

UNDERSTANDING DISCRIMINATION

- 2% Rule for Children in Therapeutic Foster Care
- Providing Accommodations for People with Disabilities
 - ✓ Termination of Parental Rights of Parents with Mental Disabilities
 - ✓ *Tennessee v. Lane*, 541 U.S. 507 (2004)
 - ✓ Free Technical Assistance Available



MEMORANDUM



FROM: Kayla A. Bower, JD
Oklahoma Disability Law Center, Inc.

DATE: October 19, 2007

RE: Children with mental illness in therapeutic foster care

I. DESCRIPTION OF THE PROBLEM

The Oklahoma Legislature passed a statute which often excludes children with mental illness in therapeutic¹ foster care from enrolling and receiving benefits of the public educational system which encompasses the home in which they may be placed in the community. The statute as enforced by the school districts causes Department of Human Services (DHS) to delay assignment of deprived and abused children in its custody to a community-based therapeutic foster care home until a school district can be located with less than two percent (2%) of its enrollment also receiving therapeutic² foster care. As a result, deprived and abused children in state custody are at risk of remaining institutionalized (in hospitals, emergency shelters, etc.) or moved around the state many miles from their home to avoid the impact of the two percent (2%) rule.

The statute with the “2% Rule” is found in Title 10, Section 1-113 of the Oklahoma Statutes:

C. For the purpose of ensuring that a child placed in a therapeutic foster care home, as defined in Section 7203 of Title 10 of the Oklahoma Statutes, receives an appropriate education, no receiving school district shall be required to enroll such a child if the enrollment would cause the proportion of students in therapeutic foster care homes as compared to the average daily membership of the receiving district for the preceding school year to exceed two percent (2%). Children served by Head Start may not be counted for the purpose of this paragraph unless the child is on an individualized education program provided by the school district. Any school district may enroll such students who are outside the student's resident district in therapeutic foster care home placements which exceed this limit if the school determines it possesses the ability to provide such child an appropriate education.

¹The child lives in a family home which provides specific supportive services designed to remedy social and behavioral problems. These children have a variety of DSM-IV mental health diagnoses.

²Oklahoma's large number of school districts (almost 540) in a state with a relatively small population makes the rule particularly burdensome because many districts (most of which are rural) are so small that the mere addition of one or two children with mental illness in foster care would place them over the two percent (2%) limit.

II. WHAT SHOULD BE DONE

Because of the requirement to provide children with an education, personnel making child placement decisions are reluctant to place a child in a community when the school district is refusing to enroll the child, so they continue their search for another school district, with all the complications and negative impact caused by the delay. It is our recommendation that a child with mental illness who is being placed in therapeutic foster care to remedy social and behavioral problems be placed in a community first based on the existence of a family home which can meet the child's needs. This will enable the child to be placed in a home in the community as quickly as possible, a result contemplated by the federal and state requirements for care of abused and deprived children. Upon placement in the community, a plan of action can be implemented to achieve enrollment of the child in the school district. Where appropriate, our office³ is willing to provide legal and advocacy services, including technical assistance, designed to enroll a child in school.

A. Administratively

Our office has administratively challenged the failure of a school district to enroll a child living in a therapeutic foster home because of the two percent (2%) rule and prevailed for the individual student by agreement of the parties, which did not yield a printed opinion of precedential value for other students. This can be repeated for individual children as each case arises. Because the issue involved is provision of an education for children with disabilities, exhaustion of administrative remedies may be required before seeking judicial relief. *Cudjoe v. Edmond Public Schools*, 297 F.3d 1058 (10th Cir. 2002).

B. Judicially

This statute should be challenged in Court because it is unlawful and unwarranted discrimination based on disability (mental illness). See the discussion in footnote 5 regarding jurisdiction of the District Court which oversees the State's juvenile system.

C. Legislatively

The statute should be rewritten to eliminate this limitation.

³Our office is the federally funded protection and advocacy system for people with disabilities in Oklahoma. The priorities and objectives established by our Board of Directors are committed to providing an appropriate public education for children with mental illness in the least restrict environment in the community where they can receive appropriate mental health services and supports. Any representative of a child eligible for services may contact our office directly to determine if the child's situation meets program and office standards for acceptance.

III. BASIS FOR CHALLENGE

Federal statutes support the conclusion that Oklahoma's statute with its two percent (2%) limitation should not be interpreted to confine children with mental illness in restricted settings (hospitals, emergency shelters, etc.) nor to prevent them from moving to available community homes with appropriate therapeutic supports and services.

Americans with Disabilities Act of 1990⁴ (ADA)

Title II of the ADA, 42 U.S.C. §§ 12131-34, prohibits discrimination by state and local government agencies. Title II covers all public agencies, whether or not they receive federal financial assistance. Title II employs broad language in outlawing discrimination, stating 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." The Supreme Court has confirmed, in *PA Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998), that this language covers all public entities "without any exception." A more detailed interpretation of this prohibition is included in Title II's implementing regulations (28 CFR 35), issued in 1991 by the United States Department of Justice in its capacity as the agency charged with interpreting Title II.

Title II was intended as a vehicle to end the unnecessary institutionalization and segregation of individuals with disabilities. ADA regulations specifically direct public entities to "administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." On June 22, 1999, the United States Supreme Court issued its first decision on this rule in *Olmstead v. L.C.*, 527 US 581 (1999). In its analysis of this regulation, the Justice Department states: "[T]hese provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears and stereotypes of individuals with disabilities Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates people with disabilities to second-class status."

In *Olmstead*, a 6-3 opinion authored by Justice Ruth Bader Ginsburg, the Supreme Court affirmed the ruling by the United States Court of Appeals for the Eleventh Circuit that unjustified isolation of individuals with disabilities is properly regarded as discrimination based on disability. The court held that unjustified segregation in institutions is discrimination not only because it perpetuates unwarranted assumptions that people with disabilities are incapable or unworthy of participating in community life, but also because confinement in an institution severely curtails everyday life

⁴See also the similar Rehabilitation Act of 1973, which applies to entities receiving federal financial assistance

activities, such as family relations, social contacts, work, educational advancement and cultural enrichment.

In *K.L. v. Valdez*, No. 93-1359 BB/LCS (D.N.M. Oct. 6, 1995), the federal court in New Mexico refused to dismiss the ADA and Section 504 claims of children with mental, emotional and developmental disabilities who alleged that several state agencies provided inadequate care to children with disabilities who were in or at risk of entering state custody⁵.

Individuals with Disabilities Education Improvement Act of 2004 (IDEA)

A. IDEA's Access to Education

The IDEA requires that school district provide a free appropriate public education to all children with disabilities. 20 U.S.C. § 1400 *et seq.* There is not a single word in IDEA that suggests that there is a basis upon which to refuse to enroll a student with a disability who resides in the school district. IDEA is a statute about access. Once the student with a disability resides in the school district, the school district must assure access to an education to the child with a disability. IDEA contains a variety of requirements which enable a student with mental illness to obtain an education in an integrated manner in a public school – for example, research-based methodology⁶, related services⁷, positive behavioral interventions and supports (see below), etc.

B. IDEA and Medicaid

The children in state custody are eligible for Medicaid and receive all medically necessary services (including behavioral health services) through the State's Medicaid program. The Bazelon Center published a book entitled, "Teaming Up: Using the IDEA and Medicaid to Secure Comprehensive Mental Health Services for Children and Youth."⁸ This publication is designed to inform practitioners—IDEA attorneys and advocates who are not familiar with Medicaid, and Medicaid

⁵The Tenth Circuit affirmed the federal court in New Mexico, which required federal court abstention in a state where claims under federal statutes could be raised in a state court proceeding which was exercising jurisdiction over children in state custody. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999). District Courts in Oklahoma which assume jurisdiction of abused and neglected children are courts of general jurisdiction with no limit on the type of claims that can be raised in state proceedings.

⁶The research based methodology requirements found initially in the No Child Left Behind Act, 20 U.S.C. 6361, were incorporated into IDEA 2004, 20 U.S.C. § 1411(e)(2)(C)(xi) and 34 C.F.R. § 300.35.

⁷*Cedar Rapids v. Garret F.*, 526 U.S. 66 (1999).

⁸Available online at: <http://www.bazelon.org/issues/children/publications/teamingup/report.pdf>

attorneys and advocates who do not know the IDEA or who have little experience in using Medicaid—how they may obtain the services and supports needed by children with emotional and behavioral disorders. Collaborative service delivery among major agencies statewide is provided for by a cooperative interagency agreement⁹.

C. IDEA and PBIS

A book published by the Bazelon Center, “Way to Go: School Success for Children with Mental Health Care Needs” concludes that the PBS¹⁰/mental health collaboration “has produced excellent results and won widespread support among stakeholders—school and mental health professionals, parents and youth, support staff and community members. It is affordable, cost-efficient and effective in creating school environments that are safer, more respectful and better suited to learning.” In a project supported by the Annie E. Casey Foundation, the Bazelon Center interviewed policymakers, educators and mental health administrators in a number of states and visited PBS school/mental health initiatives in six: Illinois, Maryland, Montana, New Hampshire, New York and Texas. The report reflects the Bazelon Center’s conclusions based on these interviews and site visits, and on recommendations by experts and families. It spells out policy steps for state, local and federal governments, with information about potential funding sources for a PBS school/mental health initiative.

D. IDEA and HIGH RISK POOL

There is no published data which suggests that children with mental illness who live in therapeutic foster homes produce an undue financial burden for a school district. Historically, many state education agencies (SEAs) have formally or informally used risk pools to provide extra funds to local education agencies (LEAs) serving students with high cost special education needs. With the 2004 reauthorization of the Individuals with Disabilities Education Improvement Act (IDEA), SEAs have been encouraged to formalize their approach to establishing or operating risk pools. In 2006, the National Association of State Directors of Special Education (NASDSE) published a document¹¹ to describe various state approaches to maintaining risk pools, both before and after the reauthorization of IDEA. In Appendix II, NASDSE describes Oklahoma’s newly implemented risk pool plan. The Oklahoma State Department of Education set aside \$2,351,736 for disbursements from its high-cost fund, as well as \$13,653 for disbursements to support innovative and effective ways of cost sharing.

⁹<http://www.okkids.org/documents/Interagency%20Agreement.pdf>

¹⁰Positive behavioral interventions and supports are required by the IDEA. The U. S. Department of Education’s website for its Technical Assistance Center on Positive Behavioral Interventions and Supports is located at <http://www.pbis.org>.

¹¹<http://projectforum.org/docs/RiskPools-StateApproaches.pdf>

CONCLUSION

The ADA prohibits discrimination based on disability and contains an integration mandate that prevents the unjustified isolation of people with disabilities. The IDEA requires enrollment of the students where they live in a home and does not give the school the power to force the students to move from their home in the school district. The IDEA requires that each student with a disability be provided a free appropriate public education. Interagency collaboration (including Medicaid, positive behavioral intervention, etc.) supports a student living in the community in a home – not an institution, facility or emergency shelter. Floating children with mental illness around the state because a school district invokes the “2% Rule” to exclude the child is unjustified and harmful to the children.

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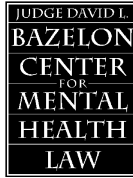
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TERMINATION OF PARENTAL RIGHTS OF PARENTS WITH MENTAL DISABILITIES¹

Many parents with mental disabilities find themselves fighting to keep custody of their children or to prevent their parental rights from being terminated. Often, these parents are ill-served by the child welfare system because in-home training and other family preservation services are not designed to meet their specialized needs. Without modifications, these services may be completely ineffective in achieving their purpose and, as a result, parents with mental disabilities may lose their children.

