabled persons.”<sup>110</sup> Also, it was an error on the part of the Court to consider evidence of generalized societal discrimination and discrimination by local governments.<sup>111</sup> With respect to the Court’s congruence and proportionality test, the Chief Justice found that permitting money damages to be sought against States under Title II was an invalid exercise of congressional power because the Act’s provisions sought to correct discrimination to a greater extent than the Fourteenth Amendment.<sup>112</sup> “Title II requires, on pain of money damages, special accommodations for disabled persons in virtually every interaction they have with the State.”<sup>113</sup> For that reason, Congress had overstepped its bounds.<sup>114</sup>

Chief Justice Rehnquist also took issue with the fact that the Court sought to limit its holding to cases addressing access to the courts.<sup>115</sup> The Chief Justice argued that “carv[ing] up” Title II to apply only to the case at hand was inconsistent with previous decisions addressing state immunity.<sup>116</sup> Rather, the Court’s analysis was not of Title II, but of some “hypothetical” statute addressing “courthouses.”<sup>117</sup> The Chief Justice went on to add that even under the Court’s limited analysis as applied to access to the courts, there was still a lack of evidence showing state discrimination, and the statute was overly broad, as States would be held liable for “any sort of inconvenience in accessing” a courthouse.<sup>118</sup>

#### IV. TITLE II AS A REMEDY AFTER *LANE*

After *Lane*, it is clear that claims brought under Title II will prevail if they allege the violation of a fundamental right. This sounds like a victory for the disabilities movement. The Court’s

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upheld Congress’s abrogation of state immunity under the Family and Medical Leave Act of 1993, was wrongly decided and he sought to “disavow any reliance” on that case. *See Lane*, 541 U.S. at 566 (Thomas, J., dissenting).

<sup>110</sup> *Lane*, 541 U.S. at 541 (Rehnquist, C.J., dissenting).

<sup>111</sup> *See id.* at 541–42.

<sup>112</sup> *See id.* at 549.

<sup>113</sup> *Id.*

<sup>114</sup> *See id.* at 538.

<sup>115</sup> *See id.* at 551.

<sup>116</sup> *See id.*

<sup>117</sup> *See id.*

<sup>118</sup> *See id.* at 553 (citing 42 U.S.C. § 12132 (2000)).

language, however, puts a major limitation on Title II claims. In order to prevail, the claimant relying on the Title II as remedial legislation *must* allege the violation of a fundamental right. To fully understand the extent of this limitation, it is necessary to first compare *Lane* with *Garrett*, and then analyze how *Lane* may impact the rights of disabled Americans.

#### A. Comparing *Lane* with *Garrett*

In two separate decisions, the Supreme Court addressed whether the Eleventh Amendment barred Title I and Title II claims brought against the States for money damages. In *Garrett*, the Court found that Congress did not validly abrogate state immunity under Title I.<sup>119</sup> In *Lane*, the Court found that, in at least one circumstance, States were not immune from suits brought under Title II.<sup>120</sup> An explanation for these divergent results appears to be based on two factors. First, *Garrett* was decided under rational basis review,<sup>121</sup> whereas strict scrutiny applied in *Lane*.<sup>122</sup> Second, there was more proof of the type of state discrimination at issue in *Lane* than the type of discrimination at issue in *Garrett*.<sup>123</sup>

The Court's decision to apply different levels of scrutiny in *Garrett* and *Lane* seems to have greatly affected the outcomes in both cases.<sup>124</sup> As only rational basis review applied in *Garrett*, any instance of discrimination against disabled individuals would be constitutional if it served a "legitimate governmental purpose."<sup>125</sup> Therefore, if a state employer failed to hire a disabled individual on the ground that doing so would require making structural changes at a high cost, the employer's actions would not violate the Equal Protection Clause because a

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<sup>119</sup> See *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001).

<sup>120</sup> See *Lane*, 541 U.S. at 533–34.

<sup>121</sup> See *supra* notes 68–69 and accompanying text.

<sup>122</sup> See *supra* note 99 and accompanying text.

<sup>123</sup> See *supra* notes 70–73, 100–04 and accompanying text.

