Note

Applying Section 5: *Tennessee v. Lane* and Judicial Conditions on the Congressional Enforcement Power

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INTRODUCTION

Last Term, the Supreme Court upheld for the first time Congress's effort to enforce the Due Process Clause. In *Tennessee v. Lane*, the Court considered whether Congress had exceeded its constitutional authority in Title II of the Americans with Disabilities Act (ADA) by requiring states to provide accessible courthouses for disabled people like George Lane.[1] Respondent Lane was arrested after refusing to crawl or be carried up two flights of stairs to face a misdemeanor charge on the second floor of a courthouse with no elevator. He sued Tennessee for failing to comply with Congress's courthouse-accessibility mandate. Reviewing Title II of the ADA, the Court validated Congress's exercise of its Fourteenth Amendment Section 5 power "to enforce, by appropriate legislation,"[2] the Due Process Clause guarantees of courthouse access for all citizens, including people with disabilities.[3]

The result in *Lane* was received as "unexpected,"[4] standing out from recent decisions in which the Court had dramatically constrained Congress's Section 5 power. In the seven years prior to *Lane*, the Rehnquist Court had invalidated five different laws—including three landmark civil rights laws—on the ground that Congress had exceeded its power to enforce the Fourteenth Amendment.[5] Animating these rulings was the central claim that Congress may only use its Section 5 power to enforce judicial articulations of Fourteenth Amendment rights, not its own interpretation of those rights. Robert Post and Reva Siegel have aptly characterized this Fourteenth Amendment jurisprudence as "juricentric" because it reflects a vision of the Constitution in which interpretive

1. 124 S. Ct. 1978 (2004).

2. U.S. CONST. amend. XIV, § 5.

3. *Lane* marked the fourth time that the Supreme Court granted petitions for certiorari on the constitutional validity of Title II. *See* Med. Bd. v. Hason, 537 U.S. 1028 (2002), *cert. dismissed*, 538 U.S. 958 (2003); Bd. of Trs. v. Garrett, 531 U.S. 356, 360 n.1 (2001) ("To the extent the Court granted certiorari on the question whether respondents may sue their state employers for damages under Title II of the ADA, . . . that portion of the writ is dismissed as improvidently granted."); Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc) (holding that Title II of the ADA exceeded Congress's Section 5 power to abrogate the states' Eleventh Amendment immunity), *cert. granted sub nom.* Alsbrook v. Arkansas, 528 U.S. 1146, *cert. dismissed*, 529 U.S. 1001 (2000).

4. Anne Gearan, *High Court Boosts Civil Rights for People with Disabilities; Disability Law Applied to States*, CHARLESTON (W. Va.) GAZETTE, May 18, 2004, at 2A.

5. *Garrett*, 531 U.S. 356 (Title I of the ADA); United States v. Morrison, 529 U.S. 598 (2000) (Violence Against Women Act of 1994); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (Patent Remedy Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (Religious Freedom Restoration Act).

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authority is concentrated exclusively in the judiciary.[6] Additionally, in recent decisions the Court had invoked federalism concerns to further constrain Section 5, holding that states' sovereign immunity under the Eleventh Amendment justifies restricting otherwise legitimate Section 5 legislation. These judicial conditions on the Section 5 power left deep uncertainty about the federal government's capacity to establish constitutional standards that bind the states according to the rights enshrined in the Fourteenth Amendment.

Lane is innovative in several respects. It is the first case to validate a Section 5 statute enforcing the Due Process Clause. It is the first to consider a Section 5 statute that enforced multiple constitutional rights. It is the first to address explicitly the question of whether Section 5 legislation should be evaluated on its face or only as applied to the circumstances of a particular case. In all of these areas, *Lane* raises new questions about the relationship between the Court and Congress in enforcing the Fourteenth Amendment.

Measuring *Lane* against the juricentric rulings that characterized the period from 1997 to 2001, some commentators have interpreted the case as signaling "a significant break from recent decisions."[7] Indeed, only three years earlier in *Board of Trustees v. Garrett*, the Court rejected Congress's Section 5 authority to prohibit employment discrimination against individuals with disabilities through Title I of the ADA.[8] Others, by contrast, have criticized *Lane* for refusing to validate all of Title II[9] and instead reaching only those aspects of Title II that require access to courthouses. The question is whether *Lane* simply reflects the compelling facts of that case or rather represents a broader shift in the Court's attitude toward congressional power.

This Note argues that, although *Lane* affirms the Court's juricentric review framework for testing the validity of Section 5 laws, the Court applied this model in important new ways to vindicate a more expansive

6. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003); *see also* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85 (2001) (arguing that the Court is deploying what they call "crystal ball" and "phantom legislative history" methodologies in order to subordinate Congress to its own vision of Fourteenth Amendment enforcement); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1360-82 (2001) (arguing that the emerging review framework for Section 5 hinges Congress's power to interpret the Equal Protection Clause solely on the Court's own dispositive constitutional vision of Section 1).

7. Linda Greenhouse, *Justices Find States Can Be Liable for Not Making Courthouses Accessible to Disabled*, N.Y. TIMES, May 18, 2004, at A20.

8. 531 U.S. at 360. Prior to *Lane*, those concerned with preserving the scope of disability discrimination law feared that *Garrett* would be applied to similarly invalidate Congress's Section 5 power for Title II of the ADA. *See, e.g.*, Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653 (2000); Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1075 (2004).

9. *See, e.g.*, Valerie Jablow, *Court-Access Decision's Narrow Scope Worries Advocates for Disabled*, TRIAL, July 2004, at 92.

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Section 5 power for Congress. Through a series of doctrinal innovations, *Lane* strikes a new balance of judicial and legislative enforcement powers that ultimately preserves for the courts exclusive *interpretive* authority, while providing Congress greater discretion to design innovative *enforcement* legislation that is binding on the states. This Note demonstrates that *Lane* possesses far-reaching implications for future judicial review of Congress's Section 5 legislation.

In Part I of this Note, I examine how the *Lane* Court affirmed the doctrinal tests used to invalidate Title I of the ADA while, at the same time, upholding a nearly identical antidiscrimination mandate in Title II of the ADA. By identifying the key features of *Lane*'s Section 5 review, this Part reveals the compatibility between the Court's stringent review conditions and its validation of Due Process Clause enforcement.

Parts II and III then consider the scope-of-review puzzles posed by Title II's enforcement of multiple constitutional rights. As these Parts show, the Court expanded legislative authority even while restricting its holding to the specific context of courthouse access. Part II argues that *Lane* retains juricentric restrictions on Section 5 by using, for the first time, an as-applied methodology to test Congress's invocation of the Section 5 power. Part III then demonstrates that, despite its narrow holding, *Lane* vindicates more expansive authority for congressional remedies based on broader pragmatic considerations of the "gravity of the harm"[10] stemming from Fourteenth Amendment violations.

Finally, Part IV shows how *Lane* distinguishes its Section 5 review framework from the Eleventh Amendment federalism concerns used in recent decisions to restrict otherwise valid Section 5 legislation. Through the lens of Due Process Clause enforcement, *Lane* exposes the true stakes of these previous Section 5 rulings by revealing their threat to the national government's power to enforce constitutional rights standards against the states.

By examining how the Court combined a juricentric vision with a validation of Congress's power to use Section 5 to enforce Due Process Clause rights, this Note reveals *Lane* to be a potential turning point in the Court's Section 5 jurisprudence. While some interpret *Lane* to mark a "congressional power day"[11] and others criticize it as a narrow exception to the Court's encroachment on legislative enforcement,[12] this Note challenges both interpretations as incomplete. The Court's juricentric logic continues to formally deny Congress the independent authority to interpret the

10. Tennessee v. Lane, 124 S. Ct. 1978, 1988 (2004).

11. Posting of Marty Lederman to SCOTUSblog, http://www.goldsteinhowe.com/blog/archive/2004_05_16_SCOTUSblog.cfm (May 17, 2004, 10:04 EST).

12. *See, e.g.*, Jablow, *supra* note 9, at 92.

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Fourteenth Amendment. Nevertheless, this Note shows important ways in which *Lane*'s analytic structure implicitly validates more expansive authority for Congress to give practical content to constitutional values through remedial legislation. Thus, by explicating the doctrinal and conceptual changes that drive the Court's analysis in *Lane*, this Note reveals how the Court has begun to create room for a more balanced relationship between the judicial and legislative powers to enforce the Fourteenth Amendment.

I. THE ENFORCEMENT MODEL LIVES

At issue in *Lane* was the validity of a disabled person's damages suit against Tennessee for its failure to enforce the accessibility requirements in Title II of the ADA. Under its Section 5 power, Congress passed Title II[13] as a constitutionally binding requirement on the states: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[14] Invoking this legal prohibition against their exclusion, six citizens brought damages suits against Tennessee for failing to make state courthouses accessible to people with physical disabilities.

George Lane, a paraplegic who uses a wheelchair, was one of the individuals who challenged his exclusion from the courtroom.[15] When Tennessee prosecuted Lane on criminal misdemeanor charges, the state judge refused to move from a second-floor courtroom to one on the ground floor or to make a reasonable accommodation so that Lane could be present for his trial. The judge subsequently ordered law enforcement officers to arrest Lane after he refused to crawl or be carried up two flights of stairs to appear at his trial.[16] Lane argued that Tennessee's failure to make the courthouse accessible was precisely the type of constitutional violation that Congress sought to eliminate by invoking the "sweep of congressional authority"[17] to enforce the Fourteenth Amendment. Tennessee sought to dismiss Lane's suit on the ground that "Title II of the ADA exceeds

13. 42 U.S.C. §§ 12131-12165 (2000).
14. *Id.* § 12132.
15. Petition for Writ of Certiorari app. at 15, *Lane* (No. 02-1667).
16. *Id.*
17. Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, § 2(b)(4), 1990 U.S.C.C.A.N. (104 Stat.) 327 (codified as amended at 42 U.S.C. § 12101(b)(4) (2000)); *see also* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." (footnote omitted)).

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Congress' power under Section 5 of the Fourteenth Amendment to abrogate the sovereign immunity of the States."[18]

In evaluating *Lane*'s holding, Section A explicates the requirements of the Court's current review framework, revealing two key conditions imposed by the Court as prerequisites for valid congressional enforcement. Section B explains how the Court deployed these constraining conditions and nevertheless validated Title II's courthouse-accessibility mandate based on analytically distinct features of congressional Due Process Clause enforcement.

A. *The Rehnquist Court Reconstruction*

In 1997, the Rehnquist Court began narrowing the scope of Congress's Fourteenth Amendment enforcement authority by claiming that Section 5 legislation could represent a direct threat to the "separation of powers and the federal balance."[19] Breaking with decades of substantial deference to Congress over Section 5 lawmaking,[20] the Court in *City of Boerne v. Flores* invalidated the Religious Freedom Restoration Act (RFRA), which Congress had defiantly passed to overrule an earlier Court decision.[21] While cloaking its new approach in language of "wide latitude,"[22] the Court insisted that Congress's Section 5 authority was limited by the judiciary's "duty to say what the law is":[23] "Congress' power under § 5 . . . extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment. . . .

18. Brief for Petitioner at 15, *Lane* (No. 02-1667).

19. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

20. Prior to 1997, the Court granted broad discretion to Congress to enact Section 5 laws in the longstanding tradition of rational basis review that began with *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). So long as the Court could perceive some rational basis for the law's Section 5 grounding, Congress's authority would be respected. Extensive scholarly inquiry has traced the link between *McCulloch* and the Framers' expected standard of "appropriate legislation" for Section 5 enforcement by Congress. *See, e.g.*, Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1129-33, 1158-65 (2001); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique,* Morrison, *and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 118; Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115, 122-45 (1999).

