Supplemental Materials for Brest, Levinson, Balkin, Amar and Siegel
Processes of Constitutional Decisionmaking
Hibbs and Lane– Reconstruction Power

NEVADA DEPARTMENT OF HUMAN RESOURCES
v.
WILLIAM HIBBS

538 U.S. 721 (2003)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Family and Medical Leave Act of 1993 (FMLA or Act) entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a 'serious health condition' in an employee's spouse, child, or parent. The Act creates a private right of action to seek both equitable relief and money damages 'against any employer (including a public agency) in any Federal or State court of competent jurisdiction,' should that employer 'interfere with, restrain, or deny the exercise of ' FMLA rights. We hold that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the Act.

Petitioners include the Nevada Department of Human Resources (Department) and two of its officers. Respondent William Hibbs (hereinafter respondent) worked for the Department's Welfare Division. In April and May 1997, he sought leave under the FMLA to care for his ailing wife, who was recovering from a car accident and neck surgery. The Department granted his request for the full 12 weeks of FMLA leave and authorized him to use the leave intermittently as needed between May and December 1997. Respondent did so until August 5, 1997, after which he did not return to work. In October 1997, the Department informed respondent that he had exhausted his FMLA leave, that no further leave would be granted, and that he must report to work by November 12, 1997. Respondent failed to do so and was terminated. ...

This case turns ... on whether Congress acted within its constitutional authority when it sought to abrogate the States' immunity for purposes of the FMLA's family-leave provision.

In enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under §5 of the Fourteenth Amendment to enforce that Amendment's guarantees. Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce. *Seminole Tribe, supra.* Congress may, however, abrogate States' sovereign immunity through a valid exercise of its §5 power, for 'the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment.' *Fitzpatrick v. Bitzer,* 427 U. S. 445, 456 (1976) (citation omitted). . . . .

Congress may, in the exercise of its §5 power, do more than simply proscribe conduct that we have held unconstitutional. ' 'Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.' ' In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.

City of Boerne also confirmed, however, that it falls to this Court, not Congress, to define the substance of constitutional guarantees. 'The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch. Section 5 legislation reaching beyond the scope of §1's actual guarantees must be an appropriate remedy for identified constitutional violations, not 'an attempt to substantively redefine the States' legal obligations.' We distinguish appropriate prophylactic legislation from 'substantive redefinition of the Fourteenth Amendment right at issue,' by applying the test set forth in *City of Boerne:* Valid §5 legislation must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'

The FMLA aims to protect the right to be free from gender-based discrimination in the workplace.[a] We have held that statutory classifications that distinguish between males and females are subject to heightened scrutiny. See, *e.g., Craig v. Boren,* 429 U. S. 190 (1976). For a gender-based classification to withstand such scrutiny, it must 'serv[e] important governmental objectives,' and 'the discriminatory means employed [must be] substantially related to the achievement of those objectives.' *United States v. Virginia*, 518 U. S. 515 (1996). The State's justification for such a classification 'must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.' We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area.

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[a]The text of the Act makes this clear. Congress found that, 'due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.' 29 U. S. C. §2601(a)(5). In response to this finding, Congress sought 'to accomplish the [Act's other] purposes ... in a manner that ... minimizes the potential for employment discrimination *on the basis of sex* by ensuring generally that leave is available ... *on a gender-neutral basis*[,] and to promote the goal of equal employment opportunity *for women and men* ... .' §§2601(b)(4) and (5) (emphasis added).

... Congress responded to [the long] history of discrimination [against women] by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964, and we sustained this abrogation in *Fitzpatrick [v. Bitzer]*. But state gender discrimination did not cease. ... According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States' gender discrimination in this area. The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here, as in *Fitzpatrick*, the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic §5 legislation.

As the FMLA's legislative record reflects, a 1990 Bureau of Labor Statistics (BLS) survey stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies. S. Rep. No. 103-3, pp. 14-15 (1993). The corresponding numbers from a similar BLS survey the previous year were 33 percent and 16 percent, respectively. *Ibid*. While these data show an increase in the percentage of employees eligible for such leave, they also show a widening of the gender gap during the same period. Thus, stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread.[b]

Congress also heard testimony that '[p]arental leave for fathers ... is rare. Even ... [w]here child-care leave policies do exist, men, *both in the public and private sectors*, receive notoriously discriminatory treatment in their requests for such leave.' *Id.*, at 147 (Washington Council of Lawyers) (emphasis added). Many States offered women extended 'maternity' leave that far exceeded the typical 4- to 8-week period of physical disability due to pregnancy and childbirth, but very few States granted men a parallel benefit: Fifteen States provided women up to one year of extended maternity leave, while only four provided men with the same. This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex- role stereotype that caring for family members is women's work.[c]

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[b]While this and other material described leave policies in the private sector, a 50-state survey also before Congress demonstrated that '[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees.'

