EDUCATION AS A VITAL RIGHT

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I. INTRODUCTION

Congress has long recognized the problem of discrimination against the disabled in accessing public services, including education. Congress first addressed the problem in 1973 by enacting section 504 of the Rehabilitation Act, which prohibited discrimination on the basis of disability by any federally funded program or activity. Congress subsequently enacted Title II of the Americans with Disabilities Act of 1990 ("ADA"), which expanded this prohibition to all state and local governments. Both of these statutes provide for money damages and the recovery of attorneys' fees by successful plaintiffs.

With respect to the education of grade school students in particular, in 1975 Congress enacted the Education for All Handicapped Children Act ("EAHCA")[1] in response to congressional studies that revealed

> better than half of the Nation's 8 million disabled children were not receiving appropriate educational services. Indeed, one out of every eight of these children was excluded from the public school system altogether; many others were simply "warehoused" in special classes or were neglectfully shepherded through the system until they were old enough to drop out.[2]

The EAHCA mandated that children with disabilities had the right to a "free appropriate public education," and established administrative procedures for securing that right.[3] However the EAHCA did not include money damages or attorneys' fees. In 1984, the U.S. Supreme Court held that the EAHCA was the exclusive remedy for disabled students asserting their right to access public education in *Smith v. Robinson*.[4] Congress reacted by passing an amendment to the EAHCA overruling *Smith v. Robinson* to provide for attorneys' fees and money, in addition to equitable remedies, stating:

> Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes. protecting the rights of

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1. Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975).
2. Honig v. Doe, 484 U.S. 305, 309 (1988).
3. *Id*.
4. 468 U.S. 992 (1984).

> handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.[5]

In 1990, the name of the EAHCA was changed by amendment to the Individuals with Disabilities Education Act ("IDEA"), at which time an express reference to the ADA (which had been enacted in the interim) was added to the above quoted provision.[6] Thus, Congress made clear that equitable remedies alone were insufficient to remedy the widespread discrimination against students with disabilities, and the inclusion of money damages was needed to effect meaningful change. However, the ability of both grade school and college level students (who are not covered by the IDEA) with disabilities to recover money damages from state-run educational institutions[7] depends on whether Congress successfully abrogated sovereign immunity when it enacted Section 504 and Title II of the ADA.

II. THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY

The Eleventh Amendment, by its terms, bars suits in federal court against states by citizens of other countries and other states.[8] In 1890, the Supreme Court interpreted the Eleventh Amendment as extending to suits in federal court brought by citizens against their own state.[9] Sovereign immunity also extends to an entity that

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5. The Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986).

6. Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f) (1990).

7. Whether an educational institution is considered an arm of the state for purpose of Eleventh Amendment immunity depends on a number of factors including the status of the institution under state law, the institution's degree of autonomy and whether the state is ultimately liable for paying a money judgment obtained against the institution, and the results vary from state to state. *See, e.g.*, Scaglione v. Mamaroneck Union Free Sch. Dist., 47 F. App'x 17, 18 (2d Cir. 2002) (New York) (finding public schools to be arms of the state); *Belanger v. Madera Unified Sch. Dist.,* 963 F.2d 248, 254 (9th Cir.1992) (California); Minton v. St. Bernard Par. Sch. Bd., 803 F.2d 129, 130 (5th Cir. 1986) (Louisiana). *But see* Holz v. Nenana City Pub. Sch. Dist., 347 F.3d 1176 (9th Cir. 2003) (Alaska) (finding public schools are not arms of the state); Jefferson Cnty. Bd. of Educ. v. Bryan M., 133 F. Supp. 3d 1359 (N.D. Ala. 2015); Black v. N. Panola Sch. Dist., 461 F.3d 584 (5th Cir. 2006) (Mississippi); Creager v. Bd. of Educ. of Whitley Cnty., Ky., 914 F. Supp. 1457 (E.D. Ky. 1996) (Kentucky); Stoddard v. Sch. Dist. No. 1, Lincoln City, Wyo., 590 F.2d 829 (10th Cir. 1979) (Wyoming). The results are similarly diverse for universities and charter schools.

8. "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.

9. Hans v. Louisiana, 134 U.S. 1 (1890). However, this case did not address the circumstances under which Congress could abrogate sovereign immunity. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), Justice Rehnquist, writing for a unanimous court (with Justices Brennan and Stevens concurring) held that Congress had the power to abrogate Eleventh Amendment immunity pursuant to the Enforcement Clause (Section 5) of the Fourteenth Amendment. In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in a fractured opinion authored by Justice Brennan, the Court held that Congress could also abrogate sovereign immunity under the Commerce Clause (U.S. CONST. art. I, § 8, cl. 3). That case was subsequently overruled by a sharply divided court in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) authored by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Souter authored a dissent joined by Justices Ginsburg and Breyer on the ground that Eleventh Amendment immunity only applies to disputes between states and citizens of other states, not suits involving citizens of the same state. Justice Stevens authored a separate dissent making the same point, but even more strongly. Justice Stevens was so troubled by the holding in *Seminole Tribe* that in his dissent in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 97 (2000), he stated: "Despite

qualifies as an "arm of the State,"[10] but not to local governments such as counties and municipalities or their agencies.[11]

There are two exceptions to Eleventh Amendment immunity: a voluntary waiver of sovereign immunity by the state and congressional abrogation of sovereign immunity with respect to a specific federal statute made applicable to the states by means of the Fourteenth Amendment.[12] Typically, the first exception applies where Congress conditions acceptance of federal funding on a waiver of state immunity.[13]

However, Title II of the ADA has no such provision. Thus, for it be constitutionally valid it must meet two conditions: Congress must have made unequivocally clear that it intended to abrogate States' Eleventh Amendment immunity, and Congress must have acted pursuant "to a valid grant of constitutional authority."[14] Section 5 of the Fourteenth Amendment grants Congress the power "to enforce, by appropriate legislation, the provisions of this article."[15] Section I of the Fourteenth Amendment encompasses both due process and equal protection.[16]

There is no question that Congress intended to abrogate sovereign immunity when it enacted Title II because it explicitly said so in the statute.[17] However, whether Title II meets the second requirement, at least insofar as it applies to discrimination on the basis of disability in the context of public education, is another matter.

Lower federal courts are divided on the issue. In some states a student with a disability can bring a damages claim against a public school or college for violating Title II, while in other states the same student would be out of luck.[18] This is not a minor issue where regional differences are acceptable. Title II is a major piece of federal legislation that impacts one of the most important services provided by the government: public education. Discrepancies on such an important issue are troubling and must eventually be resolved by the Supreme Court. This paper will attempt to suggest a way courts might resolve the question in a manner consistent with Supreme Court precedent and will hopefully be capable of withstanding the Court's inevitable review.

III. ABROGATION OF SOVEREIGN IMMUNITY BY MEANS OF PROPHYLACTIC LEGISLATION: THE 1965 VOTING RIGHTS ACT AND THE RATCHET THEORY

In *Lassiter v. Northampton County Board of Elections*,[19] the U.S. Supreme Court rejected a black woman's equal protection challenge to the literacy test requirement for voting in the State of North Carolina.[20] The Court noted that although

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my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent." He was joined in that dissent by Justices Souter, Ginsburg and Breyer.

10. N. Ins. Co. of N.Y. v. Chatham Cnty., 547 U.S. 189, 194 (2006).

11. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); *see also* Monell v. Dep't of Soc. Servs. 436 U.S. 658, 690 n. 54 (1978).

12. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984).

13. Lane v. Pena, 518 U.S. 187, 198 (1996).

14. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 364 n.3 (2001).

15. U.S. CONST., amend. XIV, § 5.

16. *Id.* at § 1.

17. 42 U. S. C. § 12202 (1990).

18. *See* Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986).

19. 360 U.S. 45 (1959).

20. *Id.*

Article I, Section 2 of the Constitution establishes the right of suffrage, it expressly makes that right "subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed," [21] subjecting restrictions on the right to vote to the relatively low "rational basis" standard. Because the state's literacy test was neutral on its face, the Court easily concluded it was constitutional.[22]

Congress subsequently enacted the Voting Rights Act of 1965, which "was designed by Congress to banish the blight of racial discrimination in voting."[23] The 1965 Voting Rights Act included numerous provisions restricting certain states, when certain conditions are met, from placing facially neutral requirements, such as literacy tests, on the right to vote. In *South Carolina v. Katzenbach*, the Supreme Court held this provision to be constitutional based on Congress's power to enact remedial and preventative, i.e. prophylactic, legislation that proscribes "facially constitutional conduct"[24] to combat an entrenched historical pattern of racial discrimination in voting that persisted despite the Fifteenth Amendment's ban on such discrimination.[25]

That case was followed in the same term by *Katzenbach v. Morgan*.[26] The Court addressed another provision of the 1965 Voting Rights Act, prohibiting the State of New York from using English literacy tests on Puerto Rican voters whose education was in Spanish, rather than English. Justices Harlan and Stewart dissented on the ground that there was no factual data showing a history of discrimination against Puerto Rican minorities in New York, and therefore the law was not remedial in nature. The dissent asserted Congress was unilaterally extending constitutional protection to a state whose conduct had never been found to be unconstitutional. Justice Brennan, writing for the majority, appears to have acknowledged as much in what became known as the "ratchet theory," which suggests that Congress can expand constitutionally protected rights but cannot restrict or eliminate rights already determined to be protected by the Constitution.[27]

IV. THE SUPREME COURT REPUDIATES THE RATCHET THEORY AND ESTABLISHES THE CONGRUENCE AND PROPORTIONALITY TEST

Although not without criticism, for the next three decades Justice Brennan's ratchet theory was commonly understood as good law.[28] However, that interpreta-

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21. *Id.* at 51.

