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Between the Hockey Rink and the Voting Booth: The ADA and Abrogation of Sovereign Immunity in the Educational Context

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THE ADA AND ABROGATION OF SOVEREIGN IMMUNITY IN THE EDUCATIONAL CONTEXT

I. INTRODUCTION

Since the United States Supreme Court's decision in *Tennessee v. Lane*[1] on May 17, 2004, there has been a flurry of cases questioning the validity of abrogation of sovereign immunity by Title II of the Americans with Disabilities Act ("ADA Title II")[2] in various public service contexts.[3] Two cases, *McNulty v. Board of Education of Calvert County*[4] and *Association for Disabled Americans v. Florida International University*,[5] have considered whether the ADA validly abrogates Eleventh Amendment sovereign immunity for private suits alleging violations of Title II in the educational context. These two cases yielded conflicting results. This Note argues that only the latter, in its finding that private individuals may sue the state for violations of Title II in the

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[1] 541 U.S. 509 (2004).

[2] 42 U.S.C. §§ 12131-12150 (2000).

[3] *See*, *e.g.*, Bill M. *ex rel.* William M. v. Neb. Dep't of Health and Human Servs. Fin. and Support, 408 F.3d 1096, 1100 (8th Cir. 2005) (finding that *Lane* only applies to the specific right of access to courts and related claims and rejecting suit under Title II for denial of certain Medicaid-funded services); Miller v. King, 384 F.3d 1248, 1272-74 (11th Cir. 2004) (finding that the "negative obligation" of the Eighth Amendment right to be free from cruel and unusual punishment, as opposed to the positive due process guarantee of accessible courts, makes abrogation a disproportionate remedy in the prison context when the Eighth Amendment right is "the only right at issue"); Simmang v. Texas Bd. of Law Exam'rs, 346 F .Supp. 2d 874, 882 (W.D. Tex. 2004) (finding that Eleventh Amendment immunity is not validly abrogated by the ADA Title II for allegations against the state board of law examiners because "the right to practice law is not a fundamental right for the purposes of the Fourteenth Amendment" (quoting Tolchin v. Supreme Court of N.J., 111 F.3d 1099, 1114 (3d Cir. 1997))); Haas v. Quest Recovery Servs., 338 F. Supp. 2d 797, 803 (N.D. Ohio 2004) (finding that sovereign immunity is not abrogated in a suit against the state for inaccessibility of drug rehabilitation treatment facilities, relying heavily on divide between legislation protecting due process rights and equal protection guarantees).

[4] No. Civ. A. DKC 2003-2520, 2004 WL 1554401 (D. Md. July 8, 2004).

[5] 405 F.3d 954 (11th Cir. 2005).

educational context, correctly applied *Lane* and, further, that this decision should have extended to acknowledge the possibility of valid abrogation authorizing the imposition of liability for violations of both due process and equal protection guarantees.

In *Lane*, the U.S. Supreme Court affirmed the Sixth Circuit's remand of the ADA Title II claim of George Lane, a paraplegic confined to a wheelchair, against the state of Tennessee for the denial of "access to, and the services of, the state court system."[6] The Court found that Mr. Lane asserted a valid claim for equitable relief and damages against the state under the ADA Title II.[7] The finding that Title II validly abrogated state sovereign immunity in the context of access to courts was a central focus of the Court's holding. *McNulty* was decided on July 8, 2004 in the District Court of Maryland and purports to follow *Lane*. In *McNulty*, a high school student brought a claim under the ADA Title II against the Calvert County Board of Education.[8] The district court dismissed the claim, finding that state immunity was not validly abrogated by the ADA in the context of public education because disability is not a suspect class and education is not a fundamental right.[9] In *Association for Disabled Americans*, plaintiffs with hearing impairments brought suit for equitable relief against Florida International University ("FIU") alleging that the University's failure to provide appropriate interpreters and other assistance violated the ADA Title II.[10] The Eleventh Circuit reversed the Southern District of Florida's decision granting FIU's motion to dismiss based on Eleventh Amendment immunity.[11]

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[6] *Lane*, 541 U.S. at 513-15.

[7] *Id.* at 515.

[8] *McNulty*, 2004 WL 1554401, at *2. The defendants included the "Board of Education of Calvert County; J. Kenneth Horsmon, superintendent of Calvert County Public Schools; Kathryn Coleman, director of student services; Raymond D'Arienzo, supervisor of student services; George Miller, principal of Northern High School; Craig Hunter, vice principal of Northern High School; Karen Neal, former vice principal of Northern High School; and James Parent, principal of the Calvert Career Center." *Id.*

[9] The *McNulty* court dismissed a Title II claim for money damages for failure to state a claim in accordance with Federal Rule of Civil Procedure 12(b)(6). *Id.* at *2, 8.

[10] Ass'n for Disabled Ams. v. Fla. Int'l Univ., 178 F. Supp. 2d 1291, 1292 (S.D. Fla. 2001), *rev'd by* 405 F.3d 954 (11th Cir. 2005).

[11] Ass'n for Disabled Ams. v. Fla. Int'l Univ., 405 F.3d 954, 959 (11th Cir. 2005).

This Note will argue that *Lane* prescribed the result in *Association for Disabled Americans* and that *McNulty*, in contrast, took an inappropriately narrow view of *Lane* by summarily foreclosing the possibility of maintaining private actions for education claims under the ADA Title II solely because education is not considered a fundamental right under the Federal Constitution. Although the *Lane* Court gave substantial weight to the fact that the right at issue was access to courts, the fundamental nature of the right is not entirely controlling in the determination of whether federal legislation, and specifically the ADA Title II, may properly abrogate states' immunity to private suits pursuant to the Fourteenth Amendment's section 5 power. *Association for Disabled Americans* acknowledged this but did not engage in a comprehensive analysis of the claim in the educational context sufficient to support future differentiation from claimed violations in other public service contexts. In arguing that the Eleventh Circuit reached the proper result, this Note also seeks to supplement the Eleventh Circuit's analysis in two ways: First, this discussion more thoroughly demonstrates why the educational context presents a special case for valid abrogation. Second, it argues that abrogation is valid with regard to claims that implicate either the due process or equal protection guarantee.

Part II will briefly discuss the scope, purpose, and requirements of the ADA generally and Title II specifically. Next, Part III will discuss the evolution of the abrogation analysis and what the *Lane* decision added to the established standard, specifically addressing the question of whether Title II validly abrogates sovereign immunity. Part IV will illustrate, using the case examples of *McNulty* and *Association for Disabled Americans,* how courts should apply this standard acknowledging that the fundamental right consideration was not dispositive in *Lane*. The *McNulty* court should not have dismissed the claim under Title II relying solely on the premise that when a nonfundamental right is at issue, the ADA's abrogation of sovereign immunity under Title II cannot under any circumstances be valid. *Association for Disabled Americans* reached the proper result but should have also engaged in a thorough abrogation analysis sufficient to support future similar decisions in the context of public education. This last part of the Note will suggest a comprehensive alternative analysis that district courts, like the *McNulty* court, should use to maintain consistency with precedent, including *Lane*.

Unlike the *McNulty* court's method, this analysis considers the impact of the educational context on the abrogation question.

II. THE AMERICANS WITH DISABILITIES ACT, TITLE II

Based on extensive legislative findings that contributed to a lengthy and influential legislative history, Congress passed the Americans with Disabilities Act[12] in 1990. The final version included summaries of the findings and purposes of the law.[13] Two important summary findings relate that

> some 43,000,000 Americans have one or more physical or mental disabilities, and [that] this number is increasing as the population as a whole is growing older [and] discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services . . . .[14]

To remedy growing and pervasive discrimination in these "critical" areas, Congress purported to invoke both the Article I commerce power and the Fourteenth Amendment's "sweep of Congressional authority."[15] The latter authority, section 5 enforcement power, may be invoked to implement the equal protection or due process guarantees of the Fourteenth Amendment. Under this authority, the ADA Title II asserts "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."[16]

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[12] 42 U.S.C. §§ 12101-12213 (2000).

[13] 42 U.S.C. § 12101 outlines the findings and purposes behind the drafting and passing of the ADA as a whole. Titles I, II, and III address discrimination against people with disabilities in different contexts. Title I addresses employment, Title II addresses public services, programs, and activities, and Title III addresses public accommodations. *See id*. §§ 12101. This section briefly summarizes the lengthy legislative history behind the Act and then focuses on the specifics of Title II.

[14] *Id*. § 12101(a)(1), (a)(3).

[15] *Id*. § 12101(b)(4). Abrogation of sovereign immunity pursuant to the Commerce Clause has long been considered an invalid use of Congressional power. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 79 (2000).

[16] 42 U.S.C. § 12132 (2000). *See* 28 C.F.R. § 35.149 (2000) (implementing regulations of the ADA Title II nondiscrimination requirement); *see also* 42 U.S.C. § 12131(1) (2000) ("The term 'public entity' means any State or local government . . . ."); [T]he term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential

To guard against disability discrimination, Title II's requirement of "reasonable modifications"[17] and corresponding regulations outline how public entities are required to modify existing services and facilities[18] and construct new facilities.[19] Importantly, the regulations include the significant qualification that they do not "[r]equire a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."[20]

The enforcement provision of Title II routes through other legislative acts, including Title VI of the Civil Rights Act of 1964[21] via the Rehabilitation Act,[22] providing that an aggrieved individual may bring a civil action for injunctive relief, and possibly compensatory damages.[23] It is this enforcement provision, combined with the ADA's express abrogation of states' sovereign immunity,[24] that is the focus of the controversy over whether the ADA as a whole, or the Titles individually, validly abrogate Eleventh Amendment sovereign immunity. Congress included the abrogation of sovereign immunity to serve as a powerful tool to protect "individuals with disabilities [because they] are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society . . . ."[25] This abrogation provision is a major component

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eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id. § 12131(2). See 42 U.S.C. § 12111 (2000) for definitions generally.

[17] 42 U.S.C. § 12131(2) (2000).

[18] 28 C.F.R. § 35.150 (2000).

[19] *Id.* § 35.151 (2000).

[20] *Id*. § 35.150(a)(3). *See also* Tennessee v. Lane, 541 U.S. 509, 531 (2004) (discussing the "reasonable measures" the legislation requires in the proportionality assessment); *infra* Part IV.C.4 (discussing how these internal limitations rebut the argument that the legislation is overbroad and seeks to enforce more than irrational disability discrimination).

[21] 42 U.S.C. §§ 2000d-2000d7 (2000).

[22] 29 U.S.C. § 794(a) (2000).

[23] 42 U.S.C. § 2000d (2000) has been interpreted to provide for damages relief. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 598-601 (1983) (explaining that the drafters of Title VI aimed primarily at the provision of "preventive relief," but that victims of intentional discrimination may also be entitled to compensatory damages); *see also* Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 655 n.11 (discussing the use of Title VI remedies for application of the ADA Title II and possible interpretive problems arising from incorporation of those remedies).

[24] 42 U.S.C. § 12202 (2000).

[25] *Id*. § 12101(a)(7).

of the ADA's goal of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[26]

III. THE STANDARD FOR ABROGATION

The United States Supreme Court has interpreted the Eleventh Amendment[27] to hold nonconsenting states immune from suits by citizens of other states and citizens of their own states.[28] The ADA expressly abrogates states' Eleventh Amendment immunity to private suits when a claim is brought due to a violation of the Act:

> A State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.[29]

Generally, the Court has deemed abrogation of this immunity valid in some instances when Congress acts pursuant to its Fourteenth Amendment section 5 power, but never when Congress acts pursuant to Article I.[30] In order for

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[26] *Id*. § 12101(b)(1).

[27] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. There are, however, four prominent instances in which suits against a state are permitted. The United States may sue a state. *See, e.g.*, United States v. Mississippi, 380 U.S. 128, 141 (1965). States may sue each other under certain circumstances. *See, e.g.*, Colorado v. New Mexico, 459 U.S. 176, 182 n.9 (1982). A private individual may sue a state officer for prospective injunctive relief. *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 165-67 (1908). Finally, an individual may sue the state or a state agency when the Eleventh Amendment immunity is validly abrogated by section 5. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). The fourth instance is at issue here.

[28] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001). (reiterating this interpretation of the Eleventh Amendment immunity, citing the line of cases extending the immunity). *See* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, CIVIL RIGHTS LAW AND PRACTICE § 5.35 (2d ed. 2004) (addressing progression of interpretations of Eleventh Amendment immunity).

[29] 42 U.S.C. § 12202.