[c]For example, state employers' collective-bargaining agreements often granted extended 'maternity' leave of six months to a year to women only. ... Evidence pertaining

Finally, Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. It was aware of the 'serious problems with the discretionary nature of family leave,' because when 'the authority to grant leave and to arrange the length of that leave rests with individual supervisors,' it leaves 'employees open to discretionary and possibly unequal treatment.' Testimony supported that conclusion, explaining that '[t]he lack of uniform parental and medical leave policies in the work place has created an environment where [sex] discrimination is rampant.'

. . . JUSTICE KENNEDY argues in dissent that Congress' passage of the FMLA was unnecessary because 'the States appear to have been ahead of Congress in providing gender-neutral family leave benefits,' and points to Nevada's leave policies in particular. However, it was only '[s]ince Federal family leave legislation was first introduced' that the States had even 'begun to consider similar family leave initiatives.'

Furthermore, the dissent's statement that some States 'had adopted some form of family-care leave' before the FMLA's enactment, glosses over important shortcomings of some state policies. First, seven States had childcare leave provisions that applied to women only. Indeed, Massachusetts required that notice of its leave provisions be posted only in 'establishment[s] in which females are employed.' These laws reinforced the very stereotypes that Congress sought to remedy through the FMLA. Second, 12 States provided their employees no family leave, beyond an initial childbirth or adoption, to care for a seriously ill child or family member. Third, many States provided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs. Three States left the amount of leave time primarily in employers' hands. Congress could reasonably conclude that such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees that Congress sought to eliminate. Finally, four States provided leave only through administrative regulations or personnel policies, which Congress could reasonably conclude offered significantly less firm protection than a federal law. Against the above backdrop of limited state leave policies, no

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to parenting leave is relevant here because state discrimination in the provision of both types of benefits is based on the same gender stereotype: that women's family duties trump those of the workplace. JUSTICE KENNEDY's dissent ignores this common foundation that, as Congress found, has historically produced discrimination in the hiring and promotion of women. Consideration of such evidence does not, as the dissent contends, expand our §5 inquiry to include '*general* gender-based stereotypes in employment.' To the contrary, because parenting and family leave address very similar situations in which work and family responsibilities conflict, they implicate the same stereotypes.

matter how generous petitioner's own may have been, Congress was justified in enacting the FMLA as remedial legislation.[d]

In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic §5 legislation.

[I]n *Garrett* and *Kimel* ... the §5 legislation under review responded to a purported tendency of state officials to make age- or disability-based distinctions. Under our equal protection case law, discrimination on the basis of such characteristics is not judged under a heightened review standard, and passes muster if there is 'a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases.' Thus, in order to impugn the constitutionality of state discrimination against the disabled or the elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a 'widespread pattern' of irrational reliance on such criteria. We found no such showing with respect to the ADEA and Title I of the Americans with Disabilities Act of 1990 (ADA).

Here, however, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test--it must 'serv[e] important governmental objectives' and be 'substantially related to the achievement of those objectives,'-- it was easier for Congress to show a pattern of state constitutional violations. Congress was similarly successful in *South Carolina v. Katzenbach,* 383 U. S. 301 (1966), where we upheld the Voting Rights Act of 1965: Because racial classifications are presumptively invalid, most of the States' acts of race discrimination violated the Fourteenth Amendment.

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[d]Contrary to the dissent's belief, we do not hold that Congress may 'abrogat[e] state immunity from private suits whenever the State's social benefits program is not enshrined in the statutory code and provides employers with discretion,' *post,* at 10, or when a State does not confer social benefits 'as generous or extensive as Congress would later deem appropriate,' *ibid.* The dissent misunderstands the purpose of the FMLA's family leave provision. The FMLA is not a 'substantive entitlement program;' Congress did not create a particular leave policy for its own sake. Rather, Congress sought to adjust family leave policies in order to eliminate their reliance on and perpetuation of invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace. In pursuing that goal, for the reasons discussed above, Congress reasonably concluded that state leave laws and practices should be brought within the Act.

The impact of the discrimination targeted by the FMLA is significant. Congress determined:

> Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers- to-be.

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is 'congruent and proportional to the targeted violation.' Congress had already tried unsuccessfully to address this problem through Title VII and the amendment of Title VII by the Pregnancy Discrimination Act, 42 U. S. C. §2000e(k). Here, as in *Katzenbach*, Congress again confronted a 'difficult and intractable proble[m],' where previous legislative attempts had failed. Such problems may justify added prophylactic measures in response.

