2004

The Section 5 Power after Tennessee v. Lane

William D. Araiza
Brooklyn Law School, bill.araiza@brooklaw.edu

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The last two terms of the Supreme Court have witnessed important developments in the Court's approach to Congress' power to enforce the Fourteenth Amendment (the so-called "Section 5" power).[1] Prior to the 2002-2003 term, the Court had never upheld a Section 5-based statute using the "congruence and proportionality" standard it enunciated in the 1997 case of *City of Boerne v. Flores*.[2] Instead, in a string of post-*Boerne* cases, the

* Professor of Law and Richard A. Vachon, S.J., Fellow, Loyola Law School, Los Angeles. The author wishes to thank David Ahout, Andrew Miller, Stephen Ram, and Adiv Zelony for fine research assistance.

1. Congress' power to enforce the Fourteenth Amendment is found in Section 5. U.S. CONST. amend. XIV, § 5.

2. 521 U.S. 507, 520 (1997).

Court applied that standard to find that Congress had exceeded its power to enact "appropriate" legislation to enforce the Fourteenth Amendment's guarantees of due process and equal protection.[3]

Those post-*Boerne* cases reflected the Court's continuing suspicion of congressional power and, conversely, its solicitude for state sovereignty.[4] In particular, they revealed the Court's skepticism that serious constitutional violations were afoot that justified remedial legislation, and that Congress had enacted legislation that was a proportionate remedy for the violations that did exist. The Court's approach to the first of these issues reflected its insistence on primacy in defining constitutional rights; in turn, the second issue revealed unwillingness to defer to Congress' own decisions how to wield its remedial power. A statement in one of these cases, *Kimel v. Board of Regents*, encapsulates the Court's approach: after determining that the challenged statute, the Age Discrimination in Employment Act, sought to safeguard the equal protection rights of a non-suspect class using remedies that struck the Court as unnecessarily harsh, the Court concluded that the statute "was an unwarranted response to a perhaps inconsequential problem."[5]

Still, the post-*Boerne* cases left unanswered important questions about the Court's new Section 5 jurisprudence. Most importantly, none of them had considered the legitimate scope of legislation benefiting a suspect class.[6] Additionally, with the exception of *Boerne* itself, which considered a statute that was in many ways *sui generis*,[7] none of these cases considered

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3. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (equal protection rights of the disabled); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (equal protection rights of the elderly); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (property rights). In another post-*Boerne* case, *United States v. Morrison*, 529 U.S. 598 (2000), the Court struck down, as inappropriate Section 5 legislation, the federal Violence Against Women Act, on the ground that it regulated the conduct of private parties rather than the state. Because *Morrison* based its result solely on the proposition that Section 5 did not authorize Congress to regulate private conduct, it will not be considered in detail since Title II clearly applies to state actors. *Id.*

4. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (announcing a new doctrine that Congress may not commandeer state governmental processes); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that Congress' Article I power does not extend to abrogating state sovereign immunity for retrospective relief in federal court); Alden v. Maine, 527 U.S. 706 (1999) (extending the *Seminole Tribe* rule to suits against states in state court); Idaho v. Coeur d'Alene Tribe, 526 U.S. 261 (1997) (barring relief under *Ex parte Young* exception to Eleventh Amendment when the requested relief trenches on state's sovereign interests).

5. 528 U.S. 62, 89 (2000).

6. *See* William D. Araiza, *ENDA Before It Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*, 22 B. C. THIRD WORLD L.J. 1, 5 n.27 (2002) (noting the unanswered Section 5 questions after *Boerne*, *Florida Prepaid*, *Kimel*, and *Garrett*) [hereinafter "*ENDA*"]; *see also supra* note 3 (discussing the relevance of *Morrison*).

7. Concededly, *Boerne* considered legislation designed to protect religious freedom – surely a fundamental right. *Boerne*, 521 U.S. at 511. However, the statute struck down in that case was so obviously aimed at overturning Supreme Court precedent, thus not "enforcing" the Fourteenth Amendment but instead interpreting it, that the Court had little difficulty finding Congress had exceeded its Section 5 authority. *Id.* at 536. There was no dissent in *Boerne* on the question of the application of "congruence and proportionality" standard to the statute. The only dissents, by Justices O'Connor, Souter, and Breyer, dealt with the substance of the underlying constitutional rule

legislation protecting a fundamental constitutional value. Thus, even after these cases were decided, the question remained how the Court would respond to legislation that sought to enforce equality and substantive rights the Court itself had determined to be of special moment.

The Court began to answer that question in 2003. That year, in *Nevada Department of Human Resources v. Hibbs*,[8] the Court upheld the Family and Medical Leave Act (FMLA) of 1993 as appropriate Section 5 legislation to enforce the equal protection rights of women. The FMLA required employers, including states, to provide employees with leave time to care for sick family members or new children.[9] The Court upheld application of the FMLA to the states on the theory that inappropriate gender stereotypes cast women as the primary family caregivers, thus as less reliable employees, and the FMLA combated such stereotypes by giving men and women equal rights to take on that traditionally gendered role.[10]

A year after *Hibbs*, in *Tennessee v. Lane*,[11] the Court upheld Title II of the Americans With Disabilities Act (ADA) against a Section 5 challenge. Title II of the ADA prohibits discrimination against the disabled in the provision of "the services, programs, or activities of a public entity."[12] The Court upheld application of Title II to the states as applied to disability discrimination in the provision of access to courts, based on the importance of the right to access courts and evidence of state discrimination in that regard.[13] Thus, *Hibbs* and *Lane* upheld statutes that attempted to safeguard, respectively, the equality rights of a quasi-suspect class,[14] and rights that the Court considered "basic constitutional guarantees, infringements of which are subject to more searching judicial review."[15]

For all its importance as the case that broke the states' Section 5 winning streak, *Hibbs* can be seen in retrospect as a relatively easy case. The FMLA is a narrow statute, in the sense that it confined itself to the use

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that was the subject of the legislation. *See id.* at 544 (O'Connor, J., dissenting) (disagreeing with the underlying substantive rule); *id.* at 565 (Souter, J., dissenting) (expressing doubts about the underlying rule); *id.* at 566 (Breyer, J., dissenting) (expressing doubts about the underlying rule).

8. 538 U.S. 721 (2003).

9. 29 U.S.C. §§ 2601-2612 (1998).

10. *See Hibbs*, 538 U.S. at 936-37.

11. 124 S. Ct. 1978 (2004).

12. 42 U.S.C. § 12132 (2004). By contrast, in *Garrett*, the Court struck down Title I of the ADA, which prohibited much employment discrimination based on disability. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001).

13. *Lane*, 124 S. Ct. at 1994. The Court expressed no opinion on other applications of Title II. For a discussion of this as-applied approach to statutes challenged on Section 5 grounds, *see infra* Part III (A).

14. *See* Craig v. Boren, 429 U.S. 190 (1976) (establishing gender as a quasi-suspect class); *see also* United States v. Virginia, 518 U.S. 515, 546 (1996) (requiring that gender classifications be supported by "an exceedingly persuasive justification").

15. *Lane*, 124 S. Ct. at 1988.

of a single classification tool (gender) in a discrete regulatory field (employment leave for family reasons). Moreover, Chief Justice Rehnquist's majority opinion relied heavily on the fact that the FMLA's Section 5 justification rested squarely on the fact that the statute targeted gender discrimination, a classification that receives judicial heightened scrutiny. According to the Court, the extra scrutiny courts gave such classifications made "it . . . easier for Congress to show a pattern of state constitutional violations."[16] Given this lower threshold, the Court found the FMLA constitutional through what at least in theory was a relatively straightforward application of the doctrine from cases such as *Boerne* and *Kimel*, despite the somewhat unusual gender equality theory on which it was based[17] and the admittedly more generous interpretation of the congressional evidence of the need for Section 5 legislation.[18]

Lane, however, raised more difficult questions for the Court. While Title II of the ADA applied to rights the Court has considered especially important, such as the right of access to the courts, it also applied to every service or program offered by a state.[19] Thus, Title II cut across far more regulatory areas than the FMLA (and indeed, any of the statutes the Court had considered since *Boerne*). As a consequence, Title II could have been feasibly justified as general protection for the equal protection rights of the disabled.[20] So understood, Title II was broader both in its regulatory reach and its potential constitutional basis; its breadth required the *Lane* Court to determine both how to frame the issue before it and, once it framed that issue as one of judicial access, how to determine the relevance of disability discrimination in areas other than judicial access. The Court's approach to these questions is important to the Section 5 doctrine generally due to the very nature of the congruence and proportionality test. Because that test is – literally – a proportionality test that requires some ends-means fit, how broadly or how narrowly the Court conceptualizes the proper unit of analysis will matter in every Section 5 case.[21]

Beyond answering these important questions, the Court in *Lane* also suggested several other potentially significant changes in its approach to Section 5 issues. First, the majority credited evidence of discrimination submitted to a congressionally-created task force, not evidence submitted directly to Congress, let alone evidence transmuted into formal congressional findings.[22] Second, in dicta relegated to a footnote, the

16. *Hibbs*, 538 U.S. at 736.

17. *Id.* at 737-39.

18. *See id.* at 730-34.

19. 42 U.S.C. § 12132 (2004).

20. *See Lane*, 124 S. Ct. at 1988 ("Title II . . . seeks to enforce [the Fourteenth Amendment's] prohibition on irrational disability discrimination.").

21. *See* discussion *infra* Part II (A) (discussing the Court's use of evidence dealing with matters other than disability discrimination with regard to courthouse access); discussion *infra* Part III (A) (discussing the Court's use of an as-applied analysis in upholding the statute).

22. *See Lane*, 124 S. Ct. at 1991 (citing Task Force on the Rights and Empowerment of Americans With Disabilities, *From ADA to Empowerment* (Oct. 12, 1990)).

majority suggested that evidence of private party conduct was relevant when considering the need for legislation aimed at state actors.[23] Third, it stated, rather casually although with a potentially important caveat, that Congress had the power to ban discriminatory effects in order to deter or remedy actions that had a discriminatory motive.[24]

Finally, Justice Scalia, writing separately from the other three dissenters, made an important statement that will surely bear on future Section 5 cases. Justice Scalia rejected *Boerne*'s congruence and proportionality standard as too malleable and subjective.[25] He then announced that, with the important exception of statutes dealing with racial discrimination, he would henceforth vote to confine congressional power under Section 5 to statutes that essentially provided causes of action for violations of the judicially-announced constitutional rule, or that would otherwise directly facilitate judicial enforcement.[26] With regard to legislation remedying race discrimination, however, Justice Scalia went in the other direction,[27] announcing his intention to apply a modified version of the deferential test espoused in *Katzenbach v. Morgan*.[28]

This Article considers these important moves by the Court and individual justices in *Lane*. After introducing the case, it begins its analysis in Part I with an examination of how the Court characterized the constitutional violation Congress sought to remedy in Title II of the ADA. Part II then considers how the Court construed the evidence of such constitutional violations. Part III considers the problem posed by the breadth of the statute in relation to the constitutional violations the Court focused on. These first three parts reflect the standard Section 5 analysis the Court has engaged in under *Boerne*: determining the scope of the constitutional violation targeted by the legislation, considering any evidence suggesting that the problem was worse than what was indicated by the Court's own jurisprudence, and then comparing the result to the statute to determine whether the latter is "congruent and proportional."[29] These first three Parts examine whether *Lane* suggests a different Court approach to these issues. Part IV considers the Court's and Justice Scalia's approaches in light of their potential effect on other likely future Section 5 issues. The

23. *Id.* at 1991 n.16.

24. *See id.* at 1986 ("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.").

25. *See id.* at 2007-08 (Scalia, J., dissenting).

26. *See id.* at 2007-13.

27. *Id.* at 2011-12.

28. 384 U.S. 641 (1966).

29. *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001) (first step); *id.* at 368 (second step); *id.* at 372-73 (third step).

Article concludes in Part V by evaluating *Lane*'s place in the Court's unsteadily evolving Section 5 jurisprudence.

INTRODUCTION: THE *LANE* CASE

Lane involved claims of disabled individuals that were unable to attend judicial proceedings.[30] George Lane, a paraplegic, attempted to access a second-floor courtroom in the Polk County, Tennessee, courthouse in order to answer criminal charges.[31] Because the courthouse did not have an elevator, Lane had to leave his wheelchair and crawl up a stairway to attend court sessions.[32] He refused to do this again when required to attend later proceedings, and also refused an offer by deputies to carry him up the stairs.[33] At least one session in his case was held in a ground floor library that Lane alleged was not generally accessible to the public.[34] Beverly Jones, the second plaintiff, is also a paraplegic.[35] She requested modifications to Tennessee courthouses to allow her to conduct business as a court reporter.[36] Both plaintiffs sued Tennessee and a number of counties under Title II, seeking both damages and injunctive relief.[37]

The district court refused to dismiss the case on Eleventh Amendment grounds, and the Sixth Circuit affirmed that refusal.[38] The Sixth Circuit based its decision on that court's *en banc* holding in *Popovich v. Cuyahoga County Court of Common Pleas*,[39] that Title II validly abrogated state sovereign immunity to the extent it protected due process rights. *Popovich* also held, though, that Title II's abrogation was invalid to the extent that it implicated equal protection rights. The appellate court in *Lane* remanded the case to the district court to determine whether in fact the plaintiffs had suffered violations of their due process rights.

The Supreme Court affirmed the Sixth Circuit.[40] It stated first that, as presented in that case, Title II could be viewed as protecting the due process right to judicial access or the more general equal protection rights of the disabled.[41] The Court proceeded, without explicitly announcing it, to consider Title II only as it applied to the former.[42] It then presented the

30. The facts and procedural history are taken from the Court's opinions as well as the briefs in the case. *See Lane*, 124 S. Ct. at 1982.

31. *Id.*

32. *Id.* at 1983.

33. *Id.*

34. Petitioner's Reply Br. at 3, Tennessee v. Lane, 124 S. Ct. 1978 (2004) (No. 02-1667).

35. *Lane*, 124 S. Ct. at 1982.

36. Br. for the Private Resp'ts at 6, Tennessee v. Lane, 124 S. Ct. 1978 (2004) (No. 02-1667).

37. *Id.* at 6-7.

38. *Lane*, 124 S. Ct. at 1983.

39. 276 F.3d 808 (6th Cir. 2002) (en banc), *cert. denied*, 530 U.S. 812 (2002).

40. *Lane*, 124 S. Ct. at 1994.

41. *See Lane*, 124 S. Ct. at 1988.

42. *Id.*

evidence it considered relevant to that application of Title II.[43] That evidence consisted of state discrimination against the disabled across a variety of subjects, including, but not limited to, the provision of judicial services.[44] Following the Court's settled Section 5 doctrine, the Court then considered whether Title II's provisions were congruent and proportional to the constitutional right it sought to vindicate.[45] In considering Title II's fit with that underlying right, the Court explicitly stated that it was limiting its holding to Title II's vindication of that right, rather than to Title II overall.[46] It decided that, as applied to judicial access, Title II satisfied the congruence and proportionality test, since its requirement of reasonable accommodation tracked the Court's own constitutional rule that cost and convenience considerations did not warrant states in denying access to judicial processes.[47]

I. DELINEATION OF THE RIGHT

Lane required the Court to decide the grounds on which to evaluate Title II's Section 5 basis. At its most basic, the case offered the Court the option of considering Title II as an enforcement of the equal protection rights of the disabled, or, alternatively, as an enforcement of a variety of due process rights the deprivation of which, in the Court's words, were "subject to more searching judicial review."[48] As examples of such rights the Court cited *Dunn v. Blumstein*,[49] which protected the right to vote, *Shapiro v. Thompson*,[50] which has come to be understood as protecting an incompletely defined "right to travel," and *Skinner v. Oklahoma*,[51] which protected rights to procreation.[52] The Court chose the due process basis, and in particular, based on the facts of the case before it, the due process right of access to judicial proceedings.[53]

As a tactical matter this choice makes eminent sense. The due process rights the Court cited Title II as protecting are considered "basic,"

43. *See id.* at 1989-92.