[30] *See supra* note 15. There are some instances in which the Fourteenth Amendment's section 5 power may abrogate the states' sovereign immunity because the Fourteenth Amendment is directed specifically at imposing some limitations on the state and such limitations may sometimes be "appropriate legislation" to enforce provisions of section 1. This valid abrogation pursuant to section 5 relies heavily on the chronology and purpose of the Fourteenth Amendment, as it was adopted after the

Congress to validly abrogate sovereign immunity pursuant to section 5, Congress must (1) explicitly intend to abrogate sovereign immunity, and (2) be legislating within the bounds of the power granted to Congress by section 5.[31]

A. Express Intent to Abrogate

The first part of the analysis, express statutory intent to abrogate, generally presents a low bar and is answered affirmatively in most instances.[32] In *Lane*, for example, the Court found that section 12202 of the ADA unequivocally expressed Congress's intent to abrogate sovereign immunity to private suits by simply looking at the statutory language.[33] The second "predicate question,"[34] whether abrogation was within Congress's grant of power, is more complicated.

B. Section Five Enforcement Power and the Boerne *Proportionality Test*

Section 5 of the Fourteenth Amendment gives Congress the power to enforce the provisions of the Fourteenth Amendment through "appropriate legislation."[35] Congress may invoke this power to enforce the due process and equal protection guarantees of section 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

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Eleventh and for the purpose of limiting state power to protect national citizens. Article I legislation, for similar reasons, cannot validly abrogate immunity. Fitzpatrick v. Bitzer, 427 U.S. 445, 452-54. (1976); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727 (2003). *See also Garrett*, 531 U.S. at 388-89 (Breyer, J., dissenting); Colker, *supra* note 23, at 701 (2000) (emphasizing that Title VII of the Civil Rights Act unquestionably abrogates sovereign immunity and it is only a question of when, not if, Congress may so abrogate).

[31] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 72 (2000) (citing these instances).

[32] *See Hibbs*, 538 U.S. at 726 (citing the "clarity" of Congress' intent to abrogate immunity in the Family Medical Leave Act); *Garrett*, 531 U.S. at 363-64 (citing 42 U.S.C. § 12202 as an unequivocal expression of abrogating sovereign immunity in beginning examination of Title I); *Kimel*, 528 U.S. at 78 (finding that suits against the states are authorized by the ADEA).

[33] *Lane*, 541 U.S. at 517-18.

[34] *Id.* at 517.

[35] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

> process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[36]

In *City of Boerne v. Flores*,[37] the Court developed a test to determine the validity of legislation enacted pursuant to the section 5 enforcement power. *Boerne* was concerned with the ability of Congress to pass legislation pursuant to section 5, not with abrogation of sovereign immunity. *Boerne*'s test, however, is important here because it demonstrates when Congress may act pursuant to its section 5 power, the second component of the abrogation analysis.[38] Such legislation must be remedial and not substantive,[39] and it must be congruent and proportional to identified violations.[40]

The *Boerne* court found that the Religious Freedom and Restoration Act ("RFRA") was not remedial because the legislative record lacked evidence of violations during the forty years preceding the Act's passage.[41] The Court agreed that the scope of the right at issue was the constitutional right to free exercise of religion,[42] but asserted, in essence, that there were not recent and significant violations to remedy.[43] Second, the Court found that the legislation attempted to change the way courts reviewed claims brought under the Due Process Clause

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[36] U.S. CONST. amend. XIV, § 1.

[37] 521 U.S. 507 (1997). In *Boerne*, the Court invalidated the Religious Freedom Restoration Act of 1993 determining that its proposed remedy was disproportionate to the enforcement of constitutional guarantees and instead was aimed at changing the content of those guarantees. *Id*. at 532.

[38] The first component is that the legislation explicitly outline its intention to abrogate sovereign immunity, as discussed *supra* notes 32-34 and accompanying text.

[39] *Boerne*, 521 U.S. at 521.

[40] *Id.* at 520.

[41] *Id.* at 530.

[42] *Id*. at 519. This is the determination of the "scope" of the constitutional right at stake. In other cases, the scope of the right is less clear and depends on the questions of whether the alleged violation of the right involves a suspect classification or implicates a fundamental right. *See* Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) (disability is not a suspect classification and access to courts is a fundamental right); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003) (gender classification warrants heightened scrutiny); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 366 (2001) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), and reiterating that disability classifications are not suspect and warrant only rational basis review); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (age is not a suspect classification and warrants only rational basis review).

[43] The *Boerne* court engages in a lengthy examination of section 5, including history of the Framers' intent and use of the enforcement power, to support the proposition that it is a remedial and not substantive power. *Boerne*, 521 U.S. at 520-29.

of the Fourteenth Amendment,[44] risking substantively changing the amendment's guarantees. The Court implemented a test of congruence and proportionality to determine where this line exists between permissible remedial and impermissible substantive use of the enforcement clause.[45]

In making the congruence and proportionality determination, the *Boerne* Court examined the Congressional record to determine whether Congress enacted the legislation due to historical and continuing constitutional violations. The Court relied on the dearth of current and pervasive instances of violations to identify the Act's most serious shortcoming:[46] the legislation's failure to be proportional to any constitutional violation described in the legislative history.[47] This determination was based on the Court's perception of the expansive and interminable sweep of the legislation that reached many laws unlikely to violate any constitutional rights.[48] RFRA explicitly required the state to show a compelling interest for certain legislation where the Court had previously determined that due process required less stringent review of similar state legislation. RFRA's fatal breadth was evident because of the lack of relevant legislative history documenting constitutional violations.[49] The permissible

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[44] *Id.* at 535. Congress was trying to reestablish a standard of review the Court had rejected in Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

[45] The Court emphasized that

> Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]." . . . While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

Boerne, 521 U.S. at 519-20 (quoting U.S. CONST. amend. XIV, § 5, brackets in original).

[46] *Boerne*, 521 U.S. at 532. The Court found the disproportionality more fatal than the lack of legislative evidence: "[L]ack of support in the legislative record . . . is not [the legislation's] most serious shortcoming." *Id*. at 531.

[47] The Court concluded that the legislation "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532.

[48] *Id.*

[49] The recent cases dealing with sovereign immunity have similarly looked to the Congressional findings before making a determination as to whether legislation is

breadth of a remedial statute narrows as the constitutional violations contemplated by Congress and demonstrated in the legislative history, the foundational concerns of the statute, diminish.[50]

Boerne is important because it lays out the congruence and proportionality test, the second piece of the abrogation analysis. Because in most cases the question as to whether a statute intends to abrogate is easily answered, congruence and proportionality becomes decisive in the abrogation inquiry.

C. Setting the Stage for Lane*:* Board of Trustees of the University of Alabama v. Garrett[51]

Garrett is the most relevant precedent to *Lane* for the purposes of this discussion, having applied the test for abrogation in its entirety to ADA claims. The *Garrett* Court cited express intent to abrogate in the ADA, identified the scope of the right at stake, and assessed the congruence and proportionality of Title I.[52] *Garrett* involved the cases of two[53]

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congruent and proportional to Congress' objectives that are supposed to be based on those findings. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003) ("[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation."); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 370 (2001) (citing the great amount of discrimination outlined in legislative findings and pointedly relying on the dearth of evidence of violations specific to the right at issue: "Congress assembled . . . minimal evidence of unconstitutional *state* discrimination in employment against the disabled.") (emphasis added); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (emphasizing that Congress lacked findings of age discrimination by the states when passing the legislation in question: "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age.").

[50] While striking down the legislation in question, the Boerne court did preserve Congress' power to enforce broad legislation that "prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" 521 U.S. at 530 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)). Congress is permitted to enforce "broadly sweeping" legislation under certain circumstances, even when it might interfere with traditionally exclusive territory of the state. *Id*. at 517-18. Proportionality is the key.

[51] 531 U.S. 356 (2001).

[52] *Id.* at 365.

[53] Garrett v. Bd. of Trs. of the Univ. of Ala. in Birmingham, 989 F. Supp. 1409, 1410-12 (N.D. Ala. 1998) (consolidating and granting the state's motion for summary judgment in both cases for claims under the ADA, the Rehabilitation Act, and the FMLA). The Eleventh Circuit reversed summary judgment as to the ADA and Rehabilitation Act, but affirmed immunity as to the claim brought pursuant to the FMLA. Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 193 F.3d 1214, 1216 (11th Cir. 1999). The ADA claims seeking money damages in suit against the state were the only claims in front of the United States Supreme Court. *Garrett*, 531 U.S. at 360 (2001).

employees of state agencies who claimed protection under Title I of the ADA and brought suit against the state of Alabama for discrimination in employment on the basis of disability.[54]

The *Garrett* Court briefly acknowledged the ADA's express intent to abrogate[55] and then moved to "identify with some precision the scope of the constitutional right at issue."[56] Because the *Garrett* Court was dealing with claims of employment discrimination, the Court determined the scope of the constitutional right at issue by discussing whether disability is a suspect classification for equal protection purposes.[57] Citing *City of Cleburne v. Cleburne Living Center*[58] with approval, the Court repeated that disability is not a suspect classification and that such classification by the state warrants only rational basis review.[59] Emphasizing that the House and Committee Reports repeatedly mention "employment in the private sector"[60] and that *state* discrimination in employment is not mentioned in the Act's

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[54] Patricia Garrett took leave from her work as a Director of Nursing for the University of Alabama hospital to undergo treatment for breast cancer and was denied her director position upon return. *Garrett*, 531 U.S. at 362. Milton Ash requested modification of his employment environment and hours due to asthma and sleep apnea upon a doctor's recommendation, was denied those requests, and reported low work evaluations he attributed to the requests. *Id.*

[55] *Id*. at 364.

[56] *Id*. at 365.

[57] *Id.*

[58] 473 U.S. 432 (1985) (striking down the application of a city ordinance using only rational basis review because state action classifying people with disabilities is not considered suspect). Ruth Colker argues that *Cleburne* was decided on the premise that Congress was actively seeking to redress disability discrimination and applying heightened scrutiny would inhibit Congressional affirmative action to remedy unconstitutional behavior:

> It turns *City of Cleburne* on its head to say that the majority chose rational basis scrutiny because it wanted to restrict the power of Congress to impose affirmative obligations on the states to benefit individuals with disabilities . . . . The majority . . . chose rational basis scrutiny because it had confidence that federal and state governments were seeking to create affirmative rights for individuals with disabilities.

Colker, *supra* note 23, at 692.

[59] The Court said that "States are not required by the Fourteenth Amendment to make special accommodations for the disabled [and that if] special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Garrett*, 531 U.S. 367-68. For an argument that this language is misleading, especially in light of *Garrett*'s disparate treatment grievance that lacked any request for "special" (the Court's language) or even "reasonable" (the ADA's language) accommodations, see Anita Silvers & Michael Ashley Stein, *From* Plessy *(1896) and* Goesart *(1948) to* Cleburne *(1985) and* Garrett *(2001): A Chill Wind from the Past Blows Equal Protection Away*, *in* BACKLASH AGAINST THE ADA 221, 240-4 (Linda Hamilton Krieger ed., 2003).

[60] *Garrett*, 531 U.S. at 371 (quoting S. REP. No. 101-116, at 6 (1989)).

legislative findings, the Court dismissed the argument that there was evidence in the legislative record to support findings of unconstitutional employment discrimination in public employment.[61] Evidence of discrimination in *private* employment did not support Title I's purported enforcement of constitutional guarantees in *public* employment. Unconvinced by more general evidence of state discrimination against people with disabilities in other areas covered by the ADA, the Court concluded that Title I does not validly abrogate sovereign immunity to allow private suits against state employers.[62] Chief Justice Rehnquist concluded that without evidence of a pattern of discrimination and targeted congruent and proportional legislation, "the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*"[63] amounting to a substantive rather than remedial use of section 5 power.

Although this holding only explicitly prohibited the application of *Title I* to states, it supported the high bar that the Court would apply to future claims of abrogation of state sovereign immunity under other Titles of the ADA.[64] The question became whether a private suit against the state under any Title of the ADA could be separated from the holding on Title I in *Garrett* and deemed consistent with, and not impermissibly expansive of, extant substantive guarantees of the Fourteenth Amendment.

D. Interpreting Garrett*:* Popovich v. Cuyahoga County[65]

The *Lane* Court was not the first to attempt to apply *Garrett*'s analysis to Title II of the ADA. *Garrett* is vulnerable to at least two distinct interpretations that the *Lane* Court recognized even though it declined to definitively adopt one to the exclusion of the other.[66] *Popovich v. Cuyahoga County*,[67]

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[61] *Id*. at 372.

[62] Chief Justice Rehnquist noted, however, that recourse under Title I still applies to private employers, that the federal government may sue states for money damages, and that individuals may still seek injunctive relief against the state under Title I. *Id*. at 374 n.9.

[63] *Id.*

[64] *Id.*

[65] Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002) (en banc), *cert. denied*, Popovich v. Cuyahoga County, 537 U.S. 812 (2002).

