Volume 2, Chapter 13: Governmental Actors, Private Actors, and the Scope of the 13th and 14th Amendments
Section II. The Scope of Congressional Power to Enforce the 14th Amendment: The Modern View
Page 1888. Insert after *City of Boerne v. Flores*: Notes

The scope of Congressional power under §5 of the Fourteenth Amendment has been hotly debated since *City of Boerne*. Congress can overcome state sovereign immunity and allow victims of state discrimination to recover monetary damages if passing a statute pursuant to §5, while it is unable to do so if acting pursuant to the Commerce Clause. In *Kimel v. Florida Bd. of Regents*, 528 U. S. 62 (2000), the Court held that Congress could not rely on §5 to hold states liable for money damages if sued pursuant to the Age Discrimination in Employment Act. Similarly, in *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U. S. 356 (2001), the Court held that Congress could not rely on §5 to hold states liable for money damages if sued by a state employee pursuant to the Americans With Disabilities Act. In contrast, in *Nevada Department of Human Resources v. Hibbs*, 538 U. S. 721 (2003), the Court held that the Family and Medical Leave Act was an appropriate exercise of §5 powers since Congress contended it was passed to eliminate gender discrimination against females, and females are a recognized protected class under §1 of the Fourteenth Amendment. In *Tennessee v. Lane*, the Court revisits the ADA, as it considers how inaccessible courthouses impact both the disabled as a group and affects their ability to effectuate their fundamental rights regarding access to justice.

Tennessee v. Lane
542 U.S. ___ (2004)

[Stevens, J., delivered the opinion of the court, in which O'Connor, Souter, Ginsburg, and Breyer, JJ., joined. Souter, J., filed a concurring opinion, in which Ginsburg, J., joined. Ginsburg, J., filed a concurring opinion, in which Souter and Breyer, JJ., joined. Rehnquist, C.Jj., filed a dissenting opinion, in which Kennedy and Thomas, JJ., joined. Scalia, J., and Thomas, J., filed dissenting opinions.]

JUSTICE STEVENS delivered the opinion of the Court.

Title II of the Americans with Disabilities Act of 1990 (ADA or Act), U. S. C. §§12131–12165, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." §12132. The question presented in this case is whether Title II exceeds Congress' power under §5 of the Fourteenth Amendment.

I. In August 1998, respondents George Lane and Beverly Jones filed this action against the State of Tennessee and a number of Tennessee counties, alleging past and ongoing violations of Title II. Respondents, both of whom are paraplegics who use wheelchairs for mobility, claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process. Respondents sought damages and equitable relief.

The State moved to dismiss the suit on the ground that it was barred by the Eleventh Amendment. The District Court denied the motion without opinion, and the State appealed. The United States intervened to defend Title II's abrogation of the States' Eleventh Amendment immunity. On April 28, 2000, after the appeal had been briefed and argued, the Court of Appeals for the Sixth Circuit entered an order holding the case in abeyance pending our decision in *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U. S. 356 (2001).

In *Garrett*, we concluded that the Eleventh Amendment bars private suits seeking money damages for state violations of Title I of the ADA. We left open, however, the question whether the Eleventh Amendment permits suits for money damages under Title II. Following the *Garrett* decision, the Court of Appeals, sitting en banc, heard argument in a Title II suit brought by a hearing-impaired litigant who sought money damages for the State's failure to accommodate his disability in a child custody proceeding. *Popovich v. Cuyahoga County Court*, 276 F. 3d 808

(CA6 2002). A divided court permitted the suit to proceed despite the State's assertion of Eleventh Amendment immunity. The majority interpreted *Garrett* to bar private ADA suits against States based on equal protection principles, but not those that rely on due process principles. The minority concluded that Congress had not validly abrogated the States' Eleventh Amendment immunity for any Title II claims, while the concurring opinion concluded that Title II validly abrogated state sovereign immunity with respect to both equal protection and due process claims.

Following the en banc decision in *Popovich*, a panel of the Court of Appeals entered an order affirming the District Court's denial of the State's motion to dismiss in this case. The order explained that respondents' claims were not barred because they were based on due process principles. In response to a petition for rehearing arguing that *Popovich* was not controlling because the complaint did not allege due process violations, the panel filed an amended opinion. It explained that the Due Process Clause protects the right of access to the courts, and that the evidence before Congress when it enacted Title II "established that physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause." Moreover, that "record demonstrated that public entities' failure to accommodate the needs of qualified persons with disabilities may result directly from unconstitutional animus and impermissible stereotypes." The panel did not, however, categorically reject the State's submission. It instead noted that the case presented difficult questions that "cannot be clarified absent a factual record," and remanded for further proceedings. We granted certiorari and now affirm.

II. The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities. In the years immediately preceding the ADA's enactment, Congress held 13 hearings and created a special task force that gathered evidence from every State in the Union.

The conclusions Congress drew from this evidence are set forth in the task force and Committee Reports, described in lengthy legislative hearings, and summarized in the preamble to the statute. Central among these conclusions was Congress' finding that

> "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."

42 U. S. C. §12101(a)(7).

Invoking "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce," the ADA is designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." §§12101(b)(1), (b)(4). It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.

Title II, §§12131–12134, prohibits any public entity from discriminating against "qualified" persons with disabilities in the provision or operation of public services, programs, or activities. The Act defines the term "public entity" to include state and local governments, as well as their agencies and instrumentalities. §12131(1). Persons with disabilities are "qualified" if they, "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, mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." §12131(2). Title II's enforcement provision incorporates by reference §505 of the Rehabilitation Act of 1973, 29 U. S. C. §794a, which authorizes private citizens to bring suits for money damages. 42 U. S. C. §12133.

III. The Eleventh Amendment renders the States immune from "any suit in law or equity, commenced or prosecuted . . . by Citizens of another State, or by Citizens or Subjects of any Foreign State." Even though the Amendment "by its terms . . . applies only to suits against a State by citizens of another State," our cases have repeatedly held that this immunity also applies to unconsented suits brought by a State's own citizens. *Garrett*. Our cases have also held that Congress may abrogate the State's Eleventh Amendment immunity. To determine whether it has done so in any given case, we "must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant

of constitutional authority." Id.

The first question is easily answered in this case. The Act specifically provides: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U. S. C. §12202. As in *Garrett*, no party disputes the adequacy of that expression of Congress' intent to abrogate the States' Eleventh Amendment immunity. The question, then, is whether Congress had the power to give effect to its intent.

