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Four Pathways of Undermining Board of Trustees of the University of Alabama v. Garrett

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FOUR PATHWAYS OF UNDERMINING *BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT*

Derek Warden[•]

ABSTRACT

In Board of Trustees of the University of Alabama v. Garrett*, the Supreme Court held that Title I of the ADA did not validly abrogate state sovereign immunity; and as such, a plaintiff could not obtain damages against the states or sue the states directly for injunctive relief. Many courts and scholars have read* Garrett *as sounding the death knell for ADA Title I government employee plaintiffs. This article shows that such fears are misplaced. Indeed, this article offers four pathways around* Garrett *that show Title I and its requirements are very much alive and well. First, the article shows that traditional civil rights doctrines allow government employees to sue their employers either for damages or injunctive relief regardless of* Garrett*'s perceived holding. Second, the article shows how subsequent case law developed under Title II of the ADA allows Title I plaintiffs to sue the states for damages where the state conduct violates both Title I and the Constitution. Third, the article explores the ramifications of using Title II of the ADA as employment discrimination legislation instead of Title I and shows that the abrogation outcome is different. Finally, in the fourth pathway of this article, it is shown that because disability discrimination violates valid national policy legislation (passed under the Commerce Clause) any government interest manifested in such a way as to violate that policy-based*

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law is illegitimate for purposes of equal protection rational basis scrutiny. As such, the fourth pathway argues all violations of the ADA amount to violations of the Fourteenth Amendment; and due to the analysis of the second pathway, Garrett *should be totally overruled.*

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I. INTRODUCTION

A. General Background

During most of world history, even into the modern era, persons with disabilities have been largely ostracized, mistreated, and regarded as having little to no value to society. These sentiments led to vast and widespread social ills which affected persons with disabilities in ways often times difficult for individuals today to fathom.[1] Some of the ways persons with disabilities were treated have been said to resemble horror movies rather than real life, while other forms of social ills directed toward them were more benign.[2] Examples of the more benign social ills were inaccessible buildings, roads, homes, and programs. More malicious forms of discrimination included unjustified institutionalization, intentional and accidental exacerbation of disabilities, forced sterilization, standing torture, scalding baths, and outright denial of services based on stereotypes.[3]

Thankfully, the world began to turn. Documentaries exposing ill treatment of people with disabilities brought the public's attention to the awful scenes of massive mental health institutions such as Bridgewater,[4] Willowbrook,[5] and Pennhurst.[6] Parents and family members began to think of ways to care for those with disabilities. Social movements arose, which targeted the inaccessibility of bus routes and public buildings. Federal and state laws opened the courthouse doors to those with disabilities to sue for discriminatory practices. States that accepted federal funds were forced to establish protection and advocacy systems[7] that now resemble *parens patriea*.[8] These protection and advocacy systems are meant to prevent and address the aforementioned widespread social ills.[9]

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1. Derek Warden, *A Worsened Discrimination: How the Exacerbation of Disabilities Constitutes Discrimination by Reason of Disability Under Title II of the ADA and § 504 of the Rehabilitation Act*, 46 S. U. L. REV. 14, 21–22 (2018).

2. *Id.* at 22.

3. 42 U.S.C.A. § 12101(a) (Westlaw through Pub. L. No. 116-65) (listing several such examples).

4. *See* Warden, *supra* note 1, at 22.

5. *See id.* at 27.

6. *See id.* at 24.

7. Melissa Bowman, *Open Debate Over Closed Doors: The Effect of the New Developmental Disabilities Regulations on Protection and Advocacy Programs*, 85 KY. L. J. 955, 956–57 (1997).

8. *See* Fernando J. Gutierrez, *Who Is Watching Big Brother When Big Brother Is Watching Mental Health Professionals: A Call For the Evaluation of Mental Health Advocacy Programs*, 20 LAW & PSYCHOL. REV. 57, 63 (1996).

9. Gary P. Gross, *Protection and Advocacy System Standing – To Vindicate the Rights of Persons with Disabilities*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 674, 674 (1998).

Two of the laws enacted during the height of the disability rights movement stand as paramount: the Rehabilitation Act[10] and the Individuals with Disabilities Education Act ("IDEA").[11] The latter covers the education of persons with disabilities[12] and the former covers numerous other types of discrimination by entities that receive federal funds.[13] These laws, though effective and useful, did not produce total social integration or eliminate mistreatment of persons with disabilities.[14] State laws meant to supplement the Rehabilitation Act and the IDEA were held not enforceable by the federal courts.[15] Indeed, federal courts took little time to narrow the scope of both the IDEA and the Rehabilitation Act.[16] It became clear that additional protections for persons with disabilities were necessary.[17]

That something more would be a law that protected people with disabilities from all entities and not just those that received federal funds.[18] The law would need to cover roads, sidewalks, commercial buildings, hotels, court houses, prisons, and schools as well as practices, procedures, actions, inactions, and policies based on stereotypes.[19] It would need to cover not only those things that were directly discriminatory but also those things that led to discrimination.[20] It would need to address situations where disabilities were *a* cause of discrimination not the *sole* cause.[21] It would need to abro-

10. 29 U.S.C.A. §§ 701–799 (Westlaw through Pub. L. 116-91).

11. 20 U.S.C.A. §§ 1400–1482 (Westlaw through Pub. L. 116-91).

12. Durbrow v. Cobb Cty. Sch. Dist., 887 F.3d 1182, 1189 (11th Cir. 2018) ("The IDEA represents an ambitious national undertaking to promote the education of children with disabilities.").

13. 1 AMERICANS WITH DISAB.: PRACT. & COMPLIANCE MANUAL § 1:1 (Westlaw 2019).

14. *See* Spieth v. Bucks Cty. Hous. Auth., 594 F. Supp. 2d 584, 590 (E.D. Penn. 2009) ("Because the RA applies only to federally funded programs and activities, Congress enacted Title II of the ADA to extend these prohibitions to all state and local government programs and activities.").

15. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (holding that plaintiffs may not use *Ex parte Young* to force state actors to comply with state law).

16. *See* Pinkerton v. Spellings, 529 F.3d 513, 516 (5th Cir. 2008) (recognizing that courts apply a higher causation standard for § 504 of the Rehabilitation Act than they do for the ADA); Dellmuth v. Muth, 491 U.S. 223 (1989) (holding that original IDEA did not validly abrogate state sovereign immunity), *superseded by statute*, 20 U.S.C. § 1403, *as recognized in* Pace v. Bogalusa City Sch. Bd., 403 F.3d 272 (5th Cir. 2005).

17. Armen H. Merjian, *Bad Decisions Make Bad Decisions: Davis, Arline, and Improper Application of the Undue Financial Burden Defense Under the Rehabilitation Act and the Americans with Disabilities Act*, 65 BROOK. L. REV. 105, 141 (1991).

18. Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 59–60 (2000) (noting that the application of the Act was "quite limited").

19. 42 U.S.C.A. §§ 12101(a)(1)–(3), (5) (Westlaw through Pub. L. 116-65) (noting these and similar forms of discrimination continued even in 1990 well after the passage of the Rehabilitation Act).

20. 42 U.S.C.A. § 12101(a)(5) (Westlaw through Pub. L. 116-65).

21. *See* Pinkerton v. Spellings, 529 F.3d 513, 516–19 (5th Cir. 2008) (causation standards for the ADA and § 504 are different).

gate sovereign immunity and be free from the defense of qualified immunity.[22]

The need to protect persons with disabilities would soon be met, but not without a fight. The need was met when the Americans with Disabilities Act ("ADA") was passed.[23] The fight took place on national news and became known as the "Capitol Crawl."[24] On the eve of the passage of the ADA, it appeared as though the law would fail.[25] Hope seemed to hang by a thread. Supporters of the law were required to resort to self-advocacy. During the "Capitol Crawl," individuals climbed out of their wheelchairs and literally crawled up the steps to the Capitol Building in Washington D.C.[26]

Their efforts won out, and the ADA was passed in 1990 by sweeping margins in both houses of Congress.[27] President George H.W. Bush signed the act into law, declaring, "Let the shameful wall of exclusion finally come tumbling down."[28]

B. The Americans with Disabilities Act in General

That paradigm shifting statute, the Americans with Disabilities Act, is divided into five titles. Title I governs employment.[29] Title II covers public entities.[30] Title III governs places of public accommodation and services of private entities.[31] Title IV governs telecommunications.[32] Title V concerns various other miscellaneous matters.[33] For purposes of this article, Titles I, II, and V are the most significant.

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22. Derek Warden, *A Helping Hand: Examining the Relationship Between (1) Title II of the ADA's Abrogation of Sovereign Immunity Cases and (2) the Doctrine of Qualified Immunity in §1983 and* Bivens *Cases to Expand and Strengthen Sources of "Clearly Established Law" in Civil Rights Actions*, 29 GEO. MASON U. CIV. RTS. L.J. 43, 45 (2018) (noting that qualified immunity does not apply to the ADA and that Title II is often valid abrogation of sovereign immunity).

