

KENNEDY, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 99–1240

BOARD OF TRUSTEES OF THE UNIVERSITY OF
ALABAMA, ET AL., PETITIONERS *v.*
PATRICIA GARRETT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

[February 21, 2001]

JUSTICE KENNEDY, with whom JUSTICE O’CONNOR joins,
concurring.

Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves. Quite apart from any historical documentation, knowledge of our own human instincts teaches that persons who find it difficult to perform routine functions by reason of some mental or physical impairment might at first seem unsettling to us, unless we are guided by the better angels of our nature. There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.

One of the undoubted achievements of statutes designed to assist those with impairments is that citizens have an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with impairments or disabilities into the larger society. The law works this way because the law can be a teacher. So I do not doubt that the Americans with Dis-

abilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society.

It is a question of quite a different order, however, to say that the States in their official capacities, the States as governmental entities, must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens. It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws, particularly where the accusation is based not on hostility but instead on the failure to act or the omission to remedy. States can, and do, stand apart from the citizenry. States act as neutral entities, ready to take instruction and to enact laws when their citizens so demand. The failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause. See *Washington v. Davis*, 426 U. S. 229 (1976).

For the reasons explained by the Court, an equal protection violation has not been shown with respect to the several States in this case. If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations. This confirming judicial documentation does not exist. That there is a new awareness, a new consciousness, a new commitment to better treatment of those disadvantaged by mental or physical impairments does not establish that an absence of state statutory correctives was a constitutional violation.

It must be noted, moreover, that what is in question is not whether the Congress, acting pursuant to a power

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granted to it by the Constitution, can compel the States to act. What is involved is only the question whether the States can be subjected to liability in suits brought not by the Federal Government (to which the States have consented, see *Alden v. Maine*, 527 U. S. 706, 755 (1999)), but by private persons seeking to collect moneys from the state treasury without the consent of the State. The predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity. That predicate, for reasons discussed here and in the decision of the Court, has not been established. With these observations, I join the Court's opinion.