Efforts to prevent loss of parental rights by this population have fared very poorly in the courts. Frequently, child welfare agencies and courts act based on generalized assumptions about a parent's disability rather than specific instances of abuse or neglect or based on evidence of the effects of a disability that have since been corrected. In many cases, parents with mental disabilities lose their children because they do not receive services that address the effects of their disability on parenting. These service needs are rarely identified. As a result, some parents are unable to complete their case plan, while others do complete their case plan but lose their children anyway because their needs remain unaddressed.

Strong advocacy and strategic planning are needed to prevent these trends from continuing. Collaboration between protection and advocacy system lawyers and lawyers who represent parents in custody and termination proceedings may help generate more positive results in this area. This information sheet outlines some of the problems that arise in seeking to prevent individuals with mental disabilities from losing parental rights and suggests strategies to improve outcomes in this area of law.

Background

Historically, individuals with mental disabilities have faced enormous societal biases concerning their fitness to serve as parents. For many years, the chief governmental response to the issues and challenges of parenting with a mental disability was to sterilize individuals with

¹ This paper is based on a previous paper prepared by Jennifer Mathis and Mary Giliberti of the Bazelon Center and Mark Murphy of the Disabilities Law Project, with support from the Advocacy Training/Technical Assistance Center (ATTAC) of NAPAS (now known as the National Disability Rights Network), a federal interagency project of the Administration on Developmental Disabilities, the Center for Mental Health Services, and the Rehabilitation Services Administration, as well as support from the Women's Bar Association Foundation.

mental disabilities and prevent them from having children.² As attitudes have evolved, involuntary sterilization has been replaced, some would argue, by taking away these parents' children after they are born. Child welfare systems provide services to assist parents with mental disabilities to overcome parenting difficulties. However, stereotyped notions that individuals with mental disabilities are inadequate parents and place their children at high of abuse or neglect continue to be prevalent.³ These deeply ingrained notions, together with a widespread lack of understanding of what types of parenting services are effective for individuals with mental disabilities, have made it very difficult for parents with mental disabilities to maintain parental rights.

Applicable Law

The Americans with Disabilities Act (ADA)

By its terms, the ADA is applicable to the provision of services designed to help parents maintain or regain custody as well as to the initiation of termination of parental rights proceedings. Title II of the ADA prohibits state and local government entities from discriminating against individuals with disabilities in their programs, services, and activities. 42 U.S.C. § 12132. Specifically, a public entity cannot provide individuals with disabilities an unequal opportunity to participate in its programs, services or activities, and must make

² See, e.g., Linda Dowdney & David Skuse, *Parenting Provided by Adults with Mental Retardation*, 34 J. Child Psychiatry 25, 25 (1993). Involuntary sterilization was implemented not simply because of fears that individuals with mental disabilities would be unfit parents, but also because of perceptions that it was necessary to prevent large numbers of offspring with mental retardation. *Id.* In *Buck v. Bell*, 274 U.S. 200 (1927), the Supreme Court upheld a Virginia statute permitting superintendents of institutions for individuals with mental disabilities to condition release of residents on involuntary sterilization if they determined that sterilization was in the “best interests of the patient and of society.” The Court concluded that “[i]t would be strange if [the state] could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence.” 274 U.S. at 207. According to the Court, “[i]t is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.” *Id.*

³ See Alexander J. Tymchuk & Linda Andron, *Mothers with Mental Retardation Who Do or Do Not Abuse or Neglect their Children*, 14 Child Abuse & Neglect 313 (1990) (despite criticism of literature suggesting individuals with mental retardation are inadequate parents, attitudes continue to prevail that children of such individuals are at higher risk of abuse or neglect). See also Katherine A. Judge, *Serving Children, Siblings, and Spouses: Understanding the Needs of Other Family Members*, in *Helping Families Cope with Mental Illness* (Harriet P. Lefley ed. 1994) 161, 164 (citing evidence that individuals with serious mental illness lose custody of their children or parental rights at disproportionately high rates despite low rates of child abuse).

reasonable modifications in its programs, services and activities to ensure equally effective participation. 28 C.F.R. §§ 35.130(b)(1)(ii), (b)(7). Reunification and other family preservation services are services, programs or activities. Similarly, initiation of proceedings to terminate parental rights should be considered a program or activity.⁴

Thus, parents with mental disabilities who require modifications in the services provided to assist them in maintaining or regaining custody or preventing the termination of parental rights should be able to assert an ADA claim if the state fails to make needed reasonable modifications in those services. *See, e.g., In re J.A.*, No. 03-1260, 2003 WL 22203471, *1 (Iowa Ct. App. Sept. 24, 2003) (recognizing that ADA requires reasonable modifications to services in order to provide parents with disabilities equal opportunity); *In the Interest of K.K.W.*, No. CCL-86-2039, 7 National Disability Law Reporter ¶ 111 (Tex. County Ct., Anderson County July 11, 1995) (on file with author) (state failed to make reasonable modifications to its reunification services to assure equally effective services to parent with schizophrenia; state provided only the homemaker services and six-week parenting class offered to parents without disabilities). *See also In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d 778, 783 (Md. 2002) (court need not decide applicability of ADA in present case, but child welfare agencies and courts must recognize that Congress “expressed a concern [in the ADA] that extra steps be taken to insure that the disabled are not subject to discrimination, however inadvertent it may be in a given case”). In addition, a parent with a mental disability should be able to assert an ADA claim if the state has refused parenting services based on her disability, or has initiated termination or dependency proceedings due to her disability and would not normally initiate such proceedings against a parent without a disability under similar circumstances.⁵

⁴ As described below, however, many courts have disagreed.

⁵ Such conduct might, of course, give rise to a constitutional claim as well. However, ADA and constitutional claims are seldom used to challenge this type of straightforward disparate treatment because they generally do not add anything to the state law arguments raised in such situations. The refusal to provide services due to a disability would violate the state law duty to make “reasonable efforts” to prevent the loss of parental rights; the unwarranted initiation of termination of parental rights proceedings would not be in the best interests of the child under state law.

A parent with a mental disability would also be able to assert an ADA claim where a child welfare statute treats parents with mental disabilities less favorably than parents without disabilities. This type of facial challenge to termination statutes is generally not viable, however, because virtually every statute permitting termination based on a mental disability requires that the individual be unable to parent due to the disability. Hence challenges to the application of the statute are more likely to succeed than facial challenges. *Cf. In the Interest of N.R.*, 967 P.2d 951 (Utah Ct. App. 1998) (termination statute was not unconstitutional because there was a rational basis for permitting termination where a mental illness renders a parent unable to

The caselaw concerning the ADA and parental rights has overwhelmingly rejected the claims of parents with mental disabilities. Many courts have held the ADA may not be raised as a defense to termination of parental rights (TPR) proceedings for a variety of reasons. Some courts have refused to apply the ADA based on the conclusion that TPR proceedings are not a “service, program or activity” within the meaning of the ADA.⁶ Some courts have held the ADA inapplicable to TPR proceedings because their jurisdiction is limited to interpreting the state child welfare law, such as determining the “best interests of the child” or “reasonable efforts,” rather than conducting “an open-ended inquiry into how the parents might respond to alternative services and why those services have not been provided.”⁷ Finally, some courts have concluded that the ADA provides no defense to TPR proceedings because Title II contemplates only affirmative action on the part of the injured party rather than defenses against a legal action by a public entity.⁸

Not all courts have held that the ADA is inapplicable to TPR proceedings. Some courts have held that the ADA does provide a defense in such proceedings,⁹ and others have applied the ADA in TPR proceedings without specifically ruling on its applicability.¹⁰ Overwhelmingly,

respond to reunification services, and other parents incapable of responding to services were also subject to termination).

⁶ See, e.g., *In re Adoption of Gregory*, 747 N.E.2d 120, 125 (Mass. 2001); *In the Matter of Terry*, No. 214617, 2000 WL 244425, *5 (Mich. Ct. App. Feb. 29, 2000); *In re Antony B.*, 54 A.2d 893, 899 (Conn. App. Ct. 1999); *In the Interest of B.K.F.*, 704 So.2d 314, 317 (La. Ct. App. 1997); *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997).

⁷ *In re B.S.*, 693 A.2d at 721. See also *In the Interest of Torrance P.*, 522 N.W.2d 243, 244-45 (Wis. Ct. App. 1994) (duty to make diligent effort to provide court-ordered services is defined by the TPR statute and not the ADA; ADA does not increase those responsibilities or dictate how they must be discharged); *In re Maryia R.*, 1997 WL 178082, *5 (Conn. Super. Ct. Apr. 1, 1997) (while father’s developmental disability must be considered in determining reasonableness of county’s efforts, neither his disability nor the ADA changes inquiry or burden of proof).

⁸ *In re Doe*, 60 P.3d 285, 293 (Haw. 2002); *In the Matter of Rodriguez*, No. 98CA007073, 1999 WL 568115, *8 (Ohio Ct. App. Aug. 4, 1999).

⁹ *In the Matter of John D.*, 934 P.2d 308, 313-14 (N.M. Ct. App. 1997) (ADA provides a defense to evidence of presumptive abandonment when parent can show that she or he lacked responsibility for the destruction of the parent-child relationship due to the state’s violation of the ADA).

¹⁰ See, e.g., *In the Matter of J.B.*, No. 95CA1698, 1996 WL 309979, *3 (Ohio Ct. App. 1996) (assuming without deciding that ADA applies to TPR proceedings); *In re Caresse B.*, 1997

however, those courts have concluded that sufficient reasonable modifications in family preservation services were made to accommodate individuals' mental disabilities, and therefore no ADA violations occurred.¹¹

In October 2006, a cert petition was filed in the Supreme Court seeking review of a Rhode Island court's decision that a termination of parental rights proceeding "does not constitute the sort of service, program or activity that would be governed by the dictates of the ADA."¹² The question presented was "[w]hether Title II applies to termination of parental rights proceedings initiated by state agencies and prosecuted in state courts." *Irving N. v. Rhode Island Dep't of Children, Youth and Families*, No. 06-603 (cert. petition filed Oct. 30, 2006), *cert. denied*, 127 S.Ct. 1372 (2007). The petition noted that the Rhode Island decision is inconsistent with the plain language of the ADA and with the Supreme Court's ruling in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), which made clear that the ADA makes no exceptions for activities that implicate particularly strong state interests. Because the Court declined to accept the case, the conflict among the courts remains unresolved.

Even the courts that have rejected the ADA's applicability in TPR proceedings have generally agreed, however, that it can be raised either in earlier proceedings or as a separate cause of action to challenge the failure to make reasonable modifications in reunification services.¹³ Some courts have held that, in order for the issue of reasonable accommodations in

WL 133402, *5 (applying ADA); *In the Interest of C.C.*, No. 95-1022, 1995 WL 810019, *5-7 (Iowa Ct. App. Dec. 22, 1995) (applying ADA); *In re Dependency of C.C.*, No. 40888-7-I, 1999 WL 106824, *5-6 (Wash. Ct. App. Mar. 1, 1999) (applying ADA); *J.T. v. Arkansas Dep't of Hum. Servs.*, 947 S.W.2d 761, 766-68 (Ark. 1997) (applying ADA); *In re Karrlo K.*, 669 A.2d 1249, 1259 (Conn. Super. Ct. 1994) (applying ADA); *In the Matter of K.D.W.*, No. C5-93-2262, 1994 WL 149450 (Minn. Ct. App. 1994) (applying ADA).

¹¹ But see *In the Interest of K.K.W.*, No. CCL-86-2039, 7 NDLR ¶ 111 (Tex. County Ct., Anderson County July 11, 1995) (state violated ADA by failing to modify its reunification services to assure equally effective services to parent with schizophrenia; state provided only the homemaker services and six-week parenting class offered to parents without disabilities).

¹² See *In re Kayla N.*, 900 A.2d 1202, 1208 (R.I. 2006).