[66] This Note argues that in using the fundamental rights tack, the *Lane* Court does not deem the equal protection route invalid. *See infra* Part IV.

[67] *Popovich*, 276 F.3d 808.

more specifically the majority and concurrence therein, outline the tension that exists between these possible interpretations of *Garrett*. The *Popovich* opinions discussed whether Title II may validly abrogate sovereign immunity, pursuant to the section 5 power, to enforce both the due process and equal protection guarantees of the Fourteenth Amendment.[68] This case is important for the purposes of this Note for three reasons: the *Lane* Court discussed the *Popovich* decision and the concurrence without approving either strict approach,[69] the Court denied certiorari on *Popovich* upon the state's appeal, and the case also dealt with Title II and disability discrimination related to access to courts. Additionally, the Sixth Circuit's decision in *Popovich* influenced the remand by the Sixth Circuit in *Lane*,[70] which the Supreme Court affirmed. This discussion is essential here because disability discrimination in education, the specific issue in *McNulty* and *Association for Disabled Americans*, deals with a challenge to *irrational* disability discrimination, implicating Title II's enforcement of the equal protection rather than due process guarantee. The concurrence in *Popovich* is an especially useful guide for determining how a court should deal with examining whether Title II is an appropriate enforcement of the equal protection guarantee.

In *Popovich* an individual with a hearing impairment brought suit under Title II of the ADA due to the State's failure to provide adequate hearing assistance in his child custody case that would have afforded him meaningful access to court.[71] The majority opinion read *Garrett* as excluding the possibility that Title I validly abrogates sovereign immunity when addressing equal protection violations.[72] *Popovich* stated

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[68] *Id.* at 810-11.

[69] Tennessee v. Lane, 541 U.S. 509, 514-15 (2004).

[70] Lane v. Tennessee, 315 F.3d 680, 683 (6th Cir. 2003).

[71] *Popovich*, 276 F.3d at 811. Indeed, the facts of *Popovich* implicate not only the fundamental right of access to courts, but also the "special nature of parental rights" that is "sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Id.* at 813-14 (citing Santosky v. Kramer, 455 U.S. 745, 774 (Rehnquist, J., dissenting)).

[72] *Id*. at 812. The court noted this exclusion's basis in *Garrett*:

> The [*Garrett*] Court, noting that the *Title I* legislation is limited to employment discrimination against the disabled, said that "the scope of the constitutional right at issue" is simply "equal protection" . . . . The Court then held that Section 5 of the Fourteenth Amendment does not give Congress the power to enforce the Equal Protection Clause by authorizing federal employment discrimination suits against states based purely on *disability*.

conclusively that "congressional authority under section 5 to enforce the Equal Protection Clause is limited and will not sustain the Disabilities Act as an exception to Eleventh Amendment state immunity."[73] *Popovich* also expressed a willingness to extend *Garrett*'s reasoning to all Titles of the ADA, acknowledging that there is only a small possibility that the Supreme Court may distinguish *Garrett* in future cases involving the other Titles.[74]

The *Popovich* court did, however, remand because it deemed Title II's abrogation of sovereign immunity an appropriate section 5 enforcement of the Due Process Clause.[75] The *Popovich* court emphasized that a major distinction between Titles I and II is the type of claims the Titles cover, with the latter "encompass[ing] various due process-type claims with varying standards of liability . . . not limited to equal protection claims."[76] Considering the nature of the fundamental rights involved in meaningful access to child custody hearings, *Popovich* held that Congress was within its power to legislate immunity abrogation and by doing so was "enforcing" rather than "expanding" the due process guarantee.[77] The majority failed to explain, however, why Congress cannot "enforce" rather than "expand" the Equal Protection Clause's guarantee against irrational disability discrimination. Whether Congress sought to enforce the prohibition on irrational disability discrimination or sought to

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Id. The court specified that abrogation is invalid as an enforcement of the Equal Protection Clause in other contexts, clearly stemming from this interpretation of *Garrett*:

> We reverse and remand the case for a new trial because the charge to the jury appears to permit the jury to find in favor of the plaintiff if it finds discrimination against him or exclusion from public proceedings based on equal protection principles. After *Garrett*, this is an impermissible basis on which to base federal jurisdiction under the Eleventh Amendment or a verdict and damages against a state court under the Disabilities Act.

Id. at 816.

[73] *Id*. at 812.

[74] *Id.*

[75] *Id.* at 813.

[76] *Popovich*, 276 F.3d at 813. *Lane* uses very similar language to describe the coverage of Title II, noting that

> Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review. These rights include some, like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment.

Tennessee v. Lane, 541 U.S. 509, 522-23 (2004) (internal citations omitted).

[77] *Popovich*, 276 F.3d at 815.

enforce the due process guarantee served as the *Popovich* court's key to assessing the validity of the ADA's abrogation of Eleventh Amendment immunity.[78] *Popovich* does not even address *Garrett*'s lengthy discussion of the legislative history of Title I and the distinction *Garrett* makes between evidence of violations supporting Title I and evidence of violations supporting Titles II or III.

Judge Moore's concurring opinion in *Popovich* specified this shortcoming in the court's opinion. The *Popovich* concurrence refused to foreclose the possibility that Title II's abrogation of Eleventh Amendment immunity could be a valid enforcement of the equal protection guarantee particularly because that question was not even before the court.[79] While the majority seemed to forego the application of any type of standard to state action under the constitutional guarantee of equal protection, highlighting that "the scope of the constitutional right at issue [was] *simply* equal protection,"[80] the concurrence reminded the court that the Equal Protection Clause prohibits "arbitrary and invidious discrimination against individuals with disabilities [and that] 'the [disabled], like others, have and retain their substantive constitutional rights *in addition to the right to be treated equally by the law*.'"[81] Agreeing that when the scope of the right does not extend further than that afforded by the guarantee to be treated equally by the law (when there is a nonfundamental right involved) Congress cannot impose more than equal protection liability,[82] the concurrence asserted that this liability nonetheless mandates that states act rationally.[83] This was not an issue in *Garrett* because no history of irrational disability discrimination in public employment had been identified, not

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[78] *Popovich* also discussed the separation of powers problem at length, citing the boundaries of Congress' section 5 enforcement power to prohibit a "'broader swath of conduct' than the courts have themselves identified as unconstitutional." *Id*. at 813 (quoting Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001)).

[79] *Id*. at 818 (Moore, J., concurring).

[80] *Id*. at 812 (quoting *Garrett*, 531 U.S. at 963) (emphasis added, internal quotation marks omitted). The court continues, "Title I does not encompass claims based on substantive rights under the Due Process Clause, and therefore the scope of the constitutional right Congress is enforcing does not go beyond equal protection liability." *Id.*

[81] *Id*. at 818 (Moore, J., concurring) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447 (1985)) (emphasis added).

[82] *Popovich*, 276 F.3d at 812.

[83] *Id*. at 818 (Moore, J., concurring).

because Congress was powerless to remedy equal protection violations had they occurred therein.

Judge Moore specifically referenced *Garrett*'s focus on Congress' failure to identify a history and pattern of unconstitutional discrimination in *public* employment and the resulting reluctance to accept enforcement of Title I against the states.[84] In doing so, Judge Moore underscored that *Garrett*'s review of the legislative history of Title I cannot also be considered a review of the legislative history of Title II. Judge Moore felt that a Title II claim requires review of documented constitutional violations in relation to the specific claim being brought in order to determine the validity of section 5 enforcement power regarding immunity abrogation. Judge Moore asserted that the enforcement clause can validly remedy either due process *or* equal protection violations.[85] Moreover, the concurrence cited the legislative history and evidence before Congress that supported Title II, noting the distinction from the lack of history in *Garrett*. Quoting the majority's declaration that the right involved here "sounds more clearly not in equal protection but in due process,"[86] the concurrence pointed out that the evidence of "states' discrimination against the disabled in areas such as voting and education[] clearly implicates the Equal Protection Clause."[87] Judge Moore did not see reason to foreclose the application of Title II against the states for the violation of the Constitution's equal protection guarantee, especially when the question of a nonfundamental right was not before the court.

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[84] *Id.* Judge Moore was unequivocal in her assertion that *Garrett*'s finding on Title I does not control abrogation findings under the other Titles of the Act. *Id.*

[85] *Id.* Consider also that *Lane*'s as applied approach more closely resembled Judge Moore's inclination to assess Title II on its own merits, in review of its own legislative history. This supports the argument that *Lane* does not adopt the *Popovich* majority's approach that propounds validity of abrogation only in protection of substantive due process rights.

[86] *Id*. at 820 (Moore, J., concurring).

[87] *Popovich*, 276 F.3d at 820. Judge Moore's language here presents an interesting comparison to the Justice Stevens authored majority opinion in *Lane*:

> Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts.

Tennessee v. Lane, 541 U.S. 509, 530-31 (2004). Justice Stevens framed this to compare access to courts to other rights one may claim along Title II's spectrum of protection; Moore uses similar language to discuss when Title II may validly be used to enforce equal protection by mentioning voting and education.

Finally, in demonstrating the congruence and proportionality of the section 5 power used in Title II to enforce equal protection rather than due process, Judge Moore pointed out that in order to take

> some affirmative steps to ensure that the disabled have access to governmental programs, [Title II] targets discrimination that is unreasonable. Title II requires reasonable modifications only when a disabled individual is otherwise eligible for a public service and the modifications would not fundamentally alter the nature of the service. The states therefore maintain their discretion over the provision of public services so long as they do not *arbitrarily discriminate* against the disabled.[88]

These named internal limitations, in combination with the record behind Title II, convinced Judge Moore that "Title II is a more congruent and proportional remedy than Title I."[89]

The *Lane* Court's refusal to definitively resolve the *Popovich* tension, even after the Sixth Circuit applied *Popovich* to *Lane*, strongly implies that the Court intended to hold the door open to nonfundamental rights claims under Title II. Much of Judge Moore's reasoning is echoed in *Lane* – from the parsing of the ADA into an "as applied"[90] approach to the thorough review of the legislative history behind each purported protection. Additionally, Judge Moore's mentioning of voting and education may be said to have influenced Stevens' idea of the spectrum of possible claims ranging from hockey rinks to voting booths. In naming these extremes, Justice Stevens likely countenanced claims that would implicate fundamental rights and nonfundamental rights associated with equal protection, ranging in importance from education to access to hockey rinks. *Lane* mentioned this *Popovich* tension but did not resolve it because only the due process guarantee was at issue on the facts of the case. However, cases that deal exclusively with the equal protection guarantee, like *McNulty*

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[88] *Popovich*, 276 F.3d at 820 (Moore, J., concurring) (emphasis added). *See also* Ass'n for Disabled Ams. v. Fla. Int'l Univ., 405 F.3d 954, 959 (11th Cir. 2005) (emphasizing similarly that states maintain discretion over the provision of public services and that the ADA only calls for reasonable accommodations, barring only irrational discrimination).

[89] *Popovich*, 276 F.3d at 820 (Moore, J., concurring); *cf.* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 370-73 (2001) (rejecting the congruence and proportionality of Title I, even assuming "it [were] possible to squeeze out of these examples a pattern of unconstitutional discrimination").

[90] *Lane*, 541 U.S. at 551 (2004) (Rehnquist, C.J., dissenting). For ease of discussion, this Note accepts Chief Justice Rehnquist's labeling of the Court's analysis as the "as applied" approach and will refer to it as such throughout the discussion.

and *Association for Disabled Americans*, should engage in this prescribed inquiry.

*E. The Post-*Lane *Standard*

1. The Facts of *Lane*

George Lane and Beverly Jones brought a private suit against the state of Tennessee seeking damages and equitable relief.[91] Due to paraplegia, both Lane and Jones were unable to access certain court facilities and services in county courthouses.[92] Lane was required to attend court for criminal proceedings[93] and Jones needed to access court for her work as a certified court reporter.[94] Neither plaintiff found the county courthouses to be wheelchair accessible.[95] The U.S. Supreme Court upheld the Sixth Circuit's conclusion that Title II validly abrogates Eleventh Amendment sovereign immunity for the due process claim involving access to courts.[96]

The U.S. Supreme Court's acknowledgment of the fundamental nature of the right at stake was important in this holding, but the Court did not foreclose the possibility of valid abrogation when a fundamental right is not at stake and when only equal protection violations are identified. Additionally, the position of certain rights on the spectrum between a hockey rink and a voting booth[97] may also impact the abrogation analysis.

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[91] *Id.* at 513-14.

[92] *Id*. at 513.