<sup>124</sup> See *supra* note 99 and accompanying text; see also Timothy J. Cahill & Betsy Malloy, *Overcoming the Obstacles of Garrett: An "As Applied" Saving Construction for the ADA's Title II*, 39 WAKE FOREST L. REV. 133, 163 (2004) (stating that the Supreme Court could find a valid abrogation of state immunity in *Lane* because, unlike the Title I analysis in *Garrett*, Title II addresses fundamental rights). For a remarkably accurate prediction as to how the Court could decide *Lane*, see Cahill & Malloy, *supra*.

<sup>125</sup> See *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

legitimate government purpose, saving money, would have been served.<sup>126</sup> Since *Lane* addressed the violation of a fundamental right, state conduct would not be constitutional if founded on a mere rational basis.<sup>127</sup> Subject to a strict scrutiny analysis, a State's denial of a fundamental right to persons with disabilities could only be justified by serving a compelling state interest.<sup>128</sup>

Another possible factor that contributed to the different outcomes in *Garrett* and *Lane* was the amount of evidence available in each case showing a history and pattern of state discrimination.<sup>129</sup> In *Garrett*, the Court found that the ADA's legislative record failed to show that there was sufficient evidence of discrimination against the disabled in the area of employment.<sup>130</sup> The Court noted that much of the record before Congress pertained to "discrimination by the States in the provision of public services and public accommodations."<sup>131</sup> Similarly, in *Lane* the Court used such evidence to support its finding of a history and pattern of discrimination as it related to the provisions of Title II.<sup>132</sup> Moreover, whereas in *Garrett* the Court refused to consider evidence of discrimination by local governments,<sup>133</sup> the *Lane* Court relied on such proof to find a history and pattern of discrimination.<sup>134</sup> Furthermore, the ADA's legislative findings stated that discrimination by the States in the denial of public services and programs was a concern,<sup>135</sup> but failed to make any such declaration with regard to employment discrimination.<sup>136</sup> In sum, different levels of scrutiny and the

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<sup>126</sup> See *supra* note 75 and accompanying text.

<sup>127</sup> See *supra* note 63.

<sup>128</sup> See *supra* note 63.

<sup>129</sup> Cf. Cahill & Malloy, *supra* note 124, at 167 (stating that Title II "may not meet the same fate" as Title I "[b]ecause the legislative record in support of Title II appears to be more substantial than that for Title I").

<sup>130</sup> See *supra* notes 70–73 and accompanying text.

<sup>131</sup> See Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 371 n.7 (2001). Equal access to public accommodations is addressed in Title III of the ADA. See 42 U.S.C. §§ 12181–12189 (2000).

<sup>132</sup> See Tennessee v. Lane, 541 U.S. 509, 526 (2004). It should be noted that in *Garrett*, writing for the majority, Chief Justice Rehnquist found such evidence to be unreliable as it was anecdotal and was "submitted not directly to Congress but to the Task Force on the Rights and Empowerment of Americans with Disabilities." See *Garrett*, 531 U.S. at 370–71.

<sup>133</sup> See *supra* note 71 and accompanying text.

<sup>134</sup> See *supra* note 101 and accompanying text.

<sup>135</sup> See *supra* note 73 and accompanying text.

<sup>136</sup> See *supra* note 103 and accompanying text.

Court's differing interpretations of the ADA's legislative record appear to account for the different outcomes in *Garrett* and *Lane*.

*B. The Reach of Lane's Holding*

Whereas the holding in *Garrett*, that suits brought against the States under Title I for money damages are "barred by the Eleventh Amendment,"<sup>137</sup> cannot be subject to interpretation, it is not as clear whether the same can be said for *Lane*. The Court upheld Title II, but limited its holding to the denial of access to the courts. This decision appears to have been heavily influenced by the existence of a violation of a fundamental right.<sup>138</sup>

It is suggested here that *Lane* indicates that suits brought under Title II against a State for money damages will be successful if the claimant can show the violation of a fundamental right. The reasons are twofold. First, the violation of a fundamental right will trigger strict scrutiny analysis.<sup>139</sup> Thus, if a claim speaks in terms of fundamental rights, the Court is going to give far less deference to the States.<sup>140</sup> Second, and logically related, the Supreme Court will find a valid abrogation of state immunity when it applies a standard of review higher than rational basis.<sup>141</sup> This is to say that under a strict scrutiny analysis, the Court will find that remedial legislation passed pursuant to Section 5 of the Fourteenth Amendment is congruent and proportional to the history and pattern of the discrimination it seeks to remedy. Such a proposition is consistent with a

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<sup>137</sup> *Garrett*, 531 U.S. at 360.

