# SUPREME COURT OF THE UNITED STATES

No. 02–1667

TENNESSEE, PETITIONER *v.* GEORGE LANE ET AL.

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

[May 17, 2004]

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

In *Board of Trustees of Univ. of Ala.* v. *Garrett,* 531 U. S. 356 (2001), we held that Congress did not validly abrogate States' Eleventh Amendment immunity when it enacted Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. §§12111–12117. Today, the Court concludes that Title II of that Act, §§12131–12165, does validly abrogate that immunity, at least insofar "as it applies to the class of cases implicating the fundamental right of access to the courts." *Ante*, at 19. 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 (2003); *Garrett, supra,* at 363; *Kimel* v. *Florida Bd. of Regents,* 528 U. S. 62, 73 (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. While the Court correctly holds that Congress satisfied the first prerequisite, *ante*, at 6, I disagree with its conclusion that Title II is valid §5 enforcement legislation.

Section 5 of the Fourteenth Amendment grants Con-

gress the authority "to enforce, by appropriate legislation," the familiar substantive guarantees contained in §1 of that Amendment. U. S. Const., Amdt. 14, §1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). Congress' power to enact "appropriate" enforcement legislation is not limited to "mere legislative repetition" of this Court's Fourteenth Amendment jurisprudence. *Garrett, supra*, at 365. Congress may "remedy" and "deter" state violations of constitutional rights by "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Hibbs,* 538 U. S., at 727 (internal quotation 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 (quoting *Kimel, supra*, at 88); *City of Boerne* v. *Flores,* 521 U. S. 507, 525 (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 (quoting *City of Boerne, supra,* at 520). While the Court today pays lipservice to the "congruence and proportionality" test, see *ante*, at 8, 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.

The first step is to "identify with some precision the scope of the constitutional right at issue." *Garrett, supra,* at 365. This task was easy in *Garrett, Hibbs, Kimel,* and *City of Boerne* because the statutes in those cases sought to enforce only one constitutional right. In *Garrett*, for example, the statute addressed the equal protection right of disabled persons to be free from unconstitutional employment discrimination. *Garrett, supra,* at 365. See also *Hibbs, supra*, at 728 ("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 (right to be free from unconstitutional age discrimination in employment); *City of Boerne, supra,* at 529 (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 (discussing *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985)); see also *ante*, at 11.

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 11–12. 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 19, 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 (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 (1971); (3) the right of the criminal defendant to trial by a jury composed of a fair cross section of the community, *Taylor* v. *Louisiana*, 419 U. S. 522, 530 (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 (1986). *Ante*, at 11–12.

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. This step is crucial to determining whether Title II is a legitimate attempt to remedy or prevent actual constitutional violations by the States or an illegitimate attempt to rewrite the constitutional provisions it purports to enforce. Indeed, "Congress' §5 power is appropriately exercised *only* in response to state transgressions." *Ibid.* (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 12–15. 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 unsupportive of Title I's ban on employment discrimination. 531 U. S., at 368–372; see also *City of Boerne,* 521 U. S., at 530 (noting that the "legislative record lacks . . . modern instances of . . . religious bigotry"). The evidence here is likewise irrelevant to Title II's purported enforcement of Due Process access-to-the-courts rights.

Even if it were proper to consider this broader category of evidence, much of it does not concern *unconstitutional* action by the *States*. The bulk of the Court's evidence concerns discrimination by nonstate governments, rather than the States themselves.[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; *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank,* 527 U. S. 627, 640 (1999); *Kimel,* 528 U. S., at 89. Moreover, the majority today cites the same congressional task force evidence we rejected in *Garrett*. *Ante*, at 15 (citing *Garrett, supra*, at 379 (BREYER, J., dissenting), and 531 U. S., at 391–424 (App. C to opinion of BREYER, J., dis-

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[1] For further discussion of the propriety of this approach, see *infra*, at 14–15.

[2] *E.g., ante,* at 13 (citing *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U. S. 432 (1985) (irrational discrimination by city zoning board)); *ante,* at 14, n. 12 (citing *New York ex rel. Spitzer* v. *County of Delaware*, 82 F. Supp. 2d 12 (NDNY 2000) (ADA lawsuit *brought by State* against a county)); *ante,* at 13–14, n. 11 (citing four cases concerning local school boards' unconstitutional actions); *ante,* at 14, n. 13 (citing one case involving conditions in federal prison and another involving a county jail inmate); *ante*, at 15 (referring to "hundreds of examples of unequal treatment . . . by States *and their political subdivisions*" (emphasis added)).

senting) (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. 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. Therefore, 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 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]

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[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 (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 1. 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 2. The court conducted a preliminary hearing in the first-floor library to accommodate Lane's disability, App. to Pet. for Cert. 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

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 ("[W]e examine whether *Congress* identified a history and pattern" of constitutional violations); *ibid.* ("[t]he *legislative record* . . . fails to show that *Congress* did in fact identify a pattern" of constitutional violations) (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 14, n. 14 (citing *Ferrell* v. *Estelle*, 568 F. 2d 1128, 1132–1133 (CA5), 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]

