FOURTEENTH AMENDMENT DUE PROCESS RIGHTS V. STATES' SOVEREIGN IMMUNITY

by LOUIS A. TROSCH*

I. INTRODUCTION

The voting patterns of our current U.S. Supreme Court suggest that there are sharp divisions between the justices in one key area: civil rights. In recent years, the conservative justices have voted as a five-member majority block to subordinate individual rights to states' rights. The majority's protection of states' rights has resulted in striking down remedial measures in three civil rights statutes that had given state employees a cause of action against the state employers.[1]

There are two carefully drawn exceptions, thus far established, to state sovereign immunity from suits for money damages: equal protection and due process. Litigants have generally been unsuccessful in their efforts to seek money damages for state violations of federal equal protection laws. The due process line of cases examines whether violations of due process by states can be remedied by suits for money damages. The Supreme Court's ruling in *Tennessee v. Lane*,[2] involving

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[1] *See* Kimel v. Florida Board of Regents, 528 U.S. 62, 88 (2000); United States v. Morrison, 520 U.S. 598, 598-613 (2000); University of Alabama v. Garrett, 531 U.S. 356 (2001).

[2] 541 U.S. 509 (2004).

firmly rooted constitutional due process rights, indicates that litigants will be more successful remedying these violations despite the sovereign immunity barrier. It is the purpose of this article to analyze the extent to which due process rights carry greater constitutional protection than state sovereign immunity.

II. ELEVENTH AMENDMENT SOVEREIGN IMMUNITY DOCTRINE

A. Suits Pursuant to Federal Laws: A Brief History of the Doctrine

The Eleventh Amendment states, "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."[3] The Amendment prohibits suit in federal courts against state governments in law, equity, or admiralty, by a state's own citizens, citizens of another state, or citizens of foreign countries.[4] Moreover, the Supreme Court has recently interpreted the Eleventh Amendment to prohibit lawsuits in state courts against state governments without their consent.[5]

Despite such an expansive reading of the Eleventh Amendment, the Supreme Court has acknowledged that states' immunity from suit in federal court is not absolute. Unwilling to trust that state courts will independently uphold and enforce the Constitution and federal laws, the Supreme Court has devised several means to circumvent sovereign immunity and ensure federal court review of illegal state actions.[6]

One of the ways the Court has avoided the broad prohibition of the Eleventh Amendment has been to allow suits against states pursuant to federal laws. The Fourteenth Amendment provides in relevant part: "No State shall...deprive any person of life, liberty, or property without due process of law; nor deny any person...equal protection under the law."[7] Section 5 of the Fourteenth Amendment gives Congress the power "to enforce, by appropriate legislation, the provisions of this Article."[8] As such, Congress may abrogate states' sovereign immunity when acting pursuant to § 5 of the Fourteenth Amendment.

Fitzpatrick v. Bitzer[9] is the seminal case holding that Congress may authorize suits against state governments when it is acting pursuant to its powers under the Fourteenth Amendment.[10] The Court reasoned

[3] U.S. CONST. AMEND XI.
[4] ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.1, at 394 (4th ed. 2003).
[5] Alden v. Maine, 527 U.S. 706 (1999).
[6] CHEMERINSKY, *supra* note 5, § 7.1, at 394.
[7] U.S. CONST. AMEND. XIV, § 5.
[8] *Id.*
[9] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)
[10] *Id.* at 456.

that the Fourteenth Amendment was specifically intended to limit state sovereignty, and, that through ratification of the Amendment, the States empowered Congress with the ability to enforce its substantive guarantees.[11] The Court concluded that such enforcement could include providing for private suits against the states without violating the doctrine of sovereign immunity.[12]

In 1996, the Supreme Court reaffirmed *Fitzpatrick* in *Seminole Tribe of Florida v. Florida*,[13] holding that Congress may abrogate the Eleventh Amendment only when acting pursuant to its § 5 powers under the Fourteenth Amendment and not under any other constitutional authority.[14] This overruled a series of cases decided in the late 1980s, including *Pennsylvania v. Union Gas Co.*[15], in which the Supreme Court held that Congress may allow suits when acting pursuant to other constitutional powers, including its Commerce Clause power, so long as the federal law clearly and expressly permits federal court jurisdiction over state governments in its text.[16] The *Seminole Tribe* decision thus increased states' ability to use sovereign immunity as a defense to suit. Moreover, the decision articulated a two-part test for lower courts to apply in determining whether Congress has validly abrogated states' sovereign immunity: (1) whether Congress has "unequivocally expressed its intent to abrogate immunity;" and (2) whether Congress has acted pursuant to a "valid exercise of power."[17]

B. Appropriate Legislation under § 5

The critical question after the *Seminole Tribe* decision became whether and what type of legislation constitutes a valid exercise of Congress's § 5 powers. Beginning with *City of Boerne v. Flores*,[18] the Supreme Court decided a series of cases that sharply limited Congress' power to regulate the states under § 5.[19]

[11] *Fitzpatrick*, 427 U.S. at 454-456.

[12] *Id.* at 456.

[13] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

[14] *Id.* at 59.

[15] Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), overruled by Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

[16] CHEMERINSKY, *supra* note 5, § 7.7, at 449.

[17] *Seminole Tribe*, 517 U.S. at 55 (citing *Green v. Mansour*, 474 U.S. 64, 68, 106 (1985)).

[18] City of Boerne v. Flores, 521 U.S. 507 (1997).

[19] National Council on Disability, *Tennessee v. Lane:* The Legal Issues and the Implications for People with Disabilities (2003), *available at* http://www.ncd.gov/newsroom/publications/legalissues.html (last visited Feb. 10, 2004) (copy on file with author) [hereinafter Legal Issues].

