

LANE, FUNDAMENTAL RIGHTS, AND VOTING

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INTRODUCTION

Disability law and the thornier issues of federalism are unlikely companions. Lawyers and scholars who are interested in disability law tend to be advocates dedicated to removing barriers and creating change.¹ At least in caricature, “federal court” types are of a dryer sort, committed to serious questions of the balance of state and federal power.² Yet somehow and somehow, these worlds have collided. Disability law has moved to the forefront of the largest federalism questions of our day. This intersection has left its mark on disability law and federalism, with important implications for other civil rights statutes.

When Congress passed the Americans with Disabilities Act (ADA), it sought to eliminate barriers to the full inclusion of individuals with disabilities into larger society.³ It attempted to use the full arsenal of congressional power to change the ways that employers, state and local governments, and public accommodations interact with people with disabilities.⁴ It was these goals—protecting the civil and oftentimes fundamental rights of people with disabilities—that, in cases like *Board of Trustees of the University of Ala-*

1. In recent years, there has been an explosion of scholarship, especially books, relating to disability law. These books have been very illuminating, and most have clear views promoting disability rights. See, e.g., JOE SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1994); MARY JOHNSON, *MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE, AND THE CASE AGAINST DISABILITY RIGHTS* (2000); PAUL K. LONGMORE, *WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY* (2003).

2. See, for example, Mark Greenbaum’s Online Review of *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (4th ed. 1996), at <http://www.amazon.com/exec/obidos/tg/detail/-/1566623359/102-4594934-6619352?v=glance>, stating that “Federal Courts and Federal Jurisdiction is generally recognized as the hardest course in law school.”

3. 42 U.S.C. § 12101(b) (2003).

4. *Id.* § 12101(b)(4).

*bama v. Garrett*⁵ and most recently *Tennessee v. Lane*,⁶ created the current intersection of disability law and “new federalism.”⁷

Several years after the ADA was passed, the Court began restructuring the balance between federal and state powers. Of particular interest to the Court was the circumstances under which Congress could use its powers under Section 5 of the Fourteenth Amendment both generally to pass civil rights laws, and specifically to abrogate the states’ sovereign immunity. *Garrett*, which held that private individuals could not sue state employers for money damages,⁸ was the Court’s most restrictive statement of Congress’s ability to use Section 5 to abrogate sovereign immunity. In *Tennessee v. Lane*, the Court retreated from some of *Garrett*’s harsher principles, holding that the ADA’s abrogation of state sovereign immunity was valid insofar as it was intended to remedy state discrimination against people with disabilities regarding the “fundamental right” of access to courthouses.⁹ Cases involving other rights covered by Title II of the ADA, including fundamental rights like voting, are sure to follow.¹⁰

It may be that with *Lane*, the Court has turned a corner in its view of the ADA. There are certainly hints in the opinion that the Court may be beginning to appreciate the challenges people with disabilities face in integrating into larger society and the need for sweeping antidiscrimination legislation.¹¹ But this Article addresses a slightly different issue: placing *Lane* within the context of new federalism, and its implications for ADA voting rights claims and other civil rights statutes. On one hand, *Lane* confirms that the Court will continue to operate within the “congruence and proportionality” framework established and applied in *City of Boerne v. Flores*,¹² *Col-*

5. 531 U.S. 356 (2001).

6. 124 S. Ct. 1978 (2004).

7. “New federalism” is a term that has been given to a line of Supreme Court cases, starting in the 1990s, addressing the balance between federal and state powers.

8. *Garrett*, 531 U.S. at 374.

9. *Lane*, 124 S. Ct. at 1980.

10. So far, the post-*Lane* cases that have made it to the Court of Appeals level have involved “non-fundamental” rights, often in the prison context. *See, e.g.*, *Cochran v. Pinchak*, 401 F.3d 184, 193 (3d Cir. 2005) (holding that Congress did not validly abrogate state sovereign immunity for claims for monetary damages brought by prison inmates under the Equal Protection Clause for accessible prison programs); *Assoc. for Disabled Americans, Inc. v. Florida Int’l Univ.*, 2005 WL 768129, *4 (11th Cir. 2005) (holding that as applied to education, Title II of the ADA is a valid exercise of Congress’s Fourteenth Amendment powers); *Phiffer v. Columbiana River Corr. Inst.*, 384 F.3d 791, 792 (9th Cir. 2004) (holding that Congress validly abrogated state sovereign immunity in a prison failure-to-accommodate claim); *Miller v. King*, 384 F.3d 1248, 1275 (11th Cir. 2004) (holding that Congress did not validly abrogate state sovereign immunity for claims for monetary damages brought by prison inmates under the Eighth Amendment). Right before the publication of this Article, the Supreme Court accepted certiorari in a case, like *Miller*, involving the validity of Congress’s abrogation of state sovereign immunity for monetary damages brought by prison inmates. *See Goodman v. Georgia*, 2005 WL 608409 (2005).

11. *See id.* at 1996 (Ginsburg, J., concurring) (“Including individuals with disabilities among people who count in composing ‘We the People,’ Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation.”); *id.* (“Legislation calling upon all government actors to respect the dignity of individuals with disabilities is entirely compatible with our Constitution’s commitment to federalism, properly conceived.”).

12. 521 U.S. 507 (1997).

lege Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,¹³ *Kimel v. Florida Board of Regents*,¹⁴ and *Garrett*. Yet *Lane* makes clear—albeit implicitly—that there is a new and different set of rules for cases involving “fundamental rights.”

New federalism is premised on the idea that the Court is the ultimate arbiter of Congress’s ability to use its Section 5 powers to enforce Section 1 of the Fourteenth Amendment. This means that the Court will review the congressional record to gauge the appropriateness and constitutional need for Congress’s action. This Article argues that *Lane* departs from previous new federalism cases (*Garrett* in particular) in three important ways. First, before *Lane*, the Court had signaled that in its review of the congressional record, it would consider only clear constitutional violations by state actors. However, after *Lane*, in cases involving fundamental rights, unequal and discriminatory treatment in the exercise of those rights by state, local, or county officials (also referred to herein as “public officials”) will suffice, even if this behavior would not clearly be unconstitutional.

Second, prior to *Lane*, the Court considered only state unconstitutional behavior abridging the exercise of the precise right at issue in the application of the statute to that case. After *Lane*, when Congress writes a statute that implicates a number of fundamental rights, the Court will consider discriminatory treatment by public officials in the exercise of any of those rights that are “related” to the right at issue. This Article argues that these first two departures from prior new federalism cases amount to a presumption in favor of Congress’s Section 5 powers when Congress legislates to protect fundamental rights.

Third, *Lane* shifts from prior new federalism principles at the stage of the analysis when the Court reviews the “appropriateness” of the congressional response. In *Garrett*, the Court viewed the ADA’s Title I reasonable accommodation mandate as a negative factor in the congruence and proportionality analysis, but *Lane* shows that the Court will view Title II’s parallel provision as providing evidence that the ADA is congruent and proportional Section 5 legislation.