21. Employment Div. v. Smith, 494 U.S. 872 (1990). For a discussion of this sharp break with decades of deference, see, for example, Michael W. McConnell, *The Supreme Court, 1996 Term—Comment: Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997). *But see* Ronald D. Rotunda, *The Eleventh Amendment,* Garrett, *and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1210-13 (2002) (arguing that *Garrett* restricted Congress's authority consistent with previous decisions); Lawrence G. Sager, *Congress as Partner / Congress as Adversary*, 22 HARV. J.L. & PUB. POL'Y 85, 89 (1998) ("The villain here is Congress, not the Court. . . . *Boerne*, correctly understood, enforces a plausible boundary between the authority of the Court and that of Congress.").

22. *Boerne*, 521 U.S. at 520.

23. *Id.* at 536 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

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Congress does not enforce a constitutional right by changing what the right is."[24]

Across six decisions, the Rehnquist Court then constructed a completely new doctrinal framework to test Section 5 laws—a juricentric "enforcement model"[25]—reflecting the essential premise that "Congress can use its Section 5 power only to enforce constitutional meanings that the Court itself is prepared to enforce pursuant to Section 1."[26] In this framework the Court asks, first, whether Congress's Section 5 power is appropriately invoked and, second, whether the actual Section 5 law crafted by Congress is an appropriate remedy. In *Garrett*, the Rehnquist Court held that Congress could not activate its Section 5 power unless it first demonstrated that states had systematically violated citizens' Fourteenth Amendment rights as the Court was prepared to define those rights. Because this requirement conditions any exercise of Section 5 power upon the demonstration that constitutional rights have been violated, I call it the "rights condition."[27] In *Boerne*, the Rehnquist Court had held that Congress could not exercise its Section 5 power unless it passed legislation that created a "congruent and proportional" response to these violations of constitutional rights.[28] Because this restriction conditions the exercise of Section 5 power on the issuance of a proper remedy, I call it the "remedial condition."

Within this framework, the rights condition itself imposes two distinct requirements. First, Congress must document, to the Court's satisfaction, a "history and pattern" of state violations.[29] Second, these transgressions must be unconstitutional according to the Court's prior Section 1 decisions,[30] which means that Congress can use its Section 5 power only if it first demonstrates violations of rights that a court itself would remedy pursuant to Section 1. This rights condition therefore imposes substantive as well as

24. *Id.* at 519 (alteration in original).

25. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1946 (2003); *see also id.* at 2058 ("The theoretical engine of the Rehnquist Court's recent Section 5 decisions is the enforcement model . . . .").

26. *Id.* at 1949.

27. Congress cannot activate its Section 5 power at all unless it has "identified a history and pattern of unconstitutional" state transgressions. Bd. of Trs. v. Garrett, 531 U.S. 356, 368 (2001).

28. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520.

29. *Garrett*, 531 U.S. at 368. A host of scholarly responses to *Garrett* focused their critiques on this requirement that Congress justify its actions with a "sufficient" documentary record. *See, e.g.*, A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169 (2001); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115 (2003).

30. *Garrett*, 531 U.S. at 365.

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procedural restrictions on Congress. In *Garrett* the Court rejected, as a procedural matter, categories of evidence that Congress had attempted to use to vindicate Title I of the ADA as a Section 5 statute. The Court also held that the evidence adduced by Congress to sustain Title I did not establish what the Court would deem violations of the Constitution.

Even if Congress identifies widespread violations of judicially ascertained rights, the remedial condition still allows the Court to prevent Congress from using its Section 5 power to enact legislation that disguises competing interpretations of the Fourteenth Amendment under the mask of a Section 5 remedy. Thus, in *Kimel v. Florida Board of Regents*, the Court concluded that the Age Discrimination in Employment Act exceeded congressional Section 5 authority because its remedial requirements were "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act" and hence had become "substantive" in nature.[31]

While decisions from *Boerne* through *Garrett* only seemed to increase the burden on Congress for Section 5 lawmaking, in 2003 the Court shed new light on the *Garrett-Boerne* tests for appropriate equal protection enforcement. In *Nevada Department of Human Resources v. Hibbs*, the Court validated the Family and Medical Leave Act (FMLA) as Section 5 legislation even while claiming to preserve judicial supremacy.[32] Faced with a weak legislative record demonstrating states' unconstitutional family leave policies and a remedy that imposed the costs of family leave on employers,[33] the *Hibbs* Court introduced two new doctrinal rules to justify its conclusion that the rights and remedial conditions were fulfilled. First, the Court held that Congress could more easily demonstrate a pattern of constitutional violations if the rights at stake were subjected to "a heightened level of scrutiny":[34]

> Under our equal protection case law, discrimination on the basis of [age or disability] . . . passes muster if there is a rational basis for doing so at a class-based level, even if it is probably not true that those reasons are valid in the majority of cases. . . .
>
> . . . Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our

31. 528 U.S. 62, 83 (2000).
32. 538 U.S. 721 (2003).
33. *See* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 16 & n.68 (2003).
34. *Hibbs*, 538 U.S. at 736.

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> rational-basis test[,] . . . it was easier for Congress to show a pattern of state constitutional violations.[35]

The Court's heightened scrutiny of gender classifications proved dispositive for fulfillment of the rights condition in *Hibbs*. In *Garrett*, by contrast, the Court had concluded that the disability discrimination prohibited by Title I of the ADA triggered only rational basis scrutiny, and consequently that Congress would be held to a much higher standard in demonstrating a pattern of constitutional violations.

Second, the *Hibbs* Court offered a more generous application of the *Boerne* congruence-and-proportionality test for the remedial condition, announcing that Congress's past efforts to enforce Section 1 guarantees might affect a Section 5 law's proportionality. Defending the remedial form of the FMLA, the Chief Justice concluded, "Congress again confronted a 'difficult and intractable proble[m],' where previous legislative attempts had failed. Such problems may justify added prophylactic measures in response."[36] The *Boerne* test already measured proportionality of "remedial measures . . . in light of the evil presented,"[37] but now the *Hibbs* Court applied greater deference by measuring the law's remedial proportionality in light of Congress's coordinate role in enforcement over time.

While a juricentric vision of the Section 5 power generated the enforcement model and its tests, the Court has also invoked a distinct federalism jurisprudence to invalidate Section 5 legislation in ways that deeply threaten the national government's power to bind the states with constitutional rights standards. Citing an Eleventh Amendment bar to private suits against states, the Court has twice limited civil rights enforcement by the national government. The Court invoked the Eleventh Amendment to end congressional use of commerce authority to constitutionally bind the states with antidiscrimination laws. Invalidating Congress's abrogation of states' immunity to suit, in 1996 the Court declared in *Seminole Tribe v. Florida* that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[38]

Additionally, even after acknowledging Section 5 as a power for which "Congress' authority to abrogate [the Eleventh Amendment bar] is undisputed,"[39] the Court nevertheless invoked the Eleventh Amendment to

35. *Id.* at 735-36 (internal quotation marks omitted).

36. *Id.* at 737 (alteration in original) (citations omitted).

37. City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

38. 517 U.S. 44, 72-73 (1996); *see also* Alden v. Maine, 527 U.S. 706, 754 (1999) ("[W]e hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.").

39. *Seminole Tribe*, 517 U.S. at 72 n.15.

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restrict otherwise legitimate Section 5 legislation. In *Garrett*, the Court actually applied the rights condition for valid Section 5 legislation according to the prescriptions of its Eleventh Amendment jurisprudence. Further, even while holding that Title I exceeded Section 5 authorization, the Court suggested its decision did not threaten the federal power to enforce constitutional guarantees because "Title I of the ADA still prescribes standards applicable to the States"[40] through other enforcement mechanisms that do not implicate states' Eleventh Amendment immunity.[41] This attempted defense of the Court's attack on congressional power reveals a key theme in the Court's recent expression of the enforcement model. Reflecting this judicial framing, scholars have also conflated these jurisprudential arenas, targeting their critiques of the Section 5 rulings at the Justices composing the "Federalism Five."[42] Yet, as this Note will show, it is the Court's separation-of-powers vision that ultimately drives its enforcement model, not federalism values. At stake is the national government's capacity to enforce constitutional rights. After analyzing the shape of the enforcement model as applied by *Lane* in Section B, this Note ultimately shows how *Lane* directly challenges the use of Eleventh Amendment federalism principles to restrict the national government's Section 5 power to establish constitutional rights standards binding on the states.

B. *Due Enforcement*

Lane, a 5-4 decision authored by Justice Stevens, holds that Title II's mandate of courthouse access "constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment."[43] Yet

40. Bd. of Trs. v. Garrett, 531 U.S. 356, 374 n.9 (2001).

41. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); *see also Alden*, 527 U.S. at 756 ("We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power.").

42. *See, e.g.*, Mark R. Killenbeck, *In(re)Dignity: The New Federalism in Perspective*, 57 ARK. L. REV. 1, 3 (2004) (classifying this consistent majority in each of these decisions as Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas); *see also* R. Shep Melnick, Both the Sword and the Purse: State Governments and Statutory Rights in the Rehnquist Court (Aug. 30, 2002) (unpublished manuscript), *available at* http://www.bc.edu/schools/cas/polisci/meta-elements/pdf/melnick/sword-and-the-purse.pdf. For illustrative critiques focusing on federalism as a component of these Section 5 decisions, see JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367 (2002); and Todd B. Tatelman, Comment, Nevada Department of Human Resources v. Hibbs*: The Eleventh Amendment in a States' Rights Era: Sword or Shield?*, 52 CATH. U. L. REV. 683 (2003).

43. Tennessee v. Lane, 124 S. Ct. 1978, 1994 (2004).

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despite this endorsement of congressional power, the majority unmistakably affirmed the Court's claim to exclusive interpretive authority. This Section explains how the Court analyzed Title II according to the conditions of the enforcement model but deployed this framework in new ways based on distinct features of Due Process Clause enforcement.

To identify the line separating valid enforcement from substantive redefinition of the Fourteenth Amendment, the *Lane* opinion is organized around the *Garrett* and *Boerne* tests of Section 5 authority. *Lane* confirms that, first, the *Garrett* rights condition requires a "relevant history and pattern of constitutional violations"[44] and, second, the *Boerne* remedial condition demands that Section 5 legislation "exhibit[] a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[45]

The *Lane* Court began by considering "the constitutional right or rights that Congress sought to enforce when it enacted Title II."[46] In *Garrett*, this first step sufficed to invalidate Title I of the ADA, with Chief Justice Rehnquist defining the constitutional right in question according to the Court's standard of review in its equal protection precedent for disability, *City of Cleburne v. Cleburne Living Center*.[47] Construing *Cleburne* to grant only "minimum 'rational-basis' review"[48] of disability classifications, *Garrett* made this standard of review itself a binding substantive framework and thereby discounted much of the ample discrimination record amassed by Congress in passing the ADA.[49] Thus, in the first step of the enforcement model, the *Garrett* Court transformed rational basis review into a doctrine of minimal scrutiny for state disability discrimination and strict scrutiny of Congress's Section 5 laws.[50] As Justice Breyer explained,

44. *Lane*, 124 S. Ct. at 1987.

45. *Id.* at 1986 (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).

46. *Id.* at 1988.

47. 473 U.S. 432 (1985) (finding no rational basis for a special-use-permit requirement for group homes for mentally retarded individuals). The Court articulated three tiers of scrutiny for legislative classifications—rational basis scrutiny, intermediate scrutiny, and strict scrutiny. *Id.* at 442-43 (finding that individuals classified as mentally retarded are not subject to heightened scrutiny).

48. Bd. of Trs. v. Garrett, 531 U.S. 356, 366 (2001). *But see Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in the judgment in part and dissenting in part) (noting that the Court actually applied a more exacting standard than the mere rational basis analysis given to general economic and social legislation).

49. *Garrett*, 531 U.S. at 368, 372; *see also id.* at 377 (Breyer, J., dissenting) ("Congress compiled a vast legislative record documenting massive, society-wide discrimination against persons with disabilities." (internal quotation marks omitted)).

