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THE FOURTH “r”: SUSTAINING THE ADA’S PRIVATE “RIGHT” OF ACTION AGAINST STATES FOR DISABILITY DISCRIMINATION IN PUBLIC EDUCATION

I. INTRODUCTION

Consider the following scenario: Jane Doe,¹ a student with cerebral palsy who is wheelchair bound, is unable to navigate the building where she attends school because of various architectural barriers. Moreover, while her disability imposes significant physical limitations, she carries herself with personality and intelligence. While mentally, she is more than capable of learning and contributing to the world around her, she faces educators who assume that her physical challenges translate to an inability to learn like other children.

Over the course of her career as a student, Jane’s parents have spent countless hours meeting with teachers and administrators in order to ensure that Jane’s educational needs are met. These perceived limitations serve to hinder not only her progress but also her access to various educational resources. After all, from an administrative point of view, apathy with respect to various physical and institutional barriers to Jane’s education seems much more justified if it is assumed that any benefit she might derive from the educational system is at best limited.² Jane’s parents, aware that her teachers assume that her physical limitations render any attempts to teach her to read futile, hire a private tutor who is willing to use a teaching method that takes into account Jane’s special needs.³

1. I would like to extend a special thanks to a colleague, Alene Haskell, who shared some of the experiences she has had in dealing with her child’s education, which served as a basis for formulating Jane Doe.

2. My own experience as a student with a visual disability in the public schools was extraordinarily positive. However, early on, there were those individuals in my school district who imputed from my visual limitations a diminished mental capacity. It was only at the insistence of an elementary school teacher that my standardized test scores were included with the rest of my classmates. While the inclusion of test scores is relatively minor, such reluctance is indicative of the problematic nature of general societal attitudes that bear no relation to one’s actual disability, yet serve to impose limitations on the potential of the disabled.

3. It is this attitude, known as the “spread effect,” that Professor Bagenstos argues is problematic. Samuel Bagenstos, *The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923, 926 (2004) (“[S]ociety frequently views a disability as imposing limitations that are more severe or more extensive than they actually are. This ‘spread effect’—in which a limitation in one functional area is erroneously viewed as indicating the existence of limitations in other functional areas”—often justifies various forms of discrimination against the

Her experiences are representative of the problems typically faced by disabled students and their parents. In 1990, Congress enacted the Americans with Disabilities Act (ADA), a sweeping piece of legislation that sought fundamental change in the treatment of the disabled.⁴ Title II of the ADA imposes on public entities, including state and local governments, an obligation to avoid discrimination against the disabled in the provision of public services.⁵ Title II provides for enforcement of its nondiscrimination provisions through actions filed in federal courts by private citizens.⁶

Under Title II's enforcement provision, Congress also authorized suits by private citizens in federal court against state entities, thus expressing its clear intent to abrogate the states' sovereign immunity.⁷ The Supreme Court has held that Congress may abrogate the states' sovereign immunity under the Eleventh Amendment pursuant to its enforcement powers under section 5 of the Fourteenth Amendment.⁸

disabled as rational).

4. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2000). The ADA was a sweeping mandate for antidiscrimination in both the public and private sectors. *See id.*

5. 42 U.S.C. §§ 12131–12134 (2000). Section 12132 provides “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.” *Id.* § 12132.

6. *Id.* § 12133. Under the statutory scheme, § 12133 incorporates by reference the enforcement provisions under § 505 of the Rehabilitation Act of 1973. *Id.* (citing 29 U.S.C. § 794a (2000)). This act, in turn, incorporates the rights and remedies provided in Title VI of the Civil Rights Act of 1964. 29 U.S.C. § 794a (citing 42 U.S.C. §§ 2000d–2000d(6), 2000e-16, 2000e-5(f)-(k)). The Supreme Court has recognized an implied right to a private action to enforce these provisions. *See Alexander v. Sandoval*, 532 U.S. 275, 279–80 (2001).

7. 42 U.S.C. § 12202 (2000).

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Id. Under the Eleventh Amendment, “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. While a strict reading of this language suggests that state sovereign immunity precludes only those suits brought against a state by non-residents, the Supreme Court has long recognized immunity from suit in federal court by a state's own citizens. *See, e.g., Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

8. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (“Congress may, in determining what is ‘appropriate legislation’ for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.”). The Fourteenth Amendment, in pertinent part, reads as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

Recently, the Supreme Court addressed the constitutionality of Title II’s abrogation of the states’ sovereign immunity in its decision in *Tennessee v. Lane*.⁹ The *Lane* Court held that the appropriateness of Title II should be determined on an as-applied basis.¹⁰ Consequently, the Court limited its inquiry to whether Title II of the ADA as applied to court access (at issue in *Lane*) was a valid exercise of congressional power under section 5 of the Fourteenth Amendment (“section 5”).¹¹ The Court’s opinion left open the question of whether a student such as Jane has the right to sue a state or one of its agencies for perceived violations of Title II in the education context.¹² The Court expressly avoided the question of the constitutionality of Title II as applied to access for the disabled to public services beyond those provided by the judiciary.¹³

The Note that follows analyzes the constitutionality of Title II as a valid exercise of Congress’s section 5 authority in the context of education.¹⁴ The Note is organized as follows. Part II presents a discussion of the background surrounding the enactment of the ADA and the Supreme Court’s section 5 jurisprudence.¹⁵ Part III argues that Title II’s abrogation of the states’ sovereign immunity would likely be deemed

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

...

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5.

9. *Tennessee v. Lane*, 541 U.S. 509 (2004).

10. *Id.* at 1992–94.

11. *Id.* at 1993. The *Lane* decision was the second case analyzing the ADA’s abrogation of the states’ Eleventh Amendment immunity. In 2001, the Court held invalid the ADA’s Title I abrogation of state sovereign immunity as it applied to nondiscrimination in state employment practices. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). Some commentators argued that the *Garrett* decision was a death knell for Title II’s abrogation of state sovereign immunity. *See, e.g., Alison Tanchyk, An Eleventh Amendment Victory: The Eleventh Amendment vs. Title II of the ADA*, 75 TEMP. L. REV. 675, 675 (2002) (“The days when a disabled individual could sue a state for monetary damages under Title II of the Americans with Disabilities Act of 1990 . . . are numbered.”). *But see* 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 (2004) (advocating an “as applied” approach to the constitutionality of Title II’s abrogation of the state’s Eleventh Amendment immunity nearly identical to that adopted by the Supreme Court in *Lane*).

12. *Lane*, 541 U.S. at 531 (“Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.”).

13. *Id.*

14. *See infra* notes 18–32 and accompanying text.

15. *See infra* notes 18–99 and accompanying text.

invalid under the Supreme Court's current analytical model.¹⁶ Part IV proposes a modification to the Court's current approach to equal protection cases that would likely save Congress's enactment of the ADA from an Eleventh Amendment challenge.¹⁷ Part V concludes the discussion.

II. BACKGROUND

In July of 1990, the ADA passed both houses of Congress with wide bipartisan support.¹⁸ This legislation was hailed as the dawn of a new era in civil rights law.¹⁹ In its official findings, Congress noted that the disabled population in America faced significant societal barriers in access to such basics as education, transportation, public buildings, and employment.²⁰

16. See *infra* notes 100–25 and accompanying text

17. See *infra* notes 126–32 and accompanying text.

18. The ADA passed the House by a vote of 377–28. 136 CONG. REC. H4629 (daily ed. July 12, 1990). The ADA passed the Senate with ninety-one votes for and six against. 136 CONG. REC. S9695 (daily ed. July 13, 1990).