44. *Id.*

45. *See id.* at 1992-94.

46. *See id.* at 1993.

47. *See id.* at 1993-94.

48. *Id.* at 1988.

49. 405 U.S. 330 (1972) (striking down one-year state and three-month county residence requirements for voter registration).

50. 394 U.S. 618 (1969) (striking down residency requirements for qualification for welfare assistance).

51. 316 U.S. 535 (1942) (striking down law mandating sterilization after commission of multiple crimes of certain types).

52. *See Lane*, 124 S. Ct. at 1988.

53. *Id.*

"infringements of which are subject to more searching judicial review."[54] By contrast, state action burdening the disabled as a class receives only rational basis scrutiny, even if the Court has previously found one disability-related classification to fail rational basis review.[55] Thus, in choosing the grounds on which to consider the statute, the Court in *Lane* followed the logic driving *Hibbs* the year before – that Congress will have an easier time justifying a Section 5 statute when it is aimed at a right enjoying more judicial protection under Section 1.[56] That choice also meant that the Court could avoid a more direct collision with *Garrett* and *Kimel*, both of which had established stringent requirements for Section 5 legislation enforcing rights the Court itself had protected only through the rational basis test.[57] Chief Justice Rehnquist's dissent impliedly acquiesced in that choice,[58] even though a later part of his critique targeted the entire idea of testing Title II as applied to a particular right.[59]

The Court's approach to this preliminary issue suggests the caution with which Justice Stevens wrote the opinion. Unquestionably, this caution was driven by the need to retain the vote of Justice O'Connor, who had joined the majority opinions in *Garrett*,[60] *Florida Prepaid* [61] and *Morrison*,[62] and who authored the opinion in *Kimel*.[63] At the same time, the latitude Justice

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54. *Id.* It bears repeating that Title II also protects other, less weighty, rights. At this stage of its opinion the Court simply ignored those other rights.

55. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

56. *See Hibbs*, 123 S. Ct. at 1982; *see also Lane*, 124 S. Ct. at 1992 (emphasizing the rationale in *Hibbs* that "because the FMLA was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, 'it was easier for Congress to show a pattern of state constitutional violations' than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review").

57. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) ("The legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000) ("The [ADEA] . . . prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.").

58. *See Lane*, 124 S. Ct. at 1998.

> In this case the task of identifying the scope of the relevant constitutional protection is more difficult [than in *Garrett*, *Hibbs*, *Kimel* and *City of Boerne*] 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. 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, the proper inquiry focuses on the scope of those due process rights.

Id. (Rehnquist, C.J., dissenting) (internal quotation and citations omitted).

59. *See Lane*, 124 S. Ct. at 2004 (Rehnquist, C.J., dissenting) (criticizing the Court for upholding Title II as applied to courthouse access, rather than considering Title II in its entirety); *see also* discussion *infra* Part III (A).

60. *Garrett*, 531 U.S. at 358.

61. Fla. Prepaid Postsecondary Educ. Expense Bd. V. Coll. Sav. Bank, 527 U.S. 627, 629 (1999).

62. United States v. Morrison, 529 U.S. 598, 600 (2000).

63. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 65 (2000).

Stevens enjoyed to base the opinion on the right to judicial access meant that he was explicitly able to leave undecided the equal protection ground.[64]

The Court's choice raises issues about the proper approach to the Section 5 power. First, as noted above, Chief Justice Rehnquist protested the very idea of limiting Section 5 review to a particular application of a given statute.[65] Second, the Court's approach raises issues of evidentiary relevance. In particular, while the Court confined its holding to Title II's application to courthouse discrimination, it cited evidence of disability-based discrimination in areas such as marriage and voting as proof of the problem Title II sought to combat. The next part of this Article discusses this interplay between the scope of the Court's review and the relevance of particular pieces of evidence supporting the need for the statute.[66]

II. THE EVIDENTIARY RECORD

After identifying the right at issue as primarily a due process right to judicial access, the Court then proceeded to consider the evidence of discrimination. The Court did not mince its words; its analysis of the evidentiary record began as follows: "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."[67] This Part of the Article begins by examining the Court's treatment of disability-based discrimination by states. It then considers the Court's approach to evidence of discrimination by non-state entities. It concludes by evaluating *Lane*'s approach to the evidence, and what that approach means for the Court's evolving understanding of Section 5.

A. Evidence of State Discrimination

The Court began its evidentiary inquiry by citing legal burdens on disabled persons' ability to participate in government-run programs and services.[68] It cited a variety of legal sources: state statutes that simply treated disabled persons differently with regard to services such as marriage and voting, Supreme Court decisions finding unconstitutional disability discrimination (all of the cases which dealt with mental disabilities), and cases where lower courts had found discrimination based on a variety of

64. *See Lane*, 124 S. Ct. at 1994 n.20.
65. *See* discussion *infra* Part III (A).
66. *See* discussion *infra* Part II.
67. *Lane*, 124 S. Ct. at 1989.
68. *Id.*

disabilities and a variety of contexts, including prisons, schools, and voting.[69]

Chief Justice Rehnquist's dissent took issue with this part of the majority's evidentiary presentation. He argued that the cited evidence was irrelevant to Title II, since much of it dealt with the provision of services other than judicial access,[70] and reflected discrimination that was nevertheless constitutionally permissible.[71]

After concluding that the above evidence indicated persistent disability-based discrimination despite state and preexisting federal anti-discrimination legislation,[72] the Court then narrowed its evidentiary focus to judicial proceedings and courthouses.[73] The Court cited evidence from a 1983 report from the U.S. Civil Rights Commission that concluded: "76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities . . . ."[74] They also cited direct testimony to Congress about the physical inaccessibility of courthouses,[75] as well as examples of disability-based courthouse exclusion uncovered by a congressionally-charged task force.[76]

Chief Justice Rehnquist's dissent also criticized this part of the majority's evidence. He characterized the Civil Rights Commission's 76% figure as "a single conclusory sentence" that might not have even included courthouses.[77] He attacked the reference to direct congressional testimony as merely comprising the statements of two witnesses, "neither of whom reported being denied the right to be present at constitutionally protected court proceedings."[78] Similarly, Chief Justice Rehnquist criticized the congressional task force's evidence as anecdotal and unclear with regard to whether the evidence showed actual exclusion.[79]

At stake in this dispute is the future of *Garrett*'s critical inquiry into the evidentiary support for Section 5 legislation. In *Garrett*, the Court engaged in an extremely close review of the evidentiary support for Title I of the ADA, which restricted disability-based employment discrimination.[80] That inquiry led the *Garrett* Court to express concern over what it saw as the relatively small number of discrimination incidents identified by Congress

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69. *Id.* at 1989-1990.

70. *Id.* at 1999 (Rehnquist, C.J., dissenting).

71. *Id.* at 2000 n.3 (Rehnquist, C.J., dissenting).

72. *Id.* at 1990.

73. *Id.*

74. *Id.*

75. *Id.* at 1991.

76. *Id.*

77. *Id.* at 1997, 2001 (Rehnquist, C.J., dissenting).

78. *Id.*; *see also id.* at 2001 n.7.

79. *Id.* at 2001 (Rehnquist, C.J., dissenting) (describing this evidence as "a few anecdotal handwritten reports of physically inaccessible courthouses, again with no mention of whether States provided alternate means of access").

80. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

itself that did not necessarily reflect *unconstitutional* discrimination,[81] given the rational-basis standard applicable to disability discrimination.[82] Further cause for concern was the fact that most of these incidents did not pertain to employment, which was the subject of Title I,[83] and no precise factual findings by Congress relating to the existence of unconstitutional state-sponsored employment discrimination based on disability were presented.[84]

Lane's favorable evaluation of the evidence revealed a significantly more lenient evidentiary standard than *Garrett*. First, *Lane*'s overall appraisal of the evidence suggests a stronger presumption in favor of Congress than does *Garrett* and cases before it. This difference is a matter not of formal doctrine, but rather of the Court's general predisposition, what Justice Frankfurter in an analogous context referred to as a "mood."[85] Justice Frankfurter was referring to the standard of judicial review of administrative action that Congress had mandated in the Administrative Procedure Act.[86] While that topic is seemingly far from issues of congressional power under Section 5, it is nevertheless analogous because, like the *Lane* Court's review of the evidence, it must be examined not just for what the Court *says* it is doing but for what the Court actually *does*. Standards of review – whether of agency action or congressional work-product – are accorded true meaning not when they are explicated, but when they are applied.

Thus, while *Lane*'s actual review of the evidence is not marked by any self-conscious alteration of pre-existing law,[87] that review surely reveals a more lenient mood than does the analogous review in *Garrett* and previous cases. For example, compare *Lane*'s approving citation of a report's finding that "76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities"[88] and of a task force's evidence of "numerous examples" of "exclusion" of disabled

81. *See id.* at 368.

82. *See id.* at 368-69.

83. *See id.* at 369.

84. *See id.* That critical inquiry also included skepticism about the fact that many of the examples of state-sponsored discrimination derived not from congressional investigation but from the report of a congressionally-assigned task force, which itself made no findings about discrimination. *See id.* at 379. This aspect of *Garrett*'s fact finding inquiry was also at issue in *Lane*, and is discussed below. *See infra* notes 90-96 and accompanying text. Finally, *Garrett* took issue with the fact that many examples of disability discrimination were from the private sector. This aspect too arose in *Lane*. *See infra* notes 90-96 and accompanying text.

85. *See* Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 487 (1951).

86. *Id.* at 474.

87. By contrast, the Court's determination of what evidence is actually relevant is changed in *Lane*. *See infra* notes 88-126 and accompanying text.

88. *Lane*, 124 S. Ct. at 1990.

people from judicial services with *Garrett*'s dismissal of similarly general examples of disability-based employment discrimination by states:

> Several of these incidents undoubtedly evidence an unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA. Whether they were [unconstitutionally] irrational under our decision in *Cleburne* is more debatable, particularly when the incident is described out of context. But even if it were to be determined that each incident upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.[89]

This difference between *Lane* and previous cases cannot be reduced to a formula, or to a change in formal doctrine. It is, instead, a change in the Court's "mood." But it is no less important, both for its implications for future Supreme Court cases and the implicit message it sends to lower courts.

Lane's evidentiary review also reveals more explicit changes in the Court's review of evidence supporting a Section 5 statute, which complement its more generous review mood. First, *Lane* did not confine its review to examples of clearly unconstitutional state conduct, as had *Garrett* and cases before it.[90] *Lane* described state conduct in this area as marked by "pervasive unequal treatment," "prohibiti[ons on] persons engaging in activities such as marriage and serving on juries," "a pattern of unequal treatment,"[91] and a "pattern of disability discrimination."[92] While the Court did point to some state conduct that had been adjudged unconstitutional,[93] its reliance on other actions as well indicates a shift from *Garrett*'s more stringent evidentiary requirements. Second, the *Lane* majority accepted and relied on evidence derived by a congressional task force.[94] In *Garrett* the Court criticized the dissent's reliance on evidence from that task force, as Congress had not itself developed that information and had failed to make its own findings about disability-related employment discrimination.[95] That

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89. *Garrett*, 531 U.S. at 370; *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89-91 (2000) (finding the legislative record supporting the Age Discrimination in Employment Act's application to states to be insufficient, as consisting "almost entirely of isolated sentences clipped from floor debates and legislative reports").

90. *See Garrett*, 531 U.S. at 370-72; *see also Kimel*, 528 U.S. at 82-86; Fla. Prepaid Postsecondary Educ. Expense Bd. V. Coll. Sav. Bank, 527 U.S. 627, 645-47 (1999).

91. *Lane*, 124 S. Ct. at 1989.

92. *Id.* at 1990.

93. *See id.* at 1989 (describing some state conduct as "unconstitutional"); *id.* at 1990 (describing some state conduct as unconstitutional and citing cases). Indeed, the Chief Justice's dissent conceded that the Court did cite two cases in which courts found unconstitutional discrimination against the disabled. *See id.* at 1997, 2000 (Rehnquist, C.J., dissenting).

94. *See id.* at 1991.

95. *See Garrett*, 121 S. Ct. at 966.

objection was absent from the *Lane* Court's consideration of the task force's evidence.[96]

Finally, *Lane* considered evidence of unequal treatment of the disabled over a wide array of public services, including prisons, public schools, voting, and marriage.[97] The Court's broader consideration of evidence calls into question the relationship between the scope of its holding and the evidence it considered relevant. The Court ultimately considered and upheld Title II only as it related to states' provisions of judicial services, even though Title II referred to public entities' "services, programs and activities."[98] Thus, while evidence of states' discrimination in areas such as schools and voting might be relevant to Title II's constitutionality in general, the Court refrained from considering the constitutionality of those applications, yet still considered evidence of discrimination in those areas.[99]

Title II's broad scope presented a different type of problem than earlier cases, which generally had considered statutes that focused on one particular regulatory area.[100] Thus, *Lane*'s consideration of a broader array of evidence is not technically inconsistent with previous cases. Nevertheless, for *Lane* to have been truly consistent with the general thrust of those earlier cases, it would have had to confine its evidentiary review to instances of discrimination on the topic that was the subject of the Court's ultimate holding. Indeed, Chief Justice Rehnquist's dissent criticized the majority on exactly this point.[101]

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96. *See Lane*, 124 S. Ct. at 1991 & n.16.

97. *See id.* at 1989-1990.

98. 42 U.S.C. § 12132 (2004).

99. *See Lane*, 124 S. Ct. at 1990.

100. *See Garrett*, 531 U.S. 360-62 (considering challenge to statute restricting disability-based employment discrimination); United States v. Morrison, 529 U.S. 598, 601-02 (2000) (considering challenge to statute providing remedies for victims of gender-based violence); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (considering challenge to statute restricting age-based employment discrimination); Fla. Prepaid Postsecondary Educ. Expense Bd. V. Coll. Sav. Bank, 527 U.S. 627, 630 (1999) (considering challenge to statute providing remedies for state infringements of patents); City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (considering challenge to statute restricting states from infringing on free religious exercise). *Boerne* is arguably a broader statute than the others, in that its protection of free exercise restricted state conduct across a wide variety of areas, from zoning to public health laws.

101. *See Lane*, 124 S. Ct. at 1999. In his dissent, the Chief Justice stated:

> 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. . . . 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.

Id. (Rehnquist, C.J., dissenting); *see also Garrett*, 531 U.S. at 370 n.7 (criticizing the relevance of much of the supporting evidence relied on by the dissent, since "[t]he overwhelming majority of [the examples of state discrimination provided in the dissent's appendix] pertain to alleged discrimination by the States in the provision of public services and public accommodations, which are areas addressed in Titles II and III of the ADA").

The Court's broader evidentiary focus reflects a significant shift in the Section 5 doctrine. Its willingness to credit both the task force's evidence, evidence of potentially constitutional state discrimination, and evidence not dealing in particular with judicial services suggests that the Court is moving away from a model in which the Court's relationship to Congress is analogous to that between an appellate court and a trial court that has reached a verdict in a litigation. In that model, the reviewing court demands that that verdict be supported by facts found by that body itself and that are precisely relevant to the issue at hand. As explained below, the Court's shift from that model suggests a deeper appreciation for the institutional differences between courts and Congress.[102]

B. Evidence of Misconduct by Parties Other Than States

In the course of considering the evidence supporting Title II, the Court responded to criticism by Chief Justice Rehnquist, in dissent, that some of this evidence revealed discrimination by non-state actors.[103] The Chief Justice appears to have meant governmental actors that were sub-state entities, rather than purely private, non-governmental actors.[104] In response, the Court added an important footnote that seems to have expanded the previous doctrine's openness to evidence of conduct by other governmental units as well as private parties. First, the Court described as "mistaken" the premise that "a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves."[105] The Court then noted that discrimination in the provision of judicial services should logically be considered state action, because courts are "typically treated as arms of the State for Eleventh Amendment purposes."[106] At this point the Court cited cases where courts had looked to state law to determine whether a particular court was in fact a creature of the state or of a sub-unit, and had held that they were state creations.[107] Thus, by this point the Court had put a potentially sizable dent in its pre-*Lane* doctrine that non-State activity could never be considered when examining whether state misconduct justified a Section 5 remedy.