22. The Court did note the literacy test would be unconstitutional if there was evidence it was "employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot," but held that no such inference could be made in the present case. *Id.* at 53.

23. South Carolina v. Katzenbach, 383 U.S. 301, 307 (1966).

24. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003).

25. South Carolina v. Katzenbach, 383 U.S. at 301. Although this legislation was technically enacted pursuant to Section 2 of the Fifteenth Amendment, which grants Congress the power to enforce that Amendment through "appropriate legislation," the Court made clear that Congress's authority under Section 2 is the same as its authority under Section 5 of the Fourteenth Amendment. *Id.*

26. 384 U.S. 641 (1966).

27. *Id.* at 651, n.10.

28. *See, e.g.*, G. Sidney Buchanan, Katzenbach v. Morgan *and Congressional Enforcement Power Under the Fourteenth Amendment: A Study in Conceptual Confusion*, 17 HOUS. L. REV. 69 (1979); Donald Francis Donovan, Note, *Toward Limits on Congressional Enforcement Power under the Civil War Amendments*, 34 STAN. L. REV. 453 (1982).

tion of *Morgan* was squarely rejected by the Court in *City of Boerne v. Flores*.[29] The decision in *Flores* is part of what has been characterized as the "Rehnquist Revolution." Under the leadership of Chief Justice Rehnquist, the Supreme Court issued a number of decisions that "dramatically limited the scope of Congress' powers and [] greatly expanded the protection of state Sovereign Immunity."[30]

Flores addressed the constitutionality of the Religious Freedom Restoration Act of 1993 ("RFRA") as applied to the states. Congress enacted RFRA in response to the Supreme Court's holding in *Employment Division v. Smith*, that, even though the free exercise of religion is expressly included in the Constitution, "neutral, generally applicable laws [that apply] to religious practices" are subject to the "rational basis" standard, rather than the far more stringent compelling governmental interest standard.[31] RFRA expressly overruled *Smith* by mandating that the "compelling interest" standard must be applied to any statute that has a "substantial impact" on religious practices.[32]

In *Flores*, the Supreme Court reaffirmed its commitment to *Smith* by holding RFRA to be an unconstitutional extension of congressional power. The Court made clear it is solely the purview of the judiciary to determine what constitutes a constitutional violation, and Congress can only use its Section 5 powers in a manner "responsive to, or designed to prevent, unconstitutional behavior."[33]

Acknowledging that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the law is not easy to discern,"[34] Justice Kennedy, writing for the majority, articulated the "congruence and proportionality" test to aid in the analysis. Under this test, it is first necessary to identify the constitutional right at issue and the way this right has been adversely impacted by state law. Congress may then enact appropriate remedial measures so long as there is "a congruence between the means used and the ends to be achieved."[35] If the proposed remedy exceeds the scope of the identified injury, the legislation is an "intrusion into the States' traditional prerogatives" and therefore an unconstitutional overreach of congressional power.[36]

In *Flores*, the Court found that "Congress had uncovered only anecdotal evidence that, standing alone, did not reveal a widespread pattern of religious discrimination in this country."[37] As a result, RFRA was "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."[38]

Returning to *Morgan*, the Court noted two possible rationales that could justify the result without resort to the ratchet theory. One was that the provision at issue was intended to remedy "discrimination in establishing voter qualifications." The other was "to deal with 'discrimination in governmental services'" by "giv[ing]

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29. 521 U.S. 507 (1997).

30. Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. RV. 1 (2004); *see also* discussion *supra* note 9.

31. 494 U.S. 872 (1990).

32. Religious Freedom Registration Act of 1993 (RFRA) Pub. L. N. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb (*et seq*)).

33. *Flores,* 521 U.S. at 532.

34. *Id.* at 519.

35. *Id.* at 534.

36. *Id.*

37. *Id.* at 531.

38. *Id*. at 532.

Puerto Ricans 'enhanced political power' that would be 'helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." The Court found that "[b]oth rationales for upholding § 4(e) rested on unconstitutional discrimination by New York and Congress's reasonable attempt to combat it."[39]

The Court subsequently applied the congruence and proportionality test in *Board of Trustees of the University of Alabama v. Garrett*[40] and *Kimel v. Florida Board of Regents*[41] to invalidate congressional abrogation of state sovereign immunity as to Title I of the ADA and the Age Discrimination in Employment Act ("ADEA"), respectively. Both statutes are prophylactic legislation that targeted employment discrimination on the basis of disability and age, respectively.

Because neither disability nor age are suspect categories for equal protection purposes, "the Fourteenth Amendment does not require States to make special accommodations" for the disabled or the elderly, "so long as their actions toward such individuals are rational."[42] In order to adopt a broad prophylactic statute abrogating state sovereign immunity and providing a damages remedy for discrimination on the basis of disability or employment, Congress would need to "identify . . . a 'widespread pattern' of irrational reliance [by the states] on such criteria," which the Court held Congress had failed to do as to either statute.[43]

It is noteworthy that the majority opinion in *Garrett* was authored by Chief Justice Rehnquist, in which he was joined by Justices O'Connor, Scalia, Kennedy and Thomas. Justice Breyer filed a dissenting opinion, in which Justices Stevens, Souter and Ginsburg joined. In his dissent, Justice Breyer took the majority to task for "[r]eviewing the congressional record as if it were an administrative agency record."[44] Justice Breyer included an appendix to his dissent in which he provided a "complete listing of the hundreds of examples of discrimination by state and local governments."[45] He chided that "[t]he Court's failure to find sufficient evidentiary support may well rest upon its decision to hold Congress to a strict, judicially created evidentiary standard" and concluded "it is difficult to understand why the Court, which applies 'minimum 'rational-basis' review' to statutes that burden persons with disabilities [] subjects to far stricter scrutiny a statute that seeks to *help* those same individuals."[46]

In 2003, the Court applied the congruence and proportionality test to another piece of prophylactic Section 5 legislation, the Family and Medical Leave Act of 1993 ("FMLA"), in *Nevada Department of Human Resources v. Hibbs*.[47] The ma-

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39. Katzenbach v. Morgan, 384 U.S. 641(1966).

40. 531 U.S. 356, 366-67 (2001). Patricia Garrett was a nurse who had been diagnosed with breast cancer, which required time-consuming radiation and chemotherapy treatments. As a result of these treatments, the state hospital for which Garrett worked transferred her to an inferior position that carried less authority and less pay. Milton Ash, a second claimant in the case, was a security officer employed by the state who was diagnosed with chronic asthma and sleep apnea. He requested a reassignment to accommodate his conditions, which was denied.

41. 528 U.S. 62 (2000). Daniel Kimel sued Florida State University for failing to give him a raise on account of his age.

42. *Garrett*, 531 U.S. at 351.

43. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003).

44. *Garrett*, 531 U.S. at 376 (Breyer, J., dissenting).

45. *Id.* at 388.

46. *Id.* (emphasis in original).

47. *Hibbs*, 538 U.S. at 721.

jority opinion, somewhat surprisingly authored by Chief Justice Rehnquist with Justice Kennedy dissenting, held the FMLA, which "entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons," and provides state employees the right to money damages as a remedy, was a valid exercise of Congress's enforcement authority under Section 5 of the Fourteenth Amendment.[48]

The Court emphasized that the FMLA addressed "state gender discrimination, which triggers a heightened level of scrutiny," making it "easier for Congress to show a pattern of state constitutional violations."[49] Underscoring the subjective nature of the congruence and proportionality test, the majority and the dissent vigorously disagreed over whether the evidence that Congress had adduced was sufficient to justify the prescribed remedy.[50]

The *Garrett* Court made clear that its decision was limited to Title I of the ADA. This left the lower courts to grapple with the constitutionality of Title II consistent with the principals established in *Flores* and *Garrett*.

V. ELEVENTH AMENDMENT IMMUNITY AND TITLE II OF THE AMERICANS WITH DISABILITIES ACT

A. Post-Garrett, Every Circuit Court to Consider the Issue, Save the Ninth, Held Title II Was Not a Valid Abrogation of Eleventh Amendment Immunity

Title II of the ADA provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity."[51] Every circuit to consider the issue of whether Title II validly abrogated Eleventh Amendment immunity with respect to equal protection claims post-*Garrett* held that it did not, with the Ninth as the only outlier.[52]

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48. *Id.* at 724.

49. *Id.* at 722.

50. *Id.* at 735, n.11.

51. 42 U.S.C. § 12132 (1990).

52. *See* Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001) (concluding that Garrett "effectively overruled" prior circuit precedent holding that Title II validly abrogated sovereign immunity); Klingler v. Dir., Dep't of Revenue, 281 F.3d 776, 777 (8th Cir. 2002) (holding similarly); Carten v. Kent State Univ., 282 F.3d 391, 394-96 (6th Cir. 2002)(Title II exceeds Congressional authority under Equal Protection); Thompson v. Colorado, 278 F.3d 1020, 1034 (10th Cir. 2001), *cert. denied* 122 S. Ct. 1960 (2002) (holding similarly); *see also* Popovich v. Cuyahoga Cnty. Ct. of Common Pleas, 276 F.3d 808, 812-16 (6th Cir. 2002) (en banc) (holding abrogation invalid as to equal protection, although not as to due process claims); Garcia v. S.U.N.Y. Health Sci. Ctr., 280 F.3d 98, 112 (2d Cir. 2001) (holding that Title II exceeds Congress' authority under § 5 to the extent that it authorizes suits against states when there is no evidence of "discriminatory animus or ill will due to disability"); as well as pre-*Garrett* cases: Walker v. Snyder, 213 F.3d 344, 346-47 (7th Cir. 2000) (holding abrogation invalid); Alsbrook v. City of Maumelle, 184 F.3d 999, 1005-10 (8th Cir. 1999) (en banc) (holding similarly); *cf*., Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698, 707 (4th Cir.1999) (holding that a regulation enacted pursuant to Title II did not validly abrogate State sovereign immunity). *But see* Hason v. Med. Bd. of Cal., 279 F. 3d 1167, 1170-71 (9th Cir. 2002) (reaffirming two prior circuit decisions: Dare v. California, 191 F.3d 1167, 1174-76 (9th Cir. 1999) and Clark v. California, 123 F.3d 1267 (9th Cir. 1997)). In *Hanson* the Court concluded that Title II validly abrogated the sovereign immunity, despite a vigorous dissent by Judge O'Scannlain, joined by Judges Kozinski, T.G. Nelson and Kleinfeld, asserting that after *Garrett*, "*Clark* and *Dare* have gone the way of the dodo bird and the wooly mammoth, overtaken and relegated to extinction by the course of events." 294 F.3d at 1166-71.