1. Requirement of Congruence and Proportionality:

In *City of Boerne*, the Court struck down the Religious Freedom Restoration Act (RFRA), which required state laws burdening religious freedom to meet a "compelling interest" test.[20] The Court had already defined the applicable test for these laws in *Employment Division v. Smith*,[21] holding that neutral laws of general applicability burdening religious practices need not be supported by a compelling government interest.[22] The RFRA, adopted in 1993, was designed to supersede the standard as set forth in *Smith* and restore the compelling interest test to all laws burdening the free exercise of religion.[23] The Supreme Court declared the RFRA unconstitutional as exceeding the scope of Congress' power under § 5 and held that Congress is limited to enacting laws that prevent or remedy violations of rights already recognized by the Court. Congress may not create new constitutional rights or expand the scope of rights as already interpreted by the Court.[24]

Moreover, in *City of Boerne*, the Court said that Congressional legislation under § 5 must be narrowly tailored to remedying constitutional violations, stating that there must be a "congruence and a proportionality between the injury to be prevented and the means adopted to that end."[25] Congress may prohibit conduct which is not in itself unconstitutional if such prohibition prevents the constitutional violations primarily targeted by the legislation; however, such prohibitions must be a congruent and proportional response to documented constitutional violations.[26]

2. Requirement of an Adequate Legislative Record:

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank[27] followed directly from *Seminole Tribe* and *City of Boerne*. In *Florida Prepaid*, the Court reaffirmed that Congress can authorize suits against states pursuant only to § 5 of the Fourteenth Amendment.[28] Applying the restrictive test articulated in *City of Boerne*, the Court held federal legislation authorizing suits against state governments for patent infringement is impermissible as not

[20] *City of Boerne* 521 U.S. at 532; *see also* 42 U.S.C. §§ 2000bb-1-4 (1994).
[21] Employment Division v. Smith, 494 U.S. 872 (1990).
[22] *Id.* at 885.
[23] 42 U.S.C. § 2000bb-1.
[24] *City of Boerne*, 521 U.S. at 519-520.
[25] *Id.* at 520.
[26] *Id.* at 518, 532.
[27] Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999).
[28] *Id.* at 636-37.

"congruent" or "proportionate" to remedy constitutional violations.[29] The Court stated: "In enacting the Patent Remedy Act, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations...the legislative record thus suggests that the Patent Remedy Act does not respond to a history of widespread and persisting deprivation of constitutional rights of the sort Congress has faced in enacting proper prophylactic legislation."[30] Hence *Florida Prepaid* represented a subtle shift in the Court's § 5 analysis, emphasizing the necessity of an adequate historical record of state constitutional violations justifying a prescribed remedy.[31]

III. FEDERAL EQUAL PROTECTION LAW V. SOVEREIGN IMMUNITY

A. Age Discrimination in Employment

In 2000, the Court applied the congruence and proportionality test to civil rights legislation for the first time in *Kimel v. Florida Board of Regents*,[32] holding that the Age Discrimination in Employment Act (ADEA) is not applicable to state employers.[33] The ADEA makes it unlawful for employers "to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual...because of such individual's age."[34] Classifications based on age are generally only subject to rational basis review. In other words, the state need only show that the classification is rationally related to some legitimate state purpose in order for the classification to be deemed constitutional.[35] Therefore, the Court concluded that the broad prohibition of age discrimination in the ADEA exceeded the scope of Congress' power under § 5 as it imposed a higher level of judicial scrutiny on age classifications than that imposed by the Court's equal protection analysis.[36] This, the Court held, was an impermissible expansion of the substance of constitutional protection for the elderly.[37]

The Court further emphasized Congress' failure to uncover any significant pattern of age discrimination by state governments which would justify the legislation.[38] The Court, examining the legislative record that led to the passage of the ADEA, stated that because of "the

[29] *Id.* at 646-47; *see also City of Boerne*, 521 U.S. at 520.
[30] *Id.* at 640
[31] *Id.* at 645; *see also* Legal Issues, *supra* note 19.
[32] Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).
[33] *Id.* at 91.
[34] 29 U.S.C. § 623 (a)(1) (1994).
[35] *Kimel*, 528 U.S. at 83.
[36] *Id.* at 86-88.
[37] *Id.*
[38] *Id.* at 88-91.

lack of evidence of widespread and unconstitutional age discrimination by the states, we hold that the ADEA is not a valid exercise of power under § 5 of the Fourteenth Amendment."[39] *Kimel* confirmed and elaborated on the standard as set forth in *Florida Prepaid* by insisting on a record of constitutional violations by the states in order to justify remedial legislation.[40]

B. Disability Discrimination in Employment

The second instance in which the Supreme Court applied the congruence and proportionality test to limit state employee's remedies for state civil rights violations was *Board of Trustees of the University of Alabama v. Garrett.*[41] In *Garrett*, two state employees, alleging that the State of Alabama had subjected them to disability discrimination and denied them reasonable accommodation, sued for damages under Title I of the Americans with Disabilities Act (ADA).[42] In a five to four decision, the Court held that state governments may not be sued for damages under Title I, which prohibits employment discrimination based on disability and requires reasonable accommodations for employees with disabilities.[43] The Court held that Congress failed to properly abrogate the states' Eleventh Amendment immunity when it provided state employees with a cause of action against state employers for violations of the ADA.[44]

Applying principles first articulated in *Boerne* and *Kimel*, the Court reasoned that overriding the state's sovereign immunity required a three-pronged abrogation analysis.[45] First, the Constitutional right at issue must be identified.[46] Second, the history of the States' conduct must be examined to determine if there have been constitutional violations.[47] Finally, if there is a pattern of such violations, the remedies established by Congress must be examined to determine if they are congruent and proportional.[48]

The Court identified the constitutional right at issue in *Garrett* as freedom from employment discrimination based on disability.[49]

[39] *Id.* at 91.
[40] *See* Legal Issues, *supra* note 19.
[41] Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).
[42] *Id.* at 360.
[43] *Id.* at 374; *see also* 42 U.S.C. §§ 12112 (a), (b)(5)(A).
[44] *Id.*
[45] *City of Boerne,* 521 U.S. at 520; *Kimel*, 528 U.S. at 91; *see also* Legal Issues, *supra* note 19.
[46] *Garrett*, 531 U.S. at 365-72.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 366.