One good “laboratory” by which to test this view of *Lane* is those cases involving the right to vote for people with disabilities under Title II of the ADA. *Lane* readily lends itself to this discussion. As a case not about voting, it is striking that it mentions voting as an example of a fundamental right covered by the ADA no less than five times.¹⁵ This Article argues that

13. 527 U.S. 666 (1999).

14. 528 U.S. 62 (2000).

15. See *Lane*, 124 S. Ct. at 1989 (“For example, [a]s of 1979, most States . . . categorically disqualified ‘idiots’ from voting, without regard to individual capacity.”) (citations omitted); *id.* (“The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including . . . voting.”); *id.* at 1992 (“According to petitioner . . . Title II applies not only to public education and voting-booth access”); *id.* at 1992-93 (“Whatever might be said about Title II’s other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths”); *id.* at 1995 (Souter, J., concurring) (“Laws

after *Lane*, courts should find that Title II of the ADA validly abrogates states' sovereign immunity insofar as Title II is applied to voting. This application of *Lane* to voting demonstrates how *Lane* helps restore the balance of state and federal power and shows that the *Lane* framework endorsed herein should be sufficiently clear to assuage concerns that every fundamental right covered by Title II will need to be litigated individually in a long and expensive process.

This Article proceeds in three parts. Part I introduces "new federalism" with a view toward situating *Lane* within it. Part II begins the process of deconstructing *Lane*. It proposes viewing *Lane* to mean that cases involving fundamental rights change the heretofore-established rules of new federalism. Specifically, Congress does not need the detailed and specific evidentiary record of constitutional violations by state actors required in other situations. Instead, the Court will look for instances of state or local governments substantially impairing the exercise of the fundamental right at issue. The Court will also consider the impairment of other related fundamental rights by public officials. In addition, Title II's reasonable accommodation provision weighs positively in the congruence and proportionality analysis instead of negatively, as it did in *Garrett's* Title I analysis. Part II also provides a more explicit theoretical basis for this shift than is presented in *Lane* itself—this relaxed evidentiary standard is justified because when fundamental rights (and therefore heightened scrutiny) are involved, there is a greater likelihood that conduct by public officials can be unconstitutional. Part III applies this interpretation of *Lane* to the next generation of fundamental rights claims under the ADA—that is, cases involving the right to vote. Part III argues that after *Lane*, courts should hold that Title II is valid prophylactic legislation insofar as it relates to the right to vote for people with disabilities. Part III responds to criticism of this view of *Lane* as applied to voting and shows how, with *Lane*, the Court has used disability law to help restore the balance of state and federal power. *Lane's* presumption, thus defined, could help to avoid time-consuming and expensive ADA litigation relating to Title II's validity in the case of other fundamental rights. Part III concludes with a discussion of how *Lane* will affect other federal civil rights statutes, and the Help America Vote Act in particular.

I. NEW FEDERALISM

The last decade has seen a significant shift in the balance of state and federal powers. In a series of cases dubbed the "new federalism," the Court has dramatically limited Congress's powers to pass federal civil rights statutes. This shift has occurred on several fronts, including restricting Congress's ability to legislate pursuant to its Article I power to "regulate Com-

compelling sterilization were often accompanied by others indiscriminately requiring institutionalization, and prohibiting certain individuals . . . from voting . . .").

merce . . . among the several States,"¹⁶ and narrowing the scope of Congress's power to enact legislation using Section 5 of the Fourteenth Amendment.¹⁷

This Article focuses on the second line of cases. Given new federalism's parallel curtailment of Congress's ability to legislate pursuant to Article I,¹⁸ Section 5 has become an even more important source of congressional power.¹⁹ The Eleventh Amendment, as interpreted by the Court as far back as 1890, provides that states are generally immune from suits by citizens in federal court.²⁰ In certain circumstances, however, Congress may abrogate the states' sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.²¹ In the last decade, the Rehnquist Court has taken an

16. U.S. CONST. art. I, § 8, cl. 3. New federalism decisions limiting Congress's Commerce Clause powers include *United States v. Lopez*, 514 U.S. 549, 561 (1995) (holding that the Gun Free School Zones Act of 1990 exceeded Congress's Commerce Clause authority), and *United States v. Morrison*, 529 U.S. 598, 609 (2000) (holding that the provision in the Violence Against Women Act providing victims of gender-motivated violence with a federal civil action against their perpetrators could not be justified as an exercise of Congress's power to regulate interstate commerce).

17. Section 1 of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees contained in Section 1 by enacting appropriate legislation. New federalism cases limiting Congress's Section 5 powers include *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (holding the Religious Freedom Restoration Act unconstitutional); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637 (1999) (holding the Patent and Plant Variety Protection Remedy Clarification Act unconstitutional in part); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (holding the provision of the Age Discrimination in Employment Act allowing private individuals to sue states for damages unconstitutional); *United States v. Morrison*, 529 U.S. 598, 609 (2000) (holding that the provision in the Violence Against Women Act providing victims of gender-motivated violence with a federal civil action against their perpetrators could not be justified as an exercise of Congress's power to regulate interstate commerce); and *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) (holding the provision of the Americans with Disabilities Act allowing private individuals to sue state employers for damages unconstitutional). *But see Nevada v. Hibbs*, 538 U.S. 721, 727 (2003) (upholding the private damage provision of the Family and Medical Leave Act).

18. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 60 (1996) (holding that Congress cannot abrogate state sovereign immunity in federal court pursuant to its Commerce Clause authority); *Alden v. Maine*, 527 U.S. 706, 756 (1999) (extending *Seminole Tribe* to state courts).

19. See Evan Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1131 (2001).

Thus, at the turn of the new century, Congress may enforce federal law by subjecting unconsenting states to private suits for damages pursuant to its Section 5 powers, but not pursuant to its Article I powers. This doctrinal distinction clearly puts additional pressure on Congress to justify many of its federal statutes as being valid exercises of the Section 5 enforcement power rather than exercises of Article I authority.

Id.

20. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." So while the plain language of the Eleventh Amendment applies only to suits against a state by citizens of another state, the Court has consistently interpreted the Amendment to preclude suits by citizens against their own states. See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 15 (1890); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

21. In this context, "abrogation" means that Congress passes a statute that allows states to be sued in federal court. See *Garrett*, 531 U.S. at 363 ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court."). The Court has held that

increasingly restrictive view of when Congress may do so.²² This section sets forth this doctrinal landscape as a precursor to, and as a key to understanding, the Court's decision in *Lane*.