[93] *Id*. In the *Lane* analysis, the nature of Lane's compulsion to appear in court is significant to the identification of a fundamental right, as the court cites the "variety" of constitutional guarantees Title II seeks to enforce including the Due Process Clause and the Confrontation Clause of the Sixth Amendment. *Id*. at 522-23.

[94] *Id.* at 514.

[95] *Lane*, 541 U.S. at 514. Lane, in fact, had crawled up the stairs to attend his first appearance and at the second hearing he refused to crawl or be carried up the stairs. *Id.*

[96] In fact, the Sixth Circuit remanded, Lane v. Tennessee, 315 F.3d 680, 682 (6th Cir. 2003), and the Supreme Court affirmed remand for further proceedings on the factual record after finding abrogation valid in the context of this due process claim. Tennessee argued that due process rights were not at stake and the claimants disagreed. *Lane*, 541 U.S. at 515.

[97] *See infra* Part IV (arguing that equal protection violations warrant exercise of section 5 power abrogating sovereign immunity and that education holds a special place on the Court's conceptualized spectrum).

2. Scope of the Right/Identification of a Fundamental Right

The *Lane* Court cited precedent, including *Garrett*, at length but also discussed the prior Sixth Circuit case, *Popovich*, involving Title II and access to courts. The *Popovich*[98] majority drew a clear distinction between due process and equal protection violations and the justifiable exercise of the section 5 power for abrogation in enforcement of the ADA's Title II.[99] The *Lane* Court cited this distinction made by *Popovich*, but did not explicitly adopt it. Instead, the Court left open the question as to Title II's remedies dealing with equal protection violations not necessarily implicating fundamental rights. Importantly, the *Lane* Court also did not adopt the same distinction the Sixth Circuit made in *Lane* to accord with the Circuit's holding in *Popovich* – that Title II may validly abrogate sovereign immunity to remedy due process violations but not equal protection violations. The *Lane* Court continued with the standard abrogation analysis rather than base its decision on the due process-equal protection divide.[100]

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[98] *See supra* Part III.D.

[99] 276 F.3d 808, 811 (6th Cir. 2002) (en banc).

[100] *See Lane*, 541 U.S. at 515-17. Interestingly, much of the Sixth Circuit's language in *Lane* lauded the remedy of Title II to constitutional violations identified in the legislative history as congruent and proportional. Indeed, much of this praise can support an argument for finding Title II abrogation valid in a wider range of constitutional violations than for infringement of the fundamental right of access to courts. The Sixth Circuit discussed this at length:

> Title II ensures that the refusal to accommodate an individual with a disability is genuinely based on unreasonable cost or actual inability to accommodate, not on inconvenience or unfounded concerns about costs. This statutory protection is a preventive measure commensurate to the gravity of precluding access to the courts by those with disabilities. In addition, these requirements are carefully tailored to the unique features of disability discrimination that persists in public services. A simple ban on discrimination against those with disabilities lacks teeth. The continuing legacy of discrimination is too powerful. Title II affirmatively promotes integration of those with disabilities.

Lane, 315 F.3d at 683. One may argue that the acknowledgment of this recognized history of disability discrimination in public services, and the recognition that section 5 enforcement needs "teeth" in light of this history, militates against denying equal protection guarantees the same force of protection. If there were not any affirmative enforcement mechanisms for remedying equal protection violations, irrational disability discrimination would also persist. *See also* David R. Fine, *Court Left Issues Open*, NAT'L L.J. 23, June 7, 2004, at 23, as cited in *McNulty*, for a brief discussion of the Court's possible motivation for alluding to this divide but not ascribing to it. Fine feels that the Court may have rejected it if not for the need to bring in Justice O'Connor. *Id.*

Lane discussed both the nature of the right at issue and the historical discrimination outlined in the legislative record, thus adhering to the well-established standard of determining whether sovereign immunity has been validly abrogated. The *Lane* Court applied the standard *Boerne* proportionality test; *Lane*'s further identification of a fundamental right necessarily weighed into this proportionality test, perhaps mostly because the specific right at stake based upon those facts "sound[ed] most clearly not in equal protection but in due process."[101] However, *Lane*'s holding did not deem the identification of a fundamental right essential to finding the ADA's abrogation provision valid in *all* circumstances.

After confirming that the ADA expressly intends to abrogate sovereign immunity,[102] the *Lane* Court began the *Boerne* analysis by identifying the scope of the right at issue.[103] In *Lane*,

> the task of identifying the scope of the relevant constitutional protection [was] more difficult [than in *Garrett*] because Title II purports to enforce a panoply of constitutional rights of disabled persons: not only the equal protection right against irrational discrimination, but also certain rights protected by the Due Process Clause.[104]

This broad coverage, however, does not mandate the finding that Title II is overbroad, does not require that each Title II protection be scrutinized at once, and does not declare that Title II protections must rest entirely on the identification of a fundamental right under the due process clause.[105] Instead, this coverage demonstrates Congress' identification of constitutional violations that impact both fundamental and nonfundamental rights, including the right to be treated equally under the law.

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[101] *Popovich*, 276 F.3d at 820. *See supra* note 86.

[102] *Lane*, 541 U.S. at 518.

[103] *Id.* at 522. First, the Court reiterated *Garrett*'s articulation of "the Fourteenth Amendment's command that 'all persons similarly situated should be treated alike'" and emphasized that Title II "also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Id.* at 522-23 (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)).

[104] *Id*. at 540 (Rehnquist, C.J., dissenting).

[105] *Id.* at 522-23. The Court lists all of the constitutional rights involving some kind of access to courts protected by the due process clause of the Fourteenth Amendment, including rights guaranteed by the First and Sixth Amendments. *Id*. at 523.

The prohibition on unconstitutional irrational disability discrimination remains intact as a crucial determinant for the validity of prophylactic legislation where there is no fundamental right implicated. The Court's identification of the importance of access to courts motivated it to find in favor of abrogation by citing history of discrimination in public services and accommodations generally, rather than limiting its review of evidence to infringements on access to courts.[106] The identification of a fundamental right in *Lane* did not entirely control the finding of valid abrogation.

For the purpose of illustration, Chief Justice Rehnquist's observation in *Nevada Department of Human Resources v. Hibbs*[107] is useful: the heightened scrutiny triggered by suspect classifications makes it "easier for Congress to show a pattern of state constitutional violations."[108] Constitutional violations in fundamental rights areas are perhaps more easily proven because state action is subject to heightened scrutiny, but that does not mean that it is impossible to demonstrate a history of violations in nonfundamental rights areas that may nonetheless require prophylactic measures triggering the protections of the Equal Protection Clause. In fact, the *Lane* Court explicitly acknowledged that "[w]hen Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the *Equal Protection Clause*."[109]

The prohibition on irrational disability discrimination is most definitely a "basic objective" of the Equal Protection Clause. This is true even though *Lane*'s identification of the right at stake as the fundamental one of access to courts led the Court to its final approach to dealing with the ADA's purported abrogation – the as applied approach to determining the validity of the ADA's abrogation of sovereign immunity.

The *Lane* Court's as applied analysis means that the Supreme Court found "nothing in [its] case law [that required

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[106] *Id*. at 529-31.

[107] 538 U.S. 721 (2003). This case dealt with the Family Medical Leave Act "aim[ed] to protect the right to be free from gender-based discrimination in the workplace." *Id.* at 728. The Court found that the Family Medical Leave Act did validly abrogate states' Eleventh Amendment immunity. *Id.* at 740.

[108] *Id*. at 736.

[109] *Lane*, 541 U.S. at 520 (emphasis added).

it] to consider Title II, with its wide variety of applications, as an undifferentiated whole."[110] The Court considered congruence and proportionality as it applied to the fundamental right of access to courts only, in relation to the documented history of unconstitutional violations both in public services generally and in the administration of justice specifically.[111] The *Lane* majority rejected the dissent's contention that prior case law mandated it had to examine Title II and all the protections outlined therein to validate abrogation in this context.[112] The *Lane* majority countered that *Garrett* in particular supports this as applied approach because *Garrett* both determined the validity of abrogation as to the "enforcement of a *single* constitutional right"[113] and only as to *Title I* of the ADA. The Court was content to keep its holding narrow, concluding:

> Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the states to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts.[114]

The explicit limits of this as applied approach should not invalidate abrogation under Title II addressing in all instances that do not implicate a fundamental right. To appropriately apply *Lane* in other contexts, it is necessary to understand the analysis that follows the Court's outlining of the metes and bounds of the specific right at stake. In line with the congruence and proportionality test, and in a similar manner to the *Garrett* Court, the *Lane* Court thoroughly discussed the legislative history behind enactment of Title II and its purported remedies.

3. The Court's Use of the Legislative History

The ADA's legislative history supports the proposition that the ADA validly abrogates sovereign immunity in varying Title II contexts. Whether the object of legislation is remedying violations of a fundamental right, as in *Lane,* or a

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[110] *Id.* at 530.

[111] *Id.* at 531.

[112] *Id*. at 530 n.18. *See also id.* at 534 (Souter, J., concurring) (suggesting that even Rehnquist's more "expansive enquiry" would have the same result).

[113] *Id*. at 531 n.18 (emphasis added).

[114] *Lane*, 541 U.S. at 530-31.

nonfundamental right, as in *Garrett,* the Court engages in the examination of the legislative record. Therefore, this analysis may again be understood through comparison with *Garrett* and through use of the *Lane* Court's own distinguishing from *Garrett*.

Distinction from *Garrett* has at least two components in the *Lane* analysis: nonfundamental as opposed to fundamental right identification and comparison of legislative histories evidencing state constitutional violations in Title I as opposed to Title II. The legislative history of Title I cited in *Garrett* did not support legislative congruence and proportionality because the constitutional violations demonstrated in the record related primarily to private, not public, employment. Put simply, this legislative history of private discrimination could not have supported congruence and proportionality considering the ADA's requirements of the state, a public entity.[115] The *Lane* Court remembered

> that the 'overwhelming majority' of [the] evidence [in *Garrett*] related to 'the provision of public services and public accommodations, which areas are addressed in Titles II and III,' rather than Title I [and] that neither the ADA's legislative findings nor its legislative history reflected a concern that the States had been engaging in a pattern of unconstitutional employment discrimination.[116]

The *Garrett* Court engaged in the standard right identification process that *Lane* followed.[117] *Garrett* defined the right alleged to be violated, the guarantee of equal protection in the employment context,[118] and discussed the decisive dearth of legislative history outlining violations.[119]

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[115] *But see id*. at 551-52. (Rehnquist, C.J., dissenting). In his dissent, Chief Justice Rehnquist stated that there was little evidence of discrimination by the states at all in the legislative record. *Id.* Seemingly to the contrary, Chief Justice Rehnquist's argument in *Garrett* regarding legislative history could be construed to mean that the evidence of discrimination by the state in public services was indeed present and strong. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 371-72 & n.7 (2001).

[116] *Lane*, 541 U.S. at 521-22 (quoting *Garrett*, 531 U.S. at 371 n.7) (internal citations omitted).

[117] *Garrett*, 531 U.S. at 365.

[118] *Id.* ("[W]e look to our prior decisions under the Equal Protection Clause dealing with the issue.")

[119] The *Garrett* Court was looking at the legislative record of Title I specifically. *Id.* at 368-74. *Lane* followed this pattern, unchanged in this particular sense by the involvement of a fundamental right. *Lane*, 541 U.S. at 523-24.

Once the constitutional rights at stake were iterated, the *Lane* Court proceeded with the traditional and influential examination of legislative history that is entirely in line with *Garrett* and other precedent.[120] The Court's mention of a "more searching judicial review"[121] required in the context of fundamental rights did not eclipse its acknowledgment that Title II also seeks to prohibit "irrational disability discrimination . . . ."[122] Title II's duty to accommodate may well meet the congruence and proportionality standard in other contexts given the great extent of legislative history involving other constitutional violations, absent the implication of a fundamental right.[123]

The *Lane* Court explained why the ADA's legislative history legitimizes Title II abrogation of sovereign immunity in reference to access to courts where Title I did not in reference to private employment in *Garrett*.[124] The *Garrett* Court was not

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[120] *Lane*, 541 U.S. at 523. The Court states that "[w]hether Title II validly enforces these constitutional rights is a question that 'must be judged with reference to the historical experience which it reflects.'" *Id.* (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

[121] *Id.* at 522-23.

[122] *Id.* at 522. *See also* Brief for Paralyzed Veterans of America et al. as Amici Curiae Supporting Appellants, Tennessee v. Lane, 541 U.S. 509 (2004) (No. 02-1667), 2003 WL 22721614, at *5. ("Congress' findings explicitly and unambiguously encompass discrimination in public areas that are largely or entirely within the purview of the States, as well as multiple areas that indisputably include State conduct. Congress also specifically found that the discrimination at issue was irrational, noting a 'history of purposeful unequal treatment . . . resulting from stereotypic assumptions.'") (citations omitted). This brief also outlines "Patterns of Unconstitutional State Discrimination in Education." *Id.* at *19-21.