The Court continued, though, to offer both an explanation and historical support for this relaxed evidentiary requirement. It stated that:

> To be sure, evidence 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 (1999), *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000),

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102. *See infra* notes 127-55 and accompanying text.

103. *See Lane*, 124 S. Ct. at 1991.

104. *See id.* at 1999-2000 (Rehnquist, C.J., dissenting).

105. *See id.* at 1991 n.16.

106. *Id.*

107. *Id.*

> 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., [sic] at 312-315, to which the Chief Justice favorably refers . . . involved the conduct of county and city officials, rather than the States. Moreover, what THE CHIEF JUSTICE calls an "extensive legislative record documenting States" gender discrimination in employment leave policies' in *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (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., [sic] at 730-735. See also *id.* at 745-750 (KENNEDY, J., dissenting).[108]

The first sentence of this quotation represents the Court's attempt to harmonize its broader evidentiary reach in *Lane* with its narrower ones in *Florida Prepaid*, *Kimel*, and *Garrett*. The Court seems to suggest that in those earlier cases, Congress had used Section 5 simply to place states on an equal footing with private parties with regard to their liability for damages and other awards of retrospective relief. Indeed, those earlier cases considered statutes that regulated states in their capacity as economic actors – patent infringers in *Florida Prepaid*[109] and workplace discriminators in *Kimel*,[110] and *Garrett*.[111] By (implicit) contrast, Title II of the ADA – or at least Title II as applied to the provision of judicial services – might be seen as regulating the states in their performance of a uniquely governmental function, that is, adjudicators.

The distinction drawn by the Court is susceptible to different interpretations. The Court may be suggesting that evidence of non-state governmental action is simply more probative when the subject area is uniquely governmental. On this theory the Court might reason that different levels of state government face similar political and bureaucratic pressures and temptations, with the result that misconduct by one level with regard to a uniquely governmental function suggests the possibility of similar misconduct by others.[112] So understood, the Court appropriately pointed to

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108. *Id.* at 1991 n.16 (citations omitted).

109. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. V. Coll. Sav. Bank, 527 U.S. 627, 647 (1999) (striking down statute that provided a remedy for patent violations by state governments).

110. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (striking down statute that regulated states' ability to engage in age-based employment discrimination).

111. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) (striking down statute that regulated states' ability to engage in disability-based employment discrimination).

112. *Cf. Garrett*, 531 U.S. at 378 (Breyer, J., dissenting) ("Local governments often work closely

the dissent's favorable invocation of *Katzenbach*, where misconduct by county and city officials with regard to voting rights was held to be sufficiently probative of state misconduct to justify imposing burdens on states.[113] But this theory is not completely satisfactory, since there is no reason to doubt that state and sub-state entities also face similar pressures when, for example, they act as employers or other economic actors. This explanation simply does not account for the distinction drawn in the footnote.

On the other hand, the Court's distinction might point to some sort of heightened proof requirement growing out of a suspicion of Congress' inferred intent. On this theory the Court might appropriately require more specific proof of state misconduct in order to rebut a suspicion that Congress was "really" simply trying to place all participants in interstate commerce (state and private employers, for example) on the same footing, without any special concern for either Fourteenth Amendment rights or states' constitutional sovereignty. This suspicion ultimately derives from the Court's conception of federalism: the entire reason Congress cannot place private and public participants in interstate commerce on the same footing through the commerce power is because of states' special immunity from retrospective liability.[114] In a sense, this explanation reduces to the Court imposing a heightened evidentiary requirement to ensure that Congress does not attempt an end-run around *Seminole Tribe*.[115]

Up to this point, the footnote's analysis of the evidentiary issue treads a careful line in attempting to harmonize the *Lane* majority's more generous evidentiary rules with the more restrictive ones in *Florida Prepaid*, *Kimel*, and *Garrett*, all of which were joined or written by Justice O'Connor, the *Lane* majority's fifth vote.[116] It is difficult, however, to read the Court's characterization of *Hibbs* as consistent with those cases. Justice Stevens characterized the record in *Hibbs* as containing "little specific evidence of a pattern of unconstitutional discrimination on the part of the States," and as relating "primarily to the practices of private-sector employers and the Federal Government."[117] This characterization of *Hibbs* places it in the

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with, and under the supervision of, state officials, and in general, state and local government employers are similarly situated.").

113. *See Lane*, 124 S. Ct. at 1991 n.16.

114. *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996); *see also* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997).

115. It bears repeating that four members of the *Lane* majority dissented in *Seminole Tribe*, and have continued to express their opposition. *See, e.g.*, *Kimel*, 528 U.S. at 92 (Stevens, J., joined by Souter, Ginsburg and Breyer, J.J., dissenting) (expressing continued opposition to *Seminole Tribe*). Nevertheless, the need to retain Justice O'Connor's support undoubtedly led Justice Stevens in *Lane* to attempt to harmonize earlier Section 5 cases with the result upholding Title II. This effort occurred even though the harmonization included a principle that was derived from *Seminole Tribe*, namely, the inability of Congress to make state government-participants in interstate commerce equally liable for retrospective relief. *See* Lane, 124 S. Ct. 1978.

116. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 629 (1999); *Kimel*, 528 U.S. at 65; *Garrett*, 531 U.S. at 358.

117. *Lane*, 124 S. Ct. at 1991 n.16; *see also id.* at 1992 n.17 (noting that *Hibbs* relied on, among other evidence, "(1) a Senate Report citation to a Bureau of Labor Statistics survey revealing

starkest possible contrast to *Garrett*, which insisted on a "pattern of unconstitutional discrimination" before a statute will be held to have satisfied Section 5,[118] and insisted that that discrimination be attributable to the state itself.[119]

By characterizing most of the evidence in *Hibbs* as relating to non-state entities entirely, Justice Stevens opened the door to a significant expansion of the type of evidence courts can take into account in determining the need for Section 5 legislation. He did not act on that characterization in *Lane*, instead confining his evidentiary presentation to actions of state governments and their subdivisions.[120] Perhaps this was because enough evidence existed from those actors to craft a defensible case for Title II, or perhaps it was because Title II, unlike the FMLA, applied largely to uniquely-governmental functions (especially given the Court's limitation of its holding to the provision of judicial services). Most basically, Justice Stevens' failure to apply this characterization of *Hibbs* may have derived from the need to keep Justice O'Connor from writing a separate concurrence that would have deprived him of a majority. Whatever the reason, the fact remains that his provocative characterization of a prior case provides a lever with which a future court may further pry open *Garrett*'s narrow evidentiary focus.

Finally, recall that *Hibbs* was a case about an employment statute that regulated states in their capacity as employers, rather than in some uniquely governmental capacity. Describing that case as having relied on evidence of private party conduct thus seemingly undermined the Court's own earlier harmonization of the cases, in which requiring evidence of state misconduct was especially important "when . . . 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."[121] Unless there is something about the gender focus of the FMLA that absolves Congress of suspicion of relying on Section 5 "solely . . . to place the States on equal footing with private actors,"[122] Justice Stevens appears by this characterization to have opened an additional crack in his own explanation of those earlier cases as reflecting this distinction. Ultimately, it may be that the FMLA's focus on gender discrimination, which receives heightened scrutiny from the Court, serves to distinguish *Hibbs*' more generous evidentiary scope from those in the earlier

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disparities in private-sector provision of parenting leave to men and women; [and] (2) submissions from two sources . . . that public-sector parental leave policies differ little from private-sector policies") (internal quotation and brackets omitted).

118. *Garrett*, 531 U.S. at 370.

119. *See id.*

120. *See Lane*, 124 S. Ct. at 1989-91.

121. *Id.* at 1991 n.16.

122. *Id.*

cases. Whether this latter distinction can provide a durable basis for these different approaches, however, is an open question.

C. The Court's Use of Evidence in Lane

Taken together, the Court's examination of the evidence in *Lane* reveals a significant change in its understanding of Congress' role under Section 5. The model in *Florida Prepaid*, *Kimel* and *Garrett* envisioned Congress acting like an agency or an inferior court, gathering evidence into a record and making final determinations by applying that evidence to established law, both of which functions are subject to review by an appellate tribunal. This analogy is extended by the precision and convincingness the Court has required of Congress' fact finding. In particular, under those earlier cases that evidence must reveal (1) a pattern of misconduct, (2) by the states themselves, not sub-state units (let alone private parties), (3) that is of precisely the type targeted by the statute (for example, in *Garrett*, employment discrimination, not public facility discrimination,)[123] and (4) that rises to the level of unconstitutional state action.

The Court's high standard for Congress' fact finding in these earlier Section 5 cases[124] suggests the constitutional significance it accorded the countervailing interest in state sovereignty. Just as a deprivation of liberty requires a court to satisfy the highest proof standard, reached through careful procedure, so too, cases such as *Garrett* seemed to say,[125] does deprivation of a state's sovereign immunity from retrospective relief and the assumed indignity of having to defend against suits in its own name require precise and convincing proof. Given this understanding of the Court's approach, it is not surprising that dissenters in *Lane* have spoken of a state's Eleventh Amendment "rights" and have found similarities between those "rights" and an individual's constitutional rights.[126]

By contrast, *Lane*'s use of evidence paints a picture in which Congress' knowledge of problematic state conduct derives from more than formal factual investigation, yielding precisely-focused information developed by Congress itself. First, the *Lane* Court deemed relevant evidence that was not precisely focused on either the "proper" wrongdoer (the State), the "proper" subject of the wrongdoing (access to judicial services), the "proper" legal standard (unconstitutionality), nor even the "proper" fact finder (Congress itself).[127] Instead, it credited, respectively, evidence from non-state entities that addressed issues other than access to judicial services, and that did not rise to levels of unconstitutional conduct.[128] Moreover, the Court did not insist that the evidence have been developed by Congress itself. Indeed, in

123. *Garrett*, 531 U.S. at 356

124. *See, e.g.*, *Lane*, 124 S. Ct. at 2000 n3.

125. *See Garrett*, 531 U.S. at 370.

126. *See infra* note 190.

127. *See Garrett*, 531 U.S. at 370.

128. *See Lane*, 124 S. Ct. at 1991 n.16.

addition to crediting evidence developed by the task force, the Court gave no indication that Congress was aware of the discriminatory state laws the Court cited, nor of the litigation in which courts considered claims of illegal disability discrimination,[129] both of which the Court cited as justifications for Title II.[130]

In the picture that emerges from the Court's consideration of this evidence, examples of disability-related discrimination in a variety of areas revealed a general social reality justifying remedial legislation. In holding that such a picture justified congressional action, the Court implicitly recognized the difference between Congress and the courts as institutions, and how that difference affects their authority to act.[131] In particular, Congress is – or should be – free from the inherent limitations of the adjudicative format.[132] Congress does not determine individual parties' legal liability based on existing law; thus it need not be bound by judicial rules of

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129. *See id.* at 1989-1990.

130. *Id.* at 1994. It should be pointed out that earlier cases such as *Garrett* focused on judicial decisions uncovering constitutional violations as the type of evidence that would best support Section 5 legislation, without requiring that Congress have been aware of those decisions. *See, e.g.*, *Garrett*, 531 U.S. at 374-75 (Kennedy, J., concurring) (stressing the lack of court cases finding unconstitutional disability-based employment discrimination). Thus, it seems that at least with regard to this type of evidence, those earlier cases did not require congressional awareness. The best way to explain this is by concluding that the Court viewed such evidence as independently reliable, and thus probative, evidence of constitutional violations. Obviously, such privileging of judicial determinations of constitutional right fits within the Court's overall juricentric approach to Section 5. *See generally* William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TULANE L. REV. (forthcoming 2005). For other evidence to be probative, however, cases like *Garrett* seem to require congressional consciousness. In *Garrett*, for example, the Court not only criticized the task force evidence as not developed by Congress, but then immediately followed that criticism with the further observation that Congress did not formally find the relevant facts in its statement of legislative findings. *See id.* at 370.

131. For longer discussions of how Congress' and the courts' different institutional positions justify different standards for legislative and judicial action, see William D. Araiza, *The Section Five Power and the Rational Basis Standard*, 79 TUL. L. REV. (forthcoming 2005) [hereinafter "*The Section 5 Power*"]; William D. Araiza, *Courts, Congress and Equal Protection: What Brown Teaches Us About the Section 5 Power*, 47 HOW. L. J. 199, 221-226 (2004) (discussing these institutional differences).

132. *See, e.g.*, Robert Post, *Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 34 n.146 (2003).

> Judicial power exists to adjudicate controversies, and it typically involves the assignment of individual guilt and liability. Because we believe in principles of individual responsibility, we require courts to function in a way that precludes guilt by association. Legislatures, by contrast, are forbidden from allocating individual guilt and responsibility. The essence of legislative power instead lies in the establishment of general rules of conduct. It is therefore misguided to understand Section 5 legislation as accusing particular states of wrongdoing, or as punishing them for past misconduct. Instead Section 5 legislation, like all legislation, seeks to vindicate public values. For this reason Section 5 legislation, like all legislation, is not to be restricted by rules appropriate for the proper functioning of a court.

Id.

evidence, burden of proof, and liability.[133] Moreover, because the scope of Congress' power extends beyond particular parties to a litigation to the entire nation, its remedies need not be as cabined by the need to avoid involving innocent third parties or parties over which a court lacks jurisdiction.[134] Indeed, one way to illustrate the plenary nature of Congress' power is as a contrast to these limitations on the judicial power.[135] This is not to suggest that Congress' powers under Section 5 are unlimited. However, Congress' freedom from the confines of the adjudicative form clearly gives it more latitude to act than courts. As reflected in *Lane*, one of the ways this latitude is felt is in the evidence that can support Section 5 enactments.[136]

It is also significant that *Lane* goes beyond indicating that Congress may consider a broader set of evidence than a court, to suggest that the evidence need not have been officially before Congress.[137] When the Court speaks about Congress acting "against a backdrop of pervasive unequal treatment in the administration of state services,"[138] it suggests that, quite literally, the world is Congress' record.[139] Again, this makes sense given Congress' institutional characteristics. Judicial proceedings are closed systems. Verdicts must be based on evidentiary records built in the trial, which juries and judges may not supplement with their own information or investigation, and information developed during the trial but inappropriately admitted must not be considered. In such situations it makes perfect sense for appellate review of a verdict or judicial review of a trial-type administrative adjudication[140] to consider whether the decision was supported based only on the evidence produced in that proceeding.

Congress, however, is situated completely differently from a trial court or an administrative tribunal. Its legitimacy does not flow from its procedural fairness, the rigor of its evidentiary rules, or, in the case of an administrative tribunal, its possession of delegated power. Instead, Congress' legitimacy derives from the electoral mandate and accountability of its members and their collective national perspective. Those characteristics bestow upon it a presumptive understanding and reflection of

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133. *Id.*

134. *Cf.* Milliken v. Bradley, 418 U.S. 717 (1974) (reversing lower court school desegregation injunction that involved innocent parties).

135. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 112-13 (1995) (O'Connor, J., concurring) (contrasting the courts' limited role in combating racial bias and imbalance with Congress' "discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment") (internal quotation and citation omitted).

136. *See Lane*, 124 S. Ct. at 1990-92.

137. *See id.* at 1989.

138. 124 S. Ct. at 1989.

139. As stated earlier, prior cases such as *Garrett* assumed that Congress could take account of evidence of court cases.

140. *See* 5 U.S.C. §§ 554, 556-57 (2000) (setting forth rules for formal agency adjudications); *see also id.* at § 706 (2)(E) (specifying that judicial review of formal, trial-type administrative procedures must be based only on the record created by the agency).

the society it represents.[141] Thus, it is appropriate to presume that Congress is aware of reasonably public information that supports its position.

