

DISENTANGLING THE ELEVENTH AMENDMENT AND THE
AMERICANS WITH DISABILITIES ACT: ALTERNATIVE
REMEDIES FOR STATE-INITIATED DISABILITY
DISCRIMINATION UNDER TITLE I AND TITLE II

SETH A. HORVATH*

When it was first drafted and put into effect, the Americans with Disabilities Act (ADA) allowed litigants to seek monetary damages from state governments for disability-based discrimination under Title I and Title II of the statute. On Eleventh Amendment grounds, however, recent decisions have virtually eliminated the prospect of monetary damage awards against the states for such violations. In the wake of these decisions, the precise scope of remedies against the states for violations of Titles I and II of the ADA is unclear. This note examines possible alternative remedies for private plaintiffs alleging disability discrimination by the states. Ultimately, the note argues that two viable remedies exist: injunctive relief under Ex parte Young, and the so-called plan waiver exception to the Eleventh Amendment. The note asserts that the plan waiver remedy is particularly suitable when a Title I violation is alleged, while Ex parte Young injunctive relief should be favored as a remedy for Title II violations.

“The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.”¹

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1. Falbo v. United States, 320 U.S. 549, 561 (1944) (Murphy, J., dissenting).

I. INTRODUCTION

Consider the following scenario. A wheelchair-bound lawyer applies for a position in a state's appellate defense office. Her prior experience with appellate work is quite extensive, and overall, her qualifications for the job are excellent. The building housing the office in which she wishes to work is wheelchair accessible, and any additional modifications to the working environment that she would require to accommodate her disability would be minimal. Nevertheless, she is denied employment. Certain that the decision not to hire her was based on her disability, she considers filing suit against the state under Title I of the Americans with Disabilities Act (ADA or Act), which prohibits disability-based employment discrimination.² Her choice whether or not to file suit will depend on the nature of the remedies available to her in the event she successfully proves the state discriminated against her. Do existing remedies under Title I for state-initiated disability discrimination provide enough of an incentive for her to file suit?

Now consider another similar set of circumstances. A lawyer with a history of mental illness who has successfully stabilized his condition through regular treatment moves to a new state and applies for admission to the state bar, disclosing his history of mental illness in the preliminary stages of the application process.³ The state bar examiner denies him admission to the bar on the ground that his history of mental illness renders him unfit to practice law in the state. Frustrated by a decision he perceives as being grounded in irrational bias against the mentally ill, the lawyer considers filing suit against the state under Title II of the ADA, which prohibits discrimination in the provision of services by public entities.⁴ His choice whether or not to file suit, like that of the wheelchair-bound lawyer who was denied employment by the state appellate defender, will depend on the types of remedies available to him if he is able to prove that the state bar examiner discriminated against him on the basis of his mental illness. Do the remedies for disability-based discrimination in the provision of public services available under Title II provide him with an adequate incentive to file suit?

These examples illustrate a dilemma that only recently arose in the context of ADA litigation—ironically, a dilemma over the scope of remedies available under a statute originally intended to be broadly remedial.⁵ Prior to 2001, ADA litigants alleging discrimination by state

2. 42 U.S.C. § 12112 (2000).

3. The facts of this hypothetical are loosely analogous to those of *Medical Board v. Hason*, 279 F.3d 1167 (9th Cir. 2002), cert. granted 71 U.S.L.W. 3247 (U.S. Nov. 18, 2002) (No. 02-479), cert. dismissed, 123 S. Ct. 1779 (2003).

4. 42 U.S.C. § 12131.

5. See *id.* § 12101 (discussing purposes underlying the enactment of the ADA, the scope of the Act's coverage, and the means of enforcing it).

governments had access to money damages under Title I and Title II.⁶ This, however, is no longer the case.⁷ Rulings on the applicability of the Eleventh Amendment to Title I and Title II of the ADA have significantly altered the remedial scope of the statute,⁸ adding to the already long list of misgivings over a piece of legislation once revered for its ambitious, all-encompassing protection of the disabled.⁹ With monetary damages no longer available to private plaintiffs filing suit against state governments under Title I,¹⁰ injunctive relief and suits for damages initiated by the United States have become important remedial options for disabled individuals in the employment context.¹¹ Moreover, with the Supreme Court likely to eliminate or strictly limit the availability of monetary damages under Title II,¹² injunctive relief and suits for damages by the United States are also likely to become important means of remedying disability discrimination in the provision of services by public entities.¹³

This note discusses the boundaries of the remedial framework that the Supreme Court has left the lower federal courts to develop and administer under Title I and Title II of the ADA. Part II discusses the nature of states' Eleventh Amendment immunity and describes the exceptions to this immunity.¹⁴ It then describes the remedial provisions of Title I and Title II of the ADA.¹⁵ Part III analyzes injunctive relief and suits for damages by the United States as remedies for disability discrimination under Title I and Title II.¹⁶ As to Title I, the analysis focuses on the policy and doctrinal reasons that make injunctive relief an inadequate remedy for state-initiated disability discrimination in the context of employment.¹⁷ It also suggests that Title I lends itself to an expansion of the so-called plan waiver exception to the Eleventh Amendment, which allows the United States to sue state governments for damages on behalf of private plaintiffs.¹⁸ As to Title II, the analysis first offers a basis for the conclusion that injunctive relief and suits for damages by the United States will soon become the only remedial options left to private plaintiffs filing suit against state governments for discrimination in the provi-

6. See, e.g., *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999); *Crawford v. Ind. Dep't of Corr.*, 115 F.3d 481 (7th Cir. 1997); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997).

7. See *infra* text accompanying notes 120–57.

8. See *infra* notes 120–57 and accompanying text.

9. See, e.g., Tom Harkin, *Our Newest Civil Rights Law: The Americans with Disabilities Act*, TRIAL, Dec. 1990, at 56 (describing the ADA as the “emancipation proclamation for people with disabilities”).

10. See *infra* text accompanying notes 120–34.

11. See *infra* text accompanying notes 120–34.

12. See *infra* text accompanying notes 135–57.

13. See *infra* text accompanying notes 135–57.

14. See *infra* text accompanying notes 22–83.

15. See *infra* text accompanying notes 84–115.

16. See *infra* text accompanying notes 116–302.

17. See *infra* text accompanying notes 162–230.

18. See *infra* text accompanying notes 231–74.

sion of public services, programs, and activities.¹⁹ It then discusses the merits of injunctive relief and suits by the United States in relation to the remedial provisions currently in place under Title II.²⁰ Finally, Part IV suggests that in developing and administering the remedial framework for suits by private plaintiffs against state governments under Title I and Title II, lower federal courts can, on the basis of sound legal principles, give preference to suits by the United States under Title I and to suits for injunctive relief under Title II, while also remaining open to the possibility that suits by the United States under Title II may be appropriate in certain circumstances.²¹ These distinctions, it is argued, are consistent with the differences between the coverages of Title I and Title II, and with the enforcement procedures that apply to each.

II. BACKGROUND

To fully understand the effect of the Supreme Court's recent Eleventh Amendment jurisprudence on the ADA, it is necessary to first describe the nature and extent of the states' Eleventh Amendment immunity and the scope of the ADA's coverage. When Congress enacted the ADA, it intended ADA plaintiffs to be able to sue state governments for monetary damages in federal court for violations of the statute.²² Practice has since deviated considerably from intent, and the source of this deviation has been the principle of sovereign immunity, as rooted in the Supreme Court's Eleventh Amendment jurisprudence.²³

A. *The Eleventh Amendment: An Introduction*

The Eleventh Amendment embodies the principle of state sovereign immunity from suit.²⁴ It provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or eq-

19. See *infra* text accompanying notes 135–57.

20. See *infra* text accompanying notes 275–302.

21. See *infra* text accompanying notes 303–17.

22. See 42 U.S.C. § 12202 (2000) (“A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.”).

23. See *infra* text accompanying notes 116–57.

24. The Supreme Court has indicated that the Eleventh Amendment does not confer immunity from suit on states so much as it confirms their possession of this immunity as sovereigns. See, e.g., *Alden v. Maine*, 527 U.S. 706, 728–29 (1999) (“The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States’ immunity from suit is demarcated not by the text of the Amendment alone but by the fundamental postulates implicit in the constitutional design.”); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (“Behind the words of the constitutional provisions are postulates which limit and control.”). For a detailed discussion of the nature of sovereign immunity, see Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1693–1708 (1997).

uity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”²⁵ By its own terms, the amendment bars citizens of one state from filing suit in federal court against the government of another state.²⁶ It also extends this prohibition to foreign nations.²⁷ The language of the amendment itself does not bar suits against a state by its own citizens, but the Supreme Court has long interpreted it to prohibit such suits²⁸ and has shown no indication it will retreat from this position.²⁹ The restrictions of the Eleventh Amendment thus apply to all private plaintiffs.³⁰

Like any rule, however, the Eleventh Amendment is subject to a number of exceptions.³¹ Some commentators have gone so far as to label it the “lawyer’s amendment,” because lawyers aware of the exceptions can avoid many of the jurisdictional complications that the amendment poses.³² While the exceptions themselves may be categorized in various ways,³³ and while the scope of the exceptions is subject to debate,³⁴ courts and commentators alike consistently recognize the same characteristics as placing a cause of action outside the scope of the Eleventh Amendment. In general, the amendment does not apply when: (1) a nonstate governmental entity is a defendant;³⁵ (2) the federal government or a state government is a plaintiff;³⁶ (3) the suit is for injunctive relief;³⁷ (4) a state waives its immunity;³⁸ or (5) the federal government abrogates a state’s immunity.³⁹

25. U.S. CONST. amend. XI.

26. *Id.*

27. *Id.* For a discussion of the historical reasons explaining the scope of coverage of the Eleventh Amendment, see 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.12, at 150–52 (3d ed. 1999).

28. See *Hans v. Louisiana*, 134 U.S. 1, 21 (1890).

29. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 44 (1996) (reaffirming *Hans*); see also Ronald D. Rotunda, *The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1183 n.2 (2002).

30. See *supra* notes 24–29 and accompanying text.

31. See *infra* notes 35–39 and accompanying text.

32. See Rotunda, *supra* note 29, at 1185; see also Carlos Manuel Vásquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 860 (2000) (referring to “alternative mechanisms for enforcing federal law left open by the Eleventh Amendment” as significantly reducing “the problems the Amendment would otherwise pose for the efficacy of the federal legal obligations to the states”).

33. Compare 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3524, at 255 (Supp. 2003), and 1 ROTUNDA & NOWAK, *supra* note 27, at 154, with Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 96–98 (1999).

34. See 1 ROTUNDA & NOWAK, *supra* note 27, at 152–74.

35. See *infra* notes 40–47 and accompanying text.

36. See *infra* notes 48–52 and accompanying text.

37. See *infra* notes 53–56 and accompanying text.

38. See *infra* notes 57–62 and accompanying text.

39. See *infra* notes 63–83 and accompanying text.

1. *Nonstate Defendants*

The Eleventh Amendment only bars lawsuits against state governments,⁴⁰ so a governmental entity that does not qualify as an “arm of the State”⁴¹ is not immune from a lawsuit filed by a private plaintiff in federal court. As part of state governments, state agencies enjoy Eleventh Amendment immunity.⁴² Likewise, state officers acting in their official capacities cannot be sued for damages in federal court.⁴³ Politically independent units such as counties,⁴⁴ cities,⁴⁵ and school boards,⁴⁶ however, may be sued in federal court without running afoul of the amendment. In addition, the amendment does not prohibit suits against state officials in their personal capacity.⁴⁷

2. *United States/State Plaintiff Exception*

Even if a state is named as a defendant, or the named defendant qualifies as an agent or instrumentality of the state, the defendant may be sued in federal court by either the United States⁴⁸ or another state.⁴⁹ The Supreme Court has described the ability of the United States and individual states to file federal suits against state governments as stemming from the fact that states waived certain aspects of their intergovernmental immunity from suit when they joined the Union.⁵⁰ This doctrine is often referred to as plan waiver because it is premised on the view that states waived their immunity from suit against one another and their immunity from suit against the United States as part of the constitu-

40. U.S. CONST. amend. XI (preventing the judicial power of the United States from extending “against one of the United States”).