23. 42 U.S.C.A. §§ 12101–12213 (Westlaw through Pub. L. 116-65).

24. Faye Ginsburg & Rayna Rapp, *Making Accessible Futures: From the Capitol Crawl to #Cripthevote*, 39 CARDOZO L. REV. 699, 703 (2017).

25. *A Magna Carta and the Ides of March to the ADA*, MINN. GOVERNOR'S COUNCIL ON DEVELOPMENTAL DISABILITIES (Mar. 1, 2015), http://mn.gov/mnddc/ada-legacy/ada-legacy-moment27.html.

26. Ginsburg & Rapp, *supra* note 24, at 703.

27. *See* Brian East, *Struggling to Fulfill Its Promise – The ADA at 15*, 68 TEX. B.J. 614, 614–15 (2005).

28. *Id.* at 614.

29. 42 U.S.C.A. §§ 12111–12117 (Westlaw through Pub. L. 116-91).

30. 42 U.S.C.A. §§ 12131–12165 (Westlaw through Pub. L. 116-91).

31. 42 U.S.C.A. §§ 12181–12189 (Westlaw through Pub. L. 116-91).

32. 47 U.S.C.A. § 225 (Westlaw through Pub. L. 116-91).

33. 42 U.S.C.A. §§ 12201–12213 (Westlaw through Pub. L. 116-91).

Title I prohibits employers from discriminating against individuals on the basis of disability.[34] It provides several theories under which plaintiffs may sue. First is disparate treatment, where a person is treated differently because of his or her disability.[35] Second is disparate impact, wherein a facially neutral policy has an overwhelming discriminatory effect on otherwise qualified persons with one or more disabilities.[36] Finally, qualified persons may recover from an employer that fails to make reasonable accommodations for those persons.[37]

Title II, on the other hand, states: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[38] This operative language has caused some confusion among the lower courts, which will be discussed later. Like Title I, Title II provides several theories of discrimination—disparate treatment, disparate impact, and failure to make reasonable accommodation.[39]

In addition to these general theories of discrimination, Title I has numerous regulations that govern discriminatory actions and place certain affirmative obligations on employers.[40] Title II likewise contains numerous regulations with sweeping implications.[41] These regulations are often given controlling weight as Congress directed the attorney general to issue these regulations.[42]

Title V extends the protections of the ADA to Congress,[43] excludes certain conditions,[44] prohibits claims of "reverse discrimination,"[45] allows recovery of attorney's fees,[46] and purports to abrogate state Eleventh Amendment immunity for an action brought under the ADA.[47]

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34. 42 U.S.C.A. § 12112(a) (Westlaw through Pub. L. 116-91).
35. Raytheon Co. v. Hernandez, 540 U.S. 44, 52–53 (2003).
36. *Id.*
37. EEOC v. LHC Group, Inc., 773 F.3d 688, 703 n.6 (5th Cir. 2014).
38. 42 U.S.C.A. § 12132 (Westlaw through Pub. L. 116-63).
39. Hernandez v. Bd. of Educ. of Albuquerque Pub. Sch., 124 F. Supp. 3d 1181, 1185 (D.N.M. 2015).
40. 29 C.F.R. §§ 1630.1–1630.16 (2019).
41. 28 C.F.R. § 35.101–35.999 (2019).
42. 42 U.S.C. § 12134 (Westlaw through Pub. L. 116-63); Todd v. Carstarphen, 236 F. Supp. 3d 1311, 1326 (N.D. Ga. 2017) (collecting sources).
43. 42 U.S.C.A. § 12209 (Westlaw through Pub. L. 116-91).
44. 42 U.S.C.A. § 12211 (Westlaw through Pub. L. 116-91).
45. 42 U.S.C.A. § 12201 (Westlaw through Pub. L. 116-91).
46. 42 U.S.C.A. § 12205 (Westlaw through Pub. L. 116-91).
47. 42 U.S.C.A. § 12202 (Westlaw through Pub. L. 116-91).

C. *Board of Trustees of the University of Alabama v. Garrett*

Patricia Garrett was a nurse who worked for the University of Alabama.[48] When she was diagnosed with cancer, she asked for an accommodation; instead, she was demoted.[49] Following her demotion, she sued the university for damages.[50] The question before the Court was whether Title I of the ADA—which deals exclusively with employment—validly abrogated state sovereign immunity.[51]

Prior to any discussion on the Court's analysis, it is important to mention a few legal principles. Plaintiffs may not sue the states or arms of the states, such as universities, without the consent of the state or a proper abrogation of sovereign immunity.[52] States did not waive their sovereign immunity under the ADA.[53] As such, the only method by which Garrett could recover damages against the state under the ADA is if the ADA validly abrogated sovereign immunity. Congress may abrogate state sovereign immunity (1) when it declares its intent to abrogate sovereign immunity and (2) where the underlying law is a valid exercise of a constitutional power.[54] At one point, it was thought that this second prong could be established using Congress' commerce power.[55] However, that theory was disfavored in *Seminole Tribe*.[56] Effectively, now the only provisions that validly abrogate sovereign immunity are the enforcement provisions of the Reconstruction amendments.[57] Most notable of these is the Fourteenth Amendment.[58] The only difference between valid enforcement legislation and abrogation legislation is that the former does not require a congressional showing of intent to abrogate.[59] Nevertheless, enforcement legislation is controlled by the *City of Boerne* test, which requires that the means Congress adopted to enforce a constitutional right be congruent and proportional to the right that Congress sought to protect.[60] The test resulting from *City of Boerne* also requires a

48. Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 362 (2001).
49. *Id.*
50. *Id.*
51. *Id.* at 360.
52. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000).
53. Gary v. Ga. Dept. of Human Res., 323 F. Supp. 2d 1368, 1372 (M.D. Ga. 2004).
54. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996).
55. *Id.* at 59.
56. *Id.* at 72.
57. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 455–56 (1976).
58. David Krinsky, *A Plan Revised: How the Congressional Power to Abrogate State Sovereign Immunity Has Expanded Since the Eleventh Amendment*, 93 GEO. L. J. 2067, 2070–72 (2005) (noting that the Fourteenth Amendment has "swallowed the Eleventh Amendment").
59. Warden, *supra* note 22, at 56–57.
60. *Id.* at 56 n.69.

showing of historical discrimination—or at least a congressionally identified history of unconstitutional actions.[61]

Such was the state of the law when *Garrett* came before the Court. The Court held that discrimination against persons with disabilities in employment was subject only to rational basis scrutiny, and that the state's conduct in *Garrett* satisfied this test because discrimination against employees with disabilities was a rational way to save scarce resources.[62] The Court then went on to discuss how Congress had not identified a widespread history of discrimination against persons with disabilities in public employment.[63] Finally, and perhaps most importantly, it ruled that the ADA's requirements that employers not discriminate against persons with disabilities and make reasonable accommodation of those with disabilities far exceeded the bounds of what the rational basis test required of government employers, such that the ADA amounted not to enforcement of the Fourteenth Amendment, but an attempt to rewrite the Court's Fourteenth Amendment jurisprudence.[64] As such, Title I of the ADA was not a congruent and proportional response to a documented history of widespread discrimination against persons with disabilities in public employment.[65] And because Title I lacked congruence and proportionality, it was not valid Fourteenth Amendment enforcement legislation; thus, even though the ADA clearly expressed an intent to abrogate sovereign immunity, Title I of the ADA did not validly abrogate state sovereign immunity.[66]

While the Court's reasoning may seem sound, I believe that *Garrett* belongs in its own anti-canon;[67] an article arguing as much is planned for a later date. Nevertheless, many courts and scholars believe that *Garrett* sounded the death knell for Title I of the ADA for government employees.[68] Indeed, even those courts and scholars that have taken a standard doctrinal route to avoid *Garrett* have fallen to the error of believing there are no ar-

61. *Id.* at 56–57.

62. Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366–68, 372 (2001).

63. *Id.* at 368 ("The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.").

64. *Id.* at 372.

65. *Id.*

66. *Id.* at 374.

67. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (discussing the traditional "anticanon").