19. Statement by President George Bush upon Signing S. 933 (*reprinted in* 1990 U.S.C.C.A.N. 601, 601 (1990)). Upon signing the ADA into law, the President stated, “[i]t is altogether fitting that the American people have once again given clear expression to our most basic ideals of freedom and equality. The Americans with Disabilities Act represents the full flowering of our democratic principles, and it gives me great pleasure to sign it into law today.” *Id.*

20. 42 U.S.C. § 12101(a)(3) (2000). Congress also found that the disabled are effectively relegated to second-class status because of stereotypes and unfair prejudices that unfairly limit their potential. See *id.* § 12101(a). Congress specifically found:

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced

The ADA represented a significant expansion of federal involvement in disability antidiscrimination law.²¹ After all, previous antidiscrimination laws focused on preventing discrimination by those entities receiving federal funding.²² Moreover, the ADA expanded the antidiscrimination provisions of previous federal laws, namely the Rehabilitation Act of 1973, to prohibit discriminatory behavior on a broader scale.²³

The ADA is divided into several titles.²⁴ Title II, which applies to public services provided by public entities, is the focus of the current inquiry.²⁵ Under Title II’s scheme, public entities, including state and local governments, must provide public services to any qualified individual with

with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) 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; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

Id.

21. See Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 428–29 (1991) (noting that the majority of the federal statutes prohibiting discrimination against the disabled did not cover those activities that did not involve the federal government directly or indirectly through federal grants or contracts).

22. See, e.g., 29 U.S.C. § 794 (2000). In addition to the Rehabilitation Act cited previously, the Individuals With Disabilities Education Act (IDEA) specifically addresses the educational needs of children with disabilities. See 20 U.S.C. § 1400–1487 *et seq.* (2000). The IDEA authorizes administrative hearings when disputes over the appropriate level of services arise between parents and educators. *Id.* § 1415(f). The IDEA guarantees to students with disabilities a free, appropriate special education from public schools. See *id.* § 1412(a)(1)(A). The ADA goes beyond either of these two statutes in broadly prohibiting discrimination against the disabled on the part of state actors in the provision of public services. 42 U.S.C. § 12132.

23. See Burgdorf, *supra* note 21, at 430 n.93. Section 504 of the Rehabilitation Act, prohibits discrimination based solely upon one’s disabled status. 29 U.S.C. § 794 (2000). The ADA avoids the problem of determining the sole motivation for adverse actions taken against a disabled individual by eliminating this language. Burgdorf, *supra* note 21, at 430 n.93. By applying its antidiscrimination provisions to all sectors of society, Congress sought to “guarantee[] a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities, and protect[] society against the loss of valuable talents.” Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 471 (2000).

24. See 42 U.S.C. § 12101–12213 (2000) (Title I focuses on the provision of public services by state agencies; Title II focuses on the provision of public services by private entities; Title IV contains miscellaneous provisions).

25. See *id.* §§ 12131–12134.

a disability.²⁶ Furthermore, in order to ensure that disabled individuals are able to enforce the nondiscrimination provisions of Title II, the ADA authorizes private citizens to bring suit in federal courts (including actions against states and state agencies).²⁷ Because Title II provides for private enforcement notwithstanding the sovereign immunity granted states by the Eleventh Amendment, an analysis of Title II as applied to education necessarily requires an understanding of both the Supreme Court's section 5 jurisprudence and its approach to congressional abrogation of Eleventh Amendment immunity generally.

The current Court's sovereign immunity analysis began with *Seminole Tribe of Florida v. Florida*, in which the Court held that Congress's power to abrogate the states' Eleventh Amendment immunity does not derive from its Article I commerce powers.²⁸ In *Seminole Tribe*, a Native American tribe sought to enforce the provisions of the Indian Gaming Regulatory Act (IGRA).²⁹ The Court established a two-part test for determining whether Congress has validly abrogated the states' sovereign immunity: (1) Congress must express an unequivocal intent to abrogate that immunity; and, (2) the abrogation of that immunity must be a valid exercise of its constitutional authority.³⁰

Following *Seminole Tribe*, the Court issued its decision in *City of Boerne v. Flores*. *City of Boerne* is the first in a recent series of Supreme Court decisions addressing the appropriateness of section 5 legislation enacted by Congress.³¹ In *City of Boerne*, the Court addressed Congress's enactment of the Religious Freedom Restoration Act of 1993 (RFRA).³² The RFRA prohibited government entities (including state and local

26. *Id.* § 12132. Under Title II, a qualified individual with a disability is any person with a disability "who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2).

27. See *supra* notes 6–7 and accompanying text.

28. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64–5 (1996) (overruling the plurality decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)). In fact, the Court was clear that Congress's Article I powers could not be used to extend the judicial power of the courts of the United States as enumerated in Article III. *Id.* at 65. The Court also reaffirmed Congress's power to abrogate the states' sovereign immunity under section 5 of the Fourteenth Amendment. *Id.* at 72–73.

29. *Id.* at 47 (citing 25 U.S.C. § 2710). Under the IGRA, an Indian tribe could only engage in certain gaming activities if it reached a compact with the state in which such activities would take place. *Id.* Furthermore, the Act imposed a duty on the states to negotiate in "good faith" with a tribe interested in engaging in such activities. *Id.* Failure on the part of the state to negotiate in good faith authorized a tribe to seek redress in federal court. *Id.*

30. *Id.* at 55.

31. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

32. *City of Boerne*, 521 U.S. at 511 (citing 42 U.S.C. § 2000bb *et seq.*).

governments) from taking actions that “substantially burden” an individual’s exercise of his or her religious beliefs unless the government could demonstrate that such action was (1) meant to further a compelling government interest; and (2) representative of the least restrictive means for furthering that compelling interest.³³

According to the *City of Boerne* Court, Congress’s section 5 power extends to enforcing the Fourteenth Amendment’s prohibitions on constitutional violations, but does not work a substantive change in what constitutes such violations.³⁴ Furthermore, congressional efforts to enforce the Fourteenth Amendment must bear some “congruence and proportionality” to the wrongs Congress seeks to prevent.³⁵ In examining the RFRA, the Court held that the Act was wholly out of congruence and proportionality with the harms Congress sought to prevent.³⁶ According to the Court, the RFRA was not a tailored response to constitutional violations; rather, it intruded into every level and sphere of government activity.³⁷ *City of Boerne* began the congruence and proportionality analysis that has become an essential step in determining the

33. See 42 U.S.C. § 2000bb-1 (2000). The RFRA was enacted as a response to the decision of the Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in which the Court declined to apply a balancing test in free-exercise cases involving generally applicable laws that burden religious practice. *City of Boerne*, 521 U.S. at 512–13. Congress sought to overturn the Court’s decision in *Smith* and require federal courts to apply such a specific balancing test in analyzing free-exercise challenges to laws generally applicable to the public. *Id.* P.F. Flores, the Archbishop of San Antonio, sought from the City of Boerne a building permit to enlarge a parish located in an historic part of that city. *Id.* at 511–12. The city denied the building permit, and the Archbishop filed suit against the City of Boerne under the RFRA. *Id.* at 512. The district court concluded that Congress had exceeded its authority under the Fourteenth Amendment, and the Fifth Circuit reversed. *Id.*

34. *City of Boerne*, 521 U.S. at 519–20. The nature of section 5 is remedial rather than substantive. *Id.* Congress has the power to remedy and prevent constitutional violations of the states, but section 5 does not confer upon Congress the power to work a substantive change in the Fourteenth Amendment itself. *Id.*

35. *Id.* at 520 (“Congress must have wide latitude. . .” in creating enforcement measures under section 5, but “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted. . . . Lacking such a connection, legislation may become substantive in operation and effect.” *Id.*

36. *City of Boerne*, 521 U.S. at 530–36. The Court analyzed the record before Congress in enacting the RFRA and determined that it was distinctly lacking in “examples of modern instances of generally applicable laws passed because of religious bigotry.” *Id.* at 530. Notwithstanding the legislative record, the “RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. [The] RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” *Id.* at 532.

37. *Id.* at 532. Fundamentally, the Court objected to what it saw as Congress’s attempt to rewrite the substantive constitutional guarantees as it defined them. *Id.* at 519 (holding that Congress lacks the “power to decree the substance of the Fourteenth Amendment’s restrictions on the States”).

constitutionality of congressional attempts at enforcement of the Fourteenth Amendment.