41. *Alden v. Maine*, 527 U.S. 706, 756 (1999).

42. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) (noting that the Eleventh Amendment’s reference to actions “against one of the United States” includes actions against state agents and instrumentalities, not just actions in which a state is a named defendant).

43. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985) (explaining that an action against a state official in his or her “official capacity” is prohibited by the Eleventh Amendment because, in reality, it is simply an alternative means of pleading an action against the state). *But see infra* text accompanying notes 53–56 (discussing the *Ex parte Young* action).

44. *See, e.g., Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (holding the Eleventh Amendment inapplicable to a county).

45. *See, e.g., Maybanks v. Ingraham*, 378 F. Supp. 913, 918 (E.D. Pa. 1974) (holding the Eleventh Amendment inapplicable to a city).

46. *See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (holding the Eleventh Amendment inapplicable to a school board).

47. *See Hafer v. Melo*, 502 U.S. 21, 27–31 (1991). Distinguishing between an “official capacity” suit and a “personal capacity” suit is often difficult. This determination is closely linked to the nature of the relief sought in a particular lawsuit. *See* 13 WRIGHT ET AL., *supra* note 33, § 3524, at 148–59 (2d ed. 1984). Focusing on the type of relief sought can help to clarify whether the state is a “real . . . party in interest” in the lawsuit, *see Caminker, supra* note 33, at 97 (quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)), in which case the Eleventh Amendment applies.

48. *See, e.g., United States v. Mississippi*, 380 U.S. 128, 136 (1965).

49. *See, e.g., South Dakota v. North Carolina*, 192 U.S. 286 (1904).

50. *See Caminker, supra* note 33, at 97 (citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

tional “plan.”⁵¹ The doctrine of plan waiver incorporates the notion that sovereign immunity is a structural feature of the federal system itself, not simply a creation of the Eleventh Amendment.⁵²

3. *Injunctive Relief*

The Eleventh Amendment also does not preclude suits that seek to enjoin a state officer from engaging in conduct that is illegal under federal law or the Constitution.⁵³ The Supreme Court first articulated this interpretation of the amendment in *Ex parte Young*, holding that the Eleventh Amendment did not bar an action in federal court that sought to enjoin Minnesota’s Attorney General from enforcing a statute that allegedly violated the Fourteenth Amendment.⁵⁴ The Court noted that when a state official’s conduct contravenes constitutional guarantees, the officer “is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”⁵⁵ The *Young* doctrine, a creature of judicial interpretation, allows a litigant to prevent illegal state action in a lawsuit that is really one against a state as such, despite the Eleventh Amendment’s bar against suing state governments.⁵⁶

4. *Waiver*

Eleventh Amendment immunity is also limited by the doctrine of waiver. States may waive their Eleventh Amendment immunity from suit as long as the waiver is explicit.⁵⁷ The logical basis for allowing states to waive the Eleventh Amendment bar and forego their immunity is that the Eleventh Amendment protects the states as litigants.⁵⁸ Because litigants may choose to give up certain protections if they do so explicitly, the states, as litigants, may give up the protection of the Eleventh Amendment.⁵⁹ States may, for instance, choose to voluntarily surrender their immunity when their citizens indicate through the political process that they want access to a private right of action that would otherwise be precluded by the Eleventh Amendment.⁶⁰ In the past, courts have found waiver of Eleventh Amendment immunity where states have enacted

51. *See id.* at 93.

52. *See Alden v. Maine*, 527 U.S. 706, 713 (1999).

53. *See Ex parte Young*, 209 U.S. 123, 150–51 (1908).

54. *Id.* at 149, 168.

55. *Id.* at 159–60.

56. For further discussion of the *Young* doctrine, see 17 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 4231–4232 (2d ed. 1988).

57. *See, e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680–83 (1999); *Idaho v. Couer d’Alene Tribe*, 521 U.S. 261, 267 (1997); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990).

58. *See Rotunda, supra* note 29, at 1184.

59. *See id.*

60. *See id.*

statutes allowing them to be sued in federal court for civil rights violations⁶¹ and statutes consenting to suit of specific state agencies.⁶²

5. *Abrogation*

Finally, Congress may abrogate the states' Eleventh Amendment immunity when it clearly indicates its intent to do so and acts pursuant to a valid grant of congressional authority.⁶³ Determining whether Congress expressly intends to abrogate immunity involves examining the text of the statute Congress enacts to create a private right of action against the states.⁶⁴ Once a court resolves this threshold issue, it can determine whether the abrogation of immunity constitutes a valid exercise of congressional power.⁶⁵ Prior to the Supreme Court's decision in *Seminole Tribe v. Florida*,⁶⁶ the Court had indicated that Congress possessed the authority to abrogate sovereign immunity under its power to regulate interstate commerce,⁶⁷ but *Seminole Tribe* established that Congress cannot abrogate the states' immunity pursuant to the Commerce Clause.⁶⁸ After *Seminole Tribe*, the sole basis for congressional abrogation of state immunity is Congress's Fourteenth Amendment enforcement power.⁶⁹

Section 1 of the Fourteenth Amendment protects individuals against state action that violates the Privileges or Immunities Clause, the Equal Protection Clause, or the Due Process Clause.⁷⁰ Section 5 of the amendment gives Congress the power to enforce the provisions of Sec-

61. See, e.g., *Tang v. R.I. Dep't of Elderly Affairs*, 904 F. Supp. 55, 63 (D.R.I. 1995) (holding that a Rhode Island statute providing that the state would be liable in tort actions in the same manner as private individuals and corporations waived the state's Eleventh Amendment immunity in a racial discrimination action under § 1981).

62. See, e.g., *Weidenfeller v. Kudulis*, 392 F. Supp. 967, 969 (E.D. Wis. 1975) (holding that a Wisconsin statute providing that the Department of Health and Social Services could be sued waived the state's Eleventh Amendment immunity with respect to the Department in an action under the Fair Labor Standard Act); see also *Port Auth. Trans-Hudson Corp.*, 495 U.S. at 305, 306 (holding that the statutory consent to suit provision in the compact between New York and New Jersey creating a bi-state entity designed to operate certain transportation facilities waived the states' Eleventh Amendment immunity vis-à-vis the entity).

63. *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996).

64. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73–74 (2000) (concluding that Congress clearly indicated its intent to abrogate the states' immunity from suit when it stated that an individual filing suit pursuant to the Age Discrimination in Employment Act could seek relief from various employers, including state agencies); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (holding that Congress made its intent to abrogate the states' sovereign immunity clear when it stated in the text of the Trademark Remedy Clarification Act that "such state entities 'shall not be immune, under the Eleventh Amendment of the Constitution of the United States. . . .'").

65. See, e.g., *Kimel*, 528 U.S. at 73.

66. 517 U.S. 44.

67. See *Pennsylvania v. Union Gas Co.* 491 U.S. 1, 14–15 (1989) (plurality opinion).

68. *Seminole Tribe*, 517 U.S. at 66, 72–73 (overruling *Union Gas* and stating that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction").

69. See *id.* at 59; see also *infra* notes 70–83 and accompanying text.

70. U.S. CONST. amend. XIV, § 1.

tion 1.⁷¹ Thus, pursuant to its Section 5 enforcement power, Congress can pass legislation that protects individuals from violations of the guarantees in Section 1.⁷² In other words, it can create causes of action against state governments that subject them to suit by private plaintiffs.⁷³

The scope of Congress's enforcement power was uncertain for many years.⁷⁴ In *City of Boerne v. Flores*, however, a clear majority of the Supreme Court confirmed that the enforcement power is not unlimited.⁷⁵ In *Flores*, the Court invalidated the Religious Freedom Restoration Act (RFRA).⁷⁶ The RFRA limited state laws burdening the exercise of religion, and the Court held that this limitation exceeded the scope of Congress's Section 5 enforcement power.⁷⁷ In so doing, it reasoned that Congress's power under Section 5 is "remedial"⁷⁸ and does not include the substantive "power to determine what constitutes a constitutional violation."⁷⁹ The Court established a balancing test for determining whether legislation falls within the Section 5 power, stating that "there must be a *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end."⁸⁰ According to the Court, the RFRA lacked this congruence and proportionality, because Congress had failed to produce evidence that the states had engaged in a pattern of enacting laws to restrict the exercise of religion.⁸¹ Without evidence of such an injury, the RFRA could not possibly be a congruent and proportional means of remedying it.⁸² The RFRA was thus inappropriate legislation under Section 5 and did not validly abrogate the states' Eleventh Amendment immunity.⁸³

71. *Id.* § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

72. *Id.*

73. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); see also John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

74. In the 1966 case of *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Supreme Court laid the groundwork for a broad interpretation of the scope of Congress's enforcement power. See *id.* at 653 (confirming that Congress may enact legislation to remedy a violation of Equal Protection as long as the legislative remedy is reasonably related to the proper goal of enforcing Section 1 of the Fourteenth Amendment and also suggesting that Congress may actually *define* the scope of the Equal Protection guarantee itself). The broad interpretation of the enforcement power set forth in *Morgan* was first limited in *Oregon v. Mitchell*, 400 U.S. 112 (1970). In *Mitchell*, there was no opinion of the Court, but a majority of Justices agreed that Congress cannot define the substantive meaning of the Equal Protection Clause. See *id.* at 127. For further discussion of the Court's early decisions defining the scope of the enforcement power, see Rotunda, *supra* note 29, at 1204–13.

75. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

76. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended in sections of 42 U.S.C. § 2000bb).

77. See *Flores*, 521 U.S. at 519.

78. *Id.* at 519 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

79. *Id.*

80. *Id.* at 520 (emphasis added).

81. See *id.* at 530–34.

82. See *id.*

83. See *id.*

B. *The Americans with Disabilities Act: A Synopsis*

The Eleventh Amendment and its exceptions have become a source of particular interest and concern in the context of the ADA. Congress enacted the ADA in 1990 to prevent disability discrimination in the United States.⁸⁴ To be considered “disabled” for purposes of the Act, an individual must have a “physical or mental impairment that substantially limits one or more of the major life activities,”⁸⁵ have a “record of such an impairment,”⁸⁶ or be “regarded as having such an impairment.”⁸⁷ This tripartite definition of “disability” applies to the antidiscrimination provisions in each of the ADA’s titles, which regulate employment (Title I),⁸⁸ public services (Title II),⁸⁹ public accommodations (Title III),⁹⁰ and telecommunications (Title IV).⁹¹ Of these titles, only Title I and Title II have clashed with the restrictions of the Eleventh Amendment⁹² because only Title I and Title II provide litigants with a right of action against public entities.⁹³

1. *ADA Title I*

Title I of the ADA prohibits employment discrimination on the basis of disability in job application procedures, hiring, advancement, dis-

84. See 42 U.S.C. §§ 12101–12213 (2000). Congress set forth the following findings in the text of the ADA:

[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

Id. § 12101(a)(5). To remedy this “serious and pervasive social problem,” *id.* § 12101(a)(2), Congress enacted the ADA, intending to provide “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” *id.* § 12101(b)(1), and “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,” *id.* § 12101(b)(2).

85. *Id.* § 12102(2)(A).

86. *Id.* § 12102(2)(B).

87. *Id.* § 12102(2)(C). Individuals may be “regarded as” having a disability if they have an impairment that does not substantially limit a major life activity but is treated as if it does; they have an impairment that substantially limits a major life activity because of the attitudes of others; or they are treated as having an impairment where no impairment exists. See 29 C.F.R. § 1630.2(1) (2002).