¹³ See, e.g., *Stone v. Daviess*, 656 N.E.2d 824, 830 (Ind. Ct. App. 1995) (ADA does not apply to TPR proceedings because Indiana does not require services to be provided before parental rights are terminated, but ADA does require state to make reasonable accommodations to services provided in CHINS proceedings); *In re Antony B.*, 54 A.2d at 473 n.9 (ADA does apply to reunification services and programs; failure to provide adequate services due to a parent's mental condition would give rise to a separate cause of action under the ADA); *In re B.S.*, 693 A.2d at 722 ("we do not mean to suggest that parents lack any remedy for SRS's

services to be preserved at the TPR stage, it must have been raised at the removal or review hearing where the services are offered.¹⁴ Generally, courts have expressed the view that ADA claims based on the failure to modify services must be raised early on in the process.¹⁵ At least one court has held, however, that the ADA may not be raised in dependency proceedings either.¹⁶

Where courts have agreed that the ADA requires modification of family preservation services to meet the needs of parents with disabilities, they have often limited their analysis of modified services to services that are already “available” or provided to others in the state. *See, e.g., In the Matter of Terry*, 2000 WL 244425, at *6 (state had no other services available that would address mother’s disability beyond those provided to her; ADA does not require full-time live-in assistance with her children); *In the Matter of the Welfare of H.S.*, 973 P.2d 474, 481 (Wash. Ct. App. Mar. 9, 1999) (ADA does not require provision of services to people with disabilities not provided to others); *In re Caresse B.*, 1997 WL 133402, at *5 (mother failed to

alleged violations of the ADA;” parents should raise complaints about services in a timely fashion).

¹⁴ *In re M.J.M.*, No. 02-0499, 2002 WL 987437, *1 (Iowa Ct. App. 2002) (ADA was not violated because neither parent had requested specific reunification services prior to the termination hearing); *In the Interest of S.L.P.*, Nos. 9-383, 98-1345, 1999 WL 975765, *4 (Iowa Ct. App. Oct. 27, 1999); *In the Matter of Terry*, No. 214617, 2000 WL 244425, *6 (Mich. Ct. App. Feb. 29, 2000) (parent must claim violation of ADA when service plan is adopted or soon afterward; where person fails to make timely claim that services provided are inadequate to meet her needs due to a disability, she cannot raise the ADA at a TPR dispositional hearing and only remedy is to bring a separate action under the ADA).

¹⁵ *See In the Matter of Terry*, 2000 WL 244425, at *6 (“Any claim that the FIA is violating the ADA must be raised in a timely manner, however, so that any reasonable accommodations can be made. Accordingly, if a parent believes that the FIA is unreasonably refusing to accommodate a disability, the parent should claim a violation of her rights under the ADA, either when a service plan is adopted or soon afterward.”); *In the Interest of S.L.P.*, 1999 WL 975765, at *4 (“Not only the sufficiency of services but also the issue of reasonable accommodation should be raised at the removal or review hearing or when they are offered . . . It is too late to challenge the service plan at the termination hearing.”); *In the Interest of A.M.*, No. 99-420, 1999 WL 780586, *3 (Iowa Ct. App. Sept. 29, 1999) (“parents have the responsibility to demand services if they are not offered prior to the termination hearing”); *In re B.S.*, 693 A.2d at 722 (“We hope that the effect of this decision is to encourage parents and other recipients of SFS services to raise complaints about services vigorously and in a timely fashion.”).

¹⁶ *M.C. v. Dep’t of Children & Families*, 750 So.2d 705, 706 (Fla. Ct. App. 2000) (dependency proceedings are held for the benefit of the child, not the parent, and therefore ADA may not be used as defense in such proceedings).

show that the services she requested as an accommodation were available); *Bartley v. State*, No. 36698-0-I, 1996 WL 737308, *3 (Wash. Ct. App. Dec. 23, 1996) (mother was provided “all reasonably available services”). These courts have generally not specified the rationale for so limiting the requirement of modified services, but presumably requiring services not available in the state might constitute a fundamental alteration in the family preservation program. The fact that such services are not provided to other parents by the child welfare system, however, should not be the touchstone of whether they would constitute a fundamental alteration if they could reasonably be procured. If it were, the mandate to provide reasonable modifications would be rendered meaningless in this context.

Finally, the ADA does not permit accommodations to be forced on individuals who do not want them. 28 C.F.R. § 35.130(e)(1). Thus, in situations where parents have refused certain family preservation services, courts have held that accommodations cannot be forced on them under the ADA. *See, e.g., In the Interest of Matthew S.*, 1999 WL 545359, *9-10 (Conn. Super. Ct. Jul. 16, 1999); *In the Interest of Natalia G.*, 1998 WL 433894, *4 (Conn. Super. Ct. Jul. 22, 1998).

Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act also requires reasonable modifications to be provided to ensure individuals with disabilities equal opportunity to participate in and benefit from programs and activities receiving federal funding. 29 U.S.C. § 794; 45 C.F.R. §§ 84.4; *Alexander v. Choate*, 469 U.S. 287, 300 (1985). As child welfare agencies receive federal funds, they should be covered entities under Section 504.

The Adoption and Safe Families Act (ASFA) & State Law “Reasonable Efforts” Requirements

In addition to the ADA’s reasonable modification requirement, the federal Adoption and Safe Families Act (ASFA) requires states to make “reasonable efforts” to preserve and reunify families to prevent or eliminate the need for removing a child from the home.¹⁷ ASFA does not provide a private right of action for parents to enforce the “reasonable efforts” provision.¹⁸ However, states generally require the provision of reasonable efforts as part of their statutory schemes in order to comply with ASFA. Neither ASFA nor most state child welfare statutes specifically require the reasonable efforts to be designed to meet the needs of parents with disabilities.¹⁹ Arguably, family preservation efforts are not reasonable if they do not take into

¹⁷ 42 U.S.C. § 671(a)(15).

¹⁸ *Suter v. Artist M.*, 503 U.S. 347 (1992).

¹⁹ Arkansas’s child welfare statute does require that the state make reasonable accommodations in accordance with the ADA to parents with disabilities in order to allow them meaningful access to reunification and preservation services. Ark Code Ann. § 9-27-341.

account a parent's disability, as such failure means that the services will have little chance of success. The bulk of the caselaw concludes that the efforts made by states to provide individualized services to prevent individuals with disabilities from losing parental rights constitute "reasonable efforts," even where they appear to be inadequate.²⁰

A number of courts have found, however, that parental rights should not be terminated because the state had not made reasonable efforts.²¹ See, e.g., *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d 778 (Md. 2002) (state failed to provide adequate reunification services tailored to meet the needs of father with mental disability); *Mary Ellen C. v. Arizona Dep't of Economic Security*, No. 1 CA-JV 98-0130 (Ariz. Ct. App. Jan. 19, 1999) (state is obliged to undertake measures that offer a reasonable possibility of success; state did not offer mother significant reunification services for almost a year after removing child; state failed to follow recommendations of evaluating psychologist, such as providing intensive psychiatric services; state merely provided mother with phone number of state's contract MCO and failed to follow up with the MCO);²² *In re the Dependency of H.W. & V.W.*, 961 P.2d 963, 967 (Wash. Ct. App. 1998) (while state attempted to tailor parenting classes and other services to mother's developmental disability through providing hands-on and one-on-one training, mother was never referred to the Division of Developmental Disabilities for services and no attempt was made to investigate what services might be available through DDD; mother was in fact eligible for an assisted living program for herself and the child); *In re Victoria M.*, 207 Cal. App.3d 1317, 1327-30 (Cal. Ct. App. 1989) (reversing termination order because findings unsupported by sufficient evidence; mother with developmental disability was given no assistance in finding housing required by her reunification plan, her parenting skills counseling was tailored to her special needs only by requiring her to obtain counseling in protecting herself and her children from sexual abuse; mother was never referred to a regional developmental disabilities service center that might have addressed her problems).

Significantly, these decisions carefully scrutinize the states' assertions that services were tailored to accommodate the needs of parents with disabilities. The decisions also require child welfare authorities to work with the developmental disabilities or mental health service system. Two other favorable decisions are worth mentioning for their useful discussion. In *In re P.A.B.*, 570 A.2d 522 (Pa. Super. Ct. 1990), the court reversed a termination order, holding that the trial court erred in failing to consider the role of the parental bond between parents with mental retardation and their children in determining the best interests of the child. In *Division of Family*

²⁰ Virtually every one of the ADA cases cited in this memorandum also holds that the state made reasonable efforts under state law to prevent the loss of parental rights.

²¹ The following cases are not the product of an exhaustive search of relevant caselaw in every state. They are merely a sample of the positive rulings in "reasonable efforts" cases.

²² Copies of this and other unpublished decisions cited in this memorandum are available through the Bazelon Center for Mental Health Law.

Servs. v. Murphy, Nos. 98-28600, 98-28773, * 25 (Del. Fam. Ct. Feb. 14, 2000) (on file with author), the court returned custody to two parents with mental retardation, finding that while parents each had limitations, they were able to adequately address these issues by working as a parental team. The court also noted that the fact that the parents might require agency assistance from time to time in raising the child did not make the child dependent. *Id.* at 27.

Some appeals courts have also reversed decisions to terminate parental rights where those decisions were based on generalized assumptions or speculation about the effects of a parent's disability. *See In re C.W.*, 211 S.W.3d 93 (Mo. 2007) (en banc) (trial court inappropriately relied on out of date psychiatric assessment and unwarranted assumptions that mother's mental illness would make her unfit to parent, and had no current evidence of mother's mental health status or the present needs of the child, nor was there any expert testimony about the mother's prognosis for recovery); *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d 778 (Md. 2002) (trial court inappropriately relied on report of psychiatric examiner who provided only speculative testimony concerning the ability to parent of father with a mental disability).

Strategies

Following are some suggestions concerning how to navigate the child welfare system on behalf of a parent with a mental disability.

- **Raise modification issues early.** If a parent requires modifications in training or other family preservation services due to a disability, the need for modifications should be raised as early as possible, whether under the ADA, state law or both. The issue should be raised during dependency (custody) proceedings when services are offered or if the services provided appear to be ineffective. In any event, the issue should be raised long before the initiation of termination of parental rights proceedings. Indeed, as noted above, a number of courts have strongly emphasized the importance of raising this issue early.

There are several reasons for raising these issues early. First, as discussed above, some courts require that the issue be raised during dependency proceedings in order for it to be preserved at the TPR stage. Moreover, ADA claims for modifications are weaker when raised during TPR proceedings, which several courts have held are not a service, program or activity within the meaning of Title II. Additionally, the longer the child has been removed from the parent's home, the more difficult it becomes to demonstrate the parent's capabilities, and the more reluctant courts are to order the provision of additional services. The ideal situation in which to demonstrate that modifications in services would help the parent learn appropriate skills is where the child still resides with the parent.

- **How to raise the issue.** First, advocates should look to controlling law to determine what limitations exist on how these issues may be raised – for example, whether ADA

claims may be raised as an affirmative defense to TPR proceedings. In addition to **raising an ADA claim for failure to accommodate as an affirmative defense**, advocates may consider **raising an ADA claim as a counterclaim** in dependency or TPR proceedings.

Advocates should also consider the possibility of **bringing a separate ADA lawsuit** in state or federal court. This course of action entails certain risks. Raising an ADA claim in federal court may result in the federal court abstaining under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* abstention doctrine permits a federal court to abstain where deciding the federal claims would interfere with ongoing state court proceedings in which there is an important state interest, if there was an adequate opportunity to raise the federal claims in the state proceedings. At least one federal court has declined, based on *Younger* abstention grounds, to exercise jurisdiction over ADA and constitutional claims challenging the application of a TPR statute. See *Thompson v. Vacco*, No. 96 Civ. 8670(SS), 1997 WL 539949 (S.D.N.Y. Aug. 29, 1997).