[123] "Because this implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in classes of cases that implicate only *Cleburne*'s prohibition on irrational discrimination." *Lane*, 541 U.S. at 532 n.20.

[124] The *Garrett* Court's holding that "Congress did not validly abrogate the states' sovereign immunity from suit by private individuals for money damages under Title I[,]" 531 U.S. at 374 n.9, left open the question as to Title II, especially after the *Garrett* Court repeated that there was evidence present addressing discrimination in the public sector, covered by Titles II and III. *Id.* at 369-71, 371 n.7. *Garrett* also suggested that not only does Title I not validly abrogate sovereign immunity, but that perhaps Congress never meant it to in the context of public employment as opposed to in the other contexts for which there is a massive amount of evidence of disability discrimination in the legislative history: "[T]here is . . . strong evidence that Congress' failure to mention States in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action has been documented." *Id.* at 372. This indicates that the *Garrett* opinion is not only based on the Court's finding that the legislation is entirely incongruent to any constitutional violation it seeks to remedy, but also based upon the Court's impression that public employment was not a context in which Congress determined people needed protection under the ADA. *See also* LEWIS, *supra* note 28, at §5.35, at 440 n.42 ("A negative pregnant in *Garrett* suggests that the Court might incline more favorably

convinced by legislative history and task force reports indicating Congress' recognition of a history of pervasive employment discrimination in the public sector partly due to the lack of any such specific instances being mentioned in the Act's legislative findings themselves.[125] The Act's findings cited by the *Garrett* Court do, however, mention public services as "critical areas" in which "discrimination against individuals with disabilities persists . . . ."[126] This language supports the *Garrett* Court's seeming concession that there is significant evidence of discrimination in the public sector, specifically in public services and accommodations that are covered in ADA Titles II and III. This evidence was persuasive enough for Congress to include it in the Act itself, indicating that Congress found the findings amounted to a history of pervasive unconstitutional state action that it was aiming to remedy.

Another aspect of comparison in the legislative histories discussed in *Garrett* and *Lane* relates to the type of legislative histories the Court uses or rejects in the two cases. One of Chief Justice Rehnquist's major concerns, in both the *Garrett* decision and the *Lane* dissent, was the use of anecdotal and broad evidence to analyze the validity of abrogation as part of legislative congruence and proportionality aimed to enforce a specific constitutional guarantee.[127] Chief Justice Rehnquist insisted that the *Lane* Court used evidence rejected by the *Garrett* Court, evidence that cannot possibly demonstrate a history of pervasive state discrimination in either the public employment or the access to court areas.[128] It is not surprising

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towards effective Congressional abrogation of the states' immunity from actions under ADA Titles II and III. The Court notes that the legislative record and resulting findings in Senate and House reports were deficient respecting a history of state *employment* (i.e., Title I) discrimination against the disabled, specifically distinguishing the more ample record and findings about public services and accommodations.").

[125] *Garrett*, 531 U.S. at 370-71.

[126] 42 U.S.C. §12101(3) (2000). The legislative findings here also mention 'education' as discussed *infra* Part IV. Notably, Chief Justice Rehnquist's dissent in *Lane* reiterated this point. It stated that because access to courts was not mentioned in the legislative findings, similar to the silence on public employment, Congress did not "truly under[stand the] [task force] information as reflecting a pattern of unconstitutional behavior by the States." *Lane*, 541 U.S. at 546 (Rehnquist, C.J., dissenting).

[127] *Lane*, 541 U.S. at 542-43 (Rehnquist, C.J., dissenting).

[128] *Id.* at 541 (Rehnquist, C.J., dissenting).

> Rather than limiting its discussion of constitutional violations to the due process rights on which it ultimately relies, the majority sets out on a wide-ranging account of societal discrimination against the disabled. This digression recounts historical discrimination against the disabled through

that the *Lane* majority found Chief Justice Rehnquist's objections in this regard "puzzling."[129] The distinctions the *Garrett* Court made were categorical; the Court primarily distinguished public employment from private employment, specific to equal protection in employment. In contrast, the voluminous record of discrimination in public services that *Lane* detailed includes examples of discrimination in access to courts, and the Court took access to courts to be a part of Title II's public services. Instead of making categorical comparisons[130] like the *Garrett* Court, the *Lane* Court dealt with one category, public services, and the subcategory of access to courts.[131]

The *Lane* Court left open the possibility that Title II, unlike Title I, would survive abrogation analysis without the identification of a fundamental right. The Court's severing of Title II from the rest of the ADA and examination of Title II as it applied only to the guarantee of access to courts left future decisions regarding abrogation under Title II in different public service contexts open to separate analyses.

> institutionalization laws, restrictions on marriage, voting, and public education, conditions in mental hospitals, and various other forms of unequal treatment in the administration of public programs and services. Some of this evidence would be relevant if the Court were considering the constitutionality of the statute as a whole; but the Court rejects that approach in favor of a narrower "as applied" inquiry. We discounted much the same type of outdated, generalized evidence in *Garrett* as unsupportive of Title I's ban on employment discrimination.

Id. at 541-42 (internal citations omitted). Chief Justice Rehnquist is highly critical of this approach, even though it may be argued that it is quite in line with his *Garrett* parsing of the ADA.

[129] *Id*. at 528.

[130] The categories posited opposite one another in *Garrett* are 'public' and 'private' employment. This is the most influential distinction in the record that *Garrett* examines, leading it to conclude that public employment was not contemplated by the Title I protections – there was no evidence that Title I targeted discrimination in public employment. *Garrett*, 531 U.S. at 370-71.

[131] The *Lane* Court also declared that the Congressional record bolstering the ADA was even stronger than that examined in Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003), where the Court definitively found congruence and proportionality of prophylactic legislation enacted pursuant to section 5 based on Congressional findings of the same kind: "[T]he record of constitutional violations in this case – including judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services – far exceeds the record in Hibbs." Lane, 541 U.S. at 529. Interestingly, Chief Justice Rehnquist's argument in his Lane dissent is similar to Justice Kennedy's dissent from the Rehnquist authored majority in *Hibbs*. *See Hibbs*, 538 U.S. at 746-48.

IV. TITLE II AND THE ABROGATION OF SOVEREIGN IMMUNITY IN THE EDUCATIONAL CONTEXT

This section uses *Lane*'s as applied analysis to examine claims brought in the education context under Title II. *Lane*'s narrow holding does not foreclose private suits for equitable relief and money damages in public service contexts that do not implicate fundamental rights; instead, the decision encourages analysis of each specific case of discrimination in the various public service contexts contemplated by Title II. Because public education is unique among services offered by the government, it deserves special consideration in the abrogation analysis. Thus, ADA Title II claims brought in the public education context evince a greater likelihood of valid abrogation, which is supported by the legislative history of the ADA Title II. *Lane*'s language, including the reference to accessing anything from "hockey rinks [to] voting booths,"[132] demonstrates that the Court expects a wide range of rights asserted between these two extremes. Decisions along the spectrum will depend largely on the congressional record of recent and significant constitutional violations in public services to determine the congruence and proportionality of the legislation.

Given the relative lack of case law analyzing the validity of Title II specifically, *Lane* impacts the way courts should look at Title II, with and without the fundamental rights piece of the analysis. Two recent cases, *McNulty v. Board of Education of Calvert County*[133] and *Association for Disabled Americans v. Florida International University*,[134] consider the Title II context of public education that does not trigger the fundamental rights analysis. Both cases rely on *Lane* and reach opposite results. The remainder of this Note will focus on the potential for abrogation in the context of public education, explaining how the District Court of Maryland misconstrued the *Lane* precedent and supplementing

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[132] "Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to courts. Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further." *Lane*, 541 U.S. at 530-31.

[133] No. Civ. A. DKC 2003-2520, 2004 WL 1554401 (D. Md. July 8, 2004).

[134] 405 F.3d 954 (11th Cir. 2005).

the Eleventh Circuit's analysis to offer more concrete guidelines for future courts confronting the issue.

A. The District Court: McNulty v. Board of Education of Calvert County[135]

When Ryan McNulty was in the ninth grade, he was subjected to several disciplinary measures and, primarily as a disciplinary measure, the vice principal of his public high school assigned him to a separate education program that was outside of the mainstream of classes.[136] This program did not offer the same classes as the mainstream track, and Ryan completed his tenth grade year at a private school where he excelled.[137] When he returned to the public high school for the eleventh grade, Ryan was subject to several more disciplinary measures that he felt were inflicted unfairly, including at least two suspensions.[138] Ryan McNulty's diagnosed disability was Attention Deficit Hyperactivity Disorder (ADHD).[139] Administrators did not consider his conduct to be a manifestation of his disability.[140]

After Ryan was told he would not be promoted due to his absences even though he passed all of his classes, his parents objected and the school eventually agreed to promote him.[141] Ryan graduated from the school in June 2002.[142] McNulty alleged that a series of disciplinary referrals, failure to adhere to a section 504 education plan, and retaliation against parents by the school[143] representatives all made out violations of Title II's provision that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services,

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135 2004 WL 1554401.

136 *McNulty*, 2004 WL 155401, at *1.

137 *Id*.

138 *Id.*

139 *Id*.

140 *Id*.

141 *Id*. at *2.

142 *McNulty*, 2004 WL 155401, at *2.

143 This Note uses the *McNulty* acknowledgement of the Board of Education as a state agency. *Id*. at *4. The Board of Education in this case may be considered an arm of the state for the purposes of sovereign immunity analysis.

programs, or activities of a public entity, or be subjected to discrimination by any such entity."[144]

The *McNulty* court dismissed the ADA Title II claim on a 12(b)(6) motion without reaching the merits of the claim, citing *Lane* as the basis for dismissal.[145] *McNulty* referred to *Lane*'s as applied method and found that "Eleventh Amendment immunity remains intact for education claims under Title II of the ADA."[146] *Lane* did not call for such a result in the education context. The facts in *McNulty* implicate the section 5 enforcement power enacting the ADA as "appropriate legislation" to enforce the Fourteenth Amendment's equal protection guarantee, rather than the due process guarantee discussed in *Lane*. In this context, Title II protects individuals against irrational disability discrimination in public education. The facts do not trigger the fundamental rights portion of the *Lane* analysis, but nonetheless support Title II's legitimate abrogation of Eleventh Amendment sovereign immunity.[147] The legislative history documenting violations and the importance of equality in the provision of educational services make out a stronger case for abrogation of Eleventh Amendment immunity in education than in other contexts.

The *McNulty* court's rationale was based entirely on education not being a fundamental right and disabled persons not being members of a suspect class.[148] While purporting to be based on *Lane*, this analysis did not implement *Lane*'s methodology. Instead, the *McNulty* court substituted one question – whether there is a fundamental right at stake – for the lengthy and complex section 5 abrogation analysis that sovereign immunity jurisprudence, up to and including *Lane*, mandates. The *McNulty* court's approach is more analogous to the Sixth Circuit's decisions in *Popovich* and *Lane,* rather than to the approach the U.S. Supreme Court set forth in *Lane*. The Supreme Court did not rely on the due process-equal

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[144] *Id*. at *6 (citing 42 U.S.C. § 12132 (2000)). Although McNulty alleged claims under Title II, 42 U.S.C. § 1983, § 504, and 29 U.S.C. § 794, this Note will only discuss whether dismissal of the ADA Title II claim was appropriate. *Id*. at *2.

[145] *Id.* at *3.

[146] *McNulty*, 2004 WL 155401, at *3.

[147] Abrogation in this context is valid because Congress enacted ADA Title II to prevent irrational disability discrimination in the face of recent and significant evidence of such discrimination and because the education context warrants special consideration. Preventing irrational disability discrimination is a "basic objective[]" of the Equal Protection Clause. Tennessee v. Lane, 541 U.S. 509, 520 (2004).

[148] *McNulty*, 2004 WL 1554401, at *10-11.

protection divide for its holding. The Court instead exhaustively examined the legislative history and the congruence and proportionality of Title II's remedy. In this reliance, the *Lane* decision directed courts, including the district court in *McNulty*, to look into the specific legislative findings in the area of public education, an endeavor that may have resulted in denial of the defendant's 12(b)(6) motion. In heavy reliance on the due process-equal protection divide, *McNulty* briefly mentioned that "state action affecting the disabled is subject only to rational basis review"[149] but did not explain how this would affect the abrogation analysis. In fact, the court did not acknowledge the prohibition on irrational disability discrimination as potentially providing any floor for state action.