This presumption is especially appropriate when Congress makes judgments about equality. The labeling of a classification as so unfair so as to be invidious is primarily an exercise in value judgment rather than legal reasoning. Legal sources do not provide answers to this question: the text of the Equal Protection Clause merely restates the question,[142] the drafters' intentions at best do nothing more than cabin the scope of the clause[143] or reveal an unenlightening concern with "class legislation,"[144] and precedent merely reflects decisional methods of earlier courts, which include reference to social attitudes.[145] For its part, a decisional aid such as the tiered scrutiny structure, and the suspect class inquiry on which it is built,[146] can help courts reach conclusions about a classification's fairness. But such a theory merely provides an indirect, political process-based lens that allows courts only to reach second-order conclusions about the likely fairness of a classification.

Fundamentally, labeling a classification invidious indicates that it deviates from societal attitudes about which characteristics justify different treatment with regard to a particular regulatory area and which are irrelevant.[147] This exercise is inherently value-laden, given that there is no objective or natural way of knowing which classifications are relevant and

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141. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001).

142. *See* U.S. CONST. amend. XIV, § 1.

143. *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 81 (1873) ("We doubt very much whether any action of a State not directed against the Negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause].").

144. *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED (1993) (explaining how the Supreme Court before the New Deal attempted to apply the equal protection rule against "class legislation").

145. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 669 (1966).

> In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. This Court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. Plessy v. Ferguson, 163 U.S. 537 [1896] [sic]. Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954 – more than a half-century later – we repudiated the "separate-but-equal" doctrine of *Plessy* as respects public education we stated: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written." *Brown v. Board of Education*, 347 U.S. 483, 492 [1954] [sic].

Id. (footnotes omitted).

146. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

147. *See generally Harper*, 383 U.S. at 669-70; *see also* Post, *supra* note 132, at 25-26 (discussing how the evolution of the Court's gender discrimination jurisprudence depended on changes in underlying social attitudes as reflected in legislation).

therefore reasonable.[148] The same institutional characteristics that make Congress presumptively aware of the facts the *Lane* Court cited – that is, its electoral accountability and national scope – should make it more qualified to make judgments about which classifications American society considers fundamentally unfair.[149]

Of course, judicially enforceable limits still restrict Congress' presumed knowledge of empirical reality and the social meaning it can place on that reality. Most notably, under the *Boerne* approach Congress must acknowledge court-made "law" when legislating under its Section 5 power. For example, the court has made clear that some classification tools (such as race) are so obviously irrelevant for most legitimate purposes that court-made law on that topic has solidified into more or less firm rules that cannot be second-guessed by Congress, short of a long-term shift in fundamental national attitudes.[150] Similarly, the Court's understanding of the Fourteenth Amendment as a powerful yet limited provision that left significant autonomy to states[151] means that Congress cannot impose whatever limits it wishes on run-of-the-mill state classification decisions and justify them as a use of its Section 5 power.

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148. The *Lochner*-era Court attempted to find in the common law a natural or objective reference point by which to judge the reasonableness of legislative classifications. For example, in two cases from 1936, the Court upheld and struck down different provisions of a New York milk price support act, based on the extent to which the statute's classifications respectively mirrored and deviated from the classifications that had emerged from the previously common law-regulated market. *Cf.* Borden's Farm Prods. v. Ten Eyck, 297 U.S. 261-63 (1936) (upholding part of New York milk price control law because it replicated the conditions found in the previous common-law regulated marketplace) *with* Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 272 (1936) (striking down part of same law because it introduced distinctions unknown to the common law). Reliance on the common law as the reference point for judging the reasonableness of legislative classifications was a casualty of the 1937 revolution, just as was reliance on the common law as a reference point for judging reasonable interferences with the right to contract. *See,* e.g., Ferguson v. Skrupa, 372 U.S. 726, 732-33 (1963) (setting forth extremely broad state latitude to regulate the due process right to conduct businesses).

149. The *Lane* Court focused on the due process protections provided by Title II. *See* Tennessee v. Lane, 124 S. Ct. 1978, 1988-94 (2004). The appropriate role of Congress in determining the scope of due process rights is different from its analogous role with regard to equality, because the fundamental inquiries are different: equality is fundamentally a social conclusion rather than a legal one, and thus requires recourse to different sources and asks different questions. For longer discussions of this distinction, and of Congress' special role in giving meaning to the equal protection guarantee, *see ENDA*, *supra* note 6, at 61-64; *see also The Section 5 Power*, *supra* note 1311.

150. *Cf.* Katzenbach v. Morgan, 384 U.S. 641 n.10 (1966) (explaining that Congress' broad Section 5 power does not extend to limiting constitutional rights); *with The Section 5 Power*, *supra* note 131 (discussing this so-called "ratchet theory"); *see also* Adarand Constructors Inc. v. Pena, 515 U.S. 200, 235-36 (1995) (subjecting federal race-based set aside programs to strict scrutiny). Even with regard to race, however, the suppleness of the Court's equal protection doctrine can never be underestimated, a point driven home when in the same year as *Hibbs*, the Court upheld the race based affirmative action plan in *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

151. This view – well-accepted by the Court today despite major disagreements about exactly how much autonomy states retain – has not always been understood as the correct one. *See, e.g.*, JACOBUS TENBROEK, EQUAL UNDER LAW, 202-03 (1965) (arguing that the drafters of the Fourteenth Amendment understood it as a revolutionary reduction in the powers of states to the benefit of the national government).

But beyond these more or less solid court-made rules there lies a large area of ambiguity as to the true meaning of equal protection. In that area, encompassing everything from classifications based on gender to those based on sexual orientation and disability to those based on other criteria, courts take less categorical approaches. The Court has recognized that, despite the general irrelevance of the gender characteristic, the genders are not fungible, and that some real differences do exist.[152] It has also struck down at least some sexual orientation and mental retardation classifications as constitutionally irrational,[153] and has on occasion even struck down classic social and economic legislation for the same reason.[154] In such equal protection gray areas – comprising the vast majority of state regulation – Congress' presumed knowledge of the world and superiority in according social meaning to that knowledge should justify judicial deference to Section 5 legislation.

Lane, of course, is more a case about the due process right to judicial access than the general equality rights of the disabled. Thus, it may be more appropriate in that case to test Congress' judgment against a legal standard – as indeed, the Court in *Lane* did.[155] But even when, as in *Lane*, such a legal standard exists, it remains appropriate to give Congress its due with regard to its capacity to develop facts relating to that standard. As suggested above, *Lane* goes some distance toward re-establishing the appropriate level of deference to Congress' fact finding abilities.

III. THE CONGRUENCE AND PROPORTIONALITY OF TITLE II

A. The Facial/As-Applied Issue As Considered by the Court

When the *Lane* Court turned to consideration of whether Title II was a congruent and proportional response to the constitutional wrongs identified as Congress' target, based on the evidence the Court was willing to credit, it confronted a situation it had not faced in other post-*Boerne* Section 5 cases. In *Boerne*, *Florida Prepaid*, *Morrison*, *Kimel*, and *Garrett*, the Court had considered statutes that targeted a particular subject area: religious discrimination in *Boerne*, patent infringement in *Florida Prepaid*, gender-

152. *See* United States v. Virginia 518 U.S. 515, 533 (1996); Nguyen v. INS, 533 U.S. 53, 63 (2001) (upholding gender classification based on perceived "real" differences between the genders).

153. *See* Romer v. Evans, 517 U.S. 620, 635-36 (striking down Colorado Amendment 2 as a violation of the equal protection rights of gays and lesbians); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (striking down discrimination against the mentally retarded as unconstitutionally invidious, despite the reasonableness of classifying based on mental retardation in many cases).

154. *See* Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 345-46 (1989).

155. *See* discussion *supra* Part III (B).

motivated violence in *Morrison*, and employment discrimination in *Kimel* and *Garrett*. Title II of the ADA was different. It regulated the provision of "public services," a broad term that covered everything from access to voting, conditions in penal institutions, and courthouse design.[156] Thus, even after the Court decided that access to judicial proceedings was an important right, and that Congress had a strong evidentiary basis for believing that discrimination on that issue was a serious problem, it nevertheless had to decide how to deal with the fact that Title II dealt with much more than that topic.[157]

The Court's solution to this problem was to limit its holding to Title II's applicability to judicial access.[158] As support for this as-applied analysis, the Court cited *United States v. Raines*,[159] a prosecution brought against a state official under the Civil Rights Act of 1957.[160] The official argued that the statute went beyond Congress' power to enforce the Fifteenth Amendment because it could be construed to regulate the conduct of private parties. The defendant then raised an overbreadth argument: even though Congress had the constitutional power to enact a statute that applied to him, he argued, the statute was still unconstitutional because it might be understood to apply to private parties, whose conduct Congress had no authority to regulate.[161] The *Raines* Court rejected that argument and allowed the prosecution to go forward, concluding that that case presented no reason to make an exception to the general rule against such overbreadth claims, and that, applied to that defendant, the statute was within Congress' power.[162] So too, the Court in *Lane* concluded that, whatever the constitutionality of applying Title II to state provision of voting, penal or sports spectator services, the statute was an appropriate tool to ensure judicial access to the courts.[163]

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156. *See* Tennessee v. Lane, 124 S. Ct. 1978, 1992 (2004) ("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."); *see also id.* at 1992 n.18 ("*Garrett* and *Florida Prepaid*, like all of our other recent § 5 cases, concerned legislation that narrowly targeted the enforcement of a single constitutional right."). RFRA – the statute stuck down in *Boerne* – is in a somewhat different position than the statutes struck down in *Florida Prepaid*, *Kimel*, and *Garrett*, notwithstanding the Court's grouping them together. RFRA was narrow in the sense that it dealt with only one type of discrimination, that which was based on religious exercise. But that statute nevertheless cut deeply into state prerogatives, from taxing to historic preservation to every other regulatory area where religious exercise might be burdened. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997). Still, Title II is in a real sense broader than RFRA: while Title II deals only with disability-based discrimination, it also targets the exercise of a variety of fundamental rights including not just the judicial access rights discussed in *Lane*, but also, for example, rights to vote and to humane treatment while in custody. *See Lane*, 124 S. Ct. at 1989-90 (noting instances of state discrimination with regard to these rights).

157. *See Lane*, 124 S. Ct. at 1988.

158. *See id.* at 1993 ("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.").

159. *See id.* at 1993 (citing United States v. Raines, 362 U.S. 17 (1960).

160. *See id.* at 1993 n.19.

161. *See id.*

162. *See id.*

163. *See id.* at 1993.

Dissenting in *Lane*, Chief Justice Rehnquist took issue with the majority's as-applied approach. He instead argued that Title II should stand or fall as a whole,[164] complaining that Title II was overbroad because provisions for equal access to transportation, recreation and other programs had "no permissible prophylactic relationship to enabling disabled persons to exercise their fundamental constitutional rights."[165] He then argued that the Court cured what he considered Title II's "massive overbreadth"[166] by considering (and upholding) the statute "only 'as it applies to the class of cases implicating the accessibility of judicial services.'"[167]

The Chief Justice conceded that the Court normally favored as-applied rather than facial challenges, but he argued that *Boerne*'s Section 5 analysis required a different approach.[168] According to him, the congruence and proportionality test, by measuring the breadth of the statute against the scope of the right it seeks to enforce and the record of violations it purports to correct, necessarily implies consideration of the statute as a whole, rather than as applied to one situation, such as judicial access.[169] In turn, that holistic consideration required an all-or-nothing decision to either uphold or strike down the statute.[170]

The correctness of the *Lane* majority's as-applied analysis is crucial to the scope of Congress' Section 5 power under the congruence and proportionality test. As a test measuring the reach of a statute in relation to the harms it seeks to remedy, it requires courts to perform the preliminary step of determining the scope of both the statute's provisions and the harms it seeks to remedy. The results of these preliminary inquiries are critical, as they effectively establish the values for the inputs into the test, and thus largely determine the outcome. A rough parallel to this process can be found in the regulatory takings doctrine, where the identification of the

164. *See id.* at 1997 (Rehnquist, C.J., dissenting).

165. *See id.* at 2004 (Rehnquist, C.J., dissenting).

166. *See id.* To avoid confusion, it should be noted that Chief Justice Rehnquist used the term "overbreadth" here differently than the way the *Raines* Court used it. The argument in *Raines* was based on an overbreadth analysis in the sense that the defendant was arguing that the statute's constitutionally questionable application to private parties should have rendered its application to him, a state official, invalid. This type of overbreadth argument is essentially an argument for third-party standing – that is for the defendant in *Raines* to have the right to assert the legal claims of a private party not before the court. By contrast, the Chief Justice's dissent in *Lane* used the term "overbreadth" to refer to the alleged mismatch between Title II's scope and the scope of the constitutional right it was alleged to enforce.

167. *See id.*

168. *See id.* at 1998-99 (Rehnquist, C.J., dissenting).

169. *See id.*

170. *See id.* at 2005 (Rehnquist, C.J., dissenting) ("[T]he majority's approach is not really an assessment of whether Title II is appropriate *legislation* at all . . . but a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation.") (internal quotation omitted).

affected parcel largely determines the extent of the government's interference with the property interest.[171] As with any test whose result turns on the proportionality of a challenged action to a countervailing need[172] or protected right,[173] the description of the scope of the action, need, or right is crucial to the result that test yields.

The Chief Justice's attack on the majority's as-applied approach deserves note, as he authored *United States v. Salerno*,[174] the case that established an extraordinarily strong presumption in favor of as-applied, rather than facial or overbreadth, constitutional claims.[175] Ironically, his argument in *Lane* parallels those of commentators, often critical of *Salerno*, who have argued that the appropriateness of as-applied challenges turns largely not on autonomous principles of judicial practice, but instead, on the underlying substantive doctrine being applied.[176] For example, Professor Michael Dorf has argued that so-called "litigation rights," that is, rights, such as that against self-incrimination, that by definition cannot be asserted except in a litigation setting, do not present the possibility of chill that

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171. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987). The majority stated:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction.

Id. (internal quotation omitted); *see also* Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978) (rejecting property owner's argument that its air rights constituted the appropriate unit of analysis in determining the extent to which its property was taken). *Compare* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001) ("The first step [in the congruence and proportionality analysis] is to identify with some precision the scope of the constitutional right at issue."), *and id.* at 364 (characterizing this step of the analysis as "determin[ing] the metes and bounds of the constitutional right in question"), *and id.* at 372-73 (citing the third step of the congruence and proportionality inquiry as a comparison between those constitutional rights and the rights and remedies created by the Section 5 legislation).

172. For example, the Court's Section 5 cases have consistently stated that stubborn or difficult problems may justify correspondingly more intrusive Section 5 legislation. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

173. In the regulatory takings context, for example, the Court has inquired into the extent to which the challenged action has infringed on the individual's property interest. *See, e.g.*, Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (determining that the infringement is minimal because the challenged landmark designation allowed the property owner to continue using the property for its originally intended purpose as a train station); *see also infra* notes 213-215 and accompanying text (discussing the identification of the right in substantive due process cases).

174. 481 U.S. 739 (1987).

175. *Id.* Facial and overbreadth claims are closely related, with judges and commentators sometimes not fully distinguishing between the two. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 709 n.7 (1997) (Stevens, J., concurring) (criticizing what he described as an overly rigid statement of when facial challenges would be accepted, and illustrating more lenient applications of the rule against facial challenges by reference to overbreadth claims). Facial and overbreadth challenges share the characteristic that they are independent of the adjudicative facts relevant to the party claiming a right, and seek invalidation of the challenged law on the ground that it is more broadly unconstitutional. *See Salerno*, 503 U.S. at 317.

176. *See, e.g.*, Richard A. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); Marc Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998); Michael Dorf, *Facial Challenges to State and Federal Statutes*, 47 STAN. L. REV. 235, 251-83 (1994).

justifies overbreadth challenges.[177] By contrast, Professor Dorf provides reasons counseling in favor of a "robust" overbreadth analysis when courts consider challenges to laws restricting abortions.[178] These examples matter not because of their necessary rightness or wrongness, but because, like Chief Justice Rehnquist's argument, they suggest the doctrine-specific nature of the as-applied/facial decision.

