I. INTRODUCTION

On July 26, 2005, President George W. Bush released a proclamation celebrating the fifteenth anniversary of the Americans with Disabilities Act¹ ("ADA"), signed into law by the former President Bush.² In the proclamation, President Bush “call[ed] on all Americans . . . to fulfill the promise of the ADA [and] to give all people the opportunity to live with dignity, work productively, and achieve their dreams.”³ At the time of its signing there were more than forty-three million disabled persons in the United States⁴; this number has grown to more than forty-nine million.⁵

³ Id.
The purpose of the ADA was to eliminate discrimination against this growing population in a number of areas by providing a "legal recourse to redress such discrimination."\(^6\)

While the overall success of the ADA is debatable,\(^7\) it is clear that private enforcement of the ADA has been under attack for the last ten years—at least when the defendant is a sovereign state. Since the controversial *Seminole Tribe of Florida v. Florida*\(^8\) decision in 1996—holding that Congress can abrogate a state's sovereign immunity only through a valid exercise of Section 5 of the Fourteenth Amendment—the survival of a private cause of action against a state entity under the ADA has been questionable. In the last five years, the Court has attempted to provide an answer. In *Board of Trustees of the University of Alabama v. Garrett*, the Court held that Title I of the ADA, which prohibits disability discrimination in the context of employment, was not a valid exercise of Section 5 and therefore could not abrogate state immunity.\(^9\) Although the *Garrett* decision was limited to Title I, many of the lower courts assumed that the sovereign immunity bar would extend to Title II, which regulates access to public services and programs.\(^10\) Then, in *Tennessee v. Lane*, the Court held that Title II's application to the fundamental right of access to the courts was a valid exercise of Section 5, and the immunity bar was tentatively lifted.\(^11\)

The question remains, however, whether *Lane*’s holding applies to Title II private causes of action involving the important, although nonfundamental, right to public education. In the past two years the lower courts struggled with that question in a number of private actions against state educational entities. Two circuits have held that *Lane* does extend to equal access to public education.\(^12\) On the other hand, several district courts in the Second Circuit have recently declined to extend *Lane* to the educational context, and two other circuit courts have declined to extend *Lane* to any nonfundamental right.\(^13\)

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10. See cases cited infra note 213.
12. See infra Part V.A.
13. See infra Part V.A.
The question is not whether public schools must abide by ADA regulations and accommodate the increasing number of disabled students. The ADA is, at the very least, a valid exercise of Congress’s commerce power, and federal law is still the “supreme Law of the Land.” The question is whether disabled individuals may enforce their rights against noncompliant state educational institutions through private suits.

The problem with asking this question is that no answer is satisfactory, and therefore the present confusion in the courts is warranted. The Seminole doctrine and subsequent Supreme Court holdings logically lead to the survival of state school immunity in Title II suits. The alternatives for enforcement of the ADA, however, are either extremely limited or not viable at all in the context of education. In the end, the lower courts are left with a terrible choice: either defy the logic provided by the Court’s previous rulings, or follow precedent and give state schools the ability to ignore supreme federal law.

This Note does not argue the logic of the Seminole holding; that topic has been well covered. Instead, this Note attempts to take a much more pragmatic approach in advocating for the reversal of Seminole. Through an examination of the lower courts’ current confusion regarding states’ immunity to Title II suits in the educational context, I will attempt to show that the Seminole doctrine—the root of that confusion—has become an unworkable rule of law and therefore can and should be overruled consistent with stare decisis. Part II examines the history behind sovereign immunity jurisprudence, the Seminole decision, and other subsequent decisions that constricted congressional abrogation of immunity. Part III considers previous scholarly critiques of the Seminole doctrine. Part IV discusses the ADA and the Court’s post–Seminole decisions, limiting the ability of disabled individuals to enforce their rights against state entities. Part V looks at the recent division of the lower courts regarding Title II suits against state schools and argues that, in light of the

14. See James Leonard, A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After Seminole Tribe and Flores, 41 ARIZ. L. REV. 651, 703 (1999) (stating that the ADA “is, at best, a measure under section 5 of the Fourteenth Amendment and, at worst, a Commerce Clause enactment”).
15. See U.S. CONST. art. VI, cl. 2.
16. See infra Part III.
17. In Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), the Court found that “the rule of stare decisis is not an ‘inexorable command.’” Id. at 854. One of the many factors the Court stated as indicating a need for reexamination and overruling of prior case law was when “the rule has proven to be intolerable simply in defying practical workability.” Id. The Court went on to hold that Roe v. Wade’s “simple limitation” on state law was not unworkable. Id. at 855.
conflict between established precedent and the enforcement of federal law, there is no acceptable answer as to whether state immunity is retained in the educational context. Part VI concludes that because the *Seminole* doctrine has become an unworkable rule of law as applied to Title II suits against state schools, *Seminole* can be overruled consistent with stare decisis.

II. SOVEREIGN IMMUNITY JURISPRUDENCE

A. THE ELEVENTH AMENDMENT AND THE EXPANSION OF IMMUNITY

The Eleventh Amendment reads: "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."\(^{18}\) The Amendment was a legislative response to the "shock of surprise" created "throughout the country"\(^ {19}\) by one of the Supreme Court's first decisions, *Chisholm v. Georgia*.\(^ {20}\) In *Chisholm*, a South Carolina citizen brought a claim against Georgia for the recovery of payments not received on a Revolutionary War contract, and Georgia subsequently refused to recognize the Supreme Court's jurisdiction over a sovereign state.\(^ {21}\) The Court held, by a 4-1 margin, that Georgia was not immune to private suit in federal court.\(^ {22}\) The Court's reasoning, in its five separate opinions, was based in part on the text of Article III.\(^ {23}\) The Court also relied on a broader argument that a state is "subordinate to the [p]eople," who agree to be subject to federal law, and therefore "[a]s to the purposes of the Union . . . Georgia is not a sovereign state."\(^ {24}\) The Eleventh Amendment, ratified only two years after *Chisholm*, clearly overrules *Chisholm*’s holding that federal courts have jurisdiction over a diversity suit brought against a state by a citizen of another state.\(^ {25}\)

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18. U.S. CONST. amend. XI.
21. See id. at 419–20, 469; Leonard, supra note 14, at 660.
The state's sovereign immunity to private suits based on diversity, conferred by a literal reading of the Eleventh Amendment, "played a relatively unimportant role in federal litigation" for most of the nineteenth century.26 Because federal question jurisdiction was not given to the federal courts until 1875, sovereign immunity issues came up in a limited number of contexts, such as "cases within the Supreme Court's original jurisdiction."27

The first major expansion of state immunity resulted from the Court's ruling in *Hans v. Louisiana.*28 Hans, a Louisiana citizen, brought a claim against Louisiana in federal court to recover unpaid interest on state-issued bonds in violation of the Contract Clause of the U.S. Constitution.29 The Court held that principles of state sovereign immunity prevented a citizen of a state from calling that state before a federal court.30 In other words, the sovereign immunity bar was extended to suits brought under federal question jurisdiction. In response to arguments that a literal reading of the Eleventh Amendment did not include the prohibition of suits brought by citizens of the defendant state, the Bradley opinion stated that the retention of state sovereign immunity to private suit in federal court was of fundamental concern to the framers of the Constitution. Further, subjecting nonconsenting states to private suit would amount to a construction of the Constitution and the law "never imagined or dreamed of."31 Justice Bradley quoted both Madison's and Marshall's assurances at the Virginia Convention that Article III conferred only federal jurisdiction over cases when a state brought a citizen into federal court, not the other way around.32 As means of additional support, Justice Bradley pointed to the "anomalous result" of upholding a state's sovereignty only if the citizen plaintiff is not a citizen of the defendant state.33

B. PRE-SEMINOLE ABROGATION OF STATE SOVEREIGN IMMUNITY

The reasoning of the *Hans* Court has been much maligned from its inception. The Court's conclusion, however, that the states enjoy broad immunity from all private suits in federal court, has never been

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27. Id.
29. Id. at 1-3.
30. Id. at 10-11.
31. Id. at 15.
32. Id. at 14.
33. Id. at 10.
overturned.34 In fact, the vast majority of the Court’s decisions since Seminole have increased the state’s immunity, not by directly expanding the scope of the immunity, but by limiting the ways in which Congress can abrogate immunity through legislation.35

Before Seminole, however, the Court held that Congress could validly abrogate state sovereign immunity through both the Commerce Clause power36 and Section 537 of the Fourteenth Amendment.38 The only limit on this power seemed to be that the legislation that provided private actions against states had to clearly state its intention to abrogate.39

In Fitzpatrick v. Bitzer, the Court held that state sovereign immunity, as embodied in the Eleventh Amendment, could be abrogated by a valid exercise of Congress’s Section 5 power under the Fourteenth Amendment.40 Because the Court found that Title VII was a valid exercise of Section 5, former employees of Connecticut were allowed to bring a claim against the state for retrospective money damages for discriminatory treatment they received in obtaining retirement-plan compensation.41 The majority opinion, penned by Justice Rehnquist, argued that the states, in ratifying the Fourteenth Amendment, accepted limitations on their authority and the consequential expansion of the federal government’s power over the states.42 Invoking language from Ex parte Virginia, the Court found that “in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent.”43 Many have posited that the majority relied on the fact that the Fourteenth Amendment was ratified many years after the Eleventh Amendment to support this claim of the state’s

34. Leonard, supra note 14, at 664.
36. U.S. CONST. art. I, § 8, cl. 3.
37. The Fourteenth Amendment prohibits state action that “deprive[s] any person of life, liberty, or property, without due process of law” or denies persons the “equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Section 5 reads, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.
41. Id. at 448–49.
42. See id. at 455–56.
43. Id. at 454 (quoting Ex parte Virginia, 100 U.S. 339, 346 (1880)).
acceptance of limitations placed on sovereign immunity.\textsuperscript{44} This temporal justification, however, is not stressed in the Fitzpatrick opinion and is only later claimed by Justice Rehnquist in his discussion of Fitzpatrick in Seminole.\textsuperscript{45} Justice Brennan's concurrence, arguing that Congress may abrogate state sovereign immunity through any enumerated power and that Title VII was enacted under the Commerce Clause as well as Section 5, foreshadowed the Pennsylvania v. Union Gas Co.\textsuperscript{46} plurality opinion.