In 1999, the Supreme Court once again faced the issue of congressional abrogation of Eleventh Amendment immunity in its decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.³⁸ The *Florida Prepaid* Court addressed the validity of congressional amendments to U.S. patent laws that provided for explicit abrogation of Eleventh Amendment immunity.³⁹ Emphasizing the lack of an identified pattern of wrongful state conduct and what it viewed as the statute's excessive breadth, the *Florida Prepaid* Court ultimately held that the Patent Remedy Act (PRA) failed the *City of Boerne* test, and therefore, its abrogation of the states' sovereign immunity was an invalid exercise of Congress's section 5 power.⁴⁰

In *Florida Prepaid*, College Savings Bank, a New Jersey financial institution, sued Florida Prepaid Postsecondary Education Expense Board for patent infringement.⁴¹ In addressing the propriety of the infringement suit given congressional abrogation of Eleventh Amendment immunity, the Court offered further refinement of the approach established by *Seminole Tribe* and *City of Boerne*.⁴² The Court held that the first prong of the test elaborated in *Seminole Tribe* was clearly met. That is, Congress was unequivocal in its intent to abrogate the immunity granted the states by the Eleventh Amendment.⁴³

In determining whether the PRA's sovereign immunity provisions represented a valid exercise of power (i.e., the second prong of the *Seminole Tribe* analysis),⁴⁴ the Court held that the PRA, like the RFRA in

38. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627 (1999).

39. *Id.* at 630–31 (citing 35 U.S.C. §§ 271(h), 296(a) (2000)). Prior to these amendments, the patent laws did not explicitly include state entities among those against whom patent infringement actions could be pursued. *Id.* at 631 (citing 35 U.S.C. § 271(a) (1988)). These amendments were a reaction to decisions of both the Supreme Court and courts of appeals that required Congress to explicitly state its intent to abrogate Eleventh Amendment immunity. *Id.* at 631–32 (citations omitted).

40. *Id.* at 647 (“The historical record and the scope of coverage therefore make it clear that the Patent Remedy Act cannot be sustained under § 5 of the Fourteenth Amendment.”).

41. *Id.* at 630–31. College Savings Bank held a patent for its savings methodology that ensured that investors would accumulate sufficient funds to cover their children's college education. *Id.* Florida Prepaid Postsecondary Education Expense Board was an entity created by the state of Florida that provided similar college financial planning services for Florida residents. *Id.* at 631. In its complaint, College Savings alleged both direct and indirect infringement of its patent. *Id.*

42. *Id.* at 635–39 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), *City of Boerne*, 527 U.S. at 530–31).

43. Fla. Prepaid, 527 U.S. at 635.

44. *Seminole Tribe*, 517 U.S. at 55.

City of Boerne, was out of congruence and proportionality with the wrong Congress sought to prevent.⁴⁵

In its *City of Boerne* analysis, the Court emphasized the importance of identifying the constitutional violation that Congress seeks to prevent.⁴⁶ According to the Court, the remedy Congress created vastly outstripped the rather limited scope of state conduct with respect to patent infringement that the Fourteenth Amendment prohibits.⁴⁷ *Florida Prepaid* highlights the premium that the *City of Boerne* test places on identifying the specific constitutional right at issue in a given section 5 case and how Congress has sought to remedy previous assaults on, or perceived threats to, that constitutional right.⁴⁸

The year after the Court handed down *Florida Prepaid*, it once again had occasion to address section 5 legislation enacted by Congress in *Kimel v. Florida Board of Regents*.⁴⁹ The Court addressed the constitutionality of the Age Discrimination in Employment Act (ADEA) as it applied to states, subjecting them to suit for age discrimination in employment practices.⁵⁰ Once again, the Court analyzed whether Congress acted within

45. *Fla. Prepaid*, 527 U.S. at 638–47. The Court began its inquiry by analyzing the rights that the PRA sought to protect. *Id.* at 640. The Court determined that Congress failed to demonstrate a historical record of constitutional violations to justify prophylactic legislation in the form of the Patent Remedy Act. *Id.* at 645–46:

The legislative record thus suggests that the Patent Remedy Act does not respond to a history of ‘widespread and persisting deprivation of constitutional rights’ of the sort Congress has faced in enacting proper prophylactic § 5 legislation. . . . Instead, Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution. (citations omitted).

46. *Id.* at 646. While the Court stated that the lack of a legislative record identifying the constitutional rights Congress was attempting to protect was not “determinative,” the Court, following *City of Boerne*, noted, “identifying the targeted constitutional wrong or evil is still a critical part of our § 5 calculus because ‘[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one.’” *Id.* (citing *City of Boerne*, 521 U.S. at 530).

47. *Id.* at 646. The Court criticized Congress for subjecting states to suit in federal court for myriad forms of patent infringement (many of which appear to fall outside of the realm of Fourteenth Amendment violations). In addition, Congress imposed no limitations on the duration of the states’ amenability to suit. *Id.* When section 5 legislation interferes with a range of constitutionally acceptable conduct, restricting the duration of such interference and limiting the application of such statutes to those states actually in violation of the constitutional provisions are indicative of the congruence and proportionality of Congress’s section 5 remedy. *Id.* at 647 (citing *City of Boerne*, 521 U.S. at 533). Justice Stevens filed a dissenting opinion in which Justices, Souter, Ginsberg, and Breyer joined. *Id.* at 648–65 (Stevens, J., dissenting). The dissenters objected to the majority’s approach in *Florida Prepaid*, arguing that their approach tended not to give Congress its due deference. *See id.* at 654–65.

48. *Id.* at 646.

49. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

50. *Id.* at 66 (citing 29 U.S.C. § 621-634 (2000)). The ADEA makes it unlawful for employers “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” 29 U.S.C. § 623(a)(1). While the ADEA did not initially apply to employment

its section 5 powers via the two-step *Seminole Tribe/City of Boerne* inquiry.⁵¹

After determining that Congress unequivocally expressed its intent to abrogate the protections of the Eleventh Amendment, the Court commenced its analysis of whether Congress acted appropriately under its section 5 authority.⁵² As in *City of Boerne* and *Florida Prepaid*, the Court once again determined that Congress had exceeded its section 5 authority.⁵³ Just as in *Florida Prepaid*, the Court focused on the lack of a legislative record that demonstrated congressional notice of widespread constitutional violations visited upon the aged by state employers.⁵⁴ The lack of a record, coupled with the fact that the ADEA prohibited state actors from engaging in a much wider range of conduct than that which would actually constitute a constitutional violation, suggested that the ADEA was wholly out of congruence and proportionality with the wrongs Congress sought to prevent.⁵⁵

decisions made by states, Congress extended the definition of employers covered by the statute to include states in 1974. *Kimel*, 528 U.S. at 68. The ADEA authorized those aggrieved by age discrimination to enforce its provisions through private actions filed in either federal or state court. *Id.* These actions could be filed against any employer, including state and local governments or agencies. *Id.*

51. *Id.* at 73. In determining whether Congress had explicitly stated its intent to abrogate the states' sovereign immunity, the Court ultimately determined that Congress's amendment of the ADEA in 1974 to include state governments and agencies was sufficiently unequivocal about its intent to do so. *Id.* at 75–76.

52. *Id.* at 78–92 (applying the “congruence and proportionality” analysis as established in *City of Boerne*).

53. *Kimel*, 528 U.S. at 91.

Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field. In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid.

Id.