A. City of Boerne—*The Birth of Congruence and Proportionality*

New federalism's "congruence and proportionality" test has its roots in *City of Boerne v. Flores*.²³ There, the Court struck down the Religious Freedom Restoration Act (RFRA).²⁴ RFRA was passed by Congress in reaction to the Court's controversial 1990 decision in *Employment Division, Department of Human Resources v. Smith*,²⁵ holding that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest.²⁶ RFRA directed courts to apply strict scrutiny to laws impairing the exercise of religious practices instead of the rational basis review set forth in *Smith*.²⁷

In *Boerne*, the Archbishop of San Antonio requested a permit to increase the size of a church located in Boerne, Texas.²⁸ This request was denied on the basis of a zoning regulation enacted to protect historic districts.²⁹ The Archbishop (and the United States) argued that RFRA was a legitimate exercise of Congress's powers under Section 5 of the Fourteenth Amendment "to enforce" by "appropriate legislation" Section 1 of the Fourteenth Amendment's "guarantee that no State shall deprive any person of 'life, liberty, or property, without due process of law' nor deny any person

Congress may abrogate the states' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000). The Court's new federalism cases dealing with abrogation all focus on this second requirement—the circumstances under which Section 5 of the Fourteenth Amendment is a "valid grant of constitutional authority." If this test is not met, Congress may not pass a statute providing a damage remedy against states. But under the doctrine of *Ex parte Young*, 209 U.S. 123, 155-56 (1908), Congress may still allow for prospective injunctive relief against state officials.

22. There has been no shortage of scholarly opinion as to whether this is a necessary restoration of the proper balance between federal legislation and state sovereignty. See Roderick M. Hills Jr., *The Eleventh Amendment as a Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1226 (2001) (arguing that the Rehnquist Court's jurisprudence serves the public interest by maintaining a damages versus injunction distinction that serves as a check on federal agencies); Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 NOTRE DAME L. REV. 919, 920 (2000) (finding this to be an unfounded and muddled product of an activist Court); Caminker, *supra* note 19; Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 953 (2000) ("The Court's Eleventh Amendment and sovereign immunity case law deserves the condemnation and resistance of scholars."); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001); JOHN T. NOONAN JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002).

23. 521 U.S. 507, 520 (1997).

24. *Id.* at 536.

25. See 42 U.S.C. § 2000bb(a)(4) (2000); *Boerne*, 521 U.S. at 512.

26. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 885 (1990).

27. 42 U.S.C. § 2000bb-1(b) (2000) (prohibiting the government from "substantially burden[ing] a person's exercise of religion" unless the government can demonstrate that the burden "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest").

28. *Boerne*, 521 U.S. at 512.

29. *Id.*

‘equal protection of the laws.’”³⁰ The due process right at issue in *Boerne* was the fundamental right of free exercise of religion.³¹

While acknowledging that Section 5 is “a positive grant of legislative power”³² to Congress, the Court struck down RFRA as applied to states, holding that it was an unacceptable use of Congress’s Section 5 powers.³³ The Court did not view RFRA as legitimately protecting existing constitutional rights under Section 5, but rather as an attempt by Congress to substantively redefine the Due Process Clause’s right to free exercise of religion.³⁴ Here, the line between protection of existing constitutional rights and creating new ones was easy to discern because RFRA was such a clear repudiation of the constitutional standard the Court had just announced in *Smith*.

The Court held that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”³⁵ Even to the extent RFRA had a “legitimate” purpose—that is, to protect unconstitutional state behavior as defined by *Smith*—it failed the congruence and proportionality test. The Court viewed the “means” it employed—requiring state laws to be judged under a strict scrutiny standard—as too big to fit the small window of a legitimate purpose.³⁶

Boerne gave the rules that Congress would thereafter operate under when it attempted to use its Section 5 powers. It set forth a view of Section 5 as a remedial rather than substantive power. Several post-*Boerne* decisions confirmed and provided context for this principle in cases where Congress attempted to use Section 5 of the Fourteenth Amendment to abrogate the states’ Eleventh Amendment sovereign immunity by providing a private damage remedy against states.

B. Florida Prepaid—*The Eleventh Amendment and Damage Claims Against States*

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,³⁷ the Court struck down the Patent and Plant Variety Protection Remedy Clarification Act,³⁸ a federal statute authorizing suits against states for patent infringement.³⁹ Following *Boerne*, the Court held

30. *Id.* at 517 (quoting U.S. CONST. amend. XIV, §§ 1, 5).

31. *Id.*

32. *Id.* at 517 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)); *id.* at 536.

33. *Id.*

34. *Id.* at 532-34.

35. *Id.* at 520.

36. The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. *Id.* at 534-35.

37. 527 U.S. 627 (1999).

38. *Id.* at 630.

39. 35 U.S.C. §§ 271(h), 296 (2000).

that Congress had not validly used its Section 5 powers to subject states to lawsuits for damages.⁴⁰ Viewed against the backdrop of Eleventh Amendment state sovereignty, the statute failed *Boerne*'s congruence and proportionality test because "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."⁴¹

C. Kimel—*The Importance of the Level of Scrutiny*

*Kimel v. Florida Board of Regents*⁴² involved the Age Discrimination in Employment Act (ADEA), which prevents discrimination in employment on the basis of age.⁴³ As written, the ADEA provided a damage remedy for private individuals against state employers who violated the statute.⁴⁴ Following *Boerne* and *Florida Prepaid*, the Court held that Congress had exceeded its constitutional authority in abrogating the states' immunity because it had not identified a pattern of age discrimination by the states.⁴⁵ The substantive requirements the ADEA imposed on state and local governments were disproportionate to the injury sought to be prevented, and therefore not "congruent and proportional" with any unconstitutional conduct that could conceivably be targeted by the Act.⁴⁶

In *Kimel*, the Court expanded on the nature of the legislative record of constitutional violations that Congress must find before it uses its Section 5 powers to abrogate the states' sovereign immunity.⁴⁷ Following the *Boerne* principle that Congress must compile its record based on existing constitutional law, the Court reasoned that discrimination on the basis of age should be evaluated under a rational basis standard.⁴⁸ Therefore, Congress must compile a record establishing a pattern of *irrational* discrimination against elderly individuals by state employers.⁴⁹ The Court held that Congress did not adequately compile this record before it acted.⁵⁰

D. Board of Trustees of the University of Alabama v. Garrett—*New Federalism and the ADA*

*Board of Trustees of the University of Alabama v. Garrett*⁵¹ was the first intersection of disability law and new federalism. Patricia Garrett was employed as the Director of Nursing for the University of Alabama at Bir-

40. *College Savings Bank*, 527 U.S. at 647.

41. *Id.* at 640.

42. 528 U.S. 62 (2000).

43. 29 U.S.C. § 621-634 (2000).

44. *Id.* § 626(c)(1) (providing that "any person aggrieved" by an employer's violation of the Act "may bring a civil action in any court of competent jurisdiction" for legal and equitable relief).

45. *Kimel*, 528 U.S. at 89-91.

46. *Id.* at 83.