Cleburne v. Cleburne Living Center, Inc.[50] set forth the standard of review applicable to classifications based on disability, stating that such classifications, like those based on age, would receive only the minimum rational basis review.[51] State action, being subjected to rational basis equal protection scrutiny does not violate the Fourteenth Amendment when such scrutiny rationally furthers the purpose identified by the State.[52] In *Garrett*, the Court explained the result of *Cleburne* as not requiring States to make special accommodations for the disabled so long as their conduct towards such individuals is rational; if special accommodations for the disabled are to be required, "they have to come through positive law and not through the equal protection clause."[53]

The Court next looked to the legislative record to determine whether Congress had identified a "history and pattern" of unconstitutional disability discrimination by State employers.[54] It found that the great majority of the incidents supporting Congress' general finding of disability discrimination did not deal with the activities of the States, and the few which did fell "far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based."[55] Hence the Court held that the legislative record of the ADA failed to identify a pattern of irrational State discrimination in employment against the disabled sufficient to justify prophylactic legislation.[56]

But even if Congress had found a pattern of unconstitutional disability discrimination by the States, the Court reasoned, "the rights and remedies created by the ADA against the States" were not a congruent and proportional response.[57] Title I requires State employers to make special accommodations for the disabled unless they can demonstrate that the necessary accommodation would constitute an "undue hardship on the operation of business."[58] The Court found this scheme to be over-inclusive because its "accommodation duty far exceeds what is constitutionally required" of State employers when justifying rational classifications based on disability.[59] The majority thus reiterated its holding in *City of Boerne* that Congress may legislate

[50] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).
[51] *Id.* at 446.
[52] *Garrett*, 531 U.S. at 367 (quoting *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)).
[53] *Id.* at 367-68.
[54] *Id.* at 368.
[55] *Id.* at 370.
[56] *Id.*
[57] *Id.* at 372.
[58] 42 U.S.C. § 12112 (b)(3)(A).
[59] *Garrett*, 531 U.S. at 372.

pursuant to § 5 so long as it does not change the substantive constitutional guarantees of the Fourteenth Amendment as interpreted by the Court.

Garrett left open, however, the question whether Title II constitutes a valid exercise of Congress' § 5 enforcement power.

C. Gender Discrimination in Employment

In June 2003, the Court issued its decision in *Nevada Department of Human Resources v. Hibbs*.[60] *Hibbs* considered whether the Eleventh Amendment prohibits individuals from suing states for damages under the Family and Medical Leave Act of 1993 (FMLA).[61] The FMLA entitles an eligible employee up to 12 weeks of unpaid leave annually for the onset of a "serious health condition" in the employee's spouse, child, or parent.[62] The plaintiff in this case, an employee of the Nevada Department of Human Resources, sought leave under the Act to care for his ailing wife.[63] Subsequently, he was fired by his employer for failure to return to work prior to exhausting his 12 weeks of leave.[64]

In a six to three decision, the Court upheld the damages remedy noting that the FMLA's purpose was to protect the right to be free from gender-based discrimination, a classification subject to heightened scrutiny.[65] The majority distinguished *Kimel* and *Garrett* on the ground that age and disability discrimination are subject only to rational basis scrutiny.[66] The Court went on to say, "because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than [the] rational basis test, it was easier for Congress to show a pattern of state constitutional violations."[67]

Moreover, the Court reasoned that, unlike Title I of the ADA, the FMLA was sufficiently narrowly-tailored to abrogate states' immunity under the Eleventh Amendment.[68] The Court found the impact of the discrimination targeted by the FMLA to be significant, based on mutually reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities, to be significant.[69] By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family

[60] Nevada v. Hibbs, 538 U.S. 721 (2003).
[61] 29 U.S.C. § 2612 (2003); *see also* Legal Issues, *supra* note 19.
[62] 29 U.S.C. § 2612 (a)(1)(c).
[63] *Hibbs*, 538 U.S. at 725.
[64] *Id.*
[65] *Id.* at 728; *see also* Craig v. Boren, 429 U.S. 190, 197-99 (1976).
[66] *Hibbs*, 538 U.S. at 727.
[67] *Id.* at 731.
[68] *Id.* at 740.
[69] *Id.* at 738.

care would no longer be stigmatized as an "inordinate drain on the workplace caused by female employees," and that "employers could not evade leave obligations simply by hiring men."[70] Hence the Court found the FMLA, narrowly targeted at the fault line between work and family, and affecting only one aspect of the employment relationship, a congruent and proportional response to sex-based discrimination by the states.[71]

IV. FUNDAMENTAL DUE PROCESS RIGHTS

Among the rights protected by the Due Process Clause of the Fourteenth Amendment are a variety of basic constitutional guarantees, infringements of which are subject to searching review.[72] For criminal defendants, the Due Process Clause has been interpreted to provide that "an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings."[73] The Sixth Amendment guarantees an accused all the rights necessary for a full defense, including being informed of the nature and cause of an accusation, confronted with witnesses against him, having compulsory process for obtaining witnesses in his favor, and having assistance of counsel for his defense.[74] These rights are part of the "due process of law" that is guaranteed by the Fourteenth Amendment.[75] The rights to notice, confrontation, and compulsory process, taken together, guarantee that a charge may be answered in a manner considered fundamental to the fair administration of American justice.[76] Moreover, the Constitution guarantees to criminal defendants that court proceedings be open to the public, and the right to trial by a jury of their peers.[77]

In civil litigation, parties have an analogous due process right to be present in the courtroom and to meaningfully participate unless their exclusion furthers important governmental interests.[78] The Due Process clause requires the States to afford civil litigants a "meaningful opportunity to be heard."[79] At a minimum, the clause requires that deprivation of life, liberty or property be preceded by notice and

[70] *Id.* at 737.
[71] *Id.* at 738-740.
[72] *See* Tennessee v. Lane, 124 S. Ct. 1978, 1988 (2004).
[73] Faretta v. California, 422 U.S. 806, 819 (1975).
[74] *Id.* at 818.
[75] *Id.*
[76] *Id.*
[77] U.S. CONST. AMEND. VI; U.S. CONST. AMEND. I.; *see also Lane*, 124 S. Ct. at 1988.
[78] *See* Popovich v. Cuyahoga County Court of Common Pleas, 276 F. 3d 808, 813-14 (6th Cir. 2002).
[79] Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

opportunity for hearing appropriate to the nature of the case.[80] Thus the State's obligations under the Fourteenth Amendment are not generalized ones; rather, "the State owes to each individual that process which, in light of the values of a free society, can be characterized as due."[81]

V. DUE PROCESS V. SOVEREIGN IMMUNITY: *TENNESSEE V. LANE*

On May 17th, 2004 the Supreme Court rendered its decision *Tennessee v. Lane*,[82] holding that Title II of the Americans with Disabilities Act of 1990 (ADA)—which provides that no qualified person shall be excluded from or denied benefits of a public program by reason of a disability, and which authorizes money damages against the states—is a valid exercise of congressional power under § 5 of the Fourteenth Amendment as applied to enforce the constitutional right of access to the courts.[83] This decision signals a shift away from the Court's trend of protecting states' rights under the Eleventh Amendment, particularly where firmly rooted due process rights are implicated.