Additionally, once a state court decision has been made, either in dependency or TPR proceedings, federal claims challenging the failure to modify parenting services may invite dismissal on *Rooker-Feldman* grounds. Under this doctrine, arising out of the decisions in *Rooker v. Fidelity Trust*, 263 U.S. 413, 416 (1923), and *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 486 (1983), a federal court lacks subject matter jurisdiction to review final state court determinations or to decide claims that are “inextricably intertwined” with a state court determination. This has been interpreted to mean that a federal court cannot decide a claim where granting the relief the plaintiff seeks would require the court to decide that a state court determination was wrong or render the state court determination effectively void. Thus, a federal ADA suit that effectively seeks to change the result of a custody or TPR decision is vulnerable to dismissal under the *Rooker-Feldman* doctrine.

If there is no adequate opportunity to raise the issues in the state court proceedings, however, then neither the *Younger* doctrine nor the *Rooker-Feldman* doctrine should bar a federal court from hearing an ADA claim for failure to modify services.²³ Advocates should look to caselaw and jurisdictional statutes to determine whether a court deciding child welfare issues has jurisdiction to decide ADA claims. In addition, it would be useful to know whether the state has taken the position in previous

²³ A plaintiff’s federal claims will not be barred by the *Rooker-Feldman* doctrine if the plaintiff did not have a reasonable opportunity to raise these claims in the state court proceedings. See, e.g., *Brown & Root, Inc. v. Breckenridge*, No. 99-1831, 2000 WL 526068, at *6 (4th Cir. May 2, 2000); *Long v. Shorebank Devel. Corp.*, 182 F.3d 548, 558 (7th Cir. 1999); *Dale v. Moore*, 121 F.3d 624, 626 (11th Cir. 1997). Neither will *Younger* abstention bar federal claims under those circumstances.

cases that federal claims cannot be raised in dependency or TPR proceedings. Absent a clear answer on the scope of the state court's jurisdiction, advocates should raise these issues first in child welfare proceedings. If the state court rules that ADA claims cannot be raised in these proceedings, advocates should be able to raise the ADA claims in federal court.

If advocates plan to file a separate ADA claim in either state or federal court, they should attempt to have the dependency or TPR proceedings stayed pending a decision on the modifications claim under the ADA. If the proceedings are not stayed, once a TPR decision is issued, it will be extremely difficult to obtain any effective relief under the ADA.

The best course of action will generally be to raise the ADA initially as a defense (and possibly counterclaim as well) in dependency proceedings and see what the court does. If the court indicates that the ADA is not properly raised in these proceedings but may be raised in a separate action, then counsel may consider filing an ADA action in state or federal court.

- **Where possible, advocates should attempt to characterize the services sought as modified versions of the services provided by the child welfare system.** In doing so, advocates should be able to minimize vulnerability to the ADA's "fundamental alteration" defense. If the services needed are essentially modified versions of the services provided to others in child welfare system (for example, parenting classes with more hands-on instruction or instruction provided in the home rather than in a clinic setting), as opposed to services not normally provided by the child welfare system, the fundamental alteration defense should pose less of a problem.

However, the fact that the service needed is not provided to anyone else does not necessarily make it a fundamental alteration. If providers can be procured and the service does not fundamentally change the nature of family preservation services in the state, then strong arguments may be made that the service is not a fundamental alteration.

- **Advocates should also look to the developmental disabilities or mental health system as well to determine whether these systems provide services that would assist the parent.** Usually the parenting services required by parents with mental disabilities will involve at least some services that are provided through these systems. The fact that these services are not ordinarily provided through the child welfare system should not mean that providing them would fundamentally alter that system. For example, if a parent requires medication monitoring and that service is available through the mental health system, it would not be difficult for the child welfare system to work with the mental health system to assure that the parent receives these services; frequently the two systems do work together in some respects anyway. Indeed, some courts have found that working with the DD or MH system is required as part of the state's duty to make

reasonable efforts under state law.²⁴

- **It is crucial to build a good record, including the opinions of a knowledgeable expert.** Generally, states have successfully argued that they have made reasonable modifications to family preservation services, though in many instances those modifications were insufficient to make the services effective. Given the reluctance of courts to order further modifications when some modifications have already been provided, the importance of an expert who can explain why the services provided were ineffective, and what services the parent needs, cannot be overstated.²⁵ The expert should be able to provide an opinion about the parent's prognosis for recovery²⁶ and to explain the inadequacies of the evaluations relied upon by the agency. In addition, building a careful record detailing the parent's strengths and bonds with the child is necessary to combat the stigma attached to parents with mental disabilities.
- Advocates may wish to consider seeking **legislative or regulatory change** to incorporate into the child welfare laws the responsibility to ensure appropriate assessments of the service needs of parents with disabilities and to make reasonable modifications in compliance with the ADA, including the responsibility of child welfare system employees to work with the MH/MR system to provide appropriate family preservation services to parents with mental disabilities.

²⁴ See, e.g., *In re the Dependency of H.W. & V.W.*, 961 P.2d at 967 (state failed to make reasonable efforts because mother was never referred to the Division of Developmental Disabilities for services and no attempt was made to investigate what services might be available through DDD; mother was in fact eligible for an assisted living program for herself and the child); *In re Victoria M.*, 207 Cal. App.3d at 1330 (state failed to make reasonable efforts; among other things, mother was never referred to a regional developmental disabilities service center that might have addressed her problems).

²⁵ The following example demonstrates how modifications can be insufficient. One of the studies of parenting skills in mothers with mental retardation notes that even when in-home, hands-on services were successfully provided to teach a mother with mental retardation how to cook pancakes, followup visits revealed that the mother subsequently fed her child pancakes for breakfast, lunch and dinner. Steven A. Rosenberg & Gay Angel McTate, *Intellectually Handicapped Mothers: Problems and Prospects*, *Children Today*, Jan/Feb. 1982, at 24, 25. While the modifications provided were effective in helping the mother learn to cook, they were not sufficient to help her improve childcare skills and further assistance was required.

²⁶ "Recovery" refers to the idea of living successfully with a disability and not necessarily to "curing" the disability.

the time of bankruptcy⁵⁰⁸ derives no benefit at all from *Rash*, but still faces some risk of collateral depreciation.¹⁷

There are very good reasons for Congress to prescribe full risk compensation for creditors. Every action in the free market has a reaction somewhere. If sub-prime lenders are systematically under-compensated in bankruptcy, they will charge higher rates or, if they already charge the legal maximum under state law, lend to fewer of the riskiest borrowers. As a result, some marginal but deserving borrowers will be denied vehicle loans in the first place. Congress evidently concluded that widespread access to credit is worth preserving, even if it means being ungenerous to sympathetic debtors.

* * *

Today's judgment is unlikely to burnish the Court's reputation for reasoned decisionmaking. Eight Justices are in agreement that the rate of interest set forth in the debtor's approved plan must include a premium for risk. Of those eight, four are of the view that beginning with the contract rate would most accurately reflect the actual risk, and four are of the view that beginning with the prime lending rate would do so. The ninth Justice takes no position on the latter point, since he disagrees with the eight on the former point; he would reverse because the rate proposed here, being above the risk-free rate, gave respondent no cause for complaint. Because I read the statute to require full risk compensation, and because I would adopt a valuation method that has a realis-

17. It is true that, if the debtor defaults, one of the costs the creditor suffers is the cost of liquidating the collateral. See *supra*, at 1975. But it is illogical to "compensate" for this risk by requiring all plans to pay the full cost of

liquidation (replacement value minus foreclosure value), rather than an amount that reflects the possibility that liquidation will actually be necessary and that full payments will not be made.



541 U.S. 509, 158 L.Ed.2d 820

TENNESSEE, Petitioner,

v.

George LANE et al.

No. 02-1667.

Argued Jan. 13, 2004.

Decided May 17, 2004.

Background: Disabled citizens brought action against state under Title II of the Americans with Disabilities Act (ADA), seeking to vindicate their right of access to the courts. The United States District Court for the Middle District of Tennessee, Thomas A. Higgins, J., denied state's motion to dismiss. State appealed. On petition for rehearing, the Court of Appeals, 315 F.3d 680, affirmed and remanded. Certiorari was granted.

Holding: The United States Supreme Court, Justice Stevens, held that Title II of the ADA, as applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment.

Affirmed.

Justice Souter filed a concurring opinion in which Justice Ginsburg joined.

Justice Ginsburg filed a concurring opinion in which Justices Souter and Breyer joined.

liquidation (replacement value minus foreclosure value), rather than an amount that reflects the possibility that liquidation will actually be necessary and that full payments will not be made.

Chief Justice Rehnquist filed a dissenting opinion in which Justices Kennedy and Thomas joined.

Justices Scalia and Thomas filed dissenting opinions.

Syllabus *

Respondent paraplegics filed this action for damages and equitable relief, alleging that Tennessee and a number of its counties had denied them physical access to that State's courts in violation of Title II of the Americans with Disabilities Act of 1990(ADA), which provides: "[N]o 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. After the District Court denied the State's motion to dismiss on Eleventh Amendment immunity grounds, the Sixth Circuit held the appeal in abeyance pending *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866. This Court later ruled in *Garrett* that the Eleventh Amendment bars private money damages actions for state violations of ADA Title I, which prohibits employment discrimination against the disabled. The en banc Sixth Circuit then issued its *Popovich* decision, in which it interpreted *Garrett* to bar private ADA suits against States based on equal protection principles, but not those relying on due process, and therefore permitted a Title II damages action to proceed despite the State's immunity claim. Thereafter, a Sixth Circuit panel affirmed the dismissal denial in this case, explaining that respondents' claims were not barred because they were based on due process principles. In response to a rehearing petition arguing that *Popovich* did not control because respondents' complaint did not allege due process violations, the panel filed an amended opinion, explaining that due process protects the right of access to the courts, and that the evidence before Congress when it enacted Title II estab-

1. Constitutional Law ⇔82(6.1)

Congress' enforcement power under the Fourteenth Amendment is broad, and 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. U.S.C.A. Const.Amend. 14.

2. Constitutional Law ⇔82(6.1)

While Congress must, pursuant to its enforcement power under the Fourteenth Amendment, 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. U.S.C.A. Const.Amend. 14.

3. Civil Rights ⇔1005, 1056

Constitutional Law ⇔299.2

Federal Courts ⇔265

Title II of the Americans with Disabilities Act (ADA), prohibiting discrimination by a public entity, validly abrogated Eleventh Amendment immunity through enforcement of the Fourteenth Amendment, as applied to cases implicating the fundamental right of access to the courts. U.S.C.A. Const.Amend. 11, 14, §5; Americans with Disabilities Act of 1990, §§ 201, 502, 42 U.S.C.A. §§ 12131, 12202.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of

the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

lished, *inter alia*, that physical barriers in courthouses and courtrooms have had the effect of denying disabled people the opportunity for such access.

Held: As it applies to the class of cases implicating the fundamental right of access to the courts, Title II constitutes a valid exercise of Congress' authority under § 5 of the Fourteenth Amendment to enforce that Amendment's substantive guarantees. Pp. 1984–1994.

(a) Determining whether Congress has constitutionally abrogated a State's Eleventh Amendment immunity requires resolution of two predicate questions: (1) whether Congress unequivocally expressed its intent to abrogate; and (2), if so, whether it acted pursuant to a valid grant of § 5 constitutional authority. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522. The first question is easily answered here, since the ADA specifically provides for abrogation. See § 12202. With regard to the second question, Congress can abrogate state sovereign immunity pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. *E.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614. That 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.” *City of Boerne v. Flores*, 521 U.S. 507, 519, 117 S.Ct. 2157, 138 L.Ed.2d 624. In *Boerne*, the Court set forth the test for distinguishing between permissible remedial legislation and unconstitutional substantive redefinition: Section 5 legislation is valid if it exhibits “a congruence and proportionality” between an injury and the means adopted to prevent or remedy it. *Id.*, at 520, 117 S.Ct. 2157. Applying the *Boerne* test in *Garrett*, the Court concluded that ADA Title I was not a valid

exercise of Congress' § 5 power because the historical record and the statute's broad sweep suggested that Title I's true aim was not so much enforcement, but an attempt to “rewrite” this Court's Fourteenth Amendment jurisprudence. 531 U.S., at 372–374, 121 S.Ct. 955. In view of significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' § 5 power, *id.*, at 360, n. 1, 121 S.Ct. 955. Pp. 1985–1988.