<sup>138</sup> See Cahill & Malloy, *supra* note 124, at 139 (stating that the plaintiffs in *Lane* were likely to be successful "because the *Lane* case involve[d] a fundamental right").

<sup>139</sup> See *supra* note 63.

<sup>140</sup> Cf. Cahill & Malloy, *supra* note 124, at 139 ("By examining the specific state program or service alleged to discriminate against the disabled, the Court may apply a different level of scrutiny to the [S]tate's action than the rational basis scrutiny that applied in *Garrett*.").

<sup>141</sup> See *Tennessee v. Lane*, 541 U.S. 509, 529 (2004) (stating that "because the [Family Medical and Leave Act] was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, 'it was easier for Congress to show a pattern of state constitutional violations' than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review" (citing *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735–37 (2003))); see also James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After Seminole Tribe and Flores*, 41 ARIZ. L. REV. 651, 686 (1999) (stating that "plaintiffs tend to prevail when strict or heightened scrutiny is applied").

number of the Court's recent decisions addressing the issue of state immunity.<sup>142</sup> In *Nevada Department of Human Resources v. Hibbs*,<sup>143</sup> the Court reviewed a provision of the Family and Medical Leave Act of 1993.<sup>144</sup> Reiterating that classifications based on gender were "subject to heightened scrutiny,"<sup>145</sup> the Court found that Congress had validly abrogated state immunity.<sup>146</sup> In *Kimel v. Florida Board of Regents*,<sup>147</sup> the Court held States immune from suits brought under the Age Discrimination in Employment Act of 1967<sup>148</sup> because in the case of age discrimination, only rational basis review applies.<sup>149</sup> Hence, *Lane* appears to be the most recent addition to the Supreme Court's modern Eleventh Amendment jurisprudence, setting forth a clear trend in how such cases are decided. In *Lane* and *Hibbs*, where one of the higher forms of review applied, the Court found a valid abrogation of state immunity in both instances. In *Kimel* and *Garrett*, where rational basis review applied, the Court upheld state immunity. Accordingly, a Title II claim that alleges the violation of a fundamental right so as to invoke review under strict scrutiny will not be barred by the Eleventh Amendment.<sup>150</sup>

### C. *Moving Beyond Lane*

The preceding section argued that a court will always find a valid abrogation of state immunity when a claim brought under Title II alleges the violation of a fundamental right. It is suggested here that a claim under Title II's remedial legislation will *only* prevail if it alleges the violation of a fundamental

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<sup>142</sup> See Cahill & Malloy, *supra* note 124, at 160–61.

<sup>143</sup> 538 U.S. 721 (2003).

<sup>144</sup> See 29 U.S.C. § 2612(a)(1)(C) (2000). The Act gives eligible employees twelve weeks of leave for every twelve month period for the birth of a child; for the placement of child with the employee for adoption or foster care; to care for a spouse, child, or parent with a serious health condition; and when the employee is unable to perform his duties due to a serious health condition. See *id.* § 2612(a)(1)(A)–(C).

<sup>145</sup> *Hibbs*, 538 U.S. at 728.

<sup>146</sup> See *id.* at 740.

<sup>147</sup> 528 U.S. 62 (2000).

<sup>148</sup> See *id.* at 67.

<sup>149</sup> See *id.* at 83.

<sup>150</sup> Cf. Cahill & Malloy, *supra* note 124, at 139 ("Because the *Lane* case involves a fundamental right, the Court should apply strict scrutiny when evaluating Title II's congruence and proportionality.").

right.<sup>151</sup> *Lane* presented the Court with an opportunity to decide whether States were immune from all Title II claims; however, it declined to do so.<sup>152</sup> The Court made it clear that its holding only applied to the fundamental right of access to the courts.<sup>153</sup> The issue as to whether Title II can be used in suits alleging the denial of state services and programs that do not implicate the violation of a fundamental right has yet to be decided. The Court mentioned the unavailability of access to a state-owned hockey rink as an example of this type of claim.<sup>154</sup> By applying the three-step analysis to claims of this type, it appears that Congress did not validly abrogate state immunity.