50. *See* Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481 (2002); Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court's "Strict Scrutiny" of Congressional Efforts To Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091 (2001). For a more extended discussion by a lower court before *Garrett*, see *Kilcullen v. New York State Department of Transportation*, 33 F. Supp. 2d 133, 143 (N.D.N.Y. 1999) ("'This Court concludes that under *Boerne*, the boundaries of the right granted to persons with disabilities under the Equal

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"[I]t is difficult to understand why the Court, which applies 'minimum "rational-basis" review' to statutes that *burden* persons with disabilities, subjects to far stricter scrutiny a statute that seeks to *help* those same individuals."[51]

In contrast, *Lane* emancipates Title II from *Garrett*'s application of the rights condition by mobilizing the Due Process Clause guarantees not just for people with disabilities but for all citizens: "Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees . . . ."[52] As a primary preserve of constitutional rights, access to the courthouse spotlights the enforceable guarantee of fundamental rights for every citizen, regardless of any comparative classifications that simultaneously hinder exercise of these fundamental rights. The Court articulated each constitutional guarantee without mentioning disability because the case implicated Congress's power to enforce due process rights of courthouse access for "criminal defendants," "civil litigants," and "members of the public" alike,[53] not just George Lane:

> The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California*. The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. *Boddie v. Connecticut*. We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor v. Louisiana*. And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment. *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*.[54]

Protection Clause is defined by the level of judicial scrutiny applicable to claims alleging discrimination on the basis of disability, i.e. the rational basis test.").

51. *Garrett*, 531 U.S. at 387-88 (Breyer, J., dissenting) (citation omitted).

52. Tennessee v. Lane, 124 S. Ct. 1978, 1988 (2004).

53. *Id.*

54. *Id.* at 1988 (citations omitted).

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Thus, instead of making *Cleburne*'s equal protection ruling its analytic anchor, *Lane* tests Title II's courthouse-access mandate according to fundamental guarantees in the Court's Due Process Clause jurisprudence.

In its application of the rights condition, *Lane* affirms the Court's interpretive exclusivity while validating Congress's due process enforcement for the first time. To find the rights condition fulfilled, *Lane* acknowledges courthouse-access guarantees as constitutionally binding—according to the Court's vision of Section 1.[55] In this respect, the passage above underscores the enforcement model's core premise: "Congress does not enforce a constitutional right by changing what the right is."[56] For each constitutional right of judicial access implicated in Title II's accessibility requirement, *Lane* identifies a specific decision in which the Supreme Court had already recognized that right as protected under the Due Process Clause. Consequently, even as the *Lane* Court partially freed itself from *Garrett* by reviewing enforcement of constitutional rights under the Due Process Clause, the Court affirmed its core vision of the enforcement power in which the Fourteenth Amendment—and the Constitution—remains exclusively articulable by the judiciary.

At the same time, the Court sharply distinguished its evaluation of the rights condition in *Lane* from its review in *Garrett* by replacing strict scrutiny of Section 5 legislation with heightened scrutiny of the *violations* Congress sought to redress through Title II of the ADA. This greater deference in testing whether Congress had identified a pattern of states' unconstitutional transgressions is driven by the Court's broad articulation of fundamental rights in the Due Process Clause, "infringements of which are subject to more searching judicial review":[57]

> [B]ecause 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*. . . . Title II is aimed at the enforcement of a variety of basic rights . . . 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.[58]

55. *Cf. Garrett*, 531 U.S. at 365, 368 (declaring that employment accommodations for people with disabilities exceed the requirements of the Equal Protection Clause as interpreted by the Court).

56. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

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

58. *Id.* at 1992 (internal quotation marks omitted).

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By focusing on the Due Process Clause, where the Court's precedent mandated heightened judicial scrutiny of violations, Justice Stevens fit the Court's evidentiary review into the *Hibbs*—not the *Garrett*—application of the enforcement model. With fundamental due process rights at stake, Congress would be given greater leeway to demonstrate a pattern of constitutional violations.

It bears observation that *Lane*'s heightened judicial scrutiny under the Due Process Clause differs from *Hibbs*'s broad review of the FMLA record under the Equal Protection Clause. The *Hibbs* Court's judicial presumption made it "easier for Congress to show a pattern of state constitutional violations" satisfying the rights condition.[59] In contrast, heightened scrutiny in *Lane* does not give rise to a presumed pattern of violations, but instead applies a presumption of unconstitutionality to the states' exclusion of people with disabilities that Congress documented with "statistical, legislative, and anecdotal evidence."[60] Thus, although different from its presumption for equal protection enforcement, the Court's heightened scrutiny of states' conduct narrowed the scope of any acceptable exclusion and thereby freed *Lane*'s analysis of the ADA from *Garrett*.

The importance of this due-process-driven application of the rights condition is clearly evident in the Court's conclusion that "Congress enacted Title II against a backdrop of . . . systematic deprivations of fundamental rights."[61] Justice Stevens directly mobilized *Hibbs* to reject the Chief Justice's claim that *Lane* presents a "near-total lack of actual constitutional violations in the congressional record . . . reminiscent of *Garrett*."[62] Turning to the Chief Justice's own majority opinion in *Hibbs* for support, Justice Stevens noted,

> Just last Term in *Hibbs*, we approved the family-care leave provision of the FMLA as valid § 5 legislation based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional state conduct. . . . [I]n any event, the record of constitutional violations in [*Lane*] . . . far exceeds the record in *Hibbs*.[63]

As a result, the *Lane* Court concluded, the "sheer volume of evidence demonstrat[es] the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services."[64] To

59. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).
60. *Lane*, 124 S. Ct. at 1992.
61. *Id.* at 1989.
62. *Id.* at 2002 (Rehnquist, C.J., dissenting).
63. *Id.* at 1991-92 (majority opinion).
64. *Id.* at 1991.

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emphasize its jurisprudential consistency, *Lane* even references findings in *Garrett*, as the *Garrett* Court had rejected Title I's Section 5 validity by noting "that the 'overwhelming majority' of . . . evidence related to 'the provision of public services and public accommodations, which areas are addressed in Titles II and III,' rather than Title I."[65]

Lane also deploys the *Boerne* remedial condition in upholding Title II's courthouse-accessibility mandates. The Court endorsed Congress's prohibition on the exclusion of people with disabilities according to its own jurisprudential baseline for constitutional remediation, underscoring 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," along with "a number of affirmative obligations" for access to the judiciary.[66] Yet the Court also looked beyond its own jurisprudence in providing practical meaning to this due process mandate for the specific context of people with disabilities. Lacking any contrary decision applying the due process mandate to this setting, the Court endorsed Congress's remedial conclusion that "failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion."[67] This crucial recognition drives Title II's articulation of an affirmative duty to ensure accessibility for people with disabilities. By moving beyond the limits of the Court's equal protection vision for people with disabilities to instead confront guarantees for all citizens in the Due Process Clause, *Lane* deploys an enforcement model that still conditions approval on congruence and proportionality in Section 5 remedies but that also accepts more meaningful judicial-legislative dialogue about the shape of those broad due process mandates for courthouse access.

Thus, *Lane*'s application of the *Garrett-Boerne* tests affirms the core principles and overall structure of the enforcement model, but it also liberates Congress's enforcement power from the strict interpretive review previously fatal in Section 5 decisions. The next two Parts examine the new puzzles posed in *Lane*'s scope of review for the rights and remedial conditions, as well as the implications of this decision for future judicial review of Section 5 challenges.

65. *Id.* at 1987 (quoting Bd. of Trs. v. Garrett, 531 U.S. 356, 371 n.7 (2001)).
66. *Id.* at 1994.
67. *Id.* at 1993.

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II. THE JUDICIAL PRESERVE OF AS-APPLIED ENFORCEMENT REVIEW

A controversial and puzzling feature of *Lane* was the Court's refusal to review Title II as a whole and its decision to consider instead only the rights to courthouse access raised by the particular facts of the case. This narrow scope of review provoked criticism of *Lane* for "rais[ing] as many questions as it answers."[68] The *Lane* majority's limitation of the decision to only "the class of cases implicating the fundamental right of access to the courts"[69] marked a compromise by the four Justices who dissented from previous Section 5 rulings, in order to secure Justice O'Connor's crucial fifth vote.[70] The prospect of an olive branch was palpable during *Lane*'s oral argument, when Justice Breyer sought to mobilize the potency of courthouse exclusion to preclude the *Garrett* majority from reassembling to invalidate Title II in its entirety: "[W]e're talking here [about using] the statute [for] judicial or courthouse-related services, programs, or activities. So I was seeing this as a kind of as-applied challenge, and if it's constitutional in this area, maybe we leave the other areas for a later time."[71]

Using this framework, the *Lane* Court narrowed Tennessee's challenge—and the scope of the Court's holding—to Title II's validity only insofar as it protected access to courts.[72] This was the first time since *Boerne* that a majority explicitly addressed the question of whether review of Section 5 legislation should be directed to the application of a statute as distinct from consideration of the statute's facial validity. I call this the "scope of review" question. As Parts II and III demonstrate, the consensus reached for *Lane*'s scope of review forms the analytic linchpin in the Court's vindication of both the judicial and legislative enforcement powers.

This Part shows that *Lane*'s as-applied review of the enforcement of multiple constitutional rights was consistent with previous Section 5 decisions and was driven by the juricentric logic of the rights condition itself. Importantly, this Part also reveals that *Lane*'s as-applied parsing of Section 5 enforcement is not merely an exception for the compelling access-to-courts fact pattern presented by George Lane and other

68. Sharmila Roy, *Suits Against States: What To Know About the 11th Amendment*, ARIZ. ATT'Y, Oct. 2004, at 26.

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

70. In crafting the majority opinion, Justice Stevens likely was influenced by the competing imperatives of vindicating Congress's enforcement power and preserving Justice O'Connor's support for a more limited decision validating the enforcement model, which may explain some ambiguities left unresolved. *See, e.g.*, *infra* notes 109-111 and accompanying text.

71. Transcript of Oral Argument at 10, *Lane* (No. 02-1667).

72. *Lane*, 124 S. Ct. at 1992-93 ("Whatever might be said about Title II's other applications, the question presented in this case is . . . whether Congress had the power under § 5 to enforce the constitutional right of access to the courts.").

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respondents. Rather, the rationale of this as-applied ruling binds future judicial review of Title II for enforcement of other constitutional rights as well.

A. *Parsing Section 5 Enforcement*

The Court's logic in upholding Title II as applied to courthouse access is reasonably clear. Federal courts have traditionally declared a legislative enactment unconstitutional in two ways: on its face, concluding it is unconstitutional in all of its applications, or as applied to the circumstances of a particular case.[73] The Court has also recognized a special First Amendment analysis that forbids certain forms of statutory overbreadth: A statute can be facially unconstitutional even when it can be constitutionally applied to a litigant if it has "too many" unconstitutional applications to third parties not before the court.[74] Because Title II's remedial mandate reaches government conduct in many settings, from courthouses and voting booths to prison facilities[75] and "seating at state-owned hockey rinks,"[76] Tennessee's challenge to Title II turned heavily on the statute's alleged overbreadth.[77]

Given the Court's view of facial invalidation as, "manifestly, strong medicine. . . . employed by the Court sparingly and only as a last resort,"[78] *Lane*'s as-applied scope could be viewed as rather unremarkable. After all, while an as-applied challenge only invites narrow review of a statute's constitutionality, facial invalidation betrays a deep tension with the Article III mandate that courts resolve specific cases or controversies and confront constitutional questions only as a last resort.[79] For a litigant to successfully

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73. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

74. Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 369 (1998); *see also* Broadrick v. Oklahoma, 413 U.S. 601, 610-15 (1973).

75. *See, e.g.*, Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210 (1998) (concluding that state prisons are "public entities" subject to the prescriptions of Title II).

76. *Lane*, 124 S. Ct. at 1992. During oral argument, Justice Scalia suggested that the reach of the program-accessibility requirement even to state-owned hockey rinks illustrated the statute's disproportionate, undifferentiated response to violations that do not implicate fundamental rights guarantees, *see, e.g.*, Transcript of Oral Argument at 42, *Lane* (No. 02-1667), and hence remain subject to the *Cleburne* rationality standard for discrimination, as construed in *Garrett*.