In *Fitzpatrick v. Bitzer*, 427 U. S. 445 (1976), we held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under §5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. This enforcement power, as we have often acknowledged, is a "broad power indeed." *Mississippi Univ. for Women v. Hogan*, 458 U. S. 718, 732 (1982), citing *Ex parte Virginia*, 100 U. S. 339, 346 (1880). It includes "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U. S., at 81. We have thus repeatedly affirmed that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dept. of Human Resources v. Hibbs*, 538 U. S. 721 (2003). See also *City of Boerne v. Flores*, 521 U. S. 507 (1997). The most recent affirmation of the breadth of Congress' §5 power came in *Hibbs*, in which we considered whether a male state employee could recover money damages against the State for its failure to comply with the family-care leave provision of the Family and Medical Leave Act of 1993 (FMLA), 29 U. S. C. §2601 et seq. We upheld the FMLA as a valid exercise of Congress' §5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional under the rule of *Personnel Administrator of Mass. v. Feeney*, 442 U. S. 256 (1979). When Congress seeks to remedy or prevent unconstitutional discrimination, §5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.

Congress' §5 power is not, however, unlimited. While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." *Boerne*. In *Boerne*, we recognized that the line between remedial legislation and substantive redefinition is "not easy to discern," and that "Congress must have wide latitude in determining where it lies." Id. But we also confirmed that "the distinction exists and must be observed," and set forth a test for so observing it: Section 5 legislation is valid if it exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id. In *Boerne*, we held that Congress had exceeded its §5 authority when it enacted the Religious Freedom Restoration Act of 1993 (RFRA). We began by noting that Congress enacted RFRA "in direct response" to our decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), for the stated purpose of "restor[ing]" a constitutional rule that Smith had rejected. Though the respondent attempted to defend the statute as a reasonable means of enforcing the Free Exercise Clause as interpreted in Smith, we concluded that RFRA was "so out of proportion" to that objective that it could be understood only as an attempt to work a "substantive change in constitutional protections." Id. Indeed, that was the very purpose of the law.

This Court further defined the contours of *Boerne*'s "congruence and proportionality" test in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627 (1999). At issue in that case was the validity of the Patent and Plant Variety Protection Remedy Clarification Act (hereinafter Patent Remedy Act), a statutory amendment Congress enacted in the wake of our decision in *Atascadero State Hospital v. Scanlon*, 473 U. S. 234 (1985), to clarify its intent to abrogate state sovereign immunity from patent infringement suits. Noting the virtually complete absence of a history of unconstitutional patent infringement on the part of the States, as well as the Act's expansive coverage, the Court concluded that the Patent Remedy Act's apparent aim was to serve the Article I concerns of "provid[ing] a uniform remedy for patent infringement and . . . plac[ing] States on the same footing as private parties under that regime," and not to enforce the guarantees of the Fourteenth Amendment. See also *Kimel*, 528 U. S. 62 (finding that the Age Discrimination in Employment Act exceeded Congress' §5 powers under *Boerne*); *United States v. Morrison*, 529 U. S. 598 (2000) (Violence Against Women Act).

Applying the *Boerne* test in *Garrett*, we concluded that Title I of the ADA was not a valid exercise of Congress' §5 power to enforce the Fourteenth Amendment's prohibition on unconstitutional disability discrimination in public employment. As in Florida Prepaid, we concluded Congress' exercise of its prophylactic §5 power was unsupported by a relevant history and pattern of constitutional violations. Although the dissent pointed out that

Congress had before it a great deal of evidence of discrimination by the States against persons with disabilities, id., at 379 (BREYER, J., dissenting), the Court's opinion noted that the "overwhelming majority" of that evidence related to "the provision of public services and public accommodations, which areas are addressed in Titles II and III," rather than Title I, id., at 371, n. 7. We also noted that neither the ADA's legislative findings nor its legislative history reflected a concern that the States had been engaging in a pattern of unconstitutional employment discrimination. We emphasized [in *Garrett*] that the House and Senate Committee Reports on the ADA focused on "'discrimination [in] . . . employment in the private sector,'" and made no mention of discrimination in public employment. Finally, we concluded that Title I's broad remedial scheme was insufficiently targeted to remedy or prevent unconstitutional discrimination in public employment. Taken together, the historical record and the broad sweep of the statute suggested that Title I's true aim was not so much to enforce the Fourteenth Amendment's prohibitions against disability discrimination in public employment as it was to "rewrite" this Court's Fourteenth Amendment jurisprudence.

In view of the significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' §5 enforcement power. It is to that question that we now turn.

IV. The first step of the *Boerne* inquiry requires us to identify the constitutional right or rights that Congress sought to enforce when it enacted Title II. In *Garrett* we identified Title I's purpose as enforcement of the Fourteenth Amendment's command that "all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432 (1985). As we observed, classifications based on disability violate that constitutional command if they lack a rational relationship to a legitimate governmental purpose. Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review. These rights include some, like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U. S. 806 (1975). The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. *Boddie v. Connecticut*, 401 U. S. 371, 379 (1971). We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor v. Louisiana*, 419 U. S. 522 (1975). And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment. *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 U. S. 1 (1986).

Whether Title II validly enforces these constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." *South Carolina v. Katzenbach*, 383 U. S. 301 (1966). While §5 authorizes Congress to enact reasonably prophylactic remedial legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent. "Difficult and intractable problems often require powerful remedies," *Kimel*, but it is also true that "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one," *Boerne*.

It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, "[a]s of 1979, most States . . . categorically disqualified 'idiots' from voting, without regard to individual capacity." The majority of these laws remain on the books, and have been the subject of legal challenge as recently as 2001. Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying and serving as jurors.

The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, e.g., *Jackson v. Indiana*, 406 U. S. 715 (1972); the abuse and neglect of persons committed to state mental health hospitals, *Youngberg v. Romeo*, 457 U. S. 307 (1982); and irrational discrimination in zoning decisions, *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432 (1985). The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting. Notably, these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice.

This pattern of disability discrimination persisted despite several federal and state legislative efforts to address it. In the deliberations that led up to the enactment of the ADA, Congress identified important shortcomings in existing laws that rendered them "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." It also uncovered further evidence of those shortcomings, in the form of hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions. See *Garrett*, 531 U. S., at 379 (BREYER, J., dissenting). As the Court's opinion in *Garrett* observed, the "overwhelming majority" of these examples concerned discrimination in the administration of public programs and services.

With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs might be restructured or relocated to other parts of the buildings. U. S. Civil Rights Commission, Accommodating the Spectrum of Individual Abilities 39 (1983). Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities.