A. History and Purpose of Title II of the ADA

The Americans with Disabilities Act of 1990 grew out of the Civil Rights Movement of the 1960s.[84] That movement gave rise to other civil rights movements, most notably the Women's Rights Movement and the Disability Rights Movement.[85] While minorities and women were protected by civil rights legislation passed by Congress during the 1960s, the rights of individuals with disabilities were not protected by federal legislation until much later.[86] Although the Civil Rights Act of 1964 prohibited discrimination on the basis of race, religion, or national origin, and applied to entities receiving federal funds, employers, and places of public accommodation, it did not extend protection to people with disabilities.[87]

[80] *Id.* at 378.

[81] *Id.* at 380.

[82] Tennessee v. Lane, 124 S. Ct. 1978 (2004); *see also* 42 U.S.C. § 12132 (2003).

[83] *Lane,* 124 S. Ct. at 1984-94.

[84] *See*, e.g., H.R. 12, 154, 92d Cong. 1st Sess., 117 CONG. REC. 45.945 (1971); S.3044, 92d Cong., 2d Sess., 118 CONG. REC. 525 (1972); H.R. 14, 033, 92d Cong., 2d Sess., 118 CONG. REC. 9712 (1972); H.R. 370, 99th Cong., 1st Sess., 131 CONG. REC. H104 (daily ed. Jan., 7, 1985).

[85] *Id.*

[86] Title V of the Rehabilitation Act initiated the process of protecting the basic equal rights of people with disabilities. *See* 29 U.S.C. §§ 790-794 (1994).

[87] 42 U.S.C. §§ 2000a-2000e (1997).

With some modifications, Congress enacted the ADA on July 26, 1990 pursuant to its powers under the Fourteenth Amendment and the Interstate Commerce Clause.[88] The ADA was heralded as one of the most sweeping, comprehensive pieces of legislation designed to correct the historical exclusion of disabled individuals from specific social contexts. Borrowing language from the National Council on the Handicapped, the ADA was specifically enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, enforceable standards addressing discrimination against people with disabilities."[89] In its enumerated findings, the ADA described individuals with disabilities as "a discrete and insular minority, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."[90]

For purposes of the act, a "disabled" person must have "a physical or mental impairment that substantially limits one or more of the major life activities," have "a record of such an impairment," or be "regarded as having such an impairment."[91] This definition of disability applies to the antidiscrimination provisions in each of the ADA's titles, which regulate employment (Title I), public services (Title II), public accommodations offered by private entities (Title III), and telecommunications (Title IV).[92] Of these titles, only I and II have clashed with the restrictions of the Eleventh Amendment because only Title I and Title II provide litigants with a right to seek monetary damages from state government entities.[93]

Title II of the ADA prohibits disability-based discrimination in the provision of public services. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or

[88] Though in 1996, the Court rejected the principle that Congress could use its powers under the Interstate Commerce Clause to abrogate states' sovereign immunity in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Senate passed the final bill on July 12, 1990 with a vote of 377 in favor of the bill and 28 opposing. The House passed the final version on July 13, 1990 with 91 in favor of the bill and 6 opposing.

[89] 42 U.S.C. § 12101(b)(1)-(2) (2003).

[90] 42 U.S.C. § 12101 (a)(7).

[91] 42 U.S.C. § 12102 (2) (2003).

[92] 42 U.S.C. §§ 12111-12117, §§12131-12165, §§12181-12189 (2003). 47 U.S.C. §225 (2003); *see also* Seth A. Horvah, *Disentangling the Eleventh Amendment and the Americans with Disabilities Act: Alternative Remedies for State-Initiated Disability Discrimination under Title I and Title II*, 2004 U. ILL. L. REV. 231, 240 (2004).

[93] Horvah, *supra* note 92.

activities of a public entity or be subjected to discrimination by any such entity."[94] Unlike Title I, Title II applies specifically to public entities and prohibits state courts, state agencies, or individual state officials from engaging in discriminatory conduct against the disabled. It applies whenever the conduct denies state benefits or restricts participation in any public program or activity such as public education, transportation, recreation, health care, social services, law enforcement, court proceedings, or the political process itself.[95]

B. Tennessee v. Lane

Following *Garrett,* the Sixth Circuit Court of Appeals, sitting en banc, heard argument in *Popovich v. Cuyahoga County Court of Common Pleas:*[96] a suit brought by a hearing-impaired litigant who sought money damages under Title II of the ADA for the state's failure to accommodate his disability in a child custody proceeding.[97] The majority interpreted *Garrett* to bar private ADA suits against states based on equal protection principles, but not those relying on the due process clause.[98] The Sixth Circuit therefore permitted a Title II damages action, based on a due process right of access to the courts, to proceed against the state's immunity claim.[99]

In 1998 George Lane and Beverly Jones, both paraplegics who use wheelchairs, filed a lawsuit against the State of Tennessee and 25 Tennessee counties alleging that several courthouses in the state were inaccessible to them.[100] After police charged Lane with two misdemeanor offenses in 1996, he was summoned to appear at the Polk County Courthouse in Benton, Tennessee.[101] At that time, all court proceedings in the courthouse took place on the second floor and the courthouse had no elevator.[102] At his first appearance, Lane dragged himself up two flights of stairs to get to the courtroom.[103] Once there, he was arraigned and ordered to appear at a later date for hearing.[104] Upon his return, Lane refused to climb to the courtroom and declined to be carried by officers.[105] The court ordered Lane's arrest, and he was