88. See 42 U.S.C. §§ 12111–12117.

89. See *id.* §§ 12131–12165.

90. See *id.* §§ 12181–12189.

91. See 47 U.S.C. § 225 (2000).

92. See *infra* notes 116–57 and accompanying text.

93. See *infra* notes 95, 109 and accompanying text. Title III prohibits discrimination on the basis of disability by places of public accommodation operated by private entities. See 42 U.S.C. § 12182; see also *id.* §§ 12181(6)–12181(7). For a discussion of the legislative history of Title III and the complications that have arisen in its enforcement, see Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000). Title IV amends the Communications Act of 1934, 47 U.S.C. §§ 151–757, to require that all “common carriers,” *id.* § 225(a)(1), provide “telecommunications relay services,” *id.* § 225(a)(3), that allow individuals with hearing or speech impairments to communicate by telephone with hearing individuals in a manner equivalent to that used by hearing individuals. See *id.* §§ 225(b)–225(c). ADA Title V contains miscellaneous provisions. 42 U.S.C. §§ 12201–12213.

charge, compensation, and training.⁹⁴ Both private and public entities fall within the scope of Title I's coverage as defendants because Title I applies to any employer with fifteen or more employees.⁹⁵ For a disabled individual to be protected by Title I, the individual must be able to perform the essential functions of the job at issue "with or without reasonable accommodation."⁹⁶ Under these terms, an individual has a cognizable claim under Title I if the individual: (1) is disabled within the meaning of the Act; (2) is able to perform a job with or without some form of reasonable accommodation; (3) is working, or wishes to work, for an employer with fifteen or more employees; and (4) is discriminated against by that employer on the basis of a disability in any employment-related decision.⁹⁷

Even if the above criteria are met, however, a Title I plaintiff may not file suit without first following the administrative procedures set forth in Title VII of the Civil Rights Act of 1964.⁹⁸ Title I of the ADA adopts the remedial provisions of Title VII.⁹⁹ That being the case, the Equal Employment Opportunity Commission (EEOC) is responsible for enforcing Title I.¹⁰⁰ A job applicant or employee that believes he or she has been discriminated against on the basis of disability by a state employer must file a charge with the EEOC, and the EEOC will investigate that charge.¹⁰¹ If the EEOC determines that there is no reasonable cause to believe the charge, then the charge will be dismissed.¹⁰² In this case, the EEOC will issue a right-to-sue letter to the complainant, giving the complainant permission to file a private suit against the employer.¹⁰³ If, on the other hand, the EEOC finds reasonable cause to believe that an

94. 42 U.S.C. § 12112(a).

95. *See id.* § 12111(5)(A) (defining the term "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day") (emphasis added).

96. *See id.* § 12112(a) ("No covered entity shall discriminate against a *qualified individual with a disability.*") (emphasis added); *see also id.* § 12111(8) ("The term 'qualified individual with a disability' means an individual with a disability who, *with or without reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires.") (emphasis added). Examples of reasonable accommodations include making existing facilities accessible to individuals with disabilities, job restructuring, part-time work, modified work schedules, reassignment to vacant positions, equipment modification, and the provision of qualified readers or interpreters. *Id.* § 12111(9)(A)–(B). The ADA does not obligate an employer to provide a reasonable accommodation if the accommodation would place an "undue hardship" on the operation of the employer's business. *See id.* § 12112(b)(5)(A).

97. *See supra* notes 94–96 and accompanying text.

98. *See* 42 U.S.C. § 2000e-5.

99. *Id.* § 12117 ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . .").

100. *Id.* § 2000e-5(a). The EEOC consists of five members appointed by the President. It has district offices throughout the country, which process charges of discrimination, and its Office of General Council is responsible for litigating on its behalf. MACK A. PLAYER, *FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL* § II-5.01 (4th ed. 1999).

101. *See* 42 U.S.C. § 2000e-5(b); 29 C.F.R. §§ 1601.6–7 (2002).

102. *See* 42 U.S.C. § 2000e-5(b); 29 C.F.R. §§ 1601.18–19.

103. *See* 29 C.F.R. § 1601.28(a).

employer discriminated against the complainant, then it will negotiate with the employer and attempt to obtain relief for the complainant.¹⁰⁴ If this conciliatory process fails, then the EEOC will refer the case to the Department of Justice (DOJ).¹⁰⁵ Upon referral, the DOJ may either initiate litigation on behalf of the complainant or issue a right-to-sue letter to the complainant.¹⁰⁶ Regardless of whether the complainant or the DOJ initiates litigation, Title VII provides for both injunctive relief and monetary damages.¹⁰⁷

2. *ADA Title II*

Title II of the ADA prohibits disability-based discrimination in the provision of government services, programs, and activities.¹⁰⁸ Unlike Title I, it applies specifically to public entities, and its coverage is not subject to a minimum-maximum size limitation.¹⁰⁹ For a disabled individual to be protected by Title II, the individual must, with or without reasonable accommodation, meet the “essential eligibility requirements” for receiving the government service or participating in the government program at issue.¹¹⁰ An individual thus has a valid claim under Title II if the individual: (1) is disabled within the meaning of the statute; (2) is eligible to receive services or participate in programs or activities that a public entity provides; (3) and is denied the benefits of those services, programs, or activities on the basis of the disability.¹¹¹

104. See 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.24.

105. See 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28(d).

106. See 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28(d).

107. For a discussion of the full scope of injunctive and monetary remedies available under Title VII, see HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE §§ 4.25–4.26 (2001).

108. 42 U.S.C. § 12132. Some of the services covered by Title II include public education, transportation, recreation, health care, social services, law enforcement, courts, prisons, voting, and town meetings. LEWIS & NORMAN, *supra* note 107, § 10.11, at 449.

109. Compare 42 U.S.C. § 12111(5)(A) (defining employer as having fifteen or more employees), with *id.* § 12131(1) (“The term ‘public entity’ means (A) any State or local government [and]; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government . . .”).

110. See *id.* § 12132 (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”) (emphasis added); see also *id.* § 12131(2) (“The term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”) (emphasis added).

111. See *supra* notes 108–10 and accompanying text. Federal courts are split on the issue of whether Title II’s “services, programs, or activities” language covers employment discrimination by public entities. Compare, e.g., *Zimmerman v. Or. Dep’t of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999) (holding that Title II’s “services” language refers only to the “outputs” of a public agency, so employment, an “input,” cannot be considered a service within the meaning of Title II), with *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 821 (11th Cir. 1998) (“The statutory language used by Congress in the creation of Title II is brief. Extensive legislative commentary regarding the applicability of Title II to employment discrimination, however, is so pervasive as to belie

Title II incorporates the enforcement procedures and remedies of Title VI of the Civil Rights Act of 1964.¹¹² Thus, like Title I, it provides for injunctive relief, as well as the recovery of monetary damages.¹¹³ The main distinction between the enforcement of Title I and the enforcement of Title II is that Title II's enforcement procedures do not require an aggrieved party to file an administrative complaint prior to filing a private lawsuit.¹¹⁴ Thus, an individual may file suit against a public entity pursuant to Title II without first filing a complaint with an administrative agency and awaiting the conclusion of conciliatory proceedings.¹¹⁵

any contention that Title II does not apply to employment actions.”). The statutory interpretation issue of ADA Title II's applicability to employment discrimination lawsuits has two important implications. First, in jurisdictions where Title II applies to disability discrimination in government employment, government employees may file suit directly without administrative approval, because the remedial provisions of Title II do not require the timely filing of charges with the EEOC or any other agency before commencing suit. *See* 42 U.S.C. § 12133; *see also infra* notes 114–15 and accompanying text. Second, the application of Title II to employment discrimination expands the purview of the ADA's prohibition against such discrimination to include government entities with fewer than fifteen employees because Title II's coverage of public entities is not subject to any maximum-minimum size requirement. *See* 42 U.S.C. § 12131. Taken together, direct filing and expanded coverage make ADA employment discrimination lawsuits easier for government employees to file.

112. The exact path of this incorporation is a bit tortuous. Title II's enforcement provision adopts the enforcement provisions of the Rehabilitation Act of 1973 (RHA), the precursor of the ADA. *See* 42 U.S.C. § 12133 (adopting the “remedies, procedures, and rights set forth in section 794a of Title 29” as those applicable to discrimination occurring in violation of ADA Title II); Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(1)–(2) (2000). While it is not immediately apparent whether Title II's enforcement provision refers to § 794a(a)(1), § 794a(a)(2), or both, legislative history clarifies that it refers to § 794a(a)(2). *See* S. REP. NO. 101-116, at 57–58 (1989). This interpretation is also consistent with logic and common sense. Because § 794a(a)(2) governs the enforcement of § 794, which prohibits recipients of federal funds from discriminating against an “otherwise qualified individual with a disability” in “any program or activity receiving federal financial assistance,” *see* 29 U.S.C. § 794(a), and because Title II, like § 794, addresses discrimination in the context of government services, programs, and activities, it is logical that § 794a(a)(2) would govern violations of Title II. After all, § 794a(a)(1) governs violations of § 791, and § 791 applies only to federal employers that engage in disability discrimination against federal employees. *See* 29 U.S.C. § 791. The result of Title II's adoption of § 794a(a)(2) is the consequent incorporation of the enforcement procedures and remedies of Title VI of the Civil Rights Act. *See* 29 U.S.C. § 794a(a)(2) (adopting the “remedies, procedures, and rights” of Title VI). Therefore, a party that files a Title II suit against a public entity alleging discrimination in the provision of a government service is bound by the enforcement procedures of Title VI and has access to the remedies provided by Title VI. *See* 42 U.S.C. § 2000d-7.

113. *See* 42 U.S.C. § 2000d-7 (“In a suit against a State . . . remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.”).

114. *See id.*; 28 C.F.R. § 35.172(b) (2002) (“At any time, the complainant may file a private suit pursuant to . . . the Act, whether or not the designated agency finds a violation.”); *id.* § 35, app. A, subpt. F, § 35.172 (“The Act requires the Department of Justice to establish administrative procedures for resolution of complaints, but does not require complainants to exhaust these administrative remedies. The Committee Reports make clear that Congress intended to provide a private right of action with the full panoply of remedies for individual victims of discrimination. Because the Act does not require exhaustion of administrative remedies, the complainant may elect to proceed with a private suit at any time.”); *see also* DEP'T OF JUSTICE, ADA TITLE II DOJ TECHNICAL ASSISTANCE MANUAL § II-9.1000 (1996), *reprinted in* RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABILITY DISCRIMINATION HANDBOOK: STATUTES AND REGULATORY GUIDANCE (3d ed. 2000) [hereinafter TECHNICAL ASSISTANCE MANUAL].

115. *See* TECHNICAL ASSISTANCE MANUAL, *supra* note 114, § II-9.1000.