68. *See* Pace v. Bogalusa City Sch. Bd., 403 F.3d 273, 282–83 (5th Cir. 2005) ("The *Garrett* Court concluded that Title I of the ADA was outside the scope of valid § 5 legislation; therefore, Congress's attempt at abrogation failed, and private suits against states in federal court were barred by the Eleventh Amendment."); 2 AMERICANS WITH DISAB.: PRACT. & COMPLIANCE MANUAL § 7:8 (Westlaw 2019) ("Title I of the Americans with Disabilities Act (ADA) has been declared unconstitutional to the extent that it subjects nonconsenting states to private suits for damages.").

guments that Title I of the ADA validly abrogates sovereign immunity in the employment context.[69]

While in *Garrett* the Court certainly weakened Title I of the ADA, *Garrett* should not be interpreted as defeating it. This article explores four path ways around *Garrett*, each more theoretical than the last. Part II will discuss how standard civil rights doctrine allows litigants to bypass the vast majority of *Garrett*'s ill effects. Part III will discuss what I style "the *Georgia-Lane* analysis" and will show how this analysis allows abrogation under Title I in those situations where government conduct actually violates the Constitution. Part IV will explore using Title II of the ADA to prohibit public employers from discriminating on the basis of disability and will show the impact such a view would have on abrogation of sovereign immunity. Finally, Part V will discuss the *Garrett* decision's own internally flawed reasoning and show how the Court's reasoning in *Garrett* necessarily means that disability discrimination is never rationally related to a legitimate government interest.

II. THE FIRST PATHWAY

This part examines traditional civil rights doctrines and shows that Title I of the ADA is still very much alive for state employees who seek injunctive relief. In addition, it shows why local government employees may use Title I to obtain damages. Finally, it explains that insofar as either local or state employees work for agencies that receive federal funds, such plaintiffs may sue their employers for damages under a sister statute to Title I, the Rehabilitation Act. While no court would seriously quarrel with the propositions made herein, this part is provided for completeness and in the hope that courts and litigants may find it useful in the future.

A. State Employees and *Ex parte Young*

As noted above, the Eleventh Amendment (sovereign immunity) protects states and arms of the state from being sued for either injunctive relief or damages.[70] There are exceptions to this immunity, of course. One such exception is the legal fiction of *Ex parte Young*.[71] That case now stands for two propositions. First, there is an implied cause of action to sue for injunc-

69. *See* Collazo-Rosado v. Univ. of P.R., 775 F. Supp. 2d 376, 387–89 (D.P.R. 2011); Gregory v. Admin. Office of the Courts of N.J., 168 F. Supp. 2d 319, 327 (D.N.J. 2001); Smith v. State Univ. of N.Y., No. 1-CV1454, 2003 WL 1937208 at *4–5 (N.D.N.Y. April 23, 2003).

70. MSA Realty Corp. v. Illinois, 990 F.2d 288, 291 (7th Cir. 1993).

71. *Ex parte* Young, 209 U.S. 123, 154 (1908).

tive relief directly under the constitution.[72] Second, plaintiffs may sue state actors in their "official capacities" for equitable relief without offending the Eleventh Amendment.[73] Such injunctions may extend to reinstatement of employment.[74] However, plaintiffs may not sue such state actors in their official capacities for damages,[75] nor may plaintiffs use the doctrine to enforce state law.[76]

Nevertheless, in order to use *Ex parte Young* to enforce a statute, that statute must be validly enacted.[77] Therefore, if Title I is a valid enactment, plaintiffs may use *Ex parte Young* to enforce it regardless of whether or not Title I validly abrogates sovereign immunity.[78] In *Garrett*, the Court held that Title I did not validly abrogate sovereign immunity because Title I was not valid Fourteenth Amendment enforcement legislation. As such, a plaintiff must find another source of legislative power upon which Title I may stand. That source of power is the Commerce Clause. The ADA specifically states that it was enacted pursuant to the Commerce Clause.[79] Therefore, if the ADA is valid Commerce Clause legislation, plaintiffs may enforce it under *Ex parte Young*. Due to the inherent commercial nature of employment and the sweeping impact disability discrimination had on the national economy, courts should have and have had absolutely no problem in finding that Title I of the ADA is valid Commerce Clause legislation.[80] Thus, it is possible to enforce Title I under *Ex parte Young*. Indeed, the Supreme Court itself squarely recognized the amenability of Title I to *Ex parte Young* actions.[81]

Therefore, while *Garrett* appears to foreclose damages actions against the states, plaintiffs may resort to using *Ex parte Young* to enforce the provisions of Title I of the ADA. Such enforcement no doubt extends to declaratory relief, as to the illegality of state policies, and to reinstatement, or any other manner of injunctive relief.

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72. JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW & GEORGE A. RUTHERGLEN, CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 495 (Foundation Press 4th ed. 2018).

73. *Id.*

74. Nelson v. Univ. of Tex. at Dall., 535 F. 3d 318, 322 (5th Cir. 2008).

75. Perez v. Wade, 652 F. Supp. 2d 901, 904 (W.D. Tenn. 2009) (collecting sources).

76. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984). The *Halderman* decision has become known as the *Pennhurst* Doctrine. It involves a disability rights case. The author of this article plans to write a separate article criticizing the case as belonging in a disability rights anti-canon.

77. This is simply a matter of logic. If the federal statute is unconstitutional, it is unenforceable.

78. Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001).

79. 42 U.S.C.A. § 12101(b)(4) (Westlaw through Pub. L. 116091).

80. Mitchell v. Miller, 884 F. Supp. 2d 334, 366 n.15 (W.D. Penn. 2012) (collecting sources).

81. *Garrett*, 531 U.S. at 374 n. 9.

B. Title I of the ADA and Local Governments

Recall that in *Garrett* a state employee alleged employment discrimination perpetrated by her employer, the State.[82] According to the Court in *Garrett*, Title I did not validly abrogate sovereign immunity because it was not valid Fourteenth Amendment legislation.[83] Title I, however, *is* valid Commerce Clause legislation.[84] While Congress may not abrogate sovereign immunity by resorting to the Commerce Clause, Congress may subject local entities and officials to damage awards by resorting to that same clause because states are protected by sovereign immunity while local entities are not.[85]

C. The Rehabilitation Act

Garrett was decided on the basis of sovereign immunity. Aside from *Ex parte Young* and abrogation, one additional exception to sovereign immunity is waiver.[86] States may waive their immunity in any way they wish.[87] One typical way for waiver to occur is by receipt of federal funds. In order for a state to receive those federal funds, the state typically agrees to waive their Eleventh Amendment immunity.[88] One statute that requires such a waiver is the Rehabilitation Act.[89] The waiver extends only to the particular state agency that accepts federal funds.[90] The Rehabilitation Act incorporates the standards of the ADA.[91] Thus, if a state entity accepted federal funds and committed some form of disability discrimination, the offended employee would be able to sue for damages or any other available relief without offending the Eleventh Amendment.

Therefore, the first pathway undermines the *Garrett* decision in a number of ways. First, *Garrett* has virtually no effect on the ability of employees to seek injunctive relief against state actors, which operates in much the same way as if the State itself were sued. Second, *Garrett* has no impact on

82. *See* discussion *supra* Part I.C.
83. *Garrett*, 531 U.S. at 374.
84. *Mitchell*, 884 F. Supp. 2d at 366 n.15.
85. *Garrett*, 531 U.S. at 368–69.
86. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999).
87. *Id.*
88. Koslow v. Pennsylvania, 302 F.3d 161, 171 (3d Cir. 2002).
89. *Id.* at 170.
90. *Id.* at 171.
91. Washington v. Ind. High Sch. Athletic Ass'n, 181 F.3d 840, 845 n.6 (7th Cir.1999) ("Title II of the ADA was modeled after § 504 of the Rehabilitation Act; the elements of claims under the two provisions are nearly identical, and precedent under one statute typically applies to the other.").

the ability of local employees to sue local entities. Finally, insofar as a state agency accepts federal funds, that particular state agency has waived its Eleventh Amendment immunity.

However, the first pathway, around *Garrett*, alone is insufficient to cover all employees as many people with disabilities are employed by states and state agencies and many state agencies do not accept federal funds. Moreover, injunctive relief is not always the most apt or desirable option for these employees, especially if they were forced out of their employment due to disability related harassment. As such, the following three parts consider further options for avoiding the negative impacts of *Garrett*.

III. THE SECOND PATHWAY: USING THE *GEORGIA-LANE* ANALYSIS FOR SITUATIONS WHERE STATES VIOLATE BOTH TITLE I AND THE CONSTITUTION

This part considers the implications of post-*Garrett* abrogation of sovereign immunity cases under Title II of the ADA. Title II of the ADA prohibits public entities from discriminating on the basis of disability. The circuits currently are split on whether Title II of the ADA actually prohibits employment discrimination. More discussion on the circuit split is taken up under the third pathway discussed below. This part considers only whether the two seminal cases under ADA Title II abrogation—*Lane* and *Georgia*—could influence or mitigate some of the negative aspects of *Garrett*, and in effect undermine the traditional view that *Garrett* sounded the end of Title I damages and injunctive actions directly against the States.

