OVERCOMING THE OBSTACLES OF *GARRETT*: AN "AS APPLIED" SAVING CONSTRUCTION FOR THE ADA'S TITLE II

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Recent Supreme Court cases regarding Congress' abrogation authority have seriously impaired Congress' ability to demonstrate a valid exercise of its Section 5 power under the Fourteenth Amendment to subject nonconsenting states to suit for money damages in federal court. During its 2003 term, the Supreme Court has again granted certiorari to a case involving the proper scope of Congress' section 5 power, Lane v. Tennessee. Lane *involves a suit for money damages under Title II of the ADA based on the alleged failure of the State of Tennessee to make its courthouses accessible. Many commentators suggest that the Supreme Court will follow its current precedent and deny a damage remedy in* Lane, *particularly since the Court barred a suit for damages brought by a state employee for an alleged violation of Title I of the ADA in* Board of Trustees of the University of Alabama v. Garrett. *This article critiques the Court's current analysis as seen in* Garrett *and proposes that the Court should evaluate the ADA's Title II damage remedy against the states differently than it did Title I's. It suggests that the Court should adopt an "as applied" analysis when deciding Title II damage remedy claims. 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 state's action than the rational basis scrutiny that applied in* Garrett. *For example, in* Lane, *the fundamental right of access to the state court system has been denied to disabled plaintiffs in Tennessee because the courthouses are inaccessible to those who cannot walk up the stairs. Because the* Lane *case involves a fundamental right, the Court should apply strict scrutiny when evaluating Title II's congruence and proportionality. Analyzing the* Lane *case, and other Title II damages claims on the facts*

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and with respect to the right that has allegedly been abridged is the appropriate federalism standard.

I. INTRODUCTION

In *Board of Trustees of the University of Alabama v. Garrett*,[1] the Supreme Court ruled that the Eleventh Amendment barred a suit brought by a state employee to recover money damages for an alleged violation of Title I of the Americans with Disabilities Act of 1990 ("ADA")[2] because Congress did not validly abrogate the states' sovereign immunity in that title of the ADA.[3] The outcome in *Garrett* was not surprising.[4] The decision reflects the reasoning of a series of recent cases that are "rapidly changing [the] landscape" of the Supreme Court's Eleventh Amendment jurisprudence regarding Congress' abrogation authority.[5] Specifically, these cases have seriously impaired Congress' ability to demonstrate a valid exercise of its Section 5 power under the Fourteenth Amendment to subject

1. 531 U.S. 356 (2001).

2. 42 U.S.C. §§ 12111–12117 (2000).

3. *See Garrett*, 531 U.S. at 360. Title I of the ADA imposes a number of obligations on public and private employers, including barring discrimination based on disability and requiring reasonable accommodations for employees with disabilities. 42 U.S.C. § 12112 (2000).

4. *See* Michael H. Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31 (2001). In an article written before *Garrett* was decided, Professor Gottesman, who presented oral argument on behalf of the respondents in *Garrett*, predicted that the Court would rule that the Eleventh Amendment bars suits brought under Title I of the ADA. *Id.* at 34, 104, 107.

5. *Kiman v. N.H. Dep't of Corr.*, 301 F.3d 13, 17 (1st Cir. 2002). *Garrett* is the seventh Supreme Court decision since *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), to eradicate a federal statute's attempt to abrogate state immunity from suit in federal court. *See* Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After* Garrett, 28 J.C. & U.L. 41, 41-42 (2001) (arguing that this line of cases has "rewritten the rules regulating Congress' abrogation authority under Section 5 of the Fourteenth Amendment"). One commentator criticized these recent developments as stemming from "a bare five-person majority of the current Supreme Court, which has pursued an eccentric mission of attempting to reinvigorate state 'sovereignty' that appears to have no constituency in contemporary society." Gottesman, *supra* note 4, at 34. This "slim but sturdy five-member conservative majority" is made up of Chief Justice William Rehnquist and Justices Anthony Kennedy, Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas. Hartley, *supra*, at 42-43 n.10 and accompanying text. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1053 (2001).

nonconsenting states to suit in federal court.[6] For instance, in *Garrett*, despite what has generally been seen as an extensive legislative record of disability discrimination findings,[7] the Court concluded that Congress failed to document a pattern of discrimination by the states that violated the Fourteenth Amendment.[8] In fact, since 1997 the Court has determined that Congress lacked valid Section 5 power under six federal statutes.[9] In the words of one commentator, this Court "has an appetite for rejecting Congress's invocations of its Fourteenth Amendment power."[10]

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6. *See* Gottesman, *supra* note 4, at 35.

7. *See* William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 139 (2001); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Power*, 53 STAN. L. REV. 1127, 1152 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 86 (2001), Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1173-74 (2001); Nicole S. Richter, *The Americans with Disabilities Act After* University of Alabama v. Garrett: *Should the States Be Immune from Suit?*, 77 CHI.-KENT L. REV. 879, 896 (2002); *see also Garrett*, 531 U.S. at 377 (Breyer, J., dissenting) ("Congress compiled a vast legislative record documenting 'massive, society-wide discrimination' against persons with disabilities.") (quoting S. REP. NO. 101-116, at 8-9 (1989)).

8. *Garrett*, 531 U.S. at 374; *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000) (concluding that the legislative record of the Age Discrimination in Employment Act ("ADEA") was insufficient to justify Congressional abrogation of states' sovereign immunity under Section 5 of the Fourteenth Amendment).

9. Hartley, *supra* note 5, at 41 n.3. In addition to *Garrett*, the decisions in which the Court ruled that Congress' Section 5 power was lacking are: *United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act of 1994); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (ADEA); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (two sections of the Patent and Plant Variety Protection Remedy Clarification Act); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) (the Trademark Act of 1946); and *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act of 1993).

10. Gottesman, *supra* note 4, at 35; *see also* Colker & Brudney, *supra* note 7; Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 586 (2000) (arguing that the Supreme Court's failure to defer to the EEOC shows a lack of respect for Congress' determination on many of the open interpretations of the ADA). "[I]t makes sense to believe that Congress intended that policy choices implicated by implementation of the ADA be made by administrative agencies, rather than by courts." *Id.* "The Supreme Court, however, has become accustomed to placing its own imprint on federal statutes in general and employment discrimination laws in particular." *Id.* at 586-87. *But see* Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 436 (2001); Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*,

Garrett's holding applies only to employment discrimination claims under the ADA's Title I. Since *Garrett*, the federal courts have been divided on the constitutionality of the damage remedy under the ADA's Title II, the disability act's provision concerning the elimination of discrimination by state governments.[11] Title II prohibits governmental entities from denying public services, programs, and activities to individuals on the basis of their disability,[12] and further provides persons who have suffered discrimination with a damage remedy.[13] Given the Court's application of this "clear trend"[14] regarding abrogation of state immunity to Title I of the ADA in *Garrett*, most judges and scholars predict that "the handwriting . . . is on the wall"[15] for the Court's likely handling of the same issue under Title II of the ADA.[16] Their reasoning generally goes like this:[17] The *Garrett* Court, relying on firmly settled precedent, held that the legislative record of Title I failed to establish the necessary pattern of discrimination against disabled persons by the states to justify abrogation of their sovereign immunity.[18] The legislative record is the same for both Title I and Title II. Therefore, the Court, if given the opportunity,

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75 NOTRE DAME L. REV. 1133, 1135 (2000); James E. Pfander, *Once More unto the Breach: Eleventh Amendment Scholarship and the Court*, 75 NOTRE DAME L. REV. 817, 832 (2000); Louise Weinberg, *Of Sovereignty and Union: The Legends of* Alden, 76 NOTRE DAME L. REV. 1113, 1119 (2001).

11. *See infra* Part IV.

12. *See* 42 U.S.C. § 12132 (2000).

13. *See id.* § 12133.

14. Kiman v. N.H. Dep't of Corr., 301 F.3d 13, 26 (1st Cir. 2002) (Torruella, J., dissenting).

15. *Id.*; *see* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 522 (2000) (arguing that the Court uses the *Boerne* test when it "is indifferent or hostile to the constitutional values at stake in particular instances of Section 5 legislation").

16. *See, e.g.*, Popovich v. Cuyahoga County Ct. Com. Pl., 276 F.3d 808, 812 n.4 (6th Cir. 2002) (en banc), *cert. denied*, 537 U.S. 812 (2002) (observing that the "*Garrett* rule would appear to apply to both Title I and Title II"); Wessel v. Glendening, 306 F.3d 203, 214-15 (4th Cir. 2002) (stating that the reasoning of *Garrett* "applies with equal force to Title II" and that "the majority of our sister circuit courts" follow the same analysis); *see also* Hartley, *supra* note 5, at 83-84; Alison Tanchyk, Comment, *An Eleventh Amendment Victory: The Eleventh Amendment vs. Title II of the ADA*, 75 TEMP. L. REV. 675, 707-08 (2002) (arguing that Title II "suffers from the same flaws afflicting Title I").

17. *See, e.g.*, Stanton K. Oishi, Note, Patricia N. v. Lemahieu: *Abrogation of State Sovereign Immunity Under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act After* Board of Trustees v. Garrett, 24 U. HAW. L. REV. 347, 375 (2001).

18. 531 U.S. 356, 370 (2001).

will conclude that Title II also lacks a pattern of discrimination and will rule that no valid abrogation of states' immunity occurred under Title II of the ADA and damages are thus not permissible against the state.

The Supreme Court has not yet had the opportunity to decide what has been called the "inevitable sequel to *Garrett*."[19] On November 18, 2002, the Court granted certiorari in *Hason v. Medical Board*[20] to determine whether the Eleventh Amendment bars suit under Title II of the ADA.[21] However, the petitioner, at the urging of disability advocates, withdrew the case just weeks before it was scheduled for oral argument.[22]

During its 2003 term, the Supreme Court has again granted certiorari in a Title II case, *Lane v. Tennessee*.[23] When the Court addresses the scope of Congress' power at issue in *Lane*, it might well follow the simple syllogism set forth above.[24] After all, the *Garrett* analysis is based on now well-established precedent.[25] On the other hand, other important considerations exist under Title II which could and should make the Court's decision in *Lane* more difficult.

First, in *Garrett,* the Court seemingly had the chance to dispose of the Title II issue at the same time that it ruled on Title I, but it specifically elected not to do so.[26] That the Court reserved the

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19. Petitioner's Brief on the Merits at 4, Med. Bd. v. Hason, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003) (No. 02-479). Before *Garrett*, the Supreme Court had had several opportunities to decide Title II's constitutionality with respect to damage awards against the states but had declined to do so.

20. 279 F.3d 1167 (9th Cir. 2002), *cert. granted*, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003). In *Hason*, the Medical Board denied Hason's application to practice medicine on the basis of Hason's history of mental illness, even though it had not evaluated his current condition. *See id.* at 1169-70.

21. Petitioner's Brief on the Merits at i, *Hason* (No. 02-479).

22. *See Med. Bd. v. Hason*, 123 S. Ct. 1779 (2003). The California Attorney General, Bill Lockyer, withdrew the case without having reached a settlement because it turned out to be a political liability. *See* Charles Lane, *On Second Thought . . .*, WASH. POST, Apr. 11, 2003, at A25. Apparently, this was the first time in history that a case before the Supreme Court was dismissed at the request of the petitioner in the absence of a settlement. *See id.*

23. 315 F.3d 680 (6th Cir. 2003), *cert. granted in part*, 123 S. Ct. 2622 (2003). The *Lane* plaintiffs, both paraplegics who use wheelchairs, allege that several courthouses in the state are inaccessible to persons who use wheelchairs. They allege that such denial of access to judicial proceedings provides them with a claim for damages under Title II. *See id.* at 683.

24. *See* Hartley, *supra* note 5, at 83-84; Tanchyk, *supra* note 16, at 707-08.

25. Tanchyk, *supra* note 16, at 683.

26. Bd. of Trs. v. Garrett, 531 U.S. 356, 360 n.1 (2001). Although both

question of the Eleventh Amendment's applicability to Title II for a later date indicates that Title II is constitutionally distinguishable from Title I.[27] Second, in a footnote in *Garrett*, the Court intimated that it might view the legislative history of the ADA from a different perspective in the context of a Title II claim.[28] Although the Court found insufficient evidence of employment discrimination by the states on the basis of disability (the focus of Title I), the Court noted that the record was replete with accounts of discrimination by the states in providing public services (the focus of Title II).[29] Finally, despite the apparent clarity of the *Garrett* opinion,[30] the circuit courts have struggled to reach a consensus on how best to deal with the Eleventh Amendment issue under the special circumstances of Title II.[31] The fact that several circuits have concluded that Congress validly abrogated the states' immunity under Title II after the *Garrett* decision was handed down strongly suggests that the opinion was not as definitive on this issue as it may have appeared at first glance.