Given the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services, the dissent's contention that the record is insufficient to justify Congress' exercise of its prophylactic power is puzzling, to say the least. Just last Term in *Hibbs*, we approved the family-care leave provision of the FMLA as valid §5 legislation based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional state conduct.**[fn17]**

We explained that because the FMLA was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, "it was easier for Congress to show a pattern of state constitutional violations" than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review. Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications. And in any event, the record of constitutional violations in this case—including judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services—far exceeds the record in *Hibbs*.

The conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself: "[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U. S. C. §12101(a)(3). This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.

V. The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment. At the outset, we must determine the scope of that inquiry. Title II—unlike RFRA, the Patent Remedy Act, and the other statutes we have reviewed for validity under §5—reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees. Petitioner urges us both to examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity. According to petitioner, the fact that Title II applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks indicates that Title II is not appropriately tailored to serve its objectives. But nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole.[18] Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under §5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid §5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further. See *United States v. Raines*,

362 U. S. 17, 26 (1960). **[fn 19]**

Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult and intractable proble[m]" warranted "added prophylactic measures in response." *Hibbs*.

The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. 42 U. S. C. §12131(2). But Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. Ibid. As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways. In the case of facilities built or altered after 1992, the regulations require compliance with specific architectural accessibility standards. 28 CFR §35.151 (2003). But in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. §35.150(b)(1). Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. Ibid. And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service. §§35.150(a)(2), (a)(3).

This duty to accommodate is perfectly consistent with the well-established due process principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts. Boddie, 401 U. S., at 379 (internal quotation marks and citation omitted).[20] Our cases have recognized a number of affirmative obligations that flow from this principle: the duty to waive filing fees in certain family-law and criminal cases,[21] the duty to provide transcripts to criminal defendants seeking review of their convictions,[22] and the duty to provide counsel to certain criminal defendants.[23] Each of these cases makes clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[24] It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end.

For these reasons, we conclude that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' §5 authority to enforce the guarantees of the Fourteenth Amendment. The judgment of the Court of Appeals is therefore affirmed. It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring.

I join the Court's opinion subject to the same caveats about the Court's recent cases on the Eleventh Amendment and §5 of the Fourteenth that I noted in *Nevada Dept. of Human Resources v. Hibbs*, 538 U. S. 721 (2003) (SOUTER, J., concurring).

Although I concur in the Court's approach applying the congruence-and-proportionality criteria to Title II of the Americans with Disabilities Act of 1990 as a guarantee of access to courts and related rights, I note that if the Court engaged in a more expansive enquiry as THE CHIEF JUSTICE suggests, post, (dissenting opinion), the evidence to be considered would underscore the appropriateness of action under §5 to address the situation of disabled individuals before the courts, for that evidence would show that the judiciary itself has endorsed the basis for some of the very discrimination subject to congressional remedy under §5. *Buck v. Bell*, 274 U. S. 200 (1927), was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities. See id., at 207 ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough"). Laws compelling sterilization were often

accompanied by others indiscriminately requiring institutionalization, and prohibiting certain individuals with disabilities from marrying, from voting, from attending public schools, and even from appearing in public. One administrative action along these lines was judicially sustained in part as a justified precaution against the very sight of a child with cerebral palsy, lest he "produc[e] a depressing and nauseating effect" upon others. *State ex rel. Beattie v. Board of Ed. of Antigo*, 172 N. W. 153 (Wis. 1919) (approving his exclusion from public school).1

Many of these laws were enacted to implement the quondam science of eugenics, which peaked in the 1920's, yet the statutes and their judicial vindications sat on the books long after eugenics lapsed into discredit.[2] Quite apart from the fateful inspiration behind them, one pervasive fault of these provisions was their failure to reflect the "amount of flexibility and freedom" required to deal with "the wide variation in the abilities and needs" of people with disabilities. *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432 (1985). Instead, like other invidious discrimination, they classified people without regard to individual capacities, and by that lack of regard did great harm. In sustaining the application of Title II today, the Court takes a welcome step away from the judiciary's prior endorsement of blunt instruments imposing legal handicaps.

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring.

For the reasons stated by the Court, and mindful of Congress. objective in enacting the Americans with Dis abilities Act.the elimination or reduction of physical and social structures that impede people with some present, past, or perceived impairments from contributing, according to their talents, to our Nation.s social, economic, and civic life.I join the Court.s opinion.

The Americans with Disabilities Act of 1990 (ADA or Act), 42 U. S. C. §§12101.12213, is a measure expected to advance equal-citizenship stature for persons with dis abilities. See Bagenstos, "Subordination, Stigma, and Disability," 86 Va. L. Rev. 397, 471 (2000) (ADA aims both to .guarante[e] a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities, and [to] protec[t] society against the loss of valuable talents.). As the Court.s opinion relates, see ante, the Act comprises three parts, prohibiting discrimination in employment (Title I), public services, programs, and activities (Title II), and public accommodations (Title III). This case concerns Title II, which controls the conduct of administrators of public undertakings.

Including individuals with disabilities among people who count in composing .We the People,. Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation. Central to the Act.s primary objective, Congress extended the statute.s range to reach all government activities, §12132 (Title II), and required .reasonable modifications to [public actors.] rules, policies, or practices,. §§12131(2).12132 (Title II). See also §12112(b)(5) (defining discrimination to include the failure to provide .reasonable accommodations.) (Title I); §12182(b)(2)(A)(ii) (requiring .reasonable modifications in [public accommodations.] policies, practices, or proce dures.) (Title III); Bagenstos, supra, at 435 (ADA supporters sought "to eliminate the practices that combine with physical and mental conditions to create what we call 'disability.' The society-wide universal access rules serve this function on the macro level, and the requirements of individualized accommodation and modification fill in the gaps on the micro level.")

In *Olmstead v. L. C.*, 527 U. S. 581 (1999), this Court responded with fidelity to the ADA.s accommodation theme when it held a State accountable for failing to provide community residential placements for people with disabilities. The State argued in Olmstead that it had acted impartially, for it provided no community placements for individuals without disabilities. Id., at 598. Congress, the Court observed, advanced in the ADA "a more comprehensive view of the concept of discrimination," ibid., one that embraced failures to provide "reasonable accommodations." The Court today is similarly faithful to the Act's demand for reasonable accommodation to secure access and avoid exclusion.