54. *Id.*

55. *Id.* In evaluating the constitutional right at issue under the ADEA, the Court noted that the Equal Protection Clause of the Fourteenth Amendment did not provide the same level of protection to the aged as other groups, such as those identified by race or gender. *Id.* at 83. Under the Court's equal protection jurisprudence, states may discriminate against individuals based on their age as long as that discrimination is “rationally related to a legitimate state interest.” *Id.* Moreover, the burden is upon the plaintiff to demonstrate the irrationality of a state's discriminatory practices. *Id.* at 84. As a result, Congress's application of the ADEA to the states effectively placed the burden of persuasion in age discrimination cases upon the state and thus imposed a “substantially higher burden” on the states than that present under the Equal Protection Clause. *Id.* at 87–88. In order to understand fully the approach the Court uses to analyze *Kimel* and subsequent section 5 cases, it is important to understand the Court's Equal Protection Clause jurisprudence. Under section 1 of the Fourteenth Amendment, states are required to provide to individuals the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

Both *Kimel* and *Florida Prepaid* see the beginnings of what resembles the Court’s current approach under *City of Boerne*. That is, they establish the importance of first identifying the constitutional right at issue in a given section 5 case, as well as examining the record Congress compiled, before attempting to enact such legislation. These preliminary steps are essential to the congruence and proportionality inquiry, as they provide a yardstick by which to measure the appropriateness of Congress’s chosen remedy under section 5.

In 2001, the Court faced its first case testing the ADA’s abrogation of Eleventh Amendment immunity in *Board of Trustees of the University of Alabama v. Garrett*.⁵⁶ The Court began its analysis by first noting that

While state actors have the power to act in a way that discriminates against certain classifications of individuals, the Equal Protection Clause imposes varying burdens on the states to demonstrate the validity of such classifications. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–41 (1985). As a general matter, legislation is presumptively constitutional, and any classifications that result in discriminatory treatment are valid, so long as they bear a rational relationship to a legitimate state interest. *Id.* at 440.

This general rule does not apply where state conduct relies on certain classifications such as race, alienage, or national origin. *Id.* Such laws or conduct are subject to strict judicial scrutiny and will only be upheld if they are “suitably tailored to serve a compelling state interest.” *Id.* (citations omitted). Other classifications such as gender are also subjected to a heightened form of judicial scrutiny somewhere in between so-called rational basis review and strict scrutiny. *Id.* Under this heightened judicial scrutiny, a classification will be upheld only if it is “substantially related to a sufficiently important governmental interest.” *Id.* at 441 (citations omitted).

Under both strict and heightened scrutiny, the burden of demonstrating the constitutional validity of a classification is borne by the party seeking to uphold the classification. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (heightened scrutiny); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (strict scrutiny).

In addition to certain suspect and quasi-suspect classifications, state actions that deprive citizens of certain rights deemed “fundamental” are subject to greater judicial scrutiny than rational basis. *Tennessee v. Lane*, 541 U.S. 509, 529 (2004). It is important to note, however, that the Court has declined to read the Constitution as guaranteeing, either implicitly or explicitly, a fundamental right to education. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); *see also Sellers v. Sch. Bd. of the City of Manassas*, 141 F.3d 524, 531 (4th Cir. 1998) (citing *Rodriguez* and holding education not to be a fundamental right guaranteed by the Constitution); *Johnson v. S. Conn. State Univ.*, No. CIV.A.3:02-CV-2065, 2004 WL 2377225, at *4 (D. Conn. Sept. 30, 2004) (same).

In *Rodriguez*, the plaintiffs filed a class action challenging the school financing system used by the state of Texas. *Rodriguez*, 411 U.S. at 4. The lower court determined that the financing system operated to discriminate against poor children. *Id.* at 18. Because of this disparate treatment, the lower court found that poor children represented a suspect class. *Id.* It further argued that the importance of education demanded a determination that education was a “fundamental right.” *Id.* Consequently, the lower court determined that strict scrutiny applied to the Texas school financing system. *Id.* In reviewing the decision on appeal, the Supreme Court held that a suspect class did not exist. *Id.* at 16–28. Moreover, the Court held education not to be a fundamental right. *Id.* at 29–40. As a consequence, rational basis and not strict scrutiny was the appropriate standard of review. *Id.* at 40.

56. Bd. of Tr. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001). In *Garrett*, the Court faced a challenge to Title I of the ADA and the fact that it subjects state entities to suit in federal court for disability discrimination in employment. *Garrett*, 531 U.S. at 360 (citing 42 U.S.C. §§ 12111–12117 (2000)). Under Title I, employers, including states, are prohibited from “discriminat[ing] against a

Congress, in enacting the ADA, had expressed its unequivocal intent to abrogate the states' sovereign immunity.⁵⁷ The Court next conducted its "congruence and proportionality" analysis.⁵⁸

The *Garrett* Court made clear that the analysis of section 5 legislation and its congruence and proportionality first begins by identifying the "metes and bounds" of the constitutional rights at issue.⁵⁹ Once the constitutional right has been identified, the inquiry moves to whether Congress, in enacting its prophylactic legislation, first identified a historical pattern of constitutional violations on the part of the states.⁶⁰

The majority found that the record before Congress lacked any showing of a pattern of unconstitutional treatment of the disabled on the part of the states in employment decisions.⁶¹ In addition to the fact that the

qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §§ 12112(a), 12111(2), (5), (7). The ADA requires covered employers to make "reasonable accommodations" to address the mental and physical challenges posed by an individual's disability unless doing so would create an "undue hardship." 42 U.S.C. § 12112(b)(5)(A).

Plaintiff Patricia Garrett was a nurse at the University of Alabama's Birmingham Hospital. *Garrett*, 531 U.S. at 362. She took substantial medical leave in order to receive cancer treatments, and upon her return to work, her supervisor informed her that she would have to give up her position. *Id.* Thereafter, she applied for and was placed in a lower paying position. *Id.* Plaintiff Milton Ash was an employee of the Alabama Department of Youth Services. *Id.* Mr. Ash suffered from both chronic asthma and sleep apnea; however, his employer refused to make any accommodations for Mr. Ash. *Id.* Ash and Garrett each filed separate causes of action; their cases were later consolidated on appeal to the Eleventh Circuit. *Id.* at 362–63.

57. *Id.* at 364 (quoting 42 U.S.C. § 12202).

58. *Id.* at 365–74.

59. *Id.* at 368. "The first step in applying these now familiar principles [of congruence and proportionality] is to identify with some precision the scope of the constitutional right at issue." *Id.* at 365. In analyzing the constitutional right at issue under Title I, the Court examined the protection afforded the disabled as a class under the Equal Protection Clause. *Id.* at 365–67. The Court looked to its prior decision in *City of Cleburne* and determined that the disabled were neither a "suspect" nor "quasi-suspect" class, and therefore, legislation making such classifications is subject merely to rational basis review. *Id.* at 366 (citing *City of Cleburne*, 473 U.S. at 446). While *City of Cleburne* involved the review of a zoning statute that was allegedly discriminatory toward the mentally challenged, the *Garrett* Court read *City of Cleburne* as establishing a broader rule for both the physically and mentally disabled. *Id.* "Thus, the result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Id.* at 367.

60. *Id.* at 368 ("Just as § 1 of the Fourteenth Amendment applies only to actions committed 'under color of state law,' Congress' § 5 authority is appropriately exercised only in response to state transgressions.").

61. *Id.* at 369–72. The Court noted Congress's general finding that society has historically "isolate[d]" and "segregate[d]" the disabled. *Id.* at 369 (citing 42 U.S.C. § 12101(a)(2)). However, while the Court acknowledged ample support in the legislative record for Congress's conclusions, the majority noted that many of the incidents in the record did not involve state actors. *Id.* The majority also argued that Congress's failure to find that public sector employment was among the areas in which a federal prohibition of disability discrimination was needed suggested that Congress did not

Court viewed the legislative record of the ADA as scant with respect to a historical pattern of constitutional violations, the Court also criticized the ADA as wholly out of proportion to the wrongs Congress sought to prevent.⁶² As with the ADEA in *Kimel*, the ADA represented a substantial increase in the burden on state conduct over that imposed by the Equal Protection Clause of the Fourteenth Amendment.⁶³

The *Garrett* decision provided the first clear delineation of the three-step approach to analyzing the constitutionality of section 5 legislation. That is, the inquiry begins by identifying the specific constitutional right at issue. The inquiry next moves to whether Congress, prior to enacting the remedial legislation, has identified a pattern of constitutional violations by the states. The final step requires an analysis of the congruence and proportionality of the congressional solution with respect to the constitutional violations sought to be prevented.