These considerations support the conclusion that the distinctive characteristics of Title II may cause the Court to veer from its firmly rooted precedent when it addresses the immunity question. Despite its recent history in the area of Eleventh Amendment jurisprudence,

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parties briefed the Eleventh Amendment issue for both Title I and Title II, the Court deferred judgment on Title II because neither party discussed whether Title II was available for claims of employment discrimination, which was the focus of the plaintiff's claim. *Id.*

27. Brief for the United States at 9, *Hason*, (No. 02-479).

28. *See Garrett*, 531 U.S. at 371 n.7.

> Only a small fraction of the anecdotes Justice Breyer identifies in his Appendix C relate to state discrimination against the disabled in employment. At most, somewhere around 50 of these allegations describe conduct that could conceivably amount to constitutional violations by the States, and most of them are so general and brief that no firm conclusion can be drawn. The overwhelming majority of these accounts pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA.

Id.

29. *Id.*; Brief of Respondent at 17, *Hason*, (No. 02-479).

30. *See* Kiman v. N.H. Dep't of Corr., 301 F.3d 13, 26 (1st Cir. 2002) (Torruella, J., dissenting).

31. *Compare Kiman*, 301 F.3d at 20 ("We conclude that the concerns that justify facial challenges are not present in this area of the law, and we view this case as a challenge to Title II as applied."), *with* Wessel v. Glendening, 306 F.3d 203, 208 (4th Cir. 2002) (concluding that the abrogation analysis should consider the whole of Title II). *See also* Tanchyk, *supra* note 16, at 675 (noting that "the circuit courts of appeals that have addressed Title II are split with respect to [the] issue" of whether the statute "validly abrogates the states' Eleventh Amendment immunity").

the Supreme Court surprised many court watchers last May when it held that the states are subject to private lawsuits for damages under the Family Medical Leave Act ("FMLA") in *Nevada Department of Human Resources v. Hibbs*.[32] The *Hibbs* decision suggests that the Court may be more willing to allow the abrogation of state rights, particularly when more than rational basis scrutiny applies to the state's allegedly discriminatory actions.

This article proposes that the Court should evaluate the ADA's Title II damage remedy against the states differently than it did Title I's, and suggests that the Court should adopt an "as applied" analysis when deciding Title II damage remedy claims.[33] 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 state's action than the rational basis scrutiny that applied in *Garrett*. For example, in *Lane*, the fundamental right of access to the state court system has been denied to disabled plaintiffs in Tennessee because the courthouses are inaccessible to those who cannot walk up the stairs. Because the *Lane* case involves a fundamental right, the Court should apply strict scrutiny when evaluating Title II's congruence and proportionality. The result should be the same as in *Hibbs*—the *Lane* plaintiffs should be able to recover damages because Congress validly abrogated the

32. 123 S. Ct. 1972, 1976 (2003) (upholding abrogation under FMLA). In fact, the last time the Court held that Congress validly abrogated states' sovereign immunity prior to *Hibbs* was in 1976 in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457 (1976) (ruling that Congress had the power under the 1972 Amendments to Title VII of the Civil Rights Act of 1964 to authorize federal courts to award backpay against a state in order to enforce the substantive guarantees of the Fourteenth Amendment). *Fitzpatrick* has been called the "high-water mark of the expansion of exceptions" to the Eleventh Amendment. Michael E. Solimine, *Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment*, 101 MICH. L. REV. 1463, 1467 (2003). The only other time the Court arguably found valid abrogation was in *Hutto v. Finney*. 437 U.S. 678, 693-94 (1978) (relying on *Fitzpatrick* for the proposition that Congress intended to exercise the same power to authorize attorney's fees awards against the state under the Civil Rights Attorney's Fees Awards Act of 1976, but without conducting any further analysis on the issue).

33. Other scholars have noted the manner in which the Supreme Court has analyzed the recent Section 5 cases and have a variety of critiques. Some have concluded that an "as applied" approach would be preferable because it better respects the separation of powers concerns and is more in line with precedent and traditional norms of statutory interpretation. *See* Catherine Carroll, Note, *Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section 5 of the Fourteenth Amendment*, 101 MICH. L. REV. 1026 (2003) (critiquing the Supreme Court's implicit adoption of a "facial overbreadth" approach to reviewing challenges to legislation enacted pursuant to Congress' Section 5 power); *see also* Richard H. Fallon, Jr., *As Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000).

state's sovereign immunity. Analyzing the *Lane* case, and other Title II damages claims on the facts and with respect to the right that has allegedly been abridged is the appropriate federalism standard.[34]

Part II of this article highlights the unique qualities of Title II and the complex history of Eleventh Amendment jurisprudence in the area. Part III examines the Court's opinion in *Garrett* in more detail. Part IV analyzes the various opinions formulated by the circuit courts regarding abrogation of state sovereign immunity under Title II and the options available to the Court when it decides *Lane*. Part V describes the potential differences between *Garrett* and *Lane* and suggests how best to resolve the question of damages awards under Title II. Finally, Part VI concludes that an "as applied" approach could help support an abrogation finding if it also recognizes that many of the rights protected by Title II are fundamental constitutional rights. Part VI also concludes that jurisprudence and policy considerations strongly favor upholding Title II damage awards in *Lane v. Tennessee*.

II. THE ANALYTICAL FRAMEWORK

This section provides an overview of the relevant legal principles regarding the ADA and the Eleventh Amendment. In addition, this section provides an explanation of the relevant Eleventh Amendment cases leading up to the Court's decision in *Garrett* and sets forth the standards that are used by the Court to evaluate whether Congress validly abrogated a state's sovereign immunity through Section 5 of the Fourteenth Amendment.

A. *Title I v. Title II of the ADA*

Congress enacted the Americans with Disabilities Act[35] in 1990 with the purpose of establishing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[36] The statute is "a massive piece of legislation" consisting of five titles covering disability discrimination in both the private and public sectors.[37] This article focuses on

34. This article focuses on Title II of the ADA and the appropriate standard to apply to Congress' authority to remedy certain forms of discrimination against the disabled. It does not discuss whether this "as applied" standard should be applied to other legislation enacted pursuant to Section 5 of the Fourteenth Amendment.

35. 42 U.S.C. §§ 12101–12213 (2000).

36. *Id.* § 12101(b)(1).

37. Tanchyk, *supra* note 16, at 678. Title I covers disability discrimination in the workplace. *See* 42 U.S.C. §§ 12111–12117 (2000). Title II applies to public services. *Id.* §§ 12131–12165. Title III relates to public accommodations

Titles I and II. Title I addresses discrimination against individuals with disabilities in the employment setting,[38] and Title II prohibits disability discrimination by a state or local government in the granting of services, programs, or activities,[39] such as social service programs, educational programs, public transportation, judicial proceedings, or the political process itself.[40]

Several key distinctions exist between the two provisions. For instance, Title I applies to both the private and public sectors,[41] but Title II applies solely to state and local governments and their agencies.[42] Further, while Title I's reach is limited strictly to employment decisions, the coverage of Title II is much broader[43] and applies to discrimination in all public places and public services against all disabled people, not just disabled applicants and employees. Significantly, Title II applies to the very broad category of all "services, programs, or activities of a public entity."[44] Its scope extends not only to areas such as licensing and zoning, but also to

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such as hotels and restaurants. *Id.* §§ 12181–12189. Title IV deals with telecommunications services for hearing- and speech-impaired individuals. 47 U.S.C. §§ 225, 611 (2000). Finally, Title V contains miscellaneous provisions, including § 12202, which abrogates state immunity. 42 U.S.C. §§ 12201–12213 (2000).

38. 42 U.S.C. § 12112(a) (2000). The statute reads: "No covered entity shall discriminate against a 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." *Id.* A "covered entity" is defined as "an employer, employment agency, labor organization, or joint labor-management committee." *Id.* § 12111(2).

39. 42 U.S.C. § 12132 (2000). The statute reads: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.* Title II also specifically focuses on defining and eliminating discrimination against disabled individuals in the public transportation context. *Id.* §§ 12141–12165.

40. *See* Wessel v. Glendening, 306 F.3d 203, 210 (4th Cir. 2002); Hason v. Med. Bd., 279 F.3d 1167, 1172-73 (9th Cir. 2002), *cert. granted,* 537 U.S. 1028 (2002), *cert. dismissed,* 123 S. Ct. 1779 (2003).

41. Richter, *supra* note 7, at 886.

42. 42 U.S.C. § 12131 (2000). For a brief discussion, see Brief for the United States at 8, Tennessee v. Lane, 123 S. Ct. 2622 (2003) (No. 02-1667) and Brief of Respondent at 3, Med. Bd. v. Hason, 537 U.S. 1028 (2002), *cert. dismissed,* 123 S. Ct. 1779 (2003) (No. 02-479).

43. Tanchyk, *supra* note 16, at 679; *see also* Popovich v. Cuyahoga County Ct. Com. Pl., 276 F.3d 808, 815 (6th Cir. 2002) (en banc), *cert. denied,* 537 U.S. 812 (2002) (holding that Title II recognizes damages for claims based on the Due Process Clause of the Fourteenth Amendment).

44. 42 U.S.C. §12132 (2000).

fundamental government functions like voting, education, and institutionalization.[45] Because of its breadth, Title II can be used to enforce various constitutional rights, such as the right to vote,[46] the right to be free from cruel and unusual punishment,[47] the right to be free from unjustified denial of physical liberty,[48] and the right to have access to judicial proceedings.[49] In sum, Title II exists to prevent discrimination that has "effectively created a second class of citizens who lack the full and equal opportunity to participate in civic life. Title II's general requirements are directly aimed at eliminating that second-class status."[50]

Because of this greater breadth of coverage under Title II, there exists more evidence in the congressional record of unconstitutional behavior by the states of the conduct prohibited by Title II. In fact, the Court in *Garrett* acknowledged that there are more examples of unconstitutional state conduct when it stated that "[t]he overwhelming majority of these accounts [referring to examples of discrimination in the congressional record] pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and

45. Brief for United States at 10-11, 21-35, *Lane*, (No. 02-1667); *see, e.g.*, Thomas *ex rel.* Thomas v. Davidson Acad., 846 F. Supp. 611, 620 (M.D. Tenn. 1994) (granting preliminary injunction prohibiting educational institution from expelling disabled student because she exercised her rights under the ADA).

46. *See, e.g.*, Doe v. Rowe, 156 F. Supp. 2d 35, 56-59 (D. Me. 2001) (holding that constitutional provision that prevented voting by mentally ill persons violated Title II as well as federal constitutional procedural due process and equal protection).

47. *See* Kiman v. N.H. Dep't of Corr., 301 F.3d 13, 24-25 (1st Cir. 2002) (holding that allegations concerning deliberate indifference by prison officials to unique health and safety concerns arising from plaintiff's disability were sufficient to state a violation of an established constitutional right such that plaintiff could proceed with his Title II damages claim).

48. *See, e.g.*, Olmstead v. Zimring, 527 U.S. 581, 600, 607 (1999) (holding that Title II of the ADA prohibits unjustified institutional isolation of mentally disabled individuals).

49. *See, e.g.*, Lane v. Tennessee, 315 F.3d 680, 683 (6th Cir. 2003), *cert. granted in part*, 123 S. Ct. 2622 (2003) (holding that two disabled individuals who had been denied access to courthouses in Tennessee could bring claims for damages under Title II); Popovich v. Cuyahoga County Ct. Com. Pl., 276 F.3d 808, 815 (6th Cir. 2002) (en banc), *cert. denied*, 537 U.S. 812 (2002) (finding for a hearing-impaired man in a Title II action against a state court that failed to provide adequate hearing assistance).

50. Brief for Private Respondents at 34, *Lane* (No. 02-1667); *see also* Brief of Respondent at 3, Med. Bd. v. Hason, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003) (No. 02-479) (arguing that Title II exists to "ensure that individuals with disabilities have access to their government in the same way as other citizens.").