Legislation calling upon all government actors to respect the dignity of individuals with disabilities is entirely compatible with our Constitution's commitment to federalism, properly conceived. It seems to me not conducive to a harmonious federal system to require Congress, before it exercises authority under §5 of the Fourteenth Amendment, essentially to indict each State for disregarding the equal-citizenship stature of persons with disabilities. But see post, (SCALIA, J., dissenting). (Congress may impose prophylactic §5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations..); *Nevada Dept. of Human Resources v. Hibbs*, 538 U. S. 721, 743 (2003) (SCALIA, J., dissenting) (to be controlled by §5 legislation, States can demand that it be shown to have been acting in violation of the Fourteenth Amendment).

Members of Congress are understandably reluctant to condemn their own States as constitutional violators, complicit in maintaining the isolated and unequal status of persons with disabilities. I would not disarm a National Legislature for resisting an adversarial approach to lawmaking better suited to the courtroom.

As the Court's opinion documents, see ante, Congress considered a body of evidence showing that in diverse parts of our Nation, and at various levels of government, persons with disabilities encounter access barriers to public facilities and services. That record, the Court rightly holds, at least as it bears on access to courts, sufficed to warrant the barrier-lowering, dignity-respecting national solution the People.s representatives in Congress elected to order.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting.

In *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U. S. 356 (2001), we held that Congress did not validly abrogate States' Eleventh Amendment immunity when it enacted Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. §§12111–12117. Today, the Court concludes that Title II of that Act, §§12131–12165, does validly abrogate that immunity, at least insofar "as it applies to the class of cases implicating the fundamental right of access to the courts." Ante. Because today's decision is irreconcilable with *Garrett* and the well-established principles it embodies, I dissent.

The Eleventh Amendment bars private lawsuits in federal court against an unconsenting State. E.g., *Nevada Dept. of Human Resources v. Hibbs*, 538 U. S. 721 (2003). Congress may overcome States' sovereign immunity and authorize such suits only if it unmistakably expresses its intent to do so, and only if it "acts pursuant to a valid exercise of its power under §5 of the Fourteenth Amendment." *Hibbs*. While the Court correctly holds that Congress satisfied the first prerequisite, ante, I disagree with its conclusion that Title II is valid §5 enforcement legislation.

Section 5 of the Fourteenth Amendment grants Congress the authority "to enforce, by appropriate legislation," the familiar substantive guarantees contained in §1 of that Amendment. U. S. Const., Amdt. 14, §1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). Congress' power to enact "appropriate" enforcement legislation is not limited to "mere legislative repetition" of this Court's Fourteenth Amendment jurisprudence. *Garrett*, supra, at 365. Congress may "remedy" and "deter" state violations of constitutional rights by "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Hibbs*. Such "prophylactic" legislation, however, "must be an appropriate remedy for identified constitutional violations, not 'an attempt to substantively redefine the States' legal obligations.'" Id.; *City of Boerne v. Flores*, 521 U. S. 507 (1997) (enforcement power is "corrective or preventive, not definitional"). To ensure that Congress does not usurp this Court's responsibility to define the meaning of the Fourteenth Amendment, valid §5 legislation must exhibit "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Hibbs*. While the Court today pays lipservice to the "congruence and proportionality" test, see ante, it applies it in a manner inconsistent with our recent precedents.

In *Garrett*, we conducted the three-step inquiry first enunciated in *City of Boerne* to determine whether Title I of the ADA satisfied the congruence-and-proportionality test. A faithful application of that test to Title II reveals that it too "'substantively redefine[s],'" rather than permissibly enforces, the rights protected by the Fourteenth Amendment. *Hibbs*.

The first step is to "identify with some precision the scope of the constitutional right at issue." *Garrett*. This task was easy in *Garrett*, *Hibbs*, *Kimel*, and *City of Boerne* because the statutes in those cases sought to enforce only one constitutional right. In *Garrett*, for example, the statute addressed the equal protection right of disabled persons to be free from unconstitutional employment discrimination. *Garrett*. See also *Hibbs*,("The [Family and Medical Leave Act of 1993 (FMLA)] aims to protect the right to be free from gender-based discrimination in the workplace"); *Kimel*,(right to be free from unconstitutional age discrimination in employment); *City of Boerne*, supra,(right of free exercise of religion). The scope of that right, we explained, is quite limited; indeed, the Equal Protection Clause permits a State to classify on the basis of disability so long as it has a rational basis for doing so. *Garrett*.

In this case, the task of identifying the scope of the relevant constitutional protection is more difficult because Title II purports to enforce a panoply of constitutional rights of disabled persons: not only the equal protection right against irrational discrimination, but also certain rights protected by the Due Process Clause. Ante.

However, because the Court ultimately upholds Title II "as it applies to the class of cases implicating the fundamental right of access to the courts," ante, the proper inquiry focuses on the scope of those due process rights. The Court cites four access-to-the-courts rights that Title II purportedly enforces: (1) the right of the criminal defendant to be present at all critical stages of the trial, *Faretta v. California*, 422 U. S. 806 (1975); (2) the right of litigants to have a "meaningful opportunity to be heard" in judicial proceedings, *Boddie v. Connecticut*, 401 U. S. 371 (1971); (3) the right of the criminal defendant to trial by a jury composed of a fair cross section of the community, *Taylor v. Louisiana*, 419 U. S. 522 (1975); and (4) the public right of access to criminal proceedings, *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 U. S. 1 (1986).

Having traced the "metes and bounds" of the constitutional rights at issue, the next step in the congruence-and-proportionality inquiry requires us to examine whether Congress "identified a history and pattern" of violations of these constitutional rights by the States with respect to the disabled. *Garrett*. This step is crucial to determining whether Title II is a legitimate attempt to remedy or prevent actual constitutional violations by the States or an illegitimate attempt to rewrite the constitutional provisions it purports to enforce. Indeed, "Congress' §5 power is appropriately exercised only in response to state transgressions." Ibid. But the majority identifies nothing in the legislative record that shows Congress was responding to widespread violations of the due process rights of disabled persons.

Rather than limiting its discussion of constitutional violations to the due process rights on which it ultimately relies, the majority sets out on a wide-ranging account of societal discrimination against the disabled. Ante. This digression recounts historical discrimination against the disabled through institutionalization laws, restrictions on marriage, voting, and public education, conditions in mental hospitals, and various other forms of unequal treatment in the administration of public programs and services. Some of this evidence would be relevant if the Court were considering the constitutionality of the statute as a whole; but the Court rejects that approach in favor of a narrower "as-applied" inquiry. We discounted much the same type of outdated, generalized evidence in *Garrett* as unsupportive of Title I's ban on employment discrimination. See also *City of Boerne* (noting that the "legislative record lacks . . . modern instances of . . . religious bigotry"). The evidence here is likewise irrelevant to Title II's purported enforcement of Due Process access-to-the-courts rights.