77. *See, e.g.*, Brief of Petitioner at 29-30, *Lane* (No. 02-1667) ("Title II targets . . . an unlimited array of subjects ranging from parking space availability at state museums and concert seating priorities at state performing arts centers to recreational offerings at state parks and the configuration of bathroom stalls at highway rest areas." (footnotes and internal quotation marks omitted)).

78. *Broadrick*, 413 U.S. at 613.

79. Isserles, *supra* note 74, at 361; *see also* New York v. Ferber, 458 U.S. 747, 767 & n.20 (1982) ("The traditional rule is that a person to whom a statute may constitutionally be applied

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challenge the constitutionality of a law on its face, the Court has held that "the challenger must establish that no set of circumstances exists under which the Act would be valid."[80] Even so, disagreement has persisted among the Justices regarding the proper settings in which each scope of review should be deployed.[81]

The Rehnquist Court began its stringent scrutiny of Section 5 legislation in *Boerne* by analyzing Congress's authority for RFRA on its face, declaring that the "judgment of the . . . Act's constitutionality is reversed."[82] Invoking this facial review in *Lane*, Chief Justice Rehnquist expressed "grave doubts" about the majority's as-applied methodology: "Our § 5 precedents do not support this as-applied approach. . . . If we had arbitrarily constricted the scope of the statutes to match the scope of a core constitutional right, those cases might have come out differently."[83]

In actuality, however, the Court had never addressed the required scope of review under its enforcement model. From *Boerne* through *Hibbs* the Court reviewed either the statute or the statutory title in toto—on five different occasions—without a single discussion by the majorities about whether an as-applied approach might be appropriate. Taking note of the uncertainty about the proper scope of Section 5 challenges post-*Boerne*, Richard Fallon concluded that "it is a mark of reigning confusion that at least three interpretations of [the scope of] *Florida Prepaid* are reasonably defensible. . . . [The Court] then needs to be more explicit about the nature and intended effects of the tests that it employs . . . ."[84] In fact, *Florida Prepaid* was the only Section 5 case where a dissenting Justice attempted to "save" the statute by calling for as-applied analysis, but the lack of any response in the majority opinion left the validity of this approach uncertain.[85] This Part demonstrates how *Lane*'s as-applied scope of review can be reconciled with the logic of the post-*Boerne* rulings.

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may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.").

80. United States v. Salerno, 481 U.S. 739, 745 (1987).

81. *See, e.g.*, Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1322-23 (2000) (illustrating the sharp disagreement between Justices Scalia and Stevens regarding application of the *Salerno* standard to anti-abortion statutes).

82. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

83. Tennessee v. Lane, 124 S. Ct. 1978, 2005 (2004) (Rehnquist, C.J., dissenting).

84. Fallon, *supra* note 81, at 1358-59.

85. For a critique of the Court's decision to construct a facial overbreadth standard in post-*Boerne* cases "without any discussion of its merits or drawbacks," see Catherine Carroll, Note, *Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment*, 101 MICH. L. REV. 1026, 1030 (2003). *See also* Timothy J. Cahill & Betsy Malloy, *Overcoming the Obstacles of* Garrett*: An "As Applied" Saving Construction for the ADA's Title II*, 39 WAKE FOREST L. REV. 133, 139-40 & n.34 (2004) (urging the Court to decide *Lane* with some form of as-applied analysis to avoid facial invalidation but declining to discuss how the rationale for this standard of review applies to any other Section 5 laws).

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The Court's Section 5 holdings in cases long before *Boerne* and as recently as *Garrett* provide consistent support for *Lane*'s limitation of the scope of review. First, the Court has already deployed an as-applied approach for review of legislative enforcement in the leading case cited by the majority, *United States v. Raines*.[86] *Raines* unambiguously established the limited scope that the Court should impute to constitutional challenges against Congress's enforcement power. The challenged law was the Civil Rights Act of 1957, passed pursuant to Congress's Fifteenth Amendment enforcement power:[87] "We think that under the rules we have stated, [the district] court should then have gone no further and should have upheld the Act as applied in the present action . . . ."[88] Discounting this clear precedent, the Chief Justice argued in *Lane* that *Raines* was decided before the Rehnquist Court's reconstruction of Section 5 review: "[T]he only authority cited by the majority is *Raines*, a case decided long before we enunciated the congruence-and-proportionality test."[89] However, the force of the *Raines* doctrine in shaping the scope of review for the Civil War amendments has been repeatedly affirmed, even in decisions later affirmed by *Boerne* itself. For instance, the seminal rulings in the 1960s Voting Rights Act cases deployed a form of as-applied review.[90] This approach continued into the 1970s with particular clarity in *Griffin v. Breckenridge*, where the Court again relied on *Raines*:

> Consequently, we need not find the language of § 1985(3) now before us constitutional in all its possible applications in order to

86. 362 U.S. 17 (1960).

87. The enforcement power in "Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment," Bd. of Trs. v. Garrett, 531 U.S. 356, 373 n.8 (2001) (Rehnquist, C.J.), and these enforcement powers have "always been treated as coextensive," City of Rome v. United States, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting).

88. *Raines*, 362 U.S. at 24-26. For a classic illustration of this judicial reasoning outside the Section 5 context, see Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219-20 (1912) ("[T]his court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now.").

89. Tennessee v. Lane, 124 S. Ct. 1978, 2005 (2004) (Rehnquist, C.J., dissenting) (citation omitted).

90. *See* Katzenbach v. Morgan, 384 U.S. 641, 645 n.3, 643-45 (1966) (noting that because appellees attacked the constitutionality of section 4(e) of the Voting Rights Act for enabling thousands of Puerto Rican citizens to vote in violation of state law, the facts of the case defined the "limitation on appellees' challenge to § 4(e), and thus on the scope of our inquiry"); South Carolina v. Katzenbach, 383 U.S. 301, 317 (1966) ("[W]e find that South Carolina's attack on §§ 11 and 12(a)-(c) is premature. No person has yet been subjected to, or even threatened with, the criminal sanctions which these sections of the Act authorize. *United States v. Raines*. Consequently, the only sections of the Act to be reviewed at this time are §§ 4(a)-(d), 5, [and] 6(b) . . . ." (citation omitted)).

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> uphold its facial constitutionality and its application to the complaint in this case.
>
> . . . Our inquiry, therefore, need go only to identifying a source of congressional power to reach the private conspiracy alleged *by the complaint in this case.*[91]

Even after *Boerne*, *Garrett* provides the most relevant case study for the consistency of as-applied versus facial constructions, because this is the only recent case where the majority addressed a form of the scope-of-review question. In light of his vigorous rejection of *Lane*'s limited scope, it is instructive to consider how Chief Justice Rehnquist himself narrowed the scope of the challenge in *Garrett*:

> We are not disposed to decide the constitutional issue whether Title II . . . is appropriate legislation under § 5 of the Fourteenth Amendment . . . . To the extent the Court granted certiorari on the question whether respondents may sue their state employers for damages under Title II of the ADA, that portion of the writ is dismissed as improvidently granted.[92]

Although the Chief Justice hinged this distinction on Title II's "somewhat different remedial provisions" from Title I,[93] this nevertheless reflected an overt presumption of severability where none had previously been exercised by the Rehnquist Court since *Boerne*.[94] Thus, just as the *Garrett* Court restricted its scope of review after accepting Titles I and II, the *Lane*

91. 403 U.S. 88, 104 (1971) (emphasis added) (reviewing the legislative enforcement power under the Thirteenth Amendment). Like the Fourteenth Amendment's Section 5 and the Fifteenth Amendment's Section 2, the Thirteenth Amendment's Section 2 grants Congress enforcement power.

92. Bd. of Trs. v. Garrett, 531 U.S. 356, 360 n.1 (2001) (citation omitted). The Chief Justice asserted this limitation to the scope of statutory review because it was not clear whether Title II provided any legal remedy for the employment discrimination in the *Garrett* fact pattern. *Id.*

93. *Id.*

94. The Court did not specify in *Lane* how such a severability presumption attaches to an as-applied scope of review after a *Garrett-Boerne* invalidation of the Section 5 law. Scholarship on severability has long noted that "[w]hen particular words or sections of a statute are unconstitutional, a court may excise them from the law," but "[w]hen statutory language is too broad, . . . there is nothing to be severed." Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 82 (1937). Were the Court to conclude from the *Garrett-Boerne* tests that an application before the Court did not present a valid exercise of the Section 5 power, the way it could consistently "save" or "cure" the statute while invalidating the application would likely be to "construe the language employed as limited to its constitutional applications," *id.*; *see also* Dorf, *supra* note 74. In an alternative severability remedy, the Court might excise the language from a statutory provision or regulation authorizing an unconstitutional application. For an illustration of the latter severability remedy of excising specific provisions to save the constitutionality of a statute, see *United States v. Booker*, 125 S. Ct. 738, 764-68 (2005) (majority opinion of Breyer, J.).

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Court mirrored this shift to a limited scope *within* Title II. The methodology used to determine just how much the Court must limit its scope will be described in the following Section, but what *Garrett* clearly demonstrates is that the enforcement model had already been applied without facial analysis of the ADA in its entirety.

B. *Conditioning As-Applied Section 5 Review*

The previous Section demonstrated how earlier Section 5 rulings buttressed the *Lane* Court's decision to deploy some limitation on its scope of review. However, only in *Lane* does the Court provide an explicit discussion of the scope of review *required* by the enforcement model. As this Section reveals, *Lane* carefully navigates between the Scylla of facial determinations that might raise the specter of Title II's overbreadth and the Charybdis of an as-applied methodology that turns only on the facts of each plaintiff's case and would be inconsistent with *Garrett* itself. The Court negotiated this middle ground by unveiling an as-applied methodology driven by the logic of the enforcement model's rights condition.

At the heart of *Lane*'s as-applied review is the Court's juricentric vision of the Fourteenth Amendment embodied in the enforcement model's rights condition. The Court preserved its role as "the ultimate expositor of the constitutional text"[95] by deploying an as-applied review of Title II based on the four due-process-protected rights that the majority identified as implicated by citizens' courthouse exclusion. The Chief Justice criticized this as-applied approach as an effort to "rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right."[96] However, this critique fails to acknowledge the extent to which it was the *Lane* Court's predicate identification of the specific constitutional rights at issue that ultimately drove its constricted scope of review. *Lane* affirmed explicitly, for the first time post-*Boerne*, that the congruence and proportionality of a Section 5 statute must be reviewed within the scope of the judicially cognizable constitutional rights implicated in the instant case in order to evaluate how their specific, systematic deprivation was documented and remedied by Congress. It is this central premise of the enforcement model—the juricentric review of a Section 5 law—that underpins *Lane*'s as-applied holding.

Interestingly, only a limited number of the sources *Lane* cites to satisfy the rights condition were actually presented in Congress as evidence of

95. United States v. Morrison, 529 U.S. 598, 617 n.7 (2000).
96. Tennessee v. Lane, 124 S. Ct. 1978, 2005 (2004) (Rehnquist, C.J., dissenting).

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disabled people's exclusion from the judicial system. Instead, much of *Lane*'s evidence was testimony from disabled Americans collected over several years by the congressionally charged Task Force on the Rights and Empowerment of Americans with Disabilities.[97] *Garrett* had rejected this evidence because it was "submitted not directly to Congress but to the Task Force."[98] In stark contrast, *Lane* validates that same "appointed task force" to illustrate disabled people's undeniable exclusion from the courthouse.[99] Further, *Lane* does not purport to prove that these "numerous examples of the exclusion of persons with disabilities from state judicial services and programs" were necessarily unconstitutional deprivations.[100] *Lane* also cites the U.S. Civil Rights Commission's finding that "76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities."[101] Yet once again, *Lane* makes no effort to claim that this evidence of exclusion from public buildings sufficed to establish unconstitutional transgressions. To be sure, *Lane* explicitly asserts that the record was sufficient for the rights condition because of the "sheer volume of evidence demonstrating the nature and extent of *unconstitutional* discrimination against persons with disabilities in the provision of public services."[102] Nevertheless, Justice Stevens validated this "sheer volume" of evidence as relevant for the rights condition even as *Garrett* dismissed much of this same evidence as "'unexamined, anecdotal accounts.'"[103]

Why was this evidence sufficient for the as-applied rights condition? The Court's prior use of heightened scrutiny underpinned this conclusion. Compared to *Hibbs*, *Lane* deploys "a standard of judicial review at least as searching, and in some cases more searching."[104] This meant the *Lane* Court could more easily presume that the widespread exclusion of people with disabilities, recorded in Congress's statistical, legislative, and anecdotal evidence, failed to meet the compelling-interest standard justifying deprivation of due process rights. As a result, even though the as-applied scope limited the focus of evidence to the question of courthouse

97. The task force held more than sixty public forums, attended by 30,000 people from across the United States. For an extensive list of the fact-finding hearings conducted during the three-year period in which the ADA was under consideration by Congress, see *Garrett*, 531 U.S. at 389 app. A (Breyer, J., dissenting). *See also id.* at 391 app. C (listing the hundreds of discrimination submissions that would have violated Title II, all catalogued by the task force).