B. The Supreme Court Addresses the Issue in Tennessee v. Lane and United States v. Georgia

In *Tennessee v. Lane*, it was finally time for the Supreme Court to address the issue of Eleventh Amendment immunity in the context of Title II.[53] The Court had no trouble addressing the threshold question of whether Congress unequivocally expressed its intent to abrogate because "the ADA specifically provides for abrogation."[54] Turning next to *Flores*'s congruence and proportionality test, the Court undertook to determine the constitutional rights Congress sought to enforce when it enacted Title II.

The *Lane* Court identified a substantial history of "pervasive unequal treatment [against the disabled] in the administration of state services and programs, including systematic deprivations of fundamental rights."[55] This history included discriminatory state laws, many of which were still valid law at the time of the litigation, that prevented the disabled from taking part in fundamentally protected activities such as voting, marrying, and serving as jurors. The history of discrimination was also documented in a number of cases that had come before the Supreme Court and the lower courts dealing with the unconstitutional treatment of the disabled.[56]

In addition, before Congress enacted Title II, there had been several pieces of federal and state legislation aimed at addressing discrimination against the disabled. However, "important shortcomings" in the laws "rendered them 'inadequate to address the pervasive problems of discrimination'" faced by the disabled.[57]

Having identified the general history of discrimination, the Court went on to discuss the evidence specifically related to the accessibility of state-owned buildings to those with disabilities, which the Court determined to be substantial.[58] Based on this evidence, the Court concluded the "extensive record of disability discrimination" was sufficient to "[make] clear beyond peradventure that inadequate provisions of public services and access to public facilities was an appropriate subject of prophylactic legislation."[59] The next hurdle the Court faced was whether Title II, the legislation Congress actually *did* enact, was an appropriate response to the "history and pattern of unequal treatment" described above.[60]

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53. 541 U.S. 509, 517 (2004).

54. *Id.* at 518.

55. *Id.* at 524.

56. *See* Jackson v. Indiana, 406 U.S. 715 (1972) (dealing with the disabled being unjustifiably committed to psychiatric institutions); Youngberg v. Romeo, 457 U.S. 307 (1982) (dealing with abuse and neglect of those committed to psychiatric institutions); Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (dealing with irrational discrimination against the disabled in city zoning decisions).

57. *Lane*, 541 U.S at 527.

58. *Id.* The Court examined several of the documents Congress cited in the legislative history of Title II, including a 1983 report from the US Commission on Civil Rights which found that 76 percent of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities. U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, 39 (1983); *Oversight Hearing on H.R. 4498 before the H. Subcomm. on Select Educ. of the H. Comm. on Educ. and Labor*, 100th Cong., 2d Sess., 40-41, 48 (1988); and the findings of the Task Force on the Rights and Empowerment of Americans with Disabilities in 1990, Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* (Oct. 12, 1990).

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

60. *Id.* at 530.

Because the language of Title II is broad, its prophylactic remedies reach "a wide array of official conduct."[61] Everything from the administration of voting booths to disabled-access "seating at state-owned hockey rinks"[62] is potentially a subject of Title II litigation. In order to avoid the issue of Title II's insufficient tailoring, the Court limited the scope of its inquiry to the question with which it was presented: "whether Congress had the power under § 5 to enforce the constitutional right of access to the courts," leaving open the constitutionality of Title II's many other applications.[63]

The final step of the Court's analysis was to determine whether the remedies provided by Title II were "congruent and proportional" to the right at issue in that case: access to the courts.[64] Although the specific right at issue in the case was physical access to a public facility, which, in and of itself, is neither a constitutional nor even a recognized fundamental right, the Court noted that there were a panoply of related fundamental rights associated with court proceedings:

> (1) the right of the criminal defendant to be present at all critical stages of the trial; (2) the right of litigants to have a 'meaningful opportunity to be heard' in judicial proceedings; (3) the right of the criminal defendant to trial by a jury composed a fair cross section of the community; and (4) the public right of access to criminal proceedings.[65]

Title II requires states to "take reasonable measures to remove architectural and other barriers to accessibility."[66] These remedies are limited in that they only require "'reasonable modifications' that would not fundamentally alter the nature of the service provided" and do not require states "to undertake measures that would impose an undue financial or administrative burden."[67] After weighing these remedies against the history of discrimination described above, the Court concluded: "Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress's § 5 authority to enforce the guarantees of the Fourteenth Amendment."[68]

The Supreme Court once again addressed the interplay between Title II of the ADA and the Eleventh Amendment in the strange case of *United States v. Georgia*.[69] That case involved a claim by a wheelchair-bound prisoner who claimed the state abused him in various ways related to his disability, including locking him in his cell for 23-24 hours a day, where he could not turn around or reach the toilet, so he would be "forced to sit in his own feces and urine while prison officials refused

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61. *Id.*

62. *Id.*

63. *Id.* at 531. The dissent noted that deploying an "as applied" test is highly unusual in this context: "Our § 5 precedents do not support this as-applied approach. In each case, we measured the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce. If we had arbitrarily constricted the scope of the statutes to match the scope of a core constitutional right, those cases might have come out differently." *Id.* at 551-52 (Rehnquist, C.J., dissenting.)

64. *Id.* at 531.

65. *Id*. at 540-41 (citations omitted).

66. *Id*. at 531.

67. *Id.* at 532.

68. *Id.* at 533-34.

69. 546 U.S. 151 (2006).

to assist him in cleaning up the waste."[70] The plaintiff's pro se complaint included claims against both state defendants and individual prison officials for violation of the Eighth Amendment prohibition of cruel and unusual punishment (and possibly other established constitutional rights), as well as claims for money damages against the state defendants under Title II of the ADA, based on the same conduct.[71]

An over-eager Eleventh Circuit dismissed the Title II claims while allowing the plaintiff to proceed on his § 1983 claims.[72] A nonplussed Justice Scalia wrote an opinion for a unanimous Court ordering reinstatement of the prisoner's Title II claims, insofar as he alleged actual constitutional violations, noting that: "While the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions."[73] The Court remanded the case to the lower court to determine:

> [O]n a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.[74]

What is noteworthy about *Georgia* is not the majority's holding, but Justice Stevens's concurrence, in which Justice Ginsburg joined, emphasizing that "although petitioner Goodman's Eighth Amendment claims provide a sufficient basis for reversal, our opinion does not suggest that this is the only constitutional right applicable in the prison context and therefore relevant to the abrogation issue."[75]

Justice Stevens noted that "Congress's decision to extend Title II's protections to prison inmates was not limited to violations of the Eighth Amendment," in support of which he cited the "backdrop of pervasive unequal treatment" leading to the enactment of Title II discussed in *Lane*.[76] Additionally, he referenced the Appendixes to Justice Breyer's dissent in *Garrett* "showing, for example, that prisoners with developmental disabilities were subject to longer terms of imprisonment than other prisoners," as well as a number of other examples where individuals with disabilities had suffered discrimination while incarcerated.[77] These included "the abridgment of religious liberties, undue censorship, interference with access to the judicial process, and procedural due process violations."[78]

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70. *Id.* at 156.
71. *Id.* at 154-56.
72. *Id*. at 156.
73. *Id*. at 158 (emphasis original) (internal citations omitted).
74. *Id.* at 159.
75. *Id*. at 160-61 (Stevens, J., concurring).
76. *Id.* at 161.
77. *Id.* at 162.
78. *Id.*

C. The Lower Courts Struggle to Analyze the Applicability of Title II to Discrimination in Education

Subsequent to the Supreme Court's decision in *Lane*, any decision that held Title II unconstitutional across the board was no longer fully viable. However, because *Lane* calls for an issue-specific analysis,[79] courts have not abandoned their prior holdings altogether. With respect to discrimination in the context of education, the result is somewhat of a mixed bag.

