

The Americans with Disabilities Act and Inmates with Disabilities: The Extent to Which Title II of the Act Provides a Recourse

Paul Evans^{*}

Serving a prison term is a punishment to be dreaded for any American, but it can be far more dreadful for a person with a disability.¹ In the United States today, there are over two million incarcerated individuals, of whom a substantial number suffer from a physical or mental disability.² Certainly, every individual will face

^{*} J.D. (2006), Washington University in St. Louis School of Law.

1. The definition of “disability” that is relevant to this article is contained in the Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (2005) (codified in scattered sections of 27 and 42 U.S.C.). “In this Act, the term ‘disability’ means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2) (2005).

The word “inmate” must also be defined. This article will refer to inmates as persons incarcerated in local, state, and federal facilities. Most often, the word “inmate” will refer to people with disabilities incarcerated in state-run prisons. However, local facilities may also be discussed, because “there is substantial overlap and shared use of correctional facilities by state and local governments.” Brief of Petitioner at 18 n.9, *United States v. Georgia (Goodman)*, 126 S. Ct. 877 (2006) (Nos. 04-1203, 04-1236), 2005 WL 1811401.

For an example of the issues faced by an inmate with a disability, see *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987). In this case an inmate whose legs were amputated below the knees was forced to drag himself across the floor of his cell to use the toilet because the space between the toilet and the wall was too narrow for the inmate to maneuver his wheelchair. *Id.* at 392. In addition, the opening in the seat was too wide for his atrophied leg muscles and narrow buttocks, and there was no bar for him to steady himself, so he often slipped into the toilet water or fell on the ground. *Id.* Due to these problems the inmate resorted to using a catheter, but contracted a kidney infection as a result. *Id.*

2. See LAURA M. MARUSCHAK & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 181644, MEDICAL PROBLEMS OF INMATES, 1997 (2001). This report estimated that 31% of state inmates and 23% of federal inmates have a “learning or speech disability, a hearing or vision problem, or a mental or physical condition.” *Id.* at 1. In addition, 21% of state inmates and 22% of federal inmates acquired a medical problem after becoming incarcerated. *Id.* Furthermore, the instance of medical problems increased with time served in prison. *Id.* The California Department of Corrections (CDC) found it housed 1000 inmates with a serious physical disability. *Armstrong v. Wilson*, 942 F. Supp. 1252, 1254 (N.D. Cal. 1996). The facts about CDC inmates with disabilities presented in *Armstrong* were compiled from

their own unique challenges in prison, but the punishment of a disabled person should be no more severe than that of his fellow inmates. At the same time, prisons are restrained by safety and financial concerns and cannot sacrifice either at the whim of a particular inmate. The balance between these opposing needs is one that courts, including the United States Supreme Court, are asked to make.

Following the Supreme Court's decision in *Tennessee v. Lane*,³ the court system was forced to examine the constitutionality of applying Title II of the Americans with Disabilities Act of 1990 ("ADA") to inmates with disabilities facing discrimination in state-run prisons.⁴ Title II regulates public services by requiring that "reasonable modifications" be made for people with disabilities and allowing for private lawsuits seeking money damages to be brought

surveys. *Id.* It was determined that of the 130,000 inmates incarcerated with the CDC, 345 used a wheelchair; 650 had lower extremity impairments that required the use of a walker, cane, or prosthesis; 141 could not hear even with the use of a hearing aid; and 219 had uncorrectable vision problems. *Id.*

See also Sandra J. Carnahan, *The Americans with Disabilities Act in State Correctional Institutions*, 27 CAP. U. L. REV. 291, 292 (1999) (estimating rate of mental illness within the United States' incarcerated population to be as high as 7.2%); T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, 285 (1997) (stating that a conservative estimate of prevalence of serious mental disorders amongst prison and jail inmates is 6%); ALLEN J. BECK & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 188215, MENTAL HEALTH TREATMENT IN STATE PRISONS, 2000, at 3 (2001) (estimating that as of 2000, one in every eight state prisoners was receiving some mental health therapy or counseling).

Although some inmates with disabilities are in medical wards, many are living amongst the general inmate population, whose ever-increasing size has been accompanied by deteriorating prison conditions. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2001 432-35 (2001), available at <http://www.hrw.org/wr2k1>. The Human Rights Watch's report documented pervasive overcrowding in prisons, with twenty-two states and the federal prison system operating at 100% or more of their actual capacity. The report concluded that the system was simply unable to cope with the overflow, which resulted in rampant sexual and physical abuses. *Id.*

There is, however, one bright spot for inmates with disabilities: "[t]he fact that it is possible for prisoners to bring meaningful court actions against prison administrations at all remains at least a demonstration of democracy at work. As Dostoyevsky (1860) noted, '[T]he standards of a nation's civilization can be judged by opening the doors of its prisons.'" Roy D. King, *Prisons*, in THE HANDBOOK OF CRIME & PUNISHMENT 589, 622 (Michael Tonry ed., 1998).

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

4. 42 U.S.C. §§ 12131-12134, 12141-12150, 12161-12165; *Lane*, 541 U.S. at 513.

against states that are in noncompliance.⁵ Title II has also provided recourse for disabled state inmates.⁶

In *Lane*, the Court's holding was limited to the application of Title II to cases implicating "the fundamental right of access to the courts," which it considered a valid exercise of the Fourteenth Amendment's section 5 enforcement power.⁷ Section 5 provides Congress with the authority to enforce the amendment through "appropriate legislation."⁸ The Court held that a state's Eleventh Amendment immunity from suits for money damages brought by private citizens in federal court could be abrogated by section 5 in this instance.⁹ This holding was based on Congress's constitutional authority to provide access to the courts under the Fourteenth Amendment's due process clause.¹⁰ The Court refused, however, to consider Title II's application beyond access to the courts.¹¹

The *Lane* decision came on the heels of *Board of Trustees v. Garrett*,¹² where the Court held that Congress had not validly abrogated the states' Eleventh Amendment immunity under Title I of the ADA with respect to private suits seeking money damages.¹³

5. See discussion of Title II *infra* notes 28–31 and accompanying text.

6. In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), the Supreme Court held that state inmates are entitled to the protections of the ADA. *Id.* at 213. *Yeskey* is discussed further *infra* notes 29–32 and accompanying text.

Prior to the ADA's enactment, eligible inmates brought actions as a constitutional violation or, if eligible, under the ADA's predecessor, the Rehabilitation Act of 1973, which regulates federally funded entities. Elaine Gardner, *The Legal Rights of Inmates with Physical Disabilities*, 14 ST. LOUIS U. PUB. L. REV. 175, 188–98 (1994). "The Eighth Amendment proscription against 'cruel and unusual punishment' is what inmates generally look to for protection against certain abuses which may exist in a correctional institution." *Id.* at 199. Section 504 of the Rehabilitation Act "guarantees equal access for persons with disabilities to programs receiving federal financial assistance" and "has been utilized successfully by inmates with disabilities in federal courts and through administrative complaints." *Id.* at 188, 190.

7. *Lane*, 541 U.S. at 534 (Souter, J., concurring).

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

9. *Lane*, 541 U.S. at 533–34.

10. *Id.* at 532.

11. *Id.* at 531. ("Because we find that Title II unquestionably is valid [section] 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.").

12. 531 U.S. 356 (2001).