III. ANALYSIS

A. *The Intersection of the Eleventh Amendment and the ADA*

Having separately discussed the Eleventh Amendment and the ADA, the nature and consequences of their relationship with one another can be analyzed. The first portion of this analysis discusses Supreme Court case law dealing with the issue of private lawsuits against state governments under Title I and Title II of the ADA.¹¹⁶ It focuses on the Court's seminal Title I decision, *Board of Trustees v. Garrett*,¹¹⁷ as well as *Medical Board v. Hason*,¹¹⁸ a Title II case that was pending before the Court in 2003, until the petitioner, for reasons indicative of the position the Court is likely to take on the constitutionality of Title II, notified the Court it did not wish to proceed with the case.¹¹⁹

1. *ADA Title I and Board of Trustees v. Garrett*

In *Board of Trustees v. Garrett*, respondent Patricia Garrett, a registered nurse employed as a nursing director in a state-run hospital in Alabama, was forced to accept a lower paying position after returning from a leave of absence she took to undergo cancer treatment.¹²⁰ Respondent Milton Ash, a state-employed security officer, was denied the accommodations he requested to minimize the impact his work environment and schedule had on his chronic asthma and sleep apnea.¹²¹ Garrett and Ash filed separate lawsuits in the United States District Court for the Northern District of Alabama, seeking monetary damages under Title I of the ADA.¹²² The court disposed of both cases in a single opinion, denying Garrett and Ash damages on the ground that the ADA exceeded Congress's authority to abrogate the states' Eleventh Amendment immunity.¹²³ The Court of Appeals for the Eleventh Circuit reversed,¹²⁴ relying on its decision in *Kimel v. State Board of Regents*,¹²⁵ which held that the ADA validly abrogated the states' Eleventh Amendment immunity.¹²⁶

After granting certiorari, the Supreme Court reversed the Eleventh Circuit, holding that the Eleventh Amendment bars state employees from suing states in federal court to recover monetary damages for the states' failures to comply with Title I's prohibition against disability-

116. See *infra* text accompanying notes 120–57.

117. 531 U.S. 356 (2001).

118. 279 F.3d 1167 (9th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3247 (U.S. Nov. 18, 2002) (No. 02-479), *cert. dismissed*, 123 S. Ct. 1779 (2003).

119. See *infra* notes 135–50 and accompanying text.

120. See *Garrett*, 531 U.S. at 362.

121. *Id.*

122. *Id.* at 360, 362.

123. See *id.* at 362–63.

124. *Id.* at 363.

125. 139 F.3d 1426 (11th Cir. 1998).

126. *Id.* at 1443; see *Garrett*, 531 U.S. at 363.

based employment discrimination.¹²⁷ In so holding, the Court determined that Title I did not fall within the scope of Congress's section 5 enforcement power.¹²⁸ According to the Court, in enacting Title I of the ADA, Congress did not successfully identify a history and pattern of unconstitutional employment discrimination by the states against the disabled.¹²⁹ The Court further stated that even if Title I's legislative history could be interpreted as demonstrating a pattern of disability discrimination in employment by the states, Title I would still not validly abrogate the states' Eleventh Amendment immunity, because it was not a "congruent and proportional" response to disability discrimination.¹³⁰ In this regard, the Court explained that Title I's reasonable accommodation provision requires state employers to do more than is constitutionally necessary to accommodate disabled employees.¹³¹ The Constitution requires only that the states refrain from acting irrationally toward disabled individuals.¹³² Because it would be rational, for financial reasons, for a state employer to make hiring decisions based on a potential employee's ability to use existing facilities,¹³³ but impermissible under the ADA, the ADA's reasonable accommodation requirement unconstitutionally prohibited state employers from considering individuals' disabilities in their employment decisions.¹³⁴

2. *Medical Board v. Hason and the Title II Circuit Split*

Though the Court in *Garrett* disposed of the issue of the states' immunity from suit under Title I of the ADA, it did not address the issue of whether private parties can recover monetary damages from states under Title II for disability discrimination in the provision of government services, programs, and activities.¹³⁵ The Court was poised to resolve this

127. *See Garrett*, 531 U.S. at 360.

128. *See id.* at 360, 374.

129. *See id.* at 374.

130. *See id.* at 372–74.

131. *See id.* at 372.

132. *See id.* at 366–67 (discussing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), in which the Court held that disability did not constitute a quasi-suspect classification for purposes of its equal protection jurisprudence, and concluding that *Cleburne* established that states merely must act rationally toward disabled individuals to avoid violating the Equal Protection Clause).

133. *See id.* at 372.

134. *See id.*

135. The *Garrett* Court reasoned that while the petitioners' "Questions Presented" could be read to apply to both Title I and Title II of the ADA, "no party has briefed the question whether Title II of the ADA, dealing with the 'services, programs, or activities of a public entity,' . . . is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject." *Id.* at 360 n.1 (citation omitted). Accordingly, the Court indicated that it was "not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored [the Court] with briefing on the statutory question." *Id.* The Court then dismissed the portion of the writ of certiorari on the question of whether state employers may be sued for monetary damages pursuant to ADA Title II. *Id.*

issue in *Medical Board v. Hason*.¹³⁶ In *Hason*, the respondent, a physician, was denied a license to practice medicine in California on the basis of his history of mental illness.¹³⁷ In response, he sued the Medical Board of the State of California under Title II of the ADA in the United States District Court for the Central District of California for both damages and injunctive relief.¹³⁸ The district court dismissed the plaintiff's complaint against the Medical Board on the ground that the Eleventh Amendment barred his claims.¹³⁹ The Court of Appeals for the Ninth Circuit reversed and remanded, holding that the Eleventh Amendment did not bar the plaintiff's Title II claims.¹⁴⁰ It rested its holding on two of its previous decisions upholding Title II as a valid exercise of Congress's enforcement power.¹⁴¹ The court reasoned that the Supreme Court's decision in *Garrett* was restricted to Title I and, therefore, did not compel it to reconsider its decisions on Title II.¹⁴²

The remainder of *Hason*'s procedural history serves as a telling sign of the decision the Court is likely to make in determining the applicability of Title II to state governments. On March 3, 2003, roughly three weeks before oral arguments in *Hason* were scheduled to proceed before the Supreme Court, Bill Lockyer, the California Attorney General, sent the Court a letter indicating that the State of California no longer wished to argue the case before the Court.¹⁴³ Shortly thereafter, on April 7, the Court entered an order dismissing the case.¹⁴⁴ Lockyer had first made his position on discontinuing the case officially known in a February 21, 2003, letter to the Medical Board of California.¹⁴⁵ The letter noted that "it would be truly unfortunate to have the entirety of the ADA's remedial scheme against state discrimination decided in the context of this case's limited focus. It is understandable that California's community of persons with disabilities is extremely anxious over such a prospect."¹⁴⁶ In addition, it concluded that discontinuing the case would serve "the greater public interest."¹⁴⁷ Settlement talks in the case had failed,¹⁴⁸ but

136. 279 F.3d 1167 (9th Cir. 2002), cert. granted, 71 U.S.L.W. 3247 (U.S. Nov. 18, 2002) (No. 02-479), cert. dismissed, 123 S. Ct. 1779 (2003).

137. *Id.* at 1169-70.

138. *Id.* at 1170.

139. *Id.*

140. *Id.* at 1174.

141. See *Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999); *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir. 1997).

142. See *Hason*, 279 F.3d at 1171.

143. See Charles Lane, *On Second Thought . . .*, WASH. POST, Apr. 11, 2003, at A25.

144. *Id.*; see also 123 S. Ct. 1779 (2003). The April 7 order is thought to mark the first instance in the Court's history that the Justices have dismissed a case solely upon request of the party that originally petitioned for certiorari. Lane, *supra* note 143, at A25.

145. Lane, *supra* note 143, at A25.

146. *Id.* (quoting Letter from Bill Lockyer, Attorney General, California, to Medical Board of California (Feb. 21, 2003)).

147. *Id.* (quoting Letter from Bill Lockyer, Attorney General, California, to Medical Board of California (Feb. 21, 2003)).

148. *Id.*

by at least one account, the case had become a “political liability,”¹⁴⁹ and Lockeyer was eager to end the litigation. Reportedly, California disability activists, concerned that the Court’s decision in the *Hason* case would limit the coverage of Title II, communicated to the Attorney General that they would not support his potential bid for governor in 2006 if California did not withdraw from the case.¹⁵⁰ Regardless of whether Lockeyer’s decision about the case was a direct response to the political pressure exerted by California’s disability lobby or a public policy choice that it would be in the best interest of the State of California to ensure the continued availability of money damages under Title II by not pursuing the litigation, the obvious implication of the decision was that the parties interested in the case’s outcome were fairly certain the Court would resolve the matter in favor of California. Their apparent certainty comes as no surprise in light of prevailing Title II case law.

The Ninth Circuit’s decision in *Hason* further exacerbated a circuit split over the issue of whether the states are immune from suit for damages by private individuals under Title II. The Fourth, Fifth, Eighth, and Tenth Circuits agree that the states are entirely immune from suit under Title II;¹⁵¹ the First, Second, and Sixth Circuits have taken the position that the states are partially immune from suit;¹⁵² and the Seventh Circuit is indeterminate but has indicated it might hold that the states are entirely immune from suit.¹⁵³ Only the Ninth Circuit maintains that the

149. *Id.*

150. *Id.*

151. See *Wessel v. Glendening*, 306 F.3d 203, 210–15 (4th Cir. 2002) (holding that Congress did not validly abrogate the states’ Eleventh Amendment immunity when it enacted Title II of the ADA); *Klingler v. Dir., Dep’t of Revenue*, 281 F.3d 776, 777 (8th Cir. 2002) (affirming *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1006–10 (8th Cir. 1999), a pre-*Garrett* decision holding that Title II does not validly abrogate the states’ sovereign immunity); *Reickenbacker v. Foster*, 274 F.3d 974, 981–83 (5th Cir. 2001) (overruling *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998), after *Garrett* and holding that “[s]ince the accommodation obligation imposed by Title II . . . far exceeds that imposed by the Constitution, we cannot conclude that [it is] proportional and congruent to the legislative findings of unconstitutional discrimination against the disabled by the States”); *Thompson v. Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001) (holding that Title II does not validly abrogate the states’ sovereign immunity).

152. See *Kiman v. N.H. Dep’t of Corr.*, 301 F.3d 13, 24 (1st Cir. 2002) (holding that “Congress acted within its powers in subjecting the states to private suit under Title II of the ADA, at least as that Title is applied to cases in which a court identifies a constitutional violation by the state” and declining to rule on whether Congress acted within its enforcement power by allowing private suits under “the full scope of Title II”); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 811 (6th Cir. 2002) (holding that Title II does not constitute a legitimate exercise of the enforcement power as applied to equal protection violations of Section 1 of the Fourteenth Amendment, but does constitute a legitimate exercise as applied to certain due process-type violations); *Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 111 (2d Cir. 2001) (holding that Title II actions may only be brought against the states if the plaintiff can establish that the “violation was motivated by discriminatory animus or ill will based on the plaintiff’s disability”).

153. See *Erickson v. Bd. of Governors*, 207 F.3d 945, 948 (7th Cir. 2000) (questioning the vitality of *Crawford v. Ind. Dep’t of Corr.*, 115 F.3d 481, 487 (7th Cir. 1997), which upheld Title II as a valid abrogation of state sovereign immunity).

states are not immune from suit.¹⁵⁴ Thus, of the circuit courts that have ruled on this issue, a majority agrees that the states are at least partially immune from suit under Title II,¹⁵⁵ and a clear plurality maintains that the states' immunity under Title II is absolute.¹⁵⁶ In light of the current status of circuit court case law on Title II, the Supreme Court's decision in favor of state immunity under Title I, and the circumstances surrounding the *Hason* case, the Supreme Court is likely to determine that the states are either partially or entirely immune from suit for damages by private individuals under Title II, placing Title II plaintiffs filing suit against the states on the same footing as Title I plaintiffs insofar as the availability of monetary damages is concerned.¹⁵⁷

B. *Post-Garrett Remedies for State Disability Discrimination*

Even though private plaintiffs are no longer able to file suit for monetary damages in federal court against state governments under Title I¹⁵⁸ and the availability of this remedial option is quickly dwindling under Title II as well,¹⁵⁹ ADA plaintiffs still have access to various remedies for state-initiated disability discrimination. These remedies stem from the exceptions to the states' Eleventh Amendment immunity described above.¹⁶⁰ This portion of the analysis discusses those remedies as they apply to Title I and Title II of the ADA.¹⁶¹

I. *Post-Garrett Remedies Under Title I*

In a brief footnote at the end of the *Garrett* opinion, the Supreme Court set forth the parameters of an alternative remedial framework for addressing disability discrimination by the states.¹⁶² Footnote nine indicates that, despite the Court's holding in *Garrett*, Title I is still applicable to the states and can be enforced: (1) by private individuals in *Ex parte*

154. See *Med. Bd. v. Hason*, 279 F.3d 1167 (9th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3247 (U.S. Nov. 18, 2002) (No. 02-479), *cert. dismissed*, 123 S. Ct. 1779 (2003) (affirming the pre-*Garrett* decision, *Dare v. California*, 191 F.3d 1167, 1174-75 (9th Cir. 1999), which held that "the ADA was a congruent and proportional exercise of Congress's enforcement powers under § 5 of the Fourteenth Amendment that abrogated Eleventh Amendment immunity").