For example, *Doe v. Trustees of the University of Illinois* is a post-*Lane* district court opinion out of the Seventh Circuit.[80] In a pre-*Lane* decision, *Walker v. Snyder*, the Seventh Circuit rejected a prisoner's claim for disability accommodations on the ground that Congress lacked the authority to subject states to Title II of the ADA.[81] Faced with deciding whether Title II was a valid abrogation of state immunity in the context of education, the *Doe* court acknowledged the continued viability of *Walker* was questionable, but noted that "the decision provides an indication of the Seventh Circuit's skepticism regarding the scope of Title II."[82]

The district court decided to play it safe by narrowly—and incorrectly—interpreting *Lane* as having "hinged on the fact that the plaintiffs had suffered violations of a fundamental right."[83] The "difference in this case," the district court noted, "is that education, despite its undoubted importance, is not considered by the Supreme Court to be a fundamental constitutional right . . . ."[84] In the court's view, this distinction was critical: without a fundamental right at issue, "Title II . . . exceeds Congress's power under section five."[85]

The Fourth Circuit, in *Constantine v. Rectors & Visitors of George Mason Univ.*,[86] reached the opposite conclusion, upholding Title II as applied to education.[87] In *Constantine,* a law student sued a state university for disability discrimination under Title II. The student had an established history of intractable migraine syndrome and was denied extra time on an exam when she suffered a migraine attack during the test. As a result, she failed the class. She appealed her grade and requested a re-examination, but those requests fell on deaf ears. As a result of her failing grade, Constantine was unable to graduate on time. This delay cost her a clerkship she had previously accepted, and the "F" on her transcript continued to harm her employment prospects for years.[88]

The *Constantine* court first acknowledged that "[b]ecause classifications based on disability are subject to minimal scrutiny, States may make distinctions on the basis of disability so long as 'there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'"[89] The *Constantine* court

79. Tennessee v. Lane, 541 U.S. 509, 541 (2004).
80. 429 F. Supp. 2d 930 (N.D. Ill. 2006).
81. Walker v. Snyder, 213 F.3d 344, 347 (7th Cir. 2000).
82. Doe, 429 F. Supp. at 938.
83. *Id*.
84. *Id.*
85. *Id.* at 939.
86. 411 F.3d 474 (4th Cir. 2005).
87. *Id.* at 490.
88. *Id*. at 478-79.
89. *Id.* at 486 (internal citations omitted).

also acknowledged "education is not a fundamental right,"[90] and because "classifications based on disability are subject to minimal scrutiny,"[91] the court concluded it was required to apply "rational-basis review."[92] Essentially, exclusion from school becomes the constitutional equivalent of exclusion from a state-operated hockey rink.

Once the court reached this conclusion, it should have been next-to-impossible to find that Congress properly abrogated Eleventh Amendment immunity because when the right protected is only subject to rational-basis review, the congruence and proportionality test can almost never be satisfied.[93] Rational-basis sets a very low bar, and the number of times the Supreme Court has concluded a state did not meet that standard can be counted on one hand.[94] Furthermore, in each of those cases the Court was considering the constitutionality of a single state statute. As the Court made clear in *Garrett,* if Congress wants to justify *prophylactic* legislation under these circumstances, it would have to show "a history and pattern of unconstitutional discrimination by the States"—and the Supreme Court in *Garrett* waxed almost rhapsodically about how "hardheaded[]" and sensible it was for the state to discriminate on the basis of disability, even if only on the basis of cost.[95]

One would think, therefore, that this would be the end of the analysis, but the *Constantine* court pushed on in an effort to rationalize why a prophylactic rule against disability discrimination in education is more acceptable than it is in the employment context. First the court cited the Supreme Court's observation in *Waters v. Churchill* that "a State's 'interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.'"[96]

Having minimized the states' interests, the court similarly minimized the burden imposed by Title II (which does not necessarily require structural modifications to existing facilities), as opposed to Title I (which does).[97] Next, the court fell back on "the pattern of unconstitutional disability discrimination described by the Court in *Lane*" in the provision of public services in general, concluding that even if Title II "exceeds the boundaries of the Fourteenth Amendment," it is not so out of pro-

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90. *Id.* at 486-87.

91. *Id.* at 486.

92. *Id.* at 487.

93. There is no case where the Supreme Court has approved a prophylactic rule where the right in question can be abridged on a showing of mere rational basis.

94. With three fingers to spare. Only two cases in the history of the Court snuggly fit this category. The first is the above-mentioned *Cleburne v. Cleburne Living Ctr., Inc*, 473 U.S. at 448, and the second is *Romer v. Evans*, 517 U.S. 620 (1996). In that case, the Court determined that a state constitutional amendment in Colorado preventing laws or ordinances according protected status to homosexuals or bisexuals lacked a "rational relationship to legitimate state interests." 517 U.S. at 632. Another candidate for this category is *United States v. Windsor*, where the Court struck down the portion of the Defense of Marriage Act that allowed the federal government to deny marriage benefits to same-sex couples married under state law. 133 S.Ct. 2675, 2696 (2013). However, *Windsor* rested on a number of lines of reasoning, and the standard of scrutiny the court applied was not exactly clear.

95. *Garrett*, 531 U.S. at 366-68, 371; *but see id.* at 374 (Kennedy, J. , concurring) ("Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity *caused by simple want of careful, rational reflection* or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.") (emphasis added).

96. Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d at 490, (citing Waters v. Churchill, 511 U.S. 661, 675 (1994)).

97. *Id*. at 490.

portion "that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[98]

The *Constantine* court's reasoning was a clear misapplication of *Lane*. The test in *Lane* is explicitly designed to determine whether Title II is constitutional on an "as applied" basis.[99] Therefore, it is necessary to establish unconstitutional discrimination within the "class of cases" at issue.[100] Rather than follow the lead of *Lane* and examine how discrimination in *education* services can impair fundamental rights, the *Constantine* court simply cited *Lane* for the general proposition that "Title II was enacted in response to a pattern of unconstitutional disability discrimination by States . . . with respect to the provisions of public services." [101] Nor did the court make any effort to identify instances of irrational discrimination in the context of education, even though *Lane* itself references a number of such cases.

The *Constantine* court's effort to downplay the remedies provided in Title II are also not particularly convincing. By any measure, the remedies provided by Title II are actually quite substantial, including the creation of a private right of action for money damages against state governments in abrogation of the Eleventh Amendment.

Furthermore, the jurisprudence regarding prophylactic legislation requires that Congress abrogate a state's Eleventh Amendment immunity only in order to safeguard a constitutional guarantee.[102] While it is one thing to allow prophylactic legislation to exceed the strict boundaries of the unconstitutional conduct it was enacted to address, it is quite another to approve prophylactic legislation in the absence of any unconstitutional violations, so long as it is not too burdensome, as the court in *Constantine* effectively holds.

These missteps on the part of the Fourth Circuit stem from the same basic error: once the court identifies the standard of review as rational basis, prophylactic legislation becomes almost impossible to justify. Because *Lane* prescribed an "as applied" analysis to Title II, it makes no difference if, on the whole, Title II is not "so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[103] Rather, there must be a showing of proportionality in the "class of cases" at issue.[104]

Because *Constantine* failed to conduct an "as applied" analysis, its logic suggests all of Title II properly abrogated the state's Eleventh Amendment immunity, which was the approach taken by the Ninth Circuit pre-*Garrett*, and which it has maintained post-*Lane*.[105] Although there is a spate of cases in the Northern District of California that have held Title II did not abrogate state immunity in the context of education, curiously none of them acknowledge, much less attempt to distinguish, there is controlling Ninth Circuit authority to the contrary.[106]

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98. *Id*.

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

100. *Id.* at 531.

101. *Constantine,* 411 F.3d at 487.

102. *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (describing § 5 of the Fourteenth Amendment as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.").

103. *Constantine*, 411 F.3d at 490 (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

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

105. *See, e.g.*, Phiffer v. Columbia River Correctional Inst., 63 F. App'x 335 (9th Cir. 2003).

106. *See, e.g.*, Pantell v. Antioch Unified Sch. Dist., No. C14-1381 PJH (N.D. Cal. 2015); J.F. v. New

Some lower courts in the Fourth Circuit, as in the Ninth, have stumbled over this approach, but rather than follow the example of the Northern District of California and simply ignore the circuit's holding, they have found creative ways to read *Constantine* more narrowly. For example, the district court in *Belk v. Smith*[107] addressed a prisoner's Title II claim that his disability prevented him from participating in a program that allowed prisoners to earn credit towards a reduced sentence.

The district court did not believe Congress had authority to abrogate the State's Eleventh Amendment immunity in the prison context. It therefore concluded that *Constantine*'s apparent holding that Title II had abrogated the state's immunity in all its endeavors was too broad: "[O]n its face, the [*Constantine*] Court's reasoning appears applicable to all situations in which a state, acting as a sovereign, engages in conduct which could implicate an individual's right to be free from irrational disability discrimination."[108]

Nevertheless, the *Belk* court distinguished *Constantine* by pointing to the "special role" of education that "has at times resulted in courts exercising greater scrutiny."[109] A clever move, but nothing in the *Constantine* opinion even hints it is applying a higher level of scrutiny because education is involved. Indeed, the *Constantine* court doesn't waste so much as a line extolling the importance of education.[110]

In *Bowers v. National Collegiate Athletic Ass'n*[111] the Third Circuit concluded that Title II is a "justifiable prophylactic measure to avoid the risk of unconstitutional treatment of disabled students," based on a "regrettable past history" of "exclusion and segregation of disabled students."[112] The *Bowers* court relied largely on *Constantine*[113] for its holding that Congress validly abrogated Eleventh Amendment immunity in the public education context.[114]

The Second Circuit also addressed the applicability of Title II to the educational context in the pre-*Lane* case, *Garcia v. S.U.N.Y Health Sciences Center of Brooklyn*.[115] Garcia was a medical student who was dismissed for failure to pass all the

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Haven Unified Sch. Dist., No. C13-03808 SI (N.D. Cal. 2014); J.C. v. Cambrian Sch. Dist., No. C12-03515 WHO (N.D. Cal. 2014); E.H. v. Brentwood Union Sch. Dist., No. C13-3243 TEH, 2013 WL 5978008 (N.D. Cal. 2013).

107. No. 1:10CV724, 2013 WL 5430426 (M.D.N.C. Sept. 27, 2013).

108. *Id.*at *8.

109. *Id.*

110. Other district courts in the Fourth Circuit have refused to apply *Constantine* outside the education context. *See, e.g.*, Chase v. Baskerville, 508 F. Supp. 2d 492 (E.D. Va. 2007) (court declines to extend *Constantine* to a deaf prisoner's claim that he needed an interpreter to assist him in his school work). But some courts have had no trouble following *Constantine*, both in the educational context (*Adams v. Montgomery Coll.*, 834 F. Supp.2d 386 (D. Md. 2011)) (public higher education), and outside of it (*Zemedagegehu v. Arthur*, No. 1:15CV57 (JCC/MSN), 2015 WL 1930539 (E.D. Va. 2015) ("For the reasons discussed below, Title II's remedies are a congruent and proportional response to the pattern of disability discrimination as applied to local jails.") (citing *Constantine*, 411 F.3d at 487-88)).