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

The dissent characterizes the FMLA as a 'substantive entitlement program' rather than a remedial statute because it establishes a floor of 12 weeks' leave. In the dissent's view, in the face of evidence of gender- based discrimination by the States in the provision of leave benefits, Congress could do no more in exercising its §5 power than simply proscribe such discrimination. But this position cannot be squared with our recognition that Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' but may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.' For example, this Court has upheld certain prophylactic provisions of the Voting Rights Act as valid exercises of Congress' §5 power, including the literacy test ban and preclearance requirements for

changes in States' voting procedures. See, *e.g.*, *Katzenbach v. Morgan*, 384 U. S. 641 (1966); *Oregon v. Mitchell*, 400 U. S. 112 (1970); *South Carolina v. Katzenbach*, *supra*.

Indeed, in light of the evidence before Congress, a statute mirroring Title VII, that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object. Such a law would allow States to provide for no family leave at all. Where '[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women,' and state practices continue to reinforce the stereotype of women as caregivers, such a policy would exclude far more women than men from the workplace.

Unlike the statutes at issue in *City of Boerne*, *Kimel*, and *Garrett*, which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted at the fault line between work and family--precisely where sex-based overgeneralization has been and remains strongest--and affects only one aspect of the employment relationship.

We also find significant the many other limitations that Congress placed on the scope of this measure. The FMLA requires only unpaid leave, and applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months . Employees in high-ranking or sensitive positions are simply ineligible for FMLA leave; of particular importance to the States, the FMLA expressly excludes from coverage state elected officials, their staffs, and appointed policymakers. Employees must give advance notice of foreseeable leave, and employers may require certification by a health care provider of the need for leave. In choosing 12 weeks as the appropriate leave floor, Congress chose 'a middle ground, a period long enough to serve ' the needs of families' but not so long that it would upset 'the legitimate interests of employers.' ' Moreover, the cause of action under the FMLA is a restricted one: The damages recoverable are strictly defined and measured by actual monetary losses, and the accrual period for backpay is limited by the Act's 2-year statute of limitations (extended to three years only for willful violations).

For the above reasons, we conclude that §2612(a)(1)(C) is congruent and proportional to its remedial object, and can 'be understood as responsive to, or designed to prevent, unconstitutional behavior.'

The judgment of the Court of Appeals is therefore

Affirmed.

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

concurring.

Even on this Court's view of the scope of congressional power under §5 of the Fourteenth Amendment, the Family and Medical Leave Act is undoubtedly valid legislation, and application of the Act to the States is constitutional; the same conclusions follow *a fortiori* from my own understanding of §5, see *Garrett, supra,* at 376 (BREYER, J., dissenting); *Kimel, supra,* at 92 (STEVENS, J., dissenting); *Florida Prepaid, supra,* at 648 (STEVENS, J., dissenting); see also *Katzenbach v. Morgan,* 384 U. S. 641, 650-651 (1966). I join the Court's opinion here without conceding the dissenting positions just cited or the dissenting views expressed in *Seminole Tribe of Fla. v. Florida,* 517 U. S. 44, 100 (1996) (SOUTER, J., dissenting).

JUSTICE STEVENS, concurring in the judgment.

Because I have never been convinced that an Act of Congress can amend the Constitution and because I am uncertain whether the congressional enactment before us was truly ' needed to secure the guarantees of the Fourteenth Amendment,' I write separately to explain why I join the Court's judgment.

The plain language of the Eleventh Amendment poses no barrier to the adjudication of this case because respondents are citizens of Nevada. The sovereign immunity defense asserted by Nevada is based on what I regard as the second Eleventh Amendment, which has its source in judge-made common law, rather than constitutional text. As long as it clearly expresses its intent, Congress may abrogate that common-law defense pursuant to its power to regulate commerce 'among the several States.' The family-care provision of the Family and Medical Leave Act of 1993 is unquestionably a valid exercise of a power that is 'broad enough to support federal legislation regulating the terms and conditions of state employment.' Accordingly, Nevada's sovereign immunity defense is without merit.

JUSTICE SCALIA, dissenting.

I join JUSTICE KENNEDY's dissent, and add one further observation: The constitutional violation that is a prerequisite to 'prophylactic' congressional action to 'enforce' the Fourteenth Amendment is a violation *by the State against which the enforcement action is taken*. There is no guilt by association, enabling the sovereignty of one State to be abridged under §5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States. Congress has sometimes displayed awareness of this

self-evident limitation. That is presumably why the most sweeping provisions of the Voting Rights Act of 1965--which we upheld in *City of Rome v. United States*, 446 U. S. 156 (1980), as a valid exercise of congressional power under §2 of the Fifteenth Amendment--were restricted to States 'with a demonstrable history of intentional racial discrimination in voting.'