155. See *Kiman*, 301 F.3d at 24; *Wessel*, 306 F.3d at 210-15; *Popovich*, 276 F.3d at 811; *Klingler*, 281 F.3d at 777; *Garcia*, 280 F.3d at 111; *Reickenbacker*, 274 F.3d at 981-83; *Thompson*, 278 F.3d at 1034; see also *Erickson*, 207 F.3d at 948 (questioning the vitality of *Crawford*, 115 F.3d at 487).

156. See *Wessel*, 306 F.3d at 210-15; *Klingler*, 281 F.3d at 777; *Reickenbacker*, 274 F.3d at 981-83; *Thompson*, 278 F.3d at 1034.

157. See *supra* notes 120-56 and accompanying text. During the publication of this note, the Supreme Court granted certiorari in *Tennessee v. Lane*, 315 F.3d 680 (6th Cir. 2003), *cert. granted*, 71 U.S.L.W. 3789 (U.S. June 23, 2003) (no. 02-1667), to resolve the issue of whether ADA Title II fails to validly abrogate the states' Eleventh Amendment immunity from private claims for monetary damages. The Court should issue its opinion in the case sometime in 2004.

158. See *supra* text accompanying notes 120-34.

159. See *supra* text accompanying notes 135-56.

160. See *supra* text accompanying notes 40-83.

161. See *infra* Part III.B.1-2.

162. See *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 n.9 (2001).

Young actions for injunctive relief, and (2) by the United States in actions for monetary damages.¹⁶³ Footnote nine also suggests that state antidisability discrimination laws provide individuals with an alternative means of redressing disability discrimination,¹⁶⁴ but because the adequacy of this particular remedial alternative has been addressed at length elsewhere,¹⁶⁵ this analysis focuses on the federal recourse against disability discrimination outlined in *Garrett*.

a. *Ex parte Young* Injunctive Relief in General

Recall that an *Ex parte Young* action allows a plaintiff to sue a state official in his or her official capacity to prevent a violation of federal law.¹⁶⁶ The *Young* doctrine is premised on the idea that a state cannot authorize an official to engage in a violation of federal law.¹⁶⁷ Actions committed in violation of federal law are considered *ultra vires* and therefore do not constitute actions of the state.¹⁶⁸ Because these actions are not the actions of the sovereign, they cannot be protected by sovereign immunity.¹⁶⁹ The result of this reasoning is that *Ex parte Young* suits are regarded as being against individual defendants rather than against states.¹⁷⁰ As one commentator has noted, this legal fiction possesses “its own illogic.”¹⁷¹ The Fourteenth Amendment only applies to the states,¹⁷² thus, to obtain relief under the amendment a plaintiff must be able to demonstrate that the plaintiff’s constitutional rights were violated as a result of state action.¹⁷³ When the Court handed down its decision in *Ex parte Young*, it could have held that the Fourteenth Amendment altered the states’ Eleventh Amendment immunity, given that the Fourteenth Amendment was ratified after the Eleventh Amendment.¹⁷⁴ But the Court refused to do so.¹⁷⁵ It instead considered the enforcement of the

163. *Id.* (“Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*.”).

164. *See id.* (“[S]tate laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.”).

165. *See* Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075, 1113 (2002) (concluding that a majority of state antidisability discrimination statutes do not provide coverage as extensive as the ADA).

166. *See supra* text accompanying notes 53–56.

167. *See Ex parte Young*, 209 U.S. 123, 159 (1908).

168. *Id.*

169. *Id.*

170. *See* 17 WRIGHT ET AL., *supra* note 56, § 4231, at 563–64.

171. *Id.* at 564.

172. U.S. CONST. amend. XIV.

173. *See* 17 WRIGHT ET AL., *supra* note 56, § 4231, at 564 (citing *Civil Rights Cases*, 109 U.S. 3 (1833)).

174. *See id.*

175. *See id.*; *see also Ex parte Young*, 209 U.S. 123, 150 (1908) (“We think that whatever the rights of complainants may be, they are largely founded upon [the Fourteenth] Amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier Amendment. We may assume that each exists in full

statute at issue in *Young* to be state action under the Fourteenth Amendment, but merely the individual wrong of a flesh-and-blood bureaucrat under the Eleventh Amendment.¹⁷⁶

The “illogic” of the *Young* doctrine serves an important function, because it prevents the states from ignoring federal laws that they might otherwise be able to disregard without rebuke.¹⁷⁷ At the same time, the “illogic” of *Young* is the root of its limitations.¹⁷⁸ *Ex Parte Young* empowers federal courts to order state officials engaging in unconstitutional or illegal conduct to refrain from doing so, even when complying with the law requires expenditure of state funds.¹⁷⁹ These expenditures, however, may only go toward *prospective* injunctive relief.¹⁸⁰ Retroactive relief of any sort, even if characterized as equitable or injunctive, is barred by the Eleventh Amendment.¹⁸¹ For example, in the same suit in which the Court upheld a lower federal court’s order to a state officer forcing him, prospectively, to disburse state welfare payments in conformity with federal laws, it struck the order requiring him to pay past due welfare checks on the ground that this remedy constituted impermissible retroactive relief.¹⁸² The distinction between retroactive and prospective relief is admittedly a difficult one to make,¹⁸³ but the Court continues to distinguish between claims for retroactive monetary relief and claims that will require the future expenditure of money.¹⁸⁴ Typically, the date used to determine whether a cost to the state is prospective or retroactive is the date on which a federal district court has decided the state’s conduct is wrongful.¹⁸⁵

force, and that we must give to the 11th Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant.”).

176. See 17 WRIGHT ET AL., *supra* note 56, at 564–65.

177. See *id.* at 567–68.

178. See *id.* at 567.

179. See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974).

180. See 1 ROTUNDA & NOWAK, *supra* note 27, at 160.

181. *Id.* at 159.

182. See *Edelman*, 415 U.S. 651, *rehearing denied*, 416 U.S. 1000 (1974), *on remand*, 405 F. Supp. 802 (N.D. Ill. 1975), *rev’d* 551 F.2d 152 (7th Cir.), *on rehearing*, 563 F.2d 873 (7th Cir. 1977), *aff’d sub nom.* *Quern v. Jordan*, 440 U.S. 332 (1979).

183. See, e.g., *id.* at 667 (noting that “[a]s in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night”).

184. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 250–53 (1985) (holding that a claim of counties for indemnification from the state was a claim for retroactive monetary relief barred by the Eleventh Amendment); see also *Fla. Ass’n of Rehab. Facilities, Inc. v. Fla. Dep’t of Health & Rehab. Servs.*, 225 F.3d 1208, 1219–26 (2000) (holding that the *Ex parte Young* doctrine does not apply if the prospective relief the plaintiff seeks is measured in terms of monetary loss from past breach of legal duty, because such measurement renders the prospective relief the functional equivalent of money damages).

185. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451 (1976) (“In *Edelman* this Court held that monetary relief awarded by the District Court to welfare plaintiffs, by reason of wrongful denial of benefits which had occurred previous to the entry of the District Court’s determination of their wrongfulness, violated the Eleventh Amendment.”); see also *Buckhanon v. Percy*, 708 F.2d 1209, 1215 (7th Cir. 1983)

b. Shortcomings of Injunctive Relief Under Title I

An *Ex parte Young* action suffers a number of shortcomings as a remedy for state-initiated disability discrimination in the employment context. As a means of injunctive relief, it is subject to the same limitations as any other injunction used to resolve employment disputes.¹⁸⁶ In addition, the limitations inherent in the type of relief an *Ex parte Young* action offers are exacerbated by weaknesses in the doctrinal foundation of *Ex parte Young* itself.¹⁸⁷ These weaknesses stem from the Supreme Court's most recent discussions of the history and current applicability of the *Ex parte Young* action.¹⁸⁸

i. Inherent Limitations of Injunctive Relief in the Context of Employment Disputes

Contract law has long accounted for the complications that accompany courts' use of injunctive relief in the employment context.¹⁸⁹ Specific performance of a contract, an injunctive remedy, requires a party that breaches a contract to perform its contractual obligations in the manner originally agreed upon.¹⁹⁰ Courts traditionally have not compelled specific performance of contracts for personal services because performance of these agreements typically involves close association between the parties.¹⁹¹ Enforcing this association after a dispute has compromised the parties' confidence in one another is detrimental to the interests of both parties.¹⁹² Thus, regardless of whether an employee or an employer breaches the employment contract, the remedy of specific performance is heavily disfavored.¹⁹³ It is much more common for courts to simply award damages to the aggrieved party in an action for breach of contract.¹⁹⁴

The same logic applies outside the context of purely contractual employment disputes. In the civil rights arena, Title VII prohibits employment discrimination on the basis of race, color, religion, and national origin.¹⁹⁵ It covers discrimination that occurs in any aspect of the employment relationship, including application, hiring, advancement, dis-

("[T]he date for determining whether a monetary award is retroactive or prospective is that upon which the district court determined that the state's conduct was wrongful.").

186. See *infra* notes 189–219 and accompanying text.

187. See *infra* notes 220–30 and accompanying text.

188. See *infra* notes 220–30 and accompanying text.

189. See 12 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1204, at 441–45 (interim ed. 2002).

190. 11 *id.* § 990, at 2–4.

191. 12 *id.* § 1204, at 443.

192. *Id.*

193. *Id.* at 444.

194. *Id.* at 188.

195. 42 U.S.C. § 2000e-2 (2000).

charge, compensation, and training.¹⁹⁶ Title VII's extensive enforcement provisions allow for injunctive relief, which may take various forms depending on the exact context in which the discrimination the injunctive relief is intended to remedy occurs.¹⁹⁷ In the context of wrongful discharge, for instance, this injunctive relief takes the form of reinstatement.¹⁹⁸ In the context of advancement, injunctive relief requires the individual who has suffered discrimination to be promoted as soon as a position opens that is similar to the one that individual was denied.¹⁹⁹ Courts, however, have traditionally not granted reinstatement or promotion to Title VII plaintiffs wrongfully discharged or denied advancement on the basis of a suspect trait where money damages were found to be a sufficient remedy.²⁰⁰ This position is consistent with the position courts have taken in disputes over the breach of contracts for personal services,²⁰¹ which should come as little surprise given that the concerns surrounding injunctive relief in the context of Title VII employment discrimination are arguably even more acute than those that arise in the midst of contractual employment disputes.²⁰²

As mentioned, Title I of the ADA incorporates the remedial provisions of Title VII of the Civil Rights Act of 1964.²⁰³ Thus, under Title I, a court may grant a plaintiff an injunction as a remedy for disability discrimination.²⁰⁴ Before *Garrett*, however, Title I plaintiffs who sued state employers could count on receiving monetary damages as a remedy for disability discrimination.²⁰⁵ While injunctive relief was available to plaintiffs, it was not their sole remedial option.²⁰⁶ Its limitations were either offset or avoided altogether by the prospect of receiving a monetary judgment.²⁰⁷

In contrast, an *Ex parte Young* action allows a Title I plaintiff that sues a state to obtain only injunctive relief, so the remedy afforded by a *Young* suit is subject to the same limitations as the specific performance

196. *Id.*

197. *See, e.g.*, LEWIS & NORMAN, *supra* note 107, §§ 4.25–26.