1. Hypothetical State Immunity Challenge to Title II Claim  
Under Rational Basis Review Using the Supreme Court's  
Analyses in *Garrett* and *Lane*

a. *Step One: Identifying the Right at Issue*

Title II of the ADA was enacted to protect fundamental rights *and* ensure equal protection of disabled Americans.<sup>155</sup> As a result, a claim under Title II that does not implicate the violation of a fundamental right, such as the Court's equal access to a hockey rink example, would be subject to rational basis review, as the disabled are not a protected class under the Fourteenth Amendment.<sup>156</sup> Thus, like the Title I claim in *Garrett*, Title II claims based on equal protection will not stand if a State's failure to make accommodations is rational.<sup>157</sup>

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<sup>151</sup> See *id.* at 162 ("For the Supreme Court to find that Title II is a valid exercise of Congress' Section 5 authority, a higher level of scrutiny than rational basis appears to be a necessity.").

<sup>152</sup> See *supra* note 105 and accompanying text.

<sup>153</sup> See *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004).

<sup>154</sup> See *id.* at 530–31.

<sup>155</sup> See *id.* at 522 ("Title II, like Title I, seeks to enforce [the] prohibition [of] irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees . . .").

<sup>156</sup> Cf. Alison Tanchyk, Comment, *An Eleventh Amendment Victory: The Eleventh Amendment vs. Title II of the ADA*, 75 TEMP. L. REV. 675, 696, 700 (2002) (stating that "disabled individuals enjoy no special rights under the Fourteenth Amendment" and therefore "state actions discriminating against the disabled are not unconstitutional as long as they are rationally related to a legitimate state interest").

<sup>157</sup> See *supra* note 69 (explaining the level of court scrutiny for claims based on discrimination against the disabled).

b. *Step Two: Determining Whether Congress Identified a History and Pattern of States Denying Services and Programs to Persons with Disabilities*

It appears that there is a sufficient history and pattern of discrimination against the disabled in the area of state services and programs to satisfy the second step in the congruence and proportionality test. In *Lane*, the Court did not appear to limit its inquiry to the denial of access to the courts.<sup>158</sup> Much of the Court's language in this step of the analysis addressed the history and pattern of discrimination in state services and programs generally.<sup>159</sup> The Court noted, for example, that Congress's evidence of discrimination against the disabled included "hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions," and that "the 'overwhelming majority' of these examples concerned discrimination in the administration of public programs and services."<sup>160</sup> Additionally, as noted above, the Court identified the "sheer volume" of proof of discrimination based on disability with respect to public services and programs.<sup>161</sup> Moreover, Congress's findings in the text of the ADA indicated that the disabled faced discrimination in the area of "'access to public services.'"<sup>162</sup> Therefore, Congress has provided a history and pattern of state discrimination against the disabled in the area of public services.<sup>163</sup>

*Lane's* effect on the application of step two of the congruence and proportionality test is currently being played out in the lower courts. A number of courts, including the Fourth and Eleventh Circuits, have concluded that the Supreme Court essentially decided in *Lane* that Title II as a whole passes step two of the

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<sup>158</sup> See *Lane*, 541 U.S. at 524 ("Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.") (emphasis added).

<sup>159</sup> See *id.* at 526.

<sup>160</sup> *Id.* (citing *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 371 n.7 (2001)).

<sup>161</sup> See *supra* note 102 and accompanying text.

<sup>162</sup> See *Lane*, 541 U.S. at 529 (emphasis omitted) (quoting 42 U.S.C. § 12101(a)(3) (2000)).