Today's opinion for the Court does not even attempt to demonstrate that each one of the 50 States covered by 29 U. S. C. §2612(a)(1)(C) was in violation of the Fourteenth Amendment. It treats 'the States' as some sort of collective entity which is guilty or innocent as a body. '[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination,' it concludes, 'is weighty enough to justify the enactment of prophylactic §5 legislation.' This will not do. Prophylaxis in the sense of extending the remedy beyond the violation is one thing; prophylaxis in the sense of extending the remedy beyond the violator is something else. See *City of Rome*, *supra*, at 177 ('Congress could rationally have concluded that, because electoral changes *by jurisdictions with a demonstrable history of intentional racial discrimination* in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact' (emphasis added)).

When a litigant claims that legislation has denied him individual rights secured by the Constitution, the court ordinarily asks first whether the legislation is constitutional *as applied to him*. When, on the other hand, a federal statute is challenged as going beyond Congress's enumerated powers, under our precedents the court first asks whether the statute is unconstitutional *on its face*. If the statute survives this challenge, however, it stands to reason that the court may, if asked, proceed to analyze whether the statute (constitutional on its face) can be validly applied to the litigant. In the context of §5 prophylactic legislation applied against a State, this would entail examining whether the State has itself engaged in discrimination sufficient to support the exercise of Congress's prophylactic power.

It seems, therefore, that for purposes of defeating petitioner's challenge, it would have been enough for respondents to demonstrate that §2612(a)(1)(C) was *facially* valid--*i.e.*, that it could constitutionally be applied to *some* jurisdictions. (Even that demonstration, for the reasons set forth by JUSTICE KENNEDY, has not been made.) But when it comes to an as-applied challenge, I think Nevada will be entitled to assert that the mere facts that (1) it is a State, and (2) some States are bad actors, is not enough; it can demand that *it* be shown to have been acting in violation of the Fourteenth Amendment.

JUSTICE KENNEDY, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

[C]ongress does not have authority to define the substantive content of the Equal Protection Clause; it may only shape the remedies warranted by the violations of that guarantee. This requirement has special force in the context of the Eleventh Amendment, which protects a State's fiscal integrity from federal intrusion by vesting the States with immunity from private actions for damages pursuant to federal laws. The Commerce Clause likely would permit the National Government to enact an entitlement program such as this one; but when Congress couples the entitlement with the authorization to sue the States for monetary damages, it blurs the line of accountability the State has to its own citizens. . . .

The Court is unable to show that States have engaged in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits. The inability to adduce evidence of alleged discrimination, coupled with the inescapable fact that the federal scheme is not a remedy but a benefit program, demonstrate the lack of the requisite link between any problem Congress has identified and the program it mandated.

[A]ll would agree that women historically have been subjected to conditions in which their employment opportunities are more limited than those available to men. As the Court acknowledges, however, Congress responded to this problem by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964. The provision now before us, 29 U. S. C. §2612(a)(1)(C), has a different aim than Title VII. It seeks to ensure that eligible employees, irrespective of gender, can take a minimum amount of leave time to care for an ill relative.

The relevant question, as the Court seems to acknowledge, is whether, notwithstanding the passage of Title VII and similar state legislation, the States continued to engage in widespread discrimination on the basis of gender in the provision of family leave benefits. If such a pattern were shown, the Eleventh Amendment would not bar Congress from devising a congruent and proportional remedy. The evidence to substantiate this charge must be far more specific, however, than a simple recitation of a general history of employment discrimination against women. When the federal statute seeks to abrogate state sovereign immunity, the Court should be more careful to insist on adherence to the analytic requirements set forth in its own precedents. Persisting overall effects of gender-based discrimination at the workplace must not be ignored; but simply noting the problem is not a substitute for evidence which identifies some real discrimination the family leave rules are designed to prevent.

[T]he Act's findings of purpose are devoid of any discussion of the relevant evidence. See *Lizzi v. Alexander*, 255 F. 3d 128, 135 (CA4 2001) ('In making [its] finding of purpose, Congress did not identify, as it is required to do, any pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care'); see also *Chittister v. Department of Community and Econ. Dev.*, 226 F. 3d 223, 228-229 (CA3 2000) ('Notably absent is any finding concerning

the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause').

As the Court seems to recognize, the evidence considered by Congress concerned discriminatory practices of the private sector, not those of state employers. The statistical information compiled by the Bureau of Labor Statistics (BLS), which are the only factual findings the Court cites, surveyed only private employers. While the evidence of discrimination by private entities may be relevant, it does not, by itself, justify the abrogation of States' sovereign immunity. *Garrett*.

The Court seeks to connect the evidence of private discrimination to an alleged pattern of unconstitutional behavior by States through inferences drawn from two . . . statements . . . made during the hearings on the proposed 1986 national leave legislation, [which] preceded the Act by seven years. The 1986 bill, which was not enacted . . . sought to provide parenting leave, not leave to care for another ill family member. The testimony on which the Court relies concerned the discrimination with respect to the parenting leave. . . .