111. 475 F.3d 524 (3d Cir. 2007).

112. *Id.* at 555.

113. The court also cited in passing the First and Eleventh Circuit opinions in *Toledo* and *Ass'n for Disabled Americans,* discussed at Part IV.D *infra,* but did not seem to rely on their reasoning. *Bowers*, 475 F.3d at 555-56.

114. The *Bowers* court did say, "States have made educational decisions on the basis of irrational misconceptions and stereotypes held about disabled students." But it cited as support for this proposition only the U.S. Government's amicus brief, not the legislative history of the ADA. *Bowers*, 475 F.3d at 555.

115. 280 F.3d 98 (2d Cir. 2001).

first-year courses.[116] He brought suit under Title II, *inter alia,* claiming that he was denied an accommodation for his Attention Deficit Disorder.[117] Applying a straightforward pre-*Lane* analysis, the court concluded that "Title II in its entirety exceeds Congress's authority under § 5 . . . ."[118] Once again, this is contrary to the holding in *Lane*.

Nevertheless, the Second Circuit concluded that Congress *did* act within its constitutional authority in providing a damages remedy, insofar as "plaintiffs bringing such suits to establish that the Title II violation was motivated by discriminatory animus or ill will based on the plaintiff's disability."[119] Finding that Garcia did not "allege discriminatory animus or ill will based on his purported disability,"[120] the Second Circuit affirmed the district court's dismissal of the Title II claim. In other words, the Second Circuit held that Title II *is* valid insofar as it provides a remedy for specific acts of discrimination that are motivated by ill will or irrational discrimination on the basis of disability. The problem, of course, is that Title II is, inescapably, a prophylactic rule. In 2015, the Second Circuit noted in *Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis*.,[121] that subsequent to the Supreme Court's decision in *United States v. Georgia*,[122] there was "continued uncertainty" as to the vitality of its holding in *Garcia.*[123] The *Dean* court questioned whether Title II is an invalid exercise of congressional authority insofar as it purported to create a prophylactic rule, which "has led to a divergence in the approaches adopted by district courts in this Circuit in their assessment of Congress's abrogation of sovereign immunity under Title II."[124] Ultimately the Second Circuit punted on the issue: "We express no position as to the question of whether Congress has validly abrogated sovereign immunity in the context of discrimination in access to public education on the basis of disability."[125]

VI. A BETTER APPROACH: THE CLOSE CONNECTION BETWEEN EDUCATION AND FUNDAMENTAL CONSTITUTIONAL RIGHTS MAKES EDUCATION A "VITAL RIGHT" WARRANTING A HIGHER LEVEL OF SCRUTINY THAN RATIONAL BASIS

The Supreme Court has repeatedly and explicitly stated there is no constitutional right to education[126] and the disabled are not a suspect class.[127] Nevertheless, a closer look at *Lane* in conjunction with other Supreme Court precedents, suggests that this does not compel the conclusion that Congress exceeded its authority when it enacted Title II.

A. Reexamining Lane: A More Expansive Application of the Congruence and

116. *Id.* at 103.
117. *Id.* at 104.
118. *Id.* at 110.
119. *Id.* at 111.
120. *Id*. at 112.
121. 804 F.3d 178 (2d Cir. 2015).
122. 546 U.S. 151 (2006).
123. 280 F.3d at 98.
124. *Dean*, 804 F.3d at 194.
125. *Id*. at 195.
126. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
127. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 US 356, 365-68 (2001).

Proportionality Test

One of the striking aspects of *Lane* is that the majority opinion was authored by Justice Stevens[128] and joined by Justices O'Connor, Souter, Ginsburg and Breyer, while Chief Justice Rehnquist and Justices Kennedy, Thomas and Scalia dissented. In short, with the defection of Justice O'Connor, the dissenters in *Garrett* became the majority in *Lane*, while the majority in *Garrett* became the dissenters in *Lane*.

Another striking aspect is that rather than consider the validity of Title II as "an undifferentiated whole," the Court chose to evaluate the statute in the context of the specific circumstances in the case before it: "the constitutional right of access to the courts."[129] In this manner, the Court was able to avoid the argument that Title II "is not appropriately tailored to serve its objectives," because it "applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks."[130]

Perhaps the most striking aspect of Lane is that although the specific right at issue in the case was physical access to a public facility, the Court acknowledged there are a panoply of related rights that might be impacted as well. Thus, the *Lane* majority lists a bundle of fundamental rights associated with court proceedings:

> (1) the right of the criminal defendant to be present at all critical stages of the trial; (2) the right of litigants to have a 'meaningful opportunity to be heard' in judicial proceedings; (3) the right of the criminal defendant to trial by a jury composed a fair cross section of the community; and (4) the public right of access to criminal proceedings.[131]

With respect to evidence of discrimination, Justice Kennedy, in his dissent, was correct in pointing out the majority was able to identify few, if any, instances where Congress documented an *actual* denial of due process because of physical inaccessibility:[132]

> A violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding. We have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance. Indeed, the fact that the State

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128. Justice Stevens, it will be remembered, firmly staked his position that there is no state sovereign immunity with respect to citizens suing their own states in federal court pursuant to a federal statute. *See generally supra* note 9.

129. Tennessee v. Lane, 541 U.S. 509, 531 (2004). Chief Justice Rehnquist was highly critical of this approach: "The effect is to rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right." *Id.* at 551. Given the predilection of the other members of the majority towards affording Congress wide latitude when it comes to abrogating state immunity, this may have been a necessary compromise to secure Justice O'Connor's vote, thereby tipping the balance in favor of abrogation.

130. *Id.* at 530. It is noteworthy that in articulating the scope of Title II, the Court chose public education to place on the other end of the spectrum from hockey rinks. For a more detailed discussion of this aspect of the case and its implications *see* Neary, *Reversing a Trend: An As-Applied Approach Weakens the Boerne Congruence and Proportionality Test*, 64 MD. L. REV. 910 (2005).

131. 541 U.S. at 540-41 (citations omitted).

132. *Id.* at 543-48 (Rehnquist, C.J., dissenting).

> may need to assist an individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding.[133]

And, as the dissent tartly observes, the actual plaintiff in *Lane* was not prevented from attending court:

> The majority admits that Lane was able to attend the initial hearing of his criminal trial. *Ante,* at 514. Lane was arrested for failing to appear at his second hearing only after he refused assistance from officers dispatched by the court to help him to the courtroom. *Ibid.* The court conducted a preliminary hearing in the first-floor library to accommodate Lane's disability, App. to Pet. for Cert. 16, and later offered to move all further proceedings in the case to a handicapped-accessible courthouse in a nearby town. In light of these facts, it can hardly be said that the State violated Lane's right to be present at his trial; indeed, it made affirmative attempts to secure that right.[134]

The majority countered by observing "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[135] The Court observed its own decisions, as well as those 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, public education, and voting. Notably, these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice."[136]

A concurrence by Justice Souter in which Justice Ginsburg joined, "piled on" as it were, by pointing out "the judiciary itself has endorsed the basis for some of the very discrimination subject to congressional remedy under § 5," citing, for example *Buck v. Bell*,[137] which "was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities."[138] The fact that little of this evidence dealt with the specific issue at hand, lack of physical access to court buildings was of no particular moment to the majority. Thus, despite the dissent's pointed criticisms, the majority concluded Title II of the ADA was a valid abrogation of Eleventh Amendment immunity in the context of that case.

I suggest the *Lane* majority was actually applying something akin to a cost-benefit analysis to the situation. Basic economics teaches that the more expensive or difficult something is to obtain, the less it will be consumed. Requiring a disabled person crawl up the courthouse steps, or even to be carried into court by court personnel, imposes a significant additional burden and, at least, a sacrifice of personal dignity, in order for that person to exercise his fundamental right of access to justice. Even if this does not make access altogether impossible, it is a significant

133. *Id.* at 546-47.

134. *Id.* at 543 n.4.

135. *Id.* at 524 (majority opinion).

136. *Id.* at 525.

137. 274 U.S. 200 (1927)

138. *Lane*, 541 U.S. at 535.

burden that others need not endure when availing themselves of their right to due process through the courts.

Importantly, not only is there a loss of personal dignity, the burden of accommodating the needs of those with disabilities on an ad hoc basis may subtly skew the legal process against the disabled litigant. After all, requiring court personnel to carry disabled adults, or forcing the court to re-schedule or relocate hearings so the disabled person can make an appearance, imposes significant burdens on the institution, burdens that will be directly attributed to the troublesome litigant, who may fear (wrongly or rightly) this will cause resentment on the part of individuals on whom these burdens fall. Or, to put it somewhat differently, the need to employ extraordinary measures to gain access to court facilities will deny the disabled litigant full equality before the law by forcing him to make repeated, troublesome demands on the court and its staff.

The problem is compounded by the fact that the most important legal battles can often be quite protracted, requiring many visits to the courthouse. In aggregate, this higher cost is going to put pressure on individuals with disabilities to avoid taking such actions or forcing them into unfavorable settlements—in effect chilling their access to justice. Even if not entirely deterred, being relegated to such extraordinary measures to achieve what people without disabilities have by just walking into the courthouse may impart a reasonable apprehension about being shortchanged in the administration of justice. In other words, they will feel unequal before the law.