III of the ADA."[51] The *Garrett* majority also quoted both the House and the Senate Committee hearings, which recited that discrimination was rampant in the areas of public services, transportation, and public accommodations, among others; areas covered by the ADA's Title II.[52]

An additional difference can be seen in the remedial schemes provided pursuant to Title I and Title II.[53] Indeed, the *Garrett* Court specifically declined to address Title II based in part on these remedial provisions,[54] suggesting that the different remedial basis for these two Titles may be important in the validity of the private remedy under Title II. Title II's remedial scheme incorporates the remedial scheme of the Rehabilitation Act of 1973.[55] The Rehabilitation Act, in turn, incorporates the remedies of Title VI of the Civil Rights Act of 1964. The remedial scheme of Title VI includes a judicially implied private cause of action,[56] which permits a court a certain amount of flexibility when fashioning a remedy.[57] Title I, on the other hand, incorporates the remedies found in Title VII of the Civil Rights Act of 1964, which has an explicit private right of action. Thus, the differences that the *Garrett* Court referred to in footnote one of its opinion may well be referring to the differences between implied and express remedies and the subsequent role of the court in interpreting the scope of that remedy.

B. A Brief Summary of Eleventh Amendment Doctrine

The key language of the Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend

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51. Bd. of Trs. v. Garrett, 531 U.S. 356, 371 n.7 (2001).

52. *Id.* at 371-72.

53. Specifically, Title I states in 42 U.S.C. § 12117(a) (2000):

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

Title II in 42 U.S.C. § 12133 (2000) states that "[t]he remedies, procedures, and rights set forth in section 794a of this title 29 [section 505 of the Rehabilitations Act of 1973] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this chapter."

54. *Garrett*, 531 U.S. at 360 n.1.

55. 29 U.S.C. § 794a (a)(2) (2000).

56. 42 U.S.C. §§ 2000d–2000d-7 (2000).

57. *See generally* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284 (1998).

to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ."[58] In literal terms, the Amendment seemingly applies strictly to suits in federal court against a state by citizens of another state.[59] Indeed, the Amendment came in direct response to an early Supreme Court case, *Chisholm v. Georgia*,[60] in which the Court extended federal jurisdiction to a suit between a South Carolina citizen and the State of Georgia.[61] But nearly a century after the passage of the Amendment, the Court in *Hans v. Louisiana*,[62] held that despite the plain language, the drafters did not intend to produce the anomalous result of subjecting a state to the suits of its own citizens in federal court when the state was protected from the suits of citizens of another state.[63] Thus, the *Hans* Court expanded the interpretation of the Amendment to include suits between a state and a citizen of that state.[64]

Following the broad ruling in *Hans*, several exceptions developed to counterbalance its expansive interpretation of the Eleventh Amendment.[65] One of the most important exceptions is

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58. U.S. CONST. amend. XI.

59. Hartley, *supra* note 5, at 44.

60. 2 U.S. (2 Dall.) 419 (1793).

61. *Id.* at 450. The result in *Chisholm* set off such a shock wave that the Eleventh Amendment was introduced to overrule the case only two days after the decision was rendered. RICHARD H. FALLON, JR. ET AL., HART & WESCHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1048 (4th ed. 1996).

62. 134 U.S. 1 (1890).

63. *Id.* at 10.

64. *Id.* at 21. For a succinct overview of the current status of Eleventh Amendment interpretation, see *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 779 (1991) (citations omitted), which explains:

> Despite the narrowness of its terms, since *Hans v. Louisiana*, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

65. A discussion of all the possible exceptions is outside the scope of this article; however, it is worth noting that state sovereign immunity in federal court does not extend to: (1) a suit against a state brought by another state, (2) suits brought by the United States against a state, (3) suits against political subdivisions, (4) private suits against a state brought in the state court of another state, (5) a suit for prospective injunctive relief against a state official, (6) suits in which the state consents to the action, and (7) suits in which Congress validly abrogates a state's judicial immunity. *See* FALLON ET AL., *supra* note 61, at 148-58 (Supp. 2002); *see also* Hartley, *supra* note 5, at 45. Even though federal claims brought against a state in that state's court were

Congress' authority to abrogate state immunity. Congress possesses the power to abolish the states' sovereign immunity "when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'"[66] Although at one point the Commerce Clause was an acceptable source of congressional authority to accomplish this end,[67] currently the only realistic path toward abrogation is through Section 5 of the Fourteenth Amendment.[68] In *Seminole Tribe of Florida v. Florida*,[69] the Court reaffirmed the principle established earlier in *Fitzpatrick v. Bitzer*[70]—that the Fourteenth Amendment "fundamentally altered" the constitutional balance of power between the states and the federal government and therefore necessarily infringed "upon the province of the Eleventh Amendment."[71] Thus, the critical issue in congressional abrogation cases has become the scope of the Section 5 power.[72]

Section 5 of the Fourteenth Amendment provides Congress with explicit authority to enforce the guarantees of Section 1 of the Fourteenth Amendment, namely equal protection and due process,

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long considered to be outside the reach of the sovereign immunity defense, in *Alden v. Maine*, 527 U.S. 706, 754 (1999), the Court held that states enjoy immunity from suit in their own courts. *See* FALLON ET AL., *supra* note 61, at 149 (Supp. 2002).

66. Bd. of Trs. v. Garrett, 531 U.S. 356, 363 (2001) (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000)). The question of whether Congress unequivocally intended to abrogate state sovereign immunity is not an issue with respect to the ADA. A provision in Title V of the ADA makes it clear that a claimant can pursue money damages against a state in federal court. *See* 42 U.S.C. § 12202 (2000). Therefore, the salient issue in cases involving the Eleventh Amendment and the ADA is whether Congress had the *authority* to validly abrogate judicial immunity.

67. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 (1989) (concluding that Congress' power to regulate commerce would be "incomplete without the authority to render States liable in damages"), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44, 65-66 (1996) (rejecting the notion set forth in *Union Gas* that Congress could expand the scope of the federal courts' jurisdiction through its Article I powers and dismissing *Union Gas* as a plurality decision based on incoherent reasoning).

68. Hartley, *supra* note 5, at 45. Other post-Eleventh Amendment constitutional amendments should work to abrogate state sovereign immunity as well, for example, the Thirteenth, Fifteenth, and Nineteenth Amendment. The problem with using those amendments is that they have a limited subject matter scope.

69. 517 U.S. 44 (1996). Subsequent to *Seminole Tribe*, the Supreme Court held that the Eleventh Amendment barred Congress from using the Commerce Clause to authorize suits against states in state court. *See* Alden v. Maine, 527 U.S. 706 (1999).

70. 427 U.S. 445 (1976).

71. *Seminole Tribe*, 517 U.S. at 59.

72. FALLON ET AL., *supra* note 61, at 150-51 (Supp. 2002).

and to enact legislation specifically addressing conduct that violates that amendment.[73] Congress may do so both by prescribing sanctions for actual constitutional violations, and by prohibiting otherwise constitutional conduct as a means to prevent unconstitutional behavior.[74] Under its Section 5 power, Congress may authorize private individuals to bring lawsuits against the states themselves, including suits that seek damages.[75] Congress cited Section 5 specifically in enacting the ADA and expressly stated the ADA was intended to abrogate the states' sovereign immunity.[76]

Not long after the Court restricted Congress' ability to abrogate state immunity in *Seminole Tribe*, the Court also began to confine Congress in other ways.[77] In *City of Boerne v. Flores*,[78] a case that did not involve the Eleventh Amendment, the Court held that although Congress has remedial powers under Section 5 to enforce the provisions of Section 1 of the Fourteenth Amendment, those powers do not include the ability to alter substantive constitutional rights.[79] Accordingly, because congressional action under Section 5

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73. U.S. CONST. amend. XIV, § 5.

74. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000) (holding that Section 5 legislation is not limited to prohibiting and remedying clearly unconstitutional conduct). The Court has said that Congress may enact "reasonably prophylactic legislation" when faced with "[d]ifficult and intractable problems, [which] often require powerful remedies." *Id.* The extent of Congress' authority under Section 5 continues to cause controversy, and the Court has failed to provide clear guidelines as to the extent of Congress' power under this Section, particularly with regard to conduct that is in itself not unconstitutional. *See* Oregon v. Mitchell, 400 U.S. 112, 134-35 (1970) (adopting a narrower interpretation of Congress' power under Section 5 by asking whether there existed a sufficiently close relationship between the constitutional violations that were the basis of the statute and the remedies created by Congress); Katzenbach v. Morgan, 384 U.S. 641, 657-58 (1966) (upholding a federal ban on literacy tests, even though the Court had previously held that literacy tests did not violate the Fourteenth Amendment).

75. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 364 (2001); *Kimel*, 528 U.S. at 80.

76. 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 [a] Federal or State court of competent jurisdiction for a violation of this Act.").

77. Professor Hartley argues that the restrictions in the areas of the Eleventh Amendment and Section 5 of the Fourteenth Amendment reflect the current Court's efforts to undergo a "federalism revival." Hartley, *supra* note 5, at 42-43.

78. 521 U.S. 507, 532 (1997) (holding unconstitutional the Religious Freedom Restoration Act ("RFRA") that required that state laws restricting religious practices meet a "compelling interest" test).

79. *Id.* at 519. In *City of Boerne*, the Court found that in enacting RFRA Congress had failed to do its job as the Act's remedies were "so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as

often includes "a somewhat broader swath of conduct"[80] than what is proscribed by Section 1, legislation enacted pursuant to Section 5 must demonstrate a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[81]

In *City of Boerne* as well as in each of the five cases addressing Congress' Section 5 powers following it, the Court declared that the federal statute in question failed to meet the congruence and proportionality test.[82] Although these cases have created "considerable uncertainty" regarding the standards of the test,[83] some patterns have emerged that demonstrate the guiding factors in the Court's analysis. First, the Court will "identify with some precision the scope of the constitutional right at issue."[84] If the statute in question forbids conduct that is constitutional under the Fourteenth Amendment, then the Court is less likely to find the legislation "congruent."[85] Next, based on the "metes and bounds of the constitutional right in question," the Court will "examine whether Congress identified a history and pattern of unconstitutional" conduct by the states.[86] In order for Congress to

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responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532.

80. *Kimel*, 528 U.S at 81.

81. *City of Boerne*, 521 U.S. at 520. In essence, the issue is one of overbreadth. Hartley, *supra* note 5, at 46-47. Because legislation enacted under Section 5 always covers conduct beyond what is proscribed by Section 1, the Court in *City of Boerne*, through its "congruence and proportionality" language, created a standard to prevent such legislative action from intruding on the Court's authority to "decree the substance of the Fourteenth Amendment's restrictions on the States." *City of Boerne*, 521 U.S. at 519.

82. Hartley, *supra* note 5, at 47; *see, e.g.*, Fed. Mar. Comm'n v. S.C. State Port Auth., 535 U.S. 743, 769 (2002) (extending principle of sovereign immunity to bar suits against state entities before federal administrative agencies); Bd. of Trs. v. Garrett, 531 U.S. 356, 374 (2001) (holding that the federal ADA is not appropriate legislation under Section 5 of the Fourteenth Amendment and is not enforceable as against a state); *Kimel*, 528 U.S. at 91-92 (holding that the federal ADEA is not appropriate legislation under Section 5 of the Fourteenth Amendment and is not enforceable as against a state); Alden v. Maine, 527 U.S. 706, 759-60 (1999) (extending principle of sovereign immunity to bar suits brought in state court); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (holding trademark law was not appropriate legislation under Section 5 of the Fourteenth Amendment and was unenforceable against a state); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646-47 (1999) (holding patent law was passed pursuant to the Commerce Clause and was unenforceable as against a state).

83. Hartley, *supra* note 5, at 47.

84. *Garrett*, 531 U.S. at 365.

85. Hartley, *supra* note 5, at 47.

86. *Garrett*, 531 U.S. at 368 (citing Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999)). *Florida Prepaid*

exercise its Section 5 authority appropriately, the legislative record must show that the prohibitions are "proportional" to the targeted constitutional violation.[87] Finally, in light of the conclusions made regarding the first two parts of the analysis, the Court will determine whether the federal statute in question is a "congruent and proportional response to actual and threatened violations of the Fourteenth Amendment."[88]

III. THE SUPREME COURT'S DECISION IN *GARRETT*

The Court's reasoning in *Garrett* will certainly play an influential role in subsequent Eleventh Amendment cases, particularly those that apply to other titles of the ADA. Therefore, a detailed understanding of *Garrett* is critical to examining how the Court might resolve the issue of whether the Eleventh Amendment applies to Title II of the ADA.