Union Gas involved a third party suit brought by the owners of a coal gasification plant against Pennsylvania.\textsuperscript{57} While excavating a creek near the plant, Pennsylvania caused a leak in one of the plant's large coal deposits.\textsuperscript{48} The United States reimbursed the state for some of the cleanup costs and then sued Union Gas under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").\textsuperscript{49} When Union Gas brought the third party suit against Pennsylvania, the state claimed that CERCLA, as an exercise of Congress's commerce power, could not abrogate state sovereign immunity.\textsuperscript{50}

Justice Brennan's plurality opinion invoked a rationale similar to that in Fitzpatrick, in support of Commerce Clause abrogation of state sovereign immunity, stating "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States."\textsuperscript{51} Justice Scalia's dissent claimed that the reasoning in Fitzpatrick was inapplicable to the case at hand because Article I predates the Eleventh Amendment and therefore, unlike the Fourteenth Amendment, cannot limit sovereign immunity guaranteed to the states by the Eleventh Amendment.\textsuperscript{52} The plurality responded by pointing to the logical inconsistency inherent in the dissent's claim that the sovereign immunity of the states "was part of the understood background against which the Constitution was adopted," and then claiming that the Commerce Clause power cannot limit that immunity because it came first.\textsuperscript{53} The plurality also stressed that without the ability to

\textsuperscript{44} See Leonard, supra note 14, at 672.
\textsuperscript{46} Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (plurality opinion), overruled by Seminole, 517 U.S. 44.
\textsuperscript{47} Id. at 6.
\textsuperscript{48} Id. at 5.
\textsuperscript{49} Id. at 6.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 16.
\textsuperscript{52} Id. at 41–42 (Scalia, J., dissenting).
\textsuperscript{53} Id. at 17–18 (plurality opinion) (quoting id. at 31–32 (Scalia, J., dissenting)).
hold the states liable for damages, the commerce power would be incomplete because "in many situations, it is only money damages that will carry out Congress’s legitimate objectives under the Commerce Clause."54 Justice White, in a separate "cryptic opinion,"55 agreed with Justice Brennan’s conclusions, but not with his reasoning.56 Despite the plurality opinion supported by Justice White’s tepid concurrence, the majority of lower court rulings after Seminole did recognize the Commerce Clause power as validly abrogating the sovereign immunity of the states.57

C. NEW LIMITATIONS PLACED ON THE ABROGATION POWER AND SUBSEQUENT EXPANSION OF STATE SOVEREIGNTY

1. Seminole Tribe of Florida v. Florida

A little less than seven years after Union Gas was decided, the Court held in Seminole Tribe of Florida v. Florida that Congress could not abrogate a state’s sovereign immunity pursuant to the Indian Commerce Clause.58 The case involved a suit brought by a Native American tribe against Florida and its governor to compel the state to negotiate, in good faith, a gambling compact required by the Indian Gaming Regulatory Act ("IGRA").59 The suit against Florida was dismissed based on the inability of IGRA, passed pursuant to the Indian Commerce Clause, to abrogate Florida’s sovereign immunity to private suits.60

The Court then found that, because “the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause,” the Commerce Clause power could no longer abrogate state sovereign immunity, thereby overruling Union Gas.61 The Rehnquist majority opinion was based on two major justifications. The Court claimed that the disjointed Union Gas plurality opinion created confusion in the lower courts, and the Court found the plurality’s rationale inconsistent with Hans and more than one hundred years of federalism case law.62 The majority saw the Union Gas plurality as an “eviscerat[ion]” of the decision in Hans, and once again, citing Scalia’s

54. Id. at 20.
56. Union Gas, 491 U.S. at 45 (White, J., concurring in the judgment and dissenting in part).
57. Id. at 47.
59. Id. at 62.
60. See id. at 62, 66.
61. Id. at 64.
dissent in *Union Gas*, argued that *Fitzpatrick*’s reasoning could not apply in the case of the Commerce Clause as it was antecedent to the principles espoused in the Eleventh Amendment. The Court recognized the “constitutional stature” of the sovereign immunity embodied in the Eleventh Amendment, and therefore no Article I power could abrogate it. As a result, Congress could abrogate state sovereign immunity only through Section 5 of the Fourteenth Amendment.

Both Justice Souter’s and Justice Stevens’s dissents laid out broad historical arguments that the sovereign immunity enjoyed by the states was not a constitutional mandate—outside of the literal bar on citizen/state diversity jurisdiction in the Eleventh Amendment—but a common law protection, limited by any enumerated power. Arguing that the *Hans* Court made fundamental mistakes in its reading of the Eleventh Amendment and understanding of the history of sovereign immunity, Justice Souter concluded that the “Court today simply compounds already serious error in taking *Hans* the further step of investing its rule with constitutional inviolability against the considered judgment of Congress to abrogate it.” Justice Souter stopped short, however, of arguing for overruling *Hans*, cautious of offending principles of stare decisis. Justice Stevens also warned that Congress would be increasingly unable to provide “a federal forum for a broad range of actions against States”—the implication being that the states would have little incentive, without these federal forums, to comply with some federal laws.

The majority characterized the dissent as “cobbled together from law review articles and its own version of historical events.” They claimed a reading of the Eleventh Amendment as providing a bar only to cases that exactly conform to the facts of *Chisholm*—diversity jurisdiction over a defendant state—would be to ignore the fact that federal question jurisdiction was not given to federal courts until 1875. The majority stressed that behind the words of the Eleventh Amendment is the “essential

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63. *Id.* at 64–66.
66. *See id.* at 95–117 (Stevens, J., & Souter, J., dissenting). *See also* Bloom, *supra* note 64, at 383 (discussing the opinions written by Justice Souter and Justice Stevens).
68. *See id.*
69. *Id.* at 77.
70. *Id.* at 68 (majority opinion).
71. *Id.* at 69–70.
postulate” that the States are immune from suits unless there was a “surrender of this immunity in the plan of the convention.” 72 The majority then relied on the *Hans* version of constitutional history and Madison’s and other Framers’ statements, made during debates at state ratification conventions, to support the conclusion that there was no plan for the states to surrender their immunity at the convention. 73 The majority also attacked Stevens’s claim that no federal forum would exist to enforce certain federal laws, by pointing to the availability of other ways of “ensuring state compliance with federal law,”74 including suits brought against state employees under the legal fiction of *Ex parte Young*. 75 Furthermore, the dissenters never explicitly defended *Union Gas* and instead chose to base much of their argument on *Chisholm*, supporting the majority’s argument that the plurality’s faulty logic was indefensible and confused the lower courts. 76

2. City of Boerne v. Flores

After *Seminole*, the only way that Congress could validly abrogate state immunity was through legislation pursuant to Section 5 of the Fourteenth Amendment. Consequently, the next major blow to Congress’s abrogation power came from a case that had nothing to do with Eleventh Amendment state sovereignty issues, but instead limited the scope of Section 5. *City of Boerne v. Flores* involved a Catholic church’s suit against a small city in Texas. 77 The city denied the church’s application to enlarge the church structure, which the city had designated a historic landmark. 78 The church then responded by claiming that the denial was in violation of the Religious Freedom Restoration Act of 1993 (“RFRA”). 79

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72. *Id.* at 68 (quoting Monaco v. Mississippi, 292 U.S. 313, 321–23 (1934)).

73. *Id.* at 68–70 & nn.12–13.

74. *Id.* at 72 n.16.

75. *Ex parte Young*, 209 U.S. 123 (1908). Under the *Ex parte Young* doctrine, an individual can sue to enjoin the actions of a state through the “legal fiction” of suing a government official. See, e.g., Leonard, *supra* note 14, at 667. This “way around” state sovereign immunity, along with others such as suits filed by the United States, and waiver through the Spending Clause power, is often cited by supporters of strong state immunity as a means to rebut arguments that *Seminole* created an enforcement problem. See *infra* Part III.D.

76. See *Seminole*, 517 U.S. at 68–72.


78. *Id.* at 512.

79. *Id.* RFRA was a congressional response to Employment Division Department of Human Resources v. *Smith*, 494 U.S. 872 (1990), wherein the Court declined to apply a compelling interest/substantial burden standard to a law that had a disparate impact on religious freedoms when the law is one of general applicability. *Id.* at 890. RFRA compelled strict scrutiny whenever any part of the government “substantially burdened religious exercise.” 42 U.S.C. § 2000bb(a) (2000).
The Court held that RFRA was not a valid exercise of Congress’s Section 5 power.\textsuperscript{80} Insisting that Congress does not have the power to interpret the scope of the Fourteenth Amendment,\textsuperscript{81} and could therefore only enforce remedial or preventative measures to judicially recognized violations of the Fourteenth Amendment, the Court held that RFRA was not constitutional because the law lacked “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”\textsuperscript{82} In other words, the appropriateness of legislative responses to violations of the Fourteenth Amendment would vary with the harm that was being inflicted.\textsuperscript{83}

In effect, the Court created a three-part test to determine whether a congressional action is a valid exercise of Section 5 power.\textsuperscript{84} First, the violated right must be identified, the violation of which is judged by the appropriate level of judicial scrutiny.\textsuperscript{85} Second, the Court must determine whether there is a continuous history of the violation through an examination of the congressional record.\textsuperscript{86} Finally, the Court must determine if the remedy created by the statute is “congruent and proportional” to the history and importance of the violated right.\textsuperscript{87}

This Flores test, coupled with the Seminole restrictions on the abrogation of state sovereign immunity, eventually lead to the current confusion over whether Title II of the ADA can provide valid private causes of action against state entities.\textsuperscript{88}

3. Alden v. Maine

The next major step in the expansion of state sovereign immunity came when the Court ruled, by the same 5-4 Seminole split, that a state’s immunity to private suit under federal law extended to suits in state court.\textsuperscript{89} After a suit brought by employees of Maine against their employer seeking money damages for violation of federal labor laws was dismissed from

\begin{itemize}
\item \textsuperscript{80} See Flores, 521 U.S. at 512, 536.
\item \textsuperscript{81} Despite Justice Kennedy’s contrary evaluation, this was a power that Congress arguably retained after Katzenbach v. Morgan, 384 U.S. 641 (1966). See Leonard, supra note 14, at 677–78.
\item \textsuperscript{82} Flores, 521 U.S. at 520.
\item \textsuperscript{83} See id. at 530.
\item \textsuperscript{84} See id. at 529–36. This Flores test was clarified in later cases, such as Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 365–74 (2001).
\item \textsuperscript{85} See Garrett, 531 U.S. at 365–68.
\item \textsuperscript{86} See id. at 368–73.
\item \textsuperscript{87} See id. at 734.
\item \textsuperscript{88} See infra Part V.A.
\item \textsuperscript{89} Alden v. Maine, 527 U.S. 706, 712 (1999).
\end{itemize}
federal court on an immunity defense, the employees then filed in state court. The state courts also dismissed the claims, which the Supreme Court eventually affirmed.90 The first major hurdle is that the Eleventh Amendment’s literal limit on the “judicial power of the United States” has nothing to do with suits filed in state courts. The majority responded that “the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.”91 The majority saw the Eleventh Amendment as merely a reiteration of a fundamental right that the states retained before and after the ratification of the Constitution.92 Again, the Court relied on ratification history and the Framers’ statements to support this idea of a constitutional state sovereign immunity and to rebut the dissent’s argument that sovereign immunity is a right derived “either from common law,” or, worse yet, “from natural law.”93

In addition, the majority concluded that the lack of ratification debate regarding state immunity to federal question suits in state court was another sign that “no one, not even the Constitution’s most ardent opponents, suggested the document might strip the States of the immunity.”94 In response to the dissent’s cries that the Court was limiting yet another means to compel state adherence to federal law,95 the Court again pointed to the enforcement alternatives, which did not unconstitutionally subvert state immunity to private suit.96 The majority also concluded that the Court would assume that the states would comply in good faith with federal laws as mandated by the Supremacy Clause as “[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law.”97

III. POST-SEMINOLE SCHOLARLY CRITICISM

The Seminole and Alden opinions have spawned a flood of scholarly critiques of the logic and implications of the Court’s expansion of state sovereign immunity. The purpose of this section is to give a brief overview of the arguments involved in the Seminole sovereign immunity debate. The

90. Id.
91. Id. at 713.
92. See Id.
93. See Id. at 733–35.
94. Id. at 741.
95. Id. at 760–61, 808–14 (Souter, J., dissenting).
96. As in Seminole, the Court again pointed to Ex parte Young injunctive relief, suits brought by the United States, Fourteenth Amendment abrogation, and waiver. Id. at 755–57 (majority opinion).
97. Id. at 754–55.
final conclusion of this Note—that current ADA jurisprudence in the context of public education has proven the Seminole rule of law “unworkable” and therefore vulnerable to an overruling consistent with stare decisis—is not dependent on the validity of the following critiques. A broad understanding of the previous attacks on Seminole does, however, lend support to the need for such an overruling. Most of the debate focuses around four major areas, which mirror, not coincidentally, the areas of contention between the majority and dissent in both Seminole and Alden. The first area involves a difference in the textual and structural analysis of the Eleventh Amendment and the Constitution, which inevitably leads to a debate on ratification history. The next area is the possible implications of actually subjecting states to federal causes of action for retrospective money damages. The third area of contention involves issues relating to stare decisis. The final area of contention is the effect of expanded sovereign immunity on the supremacy of federal law, considering the effectiveness of enforcement alternatives to private suit and the remaining incentives for state compliance with federal law.