The Court's reliance on evidence suggesting States provided men and women with the parenting leave of different length suffers from the same flaw. This evidence concerns the Act's grant of parenting leave, and is too attenuated to justify the family leave provision. The Court of Appeals' [argued] that 'if states discriminate along gender lines regarding the one kind of leave, then they are likely to do so regarding the other.' The charge that a State has engaged in a pattern of unconstitutional discrimination against its citizens is a most serious one. It must be supported by more than conjecture.

The Court maintains the evidence pertaining to the parenting leave is relevant because both parenting and family leave provisions respond to 'the same gender stereotype: that women's family duties trump those of the workplace.' This sets the contours of the inquiry at too high a level of abstraction. The question is not whether the family leave provision is a congruent and proportional response to general gender-based stereotypes in employment which 'ha[ve] historically produced discrimination in the hiring and promotion of women;' the question is whether it is a proper remedy to an alleged pattern of unconstitutional discrimination by States in the grant of family leave. The evidence of gender-based stereotypes is too remote to support the required showing.

The Court next argues that 'even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways.' This charge is based on an allegation that many States did not guarantee the right to family leave by statute, instead leaving the decision up to individual employers, who could subject employees to ' 'discretionary and possibly unequal treatment.' ' The study from which the Court derives this conclusion examined 'the parental leave policies of Federal executive branch agencies,' not

those of the States. . . .

Even if there were evidence that individual state employers, in the absence of clear statutory guidelines, discriminated in the administration of leave benefits, this circumstance alone would not support a finding of a state- sponsored pattern of discrimination. The evidence could perhaps support the charge of disparate impact, but not a charge that States have engaged in a pattern of intentional discrimination prohibited by the Fourteenth Amendment. *Garrett*, 531 U. S., at 372-373 (citing *Washington v. Davis*, 426 U. S. 229, 239 (1976)).

[T]he States appear to have been ahead of Congress in providing gender-neutral family leave benefits. Thirty States, the District of Columbia, and Puerto Rico had adopted some form of family-care leave in the years preceding the Act's adoption. . . . Congress relied on the experience of the States in designing the national leave policy to be cost-effective and gender-neutral. Congress also acknowledged that many States had implemented leave policies more generous than those envisioned by the Act. At the very least, the history of the Act suggests States were in the process of solving any existing gender- based discrimination in the provision of family leave.

The Court acknowledges that States have adopted family leave programs prior to federal intervention, but argues these policies suffered from serious imperfections. Even if correct, this observation proves, at most, that programs more generous and more effective than those operated by the States were feasible. That the States did not devise the optimal programs is not, however, evidence that the States were perpetuating unconstitutional discrimination. Given that the States assumed a pioneering role in the creation of family leave schemes, it is not surprising these early efforts may have been imperfect. This is altogether different, however, from purposeful discrimination. . . .

The Court further chastises the States for having 'provided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs.' The Court does not argue the States intended to enable employers to discriminate in the provision of family leave; nor, as already noted, is there evidence state employers discriminated in the administration of leave benefits. Under the Court's reasoning, Congress seems justified in abrogating state immunity from private suits whenever the State's social benefits program is not enshrined in the statutory code and provides employers with discretion.

Stripped of the conduct which exhibits no constitutional infirmity, the Court's 'exten[sive] and specifi[c] ... record of unconstitutional state conduct,' boils down to the fact that three States, Massachusetts, Kansas, and Tennessee, provided parenting leave only to their female employees, and had no program for granting their employees (male or female) family leave. As already explained, the evidence related to the parenting leave is simply too attenuated to support a charge of unconstitutional discrimination in the provision of family leave. Nor, as the Court seems to acknowledge, does the Constitution require States to

provide their employees with any family leave at all. A State's failure to devise a family leave program is not, then, evidence of unconstitutional behavior.

Considered in its entirety, the evidence fails to document a pattern of unconstitutional conduct sufficient to justify the abrogation of States' sovereign immunity. The few incidents identified by the Court 'fall far short of even suggesting the pattern of unconstitutional discrimination on which §5 legislation must be based.' Juxtaposed to this evidence is the States' record of addressing gender-based discrimination in the provision of leave benefits on their own volition.

Our concern with gender discrimination, which is subjected to heightened scrutiny, as opposed to age- or disability-based distinctions, which are reviewed under rational standard, does not alter this conclusion. The application of heightened scrutiny is designed to ensure gender-based classifications are not based on the entrenched and pervasive stereotypes which inhibit women's progress in the workplace. This consideration does not divest respondents of their burden to show that 'Congress identified a history and pattern of unconstitutional employment discrimination by the States.' . . .