A. *The Majority Opinion*[89]

The plaintiffs in *Garrett* were two employees who worked for the State of Alabama.[90] One plaintiff was Patricia Garrett, a registered nurse who was the Director of OB/Gyn/Neonatal Nursing at the University of Alabama at Birmingham Hospital.[91] Ms. Garrett underwent a rigorous course of treatment for breast cancer that required her to take a long leave of absence from her job.[92] When she returned to work, her supervisor informed her that she would no longer hold a managerial position.[93] Consequently, Ms. Garrett was

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suggested for the first time the importance the Court placed on the adequacy of the historical record of state violations relied on to justify the congressionally prescribed remedy. 527 U.S. at 647; *see also Kimel*, 528 U.S. at 91 (reviewing the congressional record that led to the enactment of the ADEA and concluding that Congress had not identified a pattern of age discrimination that constituted constitutional violations and stating that "Congress had no reason to believe that broad prophylactic legislation was necessary in this field").

87. *Garrett*, 531 U.S. at 364-65.

88. Brief for Private Respondents at 8, Tennessee v. Lane, 123 S. Ct. 2622 (2003) (No. 02-1667) (citing City of Boerne v. Flores, 521 U.S. 507, 520 (1997)); *see also* Brief of Respondent, at 5, Med. Bd. v. Hason, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003) (No. 02-479) (quoting *Garrett*, 531 U.S. at 374).

89. *Garrett* was a 5-4 decision. The majority was composed of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Kennedy wrote a concurring opinion in which Justice O'Connor joined. *Garrett*, 531 U.S. at 358-59.

90. *Id.* at 362.

91. *Id.*

92. *Id.*

93. *Id.*

forced to take a lower paying position as a nurse manager.[94]

The other plaintiff was Milton Ash, a former security officer for the Alabama Department of Youth Services ("the Department").[95] Ash suffered from chronic asthma and sleep apnea, and based on his doctor's recommendation, he requested that the Department accommodate his condition.[96] The Department, however, refused to grant his requests and allegedly started giving Ash poor performance evaluations as retribution.[97]

Garrett and Ash filed separate lawsuits under Title I of the ADA in the United States District Court for the Northern District of Alabama, and in both cases the State sought summary judgment on the ground that Congress had not abolished its Eleventh Amendment shield.[98] The court disposed of the cases in a single opinion granting summary judgment to the State.[99] The cases were consolidated on appeal to the Eleventh Circuit, which reversed the District Court's ruling.[100] The Supreme Court then granted certiorari to resolve a split among the circuit courts regarding the issue of "whether an individual may sue a state for money damages in federal court under the ADA."[101] After setting forth the relevant Eleventh Amendment doctrine, the Court focused its attention on the three-part "congruence and proportionality" test discussed above to determine whether Congress in Title I of the ADA had abrogated states' judicial immunity pursuant to a valid grant of constitutional authority.[102] The Court's analysis relating to each prong of the test is laid out below.

1. The Constitutional Right at Issue

The Court's first step was to define the exact nature of the constitutional right at issue so that it could identify the extent that Section 1 of the Fourteenth Amendment limited states' treatment of the disabled.[103] The Court held that the constitutional right addressed in Title I is freedom from unconstitutional employment discrimination against people with disabilities.[104] The Court looked to an earlier decision, *City of Cleburne v. Cleburne Living Center*,

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 362-63.
100. *Id.* at 363.
101. *Id.*
102. *Id.* 364-72.
103. *Id.* at 365.
104. *Id.* at 365-68.

Inc.,[105] in which the Court held that legislation regulating mentally retarded persons was subject to rational basis review, i.e., if there is some plausible legitimate basis for the discrimination.[106] In its opinion, the *Cleburne* Court noted that disabled persons, like the mentally retarded, were also a poor fit for quasi-suspect classification.[107] Relying on this determination, the *Garrett* Court concluded that the Fourteenth Amendment did not require the states "to make special accommodations for the disabled, so long as

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105. 473 U.S. 432 (1985). In *Cleburne*, the Supreme Court applied what is sometimes called a "rational with teeth" standard of review, striking down a zoning ordinance that required a special use permit for a group home for the mentally retarded because the discriminatory actions of the state were based on negative attitudes and fears. *Id.* at 448-50. Despite the favorable outcome for the people with disabilities in *Cleburne*, the rule that the *Cleburne* case established is that laws discriminating on the basis of disability are subject only to rational basis review, and the Court has since interpreted the *Cleburne* case very narrowly. In a vigorous dissent, Justice Marshall, joined by Justices Brennan and Blackmun, argued:

> In light of the importance of the interest at stake and the history of discrimination the retarded have suffered, the Equal Protection Clause requires [the Court] to do more than review the distinctions drawn by Cleburne's zoning ordinance as if they appeared in a taxing statute or in economic or commercial legislation.

Id. at 464 (Marshall, J., dissenting). He further argued, "How this large and diversified group [the mentally disabled] is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary." *Id.* at 442-43.

106. *Id.* at 446. The rational basis standard of review is much less demanding than the standards applied to classifications based on race or gender. *See* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1974 (2003) (reaffirming that statutory classifications that distinguish between males and females are subject to heightened scrutiny); United States v. Virginia, 518 U.S. 515, 532-33 (1996) (holding that states must provide an "exceedingly persuasive" justification for any gender-based classifications); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (holding that any racial classification is subject to strict scrutiny); *Cleburne*, 473 U.S. at 446 (holding that any disability classification is subject to rational basis review).

107. *Cleburne*, 473 U.S. at 445-46. Justice White, writing for the *Cleburne* Court, explained:

> [I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

Id.

their actions toward such individuals [were] rational."[108]

2. An Examination of the Legislative Record of the ADA

Having determined that rational basis review applied to legislation regarding disabled persons, the Court examined the legislative record of the ADA to ascertain whether Congress successfully identified "a pattern of irrational state discrimination in employment against the disabled."[109] The Court declined to answer this question in the affirmative.[110] Although the Court acknowledged that Congress made "general finding[s]" about the history of isolation and segregation of individuals with disabilities, it observed that most of the findings did not pertain to actions by the states.[111] The Court further noted that many alleged examples of discrimination against the disabled identified in the congressional record were actions that could be supported by some rational basis such as a need to save resources.[112] "In particular," the Court found that "the refusal to provide a reasonable accommodation" in the employment context "did not constitute a constitutional violation."[113]

The majority in *Garrett* limited its inquiry under this prong of the analysis in two significant ways. The first was that it refused to evaluate evidence of unconstitutional discrimination by local governments.[114] In *Lincoln County v. Luning*,[115] the Court held that

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108. *Garrett*, 531 U.S. at 367 ("[T]he 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."). Applying a higher standard of review triggers a more deferential analysis by the Supreme Court. *See Hibbs*, 123 S. Ct. at 1974 (upholding the FMLA's damage remedy based partially on the fact that the FMLA triggered heightened scrutiny because it was designed to protect the right to be free from gender-based discrimination in the workplace).

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

110. *Id.*

111. *Id.* at 369. For a critique of the Supreme Court's current stringent requirement for precise findings concerning discrimination by the states, see Post & Siegel, *supra* note 15, at 478 (pointing out that, contrary to the Court's assertion in *Garrett*, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court upheld a nationwide prohibition on literacy tests despite the absence of state by state findings); *see also* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 623 (1999); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 151.

112. NATIONAL COUNCIL ON DISABILITY, *TENNESSEE V. LANE*: THE LEGAL ISSUES AND THE IMPLICATIONS FOR PEOPLE WITH DISABILITIES (2003), *available at* http://www.ncd.gov/newsroom/publications/legalissues.html (last visited Feb. 10, 2004).

113. *Id.*

114. *Garrett*, 531 U.S. at 368-69.

115. 133 U.S. 529 (1890).

Eleventh Amendment immunity does not extend to political subdivisions.[116] Based on this long-established rule, the Court in *Garrett* reasoned that "[i]t would make no sense to consider constitutional violations on their part" when immunity does not reach units of local government.[117]

The second major limitation the Court imposed on this aspect of the analysis was that it discounted evidence of disability discrimination by the states that was included in a report compiled by a congressional task force.[118] Chief Justice Rehnquist, who authored the opinion, argued that the report could not constitute legislative findings because it was not submitted directly to Congress.[119] Further, Chief Justice Rehnquist noted that none of the findings contained in the report related to state discrimination in the area of employment.[120] Rather, the bulk of the accounts of alleged state disability discrimination fell under the headings of public services and public accommodations.[121]

3. The ADA's Congruence and Proportionality to the Targeted Violation

In the final step of the analysis, the Court concluded that even if a pattern of unconstitutional conduct by the states existed, the rights and remedies of the ADA could not be viewed as congruent and proportional to the targeted violation.[122] Specifically, the Court cited the duty of an employer to make "reasonable accommodations"[123] for disabled employees as an example of how the statute compels action that is beyond what is constitutionally required.[124] In the Court's eyes, it was wholly rational for state

116. *Id.* at 530.

117. *Garrett*, 531 U.S. at 369. In reaching this conclusion, the Court rejected the respondents' argument that legislative findings on disability discrimination by local governments were relevant because they are considered "state actors" for purposes of Fourteenth Amendment analysis. *Id.* at 368-69.

118. *Id.* at 370-71. The name of the task force was the Task Force on the Rights and Empowerment of Americans with Disabilities. *Id.*

119. *Id.*

120. *Id.* at 371.

121. *Id.* at 371 n.7.

122. *Id.* at 372.

123. *See* 42 U.S.C. § 12112(b)(5)(A) (2000) (defining the term "discriminate" to include the failure to make "reasonable accommodations" of "an otherwise qualified individual with a disability" unless the accommodation would impose "an undue hardship" on the employer).

124. *Garrett*, 531 U.S. at 372 ("[T]he 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.").

employers to hire employees who could use existing facilities; therefore, the employers were not constitutionally obligated to do anything more.[125]

B. *Justice Breyer's Dissent*[126]

Justice Breyer did not dispute the majority's determination that the Fourteenth Amendment may be limited in this instance to rational treatment, so that Section 5 power cannot require or enforce a right that goes substantially beyond rational treatment.[127] Instead, his primary objection was with the majority's analysis regarding the legislative record.[128] According to Justice Breyer, Congress amassed an extensive record of "arbitrary or invidious" treatment of disabled persons.[129] In Justice Breyer's opinion, evidence of discrimination by local governments was relevant because those entities are often indistinguishable from state governments.[130] Additionally, Justice Breyer gave substantially greater weight to the findings of the congressional task force.[131] When viewed in this light, the legislative record, in the estimation of Justice Breyer, provided more than sufficient evidence "of a widespread problem of unconstitutional discrimination" (*i.e.*, irrational treatment of the disabled that Congress has power to remedy via Section 5 powers).[132]

IV. *GARRETT*'S EFFECT ON TITLE II CASES INVOLVING THE ELEVENTH AMENDMENT

Despite the *Garrett* Court's definitive handling of the Eleventh Amendment issue under Title I, the circuit courts have varied

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125. *Id.*

126. The four dissenters were Justices Breyer, Stevens, Souter, and Ginsburg. *Id.* at 376.

127. *Id.* at 377 (Breyer, J., dissenting).

128. *See id.* at 377-85 (Breyer, J., dissenting).

129. *Id.* at 381 (Breyer, J., dissenting). Justice Breyer's dissent included a lengthy appendix listing examples of discriminatory state laws and actions. The *Garrett* majority, however, rejected Justice Breyer's appendix as evidence of a pattern of unconstitutional state discrimination in employment because the appendix "consists not of legislative findings, but of unexamined, anecdotal accounts of 'adverse, disparate treatment by state officials' . . . [and] 'adverse, disparate treatment' often does not amount to a constitutional violation where rational-basis scrutiny applies." *Id.* at 370 (citations omitted).

130. *Id.* at 378 (Breyer, J., dissenting).

131. *Id.* at 377 (Breyer, J., dissenting) (arguing that the "vast legislative record documenting 'massive, society-wide discrimination'" has been parsed in such a way that the majority says demonstrate only a few "unexamined, anecdotal accounts" of discriminatory behavior against the disabled).

132. *Id.* at 382 (Breyer, J., dissenting).

greatly in their application of *Garrett* to cases brought under Title II. Although a majority of circuits closely follow the *Garrett* analysis, several others have navigated around its restrictive principles to recognize a damages remedy under Title II. The differing rulings concerning whether Title II properly abrogates a state's sovereign immunity result from disputes about how to apply *Garrett*'s complex three-step abrogation analysis and the broad scope of Title II.[133] These two factors have led to disagreement concerning whether the determination of Congress' power to abrogate immunity should be made for Title II "overall," i.e., a facial review of the statute, or only for certain types of applications of Title II, i.e., an "as applied" review of the statute. This section outlines the broad range of circuit court opinions rendered post-*Garrett* that address how the Eleventh Amendment pertains to Title II.