(b) Title II is a valid exercise of Congress' § 5 enforcement power. Pp. 1988–1994.

(1) The *Boerne* inquiry's first step requires identification of the constitutional rights Congress sought to enforce when it enacted Title II. *Garrett*, 531 U.S., at 365, 121 S.Ct. 955. Like Title I, Title II seeks to enforce the Fourteenth Amendment's prohibition on irrational disability discrimination. *Id.*, at 366, 121 S.Ct. 955. But it also seeks to enforce a variety of other basic constitutional guarantees, including some, like the right of access to the courts here at issue, infringements of which are subject to heightened judicial scrutiny. See, *e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 336–337, 92 S.Ct. 995, 31 L.Ed.2d 274. Whether Title II validly enforces such constitutional rights is a question that “must be judged with reference to the historical experience which it reflects.” *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769. Congress enacted Title II against a backdrop of pervasive unequal treatment of persons with disabilities in the administration of state services and programs, including systematic deprivations of fundamental rights. The historical experience that Title II reflects is also documented in the decisions of this and other courts, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of

public programs and services. With respect to the particular services at issue, Congress learned that many individuals, in many States, were being excluded from courthouses and court proceedings by reason of their disabilities.⁵¹¹ A Civil Rights Commission report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by such persons. Congress also heard testimony from those persons describing the physical inaccessibility of local courthouses. And its appointed task force heard numerous examples of their exclusion from state judicial services and programs, including failure to make courtrooms accessible to witnesses with physical disabilities. The sheer volume of such evidence far exceeds the record in last Term's *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728–733, 123 S.Ct. 1972, 155 L.Ed.2d 953, in which the Court approved the family-care leave provision of the Family and Medical Leave Act of 1993 as valid § 5 legislation. Congress' finding in the ADA that “discrimination against individuals with disabilities persists in such critical areas as . . . access to public services,” § 12101(a)(3), together with the extensive record of disability discrimination that underlies it, makes clear that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation. Pp. 1988–1992.

(2) Title II is an appropriate response to this history and pattern of unequal treatment. Unquestionably, it is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services. Congress' chosen remedy for the pattern of exclusion and discrimination at issue, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of ac-

cess to the courts. The long history of unequal treatment of disabled persons in the administration of judicial services has persisted despite several state and federal legislative efforts to remedy the problem. Faced with considerable evidence of the shortcomings of these previous efforts, Congress was justified in concluding that the difficult and intractable problem of disability discrimination warranted added prophylactic measures. *Hibbs*, 538 U.S., at 737, 123 S.Ct. 1972. 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. § 12132. But Title II does not require States to employ any and all means to make judicial services accessible or to compromise 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.* Title II's implementing regulations make clear that the reasonable modification requirement can be satisfied in various ways, including less costly measures than structural changes. This duty to accommodate is perfectly consistent with the well-established due process principle that, within the limits of practicability, a State ⁵¹²must afford to all individuals a meaningful opportunity to be heard in its courts. *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780. A number of affirmative obligations flow from this principle. Cases such as *Boddie*, *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, make 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 is a reasonable prophylactic measure, reasonably targeted to a legitimate end. Pp. 1992–1994.

315 F.3d 680, affirmed.

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, *post*, p. 1995. GINSBURG, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 1996. REHNQUIST, C. J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 1997. SCALIA, J., *post*, p. 2007, and THOMAS, J., *post*, p. 2013, filed dissenting opinions.

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For U.S. Supreme Court briefs, see:

2003 WL 22137324 (Pet.Brief)

2003 WL 22733904 (Resp.Brief)

2003 WL 23010747 (Reply.Brief)

2003 WL 22733904 (Appellant.Brief)

Justice STEVENS delivered the opinion of the Court.

⁵¹³Title II of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 337, 42 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.⁵¹⁴ At his first appearance, Lane crawled up two flights of stairs to get to the court-

room. 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.¹ 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, 121 S.Ct. 955, 148 L.Ed.2d 866 (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. *Id.*, at 360, n. 1, 121 S.Ct. 955. 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 (C.A.6 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. 276 F.3d, at 811–816. The minority concluded that Congress had not validly abrogated the States' Eleventh Amendment immunity for any Title II claims, *id.*, at 821, while the concurring opinion concluded that Title II validly abrogated state sovereign immunity with respect to both equal protection and due process claims, *id.*, at 818.

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. Judgt. order reported at 2002 WL 1580210 (C.A.6 2002). 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." 315 F.3d 680, 682 (2003). Moreover, that "record demonstrated that public entities' failure to accommodate the needs of qualified persons with disabilities

1. In *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993), we held that "States and state entities that claim to be 'arms of the State' may take advantage of the

collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity." *Id.*, at 147, 113 S.Ct. 684.

may result directly from unconstitutional animus and impermissible stereotypes.” *Id.*, at 683. 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. *Ibid.* We granted certiorari, 539 U.S. 941, 123 S.Ct. 2622, 156 L.Ed.2d 626 (2003), and now affirm.

§ 516 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.² 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 § 517 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, 92 Stat. 2982, as added, 29 U.S.C. § 794a, which

2. See 42 U.S.C. § 12101; Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment 16 (Oct. 12, 1990); S.Rep. No. 101–116 (1989); H.R.Rep. No. 101–485 (1990), U.S.Code Cong. & Admin.News 1990, p. 267; H.R. Conf. Rep. No. 101–558 (1990); H.R. Conf.

Rep. No. 101–596 (1990), U.S.Code Cong. & Admin.News 1990, p. 565; cf. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 389–390, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (App. A to opinion of BREYER, J., dissenting) (listing congressional hearings).

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*, 531 U.S., at 363, 121 S.Ct. 955; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72–73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). 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.*, at 73, 120 S.Ct. 631.

⁵¹⁸The 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*, see 531 U.S., at 363–364, 121 S.Ct. 955, no party disputes

3. In *Ex parte Virginia*, we described the breadth of Congress’ § 5 power as follows: “Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional

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.

[1] In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (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. *Id.*, at 456, 96 S.Ct. 2666. This enforcement power, as we have often acknowledged, is a “broad power indeed.” *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982), citing *Ex parte Virginia*, 100 U.S. 339, 346, 25 L.Ed. 676 (1880).³ 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, 120 S.Ct. 631. 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, 727–728, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003). See also *City of Boerne v. Flores*, ⁵¹⁹521 U.S. 507, 518, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).⁴ The

power.” 100 U.S., at 345–346. See also *City of Boerne v. Flores*, 521 U.S. 507, 517–518, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

4. In *Boerne*, we observed:

“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 and intrudes into ‘legislative spheres of autonomy previously reserved to

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), 107 Stat. 6, 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, 99 S.Ct. 2282, 60 L.Ed.2d 870 1520(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.

[2] 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

the States.' *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment, see U.S. Const., Amdt. 15, § 2, as a measure to combat racial discrimination in voting, *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), despite the facial constitutionality of the tests under *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959). We have also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States. *South Carolina v. Katzenbach*, *supra* (upholding several provisions of the Voting Rights Act of 1965); *Katzenbach v. Mor-*

work a "substantive change in the governing law." *Boerne*, 521 U.S., at 519, 117 S.Ct. 2157. 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.*, at 519–520, 117 S.Ct. 2157. 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.*, at 520, 117 S.Ct. 2157.

In *Boerne*, we held that Congress had exceeded its § 5 authority when it enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* 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, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), for the stated purpose of "restor[ing]" a constitutional rule that *Smith* had rejected. 521 U.S., at 512, 515,

gan, [384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966)] (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *City of Rome v. United States*, 446 U.S. 156, 161, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980) (upholding 7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a "'standard, practice, or procedure with respect to voting'"); see also *James Everard's Breweries v. Day*, 265 U.S. 545, 44 S.Ct. 628, 68 L.Ed. 1174 (1924) (upholding ban on medical prescription of intoxicating malt liquors as appropriate to enforce Eighteenth Amendment ban on manufacture, sale, or transportation of intoxicating liquors for beverage purposes)." *Id.*, at 518, 117 S.Ct. 2157.

117 S.Ct. 2157 (internal quotation marks omitted). 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.” 521 U.S., at 529, 532, 117 S.Ct. 2157. 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, 119 S.Ct. 2199, 144 L.Ed.2d 575 (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, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), to clarify its intent to abrogate state sovereign immunity from patent infringement suits. *Florida Prepaid*, 527 U.S., at 631–632, 119 S.Ct. 2199. 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. *Id.*, at 647–648, 119 S.Ct. 2199. See also *Kimel*, 528 U.S. 62, 120 S.Ct. 631 (finding that the Age Discrimination in Employment Act exceeded Congress’ § 5 powers under *Boerne*); *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (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. 531 U.S., at 368, 374, 121 S.Ct. 955. 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, 121 S.Ct. 955 (opinion of BREYER, J.), 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, 121 S.Ct. 955. 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 that the House and Senate Committee Reports on the ADA focused on “[d]iscrimination [in] . . . employment in the private sector,” and made no mention of discrimination in public employment. *Id.*, at 371–372, 121 S.Ct. 955 (quoting S.Rep. No. 101–116, p. 6 (1989), and H.R.Rep. No. 101–485, pt. 2, p. 28 (1990), U.S.Code Cong. & Admin.News 1990, pp. 303, 310) (emphasis in *Garrett*). 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 “re-write” this Court’s Fourteenth Amend-

ment jurisprudence. 531 U.S., at 372–374, 121 S.Ct. 955.

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. *Garrett*, 531 U.S., at 365, 121 S.Ct. 955. 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, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). As we observed, classifications based on disability violate that constitutional command if they lack a rational relationship to a legitimate governmental purpose. *Garrett*, 531 U.S., at 366, 121 S.Ct. 955 (citing *Cleburne*, 473 U.S., at 446, 105 S.Ct. 3249).

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 judicial⁵²³ review. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336–337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). 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, 95 S.Ct. 2525, 45 L.Ed.2d 562 (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, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *M.L.B. v. S.L. J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (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, 95 S.Ct. 692, 42 L.Ed.2d 690 (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, 106 S.Ct. 2735, 92 L.Ed.2d 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, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). See also *Florida Prepaid*, 527 U.S., at 639–640, 119 S.Ct. 2199; *Boerne*, 521 U.S., at 530, 117 S.Ct. 2157. 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. ⁵²⁴"Difficult and intractable problems often

require powerful remedies,” *Kimel*, 528 U.S., at 88, 120 S.Ct. 631, but it is also true that “[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one,” *Boerne*, 521 U.S., at 530, 117 S.Ct. 2157.

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.”⁵ The majority of these laws remain on the books,⁶ and have been the subject of legal challenge as recently as 2001.⁷ Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying⁸ and

serving as jurors.⁹ 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, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); the abuse and neglect of persons committed to state mental health hospitals, *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982);¹⁰ and irrational discrimination in zoning decisions, *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (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,¹¹ public education,¹² and voting.¹³ Notably,

5. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 464, and n. 14, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (citing Note, Mental Disability and the Right to Vote, 88 Yale L.J. 1644 (1979)).

6. See Schriener, Ochs, & Shields, Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments, 21 Berkeley J. Emp. & Lab. L. 437, 456–472, tbl. II (2000) (listing state laws concerning the voting rights of persons with mental disabilities).