A. TEXTUAL, STRUCTURAL, AND HISTORICAL CRITIQUES OF EXPANDED STATE IMMUNITY

The literal meaning of the Eleventh Amendment seems clear after a cursory glance. It forbids federal jurisdiction over suits between a state and a citizen of another state or a foreign state. The Court in Seminole, however, relied on the more than 100-year-old conclusion that the Eleventh Amendment should not be read literally and that the Eleventh Amendment provides a much broader protection than the text explicitly states. It has been noted that the justices in the majority of both Seminole and Alden, in particular Justice Scalia, would usually be the justices “most receptive to a strong textualist approach.” Those justices, however, would counter that the protections provided by the Eleventh Amendment need to be construed by looking at the text in relation to the historical context in which it was written and that the Eleventh Amendment is simply a confirmation of a broad, preratification, and constitutionally protected state sovereign

98. See U.S. CONST. amend. XI; Bloom, supra note 64, at 380–82 (discussing textualist interpretations of the Eleventh Amendment).
100. Bloom, supra note 64, at 380.
immunity. This, of course, leads to the debate in both the Seminole and Alden opinions concerning the history surrounding the ratification of the Constitution, the Framers’ understanding of the nature of state sovereign immunity, and their intentions to constitutionalize that immunity.101

At the time of the ratification debates, many of the states—the southern states in particular—had accrued a tremendous amount of debt in the form of bonds issued during the Revolutionary War, and it was doubtful that the states would be able to pay back the full price of those bonds.102 Therefore, the bond holders sold their bonds, at largely reduced prices, to out-of-state speculators who predicted that the new Constitution would provide a way in which to enforce the payment of the full amount of the states’ debts.103 The fear that the diversity jurisdiction provided in Article III would lead to the enforcement of those debts provided fodder for the Anti-Federalist’s antiratification arguments. The Anti-Federalists contended that the grant of federal jurisdiction over private suits for monetary damages against states would offend the dignity of the states, result in an unfair windfall for the out-of-state speculators, and possibly bankrupt several southern states whose treasuries could never have withstood the enforcement of the full payment of their debts.104 Hamilton and other Federalists responded by assuring the Anti-Federalists that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,” and that states would retain this sovereignty “[u]nless . . . there is a surrender of this immunity in the plan of the convention.”105

The majority, in both Seminole and Alden, invoked this federalist/anti-federalist debate again and again in support of its conclusion that Article I powers were never meant to abrogate the strong preratification principle of state sovereignty that became part of the Constitution upon its ratification. Pointing to the Court’s reliance on Hamilton’s assurances of postratification survival of state sovereignty, Paul E. McGreal has argued that the Seminole majority’s conclusion, that Commerce Clause abrogation was never in the “plan of the convention,” was consistent with Hamilton’s

101. For a detailed account of the ratification history used in both Seminole and Alden, see Paul E. McGreal, Saving Article I from Seminole Tribe: A View from The Federalist Papers, 55 SMU L. REV. 393 (2002).
102. Id. at 396.
103. Id. at 396–97.
104. Id. at 398–402.
views.\textsuperscript{106} Citing Hamilton’s \textit{Federalist} 32, McGreel concluded that Hamilton understood the Constitution to abrogate state sovereignty in only three circumstances, the Commerce Clause power falling into none of them.\textsuperscript{107}

The most ardent opposition to the \textit{Seminole} and \textit{Alden} decisions contends that during the ratification debates at the state conventions, there was no consensus as to whether the Constitution eliminated or limited state sovereign immunity and that ratification history supports a common law, but not a constitutional state sovereign immunity.\textsuperscript{108} In support of this point, Erwin Chemerinsky referred to other supporters of ratification who believed Article III did limit state sovereignty, and that this limitation was essential to hold the states accountable to their liabilities under the law.\textsuperscript{109} Chemerinsky argued that it is a mistake to rely on the Framers’ ambiguous intent to prove that sovereign immunity is implicit in the Constitution when “[n]owhere does the [Constitution] mention or even imply that governments have complete immunity to suit.”\textsuperscript{110} Additionally, he argued, as did Justice Souter’s \textit{Alden} dissent, that history proves that the colonies did not themselves enjoy immunity and were subject to suit.\textsuperscript{111} Finally, he attacked the claim that the lack of debate during the conventions regarding immunity to suit in state court was evidence that the Framers obviously never considered a lack of immunity in their own courts as possible. He argued that the meaning of silence is “inherently ambiguous” and that the Framers likely never considered the issue at all.\textsuperscript{112} A higher burden of proof is needed when history is used to support an interpretation other than the plain meaning of the text of the Constitution.\textsuperscript{113} Therefore, \textit{Seminole} opponents conclude that state sovereign immunity is a common law doctrine at best and should not be read into the Constitution.\textsuperscript{114}

\begin{itemize}
\item \textsuperscript{106} McGreel, supra note 101, at 419–20.
\item \textsuperscript{107} Id. at 404–06, 419–21.
\item \textsuperscript{109} Id. at 1207–08. \textit{See also} Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 142–43 (1996) (Souter, J., dissenting) (discussing the various opinions of the Framers regarding whether state sovereign immunity would survive after ratification).
\item \textsuperscript{110} Chemerinsky, supra note 108, at 1202, 1208–10.
\item \textsuperscript{111} Id. at 1209–10. \textit{See also} Alden v. Maine, 527 U.S. 706, 764 (1999) (Souter, J., dissenting).
\item \textsuperscript{112} Chemerinsky, supra note 108, at 1209–10.
\item \textsuperscript{113} Bloom, supra note 64, at 381–82.
\item \textsuperscript{114} Chemerinsky, supra note 108, at 1201–03. \textit{See also} Vicki C. Jackson, \textit{The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity}, 98 \textit{Yale L.J.} 1, 120 (1988) (stating that “under present Eleventh Amendment jurisprudence, the question is at least open as to whether Congress has power to subject states to such suit under its Article I powers”).
\end{itemize}
Chemerinsky went even further and concluded that state sovereign immunity is an "anachronistic relic" and that the "entire doctrine should be eliminated." He argued that U.S. adherence to a principle rooted in the English common law protection of the sovereign immunity of the King is inconsistent with the U.S. "rejection of a monarchy and of royal prerogatives." Others have also contended that state sovereign immunity runs directly contrary to the ideals of a democratic republic, which holds only the people as ultimately sovereign. Therefore, the states should be held accountable to the people—"both to the majority at the polls and to wronged individuals in the courts."

A structural analysis of the Constitution can also be used to attack Justice Rehnquist's justifications in Seminole. The temporal argument used to justify Seminole's overruling of Union Gas—regarding the ability of the Fourteenth Amendment to abrogate and the inability of the Commerce Clause power to do the same, resting on the Fourteenth Amendment's ratification years after the Eleventh Amendment, and therefore representing a fundamental change in the power dynamic between the states and the federal government—and the dissent's retort has already been mentioned above. The validity of this argument, however, has been questioned even further in light of the Alden decision and in consideration of an alternate structural analysis of the Constitution. First, the Alden majority's reliance on the existence of an underlying principle of state sovereign immunity, which predated the ratification of the Constitution and is only reiterated by the Eleventh Amendment, further supports the Seminole dissent's attack on the temporal argument. In addition, Daniel J. Meltzer points out that the temporal argument is undercut even further when considering the customary judicial analysis of an amendment to a positive enactment. He contends that the usual method of evaluating an amended enactment is to evaluate it as a whole, not to "treat the later-added provision as trumping any predecessor." Therefore, holding that the Fourteenth Amendment trumps state sovereignty, but that the Article I enumerated powers do not

116. Id. at 1202. See also Jackson, supra note 114, at 80 (noting that "the common law doctrine was founded on a notion that sovereignty resides in the person of the monarch, whereas the premise of the Constitution was that sovereignty derived from the people").
118. See supra Part II.C.1.
120. Meltzer, supra note 25, at 21–22.
121. Id.
simply because of the timing of the Amendment, is not an argument consistent with normal structural evaluations of legislative enactments.  

B. THE IMPLICATIONS OF FORGOING STATE SOVEREIGN IMMUNITY

Proponents of expansive state sovereignty often claim that subjecting states to private suit under federal law, in the federal or state courts, would lead to an unacceptable assault on the dignity of the states and “threaten the financial integrity of the [s]tates.”123 The majority scholarly view, however, is that the actual impact on a state’s treasury and “dignity” would be minimal and that this minimal impact does not outweigh the benefits provided by the availability of retrospective damages.124

Meltzer concedes that enforcement of federal law on the states through retrospective damage remedies would “impose additional burdens on the states.”125 The burdens, however, are neither “staggering” nor greater than the burdens already placed on the states through the application of congressionally mandated and constitutional regulations.126 After all, the sovereign immunity that the states enjoy is not a right to “disregard the Constitution or valid federal law.”127 Further, the restrictions on federal regulation of states do not forbid generally applicable laws such as the Fair Labor Standards Act (“FLSA”) (or for that matter the ADA) to regulate a state’s activities.128 Therefore, Meltzer argues that compliance with valid federal law, either by good faith choice or by injunctive prospective relief provided to a litigant in an Ex parte Young suit against a state official, results in a much larger burden on the state’s treasuries than the burden resulting from allowing retrospective money damages against states through private suits.129 In the end, Meltzer concludes that this

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122. Id.
123. See, e.g., Alden, 527 U.S. at 750.
125. Meltzer, supra note 124, at 1033.
126. Id.
128. Id.; Carlos Manuel Vazquez, What is Eleventh Amendment Immunity?, 106 YALE L.J. 1683, 1704–06 (1997). In Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), the Court held that the FLSA could be applied to a municipally owned and operated mass-transit system. Id. at 554–55. In New York v. United States, 505 U.S. 144 (1992), the Court held that the Tenth Amendment prevented Congress from commandeering the state’s legislative process by directly compelling the state to enforce a federal regulatory program. Id. at 175–76, 188. In New York, Garcia was distinguished, however, as the FLSA is a law generally applicable to states as well as nonstate entities. Id. at 160–61. See also Meltzer, supra note 124, at 1027–38.
129. Meltzer, supra note 124, at 1033–34.
“burden on the state treasury” justification is, at the very least, overblown.130

Chemerinsky claims that the Court never justified holding the benefits of allowing retrospective damages, namely compensation to the injured party and effective deterrence of state violations of federal law, less important than protecting the state treasury from this minimal impact.131 Chemerinsky invokes a fairness and enterprise liability argument and suggests holding the “entire citizenry” liable for state violations of federal law rather than burdening the already injured individual.132

As for the “assault on the state’s dignity” justification for expanded state immunity, some scholars make light of this argument. They point out the absurdity in having concern for the feelings of an “utterly abstract entity,” especially in light of the frequency with which state officials are called before the federal bench in private suits.133 Meltzer, however, has pointed out that there are in fact many ways in which federal law and judicial practice have shown states a special “respect” from which we might infer recognition of state “dignity.”134 But there is a big difference, Meltzer maintains, between a history of showing respect for the states and the complete restriction on federal power to create private causes of action against states.135 Additionally, Meltzer questions the reasons that private damages, in particular, represent such an assault on the state’s dignity in light of all the federal powers that regulate the states and the ways around state sovereign immunity (especially permitted suits for injunctive relief and suits by the United States).136 Meltzer concludes that this idea of state dignity compelling state immunity to private suit is “anything but axiomatic.”137