A. *Lane* and *Georgia* Generally

In *Tennessee v. Lane*, the Supreme Court was tasked with answering whether Title II of the ADA validly abrogated state sovereign immunity.[92] The facts at issue were simple and straightforward—courthouses in Tennessee did not comply with ADA standards for construction, which made entrance to the courthouses by persons with disabilities either far more difficult or totally impossible.[93] The Court employed the traditional test to determine whether sovereign immunity had been abrogated. It started by noting that Congress had clearly expressed its intent to abrogate Eleventh Amendment immunity.[94] Following the application of the *City of Boerne* test

92. 541 U.S. 509 (2004).

93. *Id.* at 513–14.

94. *Id.* at 517 ("To determine whether it has done so in any given case, we 'must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of

(which is separate from abrogation analysis because it does not require the clear showing of intent to abrogate),[95] the Court held that Title II was a valid exercise of Congress' powers to enforce the guarantees of the Fourteenth Amendment. First, Congress was seeking to enforce the Equal Protection Clause, the Due Process Clause, and a number of other rights.[96] Second, Congress had identified a widespread history of government discrimination even if it did not find a record of constitutionally invalid building designs.[97] Finally, the ADA's requirements were "congruent and proportional" to enforcing the Constitution given the nature of the rights involved (e.g., the fundamental right of access to courts) and the widespread history of discrimination identified by Congress.[98] In short, requiring accessible features was not too far outside the bounds of constitutional requirements that all people should be granted access to courts whenever feasible.[99]

There is one problem with *Lane*. In *Lane*, the Court very clearly stated that it would go no further, at that time, than holding that Title II is valid abrogation for actions to enforce the fundamental right of access to the courts.[100] Several courts considered *Lane* and held that Title II was invalid Fourteenth Amendment enforcement legislation insofar as it sought to enforce rights that were not as fundamental as the right of access to the courts.[101]

Two years later came the Court's decision in *United States v. Georgia*.[102] As I noted elsewhere, *Georgia* forced multiple circuits to reverse their prior opinions or to withdraw them.[103] In *Georgia*, an inmate at a Georgia correctional facility sued the state under, *inter alia*, Title II of the ADA. He alleged that his cell was inaccessible, and this led to numerous health issues and possible constitutional violations.[104] The State of Georgia, relying on *Lane* and *Garrett*, argued that such damages actions are limited to fundamental rights such as those mentioned in *Lane*, and accessible cells are not such a fundamental right.[105]

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constitutional authority.') (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000)); *see id.* at 518 ("The first question is easily answered in this case.").

95. *Id.* at 518–19.
96. *Id.* at 522–23.
97. *Id.* at 522–24.
98. *Lane*, 541 U.S. at 531.
99. *Id.* at 532.
100. *Id.* at 533–34.
101. Warden, *supra* note 22, at 75 n.188 (collecting sources).
102. 546 U.S. 151 (2006).
103. Warden, *supra* note 22, at 75 n.188 (collecting sources).
104. *Georgia*, 546 U.S. at 155.
105. *See* Transcript of Oral Argument at 31, United States v. Georgia, 546 U.S. 151 (2006) (No. 04-1203) ("First of all, this case is not anything like Tennessee versus Lane. It

Fortunately, *Georgia* provided a vehicle to clear up the confusion left by *Garrett* and *Lane*. The Court held that even non-fundamental rights may properly abrogate sovereign immunity under Title II.[106] In so doing, the Court set forth the now oft-cited *Georgia* framework to determine whether a law is valid enforcement legislation under the Fourteenth Amendment—where the state actions actually violate both the ADA and the Constitution. It further cited *Lane* as an example of valid enforcement where the state action does not violate the Constitution. Combining the traditional clear statement rule noted above with *Georgia* and *Lane*, the general framework for analyzing whether proper abrogation has occurred is, on a claim-by-claim basis, asking:

(1) Whether Congress clearly expressed its intent to abrogate sovereign immunity;[107]

   a. If the answer is yes, go on to step (2). For ADA purposes, the answer to this question is always yes. It would be clear error for a court to say otherwise;[108]

(2) Whether the state action violated the ADA;[109]

   a. If not, there is no valid abrogation under the ADA. If it did violate the ADA, one then goes to step (3);

(3) Whether the state action violated the ADA and the Constitution;[110]

   a. If so, there is proper abrogation. If not, one goes to step (4);

(4) If the law violated only the ADA but not the constitution, is it still valid enforcement legislation?[111] To answer this question, one asks:

   a. What right or rights was Congress trying to enforce?[112] For ADA purposes, most courts focus on equal protection or due process rights purportedly at issue in the case.[113] However, the ADA actually seeks to enforce virtually every constitutional right, since the ADA clearly states Congress

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doesn't involve the very important civil right of access to courts, access to voting booths, or anything like that.").

106. *Georgia*, 546 U.S. at 158–59.
107. Warden, *supra* note 22, at 56.
108. Tennessee v. Lane, 541 U.S. 509, 517 (2004).
109. Warden, *supra* note 22, at 55.
110. *Id.*
111. *Id.*
112. *Id.* at 56 n.69.
113. *Lane*, 541 U.S. at 522.

was seeking to use the full force of its Fourteenth Amendment power;[114]

b. Did Congress identify a widespread pattern of constitutional violations?[115] There is a split among the circuits as to the full scope of this question, which will be answered in Part III below;

c. Are the relevant ADA requirements congruent and proportional to the enforcement of constitutional rights given the nature of the rights at issue and the history of unconstitutional conduct identified?[116] There is some gray area as to the scope of this prong as well. That gray area is discussed below in Part III as well.

Recall that in *Garrett* the Court held the facts alleged in the case did not state a claim for a constitutional violation. Recall also that the Court directly held that there was no documented, widespread history of discrimination in employment sufficient for abrogation. Finally, also recall that the Court squarely held that, assuming the few examples of such discrimination listed by Congress constituted such a history, Title I's requirements were far outside the bounds of what the Constitution requires of states when they discriminate on the basis of disability, such that Title I amounted to an incongruent and disproportional remedy; and that due to its incongruence, Title I was not enforcement of the Fourteenth Amendment but rather an attempt at rewriting it. Therefore, the facts in *Lane* were concerned with Part (4) of the *Georgia-Lane* analysis and not Parts (1) through (3). Thus, one must ask what effect the *Georgia-Lane* analysis may have on *Garrett*.

B. The Impact of *Georgia*

There are two questions to answer here. First, does *Georgia* extend outside of Title II? Second, if so, can *Georgia* actually help cure some of the worry created after *Garrett*? The answer to both is yes.

As to the first question, *Georgia* certainly must apply outside the confines of Title II of the ADA for several reasons. The first is that abrogation under the ADA is not simply an ADA issue, it deals with a fundamental constitutional question regarding federalism.[117] It would be patently absurd if the general analysis could change depending simply on the statute at issue. Secondly, and more practically, the *Georgia-Lane* analysis is virtually the

114. *Id.*
115. Warden, *supra* note 22, at 56 n.69.
116. *Id.*
117. Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698, 704 (4th Cir. 1999).

same for Fourteenth Amendment enforcement legislation in general, which was created under a non-ADA statute in *City of Boerne*.[118] Furthermore, *Georgia* itself cited numerous non-ADA abrogation cases to formulate the now-famous framework.[119] Thus, the case necessarily means that its own framework applies outside the Title II context. As *Georgia* applies outside the ADA Title II context to non-ADA cases, it applies to Title I of the ADA especially.

As to the second question, the answer is yes because *Georgia* now stands for the proposition that if a Title I plaintiff could meet requirements of parts (1) through (3) of the *Georgia-Lane* analysis, that plaintiff could sue the states for damages. Considering that a violation of the ADA would already meet the first two requirements of that analysis, one need only show that there exist some situations in which government disability discrimination can amount to unconstitutional conduct. This is the second question posed in the first paragraph of this subpart. Fortunately, there are two types of claims that seem appropriate for discussion here. The first is animus-based rational basis scrutiny.[120] The second is the substantive due process right to pursue a profession claim.[121]

Animus-based rational basis scrutiny holds the following: "if the constitutional concept of equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest."[122] The same standard and test applies to disability discrimination regardless of whether such discrimination is generally subject to only rational basis review.[123] In short, then, where animus is detected and the animus is the only cause of the conduct, the government conduct towards the person with a disability becomes unconstitutional.[124] Therefore, a hypothetical Title I ADA plaintiff could show that discriminatory conduct perpetrated on them

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118. *See* City of Boerne v. Flores, 521 U.S. 507, 516–18 (1997). In *City of Boerne*, there was no requirement of a clear expression; the court only considered its valid enforcement against the City. A discussion of the distinction between abrogation and simple enforcement under the Fourteenth Amendment can be found in Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 4 (2007).

119. United States v. Georgia, 546 U.S. 151, 158–59 (2006).

120. Carney v. Okla. Dep't of Pub. Safety, 875 F.3d 1347, 1353–54 (10th Cir. 2017) (internal alterations and citations omitted).