Justice Stevens, writing for the majority, joined this debate about whether the congruence and proportionality standard required one or the other type of analysis. In a footnote, he wrote:

> 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 hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts.[179]

Justice Stevens asks us to look at the issue from the point of the view of the right Title II is said to protect in this particular litigation: the right of disabled individuals to access judicial proceedings.[180] Thus, he focused on the particular application of the statute that enforced that right.[181] As he implied, Title II's application "to hockey rinks or voting booths"[182] said little about the right of the disabled to access courthouses. By contrast, Chief Justice Rehnquist focused on the doctrinal test, in particular its nature as an ends-means fit test.[183] According to the Chief Justice, if statutory breadth is a key factor in the underlying doctrine – as it is with the congruence and proportionality test – then it is simply cheating to narrow the statute for purposes of deciding the case, by considering only its application to the subject-matter relevant to the plaintiff's claim.[184]

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177. *See* Dorf, *supra* note 176, at 265-66. Facial challenges are closely related to First Amendment "overbreadth" claims, in which a plaintiff to which a statute can constitutionally be applied is allowed to challenge his conviction because the statute as written applies to conduct that would be constitutionally protected. *See id.* Thus, in an overbreadth challenge a plaintiff can seek the invalidation of a statute even though it had at least some constitutional application.

178. *See* Dorf, *supra* note 176, at 270-71.

179. *Lane*, 124 S. Ct. at 1993 n.18.

180. *See id.* at 1978.

181. *See id.*

182. *Id.*

183. *Id.* at 1997 (Rehnquist, C.J., dissenting).

184. *See id.* ("In conducting its as-applied analysis . . . 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.").

Doctrinal concerns beyond the congruence and proportionality doctrine itself may have given the dissent further reason to protest against an as-applied analysis of Title II. After setting forth the doctrinal argument against as-applied analyses of Section 5 legislation,[185] the dissent further complained that under the majority's approach "States will be subjected to substantial litigation in a piecemeal attempt to vindicate their Eleventh Amendment rights."[186] Chief Justice Rehnquist may have considered this burden on States to be problematic enough to warrant a facial approach to the statute, given the current Court's elevation of state sovereign immunity as a prime constitutional value.[187] Just as an unconstitutional speech restriction might chill speech and thereby harm First Amendment values without a judicial remedy, thereby justifying the unusual step of allowing an overbreadth claim,[188] so too he may have considered the burden of litigating their sovereign immunity on a piecemeal basis an unacceptable impairment of constitutional values, thus justifying a broader analysis of Section 5 legislation.[189]

This is not to suggest that the dissent's concern is warranted. For example, any analogy between First Amendment "chill" and Eleventh Amendment "chill" seems strained. Even assuming that it makes sense to speak of a state being "chilled" in the exercise of a constitutional "right,"[190] the idea that an as-applied approach to Section 5 legislation might chill states[191] remains somewhat suspect, since the Eleventh Amendment gives states immunity only from retrospective relief, not from a general, judicially-enforceable, requirement to obey federal law.[192] Because states can constitutionally be subjected to federal law based on Article I, the idea that

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185. *See id.*

186. *Id.*

187. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 64-65 (1996) (holding that state sovereign immunity is a sufficiently fundamental component of the federal system as to outweigh congressional power to regulate under Article I); Alden v. Maine, 527 U.S. 706 (1999) (extending the constitutional status of state sovereign immunity to include immunity from federal causes of action brought in state courts, based on the importance of state sovereignty in the underlying plan of the Constitution).

188. The chilling effect a potentially invalid application of a statute may have on the exercise of protected rights is one of the main reasons the Court has allowed plaintiffs to assert overbreadth claims in First Amendment cases. *See, e.g.*, Bates v. State Bar, 433 U.S. 350, 380 (1977).

189. Indeed, it is perhaps telling that the dissent speaks of the state regulatory autonomy as a state's "Eleventh Amendment rights." *Lane*, 124 S. Ct. at 1997, 2005 (Rehnquist, C.J., dissenting). Other recent federalism opinions have described states' sovereign immunity as a right. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. V. Coll. Sav. Bank, 527 U.S. 627, 681-82 (1999) (analogizing to cases refusing to find that individuals have implicitly waived constitutional rights when holding that such states should not be held to have constructively waived their sovereign immunity).

190. *See supra* note 189; *see also* Carroll, *infra* note 217, at 1060-1062.

191. *Cf.* Dorf, *supra* note 176, at 261-64 (noting the chill rationale for overbreadth challenges to laws restricting free speech and fundamental rights).

192. *See Ex parte Young*, 209 U.S. 123, 159-160 (1908) (authorizing suits against state officials for failure to obey federal law); *but see* Edelman v. Jordan, 415 U.S. 651, 664 (1974) (restricting *Young* relief to prospective relief); *see also* Garcia v. San Antonio Trans. Auth., 469 U.S. 528, 548 (1985) (holding that Article I authorizes Congress to impose restrictions on states).

an overbroad Section 5 statute would chill privileged conduct makes sense only when Section 5 serves as the only possible constitutional basis for the federal rule of conduct.[193] Chief Justice Rehnquist may also have intended to suggest that states' Eleventh Amendment immunity "rights"[194] include immunity from having to litigate suits against the state *eo nomine*, in addition to immunity from awards of retrospective relief. But if so, then the availability of *Ex parte Young* suits that are litigated against the state in all but name surely renders this latter right relatively trivial, and not a justification for abandoning the normal as-applied approach to constitutional challenges.

Beyond the dissent's possible (over) concern for sovereign immunity, the dissent's logic fails at an even more crucial point. Both the dissent and the majority agree that the crucial inquiry in *Boerne* is whether the statute attempts to redefine the substance of constitutional rights, rather than merely enforce them.[195] They also agree that the ultimate question is answered by the ends-means test described earlier.[196] But it does not follow, as Chief Justice Rehnquist insists, that courts must perform that test on the statute as a whole. Certainly pre-*Boerne* Section 5 cases do not require that

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193. Ironically, this may have been the case with Title II's application to courthouse access. Accessing courthouses for purposes of litigating rights or simply attending trials may not constitute economic activity, and thus regulation might not be feasible under the Interstate Commerce Clause. *See* United States v. Morrison, 529 U.S. 598, 610-13 (2000) (noting the crucial importance of the regulated activity's character as economic or non-economic when determining whether Congress can regulate it under its interstate commerce power). Still, Chief Justice Rehnquist did not limit his call for facial analysis of Section 5 legislation to statutes whose only possible constitutional basis is Section 5. *See Lane*, 124 S. Ct. at 2006 (Rehnquist, C.J., dissenting).

194. *Id.* at 2005 (Rehnquist, C.J., dissenting).

195. *See id.* at 1993 n.18 (describing "the question that *Boerne* asks" as "whether a piece of legislation attempts substantively to redefine a constitutional guarantee"); *id.* at 2005 (Rehnquist, C.J., dissenting) ("In applying the congruence and proportionality test, we ask whether Congress has attempted to statutorily redefine the constitutional rights protected by the Fourteenth Amendment.").

196. *Cf. id.* at 1986-87 (explaining the congruence and proportionality test) *with id.* at 2005 (Rehnquist, C.J., dissenting).

> 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.

Id. It is also worth noting that, save Justice Scalia, no member of the current Court has expressed disagreement with the basics of the congruence and proportionality test, and that no justice in *Boerne*, the case that established that test, dissented from that part of the Court's analysis. Justice O'Connor dissented on the underlying substantive question of whether the federal statute did in fact conflict with the properly-understood constitutional rule, but explicitly agreed otherwise with the Court's congruence and proportionality discussion. *See* City of Flores v. Boerne, 521 U.S. 507, 545-46 (2004) (O'Connor, J., dissenting). Justice Souter dissented on the underlying issue without expressing a view on the Section 5 question, as did Justice Breyer, *see id.* at 565 (Souter, J., dissenting), and *see id.* at 566 (Breyer, J., dissenting). Since then, all three of these justices have either joined or written an opinion applying that test.

approach.[197] More to the point, as Justice Stevens noted for the majority in *Lane*, in *Board of Trustees of the University of Alabama v. Garrett* the Court tested Title I of the ADA against the congruence and proportionality standard, leaving the rest of the statute for another day (and, of course, ultimately upholding Title II in *Lane* itself).[198]

It might be argued that the *Garrett* example is inapposite, since that case considered a complete title of the ADA, while in *Lane* the Court upheld only one application of Title II.[199] Indeed, the Chief Justice cited the literal language of Section 5, stressing the word "legislation" to argue that Title II had to stand or fall *in toto*, rather than as applied to the protection of particular rights.[200] But ultimately it is impossible to determine the appropriate statutory unit of analysis as an abstract matter, divorced from the underlying substantive doctrine. To a large degree, this issue simply restates the choice between as-applied and facial decisions, with the choice now between a larger or smaller statutory unit (*e.g.*, a title as opposed to a section).[201] There is no way to determine that a particular text is a naturally or inherently independent and self-contained unit whose constitutionality must stand or fall as a whole, independent of other statutory text.[202] For example, the ADA was enacted as a package;[203] thus, if a unit of

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197. *Raines* upheld one application of a provision of the 1957 Voting Rights Act while avoiding the difficult constitutional question that would arise from its application to a different type of defendant. *See* United States v. Raines, 362 U.S. 17 (1960). *Katzenbach v. Morgan* considered the constitutionality of Section 4(e) of the Voting Rights Act of 1965, not the entire statute. Katzenbach v. Morgan, 384 U.S. 641 (1966). Indeed, Section 4(e) was upheld as legislation to enforce the Fourteenth Amendment, while the rest of the statute was upheld as appropriate enforcement of the Fifteenth. *Id.* In *Oregon v. Mitchell*, the Court reached split decisions not only as between the constitutionality of Title II and Title III of the Voting Rights Acts Amendments of 1970, but even as between different applications of Title III. Oregon v. Mitchell, 400 U.S. 112 (1970).

198. *See Lane*, 124 S. Ct. at 1992 n.18.

199. *See id.* at 1997, 2005 (Rehnquist, C.J., dissenting).

> 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, but a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation.

Id. (citation omitted) (emphasis in original).

200. *See id.*

201. Of course, some as-applied decisions, such as the one in *Lane* itself, distinguish between applications within one statutory provision. *See id.* at 1992. But the comparison still holds. In *Lane*, the Court essentially read § 12132 as a text requiring reasonable accommodations for the disabled in the provision of a long list of public services, and limited its holding simply to one service on that list, judicial access. *See id.* at 1994.

202. It is important to note that this is a different issue than the one presented by classic severability doctrine. Under that doctrine, a statute's severability is a matter of congressional intent; essentially, a court must ask itself whether Congress, if it had known that a particular provision was unconstitutional, nevertheless would have enacted the rest of the statute. *See, e.g.*, Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 1013-1014 (1983) (Rehnquist, J., dissenting). The discussion in the text considers whether the proper constitutional analysis of a given statute requires that it be upheld or struck down *in toto*. *Id.* To the extent that the Court's decision on that issue represents a use of the Court's power to interpret the Constitution, it presumably is not subject to overruling by a legislative choice.

203. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

"legislation" is understood as a single, omnibus legislative choice expressed at a single moment through language, then presumably the ADA should stand or fall as a whole.[204] At the other extreme, the Court often considers particular sections of broad enactments in isolation when it reviews their legality. Appropriations riders are prime examples.[205] In sum, in the search for the appropriate unit of legislation to subject to judicial review, *a priori* rules seem destined to fail. In turn, this insight suggests the wisdom of an approach where the search for the appropriate analytical unit turns on the underlying substantive doctrine.

Indeed, the Court's as-applied approach to the congruence and proportionality test makes sense from the point of view of both judicial practice and underlying doctrine. First, the Court's party-centered approach to the issue focuses on the effect of the statute on the case before the Court, with all the benefits that posture brings from the perspective of good judicial practice. In particular, that approach has the benefit of avoiding consideration of factual issues; for example in *Lane*, the state's failure to make sports arenas handicapped-accessible, that presumably do not matter to the plaintiffs, that are unlikely to be adequately briefed,[206] and as to which disagreements may never have arisen.[207] These concerns are especially relevant in the particular context of Section 5 doctrine, since that doctrine accords great importance to the pervasiveness of the constitutional violations the statute attempts to remedy. When it is unclear whether, and to what extent, those violations exist, and when the parties to the case are uninterested in or unable to enlighten the court, good judicial practice suggests that the court avoid analyzing those violations.

By contrast, an approach that required consideration of the statute in all its applications would require a court to create a comprehensive list of rights and remedies that would presumably have to be tallied up and compared to all the conceivable burdens Title II imposed on states to determine whether, as a whole, Title II was a congruent and proportional safeguard for all the Fourteenth Amendment rights that it protected. Despite its disagreement with the majority's as-applied approach, the dissent performed this analysis

204. *Cf.* Dorf, *supra* note 176, at 249-51 (describing as-applied approaches to statutes as adopting a presumption that statutes are severable for purposes of judicial review). This statement assumes away even more difficult issues that would arise under an intent approach when considering statutes that amend previous statutes, or even statutes that impliedly repeal or alter judicial interpretations of pre-existing statutes.

205. *See, e.g.*, Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992) (considering a challenge to the constitutionality of § 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-21, 103 Stat. 701).

206. This consideration obviously speaks to the third-party standing component of facial challenges. *See generally* Fallon, *supra* note 176, at 1359-61.

207. *See* Carroll, *infra* note 217, at 1050-51 (expressing similar concerns).

in only the most perfunctory way.[208] In particular, it noted the majority's argument that Title II protected fundamental rights beyond judicial access, but then dismissed it with the observation that Title II applied to a variety of programs that did not apply to fundamental rights, and thus was overbroad.[209] That summary analysis was obviously incomplete as a full tallying up and comparison of Title II's rights and remedies.[210] It failed to give a detailed consideration to the rights Title II protected, whether fundamental or non-fundamental, and similarly failed to analyze the scope of protection Title II provided for rights beyond the judicial-access rights relied on by the majority.[211] Moreover, the dissent's analysis failed to account for Congress' authority under Section 5 to remedy violations of non-fundamental rights, even though non-fundamental rights have been protected by the Court in recent years.[212] The incompleteness of the dissent's analysis might be excusable, given its need to focus on the as-applied analysis actually employed by the dissent; in general, a dissent cannot be expected to provide a full application of its alternative approach. But the type of analysis the dissent's approach would require cautions against that approach.

Finally, an as-applied analysis leaves ample room for a coherent application of the congruence and proportionality formula. Applying that formula only to the particular right at issue in that case provides a meaningful test of the ultimate *Boerne* question – whether Congress is creating or enforcing constitutional rights. Such an inquiry would still catch over-aggressive congressional action if the statute deterred state conduct to a degree that severely outran the corresponding constitutional right. For example, the Court's post-*Boerne* jurisprudence, even after *Lane*, makes it doubtful that the Court would uphold, as congruent and proportional, Title II's requirement that sports arenas be made accessible to the disabled in order to vindicate their due process rights to access such venues.

Chief Justice Rehnquist complained that such an approach would always produce a result upholding the law: "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."[213] His

208. *See* Tennessee v. Lane, 124 S. Ct. 1978, 1997-2007 (2004) (Rehnquist, C.J., dissenting).

209. *See id.* at 2004 (Rehnquist, C.J., dissenting).

210. *See id.*

211. For example, the dissent did not address the extent to which Title II protected voting rights, or the extent to which Title II required states to make non-fundamental right services accessible. *See id.* at 1993-1994 (discussing implementing regulations regarding the accessibility steps Title II required governments to take).

212. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (striking down state sodomy law on due process grounds without formally finding an underlying fundamental right); BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (striking down punitive damages award as "grossly excessive" and thus a violation of due process). Given that the Court has struck down state government action under the Due Process Clause even though the rights were not denominated fundamental, it would be anomalous for the Court to forbid completely Section 5 legislation enforcing such non-fundamental rights.