Even if it were proper to consider this broader category of evidence, much of it does not concern unconstitutional action by the States. The bulk of the Court's evidence concerns discrimination by nonstate governments, rather than the States themselves. We have repeatedly held that such evidence is irrelevant to the inquiry whether Congress has validly abrogated Eleventh Amendment immunity, a privilege enjoyed only by the sovereign States. *Garrett*; *Florida Prepaid Post-secondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627 (1999); *Kimel*. Moreover, the majority today cites the same congressional task force evidence we rejected in *Garrett*. Ante, (citing *Garrett*,(BREYER, J., dissenting) (chronicling instances of "unequal treatment" in the "administration of public programs")). As in *Garrett*, this "unexamined, anecdotal" evidence does not suffice. Most of the brief anecdotes do not involve States at all, and those that do are not sufficiently detailed to determine whether the instances of "unequal treatment" were irrational, and thus unconstitutional under our decision in Cleburne. *Garrett*. Therefore, even outside the "access to the courts" context, the Court identifies few, if any, constitutional violations perpetrated by the States against disabled persons.

With respect to the due process "access to the courts" rights on which the Court ultimately relies, Congress' failure to identify a pattern of actual constitutional violations by the States is even more striking. Indeed, there is nothing in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials.

The Court's attempt to disguise the lack of congressional documentation with a few citations to judicial decisions cannot retroactively provide support for Title II, and in any event, fails on its own terms. See, e.g., *Garrett* ("[W]e examine whether Congress identified a history and pattern" of constitutional violations); ibid. ("[t]he legislative record . . . fails to show that Congress did in fact identify a pattern" of constitutional violations). Indeed, because this type of constitutional violation occurs in connection with litigation, it is particularly telling that the majority is able to identify only two reported cases finding that a disabled person's federal constitutional rights were violated. See ante, (citing *Ferrell v. Estelle*, 568 F. 2d 1128 (CA5), opinion withdrawn as moot, 573 F. 2d 867 (1978); *People v. Rivera*, 480 N. Y. S. 2d 426 (Sup. Ct. 1984)).

Lacking any real evidence that Congress was responding to actual due process violations, the majority

relies primarily on three items to justify its decision: (1) a 1983 U. S. Civil Rights Commission Report showing that 76% of "public services and programs housed in state-owned buildings were inaccessible" to persons with disabilities, ante; (2) testimony before a House subcommittee regarding the "physical inaccessibility" of local courthouses, ante; and (3) evidence submitted to Congress' designated ADA task force that purportedly contains "numerous examples of the exclusion of persons with disabilities from state judicial services and programs." Ibid.

On closer examination, however, the Civil Rights Commission's finding consists of a single conclusory sentence in its report, and it is far from clear that its finding even includes courthouses. The House subcommittee report, for its part, contains the testimony of two witnesses, neither of whom reported being denied the right to be present at constitutionally protected court proceedings. Indeed, the witnesses' testimony, like the U. S. Civil Rights Commission Report, concerns only physical barriers to access, and does not address whether States either provided means to overcome those barriers or alternative locations for proceedings involving disabled persons.

Based on the majority's description, ante, the report of the ADA Task Force on the Rights and Empowerment of Americans with Disabilities sounds promising. But the report itself says nothing about any disabled person being denied access to court. The Court thus apparently relies solely on a general citation to the Government's Lodging in *Garrett*, O. T. 2000, No. 99–1240 which, amidst thousands of pages, contains only a few anecdotal handwritten reports of physically inaccessible courthouses, again with no mention of whether States provided alternate means of access. This evidence, moreover, was submitted not to Congress, but only to the task force, which itself made no findings regarding disabled persons' access to judicial proceedings. Cf. *Garrett* (rejecting anecdotal task force evidence for similar reasons). As we noted in *Garrett*, "had Congress truly understood this [task force] information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings." Id. Yet neither the legislative findings, nor even the Committee Reports, contain a single mention of the seemingly vital topic of access to the courts. Cf. ibid.; Florida Prepaid (observing that Senate Report on Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act) "contains no evidence that unremedied patent infringement by States had become a problem of national import"). To the contrary, the Senate Report on the ADA observed that "[a]ll states currently mandate accessibility in newly constructed state-owned public buildings." S. Rep. No. 101–116, p. 92 (1989).

Even if the anecdotal evidence and conclusory statements relied on by the majority could be properly considered, the mere existence of an architecturally "inaccessible" courthouse—i.e., one a disabled person cannot utilize without assistance—does not state a constitutional violation. A violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding. We have never held that a person has a constitutional right to make his way into a courtroom without any external assistance. Indeed, the fact that the State may need to assist an individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding. Nor does an "inaccessible" courthouse violate the Equal Protection Clause, unless it is irrational for the State not to alter the courthouse to make it "accessible." But financial considerations almost always furnish a rational basis for a State to decline to make those alterations. See *Garrett* (noting that it would be constitutional for an employer to "conserve scarce financial resources" by hiring employees who can use existing facilities rather than making the facilities accessible to disabled employees). Thus, evidence regarding inaccessible courthouses, because it is not evidence of constitutional violations, provides no basis to abrogate States' sovereign immunity.

The near-total lack of actual constitutional violations in the congressional record is reminiscent of *Garrett*, wherein we found that the same type of minimal anecdotal evidence "f[e]ll far short of even suggesting the pattern of unconstitutional [state action] on which §5 legislation must be based." See also *Kimel* ("Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary"); Florida Prepaid ("The legislative record thus suggests that the Patent Remedy Act did not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic §5 legislation."

The barren record here should likewise be fatal to the majority's holding that Title II is valid legislation enforcing due process rights that involve access to the courts. This conclusion gains even more support when Title II's nonexistent record of constitutional violations is compared with legislation that we have sustained as valid §5 enforcement legislation. See, e.g., *Hibbs* (tracing the extensive legislative record documenting States' gender discrimination in employment leave policies); *South Carolina v. Katzenbach*, 383 U. S. 301 (1966) (same with respect to racial discrimination in voting rights). Accordingly, Title II can only be understood as a congressional

attempt to "rewrite the Fourteenth Amendment law laid down by this Court," rather than a legitimate effort to remedy or prevent state violations of that Amendment. *Garrett*.