[94] 42 U.S.C. § 12132.
[95] *See* 42 U.S.C. §§ 12131-12165; *see also* Legal Issues, *supra* note 19.
[96] Popovich v. Cuyahoga County Court of Common Pleas, 276 F. 3d 808 (6th Cir. 2002).
[97] *Id.*
[98] *Id.* at 811-16.
[99] *Id.* at 815-16.
[100] *Lane,* 124 S. Ct. at 1982.
[101] *Id.* at 1982-1983; *see also* Legal Issues, *supra* note 19.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 1983.

jailed.[106] In subsequent proceedings, Lane remained on the ground floor while his counsel went back and forth between him and the second-floor courtroom.[107] He ultimately pled guilty to driving with a revoked license in the accident in which he lost his leg.[108] Jones, a certified court reporter in Tennessee, alleged that because many courthouses in Tennessee are inaccessible to her, her opportunity to work and participate in the judicial process has been limited.[109] At the time the complaint was filed, Jones identified 25 counties in Tennessee that were inaccessible to her.[110]

Lane and Jones brought suit under Title II of the ADA, which prohibits government entities from denying access to public services to individuals on the basis of disability.[111] In the District Court, the State of Tennessee argued that Congress lacked the power to abrogate the states' immunity from damage claims in federal court under the Eleventh Amendment.[112] Following the *Popovich* decision, the Court of Appeals for the Sixth Circuit affirmed the lower court's denial of Tennessee's motion to dismiss and upheld the constitutionality of Title II as a means to enforce due process violations.[113] Tennessee then sought review in the Supreme Court, which Lane and Jones supported.[114]

On May 17, 2004, the Supreme Court affirmed the decision of the Sixth Circuit holding that Title II of the ADA, as applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment.[115] In determining whether Congress constitutionally abrogated Tennessee's Eleventh Amendment immunity, the Court required the resolution of two predicate questions: (1) whether Congress unequivocally expressed its intent to abrogate that immunity; and (2) if so, whether it acted pursuant to valid grant of constitutional authority.[116] The first question was easily answered as the ADA specifically provides: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or

[106] *Id.*
[107] Legal Issues, *supra* note 19.
[108] *Id.*
[109] *Lane*, 124 S. Ct. at 1983.
[110] Legal Issues, *supra* note 19.
[111] 42 U.S.C. §§ 12131-12165.
[112] Lane v. Tennessee, 315 F.3d 680, 682 (6th Cir. 2003), *aff'd*, Tennessee v. Lane, 541 U.S. 509 (2003); *see also Lane*, 124 S. Ct. at 1983.
[113] *Id.*
[114] *Lane*, 124 S. Ct. at 1984.
[115] *Id.* at 1984-94.
[116] *Id.* at 1985 (citing *Kimel*, 528 U.S. at 72-73).

State court of competent jurisdiction for a violation of this chapter."[117] The Court then turned to the second question.

Following the three-prong abrogation analysis articulated in *Garrett*, the Court identified the Constitutional right or rights that Congress sought to enforce when it enacted Title II.[118] The Court found that Title II, like Title I, seeks to enforce the Fourteenth Amendment's prohibition on irrational disability discrimination.[119] But, the Court reasoned, "it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching review."[120] The Court deemed the constitutional right at issue in *Lane* to be the right of access to the courts guaranteed by the Due Process Clause of the Fourteenth Amendment.[121]

Next, the Court looked to the historical record documenting the unconstitutional treatment of disabled persons in the administration of state services and programs. The Court found that the historical experience reflected in Title II is documented in its past decisions, "which have identified unconstitutional treatment of disabled persons in a variety of settings."[122] The Court further found that the decisions of other courts document a pattern of unconstitutional treatment "in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting."[123]

With respect to the particular right at issue in this case, Congressional findings showed that many states were excluding individuals from courthouses and court proceedings by reason of their disabilities.[124] A report before Congress found that 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by such persons.[125] Congress also heard testimony from disabled persons describing the inaccessibility of local courthouses; and its appointed task force heard examples of their exclusion from state judicial services and programs, "including exclusion of persons with visual and hearing impairments from jury service, failure to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities."[126]

[117] 42 U.S.C. § 12202. (2003).
[118] *Lane*, 124 S. Ct. at 1988 (citing *Garrett*, 531 U.S. at 365).
[119] *Id.* at 1988.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 1989.
[123] *Id.*
[124] *Id.* at 1990.
[125] *Id.*
[126] *Id.* at 1991.

The Court asserted that "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services" makes clear that the inadequate provision of these services and access to public facilities is "an appropriate subject for prophylactic legislation."[127]

The Court subsequently examined whether Title II was an appropriate response to this history and pattern of constitutional violations.[128] As articulated in *City of Boerne*, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[129] In its analysis, the Court reasoned that the remedy chosen by Congress in its enactment of Title II is a limited one.[130] Recognizing that failure to accommodate the disabled "will often have the effect of outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility."[131] However, the legislation does not require that States employ any and all means to make judicial services accessible to persons with disabilities or to compromise essential eligibility requirements for public programs.[132] It merely requires "'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service."[133] The Court found that "this duty to accommodate is consistent with the well-established due process principle that, 'within the limits of practicability, a State must afford to all individuals a reasonable opportunity to be heard' in its courts".[134] Hence the Court deemed Title II's affirmative obligation to accommodate a "reasonable prophylactic measure, reasonably targeted to a legitimate end" and upheld Title II as a valid exercise of Congress § 5 power to enforce the guarantees of the Fourteenth Amendment.[135]

C. Due Process Implications

Because Title II implicates due process rights, it applies in many situations where the court has said state action is subject to heightened scrutiny. Policies interfering with fundamental rights, such as access to judicial proceedings or the right to vote, are subject to a more exacting level of scrutiny and require more persuasive justification than a mere