213. *Lane*, 124 S. Ct. at 2005 (Rehnquist, C.J., dissenting).

argument – essentially that the impossibility of finding a principled way of carving up Section 5 statutes into particular applications requires that they not be divided up at all, but instead be treated as a whole – raises an interesting comparison to his and especially Justice Scalia's approach to substantive due process. Justice Scalia has argued that the due process right at issue should be identified at the most specific level possible, to protect against a judge subjectively casting the right at a high level of abstraction and thus finding it fundamental.[214] In nearly a mirror opposite approach, Chief Justice Rehnquist argued in *Lane* that the impossibility of a principled way of carving up Section 5 statutes for analysis required that they be considered *in toto*.[215]

The Chief Justice's argument, however, is hard to credit. Carving up a statute to consider as-applied challenges obviously requires judgment in determining where to make the cut. But that judgment need not be unprincipled. One limiting factor is the nature of the plaintiff's claim. For example, the plaintiffs' claims in *Lane* meant that the right to judicial access – its importance and the extent to which a statute was necessary to vindicate it – would be a central part of the analysis. As another example, the plaintiff in *Florida Prepaid* alleged that the state had engaged in willful patent infringement, leading Justice Stevens to argue in dissent that the Court should have confined its review of the statute to instances of willful infringement.[216] Indeed, the nature of the plaintiff's claim is crucial, since the Court's power to determine a statute's constitutionality derives from its duty to grant relief to and at the behest of injured plaintiffs.[217]

In turn, the nature of the plaintiff's claim presents the Court with options regarding the particular application of the statute on which it will rule. Thus, in *Lane*, the plaintiffs' status as disabled people seeking access to courthouses allowed the Court to choose between considering Title II as applied to the right of courthouse access, enforcing more generally the equal

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214. *See* Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1998) (Rehnquist, C.J., and Scalia, J. plurality opinion); *see also* Washington v. Glucksberg, 521 U.S. 702, 720-722 (1997). Chief Justice Rehnquist was the only justice to join Justice Scalia's footnote six in *Michael H. Glucksberg* was authored by the Chief Justice, and Justice Scalia joined that opinion.

215. *See Lane*, 124 U.S. at 2005 (Rehnquist, C.J., dissenting).

216. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. V. Coll. Sav. Bank, 527 U.S. 627, 652-54 (1999) (Stevens, J., dissenting) (arguing that the proper question before the Court was the constitutionality of applying the Patent Remedy Act to willful infringers, given the fact that the plaintiff in that case alleged that the state had willfully infringed on its patent).

217. *See* Marbury v. Madison, 5 U.S. 137, 178 (1803) (explaining that courts possessed the power of judicial review as part of its obligation to decide cases and grant relief at the behest of injured plaintiffs); *see also* Catherine Carroll, *Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment*, 101 MICH. L. REV. 1026, 1049 (2003). This vision of the Court also underpins its insistence that the requirements of injury, causation and redressability are constitutionally-mandated components of Article III standing doctrine. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975) (explaining the constitutional nature of those requirements).

protection rights of the disabled. By contrast, in *Garrett*, the lack of constitutional protection for government employment generally meant that the Court had no option but to consider Title I as an attempt to enforce the general equal protection rights of the disabled.

The identification of these rights, just like the plaintiff's claim from which is derives, is extrinsic to Section 5 doctrine. The process of identifying them thus provides an objective basis for determining how to carve up a Section 5 statute for purposes of constitutional analysis. Indeed, this is the fundamental point made by Justice Stevens when he argued that the Court's decision to consider Title II only as applied to courthouse access was consistent with the *Boerne* inquiry.[218] By taking as a starting point *Boerne*'s insistence that Congress not redefine Fourteenth Amendment rights, Justice Stevens focuses the inquiry on the right at issue. Because the plaintiffs had no concern with access to hockey rinks or voting booths, and because Section 5's impact on the right they *were* concerned about – judicial access – could be examined without reference to those other topics, it is legitimate and principled for the Court to restrict its analysis and holding as it did. Thus, contrary to Chief Justice Rehnquist's argument, it is thus not unprincipled for the Court in *Lane* to focus on a particular right – in that case, the right to courthouse access – with all its unique requirements and limitations,[219] as the lens through which it could decide how to divide Title II into its various applications.

As commentators have argued[220] – and indeed, as both the majority and dissent in *Lane* agreed[221] – the appropriate scope of the Court's review must turn on the logic of the underlying substantive constitutional doctrine. It also necessarily turns on the plaintiff's allegations, since those allegations structure the case as it reaches the Court and thus provide the Court with legitimate methods of widening or limiting the scope of its analysis.[222] As noted above, the majority and dissent joined battle on these issues. It is the result of that battle, rather than a concern about the Court limiting its consideration of Title II to only constitutional applications, that should determine the logic of the Court's decision to limit its holding in *Lane*.

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218. *See Lane*, 124 S. Ct. at 1992-93 n.18.

219. *See id.* at 1994 (explaining the scope of the right to access judicial proceedings).

220. *See, e.g.*, Dorf, *supra* note 176, at 238-39; Fallon, *supra* note 176, at 1324.

221. *See* discussion *supra* notes 170-184 and accompanying text.

222. *See, e.g., Fla. Prepaid*, 527 U.S. at 653-54.

> While I disagree with the Court's assumption that [merely negligent patent infringements by the state deprive the patent holder of property], the *Daniels* line of cases [distinguishing between negligent and willful state action] has only marginal relevance to this case: Respondent College Savings Bank has alleged that petitioner's infringement was willful. The question presented by this case, then, is whether the Patent Remedy Act . . . may be applied to willful infringement . . .

Id. (Stevens, J., dissenting) (citation omitted).

B. Title II's Fit As Applied to Judicial Access

Even as applied only to courthouse access, the Court divided on Title II's congruence and proportionality.[223] The majority tied Title II's requirements to states' due process-based obligations to provide access to judicial processes.[224] It noted that the due process doctrine required access to the courts only "'within the limits of practicability,'"[225] and found that requirement to parallel Title II's provision that compliance required only "reasonable modifications" of courthouses.[226] In essence, the majority placed Title II's "reasonable modification" mandate within the constitutional tradition that cost and convenience did not authorize withholding meaningful access to courts.[227]

Chief Justice Rehnquist's dissent took issue with this analysis. He stressed that Title II was not limited to exclusions that actually amounted to constitutional violations.[228] Thus, in his view, Title II swept more broadly than the underlying due process guarantee.[229] This was especially true, he suggested, "in light of the lack of record evidence showing that inaccessible courthouses cause actual Due Process violations."[230] Thus, Chief Justice Rehnquist rejected the majority's analogy between Title II and the due process judicial access cases, for the simple reason that those latter cases had found actual due process violations that were not proven to exist in the situations regulated by Title II.[231]

This dispute, perhaps more than any in *Lane*, highlights the fundamentally different approaches taken by the majority and the main dissent.[232] The dissent's approach is remarkable for insisting on an extraordinarily tight fit between a Section 5 statute and the underlying constitutional violations against which it seeks to enforce. The Chief Justice's dissent appears to give almost no leeway for a statute to do more than correct a situation that, if brought to a court, would be adjudged a constitutional violation. At most, the dissent allows Congress the possibility

223. *See Lane*, 124 S. Ct. at 1994.

224. *See id.* (citing cases finding affirmative state obligations to waive certain filing fees, and to provide indigent criminal defendants with free trial transcripts and counsel).

225. *Id.* at 1994 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

226. *See id.* at 1993-94 (discussing Title II's implementing regulations).

227. *See id.* at 1994 (stating that Title II's duty to provide reasonable modifications to courthouses "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") (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1979)).

228. *See Lane*, 124 S. Ct. at 2006 (Rehnquist, C.J., dissenting).

229. *See id.*

230. *Id.*

231. *See id.*

232. Justice Scalia dissented separately. *See infra* notes 274-80 and accompanying text.

of uncovering actual constitutional violations that had not previously been brought to the Court's attention.

In this respect, the Rehnquist dissent is clearly in the tradition of his majority opinion in *Garrett*. The *Garrett* decision rejected a large amount of evidence of disability-based discrimination as justifying Title I, concluding that the evidence did not establish the existence of constitutional violations.[233] Similarly, Justice Kennedy's concurrence found it relevant that few court cases had been brought alleging unconstitutional disability-based employment discrimination.[234] The *Garrett* majority, Kennedy's concurrence, and Rehnquist's *Lane* dissent all insist that the Section 5 power can be exercised only as a direct and precise response to actual constitutional violations. Indeed, despite the dissent's stated adherence to the idea that Section 5 allows Congress to sweep more broadly than the underlying violation,[235] the logic of these opinions leads ineluctably to a vision of the Section 5 power that allows Congress to do little more than generalize the particular, case-specific judicial results under the Fourteenth Amendment. In that sense, the Chief Justice's dissent is not terribly far from the approach Justice Scalia announced in his separate dissent in *Lane*.[236]

By contrast, the majority's analysis of the fit requirement allows Congress to prescribe a rule of conduct in the absence of a showing that the rule is itself constitutionally compelled, as long as that rule tracks analogous constitutional requirements.[237] The majority's analysis can be thought of as allowing Congress to supplement judge-made constitutional doctrine by applying the principles underlying that doctrine to new situations. Under this view, constitutional litigation yields principles that sketch the broad outlines of a doctrine. In turn, that doctrine functions as the guideposts keeping Section 5 legislation within its proper realm of enforcing, but not defining, the Fourteenth Amendment.

Under this approach, then, in *Lane*, previous litigation dealing with disability-based discrimination and access to judicial services led to the development of doctrine – the judicial recognition that disability-based discrimination can sometimes offend the Constitution, and that cost and

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233. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001).

234. *See id.* at 375-76.

235. *See Lane*, 124 S. Ct. at 1997 (Rehnquist, C.J., dissenting).

236. *Id.* at 2006. Chief Justice Rehnquist stated:

> 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 .... Yet the statute is not limited to occasions when the failure to modify results, or will likely result, in an actual due process violation ....

Id. at 2006 (Rehnquist, C.J., dissenting) (internal quotation omitted); *Cf. with id.* at 2007, 2009 (Scalia, J., dissenting) ("Nothing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, to prevent, or 'remedy' conduct that does not *itself* violate any provision of the Fourteenth Amendment.") (emphasis in original), and *id.* at 2010 ("[W]hat § 5 does not authorize is so-called 'prophylactic' measures, prohibiting primary conduct *that is itself not forbidden* by the Fourteenth Amendment ....") (original emphasis omitted and new emphasis added).

237. *See id.* at 1994.

convenience do not justify denying access to courts. In turn, Congress can "enforce" that doctrine through legislation applying those principles to a new fact pattern – the denial of courthouse access to the disabled. According to the *Lane* majority, Congress' rule on that issue – Title II's "reasonable accommodation" requirement – was congruent and proportional because it responded to the possibility that disability discrimination can be constitutionally problematic and tracked the rule the Court had developed for courthouse access in particular.[238]

One might roughly analogize this structure to Justice Harlan's approach to substantive due process, where enumerated constitutional rights provided the outlines of what he called "a rational continuum" that demarcated the content of the liberty protected by the Due Process clause.[239] So too in Section 5 doctrine, court-made law enunciating Fourteenth Amendment rights provides the outlines of a continuum that Congress, subject to a judicial check, can fill in. While Justice Harlan's approach required judges to use legal reasoning to determine the outer limits of liberty's rational continuum, *Lane*'s approach to Section 5 allows Congress to use its institutional advantages – its presumed superior knowledge of the empirical world and the social meanings attached to it, and its freedom from the limitations of the adjudicative format – to determine which legislative rule best connects the dots provided by constitutional doctrine. The statutory result is not immune from judicial review, but, as performed in *Lane*, that review respects the appropriate roles of courts and Congress.

C. Congress' Power to Establish a Disparate Impact Rule

A final important component of *Lane* concerns Congress' power to ban state actions that have a disparate impact on protected constitutional values. In the course of explaining the breadth of the Section 5 power, Justice Stevens wrote that "[w]hen 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."[240] This sentence appeared in the opinion after the Court had noted statements in earlier cases that the Section 5 power included the power to enact prophylactic legislation that could go beyond conduct prohibited by the amendment itself.[241] The Court's description of the Section 5 power

238. *Id.* at 1993.

239. *See* Poe v. Ullman, 367 U.S. 497, 543 (1960) (Harlan, J., dissenting from denial of jurisdiction).

240. *Lane*, 124 S. Ct. at 1986.

241. *See id.* at 1985-86; *see also id.* at 1985 (stating that the Section 5 power "includes 'the authority both to remedy and 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

included a discussion of *Hibbs*, which it described as upholding 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 Massachusetts v. Feeney*."[242]

Justice Stevens' description of *Hibbs* was accurate.[243] His statement about the prophylactic nature of the Section 5 power had also been common ground among the justices until *Lane* itself, where Justice Scalia partially defected from this consensus.[244] Nevertheless, the general nature of the statement in *Lane* that Congress has the power to ban practices that yield discriminatory effects "to carry out the basic objectives of the Equal Protection Clause"[245] suggests potentially broad congressional power. Before *Lane*, the Court in the post-*Boerne* period had expressly approved of enforcement legislation targeting discriminatory effects only in the field of race.[246] But because race, like gender, is a classification tool that yields heightened judicial scrutiny, the Court's statement in *Monterey County* is more easily cabined. By contrast, the statement in *Lane* leaves a tool that the Supreme Court and lower courts may be able to pick up and use in the future.

The importance of that statement lies in its generality. As recent cases such as *Romer v. Evans*[247] and *Grutter v. Bollinger*[248] have shown, the requirements of the Equal Protection Clause do not slavishly track the formal levels of scrutiny accorded particular classifications.[249] Thus, the

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Amendment's text'") (quoting Kimel v. Fla. Board of Regents, 528 U.S. 62 (2000)) (internal quotation omitted, brackets in original).

242. *Id.* at 1986 (citing Massachusetts v. Feeney, 442 U.S. 256 (1979)). *Feeney* held that heightened scrutiny of gender classifications would apply only when the government had purposely classified on that basis. *See Feeney*, 442 U.S. at 272.

243. Indeed, Justice Kennedy's dissent in *Hibbs* complained that while the evidence supporting the FMLA "could perhaps support the charge of disparate impact, but not a charge that States have engaged in a pattern of intentional discrimination prohibited by the Fourteenth Amendment." *Hibbs*, 538 U.S. at 749-50.

244. *See infra* notes 274-80 and accompanying text (discussing Justice Scalia's dissent in *Lane*).

245. *See Lane*, 124 S. Ct. at 1986.

246. *See* Monterey County v. Lopez, 525 U.S. 266 (1999). The question in *Monterey County* was whether application of those requirements would violate federalism when a county covered by the Act sought to implement changes in voting procedures mandated by the law of California, which was not itself a covered jurisdiction. *Id.* at 266. The *Monterey County* Court, citing *Boerne*'s recognition that Section 5 allows Congress to proscribe more conduct than that which would itself violate the Constitution, reaffirmed pre-*Boerne* precedent explicitly, holding that in appropriate circumstances Congress "may guard against both discriminatory animus and the potentially harmful *effect* of neutral laws . . . ." *Id.* at 283. The "appropriate circumstances" caveat derives from the fact that the Voting Rights Act's pre-clearance requirements apply only to particular jurisdictions that both suffered from low voter turnout or registration rates and maintained literacy, good character or analogous voter qualification tests. *See* 42 U.S.C. §§ 1973b(b)-c (2000).

247. 517 U.S. 620 (1996).

248. 539 U.S. 306 (2003).

249. For linguistic simplicity, I refer to the "requirements" of the Equal Protection Clause. In another forum I have argued that much of the Supreme Court's equal protection jurisprudence

strict scrutiny applied in *Grutter* did not mean fatal scrutiny, and the ostensible rational basis review in *Romer* did not mean a victory for the state.[250] Because the Court's tiered scrutiny structure does not yield predictable results, the Court's statement that Congress can target discriminatory effects in order to enforce the equal protection guarantee potentially widens the scope of permissible legislative action under Section 5. In particular, it provides a potential opening for Congress to act when it perceives that irrational or animus-based discrimination threatens the goal of equal protection.