The third step of our congruence-and-proportionality inquiry removes any doubt as to whether Title II is valid §5 legislation. At this stage, we ask whether the rights and remedies created by Title II are congruent and proportional to the constitutional rights it purports to enforce and the record of constitutional violations adduced by Congress.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U. S. C. §12132. A disabled person is considered "qualified" if he meets the essential eligibility requirements" for the receipt of the entity's services or participation in the entity's programs, "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." §12131(2) (emphasis added). The ADA's findings make clear that Congress believed it was attacking "discrimination" in all areas of public services, as well as the "discriminatory effect" of "architectural, transportation, and communication barriers." §§12101(a)(3), (a)(5). In sum, Title II requires, on pain of money damages, special accommodations for disabled persons in virtually every interaction they have with the State.

"Despite subjecting States to this expansive liability," the broad terms of Title II "d[o] nothing to limit the coverage of the Act to cases involving arguable constitutional violations." Florida Prepaid, 527 U. S., at 646. By requiring special accommodation and the elimination of programs that have a disparate impact on the disabled, Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination. We invalidated Title I's similar requirements in *Garrett*, observing that "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." 531 U. S., at 368; id., at 372–373 (contrasting Title I's reasonable accommodation and disparate impact provisions with the Fourteenth Amendment's requirements). Title II fails for the same reason. Like Title I, Title II may be laudable public policy, but it cannot be seriously disputed that it is also an attempt to legislatively "redefine the States' legal obligations" under the Fourteenth Amendment. *Kimel*.

The majority, however, claims that Title II also vindicates fundamental rights protected by the Due Process Clause—in addition to access to the courts—that are subject to heightened Fourteenth Amendment scrutiny. Ante, (citing *Dunn v. Blumstein*, 405 U. S. 330 (1972) (voting); *Shapiro v. Thompson*, 394 U. S. 618 (1969) (right to move to a new jurisdiction); *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942) (marriage and procreation)). But Title II is not tailored to provide prophylactic protection of these rights; instead, it applies to any service, program, or activity provided by any entity. Its provisions affect transportation, health, education, and recreation programs, among many others, all of which are accorded only rational-basis scrutiny under the Equal Protection Clause. A requirement of accommodation for the disabled at a state-owned amusement park or sports stadium, for example, bears no permissible prophylactic relationship to enabling disabled persons to exercise their fundamental constitutional rights. Thus, as with Title I in *Garrett*, the Patent Remedy Act in Florida Prepaid, the Age Discrimination in Employment Act of 1967 in *Kimel*, and the RFRA in *City of Boerne*, all of which we invalidated as attempts to substantively redefine the Fourteenth Amendment, it is unlikely "that many of the [state actions] affected by [Title II] ha[ve] any likelihood of being unconstitutional." *City of Boerne*. Viewed as a whole, then, there is little doubt that Title II of the ADA does not validly abrogate state sovereign immunity.10

The majority concludes that Title II's massive overbreadth can be cured by considering the statute only "as it applies to the class of cases implicating the accessibility of judicial services." Ante, (citing *United States v. Raines*, 362 U. S. 17 (1960)). I have grave doubts about importing an "as applied" approach into the §5 context. While the majority is of course correct that this Court normally only considers the application of a statute to a particular case, the proper inquiry under *City of Boerne* and its progeny is somewhat different. In applying the congruence-and-proportionality test, we ask whether Congress has attempted to statutorily redefine the constitutional rights protected by the Fourteenth Amendment. This question can only be answered by measuring the breadth of a statute's coverage against the scope of the constitutional rights it purports to enforce and the record of violations it purports to remedy.

In conducting its as-applied analysis, however, the majority posits a hypothetical statute, never enacted by Congress, that applies only to courthouses. The effect is to rig the congruence-and-proportionality test by artificially

constricting the scope of the statute to closely mirror a recognized constitutional right. But Title II is not susceptible of being carved up in this manner; it applies indiscriminately to all "services," "programs," or "activities" of any "public entity." Thus, the majority's approach is not really an assessment of whether Title II is "appropriate legislation" at all, U. S. Const., Amdt. 14, §5, but a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation.

Our §5 precedents do not support this as-applied approach. In each case, we measured the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce. If we had arbitrarily constricted the scope of the statutes to match the scope of a core constitutional right, those cases might have come out differently. In *Garrett*, for example, Title I might have been upheld "as applied" to irrational employment discrimination; or in *Florida Prepaid*, the Patent Remedy Act might have been upheld "as applied" to intentional, uncompensated patent infringements. It is thus not surprising that the only authority cited by the majority is *Raines*, supra, a case decided long before we enunciated the congruence-and-proportionality test.11

I fear that the Court's adoption of an as-applied approach eliminates any incentive for Congress to craft §5 legislation for the purpose of remedying or deterring actual constitutional violations. Congress can now simply rely on the courts to sort out which hypothetical applications of an undifferentiated statute, such as Title II, may be enforced against the States. All the while, States will be subjected to substantial litigation in a piecemeal attempt to vindicate their Eleventh Amendment rights. The majority's as-applied approach simply cannot be squared with either our recent precedent or the proper role of the Judiciary.

Even in the limited courthouse-access context, Title II does not properly abrogate state sovereign immunity. As demonstrated in depth above, Congress utterly failed to identify any evidence that disabled persons were denied constitutionally protected access to judicial proceedings. Without this predicate showing, Title II, even if we were to hypothesize that it applies only to courthouses, cannot be viewed as a congruent and proportional response to state constitutional violations. *Garrett* ("Congress' §5 authority is appropriately exercised only in response to state transgressions").

Moreover, even in the courthouse-access context, Title II requires substantially more than the Due Process Clause. Title II subjects States to private lawsuits if, inter alia, they fail to make "reasonable modifications" to facilities, such as removing "architectural . . . barriers." 42 U. S., C. §§12131(2), 12132. Yet the statute is not limited to occasions when the failure to modify results, or will likely result, in an actual due process violation—i.e., the inability of a disabled person to participate in a judicial proceeding. Indeed, liability is triggered if an inaccessible building results in a disabled person being "subjected to discrimination"—a term that presumably encompasses any sort of inconvenience in accessing the facility, for whatever purpose. §12132.

The majority's reliance on *Boddie v. Connecticut*, 401 U. S. 371 (1971), and other cases in which we held that due process requires the State to waive filing fees for indigent litigants, is unavailing. While these cases support the principle that the State must remove financial requirements that in fact prevent an individual from exercising his constitutional rights, they certainly do not support a statute that subjects a State to liability for failing to make a vast array of special accommodations, without regard for whether the failure to accommodate results in a constitutional wrong.

In this respect, Title II is analogous to the Patent Remedy Act at issue in Florida Prepaid. That statute subjected States to monetary liability for any act of patent infringement. Thus, "Congress did nothing to limit" the Act's coverage "to cases involving arguable [Due Process] violations," such as when the infringement was nonnegligent or uncompensated. Ibid.