121. Engquist v. Or. Dep't of Agric., 478 F. 3d 985, 998 (9th Cir. 2007).

122. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

123. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) ("But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.").

124. *Carney*, 875 F.3d at 1354 (internal alterations and citations omitted).

stemmed from mere animus (and indeed plaintiffs have every right to prove this in court).[125] Such a plaintiff could meet all of the first three requirements of the *Georgia-Lane* framework.

Next, there is the substantive due process right of pursuing a profession. It has been held time and again, that economic rights are largely protected by a rational basis standard of scrutiny alone.[126] Government conduct crosses the constitutional line where it seeks to prohibit an individual from pursing a profession entirely.[127] While the parameters of this right and test are presently unclear, it presents an excellent opportunity for an ADA Title I plaintiff to assert actual constitutional violations in order to meet the first three parts of the *Georgia-Lane* framework. A general set of hypothetical facts that could present a prime situation to assert such a claim, is where a government actor denies an individual an accommodation for their disability and then proceeds to inform other employers around the locale that said person could not perform their job because of their disability.[128]

Therefore, *Georgia*'s impact on *Garrett* may be very far reaching. *Georgia* allows ADA Title I plaintiffs who experience actual constitutional violations to sue states for damages regardless of *Garrett's* perceived foreclosure of that path.

IV. THE THIRD PATHWAY: TITLE II AS EMPLOYMENT DISCRIMINATION LAW

This part considers the possibility and implications of using Title II of the ADA, which deals with government services, programs, or activities, to protect state employees with disabilities. This part will only consider the utility of using Title II in situations where the government discrimination does not violate the Constitution. Recall that if government conduct violates both Title I and the Constitution, there is proper abrogation; as such there would be no need to conduct the analysis set forth in this part. Thus, this part considers only part (4) of the *Georgia-Lane* analysis set forth above. It uses the following framework. Section A will discuss the circuit split as to the viability of using Title II as employment law. Some courts allow it. Some courts do not allow it. This section will briefly explain the reasonings of the various court decisions and will conclude that those courts who allow Title II employment claims are correct. Section B will then explain why the part (4) analysis under Title II produces a different outcome than the part (4) analysis that was putatively conducted in *Garrett*. Section B will have three

125. St. Joseph Abbey v. Castille, 712 F.3d 215, 223 (5th Cir. 2013).

126. American Entertainers, L.L.C. v. City of Rocky Mount, 88 F.3d 707, 723 (4th Cir. 2018); Powers v. Harris, 379 F.3d 1208, 1215 (10th Cir. 2004).

127. Engquist v. Or. Dep't of Agric., 478 F.3d 985, 998 (9th Cir. 2007).

128. To be sure, I do not believe that such facts are the only ones upon which such a claim could lie.

subsections. The first subsection will identify the rights that Congress sought to enforce under Title II. The second subsection will discuss the history of discrimination prong of the *Georgia-Lane* analysis. This subsection concludes that due to the sweeping aims of Title II, less specificity is required than was required under Title I in *Garrett*. Finally, the third subsection will discuss the congruence and proportionality prong. It concludes that because of the sweeping nature of Title II's findings and the Supreme Court's own precedent, less congruence and proportionality is required under Title II as employment law than was required under Title I as employment law. Title II, as this subsection will show, meets this requirement.

A. The Circuit Split

Title II's operative language states: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[129]

Some courts have examined this language and noted that the "or be subject to discrimination" language is a catch all provision that prohibits discriminatory conduct regardless of whether it constitutes a service program or activity.[130] Other courts have looked at this language and concluded that the entire provision refers only to services, programs, or activities.[131] These latter courts view the catch all provision as merely prohibiting non-traditional forms of discrimination.[132]

By understanding why courts interpret the catch-all provision differently, it is possible to go deeper into the theoretical differences between the courts that have borne the subject circuit split. Before examining the theoretical differences that underlie the split, it should be noted that the regulations issued by the Attorney General to enforce Title II contain employment provisions.[133] What follows is a list of reasonings given by the various courts on the issue. While the reasons are listed all together, I note that some courts only adopt one or a few of them. Those courts that take the narrower view of Title II hold that the operative provision could not cover employment because (1) "services, programs, or activities" covers only outputs of public entities and employment is an input, thus, employment cannot be covered

129. 42 U.S.C.A. § 12132 (Westlaw through Pub. L. 116-63).
130. *See* Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 338 (4th Cir. 2012).
131. *See* Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1175 (9th Cir. 1999).
132. *Id.* at 1176–77.
133. 28 C.F.R. § 35.140 (2019).

under Title II;[134] (2) Title I covers employment such that it would be absurd to say that Title II also covers employment;[135] and (3) because Title II cannot be said to cover employment, the regulations concerning employment are directly contrary to the statute and are unlawful.[136] Some courts, however, have suggested that Title II covers employment discrimination where Title I does not apply—such as where the government entity does not employ enough people.[137]

What follows now is a listing of reasons why courts find that Title II does cover employment practices. Those courts that take the broader view hold that Title II certainly covers employment discrimination because (1) Title II covers more than merely government services, but everything a public entity does, such that it covers non-outputs like employment;[138] (2) even though Title I covers employment by public entities, this does not foreclose the possibility that Title II also covers employment in the same cases because litigants often have multiple avenues for relief under the law;[139] and (3) because Title II *might* cover employment discrimination, its language is at least ambiguous as to employment discrimination and because its language is ambiguous, the regulations issued to enforce it are given controlling weight.[140] Indeed that the circuits can disagree as to the meaning of the words, necessarily means that they are ambiguous.[141]

With all due respect for the courts that take the narrower view of Title II, the more expansive view is correct. Title II of the ADA and the ADA as a whole constitute remedial legislation.[142] As remedial legislation, its provisions should be interpreted broadly.[143] This broad interpretation mandate is referenced not only in the regulations regarding Title II as a whole,[144] but in numerous opinions and scholarship that note the ADA has a much more comprehensive view of discrimination than even the sweeping anti-

134. *Zimmerman*, 170 F.3d at 1174.

135. *See id.* at 1176–79.

136. *Id.* at 1179.

137. Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 171 (2d Cir. 2013).

138. Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist., 133 F.3d 816, 820–23 (11th Cir. 1998).

139. Currie v. Group. Ins. Comm'n., 290 F.3d 1, 6–7 (1st Cir. 2002) (specifically discussing the ADA).

140. Skinner v. Salem Sch. Dist., 718 F. Supp. 2d 186, 192 (D.N.H. 2010).

141. This is a mere matter of logic. No one doubts that the individuals who sit on the federal circuit courts are extremely intelligent. To say that Title II is not at least ambiguous at this point would be tantamount to saying that those who sit on the pro-Title II employment circuit courts are lacking in their capacities to reason.

142. Darian v. Univ. of Mass. Bos., 980 F. Supp. 77, 87 (D. Mass. 1997).

143. Johnson v. Runyon, 47 F.3d 911, 917 (7th Cir. 1995) (noting remedial legislation should be interpreted broadly to effectuate its purpose).

144. 28 C.F.R. § 35.101 (2019).

discrimination laws of the past.[145] Indeed, Congress asserted the need for a broad understanding of the ADA in such a way as to embarrass the courts. The Supreme Court was once faced with adopting either a narrow or broad interpretation of the ADA and it adopted a narrower interpretation even though a broad interpretation was possible. Congress responded by specifically abrogating those decisions and listing them in the relevant legislation.[146] Further still, a broad interpretation of the ADA that Title II covers employment discrimination would comport with modern understanding of Title II because it covers "everything a public entity does."[147] Lastly, courts that adopt a narrow version of Title II and find it does not cover the same situations that Title I covers ignore two very important facts: (1) as noted above, litigants often have multiple avenues for relief even under the same act;[148] and (2) there is a difference between using the Title for employment cases—whereas Title I does not amount to valid abrogation under part (4) of the *Georgia-Lane* framework, Title II does.

The reasons why Title I is not a valid abrogation of sovereign immunity whereas Title II does validly abrogate sovereign immunity are discussed below.

B. Title II as Valid Abrogation in the Employment Context Where Conduct Does Not Also Violate the Constitution

1. Right or Rights at Issue

The first step in the part (4) analysis is asking what right or rights Congress was seeking to enforce when it enacted the relevant legislation.[149] The Americans with Disabilities Act contains a very clear statement that it

145. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 598 (1999) ("We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.").

146. *See* Warden, *supra* note 1, at 36.

147. Yeskey v. Pa. Dep't of Corr., 118 F.3d 168, 171 (3d Cir. 1997) (noting that similar "broad language" in the ADA's implementing regulations was "intended to appl[y] to anything a public entity does") (alteration in original) (internal quotation marks omitted), *aff'd*, 524 U.S. 206 (1998); Barden v. City of Sacramento, 292 F.3d 1073, 1076 (9th Cir. 2002).