In 2003, the Court faced another challenge to congressional abrogation of Eleventh Amendment immunity under the Family and Medical Leave Act (FMLA) in *Nevada Department of Human Resources v. Hibbs*.⁶⁴ As

recognize states as having engaged in a pattern of unconstitutional employment discrimination. *Id.* at 371–72 (citations omitted). The dissent, written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, criticized the Court’s analysis of the congressional record. *Id.* at 382 (Breyer, J., dissenting). According to the dissent, Congress compiled a record including hundreds of references to discriminatory treatment of the disabled by state officials. *Id.* at 379. However, the majority responded that these were not legislative findings but anecdotal accounts of disparate treatment of the disabled, taken out of context, that did not necessarily rise to the level of unconstitutional action on the part of the states. *Id.* at 370.

The dissenters argued that the Court ignored the fact that Congress is not bound by the same restraints in crafting section 5 remedies as the courts are in their equal protection analysis. *Id.* at 383 (“The problem with the Court’s approach is that neither the ‘burden of proof’ that favors States nor any other rule of restraint applicable to *judges* applies to *Congress* when it exercises its § 5 power.”). The dissent noted that Congress must often rely on anecdotal accounts during its deliberations. *Id.* at 380. Congress need not make the sort of full evidentiary determinations that are necessary in a proceeding before a court. *Id.*; see also Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court’s “Strict Scrutiny” of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091, 1092–93 (2001) (analyzing the Court’s treatment of section 5 legislation: “[i]n effect, the Court has declared that it will apply a kind of ‘strict scrutiny’ to federal legislation that would receive only minimal scrutiny were a state to pass an identical law”).

62. *Garrett*, 531 U.S. at 371–72.

63. *Id.* at 372–73. Under rational basis scrutiny, a disabled plaintiff would bear the burden of demonstrating unlawful employment discrimination violative of the Equal Protection Clause; however, the ADA places the burden of establishing “undue hardship” for failing to accommodate an employee’s disability on the state. *Id.*

64. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003). Under the FMLA, an eligible employee is entitled to take up to twelve weeks of leave each year for a variety of reasons, including the onset of serious illness of immediate family members. *Id.* (citing 29 U.S.C. § 2612(a)(1)(C) (2000)). Moreover, the FMLA authorizes employees to pursue a private right of action in either state or federal court against employers (including public employers) who interfere with their rights under the FMLA. *Id.* at 724–25 (citing 29 U.S.C. §§ 2615(a)(1), 2617(a)(2)). The respondent, William

with previous section 5 legislation, the Court began by identifying the constitutional right at issue under the FMLA.⁶⁵ The FMLA sought to equalize the positions of working men and women who become responsible for the care of family members.⁶⁶ Because the FMLA sought to prevent the negative effects of gender-based classifications, the Court noted that the Equal Protection Clause prohibits states from making such classifications unless they “serv[e] important governmental objectives,” and that such classifications must be “substantially related to the achievement of those objectives.”⁶⁷

Following identification of the applicable constitutional principle, the Court examined the legislative record before Congress in enacting the FMLA.⁶⁸ In examining the legislative history, the Court first noted the historical pattern of unconstitutional gender discrimination on the part of states.⁶⁹ Congress also reacted to a gender gap in maternity and paternity leave coverage.⁷⁰ Congress faced a clear record of unconstitutional gender discrimination in the manner in which the states administered family leave for their employees; consequently prophylactic section 5 legislation was an appropriate congressional response.⁷¹

Hibbs, worked for the Nevada Department of Human Resources’ Welfare Division. *Id.* at 725. In the spring of 1997, Hibbs sought leave from work to care for his wife who had recently been injured in a collision. *Id.* Following notification by his employer that he had utilized all of his FMLA leave and had subsequently failed to return to work at the time specified, Hibbs was terminated. *Id.* Following that action, Hibbs filed suit in federal district court against the Nevada Department of Human Resources. *Id.* The court granted the defendant’s summary judgment motion on Eleventh Amendment grounds. *Id.* The Ninth Circuit reversed. *Id.* The Supreme Court granted *certiorari* to resolve a conflict among the circuits regarding the validity of the FMLA’s abrogation of the states’ Eleventh Amendment immunity. *Id.*

65. *Id.* at 728.

66. *Id.* at 728–29.

67. *Id.* at 728–29 (internal citations omitted). As the Court noted, “[t]he FMLA aims to protect the right to be free from gender-based discrimination. . . . We have held that statutory classifications that distinguish between males and females are subject to heightened [(intermediate) judicial] scrutiny.” *Id.* at 728.

68. *Id.* at 729–35.

69. *Hibbs*, 538 U.S. at 729–30. Historically, states used stereotypic notions of women and their place in society to deny them access to certain employment opportunities, such as the legal profession. *Id.* at 729. Courts even acquiesced in these discriminatory efforts. *Id.* (citing *Bradwell v. State*, 16 Wall. 130 (1873); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948)).

70. *Id.* at 730–31. While the studies regarding family leave were collected from private sector employers, the Court noted that Congress also received testimony that the private and public sector differed little with respect to such leave policies. *Id.* at 730 n.3.

71. *Id.* at 735. The Court made explicit a conclusion that could likely be drawn from both *Kimel* and *Garrett*. That is, the Court noted that the onus on Congress to demonstrate a pattern of constitutional violations in enacting section 5 legislation varies with respect to the applicable judicial standard. *Id.* at 735–36. That is, where the Court has identified the appropriate level of scrutiny to be applied under the Equal Protection Clause, Congress’s burden of establishing a pattern of violation is lessened with increasing judicial scrutiny. *Id.* at 736 (“Because the standard for demonstrating the

The Court next focused on the congruence and proportionality prong of the *City of Boerne* test.⁷² The Court determined that the remedy chosen by Congress in the FMLA was sufficiently congruent and proportional.⁷³ While the dissent criticized the FMLA as a government entitlement, the majority noted that a failure by the FMLA to mandate family care leave would have significantly reduced the effectiveness of Congress’s section 5 remedy.⁷⁴ Finally, because Congress created in the FMLA a targeted remedy and restricted its scope so as to minimize some of its more onerous aspects, the FMLA represented a measured congressional response to a need to enforce the Fourteenth Amendment and protect female workers.⁷⁵

In its 2003–04 term, the Supreme Court handed down its most recent pronouncement on the validity of section 5 legislation in *Tennessee v. Lane*.⁷⁶ As noted earlier, the *Lane* Court addressed the constitutionality of Title II of the ADA and its abrogation of the states’ Eleventh Amendment immunity.⁷⁷ While Title II imposes nondiscrimination requirements on an entire array of public services and programs, the particular facts of *Lane* involved access to the courts.⁷⁸

constitutionality of a gender-based classification is more difficult to meet than our rational-basis test[,] . . . it was easier for Congress to show a pattern of state constitutional violations.”).

72. *Id.* at 737–40.

73. *Id.* at 737 (“By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.”).

74. *Hibbs*, 538 U.S. at 737–38.

75. *Id.* at 738–39. As the court noted:

[u]nlike the statutes at issue in *City of Boerne*, *Kimel*, and *Garrett*, which applied broadly to every aspect of state employers’ operations, the FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship.

Id. at 738. In addition, Congress placed several restrictions on the application of the FMLA that limited its impact on important state functions, among them excluding from the family leave requirements elected officials, their staffs, and appointed policymakers. *Id.* at 739.

76. *Tennessee v. Lane*, 541 U.S. 509 (2004).

77. *Id.* at 513. Title II of the ADA, 42 U.S.C. §§ 12131–12165, prohibits state and local governments from discriminating against the disabled in both access to and provision of public services. *See Lane*, 541 U.S. at 513 (citing 42 U.S.C. § 12131–12165).