98. *Id.* at 370.

99. *Lane*, 124 S. Ct. at 1991 (majority opinion); *see also id.* at 1999 (Rehnquist, C.J., dissenting) ("[T]he majority today cites the same congressional task force evidence we rejected in *Garrett*.").

100. *Id.* at 1991 (majority opinion).

101. *Id.* at 1990.

102. *Id.* at 1991 (emphasis added).

103. *Id.* at 2000 (Rehnquist, C.J., dissenting) (quoting *Garrett*, 531 U.S. at 370).

104. *Id.* at 1992 (majority opinion).

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access, the *Lane* Court was able to affirm that Congress's exercise of power passed the rights condition based on a documented pattern of unconstitutional exclusion from the courthouse that "far exceed[ed] the record in *Hibbs*."[105]

Lane's as-applied methodology differs critically from a purely fact-based as-applied ruling. In testing the rights condition, the *Lane* Court did not limit its finding to the particular facts presented by George Lane or others. That is because Congress's power to pass a Section 5 law hinges not on the facts of a case, but rather on the constitutional right or rights at stake. The *Lane* Court underscored the juricentric, nonfactual application of the rights condition by making reference to *Hibbs*, where the Court upheld the FMLA "even though there was no suggestion that the [Nevada] leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional under . . . *Feeney*."[106]

Were the *Lane* Court to have used an even narrower as-applied approach based on the facts of the case, then the logic of the enforcement model and such rulings as *Florida Prepaid* and *Garrett* would have been undermined. In those rulings, the Court refused to avoid facially invalidating Section 5 legislation by considering whether the circumstances of the particular plaintiff before the Court actually satisfied the rights condition. The *Florida Prepaid* Court invalidated the Patent and Plant Variety Protection Remedy Clarification Act on its face, even though respondent College Savings Bank invoked that Section 5 legislation according to facts that comported precisely with the Court's own vision of the Fourteenth Amendment. Indeed, such a fact-based review was the as-applied cure Justice Stevens suggested to no avail in dissent:

> Respondent College Savings Bank has alleged that petitioner's [patent] infringement was willful. The question presented by this case, then, is whether the Patent Remedy Act . . . may be applied to willful infringement.
>
> . . . [The Court's] negative answer to that question has nothing to do with the facts of this case.[107]

Similarly, *Garrett* does not examine the facts of the case to determine whether respondent Patricia Garrett was subjected to *irrational* discrimination. If the *Garrett* Court had applied such a fact-driven as-applied ruling, Patricia Garrett might have succeeded with a damages suit

105. *Id.*
106. *Id.* at 1986.
107. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 653-54 (1999) (Stevens, J., dissenting) (footnotes omitted).

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against Alabama by showing the discrimination against her violated the Equal Protection Clause and therefore sufficed to meet the rights condition. But *Garrett* does not permit this kind of fact-based as-applied review.[108]

The contrast with *Lane*'s as-applied approach is clear. *Lane*'s as-applied validation does not flow from the specific facts of the case, which might have limited *Lane* to binding only future cases implicating the fundamental right of a criminal defendant to courtroom access or to attend his own criminal proceedings. Rather, *Lane* vindicates Title II as valid enforcement of the class of any cases implicating courthouse-access rights. As the Court's first decision upholding the enforcement of multiple constitutional rights, *Lane* sheds fresh light on exactly how the operation of the rights condition must be understood for the due process and equal protection guarantees.

It bears emphasizing that the rights-centered structure of *Lane*'s as-applied inquiry binds the courts' future review of Fourteenth Amendment Section 1 enforcement in important ways that transcend the multiplicity of guarantees at stake in the case. The *Lane* Court's finding of sufficient rights violations did not formally extend to all fundamental rights protected under the Due Process Clause, but rather only reached those guarantees implicated in courthouse access. Reflecting this structure, even judicial review of a single Section 1 provision's enforcement is critically informed by the rights-centered nature of the as-applied inquiry.

For instance, we might consider future challenges to Title II's equal protection enforcement, where the right at stake remains the single Section 1 provision whose enforcement was reviewed in *Garrett*. *Lane*'s as-applied methodology shows how the courts might measure the rights condition differently from *Garrett*, without overruling it. While Title I targets discrimination by states as employers under the Equal Protection Clause, Title II prohibits disability discrimination by state governments acting in their capacities as sovereigns.[109] Where states act in their capacities as

108. The First and Second Circuits have deployed such an alternative as-applied methodology to examine whether the facts of the case present a judicially cognizable constitutional violation. Evaluating Title II's equal protection enforcement after *Garrett*, the Second Circuit upheld Title II as applied to cases where states' treatment of people with disabilities "was motivated by either discriminatory animus or ill will due to disability." Garcia v. S.U.N.Y. Health Scis. Ctr., 280 F.3d 98, 112 (2001). The First Circuit also upheld Title II, "at least as that Title is applied to cases in which a court identifies a constitutional violation by the state." Kiman v. N.H. Dep't of Corr., 301 F.3d 13, 24 (1st Cir.), *vacated in part*, 311 F.3d 439 (1st Cir. 2002) (en banc).

109. The Court has ruled that "'[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as *sovereign* to a significant one when it acts as *employer*.'" Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 676 (1996) (alteration in original) (emphasis added) (quoting Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion)). In the Fourth Amendment context as well, the Court has recognized the special interest of "public employers . . . in ensuring that the

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sovereigns, providing governmental programs and services to citizens, the administrative efficiency justifications accepted in *Garrett* to justify disability discrimination might be construed by courts to run afoul of the rational basis standard *Cleburne* deployed to strike down the City of Cleburne's discriminatory zoning ordinances as unconstitutionally irrational.[110] To be sure, this would still depend on the Court's rational basis jurisprudence for state conduct governed under Title II, a matter requiring separate scholarly examination.[111] For this Note's purposes, it simply bears observation that *Lane*'s rights-centered as-applied inquiry should also shape courts' future vindication of the rights condition in Title II even for a challenge to "only" equal protection enforcement.

Lane has been criticized as introducing "further uncertainty into an already muddy test"[112] because the scope of review is "shrouded in uncertainty and appears hopelessly malleable, sounding the alarms of judicial lawmaking."[113] Yet this critique bears less on the unique analytic structure of *Lane* than on the "alarms of judicial lawmaking" sounded for years in response to every post-*Boerne* decision restricting legislative power. *Lane*'s specific application of the rights condition represents a pointedly modest exercise of the juricentric review framework that the Court had deployed repeatedly to invalidate Section 5 legislation. In fact, *Lane* provides new clarity about the analytic operation of the rights condition and, in relief, the distinct considerations driving the Court's application of the remedial condition discussed in Part III. Indeed, this Note demonstrates how *Lane* illuminates the Court's application of Section 5 review conditions. It shows the centrality of specific constitutional guarantees for how courts must apply the rights condition, which is consistent with prior Section 5 rulings and has binding implications for judicial review of future challenges to Title II's enforcement of other constitutional rights.

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work of the agency is conducted in a proper and efficient manner," an interest that otherwise is subordinate to the constitutional right of citizens against certain forms of search and seizure. O'Connor v. Ortega, 480 U.S. 709, 724 (1987).

110. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . .").

111. Some scholars and courts have gone further. They suggest that, precisely because Title II enforces both equal protection and due process rights, the Court should deploy its *Garrett* and *Boerne* tests with the heightened scrutiny that vindicated the FMLA in *Hibbs*. As one judge argued, "The fact that Title II implicates constitutional violations in areas ranging from education to voting also suggests that heightened judicial scrutiny under both the Due Process and Equal Protection Clauses is appropriate." Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808, 820 (6th Cir. 2002) (en banc) (Moore, J., concurring).

112. *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 258, 268 (2004).

113. *Id.* at 267.

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An alternative account might interpret *Lane*'s narrow holding less as a change in the Court's Section 5 approach and more as a product of Justice O'Connor's commitment to "decisional minimalism," a judicial philosophy that leaves maximum flexibility for future decisions by limiting the burden of a particular ruling.[114] However, speculation about Justice O'Connor's motivation does not limit the implications of *Lane*'s as-applied methodology, which extend far beyond the compelling fact pattern of this case. Moreover, *Lane* undoubtedly represents a marked shift from the facial review deployed in every other post-*Boerne* decision, where Justice O'Connor had always been in the majority. Even further, the analytic structure of *Lane*'s scope of review is critically distinguishable from a merely fact-based as-applied inquiry that would provide the narrowest ground of precedent but would be inconsistent with prior Section 5 rulings. As a result, whether one interprets *Lane* to reflect the Court's interpretive exclusivity or some commitment to decisional minimalism, this Note confirms the centrality of each enforced constitutional guarantee for the Court's application of the rights condition.

Thus, the as-applied scope of *Lane*'s Section 5 review is ultimately driven by the juricentric heartbeat of the Court's enforcement model, not by any specific fact pattern. To conclude this Part, I show how *Lane*'s as-applied methodology offers a window into future courts' review of other fundamental rights enforcement beyond the access-to-courts context.

C. *A Template for Fundamental Rights Enforcement*

Even as the *Lane* Court confined its Title II validation according to the four constitutional rights implicated in courthouse access, the Court also outlined fundamental rights deprivations beyond the courthouse context. The Court recognized that, according to its own jurisprudence, Title II "also seeks to enforce a variety of other basic constitutional guarantees."[115] These include the right to petition government, the right to vote, the right to humane conditions of confinement, the right to be secure in one's person against unreasonable search and seizure, and the right to be free from cruel and unusual punishment. Importantly, these fundamental rights are all enshrined either directly or by incorporation in the Due Process Clause and are thus binding on states' relationships with their citizens.[116] As a result, the

114. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999).

115. Tennessee v. Lane, 124 S. Ct. 1978, 1988 (2004).

116. City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (concluding that the Bill of Rights guarantees incorporated through the Due Process Clause are enforceable by Congress under Section 5).

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majority's explanation of how systematic violations of fundamental guarantees satisfy the rights condition provides a crucial template that should firmly vindicate Title II as valid Section 5 enforcement of a broad array of constitutional rights recognized in the Court's own due process jurisprudence.

The structure of *Lane*'s validation of the rights condition reveals the opinion's evidentiary template for enforcement of these other fundamental rights. For courthouse access, Justice Stevens's evidentiary review began without reference to documentation by Congress. Instead, he pointed directly to "laws that remain on the books" implicating the unconstitutional judicial exclusion of disabled people, such as state codes in Michigan and Tennessee, respectively, that banned the "infirm or decrepit" or the "mentally and physically disabled" from ever serving as jurors.[117] Stevens underscored the deep tension between these laws and the recognized constitutional prohibition against "excluding identifiable segments" from jury service.[118] In addition, Stevens mobilized the very evidentiary source called for in *Garrett* and deployed in *Hibbs*—a review of the judiciary's own chronicle of state constitutional violations. In *Garrett*, O'Connor and Kennedy joined in concurrence to suggest this approach:

> If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations.[119]

In *Hibbs*, Rehnquist imported this judicial documentation into the majority's evidentiary repertoire: "The history of the many state laws limiting women's employment opportunities is chronicled in—and, until relatively recently, was sanctioned by—this Court's own opinions."[120] *Lane* confers even greater weight on the judicial chronicle of rights violations, pointedly noting that "this Court's cases . . . have identified unconstitutional treatment of disabled persons by state agencies in a variety of settings."[121] *Lane* confirms that "[t]he decisions of other courts . . . also demonstrate a pattern of unconstitutional treatment in the administration of justice."[122] Thus, responding to the evidentiary call for "litigation and [judicial]

117. *Lane*, 124 S. Ct. at 1989 n.9 (internal quotation marks omitted).
118. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).
119. Bd. of Trs. v. Garrett, 531 U.S. 356, 375-76 (2001) (Kennedy, J., concurring).
120. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 729 (2003).
121. *Lane*, 124 S. Ct. at 1989.
122. *Id.* at 1989-90.