The absence of a fundamental right does not signify the absence of any constitutional guarantee whatsoever; in this case, the Fourteenth Amendment's protection against irrational disability discrimination should trigger the full abrogation analysis for an alleged violation of Title II. *Lane*'s Title II analysis maintains the validity of the ADA's legitimate goal of prohibiting irrational state discrimination and the fundamental right identification is not essential. As Judge Moore and the *Lane* majority would agree, evidence of "states' discrimination against the disabled in areas such as voting and education . . . clearly implicate[s] the Equal Protection Clause."[150]

B. *The Eleventh Circuit:* Association for Disabled Americans v. Florida International University[151]

The plaintiffs in *Association for Disabled Americans* alleged that FIU violated the ADA Title II by, among other things, "failing to provide qualified sign language interpreters, failing to provide adequate auxiliary aids and services such as effective note takers, and failing to furnish appropriate aids to its students with disabilities such as physical access to certain programs and facilities at FIU."[152] The plaintiffs alleged that these failures constituted the exclusion and denial of public

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[149] *Id.* (quoting Wessel v. Glendening, 306 F.3d 303 (4th Cir. 2002)).

[150] Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808, 820 (6th Cir. 2002) (en banc) (Moore, J., concurring).

[151] 405 F.3d 954 (11th Cir. 2005).

[152] *Id*. at 956.

services to people with disabilities prohibited by Title II and they sought injunctive relief to prevent further violations.[153]

The Eleventh Circuit found that "[t]he relief available under Title II of the ADA is congruent and proportional to the injury and the means adopted to remedy the injury"[154] primarily because "education, though not fundamental, is vital to the future success of our society."[155] The court accepted *Lane*'s examination of the legislative history of Title II as a whole as evidencing enough violations to support the congruence and proportionality of abrogation of sovereign immunity for suits in the education context.[156] The court acknowledged that "classifications relating to education only involve rational basis review under the Equal Protection Clause,"[157] and differentiated public education from other public service contexts covered by Title II because of "the importance of education in maintaining our basic institutions and the lasting impact of its deprivation on the life of the child."[158] In this way, the court sought to distinguish "public education from other rights subject to rational basis review."[159]

If the *Association for Disabled Americans* court followed the reasoning of Judge Moore's *Popovich* concurrence, it would have provided a better guide for courts deciding the abrogation question in future ADA Title II challenges in the education context. Indeed, the court could have explicitly recognized that section 5 grants Congress the power to take "some affirmative steps to ensure that the disabled have access to governmental programs" and that they are not arbitrarily discriminated against.[160] The Eleventh Circuit's emphasis on the importance of education is significant and essential, but its sole reliance on

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[153] *Id*. Interestingly, the plaintiff originally argued that the precedent of *Garrett* did not apply to claims for injunctive relief, but only to claims for money damages. Ass'n for Disabled Ams. v. Fla. Int'l Univ., 178 F. Supp. 2d 1291, 1293 (S.D. Fla. 2001). The district court rejected this argument in granting the defendants' motion to dismiss because the "Eleventh Amendment bars suit against an unconsenting state for injunctive relief as well as for money damages." *Id*. at 1295. This Note likewise does not separate the claims for equitable and compensatory relief in its abrogation analysis.

[154] *Ass'n for Disabled Ams.*, 405 F.3d at 959.

[155] *Id.* at 958.

[156] *Id.*

[157] *Id.* at 957.

[158] *Id*.

[159] *Ass'n for Disabled Ams.*, 405 F.3d at 957 (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982)).

[160] Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808, 820 (6th Cir. 2002) (en banc) (Moore, J., concurring).

that importance leaves the decision vulnerable to future opinions emphasizing that education is not a fundamental right. Because education does not implicate the Due Process Clause under our current constitutional jurisprudence, critics could argue that abrogation of sovereign immunity in legislation promulgated under the section 5 power enforcing the Equal Protection Clause is not justified. While *Association for Disabled Americans* answered the abrogation question correctly, it left gaps in its reasoning.

C. Lane *and Education Claims Brought Against the State under ADA Title II*

1. Reiterating the Proper Standard

Proper sovereign immunity abrogation analysis requires the two-step *Lane* inquiry that determines whether the legislation in question (1) expressly abrogates sovereign immunity, and (2) passes the *Boerne* proportionality test by being a congruent and proportional remedy to identified constitutional violations. The ADA clearly indicates its intention to abrogate sovereign immunity.[161] The *Boerne* proportionality test, involving definition of the "metes and bounds"[162] of the right at stake and determining whether an act is prophylactic, congruent, and proportional, demands a more thorough analysis in the educational context than that performed in *McNulty* and even in *Association for Disabled Americans*. The alternative approach that is consistent with *Lane* necessarily encompasses discussion of both the nature of the right to education and the legislative findings that support ADA Title II protection and abrogation of sovereign immunity in the educational context as an enforcement of the Equal Protection Clause.

2. Scope of the Right

Education is not a fundamental right under the U.S. Constitution,[163] but the Court has considered education to be "[p]erhaps the most important function of state and local

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[161] Tennessee v. Lane, 541 U.S. 509, 518 (2004).

[162] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

[163] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973); Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 531 (4th Cir. 1998).

governments."[164] Equal protection demands that because state constitutions have chosen to provide public education,[165] the right to an education "must be made available to all on equal terms."[166] Additionally, the Court has not considered disability a suspect classification.[167] Therefore, equal protection of the laws prohibits only *irrational* disability discrimination in the education context.[168]

McNulty did not acknowledge that constitutional violations of equal protection may occur as a result of irrational disability discrimination prohibited by the ADA Title II. The *McNulty* court compared *Lane*'s language stating that infringements on access to courts warrant a "more searching judicial review"[169] with the *Cleburne* determination[170] that

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[164] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[165] *See, e.g.*, MD CONST., art. VIII, § 1 ("The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.")

[166] *Brown*, 347 U.S. at 493. *See also* John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776-1900*, 42 AM. J. LEGAL HIST. 1, 33 (1998) (discussing the right, or lack thereof, in state constitutions throughout U.S. history and concluding "[i]f many of the State constitutional provisions, even those that appeared obligatory, did not create in children a right to free education, the combination of those constitutional provisions and the statutes enacted under them, together with the Equal Protection Clause of the Fourteenth Amendment, did provide a right, not to education *per se*, but to an education equal to that being provided to others").

[167] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985).

[168] *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (emphasizing "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"). *Garrett* discusses the nonsuspect classification of disability and examines a nonfundamental protection against irrational disability discrimination in public employment. The *Garrett* Court was looking at Title I, and, this Note argues, differs from *Lane*'s result because of the dearth of legislative history supporting Title I in the public employment context, not because of the nonfundamental nature of the right at stake.

[169] McNulty v. Bd. of Educ. of Calvert County, No. Civ. A. DKC 2003-2520, 2004 WL 1554401, at *10 (D. Md. July 8, 2004) (citing Tennessee v. Lane, 541 U.S. 509, 522-23 (2004)).

[170] Interestingly, in a letter dated July 13, 1989, the Deputy Assistant Attorney General, John P. Mackey, responded to Senator Coats' concern about the immunity provision in the ADA, especially as regarding burden on the courts. The correspondence did not address, however, any question as to the validity of abrogation of sovereign immunity generally. (Question by Senator Coats: "Section 603 waives the immunity of the states from suit under the Eleventh Amendment to the Constitution of the United States. Is this a back-door attempt to create a suspect class, i.e., the disabled, without any hearings or formal congressional finding? What will be the effect on the backlog of cases in the federal courts?" Response from Deputy Assistant Attorney Mackey: "The ADA would establish a statutory prohibition of discrimination on the basis of disability by, *inter alia*, State and local governments. We do not interpret the Act to change relevant constitutional standards, and would review

"state action affecting the disabled is subject only to rational basis review."[171] The *McNulty* court then used this comparison to establish a distinction between the *Lane* outcome and abrogation of sovereign immunity in the education context. The court failed to recognize that "Congress . . . has residual enforcement power for nonsuspect classes, because the Equal Protection Clause provides meaningful protection to all classes of persons."[172] The court's limited analysis only attempted to demonstrate the scope of the right, not any impossibility of it being infringed. To come to any conclusion on the abrogation question,[173] the *McNulty* court should have considered the legislative history of Title II generally, and then, *specifically in the education context*.[174]

In *Association for Disabled Americans*, the Eleventh Circuit's analysis of the scope of the educational right took into consideration the importance of equal access to public educational services while acknowledging that only irrational disability discrimination is prohibited by the ADA Title II; in

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skeptically any proposal that it do so. There have been hearings on the ADA, and it is now being considered for enactment by Congress according to established procedures. We have expressed concern that the legislation should in all areas include remedies designed to avoid excessive burdens on the judicial system."). Letter from Deputy Assistant Attorney General John P. Machkey to Senator Dan Coats (July 13, 1989), *in* THE LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT, 816, 822 (G. John Tysse ed., 1991).

[171] *McNulty*, 2004 WL 1554401, at *3 (citation omitted).

[172] Colker, *supra* note 23, at 674.

[173] *McNulty*, 2004 WL 1554401, at *3. ("A district court 'ought to consider the issue of *Eleventh Amendment* immunity at any time . . . because of its jurisdictional nature.'") (citing Suarez Corp. v. McGraw, 125 F.3d 222, 227 (4th Cir. 1997)) (emphasis added).

[174] The *Lane* Court used general violations in public services as a basis of the decision, distinguishing the case from *Garrett* in that *Garrett* had involved a claim against the state where most evidence of discrimination in the legislative history was in private employment. Tennessee v. Lane, 541 U.S. 509, 522 (2004). The *Lane* Court used these general violations, as few involve access to courts specifically, *see id*. at 543 (Rehnquist, C.J., dissenting), as well as the concern for the importance of the due process guarantee at issue to emphasize the congruence and proportionality of abrogation as applied to access to courts under Title II. Because there is a substantial record documenting unconstitutional disability discrimination in public services (in contrast with the lack of such a record in public employment cited in *Garrett*) and also in public education, the *specificity* of the record further bolsters support for the congruence and proportionality of the legislation without the identification of a fundamental right. Clearly, the *Lane* Court did not require voluminous documentation of discrimination in access to courts specifically, but instead relied heavily on more general historical violations in public services with four specific references to access to courts. *Association for Disabled Americans* similarly notes that the *Lane* Court looked at "the record supporting Title II *as a whole*" as well as mentioning specific violations in the administration of public education. 405 F.3d 954, 959 & 959 n.4 (11th Cir. 2005).

doing so, the court engaged in a more accurate description of the right at stake than the *McNulty* court.[175] This is the proper sketch of the educational right and should be the model that prevails in future cases examining this step of the analysis.

3. Legislative History

Once the "metes and bounds"[176] of a particular right have been outlined, the next step in the proportionality test is to "examine whether Congress identified a history and pattern"[177] of unconstitutional discrimination by the state against the disabled. The ADA's history demonstrates that Congress identified state discrimination to support Title II; moreover, Congressional findings outlined several specific instances of discrimination in public education.

As a starting point, it is helpful to look at evidence in the record that was particularly lacking in *Garrett* and motivated the court there to conclude that sovereign immunity was not validly abrogated under Title I for discrimination in public employment. In *Garrett*, the court repeatedly referred to the legislative history's emphasis on "employment in the private sector"[178] to argue against the possibility of legislation in proportion to any identified discrimination by the state in public employment.

A Senate report[179] supporting the ADA, almost immediately after recognizing persistent discrimination also in the areas of "public accommodations, public services, transportation, and tele-communications"[180] and that "[p]eople with disabilities as a group occupy an inferior status socially, economically, vocationally, and *educationally*,"[181] included the testimony of an individual who experienced discrimination resulting in her exclusion from public school.[182] Interestingly,

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[175] Ass'n for Disabled Ams. v. Fla. Int'l Univ., 405 F.3d 954, 958 (11th Cir. 2005).

[176] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

[177] *Id. See also* Colker, *supra* note 23, at 667-69 (discussing importance of fact-finding in section 5 enforcement power analysis).

[178] *Garrett*, 531 U.S. at 371 (citing S. REP. NO. 101-116, at 6 (1989)).

[179] S. REP. NO. 101-116, at 6. Also cited extensively in *Garrett*, 531 U.S. at 370.

[180] S. REP. NO. 101-116.

[181] *Id.* (emphasis added).