Given the insufficiency of the evidence that States discriminated in the provision of family leave, the unfortunate fact that stereotypes about women continue to be a serious and pervasive social problem would not alone support the charge that a State has engaged in a practice designed to deny its citizens the equal protection of the laws.

The paucity of evidence to support the case the Court tries to make demonstrates that Congress was not responding with a congruent and proportional remedy to a perceived course of unconstitutional conduct. Instead, it enacted a substantive entitlement program of its own. If Congress had been concerned about different treatment of men and women with respect to family leave, a congruent remedy would have sought to ensure the benefits of any leave program enacted by a State are available to men and women on an equal basis. Instead, the Act imposes, across the board, a requirement that States grant a minimum of 12 weeks of leave per year. This requirement may represent Congress' considered judgment as to the optimal balance between the family obligations of workers and the interests of employers, and the States may decide to follow these guidelines in designing their own family leave benefits. It does not follow, however, that if the States choose to enact a different benefit scheme, they should be deemed to engage in unconstitutional conduct and forced to open their treasuries to private suits for damages.

Well before the federal enactment, Nevada not only provided its employees, on a gender-neutral basis, with an option of requesting up to one year of unpaid leave, but also permitted, subject to approval and other conditions, leaves of absence in excess of one year. Nevada state employees were also entitled to use up to 10 days of their accumulated paid sick leave to care for an ill relative. Nevada, in addition, had a program of special 'catastrophic leave.' State employees could donate their accrued sick leave to a general fund

to aid employees who needed additional leave to care for a relative with a serious illness.

To be sure, the Nevada scheme did not track that devised by the Act in all respects. The provision of unpaid leave was discretionary and subject to a possible reporting requirement. A congruent remedy to any discriminatory exercise of discretion, however, is the requirement that the grant of leave be administered on a gender-equal basis, not the displacement of the State's scheme by a federal one. The scheme enacted by the Act does not respect the States' autonomous power to design their own social benefits regime.

Were more proof needed to show that this is an entitlement program, not a remedial statute, it should suffice to note that the Act does not even purport to bar discrimination in some leave programs the States do enact and administer. Under the Act, a State is allowed to provide women with, say, 24 weeks of family leave per year but provide only 12 weeks of leave to men. As the counsel for the United States conceded during the argument, a law of this kind might run afoul of the Equal Protection Clause or Title VII, but it would not constitute a violation of the Act. The Act on its face is not drawn as a remedy to gender-based discrimination in family leave.

It has been long acknowledged that federal legislation which 'deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.' The Court has explained, however, that Congress may not 'enforce a constitutional right by changing what the right is.' *City of Boerne*. The dual requirement that Congress identify a pervasive pattern of unconstitutional state conduct and that its remedy be proportional and congruent to the violation is designed to separate permissible exercises of congressional power from instances where Congress seeks to enact a substantive entitlement under the guise of its §5 authority.

The Court's precedents upholding the Voting Rights Act of 1965 as a proper exercise of Congress' remedial power are instructive. In *South Carolina v. Katzenbach*, 383 U. S. 301 (1966), the Court concluded that the Voting Rights Act's prohibition on state literacy tests was an appropriate method of enforcing the constitutional protection against racial discrimination in voting. This measure was justified because 'Congress documented a marked pattern of unconstitutional action by the States.' Congress' response was a 'limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment.' This scheme was both congruent, because it 'aimed at areas where voting discrimination has been most flagrant,' and proportional, because it was necessary to 'banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.' The Court acknowledged Congress' power to devise 'strong remedial and preventive measures' to safeguard voting rights on subsequent occasions, but always explained that these measures were legitimate because they were responding to a pattern of 'the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination.' . . . [T]he abrogation of state

sovereign immunity pursuant to Title VII was a legitimate congressional response to a pattern of gender-based discrimination in employment. The family leave benefit conferred by the Act is, by contrast, a substantive benefit Congress chose to confer upon state employees.

Discussion

1. *Broad versus narrow perspectives on discrimination*. Justice Kennedy insists that Congress provide specific evidence that state governments have intentionally discriminated against women in their decisions about granting leave to care for sick relatives. Discrimination against women by the federal government or by private actors in these decisions, discrimination in decisions about parenting leave, and evidence of continued employment discrimination against women are not sufficiently probative. Compare his analysis with Chief Justice Rehnquist's analysis of Congressional findings in *Garrett*, in which Rhenquist excludes all evidence of related forms of discrimination, including discrimination by local and municipal employees.

By contrast, in *Hibbs* Chief Justice Rehnquist describes Congress's goal broadly as preventing sex discrimination against women in employment by providing a uniform entitlement for both men and women to 12 weeks of unpaid family and medical leave. The point of the FMLA is not to redress specific unconstitutional decisions about family leave made by state actors, or even the unconstitutional failure of states to provide particular benefits. The goal rather is to combat a basic assumption that supports gender discrimination in employment: that women will (and should) sacrifice their careers to take care of their families in ways that men will not. This remedy is prophylactic in a very special sense because it attempts to get at the root causes of employment discrimination rather than (for example) alleviating proof problems in individual cases.