C. STARE DECISIS ARGUMENTS FOR EXPANSIVE STATE SOVEREIGN IMMUNITY

The Seminole majority, in overruling Union Gas, relied on the more than 100 years of adherence to the Hans broad interpretation of the

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130. See id. at 1033–35.
132. Id.
133. See Monaghan, supra note 117, at 132.
134. Meltzer, supra note 124, at 1039–41. Meltzer cites the original jurisdiction of the Supreme Court over suits with party states and the three-judge panel requirement when reviewing the constitutionality of state laws as evidence of this respect. Id.
135. Id. at 1041.
136. Id.
137. Id.
Eleventh Amendment, conferring immunity protection to the states beyond the Amendment’s literal meaning.\textsuperscript{138} The Court stated that the \textit{Union Gas} “plurality’s rationale . . . deviated sharply from our established federalism jurisprudence.”\textsuperscript{139} Some scholars, however, maintain that abrogation of state sovereign immunity through a valid exercise of Article I power is not inconsistent with stare decisis, and case law prior to \textit{Seminole} actually supports the ability of Congress to abrogate as long as it clearly expresses its intention to do so.\textsuperscript{140}

Vicki C. Jackson contends that the \textit{Seminoe} holding was “unforced by history, constitutional text, original understanding, and \textit{stare decisis}.”\textsuperscript{141} Unlike in \textit{Seminoe}, in \textit{Hans} there was no statute clearly stating Congress’s intention to authorize private suits against the states.\textsuperscript{142} Therefore, \textit{Seminoe} does not follow from established case law. It is an overly broad extension of the \textit{Hans} ruling, holding that Congress could no longer abrogate state sovereignty by clearly expressing its intention to do so in legislation pursuant to its Article I powers.\textsuperscript{143} In effect, the \textit{Seminoe} holding created a constitutionally protected immunity to private suit out of what was formerly treated as a common law protection in the cases after \textit{Hans} and immediately preceding \textit{Seminoe}.\textsuperscript{144} Jackson also points to the absurdity of the Court claiming stare decisis support for the \textit{Seminoe} decision, and thereby extending \textit{Hans}, when the Court, only nine years before, came to a 4-4 split regarding whether \textit{Hans} should be overruled.\textsuperscript{145}

Others have also attempted to show \textit{Seminoe}’s reliance on stare decisis to justify overruling \textit{Union Gas} as false or at least misleading. Meltzer argues that there was very little change in the years between \textit{Union Gas} and \textit{Seminoe}.\textsuperscript{146} In fact, the only state sovereign immunity cases that reached the Supreme Court during the interim years were cases that


\textsuperscript{139} Id. at 64.

\textsuperscript{140} Meltzer, supra note 25, at 29.

\textsuperscript{141} Vicki C. Jackson, Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young, 72 N.Y.U. L. REV. 495, 503 (1997) (emphasis added).

\textsuperscript{142} Id. at 501–02.

\textsuperscript{143} See id.

\textsuperscript{144} Id. at 502. See also Jackson, supra note 114, at 120. Jackson also concluded that, because federal law could still provide private causes of action against states in state courts, state sovereign immunity could not be a protection from suits under federal question jurisdiction, and therefore \textit{Hans} was incorrectly decided. Id. at 5–7. Of course, this argument was made moot by the \textit{Alden} decision, but still lends support to the argument that \textit{Seminoe} is inconsistent with stare decisis.

\textsuperscript{145} Jackson, supra note 141, at 501–02 (citing Welch v. Texas Dep’t of Highways & Pub. Transp., 483 U.S. 468, 475–78 (1987)).

\textsuperscript{146} Meltzer, supra note 25, at 28–33.
reaffirmed the requirement that Congress clearly state its intention to abrogate state sovereign immunity.\textsuperscript{147} Meltzer goes even further, stating that the only thing that did change was the content of the Court, and the lack of a clear majority in \textit{Union Gas}'s plurality opinion was simply a "fig leaf of cover to what otherwise looked like a naked shift resulting from new appointments."\textsuperscript{148} Further, despite the Court's claim that \textit{Union Gas} had caused confusion in the lower courts to the point that the rule of law had become unworkable, Meltzer maintains that this was "thinly supported" and that "the lower court decisions had virtually unanimously read \textit{Union Gas} to permit Congress to abrogate immunity when acting under not only its commerce power but any of its enumerated powers."\textsuperscript{149}

\section*{D. State Sovereignty and the Supremacy of Federal Law}

It has been claimed that the \textit{Seminole} expansion of sovereign immunity is in direct conflict with the supremacy clause of the Constitution for two primary reasons. First, as the dissenting justices claim in both \textit{Seminole} and \textit{Alden}, if state sovereign immunity is a common law and not a constitutional guarantee, then the limitations placed on Congress's ability to abrogate while acting pursuant to its constitutional powers—namely its Article I powers—amounts to holding "a common law doctrine... supreme over the Constitution and federal law."\textsuperscript{150} Second, state sovereign immunity to private suits takes away any real accountability for state violation of federal law.\textsuperscript{151} Without this accountability a state has little incentive to comply with federal regulations, effectively allowing the state to ignore federal law in violation of the supremacy clause.\textsuperscript{152}

As discussed above, the \textit{Seminole} and \textit{Alden} majorities attempt to rebuke the first contention by simply stating that the guarantees provided by state sovereign immunity are in fact constitutional in nature.\textsuperscript{153} The \textit{Alden} Court succinctly

\begin{itemize}
\item\textsuperscript{147} \textit{Id.} at 29.
\item\textsuperscript{148} \textit{Id.} at 29–31.
\item\textsuperscript{149} \textit{Id.} at 29. \textit{See}, e.g., Brinkman v. Dep't of Corr., 21 F.3d 370, 371–72 (10th Cir. 1994) (stating that "Congress can override state sovereign immunity, but must 'mak[e] its intention unmistakably clear in the language of the statute'" (alteration in original) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)); Reich v. New York, 3 F.3d 581, 590 (2d Cir. 1993); Hale v. Arizona, 993 F.2d 1387, 1391 (9th Cir. 1993).
\item\textsuperscript{150} Chemerinsky, \textit{supra} note 108, at 1211–13. \textit{See} Jackson, \textit{supra} note 141, at 503–12.
\item\textsuperscript{151} Chemerinsky, \textit{supra} note 108, at 1213–15.
\item\textsuperscript{152} \textit{Id.}
\item\textsuperscript{153} \textit{See supra} Parts II.C.1–2, III.A.
\end{itemize}
reject[ed] any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States. When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States.\footnote{154}

Other scholars have stated that the Supremacy Clause's mandate of federal law trumping state law is beside the point because the constitutionally protected right of state sovereignty is obviously not derived from state law.\footnote{155}

The majority's answer to the second contention regarding accountability is a little more complex. In the \textit{Seminole} opinion, Justice Rehnquist argued that the states could be held accountable to the supremacy of federal law without abrogating their immunity to private suits for retrospective damages through several alternative means.\footnote{156} The alternatives included suits pursuant to the doctrine of \textit{Ex parte Young}, suits brought by the United States, private causes of action provided by valid legislation passed pursuant to Section 5 of the Fourteenth Amendment, and of course, when the states have consented to suit and therefore waived their immunity.\footnote{157} The \textit{Alden} majority claimed that these alternatives provided a "proper balance between the supremacy of federal law and the separate sovereignty of the States."\footnote{158}

Because the limits of the Section 5 power have already been discussed above and will be fully examined in other sections in the context of the ADA, this section will proceed by briefly outlining the scholarly criticism of the other alternatives.\footnote{159}

I. \textit{Ex parte Young} Suits for Injunction

The \textit{Seminole} majority relies on the legal fiction of what is commonly referred to as the \textit{Ex parte Young} doctrine: that a citizen may sue to enjoin a state official's unlawful actions because once "a state official violates

\begin{footnotesize}
\begin{itemize}
\item[155.] McGreal, \textit{supra} note 101, at 424.
\item[157.] \textit{See id}. The \textit{Alden} Court also listed these alternative means. \textit{Alden}, 527 U.S. at 755–58. In fact, the \textit{Alden} Court spent considerably more time than the \textit{Seminole} Court did describing and promoting the effectiveness of these enforcement alternatives. Perhaps this was because the \textit{Alden} Court was taking away the state court alternative that many scholars believed still existed after \textit{Seminole}. \textit{See} Jackson, \textit{supra} note 141, at 504–06. For scholarly support of these alternative means, see Vazquez, \textit{supra} note 128, at 1706–07.
\item[158.] \textit{Alden}, 527 U.S. at 757.
\item[159.] \textit{See supra} Parts II.C.1–3. \textit{See also infra} Part IV.
\end{itemize}
\end{footnotesize}
valid federal law, he is ‘stripped of his official or representative character.’\textsuperscript{160} In other words, when a state official acts unlawfully, he is no longer “working for the state,” and therefore is subject to private suit. Rehnquist claims that the availability of a private suit for prospective injunctive relief against a state official rebuts the claim that a state’s immunity provides the opportunity for the state to ignore federal law.\textsuperscript{161}

Some scholars, however, insist that injunctive relief is not enough, claiming that money damages are “essential to ensuring accountability” and sometimes the only way to incentivize compliance with federal law.\textsuperscript{162} Many times injunctive relief will be completely inadequate to ensuring compliance because the violations do not “arise from ongoing practices.”\textsuperscript{163} Moreover, Meltzer concludes that in a world with no threat of monetary damage awards, there is “little to lose, and much to gain” for a state not to comply with federal law and simply wait for a suit compelling compliance, especially in circumstances where the “scope of federal duties is uncertain or the cost of compliance is very high.”\textsuperscript{164}

Other criticism stems, not from the need for money damages, but from the shrinking availability of \textit{Ex parte Young} suits for injunction after \textit{Seminole}.\textsuperscript{165}

2. \textit{Ex parte Young} Suits for Retrospective Monetary Damages

The \textit{Alden} majority also stated, in response to the dissent’s supremacy attack, that the \textit{Ex parte Young} doctrine would allow private actions to be brought against a state official for money damages as long as the “wrongful conduct [is] fairly attributable to the officer himself” and “the relief is sought not from the state treasury but from the officer personally.”\textsuperscript{166}

This alternative, however, has obvious problems and limitations. First, many officers are indemnified by the state for any liability incurred while acting within their official capacity and therefore monetary damages will be forbidden as coming from the state treasury.\textsuperscript{167} Additionally, many times the responsible officials cannot be identified or located,\textsuperscript{168} or may be

\begin{itemize}
\item \textsuperscript{160} Monaghan, supra note 117, at 127 (quoting \textit{Ex parte Young}, 209 U.S. 123, 160 (1908)).
\item \textsuperscript{161} \textit{Seminole}, 517 U.S. at 71 & n.14.
\item \textsuperscript{162} Chemerinsky, supra note 108, at 1214.
\item \textsuperscript{163} Meltzer, supra note 124, at 1016.
\item \textsuperscript{164} 1d. at 1016–17.
\item \textsuperscript{165} See Jackson, supra note 141, at 520–23.
\item \textsuperscript{166} \textit{Alden v. Maine}, 527 U.S. 706, 757 (1999).
\item \textsuperscript{167} Leonard, supra note 14, at 667. See also \textit{Edelman v. Jordan}, 415 U.S. 651, 663–70 (1974).
\item \textsuperscript{168} Meltzer, supra note 25, at 48.
\end{itemize}
protected by qualified immunity.\textsuperscript{169} Therefore, as Chemerinsky contends, the only alternative is to sue the state, which of course is immune from such suit—thereby leaving the injured party no remedy and essentially eviscerating any incentives for state government compliance.\textsuperscript{170}