13. *Id.* at 374. See also *Lane*, 541 U.S. at 514 ("In *Garrett*, we concluded that the Eleventh Amendment bars private suits seeking money damages for state violations of Title I of the ADA. We left open, however, the question whether the Eleventh Amendment permits suits

Lane did not create a complete bar against an application of Title II as *Garrett* did to Title I. Instead, through its limited holding, *Lane* left undetermined the circumstances in which Title II could be used to abrogate a state's Eleventh Amendment immunity. Most recently, in *United States v. Georgia (Goodman)*, the Court held that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."¹⁴ This leaves the question of whether a state's sovereign immunity can be abrogated for general violations of the law, which will likely become a more contentious issue.¹⁵

This Note will examine the extent to which Title II of the ADA constitutionally abrogates state sovereign immunity for suits by inmates with disabilities facing discrimination. Part I of this Note examines the history and legislative intent of the ADA and how the ADA has been applied to inmates. Part II describes Supreme Court decisions on abrogation of Eleventh Amendment immunity under section 5 of the Fourteenth Amendment. Part III analyzes the application of Title II to inmates with disabilities and concludes that states' sovereign immunity can be constitutionally abrogated under the ADA for violations of Title II that do not amount to unconstitutional conduct.

I. THE RIGHTS OF PEOPLE WITH DISABILITIES UNDER THE ADA AND ITS APPLICATION TO STATE PRISONS

The ADA was a reaction to what Congress considered to be widespread discrimination against people with disabilities.¹⁶ With its

for money damages under Title II.").

14. *United States v. Georgia (Goodman)*, 126 S. Ct. 877, 882 (2006).

15. *See id.* at 883 (Stevens, J., concurring).

16. 42 U.S.C. § 12101 (2000). The findings listed in the act that are relevant to this Note read as follows:

The Congress finds that—

- (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
- (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals

passage, Congress intended to bring about sweeping changes in the way that people with disabilities are treated in the United States and to ensure that the federal government plays a central role in bringing about those changes.¹⁷ Senator Tim Harkin, the act's sponsor in the Senate, called it an "emancipation proclamation for all persons with disabilities."¹⁸

with disabilities continue to be a serious and pervasive social problem;

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

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

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

Id.

17. *Id.* § 12101(b).

It is the purpose of this [Act]—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; [and]

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this [Act] on behalf of individuals with disabilities; . . .

Id.

18. 136 CONG. REC. 12, 17,369 (1990) (statement of Sen. Harkin) ("I just wanted to say that . . . today Congress opens the doors to all Americans with disabilities; that today we say no to fear, that we say no to ignorance, and that we say no to prejudice. The ADA is, indeed, the 20th century Emancipation Proclamation for all persons with disabilities.").

A. The ADA as an Emancipation Proclamation for People with Disabilities

Congress's first attempt to address the needs of people with disabilities was the Rehabilitation Act of 1973.¹⁹ Section 504 of the act established a policy wherein public entities receiving federal funding must be operated without discrimination on the basis of disability.²⁰ This provision was intended to radically alter the

19. 29 U.S.C. § 701 (2000). The Act was intended to authorize programs of various kinds to benefit people with disabilities. *Id.* § 701(b).

The purposes of this chapter are—

(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through—

(A) statewide workforce investment systems implemented in accordance with title I of the Workforce Investment Act of 1998 that include, as integral components, comprehensive and coordinated state-of-the-art programs of vocational rehabilitation;

(B) independent living centers and services;

(C) research;

(D) training;

(E) demonstration projects; and

(F) the guarantee of equal opportunity; and

(2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with significant disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

Id.

20. 29 U.S.C. § 794(a) (referred to throughout this Note as "Section 504").

No otherwise qualified individual with a disability in the United States. . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency

Id.

The language of Section 504 mirrors that of previous anti-discrimination enactments. *See, e.g.*, Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 (2000) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

treatment of people with disabilities, but its influence was significantly curtailed by its application solely to entities receiving federal funds.²¹

The major difference between the ADA and the Rehabilitation Act are their respective scopes.²² With the ADA, Congress extended

The courts have construed Section 504 to have created a broad government policy forbidding discrimination on the basis of disability by federally funded programs or activities. *See, e.g., Lloyd v. Reg'l Transp. Auth.*, 548 F.2d 1277, 1281 (7th Cir. 1977) (holding that Section 504 established affirmative rights and that a private cause of action could be invoked to vindicate those rights). In addition, the term "program or activity" has been interpreted to include entire units of a state or local government. These bodies are subject to Section 504 as long as there is a sufficient nexus between the federal assistance and the discriminatory practice. The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified in scattered sections of 20, 29, and 42 U.S.C.), which amended Section 504 by defining "program or activity" to mean "all of the operations of a department . . . of a State or of a local government." 29 U.S.C. § 794(b)(1)(A). Furthermore, the fact that a local governmental unit receives the funds only indirectly through the state does not preclude it from being considered a "program or activity" within the meaning of Section 504. *See Bentley v. Cleveland County Bd. of County Comm'rs*, 41 F.3d 600, 603 (10th Cir. 1994) (holding that a county's indirect receipt of federal funds from the Oklahoma Department of Transportation rendered it amenable to suit under the Rehabilitation Act).

21. The limitation that the entity be federally funded still allows some inmates to bring claims under the act, as it clearly applies to federal prisons and numerous state and local correctional facilities receiving federal funding. *See Gardner, supra* note 6, at 190.

There are several remedies available to eligible inmates under Section 504, including injunctive relief. In addition, Congress amended the Rehabilitation Act in 1986 to make it clear that litigants can pursue damages under Section 504. Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807 (codified in scattered sections of 29 and 42 U.S.C.). The amendment states that:

[i]n a suit against a State for a violation of [this statute], . . . 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 the suit against any public or private entity other than a state.

42 U.S.C. § 2000d-7(a)(2).

22. The fact that the ADA was intended to be an extension of the Rehabilitation Act is evidenced by how closely Congress modeled the language of the ADA on the Rehabilitation Act. Note the similarities between Section 504 of the Rehabilitation Act, quoted *supra* note 20 and the ADA's Section 202, cited *infra* note 23.

In addition to the similar wording of the two acts, Congress directed that the ADA be interpreted in a manner consistent with the Rehabilitation Act. 42 U.S.C. § 12201(a) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under [Section 504] of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title."). If an inmate's claim is within the scope of both the ADA and the Rehabilitation Act claims, he will often bring suit under both acts. In these cases, courts will combine their analysis of the claims. Carnahan, *supra* note 2, at 296 n.50; *see also Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995)

coverage beyond federally funded programs to all public entities without regard to their source of funding.²³ The ADA also defines disability broadly to encompass persons facing many different types of discrimination.²⁴ In general, the ADA bars a public entity from denying people with disabilities services or failing to provide services like those offered to others. Each of the ADA's five titles targets a specific area in which people with disabilities encounter discrimination.²⁵ Title II of the ADA is the title under which an

("The requirements for stating a claim under the ADA are virtually identical to those under § 504 of the Rehabilitation Act.")

23. See 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." (emphasis added)).

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

42 U.S.C. § 12131(2).

A "public entity" is defined as "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.* § 12131(1)(A)–(B).