[182] *Id.* at 7. Note that this type of anecdotal evidence is decidedly different from the anecdotes *Garrett* cites as never having been submitted to Congress and therefore not weighty. *Garrett*, 531 U.S. at 370.

this Senate report also quoted testimony that alludes to the particularly profound effects discrimination has in schools: "As Rosa Parks taught us, and as the Supreme Court ruled thirty-five years ago in *Brown* v. *Board of Education*, segregation 'affects one's heart and mind in ways that may never be undone.'"[183] The report continued to note instances of discrimination as it has affected schools and schoolchildren, citing the Supreme Court case *Alexander v. Choate*,[184] which referred to an earlier case dealing with the exclusion from school of an academically competitive child with cerebral palsy because "his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates."[185] This report pointedly referred to disability discrimination in the public schools as a pervasive problem and a major motivator for the enactment of the ADA before even discussing the specific legislation and its requirements.

The House also noted disability discrimination in education, citing statistics reaching deep into the problems in our education system when it comes to providing equal public access, stating that current legislation has not changed the disappointing numbers[186] and that "[f]orty percent of all adults with disabilities did not finish high school – three times more than non-disabled individuals."[187] Additionally, the report cited testimony regarding the inaccessibility of school buildings as a major problem and as indicative of the need for enforcement provisions that require real changes and accessibility.[188] This evidence and need acknowledged in the legislative record stands in "stark"[189] contrast to the lack of evidence in *Garrett.*[190] Thus, the evidence supporting Title II's remedial measures as

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[183] S. REP. NO. 101-116, at 6 (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).

[184] 469 U.S. 287 (1985).

[185] S. REP. NO. 101-116, at 7.

[186] H.R. REP. NO. 101-485, pt. 2, at 32 (1989) (noting that this statistic existed "[d]espite the enactment of Federal legislation such as the Education for Handicapped Children Act of 1975 and the Rehabilitation Act of 1973"). *See also* S. REP. NO. 101-116, at 12 (citing testimony about the then extant nondiscrimination federal laws including the Rehabilitation Act that, because "tied to the receipt of Federal financial assistance[,] [result in] total confusion for the disabled community and the inability to expect consistent treatment").

[187] H.R. REP. NO. 101-485, pt. 2, at 32.

[188] *Id*. at 40.

[189] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (using this language to cite the differences between legislative history that has influenced the Court to uphold abrogation in the past and the history presented to support Title I).

[190] *See supra* Part III.C

pertaining to the education context surpasses the *Garrett* evidence in volume and content, just as the evidence in *Lane* did.

Importantly, the *Lane* Court also considered the evidence of constitutional violations in public services generally, with such violations supporting the validity of Title II remedies:

> [The evidence of constitutional violations,] 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.[191]

The *Garrett* majority clearly acknowledged the record's accounts of state discrimination in public services and public accommodations addressed by Titles II and III of the ADA and criticized Justice Breyer's dissent because "[o]nly a small fraction of the anecdotes [he] identifie[d] in his Appendix C relate to state discrimination against the disabled in employment."[192] Justice Breyer countered that "[t]here are roughly 300 examples of discrimination by state governments themselves in the legislative record."[193] Both opinions acknowledged the voluminous evidence supporting Title II legislation providing protection to people with disabilities in the provision of public services.[194]

The *Lane* Court did a lot of the work for *McNulty* and *Association for Disabled Americans* in examining the legislative history of Title II. The *McNulty* court could have

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[191] Tennessee v. Lane, 541 U.S. 509, 529 (2004) (emphasis added). *See also supra* Part III.C (discussing the categorical distinction (private vs. public employment) the *Garrett* Court relied on to find inadequate legislative history in contrast to *Lane*'s consideration of public services generally and the subcategory of access to courts).

[192] *Garrett*, 531 U.S. at 371 n.7.

[193] *Id*. at 379. Justice Breyer goes on to emphasize, "I fail to see how this evidence 'fall[s] far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." 531 U.S. at 379 (Breyer, J., dissenting) (citing the majority's language).

[194] Another useful comparison between the Court and the dissent in *Garrett*, and again in *Lane*, would address the amount of case law that supports the contention that Congress identified a history of unconstitutional disability discrimination in a particular area. For example, in his *Lane* dissent Rehnquist points out that there are only two cases footnoted by the Court that actually found constitutional violations preceding the enactment of the ADA. *Lane*, 541 U.S. at 544 (2004) (Rehnquist, C.J., dissenting). This would not be a legitimate grievance in the public education context, considering the cases the court cites to, because they all precede enactment of the ADA in their findings of constitutional violations against people with disabilities in the education context. *See id*. at 525 n.12.

looked at the *Lane* decision to make the broad determination that there was "widespread exclusion of persons with disabilities from the enjoyment of public services"[195] constituting equal protection violations. Moreover, the legislative record demonstrated violations specific to the education context, findings that should strongly compel courts to proceed to the next step of the proportionality analysis when considering the right to equal protection in education. *Association for Disabled Americans* reflected properly on the legislative record behind the ADA Title II both generally and with respect to education-specific violations of equal protection harming individuals with disabilities.

4. Congruence and Proportionality

Once the underlying violations on which the legislation is based are clearly identified, the court must decide whether that legislation is congruent and proportional to remedying them. The *Lane* Court decided, after identifying the "pattern of exclusion and discrimination"[196] in the provision of judicial services, that "Title II's requirement of program accessibility[] is congruent and proportional to its object of enforcing the right of access to the courts."[197] Comparing the pattern and history of discrimination and exclusion to assess whether the force and breadth[198] of Title II affords the appropriate remedy for a specific right violation, the *Lane* Court considered several factors including the efficacy of prior legislation to address the constitutional violations and the internal limitations of Title II that make it a reasonable remedy.[199] These same considerations should apply to examining abrogation in the education context.

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[195] *Lane*, 541 U.S. 509, 529 (2004).

[196] *Id.* at 531.

[197] *Id.*

[198] When "breadth" is discussed in the context of the ADA, it may be taken to mean different things. First, it has been established, as is evident in both *Garrett* and *Lane*, that the Titles of the ADA can be considered separately in consideration of whether sovereign immunity is abrogated legitimately for private claims brought against the state. Second, one may consider the breadth of each title individually and whether *Lane*'s as applied approach is warranted. This Note accepts *Lane*'s as applied approach as consistent with the standard. When discussing "breadth," this Note is discussing the extent to which the legislation effectively remedies the violation of a particular right identified (or as applied to a particular right, not applied to all rights that it could possibly be applied to, i.e. hockey rinks to voting booths).

[199] *Lane*, 541 U.S. at 531.

The *Lane* Court deemed the inefficacy of prior legislation aimed at the elimination of disability discrimination as a significant factor behind Congress' adoption of the ADA.[200] The legislative findings generally evidence this failure of previous law, and the *Lane* Court understood that "Congress was justified in concluding that this 'difficult and intractable problem' warranted 'added prophylactic measures in response.'"[201] Similarly, "added" prophylactic measures are desperately needed in the education context. The failure of education specific disability law is significant in the analysis of whether Title II was an appropriate remedy in the education context.

The ADA's legislative history cites the failure of the Rehabilitation Act[202] specifically to remedy discrimination against the disabled and create consistency.[203] The Education for All Handicapped Children Act,[204] which focused on disability discrimination in the education context and served as the basis for many complaints regarding the provision of appropriate services to students, had been in effect for 15 years at the time the ADA was adopted; nonetheless, Congress found and documented persistent and egregious disability discrimination in the education context.

Both *McNulty* and *Association for Disabled Americans* should have performed this piece of the *Lane* analysis as prescribed. The *McNulty* court did not consider the legislative history of the ADA Title II with reference to educational violations, nor did it consider the inefficacy of prior legislation that might warrant its powerful remedy. If the District Court of Maryland had considered legislation specific to education that was in effect at the time the ADA was adopted, it may have acknowledged that the ADA's strong prohibitions and

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[200] *Id.*

[201] *Id.* at 531 (quoting Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 737 (2003)).

[202] *See* THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 1-2, & n.5 (2001) (discussing the genesis of these laws and also how the requirement of a free and appropriate public education is similar under the ADA and section 504); *see generally* Ruth Colker, *The Death of Section 504*, *in* BACKLASH AGAINST THE ADA 323 (Linda Hamilton Krieger ed., 2003) (discussing not only the prevalence of section 504 cases in *higher* education, but the potential of the regulations implementing the ADA negatively affecting the success of 504 suits).

[203] The report refers to the Rehabilitation Act specifically. *See supra* note 187 and accompanying text.

[204] The EHA became the Individuals with Disabilities Education Act in 1990. 20 U.S.C. § 1400-1487 (2000).

remedies were necessary because the inefficacy of prior legislation called for the "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[205] especially in the education context. The persistence of these violations despite prior remedial legislation led inevitably to the conclusion that stronger laws were needed. The *Lane* Court's discussion of the exact requirements of Title II – whether they met the need recognized by Congress while only prohibiting irrational disability discrimination in the education context – would have been appropriate for the *McNulty* court to consider. Likewise, *Association for Disabled American*'s argument would have been stronger if it had outlined the inefficacy of prior legislation that warranted the passage of the ADA.

The ADA's internal limitations also make it an extremely reasonable response under Congress' section 5 enforcement power. The "reasonable modifications"[206] requirement of Title II, and the theme of reasonable accommodations in the ADA as a whole, may be interpreted both to push the legislation past prior inadequate laws and to aim at congruence and proportionality.[207] As the *Lane* Court emphasized in its examination of congruence and proportionality,

> Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided,

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[205] 42 U.S.C. § 12101(b)(1) (2000).

[206] *Id*. § 12131(2).

[207] For instance, "Robert Burgdorf, the principal drafter of the original version of the statute, calls the ADA 'a second-generation civil rights statute that goes beyond the "naked framework" of earlier statutes and adds much flesh and refinement to traditional nondiscrimination law.'" Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1063 (2004) (quoting Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L.L. L. REV. 413, 415 (1991). Rovner also insists that the *Garrett* decision was wrongly decided and portrays a "cramped" view of equal protection. *Id.* at 1074. Although this Note emphasizes that *Lane* is consistent with *Garrett* because of the different analyses under Title I and Title II resulting from the different levels of evidence, Rovner's *Garrett* arguments can be seen as illuminating in consideration of courts like *McNulty* narrowing *Lane*. Additionally, Rovner's discussion about the changing conceptualization of disability behind the ADA is helpful in understanding the congressional intentions in light of the record of discrimination. *Id.* at 1064.

> and only when the individual seeking modification is otherwise eligible for service.[208]

The ADA is both more powerful than prior legislation and reasonable in its requirements, especially in the face of the voluminous record of constitutional violations it sought to remedy.[209]

The *McNulty* court should have asked, even if the modifications required under the ADA are congruent and proportional to the targeted violations, whether abrogation of sovereign immunity was congruent and proportional in itself. In other words, it is necessary to consider whether the option to enforce private rights against states by making the states liable for monetary damages as well as injunctive relief is an appropriate remedy as applied in each public service context. Clearly, the *Lane* Court found the option of enforcement against the state via private suit congruent and proportional in light of the record of violations. The *Lane* Court emphasized that "the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts."[210] Similarly, the question here is limited to whether Congress validly abrogated state sovereign immunity in enacting the ADA Title II to remedy persistent

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[208] *Lane*, 541 U.S. at 531-32 (2004) (internal citations omitted). "As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways . . . . And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service." *Id*. at 532.

[209] The argument for the congruence and proportionality of the use of the section 5 power to afford this measured remedy in the education context is strong because of the pointed and substantial legislation and the base assumption at the time the ADA was passed that there was simply not enough existing legislative protection for individuals with disabilities. *See* Colker, *supra* note 23, at 696.

[210] *Lane*, 541 U.S. at 530-31. As the lower court discussed in *Association for Disabled Americans v. Florida International University*, 178 F. Supp. 2d 1291, 1295 (S.D. Fla. 2001), it is possible to argue that the validity of abrogation may be determined by examining the congruence and proportionality with respect to relief requested – money damages versus equitable injunctive relief. *See supra* note 153 and accompanying text. The *Lane* Court found that states are not immune from actions for money damages for violations of the ADA Title II; this Note argues that there is no need to separate the types of relief as the less costly injunctive relief would have been found, as it was by the Eleventh Circuit in the context of education, to be congruent and proportional under the *Lane* analysis.

irrational disability discrimination in the context of public education.

D. Education's Position on the Spectrum: Closer to a Voting Booth than to a Hockey Rink

This Note assumes that the *McNulty* court's basic conclusion about the scope of the right to education is correct: it is not fundamental.[211] Although the *McNulty* court interpreted the scope of the right correctly, it failed to draw from prior education case law demonstrating that the provision of education to people with disabilities cannot be equated to the scope of the right defined in *Garrett*.