3. Suits Brought by the United States

The sovereign immunity bar does not extend to suits prosecuted against one of the states by the United States.\textsuperscript{171} The \textit{Alden} majority stressed the effectiveness of this alternative in balancing the interest of the federal government’s enforcement powers with the constitutional immunity protection granted to the states.\textsuperscript{172} The majority also highlighted the differences between allowing suits commenced by the United States and allowing broad private action to individual citizens.\textsuperscript{173} Invoking, yet again, Hamiltonian language, the majority contended that actions brought by the United States were within “the plan of the Convention.”\textsuperscript{174} Additionally, the majority argued that suits brought by the United States entailed political safeguards that would ultimately protect state sovereignty, “a control which is absent from a broad delegation to private persons to sue nonconsenting States.”\textsuperscript{175}

Critics argue, however, that to permit suits brought by the United States will not be enough to guarantee state compliance with and accountability to federal law. Meltzer concludes that there are several possible problems with relying on this alternative. First, when a federal law provides for an individual private cause of action, the remedy may be of great interest to the individual but of little interest to the public as a whole, producing little incentive for the federal government to pursue costly litigation to enforce that right—or at least causing a slower enforcement than private causes of action would provide.\textsuperscript{176} Meltzer also questions the majority’s reliance on the political safeguards provided by public, as opposed to private, enforcement, suggesting that the political influence that state officials may have on certain federal agencies may create a conflict of interest and “steer federal officials away from important national action

\begin{itemize}
  \item \textsuperscript{169} Chemerinsky, \textit{supra} note 108, at 1221–22.
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} \textit{Alden}, 527 U.S. at 755; Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.14 (1996).
  \item \textsuperscript{172} \textit{Alden}, 527 U.S. at 755–56.
  \item \textsuperscript{173} \textit{Id.}
  \item \textsuperscript{174} \textit{Id.} at 755.
  \item \textsuperscript{175} \textit{Id.} at 756.
  \item \textsuperscript{176} Meltzer, \textit{supra} note 124, at 1022–23.
\end{itemize}
that should be taken.” He also points out that the shifting of political forces from term to term may create a situation where federally created rights will only be enforced if “subsequent administrations are so inclined in the face of resource constraints and possible ongoing opposition from state and local governments.”

4. Waiver of Immunity

One way in which a state can waive its immunity to private suit is to explicitly consent to suit in federal or state court. For example, a clear statement within state legislation that the state will forgo its immunity to specific federally created private causes of action will satisfy as an explicit waiver of immunity. A state’s voluntary appearance before a court will also satisfy as an explicit waiver of immunity.

The obvious problem here is that explicit consent is a decision that the state, by definition, makes independently of the federal government—there is no enforced consent. This trust in the states to consent to private suit is reminiscent of the Alden majority’s response to the dissent’s supremacy argument. The majority stated that the Court is “unwilling to assume the States will refuse to honor the Constitution,” and the “good faith of the States thus provides...assurance” that federal law will be “‘the supreme Law of the Land.’” Chemerinsky insists that blind faith that the states will “do the right thing” is extremely flawed, especially in light of a history replete with instances where the states could not be so trusted.

Congress may also induce a state’s waiver of immunity rights by conditioning a state’s receipt of federal funds, pursuant to Congress’s spending power, on the state’s waiver of immunity to certain private

177. Id. at 1025. See also Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 793–94 (1991) (Blackmun, J., dissenting) (arguing that the law that gave Native American tribes “the right to bring federal claims against the States for damages...represents a frank acknowledgement by the Government that it often lacks the resources or the political will adequately to fulfill this responsibility,” and so the Court “should not lightly restrict the authority”).
178. Meltzer, supra note 124, at 1025.
Despite the broad spending power that Congress seems to retain, there are several limitations on Congress's power to subject states to such a condition. In South Dakota v. Dole, the Court laid out several restrictions on congressional spending power. Most notably, and relevant to the purposes of this Note, Congress must unambiguously state the conditions and must not create conditions that are so coercive as to "pass the point at which pressure 'turns into compulsion.'" Therefore, as when Congress attempts to abrogate state sovereignty, legislation that does not clearly state its intention to condition receipt of funds on waiver of immunity will fail to create a viable private cause of action against a state. In addition, some have argued that Congress's use of its spending power to compel state entities to waive their private suit immunity, especially those that receive large sums of federal funds, may be so coercive as to violate the Tenth Amendment.

IV. THE SOVEREIGN IMMUNITY DEFENSE AND THE ADA

The Seminole decision spawned a series of decisions examining congressional attempts to abrogate state sovereign immunity through a number of different statutes. Whether Congress validly abrogated state immunity through the ADA has been of particular interest to the Court in the last five years.

The purpose of this part is to first briefly describe the purpose and the rights afforded under the ADA, with particular focus on the provisions of Title II. This part will then turn to the Court's recent holdings, Board of Trustees of the University of Alabama v. Garrett, and Tennessee v. Lane, regarding the ability of the ADA to abrogate state sovereign immunity under both Title I and Title II.

A. THE AMERICANS WITH DISABILITIES ACT

The ADA was signed into law on July 26, 1990, after an exhaustive legislative inquiry into the prevalence and effects of disability

184. See e.g., Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 277–78 (5th Cir. 2005).
185. See South Dakota v. Dole, 483 U.S. 203, 207 (1987) (finding that "objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power") (internal quotations omitted).
186. Id.
187. Id. at 207, 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).
discrimination in multiple arenas of public and private life. The ADA defined disability as a “physical or mental impairment that substantially limits one or more of the major life activities” of an individual. Congress found a pervasive history of discrimination against disabled persons, which “persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.” Finding authority in Section 5 of the Fourteenth Amendment and the Commerce Clause, Congress’s stated purpose was the elimination of disability discrimination through the creation of “enforceable standards.” Each of the first three titles of the ADA provides regulations for a different area of concern: Title I regulates employment; Title II, public services and programs; and Title III, public accommodations.

Title II 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 activities of a public entity, or be subjected to discrimination by any such entity.” A “qualified individual with a disability” is defined as “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements,” for the public program or service.

Title II reaches a vast array of state-run programs and services, including public education, voting, health and welfare services, and public transportation. The breadth of the types of services to which Title II applies has been recently noted by the Court. Title II, however, does not include any specific rules but instead orders the attorney general to promulgate the regulations prohibiting disability discrimination in the area of public services and programs. These regulations provide for a wide range of both prohibited actions and affirmative mandates upon public services and

191. Id. § 12101(a)(3).
192. Id. § 12101(b)(1)–(2), (4).
193. Id. §§ 12101–12189.
194. Id. § 12132.
195. Id. § 12131(2).
197. 42 U.S.C. § 12134(a).
programs in order to ensure equal access for disabled persons. A state may not—even if "permissibly separate" services or programs are offered—deny qualified disabled persons from participation in a public service, or perpetuate administrative rules that have the effect of discriminating against qualified disabled persons. 198 There must be "reasonable modifications" to the provision of public services to avoid discrimination against qualified disabled individuals. 199 In addition, a state may not select a location for a facility that will have a discriminatory effect. 200 Title II also places an affirmative duty on the state to make existing facilities accessible to qualified disabled persons, which could include necessary structural changes where less costly alterations may not meet standards of compliance. 201 A state can, however, refuse to make reasonable modifications or alterations to existing facilities when it shows that such changes would "result in a fundamental alteration in the nature" of the service or program. 202 The regulations also include a broad requirement that the public service be provided in "the most integrated setting appropriate to the needs of qualified individuals with disabilities." 203

Title I of the ADA proposes to eliminate disability discrimination in the context of both public and private employment by providing prohibitions and mandates for employers that resemble Title II regulations. 204 The definition of "qualified individual with a disability" is essentially the same as in Title II. 205 Employers must make "reasonable accommodations" for the "otherwise qualified [employee or applicant] with a disability" unless the employer can show "undue hardship." 206 Denial of employment to an otherwise qualified individual on the basis of having to make required accommodations is also forbidden. 207 In addition, an employer may not create standards for hiring that will have the effect of discriminating against a disabled person unless those standards are necessary for the position. 208

199. Id. § 35.130(b)(7).
200. Id. § 35.130(b)(4)(i).
201. Id. § 35.150(a)(1), (b)(1).
202. Id. §§ 35.130(b)(7), 35.150(a)(3).
203. Id. § 35.130(b)(8)(d).
204. See Leonard, supra note 14, at 696.
206. Id. § 12112(b)(5)(A).
207. Id. § 12112(b)(5)(B).
208. Id. § 12112(b)(6).
The ADA also provides for a private cause of action for both injunctive and damages relief as a means to enforce its provisions, although the availability of retrospective damages is arguably limited.\(^{209}\) In addition, Title IV of the ADA clearly and unambiguously announces the intention of Congress to abrogate state sovereign immunity.\(^{210}\) Therefore, because the *Seminole* holding limited congressional abrogation power to the Fourteenth Amendment, the remaining question is, of course, whether any of the ADA’s titles amounts to a valid exercise of the Section 5 power.

**B. *Garrett*, The Rational Basis Review of Disability Discrimination, and the Pseudodownfall of the ADA Private Cause of Action Against States**

After *Seminole*, the lower courts were split as to whether any of the titles of the ADA could abrogate state sovereign immunity.\(^{211}\) However, *Board of Trustees of the University of Alabama v. Garrett* clarified the *Flores* analysis—at least as it is applied to Title I—and held that Title I of the ADA was not a valid exercise of the Section 5 power, and therefore could not abrogate state sovereign immunity.\(^{212}\) *Garrett* was another closely divided decision—with the same 5-4 split as in both *Seminole* and *Alden*—and, for at least a few years, seemed to affect judicial confidence in abrogation under Title II as well.\(^{213}\)

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\(^{209}\) The remedies provided under Title II of the ADA are the same as those provided under the Rehabilitation Act, and therefore the same as those provided under Title VI of the Civil Rights Act. For a detailed discussion of the remedies available under the ADA, see Leonard, *supra* note 14, at 697–705.

\(^{210}\) 42 U.S.C. § 12202.

\(^{211}\) This is a condition the lower courts have become accustomed to when dealing with state sovereign immunity limits on ADA causes of action. *Compare* Lavia v. Pa. Dep’t of Corr., 224 F.3d 190, 206 (3d Cir. 2000) (holding that Title I of the ADA cannot abrogate state immunity); Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ., 207 F.3d 945, 952 (7th Cir. 2000) (same); Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (holding that Title II of the ADA cannot abrogate state immunity), *with* Coolbaugh v. Louisiana, 136 F.3d 430, 432 (5th Cir. 1998) (holding that the ADA is a valid exercise of Section 5 power, allowing Congress to abrogate state immunity); *Kimel v. Fla. Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998) (same); *Clark v. California*, 123 F.3d 1267, 1269 (9th Cir. 1997) (same).