198. *Id.*

199. *Id.*

200. *See* 2 DAN B. DOBBS, LAW OF REMEDIES § 4.25, at 198–200 (1996); *see also* *Berndt v. Kaiser Aluminum & Chem. Sales, Inc.*, 789 F.2d 253, 261 (3d Cir. 1986) (upholding district court's decision to grant employee front pay instead of reinstatement on ground that employee-employer relationship had been so damaged by litigation that continued working relationship would be infeasible); *EEOC v. Kallir, Phillips, Ross, Inc.*, 420 F. Supp. 919, 926 (S.D.N.Y. 1976) (denying a hiring order where discord would prevent an employee from performing efficiently).

201. *Compare* 12 CORBIN, *supra* note 189, at 443, *with* 2 DOBBS, *supra* note 200, at 199.

202. If courts' rationale for disfavoring injunctive relief in disputes over employment contracts is that injunctive relief promotes discomfort in the work environment, *see* 12 CORBIN, *supra* note 189, at 443, discomfort in a work environment where discrimination has occurred would arguably be greater than discomfort in a work environment where a simple contractual dispute had arisen.

203. *See supra* note 99 and accompanying text.

204. *See* 42 U.S.C. § 2000e-5(g)(1) (2000).

205. *See* *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 (2001).

206. *See id.* at 365, 373–74; *see also* 42 U.S.C. § 2000e-5.

207. *See supra* note 206.

of a personal service contract or the injunction of Title VII employment discrimination.²⁰⁸ In fact, the remedial scope of an *Ex parte Young* injunction is even narrower than that of other types of injunctive relief. Title VII, for instance, allows for back pay to be awarded as an injunctive remedy,²⁰⁹ but the prospectivity limitation on *Ex parte Young* relief precludes ADA Title I plaintiffs that file suit against the states from receiving back pay, a retroactive remedy.²¹⁰

Moreover, the inherent limitations of *Ex parte Young* injunctive relief in the employment context place ADA Title I plaintiffs who invoke the *Young* doctrine at risk of receiving no relief at all for the disability discrimination they experience. This concern is more than a theoretical one. While most courts faced with the issue have granted *Ex parte Young* injunctive relief in Title I suits against state employers,²¹¹ not all have been so receptive to the *Young* argument. Take, for example, *Rizzato-Reines v. Kane County Sheriff*,²¹² a case from the United States District Court for the Northern District of Illinois. In *Rizzato-Reines*, a county sheriff's employee claiming she suffered from carpal tunnel syndrome brought an action against her employer alleging discrimination in violation of Title I of the ADA.²¹³ After noting that the Eleventh Amendment barred the plaintiff's recovery of money damages and attorney fees on her discrimination claim pursuant to *Garrett*,²¹⁴ the court discussed the plaintiff's allegation that the county sheriff did not provide her with reasonable accommodation for her carpal tunnel syndrome disability.²¹⁵ It interpreted this aspect of the plaintiff's complaint as a request for injunctive relief of the sort discussed by the Supreme Court in footnote nine of *Garrett*.²¹⁶ According to the court, granting injunctive relief would have required it to issue a mandatory injunction requiring the county sheriff to rehire the plaintiff and transfer her to another job.²¹⁷ This course of action would have been undesirable, however, because "[r]einstatement in employment discrimination cases is an equitable remedy that is not ordered when it is contraindicated by the deteriora-

208. See *supra* text accompanying notes 189–202.

209. See LEWIS & NORMAN, *supra* note 107, § 4.25.

210. See *supra* text accompanying notes 180–85; see also *Mass. State Grange v. Benton*, 272 U.S. 525, 527 (1926) (stating that “no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury”).

211. See, e.g., *Frazier v. Simmons*, 254 F.3d 1247, 1255 (10th Cir. 2002) (holding that a state employee's claims under ADA Title I could be construed as requesting injunctive relief and thus were not barred by the Eleventh Amendment); *Gibson v. Ark. Dep't of Corr.*, 265 F.3d 718 (8th Cir. 2001) (holding that state employees can sue state officials for prospective injunctive relief under ADA Title I by using the *Ex parte Young* doctrine).

212. 149 F. Supp. 2d 482 (N.D. Ill. 2001).

213. *Id.*

214. *Id.* at 483.

215. *Id.* at 484.

216. *Id.*

217. *Id.*

tion in relationship that is the typical adjunct of an employee's firing (whether justified or not)."²¹⁸ Based on this rationale, the court concluded that *Garrett* foreclosed both damage remedies and any other potential ADA-prescribed remedies against the plaintiff's employer.²¹⁹

ii. The Doctrinal Instability of *Ex parte Young*

In addition to the inherent limitations of *Ex parte Young* injunctive relief in the employment context, the overall soundness of *Ex parte Young*'s legal foundation is questionable. In recent years, the Supreme Court has indicated a willingness to restrict the *Young* doctrine. In *Seminole Tribe v. Florida*, the Court acknowledged that the application of *Ex parte Young* can be limited "where Congress has [already] prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right."²²⁰ Thus, because the legislation at issue in that case, the Indian Gaming Regulatory Act (IGRA),²²¹ contained a detailed remedial scheme and did not indicate any congressional intent to authorize suits brought under *Ex parte Young*, the Court denied the applicability of the *Young* exception to Eleventh Amendment immunity.²²²

In addition, the Court has held that the *Young* doctrine cannot be used to allow a federal court to hear the functional equivalent of a quiet-title action against a state because of the "special sovereignty interests" at stake in such an action.²²³ In that case, *Idaho v. Couer d'Alene Tribe*, two Justices even expressed their desire to limit the *Young* exception to the Eleventh Amendment to cases in which plaintiffs do not have access to any state forum to decide whether they are entitled to injunctive relief under federal law.²²⁴ Although the other seven Justices rejected this more extreme position,²²⁵ their acknowledgment that "special sovereignty interests" may exist that militate against courts granting *Ex parte Young* injunctive relief has been recognized by lower courts.²²⁶

218. *Id.* at 485.

219. *Id.*

220. *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996).

221. 25 U.S.C. § 2710 (2000).

222. *Seminole Tribe*, 517 U.S. at 76.

223. *Idaho v. Couer d'Alene Tribe*, 521 U.S. 261, 281, 287 (1997).

224. *Id.* at 274-76, 280 (Rehnquist, C.J. & Kennedy, J., concurring).

225. *Id.* at 270.

226. *See, e.g., In re Ellett*, 254 F.3d 1135 (9th Cir. 2001) (holding that an *Ex parte Young* action could be used to enjoin a state official from enforcing a bankruptcy court order allowing the state to collect unpaid taxes because an injunction barring the collection of the taxes would not intrude upon any special sovereignty interests of the state); *Joseph A. v. Ingram*, 262 F.3d 1113 (10th Cir. 2001) (holding that a suit seeking meaningful access to adoption services brought by abused and neglected children who had become wards of the State of New Mexico did not implicate the special sovereignty interests of the state); *J.B. ex. rel. Hart v. Valdez*, 186 F.3d 1280, 1287 (10th Cir. 2001) (noting that "[a] State's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex parte Young*").

Furthermore, in a recent decision, *Federal Maritime Commission v. South Carolina State Ports Authority*,²²⁷ the Court stated that “sovereign immunity applies regardless of whether a private plaintiff’s suit is for monetary damages or some other type of relief. . . . Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit.”²²⁸ In addition, the Court indicated that the purpose of the doctrine of sovereign immunity is not merely to protect state treasuries, but also to “accord the States the respect owed them as joint sovereigns.”²²⁹ The significance of the Court’s dicta in *Federal Maritime* is difficult to gauge, given the recency of the decision. Taken together with its statements in *Seminole Tribe* and *Couer d’Alene*, however, the Court’s discussion of sovereign immunity in *Federal Maritime* could be reasonably interpreted as suggesting that the Eleventh Amendment bars plaintiffs from obtaining damages *as well as injunctive relief* in suits against the states.²³⁰ The logical extension of this proposition is that the *Ex parte Young* action cannot be used to bypass the restrictions of the Eleventh Amendment.

c. Actions by the United States Against the States in General

With the limitations of *Ex parte Young* injunctive relief in mind, recall that in addition to mentioning the *Ex parte Young* action as a potential remedy against the states for violations of Title I, the Court in *Garrett* also noted that the United States could bring actions for monetary damages against states on behalf of private individuals who experience disability discrimination.²³¹ The principle that the United States can file suit against an individual state in federal court—also referred to as plan waiver²³²—is a well-established exception to the jurisdictional bar of the Eleventh Amendment.²³³ The Supreme Court and commentators, however, have only recently begun to define the contours of this exception,²³⁴ so the exact circumstances in which it applies are still uncertain.

227. 535 U.S. 743 (2002).

228. *Id.* at 765–66.

229. *Id.* at 765.

230. See Colker & Milani, *supra* note 165, at 1080 n.13; Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 659–60 (2000).

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

232. See *supra* text accompanying note 51.

233. See, e.g., United States v. Mississippi, 380 U.S. 128, 140 (1965) (noting that “nothing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever seriously supposed to prevent a State’s being sued by the United States”); United States v. Texas, 143 U.S. 621, 642–46 (1892).

234. See Alden v. Maine, 527 U.S. 706 (1999); Caminker, *supra* note 33; Jonathan R. Siegel, *The Hidden Source of Congress’s Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995).

i. The Supreme Court on Plan Waiver

The Supreme Court made some of its most recent—and, for that matter, most extensive—pronouncements on the so-called plan waiver doctrine in *Alden v. Maine*.²³⁵ In *Alden*, state probation officers brought an action against the state for violation of the Fair Labor Standards Act of 1938,²³⁶ federal legislation that purported to authorize private actions against the states in their own courts, regardless of whether they consented.²³⁷ *Alden* addressed the issue of whether Congress could subject the states to private suits for damages in state courts under federal law.²³⁸ Because the Eleventh Amendment refers only to the “Judicial power of the United States,”²³⁹ its text did not control the outcome of the case.²⁴⁰ The Court thus based its opinion on the sovereign immunity principles derived from the structure of the Constitution itself.²⁴¹ In so doing, it held that Congress cannot abrogate the states’ immunity from suit in their own courts using its Article I powers.²⁴²

In dicta, the Court was careful to note that a state’s sovereign immunity does not prevent the United States from filing suit against the states to enforce federal law, because the states consented to suits by the federal government as part of the “plan of Convention.”²⁴³ According to the Court, under the structure of the Constitution, “[a] suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to ‘take Care that the Laws be faithfully executed,’ differs in kind from the suit of an individual,” and is therefore permissible.²⁴⁴ In addition, the Court indicated that the United States could have sued Maine in state court on behalf of the plaintiffs if the United States itself had deemed the case of “sufficient importance” to file suit against the state.²⁴⁵ The United States, however, chose not to send a single attorney to Maine to participate in the litigation.²⁴⁶

Alden raises various issues about the scope of the plan waiver exception to sovereign immunity. The Court’s dictum regarding suits “by

235. 527 U.S. 706.

236. *Id.* at 711–12 (citing 29 U.S.C. § 201 *et seq.* (1994 ed. and Supp. III) (current version at 29 U.S.C. §§ 201–219 (2000))).

237. *See id.* at 712 (citing 29 U.S.C. § 201 *et seq.* (1994 ed. and Supp. III) (current version at 29 U.S.C. §§ 216(b), 203(x))).

238. *See Alden*, 527 U.S. at 712.

239. U.S. CONST. amend XI.

240. *See Alden*, 527 U.S. at 730.