7. See *Doe v. Rowe*, 156 F.Supp.2d 35 (D.Me. 2001).

8. *E.g.*, D.C.Code § 46–403 (West 2001) (declaring illegal and void the marriage of “an idiot or of a person adjudged to be a lunatic”); Ky.Rev.Stat. Ann. § 402.990(2) (West 1992 Cumulative Service) (criminalizing the marriage of persons with mental disabilities); Tenn.Code Ann. § 36–3–109 (1996) (forbidding the issuance of a marriage license to “imbecile[s]”).

9. *E.g.*, Mich. Comp. Laws Ann. § 729.204 (West 2002) (persons selected for inclusion on jury list may not be “infirm or decrepit”);

Tenn.Code Ann. § 22–2–304(c) (1994) (authorizing judges to excuse “mentally and physically disabled” persons from jury service).

10. The undisputed findings of fact in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), provide another example of such mistreatment. See *id.*, at 7, 101 S.Ct. 1531 (“Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the ‘habilitation’ of the retarded”).

11. *E.g.*, *LaFaut v. Smith*, 834 F.2d 389, 394 (C.A.4 1987) (paraplegic inmate unable to access toilet facilities); *Schmidt v. Odell*, 64 F.Supp.2d 1014 (D.Kan.1999) (double amputee forced to crawl around the floor of jail). See also, *e.g.*, *Key v. Grayson*, 179 F.3d 996 (C.A.6 1999) (deaf inmate denied access to sex offender therapy program allegedly required as precondition for parole).

12. *E.g.*, *New York State Assn. for Retarded Children, Inc. v. Carey*, 466 F.Supp. 487, 504 (E.D.N.Y.1979) (segregation of mentally retarded students with hepatitis B); *Mills v. Board of Ed. of District of Columbia*, 348

these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice.¹⁴

¹⁴This 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.” S.Rep. No. 101–116, at 18. See also H.R.Rep. No. 101–485, pt. 2, at 47, U.S.Code Cong. & Admin.News 1990, pp. 303, 329.¹⁵ 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, 121 S.Ct. 955 (BREYER, J., dissenting). See also *id.*, at

391, 121 S.Ct. 955 (App. C to opinion of 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. *Id.*, at 371, n. 7, 121 S.Ct. 955; Government’s Lodging in *Garrett*, O.T.2000, No. 99–1240 (available in Clerk of Court’s case file).

¹⁵With 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

F.Supp. 866 (D.D.C. 1972) (exclusion of mentally retarded students from public school system). See also, e.g., *Robertson v. Granite City Community Unit School Dist. No. 9*, 684 F.Supp. 1002 (S.D.Ill.1988) (elementary-school student with AIDS excluded from attending regular education classes or participating in extracurricular activities); *Thomas v. Atascadero Unified School Dist.*, 662 F.Supp. 376 (C.D.Cal.1986) (kindergarten student with AIDS excluded from class).

13. E.g., *Doe v. Rowe*, 156 F.Supp.2d 35 (D.Me. 2001) (disenfranchisement of persons under guardianship by reason of mental illness). See also, e.g., *New York ex rel. Spitzer v. County of Delaware*, 82 F.Supp.2d 12 (N.D.N.Y. 2000) (mobility-impaired voters unable to access county polling places).

14. E.g., *Ferrell v. Estelle*, 568 F.2d 1128, 1132–1133 (C.A.5) (deaf criminal defendant denied interpretive services), opinion withdrawn as moot, 573 F.2d 867 (C.A.5 1978); *State v. Schaim*, 65 Ohio St.3d 51, 64, 600 N.E.2d 661, 672 (1992) (same); *People v. Rivera*, 125 Misc.2d 516, 528, 480 N.Y.S.2d 426, 434 (Sup.Ct.1984) (same). See also, e.g., *Layton v. Elder*, 143 F.3d 469, 470–472 (C.A.8

1998) (mobility-impaired litigant excluded from a county quorum court session held on the second floor of an inaccessible courthouse); *Matthews v. Jefferson*, 29 F.Supp.2d 525, 533–534 (W.D.Ark.1998) (wheelchair-bound litigant had to be carried to the second floor of an inaccessible courthouse, from which he was unable to leave to use restroom facilities or obtain a meal, and no arrangements were made to carry him downstairs at the end of the day); *Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1289 (C.A.9 1982) (blind persons categorically excluded from jury service); *Galloway v. Superior Court of District of Columbia*, 816 F.Supp. 12 (D.D.C. 1993) (same); *DeLong v. Brumbaugh*, 703 F.Supp. 399, 405 (W.D.Pa.1989) (deaf individual excluded from jury service); *People v. Green*, 148 Misc.2d 666, 669, 561 N.Y.S.2d 130, 133 (Cty.Ct.1990) (prosecutor exercised peremptory strike against prospective juror solely because she was hearing impaired).

15. For a comprehensive discussion of the shortcomings of state disability discrimination statutes, see Colker & Milani, *The Post-Garrett World: Insufficient State Protection against Disability Discrimination*, 53 Ala. L.Rev. 1075 (2002).

might be restructured or relocated to other parts of the buildings. U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 39 (1983). Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. Oversight Hearing on H.R. 4498 before the House Subcommittee on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess., 40–41, 48 (1988). 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 dis-

abilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities. Government's Lodging in *Garrett*, O.T.2000, No. 99–1240. See also Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* (Oct. 12, 1990).¹⁶

¶⁵²⁸ 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. 538 U.S., at 728–733, 123

16. THE CHIEF JUSTICE dismisses as “irrelevant” the portions of this evidence that concern the conduct of nonstate governments. *Post*, at 1999–2000 (dissenting opinion). 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 “arm[s] of the State” for Eleventh Amendment purposes, *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and thus enjoy precisely the same immunity from unconsented suit as the States. See, e.g., *Callahan v. Philadelphia*, 207 F.3d 668, 670–674 (C.A.3 2000) (municipal court is an “arm of the State” entitled to Eleventh Amendment immunity); *Kelly v. Municipal Courts*, 97 F.3d 902, 907–908 (C.A.7 1996) (same); *Franceschi v. Schwartz*, 57 F.3d 828, 831 (C.A.9 1995) (same). Cf. *Garrett*, 531 U.S., at 368–369, 121 S.Ct. 955.

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. To be sure, evi-

dence of constitutional violations by the States themselves is particularly important when, as in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999), *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), and *Garrett*, the sole purpose of reliance on § 5 is to place the States on equal footing with private actors with respect to their amenability to suit. But much of the evidence in *South Carolina v. Katzenbach*, 383 U.S. 301, 312–315, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), to which THE CHIEF JUSTICE favorably refers, *post*, at 2003, 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 *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), *post*, at 2003, 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. See *Hibbs*, 538 U.S., at 730–735, 123

S.Ct. 1972.¹⁷ We explained that ¹⁵²⁹because 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. 538 U.S., at 735–737, 123 S.Ct. 1972. 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)

S.Ct. 1972. See also *id.*, at 745–750, 123 S.Ct. 1972 (KENNEDY, J., dissenting).

17. Specifically, we relied on (1) a Senate Report citation to a Bureau of Labor Statistics survey revealing disparities in private-sector provision of parenting leave to men and women; (2) submissions from two sources at a hearing on the Parental and Medical Leave Act of 1986, a predecessor bill to the FMLA, that public-sector parental leave polices “‘diffe[r] little’” from private-sector policies; (3) evidence that 15 States provided women up to one year of extended maternity leave, while only 4 States provided for similarly extended paternity leave; and (4) a House Report’s quotation of a study that found that failure to implement uniform standards for

(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.

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[3] 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

parenting leave would “‘leav[e] Federal employees open to discretionary and possibly unequal treatment,’” H.R.Rep. No. 103–8, pt. 2, p. 11 (1993). *Hibbs*, 538 U.S., at 728–733, 123 S.Ct. 1972.

18. Contrary to THE CHIEF JUSTICE, *post*, at 2005, neither *Garrett* nor *Florida Prepaid* lends support to the proposition that the *Boerne* test requires courts in all cases to “measur[e] the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce.” In fact, the decision in *Garrett*, which severed Title I of the ADA from Title II for purposes of the § 5 inquiry, demonstrates that courts need not examine “the full breadth of the statute” all at once.

about Title II's other applications, the question presented in this case is not whether Congress can §531 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, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).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*, 538 U.S., at 737, 123 S.Ct. 1972 (internal quotation marks omitted).

Moreover, *Garrett* and *Florida Prepaid*, like all of our other recent § 5 cases, concerned legislation that narrowly targeted the enforcement of a single constitutional right; for that reason, neither speaks to the issue presented in this case.

Nor is THE CHIEF JUSTICE's approach compelled by the nature of the *Boerne* inquiry. The answer to the question *Boerne* asks—whether a piece of legislation attempts substantively to redefine a constitutional guarantee—logically focuses on the manner in which the legislation operates to enforce that particular guarantee. It is unclear what, if anything, examining Title II's application to

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 §532 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

hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts.

19. In *Raines*, a State subject to suit under the Civil Rights Act of 1957 contended that the law exceeded Congress' power to enforce the Fifteenth Amendment because it prohibited "any person," and not just state actors, from interfering with voting rights. We rejected that argument, concluding that "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." 362 U.S., at 24–25, 80 S.Ct. 519.

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, 91 S.Ct. 780 (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 ^{§533}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

20. 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. See *Garrett*, 531 U.S., at 372, 121 S.Ct. 955.

21. *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (divorce filing fee); *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (record fee in parental rights termination action); *Smith v. Bennett*, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961) (filing fee for habeas petitions); *Burns v. Ohio*, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959) (filing fee for direct appeal in criminal case).

22. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

23. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (trial counsel for persons charged with felony offenses);

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*, 521 U.S., at 532, 117 S.Ct. 2157; *Kimel*, 528 U.S., at 86, 120 S.Ct. 631.²⁴ 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}⁵³⁴ 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.

Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (counsel for direct appeals as of right).

24. THE CHIEF JUSTICE contends that Title II cannot be understood as remedial legislation because it “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.*” *Post*, at 2006 (emphasis in original). But as we have often acknowledged, Congress “is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,” and may prohibit “a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” *Kimel*, 528 U.S., at 81, 120 S.Ct. 631. Cf. *Hibbs*, 538 U.S. 721, 123 S.Ct. 1972 (upholding the FMLA as valid remedial legislation without regard to whether failure to provide the statutorily mandated 12 weeks’ leave results in a violation of the Fourteenth Amendment).

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, 740, 123 S.Ct. 1972, 155 L.Ed.2d 953 (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*, at 2005 (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, 47 S.Ct. 584, 71 L.Ed. 1000 (1927), was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities. See *id.*, at 207, 47 S.Ct. 584 ("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 insti-

tutionalization, and prohibiting certain individuals with disabilities from marrying, from voting, from attending public schools, and even from appearing in public. ¹ 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*, 169 Wis. 231, 232, 172 N.W. 153 (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 See U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 19–20 (1983). 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, 445, 105 S.Ct. 3249, 87 L.Ed.2d 313 (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.

1. See generally *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 463–464, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring in judgment in part and dissenting in part); Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons As A "Suspect Class" Under the Equal Protection Clause*, 15 Santa

Clara Law. 855 (1975); Brief for United States 17–19.

2. As the majority opinion shows, some of them persist to this day, *ante*, at 1989–1990, to say nothing of their lingering effects on society.

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 Disabilities 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 disabilities. 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*, at 1984, 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 procedures”) (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 requirements⁵³⁷ of individualized accommodation and modification fill in the gaps on the micro level.” (footnote omitted)).