47. *Id.*

48. *Id.* at 83-84.

49. *Id.* at 84.

50. *Id.* at 91.

51. 531 U.S. 356 (2001).

mingham Hospital.⁵² She was diagnosed with breast cancer and subsequently underwent a lumpectomy, radiation treatment, and chemotherapy.⁵³ These treatments required her to take substantial leave from work. Upon returning to work, Garrett's supervisor informed her that she would have to give up her director's position and be transferred to a lower-paying position as a nurse manager.⁵⁴ Garrett brought a suit under Title I of the Americans with Disabilities Act for money damages against her employer, the Board of Trustees of the University of Alabama.⁵⁵ Garrett claimed that the Board's failure to accommodate her disability, and instead taking an adverse job action against her, was discrimination in violation of Title I.⁵⁶

The Court held that Title I of the ADA did not validly abrogate the states' sovereign immunity insofar as Title I allowed money damages against state employers, despite Congress's stated desire to do so.⁵⁷ Like *Kimel*, the level of scrutiny afforded to individuals with disabilities under the Equal Protection Clause was important.⁵⁸ In *City of Cleburne, Texas v. Cleburne Living Center*,⁵⁹ the Court considered an equal protection challenge to a city ordinance requiring a special use permit for the operation of a group home for persons with mental retardation.⁶⁰ Although the Court struck down the specific application of the city ordinance denying the use permit, it did so under rational basis scrutiny.⁶¹ So, in *Garrett*, the constitutional starting place was that a state may draw lines on the basis of disability whenever doing so is rational.⁶²

The Court identified the "right at issue" in *Garrett* as the obligation of states to make "special accommodations" for the disabled in employment.⁶³ The Court reasoned that states are not required to do so; their only constitutional obligation is to take "rational" actions toward individuals with disabilities.⁶⁴ Thus, states "could quite hardheadedly—and perhaps hardheart-

52. *Id.* at 362.

53. *Id.*

54. *See id.*

55. Title I of the ADA, 42 U.S.C. §§ 12111-12117 (2003), prohibits certain employers, including states, from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a). To this end, the ADA requires employers to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business." *Id.* § 12112(b)(5)(A).

56. *Garrett*, 531 U.S. at 360-74.

57. *See* 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 [a] Federal or State court of competent jurisdiction for a violation of this Act.").

58. *Garrett*, 531 U.S. at 365-68.

59. 473 U.S. 432 (1985).

60. *Id.* at 435.

61. *Id.* at 447-50.

62. *Garrett*, 531 U.S. at 365-67.

63. *Id.* at 366-67.

64. *Id.*

edly—hold to job-qualification requirements which do not make allowance for the disabled.”⁶⁵

Next, the Court considered whether Congress had “identified a history and pattern of unconstitutional employment discrimination by the States against the disabled.”⁶⁶ This record had to be judged within the framework of the Court’s constitutional jurisprudence, meaning that Congress must have found a pattern of *irrational* discrimination against people with disabilities.⁶⁷ As in *Kimel*, the Court found this record lacking.⁶⁸ Justice Breyer dissented, listing a vast assortment of evidence from the congressional record documenting purported unconstitutional discrimination against people with disabilities.⁶⁹ But the Court dismissed this evidence as “unexamined, anecdotal accounts of ‘adverse, disparate treatment by state officials.’”⁷⁰ The Court reasoned that this type of evidence “often does not amount to a constitutional violation where rational-basis scrutiny applies.”⁷¹ The Court also noted that “[o]nly a small fraction of [these] anecdotes . . . relate[d] to state discrimination against the disabled in employment.”⁷² Even those that did relate to employment were “so general and brief that no firm conclusion” as to unconstitutionality could be drawn.⁷³

The Court reasoned that “[e]ven were it possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States” (the Court assumed there were six such examples), “the rights and remedies created by the ADA” were so aggressive that they flunked the congruence and proportionality test.⁷⁴ The Court viewed the ADA’s requirement that employers make reasonable workplace accommodations to people with disabilities as out of line with the constitutional requirement of rationality.⁷⁵ The ADA’s barren legislative record and flawed remedy structure were made clearer by comparison to the Voting Rights Act, where Congress had “documented a marked pattern of unconstitutional action by the States.”⁷⁶

Garrett solidified the high evidentiary burden that Congress carries when it seeks to abrogate the states’ sovereign immunity pursuant to its Section 5 powers.⁷⁷ As one set of commentators explained, *Garrett*’s “implicit assumption [is] that Congress can exercise its Section 5 power only on the basis of the same kind of concrete and specific evidence of illegal conduct that a court is required to assemble in reaching a judgment about the

65. *Id.* at 367-68.

66. *Id.* at 368.

67. *Id.*

68. *Id.* at 368-72.

69. *Id.* at 390-423 (Appendix B to Opinion of Breyer, J.).

70. *Id.* at 370 (quoting *id.* at 379 (Breyer, J., dissenting)).

71. *Id.*

72. *Id.* at 371 n.7. Rather, they related to state discrimination in the provision of public services, or private discrimination in accessing places of public accommodations. *Id.* at 370-72.

73. *Id.* at 371 n.7.

74. *Id.* at 372.

75. *Id.*

76. *Id.* at 373.

77. *Id.* at 364.

liability of [the] parties.”⁷⁸ *Garrett* makes Congress beholden to the judicial branch’s constitutional jurisprudence, in that it requires a full-blown inquiry of state transgressions of the sort that a court would undertake when evaluating unconstitutional behavior.⁷⁹ *Garrett* also clarified the extent to which the Court would second-guess Congress’s legislative judgments as to remedies created by the statute under the banner of the “congruence and proportionality” analysis.⁸⁰

The Court in *Garrett* declined, however, to address the constitutionality of Title II of the ADA as it relates to discrimination in the provision of public services.⁸¹ This issue would await the Court’s decision in *Lane*.

E. Nevada v. Hibbs—*The Effect of Heightened Scrutiny*

*Nevada Department of Human Resources v. Hibbs*⁸² introduced an additional level of complexity to new federalism.⁸³ At issue in *Hibbs* was the Family and Medical Leave Act (FMLA), which requires all employers (including states) to provide up to 12 weeks of unpaid leave per year to employees who need to tend to certain enumerated family emergencies.⁸⁴ Both state and private employers are subject to monetary liability for violating the Act.⁸⁵ Like *Kimel* and *Garrett*, *Hibbs* involved the question of whether Congress validly used Section 5 of the Fourteenth Amendment to abrogate the states’ sovereign immunity by passing a statute with a monetary damages provision.⁸⁶

Both *Garrett* and *Kimel* resolved this question in favor of the states (by the same 5-4 margin).⁸⁷ In an opinion by the Chief Justice, *Hibbs* came out differently.⁸⁸ The Court held that state employees may recover money damages in the event of the state’s failure to comply with the family-care provision.⁸⁹

First, the Court defined the “right at issue”⁹⁰ under the FMLA as “the right to be free from gender-based discrimination in the workplace” and noted “that statutory classifications that distinguish between males and fe-

78. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 14 (2003).