\(^{213}\) The Ninth Circuit continued to hold its ground regarding abrogation under Title II. See *Hanson v. Med. Bd. of Cal.*, 279 F.3d 1167, 1174 (9th Cir. 2002). After *Garrett*, however, the Second, Fifth, and Tenth Circuits held that Title II was not a valid exercise of the Section 5 power. See *Garcia v. State Univ. of N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 108–10 (2d Cir. 2001); *Reickenbacker v. Foster*, 274 F.3d 974, 984 (5th Cir. 2001); *Thompson v. Colorado* 278 F.3d 1020, 1034 (10th Cir. 2001).
Garrett involved two separate cases that were consolidated on appeal.214 One case involved a registered nurse, employed by the University of Alabama Hospital, who developed cancer and was subsequently demoted after taking a leave of absence.215 The other case involved an Alabama employee who suffered from a number of disorders and requested accommodations, none of which he received.216 Both individuals filed suit against the State of Alabama, claiming that the state had violated the reasonable accommodation requirements of the ADA. The state claimed that the ADA was not a valid exercise of the Section 5 power and that Congress could not abrogate a nonconsenting state’s immunity to suit.217

In accordance with the Flores three-step analysis, the Court first identified the “scope of the constitutional right at issue,” namely the equal treatment of disabled persons under the Equal Protection Clause of the Fourteenth Amendment.218 The Court turned to its prior equal protection jurisprudence to determine the “metes and bounds” of that right.219 Relying on Cleburne v. Cleburne Living Center, Inc.,220 the Court found that disabled persons were not a classification that deserved heightened scrutiny, and state action that discriminated against the disabled would only be held to a rational basis review.221 Therefore, the state’s action that has the effect of discrimination against the disabled is constitutional under the Equal Protection Clause as long as that discrimination is not irrational. The Court then added that the states could “hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled.”222

The Court then examined whether Congress had identified “a history and pattern of unconstitutional employment discrimination by the States against the disabled,” and found no such pattern that could support

215. Id. at 362.
216. Id.
217. Id.
218. Id. at 365–66.
219. Id. at 366–68.
220. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985). In Cleburne, the Court held that the denial of a special zoning permit for a group home for the mentally disabled was a violation of the Equal Protection Clause, despite the fact that mentally disabled persons were not a quasi-suspect classification, and therefore the state action could only be judged under rational basis review. Id. at 442–45, 450.
222. Id.
congressional prophylactic legislation. The Court refused to take into consideration any history of discrimination by municipal or city governments as those entities are not afforded Eleventh Amendment protection from private suit. The Court also pointed to committee reports that stressed findings of discrimination within such “areas as employment in the private sector,” as opposed to discrimination by the states. Interestingly, the Court did acknowledge a number of instances in the record of discrimination by states within the areas of public services or programs, which are covered by Title II.

Even assuming that there was a pattern of disability discrimination by state employers, the Court found that the Title I remedy was not proportional or congruent to the injury suffered. It took specific exception to Title I’s reasonable accommodation requirement and held that it “far exceeds what is constitutionally required.” Even though an employer is not held to this requirement if the employer can show “undue hardship,” the Court held that Title I still requires much more from the state employer than rational basis review would require. Additionally, the Court argued that Title I moved far beyond the requirements of rational basis review through the outright prohibition of hiring or administrative criteria that have a disparate impact on the disabled. The Court concluded that, despite the clear statement of a congressional intent to abrogate state sovereign immunity, abrogation was impermissible under Title I because it was not remedial in nature and therefore not a valid exercise of Section 5 power.

The dissenting opinion, penned by Justice Breyer, attacked the majority’s contention that there was not a sufficient history and pattern of disability discrimination by the state and included an attached appendix that documented several hundred instances of discrimination by forty-seven of the states. Justice Breyer also took issue with the majority’s argument that evidence of discrimination by local governments and private individuals could not be used to illustrate a sufficient pattern of discrimination by the states, asserting that the “obligation that the Equal Protection Clause creates applies to state and local government entities

223. Id. at 368.
224. Id. at 369–71.
225. Id. at 371 (internal quotations omitted).
226. Id. at 371 n.7.
227. Id. at 372.
228. Id. (internal quotations omitted).
229. Id. at 372–74.
230. Id. at 377–80, 391–424 (Breyer, J., dissenting).
alike." Moreover, the dissent claimed the application of the rational basis review, a limitation on judicial action, to congressional action is not appropriate and that the majority’s reliance on this standard is the only support for “find[ing] the legislative record here inadequate.”

The dissent’s latter rationale for rejecting the majority’s application of rational basis review, however, is flawed. The majority was not judging Title I by directly applying the rational basis review to the ADA. The majority examined the record first to see whether there has been a history of irrational discrimination by the states in order to determine if remedial legislation is necessary. The majority then looked at the prophylactic remedy that the ADA supplies and determined whether that legislation goes too far beyond constitutionally mandated rational basis review of those state violations. The majority admitted that “Congress is not limited to mere legislative repetition of this Court’s constitutional jurisprudence,” and Section 5 authority includes the power to prohibit a “somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” But there is a limit and the majority used the rational basis review as a touchstone by which to judge when remedial and prophylactic legislation goes too far and becomes an impermissible “substantive” redefining of the rights afforded under the Fourteenth Amendment.

C. Tennessee v. Lane and the Title II Enforcement of Fundamental Rights

Garrett closed the book on private causes of action against states provided under Title I, and subsequently many federal circuits held that the Garrett ruling also barred private suits under Title II. The decision in Tennessee v. Lane marked a limited rebirth of the private cause of action under Title II. The Lane Court distinguished the Garrett analysis of Title I from Title II by pointing to the number of due process rights—as opposed to rights of the disabled under equal protection—that are implicated in the

231. Id. at 378–79 (citing Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)).
232. Id. at 385.
233. Id. at 368–72 (majority opinion).
234. Id. at 372–74.
235. Id. at 365 (emphasis added) (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000)).
236. See cases cited supra note 200.
protection of access to certain public services or programs, namely the fundamental right of access to the courts.\textsuperscript{238}

The facts of \textit{Lane} involve two paraplegic respondents who claimed to be denied access to Tennessee courthouses as there were no elevators to accommodate wheelchair access.\textsuperscript{239} When one of the respondents refused to be carried up the stairs to appear in his criminal hearing, he was arrested for failing to appear. The other respondent, a court reporter, claimed that she had been discriminated against in her work and had lost "an opportunity to participate in the judicial process."\textsuperscript{240} The district court denied Tennessee's invocation of Eleventh Amendment immunity and, on appeal, the Sixth Circuit held the case in abeyance pending the \textit{Garrett} decision.\textsuperscript{241}

The Supreme Court later granted certiorari after a Sixth Circuit opinion in another case, \textit{Popovich v. Cuyahoga County Court of Common Pleas},\textsuperscript{242} which distinguished the \textit{Garrett} ruling. In \textit{Popovich}, a hearing-impaired father sued a state court for not accommodating his disability during a child custody hearing and received a $400,000 jury verdict.\textsuperscript{243} The Sixth Circuit, sitting en banc, reversed and remanded as the verdict was based on the jury finding that the father's equal protection rights had been violated.\textsuperscript{244} In doing so, however, the court held that the \textit{Garrett} ruling did not apply to Title II as it enforces certain substantive rights protected by the Due Process Clause.\textsuperscript{245}

The beginning of the \textit{Lane} majority opinion seemed to indicate that the Court intended to settle the broad question as to whether Congress could validly abrogate state sovereignty through Title II's application to all public services and programs.\textsuperscript{246} The holding, however, is much more limited in its scope. The Court began the \textit{Flores} analysis, as in \textit{Garrett}, by identifying the "metes and bounds" of the constitutional right at issue.\textsuperscript{247} The Court then identified not only the equal protection rights of the

\begin{itemize}
\item\textsuperscript{238} \textit{id.} at 522–23.
\item\textsuperscript{239} \textit{id.} at 513–14.
\item\textsuperscript{240} \textit{id.} at 514.
\item\textsuperscript{241} \textit{id.}
\item\textsuperscript{242} \textit{Popovich v. Cuyahoga County Court of Common Pleas}, 276 F.3d 808 (6th Cir. 2002).
\item\textsuperscript{243} \textit{id.} at 811.
\item\textsuperscript{244} \textit{id.} at 815–16.
\item\textsuperscript{245} \textit{id.}
\item\textsuperscript{246} The Court began by stating, "[t]he question presented in this case is whether Title II exceeds Congress' power and § 5 of the Fourteenth Amendment." \textit{Lane}, 541 U.S. at 513.
\item\textsuperscript{247} \textit{id.} at 522–23.
\end{itemize}
disabled, but also the specific fundamental right of access to the courts under the Due Process Clause.\footnote{248}

Acknowledging that this right of access to the courts and others protected by the Due Process Clause are subject to “more searching judicial review” or strict scrutiny, the Court then moved on to the second step: examining the legislative record for a history and pattern of state deprivation of this right.\footnote{249} The Court found that it was “not difficult to perceive” this history of deprivation.\footnote{250} The Court’s examination, however, was much broader than that allowed under Garrett. The Court cited not only instances of deprivation of disabled persons’ right of access to the courts, but also a whole host of other rights—some fundamental and some not—in order to prove this history and pattern of harm to the disabled.\footnote{251} Moreover, the Court points to a very general statistic provided in the congressional record that “76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities” in support of this history.\footnote{252}

After establishing a history and pattern of harm to the disabled, which could support congressional prophylactic legislation, the Court then determined that the remedy provided by Title II was congruent and proportional to this harm. The Court stated that the “duty to accommodate [provided by Title II] is perfectly consistent with the well-established due process principle that ‘within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard’ in its courts.”\footnote{253} In effect, the Court found the strict scrutiny analysis—applicable to state actions that deprive individuals of their right of access to the courts—congruent and proportional to the prophylactic measures provided under Title II that protect against the possibility of such deprivation. The majority rejected Justice Rehnquist’s dissenting argument that the application of Title II remedies to a broad array of public services and programs that do not provide fundamental rights to the disabled should be taken into account when determining whether Title II is a congruent and proportional response.\footnote{254} The Court held that it was not required to

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\textit{Id.}
\footnote{248}{Id.}
\footnote{249}{Id.}
\footnote{250}{Id. at 524.}
\footnote{251}{Id. at 524–28. The Court referred not only to instances of deprivation of fundamental rights such as voting, but also pointed to deprivation of the equal access educational rights, which is not considered to be fundamental. \textit{Id. See infra Part V.A.}}
\footnote{252}{\textit{Lane}, 541 U.S. at 527.}
\footnote{253}{Id. at 532 (quoting \textit{Boddie v. Connecticut}, 401 U.S. 371, 379 (1971)).}
\footnote{254}{\textit{See id.} at 530–31, 533 & n.24. The Court stated:}
examine Title II as an "undifferentiated whole" and therefore limited its holding to allow abrogation of state immunity through Title II only in the context of the fundamental right of access to the courts.\textsuperscript{255}

As discussed above, the Rehnquist dissent rejected the majority's holding that Title II may be evaluated in the Section 5 context only as it applies to access to the courts, stating that "[i]n conducting its as-applied analysis, . . . the majority posits a hypothetical statute, never enacted by Congress, that applies only to courthouses."\textsuperscript{256} Even if the "as-applied" analysis were appropriate, the dissent contended that the majority's use of evidence other than court access evidence to support a finding of a history and pattern of harm was inappropriate unless Title II was examined as a whole.\textsuperscript{257}

The dissent's latter argument does resonate upon close examination of the majority's application of the Flores analysis. The majority first identifies a very specific right—the fundamental right of access to the courts. Then it finds evidentiary support for a history and pattern of deprivation of that right by considering instances of deprivation of that right and other rights protected by the statute as a whole. Finally, the Court returns to an examination of the original right and whether the remedy provided by Congress is permissibly remedial to protect that specific right. In effect, the Court swings back and forth from its "as applied" approach to a broad examination of the statute as a whole. Despite the logistical acrobatics, the Lane opinion did succeed in cracking open the door to private suits under Title II.

V. RECENT DIVISION: LANE IN THE CONTEXT OF EDUCATION

The next question seems to be how far the Lane holding extends. Does it extend to the protection of nonfundamental—but important—rights, such as equal access to education? In the last two years, the lower courts have been struggling with this specific question. The Eleventh and Fourth Circuits have recently held that the Lane ruling does extend to the context of education, and disabled individuals may sue the states for failure to

\textsuperscript{255} Whatever might be said about Title II's 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.

\textsuperscript{256} \textit{Id.} at 530–31, 533–34.