Note however, that Rehnquist stops short of offering an even more ambitious theory of prophylactic remedies under section 5. Under this theory, the FMLA attempts to redress structural inequalities between men and women which are reproduced through decisions by public and private employers about who to hire and who to promote, whether or not these employment decisions are made on the basis of invidious sex stereotyping. This justification for FMLA would involve Congress's judgment that the equal protection clause concerns more than individual acts of invidious motivation or stereotypical thinking. Could the Court accept this view of prophylactic remedies consistent with its decision in *Boerne*?

What explains the difference between *Kimel* and *Garrett*, on the one hand, and *Hibbs* on the other? Consider three possibilities:

(1) *Heightened scrutiny*. The first possibility is that Chief Justice Rehnquist and Justice O'Connor (the only Justices who join in all three opinions) believe that where

Congress is preventing or remedying discrimination that the Court has found subject to heightened scrutiny, it should be given more leeway to prove its case, because there is much less danger that Congress is trying to interpret the Constitution more strictly than the Court is. Alternatively, state governments are more likely to be engaging in invidious discrimination where laws or practices touching upon suspect classifications are concerned.

Note, however, that both of these explanations beg the question, because policies that have merely disparate impact on women do not violate the Constitution. As Justice Kennedy points out, under the Court's precedents, mere failure to provide parenting or family leave is not sex discrimination, even if it affects women more heavily than men. Put differently, what is most interesting about the majority opinion is that it recognizes family and medical leave as a sex equality issue even though the Court's own precedents do not. How should we account for this understanding given the Court's insistence in *Boerne* that it alone determines the meaning of constitutional equality?

(2) *Distinguishing between old rights and new rights*. Another possibility is that the Court is willing to give Congress a freer hand in imposing liability on states where it believes questions of race and gender equality are concerned, because the long history of struggles for racial and gender equality have established the centrality of these values. By contrast, age and disability discrimination laws are comparative newcomers. Under this reading, *Kimel* and *Garrett* are mostly about reining in the proliferation of new egalitarian causes of action outside of race and gender issues. How do you think the Court would apply its doctrines to a law protecting homosexuals and bisexuals from discrimination by state employers?

(3) *Don't take a good thing too far*. A third possibility is that the Court is wary of extending its federalism precedents to trench on highly visible and consequential civil rights statutes like the FMLA because this would spark hostile public reaction and undermine its authority. Would this reaction be importantly different from that produced by the decisions in *Bush v. Gore* or *United States v. Morrison*, which struck down the Violence Against Women Act? If the Court can decide the latter two cases and remain relatively unscathed, why should the issue of family and medical leave by state employers be any different?

TENNESSEE v. LANE, 541 U.S. 509 (2004): [*Lane* took up the question left open in *Garrett*: whether Congress had power under Section Five of the 14th Amendment to waive the Eleventh Amendment immunity of states for violations of Title II of the Americans with Disabilities Act of 1990 (ADA), which provides: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity," 42 U.S.C. § 12132. Lane, a paraplegic, alleged that he had to crawl up two flights of stairs to answer criminal charges in the second floor of a county courthouse that had no elevator. When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom, and was arrested and jailed for failure to appear. Jones, a paraplegic who was also a certified court reporter, alleged that she had not been able to gain access to a number of county courthouses, and, as a result, had lost both work and an opportunity to participate in the judicial process.]

STEVENS, J.: Title II, like Title I, seeks to enforce [a constitutional] 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, 819, n. 15 (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); *M. L. B.* v. *S. L. J.*, 519 U.S. 102 (1996). 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, 530 (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, 8-15 (1986). . . . .

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. . . . [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, the abuse and neglect of persons committed to state mental health hospitals, and irrational discrimination in zoning decisions. 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. As the Court's opinion in *Garrett* observed, the "overwhelming majority" of these examples concerned discrimination in the administration of public programs and services. . . .

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. 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.[e]

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[e]THE CHIEF JUSTICE dismisses as "irrelevant" the portions of this evidence that concern the conduct of nonstate governments. This argument rests on the mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves. To operate on that premise in this case would be particularly inappropriate because this case concerns the provision of judicial services, an area in which local governments are typically treated as "arms of the State" for Eleventh Amendment purposes, and thus enjoy precisely the same

[In *Hibbs*] 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: "Discrimination 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) (emphasis added). 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.

The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment. . . . 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. 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

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immunity from unconsented suit as the States.