148. Currie v. Group. Ins. Comm'n., 290 F.3d 1, 6–7 (1st Cir. 2002) (specifically discussing the ADA).

149. Bearden v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla., 234 F. Supp. 3d 1148, 1151 (W.D. Okla. 2017) ("To determine the validity of Congress' action the court must consider: "(1) the nature of the constitutional right at issue; (2) the extent to which Congress's remedial statute was passed in response to a documented history of relevant constitutional violations; and (3) whether the congressional statute is "congruent and proportional" to the specific class of violations at issue, given the nature of the relevant constitutional right and the identified history of violations.") (quoting Guttman v. Khalsa, 669 F.3d 1101, 1117 (10th Cir. 2012)).

sought to assert the full force of the Fourteenth Amendment.[150] As such, the ADA was intended to enforce equal protection,[151] due process,[152] the Privileges or Immunities Clause,[153] all unwritten rights held against the states by the substantive component of the Fourteenth Amendment's Due Process Clause,[154] and all rights incorporated against the states by virtue of the same substantive due process.[155] Most relevant to the discussion here is the Equal Protection Clause.

To be sure, the Equal Protection Clause protects people from discriminatory conduct.[156] However, it is not unconstitutional to discriminate on the basis of disability where the government does so in a way that is rationally related to a legitimate government interest.[157] That being said, of course, that statement *assumes* that discrimination against persons with disabilities or denial of employment is constitutional. I assume this for the sake of argument for the purpose of the requirement that one identify what right or rights are at issue. The question is whether the ADA in this instance goes too far beyond that constitutional rule? This question will be answered by the next two subsections.

2. A History of Unconstitutional Conduct

The test to determine whether there is or has been a history of unconstitutional conduct is whether Congress sufficiently identified a widespread pattern of unconstitutional conduct.[158] If so, the question then becomes how specific must this widespread pattern of unconstitutional conduct be? For example, in *Garrett*, the Court required Congress to have identified a widespread history of unconstitutional disability-based employment discrimination.[159] In other words, did Congress identify a history of irrational treatment of people with disabilities in employment?[160] The Court held that Congress

150. 42 U.S.C.A. § 12101(b)(4) (Westlaw through Pub. L. 116-65).

151. *See* Tennessee v. Lane, 541 U.S. 509, 522 (2004).

152. *Id.* at 522–23.

153. *Id.* (because it is in the Fourteenth Amendment).

154. *Id.*

155. Derek Warden, *The Ninth Cause: Using the Ninth Amendment as a Cause of Action to Cure Incongruence in Current Civil Rights Litigation Law*, 64 WAYNE L. REV. 403, 411 n.50 (2018) (listing the cases that slowly incorporated the Bill of Rights against the states).

156. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (quoting Sioux City Bridge Co. v. Dakota Cty., 260 U.S. 441, 445 (1923)).

157. Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L. REV. 527, 529 (2014) (noting that disability discrimination is subject only to rational basis review).

158. Guttman v. Khalsa, 669 F.3d 1101, 1117 (10th Cir. 2012).

159. Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 369, 370–72 (2001) (noting that Congress failed to show findings of unconstitutional state discrimination in employment)

160. *Id.* at 368, 371.

had not so identified a history.[161] According to the majority, it was not enough that Congress had identified a widespread history of unconstitutional conduct toward people with disabilities by public entities as a whole.[162] This need for particularized historical violations was fully visible in the majority rejecting the dissent's argument that Congress had identified numerous unconstitutional acts of public entities.[163]

This type of historical record of particularized constitutional violations was not required in *Lane*, however.[164] Recall that in *Lane*, the plaintiffs sued about the physical accessibility of courthouses.[165] If the historical record prong of the analysis were the same for both Title I and Title II, then *Lane* would have required the plaintiff show a widespread historical record of unconstitutional building practices. This was not required.[166] In fact, *Lane* found that the historical record prong was met for courthouse accessibility purposes because of widespread violations of *other* constitutional rights and discriminatory conduct.[167]

Why is there this distinction between *Garrett* and *Lane*? The only plausible reason is that the historical record prong is elastic and its requirements depend on the aim of the relevant statutory provision.[168] Thus, Title I requires a record of unconstitutional employment actions because it focuses solely on employment.[169] Title II does not need a particularized showing because its focus is on government conduct generally, of which only some actions involve basic civil rights; thus, a plaintiff need only show a history of unconstitutional government action in general.[170]

While some courts still look for a particularized record for a particular right, even those that require such a record find that Title II is a valid abro-

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161. *Id.* at 371.

162. *Id.* at 371 n.7 (noting that widespread unconstitutional conduct as whole would be applicable under Title II and not Title I, which, per the above discussion, needed specific examples of unconstitutional employment practices).

163. *Id.* at 371 (rejecting Justice Breyer's dissenting argument that he "would infer from Congress' general conclusions regarding societal discrimination against the disabled that the States had likewise participated in such action").

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

165. *Id.* at 513–14.

166. *Lane*, 541 U.S. 509 (2004).

167. *Id.* at 522–23.

168. Other courts have begun to recognize this in part. However, they do so on the grounds that *Lane* considered the record of Title II *as a whole.* Thus, so long as persons can prove a violation of Title II, they meet the historical record prong. *See* Ass'n for Disabled Am. v. Fla. Int'l Univ., 405 F.3d 954, 958 (11th Cir. 2005).

169. At least one court has expressly stated this. *See* Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 485 n.6 (4th Cir. 2005) (noting that due, in part, to Title II's aim of enforcing various rights, "less evidence was required to establish a pattern of unconstitutional conduct.").

170. *See Ass'n for Disabled Am.*, 405 F.3d at 958; *Constantine*, 411 F.3d at 485 n.6.

gation of sovereign immunity, even in the rational basis context.[171] However, the majority of courts have noted the distinction between *Lane* and *Garrett* and have now concluded that *Lane* has foreclosed the requirement of a particularized record of unconstitutional conduct under Title II.[172] In other words, the only real question left in the *Georgia-Lane* analysis is whether the requirements of Title II of the ADA, in the particular instance, are "congruent and proportional."[173]

The majority of courts are correct. Title II necessarily meets the historical record prong of the *Georgia-Lane* analysis. A plaintiff need only show that Congress has identified a widespread history of unconstitutional conduct by state and local governments generally, regardless of the particular right involved in the case. To hold otherwise would be to ignore the Supreme Court's clear directive,[174] and would be to ignore the fact that *Lane* itself did not require such a particularized historical record. Because the Court has already concluded Title II meets this prong entirely, were a Title II employment plaintiff able to show a violation of the statute, he or she would also meet both (4)(a) and (4)(b) of the *Georgia-Lane* framework. Thus, to reiterate what was said above, the only question left is the congruence and proportionality question.

3. Congruence and Proportionality

This prong asks whether the statutory regime is congruent and proportional to the relevant constitutional rights given the nature of the rights at issue and the history of unconstitutional conduct identified.[175] The doctrinal question itself admits that different standards apply to more sweeping laws, requiring broader historical findings, than to more specific laws, which need narrower findings. As such, one would be justified in believing that less congruence and proportionality is required for Title II (as the depth of his-

171. Toledo v. Sanchez, 454 F.3d 24, 35 (1st Cir. 2006).

172. *Constantine*, 411 F.3d at 487; Cochran v. Pinchak, 401 F.3d 184, 191 (3d Cir. 2005), *vacated*, 412 F.3d 500 (3d Cir. 2005); *Ass'n for Disabled Am.*, 405 F.3d at 958.

173. As will be shown below, Title II in this instance meets this test because less congruence and proportionality is required where, as here, the statute is supported by a very clear historical record.

174. Tennessee v. Lane, 541 U.S. 509, 529 (2004) ("The conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself: '[D]iscrimination against individuals with disabilities persists in such critical areas as ... education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.' This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." (citing 42 U.S.C. § 12101(a)(3) (2019))).

175. Guttman v. Khalsa, 669 F.3d 1101, 1117 (10th Cir. 2012).

torical unconstitutional conduct is very sweeping) than was required for Title I (which is limited to employment and had almost no valid historical record).