<sup>163</sup> *But see* Tanchyk, *supra* note 156, at 697 ("The ADA legislative record summarizing [Congress's] findings of discrimination against the disabled is simply not sufficient to support the abrogation of the [S]tates' Eleventh Amendment protection.").

test.<sup>164</sup> In a case addressing the right to education, the Eastern District of New York limited the step two inquiry to a history and pattern of state discrimination with respect to education, but still found that this part of the test was satisfied.<sup>165</sup> The Southern District of New York, however, in a case addressing state discrimination against applicants seeking admission to the New York State Bar, limited its inquiry to a history and pattern of state discrimination of bar applicants, and found that there was insufficient proof of such discrimination.<sup>166</sup> Still, it seems as though the Supreme Court's decision in *Lane* is influencing some lower courts to find that there is a history and pattern of state discrimination with respect to Title II, regardless of the level scrutiny applicable. It is posited here, however, that the level of scrutiny will be the decisive factor for claims under rational basis review at step three of congruence and proportionality test.

*c. Step Three: Determining Whether Title II is an Appropriate Response to the History and Pattern of States Denying Services and Programs to Persons with Disabilities*

Given the Supreme Court's analysis in both *Garrett* and *Lane*, it appears that if the Court were to decide whether Title II was an appropriate response to discrimination in the realm of state services and programs, other than instances invoking the violation of a fundamental right or an "actual" constitutional violation, it would find Title II to be disproportionate to the harms it sought to prevent. In *Lane*, the Court noted that Title II requires States to make reasonable modifications so as to ensure that disabled persons have access to services and programs.<sup>167</sup> Under the agency rules promulgated to carry out the intent of Congress, this entails spending for either structural

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<sup>164</sup> See *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005) (confirming the *Lane* Court's finding that the "sufficient historical predicate of unconstitutional disability discrimination" is satisfied when Title II is considered as a whole); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 487 (4th Cir. 2005) (finding that the enactment of Title II on its face satisfies an inquiry as to a history and pattern of unconstitutional disability discrimination by States); *Buchanan v. Maine*, 377 F. Supp. 2d 276, 281 (D. Me. 2005) ("*Lane* ruled that the [step two] inquiry was satisfied generally as applied to the ADA . . .").

<sup>165</sup> See *Press v. State Univ. of N.Y.*, 388 F. Supp. 2d 127, 134 (E.D.N.Y. 2005).

<sup>166</sup> See *Roe v. Johnson*, 334 F. Supp. 2d 415, 422–23 (S.D.N.Y. 2004).

<sup>167</sup> See *Lane*, 541 U.S. at 531 (citing 42 U.S.C. § 12131(2) (2000)).

changes or other means that guarantee equal access.<sup>168</sup> In this instance the scope of the protection is limited to rational basis review,<sup>169</sup> so Title II would not be an appropriate response if a State's refusal to make modifications was rational.<sup>170</sup> In *Garrett*, the Court stated that even if there had been a history and pattern of employment discrimination, Title I would have failed this portion of the test because the decision by a state employer not to hire a disabled person in an effort to "conserve scarce financial resources" would be "entirely rational."<sup>171</sup> Using the same reasoning, it would be rational for States to refuse to make modifications for disabled individuals if doing so would save money.<sup>172</sup> It appears then that the Court would likely find Title II to be a disproportionate response to the denial of state services and programs to disabled Americans in cases like the hockey rink example.

## 2. The Lower Courts' Interpretation of *Lane*

The issue as to the constitutionality of Title II when subject to rational basis review will remain clouded until the Supreme Court decides to rule on the question. In the meantime, the lower courts have been wrestling with the issue, attempting to interpret *Lane's* effect on Title II. It seems that the courts have in fact come out on both sides of the issue, but tend to favor state immunity.

A number of courts have limited *Lane* to cases involving either access to the courts or fundamental rights.<sup>173</sup> A couple of

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<sup>168</sup> See *id.* at 532 (citing 28 C.F.R. §§ 35.150(b)(1), 35.151 (2005)).

<sup>169</sup> See *supra* Part IV.C.1.a (noting the level of scrutiny).

<sup>170</sup> Cf. Cahill & Malloy, *supra* note 124, at 173 ("A case involving access to a hockey rink would likely come out very differently than a case involving denial of a more fundamental right, like access to voting booths or a courthouse.")

<sup>171</sup> See Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001).