In any event, our cases have recognized that evidence of constitutional violations on the part of nonstate governmental actors is relevant to the § 5 inquiry. [M]uch of the evidence in *South Carolina* v. *Katzenbach*, to which THE CHIEF JUSTICE favorably refers, involved the conduct of county and city officials, rather than the States. Moreover, what THE CHIEF JUSTICE calls an "extensive legislative record documenting States' gender discrimination in employment leave policies" in *Hibbs*, in fact contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States. Indeed, the evidence before the Congress that enacted the FMLA related primarily to the practices of private-sector employers and the Federal Government.

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.

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 problem" 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. 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. [I]n the case of older [pre-1992] 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. Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. 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.

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.* 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, the duty to provide transcripts to criminal defendants seeking review of their convictions, and the duty to provide counsel to certain criminal defendants. 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." *Boerne.* It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end.

[Justice Stevens added in a footnote:] Because this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne*'s prohibition on irrational discrimination.

[Justices Souter and Ginsburg wrote concurring opinions.]

REHNQUIST, C.J., with whom KENNEDY, J. and THOMAS, J. join, dissenting: [T]he 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. . . . We discounted much the same type of outdated, generalized evidence in *Garrett* as unsupportive of Title I's ban on employment discrimination. 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. . . . Moreover, the majority today cites the same congressional task force evidence we rejected in *Garrett*. 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*. 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 1983 U.S.] Civil Rights Commission's finding [that public services were inaccessible to persons with disabilities] 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. [T]he 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. . . . 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. . . . [N]either the legislative findings, nor even the Committee Reports, contain a single mention of the seemingly vital topic of access to the courts. To the contrary, the Senate Report on the ADA observed that "all states currently mandate accessibility in newly constructed state-owned public buildings."

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. Thus, evidence regarding inaccessible courthouses, because it is not evidence of constitutional violations, provides no basis to abrogate States' sovereign immunity. . . . .

[The next question is 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. . . .

[T]he broad terms of Title II "do nothing to limit the coverage of the Act to cases involving arguable constitutional violations." 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. . . . 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. 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. . . . Viewed as a whole, then, there is little doubt that Title II of the ADA does not validly abrogate state sovereign immunity.

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." [But] [i]n 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 (emphasis added), 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.

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. . . . . Moreover, . . . 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." 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.

SCALIA, J., dissenting: 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. . . . Even so, I signed on to the "congruence and proportionality" test in *Boerne*, and adhered to it in later cases: *Florida Prepaid , Kimel , Morrison*, and *Garrett*. But these cases were soon followed by *Hibbs*. . . . 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. . . .

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*, at 19, 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." *Id.*, at 396. 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." 384 U.S., at 648-649. 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." 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, 17 Stat. 13, 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*. . . . . 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*. . . . . 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. . . . .

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, and the doctrine of so-called "substantive due process" (which holds that the Fourteenth Amendment's Due Process Clause protects unenumerated liberties. 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*, the Court upheld, under § 2 of the Fifteenth Amendment, that provision of the Voting Rights Act Amendments of 1970, 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.

[Justice Thomas also dissented]

Discussion

1. *Synthesis or limitation?* Putting *Hibbs* and *Lane* together, should we conclude that the Court will give Congress wide latitude to enforce the Fourteenth Amendment and will apply the congruence and proportionality test of *Boerne* less stringently where the law plausibly prevents discrimination against a suspect class or infringes on a fundamental right that the Court has already recognized? Or is the Court simply backing away from its previous jurisprudence? If the former explanation is correct, what explains the original result in *Boerne*, where a fundamental right was involved? Is *Boerne* distinguishable because the Court believed that Congress was deliberately trying to defy its decision in *Smith*?

2. *Bright line rules.* Justice Scalia's dissent argues that the Court should abandon the "proportionality and congruence" test of *Boerne* because it gives judges too much discretion

to second guess Congress when they feel like it. He would prefer a bright line rule: Apply the broad construction of federal power announced in *McCulloch v. Maryland*, but only in race cases. Otherwise, section 5 power should be construed narrowly to reach only attempts directly to enforce the provisions of the 14th Amendment. This would preserve the 1960's cases but would overrule *Hibbs*, which involved sex discrimination. One effect of this rule would be that women could not bring suits against states for money damages based on the Pregnancy Discrimination Act. Scalia's approach might also prevent employment discrimination suits for money damages brought under Title VII where plaintiffs argued that state employers adopted policies that had a disparate impact on women.

Note that there is more than one way to draw a bright line that gets the Court out of the business of second guessing Congress. Why not hold that the test of *McCulloch* applies generally to the exercise of Congress's section 5 powers whenever Congress can plausibly claim that a fundamental right or suspect classification is involved? This gloss would preserve the result in *Hibbs* and thus overturn fewer precedents than Scalia's solution. What explains Scalia's particular choice of bright line rule?