A. *Circuits Following the* Garrett *Reasoning*

Since *Garrett*, the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits have struck down abrogation under Title II as an unconstitutional use of Section 5 enforcement power.[134] Recently, in

133. *Id.*; 531 U.S. at 375 (Kennedy, J., concurring) ("[P]ersons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will."); Post & Siegel, *supra* note 15, at 467. In contrast to Title I, Title II addresses state conduct that impinges on fundamental constitutional rights embodied in the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments. In such a case, a higher level of scrutiny should apply. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (holding that right to vote can be restricted only when purpose of restriction and overriding interests served thereby meet close constitutional scrutiny); Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971) (holding that due process requires state to provide meaningful access to courts absent showing of countervailing state interest of overriding significance); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."). Because state employment is not a fundamental right in evaluating evidence of unconstitutional state action supporting abrogation under Title I, the *Garrett* Court was able to consider only the limitations placed on state conditions concerning people with disabilities by the Equal Protection Clause.

134. *See* Wessel v. Glendening, 306 F.3d 203, 215 (4th Cir. 2002); Reickenbacker v. Foster, 274 F.3d 974, 983-84 (5th Cir. 2001); Thompson v. Colorado, 278 F.3d 1020, 1027, 1034 (10th Cir. 2001) (noting that *Garrett* was "clearly instrumental in informing this court's analysis"), *cert. denied*, 535 U.S. 1077 (2002); Randolph v. Rodgers, 253 F.3d 342, 345 n.4 (8th Cir. 2001); Walker v. Snyder, 213 F.3d 344, 346-47 (7th Cir. 2000), *cert. denied*, United States v. Snyder, 531 U.S. 1190 (2001).

Wessel v. Glendening[135] the Fourth Circuit adopted much of the *Garrett* Court's analysis in holding that the Eleventh Amendment prevented a disabled prison inmate from bringing suit under Title II of the ADA.[136] In applying the *Garrett* analysis to Title II, the court, however, made two significant determinations. The first was that the scope of its abrogation inquiry was not limited to a particular application of Title II such as disability discrimination in state prisons.[137] Because the plaintiff's claim arose under Title II itself as opposed to any specific regulation, the court concluded that there was "no narrower constitutional question to address."[138] The second key point the *Wessel* court made was that even considering the legislative record of the ADA as Justice Breyer saw it, few of the alleged instances of discrimination involved conduct by the states or rose to the level of a constitutional violation.[139] Accordingly, the Fourth Circuit held that Congress failed to compile an adequate record of unconstitutional discrimination by states against disabled persons.[140] The *Wessel* court concluded that Congress had acted on the basis of an inadequate record and had imposed a remedy, the duty to accommodate, that was not congruent or proportional to the identified constitutional violation.[141]

In *Thompson v. Colorado,* the Tenth Circuit held that Title II of the ADA was not a valid abrogation of state immunity.[142] There, the court illustrated three types of unconstitutional state discrimination against the disabled: First, facial distinctions between the disabled and nondisabled are unconstitutional unless rationally related to a legitimate state interest; second, invidious state action against the disabled is unconstitutional, even if facially neutral toward the

135. 306 F.3d 203 (4th Cir. 2002).

136. *Id.* at 215. The inmate claimed that he was unable to earn good conduct credits by participating in institutional work due to his disability. *Id.* at 206.

137. *Id.* at 207-08.

138. *Id.* at 208.

139. *Id.* at 212. On this latter point, Judge Wilkins writing for the court, posited that "it is not necessarily irrational for a state to require disabled voters to submit absentee ballots rather than going to the expense of retrofitting or relocating an established polling place." *Id.*

140. *Id.* at 214 (finding that Title II imposed a duty to accommodate that exceeded constitutional requirements, in that "it makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an undue burden upon the employer").

141. *Id.* at 215; *see also* Thompson v. Colorado, 278 F. 3d 1020, 1034 (10th Cir. 2001) (agreeing that the congressional record for Title II was inadequate such that the remedial legislation was "congruent and proportional" to a constitutional violation).

142. *Thompson,* 278 F.3d at 1034.

disabled (such as neutral statutory language); and finally, in certain limited circumstances (referring to the Due Process Clause's incorporation of the Bill of Rights) such as those involving voting rights and prison conditions, states are required to make at least some accommodations for the disabled.[143] As in *Garrett*, the Tenth Circuit rejected the sufficiency of the congressional record because it lacked sufficient examples of these three types of unconstitutional discrimination.[144] The court found that without this evidentiary foundation, Title II is not preventative or remedial legislation congruent and proportional to the constitutional violation.

Likewise, the Fifth, Seventh, Eighth, and Tenth Circuits have focused on what they have concluded is an inadequate legislative record when applying *Garrett*'s analysis to Title II. The Fifth Circuit in *Reickenbacker v. Foster*, an opinion upholding the state's immunity, concluded that a large portion of the ADA's legislative findings described discrimination by localities rather than state governments.[145] Furthermore, the *Reickenbacker* court agreed with the findings of the Tenth Circuit in *Thompson*, which found that "[a]pathetic attitudes and refusals to make accommodations do not usually violate the Fourteenth Amendment."[146] The Seventh Circuit in *Walker v. Snyder*[147] and the Eighth Circuit in *Randolph v. Rogers*[148] also held abrogation invalid under Title II on similar grounds. All these courts appeared to strike down the damages remedy for all applications of Title II.[149]

B. The Ninth Circuit's Ruling That Garrett *Does Not Apply to Title II*

Only one circuit has rejected the application of *Garrett* to Eleventh Amendment cases outright—the Ninth Circuit in *Hason v.*

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143. *Id.* at 1032.

144. *Id.* at 1034.

145. 274 F.3d 974, 982 (5th Cir. 2001).

146. *Id.* (quoting Thompson v. Colorado, 258 F.3d 1241, 1255 (10th Cir. 2001), *amended by* 278 F.3d 1020, *cert. denied,* 535 U.S. 1077 (2002)).

147. 213 F.3d 344, 346-47 (7th Cir. 2000) (striking down district court's awarding of damages under Title II to prisoner with poor vision against the state for its failure to accommodate his condition through providing books on tape, a brightly lit cell to himself, and transfer to a less restrictive prison; court based holding in lack of jurisdiction under the Eleventh Amendment).

148. 253 F.3d 342, 349 (8th Cir. 2001) (affirming lower court's holding that failure to provide deaf inmate with a sign language interpreter under Title II could not mandate damage awards since there was no valid abrogation in ADA to satisfy the Eleventh Amendment).

149. *See, e.g.*, *Thompson*, 278 F.3d at 1027-28 n.4 (holding that it is appropriate to "conduct the abrogation analysis by considering Title II in its entirety").

Medical Board of California.[150] In *Hason*, the Medical Board of California denied a doctor's application for a medical license because he suffered from a mental illness.[151] In considering whether the Eleventh Amendment barred the doctor's claims for damages under Title II of the ADA, the court ruled that Congress had validly abrogated states' sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.[152] The court's reasoning was simple: The Ninth Circuit had twice before reached the conclusion that Title II abrogated states' sovereign immunity,[153] and *Garrett*, by its express terms, did nothing to change that.[154] This was the extent of the court's attempt to analytically distinguish *Garrett*. Because the *Garrett* Court made it clear that its decision applied only to Title I,[155] the Ninth Circuit did not even see fit to apply the *Garrett* analysis under Title II. Thus, the Ninth Circuit seems to have taken the position that the Title II damage remedy is enforceable whenever any Title II violation exists.

C. Limiting or "As Applied" Approaches: Title II Abrogates Immunity Sometimes

Three circuits have carved out limited exceptions to the *Garrett* rule and upheld abrogation under Title II for certain violations. These courts recognize that Title II presents different issues from those raised by Title I. Most notably, as mentioned above, these courts have stated that many applications of Title II simply enforce recognized constitutional protections and thus do not go beyond constitutional requirements when awarding damages.

The First Circuit addressed the applicability of *Garrett* to Title II in *Kiman v. New Hampshire Department of Corrections*.[156] The plaintiff, Matthew Kiman, was a prisoner who suffered from amyotrophic lateral sclerosis, or Lou Gehrig's disease.[157] In a suit under Title II of the ADA, he claimed that employees of the state

150. 279 F.3d 1167 (9th Cir. 2002), *cert. granted*, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003).

151. *Id.* at 1170.

152. *Id.*

153. *See* Dare v. California, 191 F.3d 1167, 1175 (9th Cir. 1999); Clark v. California, 123 F.3d 1267, 1270-71 (9th Cir. 1997).

154. *Hason*, 279 F.3d at 1170-71.

155. *Id.* at 1171 (citing Bd. of Trs. v. Garrett, 531 U.S. 356, 360 n.1 (2001)).

156. 301 F.3d 13 (1st Cir. 2002), *vacated*, 310 F.3d 785 (1st Cir. 2002). An equally divided full court reinstated the district court opinion, dismissing the complaint. 332 F.3d 29 (1st Cir. 2003). The court held that the plaintiff did not need to prove the alleged constitutional violation before proceeding with the suit. *Kiman*, 301 F.3d at 24-25.

157. *Kiman*, 301 F.3d at 14-15.

corrections department denied his requests for accommodations for his disability.[158] The First Circuit held that the Eleventh Amendment did not bar Kiman's action because Congress had the power to subject states to private suit under Title II when that provision applied to enforce established constitutional violations, in this instance the Eighth Amendment prohibition of cruel and unusual punishment.[159] Finding that Kiman's Title II claim was merely enforcing an existing constitutional right, the court stated that it had no need to examine the ADA's legislative record because such a review is only necessary when Congress creates a remedy against the states that imposes obligations beyond constitutional requirements, not when Congress acts to enforce the Constitution.[160]

Central to the court's reasoning was the determination that due to the broad coverage of Title II, the separate applications of the statute should be viewed "as applied" as distinct from a facial challenge of the entire statute.[161] Because the court was able to restrict its scope of review to constitutional violations by the states, it did not have to consider the congruence and proportionality test, which accounts for congressional action that reaches beyond the boundaries of the guarantees in Section 1 of the Fourteenth Amendment.[162] In the end, the court concluded that Kiman had alleged sufficient facts to establish a constitutional violation under the Eighth Amendment so he was permitted to proceed with his suit against the state.[163]

The First Circuit held that "Congress acted within its power in subjecting the states to private suit under Title II of the ADA, at least as that Title is applied to cases in which a court identifies a constitutional violation by the state."[164] Yet, the court distinguished its holding from *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn,*[165] because in that court's opinion, the Second Circuit had allowed wider latitude in some situations which may not be constitutional violations by the states. The First Circuit narrowly construed the validity of Title II to situations where the court

158. *Id* at 15.

159. *Id.* at 24.

160. *Id.* at 22-23. *See, e.g.*, New York v. County of Delaware, No. 99-CV-1872, 2000 WL 1264302, at *1 (N.D.N.Y. Aug. 16, 2000) (ordering that the ADA required improved access for disabled individuals where evidence showed that in two New York counties all polling places but one were inaccessible to the disabled).

161. *Kiman*, 301 F.3d at 20.

162. *Id.* at 19-20, 23.

163. *Id.* at 24-25.

164. *Id.* at 24.

165. 280 F.3d 98 (2d Cir. 2001).

specifically identifies unconstitutional behavior by the state.[166]

In *Garcia v. S.U.N.Y. Health Sciences Center*, the Second Circuit held that a plaintiff could recover money damages under Title II in a private action against a state if she successfully demonstrated evidence of "discriminatory animus or ill will."[167] In a cryptic opinion, the court agreed with the majority of other courts that Congress does not have the authority to abrogate state sovereign immunity under Title II.[168] The court then considered the differences in the remedial schemes provided under Title I and Title II of the ADA and found that the difference in the nature of the private right of action under Title I and Title II to be determinative.[169] Title II has an implied private right of action by virtue of its incorporation of Title VI's remedial scheme.[170] The court noted that when dealing with an implied right of action, courts are free to "shape a sensible remedial scheme that best comports with the statute."[171] Given a court's flexibility in fashioning a remedy for an implied right of action, the Second Circuit concluded that it could "restrict the availability of Title II monetary suits against the states in a manner that is consistent with Congress's § 5 authority, and . . . thereby validly abrogate[ ] state sovereign immunity from private monetary suits under Title II."[172] To accomplish this limitation, the court held that private damage suits must be limited to situations

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166. For a critique of this state specific requirement, see Susan Bandes, *Fear and Degradation in Alabama: The Emotional Subtext of* University of Alabama v. Garrett, 5 U. PA. J. CONST. L. 520 (2003).