The difference in standards is in full view when one examines the relationship between *Garrett* and *Lane*.[176] In *Garrett*, the Court focused its congruence and proportionality analysis on the constitutional requirements for employees with disabilities to be free from employment discrimination.[177] In *Lane*, however, the Court did not solely focus on the constitutional rule for physically accessible courthouses.[178] Indeed, it could not have because there is no constitutional rule that courthouses must comply with the ADA's requirements.[179] Instead, *Lane* focused on consonance with other constitutional rules: freedom of the press,[180] due process,[181] as well as the duty to provide counsel to certain defendants.[182] For the *Lane* Court, requiring courthouses to be accessible to persons with disabilities under the ADA looked closer to the requirement that all people have the ability to have their day in court,[183] even if accessible features are not necessarily required by the Constitution.[184] To be sure, *Lane* is no longer controversial; a unanimous Court in *United States v. Georgia* cited it as binding.[185]

a. Consonance based congruence and proportionality

This subsection argues that plaintiffs should be able to satisfy the congruence and proportionality requirements by identifying other constitutional protections and showing that the ADA's requirements are similar to or consonant with those requirements, even if those other cases do not necessarily concern constitutional issues relating specifically to those with disabilities.

176. *Constantine*, 411 F.3d at 488 n.10 ("[T]he congruence and proportionality of Title II must be measured against a record of unconstitutional discrimination that is 'clear beyond peradventure,' while Title I was considered in light of a record that had to be 'squeezed out.'").

177. Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001).

178. *Lane*, 541 U.S. 509.

179. United States v. Georgia, 546 U.S. 151, 157–58 (noting that in *Lane* there were no constitutional violations).

180. *Lane*, 546 U.S. at 523 (noting that the ADA was seeking to enforce First Amendment rights).

181. *Id.* at 533 ("[T]his duty to accommodate is perfectly consistent with the well-established due process principle that, 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts." (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971))).

182. *Id.*

183. *Id.* at 532–33.

184. *Id.* at 543 n.4 (Rehnquist, C.J., dissenting) ("Certainly, respondents Lane and Jones were not denied these constitutional rights.")

185. United States v. Georgia, 546 U.S. 151, 157 (2006).

To be sure, the Supreme Court has never expressly adopted this consonance-based theory. However, several lower courts have adopted this approach. For example, in cases related to education, lower courts have held that while failing to accommodate people with disabilities in public education may not violate the Constitution, the ADA accommodation provisions applicable to public education and its general prohibition on disability discrimination are "consonant" with or look like other recognized constitutional rights.[186] Another recognized constitutional right was established in *Plyler v. Doe*, where the Court held that a state's denial of public education to children of undocumented aliens would fail rational basis scrutiny under the Equal Protection Clause because it would deny them numerous other societal rights.[187] Likewise, failing to accommodate children with disabilities in public education would also deny those children numerous other rights and opportunities to participate in society.[188] Thus, these cases show that where a Title II plaintiff can show consonance between the requirements of the ADA and some other constitutional protection, that plaintiff has met the less exacting congruence and proportionality requirement under Title II ADA cases.

In other words, the mandate that remedies for discriminatory conduct be congruent and proportional to the wrong, considering the nature of the right or rights at issue and the history of unconstitutional conduct as identified by Congress, shows that in some cases less congruence and proportionality is required than in other cases. Otherwise, there would be no need to take into account the nature of the right and the historical record. This is especially true for Title II of the ADA, which has a greater documented past of wrongful discrimination and requires less congruence and proportionality than does Title I. Less specificity is required for both the historical prong of the analysis (because of Title II's sweeping nature) and less tailoring is required for the congruence and proportionality analysis (because of the sweeping nature of the statute and the large historical record). Indeed, the proper focus of the congruence and proportionality analysis under Title II should not be tailored to any one specific constitutional rule applicable to disabilities alone; but whether the requirements of the ADA are consonant with some other constitutional protection, or whether they go too far beyond any case or doctrine ever announced by the Court. Thus, to summarize the

186. Toledo v. Sanchez, 454 F.3d 24, 40 (1st Cir. 2006) ("Title II's provisions are consonant with the recognition in *Plyler v. Doe* that, without an education, individuals are deprived of 'the ability to live within the structure of our civil institutions' and therefore foreclosed from 'any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.'"); *see also* Ass'n for Disabled Am. v. Fla. Int'l Univ., 405 F.3d 954, 957–58 (11th Cir. 2005) (noting that the ADA's was seeking to enforce rights similar to those found in *Plyler v. Doe*).

187. *Toledo*, 454 F.3d at 40 (citing Plyler v. Doe, 457 U.S. 202, 223 (1982)).

188. *Id.* at 40.

consonance theory of congruence and proportionality: due to the broad purposes of Title II and the broad history of constitutional rights violations identified by Congress, and insofar as it relates to Title II, the congruence and proportionality requirement is met so long as there is some consonance between (1) the ADA and (2) some other constitutional law case.[189]

A consonance-based congruence and proportionality test is firmly supported by the general purpose of abrogation theory. The purpose, as noted in several cases, is to ensure that Congress was attempting to enforce a constitutional right and not trying to rewrite the Court's jurisprudence.[190] Thus, litigants seeking to rely on a consonance theory can point to established rights to show that yes, Congress was aware of the Court's pronouncements and was enforcing the right or rights identified therein.

Fortunately, for Title II employment plaintiffs, there is such a case—*Turner v. Fouche*.[191] There, the plaintiffs wanted to be considered for positions on a school board. The State of Georgia prohibited any person who did not own property in freehold from sitting on school boards.[192] Holding that the law was subject to rational basis scrutiny alone, the Court went on to strike down the law, stating:

> We may assume that the appellants have no right to be appointed to the Taliaferro County board of education. But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.
>
> . . . .
>
> However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold.[193]

Thus, the Court admitted that even though it was theoretically possible that the property qualification could amount to a legitimate government interest, it was irrational for that interest to be imputed to every person who did not own property. Therefore, the Court, in effect, held that owning prop-

189. *See* Derek Warden, *Ex Tenebris Lux:* Buck v. Bell *and the Americans with Disabilities Act*, 51 U. TOL. L. REV. 57, 89 n.338 (2019).

190. Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001); *Lane*, 541 U.S. at 521, 541 (Rehnquist, C.J., dissenting).

191. Turner v. Fouche, 396 U.S. 346 (1970).

192. *Id.* at 364.

193. *Id.* at 362–64.

erty bears no relation to the ability of the plaintiffs to effectively perform the duties required of the board; and admitted that while there may be some plausible reason why owning property may affect job performance, the state is still prohibited from denying non-property owners positions because (1) not all non-property owners would be unable to fulfill their duties and this inability could not be imputed to all non-property owners;[194] and (2) those who meet the otherwise minimum qualifications are still able to meet the fundamental requirements of the job.[195]

Therefore, a clear cognate exists between *Turner* and the ADA: having a disability largely has no effect on one's ability to do his or her job;[196] and even assuming that some situations exist where there may be reasons for denying such persons jobs (e.g., saving money on accommodation) the ADA's requirements still prohibit discrimination and require accommodation because (1) not every person with a disability will require accommodation, nor be unable to perform their duties such as to impute any inabilities to all persons with disabilities,[197] and (2) the ADA only requires reasonable accommodation in so far as the person is otherwise qualified with or without the accommodation.[198] Therefore, under the consonance theory, a Title II employment plaintiff meets congruence and proportionality because the ADA's requirements are consonant with and go little further than the underlying constitutional theory of *Turner*.

b. *Garrett*'s narrow approach to congruence and proportionality

Further still, even assuming we take the *Garrett* approach to congruence and proportionality instead of "consonants or cognate," and assuming that a plaintiff needs congruence and proportionality with a constitutional rule for employment discrimination on the basis of disability—we still meet part (4) of the *Georgia-Lane* framework.[199] Here that is so because of the vast historical record present and applicable to Title II that did not exist under Title I, which necessitates a more generous view of congruence and proportionality.[200] Title II prohibits irrational discrimination, as does the Consti-

194. *Id.* at 364 (noting the states may not "presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold").

195. Id. at 363–64 ("It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions.").

196. *See* 42 U.S.C.A. § 12101(a) (Westlaw through Pub. L. 116-63).

197. For example, a person who has a mobility impairment will not have the same limitations as a person with visual impairments.

198. 42 U.S.C.A. § 12131(2) (Westlaw through Pub. L. 116-63).

199. *See supra* Part IV.A.