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

80. *Id.* at 372.

81. *See id.* at 374.

82. 538 U.S. 721 (2003).

83. *See* Vikram David Amar, *The New “New Federalism”: The Supreme Court in Hibbs and Guillen*, 6 GREEN BAG 2D 349, 349 (2003) (“Federalism got a bit more complicated this Term.”).

84. 29 U.S.C. § 2612(a)(1) (2000).

85. *Id.* § 2617(a)(2).

86. *Hibbs*, 538 U.S. at 724-25.

87. In both cases, Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas were in the majority, while Justices Breyer, Stevens, Souter, and Ginsburg dissented. *Garrett*, 531 U.S. at 358; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 65 (2000).

88. *Hibbs*, 538 U.S. at 735-40.

89. *Id.* at 725.

90. *Id.* at 728 (quoting *Kimel*, 528 U.S. at 81).

males are subject to heightened scrutiny.”⁹¹ The Court reviewed the history of “state laws limiting women’s employment opportunities” and discussed how this history led to the passage of Title VII of the Civil Rights Act of 1964.⁹² The Court then looked for a record of unconstitutional state behavior in the FMLA’s legislative record. The Court noted the following: a 1990 Bureau of Labor Statistics survey showing a gap in maternity and paternity leave policies for private sector employers;⁹³ testimony before Congress of discrepancies between paternity and maternity leave policies in the public and private sectors, including a report showing that 15 states provided women up to one year of extended maternity leave, while only four provided men with the same;⁹⁴ and congressional evidence, supported by testimony before Congress, that facially neutral family leave policies were applied in discriminatory ways.⁹⁵ From this, the Court concluded that “the States’ record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits [was] weighty enough to justify the enactment of prophylactic § 5 legislation.”⁹⁶

The final part of *Hibbs*’s holding relates to the FMLA’s rights and remedies structure. The Court characterized the failure of Title VII to alleviate discrimination in family-leave policies as justifying additional remedial measures.⁹⁷ It found that the FMLA was precisely targeted to the harm at issue, unlike the ADA and ADEA, which “applied broadly to every aspect of state employers’ operations.”⁹⁸ The Court also delved into the specifics of the FMLA’s remedial structure and took comfort in the fact that it limited the employees who were entitled to its protections, excluded state elected officials from being defendants, and explicitly limited damage provisions to actual monetary losses.⁹⁹

Hibbs’s inconsistencies with prior new federalism cases did not go unnoticed.¹⁰⁰ Whereas *Garrett* insisted on state-level violations of the equal protection rights of people with disabilities,¹⁰¹ *Hibbs* relied on discrimination by private¹⁰² and public sector¹⁰³ employers in family leave policies to

91. *Id.* at 728-29.

92. *Id.* at 729. Title VII’s abrogation of state sovereign immunity was upheld in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

93. *See Hibbs*, 538 U.S. at 730.

94. *Id.* at 731.

95. *Id.* at 732.

96. *Id.* at 735.

97. *Id.* at 737 (“Congress had already tried unsuccessfully to address this problem through Title VII and the amendment of Title VII by the Pregnancy Discrimination Act.”).

98. *Id.* at 738.

99. *Id.* at 738-40.

100. *See Amar*, *supra* note 83, at 350-52.

101. *See Garrett*, 531 U.S. at 369 (stating that constitutional violations by city and county actors “would make no sense”).

102. *See Hibbs*, 538 U.S. at 730-31 (discussing a 1990 Bureau of Labor Statistics survey showing a gap in maternity and paternity leave policies for private sector employers and testimony before Congress of discrepancies between paternity and maternity leave policies in the public and private sectors).

103. The only link offered in the opinion between private and “public sector” employers is the testimony by a few individuals to Congress about a report that private and public sector employment leave

support its holding that the congressional record was sufficient.¹⁰⁴ The term “public sector” is not explicitly connected to states (as opposed to local or county officials).¹⁰⁵

In terms of concrete evidence of constitutional violations by states in family leave policies, the Court refers to only 11 states as potential constitutional violators.¹⁰⁶ Recall that in *Garrett*, the Court assumed that six states had unconstitutionally discriminated against people with disabilities in employment.¹⁰⁷ As Vikram Amar notes, *Hibbs* does not discuss why 11 is sufficient and six is *de minimis*.¹⁰⁸

Hibbs is also different from previous new federalism cases in that it allows evidence of discrimination in parental leave to supplement evidence of discrimination in family leave.¹⁰⁹ The Court’s rationale for this move is that the two types of discrimination are “based on the same gender stereotype: that women’s family duties trump those of the workplace.”¹¹⁰ But in *Garrett*, the Court pointedly refused to consider discrimination against people with disabilities in areas besides employment,¹¹¹ even though these instances of discrimination are based on the same stereotypes and misperceptions about the true abilities of people with disabilities.¹¹² *Garrett* and *Hibbs* characterize testimony before Congress quite differently. In *Garrett*, this evidence is “anecdotal” or “isolated,”¹¹³ while in *Hibbs* such testimony is an important part of the evidentiary landscape.¹¹⁴

The Court acknowledges and justifies a difference between *Garrett* or *Kimel* and *Hibbs* only in terms of different levels of scrutiny. The classifica-

policies were similar. *Id.* at 730 n.3 (“While this and other material described leave policies in the private sector, a 50-state survey also before Congress demonstrated that “[t]he . . . policies available to public sector employees differ[] little from those offered private sector employees.”) (citations omitted).

104. *See id.* at 740.

105. *See id.* at 730-31 (noting use of the language “public sector”); *see also* Amar, *supra* note 83, at 351 (“Even if we all stipulated that the ‘public’ sector is guilty of gender discrimination here . . . we still do not know from anything the Court says in *Hibbs* whether States—as opposed to other public sector employers—are guilty.”).

106. *See id.* at 731-32.

107. *See Garrett*, 531 U.S. at 369-79 (noting that the “[r]espondents in their brief cite half a dozen examples from the record that did involve States”).

108. *See* Amar, *supra* note 83, at 352 (“Crucially, the *Hibbs* Court never explains why six is apparently *de minimis*, whereas eleven gives Congress pretty wide latitude to operate.”).

109. Amar refers to this as the “how” question: “[O]n the basis of what types of evidence may Congress draw inferences of unconstitutional State actions?” *Id.* at 352.

110. *Hibbs*, 538 U.S. at 731 n.5.

111. *See Garrett*, 531 U.S. at 371 n.7 (“The overwhelming majority [of the examples of state discrimination in dissenting Justice Breyer’s Appendix B] pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA.”).