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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 (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 violations. *Ante,* at 14–15, n. 14 (citing *Layton* v. *Elder*, 143 F. 3d 469 (CA8 1998) (post-ADA case finding ADA violations only); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525 (WD Ark. 1998) (same); *Galloway* v. *Superior Court*, 816 F. Supp. 12 (DC 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*, 561 N. Y. S. 2d 130 (County Ct. 1990) (finding violation of state constitution only); *DeLong* v. *Brumbaugh*, 703 F. Supp. 399 (WD Pa. 1989) (statute upheld against facial constitutional challenge; Rehabilitation Act of 1973 violations only); *Pomerantz* v. *Los Angeles County*, 674 F. 2d 1288 (CA9 1982) (Rehabilitation Act of 1973 claim; challenged jury-service statute later

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 15–16; (2) testimony before a House subcommittee regarding the "physical inaccessibility" of local courthouses, *ante*, at 16; 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. Civil Rights Commission Report, concerns only physical barriers to access, and does not address whether States either provided means to overcome those barriers or alternative locations for proceedings involving disabled persons. Cf., n. 4, *supra* (de-

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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. 4468 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").

scribing alternative means of access offered to respondent Lane).

Based on the majority's description, *ante,* at 16, the report of the ADA Task Force on the Rights and Empowerment of Americans with Disabilities sounds promising. But the report itself says nothing about any disabled person being denied access to court. The Court thus apparently relies solely on a general citation to the Government's Lodging in *Garrett*, O. T. 2000, No. 99–1240 which, amidst thousands of pages, contains only a few anecdotal handwritten reports of physically inaccessible courthouses, again with no mention of whether States provided alternate means of access. This evidence, moreover, was submitted not to Congress, but only to the task force, which itself made no findings regarding disabled persons' access to judicial proceedings. Cf. *Garrett*, 531 U. S., at 370–371 (rejecting anecdotal task force evidence for similar reasons). As we noted in *Garrett*, "had Congress truly understood this [task force] information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings." *Id.*, at 371. 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.,

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[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 18 (quoting 42 U. S. C. §12101(a)(3) (emphasis added by the Court)). However, one does not usually refer to the 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.

at 641 (observing that Senate Report on Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act) "contains no evidence that unremedied patent infringement by States had become a problem of national import"). To the contrary, the Senate Report on the ADA observed that "[a]ll states currently mandate accessibility in newly constructed state-owned public buildings." S. Rep. No. 101–116, p. 92 (1989).

Even if the anecdotal evidence and conclusory statements relied on by the majority could be properly considered, the mere existence of an architecturally "inaccessible" courthouse—*i.e.*, one a disabled person cannot utilize without assistance—does not state a constitutional violation. A violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding. We have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance. Indeed, the fact that the State may need to assist an individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding. Nor does an "inaccessible" courthouse violate the Equal Protection Clause, unless it is irrational for the State not to alter the courthouse to make it "accessible." But financial considerations almost always furnish a rational basis for a State to decline to make those alterations. See *Garrett,* 531 U. S.*,* at 372 (noting that it would be constitutional for an employer to "conserve scarce financial resources" by hiring employees who can use existing facilities rather than making the facilities accessible to disabled employees). Thus, evidence regarding inaccessible courthouses, because it is not evidence of constitutional violations, provides no basis to abrogate States' sovereign immunity.

The near-total lack of actual constitutional violations in the congressional record is reminiscent of *Garrett*, wherein

we found that the same type of minimal anecdotal evidence "f[e]ll far short of even suggesting the pattern of unconstitutional [state action] on which §5 legislation must be based." *Id.*, at 370. See also *Kimel,* 528 U. S., at 91 ("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 ("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)).

The barren record here should likewise be fatal to the majority's holding that Title II is valid legislation enforcing due process rights that involve access to the courts. This conclusion gains even more support when Title II's nonexistent record of constitutional violations is compared with legislation that we have sustained as valid §5 enforcement legislation. See, *e.g., Hibbs,* 538 U. S., at 729–732 (tracing the extensive legislative record documenting States' gender discrimination in employment leave policies); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 312–313 (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.[9]

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[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 18 (quoting *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 736 (2003)). However, this Court's precedents attest that Congress may not dispense with the required showing altogether simply because it

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; *Garrett, supra,* at 372–373.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U. S. C. §12132. A disabled person is considered "qualified" if he "meets the essential eligibility requirements" for the receipt of the entity's services or participation in the entity's programs, "*with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services.*" §12131(2) (emphasis added). The ADA's findings make clear that Congress believed it was attacking "discrimination" in all areas of public services, as well as the "discriminatory effect" of "architectural, transportation, and communication barriers." §§12101(a)(3), (a)(5). In sum, Title II requires, on

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purports to enforce due process rights. See *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank,* 527 U. S. 627, 645–646 (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 (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.*

pain of money damages, special accommodations for disabled persons in virtually every interaction they have with the State.