[127] *Id.* at 1991, 1992.
[128] *Id.* at 1992.
[129] *City of Boerne*, 521 U.S. at 520.
[130] *Lane*, 124 S. Ct. at 1993; 42 U.S.C. § 12131 (2).
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Lane* 124 S. Ct. at 1994 (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).
[135] *Id.* at 1994.

rational basis.[136] In *Garrett*, the Court noted that "Title I does not encompass claims based on substantive rights under the Due Process Clause" and identified the constitutional right at issue as freedom from employment discrimination based on disability.[137] Under *Cleburne,* such discrimination is subject only to rational basis review.[138] The Court noted in *Hibbs*—where it contrasted the standard of review applied to family and medical leave policies with the types of disability discrimination at issue in *Garrett*—that the evidence of state violations in *Garrett* was lacking in large part due to the great deference to the states under rational basis review.[139] In contrast, because the fundamental right of access to the court was implicated in *Lane,* the Court found that Congress was well within its express authority under § 5 of the Fourteenth Amendment to require states to accommodate those with disabilities. Hence the heightened level of scrutiny applicable to fundamental rights made it easier to show that the states had engaged in a pattern of constitutional violations requiring an appropriate Congressional remedy.

VI. DUE PROCESS V. SOVEREIGN IMMUNITY: APPLICATIONS IN OTHER SETTINGS

In *Lane*, the Supreme Court declined to decide whether Title II as a whole satisfies the *Boerne's* three-step congruence and proportionality requirement.[140] Instead, the Supreme Court adopted an "as-applied" test, stating that "nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole... because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further."[141] As such, federal district courts have been struggling with the task of deciding whether, in its enactment of Title II of the ADA, Congress validly abrogated States' immunity in areas other than access to courts.

A. Access to Educational Programs

In the United States District Court for the District of Connecticut, James Johnson brought an action against Southern Connecticut State University and the Bridgeport Hospital Nurse Anesthesia Program for

[136] *Id.*
[137] *Garrett*, 531 U.S. at 365, 366.
[138] *Cleburne*, 473 U.S. at 446.
[139] *Hibbs*, 538 U.S. at 731.
[140] *Lane*, 124 S. Ct. at 1992-93.
[141] *Id.*

violation of Title II of the ADA.[142] After completing the academic stage of the nurse-anesthetist training program at Southern Connecticut in May 1999, Johnson began the clinical nursing portion of the program.[143] However, in March 2001, his performance level in the clinical portion began to decline due to extreme anxiety.[144] After meeting with the medical director for the program, Johnson was informed that his clinical work had been suspended until September 1, 2001.[145] Three months after his return in September, Johnson was dismissed from the program.[146] Johnson claims that despite the defendants' knowledge of his mental disability, the defendants failed to reasonably accommodate him during the three month time period between his return from his leave of absence until the time he was dismissed.[147] As a result, Johnson alleged a violation of Title II of the ADA for disability discrimination in education, requesting monetary damages.[148]

In its analysis, the District Court reasoned:

> In the wake of *Lane*, it appears that a private suit for money damages under Title II of the ADA may be maintained against a state only if the plaintiff can establish that the Title II violation involved a fundamental right...The Supreme Court has repeatedly held that the right to an education is neither explicitly nor implicitly granted in the Constitution, and as such, cannot be considered 'fundamental.[149]

Moreover, the Court stated, "Johnson's action arises in the higher education setting" and there is "no fundamental right to a higher education."[150] As such, the Court dismissed Johnson's claim under Title II of the ADA.[151]

[142] Johnson v. Southern Connecticut State University and Bridgeport Hospital School of Nurse Anesthesia, No. 3:02-CV-2065, 2004 U.S. Dist. LEXIS 21084, at *1 (D. Conn. Sept. 30, 2004).

[143] *Id.* at *4

[144] *Id.*

[145] *Id.* at *5.

[146] *Id.*

[147] *Id.* at *6.

[148] *Id.*

[149] *Id.* at *13; *see* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35-37 (1973) (rejecting claim that education is a fundamental right); *see also* Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 458 (1988); Papasan v. Allain, 478 U.S. 265, 284-85 (1986); Martinez v. Bynum, 461 U.S. 321, 328 (1983); Plyler v. Doe, 457 U.S. 202, 223 (1982).

[150] *Johnson*, 2004 LEXIS 21084, at *14.

[151] *Id.* at *15,

Since *Lane*, another district court has held that education is not a fundamental right for purposes of Title II.[152] In *McNulty v. Board of Education of Calvert County*,[153] a secondary school student diagnosed with Attention Deficit Hyperactivity Disorder was subjected to various disciplinary measures by school personnel.[154] Ryan McNulty was suspended, reassigned to an alternative education program, and threatened with failing grades.[155] At two meetings held about his behavioral issues, school administrators and officials voted that his conduct was not a manifestation of his disability.[156] McNulty brought this action alleging disability discrimination in violation of Title II of the ADA and requesting money damages.[157]

In its analysis, the District Court noted that the *Lane* Court "did not decide whether the statutory abrogation of sovereign immunity was constitutional with regard to non-fundamental rights, such as education."[158] Therefore, it held that Eleventh Amendment immunity remains intact for education claims under Title II of the ADA."[159]

B. Employment

In September 2004, the United States District Court for the District of Connecticut considered whether Title II covered disability discrimination by municipal employers.[160] Plaintiff Kelly Cormier, a public safety dispatcher for the City of Meriden, brought suit against the City alleging intentional discrimination in violation of Title II of the ADA.[161] Cormier suffers physical impairments resulting from multiple sclerosis and alleged that her supervisors refused to reasonably accommodate her request for a work schedule modification recommended by her physician.[162]

The District Court found that Title II of the ADA only prohibits discrimination in public services and does not cover employment discrimination.[163] The Court reasoned that the differences between Title I and Title II were of such significance to the *Lane* Court as to warrant

[152] *See* McNulty v. Board of Education of Calvert County, No. CIV.A. 2003-2520, 2004 U.S. Dist. LEXIS 12680 (D. Md. July 8, 2004).
[153] *Id.*
[154] *Id.* at *1.
[155] *Id.* at *1-2.
[156] *Id.* at *1.
[157] *Id.* at *2.
[158] *Id.* at *3; *see also Lane*, 124 S. Ct. at 1982.
[159] *McNulty*, 2004 LEXIS 12680, at *3.
[160] Cormier v. City of Meriden, No. 3:03CV1819, 2004 U.S. Dist. LEXIS 21104 (D. Conn. Sept. 30, 2004).
[161] *Id.* at *1.
[162] *Id.*. at *1-2.
[163] *Id.* at *2.