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discussion of the constitutional violations,"[123] Justice Stevens included direct citation to nine cases illustrating the breadth of the forms of judicial exclusion historically faced by people with disabilities.[124]

Lane shows precisely how this evidentiary approach may similarly satisfy the rights condition for other constitutional guarantees. Combining judicial documentation with direct citations to exclusionary state laws, *Lane* provides an extensive catalogue of state violations of a vast array of fundamental rights, not merely of the four courthouse-related access guarantees. The Court cited disabled people's exclusion by states that "'categorically disqualified "idiots" from voting, without regard to individual capacity.'"[125] Justice Stevens's note of disabled people's categorical exclusions from marriage also mirrors his evidentiary demonstration of their exclusion from jury service.[126] The overt exclusion of people with disabilities is forcefully presented through *Lane*'s citation to state laws such as those "forbidding the issuance of a marriage license to imbecile[s]."[127] Further, *Lane* acknowledges additional unconstitutional deprivations outside the courthouse context by citing the Supreme Court's own documentation of disabled people's "unjustified commitment [and] the abuse and neglect of persons committed to state mental hospitals,"[128] all reflecting the states' "systematic deprivations of fundamental rights."[129] Enumerating each of these "other basic constitutional guarantees"[130]

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123. *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring).

124. *Lane*, 124 S. Ct. at 1990 n.14.

125. *Id.* at 1989 (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 464 & n.14 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part)).

126. *Lane*, 124 S. Ct. at 1989 n.8. State laws prohibiting marriage on the ground of disability extended from mental to physical disabilities, even declaring a marriage voidable "if either party to a marriage be incapable from physical causes of entering into the marriage state." MONT. REV. CODE ANN. § 48-104 (Smith 1947). Even epilepsy was targeted in more than seventeen states as an explicit basis for denying an individual the fundamental right to marry. Underscoring the potency of this evidence, Justice Stevens provided direct quotations from such statutory codes declaring illegal the marriage of "an idiot or of a person adjudged to be lunatic" and "criminalizing the marriage of persons with mental disabilities." *Lane*, 124 S. Ct. at 1989 n.8 (internal quotation marks omitted).

127. *Lane*, 124 S. Ct. at 1989 n.8 (alteration in original) (internal quotation marks omitted).

128. *Id.* at 1989. In landmark cases, courts have condemned both the conditions at institutions for the developmentally disabled as cruel and unusual and the prolonged tenure faced by each individual as violating the right to live in one's community. In *O'Connor v. Donaldson*, the Supreme Court directly rejected the lifelong incarceration of people simply because of a disability:

> A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement.
>
> . . . .
>
> In short, a state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.

422 U.S. 563, 575-76 (1975).

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

130. *Id.* at 1988.

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protected by Title II, *Lane* invokes the extensive history of deprivation documented in Congress's review of disabled people's experience. This expansive history of fundamental rights violations is all cited in *Lane* alongside the judicial record and state laws evincing a pattern of "unconstitutional treatment in the administration of justice."[131]

Lane's discussion of this record of systematic fundamental rights deprivations should not obscure the still-confined scope of the challenge to the "particular services at issue in this case."[132] Nevertheless, Justice Stevens presented this record of systematic fundamental rights deprivations according to the same analytic structure and in the same discussion showing how the rights condition is satisfied for enforcement of disabled citizens' courthouse-access guarantees. The common thread linking *Lane*'s evidentiary survey of this array of fundamental rights is clear. These rights all provide constitutional baselines governing the relationships between states and their citizens according to the Due Process Clause. Thus, even in *Lane*'s as-applied ruling, the majority's evidentiary review provides a template for how future litigation challenging the Section 5 enforcement of other fundamental rights may be processed by courts measuring the rights condition.

The *Lane* Court's conclusion that Title II met the burden of the rights condition sheds substantial new light both on the juricentric nature of the as-applied methodology and on how the rights condition might be measured in future challenges to Title II's enforcement of other constitutional rights. Part III engages a second puzzle that *Lane* reveals in the enforcement model: distinguishing the narrow evidentiary base for the as-applied rights condition from the sweeping evidence considered for the remedial condition. This Part will show how *Lane* resolves this puzzle by changing application of the remedial condition to grant Congress more expansive Section 5 authority.

III. EMANCIPATING CONGRESSIONAL REMEDIATION

If *Lane* had evaluated the remedial condition with the same as-applied methodology it deployed for the rights condition, such a narrow review would have had significant implications for the *Boerne* test by excluding evidence not tightly tied to the Court's vision of the Section 1 rights at stake. Title II's proportionality, then, would only be informed by evidence

131. *Id.* at 1990.
132. *Id.*

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relating to the courthouse-access question in this case, "not . . . to hockey rinks, or even to voting booths."[133]

On the contrary, however, *Lane* vindicates the proportionality of the Title II remedy based on a broad swath of evidence extending far beyond the Section 1 rights at stake in courthouse access. Further, the accessibility obligations imposed in the remedy cast Title II as "so-called *prophylactic legislation* that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[134] Herein lies *Lane*'s second major puzzle: How is the remedial condition's use of a sweeping evidentiary base for Title II's remedy compatible with the analytic constraints imposed by the decision's as-applied methodology? What does the evidence mobilized in *Lane* suggest about the Court's larger view of the enforcement power? Even though *Lane*'s as-applied methodology constricts the scope of evidence relevant to establishing violations under the rights condition, *Lane*'s application of the remedial condition demonstrates the Court's willingness to accept sweeping evidence of "the evil presented"[135] as relevant to Congress's pragmatic justification for Title II's remedial proportionality.

A. *Separating Support for Rights and Remedies*

The Rehnquist Court's Section 5 jurisprudence betrays an abiding uncertainty about the theoretical and historical scope of Congress's prophylactic power to remedy conditions that do not themselves constitute a violation of Section 1 of the Fourteenth Amendment.[136] On the one hand, the Court has repeatedly said that "Congress 'is not confined to . . . merely parrot[ing] the precise wording of the Fourteenth Amendment.'"[137] On the other hand, the Court has repeatedly condemned Congress for failing to satisfy the remedial condition because Section 5 legislation was not congruent and proportional to the violations it sought to remedy.[138] Even when the Court upheld Congress's Section 5 prophylaxis in *Hibbs*, Chief Justice Rehnquist took account of an expansive evidentiary base for the remedial condition only *after* tying this broad evidence tightly to the

133. *Id.* at 1993.

134. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727-28 (2003) (emphasis added).

135. City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

136. For illustrative evaluations of the Court's conception of the prophylactic scope of Section 5, see Post & Siegel, *supra* note 25, at 1949; Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673 (2001); and Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 337 (2004).

137. *Hibbs*, 538 U.S. at 737 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000)).

138. *See supra* note 5.

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Section 1 prohibition of sex discrimination. Each new source of evidence marshaled in *Hibbs* for the proportionality test—from the Court's complicity in sanctioning discrimination[139] to the failure of past remedial efforts by Congress[140]—was used to shed light on an "evil presented" that was closely situated to the Section 1 right of sex discrimination that the FMLA was presumably trying to remedy.[141] *Hibbs*, accordingly, provided only a limited glimpse at the Court's potential vindication of congressional prophylaxis.

Lane's review of the Title II accessibility remedy directly implicates the scope of Congress's power to prevent and deter future violations by proscribing even conduct the Court might deem constitutional. In prohibiting the exclusion of people with disabilities from all public services, programs or activities, Title II's duty of accommodation requires states to make reasonable modifications by removing architectural and other barriers to accessibility.[142] Applied to the courthouse, Title II thus binds all states with an accommodation duty that actively deters the future unconstitutional exclusion of people with disabilities from courthouses.

Despite congressional limitations on the scope of the modification mandate,[143] the Court before *Lane* had never interpreted the Fourteenth Amendment to require such a duty of accommodation to avoid the unconstitutional exclusion of people with disabilities. Consequently, even though the Court had recognized Congress's "authority both to remedy and deter" violations, "including [conduct] not itself forbidden by the Amendment's text,"[144] the *Garrett* Court invalidated a similar remedy in Title I: "[T]he accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer."[145] As Part I noted, the accommodation duty rejected in *Garrett* is distinguishable from the duty in *Lane* according to the Court's judicial access jurisprudence, which recognizes a "well-established due process principle" of "meaningful" access and "affirmative obligations."[146] However, the Court had never articulated the scope of an access guarantee for people with disabilities. This forms a key element in Rehnquist's dissent:

139. *Hibbs*, 538 U.S. at 729.
140. *Id.* at 737.
141. *See also supra* notes 36-37 and accompanying text.
142. 42 U.S.C. § 12132 (2000); 28 C.F.R. § 35.151 (2004) (specifying the regulations implementing Title II's mandate for program accessibility).
143. *See infra* notes 164-169 and accompanying text.
144. Bd. of Trs. v. Garrett, 531 U.S. 356, 365 (2001).
145. *Id.* at 372.
146. Tennessee v. Lane, 124 S. Ct. 1978, 1994 (2004).

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> We have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance. Indeed, the fact that the State may need to assist an individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding.[147]

On this basis, the Chief Justice used the remedial condition to criticize Title II for exceeding the Court's previous view of the Fourteenth Amendment: "[E]ven in the courthouse-access context, Title II requires substantially more than the Due Process Clause."[148] Similarly, during oral argument Justice Scalia questioned the proportionality of Title II's remedial duty even if failure to accommodate might implicate deprivation of fundamental rights: "He has a constitutional right for the state to provide him the means of being present at his trial. Now, does the means have to be an elevator or could it be someone assisting up the stairs? . . . [I]t may be less dignified . . . , but is it a constitutional violation . . . ?"[149] Rejecting this narrow application of the remedial condition, *Lane* marks the first decision in which the Court endorsed an accommodation duty as a "reasonable prophylactic measure"[150] constitutionally binding the states.

Lane's review of a Section 5 law enforcing multiple constitutional rights subject to varying degrees of judicial scrutiny illuminates the distinction between the evidence necessary to satisfy the rights condition and the evidence necessary to satisfy the remedial condition. *Lane* vindicates the congruence and proportionality of Title II on the basis of evidence that goes far beyond the mere question of whether people with disabilities have been denied access to courthouses. Recognizing the

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147. *Id.* at 2002 (Rehnquist, C.J., dissenting).

148. *Id.* at 2006.

149. Transcript of Oral Argument at 31, *Lane* (No. 02-1667). In a break with his prior positions on Section 5, Justice Scalia wrote a separate dissent criticizing the Court's post-*Boerne* review of Section 5 laws altogether:

> Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.

Lane, 124 S. Ct. at 2009 (Scalia, J., dissenting). Despite this critique suggesting the potential for greater deference to the constitutional authority of Congress, Justice Scalia actually proposed a less deferential standard for the remedial condition. In criticizing the Court's validation of Title II as prophylactic legislation, Scalia concluded, "[W]hat § 5 does *not* authorize is so-called 'prophylactic' measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment." *Id.* at 2010.

150. *Id.* at 1994 (majority opinion).

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challenge of providing legislative relief for "[d]ifficult and intractable problems [that] often require powerful remedies,"[151] *Lane* adopts a generous evidentiary standard for Title II under the remedial condition that stands in marked contrast to the narrow scope of review—for only courthouse-access violations—under the rights condition.