In its regulations, the Department of Justice has interpreted the ADA to apply to all services, programs, and activities "provided or made available by public entities." 28 C.F.R. § 35.102(a) (1991). The analysis accompanying this regulation makes it clear that the ADA applies to virtually "anything that a public entity does." *Id.* §§ 35.694, 35.696.

24. 42 U.S.C. § 12102(2). The ADA's definition of "disability" is quoted *supra* note 1. Gardner further discusses the ADA's definition of "disability":

The ADA protects individuals with disabilities. It covers not only those with traditionally recognized disabilities, but also those who have any impairment that substantially limits a major life activity. Included in the definition, additionally, are those who have recovered from a disability, such as individuals who have recovered from cancer. Finally, the ADA covers individuals who have no disability but who are treated as having one, such as individuals with facial deformities, or persons who are HIV-positive but have not developed AIDS symptoms.

Gardner, *supra* note 6, at 178–79.

25. The five titles of the ADA are Title I, 42 U.S.C. §§ 12111–12117 (2000), which addresses employment; Title II, *id.* §§ 12131–12134, 12141–12150, 12161–12165, which addresses public services; Title III, *id.* §§ 12181–12189, which addresses public accommodations and services operated by private entities; Title IV, 47 U.S.C. §§ 153221, 153225, 153661, which addresses telecommunications; and Title V, 42 U.S.C. §§ 12201–12213, which contains miscellaneous provisions.

inmate could bring a suit and address discrimination against a “qualified individual with a disability” by a “public entity.”²⁶

B. The Application of the ADA to State Prisons

Within the ADA’s findings Congress noted that there are many disabled Americans who are discriminated against in areas including “institutionalization.”²⁷ Despite this language, the courts questioned whether the term “public entity” included state prisons.²⁸ The issue was whether an inmate was a “qualified individual with a disability” within the meaning of Title II, because an inmate’s participation in the services, programs, or activities of the prison was not voluntary.²⁹

The Supreme Court resolved this issue in *Pennsylvania Department of Corrections v. Yeskey*,³⁰ which held that Title II prohibits state prisons, as “public entities,” from discriminating

26. 29 U.S.C. § 794 (2000).

27. 42 U.S.C. § 12101(a)(3). The legislative history of the ADA evidences some concern for inmates with disabilities as well. *See, e.g.*, 2 STAFF OF HOUSE COMM. ON EDUC. & LABOR, 101ST CONG., LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT (1990) (jailers took away wheelchairs as a form of punishment); U.S. COMM’N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983), cited by H.R. Rep. No. 101-485, pt. 2, at 28 (1990) (prisons have inadequate treatment and rehabilitation programs for inmates with disabilities).

28. The federal appellate courts split over whether state prisons were within the purview of Title II. *See, e.g.*, *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995).

We imagine that most prison officials would be surprised to learn that they were subject to these laws: [p]rison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody, . . . they generally do not provide services, programs, or activities as those terms are ordinarily understood. A prohibition on discrimination in those three realms thus would not seem to reach prisons.

Id. at 1347 (citation and quotations omitted). *But see* *Crawford v. Ind. Dept. of Corr.*, 115 F.3d 481 (7th Cir. 1997).

Invidious discrimination by governmental agencies, such as Indiana’s prison system, violates the equal protection clause even if the discrimination is not racial, though racial discrimination was the original focus of the clause. In creating a remedy against such discrimination, Congress was acting well within its powers under section 5 [even though the ADA forbids] . . . a form of discrimination remote from the contemplation of the framers of the Fourteenth Amendment.

Id. at 487.

29. *See* *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 211 (1998).

30. *Id.*

against inmates, who are “qualified individuals with a disability.”³¹ The Court declined, however, to consider the question of whether the application of the ADA to state prisons was constitutional.³²

II. THE REACH OF THE FOURTEENTH AMENDMENT’S SECTION 5 POWER

The question that *Yeskey* declined to consider was resolved in part by *Goodman*, which held that Title II’s application to state prisons is constitutional with respect to conduct that violates the Fourteenth

31. *Id.* at 208–09. An inmate with hypertension was denied admission to a motivational boot camp on the basis of his disability. *Id.* The Supreme Court stated that the ADA’s “language unmistakably includes State prisons and prisoners within its coverage.” *Id.* at 209.

The petitioners argued that the words “eligibility” and “participation” in the ADA’s text implied that the actions of the applicant seeking the benefits from the state be voluntary. *Id.* at 211. The Court disagreed and found that such an interpretation was “wrong on two counts.” *Id.* First, “the words do not connote voluntariness.” *Id.* Second, “even if the words did connote voluntariness, it would still not be true that all prison services, programs, and activities are excluded from the ADA because participation in them is not voluntary.” *Id.* (quotations omitted). The Court cited as an example the prison law library, which “is a service (and the use of it an activity), which inmates are free to take or leave.” *Id.*

The Court also considered the importance of the Congress’s finding that people with disabilities are subject to discrimination in “institutionalization.” *See supra* note 16 and accompanying text. The Court found that the word “institutionalization” “can be thought to include penal institutions.” *Yeskey*, 524 U.S. at 211–12. Even if Congress had not anticipated that the ADA would be applied to state prisons, it is not impossible to do so. *Id.* at 212. The Court stated that “the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” *Id.* at 212 (citation omitted).

“In order to demonstrate an ADA claim pursuant to Title II, an inmate must demonstrate: (1) a qualified disability; (2) denial of participation in or the benefits of services, programs, or activities provided by the prison; and (3) a disability-based reason for the denial of services, programs, or activities.” *Laubach v. Roberts*, 90 P.3d 961, 968–69 (Kan. Ct. App. 2004). An inmate can either make a claim for injunctive relief or for a damage award. Successful litigants can also be compensated for their attorneys’ fees. These remedies are similar to those available under the Rehabilitation Act, discussed *supra* note 21. *See also* 42 U.S.C. § 12133 (“The remedies, procedures, and rights set forth in [the Rehabilitation Act] . . . shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132.”).

32. *Yeskey*, 524 U.S. at 212. In recognizing that it had avoided this question, the Supreme Court stated that “[w]e do not address another issue presented by petitioners: whether application of the ADA to state prisons is a constitutional exercise of Congress’s power under either the Commerce Clause . . . or [section] 5 of the Fourteenth Amendment.” *Id.* The Court did not find it necessary to consider this issue, because it had not been before either the district court or the court of appeals. *Id.*

Amendment.³³ However, not all of the conduct prohibited by Title II in state prisons is unconstitutional conduct.³⁴ A determination of the extent of Title II's constitutionality as applied to inmates with disabilities can be made by applying the test the Supreme Court used to evaluate the ADA in both *Garrett* and *Lane*.

The Court has held that Congress can deny a state its Eleventh Amendment sovereign immunity in the limited circumstance in which it has both "unequivocally expressed its intent to abrogate" in the statute at issue, and it has "acted pursuant to a valid grant of constitutional authority."³⁵ In the case of the ADA, Congress stated clearly that the states will not be immune under the Eleventh Amendment for violations of the ADA.³⁶ Therefore, the question

33. *United States v. Georgia (Goodman)*, 126 S. Ct. 877, 882 (2006).

34. Brief for the Petitioner at 44, *United States v. Georgia (Goodman)*, 126 S. Ct. 877 (2006) (Nos. 04-1203, 04-1236), 2005 WL 1812489 at *38.

35. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000).