different outcomes in its sovereign immunity analysis.[164] In *Garrett*, the Supreme Court found that Title I was not a valid abrogation of state sovereign immunity because there was insufficient factual evidence of past state discrimination in employment.[165] In contrast, the *Lane* Court found a substantial record of "evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services."[166] The Court went on to say that the *Lane* opinion provides a "fairly strong indication that the Supreme Court would not consider Title II to be the appropriate statutory vehicle for employment cases."[167] As such, the District Court interpreted the provisions of Title II as not extending to discrimination in municipal employment.[168]

C. Professional Licenses

In August 2004, The United States District Court for the Southern District of New York considered whether disability discrimination in the granting of licenses to professionals merited the abrogation of states' sovereign immunity under Title II.[169] In July 2002, Jane Roe filed an application with the Committee for admission to the Bar of the State of New York.[170] Question 18(c)(1) of the application asked whether the applicant had any mental or emotional condition that would adversely affect his or her ability to practice law.[171] Roe answered in the negative; however, during a meeting with members of the Committee the following January, Roe was asked whether she was being seen by a psychiatrist, how long she had been seeing the psychiatrist, and what diagnosis the psychiatrist had given her.[172] Soon afterwards, she received a letter from the Committee requesting that she provide a letter from a treating psychologist or psychiatrist describing her condition, prognosis, and diagnosis.[173] Roe, alleging that the Committee regards her as impaired within the meaning of the ADA, sought money damages from the state under Title II of the ADA based on a claim of disability discrimination in admission to the state bar.[174]

[164] *Id.* at *19.
[165] *Garrett*, 531 U.S. at 370; *see also Lane*, 124 S. Ct. at 1987.
[166] *Cormier*, 2004 LEXIS 21104, at *19-20; *Lane*, 124 S. Ct. at 1991.
[167] *Id.* at *20.
[168] *Id.* at *34.
[169] Roe v. Supreme Court of the State of New York, Appellate Division First Department, 334 F. Supp. 2d 415 (S.D.N.Y. 2004).
[170] *Id.* at 417.
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.* at 417-418.

The Court in *Roe* found that "because of an absence of legislative findings establishing a pattern of unconstitutional discrimination in this context, this application of Title II is not a valid exercise of congressional power under § 5 and does not abrogate a state's Eleventh Amendment immunity."[175] The Court stated, "The legislative record of the ADA does not include any findings documenting a pattern of state discrimination in the admission of attorneys to the bar, or more generally in the granting of licenses to professionals."[176] It went on to say that the specific application of Title II to a state's determination of an applicant's qualification for the bar is far removed from the type of discrimination in the administration of public programs and services that *Lane* found to be supported by the congressional record.[177] Moreover, in contrast to the situation confronted in *Lane*, the application of Title II to bar applicants does not enforce basic constitutional guarantees whose violation would trigger a higher standard of judicial review.[178] Therefore, the Court reasoned, "there is no need to address the next prong of the § 5 inquiry and determine whether Title II's remedial provisions are appropriately limited."[179]

D. Inmates' Access to Justice

In September 2004, the United States Court of Appeals for the Eleventh Circuit considered whether Title II validly abrogates states' sovereign immunity in the prison setting.[180] Tracy Miller, a paraplegic wheelchair-bound inmate at Georgia State Prison, was in disciplinary isolation in a high maximum security section of the prison.[181] Able-bodied inmates in disciplinary isolation were housed in less stringent units and enjoyed more basic privileges.[182] Because of the prison's failure to accommodate his wheelchair or other disability-related needs, Miller brought suit seeking money damages for disability discrimination under Title II of the ADA.[183]

Applying the *Boerne/Lane* test to Miller's ADA claims, the District Court identified the constitutional right at issue to be the Eighth Amendment right to be free from cruel and unusual punishment, applicable to the States through the Fourteenth Amendment.[184] In

[175] *Id.* at 422.
[176] *Id.*
[177] *Id.*; *Lane*, 124 S. Ct at 1990.
[178] *Id.* at 423.
[179] *Id.*
[180] Miller v. King, et al., 384 F.3d 1248 (11th Cir. 2004).
[181] *Id.* at 1254.
[182] *Id.*
[183] *Id.* at 1254-55.
[184] *Id.* at 1272.

assessing the history and pattern of state constitutional violations of this right, the Court said that the step-two inquiry had already been decided by the *Lane* Court.[185] In Lane, "the Supreme Court considered evidence of disability discrimination in the context of access to public services and programs generally, rather than focusing only on discrimination in the context of access to the courts, and concluded that Title II in its entirety satisfies *Boerne's* step-two requirement that it be enacted in response to a history and pattern of States' constitutional violations."[186] However, the Court reasoned, "what makes this case radically different from *Lane* is the limited nature of the constitutional right at issue and how Title II, as applied to prisons, would substantively rewrite the Eighth Amendment."[187] In *Lane*, the Supreme Court's conclusion that Title II's remedy is congruent and proportional in the access-to-courts context relied heavily upon the constitutional right at issue and the States' due process obligation to provide individuals with access to the courts.[188] The District Court differentiated the "robust, positive due process obligation of the States to provide meaningful and expansive court access" from "the States' Eighth Amendment negative obligation to abstain from 'cruel and unusual punishment'"[189] Title II, it went on, prohibits far more state conduct in many more areas of prison administration than conceivably necessary to enforce the Eighth Amendment's ban on cruel and unusual punishment.[190] Therefore, the Court held that Title II of the ADA, as applied in the Eighth Amendment context to state prisons, fails to meet the requirement of proportionality and congruence.[191]