Viewed from this perspective, the majority's analysis makes sense. If the harm involved is not an actual, categorical denial of due process but, rather, a continuous burdening of due process rights by the need to invoke extraordinary means to achieve access, then it is not necessary to show a rich history of *actual* denial of due process. It is enough that there is a significant documented history of courthouses that are physically inaccessible to the disabled unless take advantage of demeaning and possibly prejudicial procedures. Coupled with the strong logical inference that such barriers will burden and probably deter the exercise of due process rights, this suffices to document a pattern of abridgement of constitutional rights.

Although unarticulated by the *Lane* majority, similar such logic must have motivated the Court to ratchet back the rigorous application of the "congruent and proportional" test it had deployed strictly in prior cases. This inferential chain enabled the Court to protect something understood to be precious, even without documented examples that its abridgment resulting constitutional violations.

Indeed, by the nature of the rights involved, it would have been very difficult for Congress to provide actual examples of how the additional burdens on those with disabilities would abridge their due process rights. If a person with a disability wanted to avoid the indignity and uncertainty of having to be carried into court for every appearance and therefore chooses not to bring a lawsuit, or enter into a plea agreement rather than go to trial in a criminal case, how would we ever find out?

What we must infer from *Lane* is that the congruence and proportionality test may be satisfied based on common sense inferences from the available evidence, without a documented record of actual occurrences. As happened in *Morgan*, the dissent's criticism actually serves to broaden the majority's holding by pointing out the Court is willing to uphold an exercise of congressional power without a rigorous showing that Congress's selected remedy responded to actual constitutional violations.

The majority's approach in *Lane* was reprised by Justice Stevens in his concurrence in *United States v. Georgia*, where he stated:

> [G]iven *the constellation of rights applicable in the prison context*, it is clear that the Eleventh Circuit has erred in identifying only the Eighth Amendment right to be free from cruel and unusual punishment in performing the first step of the "congruence and proportionality" inquiry set forth in *City of Boerne v. Flores*.[139]

This language reflects, and reinforces, the approach taken in *Lane* that the "congruence and proportionality" analysis should not be limited to the specific right at issue in the case.

This is essentially the approach the majority in *Flores* adopted in retrofitting *Katzenbach v. Morgan* by tying the elimination of an English language literacy requirement to the enhancement of the political power of the Puerto Rican minority, leading in turn to the elimination of discrimination in accessing public services by the Puerto Rican community. This is the essence of the "vital right" analysis: a right that is not itself guaranteed by the Constitution but supports constitutional rights.

B. Education Is a Vital Right

Just as the Court was forced to revisit *Morgan* in the context of the congruent and proportional test announced in *Flores,* so too it will need to grapple with its earlier decision in *Plyler v. Doe*[140] when it decides whether Title II is a valid exercise of congressional authority in the context of education. The question presented in *Plyler* was whether states may deny a tuition-free public education to children of illegal aliens. Justice Brennan got his five votes, and he made the most of it.

Justice Brennan began with a frank survey of the constitutional landscape:

> Undocumented aliens cannot be treated as a suspect class, because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.[141]

This should have sounded the death knell for plaintiffs' claims in *Plyler*, but Justice Brennan was only getting warmed up.

In an opinion as devoid of a unifying constitutional theory as it was full of warmth and compassion, Brennan pointed out several factors ultimately leading to the conclusion that the state scheme violated equal protection. Drawing on prior cases, he pointed out the significance of education to success and, indeed, to the proper functioning of our society: "By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."[142] He also pointed out that "[W]hether education is a

139. United States v. Georgia, 546 U.S. 151, 162-163 (2006) (emphasis added).

140. 457 U.S. 202 (1982).

141. *Id.* at 223.

142. *Id*.

fundamental right, Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives."[143]

Although Justice Brennan purported to sympathize with the State's desire not to waste scarce resources educating children that will soon be deported, he pointed out "a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would, of course, be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain."[144] Moreover, Justice Brennan observed, in a final flourish:

> The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. 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.[145]

Although Justice Brennan's majority opinion garnered five votes, several of the Justices who joined him also wrote separately. Justice Marshall reiterated the position he had taken in *San Antonio School District* that education *should* be deemed a constitutional right.[146] Justice Powell noted that it is "certain that illegal aliens will continue to enter the United States and, as the record makes clear, an unknown percentage of them will remain here. I agree with the Court that their children should not be left on the streets uneducated."[147] He analogized the case to the Court's earlier decision in *Weber v. Aetna Casualty & Surety Co.*,[148] where the Court held that "'visiting . . . condemnation on the head of an infant' for the misdeeds of the parents is illogical, unjust, and 'contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.'"[149]

Justice Blackmun wrote separately to reiterate his adherence to the holding in *San Antonio School District* that education is not a fundamental right, but then opined "[o]nly a pedant would insist that there are no meaningful distinctions among the multitude of social and political interests regulated by the States . . . ."[150] Not wanting to be a pedant, Justice Blackmun pointed out the relevant question is

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143. *Id.*
144. *Id.* at 226.
145. *Id.* at 230.
146. *See id.* at 230-31 (Marshall, J., concurring).
147. *Id.* at 237-38 (Powell, J., concurring).
148. 406 U.S. 164 (1972).
149. Plyer v. Doe, 457 U.S. 202, 238 (1982) (Powell, J., concurring) (quoting *Weber*, 406 U.S. at 175).
150. *Id.* at 233 (Blackmun, J. concurring).

not whether there is a fundamental right to education *vel non* but rather whether the State can exclude certain children from the educational system once it provides access to education for most of the children within its community:

> Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group – through the State's action – will have been converted into a discrete underclass. . . . In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.[151]

Although firmly maintaining that education is not a constitutional right, five justices nevertheless concluded that the state could not deny a free public education to children who were in the country illegally. The justices supported this conclusion with a variety of rationales which can be categorized as falling into two related categories: (1) the children should not suffer a permanent and irremediable disadvantage on account of misconduct by their parents; and (2) it makes little sense for us as a society to create a permanent underclass of uneducated adults who will not be able to fully participate in the economic and civic life of the community where they will likely spend their lives.

Significantly, in his concurrence, Justice Brennan noted "[w]e have recognized 'the public school as *a most vital civic institution* for the preservation of a democratic system of government . . . .'"[152] I find "vital" a useful term because it denotes a particular kind of relationship between the activity in question and life in the modern world. When modifying the term "rights," it denotes those rights that are not constitutionally guaranteed but nevertheless play a key role in allowing us as individuals and collectively as a society to take advantage of constitutional rights and discharge civic responsibilities we have come to embrace as universal.

Education clearly fits within the category of "vital" for the reasons explained by Chief Justice Warren in *Brown v. Board of Education,*[153] and by the various other courts that have addressed the issue. Even though the Supreme Court has refused to find a constitutional right to education, it has certainly recognized the pivotal function education plays in our society. For example, in *Smith v. Robinson*[154] the Court referred to the Education of the Handicapped Act, a predecessor of the IDEA, as "a comprehensive scheme set up by Congress to aid the States in complying with their *constitutional obligations* to provide public education for handicapped children."[155] One marvels at the mystery of constitutional obligations without corresponding constitutional rights, but (as Justice Brennan was fond of saying) when you have five Supreme Court votes, you can do anything.[156]

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151. *Id.* at 234.

152. *Id.* at 221 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (emphasis added)).

153. 347 U.S. 483, 496 (1954).

154. 468 U.S. 992 (1984).

155. *Id*. at 1009 (emphasis added).

156. Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law 350 (Norton 2005).

C. Applying the Congruence and Proportionality Test as Refined by Lane: Title II Validly Abrogated State Immunity in the Area of Education

Shortly after *Lane* was decided, the Eleventh Circuit issued its decision in *Association for Disabled Americans v. Florida International.*[157] That case involved claims against a state university for violating Title II of the ADA by "*inter alia*, 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."[158] The university moved to dismiss on Eleventh Amendment grounds. Applying the *Flores* congruence and proportionality test consistent with the Court's application in *Lane*, the Eleventh Circuit held that Congress had validly abrogated state immunity under Title II in the context of education.

The Eleventh Circuit started by noting:

> Although classifications relating to education only involve rational basis review under the Equal Protection Clause, '[b]oth the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child,' distinguishes public education from other rights subject to rational basis review. The Supreme Court long has recognized that even when discrimination in education does not abridge a fundamental right, the gravity of the harm is vast and far reaching.[159]

Thus, "the constitutional right to equality in education, though not fundamental, is *vital* to the future success of our society." [160] For those reasons, the court concluded "[d]iscrimination against disabled students in education affects disabled persons' future ability to exercise and participate in the most basic rights and responsibilities of citizenship, such as voting and participation in public programs and services," and it is therefore appropriate to apply a heightened level of scrutiny to discrimination cases dealing with education.[161]

The vital role of education, not only with respect to the individual but also to society as a whole, is not merely a matter of common sense. Studies show the level of an individual's education is one of the most reliable predictors of many conventional measures of success. For example, educational level is highly correlated to an individual's ability to earn a living.[162] The average unemployment rate for those with a college degree is 3.5 percent, for those with a high school diploma the rate is 6 percent, and for individuals without a high school diploma the average unemployment rate is a whopping 9 percent.[163]

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157. 405 F.3d 954 (11th Cir. 2005).

158. *Id.* at 956.

159. *Id.* at 957-58 (citations omitted) (quoting Plyler v. Doe, 457 U.S. 202, 221(1982)); *see also* Brown v. Board of Education, 347 U.S. 483, 493 (1954).

160. *Disabled Americans*, 505.3d at 958 (emphasis added).

161. *Id.* at 959 (alteration in original).

162. *See* U.S. Dept. of Labor, Bureau of Labor Statistics, *Employment Projections*, http://www.bls.gov/emp/ep_chart_001.htm.

163. *Id.*

Education is an important predictor for long term health, with the more educated reporting fewer instances of hypertension, diabetes, depression, and many other diseases.[164] A healthier population means less of a burden on our already strained health-care system coupled with a greater ability to pay for medical services when required.