78. *Lane*, 541 U.S. at 513–15. Respondents George Lane and Beverly Jones filed suit against the state of Tennessee for violations of Title II of the ADA. *Id.* at 513–14. Both individuals are paraplegics who require the use of a wheelchair. *Id.* Respondent Lane faced criminal charges, and on his first appearance before the court, he had to crawl up two flights of stairs to the second floor courtroom; there was no elevator. *Id.* Upon appearing for the second time, Lane refused to crawl or be carried up the stairs and was subsequently arrested for failing to appear. *Id.* at 514.

Respondent Jones was a “certified court reporter.” *Id.* Her complaint alleged that the inaccessibility of courthouses and courtrooms prevented her from working. *Id.* In addition, she alleged that this inaccessibility impeded her ability to participate in the judicial process. *Id.*

As it had in previous Eleventh Amendment cases, the Court began with the first prong of the *Seminole Tribe* test and held that Congress made its intent to abrogate the states' sovereign immunity unmistakably clear.⁷⁹ Next, the Court examined whether Congress "acted pursuant to a valid grant of constitutional authority."⁸⁰

The Court reaffirmed the proposition that Congress has the power under section 5 of the Fourteenth Amendment to abrogate the states' sovereign immunity.⁸¹ According to the Court, "§ 5 authorizes [Congress] to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."⁸²

The Court then moved to the *City of Boerne* inquiry to analyze the appropriateness of Congress's approach in enacting Title II.⁸³ Beginning with the first step of the *City of Boerne* analysis (identifying the constitutional right at issue), the Court noted that the disabled are entitled to the minimum level of judicial scrutiny under the Equal Protection Clause.⁸⁴ However, the Court noted that Title II's antidiscrimination provisions applied to a wide range of government services, some of which implicate the deterrence of certain constitutional violations that demand more stringent judicial scrutiny.⁸⁵

The Court next focused on the appropriateness of Title II as valid section 5 legislation by examining the historical record faced by Congress in enacting the ADA.⁸⁶ In enacting Title II, Congress faced a historical pattern of discrimination in the provision of public services by state and local governments.⁸⁷ Congress not only saw a pattern of continuing discrimination in the public services arena, but it also noted the

79. *Id.* at 518 (citing 42 U.S.C. § 12202).

80. *Id.* at 517 (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000)).

81. *Lane*, 541 U.S. at 518 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). The Court noted that Congress's authority under the Fourteenth Amendment is a "broad power indeed." *Id.* (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982)). Congress's section 5 enforcement power authorizes it to proscribe a wider array of conduct than that which is expressly prohibited by the Fourteenth Amendment. *Id.* at 518.

82. *Id.* at 520.

83. *Id.* at 522.

84. *Id.* ("[C]lassifications based on disability violate [the Equal Protection Clause] if they lack a rational relationship to a legitimate governmental purpose.')

85. *Id.* at 522–23 ("Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review.')

86. *Lane*, 541 U.S. at 524–31.

87. *Id.* at 524 ("It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systemic deprivations of fundamental rights.')

shortcomings in previous and existing legislative answers to the problems of disability discrimination.⁸⁸ Congress also received a report from a special task force documenting “hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions.”⁸⁹

Whereas the *Garrett* Court rejected any congressional reliance on the discriminatory employment decisions of non-state government entities in enacting Title I of the ADA,⁹⁰ the *Lane* majority explicitly rejected this view in the context of Title II.⁹¹ With respect to the specific issue of access to the courts, the Court noted that Congress was made aware that many disabled individuals across the country were denied access to courtrooms and court proceedings as a result of their disabilities.⁹² The voluminous record before Congress justified its efforts to provide remedial measures for disabled persons subjected to discrimination in the provision of public services.⁹³

As the Court noted, because Title II implicates a wide range of constitutional rights, the congruence and proportionality analysis is

88. *Id.* at 1990 (citing S. REP. NO. 101-116, at 18). “[E]xisting state laws do not adequately counter acts of discrimination against people with disabilities. Current Federal law is also inadequate. Currently, Federal anti-discrimination laws only address discrimination by Federal agencies, entities that have contracts with the Federal government, and recipients of Federal financial assistance.” H.R. REP. NO. 101-485, pt. II, at 47 (1989), *reprinted in* 1990 U.S.C.C.A.N. 303, 329. For a detailed discussion of the continued inadequacies of state antidiscrimination statutes, see Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075 (2002).

89. *Lane*, 541 U.S. at 526 (citing *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 379 (Breyer, J., dissenting)); *see also Garrett*, 531 U.S. at 391 (App. C to opinion of Breyer, J., dissenting) (containing “[s]ubmissions made by individuals to the Task Force on Rights and Empowerment of Americans with Disabilities”).

90. *Garrett*, 531 U.S. at 369.

91. *Lane*, 541 U.S. at 527 n.16. The dissent, like the majority in *Garrett*, argued that constitutional violations on the part of non-state actors were “irrelevant” to the inquiry into the constitutionality of Title II. *Id.* at 542 (Rehnquist, C.J., dissenting). The majority rejected this notion: “[i]n any event, our cases have recognized that evidence of constitutional violations on the part of nonstate governmental actors is relevant to the § 5 inquiry.” *Id.* at 527 n.16; *see also id.* (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 312–15 (1966)) (“[M]uch of the evidence in [*Katzenbach*] . . . to which The Chief Justice favorably refers . . . involved the conduct of county and city officials, rather than the States.”).

92. *Id.* at 527. A House subcommittee and its appointed task force received evidence of “numerous examples” in which disabled persons were excluded from the states’ judicial processes. *Id.* These include “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.* at 527.

93. *Id.* at 529 (“This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.”).

appropriately conducted on an “as applied” basis.⁹⁴ According to the Court, the remedy chosen by Congress was congruent and proportional to the wrong of denying the disabled access to the courts.⁹⁵ After all, Congress imposed a burden upon the states of ensuring that those disabled individuals for whom reasonable accommodations would render the courts accessible not be denied such access.⁹⁶ Moreover, Title II does not require states to endure undue hardship to ensure the disabled access to the courts.⁹⁷ Nor does it demand that the states sacrifice the fundamental nature of their public services and programs in order to accommodate the disabled.⁹⁸ Thus, Congress’s chosen remedy was appropriate section 5 legislation.⁹⁹

The Court’s current section 5 jurisprudence began with the relatively simple statement in *City of Boerne* that section 5 legislation must be congruent and proportional with respect to the constitutional violations it aims to remedy. Through subsequent refinement culminating in its most recent decision, *Lane*, the Court has created a three-step inquiry for determining whether section 5 legislation passes the *City of Boerne* test:

- (1) the Court begins by identifying the constitutional right at issue given particular section 5 legislation;
- (2) the inquiry next moves to an evaluation of whether Congress has identified a historical pattern of constitutional violations on the part of the states that justifies enactment of remedial legislation; and
- (3) finally, the scope of the remedy is analyzed in light of the determinations made under steps one and two to determine whether Congress’s remedy is congruent and proportional to the wrongs it seeks to prevent.

94. *Id.* at 530–31. For the Court, the relevant inquiry was whether Congress validly abrogated the states’ Eleventh Amendment immunity with respect to access to the courts. *Id.* at 531–32. In rejecting the dissent’s claim that the analysis should focus on Title II in its entirety, the Court stated, “[i]t is unclear what, if anything, examining Title II’s applications to hockey rinks or voting booths can tell us about whether Title ‘substantively redefines the right of access to the courts.’” *Id.* at 531 n.18.

95. *Id.* at 531–32.

96. *Id.* at 531.

97. *Id.* at 532.

98. *Id.* at 531–32. Title II and the subsequent administrative regulations provide a measured response to constitutional violations. *Id.* “Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only ‘reasonable modifications.’” *Id.*

99. *Id.* at 533–34.