Of course, the Court's statement is quite general, and largely reflects the consensus view that Section 5 authorizes at least some prophylactic legislation.[251] Still, it is significant that the Court explicitly recognized Congress' power to target discriminatory effects as a general principle of Section 5 doctrine, decoupled from a situation where the Section 5 statute seeks to enforce racial or gender equality. As the Court suggested in *Hibbs*, states' use of race or gender as the classification tool effectively puts a thumb on the scale in favor of congressional power.[252] By stating the rule more generally, decoupled from that halo effect, Justice Stevens may have taken a step toward expanding congressional power to remedy discrimination against non-suspect classes.

In the final analysis, though, whether that statement ripens into a more robust Section 5 power will depend on the Court's application of the statement's caveat – that Congress has the power to regulate discriminatory effects in order "to carry out the basic objectives of the Equal Protection Clause."[253] The ultimate importance of Justice Stevens' hint will depend on how stringently the Court reviews Congress' determination that unconstitutional conduct is afoot that requires a legislative response.[254]

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reflects less an authoritative statement of what the Constitution requires, and more a prudential unwillingness to strike laws down when the Court may not be able to discern with confidence whether a given law violates the Constitution. *See generally The Section 5 Power*, *supra* note 131.

250. The same might also be said of the Due Process Clause, although *Lane* mentions congressional enforcement only of equal protection. *Compare* Lawrence v. Texas, 539 U.S. 558 (2003) (striking down sodomy law as violation of the due process right to intimate conduct, despite never formally identifying that right as fundamental and engaging in strict scrutiny), *and* BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (striking down punitive damages award as violating due process without expressly stating a standard of review).

251. *But see Lane*, 124 S. Ct. at 2007 (Scalia, J., dissenting) (abandoning, except in the race context, the idea that Section 5 authorizes Congress to enact prophylactic legislation regulating primary conduct beyond that which is illegal under the Fourteenth Amendment itself).

252. *See Hibbs*, 538 U.S. at 135.

253. *Lane*, 124 S. Ct. at 1986.

254. In *Boerne* the Court cited an insufficient legislative record in rejecting an argument that RFRA should be seen as within Congress' power because it targeted effects in order to enforce against willful discrimination. City of Boerne v. Flores, 521 U.S. 530, 536 (1997). In particular, RFRA's defenders at the Court noted that the Court had upheld such statutory effects on this theory, citing cases upholding the Voting Rights Act and federal legislation mandating race-based set-

More fundamentally, it will also depend on the Court's willingness to moderate its juricentric approach to the Fourteenth Amendment. In particular, if the Court is willing to acknowledge that much of its equal protection jurisprudence consists not of authoritative determinations of what the Constitution requires, but instead of acknowledgements that the Court cannot discern the actual constitutional rule, then more room should exist for Congress to determine what is necessary "to carry out the basic objectives" of the amendment.[255] Until then, the Court's hint will remain nothing but a restatement of the generally acknowledged prophylactic nature of the Section 5 power, though pregnant with the possibility of a more robust conception of that power.

IV. SECTION 5 AFTER *HIBBS* AND *LANE*

The Court's recent change of course in its Section 5 jurisprudence raises questions about the fate of congressional enforcement legislation that might be enacted in the future. At least two pieces of such legislation are currently under some level of consideration or anticipated consideration: a renewal of the provisions of the Voting Rights Act of 1965 (VRA) that expire in 2007 and the Employment Non-Discrimination Act (ENDA). Given the Court's more restrictive Commerce Clause jurisprudence recently,[256] a renewal of the VRA would likely be constitutionally justifiable only under Congress' power to enforce the Civil War Amendments, presumably the Fifteenth.[257] ENDA, which would restrict sexual orientation-based employment discrimination,[258] would apply to most employers, private and public, and on that ground would most likely be authorized by Congress' power to regulate interstate commerce, even as that power has been trimmed in recent years. However, because legislation enacted under the Interstate Commerce and other Article I powers may not abrogate state sovereign immunity from suits

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asides, and argued that RFRA should be viewed similarly. *See id.* at 529. The Court did not reject the premise of the argument, instead concluding that those other statutes were better supported by the legislative record documenting the scope and intractability of the problem. *See id.* at 530 ("A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."). *See also id.* ("[T]he appropriateness of remedial measures must be considered in light of the evil presented . . . .").

255. For an argument to this effect, *see generally The Section 5 Power*, *supra* note 131.

256. *See generally* United States v. Morrison, 537 U.S. 863 (2003); United States v. Lopez, 124 S. Ct. 2925 (2004).

257. The original Voting Rights Act was upheld as an appropriate exercise of Congress' power to enforce the Fifteenth Amendment. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966). Renewals of this act were also upheld. *See* City of Rome v. United States, 446 U.S. 156, 180-182 (1980); Lopez v. Monterey County, 525 U.S. 266 (1999). The analysis in this Article would most likely apply to a challenge to legislation enacted pursuant to Congress' power to enforce the Fifteenth Amendment. *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372 n.8 (2001) (noting that Section 2 of the Fifteenth Amendment "virtually identical" to Section 5 of the Fourteenth Amendment).

258. *See ENDA*, *supra* note 6, at 22-24.

seeking damages and other retrospective relief,[259] ENDA lawsuits against state employers seeking such relief, for example, back pay or damages awards, would require that statute to be authorized by Section 5.[260] This part of the article considers these issues in light of the new understanding of Section 5 ushered in by *Lane*, and, where relevant, by *Hibbs*.

A. *VRA Renewal After* Lane

The *Lane* majority is fragile, dependent largely on Justice O'Connor's unsteady adherence to a more generous reading of Congress' Section 5 power.[261] Whether that fragile majority would cohere in a challenge to VRA renewal is an open question. It may be that the VRA's direct focus on racial discrimination in voting will convince the Court to review it more deferentially. *Hibbs* provides an analogy. In that case, the six-justice majority upheld the FMLA largely because the statute addressed gender discrimination, which the Court itself considers a significant constitutional concern.[262] In turn, the constitutional concern triggered by gender discrimination both yields greater judicial scrutiny and makes it easier for Congress to demonstrate the existence of a problem warranting a legislative response. Similarly, because the VRA directly targets an explicit constitutional value,[263] and, indeed, because the Court itself has identified

259. *See* Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996).

260. For an analysis of ENDA's Section 5 basis before *Hibbs* and *Lane*, *see generally ENDA*, *supra* note 6.

261. As suggested throughout much of this Article, *Lane*'s approach to Section 5 is difficult to reconcile with much of Court's previous Section 5 jurisprudence, thus making Justice O'Connor's future stance on these issues critical. For his part, the position of Chief Justice Rehnquist, who voted to uphold the FMLA in *Hibbs* but has voted to strike down or, in the case of *Monterey County*, limit, every other Section 5 statute in the *Boerne* era, is at least partly explainable by the fact that the FMLA targeted discrimination that the Court itself subjected to heightened scrutiny. *But see City of Rome*, 446 U.S. at 206-07 (Rehnquist, J., dissenting) (dissenting from a decision to uphold the Voting Rights Act's requirement that covered jurisdictions not change any voting procedure that would disparately impact minority voters); *Monterey County*, 525 U.S. at 288 (Kennedy, J., concurring in the judgment) (refraining from reading the Voting Rights Act broadly because of constitutional concerns). Another possibility, whose correctness is impossible to determine, is that Chief Justice Rehnquist is simply sufficiently favorably disposed to gender equality as to overcome federalism-based objections he might otherwise have to Section 5 legislation. *See* Robert Post, *Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 18-19 (2003) (suggesting this hypothesis).

262. *See Hibbs*, 538 U.S. at 736.

263. A slight distinction between gender discrimination in general and racial discrimination with regard to voting is that the former is a value not explicitly enshrined in the Constitution, but instead a product of judicial interpretation of the Equal Protection Clause. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197-98 (1976). By contrast, the Fifteenth Amendment explicitly prohibits racial discrimination with regard to voting. U.S. CONST. amend. XV. But for present purposes this is a distinction without a difference. The important similarity here is that the Court recognizes both of these phenomena as constitutionally problematic. That fact in turn tightens the analogy between *Hibbs'* increased deference to congressional action and the appropriate level of deference to VRA renewal.

both components of that value – racial equality and the right to vote – as important enough to trigger searching judicial scrutiny in their own rights,[264] the Court might be willing to give Congress significant latitude to enact a VRA renewal.[265]

In particular, *Hibbs*' deference to legislation enforcing a judicially recognized constitutional value might ease one of the problems with regard to VRA renewal, the lack of recent explicit constitutional violations. Recall that, in cases such as *Garrett*, the Court insisted on congressional fact findings that revealed a significant number of constitutional violations by the states.[266] Commentators have questioned whether Congress could identify such violations in VRA context, given the VRA's success in preventing them.[267] However, if the members of the *Hibbs* majority – especially Justice O'Connor and most especially Chief Justice Rehnquist[268] – are serious about "it [being] easier for Congress to show a pattern of state constitutional violations" when the Court itself scrutinizes infringements of that right more closely,[269] then that majority should be expected to accord Congress significant deference on the question of the need for VRA renewal.[270]

The source of that constitutional difficulty in either explicit text or judicial interpretations thereof is insignificant. At any rate, the two components of the Fifteenth Amendment's concerns – voting and racial equality – have been identified as fundamental constitutional concerns in their own rights. *See infra* note 264.

264. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (right to vote); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) (right to vote); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (racial classification).

265. Perhaps significantly, Justice O'Connor, writing only for herself in a pre-*Boerne* case not implicating Section 5, described congressional power to eradicate racial discrimination as "ample." *See* Missouri v. Jenkins, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring). As noted in an earlier footnote, Chief Justice Rehnquist's position on this question is unclear, given his votes in earlier cases. *See supra* note 261 and accompanying text.

266. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368-70 (2001).

267. *See* Richard Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 60 OHIO ST. L. J. (forthcoming 2005).

268. *See supra* note 261.

269. *See Hibbs*, 538 U.S. at 736.

270. Professor Vikram Amar considers this part of *Hibbs*' approach to Section 5 as "cheat[ing] a bit as to the key issue," namely, the frequency of state constitutional violations and the proportionality of Congress' legislative response. Vikram David Amar, *The New 'New Federalism*, 6 GREEN BAG 2d 349, 353 (2003). In particular, Professor Amar, comparing *Hibbs* to *Garrett*, argues that "[t]o say that gender classifications are subject to a more stringent standard of review than are disability classifications doesn't really tell us how often States are violating the constitutional rights of women versus the constitutional rights of the disabled." *Id.*

This Article's speculation about the VRA and future Section 5 legislation takes the Court's approach in *Hibbs* as a given. Nevertheless, in at least partial defense of that approach, it seems reasonable, despite Professor Amar's argument, for a court to believe that the general unreasonableness of a classification based on a trait such as gender makes it more likely that any instances of gender discrimination identified by Congress will be instances of unconstitutional state conduct. It may well be, as Professor Amar seems to suggest, that in *Hibbs* the Court did not identify a materially larger number of discrimination instances than the Court acknowledged in *Garrett*; thus, what he calls the "standard-of-review-differential" between the two classifications does not matter. *See id.* But the more theoretical point remains that a heightened standard of review makes it likely that whatever discrimination instances are in fact identified will be unconstitutional.

Hibbs does not mean that VRA renewal will get a free pass on the evidentiary issue; as in *Lane* and *Hibbs* itself,[271] the Court will presumably examine the legislative record for examples of relevant discrimination. However, *Hibbs* does suggest that the VRA's success in suppressing racial discrimination in voting should not block its renewal. In particular, *Hibbs*' lighter burden of proof should allow Congress to make the case for renewal through more indirect evidence of state misconduct.[272] Indeed, it might even mean that the decades-old evidence supporting earlier renewals and the original act itself might suffice.[273]

Justices inclined to uphold VRA renewal might find an unlikely ally in Justice Scalia. In *Lane*, Justice Scalia abandoned the congruence and proportionality test, and announced that, with the exception of statutes targeting racial discrimination, he would henceforth vote to strike down Section 5 legislation that prohibited primary conduct itself not forbidden by the Fourteenth Amendment.[274] With respect to Section 5 legislation targeting race discrimination, however, he announced that for reasons of stare decisis[275] and the Fourteenth Amendment's original concern for racial equality, [276] he would apply *Katzenbach*'s more generous test derived from Article I's Necessary and Proper Clause.[277] Justice Scalia embraced a stricter version of that test, however, stating that he would vote to allow Congress to impose requirements only on states "in which there has been an identified history of relevant constitutional violations."[278] He also stated that such legislation would have to be directed against state actors, rather than

271. *See* Tennessee v. Lane, 124 S. Ct. 1978 (2004); *Hibbs*, 538 U.S. at 735.

272. *See, e.g.*, Hasen, *supra* note 267 (recounting other commentators' suggestions for how to prove the continued need for the VRA in light of the statute's success in suppressing the most egregious forms of race-based voting discrimination).

273. Beyond such speculation, there is always the possibility that new evidence of race-based state action restricting voter rights might be enough under the *Hibbs* standard to justify VRA renewal. For example, controversies about voting in Florida, both in the 2000 election and in the run-up to the 2004 elections, might convince the Court of the need for VRA renewal. *See, e.g.*, Ford Fessended, *Florida List for Purge of Voters is Flawed*, N.Y. TIMES, July 10, 2004, at A12.

274. *See Lane*, 124 S. Ct. at 2009-13 (Scalia, J., dissenting). Under that narrower understanding, Congress could create causes of action against state actors, impose reporting requirements on states that would facilitate enforcement, and perhaps impose other requirements short of regulating primary conduct.

275. *See id.* at 2010-12 (Scalia, J., dissenting).

276. *See id.* at 2011 (Scalia, J., dissenting).

277. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966) (setting forth this test for Section 5 legislation).

278. *Lane*, 124 S. Ct. at 2012 (Scalia, J., dissenting); *see also Hibbs*, 538 U.S. at 742 (Scalia, J., dissenting) (stating that, in his view, the FMLA was inappropriate Section 5 legislation because Congress had made the statute applicable to all fifty states without documenting relevant constitutional violations in each of them).

private parties,[279] and could not "violate other provisions of the Constitution."[280]

Assuming Justice Scalia would apply his version of the *Katzenbach v. Morgan* test to legislation aimed at enforcing the Fifteenth Amendment,[281] would VRA renewal get his vote? Certainly, one question would be whether the VRA reflected "an identified history of relevant constitutional violations" in the particular states on which the VRA would be made to apply.[282] The provisions of VRA set to expire in 2007, which are the ban on literacy and other voter qualification tests[283] and the pre-clearance requirements for states' electoral procedure changes,[284] are limited to states that combined literacy, good character or analogous qualification requirements for voting with low registration or voting rates.[285] Should the 2007 renewal simply extend the terms of the current provisions – that is, should the renewal be similarly geographically limited? Justice Scalia might see a strong case for VRA renewal under his version of the deferential *Morgan* standard. Indeed, it is quite possible that Justice Scalia crafted his statement carefully, adopting the phrase "an identified history of . . . violations" exactly because it would allow him to vote for VRA renewal based on the history of voting rights violations in the covered jurisdictions.[286]

Still, if the renewed VRA's geographic limitations are based on the grandfathering in of states that were covered in 1965, 1970, and 1975,[287]

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279. *See Lane*, 124 S. Ct. at 1012 (Scalia, J., dissenting).

280. *See id.* at 2012-13 (Scalia, J., dissenting).