In *Haas v. Quest Recovery Services, Inc.*[192], the United States District Court for the Northern District of Ohio considered whether states' immunity could be abrogated for disability discrimination in the context of State confinement facilities. In September 2002, Plaintiff Rachel Haas suffered various injuries when a truck struck her all terrain vehicle.[193] Soon afterwards, the Ohio Highway Patrol cited Haas for driving under the influence of alcohol at the time of the accident.[194] She pled guilty to the charges and was sentenced to confinement in a drug and alcohol treatment facility for two six-day periods.[195] Haas alleged

[185] *Id.*
[186] *Id.*; *Lane*, 124 S. Ct. at 1992.
[187] *Miller*, 384 F.3d at 1273.
[188] *Id.* at 1274.
[189] *Id.*
[190] *Id.*
[191] *Id.* at 1275.
[192] 338 F. Supp. 2d 797 (N.D. Ohio 2004).
[193] *Id.* at 799.
[194] *Id.*
[195] *Id.*

that the facility lacked proper accommodations for her injuries, such as an elevator and disabled-access toilets and showers, and brought this action for disability discrimination in violation of Title II of the ADA.

In its analysis, the District Court noted: "*Lane* expressly limited its abrogation of Eleventh Amendment immunity to Title II claims regarding 'the constitutional right of access to the courts. Plaintiff's claims do not fit those other categories of fundamental rights identified by the Court in *Lane* and do not implicate the right of access to the courts, the right to be present at trial, the right to a meaningful opportunity to be heard, the right to a trial by jury, or the public's right of access to criminal proceedings."[196] Instead, the Court reasoned, Plaintiff's claims against Ohio sound in equal protection, not due process.[197] The Court therefore held that Title II does not abrogate Ohio's Eleventh Amendment immunity to Plaintiff's ADA claims.[198]

VII. FUTURE IMPLICATIONS OF *LANE*

The *Lane* decision, allowing suit to proceed against Tennessee for its failure to provide disabled individuals access to state courtrooms, may herald a new era for the ADA, especially where due process rights are implicated. Yet advocates are concerned that by not explicitly extending the ruling to all public venues, the Supreme Court continues in its trend to narrow the scope of the Act.[199] In *Lane,* the Court stated, "Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts."[200] Because of its applicability to so many situations, invoking so many constitutional rights, Title II did not lend itself to an "all or nothing" abrogation analysis. Nonetheless, requiring that potential plaintiffs establish that states have engaged in a history of constitutional violations in particular areas (voting, educational benefits, transportation, etc.) places an undue burden on Congress' power to structure remedies.[201] Moreover, it creates significant uncertainty about the reach of the Title II remedy.[202] Sylvia Yee, an attorney with the Disability Rights Education and Defense Fund, noted that the decision's narrow-

[196] *Id.* at 803; *Lane,* 124 S. Ct. at 1988-93.
[197] *Haas*, 338 F. Supp. 2d at 803.
[198] *Id.*
[199] Valerie Jablow, *Court-Access Decision's Narrow Scope Worries Advocates for the Disabled*, 40 TRIAL, July 2004, at 92.
[200] *Lane*, 124 S. Ct. at 1993.
[201] Legal Issues, *supra* note 19.
[202] *Id.*

ness could have unfortunate consequences for people with disabilities: "It puts them in a real position of uncertainty...now [potential plaintiffs] really do have to look at this piecemeal: 'Do we have a right to bring an action on this kind of access, on access to transportation or health services? Are they included?' And that wasn't the intent of the ADA. It was meant to open up the whole field of government services."[203]

That said, the limitations of the *Lane* decision may soon be challenged again. On March 25, 2004, disabled plaintiffs filed a class action under Title II against the Washington Area Transit Authority, which runs Washington D.C.'s bus and subway systems, in an effort to improve access to public transportation for individuals with disabilities.[204] Disability rights advocates hope that history is on their side given the Court's careful description of the long history of disability discrimination in *Lane*.[205] These advocates are confident that "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities" described there will be sufficient for the Court to apply Title II's prophylactic legislation more broadly.[206]

VIII. CONCLUSION

Although recent Supreme Court jurisprudence appears to signal a shift away from the Court's protection of states' rights under the Eleventh Amendment, the as-applied analysis of the *Lane* Court raises as many questions as it answers. It appears, at least for now, that the only sure way for plaintiffs to be able to sue state agencies in federal courts for violations of federal law is to pressure state legislators to waive the State's Eleventh Amendment immunity.[207] For example, the State of Illinois has begun to allow state employees with a claim against the state under Title VII, the ADA, the ADEA, the FMLA, or the FLSA to file suit in either state or federal court.[208] The State Lawsuit Immunity Act, as it is called, waives the State's Eleventh Amendment immunity for the enumerated claims and represents the culmination of

[203] Jablow, *supra* note 199, at 93.

[204] Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Authority, No. 1:04 CV 00498 (D.D.C. filed Mar. 25, 2004); *see also* Jablow, *supra* note 199, at 93. Final decisions in this case and in Lane v. Tennessee, remanded back to the United States District Court for the Middle District of Tennessee, are still pending.

[205] Jablow, *supra* note 199, at 93.

[206] *Lane*, 124 S. Ct. at 1991.

[207] Sharmila Roy, *Suits Against States: What to Know About the Eleventh Amendment*, 41 ARIZ. ATT'Y, Oct. 2004, at 18, 26.

[208] 745 ILCS 5/1.5 (2004).

a struggle by activists to get the state to waive its immunity in civil rights matters.[209]

For plaintiffs proceeding against states in suits pursuant to federal civil rights legislation without such a waiver, recent jurisprudence suggests that plaintiffs alleging violations involving "fundamental" due process rights will fare better than those alleging equal protection violations. The heightened scrutiny applied to fundamental due process rights, as compared to the more deferential standards applied under the Court's equal protection analyses, increases the likelihood of litigant success in remedying violations of these rights despite the sovereign immunity barrier. As litigants have generally been unsuccessful in their efforts to seek money damages for state violations of federal equal protection laws, the Court's ruling in *Lane* suggests that states' sovereign immunity will give way to individual due process rights firmly rooted in the Constitution. Consequently, the *Lane* decision makes it clear that fundamental due process rights will carry greater constitutional protection than state sovereign immunity.

[209] Roy, *supra* note 207, at 26.