<sup>172</sup> Cf. Tanchyk, *supra* note 156, at 700 (2002) ("From a practical standpoint, it makes sense not to impose expansive accommodation requirements on the [S]tates because individuals can be afflicted with a huge variety of disabilities.")

<sup>173</sup> See Bill M. v. Neb. Dep't of Health & Human Servs. Fin. & Support, 408 F.3d 1096, 1100 (8th Cir. 2005) (construing *Lane* as a "discrete application of Title II abrogation" and stating that "[o]ther applications of Title II abrogation" must fail); Press v. State Univ. of N.Y., 388 F. Supp. 2d 127, 135 (E.D.N.Y. 2005) (stating that the Supreme Court was "unwilling to expand the scope of Title II and encroach on the [S]tate's immunity with respect to a non-fundamental right such as access to post-secondary education that is subject only to rational review"); Buchanan v. Maine, 377 F. Supp. 2d 276, 283 (D. Me. 2005) ("Absent a fundamental right, based on the law as it has been developed to date, Title II is not a proportional or

courts have denied claims based on healthcare-related services on such grounds. In *Bill M. v. Nebraska Department of Health and Human Services Finance and Support*,<sup>174</sup> the Eight Circuit, addressing the denial of Medicaid services, declined to overrule its pre-*Lane* decision in *Alsbrook v. City of Maumelle*,<sup>175</sup> which found that Congress failed to abrogate state immunity with respect to Title II.<sup>176</sup> Instead, the court found that *Lane* was limited to cases addressing access to the courts.<sup>177</sup> In *Buchanan v. Maine*,<sup>178</sup> the District Court of Maine went even further, implying that a claim based on discrimination with respect to mental health services was barred by state immunity because the claim failed to invoke a fundamental right.<sup>179</sup>

The court in *Buchanan* reviewed post-*Lane* cases addressing state immunity and found that, at the time, the “case law (with one exception) caution[ed] against abrogating a [S]tate’s sovereign immunity as to Title II . . . unless a plaintiff is asserting a fundamental right.”<sup>180</sup> The one exception was *Ass’n for Disabled Americans, Inc. v. Florida International University*,<sup>181</sup> which addressed the right to education.<sup>182</sup> It appears that the issue as to whether Title II is an appropriate response to discrimination with respect to administering education is one exception where the lower courts are less willing to find state immunity, even when rational basis review applies.

The right to education is currently at the forefront of Title II litigation. In the context of state immunity challenges, the right to education is a particularly interesting issue post-*Lane* because it has not been deemed a fundamental right.<sup>183</sup> In *Ass’n for Disabled Americans*, the Eleventh Circuit rejected a state

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congruent response to the recognized history of disability discrimination for mental health services.”); *Johnson v. S. Conn. State Univ.*, No. 3:02-CV-2065 (CFD), 2004 U.S. Dist. LEXIS 21084, at \*13 (D. Conn. Sept. 30, 2004) (“[I]n the wake of *Lane*, it appears that a private suit for money damages under Title II of the ADA may be maintained against a [S]tate only if the plaintiff can establish that the Title II violation involved a fundamental right.”).

<sup>174</sup> 408 F.3d 1096 (8th Cir. 2005).

<sup>175</sup> 184 F.3d 999 (8th Cir. 1999).

<sup>176</sup> *Bill M.*, 408 F.3d at 1099–100.

<sup>177</sup> *See id.* at 1100.

<sup>178</sup> 377 F. Supp. 2d 276 (D. Me. 2005).

<sup>179</sup> *See id.* at 283.

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

<sup>181</sup> 405 F.3d 954 (11th Cir. 2005).

<sup>182</sup> *See id.* at 957.