The Eleventh Amendment proscribes that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. *But see* *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of [section] 5 of the Fourteenth Amendment.").

The bar on bringing private suits for money damages against the states has not been extended to state officials. The doctrine of *Ex parte Young*, 209 U.S. 123 (1908), allows for suits against state officials in which prospective equitable relief is sought to end continuing violations of federal law. *Young* was recently reaffirmed by the Court in *Garrett*:

Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*. In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

Bd. of Trs. v. Garrett, 531 U.S. 356, 374 n.9 (2001) (citation omitted).

It has been argued that the Supreme Court has misinterpreted the Eleventh Amendment. See Robert A. Levy, *Tennessee v. Lane: How Illegitimate Power Negated Non-Existent Immunity*, 2004 CATO SUP. CT. REV. 161 (2004) (arguing that Tennessee was not entitled to immunity in *Lane* because the Eleventh Amendment does not confer immunity at all in federal question cases), available at <http://www.cato.org/pubs/scr/2004/illegitimatepower.pdf>.

36. 42 U.S.C. § 12101(b)(4) (stating that the states are not be immune, because Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth

before the Court in *Garrett*, *Lane*, and *Goodman* was whether Congress's intended abrogation of the states' Eleventh Amendment immunity was a valid exercise of the power granted by section 5 of the Fourteenth Amendment.³⁷

A. The Supreme Court's Test for Determining the Extent of Congress's Section 5 Power as Stated in City of Boerne v. Flores

The Supreme Court has granted Congress latitude in the reach of its Fourteenth Amendment legislation. The Court has held that when acting under the authority of section 5, Congress can prohibit conduct not directly forbidden by the amendment in order to remedy or deter direct violations.³⁸ The Court, however, has drawn a distinction

amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities").

37. The discussion in Part II is limited to Congress's constitutional authority to abrogate a state's Eleventh Amendment immunity under the Fourteenth Amendment, because, in *Garrett*, the Court stated definitively that Congress may not do so under the commerce clause, which was one basis of authority advanced by Congress in the ADA. *See supra* note 36. The Supreme Court has stated that "Congress may not, of course, base its abrogation of the states' Eleventh Amendment immunity upon the powers enumerated in Article I," which include the commerce clause. *Garrett*, 531 U.S. at 364; *see also Kimel*, 528 U.S. at 79 (stating that if the Age Discrimination in Employment Act "rests solely on Congress'[s] Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

38. The scope of the Fourteenth Amendment's guarantees is defined in the amendment's first section:

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

U.S. CONST. amend. XIV, § 1.

In *Lane*, the Court returned to a definition of the scope of Congress's section 5 authority that it had first laid out in *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879). *Lane*, 541 U.S. at 520 n.3.

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

between measures that are remedial or preventive and those that create a “substantive change in the governing law.”³⁹ Those measures that do create a substantive change are considered unconstitutional.⁴⁰ The Court has acknowledged that this distinction is a difficult one to maintain, but it is one that must be made nonetheless.⁴¹

The Court has developed a test to aid in determining whether section 5 legislation is constitutional. This three-part test was first stated in *City of Boerne v. Flores*⁴² and examines the “congruence and proportionality” of the legislation to the injury to be prevented or remedied.⁴³ First, the scope of the constitutional right at issue must be identified.⁴⁴ Second, a history and pattern of unconstitutional conduct by the states must have been identified by Congress.⁴⁵ Finally, analysis of the statute is undertaken to decide if it is a congruent and proportional response to that history and pattern of unconstitutional treatment.⁴⁶

B. The Supreme Court’s Application of the Boerne Test in Garrett to Hold Title I Unconstitutional

The majority opinion in *Garrett* was limited to the issue of whether the respondents could recover money damages in a suit

Id.; see also *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976))).

39. *Boerne*, 521 U.S. at 518–19. The Supreme Court noted that Congress’s authority “is not unlimited” and distinguished constitutional legislation from that which makes “a substantive change in the governing law.” *Id.*

40. *Id.* at 520.

41. *Id.* The Court noted that Congress has “wide latitude in determining where” the distinction lies, but that there is a distinction and it “must be observed.” *Id.*

42. *Lane*, 541 U.S. at 520–21.

43. *Id.* (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”). In *Garrett*, the Court stated that “it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees. 531 U.S. at 365 (citation omitted). “Accordingly, [section] 5 legislation reaching beyond the scope of [section] 1’s actual guarantees must exhibit ‘congruence and proportionality’” *Id.*

44. *Id.*

45. *Id.* at 368.

46. *Id.* at 374.

against the state for employment discrimination on the basis of a disability under Title I.⁴⁷ The Court applied the *Boerne* test to find that Congress had not validly abrogated the states' Eleventh Amendment immunity to suits for money damages under Title I.⁴⁸ In reaching this conclusion, the Court initially attempted to define the "metes and bounds of the constitutional right in question," which is the first step in the *Boerne* test.⁴⁹ The Court found that the right at issue was the limitation that the equal protection clause⁵⁰ "places upon [s]tates' treatment of [people with disabilities]."⁵¹

The Court then looked at the precedent it had established with regard to the equal protection clause in *City of Cleburne v. Cleburne Living Center*.⁵² In *Cleburne*, the Court held that a state is not required by the Fourteenth Amendment to make special accommodations for people with disabilities in the employment

47. 42 U.S.C. §§ 12111–17 (2000). Title I's general bar against discrimination on the basis of disability states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a).

Chief Justice Rehnquist wrote the opinion of the Supreme Court in *Garrett* and was joined by Justices O'Connor, Kennedy, Scalia, and Thomas. 531 U.S. at 358. Justice Kennedy also filed a concurring opinion in which Justice O'Connor joined. *Id.* at 374. With the exception of Justice O'Connor, these same justices composed the dissenters in *Lane*. *Tennessee v. Lane*, 541 U.S. 509, 538 (2004). The Court limited its decision in *Garrett* to the issue of sovereign immunity. 531 U.S. at 364 ("The question . . . is whether Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the ADA."). In a footnote, the Court stated that it had purposely avoided determining the constitutionality of Title II at that time. *Id.* at 360 n.1 ("We are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under [section] 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question.").

The two respondents in *Garrett* were Patricia Garrett and Milton Ash, both employees of the state of Alabama. *Id.* at 362. Garrett alleged that when she returned to work after being diagnosed with breast cancer and undergoing treatment, she was forced to take a position with lower pay and less authority. *Id.* Ash, who suffered from both asthma and sleep apnea, asked his employer to make accommodations for his conditions. *Id.* The employer, however, made none of the accommodations he requested and gave him lower performance evaluations after he filed a discrimination claim with the Equal Employment Opportunity Commission. *Id.*

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

49. *Id.* at 368.

50. U.S. CONST. amend. XIV, § 1.

51. *Id.* at 365.

52. 473 U.S. 432 (1985).

context when there is a rational basis for the state's actions.⁵³ Proceeding under the rational basis standard of review, the Court found that a state need not make allowances for people with disabilities.⁵⁴ Instead, any special accommodations must come through changes in state law and not through the equal protection clause.⁵⁵

In the second step of the *Boerne* test, the *Garrett* court determined that the ADA's legislative record failed to show that Congress had identified "a pattern of irrational state discrimination in employment against [people with disabilities]."⁵⁶ The respondents cited several examples from the congressional record that evidenced state discrimination on the basis of disability.⁵⁷ The Court, however, found

53. *Garrett*, 531 U.S. at 367 ("[T]he result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for [people with disabilities], so long as their actions toward such individuals are rational."); see also *Tennessee v. Lane*, 541 U.S. 509, 529 (2004) ("*Garrett* . . . concerned legislation that targeted classifications subject to rational-basis review."). This is different from sex-based classifications, which are subject to "a heightened standard of judicial scrutiny." *Id.*

In *Cleburne*, the Supreme Court held that there are two standards of review for state legislation or official actions that are challenged for having denied equal protection. 473 U.S. at 439.