Even if these were the only impacts of education, it would certainly justify congressional attention. But education has a direct impact on the exercise of an individual's more fundamental rights, such as the right to vote. In the 2008 presidential election, the voter turnout level for individuals with at least a bachelor's degree was 71.8 percent. For high school graduates, it was 50.9 percent. For those with less than a ninth grade education, the number dropped to 23.4 percent.[165]

Education also plays a key role in the ability of individuals to communicate effectively both orally and in writing.[166] For those who lack the ability to communicate, the First Amendment right to free speech is of little practical value.

In the words of Chief Justice Warren, writing in *Brown v. Board of Education*,

> 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. Such an opportunity, where the state has undertaken to provide it, is a right, which must be made available to all on equal terms.[167]

Furthermore, the inability to exercise these rights affects not only the student but also society as a whole.

D. There is Abundant Evidence of Discrimination against the Disabled in the Area of Public Education

Having established education is a vital right, the next issue is the evidence of discrimination against individuals with disabilities in the area of education. There is ample evidence indicating individuals with disabilities are disproportionally repre-

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164. *See* The National Bureau of Economic Research, *The Effects of Education on Health*, http://www.nber.org/digest/mar07/w12352.html.

165. U.S. Census Bureau, *Voter Turnout by Educational Attainment, 2008 U.S. Presidential Election,* https://www.boundless.com/sociology/textbooks/412/government-15/the-u-s-political-system-116/voting-behavior-646-7854/images/voter-turnout-by-educational-attainment-2008-presidential-election.

166. *See generally* Sherwyn Morreale, Michael Osborn & Judy Pearson, *Why Communication is Important: a Rationale for the Centrality of the Study of Communication,* 29 J. ASS'N. COMM. ADMIN. 1-25 (Jan. 2000).

167. Brown v. Bd. Of Educ., 347 U.S. 483, 493 (1954).

sented among those Americans suffering from a poor education. Twenty-one percent of the adult population of the United States cannot read above a 5th grade level.[168] Fourteen percent, of the population, or 32 million adults are illiterate.[169] Of these 32 million, 21 percent are individuals with disabilities, even though they constitute only 9 percent of the general population.[170] There is no question that discrimination against those with disabilities in accessing education has contributed to this disparity.

Prior to the enactment of the EAHC in 1975, "congressional studies revealed that better than half of the Nation's 8 million disabled children were not receiving appropriate educational services. Indeed, one out of every eight of these children was excluded from the public school system altogether; many others were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out."[171] As the court in *Ass'n for Disabled Americans* noted, *Lane* "documented a pattern of unequal treatment in the administration of a wide range of public services . . . including . . . *public education* . . . ."[172]

The court continued, "Furthermore, Title II requires only 'reasonable modifications that would not fundamentally alter the nature of the service provided.'"[173] "For example, in its attempt to equalize physical access to public buildings, Congress imposed reasonable architectural standards for new construction and allowed for less costly measures for older facilities."[174] The court concluded that "[i]n light of the long history of state discrimination against students with disabilities . . . [t]he relief available under Title II of the ADA is congruent and proportional to the injury and means adopted to remedy the injury."[175] Significantly, this was the position suggested by the United States in its brief as intervenor.[176]

The First Circuit adopted much the same approach just a year later in *Toledo v. Sanchez*.[177] While employing a somewhat expanded explication of the *Lane* analysis, which seemed to track closely to the government's position,[178] the First Circuit found that

> (T)he thirty years preceding the enactment of the ADA evidence, a widespread pattern of states unconstitutionally excluding disabled children from public education and irrationally discriminating against disabled

168. National Center for Education Statistics, *Average prose, document and quantative literacy scores of adults: 1992 and 2003*, https://nces.ed.gov/naal/kf_demographics.asp.

169. *Id*.

170. *Id.*

171. Honig v. Doe, 484 U.S. 305, 309 (1988) (citations omitted).

172. Ass'n for Disabled Ams., Inc v. Fla. Int'l Univ., 405 F.3d 954, 958 (11th Cir. 2005) (quoting Tennessee v. Lane, 541 U.S. 509, 525 (2004)).

173. *Id.* at 959 (quoting Tennessee v. Lane, 541 U.S. 509, 529 (2004)).

174. *Id.* (footnote omitted); *see also* 28 C.F.R. § 35.1551; § 35.150(b)(1).

175. Tennessee v. Lane, 541 U.S. 509, 559 (2004).

176. Corrected Supplemental Brief for the United States as Intervenor, Ass'n for Disabled Ams. v. Fla. Int'l Univ., No. 02-10360-JJ (11th Cir. 2004) http://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/assocdisabled_supp.pdf (hereinafter "Association of Disabled Americans U.S. Brief").

177. 454 F. 3d 24, 36 (1st Cir. 2006).

178. *See, e.g.*, *id.* (explicitly adopting the government's position as to the level of generality at which to conduct the "congruence and proportionality" analysis).

> students within schools. Faced with this record of persistent unconstitutional state action, coupled with the inability of earlier federal legislation to solve this "difficult and intractable problem," Congress was justified in enacting prophylactic § 5 legislation in response.[179]

Like the Eleventh Circuit, the First Circuit in *Toledo* found it significant that "Title II's implementing regulations and the case law interpreting the Act demonstrate that the obligations imposed by Title II are limited in several ways that minimize the compliance costs imposed on states."[180] And it quoted the Eleventh Circuit for the key proposition that denial of education "affects disabled persons' future ability to exercise and participate in the most basic rights and responsibilities of citizenship . . . "[181]

Finally, relying on both on *Association for Disabled Americans* and *Constantine,* the First Circuit concluded the obligation created by Title II of the ADA "is not disproportionate to the need to protect against the outright exclusion and irrational disability discrimination that such students experienced in the recent past."[182] This conclusion is not only correct, but also fits well within the framework of existing Supreme Court jurisprudence.

E. Vital Rights and Vital Institutions

Vital rights are rights not themselves guaranteed by the Constitution, but are so important to the exercise of fundamental rights that abridging them would "often have the same practical effect as outright exclusion," *i.e*. denying a fundamental right altogether.[183] Similarly, vital institutions are so closely tied to the exercise of fundamental rights that we can presume, as a matter of experience and common sense, that impairing access to those institutions will, of necessity, diminish the ability to exercise fundamental rights, even if it is not possible to document specific instances where this has happened. Given our knowledge of how society works, our understanding of human psychology, and a proper respect for the dignity and individuality of our fellow citizens, we can be reasonably confident that interference with the ability to make use of the vital institution will necessarily impair constitutionally protected rights.

Schools and courts are examples of what I would consider to be vital institutions, and they have many things in common. They are generally run by the state (although we also have institutions that dispense private justice and private education). Both are universally available to those who need them, either free of charge or for a modest fee that is waivable to those who cannot afford it. In both types of institutions, there are great numbers who are compelled to attend, and severe penalties attach to failure to do so without proper authorization. Most importantly, both institutions are vital to the exercise of rights guaranteed by the Constitution, as well as other rights and benefits that we consider vital to partaking of the full range of benefits society has to offer.

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179. *Id.* at 38-39 (citing Nev. Dep't of Human Res. v. Hibbs*,* 538 U.S. 721, 735, 737 (2003)).

180. *Id.* at 39.

181. *Id.* at 40 (quoting Ass'n for Disabled Ams., Inc v. Fla. Int'l Univ., 405 F.3d 954, 959 (11th Cir. 2005)).

182. *Id.*

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

Once an institution is identified as vital, rather than applying rational basis, any impairment by a state of the ability to use that institution would be reviewed under a heightened standard of scrutiny. The court could then proceed to perform a "congruence and proportionality" analysis, treating either impairment of access to a vital institution or impairment of a vital right as proxies for constitutional violations.

The primary advantage of this approach is that it would enable Congress to adopt prophylactic legislation with respect to those governmental activities central to the exercise of fundamental rights differently from other activities—such as assigning "seating at state-owned hockey rinks"[184]—that have little bearing on constitutional rights. While the courts would be the ultimate arbiters as to what constitutes a vital institution or a vital right, Congress may well express its view in passing the legislation, and the courts would be justified in taking congressional views into account in making that decision.[185]

There will no doubt continue to be disagreement among judges and justices as to whether rights and institutions should be considered "vital." However, the dispute will turn on such substantive question as the centrality of the governmental activity in question to our national ethos and its relationship to the exercise of fundamental rights guaranteed by the Constitution, rather than arcane disputes about whether or not Congress managed to identify a sufficient number of constitutional violations demonstrating a "history and pattern" of constitutional violations by the states.[186]

F. Vital Rights v. Fundamental Rights

A reasonable objection to the idea of vital rights is "if these rights are so important, why not just recognize them as fundamental?" There are a few good reasons for this. To begin with, a fundamental right must be found in the Constitution. There have been several unenumerated fundamental rights identified by the Supreme Court, but the process of doing so is often clumsy and burdensome—requiring an unsatisfying patchwork of justifications.187

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184. *Id.* at 530.

185. Once an institution is identified as vital, the court would have the further task of deciding which activities are considered to be part of that institution. In education, for example, the question might well arise whether only schools covering K-12 are considered vital, or whether universities, military schools, trade schools, or other educational resources are considered vital as well.