200. *See supra* Part IV.B.1.b.

tution;[201] it also prohibits violations of the substantive due process right to pursue a profession described previously.[202] However, it also places requirements on the state employers that are beyond constitutional requirements. Nevertheless, another lesson from *Georgia* and *Lane* is that there need not be perfect parity between Title II and the Constitution, so long as the requirements are an appropriate means of protecting those constitutional rights. The ADA, providing more protections than the Constitution, is appropriate for a number of reasons. First, the ADA merely requires that accommodation be reasonable.[203] Second, the ADA may allow the states to deny unreasonable requests that require far more than the Constitution.[204] Third, accommodation requirements and the prohibition on discrimination are a means of prohibiting employers from masking outright animus-based discrimination with the veil of "saving money."[205] Fourth, likewise, the ADA's requirements help insure that people with disabilities are able to pursue their professions unencumbered by irrational conduct before the state actors commit acts that would amount to such irrationality.[206]

As such, under either the consonance-based approach to congruence and proportionality or the more narrow approach as was required in *Garrett*, Title II as employment legislation meets part (4) of the *Georgia-Lane* analysis described above. To be sure, some courts have noted that Title II, as employment discrimination, does not validly abrogate state sovereign immunity. However, these erroneous rulings were the result of the courts' failures to recognize that (1) Title II of the ADA necessitates a broader view of the historical record and (2) the historical record produced applicable to Title II necessitates far less congruence and proportionality than required for Title I.[207]

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201. *See generally* Tennessee v. Lane, 541 U.S. 509, 522 (2004) ("Title II . . . seeks to enforce this prohibition on irrational disability discrimination"); Toledo v. Sanchez, 454 F.3d 24 (1st Cir. 2006) (recognizing that while the Equal Protection Clause prohibits irrational discrimination, the ADA does as well but also prohibits other conduct).

202. *See* 42 U.S.C.A. § 12101(a)(3) (Westlaw through Pub. L. 116-63) (noting that people with disabilities had often faced discrimination in employment); *see also* Marina v. City Univ. of N.Y., 18 F. Supp. 3d 320, 330, 339 (E.D.N.Y. 2014) (recognizing ADA can enforce substantive due process as well).

203. *Lane*, 541 U.S. at 531.

204. The Court, in *Lane*, acknowledged this allowance. *See Lane*, 541 U.S. at 531–32.

205. Justice Rehnquist in *Garrett* virtually admitted that some employment actions may well be animus based. *See* Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367–68 (2001) ("They could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled.").

206. *See*, 28 C.F.R. § 35.130(b)(7)(i) (2019) (requiring public entities to make reasonable modifications to avoid discrimination).

207. *See* Clifton v. Ga. Merit Sys., 478 F. Supp. 2d 1356, 1368 (N.D. Ga. 2007) ("The court finds that the Supreme Court's holding in *Garrett* that '[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state

V. THE FOURTH PATHWAY: DISABILITY DISCRIMINATION MADE ILLEGITIMATE FOR EQUAL PROTECTION PURPOSES BY THE ADA AS COMMERCE CLAUSE LEGISLATION

Recall that in *Garrett* the Court held that Title I of the ADA was not a valid abrogation of sovereign immunity because it failed part (4) of the *Georgia-Lane* analytical framework described above. In other words, Congress failed to adequately identify a widespread history of unconstitutional employment discrimination against persons with disabilities, and that even assuming there was a history of such discrimination, that identified history was not widespread enough to warrant finding that Title I's requirements were congruent and proportional. Nevertheless, as noted above, the outcome of *Garrett* would change where Title II is used to attack employment discrimination because (1) due to the sweeping nature of Title II, it requires less specificity in its historical findings; and (2) due to the deep historical findings and sweep of Title II, less congruence and proportionality is required for it to validly abrogate sovereign immunity. Moreover, as shown above, because of *Georgia* and *Lane*, where government conduct violates both Title I of the ADA and the Constitution the statute has validly abrogated state sovereign immunity. This part briefly considers another implication from only that last statement of law. A full law review article setting forth this argument as applicable to all other pieces of federal legislation is left for a later time.

The Court in *Garrett* held that classifications based on disability are subject only to rational basis review under the Equal Protection Clause.[208] A law or government action will fail the rational basis test if it is not rationally related to a legitimate government interest.[209] In *Garrett*, the Court noted that, under the facts of the case, denying accommodations satisfied rational basis because such was a rational means of achieving the legitimate government interest of saving money.[210]

Assuming that cutting cost is a legitimate government interest, and that denying accommodations to persons with disabilities is a rational means of achieving that end, one must ask whether there are situations in which saving money would not be a legitimate government interest? To answer this question, we must understand that "legitimate interest" is largely an amor-

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discrimination in employment against the disabled' is equally applicable to employment discrimination claims under Title I and Title II of the ADA." (quoting *Garrett*, 531 U.S. at 368)).

208. Garrett, 531 U.S. at 366–67.

209. *Id.*

210. *Id.* at 372.

phous term;[211] and courts tend to disagree as to what amounts to a legitimate government interest.[212] Nevertheless, some general propositions help to answer the question. One possible way to determine whether a government interest is legitimate is by identifying interests that are disapproved of by the whole of American society or its traditions.[213] As such, it stands to reason that if any government interest manifested in such a way that ran afoul of widespread and well-accepted public policies and traditions, it is illegitimate. Put another way, if a governmental interest manifests in such a way that the manifestation violates clear and well-established societal norms, such conduct could not be rationally related to a legitimate government interest.

Discriminating against people with disabilities either by disparate treatment or by failing to accommodate such persons violates widespread societal norms that have existed for decades. Almost every state in the union prohibits disability discrimination either in their own constitutions or in statutes.[214] Shockingly enough, the Supreme Court in *Garrett* admitted that anti-disability discrimination laws were widespread and enacted in every state of the union.[215] Moreover, the ADA itself was passed by both chambers of Congress with sweeping majorities.[216] The view that Congress, through its legislative authority, can issue public policies that set the standard for legitimate government interests goes hand in hand with the Supreme Court's own stated rule that "Congress is the final authority as to desirable public policy, but in order to authorize individuals to recover money damages against the state, [the law must be constitutional]."[217] To say that the Courts can determine public policy for what constitutes a legitimate government

211. Timothy Sandefur, *Is Economic Exclusion A Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1036 (2006).

212. *Id.*

213. Other scholars have noted that the Court will at times overrule a prior decision's assertion of what constitutes a legitimate government interest based on larger widespread social movements. *See* Kermit Roosevelt III, *Judicial Supremacy, Judicial Activism: Cooper v. Aaron and Parents Involved,* 52 ST. LOUIS U. L.J. 1191, 1201 (2008) ("When it overruled *Bowers v. Hardwick* in *Lawrence v. Texas*, the Court was undoubtedly reacting to the greater social acceptance of homosexuality, reflected in both the general social climate and concrete data such as state court decisions striking down sodomy bans on state constitutional grounds."). In other words, just as history in the due process context can tell us what amounts to a protected right, so too can history tell us what amounts to a legitimate government interest.

214. *Garrett*, 531 U.S. at 368 n.5.

215. *Id.*

216. Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 152 (2d Cir. 2013) (quoting Tennessee v. Lane, 541 U.S. 509, 516 (2004)).

217. *Garrett*, 531 U.S. at 374.

interest but Congress cannot, directly contradicts this principle, and faces similar criticism as other now defunct doctrines.[218]

Of course, claiming that with the ADA Congress was establishing desirable public policy would only be valid if the ADA were itself constitutional. The ADA, in so far as it relates to employment situations may not be universally understood to be valid Fourteenth Amendment legislation. However, no one doubts that it is valid Commerce Clause legislation. Indeed, the Supreme Court in *Garrett* itself admitted this when it said that Title I could be enforced against the States via *Ex parte Young*.[219] As such, Title I is valid Commerce Clause legislation, and thus, is a valid expression of national policy prohibiting discrimination against persons with disabilities whether that manifests in unequal treatment or from failure to reasonably accommodate.

Therefore, Title I is a valid and long-standing national policy prohibiting various forms of employment discrimination against people with disabilities. Any government interest contrary to the policy of the ADA is, therefore, an illegitimate government interest. As such, those governmental actions should fail rational basis scrutiny because the actions are necessarily not rationally related to *legitimate* government interests. It follows that every violation of Title I committed by a governmental entity is a violation of the Equal Protection Clause.

Establishing that every violation of Title I is a violation of the Equal Protection Clause would totally undermine *Garrett*. *Garrett*, recall, was decided on parts (4)(b) and (c) of the what I have called the *Georgia-Lane* framework. However, as shown in Part II, that framework holds that where conduct violates both the ADA and the Constitution, abrogation of sovereign immunity is valid. Because, as shown in this part, a violation of Title I is a violation of the Equal Protection Clause, every state-employee Title I plaintiff validly asserts that the ADA has abrogated state sovereign immunity. Thus, plaintiffs may obtain damages or injunctive relief against the states directly, bypassing the Eleventh Amendment.

VI. CONCLUSION

While I fully believe that *Garrett* ranks among the Supreme Court's worst decisions and may belong in the disability rights anti-canon, I also admit that it is error to believe that *Garrett* ended Title I's applicability to state employees. This article has shown four pathways to undermine and

218. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 (1938) (criticizing doctrine of *Swift v. Tyson* on the grounds that the courts had assumed a power in a broad field in which "Congress was confessedly without power to enact . . . statutes").

219. *Garrett*, 531 U.S. at 374 n.9.

assuage concerns stemming from *Garrett*. It is my hope that *Garrett* will soon be a thing of the past, much like all the other invidious social ills that persons with disabilities have faced throughout history.