Similarly here, Congress has authorized private damages suits against a State for merely maintaining a courthouse that is not readily accessible to the disabled, without regard to whether a disabled person's due process rights are ever violated. Accordingly, even as applied to the "access to the courts" context, Title II's "indiscriminate scope offends [the congruence-and-proportionality] principle," particularly in light of the lack of record evidence showing that inaccessible courthouses cause actual Due Process violations. Id.12

For the foregoing reasons, I respectfully dissent.

JUSTICE SCALIA, dissenting.

Section 5 of the Fourteenth Amendment provides that Congress "shall have power to enforce, by appropriate legislation, the provisions" of that Amendment—including, of course, the Amendment's Equal Protection and Due Process Clauses. In *Katzenbach v. Morgan*, 384 U. S. 641 (1966), we decided that Congress could, under this provision, forbid English literacy tests for Puerto Rican voters in New York State who met certain educational criteria. Though those tests were not themselves in violation of the Fourteenth Amendment, we held that §5 authorizes prophylactic legislation—that is, "legislation that proscribes facially constitutional conduct," *Nevada Dept. of Human Resources v. Hibbs*, 538 U. S. 721 (2003), when Congress determines such proscription is desirable "'to make the amendments fully effective,'" *Morgan* (quoting *Ex parte Virginia*, 100 U. S. 339 (1880)). We said that "the measure of what constitutes 'appropriate legislation' under §5 of the Fourteenth Amendment" is the flexible "necessary and proper" standard of *McCulloch v. Maryland*, 4 Wheat. 316 (1819). *Morgan*. We described §5 as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Ibid.

The *Morgan* opinion followed close upon our decision in *South Carolina v. Katzenbach*, 383 U. S. 301 (1966), which had upheld prophylactic application of the similarly worded "enforce" provision of the Fifteenth Amendment (§2) to challenged provisions of the Voting Rights Act of 1965. But the Fourteenth Amendment, unlike the Fifteenth, is not limited to denial of the franchise and not limited to the denial of other rights on the basis of race.

In *City of Boerne v. Flores*, 521 U. S. 507 (1997), we confronted Congress's inevitable expansion of the Fourteenth Amendment, as interpreted in *Morgan*, beyond the field of racial discrimination. There Congress had sought, in the Religious Freedom Restoration Act of 1993, 42 U. S. C. §2000bb et seq., to impose upon the States an interpretation of the First Amendment's Free Exercise Clause that this Court had explicitly rejected. To avoid placing in congressional hands effective power to rewrite the Bill of Rights through the medium of §5, we formulated the "congruence and proportionality" test for determining what legislation is "appropriate." When Congress enacts prophylactic legislation, we said, there must be "proportionality or congruence between the means adopted and the legitimate end to be achieved."

I joined the Court's opinion in *Boerne* with some misgiving. I have generally rejected tests based on such malleable standards as "proportionality," because they have a way of turning into vehicles for the implementation of individual judges' policy preferences. See, e.g., *Ewing v. California*, 538 U. S. 11 (2003) (SCALIA, J., concurring in judgment) (declining to apply a "proportionality" test to the Eighth Amendment's ban on cruel and unusual punishment); *Stenberg v. Carhart*, 530 U. S. 914 (2000) (SCALIA, J., dissenting) (declining to apply the "undue burden" standard of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992)); *BMW of North America, Inc. v. Gore*, 517 U. S. 559 (1996) (SCALIA, J., dissenting) (declining to apply a "reasonableness" test to punitive damages under the Due Process Clause). Even so, I signed on to the "congruence and proportionality" test in *Boerne*, and adhered to it in later cases: *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627 (1999), where we held that the provisions of the Patent and Plant Variety Protection Remedy Clarification Act, 35 U. S. C. §§271(h), 296(a), were "'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,'" *Kimel v. Florida Bd. of Regents*, 528 U. S. 62 (2000), where we held that the Age Discrimination in Employment Act of 1967, as amended, 29 U. S. C. §621 et seq., imposed on state and local governments requirements "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act;" United States v. *Morrison*, 529 U. S. 598 (2000), where we held that a provision of the Violence Against Women Act, 42 U. S. C. §13981, lacked congruence and proportionality because it was "not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe," and *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U. S. 356 (2001), where we said that Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. §§12111–12117, raised "the same sort of concerns as to congruence and proportionality as

were found in *City of Boerne*."

But these cases were soon followed by *Nevada Dept. of Human Resources v. Hibbs*, in which the Court held that the Family and Medical Leave Act of 1993, 29 U. S. C. §2612 et seq., which required States to provide their employees up to 12 work weeks of unpaid leave (for various purposes) annually, was "congruent and proportional to its remedial object [of preventing sex discrimination], and can be understood as responsive to, or designed to prevent, unconstitutional behavior." I joined JUSTICE KENNEDY's dissent, which established (conclusively, I thought) that Congress had identified no unconstitutional state action to which the statute could conceivably be a proportional response. And now we have today's decision, holding that Title II of the ADA is congruent and proportional to the remediation of constitutional violations, in the face of what seems to me a compelling demonstration of the opposite by THE CHIEF JUSTICE's dissent.

I yield to the lessons of experience. The "congruence and proportionality" standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed. As I wrote for the Court in an earlier case, "low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.*, 514 U. S. 211 (1995).

I would replace "congruence and proportionality" with another test—one that provides a clear, enforceable limitation supported by the text of §5. Section 5 grants Congress the power "to enforce, by appropriate legislation," the other provisions of the Fourteenth Amendment. U. S. Const., Amdt. 14 (emphasis added). *Morgan* notwithstanding, one does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, "enforce" a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit—even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit. And one does not "enforce" the right of access to the courts at issue in this case, see ante, by requiring that disabled persons be provided access to all of the "services, programs, or activities" furnished or conducted by the State, 42 U. S. C. §12132. That is simply not what the power to enforce means—or ever meant. The 1860 edition of Noah Webster's American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined "enforce" as: "To put in execution; to cause to take effect; as, to enforce the laws." See also J. Worcester, Dictionary of the English Language 484 (1860) ("To put in force; to cause to be applied or executed; as, 'To enforce a law'"). Nothing in §5 allows Congress to go beyond the provisions of the Fourteenth Amendment to proscribe, prevent, or "remedy" conduct that does not itself violate any provision of the Fourteenth Amendment. So-called "prophylactic legislation" is reinforcement rather than enforcement.