III. ANALYSIS

The *Lane* decision and its predecessor sovereign immunity cases leave unanswered whether Jane, introduced above, has the right to sue a state for ADA violations. In the context of education of the disabled, Title II of the ADA represents the relevant provision, as it proscribes discrimination against the disabled in access to and provision of public services and programs.¹⁰⁰ Because the ADA authorizes suits against states by private citizens,¹⁰¹ the ultimate inquiry focuses on the propriety of Congress’s abrogation of the states’ sovereign immunity.

This analysis begins with a two-step inquiry. In order to validly abrogate the states’ Eleventh Amendment immunity: (1) Congress must make its intention to do so unequivocally clear; and (2) such abrogation must derive from a valid exercise of Congress’s constitutionally defined powers.¹⁰² With respect to the first question, the Court has made clear that Congress, in enacting the ADA, expressed its unequivocal intent to abrogate the states’ sovereign immunity.¹⁰³

The second prong of the test requires an analysis of whether Congress’s action was valid under its section 5 enforcement powers.¹⁰⁴ As Congress does not have Article I power to authorize private suits against the states,¹⁰⁵ the remaining inquiry asks whether Title II represents valid section 5 legislation in the context of education.¹⁰⁶

The first step in analyzing the propriety of section 5 legislation is to identify the “metes and bounds” of the constitutional right at issue.¹⁰⁷ Under the Court’s equal protection jurisprudence, steps taken by state actors that discriminate against the disabled are subject to the minimum

100. See 42 U.S.C. §§ 12131–12134 (2005).

101. See *id.* § 12202 (2005).

102. See *Tennessee v. Lane*, 541 U.S. 509, 517 (2004); *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000).

103. *Lane*, 541 U.S. at 518; *Garrett*, 531 U.S. at 364.

104. In cases involving both the ADA and other congressional attempts to abrogate the states’ sovereign immunity, the Court has very clearly rejected any congressional power to take such action under its Article I powers. See *e.g.*, *Garrett*, 531 U.S. at 364 (analyzing Title I of the ADA); *Kimel*, 528 U.S. at 79 (analyzing the ADEA); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996) (“The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”).

105. *Seminole Tribe of Fla.*, 517 U.S. at 64.

106. See *Lane*, 541 U.S. at 530–31 (holding that the question of whether Title II is a valid exercise of Congress’ section 5 power should be answered on an as applied basis focusing on the specific application of Title II at issue).

107. *Garrett*, 531 U.S. at 368.

level of judicial scrutiny.¹⁰⁸ Under this rational basis scrutiny, a classification based upon disability is only unconstitutional if it is not rationally related to a legitimate state interest.¹⁰⁹ Furthermore, the burden of establishing the impropriety of such a classification rests upon the challenging party.¹¹⁰ The Court has not identified education as a fundamental right;¹¹¹ therefore, any state actions impinging on our hypothetical student Jane's¹¹² educational rights are subject only to the courts' minimal judicial scrutiny.¹¹³

Having identified the constitutional right at issue under Jane's claim, the analysis moves to an examination of the record before Congress. The *Lane* Court viewed the record before Congress in enacting the ADA as "mak[ing it] clear beyond peradventure" that public services and facilities were appropriate subjects for prophylactic legislation.¹¹⁴ More specifically, in the public education context, the appendix to Justice Breyer's dissent in *Garrett* presents numerous examples of unequal treatment of the disabled.¹¹⁵ While many of these incidents involve unequal treatment of the disabled by local agencies, the Court made clear that the actions of a state's political subdivisions are relevant in section 5 analysis.¹¹⁶ It appears that the *Lane* analysis leaves little room for doubt that areas of state conduct covered by Title II were appropriate targets for section 5 legislation.¹¹⁷

108. *Lane*, 541 U.S. at 539–40; *Garrett*, 531 U.S. at 366–68 (discussing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)).

109. *Garrett*, 531 U.S. at 367.

110. *Id.* (citations omitted).

111. For a discussion, see *supra* note 55; see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

112. See *supra* Part I.

113. *Rodriguez*, 411 U.S. at 40.

114. *Lane*, 541 U.S. at 529. Although the issue before the Court was the application of Title II to access to judicial proceedings, the Court did not confine its analysis to the historical record of inaccessible judicial services. *Id.* at 524–30.

115. *Garrett*, 531 U.S. at 391 (App. C to opinion of Breyer, J., dissenting). As the *Lane* Court noted, the examples of unequal treatment by state and local agencies contained in this appendix showed further evidence of the failure of previous efforts at the state and federal level to prevent disability discrimination. *Lane*, 541 U.S. at 1990.

116. *Lane*, 541 U.S. at 1991 n.16 (noting that much of the discriminatory conduct relied upon in *S. Carolina v. Katzenbach*, 383 U.S. 301, 312–15 (1966), involved that of local officials).

117. The Chief Justice is extremely critical of the majority approach in *Lane*. "Rather than limiting its discussion of constitutional violations to the due process rights on which it ultimately relies, the majority sets out on a wide-ranging account of societal discrimination against the disabled." *Id.* at 541. Moreover, in reference to the majority's reliance on the accounts of unequal treatment found in Appendix C to Justice Breyer's *Garrett* dissent, the Chief Justice stated, "[a]s in *Garrett*, this 'unexamined, anecdotal' evidence does not suffice." *Id.* at 542 (citing *Garrett*, 531 U.S. at 370).

It is difficult to reconcile the approach to the legislative record taken by *Garrett* and *Lane*. However, one distinguishing characteristic is that *Garrett* focused purely on the application of a

Thus, the final section 5 hurdle to overcome in order to allow Jane to pursue a claim against a state or its agencies under Title II is that of congruence and proportionality. The *Garrett* analysis is instructive for this inquiry, even though it addressed Title I of the ADA, because the applicable Equal Protection Clause principles involved in Jane’s claim are identical to those in *Garrett*.¹¹⁸ Because Title II imposes the burden on the state of demonstrating an undue hardship in failing to accommodate the disabled,¹¹⁹ the Court would likely raise the same objections to Title II in the education context as it did to Title I in *Garrett*.¹²⁰ That is, whereas rational basis review requires the complaining party to negate any reasonable grounds for a State’s discriminatory act, Title II imposes on the governmental entity the burden of validating its reasons for failing to accommodate disabilities.¹²¹

Moreover, Title II proscribes a much wider swath of conduct than does the Equal Protection Clause. As the *Garrett* Court noted, Title I’s accommodation requirement prevented a state from selecting nondisabled job applicants who were able to use existing facilities.¹²² However, such financial considerations provide perfectly rational bases for justifying

constitutional right subject merely to rational basis scrutiny; whereas, Title II implicated a broad range of constitutional rights subject to not only rational basis but also heightened and strict judicial scrutiny. *Lane*, 541 U.S. at 522. Regardless of what accounts for this difference in approach, the ultimate resolution of the appropriateness of Title II in the public education context will turn on the congruence and proportionality analysis.

118. Title I did not implicate the exercise of a fundamental right nor did it attempt to prevent discrimination against a constitutionally suspect or quasi-suspect class. *See Garrett*, 531 U.S. at 366. Thus, the discriminatory behavior Title I sought to prevent is subject to the same minimal judicial scrutiny as discrimination against the disabled in the public education context.

119. *See* 28 C.F.R. § 35.150 (2004):

(a) A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

...

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens.

120. *Garrett*, 531 U.S. at 372 (referring to an employer’s right to exempt itself from the ADA’s accommodations requirements if able to demonstrate such accommodations would create undue hardship, the Court stated that “[t]he Act also makes it the employer’s duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer’s decision.”).

121. 28 C.F.R. § 35.150(a)(3).