241. *See id.* at 713 (stating that the states’ immunity from suit is a “fundamental aspect of the sovereignty which the States enjoyed before ratification of the Constitution”); *see also id.* at 730–31 (confirming that the states’ immunity from suit “inheres in the system of federalism established by the Constitution”).

242. *See id.* at 731–54.

243. *Id.* at 755.

244. *Id.* (citing U.S. CONST. art. II, § 3).

245. *Id.* at 759–60.

246. *Id.* at 759.

those entrusted with the constitutional duty” to oversee execution of the laws leaves in question the matter of whether the form of suit by the United States is a relevant consideration in determining whether it falls within the scope of plan waiver.²⁴⁷ Likewise, the Court’s dictum regarding the sufficiency of a lawsuit’s importance to the United States, considered in conjunction with its emphasis on the form a lawsuit by the United States must take, raises the issue of whether the sufficiency of the United States’s interests takes primacy over the form of the lawsuit in determining whether it is within the scope of plan waiver.²⁴⁸

ii. Defining the Scope of Plan Waiver

Professor Evan Caminker has addressed the issues raised by the Supreme Court’s dicta in *Alden* in attempting to determine with greater specificity when a given lawsuit can be said to fall within the category of lawsuits against which states waived their immunity as part of the constitutional plan.²⁴⁹ Professor Caminker argues that whether or not the plan waiver exception applies depends primarily on whether the United States is a “real party in interest” to a dispute.²⁵⁰ The structural form of the litigation, he suggests, is only of ancillary importance in determining the applicability of the exception.²⁵¹ Emphasizing the substance of a dispute over its form in determining the applicability of plan waiver, Professor Caminker argues, is consistent with the Supreme Court’s “originalist methodology,” and therefore doctrinally sound.²⁵²

Despite the fact that Professor Caminker persuasively argues that the structural form of litigation *should be* irrelevant in determining whether a suit falls within the scope of plan waiver, the Supreme Court has indicated that the form of litigation *is* a consideration in the plan waiver calculus.²⁵³ It is therefore instructive to focus on the dimensions of form *and* substance in laying out the various conceptions of the scope of plan waiver.

The narrowest conception of the scope of plan waiver is that it includes only suits brought or closely overseen by an executive branch official to defend “core proprietary interests” of the United States.²⁵⁴ Conversely, the broadest conception of the scope of plan waiver is that it

247. *See id.* at 755.

248. *Cf. id.* at 759–60.

249. *See* Caminker, *supra* note 33, at 101–31.

250. *See id.* at 113 (“[T]he dispositive factor in triggering the waiver is the United States’ interest in the dispute with a state.”).

251. *See id.* at 119–31.

252. *See id.* at 95.

253. *See Alden*, 527 U.S. at 755–56; *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 785 (1991) (suggesting that plan waiver is limited to suits “at the instance and under the control of responsible federal officers”); *see also* James E. Pfander, *Waiver of Sovereign Immunity in the “Plan of Convention,”* 1 *GEO. J.L. & PUB. POL’Y* 13, 24 (2002) (noting the Court’s apparent willingness to limit the scope of plan waiver to suits in which executive branch officials have a role).

254. *Cf.* Caminker, *supra* note 33, at 114.

encompasses suits filed by any litigant to vindicate any interest conferred by a federal statute, regardless of whether the United States directly shares in that interest.²⁵⁵ Such suits arguably fit within the plan waiver exception because they involve the indirect vindication of a general federal regulatory interest.²⁵⁶ Between these two extremes lies a gray area of sorts, in which the scope of plan waiver may be said to include any number of suits in which the United States has some degree of interest and some degree of direct involvement.²⁵⁷ All that can be said for certain about the Court's conception of the scope of plan waiver is that a suit is more likely to fall within plan waiver the more closely the suit's substance and form involve the United States.²⁵⁸

d. Applying Conceptions of Plan Waiver to Suits Under ADA Title I

Recall that ADA Title I plaintiffs must file charges with the EEOC and allow the EEOC to complete various administrative procedures before a Title I lawsuit may be filed.²⁵⁹ Using the outcome of these administrative procedures as a means of categorization, there are three types of ADA Title I plaintiffs involved in lawsuits against state governments: (1) those for whom the DOJ initiated suit after the EEOC found reasonable cause to proceed (DOJ plaintiffs);²⁶⁰ (2) those who obtained a right-to-sue letter from the DOJ after the EEOC found reasonable cause to proceed (individual reasonable cause plaintiffs);²⁶¹ and (3) those who obtained a right-to-sue letter from the EEOC after their complaints were dismissed by the EEOC (dismissed plaintiffs).²⁶² The differences between these three types of plaintiffs are relevant to determining whether their suits fall within the scope of the plan waiver exception. If the suits fall within the plan waiver exception, then the plaintiffs should be able to receive monetary damages in their suits against state defendants, regardless of the Eleventh Amendment.

Although the United States has no proprietary interest in enforcing ADA Title I,²⁶³ and although enforcing Title I would appear merely to vindicate personal interests on behalf of citizens, in doing so the United

255. See *id.* at 118 (describing Professor Siegel's notion that plan waiver should be interpreted to include all federal private rights of action because these suits all serve an indirect federal regulatory interest); see also Siegel, *supra* note 234, at 564–69.

256. See Caminker, *supra* note 33, at 118.

257. See, e.g., *Id.* at 117–18 (describing interests that may fit within the boundaries of this analysis as a “[federal] regulatory interest in controlling state behavior,” an interest in “deterring future state misconduct,” and an interest in “creating favorable precedent regarding [a] statute’s proper interpretation”).

258. See, e.g., *supra* notes 249–57 and accompanying text.

259. See *supra* notes 98–107 and accompanying text.

260. See *supra* notes 104–06 and accompanying text.

261. See *supra* notes 104–06 and accompanying text.

262. See *supra* notes 102–03 and accompanying text.

263. See generally Caminker, *supra* note 33, at 114–15 (discussing proprietary interests).

States asserts its general regulatory interest in controlling state behavior.²⁶⁴ The exact nature of this interest is, in fact, codified in the general provisions of the ADA, which indicate that one of the purposes of the Act is to ensure that the federal government has a “central role” in the enforcement of the standards it sets forth.²⁶⁵ This reasoning clearly applies to suits by DOJ plaintiffs and individual reasonable cause plaintiffs. Admittedly, it does not apply to suits by dismissed plaintiffs, because the United States cannot be said to have a regulatory interest in controlling state behavior in the context of a suit that one of its administrative agencies decided there was no reasonable cause to pursue.

The fact that the United States’s general regulatory interest in controlling state behavior may be “intangible”²⁶⁶ is offset in the instances of DOJ plaintiffs and individual reasonable cause plaintiffs by the close involvement of the United States in their lawsuits.²⁶⁷ As far as DOJ plaintiffs are concerned, executive officers actually bring and oversee their lawsuits. In fact, DOJ lawsuits fit well within the plan waiver exception. If the DOJ had the resources to litigate on behalf of every Title I plaintiff aggrieved by a state employer, then it would be able to avoid the restrictions of the Eleventh Amendment for each of those plaintiffs.²⁶⁸ The fact of the matter, however, is that there are administrative limitations on the DOJ’s ability to file suit on behalf of Title I plaintiffs, so most reasonable cause plaintiffs must file private suits on their own behalf.²⁶⁹

Various factors militate in favor of the conclusion that private suits filed by individual reasonable cause plaintiffs fall within the scope of plan waiver, even if they do not do so as apparently as suits by DOJ plaintiffs.²⁷⁰ The primary reason suits filed by individual reasonable cause plaintiffs fit into the plan waiver exception is that officials from the EEOC and the DOJ are initially involved in oversight of these suits.²⁷¹ EEOC officials investigate the charges filed by individual reasonable cause plaintiffs, conciliate on their behalfs, and refer the charges to the DOJ once the conciliation fails.²⁷² DOJ officials then become responsible for reviewing the charges and issuing right-to-sue letters to individual

264. See generally *id.* at 117–18 (discussing the sufficiency of a regulatory interest in qualifying a suit for the plan waiver exception).

265. See 42 U.S.C. § 12101(b)(3) (1994).

266. See Caminker, *supra* note 33, at 114–15.

267. See *supra* notes 105–06 and accompanying text.

268. *But see* United States v. Miss. Dep’t of Pub. Safety, 159 F. Supp. 2d 374, 377 (S.D. Miss. 2001) (holding that the Eleventh Amendment barred an ADA lawsuit for money damages brought by the United States on behalf of a private individual against the state, because while Title I can be enforced against the states by the United States in actions for damages, these actions must be brought to remedy a pattern or practice of discrimination, not to vindicate the rights of a private individual).

269. See, e.g., Siegel, *supra* note 234, at 556 (noting the expense of using the United States “litigative resources” in each suit).

270. See *infra* notes 271–74 and accompanying text.

271. See *supra* notes 100–07 and accompanying text.

272. See *supra* notes 100–07 and accompanying text.

reasonable cause plaintiffs.²⁷³ The administrative oversight of individual reasonable cause plaintiffs' suits thus satisfies the form requirement of the plan waiver exception.²⁷⁴ As a result, it seems that individual reasonable cause plaintiffs, like DOJ plaintiffs, are justified in filing suit in federal court for monetary damages against states for violations of Title I.

2. *Post-Garrett Remedies Under Title II*

To reiterate, the Supreme Court's holding in *Garrett* did not apply to ADA Title II, because, as the Court noted, Title II's remedial provisions differ from those of Title I, so disposition of the issue of whether Title II is appropriate legislation under Section 5 of the Fourteenth Amendment would have required consideration of matters that the parties in *Garrett* did not bring before the Court.²⁷⁵ Similarly, the Court's discussion of alternative remedies in footnote nine did not necessarily apply to Title II.²⁷⁶ Based on the circumstances surrounding *Medical Board v. Hason* and the pro-immunity character of the Title II circuit split, however, when the Court resolves the issue of the availability of monetary damages under Title II, injunctive relief and suits for damages by the United States will take on the same relevance as remedies for disability discrimination under Title II as they have under Title I.²⁷⁷ The issue of how well-suited these remedies are to Title II is thus particularly pertinent.

a. *Ex parte Young* Actions Under Title II

Title II is concerned with ensuring that disabled individuals are not denied the benefits of public services, programs, and activities.²⁷⁸ Because plaintiffs that file suit under Title II typically wish to gain access to public services, programs, and activities,²⁷⁹ the factors that limit the effectiveness of injunctive relief under Title I are not present under Title II.²⁸⁰ In fact, Title II violations are particularly conducive to injunctive relief because they involve situations in which disabled individuals wish to compel public entities to take some sort of affirmative action that prevents their interests from continuing to be neglected.²⁸¹

At least one decision pre-dating the Supreme Court's tacit approval of *Ex parte Young* actions under Title II in *Garrett* suggests that certain

273. See *supra* notes 105–06 and accompanying text.

274. See *supra* note 253 and accompanying text.

275. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 360 n.1 (2001).

276. See *id.* at 374 n.9.

277. See *supra* notes 135–57 and accompanying text.

278. 42 U.S.C. § 12132 (2000); see also 28 C.F.R. § 35.130 (2002).

279. See, e.g., TECHNICAL ASSISTANCE MANUAL, *supra* note 114, §§ II-3.2000–II-3.4300 (illustrating various scenarios in which plaintiffs might file suit under Title II).