112. *See* Vikram David Amar & Samuel Estreicher, *Conduct Unbecoming A Coordinate Branch: The Supreme Court in Garrett*, 4 GREEN BAG 2D 351, 353 (2001). Congress said this when it passed the ADA, noting that “individuals with disabilities continually encounter various forms of discrimination,” 42 U.S.C. § 12101(a)(5) (2003), in “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services,” *id.* § 12101(a)(3), in part because of “stereotypic[al] assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.” *Id.* § 12101(a)(7).

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

114. *See* Amar, *supra* note 83, at 352.

tions in *Garrett* and *Kimel* triggered only rational basis scrutiny, so “in order to impugn the constitutionality of state discrimination against the disabled or the elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a widespread pattern of irrational reliance on such criteria.”¹¹⁵ In contrast, the standard for demonstrating the constitutionality of gender-based discrimination is intermediate scrutiny,¹¹⁶ “making it easier for Congress to show a pattern of state constitutional violations.”¹¹⁷

But, as Amar points out, this “cheats.”¹¹⁸ The heart of *Garrett* and *Kimel* is that “congruence and proportionality” means that states must be found to have violated the Fourteenth Amendment, and the congressional fix must be appropriately tailored to these state transgressions. Although under heightened scrutiny it might be easier for Congress to find instances of unconstitutional state behavior, under a faithful reading of *Garrett* and *Kimel*, it still should have to find them.¹¹⁹

In any event, *Hibbs* indicates that when the level of scrutiny is above rational basis, the normal (*Garrett*) rules are off (or at least modified), even if there is a logical inconsistency with *Garrett*.¹²⁰ *Hibbs* teaches that an increased level of scrutiny expands the actors whose conduct the Court will look at to find unconstitutional state action.¹²¹ Discrimination in related areas can at least provide “flavor” to the legislative record of the precise right at issue.¹²² And there is some, albeit undefined, lower quantum of proof Congress must marshal to show a “pattern” of unconstitutional state behavior.¹²³ These beginning steps were greatly expanded upon in the Court’s decision in *Tennessee v. Lane*.¹²⁴

II. TENNESSEE V. LANE AND FUNDAMENTAL RIGHTS

In *Tennessee v. Lane*, the Court held that the ADA’s abrogation of state sovereign immunity was valid insofar as it was intended to remedy state discrimination against people with disabilities in the “fundamental right” of

115. *Hibbs*, 538 U.S. at 735 (internal quotations omitted).

116. This means that the legislation “must serve important governmental objectives, and . . . be substantially related to the achievement of those objectives.” *See id.* at 728 (internal quotations omitted).

117. *Id.* at 736.

118. *See Amar, supra* note 83, at 353.

119. Justice Kennedy captures this in his *Hibbs* dissent when he writes that the fact that *Hibbs* involves gender classifications, which trigger heightened scrutiny “does not divest respondents of their burden to show that Congress identified a history and pattern of unconstitutional employment discrimination by the States.” *Hibbs*, 538 U.S. at 754 (Kennedy, J. dissenting) (internal quotations omitted).

120. *See id.* at 722-23.

121. *See id.* at 736.

122. *See id.* at 735 (discussing age- or disability-based distinctions).

123. *See id.* (discussing rational basis review).

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

access to courthouses.¹²⁵ In so doing, the Court confirmed *Hibbs*'s holding that the rules are different in cases involving fundamental rights.¹²⁶

A. Background

Lane had compelling facts. George Lane, a paraplegic who uses a wheelchair for mobility, was compelled to answer a set of criminal charges on the second floor of a county courthouse that had no elevator.¹²⁷ At his first appearance, Lane crawled up two flights of stairs to get to the courtroom.¹²⁸ When Lane returned for a hearing, he refused to crawl up the stairs again and declined an offer to be carried up by courthouse officers.¹²⁹ He was subsequently arrested and jailed for failure to appear.¹³⁰ Lane sought damages and equitable relief.¹³¹ At the trial level, Tennessee moved to dismiss the suit on the grounds that it was barred by the Eleventh Amendment.¹³²

The District Court denied the state's motion without opinion.¹³³ After waiting for the Supreme Court to decide *Garrett*, the Sixth Circuit affirmed,¹³⁴ and the Supreme Court granted certiorari.¹³⁵ The issue that the Court had sidestepped in *Garrett*—whether Title II of the ADA was a valid abrogation of the states' sovereign immunity—was squarely teed up in *Lane*.¹³⁶ Both sides had reason to be optimistic as well as concerned. Dis-

125. See *id.* at 1985.

126. *Id.*

127. *Id.* at 1982.

128. *Id.*

129. *Id.* at 1983.

130. *Id.* To be fair, the record also reveals that "the court conducted a preliminary hearing in the first-floor library to accommodate Lane's disability and later offered to move all further proceedings in the case to a[n] . . . accessible courthouse in a nearby town." *Id.* at 2000 n.4 (Rehnquist, C.J., dissenting) (citations omitted). The other plaintiff was Beverly Jones, also a paraplegic who used a wheelchair for mobility. She alleged that she had not been able to gain access to a number of county courthouses and therefore lost work and the opportunity to participate in the judicial process. *Id.* at 1982-83.

131. *Id.* at 1983.

132. *Id.*

133. *Id.*

134. The court based its decision on *Popovich v. Cuyahoga County Court*, 276 F.3d 808 (6th Cir. 2002). In *Popovich*, a hearing-impaired litigant sought money damages under Title II of the ADA for the State's failure to accommodate his disability in a child custody proceeding. *Id.* at 811. The *Popovich* court permitted the suit to proceed over the state's assertion of Eleventh Amendment immunity. *Id.* at 815. The court construed *Garrett* as limited to cases involving equal protection principles, whereas *Popovich* involved claims premised on the Due Process Clause. *Id.* at 814. The court held that Title II of the ADA validly abrogated claims based on this latter clause. *Id.* Following *Popovich*, the Sixth Circuit in *Lane* held that the plaintiff's claims were not barred because they were based on due process principles. See *Lane v. Tennessee*, 2002 WL 1580210 (6th Cir. 2002). The State filed a petition for rehearing, disputing the court's characterization of the plaintiff's claims as premised on the Due Process Clause. In response, the Sixth Circuit filed an amended opinion, explaining that the Due Process Clause does involve the right of access to courts. See *Lane v. Tennessee*, 315 F.3d 680, 682 (6th Cir. 2003). Nevertheless, the panel acknowledged that the state's concerns could not be fully resolved on the record as it existed. *Id.* at 683. The court therefore remanded for further proceedings. *Id.* Tennessee filed a petition for certiorari, which the Supreme Court granted. See *Tennessee v. Lane*, 539 U.S. 941 (2003).