122. *Garrett*, 531 U.S. at 372.

constitutional discrimination against the disabled.¹²³ Title II imposes similar constraints on states in requiring them to go well beyond that demanded by the Constitution in their provision of public services.¹²⁴

Given that the Constitution requires only that states not engage in irrational discrimination against the disabled in providing educational services, Title II works a substantive change in the legal relationship between states and their citizens. The expansive requirements of Title II, at least in the context of educational services, go well beyond what is required of states by the Equal Protection Clause. While Congress's attempt to level the playing field for disabled students through Title II marks a fundamental shift in federal policy, it will likely fail the current Court's section 5 constitutionality analysis as applied to education of the disabled.¹²⁵

IV. PROPOSAL

The Court's current approach to Equal Protection cases involving the disabled assigns a disabled plaintiff the burden of demonstrating the unconstitutionality of state actions. However, not only is education among the most important of the services provided by state and local governments, but it is also an essential step in preventing the development of a class system that perpetually limits the opportunities of certain classes of individuals.¹²⁶ Education provides a key to unlock those doors closed by

123. *Id.*

124. As the *Lane* dissent noted, "Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination." *Tennessee v. Lane*, 541 U.S. 1978, 549 (2004) (Rehnquist, C.J., dissenting).

125. *See Garrett*, 531 U.S. at 368 ("If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."); *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (arguing that the ADEA was a disproportionate response to constitutional violations and noting that the ADEA effectively imposed heightened (intermediate) judicial scrutiny on age discrimination by state employers whereas the Constitution required only rational basis scrutiny). The *Lane* approach is inapposite in this context because the Court explicitly declined to address the congruence and proportionality of Title II as applied to public services such as education that implicate only the minimal form of constitutional protection afforded the disabled. *Lane*, 541 U.S. at 533 n.20. *But see Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005) (distinguishing *Garrett* and holding Title II to be valid § 5 legislation at least in the higher education context); *Ass'n for Disabled Americans, Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 959 (11th Cir. 2005).

126. *See Elizabeth Reilly, Education and the Constitution: Shaping Each Other & the Next Century*, 34 AKRON L. REV. 1 (2000); *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). The *Brown* Court noted:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is

society’s handicapping, if well-intentioned, perceptions of the abilities of those with disabilities to enter the mainstream of society. Thus, requiring disabled plaintiffs to bear the burden of demonstrating the unconstitutionality of state actions in the education context creates a task of Herculean magnitude that demands overcoming societal perceptions of disability.

While education is important to every American citizen, ensuring that the disabled have access to educational services on an equal basis is of particular importance. That is, educational opportunities help disabled students develop the skills that allow them fully to participate in society. In addition, interactions between the disabled and nondisabled serve to tear down the barriers of fear and stereotyping that surround disability.

The importance of equality in the provision of educational services demands a higher level of constitutional protection. In *Plyler v. Doe*, the Court did just that in holding that a Texas law denying illegal immigrants access to public schools should be subject to heightened judicial scrutiny.¹²⁷ Just as children whose parents have illegally entered the country should not be denied educational opportunities because of their parents’ choices,¹²⁸ disabled students should no more be denied educational opportunities because of a disability that is beyond their control.¹²⁹

required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id.

127. *Plyler v. Doe*, 457 U.S. 202, 224 (1982) (stating that the Texas statute denying public education to children of illegal immigrants can only stand if it furthers “some substantial goal of the State”).

128. *See id.* at 220 (“§ 21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of § 21.031.”).

129. For example, although Jane is fully capable of learning, external limitations imposed by stereotypic notions of her limitations serve to curtail not only her educational opportunities but also future opportunities to contribute effectively to society. *See also Plyler*, 457 U.S. at 221–22 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group

In the modern world, it is difficult to overestimate the importance of education. Not only is education the key to financial independence and self-sufficiency, it is a prerequisite to full participation in the political process.¹³⁰ Thus, ensuring that the disabled have adequate access to educational services ensures that they will have the ability to become effective participants in the civic community. By giving disabled students the tools to learn and compete, education allows them to become advocates for themselves in the political process. This representation will, in turn, translate into a shift in the manner in which other members of our society view the disabled.¹³¹

Applying a heightened form of judicial scrutiny to Jane's claim and similar claims would resolve the principal objections to the ADA's breadth raised in *Garrett*. That is, the ADA's imposition of a burden upon the governmental entity seeking to avoid accommodation would be in step with the burden to demonstrate constitutionality under heightened judicial scrutiny. Moreover, the conduct prohibited by the ADA mirrors that prohibited by the intermediate level of constitutional protection where state action is subject to heightened judicial scrutiny.¹³²

might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society."

Id.

130. See Reilly, *supra* note 125, at 1–2 (2000).

Thinking about the interaction between the Constitution and education reveals that they are deeply interconnected, at profound levels of interdependence and complexity. . . . A fundamental interdependence was formed with the decision to formulate our governmental structure as a democratic republic. The Constitution created the necessity for adequate public education to prepare the citizenry to exercise the role of self-government. An educated voting public underpins a successful democratic structure. . . .

131. Cf. Reilly, *supra* note 129, at 2 ("[O]ur social system rests on two largely accepted goals that each require access to education—the 'melting pot' which requires successful absorption of diverse immigrant populations into a pluralistic social and cultural structure, and 'upward mobility' which requires the permeability of class barriers."). The author's "melting pot" observation, while referring to the absorption of immigrant populations into mainstream society, has strong parallels in the context of education for the disabled. That is, adequate access to education for disabled students gives both disabled and nondisabled students an opportunity to interact and serves to dispel misconceptions each group might have about the other. Moreover, the opportunity for "upward mobility" is extremely relevant in the disability education context, and education provides the means by which any class that has been traditionally subordinated might overcome such inferior status and enter into full societal participation.

132. In the alternative, Congress could amend the ADA to prohibit only irrational discrimination with respect to the actions of the states in educating the disabled. While this change would likely answer the principal objections of the *Garret* Court, see *supra* note 63, with respect to the over breadth of the ADA, it would do little to assist disabled students in attaining equality in the education context. After all, the rationality requirement allows states to make decisions based on societal notions of the limitations imposed by disability, thus perpetuating those stereotypes to the continued detriment of disabled students. Cf. Bagenstos, *supra* note 3, at 926 (arguing that stereotypic notions of disability

V. CONCLUSION

The current Court’s equal protection jurisprudence presents an interesting set of challenges to the applicability of the ADA in the context of education. That is, it seems clear that the law, as it stands, would bar a student plaintiff from asserting a claim under the ADA against a state or one of its agencies. Because education is not a fundamental right and the disabled, as a class, are protected by only the minimal equal protection standard, Congress’s statutory solution to combat discrimination against the disabled is likely too broad in scope to satisfy the Court’s *City of Boerne* test.¹³³

The principal objection that the Court would raise to Title II of the ADA as applied to education is the excessive burden it imposes upon the states.¹³⁴ Under the Court’s equal protection approach, states need only avoid irrational discrimination against the disabled in the education context.¹³⁵ Moreover, a plaintiff seeking redress under the Equal Protection Clause bears the burden of demonstrating that irrationality.¹³⁶ In contrast, Title II imposes upon the state the burden of demonstrating the hardship of accommodating an individual with a disability.¹³⁷

Because Title II, as applied to education, fails to satisfy the constitutional demands of valid section 5 legislation, a change in the Court’s approach is necessary. The importance of education in improving the circumstances of the disabled demands a more rigorous judicial scrutiny for state actions that impinge on the educational rights of the disabled. Under such heightened scrutiny, the burden imposed by the ADA and the Equal Protection Clause would mirror each other much more closely, and the principal objections to the ADA’s statutory approach on the part of the Court would be addressed.

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perpetuate discrimination because they justify such behavior as *rational*). Until and unless the disabled are able to achieve relative parity in education with nondisabled students, it will be almost impossible to remove the barriers that “rational” discrimination places in front of the disabled. Thus, merely limiting the ADA to prohibiting irrational discrimination allows a vicious cycle of discrimination to endure.

133. See *supra* Part III.

134. See *supra* notes 120–25 and accompanying text.

135. See *supra* note 55.

136. *Id.*

137. *Id.*

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