280. See *supra* notes 189–219 and accompanying text.

281. See TECHNICAL ASSISTANCE MANUAL, *supra* note 114, §§ II-3.2000–II-3.4300, II-6.0000.

statutory interpretation complications bar Title II *Ex parte Young* suits.²⁸² In *Walker v. Snyder*, an inmate with a vision impairment filed suit in the United States District Court for the Northern District of Illinois against a prison official, alleging violations of ADA Title II's accommodation provisions for the official's failure to provide him with books on tape and a brightly lit cell.²⁸³ On appeal, the Seventh Circuit held that the plaintiff's claim could not proceed against the state in federal court.²⁸⁴ The court concluded that only public bodies as entities may be held liable under Title II,²⁸⁵ and an *Ex parte Young* suit is one against a state officer as an individual, not against the state as an entity.²⁸⁶ Therefore, a suit resting on the *Young* doctrine cannot support relief under Title II of the ADA.²⁸⁷

Because of the Supreme Court's endorsement of *Ex parte Young* actions in *Garrett*, the validity of *Walker* is questionable.²⁸⁸ Indeed, since *Garrett*, federal courts have been particularly receptive to *Ex parte Young* actions for injunctive relief under Title II.²⁸⁹ Precedential considerations alone, however, are not all that counsel against widespread adoption of the Seventh Circuit's rationale in *Walker*. The validity of the Seventh Circuit's decision on the availability of *Ex parte Young* injunctive relief hinges on its conclusion that Title II of the ADA does not permit personal liability.²⁹⁰ This conclusion conflicts with the basic canon of statutory interpretation that a remedial statute is to be broadly construed so as best to effectuate the remedies it provides.²⁹¹ The ADA is a remedial statute,²⁹² and because the overarching consensus of courts is that monetary damages are unavailable under ADA Title II,²⁹³ plaintiffs' ability to obtain relief rests heavily on *Ex parte Young*. Thus, interpreting Title II to permit personal liability, and therefore allow *Ex parte Young* relief, is consistent with the broad remedial purposes of the ADA.

282. See *Walker v. Snyder*, 213 F.3d 344, 347 (7th Cir. 2000).

283. *Id.* at 345.

284. *Id.* at 347.

285. See *id.* at 346.

286. *Id.* at 347.

287. *Id.*

288. See, e.g., *Boudreau v. Ryan*, No. 00C 5392, 2001 WL 840583, at *6 n.5 (N.D. Ill. May 2, 2001) (calling into question the Seventh Circuit's holding in *Walker* after *Garrett*).

289. See, e.g., *Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 99 (2d Cir. 2001); *Randolph v. Rodgers*, 253 F.3d 342, 345–46 (8th Cir. 2001) (holding that the Eleventh Amendment did not prevent a hearing-impaired inmate from seeking prospective injunctive relief in federal court against a state prison official in her official capacity for violations of the ADA that arose when the official refused to provide the inmate with a sign language interpreter during medical visits and prison proceedings); *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp. 2d 509, 510 (E.D. Pa. 2001) (holding that a state official can be sued in her official capacity under ADA Title II).

290. See *Walker*, 213 F.3d at 346.

291. See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) (discussing the broad construction of Title VII); *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974) (describing the Equal Pay Act as “broadly remedial” and indicating “it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve”).

292. See 42 U.S.C. § 12101 (2000) (outlining the purpose of the ADA).

293. See *supra* notes 151–57 and accompanying text.

b. Suits for Damages by the United States Under Title II

Recall that an individual may file suit in federal court against a public entity under Title II without first filing a charge with an administrative agency.²⁹⁴ The only conception of plan waiver into which an independent suit, such as this one, would fit would be that in which the waiver is assumed to encompass all federal statutory private rights of action, simply by virtue of their indirect service of a federal regulatory interest in controlling state behavior.²⁹⁵ The Supreme Court has already indicated that suits in which an intangible federal regulatory interest is the sole basis for qualifying for the plan waiver exception fall outside the exception's scope.²⁹⁶ Therefore, a suit filed against a state independently pursuant to Title II would appear not to fall within the plan waiver exception.

Title II does allow an individual to file an administrative complaint with an appropriate federal agency instead of proceeding directly to litigation.²⁹⁷ Unlike Title I, however, Title II does not assign administrative tasks to a single agency.²⁹⁸ The DOJ is slated as the default agency for evaluating complaints,²⁹⁹ but complaints may be filed with any federal agency that provides funding to a public entity that is the subject of a complaint.³⁰⁰ The United States certainly has a strong general regulatory interest in lawsuits filed to prevent states from violating the provisions of Title II, and, inevitably, some Title II plaintiffs will file complaints with federal agencies before filing suits individually. The administrative burdens of taking this ill-defined course of action³⁰¹ will likely deter many from doing so, but in cases where Title II plaintiffs do proceed through administrative channels, the procedure plaintiffs undergo will be indistinguishable from that which applies under Title I.³⁰² Therefore, suits filed against states by Title II plaintiffs that have exhausted their administrative remedies should, like their counterparts under Title I, fall within the plan waiver exception.

IV. RECOMMENDATION

In *Garrett*, the Court did not articulate a comprehensive remedial scheme for lower federal courts to apply in ADA cases involving state defendants.³⁰³ It clearly precluded Title I plaintiffs from obtaining mone-

294. See *supra* notes 112–15 and accompanying text.

295. See Caminker, *supra* note 33, at 117–18.

296. See *id.* at 118.

297. See 28 C.F.R. § 35.170(c) (2002); TECHNICAL ASSISTANCE MANUAL, *supra* note 114, § II-9.2000.

298. See 28 C.F.R. § 35.190; TECHNICAL ASSISTANCE MANUAL, *supra* note 114, § II-9.2000.

299. See 28 C.F.R. § 35.170(c); TECHNICAL ASSISTANCE MANUAL, *supra* note 114, § II-9.2000.

300. See 28 C.F.R. § 35.170(c); TECHNICAL ASSISTANCE MANUAL, *supra* note 114, § II-9.2000.

301. For a description of the process used to determine whether an administrative agency has jurisdiction over a complaint, see 28 C.F.R. §§ 35.170(c), 35.171(a).

302. Compare 28 C.F.R. §§ 35.171(a), .172–.74, with *supra* notes 100–06 and accompanying text.

303. See *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 n.9 (2001).

tary damages as a remedy for disability discrimination by the states, but it did not explain in any great detail the rationale justifying the availability of the alternative remedies it mentioned, the scope of those remedies, or whether those remedies even apply in the context of Title II.³⁰⁴ This lack of guidance has placed lower federal courts in the difficult position of developing the boundaries of the remedial framework that the Court alluded to, but did not define, in a way that simultaneously preserves the states' sovereignty and vindicates the rights of Title I and Title II plaintiffs that sue the states. It is apparent that the alternative remedies mentioned by the Court in *Garrett*³⁰⁵ have varying degrees of utility as applied to Title I and Title II. Thus, one issue facing courts is whether there is some legally principled manner in which to acknowledge these variations and administer the remedies accordingly.

ADA litigants and courts should recognize that *Ex parte Young* injunctive relief has limited remedial utility under Title I.³⁰⁶ An *Ex parte Young* action allows for prospective relief, which, in the context of employment discrimination, includes hiring, reinstatement, and promotion.³⁰⁷ If implemented, these remedies threaten instability and discomfort in the working environment.³⁰⁸ Yet, since *Garrett*, courts have shown a tendency to allow *Ex parte Young* injunctive relief under Title I.³⁰⁹ This tendency is certainly preferable to denying ADA plaintiffs any and all relief for state-initiated disability discrimination, but it leaves the Supreme Court's invitation to allow suits for damages by the United States unanswered.

304. *See id.*

305. In addition to the alternative remedies mentioned in *Garrett*, at least one commentator has suggested that ADA plaintiffs can utilize 42 U.S.C. § 1983 to sue state officials in their individual capacities in federal court for money damages. *See Note*, 112 *YALE L.J.* 353 (2002). This commentator reasons that even though the ADA itself provides for a comprehensive remedial scheme, that scheme has been significantly altered by the Supreme Court's recent Eleventh Amendment jurisprudence, so § 1983 actions should be allowed as an alternative remedy for state-initiated disability discrimination. While it is beyond the scope of this note to discuss the Supreme Court's § 1983 jurisprudence, three obvious criticisms of the argument just described should be mentioned briefly. First, the fact that sovereign immunity prevents suits for damages against states under the ADA does not alter the fact that at the time the ADA was drafted, Congress intended a comprehensive remedial scheme to exist as part of the statute. This comprehensive remedial scheme did not include § 1983 within its scope. Therefore, it will likely be difficult for ADA litigants to justify to federal courts, *ex post*, the applicability of § 1983 as a remedial mechanism for state disability discrimination. Second, as a more practical matter, the Supreme Court did not mention § 1983 as a potential remedy for state disability discrimination in *Garrett* footnote nine. Thus, although it undoubtedly "makes sense" to allow a § 1983 remedy, *id.* at 357, there is no concrete legal basis for doing so. Third, even if federal courts did allow ADA plaintiffs to file § 1983 actions against state officials, those plaintiffs would still have to contend with the qualified immunity defense available to the officials they sued. The qualified immunity defense could substantially limit plaintiffs' prospects of actually obtaining the damages for which they filed suit.

306. *See supra* notes 186–230 and accompanying text.

307. *See supra* notes 180–85, 198–99 and accompanying text.

308. *See supra* notes 189–93, 201–02 and accompanying text.

309. *See supra* note 211 and accompanying text.

Federal courts should favor the latter remedy in the context of Title I. Suits against the states by the United States for damages are permissible as part of plan waiver,³¹⁰ and a suit can properly be said to be “by the United States” when the United States has some degree of interest in its substance and some degree of direct involvement in its form.³¹¹ By interpreting this exception to Eleventh Amendment immunity to include suits filed by individual reasonable cause plaintiffs,³¹² federal courts will be able to provide monetary damages to litigants whom the DOJ simply does not have the resources to represent.

In contrast, federal courts should generally favor *Ex parte Young* injunctive relief as a remedy for Title II violations. Some courts might initially hesitate to allow *Ex parte Young* actions under Title II because of statutory interpretation concerns,³¹³ but Title II can be soundly interpreted to allow *Ex parte Young* actions to proceed.³¹⁴ In most instances, the injunctive relief available to Title II plaintiffs under *Ex parte Young* will be particularly well-suited to preventing the continuation of the discriminatory practices that cause them to file suit.³¹⁵

Courts, however, must also recognize that plan waiver will encompass certain suits that arise under Title II if those suits proceed through the appropriate administrative channels or if they are brought by the DOJ.³¹⁶ They should not automatically disregard the plan waiver exception as being inapplicable to Title II. Rather, they must keep track of the nature of the administrative proceedings that a plaintiff has undergone, since one of the touchstones for determining whether a given suit falls within the plan waiver exception is the form the suit takes.³¹⁷

V. CONCLUSION

The issue of what remedies are available to the victims of state-initiated disability discrimination is one that stems from a much broader debate over the protection of civil liberties in a federalist system. This note has suggested one manner in which federal courts can strike a balance between sovereign immunity and civil rights in administering remedies under Title I and Title II of the ADA. The effectiveness of injunctive relief is a function of the context in which the relief is ordered. Likewise, the utility of suits for damages by the United States depends on how narrowly or broadly the scope of plan waiver is defined. The framework offered here gives federal courts a legally principled manner

310. See *supra* notes 48–52, 232–33 and accompanying text.

311. See *supra* notes 249–58 and accompanying text.

312. See *supra* notes 270–74 and accompanying text.

313. See *supra* notes 282–87 and accompanying text.

314. See *supra* notes 266–69 and accompanying text.

315. See *supra* notes 288–93 and accompanying text.

316. See *supra* notes 299–302 and accompanying text.

317. See *supra* notes 253, 301–02 and accompanying text.

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in which to administer remedies under Title I and Title II. The existence of this framework demonstrates that, although the Supreme Court's Eleventh Amendment jurisprudence has placed limitations on the remedial options available to private plaintiffs filing suit under the ADA, the consequences of these limitations are not as dire as one might first suppose. The *Garrett* Court, as the saying goes, may have closed a door, but it opened two windows: *Ex parte Young* relief and plan waiver.