135. See *Lane*, 539 U.S. 941 (2003).

136. See *Tennessee v. Lane*, 124 S. Ct. 1978, 1992-93 (2004). This was not the Court's first attempt to resolve this issue. The Court was set to decide the issue in *Medical Board of California v. Hason*, 279

ability rights advocates, lawyers, and academics who were hoping the Court's curtailment of Congress's ability to pass federal civil rights laws had limits were gratified that the case they finally brought to the Supreme Court had very sympathetic facts.¹³⁷ Their patience in waiting for the "right case" had paid off. Yet many in this camp predicted that Title II would be struck down as had Title I, reasoning that given the Court's treatment of the ADA in *Garrett*, claims involving the Due Process Clause would fare no better under the congruence and proportionality analysis.¹³⁸

B. Lane's Holding and Reasoning

In *Lane*, the Court applied the "now familiar principles"¹³⁹ set forth in *Boerne* to determine if Title II was appropriate remedial and preventative legislation or if it worked a substantive change in the governing law.¹⁴⁰ As in other cases, its analysis went through several steps en route to holding that Title II was a valid abrogation of the states' sovereign immunity in cases involving access to courts.

1. Scope of the Right

The Court found that Title II implicates a wide variety of basic constitutional guarantees. These include some, like the right of access to the courts, which are protected by the Due Process Clause of the Fourteenth Amendment under a "more searching judicial review" than rational basis scrutiny.¹⁴¹ The Court then surveyed a range of constitutional jurisprudence in explaining what rights fall within the Due Process Clause's guarantee of right to access to courts.¹⁴²

F.3d 1167 (9th Cir. 2002). This case involved the State of California's denial of Dr. Hason's application for a license to practice medicine on the grounds of mental illness. *Id.* at 1170. The Court accepted certiorari on this question: "Does the Eleventh Amendment bar suit under Title II of the ADA against the California Medical Board for denial of a medical license based on the applicant's mental illness?" *Med. Bd. of Cal. v. Hason*, 537 U.S. 1028 (2002). The state withdrew its petition prior to oral argument, and the writ of certiorari was dismissed. *Med. Bd. of Cal. v. Hason*, 538 U.S. 958 (2003).

137. See Panel Discussion on *Tennessee v. Lane* and the Future of the Americans with Disabilities Act sponsored by the American Constitutional Society (Jan. 13, 2004) [hereinafter Panel Discussion].

This question has been presented to the justices, though the one presented in the *Lane* case several times before—twice before really—and really an enormous amount of work went on behind the scenes—behind the scenes to make sure the right case got in front of the justices so that when somebody talked about the facts today, Bill Brown was able to talk about George Lane crawling up the steps of the courthouse rather than somebody applying for a medical license, or something like that, to really bring home and personalize the circumstances that are involved in cases under Title II of the ADA.

Id. (remarks of Thomas Goldstein).

138. See 26(12) Rep. on Disability Programs 91 (June 26, 2003) (views of Peter Blanck).

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

140. *Id.* at 1986-88.

141. *Id.* at 1988.

142. These include a criminal defendant's right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, a civil litigant's right to have obstacles to full participation in judicial proceedings removed to guarantee a meaningful opportunity to be heard, a criminal defendant's right to a jury composed of a fair cross section of the community, and the public's

2. *Gravity of the Harm*

Next, the Court evaluated the gravity of the harm Congress sought to avoid, as judged through the lens of “historical experience.”¹⁴³ The Court noted that “Congress enacted Title II against a backdrop of pervasive *unequal* treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.”¹⁴⁴ It then listed such deprivations in areas such as voting, marriage, and jury service.¹⁴⁵ The Court next recounted its own cases finding *unconstitutional* treatment of people with disabilities in the areas of unjustified commitment, abuse and neglect in mental hospitals, and zoning.¹⁴⁶ Finally, it mentioned decisions of other courts finding *unequal* treatment of people with disabilities in the penal system, education, and voting.¹⁴⁷

Only then does the Court turn to the “particular services at issue in this case.”¹⁴⁸ Its discussion of the ADA’s congressional record on access to courts lists findings from the U.S. Civil Rights Commission: 76% of public services and programs housed in state-owned buildings were inaccessible to, and unusable by, people with disabilities; testimony from persons with disabilities who described inaccessibility of courthouses; and task force hearings that identified exclusion of persons with disabilities from state judicial services and programs.¹⁴⁹ The Court characterized these findings as providing a “sheer volume of evidence demonstrating the nature and extent of *unconstitutional* discrimination against persons with disabilities in the provision of *public services*.”¹⁵⁰

Note here that the Court is a little vague—and potentially misleading—by saying “unconstitutional discrimination.” The Court could be limiting this label to its own cases that have held that the treatment of people with disabilities reached unconstitutional levels, none of which involve access to courts.¹⁵¹ Or the Court could be intending to include the rest of the evidence in its discussion—which it has by its own terms described as “widespread exclusion of persons with disabilities from the enjoyment of public services”¹⁵² and “unequal treatment in the administration of a wide range of

right of access to criminal proceedings. *Id.* at 1988.

143. *Id.* at 1988-89.

144. *Id.* at 1989 (emphasis added).

145. *Id.*

146. *Id.*

147. *Id.* at 1989-90.

148. *Id.* at 1990.

149. *Id.* 1990-91.

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

151. This view is supported by the Court’s subsequent statement that the “record of constitutional violations in this case” includes “judicial findings of unconstitutional state action.” *Id.* at 1992. It then separately lists “statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services.” *Id.*

152. *Id.* at 1992.

public services, programs, and activities”¹⁵³—under the banner of “unconstitutionality.”

Technically, the latter view is incorrect. None of this other evidence involves clear “unconstitutional” conduct in the way that the Court’s decisions on unjustified commitment and zoning do.¹⁵⁴ The Court continues this careful maneuvering later in its opinion, when it states that “the record of constitutional violations in this case—including judicial findings of unconstitutional state action, *and* statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services—far exceeds the record in *Hibbs*.”¹⁵⁵ Again, the only evidence of unconstitutional violations is the “findings of unconstitutional state action.”¹⁵⁶ The rest of the sentence is built on findings of discrimination and difference, not necessarily unconstitutionality.

This dissent argues that even if this larger body of evidence were relevant, it does not concern unconstitutional discrimination.¹⁵⁷ The dissent objects to the Court including congressional findings of discrimination in rights other than access to courthouses in its “sheer volume” of evidence.¹⁵⁸ Considering state-sponsored discrimination in marriage, voting, and public education is not relevant because the scope of the right at issue is access to courts.¹⁵⁹

3. *Validity of Congressional Action*

Having considered the scope of the right and the gravity of the harm, the Court finally turns to the issue of whether “Title II is an appropriate response to this history and pattern of unequal treatment.”¹⁶⁰ As discussed above, although the Court considered a whole range of state-sponsored discrimination against people with disabilities for the purposes of the “gravity of the harm”¹⁶¹ analysis, it declined to take as broad a focus when evaluat-

153. *Id.* at 1989.