186. There is a serious shortcoming of the current test: There is no requirement that *all* states have engaged in the unconstitutional conduct in order to establish a "history and pattern." Indeed, as cases such as *Lane* and *Hibbs* show, congressional fact-finding supporting a prophylactic rule may be quite spotty and episodic. It is quite clear from the opinions in those cases that a great number of states were not shown to have engaged in unconstitutional conduct. *See Lane*, 541 U.S. at 541-48; Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 742 (2003) (Scalia, J. dissenting) ("Today's opinion for the Court does not even attempt to demonstrate that each one of the 50 States covered by 29 U. S. C. § 2612(a)(1)(C) was in violation of the Fourteenth Amendment. It treats 'the States' as some sort of collective entity which is guilty or innocent as a body."). Nevertheless, all states, including the many who were not shown to be constitutional violators, had their Eleventh Amendment immunity abrogated. The reason for this is obvious: for reasons explained above, it is often difficult or even impossible, to document the individual unconstitutional effects for actions that common sense dictates must be the consequence of governmental actions, such as burdening the access of certain individuals to court facilities. By using vital institutions or vital rights as proxies, it may be much easier to detect the likely unconstitutional effects of various state actions.

187. There are a few good examples of the precarious nature of the analysis when the court 'identifies' a right as fundamental. Most famously, in *Roe v. Wade*, 410 U.S. 113 (1973), the Court determined the right to privacy under the 14th Amendment Due Process clause extends to a woman's decision to have an abortion. More recently, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court determined the fundamental right to

Furthermore, recognizing a fundamental right guaranteed by the Constitution potentially invites a host of responsibilities. If, for instance, the Supreme Court were to recognize education as a fundamental right, it would take on the thankless task of determining exactly what is encompassed in that right and who must pay for it. Courts that have waded into that quagmire have had cause to regret it.188

The Supreme Court, in fact, confronted this very question in the 1973 case of Rodriguez v. San Antonio Independent School District189 and only two Justices—Marshall and Douglas—were willing to hold that education is a fundamental right. The question in San Antonio School District was whether Texas violated the Constitution by funding school districts in large part based on the local property tax, which resulted in strikingly unequal resources for schools throughout the State, depending on the local tax base. This meant schools in richer neighborhoods were much more well-funded than those in poorer ones. Therefore, children living in wealthy neighborhoods received a far better education than children living in poor ones.

Two years earlier, the California Supreme Court had held in Serrano v. Priest190 that education is a fundamental right and the state violated equal protection by providing school funding based in large part on the local property tax base, which varied greatly depending on the wealth of the community. While the analysis in Serrano was based almost entirely on the federal Constitution, the California Supreme Court effectively cert-proofed its opinion by holding that the same result would be obtained under the state constitution.191

When the U.S. Supreme Court made its ruling in San Antonio, it was well aware of Serrano, and indeed added a "cautionary postscript" to its opinion, effectively disapproving what it viewed as the unwise incursion of the California Supreme Court into functions reserved to the political branches of government: "The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States . . . ."192 Noting that it "lack[ed] both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues,"193 the Court was unwilling to take on the task of defining and enforcing a constitutionally required level of education.194

As noted, only two justices disagreed, although two other justices would have ruled for petitioner on other grounds.195 Justice Marshall's magisterial dissent, which takes up over 60 pages in the U.S. Reports, went unheeded.196 The Court

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marry is guaranteed to same-sex couples by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. In both cases, the Court dug deep into the ether of constitutional interpretation in order to settle highly contentious social issues. The Court is unlikely to take such a leap when it comes to education.

188. *See generally* William A. Fischell, *Did* Serrano *Cause Proposition 13?*, 42 NAT'L TAX. J. 465 (1989) (author answers question in the affirmative).

189. 411 U.S. 1, 137 (1973).

190. 487 P.2d 1241, 1244 (Cal. 1971).

191. *See id.* at 1250 n.11 ("Consequently, our analysis of plaintiffs' federal equal protection contention is also applicable to their claim under these state constitutional provisions.").

192. *Rodriguez*, 411 U.S. at 58.

193. *Id.* at 41.

194. *Id.* at 73.

195. *See id.* at 63 (Brennan, J., dissenting); *id.* (White, J., dissenting).

196. *See id.* at 71 (Marshall, J., dissenting).

has never deviated from this position, noting perhaps the sad fate of the California school system as Serrano v. Priest was implemented.197

The concept of vital rights sidesteps these problems. The only effect that recognition of such a right would confer would be heightening the standard of scrutiny a court applies when evaluating prophylactic legislation concerning that right—essentially codifying the Court's analysis in Lane. Another important advantage is that fundamental rights, once announced by the Supreme Court, are difficult or impossible to roll back. While from time to time the Court has reversed course after it had first refused to recognize a fundamental right,198 it is difficult to come up examples where the Court has repudiated a right once it recognized the right as fundamental. Vital rights, by contrast, are not based explicitly on the Constitution but rather reflect a pragmatic judgment about current societal arrangements, priorities, and institutions. They can be recognized and provide a measure of predictability, so long as they reflect the current cultural and political reality. When society changes and previously recognized vital rights no longer reflect current norms, they can be jettisoned or modified without undertaking the daunting task of amending or re-interpreting the Constitution.

At the same time, the panoply of vital rights can be expanded, as the need arises and social forms evolve. Without undertaking the analysis, it is difficult to say for certain whether there are currently any vital institutions in addition to courts and schools, but other possibilities suggest themselves for inclusion now or in the future: emergency health care facilities, prisons, public parks, sidewalks, and homeless shelters. Each has a significant connection to the exercise of fundamental rights and may qualify as vital institutions.

Another valid concern is whether the concept of vital rights will have the effect of making constitutional law even more complex and uncertain, exacerbating the issues raised by the Court's recognition of fundamental rights.199 However, in reality, the Rubicon has already been crossed. As discussed above, the Supreme Court has long considered education to be a vital right, and in Lane and Georgia the Court expanded the concept to include the courts and prison systems. Thus, there is an advantage to expressly acknowledging the concept of vital rights, and articulating its parameters.

Another positive impact of acknowledging the concept of vital rights is that it can help restore the balance between Judicial and Congressional power, at least from the perspective of the Legislative branch.

One might validly question whether it makes sense to add yet another amorphous layer of rights atop the already amorphous fundamental rights framework. However, I believe the Supreme Court is already doing this, as demonstrated most clearly by Tennessee v. Lane and United States v. Georgia. The Court does not, as a practical matter treat all State activities with equal deference. When it comes to courts and prisons (Lane and Georgia, respectively), where individual rights are directly implicated by the State's activities, the Court is far more inclined to defer to congressional judgments than where the State is acting as an employer (Garrett, Kimel).

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197. *See id.* n.189.

198. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2002) (overruling Bowers v. Hardwick 478 U.S. 186 (1986)); Brown v. Board of Education, 347 U.S. 483 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)).

199. *See* Randy Barnett, *Who's Afraid of Unenumerated Rights?* 9 U. PA. J. CONST.L.1-22 (2006).

Nor would it be particularly difficult to identify areas of State activity that directly implicate fundamental rights. The activity in question must be one that involves government interaction with the public in a way that implicates individual rights. Courts, prisons, schools, law enforcement quite clearly qualify; operating hockey rinks just as obviously does not. While there may be some activities that are debatable—there are always close cases—these could be eliminated by a strong presumption that State activities do not implicate vital rights unless it is clear beyond reasonable debate that they do. While this will take some effort on the part of the courts, once the principal categories of vital rights are established, they would remain relatively stable unless and until overtaken by historical events. The gains in terms of stability and predictability when Congress passes prophylactic legislation are well worth the effort.

VII. CONCLUSION

Education is one of the most fundamentally important services provided by the government. It gives people a foundation on which they build their lives and future success. Increased levels of education have been correlated with everything from greater levels of civic participation, to higher levels of income, and even to increased life expectancy.

Inequalities have long plagued the American educational system. This is especially true when it comes to the disabled, who face greater levels of discrimination in all walks for life, but especially in regards to government services. In response to this evil, Congress passed Title II of the ADA, which sought to guarantee the disabled equality in access to public services.

The Court's holding in Tennessee v. Lane requires lower courts to judge the congruence and proportionality of Title II's application on an 'as applied' basis. Issues dealing with discrimination in education are historically afforded rational basis review. The Supreme Court has never found the test for congruence and proportionality satisfied when the right in question is to be free from irrational discrimination. Accordingly, many courts are having a difficult time applying Title II to the ADA. There is a sense that rational basis is not really appropriate—that education is of such vital importance that it is an injustice to treat it as if it were no different than allocating seats at a state-owned hockey-rink. Nevertheless, some courts feel bound by the lines of historical practice. Because of the way the congruence and proportionality test has traditionally been administered, courts feel unable to follow their intuition about the importance of education, and to conclude that Congress has the authority to provide an effective remedy when states deny full participation in the educational system to the weakest among us.

However, in a post-Lane world, that intuition need no longer be ignored. By allowing prophylactic legislation even without a showing that there was any actual denial of a fundamental right, the Court created a release valve for cases where strict adherence to jurisprudence is at war with common sense. This paper proposes how the Lane analysis can be broadened and generalized by recognizing the twin concepts of vital rights and vital institutions. Adopting this approach will codify the Supreme Court's analysis in Lane and allow for the use of prophylactic legislation where it is hard or impossible to show actual violations of constitutional rights, but that which is being violated nevertheless has such a significant nexus to the exercise of fundamental rights that its protection is vital. Education is one such vital right and the educational system is a vital institution. There are doubtless others.

Identifying areas of State activity that directly implicate fundamental rights and freeing Congress of the need to create a legislative record demonstrating congruence and proportionality when passing prophylactic legislation will give Congress broader powers to abrogate Eleventh Amendment sovereign immunity where it believes it is necessary to do so in order to protect individual rights. At the same time, it will retain the strict regime of Flores for the many other areas of State activity where individual rights are seldom directly implicated, such as operation of quasi-commercial activities and other non-essential functions. Adopting this regime will also encourage Congress to focus its attention on specific State functions rather than passing blunderbuss statutes and then waiting to see which majority of Justices will prevail in upholding or striking down particular legislative enactments. This, I believe, will strike a better balance than now prevails between the power of Congress to legislate and the autonomy of the States.