The "ordinary considerations of cost and convenience"[212] may not serve as the rational basis exempting state accommodation in the education context as easily as it may in other contexts. Education's place on the spectrum between voting booths and hockey rinks requires special consideration in the abrogation analysis. *Lane* countenanced such unique treatment when it discussed the petitioner's contentions and the spectrum of rights Title II purports to protect. The language the Court used aligns public education and voting booth access on one side of the spectrum and positions hockey rink access on the other.[213] Education, and its nonfundamental but "important," even essential, status in Supreme Court precedent,[214] supports a unique approach to the abrogation

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[211] Thus Congress is only to look to the object of protecting people with disabilities from irrational disability discrimination in the education context as Congress would in the employment context to determine the validity of the wielding of section 5 enforcement power.

[212] *Lane*, 541 U.S. at 533.

[213] "According to petitioner, the fact that Title II applies not only to public education and voting booth access but also to seating at state-owned hockey rinks indicates that Title II is not appropriately tailored to serve its objectives. *Id*. at 530. Interestingly, this language is very similar to that of Moore's in *Popovich*. *See infra* Part III.D.

[214] Of course, this essentiality is most notably emphasized in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). This Note does not argue for the constitutional status of education in and of itself, just that the importance of education should play into the congruence and proportionality assessment and that the Court has accorded education special status that may do this without changing the way education rights are currently conceptualized. For the argument that education may be considered "an unenumerated affirmative" constitutional right, see Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 553 (1992). Bitensky also notes origins of a "negative right" to education originating with *Meyer v. Nebraska*, 262 U.S. 390 (1923), and persisting into today through substantive due process' liberty interest. *Id.* at 563-64.

analysis in the education context specific to education's important position in our rights history.[215] This unique approach to education is consistent with the Supreme Court's treatment of alleged constitutional violations in the education context, beginning with *Brown v. Board of Education.*

Brown, in finding that segregation of public schools violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution,[216] introduced the language the Court uses to the present day to describe the role of public education in our society, which does not define any positive constitutional right to education through the Due Process Clause of the Fourteenth Amendment.[217] Importantly, in

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[215] This Note does not argue that the importance of education requires "creat[ing] substantive constitutional rights in the name of guaranteeing equal protection of the laws." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973). It does, however, acknowledge *Rodriguez*'s instruction that

> the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Id. at 33-34. For the argument that this right is implicit in the Constitution, see Bitensky, *supra* note 214, at 553. *See also* Kristen Safier, Comment, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1020 (2001) (arguing that the *Rodriguez* court left open the possibility of finding a fundamental right to a minimally adequate education implicit in the Constitution). This Note argues that the *current* state of the law and conceptualization of the "right" to education allows for special weight in the abrogation analysis. This is not an argument for finding a fundamental right to a minimally adequate education through the protections of substantive due process such that would be enforced through section 5.

[216] *Brown* held that:

> [T]he plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Brown, 347 U.S. at 495 (1954). *Brown* was decided on segregation being unconstitutional rather than on education as a fundamental right, but nevertheless extolled the importance of education in its finding.

[217] The *Brown* Court emphasized that:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

making this finding that segregation violated the guarantee of equal protection, the Court emphasized that the assessment "must consider public education in the light of its full development and its present place in American life throughout the Nation."[218] The Court unequivocally asserted the importance of education, and the responsibility of the states to make it available to everyone equally once they provide it. Due partly to this language emphasizing education's critical value to citizenship and our democracy, the Court later grappled with the divide between the importance of this right and arguments that it may one day be established as a constitutional right implicit in the due process clause of the Fourteenth Amendment.[219]

In *San Antonio Independent School District v. Rodriguez* the Supreme Court upheld Texas' school financing system against equal protection and substantive due process challenges.[220] The Court refused to apply strict scrutiny and rejected wealth as a suspect classification and education as a fundamental constitutional right.[221] Applying rational basis scrutiny, the Court found that the taxing system combined with the state interest of maintaining local control over institutions of public education[222] "abundantly" satisfied the rational basis standard.[223] The *Rodriguez* court did, however, leave the door open for future decisions to find that "some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise" of other rights including First Amendment rights and utilization of the

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> *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*

Id. 493 (emphasis added).

[218] *Id.* at 492-93.

[219] Justice Marshall's *Rodriguez* dissent echoed some of the *Brown* language that emphasized the intersection of education and citizenship: "the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens." *Rodriguez*, 411 U.S. at 70-1 (1973) (Marshall, J., dissenting). The tension between Marshall's dissent and the majority opinion in *Rodriguez* exemplifies how the Court has struggled to find the appropriate characterization of the right to education.

[220] *Id.* at 18.

[221] *Id.*

[222] *Id.* at 49-51.

[223] *Id.* at 55.

vote.[224] The Court also suggested that complete deprivation of education might implicate such a constitutional protection.[225]

Plyler v. Doe[226] took up this latter question. In *Plyler*, the Supreme Court applied a heightened standard of scrutiny and upheld an equal protection challenge to a Texas law.[227] The law denied undocumented children the free public education available to children who were citizens or of other legal statuses.[228] In rejecting the Texas law, the Supreme Court rejected the plaintiffs' classification argument, finding no basis in the law for deeming illegal aliens to be a suspect class.[229] Instead, the Court seemed to base its heightened standard for the Texas law on "well-settled principles"[230] that overwhelmingly consist of examples of education's "fundamental role in maintaining the fabric of our society."[231] The *Plyler* Court emphasized the importance of education to our society politically, culturally, and constitutionally.[232] Interestingly for the purpose of this discussion, *Plyler* also cited the government barriers to education as offensive to equal protection's goals of advancement based on individual merit and the importance of education in preparing people to be self-reliant,[233] goals similar to those the Americans with Disabilities Act cited eight years later.[234] This extensive outlining of

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[224] *Rodriguez*, 411 U.S. 1, 36 (1973). The Court did not find that particular question before it though, asserting that the students in the Texas system were not alleging that "the system fail[ed] to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." *Id.* at 37.

[225] *Rodriguez*, 411 U.S. at 37. *See also* Bitensky, THEORETICAL FOUNDATIONS *supra* note 214, at 566-68 (outlining the evolution of the question of whether an affirmative constitutional right to education exists and pointing to *Rodriguez* as the beginning of the Court's discourse on the existence of such a positive right).

[226] 457 U.S. 202 (1982).

[227] *Id.* at 229-30 (emphasizing that "[i]f the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some *substantial state interest*") (emphasis added).

[228] *Id.* at 205.

[229] *Id*. at 219 n.19.

[230] *Id.* at 223.

[231] *Plyler*, 457 U.S. at 221.

[232] *Id.* at 221-22.

[233] *Id*.

[234] The ADA clearly states that the disadvantaged position of people with disabilities in our society has "been based on characteristics that are beyond the control of such individuals and [result] from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12202 (a)(7) (2000). This section also highlights that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full

education's importance included the Court's assertion that although education is not a fundamental constitutional right, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[235] *Plyler* attributed an importance to education that transcends the more common association to participation in the democratic process via meaningful voting; the Court discussed how education reflects on success in areas of personhood and not just citizenship, as noncitizens play important roles in American society.[236]

After the Court discussed education's elevated role in society, it began to review the Texas law excluding undocumented children.[237] The Court considered the children's lack of responsibility for their immigration statuses.[238] Additionally, perhaps spurred by the dicta in *Rodriguez*, the Court indicated that this case was unique because it addressed a complete deprivation of education, rather than a more fluid and difficult allegation of an inadequate education.[239] Significantly, the Court stated that it "may appropriately take into account [the] costs to the Nation"[240] of the law in determining whether the Texas statute could be upheld and found that only substantial interests would support rationality of the law, relative to the extreme costs of depriving children of education.[241] The court found none of the three discernible state interests – protection from the entry of illegal

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participation, independent living, and economic self-sufficiency for such individuals." *Id.* at § 12202 (a)(8).

[235] *Id.* at 221. This also may provide an interesting contrast to the *Rodriguez* language that highlights the inability of the court to apply a higher level of scrutiny to Texas's financing structure because of the Court's traditional deference to state substantive economic and social policy. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973). The *Rodriguez* Court directly compared education to the provision of welfare benefits in support of its application of the deferential rational basis review, citing the added complexities of state provision of public education as yet another reason to apply the lower standard. *Id.* at 40-43. In contrast, the *Plyler* court differentiated education from other benefits and used this differentiation to support its application of a heightened standard of review. *Plyler*, 457 U.S. at 221-24.

[236] *Plyler*, 457 U.S. at 222 n.20.

[237] *Id.* at 223.

[238] *Id.* at 224.

[239] The *Rodriguez* Court depended heavily upon the lack of absolute deprivation to reject the equal protection challenge to the Texas law. The Court emphasized that the claim of an inadequate education provided to one group does not support the finding of a suspect classification because no "system [can] assure equal quality of education except in the most relative sense." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20-5 (1973).

[240] *Plyler*, 457 U.S. at 224.

[241] *Id.*

immigrants, prevention of the burden on the overall quality of education,[242] and distinction based on unlawful status – substantial enough to justify the statutory deprivation of education to undocumented children.[243]

E. Significance of Context: Education in the Abrogation Analysis

The status of education in our history should not have altered the *McNulty* court's assertion that disability is not a suspect class and that education is not a fundamental right under the Federal Constitution,[244] regardless of whether the Court has left the latter question, at least as to a minimally adequate education, open. These decisions do, however, underscore the importance of education and the Supreme Court's willingness to acknowledge the ties that education has to participating meaningfully in the democratic process, and particularly in exercising the vote. Notably as well, the Court has detailed the importance of education in other areas of American society, even for individuals unable to exercise the vote.[245] Faced with an equal protection challenge to a law that deprived noncitizens of an education, the Court even applied a heightened standard of scrutiny when the allegation involved a nonsuspect class, asserting the costs to the nation of educational deprivation as an influential factor.[246]

When it comes to the abrogation analysis, a court considering whether Title II validly abrogates Eleventh Amendment immunity in the education context must not only consider the explicit scope of the education right and the legislative history documenting unconstitutional violations. It must also consider the importance of education in our society and the way that importance has influenced the Court's equal protection review. *McNulty* did not reach the merits of the case, but dismissed the Title II claim outright because

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[242] *Plyler*, 457 U.S. at 229 (finding no evidence that including undocumented children in the classroom had a negative impact on the quality of education).

[243] *Id*. at 228-30 ("It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.").

[244] All state constitutions currently provide for the right to education to some degree. Eastman, *supra* note 166, at 2, 33.

[245] Plyler v. Doe, 457 U.S. 202, 222 n.20 (1982).

[246] *Id.* at 224.

education is not a fundamental right.[247] *Association for Disabled Americans* appropriately emphasized the uniqueness of education but failed to discuss the basic constitutional floor prohibiting irrational discrimination against the disabled. Focusing on the nature of the right without acknowledging the legitimacy of legislation abrogating sovereign immunity via the section 5 power to enforce the Equal Protection Clause, left education decisions vulnerable in the future. The Supreme Court's reflections on challenges in the education context should influence section 5 analysis when Congress has purported to invoke its Fourteenth Amendment enforcement power to preserve the equal protection guarantee.

V. CONCLUSION

McNulty did not draw much from the *Lane* analysis, but simply used the Court's fundamental rights language to summarily foreclose the validity of abrogation as applied to nonfundamental rights like education.[248] Instead, the *McNulty* court should have considered whether *Lane* invited a deeper analysis of each case of discrimination in public services. *Association for Disabled Americans* properly considered the importance of education and the legislative history behind the ADA, but it failed to address the validity of affirmative section 5 legislation enforcing the equal protection guarantee in areas that do not generally implicate fundamental rights. The *Lane* analysis, sticking to standard evaluation of the section 5 enforcement power and only modifying as required for the facts of the case, called for consideration of the scope of the right at stake, the legislative history describing pervasive violations, the weaknesses of prior legislation that prevented amelioration of disability discrimination, and the special status the U.S. Supreme Court has accorded education. Only after such

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[247] McNulty v. Bd. of Educ. of Calvert County, No. Civ. A. DKC 2003-2520, 2004 WL 1554401, at *3 (D. Md. July 8, 2004). If the *McNulty* court had applied the full abrogation analysis that *Lane* demanded, the U.S. Supreme Court's treatment of education under equal protection analysis may have affected not only the determination of whether Title II validly abrogates sovereign immunity, but also the substantive analysis of McNulty's claim. For instance, McNulty's suspensions may have been alleged to constitute a deprivation of education, or a deprivation of a minimally adequate education, thus invoking discussion of some of the Court's language in *Rodriguez* and *Plyler*. Perhaps such allegations would have amounted to the finding of irrational disability discrimination in school, or even given rise to the debate about whether education's constitutional status should be reconsidered.

[248] *Id*. at *3.

analysis could the *McNulty* and *Association for Disabled Americans* courts have made thorough determinations as to whether sovereign immunity was validly abrogated for ADA Title II challenges against states in the educational context.

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