\textsuperscript{257} \textit{Id.} at 551 (Rehnquist, J., dissenting).
accommodate their right to public education under Title II.258 Some district
courts in the Second Circuit, however, have refused to allow such suits.
Because access to education is not a fundamental right, these courts upheld
state immunity defenses to Title II suits in the context of education.259 The
Eighth Circuit has not ruled specifically on the educational context issue,
but has refused to apply Lane to any suit that does not implicate
fundamental rights.260 Finally, the Fifth Circuit has done its best to avoid
the issue altogether by invoking a theory of state waiver of immunity.261

This part will proceed by evaluating these differing approaches,
concluding that the Lane holding cannot logically apply within the context
of education. This is not, however, the end of the discussion. This part will
then argue that the alternatives to private suit enforcement, on which the
Seminoles majority depends for the continued enforcement of the supremacy
of federal law, are either not available or have very little effect within the
educational context. Therefore, the confusion between the lower courts is
warranted. The courts are given the choice of either defying the logical
outcome that precedent supplies or creating a situation wherein the
supremacy of federal law cannot be enforced upon the states.

A. LOWER COURT APPLICATION OF LANE

In rejecting sovereign immunity defenses to Title II private suits
against state educational institutions, the Fourth and Eleventh Circuits have
extended the Lane holding to the protection of a nonfundamental right—the
right of equal access to public education.262 Opposed to this extension,
some district courts and commentators have argued that Title II remedies

258. See Ass’n for Disabled Ams., Inc. v. Fla. Int’l Univ., 405 F.3d 954, 958–59 (11th Cir. 2005);
        Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 490 (4th Cir. 2005).
259. See Press v. State Univ. of N.Y. at Stony Brook, 388 F. Supp. 2d 127, 135 (E.D.N.Y. 2005);
        F.3d 1096, 1100 (8th Cir. 2005).
        Bogalusa City Sch. Bd., 403 F.3d 272, 298–303 (5th Cir. 2005).
262. See, e.g., Ass’n for Disabled Ams., 405 F.3d at 958–59; Constantine, 411 F.3d at 490. See
        also San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–37 (1973). In Rodriguez, a class of Texas
        school children, living in school districts with low property tax rates, challenged the state’s financing of
        the schools on local tax rates. Id. at 4–5. One of the class’s arguments was based on the existence of a
        fundamental right to education inherent in the Constitution and that state action depriving this right
        should be judged under strict scrutiny analysis. Id. at 29. Although the Court confirmed that “education
        is perhaps the most important function of state and local governments,” id. at 29 (quoting Brown v. Bd.
        of Educ., 347 U.S. 483, 493 (1954)), the Court declined to apply strict scrutiny analysis to the Texas
        policy. Id. at 44.
are not congruent and proportional when applied to rights that only deserve minimal judicial scrutiny. In other words, Title II’s reasonable accommodation requirements, when applied to nonfundamental rights, amount to an impermissible substantive redefining of Fourteenth Amendment rights. Other commentators have agreed with the Eleventh and Fourth Circuit’s extension of Lane, stressing the importance of the right to public education and the limitations on Title II remedies.

In Constantine v. Rectors and Visitors of George Mason University, a law student at George Mason University sued the state university for not accommodating her physician-diagnosed disability. Constantine suffered a migraine headache during a final examination for a constitutional law class as a result of a medical condition for which she took prescription medication. She was unable to finish the exam and requested more time. This request was refused, and she failed the exam. After several appeals and making her complaint public in the law school’s newspaper, she was granted a date to retake the exam. That date was then inexplicably moved to an earlier date that conflicted with one of Constantine’s other courses. She was given another date, but then subsequently received another failing grade. She then filed suit, alleging that the university’s procedures were in violation of the reasonable accommodations requirements of Title II, and that her second failing grade amounted to retaliation for the publicizing of her original complaints. The university then argued that the private suit was barred by the Eleventh Amendment.

The Fourth Circuit held that Constantine’s suit was not barred because Congress could abrogate state sovereign immunity through Title II in the public education context. The court began by closely examining the Lane holding. Stressing the explicit limitations of Lane as applicable only

263. See Leonard, supra note 14, at 726–28. Although Leonard wrote this article prior to the Lane decision, his conclusion, that the reasonable accommodations provisions do not pass the Flores test, remains valid, as his equal protection analysis assumed a sufficient finding of history and a rational basis review. See also Matthew P. Hampton, The Fourth "r": Sustaining the ADA’s Private "Right" of Action Against States for Disability Discrimination in Public Education, 83 WASH. U. L.Q. 631, 649–54 (2005) (arguing for heightened scrutiny as the only way to provide for private actions under Title II in the educational context).


265. Constantine, 411 F.3d at 478–79.
266. Id. at 478.
267. Id. at 478–79.
268. Id. at 479.
269. Id.
270. Id. at 490.
in cases involving the fundamental right of access to the courts, the court found that *Lane* did not resolve the question of whether Title II was appropriate Section 5 legislation when the right implicated was the nonfundamental right of access to public education.\(^{271}\)

After applying the *Flores* three-step analysis, the court concluded that Title II was appropriately remedial in the context of education and therefore was validly promulgated under Congress’s Section 5 power. First, the court identified the right implicated—the right of disabled persons to equal access to public education.\(^{272}\) The court, however, admitted that this right does not warrant strict or heightened judicial scrutiny, and therefore government actions that violate such rights are unconstitutional only if those actions are irrational.\(^{273}\) The court then rightly found a history and pattern of deprivation in regards to disabled persons’ access to public educational services.\(^{274}\) Finally, the court concluded that Title II was a congruent and proportional response to this history of deprivation.\(^{275}\)

The court’s justifications for its finding of congruence and proportionality are, however, probably flawed as many of the Title II limitations the court cites as evidence are the same or similar to the explicit limitations on Title I—which *Garrett* held to be a nonremedial, substantive redefining of the Fourteenth Amendment. The court cited the following as proof of the congruence and proportionality of Title II: the “qualified individual with disability” prerequisite; the allowance of states to require the fulfillment of “essential eligibility criteria;” and the right the states retain to refuse to make any alterations if “undue financial and administrative burdens” are shown.\(^{276}\) But all of these limitations on Title II have Title I counterparts.\(^{277}\) Thus, the court’s reliance on them to show congruence and proportionality to an injury that is only judged under rational basis review does not follow logically from the precedent provided by either *Lane* or *Garrett*. *Lane’s* holding—that these limitations

\(^{271}\) Id. at 486.

\(^{272}\) Id. at 486–87.

\(^{273}\) Id. at 487.

\(^{274}\) Id. (noting that the *Lane* “Court found it ‘clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation’” (quoting Tennessee v. Lane, 541 U.S. 509, 529 (2004))).

\(^{275}\) Id. at 487–90.

\(^{276}\) Id. at 488–89.

\(^{277}\) See 42 U.S.C. § 12111(8) (2000) (defining “qualified individual with a disability” in the employment context as a disabled person who “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”); id. § 12112(b)(5)(A) (allowing for an “undue hardship” excuse for failing to accommodate a disabled employee or applicant).
established the proportionality of Title II remedies—was based on the strict scrutiny that is applied when evaluating government actions that violate the right of access to the court.\textsuperscript{278} The Garrett Court, however, found these limitations inadequate to establish congruence and proportionality, even assuming an adequate finding of a history of deprivation, in the context of rights that required only rational basis review.\textsuperscript{279} Therefore, the Constantine court was likely incorrect in its extension of Lane to the educational context.

The Eleventh Circuit analysis in Association for Disabled Americans, Inc. v. Florida International University, is distinguishable from the Constantine analysis only by its brevity and its misplaced reliance on the great “importance” of the right of access to public education in finding that Title II passes the Flores test. The case involved several suits against Florida International University for alleged failures to reasonably accommodate its disabled students.\textsuperscript{280} The Eleventh Circuit provided a relatively brief justification for its holding that Congress validly abrogated Florida’s immunity to private suit against one of Florida’s universities under Title II. The court went through the Flores three-step analysis: identifying the right implicated, establishing a pattern of deprivation, and examining the proportionality of the remedy.\textsuperscript{281} While identifying the right at issue the court stressed that “the constitutional right to equality in education, though not fundamental, is vital to the future success of our society.”\textsuperscript{282} The court, however, did not explain how this is relevant to the rest of the analysis. The fact that this right is “important” does little to clarify the later analysis of whether the remedy is proportional and congruent to the harm done, if there is no heightened scrutiny applied.

The other option, which more logically flows from precedent, is that Congress cannot abrogate state immunity to suit under Title II in the context of public education. As discussed above, Garrett and Lane point to the survival of state immunity to private suits under Title II in the absence of a fundamental right.\textsuperscript{283} Two district courts in the Second Circuit recently agreed, concluding that Lane cannot extend to suits outside of the “fundamental right” context and that Title II does not amount to a congruent and proportional response to the history of deprivation of the

\textsuperscript{278} See supra Part IV.C.

\textsuperscript{279} See supra Part IV.B.

\textsuperscript{280} Ass’n for Disabled Ams., Inc. v. Fla. Int’l Univ., 405 F.3d 954, 956 (11th Cir. 2005).

\textsuperscript{281} Id. at 957–59.

\textsuperscript{282} Id. at 958.

\textsuperscript{283} See supra Part IV.B–C.
right to public education. This position is also supported by the recent Eighth Circuit decision, Bill M. ex rel. William M. v. Nebraska Department of Health and Human Services, which also refused to extend Lane to any nonfundamental right.

Moreover, the Sixth Circuit, a month after it decided Popovich—the logic of which informed the Lane decision—held that Title II could not abrogate state immunity in the context of education. In Carten v. Kent State University, a disabled student sued a state university after he was academically discharged, alleging that the university “refused to accommodate his learning disability and dismissed him based on that disability.” The court refused to apply its holding in Popovich to this suit, as the complaining disabled party was not alleging a violation of a fundamental right. The court noted that “[h]ere, Carten makes no allegations that sound in due process.” Although the Carten decision predates Lane, its holding is instructive as to how far the Lane holding should extend.

The problem, however, with asserting Lane’s inapplicability to the educational context is that, without the availability of private suits, it is difficult to see how Title II’s regulations can be enforced upon state educational institutions. In the educational context, the Seminole enforcement alternatives—Ex parte Young suits, suits brought by the United States, and state waiver of immunity—are not realistic or effective methods of Title II enforcement.

B. THE FIRST ALTERNATIVE: EX PARTE YOUNG SUITS IN THE EDUCATIONAL CONTEXT

As discussed in Part III.D, the Court in Seminole relies on the availability and effectiveness of alternatives to private suits against the states to quell concerns that state immunity would result in an inability to hold states accountable to the supremacy of federal law. One of these alternatives was suits for injunctive relief under Ex parte Young. Within

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287. Id. at 393.
288. Id. at 395.
the specific context of education, however, there are a series of possible obstacles to effective enforcement of Title II through the Ex parte Young alternative.

The nature of the facts underlying many Title II suits against state schools may impede the availability of injunctive relief as the court may not find standing if a student is unable to show an ongoing injury from a state official’s actions. In City of Los Angeles v. Lyons, the Court held that the respondent had no standing to sue the city for injunctive relief after being assaulted by the police on a routine traffic stop because he was unlikely to “suffer future injury” from the same or another police officer again.290 Now consider the facts of McNulty v. Board of Education of Calvert County.291 Ryan McNulty, a student diagnosed with Attention Deficit Hyperactivity Disorder, brought suit against multiple parties, including the state entity school board, alleging a failure to accommodate his disability during his entire secondary school tenure.292 The court dismissed the suit, finding that Title II did not abrogate the state’s immunity in an educational context.293 Even if—as proposed by the Seminole Court—McNulty had merely sued for injunctive relief, under Ex parte Young it is unlikely that McNulty had standing to sue for such relief. McNulty was twenty years old and graduated by the time the court heard his case.294 McNulty is, of course, unlikely to suffer future injury from school officials at a school he no longer attends.