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . [This rule] gives way, however, when a statute classifies by race, alienage, or national origin. . . . [These types of laws are] subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id. at 440.

This second rule has also been applied to legislative classifications based on gender. See *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

54. *Cleburne*, 473 U.S. at 450.

55. See *Garrett*, 531 U.S. at 368 (stating that a state can "hold to job-qualification requirements which do not make allowance for [people with disabilities]. If special accommodations for [people with disabilities] are to be required, they have to come from positive law and not through the Equal Protection Clause.").

56. *Id.*

57. *Id.* at 369. The respondents cited, in their brief, six examples from the congressional record of employment discrimination against people with disabilities that involved the states:

A department head at the University of North Carolina refused to hire an applicant for the position of health administrator because he was blind; similarly, a student at a state university in South Dakota was denied an opportunity to practice teach because the dean at that time was convinced that blind people could not teach in public schools. A microfilmer at the Kansas Department of Transportation was fired because he had epilepsy; deaf workers at the University of Oklahoma were paid a lower salary than

it “telling” that only these few examples existed, given the large number of people employed by the states.⁵⁸ One of the primary observations offered in the concurring opinion filed in this case was also the absence of an identified pattern of disparate treatment.⁵⁹

The Court then proceeded to the third step of the *Boerne* test and addressed the congruence and proportionality of the legislation to the state violations.⁶⁰ The Court found that the ADA’s accommodation duty far exceeds what is constitutionally required.⁶¹ This is because the ADA makes unlawful a range of alternative responses that would also be reasonable and would not impose an undue burden on an employer.⁶²

those who could hear. The Indiana State Personnel Office informed a woman with a concealed disability that she should not disclose it if she wished to obtain employment.

Id.

58. *Id.* at 370. In response to the respondents’ observations, the Court stated that “[i]n 1990, the States alone employed more than 4.5 million people. It is telling, we think, that given these large numbers, Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against [people with disabilities].” *Id.*

The respondents also contended that the inquiry into unconstitutional discrimination should extend beyond the states to units of local government. *Id.* at 368. The Court acknowledged that these were state actors, but denied that the inquiry should be extended to them. *Id.* at 368–69. It stated that the Eleventh Amendment only affords the states some protection from private claims for damages. *Id.* at 369. Therefore, it would make no sense to consider the constitutional violations of local units of government and the states together. *Id.*

59. *Id.* at 376 (Kennedy, J., concurring). In Justice Kennedy’s concurring opinion, he makes clear his belief that the ADA is important legislation in confronting the prejudice that people with disabilities endure. *Id.* at 375. However, he states that “[t]he predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity.” *Id.* at 376.

60. *Id.* at 371–72.

61. Reasonable accommodation in Title I is defined as:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9) (1994).

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

The ADA does exempt employers from the reasonable accommodation requirement where the employer can demonstrate that the accommodation would impose an undue

C. The Supreme Court's Application of the Boerne Test in Lane to Hold That Title II is Constitutional Insofar as It Grants Access to the Courts

As it did in *Garrett*, the Court in *Lane* defined the question before it as whether Congress has exceeded its section 5 power.⁶³ Unlike *Garrett*, the portion of the ADA at issue was Title II.⁶⁴ The Court applied the *Boerne* test to uphold the constitutionality of Title II with respect to access to the courts.⁶⁵

Under the first step of the *Boerne* test, the Court found that, like *Garrett*, the constitutional right at issue was the “prohibition on irrational disability discrimination.”⁶⁶ Unlike Title I, however, the Court noted that Title II also seeks to enforce other constitutional

hardship on the operation of the business of such covered entity. However, even with this exception, the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an undue burden upon the employer.

Id. (citations and quotations omitted).

The Supreme Court reached this conclusion by comparing Title I to the Voting Rights Act of 1965, which was based on “abundant evidence of States’ systematic denial of [Fifteenth Amendment] rights.” *Id.* at 373. Congress’s response in this instance was “detailed but limited.” *Id.*

The dissenting opinion in *Garrett* critiques each of the majority’s conclusions, but indicates that the dissenting justices would be willing to uphold Title I under a more simple examination of section 5 power. *Id.* at 377. The dissent argues that section 5 grants Congress the power to enforce the Fourteenth Amendment’s equal protection guarantee, and the Equal Protection Clause is violated by the states when there is not a rational basis between the “disparity of treatment and some legitimate governmental purpose.” *Id.* The dissenting justices noted that they would defer to Congress’s judgment that Title I was necessary to rectify such a disparity in the area of state discrimination in the employment of people with disabilities. *Id.*

63. *Tennessee v. Lane*, 541 U.S. 509, 513 (2004). (“The question presented in this case is whether Title II exceeds Congress’ power under [section] 5 of the Fourteenth Amendment.”).

Lane arose out of an action filed against the state of Tennessee by George Lane and Beverly Jones, both of whom were paraplegics. *Id.* Lane alleged that he was forced to crawl up the stairs of a county courthouse that did not have an elevator in order to answer criminal charges. *Id.* at 513–14. Jones, a certified court reporter, alleged that she was not able to access many court rooms, and was therefore unable to work and to participate in the judicial process. *Id.* at 514.

64. *Id.* at 513.

65. *Id.* at 520. “Section 5 legislation is valid if it exhibits ‘a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’” *Id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

66. *Id.* at 522.

guarantees such as rights relating to access to the courts.⁶⁷ These rights are protected by the due process clause of the Fourteenth Amendment, the confrontation clause of the Sixth Amendment, and the First Amendment's right to access criminal proceedings.⁶⁸

Although section 5 authorizes Congress to enact "reasonably prophylactic remedial legislation," the Court found that the harm caused by inaccessible courts may warrant stronger measures.⁶⁹ Therefore, the Court determined that the right to access courts called for "a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications,"⁷⁰ which the Court had reviewed in *Nevada Department of Human Resources v. Hibbs*.⁷¹ The Court then proceeded under a heightened standard of review of the state's conduct.⁷²

The Court moved on to the second step of the *Boerne* test in search of a history and pattern of violations of the constitutional right to access the courts. The Court began by stating that Title II was enacted "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic

67. *Id.* at 522–23.

68. *Id.* at 523.

[T]he right of access to the courts at issue in this case, [is] protected by the Due Process Clause of the Fourteenth Amendment. [In addition, t]he Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant . . . the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. The Due Process Clause also requires the States to afford certain civil litigants a meaningful opportunity to be heard by removing obstacles to their full participation in judicial proceedings. We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment.

Id. (citations and quotations omitted).

69. *Id.* at 523–24.

70. *Id.* at 529.