> The congruence and proportionality requirement raises the possibility that Congress will need to show, not only that the remedy is directed toward a nationwide problem, but that every state, or at least a majority of states, contributed to that problem, a standard that no current Section 5 legislation is likely to meet . . . . [C]onsequences of such a requirement, which would deny Congress the benefits of nationwide application, are not hard to predict.

Id. at 530-31.

167. *Garcia*, 280 F.3d. at 111.

168. *Id.* at 110.

169. *Id.* at 110-11.

170. *Id.* The enforcement provision for Title II incorporates the remedial scheme of the Rehabilitation Act of 1973. 42 U.S.C. § 12133 (2000) (defining the rights and remedies of Title II to be the same as those set forth in 29 U.S.C. § 794a (2000)). The Rehabilitation Act's remedial provisions, however, incorporate the scheme from Title VI of the Civil Rights Act of 1964. 29 U.S.C. § 794a (2000). The *Garcia* court reasoned that because Title VI's remedial scheme included an implied private right of action, Title II, by way of the Rehabilitation Act, also included an implied private right of action. *Garcia*, 280 F.3d at 111.

171. *Garcia*, 280 F.3d at 111 (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284 (1998)).

172. *Id.*

where the government's actions are based on invidious discrimination.[173] Thus, the court narrowed the private right of action under Title II to apply only in situations where the conduct in that particular case was motivated by unconstitutional malice, a form of "as applied" analysis. This type of limited remedy was not possible under Title I of the ADA because the private right of action is explicit and cannot be limited by the courts in the same manner as an implied right of action.

The Sixth Circuit had taken yet another approach to the abrogation of immunity under Title II. In *Popovich v. Cuyahoga County Court of Common Pleas*[174] and *Lane v. Tennessee*,[175] the court held that abrogation is invalid for claims enforcing the right to equal protection, but valid for claims enforcing due process rights. Relying on *Garrett*, the *Popovich* court concluded that when the constitutional right in question warrants only rational basis review under the Equal Protection Clause, as in the case of Title I, Congress does not have the authority under Section 5 to abrogate states' Eleventh Amendment immunity.[176] The *Popovich* court, however, emphasized that in *Garrett*, Chief Justice Rehnquist reserved judgment on Title II's validity under Section 5 because of its unique remedial provisions, namely that it encompasses both equal protection claims and due process claims.[177] Because Congress has the authority to address due process claims under Section 5, which imposes a greater burden on the state to justify its policies, the Sixth Court surmised that portions of Title II would fall outside of the rule in *Garrett*.[178]

In *Lane v. Tennessee,* a case involving George Lane and Beverly

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173. *Id.* at 111-12. The court acknowledged that proof of discriminatory animus or ill will would often be difficult. *Id.* at 112. Therefore, the court recommended using the frameworks established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-58 (1989), to "ferret[ ] out injurious irrational prejudice." *Garcia,* 280 F.3d. at 112.

174. 276 F.3d 808 (6th Cir. 2002) (en banc), *cert. denied*, 537 U.S. 812 (2002). In *Popovich*, a hearing-impaired person sued a state court under Title II for neglecting to provide him with hearing assistance during his legal battle for child custody. *Id.* at 811.

175. 315 F.3d 680 (6th Cir. 2003), *cert. granted in part*, 123 S. Ct. 2622 (2003). In *Lane*, two paraplegics who use wheelchairs filed suit against the state of Tennessee and twenty-five Tennessee counties alleging that their operation of courthouses inaccessible to individuals with disabilities violates Title II of the ADA. *Id.* at 683.

176. *Popovich*, 276 F.3d at 812; *Lane*, 315 F.3d at 682.

177. *Popovich*, 276 F.3d at 813 (citing Bd. of Trs. v. Garrett, 531 U.S. 356, 360 n.1 (2001)).

178. *Id.*

Jones, both paraplegics who sued Tennessee for failing to ensure that individuals with disabilities have access to courthouses,[179] the Sixth Circuit again considered the specific right involved in the lawsuit before applying a federalism analysis to determine the validity of the damage claim. In *Lane*, both plaintiffs were required to be present in courtrooms on the second floor in buildings that lacked elevators. Jones worked as a court reporter. Lane was a criminal defendant who was arrested for failure to appear when he refused to crawl or be carried up the stairs to the courtroom. Tennessee had moved to dismiss the case on Eleventh Amendment sovereign immunity grounds. The District Court denied the motion to dismiss and the Sixth Circuit affirmed because the claims against Tennessee raise serious due process concerns about access to judicial proceedings, actions that are subject to strict review, and as such the Supreme Court's *Garrett* reasoning does not foreclose the Title II damages remedy.[180]

Under the approaches taken in *Kiman*, *Popovich*, *Lane*, and *Garcia*, the Title II damage remedy may be available in some situations where there exists a violation of Title II, but not all. Each of these courts appears to be applying a form of a limiting approach or a form of an "as applied" analysis to Title II's remedial provisions.

V. ADOPTING A NEW FORM OF FEDERALISM ANALYSIS FOR TITLE II

The recent Supreme Court decision in *Nevada Department of Human Resources v. Hibbs*,[181] demonstrates that the congruence and proportionality test may be satisfied if a level of scrutiny above rational basis applies to the statute. Chief Justice Rehnquist, writing for the majority in *Hibbs*, explained the difference between *Garrett* and *Hibbs*, focusing on the level of review that applied. He noted that while Congress had enacted the ADA to remedy disability discrimination, which under the Court's Fourteenth Amendment jurisprudence receives only rational basis review,[182] Congress had passed the FMLA to prevent gender discrimination,[183] which under the Court's Fourteenth Amendment jurisprudence called for an intermediate level of scrutiny.[184] He elaborated further about the

179. *Lane*, 315 F.3d at 683.

180. *Popovich*, 276 F.3d at 815. The Court reaffirmed this holding on rehearing. *Lane*, 315 F.3d at 682.

181. 123 S. Ct. 1972, 1976-79 (2003) (upholding abrogation under FMLA).

182. *Garrett*, 531 U.S. at 367. For a further discussion and critique of *Garrett*'s application of the rational basis standard, see Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 3-12 (2002).

183. *Hibbs*, 123 S. Ct. at 1982.

184. *Id.* at 1978.

standard of review explaining that the heightened standard applied to gender-based classifications actually made Congress' ability to demonstrate a pattern of state unconstitutional conduct easier.[185] Thus, the *Hibbs* Court reasoned that Congress may demonstrate more readily the existence of unconstitutional gender discrimination because the Court, in its own jurisprudence, presumes that gender-based classifications are unconstitutional.[186]

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. Since *Garrett* closed the door firmly on the argument that disabled individuals should receive a higher level of scrutiny than rational basis,[187] a facial analysis of Title II will likely result in a finding that Congress did not validly abrogate state sovereign immunity. However, an "as applied" approach, focusing on the right in question, may provide the only viable route to a plaintiff to claim a heightened review standard. As seen in the *Garcia*, *Popovich*, *Lane*, and *Kiman*[188] cases, adopting an "as applied" analysis for Title II claims makes sense because the statute "address[es] an unlimited array of subjects,"[189] some of which relate to vital functions in our society, and thus does not fit neatly under the current facial analysis used when evaluating Eleventh Amendment sovereign immunity claims. The *Garrett* Court seemed to admit as much when it reserved judgment on the issue even though it had originally granted certiorari on the question.[190]

This section evaluates the "as applied" approach as well as other arguments that may persuade the Court to reach the conclusion that Title II of the ADA validly abrogated state sovereign

185. *Id.* at 1974-75.

186. *Id.* at 1979 ("The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny . . . .").

187. *Garrett*, 531 U.S. at 367 ("[T]he 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.").

188. *See supra* notes 156-80 and accompanying text.

189. Petitioner's Brief at 29, Tennessee v. Lane, 123 S. Ct. 2622 (2003) (No. 02-1667); *see also* Petitioner's Brief at 8, Med. Bd. v. Hason, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003) (No. 02-479).

190. *See Garrett*, 531 U.S. at 360 n.1 (describing Title II as having "somewhat different remedial provisions from Title I"). Of course, it is easy to read too much into what may have been a mere technicality to the Court. The Court explained that it was reluctant to address the issue when none of the parties had briefed the precise question. *See id*; *cf.* White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 214 n.12 (1983) (refraining from deciding whether Camden's reservation by mayoral order of construction jobs for residents violates the Privileges and Immunities Clause when the issue was disposed of under the Commerce Clause).

immunity in *Lane v. Tennessee*. Finally, this section looks briefly at the ramifications that a contrary Supreme Court decision would have on the ADA's Title II.

A. *How the Court Could Get to a Finding of Valid Abrogation*

The *Garrett* Court left open several avenues for arguments that Congress validly abrogated state sovereign immunity under Title II.[191] The first argument that might persuade the Court to alter its analysis in *Garrett* to accommodate the special circumstances of Title II results from Title II's broad scope, which protects against the deprivation of rights that the Supreme Court has defined as fundamental under the Constitution.[192] While the Title I analysis in *Garrett* was limited to rational basis scrutiny under the Equal Protection Clause, Title II protects constitutional rights beyond Equal Protection, such as the right of people with disabilities to meaningful access to the states' courts, the right of people with disabilities to vote on an equal basis with other state citizens, and the right of people with disabilities to humane conditions of confinement.[193] State discrimination against people with disabilities with respect to these fundamental rights is subject to heightened review, and thus reasonable state conduct could nevertheless be unconstitutional.

The *Garrett* Court's determination that Title I was disproportionate was premised on the limited reach of the Equal Protection Clause. For example, the Court noted that Title I would require an employer to modify existing facilities to accommodate a disabled employee although it would be entirely reasonable, and therefore constitutional, for the employer to instead choose to avoid the costs of providing accommodation by hiring employees who are able to use existing facilities.[194] In contrast, although it may be reasonable for a state to desire to avoid the cost of providing an interpreter at the trial of a hearing-impaired criminal defendant, as would be required under Title II, this choice would violate the Due

191. *See* Brief for Petitioner at 15, *Lane* (No. 02-1667) ("The Court, however, declined to decide whether Congress had the constitutional authority to subject the States to claims for money damages under Title II of the ADA."); *see also* Brief for the United States at 9, *Hason* (No. 02-479) ("[I]f Titles I and II were constitutionally indistinguishable, this Cou[rt] would have had no reason to limit its holding in *Garrett*.") (citations omitted).

192. *See* Brief for United States at 10, *Lane* (No. 02-1667). For instance, Title II protects the right of disabled individuals to, among other things, vote and travel. *See* Dunn v. Blumstein, 405 U.S. 330, 336-38 (1972) (acknowledging the fundamental rights of voting and traveling).

193. *See generally* Youngberg v. Romeo, 457 U.S. 307 (1982).

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

Process Clause.[195] Applying Title II to prevent states from excluding blind persons from jury duty or to prevent inhumane treatment of disabled inmates enforces established constitutional rights. In each of these situations, no concern exists that Congress has attempted to create a new constitutional standard or that it has exceeded the permissible boundaries of prophylactic legislation.[196] By focusing on the particular right involved in each specific case, rather than on a hypothetical violation, the Court could apply stricter scrutiny when necessary to protect fundamental rights but still protect federalism concerns by applying a rational basis level of analysis to those Title II violations that do not rise to the level of constitutional deprivations. During oral argument in the *Lane* case, Justice Scalia focused on the application of Title II to a state-owned hockey rink.[197] Obviously, the state would not violate fundamental rights by limiting access by the disabled to such a location while the same could not be said for the courthouse and the voting booth. Unlike Title I, Title II can serve to protect fundamental rights in addition to

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195. *See* Popovich v. Cuyahoga County Ct. Com. Pl., 276 F.3d 808 (6th Cir. 2002) (en banc), *cert. denied*, 537 U.S. 812 (2002).

196. Although the current federalism standard does not provide sufficient deference to Congress, this proposed "as applied" approach is likewise not very deferential to Congress and may be critiqued because it scales back Congress' ability to eradicate nationwide discrimination against the disabled. Although the Supreme Court has indicated a willingness to uphold legislation that deters or remedies constitutional violations that may fall within the broad sweep of Congress' enforcement power, see *Kimel v. Florida Board of Regents*, 528 U.S. 62, 88 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997), we are pessimistic that the Court would find Title II a valid exercise of Congress' Section 5 power under its current jurisprudence. Thus, we are willing to accept a narrow damage remedy over none at all under the current precedent. *See* Carroll, *supra* note 33, at 1063-66 (arguing that the application of the Supreme Court's current facial review of Section 5 claims to Title VII may result in a holding that Title VII is not a valid exercise of Congress' power because it reaches conduct, specifically disparate impact claims, that has been held not to violate the Fourteenth Amendment).