"Despite subjecting States to this expansive liability," the broad terms of Title II "d[o] nothing to limit the coverage of the Act to cases involving arguable constitutional violations." *Florida Prepaid,* 527 U. S.*,* at 646. By requiring special accommodation and the elimination of programs that have a disparate impact on the disabled, Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination. We invalidated Title I's similar requirements in *Garrett*, observing that "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." 531 U. S., at 368; *id.,* at 372–373 (contrasting Title I's reasonable accommodation and disparate impact provisions with the Fourteenth Amendment's requirements). Title II fails for the same reason. Like Title I, Title II may be laudable public policy, but it cannot be seriously disputed that it is also an attempt to legislatively "redefine the States' legal obligations" under the Fourteenth Amendment. *Kimel*, 528 U. S., at 88.

The majority, however, claims that Title II also vindicates fundamental rights protected by the Due Process Clause—in addition to access to the courts—that are subject to heightened Fourteenth Amendment scrutiny. *Ante*, at 11 (citing *Dunn* v. *Blumstein,* 405 U. S. 330, 336–337 (1972) (voting); *Shapiro* v. *Thompson,* 394 U. S. 618, 634 (1969) (right to move to a new jurisdiction); *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535, 541 (1942) (marriage and procreation)). But Title II is not tailored to provide prophylactic protection of these rights; instead, it applies to any service, program, or activity provided by any entity. Its provisions affect transportation, health, education, and recreation programs, among many others, all of

which are accorded only rational-basis scrutiny under the Equal Protection Clause. A requirement of accommodation for the disabled at a state-owned amusement park or sports stadium, for example, bears no permissible prophylactic relationship to enabling disabled persons to exercise their fundamental constitutional rights. Thus, as with Title I in *Garrett*, the Patent Remedy Act in *Florida Prepaid*, the Age Discrimination in Employment Act of 1967 in *Kimel*, and the RFRA in *City of Boerne*, all of which we invalidated as attempts to substantively redefine the Fourteenth Amendment, it is unlikely "that many of the [state actions] affected by [Title II] ha[ve] any likelihood of being unconstitutional." *City of Boerne, supra*, at 532. Viewed as a whole, then, there is little doubt that Title II of the ADA does not validly abrogate state sovereign immunity.[10]

The majority concludes that Title II's massive overbreadth can be cured by considering the statute only "as it applies to the class of cases implicating the accessibility of judicial services." *Ante,* at 20 (citing *United States* v. *Raines,* 362 U. S. 17, 26 (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 nor-

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[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 (distinguishing *City of Boerne*, *Kimel* v. *Florida Bd. of Regents,* 528 U. S. 62 (2000), and *Garrett* on this ground). Similarly, in cases involving enforcement of the Fifteenth Amendment, we upheld "limited remedial scheme[s]" that were narrowly tailored to address massive evidence of discrimination in voting. *Garrett,* 531 U. S., at 373 (discussing *South Carolina* v. *Katzenbach,* 383 U. S. 301 (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.

mally 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 the scope of the constitutional right it purported to enforce. If we had arbitrarily constricted the scope of the statutes to match the scope of a core constitutional right, those cases might have come out differently. In *Garrett*, for example, Title I might have been upheld "as applied" to irrational employment discrimination; or in *Florida Prepaid*, the Patent Remedy Act might have been upheld "as applied" to intentional, uncompensated patent infringements. It is thus not surprising that the only authority

cited by the majority is *Raines*, *supra*, a case decided long before we enunciated the congruence-and-proportionality test.[11]

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

Even in the limited courthouse-access context, Title II does not properly abrogate state sovereign immunity. As demonstrated in depth above, Congress utterly failed to identify any evidence that disabled persons were denied constitutionally protected access to judicial proceedings. Without this predicate showing, Title II, even if we were to hypothesize that it applies only to courthouses, cannot be

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[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. 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. The Court upheld the statute as applied to respondents and declined to entertain the facial challenge. *Id.*, at 24–26. 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.

viewed as a congruent and proportional response to state constitutional violations. *Garrett*, 531 U. S., at 368 ("Congress' §5 authority is appropriately exercised only in response to state transgressions").

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

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

In this respect, Title II is analogous to the Patent Remedy Act at issue in *Florida Prepaid.* That statute subjected States to monetary liability for any act of patent infringement. 527 U. S., at 646–647. Thus, "Congress did nothing to limit" the Act's coverage "to cases involving arguable [Due Process] violations," such as when the infringement was nonnegligent or uncompensated. *Ibid.*

Similarly here, Congress has authorized private damages suits against a State for merely maintaining a courthouse that is not readily accessible to the disabled, without regard to whether a disabled person's due process rights are ever violated. Accordingly, even as applied to the "access to the courts" context, Title II's "indiscriminate scope offends [the congruence-and-proportionality] principle," particularly in light of the lack of record evidence showing that inaccessible courthouses cause actual Due Process violations. *Id.,* at 647.[12]

For the foregoing reasons, I respectfully dissent.

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[12] The majority's invocation of *Hibbs* to justify Title II's overbreadth is unpersuasive. See *ante*, at 22, 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. The Court found that the 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 violations and the necessity of prophylactic measures, the Court has no basis on which to uphold Title II's special-accommodation requirements.