71. 538 U.S. 721 (2003). *Hibbs* concerned the Family and Medical Leave Act (FMLA). The Supreme Court "approved the family-care leave provision of the FMLA as valid [section] 5 legislation" because it "was targeted at sex-based classifications, which are subject to a heightened standard of judicial review." *Lane*, 541 U.S. at 528–29.

72. *Lane*, 541 U.S. at 529.

deprivations of fundamental rights.”⁷³ It noted abuses in a number of areas, including the “penal system.”⁷⁴ After concluding its examination of the evidence, the Court found that Congress had reached a similar conclusion in its own investigation of discrimination on the basis of disability.⁷⁵ Upon the basis of these findings, the Court determined that there was extensive “unconstitutional discrimination against persons with disabilities in the provision of public services.”⁷⁶

The final question for the Court in applying the *Boerne* test was whether Title II was an appropriate response to this history and pattern of discrimination.⁷⁷ Noting the wide scope of Title II, the Court chose to limit its inquiry to whether “Congress had the power under [section] 5 to enforce the constitutional right of access to the courts.”⁷⁸ The Court considered Title II’s requirement that “reasonable modifications” be made to a public service an appropriate response to the history and pattern of discrimination in the area of access to the courts.⁷⁹ This was especially true, the Court believed, given the failure of previous legislation to correct this

73. *Id.* at 524.

74. *Id.* at 525. After noting that the Court itself had found deprivations of rights in areas of voting, marrying, serving as jurors, unjustified commitment, abuse and neglect in mental health hospitals, and zoning decisions, the Court stated that “other courts [have] document[ed] a pattern of unequal treatment in the administration of a wide range of public services, programs and activities, including the penal system, public education, and voting.” *Id.* (emphasis added).

75. *Id.* at 527–28. Congress’s findings are set forth in the ADA and are cited *supra* note 16.

76. *Id.* at 528.

77. *Id.* at 530.

78. *Id.* at 531. The Supreme Court acknowledged that unlike other statutes that it has reviewed for validity under section 5, Title II “reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees.” *Id.* at 530. Therefore, the Court chose not to decide “whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access [to such public services as] hockey rinks, or even to voting booths,” but simply failure to provide access to the courts. *Id.* at 530–31.

79. *Id.* at 531–32. The “reasonable modifications” requirement is found in 42 U.S.C. § 12131(2), which is quoted *supra* note 23.

deficiency.⁸⁰ Moreover, Title II was a proper remedy given the states' due process responsibility.⁸¹

80. *Id.* at 531 ("The unequal treatment of [people with disabilities] in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination.").

81. *Id.* at 532. "This duty to accommodate is perfectly consistent with the well-established due process principle that, 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts." *Id.* (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

Two dissents were filed in *Lane*: one by Chief Justice Rehnquist and another by Justice Scalia. Chief Justice Rehnquist's dissent took issue with the majority's as-applied approach to Title II. He argued instead that Title II should be a valid exercise of section 5 power as a whole or not at all. *Id.* at 538. He first stated that discrimination based on disability is subject to a rational basis standard of review. *Id.* at 540 ("[T]he Equal Protection Clause permits a State to classify on the basis of disability so long as it has a rational basis for doing so."). It is unclear under which step of the *Boerne* test the level of scrutiny is determined; Chief Justice made the determination at the onset, whereas the majority did so as part of step one. Consequently, unlike the majority, Rehnquist did not apply a heightened level of scrutiny to the state law. *Id.* at 539–40. Rehnquist then proceeded through the *Boerne* test in a fashion similar to the majority opinion in *Garrett*, which he also wrote. He found that the relevant constitutional protection is not only the Fourteenth Amendment's bar against irrational discrimination, but certain other rights safeguarded by Title II, such as the due process right to access to the courts. *Id.* at 540–41. He then analyzed the history and pattern of violations of disabled individuals' due process rights and found the record to be barren. *Id.* at 541. Finally, Rehnquist stated that the remedy is not congruent and proportional to the defect, because Title II allows people with disabilities to sue in "virtually every interaction they have with the State." *Id.* at 549.

Justice Scalia also wrote a dissenting opinion to emphasize that the congruence and proportionality standard is too "malleable." *Id.* at 556. He stated that "such malleable standards as 'proportionality' [can be] vehicles for the implementation of individual judges' policy preferences." *Id.* Rather than use a proportionality standard, Scalia would limit the authority of the Fourteenth Amendment to legislation enforcing its provisions and dispense with almost all legislation enacted for the purpose of reinforcement. *Id.* at 558. However, Justice Scalia appears unable to square his test with the Court's upholding of acts related to racial discrimination. He stated that:

[A]ll of our later cases except *Hibbs* that give an expansive meaning to "enforce" in [section] 5 of the Fourteenth Amendment, and all of our earlier cases that even suggest such an expansive meaning in dicta, involved congressional measures that were directed exclusively against, or were used in the particular case to remedy, *racial discrimination*.

Id. at 561.

D. Goodman Resolved in Part the Question of How Title II Applies to Inmates with Disabilities

In *Lane*'s wake, courts were confronted with the question of the extent to which Title II could be constitutionally applied.⁸² There were three possible interpretations of *Lane* in the context of state prisons. First, the ADA validly abrogates the states' Eleventh Amendment immunity with respect to Title II.⁸³ Second, Title II validly abrogates state sovereign immunity only insofar as it prohibits unconstitutional conduct.⁸⁴ Third, Title II does not apply at all in the prison context.⁸⁵

The Supreme Court resolved this question in part in *Goodman*. It adopted the second of the three approaches—that Title II validly abrogates state sovereign immunity insofar as the conduct “actually violates the Fourteenth Amendment.”⁸⁶ The extent to which the ADA

82. Compare *Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791, 792 (9th Cir. 2004) (holding that the state is not entitled to Eleventh Amendment immunity under Title II) with *Miller v. King*, 384 F.3d 1248, 1275 (11th Cir. 2004) (holding that Title II did not validly abrogate a state's sovereign immunity as applied in Eighth Amendment context to state prisons) and *Cochran v. Pinchak*, 401 F.3d 184, 193 (3d Cir. 2005) (holding Title II inapplicable because the asserted constitutional right was not a fundamental right like access to the courts).

83. See, e.g., *Phiffer*, 384 F.3d at 792 (holding that the state is not entitled to Eleventh Amendment immunity under Title II).

84. This was ultimately the holding of the Supreme Court in *United States v. Georgia* (*Goodman*), 126 S. Ct. 877 (2006).

85. See, e.g., *Cochran*, 401 F.3d at 193 (holding Title II inapplicable because the asserted constitutional right was not a fundamental right like access to the courts).

86. *Goodman*, 126 S. Ct. at 881.

While the Members of this Court have disagreed regarding the scope of Congress's prophylactic enforcement powers under [Section] 5 of the Fourteenth Amendment, no one doubts that [Section] 5 grants Congress the power to enforce the provisions of the Amendment by creating private remedies against the States for *actual* violations of these provision.

Id. (quotations and ellipsis omitted).