197. *See* Oral Argument Transcript at 42, *Lane* (No. 02-1667) (J. Scalia on hockey rinks)

> And solve that problem by requiring access to—to state-owned hockey rinks or any state-owned buildings, whether it's a courthouse or anything else. I mean, you're—you're talking about it as though all Congress was directing this legislation at was—was the problem of people getting to the voting place or the problem of people getting to—to courthouses. That's not how the legislation reads. It's all public facilities run by the state, hockey rinks, whatever.

Id. But see, Oral Argument Transcript at 51, *Lane* (No. 02-1667) (J. Ginsberg on hockey rinks) ("May I ask you about the hockey example? Supposing building a new hockey example, the architect said you could do it with equal cost, providing access and not providing access. Would it be constitutional assuming there's no extra expense to provide no access?").

Equal Protection rights.[198] Title II can, in certain circumstances, be a proportional response to unconstitutional state conduct.

Applying an "as applied" analysis permits the Court to find that the first prong of the *Garrett* analysis requires the application of strict scrutiny as the standard of review.[199] Defining the constitutional right in this way would materially alter the analytical structure of *Garrett*. Most importantly, the Court would be forced to take a much more deferential look at Congress' findings in the legislative record.[200] Consequently, the likely outcome would be that Congress validly abrogated states' sovereign immunity under Title II.

Additionally, using such an "as applied" approach is consistent with the Court's review of statutes.[201] Indeed, the traditional approach to assessing the constitutionality of a statute is to consider a particular application of the statute, rather than the statute "on its face."[202] This approach adheres to the courts' obligation to avoid

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198. Brief for United States at 10, *Lane* (No. 02-1667).

199. *Id.* at 36 (quoting Saenz v. Roe, 526 U.S. 489, 499 (1999), for the proposition that burdening fundamental rights is unconstitutional "unless shown to be necessary to promote a compelling governmental interest"). One result of this difference is that it is more difficult to establish a record of unconstitutional discrimination based on disability by the states under the rational basis standard. Chief Justice Rehnquist's majority opinion in *Hibbs* noted that the heightened scrutiny given to gender discrimination made it "easier for Congress to show a pattern of state constitutional violations." Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1982 (2003). Thus, the majority concluded that Congress has a stronger basis for abrogating the states' sovereign immunity.

200. *See* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 16 (2003) ("The legislative record of 'unconstitutional behavior' documented by Congress before enacting the FMLA, [in contrast to the ADA], was far weaker.").

201. During the oral argument, Justice Breyer noted that the Supreme Court has often used an as applied analysis in the past:

> How—how do you do that? Because if I think of the antitrust laws, for example, or other congressional statutes in olden days when the Court, you know, was worried about the scope of the Commerce Clause, what would happen is they would say, of course the antitrust law is valid, the statute's valid, but it's not valid to apply it to baseball, because baseball's not an interstate commerce, or it's not valid to apply it to insurance. Well, why couldn't the Court take the same approach here, that this statute may be valid as applied to X, Y, and Z, where they did have enough evidence, but not A, B, and C, where they didn't?

Oral Argument Transcript at 15, *Lane* (No. 02-1667) (Justice Breyer's criticism of rejecting an as applied method of analysis given the Court's willingness to apply such an analysis in other contexts such as cases involving antitrust issues).

202. *See* United States v. Raines, 362 U.S. 17, 20-26 (1960) (stating that "[t]he very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide

deciding constitutional questions and to construe statutes to avoid constitutional problems.[203] If a statute can be applied constitutionally, then the Court has indicated that the statute will be upheld as applied even if other applications of the statute are unconstitutional.[204] Until recently, the Court had used an as applied analysis for Section 5 cases.[205] Unlike ADA's Title I, Title II does not require an "all or nothing" or facial abrogation analysis because it may be applied to so many different situations, invoking so many different constitutional rights. Because of the wide variety of Title II's application, the Court should focus on the particular right requiring enforcement of Title II in *Lane* when it makes its determination concerning whether a damages remedy is "congruent and proportional."

B. *What the* Lane *Court May Actually Do*

The Supreme Court may elect not to stray from its established precedent, particularly since the "as applied" approach has not fully developed as a viable option in the circuit courts.[206] When deciding

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case and controversies properly before them" and refusing to hear arguments concerning whether the potential applicability of the Civil Rights Act of 1957 to private actors violated the state action requirement of the Fifteenth Amendment where the actual defendants involved were state officials); *see also* Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219 (1912) ("[T]his Court must deal with the case in hand and not with imaginary ones."); *see, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). For further analysis on this point, see Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 185-88 (1997) (arguing that the *City of Boerne* opinion conflicts with the presumption of constitutionality that the Court normally applies when reviewing the constitutionality of certain legislative actions).

203. *See* Carroll, *supra* note 33, at 1049-51.

204. *Raines*, 362 U.S. at 28 (Frankfurter, J., concurring) ("To deal with legislation so as to find unconstitutionality is to reverse the duty of courts to apply a statute so as to save it."); *see, e.g.*, *Edward J. DeBartolo Corp.*, 485 U.S. at 575 ("This approach [presuming the validity of federal statutes] recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The Courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

205. *See* Katzenbach v. Morgan, 384 U.S. 641, 645 n.3 (1966) (considering only those provisions of the Voting Rights Act presented by plaintiff's claims); South Carolina v. Katzenbach, 383 U.S. 301, 316-17 (1966) (applying Raines decision and confining its analysis to those provisions of the Voting Rights Act before the Court).

206. *See* Oral Argument Transcript at 23-24, *Lane* (No. 02-1667) (Chief

Garrett the Court obviously did not adopt this approach.[207] Instead, it appeared to strike down all applications of the damages remedy against the states under ADA's Title I.

Applying the current three-part federalism analysis, the Court may find that Title II is a congruent and proportional response to state discrimination against the disabled. Under the first part of that test, the Court will identify the right at issue. This is the crucial step in the analysis for the *Lane* plaintiffs. It is not certain that the Court will find the nature of the constitutional right or rights at issue in Title II to be the same as those identified in *Garrett* regarding Title I. As previously noted, the Court analyzed Title I under the Equal Protection Clause. Finding that the disabled were not a protected class, the Court applied rational basis scrutiny, and not surprisingly, found that Title I forbade otherwise constitutional conduct. However, since Title II addresses some rights protected under other provisions of the Constitution to which the Court has been more deferential, it may not meet the same fate.

Next, the Court will examine the legislative record of Title II of the ADA to determine whether it supports Congress' actions to remedy observed violations of constitutional rights. The Court could find, as it did in *Garrett*, that the record is insufficient. Because the legislative record in support of Title II appears to be more substantial than that for Title I, it is not certain if it would meet the same fate. In addition, if the Court in an "as applied" analysis considered fundamental constitutional violations, Title II would presumably not require the same degree of support in the legislative record.[208] Even if the Court does not give greater deference to Title

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Justice Rehnquist states that "in our other cases dealing with Congress' section 5 power, I don't think we've taken that position [an as applied approach]" and expresses the view that application of congruence and proportionality test mandates examination of statute in its entirety, rather than in one particular way in which it is applied.); *see also* Brief for Petitioner at 19, *Lane* (No. 02-1667) (asserting that Title I and Title II are both equal protection legislation and implying that they should be decided similarly); *Id.* at 28 (stating that "rights and remedies created by Title II share all of the incongruent and disproportionate features of Title I deemed unconstitutional by this Court in *Garrett*.").

207. Bd. of Trs. v. Garrett, 531 U.S. 356, 368-74 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67-92 (2000); *see also* Carroll, *supra* note 33, at 1036 (noting that the Garrett Court did not ask whether the state defendant had violated the Equal Protection Clause nor did it discuss the appropriateness of the ADA's application in the particular circumstances before the Court).

208. *See* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1981-82 (2003); *see also* Oral Argument Transcript at 41, *Lane* (No. 02-1667) (Justice Stevens states, "I'm not under—I really don't understand one—one argument that's going on. I don't know why one violation wouldn't be enough to justify congressional action. It often is that one—one incident triggers a legislative response. Why wouldn't one—one example be enough?").

II in this respect, an argument could be made that the legislative record in Title II documents a pattern of irrational disability discrimination by the states.[209] The Court in *Garrett* explicitly stated in a footnote that "[t]he overwhelming majority of these accounts [in the legislative record] pertain to alleged discrimination *by the States* in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA."[210] The majority in *Garrett* felt that the legislative history was more relevant to abrogation of sovereign immunity under Title II than under Title I.[211] Indeed, the legislative history of the ADA appears to show a long history of discrimination by the state and local governments in benefits and services.[212] Arguably many of the discriminatory actions on the part of states prevented access to judicial proceedings, voting booths, or other government facilities implicated in fundamental constitutional interests. Thus, more than one route exists for the Court to conclude that the states have engaged in violations of the constitutional rights of persons with

209. Brief for United States at 41, *Lane* (No. 02-1667); *see* Tanchyk, *supra* note 16, at 697; *cf.* Solimine, *supra* note 32, at 1470 (noting a criticism set forth in a recent book written by Judge Noonan of the Ninth Circuit about the current state of the Supreme Court's Eleventh Amendment jurisprudence that "the Court's insistence on a seemingly massive record of state violation of federal law ignores the fact that Congress does not irrationally rely on anecdotes in law making").

210. *Garrett*, 531 U.S. at 371 n.7 (emphasis added).

211. *See* Wessel v. Glendening, 306 F.3d 203, 210 (4th Cir. 2002) ("We note that the Supreme Court has provided very little explicit guidance regarding what materials are relevant in examining the record on which abrogation was based."); *see also* Hartley, *supra* note 5, at 59-60 ("The apparent simplicity of the arm of the state/state political subdivision dichotomy can be misleading. In fact, its application has befuddled many courts and has generated considerable criticism.").

212. The legislative history contained numerous examples of individuals unable to attend court hearings or denied access to other government facilities. *See, e.g., Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Res. and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong. 38 (1988) (testimony of Sandra Parrino, Chairperson, National Council on the Handicapped) (describing refusal of states to build accessible public facilities, including town halls); *Oversight Hearing on H.R.. 4498, Americans with Disabilities Act of 1988 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong. 40-41 (1988) (statement of Emeka Nwojke) (concerning inaccessibility of court houses and court rooms); 135 CONG. REC. S10,718 (daily ed. Sept. 7, 1989) (testimony of Judith Heumann, World Institute on Disability), *available at* 1989 WL 183110 ("When I was 5 my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard.").

disabilities and that this record justifies abrogation of the states' immunity and the imposition of a damages remedy.

It is also possible that the limitations the majority in *Garrett* placed on its examination of the legislative record, specifically its refusal to consider evidence of unconstitutional discrimination at the local government level and in the congressional task force report, may factor into the Court's analysis of Title II in *Lane* as well.[213] By considering only discrimination at the state government level, and by requiring that Congress detail discrimination in each state, the Court could see its way to a view that Congress has failed to document unconstitutional conduct requiring a damages remedy.[214]

Finally, the Court will examine Title II to determine whether it is a congruent and proportional response to the states' constitutional violation. If the Court adopts a strict application of the *Garrett* analysis, as seen in the Fourth, Fifth, Eighth, and Tenth Circuits, and if the Court considers Title II in its entirety, it is likely that *Lane* will go the way of *Garrett*.[215] This would be consistent with the Fourth Circuit's conclusion in deciding *Wessel*,[216] the Tenth Circuit's conclusion in *Thompson*,[217] and the Fifth Circuit's holding in *Reickenbacker*.[218] All of these decisions focused on the insufficiency of the legislative findings of unconstitutional discrimination, given that the scope of the abrogation inquiry examined all of Title II rather than the way in which it applied in certain instances. If the Court adopts the reasoning of these lower courts, that the statutory

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213. *Garrett*, 531 U.S. at 368-69 (finding the legislative record insufficient to identify "a pattern of irrational state discrimination in employment against the disabled."). Justice Scalia applies an even more stringent test and would require Congress to document constitutional discriminatory conduct on a state-by-state basis. *See* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1985 (2003) (Scalia, J., dissenting) ("Today's opinion . . . does not even attempt to demonstrate that each one of the 50 states covered by [the FMLA] was in violation of the Fourteenth Amendment. It treats 'the States' as some sort of collective entity which is guilty or innocent as a body.").

214. *See Wessel*, 306 F.3d at 211 ("[I]t is not at all clear that Congress' use of the term 'discrimination' referred to the sort of arbitrary and irrational behavior that violates the Constitution.").