The key doctrinal device justifying *Lane*'s broad evidentiary standard is the Court's pragmatic recognition of Congress's extensive past efforts to combat the exclusion of people with disabilities: "[T]he shortcomings of previous legislative responses . . . [to] this difficult and intractable proble[m] warranted added prophylactic measures in response."[152] Just as *Hibbs* considered legislation like the Pregnancy Discrimination Act that may have implicated conduct beyond that proscribed by the Court's Equal Protection Clause jurisprudence, so too does *Lane* consider evidence of Congress's failed remediation efforts that extends far beyond the courthouse-access deprivation that is the focus of the rights condition. Thus, the scope of the *Lane* Court's evaluation of the remedial condition was based on the pervasiveness of disability discrimination—even discrimination that did not involve fundamental rights—because such discrimination "persisted despite several federal and state legislative efforts to address it."[153]

Lane repeatedly cites with approval Justice Breyer's *Garrett* dissent, which chronicles accounts of discrimination to demonstrate the "pattern of disability discrimination [that] persisted" over decades in "hundreds of examples of unequal treatment of persons with disabilities."[154] We can best understand this breathtakingly expansive use of evidence by reference to *Lane*'s consideration of the remedial condition. *Lane* chronicles deprivations that offer compelling evidence of far-reaching and deeply entrenched evils, which justify Congress's use of a prophylactic remedy to end the exclusion of people with disabilities from the administration of justice. This use of evidence is especially striking given the Court's circumscribed scrutiny of only the "question presented in this case."[155]

B. *Codifying a Common Evidentiary Base for Section 5 Remedies*

Lane's sweeping validation of Title II's remedial proportionality has critical implications for judicial review of future challenges to Congress's equal protection and fundamental rights enforcement. Prior to *Lane*, the

151. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000).
152. *Lane*, 124 S. Ct. at 1993 (third alteration in original) (internal quotation marks omitted).
153. *Lane*, 124 S. Ct. at 1990.
154. *Id.*
155. *Id.* at 1993.

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Court had repeatedly declared that Section 5 statutes failed the remedial condition after evaluating their proportionality only on the basis of a narrow evidentiary record of constitutional violations primarily relevant to the rights condition. Yet, because the Court framed Title II as Congress's prophylactic effort justified by the expansive history of "legislative efforts to address"[156] discrimination against people with disabilities, *Lane* formally chronicles the broader commonplace exclusions that kept people with disabilities outside of the institutions of state government where they could exercise their rights and claim citizenship in their communities. Concurring in *Lane*, Justice Souter even condemned the Court's own complicity in the systematic deprivation of the constitutional rights of people with disabilities:

> [T]he judiciary itself has endorsed the basis for some of the very discrimination subject to congressional remedy under § 5. *Buck v. Bell* was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities. . . . One administrative action [excluding people with disabilities] was judicially sustained in part as a justified precaution against the very sight of a child with cerebral palsy, lest he "produc[e] a depressing and nauseating effect" upon others.[157]

Consequently, the expansive evidentiary base *Lane* incorporates into the congruence-and-proportionality test provides a common foundation for future as-applied challenges to either fundamental rights or equal protection enforcement in Title II.

Significantly, *Lane* even applies its sweeping vindication of Section 5 prophylactic power under the remedial condition to congressional efforts to enforce the Equal Protection Clause. The *Lane* Court assessed the evidence relevant for congruence and proportionality in a highly practical way, and it seized the occasion to spell out some of the implications of this approach for Section 5 legislation seeking to vindicate Section 1's equality guarantee: "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."[158]

156. *Id.* at 1990.

157. *Id.* at 1995 (Souter, J., concurring) (third alteration in original) (citation omitted) (quoting State *ex rel.* Beattie v. Bd. of Educ., 172 N.W. 153 (Wis. 1919)).

158. *Id.* at 1986 (majority opinion). For further discussion of the intersection between equal protection and disparate impact standards, see Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

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This resounding vindication of Congress's prophylactic enforcement power clarifies a crucial aspect of equal protection enforcement that the *Garrett* Court had left uncertain.[159] The 1964 Civil Rights Act's prohibition on disparate impact discrimination[160] was extended to authorize damages suits against the states only through the Equal Employment Opportunity Act (EEOA) of 1972.[161] The validity of the EEOA had been called into question, however, because it prohibits the states from enacting facially neutral regulations that have a disparate impact on women or African Americans. While such regulations would not violate the Equal Protection Clause, they do violate Title VII.[162] In the wake of *Garrett*'s strict application of the proportionality test, the Court's willingness to uphold the application of Title VII to the states remained in serious doubt. In fact, as Robert Post observed, the *Hibbs* oral argument and decision were dominated by a recognition that "[i]f the Court were to decide *Hibbs* by using the same harsh doctrinal tests that it had applied in *Garrett* . . . , it is likely that important provisions of Title VII would be struck down as beyond Congress's Section 5 power."[163] Just as *Hibbs* moved the *Boerne* proportionality test away from *Garrett*'s strict application to avoid such an outcome, in *Lane* the Court's reasoning more directly confirms the validity of the EEOA, including Title VII's proscriptions of disparate impact conduct. What makes this possible is *Lane*'s clear distinction between the rights and the remedial conditions in applying the enforcement model.

Finally, beyond its sweeping evidentiary support to justify Congress's added prophylactic power under Section 5, *Lane*'s proportionality measure of the specific accommodation duty also will drive future judicial review of challenges to Title II. Under the remedial condition, *Lane* interprets the proportionality standard to stress two elements in Title II that in the Court's view make "[t]he remedy Congress chose . . . nevertheless a limited one."[164] First, Title II applies "only when the individual seeking modification is

159. Bd. of Trs. v. Garrett, 531 U.S. 356, 372-73 (2001) (invalidating the Section 5 authority for Title I, in part because "[t]he ADA also forbids [employer conduct] that disparately impact[s] the disabled, without regard to whether such conduct has a rational basis," and holding that "such evidence [of disparate impact] alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny").

160. 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

161. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 1972 U.S.C.C.A.N. (86 Stat. 103) 122 (codified in scattered sections of 5 and 42 U.S.C.).

162. *But see* Primus, *supra* note 158 (challenging prevailing distinctions between the Equal Protection Clause and Title VII's disparate impact standard).

163. Post, *supra* note 33, at 19.

164. Tennessee v. Lane, 124 S. Ct. 1978, 1981 (2004); *cf. Garrett*, 531 U.S. at 372 (finding that Title I failed the remedial condition because "the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable").

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otherwise eligible for the service."[165] Congress limited the access requirement by stipulating that the person seeking access must be a "'qualified individual,'" which is to say "an individual with a disability who, with or without reasonable modifications . . . , meets the essential eligibility requirements for . . . participation in programs or activities provided by a public entity."[166] Without his or her disability, this individual could gain entrance. The Court regarded this limitation on the reach of Title II as evidence of its proportionality.

Second, the Court stressed the fact that Title II is a proportional remedy because it requires "only 'reasonable modifications' that would not fundamentally alter the nature of the service provided"[167] or result "in undue financial and administrative burdens."[168] Title II thus tailors its requirements to the financial and physical environments in each state, demanding that programs—"when viewed in [their] entirety"—be readily accessible.[169]

Together, these pragmatic vindications of the remedial condition recast the jurisprudential backdrop informing future courts' proportionality measure in challenges to Title II's equal protection and due process enforcement.[170]

IV. FEDERALISM AND THE SECTION 5 POWER

This Note has demonstrated how *Lane* deploys the rights and remedial conditions in new ways that affirm the judiciary's interpretive authority and simultaneously vindicate broader legislative power. Yet after *Boerne*, the Court had also applied its conditions for valid Section 5 legislation according to a jurisprudential framework altogether separate from its claimed separation-of-powers duty to limit congressional encroachment on the judiciary's interpretive exclusivity. Invoking states' sovereign immunity to suit, the Rehnquist Court had used Eleventh Amendment jurisprudence to justify applications of the rights and remedial conditions that

165. *Lane*, 124 S. Ct. at 1993.

166. 42 U.S.C. § 12131(2) (2000).

167. *Lane*, 124 S. Ct. at 1993 (citing 42 U.S.C. § 12131(2) (2000)).

168. 28 C.F.R. § 35.150(a)(3) (2004); *see also id.* § 35.130(b)(7).

169. *Id.* § 35.150(a).

170. Already, the Supreme Court has vacated circuit and district court judgments declaring that Title II exceeds Section 5, remanding these decisions to the courts for reconsideration in light of *Lane*. *See* Parr v. Middle Tenn. State Univ., No. 02-5925, 2003 WL 21130027 (6th Cir. May 13, 2003), *vacated and remanded*, 124 S. Ct. 2386 (2004); Phiffer v. Columbia River Corr. Inst., No. 01-35984, 2003 U.S. App. LEXIS 7577 (9th Cir. April 21, 2003), *vacated and remanded*, 124 S. Ct. 2386 (2004); Feaster v. Fla. Dep't of Health, 846 So. 2d 1238 (Fla. Dist. Ct. App. 2003), *vacated and remanded*, 124 S. Ct. 2387 (2004); Fla. Dep't of Highway Safety v. Rendon, 832 So. 2d 141 (Fla. Dist. Ct. App. 2002), *vacated and remanded*, 124 S. Ct. 2387 (2004).

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circumscribed otherwise legitimate Section 5 power. The result has been deep uncertainty about both the primacy of the Section 5 power and the specific meaning of Eleventh Amendment federalism postulates for the rights and remedial conditions. *Lane* focuses on this jurisprudential confusion using the lens of due process enforcement, where "federal interests are paramount."[171] As this Part demonstrates, *Lane* restores the Fourteenth Amendment's primacy over the Eleventh Amendment, thereby vindicating the national government's power to enforce constitutional rights standards against the states.

In recent decisions, the Rehnquist Court had invoked federalism to justify invalidating Section 5 legislation, most frequently citing the immunity against private damages suits given to the states by the Eleventh Amendment. *Garrett* is a prime example. While the Court invalidated Title I's enforcement authority, Justice Kennedy explained that

> what is in question is not whether the Congress, acting pursuant to a power granted to it by the Constitution, can compel the States to act. What is involved is only the question whether the States can be subjected to liability in suits brought not by the Federal Government . . . , but by private persons seeking to collect moneys from the state treasury without the consent of the State.[172]

Implicit here is the idea that the Section 5 enforcement power itself can be restricted because all that is at stake is the right of private damages actions against the states. The Court has specifically reassured us that the federal power to enforce constitutional rights is not at stake, because suits for injunctive relief against state officials for violations of federal standards remain available under *Ex parte Young*,[173] and the federal government may still sue for money damages.[174]

This reasoning is strange, however, because the Fourteenth Amendment was enacted after the Eleventh Amendment and accordingly trumps Eleventh Amendment immunity.[175] This point was made by none other than

171. Alden v. Maine, 527 U.S. 706, 756 (1999).

172. Bd. of Trs. v. Garrett, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring).

173. 209 U.S. 123 (1908) (allowing private suits to compel action by state officials).

174. *Garrett*, 531 U.S. at 374 n.9.

175. Additionally, notwithstanding the reassurance of *Garrett*'s limited impact on the Section 5 power, some lower courts had already applied the ruling to bar not only money damages directly against a state but also injunctive relief against states. *See, e.g.*, Ass'n for Disabled Ams. v. Fla. Int'l Univ., 178 F. Supp. 2d 1291, 1295 (S.D. Fla. 2001) ("The plaintiffs also argue that *Garrett* does not apply to this case because the Supreme Court's ruling was limited to the question of whether an individual could sue a state for money damages. The problem with this argument is that the Eleventh Amendment bars suit against an unconsenting state for injunctive relief as well as for money damages.").

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Chief Justice Rehnquist, who authored an opinion for the Court explicitly holding that

> the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority.[176]

Despite this recognition of Section 5's priority, the Court's recent Section 5 decisions have, in effect, rendered the Section 5 power "necessarily limited by" the Eleventh Amendment.