281. While the issue is not entirely clear, the logic of Justice Scalia's *Lane* dissent suggests that he would apply his more lenient, *McColloch*-based formula for congressional power to enforce the Fifteenth Amendment. Justice Scalia cited *South Carolina v. Katzenbach* when arguing, in favor of his stare decisis argument, that more generous understandings of the Section 5 power had, until *Hibbs*, been limited to cases dealing with federal remedies for racial discrimination. *See Lane*, 124 S. Ct. at 2010 (Scalia, J., dissenting). It may also be significant that Justice Scalia described the Voting Rights Act as "important and well-accepted." *Id.* His concentration on the original focus of the Fourteenth Amendment on race, as a justification for his singling out of race remedies for more generous treatment, would seem to apply as well to the Fifteenth Amendment, which by its terms is limited to racial discrimination in the discrete area of voting. Similarly, his explanation that nineteenth century cases' more generous standard arose during a time when Fourteenth Amendment guarantees were far less broadly scoped than today surely applies as well to the Fifteenth Amendment, given the narrow scope dictated by its terms. Thus, Justice Scalia's own analysis, as well as the implications of that analysis, would suggest that he would apply the more generous *McColloch/Morgan* standard to Section 2 legislation.

282. *Lane*, 124 S. Ct. at 2012 (Scalia, J., dissenting).

283. *See* 42 U.S.C. § 1973b(a)(1) (2000); *see also id.* at § 1973b(c) (defining these qualification tests).

284. *See id.* at § 1973c.

285. *See id.* at § 1973c; *id.* at § 1973b(a)(1); *id.* at § 1973b(b) (setting forth the actual criteria for inclusion in the qualification and pre-clearance provisions).

286. *See Lane*, 124 S. Ct. at 1212 (Scalia, J., dissenting).

287. The 1970 and 1975 amendments to the VRA brought within the statute's qualification and pre-clearance provisions states that were previously subject to those provisions, as well as those that "satisfied" the qualification and low registration/turnout requirements for the first time. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 4, 84 Stat. 314, 315; Act of Aug. 6, 1975,

then it is at least possible that Justice Scalia would find such old coverage decisions insufficiently probative, especially given the countervailing importance he would accord to insulating states from federal commands. In such a case Justice Scalia, like the rest of the Court, would be forced to consider whether the renewing Congress had compiled a sufficiently probative record of state violations to justify renewal. It bears repeating that in such a case Justice Scalia would require that a record be built pertaining to each particular state Congress wished to regulate.[288]

B. The Employment Non-Discrimination Act

The Employment Non-Discrimination Act (ENDA), a bill that would prohibit most employment discrimination based on sexual orientation, has been introduced in Congress nearly every session since the mid 1990's.[289] ENDA is undoubtedly constitutional as applied to private employers under Congress' power to regulate interstate commerce, even after the recent trimming of that power.[290] Current doctrine would also allow ENDA to be applied to state governments in their capacity as employers.[291] However, the commerce power would not authorize Congress to make retrospective relief available to state government employees as plaintiffs.[292] Such relief could be authorized only pursuant to Congress' power to enforce the Fourteenth Amendment.[293]

Would ENDA pass muster as appropriate Section 5 legislation? Certainly, prospects for that result have brightened since *Hibbs* and *Lane*.[294] At the very least, those cases stand for some loosening of the stringent

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Pub. L. No. 94-73 89 Stat. 400, 401. In essence, the VRA amendments left undisturbed previous determinations that a state was subject to the VRA's qualification and pre-clearance provisions.

288. *See supra* note 278 and accompanying text. An issue for all members of the Court would be whether the VRA itself is an unconstitutional race classification, and thus beyond Congress' power to enact regardless of the outcome of the Section 5 analysis itself. Because this issue presents a question of substantive constitutionality rather than congressional enforcement power, it is beyond the scope of this Article. For an argument that recent interpretations of the VRA reduce the likelihood that it will be found substantively unconstitutional, *see* Hasen, *supra* note 267.

289. *See, e.g.*, H.R. 2692, 107th Cong. (2001); H.R. 1858, 105th Cong. (1997); H.R. 1863, 104th Cong. (1995); H.R. 4636, 103rd Cong. (1994); *see also ENDA*, *supra* note 6, at 6 n.37.

290. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). In particular, *Morrison* emphasized the importance of the economic or non-economic nature of the activity when determining whether Congress could reach it under its commerce power. *See Morrison*, 529 U.S. at 610-11. Because employment is a quintessential economic activity, there is no reason to doubt that ENDA would fall within *Morrison*'s understanding of the commerce power.

291. *See* Garcia v. San Antonio Transit Auth., 469 U.S. 528 (1985).

292. *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

293. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that Section 5 authorizes Congress to make states liable for such relief).

294. *See generally ENDA*, *supra* note 6 (discussing ENDA's prospects as Section 5 legislation before *Hibbs* and *Lane*).

review the Court had previously applied to Section 5 legislation. In particular, they represent a loosening of *Garrett*'s quite strict evidentiary requirement. Nevertheless, both *Hibbs* and, to a lesser degree, *Lane* can be read as narrow opinions. Both of them stress the important nature of the value protected by Congress. In *Hibbs*, the Court explicitly concluded that the increased judicial scrutiny accorded gender classifications made it easier for Congress to identify the constitutional violations requisite to an appropriate use of its Section 5 power.[295] Similarly, in *Lane* the Court noted the importance of the right to access to the judicial system.[296] The *Lane* Court used the importance of the underlying right somewhat differently than in *Hibbs*, concluding that Title II's requirement of reasonable access closely tracked the constitutional rule that cost or convenience was an insufficient justification for denial of access.[297] Thus, the judicially-recognized importance of the right meant that Congress made the Section 5 standard easier to satisfy.

This analysis might find a more difficult application to ENDA. Because sexual orientation is not a suspect class as gender is, and because employment is not a fundamental right as the Court in *Lane* treated judicial access, the more generous analysis in those cases does not immediately and obviously apply to ENDA. Still, the constitutional status of sexual orientation classifications remains in a state of flux. In *Romer v. Evans*,[298] the Court struck down such a classification on equal protection grounds, while in *Lawrence v. Texas*,[299] it struck down a ban on same-sex sodomy using due process reasoning that included a significant equality theme.[300]

This protection for gays and lesbians, and for the conduct that largely marks their status,[301] might eventually be thought of as weighty enough to justify the kinds of conclusions about ENDA that the Court drew about the FMLA[302] and Title II.[303] Most straightforwardly, if *Romer* eventually comes to be seen as introducing some heightened level of scrutiny for sexual orientation classifications, then Congress might be given an easier task in identifying constitutional violations by states, thus justifying use of its Section 5 power. *Romer* does not lend itself naturally to this sort of evolution; in particular, its focus on the broad nature of the Amendment 2's burden and its unusual effect in making gays and lesbians legal outcasts

295. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

296. *See Lane*, 124 S. Ct. at 1988-94.

297. *See id.* at 1992-94.

298. 517 U.S. 620, 635-36 (1996).

299. 123 S. Ct. 2472 (2003).

300. *Id.* at 2482 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

301. *See infra* notes 304-08.

302. *See supra* note 295 and accompanying text.

303. *See supra* note 297 and accompanying text.

means that it will take some effort to expand its logic into a general presumption against sexual orientation classifications.

Lawrence will also require some expansion before it might become a doctrinal anchor for a more deferential approach to ENDA. In particular, for *Lawrence* to play this role it will be necessary for the Court to reason that the intimacy right vindicated by *Lawrence* is threatened by explicit sexual orientation classifications in fields such as employment.[304] The connection between intimate conduct and group status is by no means impossible to draw, just as it is not impossible to draw a more general connection between liberty and equality.[305] Indeed, after *Bowers v. Hardwick* a tug of war erupted between courts and gay rights advocates over whether the constitutionality of same-sex sodomy prohibitions[306] precluded heightened judicial scrutiny of sexual orientation classifications. Courts, however, have usually ruled that such heightened scrutiny was inappropriate, since the Constitution allowed prohibition of the conduct that, in their view, defined the class.[307]

The Court in *Lawrence* also began to draw this connection between liberty and equality – this time, to the benefit of gays and lesbians – when it noted the status impact Texas' sodomy law had on gays and lesbians.[308] Still, given the complexity of that relationship, its fleshing out and application to legal doctrine may require effort and a conscious expansion of the Court's protection for both gay and lesbian intimate associations and their status.

Beyond these difficult questions, *Lane* is notable also for its more relaxed evidentiary standards independent of the importance of the constitutional value at stake. As discussed earlier in this Article, the *Lane* majority found support for Title II in instances of discrimination across a spectrum of government activities beyond judicial administration,[309] did not require that all the evidence be explicitly spread across the legislative record,[310] and suggested that even private action might be probative in demonstrating the need for Section 5 legislation.[311] This more relaxed

304. This same analysis could, of course, apply to the evolution of the Court's own approach to sexual orientation discrimination.

305. *See, e.g.*, Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

306. While the Georgia statute at issue did not distinguish between same-sex and opposite-sex sodomy, the *Hardwick* Court presented the issue as one dealing with same-sex sodomy. *See Hardwick*, 478 U.S. at 190-191.

307. *See, e.g.*, Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97, 100-01 (D.C. Cir. 1987); *see also ENDA*, *supra*. note 6, at 31-34.

308. *See Lawrence*, 123 S. Ct. at 2482.

309. *See Lane*, 124 S. Ct. at 1989-90.

310. *See id.* at 1991-92.

311. *See id.* at 1991 n.16.

evidentiary requirement certainly cannot harm the prospects for a future ENDA passing Section 5 muster.

Nevertheless, the congruence and proportionality test still requires that this more relaxed evidentiary requirement be applied against the standard of a judicially derived rule regarding the importance of the underlying constitutional value; in this case either the suspectness of sexual orientation classifications generally, or the importance of the substantive right to government employment, or the right to intimacy.[312] As noted above, *Hibbs* and *Lane* read their respective statutes as focusing on values that received greater-than-normal judicial protection.[313] That judicial determination of the importance of the underlying right played an integral part in those opinions. Unless that juricentric model is altered, or the courts expand *Romer* and *Lawrence* into more general protections for gays and lesbians, or Congress creates a powerful evidentiary case about the irrationality of sexual orientation-based employment discrimination[314] or the linkage between that discrimination and the right to intimacy, then the fate of ENDA as Section 5 legislation remains unclear even after *Hibbs* and *Lane*.

V. CONCLUSION: THE TWO FACES OF *LANE*

Lane represents an important, yet an incremental, step toward a more expansive Section 5 power. The obvious need to retain Justice O'Connor's vote no doubt prevented Justice Stevens from writing a majority opinion that would have echoed more explicitly Justice Breyer's dissent in *Garrett*.[315] Justice Breyer's dissent, in a case dealing with Title I of the ADA's prohibitions on disability-related employment discrimination, credited instances of discrimination not dealing with employment particularly, as well as discrimination performed by non-state actors,[316] allowed Congress to draw from that evidence more general conclusions than a court might be justified in doing when determining a particular party's guilt or innocence.[317]

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312. *See supra* note 3044 and accompanying text.

313. *See, e.g., Lane*, 124 S. Ct. at 1992. The majority stated:

> We explained [in *Hibbs*] that because the FMLA was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, "it was easier for Congress to show a pattern of state constitutional violations" than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review. Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications.

Id. (internal citations omitted).

314. *See ENDA*, *supra* note 6, at 50-58 (suggesting avenues for congressional fact finding).

315. Except for Justice O'Connor, all of the members of the *Lane* majority joined in Justice Breyer's dissent in *Garrett*. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (Breyer, J., dissenting).

316. *See id.* at 377-79.

317. *See id.* at 380 (allowing Congress to "draw general conclusions . . .from anecdotal and opinion-based evidence . . ."); *id.* at 382-84 (arguing that Congress should be free of the evidentiary rules and presumptions reflecting courts' institutional limitations).

Justice Breyer noted the institutional differences between courts and Congress that suggested the latter's competence to impose greater burdens on states than courts could when adjudicating Fourteenth Amendment claims.[318]

Justice Stevens' opinion in *Lane* makes tentative moves in the direction of Justice Breyer's *Garrett* dissent. By taking into account evidence that does not directly relate to discrimination with regard to judicial access, and evidence from non-state actors,[319] it suggests the same sort of broader understanding of how discrimination in one area or by one type of actor in society suggests the possibility of discrimination in or by another.[320] Similarly, by taking into account evidence from a task force,[321] *Lane* echoes Justice Breyer's argument that Congress' representative nature allows it to garner evidence from broader sources than a court.[322] *Lane*'s explicit statement about Congress' power to enact disparate impact legislation in areas beyond race[323] echoes Justice Breyer's statement to that effect.[324] Finally, *Lane*'s congruence and proportionality analysis, which focused on the degree to which the challenged statute tracked the constitutional rule, rather than on the degree to which the statute directly targeted actual adjudicated or otherwise proven constitutional violations,[325] finds a close analogue in Justice Breyer's analysis of how Title I, properly understood against Congress' institutional capacities to discern unfair discrimination, tracked the Court's constitutional rule against irrational disability-based discrimination.[326]

Still, these statements in *Lane* are either dicta[327] or are applied less aggressively than in Justice Breyer's *Garrett* dissent.[328] The result is an

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318. *See id.* at 384-85 (Breyer, J., dissenting) (arguing that Congress' nature as an elected body gives it more authority than a court to second-guess state legislative determinations).

319. *See, e.g., Lane*, 124 S. Ct. at 1981.

320. *See Garrett*, 531 U.S. at 378 (Breyer, J., dissenting).

321. *See Lane*, 124 S. Ct. at 1981.

322. *See Garrett*, 531 U.S. at 382-85 (Breyer, J., dissenting).

323. *See Lane*, 124 S. Ct. at 1986.

324. *See Garrett*, 531 U.S. at 385-87 (Breyer, J., dissenting).

325. *See Lane*, 124 S. Ct. at 1993-94.

326. *See Garrett*, 531 U.S. at 383 (Breyer, J., dissenting).

327. *See, e.g., Lane*, 124 S. Ct. at 1991-92 n.16-17 (explaining that *Hibbs*' analysis was based largely on evidence of private actor conduct).

328. For example, Justice Breyer's opinion explicitly discusses the institutional competence differences that he believes justifies Congress in taking a much broader approach to the evidence. *See Garrett*, 531 U.S. at 376-89 (Breyer, J., dissenting). Furthermore, for justification supporting congressional authority to go farther than a court could to override states' decisions to classify on the basis of disability. *See id.* at 384-85 (Breyer, J., dissenting). Justice Breyer's explicitness is largely absent from *Lane*, which discussed the evidence much more straightforwardly. For the presentation of a convincing case for Title II without any need to account for Congress' institutional capabilities, see *Lane*, 124 S. Ct. at 1991 (referring to "the sheer volume of evidence demonstrating the nature

opinion that straddles the two opinions in *Garrett*, ostensibly following the majority's analysis but applying it in a way hearkening to the dissent's. It may well be that *Lane*'s "strict in theory but somewhat more lenient in fact"[329] review of Section 5 legislation may be the most change the *Garrett* dissenters will be able to achieve with the current membership of the Court. If so, then *Lane* is perhaps best understood as an opinion that paused the current Court's insistence on strict review of Section 5 legislation. Whether that pause is temporary or the precursor to a change in direction is a question that will have to await changes in the Court's composition.

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and extent of unconstitutional discrimination against persons with disabilities in the provision of public services"). The court concluded that Title II was congruent and proportional because it tracked the constitutional rule so closely. *Id.* at 1994 ("[Title II's] duty to accommodate is perfectly consistent with the well-established principle that, 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts") (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

329. The reference, of course, is to Gerald Gunther's description of strict scrutiny. *See generally* Symposium, *The New Federalism After United States v. Lopez: Panel II*, 46 CASE W. RES. L. REV. 695, 723-724 (1996). Perhaps more deeply, though, it also refers to, not coincidentally, Justice O'Connor's insistence that strict scrutiny is *not* in fact fatal. *See* Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003); Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 235 (1995); Missouri v. Jenkins, 515 U.S. 70, 112-13 (1995) (O'Connor, J., concurring). Justice O'Connor was the fifth vote in *Lane*, joining the four dissenters in *Florida Prepaid*, *Kimel*, and *Garrett*. *See supra* note 261 and accompanying text.