215. *See* Colker & Brudney, *supra* note 7, at 127-28; Hartley, *supra* note 5, at 84; Tanchyk, *supra* note 16, at 701-02; *see also* Brief for Private Respondents at 11, Tennessee v. Lane, 123 S. Ct. 2622 (2003) (No. 02-1667) ("If this Court rules that Title II cannot be supported by a sufficient Fourteenth Amendment predicate, the statute will provide no basis for any relief—damages or an injunction—unless it can be upheld under Congress's Article I commerce power").

216. Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002).

217. Thompson v. Colorado, 278 F.3d 1020 (10th Cir. 2001).

218. Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001).

language of Title II requires examination of it as a whole, then the likely outcome is that the Court will conclude that Title II, like Title I, does not pass the congruence and proportionality test. The nature of the actions that Title II was meant to encompass vary widely, from licensing and zoning to fundamental governmental functions, and thus may not support enough "critical mass" in a particular area to adequately demonstrate constitutional violations on the part of the state. Such a determination will mean that the Court will only apply rational basis scrutiny. That the claim of these particular plaintiffs also falls under the Due Process Clause of the Fourteenth Amendment would not rescue it because the Court would be considering the access to judicial proceedings along with the many applications of Title II that fall outside the fundamental rights area, such as handicap parking and access to state-owned sports facilities. Thus, allowing damages to be awarded against states under Title II in any case, even this one, would be a disproportionate remedy for the violations identifiable in the legislative record. This would clearly signal the Court's inclination to curtail the ability of disabled citizens to enforce their rights under the ADA against the states.

On the other hand, the Court may in the *Lane* case adopt one of the "as applied" approaches seen in the Second, Sixth, or First Circuits. One of the narrower versions is that of the Second Circuit's decision in *Garcia*,[219] which limited damages recovery to those plaintiffs who could show that their Title II violations were motivated by discriminatory animus or ill will based on the plaintiffs' disability.[220] Such an approach would require the Court to look at Title II not as a whole but rather to conduct an "as applied" inquiry as to whether the nature of the particular claim fell within Congress' Section 5 authority. However, as the court in *Garcia* noted, proof problems would likely arise regarding the evidence necessary to demonstrate discriminatory animus or ill will.[221] Even in *Lane*, where the plaintiffs had to be carried or crawl up the courthouse stairs, they are unlikely to show that the State of Tennessee harbored ill will toward disabled individuals by refusing to make its courthouses accessible. More likely, as Justice Marshall noted in *Alexander v. Choate*, Tennessee failed to comply with Title

219. Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98 (2d Cir. 2001).

220. *Id.* at 111 ("Government actions based on discriminatory animus or ill will towards the disabled are generally the same actions that are proscribed by the Fourteenth Amendment—i.e., conduct that is based on irrational prejudice or wholly lacking a legitimate government interest.").

221. *Id.* at 112.

II's accessibility requirements out of "benign neglect" toward the disabled.[222] In the end, although the *Garcia* approach would preserve some form of a damages remedy under Title II, this analysis does not appear suitable to the *Lane* case or for most other Title II claims.

Alternatively, the Court may adopt the Sixth Circuit's due process analysis demonstrated in both its *Lane* and *Popovich* opinions.[223] *Popovich* held that while *Garrett* precluded the possibility of suing under Title II for equal protection violations, the same did not hold true for plaintiffs bringing actions under the Due Process Clause.[224] In *Lane*, the Sixth Circuit concluded that the specific issue raised, the constitutionality of a state's denial of access to its courts to its disabled citizens, falls under the Due Process Clause of the Fourteenth Amendment.[225] If the Court determines that the Sixth Circuit was correct in engaging in due process analysis, then it may very well apply a strict scrutiny standard. Under this variant of an "as applied" approach, those plaintiffs who cast their Title II claim as a violation of a due process right have a stronger argument that Title II is a valid use of Congress' Section 5 power. Because the Due Process Clause provides an articulable, objective standard by which state action could be measured, the Court may find this limitation on Title II damages acceptable and accept that Congress validly abrogated state sovereign immunity for such claims. Such a limited abrogation may satisfy the Court's need to protect states from money damages and provide at least some additional protection for some disabled plaintiffs from certain violations of Title II.

The Court may also consider the approach taken by the First Circuit in *Kiman*.[226] Unlike *Lane*, the *Kiman* court did not identify a specific type of Title II claim that satisfies the congruent and

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222. Alexander v. Choate, 469 U.S. 287, 295 (1985) ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.").

223. Popovich v. Cuyahoga County Ct. Com. Pl., 276 F.3d 808 (6th Cir. 2002) (en banc), *cert. denied*, 537 U.S. 812 (2002).

224. *Id.* at 813.

225. Lane v. Tennessee, 315 F.3d 680, 682 (6th Cir. 2003), *cert. granted in part*, 123 S. Ct. 2622 (2003). J. Boyce, writing for the court, explained:

> [A]mong the rights protected by the Due Process Clause of the Fourteenth Amendment is the right of access to the courts. For criminal defendants like Lane, the Due Process Clause has been interpreted to provide that "an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings."

Id. (quoting Faretta v. California, 422 U.S. 806, 819 n.15 (1975)).

226. Kiman v. N.H. Dep't of Corr., 301 F.3d 13 (1st Cir. 2002).

proportionality test. Rather, it held that Title II allowed claimants to seek damages when their claim alleged constitutional violations.[227] The advantage of this approach, as noted by the First Circuit, is that such an inquiry would effectively eliminate the need to subject Title II to the congruence and proportionality test.[228] Under this approach, the Court may find that denial of access to judicial proceedings constitutes a violation of due process rights, and thus provides the plaintiffs with a damages remedy. This approach, like *Lane*, would still limit Congress' ability to address nationwide discrimination. If Congress may only act to remedy unconstitutional conduct, rather than remedy those violations that do not specifically implicate a constitutional violation,[229] the Court will have scaled back rather dramatically Congress' ability to address nationwide problems using its Section 5 legislative power.

Finally, the Court may expressly reject its analysis in *Garrett*, like the Ninth Circuit's *Hason* decision, and uphold Title II for all violations.[230] This would be the most radical approach, and thus is also the least likely. The Ninth Circuit's reasoning, that *Garrett* did not expressly address Title II at all,[231] finds at least some validity in the express pains the court took to distinguish Title I from Title II. If the Court upholds this distinction, then the plaintiffs will prevail, and Title II will become a powerful weapon for citizens with disabilities. Moreover, such a holding might provide a framework within which Congress could revisit the matter in an attempt to establish a sufficient legislative record for Title I. In this scenario, the ultimate effect of *Garrett* would be much less threatening to the rights of disabled individuals than it now seems.

In *Lane v. Tennessee*, the Court has a choice in how it will analyze Title II's abrogation of sovereign immunity, either in *toto* or "as applied" to the facts of a particular case.[232] If the Court decides

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227. *Id.* at 24.

228. *Id.* at 18-19.

229. Earlier Court cases had upheld statutes that provided broad remedies that reached conduct that was not unconstitutional. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 316-17 (1966) (holding that South Carolina's challenges to certain provisions of the Voting Rights Act were premature because no one had yet been charged with violation of those provisions).

230. Hason v. Med. Bd., 279 F.3d 1167, 1174 (9th Cir. 2002), *cert. granted*, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003); *see also* Brief for Private Respondents at 36, Tennessee v. Lane, 123 S. Ct. 2622 (2003) (No. 02-1667) ("Under this Court's precedents, a statute should be sustained so long as Congress had the power to reach the particular factual context before the Court.").

231. *Hason*, 279 F.3d at 1171 (citing *Garrett*, 531 U.S. at 360 n.1).

232. *See* Kiman v. N.H. Dep't of Corr., 301 F.3d 13, 20 (1st Cir. 2002) (observing that the question of whether a particular congressional enactment must be "wholly constitutional or wholly unconstitutional" under the Eleventh

that it should limit its inquiry to Title II as applied, the analytical framework of the Eleventh Amendment under Title II would continue to provide a damages remedy to those plaintiffs who can allege certain types of violations of their rights. 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.

C. *The Effect on Title II if the Court Follows* Garrett

Dean John C. Jeffries has suggested that "[t]he Eleventh Amendment almost never matters."[233] Although this might be true in some circumstances, it does not hold true in the context of Title II of the ADA because Title II applies exclusively to public entities; certain interpretations of the Eleventh Amendment would seriously diminish its impact.[234] If the Court were to hold that Congress did not validly abrogate states' sovereign immunity under Title II, the standards of that provision could only be enforced in one of three ways: (1) by a suit brought by the United States, (2) through a suit brought by a private individual seeking prospective injunctive relief, and (3) through state laws that protect persons with disabilities.[235] However, each of these options has its drawbacks. First, due to the limited number of federal resources, public enforcement of federal law is generally less effective than private actions.[236] Second, injunctive relief is restricted to prospective relief only.[237] Finally, the

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Amendment is an open issue).

233. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49-50 (1998) (arguing that almost any suit that is barred by the Eleventh Amendment is actionable against a state officer under 42 U.S.C. § 1983, which in essence is a suit against the state because the state typically indemnifies its officers).

234. *See* Brief for United States at 41, *Lane* (No. 02-1667) ("Petitioner . . . argue[s] . . . the existence of state laws prohibiting some forms of disability discrimination made congressional action unnecessary. But, as the facts of this case well illustrate, that argument confuses the existence of laws with their effectiveness . . . ."); *see also* Brief of Former Senator Dole, Senators Kennedy and Harkin, and Representative Hoyer as Amici Curiae in Support of Respondent at 2, Med. Bd. v. Hason, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003) (No. 02-479) ("If the Court does not take this opportunity to uphold Title II of the ADA under Section 5, federal disability laws that are just beginning to enable disabled persons to participate in critical facets of American life will be undermined before the goal of full integration has been achieved.").

235. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 374 n.9 (2001).

236. *See* Solimine, *supra* note 32, at 1484-85.

237. *See Ex parte* Young, 209 U.S. 123, 162 (1908); Nick Daum, *Section 1983, Statutes, and Sovereign Immunity*, 112 YALE L.J. 353, 356-60 (2002) (noting that a recent case involving police officer suit for failure to accommodate shows the difficulty in successfully asserting a Section 1983 suit for damages for Title II violations).

protections extended by the states are often found to be lacking when compared to Title II of the ADA.[238] Without the ability to bring a private suit against the state for money damages, persons with disabilities will lose a powerful tool to protect and enforce their rights.[239]

VI. CONCLUSION

When the Supreme Court decides the *Lane* case this term, it may apply the *Garrett* analysis to Title II and rule that Congress did not validly abrogate the states' sovereign immunity. Many compelling arguments exist, however, that could and should persuade the Court to do otherwise. Importantly, the Court should acknowledge that the broad scope of Title II, encompassing important fundamental rights, requires that a damages remedy be available for disabled individuals for Title II violations. If the Court does not take this materially different approach, it is likely to conclude that Title II does not validly abrogate the states' sovereign immunity, which would further restrict Congress' authority to protect individuals with disabilities from state-sponsored discrimination. It would seriously undermine the ability of plaintiffs to obtain damages against the states in federal court, and therefore thwart Congress' intent to require the states to provide better access to society to the disabled.

To avoid this result, the Court should acknowledge that Title II covers fundamental rights and therefore, in certain situations, requires the application of strict scrutiny when federalism concerns arise. Evaluating Title II under such an "as applied" approach would better balance the rights of the disabled and concerns about states' rights. If the Court were to adopt such an approach, the result in *Lane* would have implications far beyond the damages

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238. *See* Ruth Colker & Adam Milani, *The Post-*Garrett *World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075, 1113 (2002) ("Our study confirms . . . [that] only a minority of states actually have statutory protection against disability discrimination . . . similar to that found in ADA Title II."); *see also* Brief for the National Association of Protection and Advocacy Systems as Amicus Curiae in Support of Respondent at 8-11, *Hason* (No. 02-479) (discussing the ways in which state laws failed to protect persons with disabilities against discrimination in provision of state services).

239. Recent settlements demonstrate how important the threat of a potential damage remedy is against the states. *See* NATIONAL COUNCIL ON DISABILITY, *supra* note 112 (citing a variety of settlements concerning discrimination by state governments against the disabled in areas of zoning laws, communications for the deaf with state police and prison officials, institutionalization of the mentally ill, access to state parklands, accommodations of state driver's examination and other licensing requirements, and access to voter ballots).

remedy and even beyond Title II itself because it could change dramatically the current all or nothing approach to federalism concerns that the Court has recently embraced.

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