Morgan asserted that this commonsense interpretation "would confine the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of §1 of the Amendment." That is not so. One must remember "that in 1866 the lower federal courts had no general jurisdiction of cases alleging a deprivation of rights secured by the Constitution." R. Berger, Government By Judiciary 147 (2d ed. 1997). If, just after the Fourteenth Amendment was ratified, a State had enacted a law imposing racially discriminatory literacy tests (different questions for different races) a citizen prejudiced by such a test would have had no means of asserting his constitutional right to be free of it. Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights. One of the first pieces of legislation passed under Congress's §5 power was the Ku Klux Klan Act of April 20, 1871, entitled "An

Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Section 1 of that Act, later codified as Rev. Stat. §1979, 42 U. S. C. §1983, authorized a cause of action against "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." Section 5 would also authorize measures that do not restrict the States' substantive scope of action but impose requirements directly related to the facilitation of "enforcement"—for example, reporting requirements that would enable violations of the Fourteenth Amendment to be identified. But what §5 does not authorize is so-called "prophylactic" measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment.

The major impediment to the approach I have suggested is stare decisis. A lot of water has gone under the bridge since *Morgan*, and many important and well-accepted measures, such as the Voting Rights Act, assume the validity of *Morgan* and *South Carolina*. As Prof. Archibald Cox put it in his Supreme Court Foreword: "The etymological meaning of section 5 may favor the narrower reading. Literally, 'to enforce' means to compel performance of the obligations imposed; but the linguistic argument lost much of its force once the *South Carolina* and *Morgan* cases decided that the power to enforce embraces any measure appropriate to effectuating the performance of the state's constitutional duty." Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 110–111 (1966).

However, *South Carolina* and *Morgan*, all of our later cases except *Hibbs* that give an expansive meaning to "enforce" in §5 of the Fourteenth Amendment, and all of our earlier cases that even suggest such an expansive meaning in dicta, involved congressional measures that were directed exclusively against, or were used in the particular case to remedy, racial discrimination. See *Oregon v. Mitchell*, 400 U. S. 112 (1970) (see discussion infra); *Ex parte Virginia*, 100 U. S. 339 (1880) (dictum in a case involving a statute that imposed criminal penalties for officials' racial discrimination in jury selection); *Strauder v. West Virginia*, 100 U. S. 303(1880) (dictum in a case involving a statute that permitted removal to federal court of a black man's claim that his jury had been selected in a racially discriminatory manner); *Virginia v. Rives*, 100 U. S. 313 (1880) (dictum in a racial discrimination case involving the same statute). See also *City of Rome v. United States*, 446 U. S. 156(1980) (upholding as valid legislation under §2 of the Fifteenth Amendment the most sweeping provisions of the Voting Rights Act of 1965); *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409 (1968) (upholding a law, 42 U. S. C. §1982, banning public or private racial discrimination in the sale and rental of property as appropriate legislation under §2 of the Thirteenth Amendment).

Giving §5 more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment a priority of attention that this Court envisioned from the beginning, and that has repeatedly been reflected in our opinions. In the *Slaughter-House Cases*, 16 Wall. 36 (1873), the Court's first confrontation with the Fourteenth Amendment, we said the following with respect to the Equal Protection Clause:

> "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

Racial discrimination was the practice at issue in the early cases (cited in *Morgan*) that gave such an expansive description of the effects of §5. In those early days, bear in mind, the guarantee of equal protection had not been extended beyond race to sex, age, and the many other categories it now covers. Also still to be developed were the incorporation doctrine (which holds that the Fourteenth Amendment incorporates and applies against the States the Bill of Rights, see *Duncan v. Louisiana*, 391 U. S. 145 (1968)) and the doctrine of so-called "substantive due process" (which holds that the Fourteenth Amendment's Due Process Clause protects unenumerated liberties, see generally *Lawrence v. Texas*, 539 U. S. 558 (2003); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S.

833 (1992)). Thus, the Fourteenth Amendment did not include the many guarantees that it now provides. In such a seemingly limited context, it did not appear to be a massive expansion of congressional power to interpret §5 broadly. Broad interpretation was particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed, and the principal constitutional prohibition that some of the States stubbornly ignored. The former is still true, and the latter remained true at least as late as *Morgan*.

When congressional regulation has not been targeted at racial discrimination, we have given narrower scope to §5. In *Oregon v. Mitchell*, 400 U. S. 112 (1970), the Court upheld, under §2 of the Fifteenth Amendment, that provision of the Voting Rights Act Amendments of 1970, 84 Stat. 314, which barred literacy tests and similar voter-eligibility requirements—classic tools of the racial discrimination in voting that the Fifteenth Amendment forbids; but found to be beyond the §5 power of the Fourteenth Amendment the provision that lowered the voting age from 21 to 18 in state elections. A third provision, which forbade States from disqualifying voters by reason of residency requirements, was also upheld—but only a minority of the Justices believed that §5 was adequate authority. Justice Black's opinion in that case described exactly the line I am drawing here, suggesting that Congress's enforcement power is broadest when directed "to the goal of eliminating discrimination on account of race." And of course the results reached in *Boerne*, *Florida Prepaid*, *Kimel*, *Morrison*, and *Garrett* are consistent with the narrower compass afforded congressional regulation that does not protect against or prevent racial discrimination.

Thus, principally for reasons of stare decisis, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States. I would not, however, abandon the requirement that Congress may impose prophylactic §5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations. I would also adhere to the requirement that the prophylactic remedy predicated upon such state violations must be directed against the States or state actors rather than the public at large. And I would not, of course, permit any congressional measures that violate other provisions of the Constitution. When those requirements have been met, however, I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under §5 to prevent or remedy racial discrimination by the States.

I shall also not subject to "congruence and proportionality" analysis congressional action under §5 that is not directed to racial discrimination. Rather, I shall give full effect to that action when it consists of "enforcement" of the provisions of the Fourteenth Amendment, within the broad but not unlimited meaning of that term I have described above. When it goes beyond enforcement to prophylaxis, however, I shall consider it ultra vires. The present legislation is plainly of the latter sort.

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Requiring access for disabled persons to all public buildings cannot remotely be considered a means of "enforcing" the Fourteenth Amendment. The considerations of long accepted practice and of policy that sanctioned such distortion of language where state racial discrimination is at issue do not apply in this field of social policy far removed from the principal object of the Civil War Amendments. "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'" *United States v. 12 200-ft. Reels of Super 8MM. Film*, 413 U. S. 123(1973). It is past time to draw a line limiting the uncontrolled spread of a well-intentioned textual distortion. For these reasons, I respectfully dissent from the judgment of the Court.

JUSTICE THOMAS, dissenting. (Omitted.)