The petitioner, Tony Goodman, was a paraplegic inmate in the Georgia state prison system. *Id.* at 879. He alleged numerous deficiencies in the accommodation of his disability. *Id.* The District Court, acting after *Garrett*, dismissed his Title II claims on the basis that they were barred by state sovereign immunity. *Id.* at 880. Goodman appealed to the Eleventh Circuit, which heard argument in *Miller v. King* (discussed *supra* note 82) on the same day. Brief for Petitioner, *supra* note 34, at 6–7. On the basis of its decision in *Miller*, the Court held that Goodman's claims for money damages against the state were barred by sovereign immunity. *Goodman*, 126 S. Ct. at 880.

validly abrogated the Eleventh Amendment for Title II claims not based on such conduct is the question that remains.⁸⁷

III. TITLE II IS A CONGRUENT AND PROPORTIONAL RESPONSE TO DISCRIMINATION AGAINST STATE INMATES WITH DISABILITIES THAT BOTH THREATENS AND ACTUALLY VIOLATES THE CONSTITUTION

An analysis of Title II's application to state inmates with disabilities using the three-part *Boerne* test shows that the statute is a constitutional form of section 5 legislation.⁸⁸ This analysis will reveal that Title II as applied to state discrimination against inmates with disabilities is a congruent and proportional response to both actual and threatened constitutional violations. The Supreme Court held in *Lane* that Title II is unquestionably valid "as it applies to the class of cases implicating the accessibility of judicial services."⁸⁹ Similarly, prisons must be accessible for people with disabilities.

87. *Id.* at 884 (Stevens, J., concurring) ("I agree with the Court's decision to await further proceedings before trying to define the extent to which Title II validly abrogates state sovereign immunity in the prison context.")

88. The Supreme Court's new composition makes it difficult to predict how it will resolve section 5 questions in the future. Justice O'Connor's perspective was critical in both *Lane* and *Garrett*. According to Representative Tony Coelho, the former House majority whip and a leading drafter of the ADA, the majority focused on the issue of court access in *Lane* "in order to get Justice O'Connor's vote." Charles Lane, *Disabled Win Right to Sue States Over Court Access*, WASH. POST, May 18, 2004, at A2. By narrowing the issue, the majority managed to uphold a disputed application of the law, without pre-judging future cases. Linda Greenhouse, *Justices Find States Can Be Liable for Not Making Courthouses Accessible to Disabled*, N.Y. TIMES, May 18, 2004, at A20. "[I]t was clearly more important for Justice Stevens[, who wrote the majority opinion,] and his usual three allies to win Justice O'Connor's support than to set out a far-reaching critique of [*Garrett*] or of others she had joined on the states'-rights side." *Id.* The fact that the Court was awaiting Justice Alito's confirmation when *Goodman* was decided may be the reason for its limited holding. See Gina Holland, *Supreme Court Allows Disabled Inmate's Lawsuit in States' Rights Case*, WASH. POST, Jan. 11, 2006, at A12.

A dozen states had urged the court to bar general suits by inmates under the disabilities law. Their attorney, Gene Schaerr of Washington, said that justices probably "recognized Sandra Day O'Connor has announced her resignation and they'd rather wait until they have a full court in place until they address that issue head on." Schaerr added: "I think that's very good news for the states."

Id.

89. *Tennessee v. Lane*, 541 U.S. 509, 531 (2004).

*A. Title II Enforces Basic Constitutional Rights that Are not
Foregone as a Result of Incarceration*

In the first step of the *Boerne* test the scope of the constitutional right at issue must be identified. For the inmate with a disability, these rights include protection from irrational disability discrimination.⁹⁰ The importance that the Supreme Court attaches to this right will determine the level of scrutiny that it will use in analyzing a state's actions.⁹¹

People with disabilities are not a suspect class requiring a heightened standard of review.⁹² At the same time, discrimination against people with disabilities in state prisons warrants more than the rational basis scrutiny that the Court applied in the employment context in *Garrett*.⁹³ This is because, like *Lane*, certain constitutional guarantees are infringed upon in the prison so a "more searching judicial review" is required.⁹⁴ Given that a constitutional right is at issue in the case of an inmate with a disability, the Court should apply a heightened level of scrutiny to a state law infringing on that right, or the Court should defer to Congress's identification of a pattern of state violations of that constitutional right.⁹⁵

The Supreme Court has declared that state control over the individual "is at its apex" in the prison context.⁹⁶ However, this does not mean that the state operates without restraint in this arena.⁹⁷ One

90. *Id.* at 522 ("Title II . . . seeks to enforce [the Fourteenth Amendment's] prohibition on irrational disability discrimination.").

91. In *Goodman*, the Court did not state what type of scrutiny it would apply, which is why this question remains unanswered. *United States v. Georgia (Goodman)*, 126 S. Ct. 877, 878–82 (2006).

92. *Lane*, 541 U.S. at 529 ("[S]ex-based classifications . . . are subject to a heightened standard of judicial scrutiny.").

93. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 367 (2001).

94. *Lane*, 541 U.S. at 522–23 (Title II "seeks to enforce a variety of . . . basic constitutional guarantees, infringements of which are subject to more searching judicial review.").

95. *Id.* at 529 (citing *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735–37 (2003)). The FMLA, the legislation at issue in *Hibbs*, "was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny. [This makes it] 'easier for Congress to show a pattern of state constitutional violations' than in *Garrett* . . . which concerned legislation that targeted [a classification] subject to rational-basis review." *Id.*

96. *Johnson v. California*, 543 U.S. 499, 511 (2005).

97. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199–200

of the states' principle obligations is the Eighth Amendment's prohibition of cruel and unusual punishments,⁹⁸ which applies to states through the Fourteenth Amendment.⁹⁹ A state's failure to accommodate the needs of inmates with disabilities can violate this constitutional requirement.¹⁰⁰ In addition, the other guarantees of the Bill of Rights, which are also applicable to the states by virtue of the Fourteenth Amendment, apply in the prison context.¹⁰¹ Finally, inmates with disabilities are protected by the equal protection clause of the Fourteenth Amendment,¹⁰² and its due process clause protects liberty and property interests.¹⁰³

*B. There is a History and Pattern of Discrimination in the
Administration of State Prisons*

After identifying the constitutional right at issue the next step is to determine if there is a history and pattern of unconstitutional discrimination. In *Garrett*, the Supreme Court noted that there were

(1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”).

98. U.S. CONST. amend. VIII.

99. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947).

100. There are two facets of the cruel and unusual punishments clause contained in the Eighth Amendment. U.S. CONST. amend. VIII. First, it prevents excessive force. *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (stating that the clause proscribes “physically barbarous punishments”). Second, and more relevant to the present inquiry, it also prohibits “deliberate indifference to serious medical needs.” *Id.* at 104. There is both an objective and subjective standard for what constitutes deliberate indifference. Objectively, “the deprivation alleged must be . . . sufficiently serious.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quotations omitted). Subjective indifference requires that a prison official have a “sufficiently culpable state of mind,” which is “deliberate indifference to inmate health or safety.” *Id.* (quotations omitted).

101. *Turner v. Safley*, 482 U.S. 78, 84 (1987) (“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”); *see also Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974) (“There is no iron curtain drawn between the Constitution and the prisons of this country.”). However, the protections of the Constitution do not apply exactly as they would to a civilian. *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (stating that the “urgency of discipline, order, safety, and security in penal institutions [means that] due deference [must be given] to prison administrators’ experience and expertise”).

102. *See, e.g., Wilkinson v. Austin*, 125 S. Ct. 2384, 2395 (2005) (expressing the opinion that an inmate with a disability could be subject to “atypical and significant hardship within the correctional context”).