Lane reasserts the primacy of the Section 5 power in two significant ways. First, *Lane* decisively overrules an application of the rights condition that accorded the Eleventh Amendment priority over Section 5. *Garrett* had effected the privileged invocation of federalism values in judicial scrutiny of Section 5 by manipulating the rights condition's evidentiary requirement according to the prescriptions of the Eleventh Amendment. In *Garrett*, the Court held that even though cities and counties could violate the Fourteenth Amendment, evidence of these violations could not be used in the rights condition to establish Section 5 power, at least not to justify the kind of Section 5 power that could trump Eleventh Amendment immunity: "[T]he Eleventh Amendment does not extend its immunity to units of local government. . . . It would make no sense to consider constitutional violations on their part, as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment."[177] This reasoning implies that even though *Garrett* declared that Title I as applied to the states had failed the rights condition, Congress might still have Section 5 power for Title I to bind cities and counties that do not enjoy the trumping power of the Eleventh Amendment.[178]

Lane directly and explicitly overrules *Garrett*'s strange evidentiary logic of Eleventh Amendment primacy:

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176. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (citation omitted); *see also* Alden v. Maine, 527 U.S. 706, 756 (1999) ("We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power.").

177. *Garrett*, 531 U.S. at 369.

178. *See, e.g.*, Reickenbacker v. Foster, 274 F.3d 974, 982 n.60 (5th Cir. 2001) ("This narrowing of the analysis in *Garrett* means that Title II of the ADA could still be a valid exercise of Congress' § 5 power, but simply not provide the basis for a *use* of that power to abrogate . . . .").

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> The Chief Justice [in dissent] dismisses as "irrelevant" the portions of this evidence that concern the conduct of nonstate governments. This argument rests on the mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves. . . .
>
> In any event, our cases have recognized that evidence of constitutional violations on the part of nonstate government actors is relevant to the § 5 inquiry.[179]

Lane deliberately highlights evidence of the "failure of state and *local* governments to provide interpretive services for the hearing impaired"[180] in judicial programs and services. The Court used this evidence to establish that Title II has fulfilled the rights condition, at least with respect to the question of access to judicial services. Thus, while the *Garrett* Court measured the rights condition according to the controlling prescriptions of the Eleventh Amendment in order to reject an abundant record of discrimination by local governments, *Lane* directly overrules that logic and restores the primacy of the national enforcement power as governing states and "their political subdivisions" alike.[181]

More broadly, the unusual nature of Title II of the ADA also led the Court in *Lane* to reveal—and affirm—the true federal power at stake in its Section 5 jurisprudence, exposing the potential impact of using federalism values to restrict the national government's enforcement power. Even without Section 5 power after *Garrett*, Congress could nevertheless enact Title I pursuant to its Article I commerce power. Congressional commerce power was sufficient to subject state officials to federal injunctive relief for disability discrimination in employment.[182] The same was true with respect to Congress's power to prohibit age discrimination in *Kimel*.[183] Yet as the petitioner, respondents, the Solicitor General, and even several Justices noted during the oral argument in *Lane*, in the absence of Section 5

179. Tennessee v. Lane, 124 S. Ct. 1978, 1991 n.16 (2004) (capitalization altered) (citation omitted).

180. *Id.* at 1991 (emphasis added).

181. *Id.* at 1990. In dissent, the Chief Justice claimed that "[t]he bulk of the Court's evidence concerns discrimination by nonstate governments, rather than the states themselves. We have repeatedly held that such evidence is irrelevant to the inquiry whether Congress has validly abrogated Eleventh Amendment immunity, a privilege enjoyed only by the sovereign States." *Id.* at 1999 (Rehnquist, C.J., dissenting). Yet none of the cases Rehnquist cites affirms this proposition. Indeed, in the *Florida Prepaid* and *Kimel* citations, the Chief Justice wrote only of the limited evidence available, without a single discussion of the evidentiary quality of local government discrimination.

182. *Garrett*, 531 U.S. at 374 n.9.

183. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000).

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authority it remained deeply uncertain whether Congress could justify the enactment of Title II under its commerce power. Indeed, the Court might have held mandates for access to voting booths, courthouses, and state capitols to be simply too disconnected from interstate commerce.[184]

Title II, therefore, may have rested almost entirely on Congress's Section 5 power. Without that power, Congress could not authorize even private actions for injunctive relief against states that discriminated against people with disabilities in ways affecting fundamental rights. Thus, the Court faced the prospect of invalidating Title II's authority for these fundamental rights arenas altogether, leaving "a country where it's okay if the only places [people with disabilities] can't get into are the voting places, the courthouse, the state capit[o]l, to the vessels of democracy. . . . [A]nd there's nothing that the federal constitution has to say about it . . . ."[185]

Stepping back from this precipice, O'Connor joined the four Justices who dissented in *Florida Prepaid*, *Morrison*, *Kimel*, and *Garrett* to vindicate the Section 5 power to establish constitutional enforcement standards that bind the states. The importance of distinguishing the national power in Section 5 from federalism principles was evident in the Justices' colloquy with Tennessee's advocate, Mr. Moore, during oral argument:

> QUESTION: Mr. Moore, does Tennessee provide any cause of action for the alleged violations here, the lack of access to the courthouse?
>
> MR. MOORE: No private right of action under our State Public Buildings Act. . . .
>
> QUESTION: So you're satisfied that under Tennessee law, there would be no monetary relief available?
>
> MR. MOORE: I think that is—I think that is right.

184. The Court's recent narrowing of the commerce power has prompted this concern. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). Several months after *Garrett*, Colorado not only challenged the Section 5 authority for Title II but further "asserted a challenge to Congress' ability to pass Title II of the ADA pursuant to the Interstate Commerce Clause." Thompson v. Colorado, 278 F.3d 1020, 1025 n.2 (10th Cir. 2001). *But see* Seth A. Horvath, Note, *Disentangling the Eleventh Amendment and the Americans with Disabilities Act: Alternative Remedies for State-Initiated Disability Discrimination Under Title I and Title II*, 2004 U. ILL. L. REV. 231, 264 (arguing, prior to *Lane*, that while the Court seemed poised to invalidate Title II's Section 5 authority, "federal courts should generally favor *Ex parte Young* injunctive relief as a remedy for Title II violations").

185. American Constitution Society Panel Discussion on *Tennessee v. Lane* and the Future of the Americans with Disabilities Act 58 (Jan. 13, 2004) (remarks of Patricia Millet), *available at* http://www.acslaw.org/pdf/tennesseevlanetranscript.pdf.

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QUESTION: And would there be any enforcement action at all available to compel under Tennessee law the courthouses to be accessible?

MR. MOORE: No, Your Honor . . . . But, of course, . . . we do not dispute that our state officials can be called to account for a failure to comply with the provisions of Title II in an *Ex parte Young* action.

. . . .

QUESTION: Under what power? I guess—I guess you're arguing that there's no section 5 authority—

MR. MOORE: Yes, Your Honor.

QUESTION: —for enactment of this provision. And that would leave what, the Commerce Clause?

MR. MOORE: Yes, Your Honor.

QUESTION: And you think it would survive the Commerce Clause challenge, do you, as applied to states?

MR. MOORE: . . . Your Honor, . . . this case doesn't present that question.

. . . .

QUESTION: But I'm asking.

MR. MOORE: But we have not challenged and do not question Congress'—

QUESTION: Other states have though, have they not?[186]

To the extent that *Lane* posed a true question of federal power in Due Process Clause enforcement, and not merely a question of the scope of Eleventh Amendment immunity, the Court's unwillingness to cabin federal authority holds crucial implications for future review of Section 5 legislation. *Lane* pushed the Court to distinguish the federalism values that had become bound up in applying the enforcement model as a means of limiting congressional power. With the demise of the Second

186. Transcript of Oral Argument at 5-7, *Lane* (No. 02-1667) (italics altered).

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Reconstruction's "jurisdictional compromise,"[187] which had allowed Congress's commerce power to suffice as authorization for antidiscrimination mandates, *Lane* reveals the high stakes in constraining the Section 5 power through judicial conditions that implicate far more than "only the question whether the States can be subjected to liability . . . by private persons seeking to collect moneys."[188] Joining an as-applied review of access to the courthouse preserve of constitutional rights in *Lane*, Justice O'Connor completed a majority to confront this threat posed by invalidation of Title II and vindicate the primacy of Congress's Section 5 power. *Lane* thus restores the traditional order of priority between the Fourteenth and Eleventh Amendments.

CONCLUSION

On July 26, 1990, the Americans with Disabilities Act became law with near-unanimous bipartisan support in both houses of Congress and with President George H.W. Bush declaring, "Let the shameful wall of exclusion finally come tumbling down."[189] Since that time, a struggle over Fourteenth Amendment enforcement has emerged between coordinate branches of government that few expected a decade ago. The Court's reconstructed framework for Section 5 review has threatened a number of civil rights secured over the past fifty years. Against this backdrop, the *Lane* Court clarified the actual "metes and bounds"[190] of its own willingness to constrain the congressional power in the setting of enforcement of the Due Process Clause against the states.

Lane's application of what I have called the rights and remedial conditions reveals the tension between competing visions of the Constitution in the Court's recent Section 5 jurisprudence. The Chief Justice's juricentric perspective would extend beyond the rights condition intended to preserve the Court's exclusive interpretive authority, further limiting Congress's long-recognized authority to remedy and deter future deprivations of constitutional rights. The Court decisively rejected this vision of the Constitution on the ground that it would stifle Congress's remedial power to ensure meaningful access for people with disabilities. Justice Ginsburg provided a portrait of an aspirational Constitution that anchors the other end of the spectrum of constitutional visions enforceable

187. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 443 (2000) (internal quotation marks omitted).

188. Bd. of Trs. v. Garrett, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring).

189. Remarks on Signing the Americans with Disabilities Act of 1990, 1990 PUB. PAPERS 1067, 1070 (July 26, 1990).

190. *Garrett*, 531 U.S. at 368.

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through the Section 5 power, although her view did not receive a fifth vote. Affirming the "equal-citizenship stature" of disabled Americans "among people who count in composing 'We the People,'" Ginsburg endorsed the law precisely because Congress's findings "sufficed to warrant the barrier-lowering, dignity-respecting national solution the People's representatives in Congress elected to order."[191] It is this interaction between We the People and Congress, affirming the dignity right of all citizens to access their vessels of democracy, that is at stake in these contending visions.[192]

While *Lane* affirms the Court's fundamentally juricentric conception of constitutional interpretation, it also reveals ways to vindicate a more expansive Section 5 power with potentially far-reaching implications for future review by the courts. By validating Title II's prophylactic accommodation requirements to ensure courthouse accessibility for all people with disabilities, *Lane* spotlights the importance of Congress's democratic role and its institutional competence in giving practical content to constitutional values. Although *Lane* limits the prophylactic endorsement to the courthouse-access remedy, its implications for judicial review of future challenges to the Section 5 power should not be underestimated. Moreover, *Lane* illustrates clearly the true threat in the Court's recent use of the Eleventh Amendment to restrict otherwise legitimate Section 5 legislation. Through the lens of Due Process Clause enforcement, *Lane* reaffirms the importance of the national government's power to establish constitutional rights standards that are binding on states' relationships with their citizens. Together, these developments suggest *Lane* may mark a turning point in Section 5 jurisprudence. Even as the Court may continue to guard its interpretive authority through final judicial review, *Lane* shows how the Court can create space for Congress's more pragmatic remedial authority in the Section 5 "power to enforce, by appropriate legislation" the constitutional rights enshrined in the Fourteenth Amendment.

191. *Lane*, 124 S. Ct. at 1996-97 (Ginsburg, J., concurring).

192. *See* Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 35 (2004) ("Legally cast as upholding Congress's unique power to enforce due process rights, even against state governments, the decision might also be viewed as affirming the expressive dimensions of democratic citizenship: equal access to the courthouse, like equal access to the ballot box, is virtually constitutive of the very idea of citizenship . . . .").

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