This standing problem could be solved through large class action suits against ongoing school policies that continue to violate disabled students’ rights.295 One incentive for the filing of oftentimes costly and time-consuming class action suits for injunctive relief is the provision of attorney’s fees.296 The ADA does provide for a “reasonable attorney’s fee” to be collected by the “prevailing party,”297 and prolonged Title II class

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291. McNulty v. Bd. of Educ., No. Civ.A. DKC 2003-2520, 2004 WL 1554401, at *1 (D. Md. July 8, 2004). This case is not published and its holding was presumptively overruled by Constantine, but its facts are still relevant as an example of a common Title II private suit in the educational context.
292. Id. at *1–2.
293. Id. at *5.
294. Id. at *1.
296. See, e.g., Shadis v. Beal, 685 F.2d 824, 829 (3d Cir. 1982) (discussing the attorney fee incentive for “private citizens to enforce fundamental rights under the civil rights laws,” provided by the Fees Awards Act).
actions against state educational institutions can create extremely large attorney’s fees.\footnote{298}

This solution, however, leads to the next roadblock—the availability of attorney’s fees. Although the award of attorney’s fees ancillary to injunctive relief are considered costs and are “awarded without regard for the States’ Eleventh Amendment immunity,”\footnote{299} the Court severely limited the availability of these awards in 2001. In \textit{Buckhannon Board \& Care Home, Inc. v. West Virginia Department of Health and Human Resources}, the Court held that in order to qualify as a “prevailing party” and receive an attorney’s fee award, there must be either a “judgment on the merits or a court-ordered consent decree.”\footnote{300} In other words, a state can avoid the payment of these fees by simply changing its illegal policy and making the injunctive suit moot any time prior to judgment or settlement, even though it was likely the merits of the cause of action that led the state to make the change.\footnote{301} At first glance this seems to be an effective enforcement tool that creates an incentive for states to comply with federal law. The problem is that the possibility that attorney’s fees will become unavailable well into the costly litigation process creates a disincentive for attorneys to file suits in the first place. The dissent rightly states that this limitation “impede[s] access to court for the less well heeled, and shrink[s] the incentive Congress created for the enforcement of federal law by private attorneys general.”\footnote{302} The importance of the availability of these fees in Title II suits is clear once you consider that, as of 2000, the percentage of families with a disabled member living in poverty is close to twice that of those families with no disabled members.\footnote{303}

Moreover, despite the inapplicability of state immunity protection to assessments of attorney’s fees expressed in \textit{Hutto v. Finney}, the Court today is more likely to consider the effect of these large awards on state treasuries; the Court could reduce or eliminate an award in light of the recent extensions of state immunity protections. These large attorney’s fees

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301. \textit{Id.} at 622 (Ginsburg, J., dissenting).
will not be coming from the pockets of the state official sued under *Ex parte Young*. Fees will either be taken directly from the state or the official will likely be indemnified by the state.\(^{304}\) The *Alden* majority, in support of the further extension of the state immunity bar, stated “[e]ven today, an unlimited congressional power to . . . levy upon the treasuries of the States for compensatory damages, *attorney’s fees*, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design.”\(^{305}\) A court holding Title II as not validly abrogating state sovereign immunity in the educational context may be unwilling to subject the state treasury to large attorney fees in Title II class actions.

Therefore, because of the facts surrounding common Title II cases in the educational context and the probable limits on attorney’s fees, the availability of *Ex parte Young* suits for injunctive relief provide limited or, in some cases, no enforcement of Title II provisions on state educational institutions.

### C. THE SPENDING POWER ALTERNATIVE, WAIVER OF IMMUNITY IN THE EDUCATIONAL CONTEXT

The Fifth Circuit, understandably, has recently attempted to avoid the difficult abrogation issue in the context of education by turning to the congressional spending power.\(^{306}\) Although Title II was not passed pursuant to the spending power, the Fifth Circuit navigates around the abrogation issue by equating Title II rights and remedies to those provided by the Rehabilitation Act,\(^{307}\) which does condition receipt of all federal funds on state waiver of immunity.\(^{308}\) In *Pace v. Bogalusa City School Board*, the court held that Louisiana validly waived its Eleventh Amendment immunity to suit, pursuant to Section 504 of the Rehabilitation Act, as its Department of Education had accepted federal funds.\(^{309}\) Then the *Pace* court, noting that the rights and remedies provided by Title II and the Rehabilitation Act are “identical and duplicative,” declined to determine whether “*Lane* extends to disability discrimination in access to public

\(^{304}\) See *Hutto*, 437 U.S. at 692–94.


\(^{308}\) *Pace*, 403 F.3d at 280.

\(^{309}\) *Id.* at 288–89.
The court later reaffirmed the *Pace* holding in *Bennett-Nelson v. Louisiana Board of Regents* and again declined to address the abrogation question.\footnote{Id. at 287.} \footnote{Bennett-Nelson, 431 F.3d at 454–55.} \footnote{Pace, 403 F.3d at 277 n.13.} \footnote{See South Dakota v. Dole, 483 U.S. 203, 207, 209 (1987). See also supra Part III.D.4.} \footnote{Recently, the Court declined to draw that line. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Court held that it was unnecessary to determine when a spending power condition placed on a university becomes unconstitutionally coercive, as the conditions under the Solomon Amendment could have been required of the schools without offending any constitutional rights, namely the school’s First Amendment rights. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1307 (2006).} \footnote{U.S. DEP’T OF EDUC. FUNDING, FUNDS FOR STATE FORMULA-ALLOCATED AND SELECTED STUDENT AID PROGRAMS, http://www.ed.gov/about/overview/budget/statetables/07stbystate.pdf (last visited Dec. 13, 2006).} \footnote{Pace, 403 F.3d at 300 n.2. (Jones, J., concurring in part and dissenting in part).} \footnote{Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 449 (5th Cir. 2005).}

There is a big difference between abrogation and waiver of immunity. When immunity is abrogated, it is done so through a congressional action, the result of which is the loss of a state right without the state’s consent. A state waives its immunity rights when it “knowingly and voluntarily forfeits” that immunity.\footnote{Id. at 287.} This waiver can be induced by Congress through its power to condition the receipt of federal funds on waiver of immunity. This power is not unlimited. As discussed in Part III.D.4, there are a number of limits on the spending power, including the prohibition on conditions that are so extreme that the states are subjected to federal coercion.\footnote{Id. at 287.}

As of yet, there is no clear line regarding when a condition on federal funding of education becomes impermissibly coercive.\footnote{Id. at 287.} The courts, however, are more likely to find that the line has been crossed in conditions on educational institutions than in other areas protected by Title II. Every year, the federal government provides state educational institutions with massive amounts of funding in the form of grants, programs, and financial aid. In 2004, the federal government distributed more than $22 billion to states for use in secondary education; more than $15 billion to post-secondary schools in the form of federal Pell Grant, work study, and other programs; and more than $10 billion to states in the form of special education grants.\footnote{Id. at 287.} In *Pace*, the dissent noted that 75% of the Louisiana Department of Education’s budget came from federal funding.\footnote{Id. at 287.} In *Bennett-Nelson*, Louisiana Tech University received and distributed more than $21 million in federal financial aid to its students.\footnote{Id. at 287.} Requiring a state
to forgo this amount of federal funding in the crucial area of education in order to maintain its right to immunity—a right the Court has so vigorously defended—could be seen by today’s Court as impermissibly coercive legislation. Although the Fifth Circuit declined to find coercion in the conditioning of all federal funding to those state educational institutions, the dissent in Pace aptly questioned, "‘[i]f not now, and on this showing, when, and on what showing’ will federal grants be deemed unconstitutionally coercive?"\(^{318}\)

**D. United States Suits in the Educational Context**

Finally, the third Seminole enforcement alternative is suits brought by the United States, from which the states enjoy no immunity.\(^{319}\) As discussed in Part III.D.3, there are problems with this alternative. These problems include when the government’s incentive to enforce a certain individual’s rights is small in comparison to the individual’s interest in those rights. Also, the United States may have a conflict of interest and might forego action against states even when the claim is clearly meritorious.\(^{320}\) Both of these problems exist when depending on enforcement of Title II regulations through U.S. government suits in the educational context.

First, the individualized character of Title II’s reasonable accommodation requirements, especially in the educational context, forecloses on the idea of effective enforcement through U.S. suits. Meltzer notes that “the budgets of public enforcement agencies ‘tend to be small in relation to the potential gains from enforcement as they would be appraised by a private, profit-maximizing enforcer.’"\(^{321}\) It is not difficult to see the U.S. government’s incentive to pursue Constantine’s Title II rights to more time on her constitutional law exam or McNulty’s learning disability accommodation rights as rather small, when compared to Constantine’s or McNulty’s own private interest in the enforcement of their rights.

In addition, there is a real possibility that educational institutions wield influence on the federal government, sufficient to dissuade the federal government from bringing meritorious Title II suits against noncompliant state educational institutions. In 2003, universities and

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\(^{318}\) Pace, 403 F.3d at 300 n.2 (Jones, J., concurring in part and dissenting in part) (internal quotations omitted).


\(^{320}\) See supra Part III.D.3.

colleges reportedly spent $61.7 million on lobbying the federal government, attempting to influence policy and gain earmarked grants.\textsuperscript{322} Academic institutions are now “one of the biggest players on the lobbying scene in Washington, equaling defense contractors and ranking ahead of some other large, influential interest groups such as lawyers, labor unions, and the construction industry.”\textsuperscript{323} Moreover, the lack of U.S.-instigated Title II suits against state educational institutions, when compared to the numerous private actions brought by classes and individuals, is further evidence of a possible conflict of interest.\textsuperscript{324}

VI. CONCLUSION

The \textit{Seminole} Court, justifying the overruling of \textit{Union Gas}, claimed the plurality opinion created an unworkable rule of law. In support of this contention, the Court pointed to the “confusion” within the lower courts after \textit{Union Gas}.\textsuperscript{325} The \textit{Seminole} constriction of Congress’s power to abrogate state sovereign immunity, however, has ultimately produced much more “confusion” than \textit{Union Gas} ever did. And the current confusion in the lower courts in regard to abrogation under Title II in the educational context is completely understandable. The extension of \textit{Lane} to the nonfundamental right of equal access to education is likely barred by precedent, but the \textit{Seminole} alternatives are, at the very least, extremely limited as effective enforcement mechanisms of Title II in the educational context. Thus, the lower courts are left choosing between only two alternatives. Either the courts must ignore precedent and grant Congress the power to abrogate state immunity through an improper application of the \textit{Flores} test, or the courts can apply the test properly, effectively granting state educational institutions the power to ignore valid federal law in violation of the Supremacy Clause. This amounts to an unworkable rule of law as neither choice is acceptable. Moreover, this dilemma would not exist but for \textit{Seminole}’s overturning of \textit{Union Gas}. It has never been argued that the ADA, in any context, is not a valid exercise of Congress’s commerce power. Therefore, if not for \textit{Seminole}, the abrogation question would be relatively clear. Congress could abrogate state sovereign immunity through


\textsuperscript{323} \textit{Id.}

\textsuperscript{324} This author could find no Title II suits in state or federal court filed by the United States against state educational institutions.

\textsuperscript{325} \textit{See supra} Part II.C.1.
Title II, allowing private suit against educational institutions, thereby ensuring state compliance with federal law.

The number of children in elementary and secondary schools identified as disabled has risen steadily over the last ten years. More than half a million disabled students are currently enrolled in colleges and universities throughout the country. This problem is not going anywhere. But “[l]ike baseball, the federalism debate is never over; there is always next year,” and hopefully this Note has added a point to the side in favor of finally overruling Seminole’s “unworkable” expansion of state sovereign immunity.

328. Bloom, supra note 64, at 392.