In *Olmstead v. L. C.*, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (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, 119 S.Ct. 2176. 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,” *id.*, at 601, 119 S.Ct. 2176. 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*, at 2012 (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, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (SCALIA, J., dissenting) (to be controlled by § 5 legislation, State “can demand that it be shown to have been acting in violation of the Fourteenth Amendment” (emphasis in original)). 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 ¹⁵³⁸adversarial approach to lawmaking better suited to the courtroom.

As the Court’s opinion documents, see *ante*, at 1989–1992, 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, 121 S.Ct. 955, 148 L.Ed.2d 866 (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 or Act), 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*, at 1994. 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, 726, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003); *Garrett*, *supra*, at 363, 121 S.Ct. 955; *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). 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*, *supra*, at 726, 123 S.Ct. 1972. While the Court correctly holds that Congress satisfied the first prerequisite, *ante*, at 1985, I disagree with its conclusion that Title II is valid § 5 enforcement legislation.

¹⁵³⁹Section 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, 121 S.Ct. 955. 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*, 538 U.S., at 727, 123 S.Ct. 1972 (internal quota-

tion marks omitted). Such “prophylactic” legislation, however, “must be an appropriate remedy for identified constitutional violations, not ‘an attempt to substantively redefine the States’ legal obligations.’” *Id.*, at 727–728, 123 S.Ct. 1972 (quoting *Kimel, supra*, at 88, 120 S.Ct. 631); *City of Boerne v. Flores*, 521 U.S. 507, 525, 117 S.Ct. 2157, 138 L.Ed.2d 624 (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, supra*, at 728, 123 S.Ct. 1972 (quoting *City of Boerne, supra*, at 520, 117 S.Ct. 2157). While the Court today pays lipservice to the “‘congruence and proportionality’” test, see *ante*, at 1986, 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, supra*, at 728, 123 S.Ct. 1972.

⁵⁴⁰The first step is to “identify with some precision the scope of the constitutional right at issue.” *Garrett, supra*, at 365, 121 S.Ct. 955. 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. 531 U.S., at 365, 121 S.Ct. 955. See also

Hibbs, supra, at 728, 123 S.Ct. 1972 (“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, supra*, at 83, 120 S.Ct. 631 (right to be free from unconstitutional age discrimination in employment); *City of Boerne, supra*, at 529, 117 S.Ct. 2157 (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, supra*, at 366–368, 121 S.Ct. 955 (discussing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)); see also *ante*, at 1988.

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*, at 1988. 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*, at 1994, 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, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); (2) the right of litigants to have a “meaningful opportunity to be heard” in judicial proceedings, *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); (3) the right of the criminal defendant to trial by a jury composed ⁵⁴¹of a fair cross section of the community, *Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S.Ct. 692, 42

L.Ed.2d 690 (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, 8–15, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). *Ante*, at 1988.

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*, 531 U.S., at 368, 121 S.Ct. 955. 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 authority is appropriately exercised *only* in response to state transgressions.” *Ibid.* (emphasis added). 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*, at 1988–1990. 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.¹ We discounted much the same type of outdated, generalized evidence in *Garrett* as unresponsive of ⁵⁴²Title I’s ban on employment discrimination. 531 U.S., at 368–372, 121 S.Ct. 955; see also *City of Boerne*, 521 U.S., at 530, 117 S.Ct. 2157 (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 non-state governments, rather than the States themselves.² 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, supra*, at 368–369, 121 S.Ct. 955; *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 640, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999); *Kimel*, 528 U.S., at 89, 120 S.Ct. 631. Moreover, the majority today cites the same congressional task force evidence we rejected in *Garrett*.

1. For further discussion of the propriety of this approach, see *infra*, at 2004–2005.

2. *E.g., ante*, at 1989 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (irrational discrimination by city zoning board)); *ante*, at 1990, n. 13 (citing *New York ex rel. Spitzer v. County of Delaware*, 82 F.Supp.2d 12 (N.D.N.Y.2000) (ADA lawsuit brought by State

against a county)); *ante*, at 1989–1990, n. 12 (citing four cases concerning local school boards’ unconstitutional actions); *ante*, at 1989, n. 11 (citing one case involving conditions in federal prison and another involving a county jail inmate); *ante*, at 1990 (referring to “hundreds of examples of unequal treatment . . . by States and their political subdivisions” (emphasis added)).

Ante, at 1990 (citing *Garrett, supra*, at 379, 121 S.Ct. 955 (BREYER, J., dissenting), and 531 U.S., at 391–424, 121 S.Ct. 955 (App. C to opinion of BREYER, J., dissenting) (chronicling instances of “unequal treatment” in the “administration of public programs”). As in *Garrett*, this “unexamined, anecdotal” evidence does not suffice. 531 U.S., at 370, 121 S.Ct. 955. 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, supra*, at 370–371, 121 S.Ct. 955. ¹⁵⁴³Therefore, even outside the “access to the courts” context, the Court identifies few, if any, constitutional violations perpetrated by the States against disabled persons.³

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

3. The majority obscures this fact by repeatedly referring to congressional findings of “discrimination” and “unequal treatment.” Of course, generic findings of discrimination and unequal treatment *vel non* are insufficient to show a pattern of constitutional violations where rational-basis scrutiny applies. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 370, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001).

4. Certainly, respondents Lane and Jones were not denied these constitutional rights. The majority admits that Lane was able to attend the initial hearing of his criminal trial. *Ante*, at 1982. Lane was arrested for failing to appear at his second hearing only after he refused assistance from officers dispatched by the court to help him to the courtroom. *Ante*, at 1982. The court conducted a preliminary hearing in the first-floor library to accommodate Lane’s disability, App. to Pet. for Cert.

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.⁴

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*, 531 U.S., at 368, 121 S.Ct. 955 (“[W]e examine whether *Congress* identified a history and pattern” of constitutional violations); *ibid.* (“The legislative record (3)27 fails to show that *Congress* did in fact identify ¹⁵⁴⁴a pattern” of constitutional violations (emphases added)). 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.⁵ See *ante*, at 1990, n. 14 (citing *Ferrell v. Estelle*, 568 F.2d 1128, 1132–1133 (C.A.5), opinion withdrawn as moot, 573 F.2d 867 (1978); *People v. Rivera*, 125 Misc.2d 516, 528, 480 N.Y.S.2d 426, 434 (Sup.Ct.1984)).⁶

16, and later offered to move all further proceedings in the case to a handicapped-accessible courthouse in a nearby town. In light of these facts, it can hardly be said that the State violated Lane’s right to be present at his trial; indeed, it made affirmative attempts to secure that right. Respondent Jones, a disabled court reporter, does not seriously contend that she suffered a constitutional injury.

5. As two Justices noted in *Garrett*, if the States were violating the due process rights of disabled persons, “one would have expected to find in decisions of the courts . . . extensive litigation and discussion of the constitutional violations.” 531 U.S., at 376, 121 S.Ct. 955 (KENNEDY, J., joined by O’CONNOR, J., concurring).

6. The balance of the Court’s citations refer to cases arising *after* enactment of the ADA or do not contain findings of federal constitutional

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*, at 1990; (2) testimony before a House subcommittee regarding the “physical inaccessibility” of local courthouses, *ante*, at 1991; 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.⁷ Indeed, the witnesses’ testimony, like the U.S. Commission on Civil Rights 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. Cf. n. 4, *supra* (describing alternative means of access offered to respondent Lane).

Based on the majority’s description, *ante*, at 1990–1991, 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 alternative 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*, 531 U.S., at 370–371, 121 S.Ct. 955 (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

violations. *Ante*, at 1990, n. 14 (citing *Layton v. Elder*, 143 F.3d 469 (C.A.8 1998) (post-ADA case finding ADA violations only); *Matthews v. Jefferson*, 29 F.Supp.2d 525 (W.D.Ark.1998) (same); *Galloway v. Superior Court*, 816 F.Supp. 12 (D.D.C. 1993) (same); *State v. Schaim*, 65 Ohio St.3d 51, 600 N.E.2d 661 (1992) (remanded for hearing on constitutional issue); *People v. Green*, 148 Misc.2d 666, 561 N.Y.S.2d 130 (Cty. Ct.1990) (finding violation of state constitution only); *DeLong v. Brumbaugh*, 703 F.Supp. 399 (W.D.Pa.1989) (statute upheld against facial constitutional challenge; Rehabilitation Act of 1973 violations only); *Pomerantz v. Los Angeles County*, 674 F.2d 1288 (C.A.9 1982) (Rehabilitation Act of 1973 claim; challenged jury-service

statute later amended)). Accordingly, they offer no support whatsoever for the notion that Title II is a valid response to documented constitutional violations.

7. Oversight Hearing on H.R. 4498 before the House Subcommittee on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess., 40–41 (1988) (statement of Emeka Nwojke) (explaining that he encountered difficulties appearing in court due to physical characteristics of the courthouse and courtroom and the rudeness of court employees); *id.*, at 48 (statement of Ellen Telker) (blind attorney “know[s] of at least one courthouse in New Haven where the elevators do not have tactile markings”).

that conclusion in the Act's legislative findings." *Id.*, at 371, 121 S.Ct. 955. Yet neither the legislative findings, nor even the Committee Reports, contain a single mention of the seemingly vital topic of access to the courts.⁸ Cf. *ibid.*; *Florida Prepaid*, 527 U.S., at 641, 119 S.Ct. 2199 (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 ⁵⁴⁷external 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,

8. The majority rather peculiarly points to Congress' finding that "'discrimination against individuals with disabilities persists in such critical areas as . . . access to public services'" as evidence that Congress sought to vindicate the due process rights of disabled persons. *Ante*, at 1992 (quoting 42 U.S.C. § 12101(a)(3) (emphasis added by the Court)). However, one does not usually refer to the

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*, 531 U.S., at 372, 121 S.Ct. 955 (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 "[e]ll far short of even suggesting the pattern of unconstitutional [state action] on which § 5 legislation must be based." *Id.*, at 370, 121 S.Ct. 955. See also *Kimel*, 528 U.S., at 91, 120 S.Ct. 631 ("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*, *supra*, at 645, 119 S.Ct. 2199 ("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" (quoting *City of Boerne*, 521 U.S., at 526, 117 S.Ct. 2157)).

right to attend a judicial proceeding as "access to [a] public servic[e]." Given the lack of any concern over courthouse accessibility issues in the legislative history, it is highly unlikely that this legislative finding obliquely refers to state violations of the due process rights of disabled persons to attend judicial proceedings.

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 legislation⁵⁴⁸ that we have sustained as valid § 5 enforcement legislation. See, e.g., *Hibbs*, 538 U.S., at 729–732, 123 S.Ct. 1972 (tracing the extensive legislative record documenting States' gender discrimination in employment leave policies); *South Carolina v. Katzenbach*, 383 U.S. 301, 312–313, 86 S.Ct. 803, 15 L.Ed.2d 769 (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*, *supra*, at 374, 121 S.Ct. 955.⁹

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. *Hibbs*, *supra*, at 737–739, 123 S.Ct. 1972; *Garrett*, *supra*, at 372–373, 121 S.Ct. 955.

9. The Court correctly explains that “‘it [i]s easier for Congress to show a pattern of state constitutional violations’” when it targets state action that triggers a higher level of constitutional scrutiny. *Ante*, at 1992 (quoting *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003)). However, this Court's precedents attest that Congress may not dispense with the required showing altogether simply because it purports to enforce due process rights. See *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 645–646, 119 S.Ct. 2199,

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 discrimination⁵⁴⁹ 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 effects” 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, 119 S.Ct. 2199. By requiring

144 L.Ed.2d 575 (1999) (invalidating Patent Remedy Act, which purported to enforce the Due Process Clause, because Congress failed to identify a record of constitutional violations); *City of Boerne v. Flores*, 521 U.S. 507, 530–531, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (same with respect to Religious Freedom Restoration Act of 1993 (RFRA)). As the foregoing discussion demonstrates, that is precisely what the Court has sanctioned here. Because the record is utterly devoid of proof that Congress was responding to state violations of due process access-to-the-courts rights, this case is controlled by *Florida Prepaid* and *City of Boerne*, rather than *Hibbs*.