<sup>183</sup> *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–39 (1973).

immunity defense to a Title II claim for discrimination in the context of equal access to education.<sup>184</sup> The plaintiffs sued a university for failing to provide services such as sign language interpreters, auxiliary aids, and note takers.<sup>185</sup> Applying step one of the congruence and proportionality test, the court noted that although the right to education is only subject to rational basis review, the “importance of education” to society and the individual “distinguishes public education from other rights subject to rational basis review.”<sup>186</sup> Moreover, the harm involved is one that is “vast and far reaching.”<sup>187</sup> Turning to step two, the court found that the Supreme Court had decided that there was a history and pattern of state discrimination with respect claims under Title II.<sup>188</sup> At the third and final step, the court adopted the “as applied” method, and found Title II to be an appropriate response to state discrimination as applied to education because the Act seeks to remedy a “long history” of such discrimination and any modifications required would be limited to being reasonable.<sup>189</sup>

The Fourth Circuit has since come to the same conclusion in *Constantine v. Rectors and Visitors of George Mason University*.<sup>190</sup> At step one, the court acknowledged that the right to education was subject to rational basis review.<sup>191</sup> At step two, the court stated that after *Lane* it was “settled” that there was a history and pattern of discrimination by the States in the area of public services.<sup>192</sup> At the third step, the court considered Title II’s appropriateness to the “cases implicating the right to be free from irrational disability discrimination in public higher education.”<sup>193</sup> In finding Title II to be an appropriate response to discrimination with respect to education, the court first discussed the harm that Title II sought to remedy, discrimination on the basis of disability, and found that Title II’s mandate of

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<sup>184</sup> See *Ass’n for Disabled Ams.*, 405 F.3d at 959.

<sup>185</sup> See *id.* at 956.

<sup>186</sup> See *id.* at 957 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

<sup>187</sup> *Id.* at 957–58 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

<sup>188</sup> See *id.* at 958.

<sup>189</sup> See *id.* at 958–59.

<sup>190</sup> 411 F.3d 474, 490 (4th Cir. 2005).

<sup>191</sup> See *id.* at 486.

<sup>192</sup> See *id.* at 487.

<sup>193</sup> *Id.* at 488.

reasonable modification addressed such discrimination.<sup>194</sup> The court then noted the limitations of Title II and the regulations that govern its enforcement, such as the limitation that modifications be reasonable.<sup>195</sup> In distinguishing the case from *Garrett*, the *Constantine* court argued that Title II does not pose the same “congruence-and-proportionality concerns” as Title I based on two grounds.<sup>196</sup> First, States have a greater interest in achieving their goals in an efficient manner when acting as employers than when acting as sovereigns.<sup>197</sup> Second, the court found Title II’s remedies to be “less burdensome” because Title II, unlike Title I, does not impose a “categorical requirement” of reasonable modifications, but in fact has specific limitations.<sup>198</sup> The court acknowledged that Title II “may not be a perfect fit” for the discrimination Congress sought to remedy, but stated that the issue was not whether Title II exceeded “the boundaries of the Fourteenth Amendment, but *by how much*.”<sup>199</sup> The court concluded that Title II was constitutional as applied to the right to education because it was not “‘so out of proportion.’”<sup>200</sup>

Despite the decisions from the Fourth and Eleventh Circuits, under the analysis set forth above, courts are likely to find that Title II is invalid with respect to the right to education based on the fact that the right is limited to rational basis review.<sup>201</sup> The argument was put forth in *Press v. State University of New York*.<sup>202</sup> The court appears to have been heavily influenced by the fact that the right to education is not fundamental.<sup>203</sup> Admittedly, the court’s decision seemed to lack a complete analysis of the congruence and proportionality test. It held, however, that without the application of strict scrutiny, Title II, as applied to access to education, is “an abuse of . . . power.”<sup>204</sup> Thus, in the absence of a fundamental right, the court found Title II claims against the States to be invalid.

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<sup>194</sup> *See id.*

<sup>195</sup> *See id.* at 488–89.

<sup>196</sup> *See id.* at 489.

<sup>197</sup> *See id.* at 489–90.

<sup>198</sup> *See id.* at 490.

<sup>199</sup> *See id.*

<sup>200</sup> *See id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)).

<sup>201</sup> *See supra* Part IV.C.1.a (analyzing Title II).

<sup>202</sup> 388 F. Supp. 2d 127 (E.D.N.Y. 2005).

<sup>203</sup> *See id.* at 133–34.

<sup>204</sup> *See id.* at 134.