103. *McDonnell*, 418 U.S. at 556. (“Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law.”).

relatively few congressional findings of state discrimination against the disabled in the employment context; the Court considered this evidence that there was not widespread state discrimination in this arena because of the large number of people employed by the states and the even greater number of Americans with disabilities.¹⁰⁴ In *Lane*, the Court examined the unequal treatment of people with disabilities in the administration of all types of state services, programs, and activities, including the administration of the “penal system,” in deciding that there was a history and pattern of discrimination with respect to access to the courts.¹⁰⁵ The *Lane* Court’s willingness to look beyond findings related strictly to access to the courts stems from the application of a higher standard of review than rational basis review. In *Garrett*, where the Court would proceed under a rational basis standard of review, the examination of the history and pattern of discrimination was far more scrutinizing. Under the heightened standard of review in this case, the Court proceeded as it did in *Lane*, by examining the entire record of discrimination in public services, programs, and activities to find that Title II is an appropriate remedy.¹⁰⁶

Regardless of the lens through which the Court examines the evidence of unconstitutional treatment of inmates with disabilities, the existence of such discrimination should be readily apparent. Both Congress and the Supreme Court have recognized a “history of unfair and often grotesque mistreatment” of people with disabilities.¹⁰⁷ Specific to the prison context, Congress identified “institutionalization” as one of the areas in which “discrimination . . . persists.”¹⁰⁸ The Court has recognized that in the ADA Congress targeted “penal institutions”¹⁰⁹ to ensure that inmates with disabilities

104. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 370 (2001).

105. *Tennessee v. Lane*, 541 U.S. 509, 525 (2004).

106. *Id.* at 529.

107. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 438 (1985) (citation omitted).

108. 42 U.S.C. § 12101(a)(3) (2000).

109. *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 211–12 (1998). In *Lane* the Supreme Court noted several examples of discrimination in the penal system in a footnote, which further evidenced an acknowledgement of discrimination in this area. *Lane*, 541 U.S. at 525 n.11. The Court stated that “[t]he decisions of other courts . . . document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system . . .” *Id.* at 525. The Court then cited three cases as examples: *LaFaut v. Smith*,

are not denied “the minimal civilized measure of life’s necessities.”¹¹⁰ Moreover, there is no reason to assume that the history and pattern of discrimination against people with disabilities that Congress and the Court recognized in the administration of public services and access to public facilities is impeded by prison walls.¹¹¹

C. Title II is a Congruent and Proportional Response to the History and Pattern of Discrimination in State Prisons

The third step in the *Boerne* analysis is to determine the congruence and proportionality of Title II to a state’s discrimination against inmates with disabilities. Unlike Title I, which the *Garrett* court thought placed an undue burden on employers, Title II’s requirement that reasonable modifications be made for people with disabilities was seen as an appropriate response to the discrimination at issue in *Lane*.¹¹² The Supreme Court’s decision in *Garrett* was influenced by the rational basis standard of review it had adopted for analyzing Title I. Under the heightened standard of review applied in *Lane*, however, the Court viewed Title II as an appropriate response to the history and pattern of discrimination, especially given the failure of previous efforts to provide access to the courts for people with disabilities.¹¹³ As they did in *Lane*, the Court should find that Congress validly exercised its section 5 power in Title II, as it applies to a state’s discrimination against inmates with disabilities, because

834 F.2d 389, 394 (4th Cir. 1987), in which a paraplegic inmate was “unable to access toilet facilities”; *Schmidt v. Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999), in which a double amputee was “forced to crawl around on jail floor”; and *Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999), in which a deaf inmate was “denied access to sex-offender therapy program allegedly required as precondition for parole.” *Lane*, 541 U.S. at 525 n.11; see also Brief for Petitioner, *supra* note 1, at 30–31 (listing additional cases involving unconstitutional treatment of inmates with disabilities).

110. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

111. See *Lane*, 541 U.S. at 529.

112. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 372 (2001) (“The ADA [imposes] an ‘undue burden’ upon the employer.”). But see *Lane*, 541 U.S. at 532 (articulating that the duty to accommodate is well established with respect to access to the courts).

113. *Lane*, 541 U.S. at 531 (“The unequal treatment of disabled person, in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination.”).

Title II's duty to accommodate is consistent with the constitutional obligations imposed upon state prisons.¹¹⁴

Title II is a congruent and proportional response to the history and pattern of discrimination in state penal systems because it addresses unconstitutional conduct while acknowledging the importance of security concerns.¹¹⁵ As the Court noted in *Lane*, Title II “does not require [s]tates 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.”¹¹⁶ Instead, it prohibits the exclusion of a qualified individual from access to the courts solely by reason of their disability¹¹⁷ and requires that “reasonable modifications” be made to public services.¹¹⁸

In the prison context, the flexibility of this requirement leaves room for necessary security measures. This alleviates the principle concern about additional regulation of prisons, and makes it more likely that the Court would view Title II as a valid abrogation of the Eleventh Amendment when applied to the overall administration of the prison. While the Supreme Court held in *Goodman* that Title II is valid in instances when its protections overlap with the Constitution, Title II should also be valid in its entire application in order to prevent unconstitutional conduct.¹¹⁹

114. See also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000) (“Difficult and intractable problems often require powerful remedies.”). Cf. *Lane*, 541 U.S. at 532.

115. See *Turner v. Safley*, 482 U.S. 78, 93 (1987) (proposing that constitutional rights within a prison may be infringed in furtherance of “goals of institutional security and safety”).

116. *Lane*, 541 U.S. at 531–32.

117. 42 U.S.C. § 12132 (2000).

118. *Id.* § 12131(2); see also *McKune v. Lile*, 536 U.S. 24, 36 (2002) (“[M]ost offenders will eventually return to society, [so a] paramount objective of the corrections system is the rehabilitation of those committed to its custody.” (quotations omitted)). Therefore, providing inmates with access to programs, services, and activities available to other inmates is consistent with the goals of the penal system.

119. See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003) (“Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”); *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (stating that practices that are not themselves unconstitutional may be prohibited in order to enforce constitutional guarantee). Title II would, for example, relieve an inmate of the burden of showing a particular mental state on the part of a prison official that he would have to show when proving “deliberate indifference” under the provisions of the cruel and unusual punishments clause of the Eighth Amendment.

IV. CONCLUSION

Title II regulates programs, services, and activities, but not punishment. However, every action of the prison is part of an inmate's punishment. Like Title II's application in the due process arena, it ensures that states provide certain constitutional minima. In order to do so, however, Title II must apply not only in instances where it intersects with constitutional rights, but in the broad sense that Congress intended.

The fact that inmates with disabilities often suffer unduly in prison is unjust.¹²⁰ The punishment of an inmate with a disability and of an average inmate for the same crime should be the same; and Title II could go a long way toward rectifying the present inequity.

120. *See supra* note 1. Certainly the suffering of disabled inmates beyond that of their fellow inmates is tragic, but our view of their position may be crafted in part out of our misunderstanding of how the criminal process functions. Professor Robert Cover asserts that violence underlies the American system of justice despite our desire to view it otherwise: "There is . . . a fundamental difference between the way in which 'punishment' operates as an ideology in popular or professional literature, in political debate, or in general discourse, and the way in which it operates in the context of the legal acts of trial, imposition of sentence, and execution." Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1608–09 (1986). Title II represents an opportunity to move the realities of the incarceration of inmates with disabilities closer to this ideological view.