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, 121 S.Ct. 955; *id.*, at 372–373, 121 S.Ct. 955 (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*, *supra*, at 88, 120 S.Ct. 631.

The majority, however, claims that Title II also vindicates fundamental rights protected by the Due Process Clause—¹⁵⁵⁰in addition to access to the courts—that are subject to heightened Fourteenth Amendment scrutiny. *Ante*, at 1988 (citing *Dunn v. Blumstein*, 405 U.S. 330, 336–337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (voting); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to move to a new jurisdiction); *Skinmer v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655

10. Title II's all-encompassing approach to regulating public services contrasts starkly with the more closely tailored laws we have upheld as legitimate prophylactic § 5 legislation. In *Hibbs*, for example, the FMLA was “narrowly targeted” to remedy widespread gender discrimination in the availability of family leave. 538 U.S., at 738–739, 123 S.Ct. 1972 (distinguishing *City of Boerne*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), and *Garrett* on this ground). Similarly, in cases involving enforcement of the Fifteenth Amendment, we

(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] have [any] likelihood of being unconstitutional.” *City of Boerne*, *supra*, at 532, 117 S.Ct. 2157. Viewed as a whole, then, there is little doubt that Title II of the ADA does not validly abrogate state sovereign immunity.¹⁰

¹⁵⁵¹The 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*, at 1993

upheld “limited remedial scheme[s]” that were narrowly tailored to address massive evidence of discrimination in voting. *Garrett*, 531 U.S., at 373, 121 S.Ct. 955 (discussing *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966)). Unlike these statutes, Title II's “indiscriminate scope . . . is particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy.” *Florida Prepaid*, 527 U.S., at 647, 119 S.Ct. 2199.

(citing *United States v. Raines*, 362 U.S. 17, 26, 80 S.Ct. 519, 4 L.Ed.2d 524 (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 (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 ¹⁵⁵²the 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 ap-

11. *Raines* is inapposite in any event. The Court there considered the constitutionality of the Civil Rights Act of 1957—a statute designed to enforce the Fifteenth Amendment—whose narrowly tailored substantive provisions could “unquestionably” be applied to state actors (like the respondents therein). 362 U.S., at 25, 26, 80 S.Ct. 519. The only question presented was whether the statute was facially invalid because it might be read to constrain nonstate actors as well. *Id.*, at 20, 80 S.Ct. 519. The Court upheld the stat-

ute as applied to respondents and declined to entertain the facial challenge. *Id.*, at 24–26, 80 S.Ct. 519. The situation in this case is much different: The very question presented is whether Title II’s indiscriminate substantive provisions can constitutionally be applied to the petitioner State. *Raines* thus provides no support for avoiding this question by conjuring up an imaginary statute with substantive provisions that might pass the congruence-and-proportionality test.

proach simply cannot be squared with either our recent precedent or the proper role of the Judiciary.

¹⁵³Even 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*, 531 U.S., at 368, 121 S.Ct. 955 (“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.

12. The majority’s invocation of *Hibbs* to justify Title II’s overbreadth is unpersuasive. See *ante*, at 1994, n. 24. The *Hibbs* Court concluded that “in light of the evidence before Congress” the FMLA’s 12-week family-leave provision was necessary to “achiev[e] Congress’ remedial object.” 538 U.S., at 748, 123 S.Ct. 1972. The Court found that the

The majority’s reliance on *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (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*.

¹⁵⁴In 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. 527 U.S., at 646–647, 119 S.Ct. 2199. Thus, “Congress did nothing to limit” the Patent Remedy 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.*, at 647, 119 S.Ct. 2199.¹²

legislative record included not only evidence of state constitutional violations, but evidence that a provision merely enforcing the Equal Protection Clause would actually perpetuate the gender stereotypes Congress sought to eradicate because employers could simply eliminate family leave entirely. *Ibid.* Without comparable evidence of constitutional viola-

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, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), we¹ 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, 728, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), when Congress determines such proscription is desirable “‘to make the amendments fully effective.’” *Morgan, supra*, at 648, 86 S.Ct. 1717 (quoting *Ex parte Virginia*, 100 U.S. 339, 345, 25 L.Ed. 676 (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 *M’Culloch v. Maryland*, 4 Wheat. 316, 342, 421, 4 L.Ed. 579 (1819). *Morgan*, 384 U.S., at 651, 86 S.Ct. 1717. 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

tions and the necessity of prophylactic measures, the Court has no basis on which to uphold Title II’s special-accommodation requirements.

1. Congress had previously attempted such an extension in the Voting Rights Act Amend-

ments of 1970, 84 Stat. 318, which sought to lower the voting age in state elections from 21 to 18. This extension was rejected, but in three separate opinions, none of which commanded a majority of the Court. See *infra*, at 2012.

the guarantees of the Fourteenth Amendment.” *Ibid*.

The *Morgan* opinion followed close upon our decision in *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (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, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), we confronted Congress’s inevitable expansion of the Fourteenth Amendment, as interpreted in *Morgan*, beyond the field of racial discrimination.¹ There Congress had sought, in the Religious Freedom Restoration Act¹⁵⁵⁶ of 1993, 107 Stat. 1488, 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.” 521 U.S., at 533, 117 S.Ct. 2157.

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, 31–32, 123 S.Ct. 1179, 155 L.Ed.2d 108 (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, 954–956, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (SCALIA, J., dissenting) (declining to apply the “undue burden” standard of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599, 116 S.Ct. 1589, 134 L.Ed.2d 809 (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, 119 S.Ct. 2199, 144 L.Ed.2d 575 (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,’” 527 U.S., at 646, 119 S.Ct. 2199 (quoting *Boerne, supra*, at 532, 117 S.Ct. 2157); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), where we held that ¹⁵⁷the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* (1994 ed. and Supp. III), imposed on state and local governments requirements “disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act,” 528 U.S., at 83, 120 S.Ct. 631; *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740,

146 L.Ed.2d 658 (2000), where we held that a provision of the Violence Against Women Act of 1994, 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,” 529 U.S., at 626, 120 S.Ct. 1740; and *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), where we said that Title I of the Americans with Disabilities Act of 1990(ADA), 104 Stat. 330, 42 U.S.C. §§ 12111–12117, raised “the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*,” 531 U.S., at 372, 121 S.Ct. 955.

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, 107 Stat. 9, 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.” 538 U.S., at 740, 123 S.Ct. 1972 (internal quotation marks omitted). 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

¹⁵⁵⁸standing 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, 239, 115 S.Ct. 1447, 131 L.Ed.2d 328 (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*, at 1993, by requiring that disabled persons be provid-

ed 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 ¹⁵⁵⁹meant. 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, 86 S.Ct. 1717. 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* 247 (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, 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 ¹⁵⁶⁰color 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." 17 Stat. 13. 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.² 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 sec-

tion 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).

¹⁵⁶¹However, *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, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (see discussion *infra*); *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (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, 311–312, 25 L.Ed. 664 (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, 318, 25 L.Ed. 667 (1880) (dictum in a racial discrimination case involving the same statute). See also *City of Rome v. United States*, 446 U.S.

2. Professor Tribe's treatise gives some examples of such measures that facilitate enforcement in the context of the Fifteenth Amendment:

"The Civil Rights Act of 1957, 71 Stat. 634, authorized the Attorney General to seek injunctions against interference with the right to vote on racial grounds. The Civil Rights Act of 1960, 74 Stat. 86, permitted joinder of

states as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systemic discrimination. The Civil Rights Act of 1964, 78 Stat. 241, expedited the hearing of voting cases before three-judge courts...." L. Tribe, *American Constitutional Law* 931, n. 5 (3d ed.2000).

156, 173–178, 100 S.Ct. 1548, 64 L.Ed.2d 119 (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, 439–441, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (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, 81, 21 L.Ed. 394 (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 l₅₆₂come within the purview of this provision. It is so clearly a provision for that race and that emer-

gency, 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. See 384 U.S., at 648, 86 S.Ct. 1717 (citing *Ex parte Virginia*); 384 U.S., at 651, 86 S.Ct. 1717 (citing *Strauder v. West Virginia* and *Virginia v. Rives*).³ 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, 147–148, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)) and the doctrine of so-called “substantive due process” (which holds that the Fourteenth Amendment's Due Process Clause protects unenumerated liberties, see generally₅₆₃ *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (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

3. A later case cited in *Morgan*, *James Everard's Breweries v. Day*, 265 U.S. 545, 558–563, 44 S.Ct. 628, 68 L.Ed. 1174 (1924), applied the more flexible standard of *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819), to the Eighteenth Amendment, which, in § 1, forbade “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States . . . for beverage purposes” and provided, in § 2, that “Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.” Congress had provided, in the Supplemental Prohibition Act of 1921, § 2, 42 Stat. 222, that “only spirituous and vinous liquor may be prescribed for medicinal pur-

poses.” That was challenged as unconstitutional because it went beyond the regulation of intoxicating liquors for beverage purposes, and hence beyond “enforcement.” In an opinion citing none of the Thirteenth, Fourteenth, and Fifteenth Amendment cases discussed in text, the Court held that the *M'Culloch v. Maryland* test applied. Unlike what is at issue here, that case did not involve a power to control the States in respects not otherwise permitted by the Constitution. The only consequence of the Federal Government's going beyond “enforcement” narrowly defined was its arguable incursion upon powers left to the States—which is essentially the same issue that *M'Culloch* addressed.

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, 91 S.Ct. 260, 27 L.Ed.2d 272 (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. See 400 U.S., at 124–130, 91 S.Ct. 260 (opinion of Black, J.); *id.*, at 153–154, 91 S.Ct. 260 (Harlan, J., concurring in part and dissenting in part); *id.*, at 293–296, 91 S.Ct. 260 (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in part and dissenting in part). 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.” *Id.*, at 130, 91 S.Ct. 260. And of course the *results* reached in *Boerne*, *Florida Prepaid*, *Kimel*, *Morrison*, and *Garrett* are consistent with the narrower compass afforded congressional ¹⁵⁶⁴regulation 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. See *Hibbs*, 538 U.S., at 741–743, 123 S.Ct. 1972 (SCALIA, J., dissenting); *Morrison*, 529 U.S., at 626–627, 120 S.Ct. 1740; *Morgan*, 384 U.S., at 666–667, 669, 670–671, 86 S.Ct. 1717 (Harlan, J., dissenting).⁴ 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. See *Morrison*, *supra*, at 625–626, 120 S.Ct. 1740. And I would not, of course, permit any congressional measures that violate other

4. Dicta in one of our earlier cases seemed to suggest that even *nonprophylactic* provisions could not be adopted under § 5 except in response to a State’s constitutional violations:

“When the State has been guilty of no violation of [the Fourteenth Amendment’s] provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process

of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.” *United States v. Harris*, 106 U.S. 629, 639, 1 S.Ct. 601, 27 L.Ed. 290 (1883).

I do not see the textual basis for this interpretation.

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.

¹⁵⁶⁵I 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.

* * *

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, 127, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973) (Burger, C. J., for the Court) (footnote omitted). 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.

I join THE CHIEF JUSTICE’s dissent. I agree that Title II of the Americans with Disabilities Act of 1990 cannot be a ¹⁵⁶⁶congruent and proportional remedy to the States’ alleged practice of denying disabled persons access to the courts. Not only did Congress fail to identify any evidence of such a practice when it enacted the ADA, *ante*, at 1998–2003, Title II regulates far more than the provision of access to the courts, *ante*, at 2003–2006. Because I joined the dissent in *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), and continue to believe that *Hibbs* was wrongly decided, I write separately only to disavow any reliance on *Hibbs* in reaching this conclusion.



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