## V. THE STRENGTH OF THE ADA TODAY

Although *Garrett* and *Lane* together may be viewed as a trend in limiting the rights of disabled Americans in suits against the States and a weakening of the ADA as a whole, there are other avenues of recourse open to the disabled. With respect to discrimination by the States, disabled Americans still have two ways of seeking redress. First, as noted above, plaintiffs may seek injunctive relief against state officials.<sup>205</sup> Under *Ex parte Young*,<sup>206</sup> parties may seek such prospective injunctive relief when federal law is being violated.<sup>207</sup> Second, the doctrine of Eleventh Amendment immunity applies only to the States, and thus does not apply to municipalities.<sup>208</sup> This is so despite the fact that municipalities, to some extent, exercise state power.<sup>209</sup> A municipality can therefore be sued for money damages under the ADA. In sum, there are alternate avenues to seek redress for discrimination by the States.

The ADA also continues to protect persons with disabilities to the extent that it addresses constitutional violations. In the recent decision of *United States v. Georgia*,<sup>210</sup> the Supreme Court held that Title II was valid to the extent it sought to protect against “conduct that *actually* violates the Fourteenth Amendment.”<sup>211</sup> The case was decided in the context of the rights of prisoners.<sup>212</sup> There, the plaintiff, an inmate with disabilities, sought money damages from the State of Georgia.<sup>213</sup> The plaintiff asserted a number of claims for cruel and unusual punishment based on the Eighth Amendment, and argued that the bases for such claims were also actionable under Title II of the ADA.<sup>214</sup> As the Due Process Clause in Section 1 of the

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<sup>205</sup> See *supra* note 77 and accompanying text.

<sup>206</sup> 209 U.S. 123 (1908).

<sup>207</sup> See *id.* at 155–56; see also *Miller v. King*, 384 F.3d 1248, 1264 (11th Cir. 2004) (quoting *Fla. Ass’n of Rehab. Facilities v. Fla. Dep’t of Health & Rehab. Servs.*, 225 F.3d 1208, 1219 (11th Cir. 2000)).

<sup>208</sup> See *Lake Country Estates, Inc., v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 401 (1979) (“[T]he Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities . . .”).

<sup>209</sup> See *id.*

<sup>210</sup> 126 S. Ct. 877 (2006).

<sup>211</sup> See *id.* at 882.

<sup>212</sup> See *id.* at 879.

<sup>213</sup> See *id.*

<sup>214</sup> See *id.* at 880–81. The plaintiff, Tony Goodman, was confined to a small room in which he was unable to turn his wheelchair. See *id.* at 879. Additionally, he

Fourteenth Amendment incorporates the protections of the Eighth Amendment against cruel and unusual punishment,<sup>215</sup> the Court noted that the plaintiff's ADA claims contained allegations that "independently violated . . . the Fourteenth Amendment."<sup>216</sup> This means that the plaintiff claimed "actual" violations of the Fourteenth Amendment, and no analysis of the congruence and proportionality of remedial legislation based on Section 5 of the Fourteenth Amendment, like those at issue in *Garrett* and *Lane*, would be required.<sup>217</sup> The distinction is critical because damages are a constitutional remedy for "actual" violations.<sup>218</sup> Accordingly, the Court unanimously held that Title II was valid "insofar as [it] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment."<sup>219</sup> Thus, after *United States v. Georgia*, it is clear that constitutional violations brought pursuant to Title II will withstand a state immunity challenge.

#### CONCLUSION

It has been a long and arduous struggle for persons with disabilities to attain equal membership in society. The Americans with Disabilities Act was intended to be the final step in the movement to secure the rights of disabled Americans. Congress enacted Title II of the ADA to safeguard persons with disabilities from denials of state services and programs. It appears, however, that Congress may have overstepped its bounds by creating a general right to sue States for money damages under Title II. After *Tennessee v. Lane*, it seems that the only claims brought under Title II's remedial provisions that will survive a challenge of state immunity under the Eleventh Amendment are those that allege the violation of a fundamental right.

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alleged lack of access to facilities, such as a shower and toilet, and to prison programs, such as physical therapy and medical treatment. *See id.*

<sup>215</sup> *See id.* at 881 (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947)).

<sup>216</sup> *See id.*

<sup>217</sup> *See id.*

<sup>218</sup> *See id.*

<sup>219</sup> *See id.* at 882.