154. The word “unconstitutional” is used only 17 times in the Arnold & Porter database on Westlaw of the ADA’s legislative history (described as a “comprehensive legislative history of the Americans with Disabilities Act of 1990 . . . including the text of bills, committee reports, transcripts of hearings, and other documents”). See Description of Arnold & Porter ADA Database, http://web2.westlaw.com/scope/default.wl?mt=Westlaw&fn=_top&sv=Split&rp=%2fscope%2fdefault.wl&db=ADA-LH&vr=2.0&rs=WLV5.03. Thirteen of these uses refer to the ADA’s severability clause, 42 U.S.C. § 12213 (2003). *Id.* The other four do not relate to descriptions of any particular state or individual behavior as unconstitutional. *Id.*

155. *Tennessee v. Lane*, 124 S. Ct. 1978, 1992 (2004) (emphasis added).

156. *Id.*

157. *Lane*, 124 S. Ct. at 2000 (Rehnquist, C.J., dissenting) (“[T]here is *nothing* in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials.”).

158. *Id.* at 1999.

159. *Id.*

160. *Id.* at 1992.

161. *Id.* at 1988.

ing the appropriateness of Congress's response.¹⁶² The Court stated that it will consider Title II only as applied to the right at issue in this case—access to courts.¹⁶³ The Court held that “Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services”¹⁶⁴

Thus framed, Title II is “congruent and proportional to its object of enforcing the right of access to the courts.”¹⁶⁵ Like *Hibbs*, the Court drew comfort from the internal workings of Title II of the ADA.¹⁶⁶ The changes—both in programs and architectural barriers—that Title II requires are not unlimited.¹⁶⁷ Rather, they need only be reasonable.¹⁶⁸ Public entities never have to make changes that involve an undue financial or administrative burden, or effect a fundamental alteration in the nature of this service.¹⁶⁹

C. *Lane and New Federalism*

Lane continues a process that *Hibbs* started. *Lane* lowers Congress's evidentiary burden for statutes targeting the protection of fundamental rights. This has two dimensions. First, before *Lane*, the Court had signaled that to gauge the gravity of the harm Congress was attempting to remedy, the Court would consider only a congressional record of clear constitutional violations by state actors. After *Lane*, however, in cases involving fundamental rights, a record of unequal and discriminatory treatment in the exercise of that right by state, local, or county officials will suffice. Second, prior to *Lane*, in evaluating the congressional record, the Court considered only a state's unconstitutional behavior regarding the precise right at issue in that case. After *Lane*, when Congress writes a statute that implicates a number of fundamental rights, the Court will consider discriminatory treatment by public officials in the exercise of all fundamental rights implicated

162. *Id.* at 1992-93.

163. *Id.* at 1993.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. “[Title II] requires only ‘reasonable modifications’ that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service.” *Id.* at 1993. No mention is made of the fact that Title II's undue burden and fundamental alteration defenses do not appear in the statute. Title II's prohibition on discriminations states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132 (2003). Unlike Titles I and III, there is no statutory defense for undue burden or fundamental alteration. The ideas that modifications need be only “reasonable” and that public entities do not need to take actions that fundamentally alter the nature of the program, service, or activity come from the regulations and interpretive cases. *See* 28 C.F.R. § 35.130(b)(7) (2004) (stating that reasonable modification must be made “unless [the] public entity can demonstrate that making the modifications would fundamentally alter the nature of the program, service, or activity”); *Olmstead v. Zimring*, 527 U.S. 581, 597, 603-04 (1999) (holding that modification will constitute fundamental alteration when the change would cause an undue financial or administrative burden).

by the statute that are related to the right at issue in the case. At the same time, the Court also shows its willingness to consider civil rights statutes on an “as-applied” basis, meaning it will decide the constitutionality of one fundamental right at a time.

Lane’s third shift from previous new federalism principles is more ADA-specific. In *Lane*, for the purpose of gauging the “appropriateness of the Congressional response,” the Court views Title II’s reasonable accommodation provision as evidence that Title II is congruent and proportional Section 5 legislation. In *Garrett*, the Court took the opposite approach toward the parallel Title I reasonable accommodation provision.

This section explains these concepts, thus placing *Lane* in the context of new federalism. *Lane* unmistakably moves away from some of the more extreme language in *Garrett*. But this section suggests that *Lane* is foreshadowed enough in the cases that come before it to be defensible in terms of precedent. This section argues that *Lane*, as interpreted herein, is a desirable evolution of new federalism.

1. Unequal and Discriminatory Treatment by Public Officials

Recall that in *Garrett*, the Court struck down the Title I damage remedy against states because “[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.”¹⁷⁰ *Garrett* offered the legislative record of the Voting Rights Act as the “standard” for an acceptable level of constitutional violations by states before Congress can pass legislation pursuant to Section 5 of the Fourteenth Amendment.¹⁷¹ Commentators have persuasively argued that a pattern of irrational state discrimination means “concrete and specific evidence of illegal conduct.”¹⁷²

A parsing of the evidence considered in *Lane* conclusively demonstrates that the Court accepted less. The only evidence the Court concretely describes as showing unconstitutional (as opposed to unequal) state behavior in the administration of justice involves nine decisions of “other courts” and several state statutes.¹⁷³ A close look at these decisions and statutes reveals that they do not show a Voting Rights Act-like pattern of unconstitutional discrimination against people with disabilities in access to courthouses:

170. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001).

171. *Id.* at 373.

In [the Voting Rights Act], Congress documented a marked pattern of unconstitutional action by the States. State officials, Congress found, routinely applied voting tests in order to exclude African-American citizens from registering to vote. Congress also determined that litigation had proved ineffective and that there persisted an otherwise inexplicable 50 percent-age-point gap in the registration of white and African-American voters in some States.

Id. (citations omitted).

172. See Post & Siegel, *supra* note 78, at 14.

173. *Tennessee v. Lane*, 124 S. Ct. 1978, 1989-90 (2004).

Three cases (*Ferrell v. Estelle*,¹⁷⁴ *State v. Schaim*,¹⁷⁵ and *State v. Rivera*¹⁷⁶) address state behavior that is judged unconstitutional, but they do not relate to courthouse access, at least not in the same way that *Lane* does. Rather, these cases involve criminal defendants with hearing disabilities having their convictions held unconstitutional because the state did not give them interpreters.¹⁷⁷

Two cases (*Matthews v. Jefferson*¹⁷⁸ and *Layton v. Elder*¹⁷⁹) have facts similar to *Lane* in that civil and criminal litigants challenged physically inaccessible courthouses. However, in these cases, there were no constitutional issues. Rather, both cases hold that the defendants violated Title II of the ADA and Section 504 of the Rehabilitation Act.¹⁸⁰

Two cases (*Galloway v. Superior Court of District of Columbia*¹⁸¹ and *DeLong v. Brumbaugh*¹⁸²) hold that state policies of not allowing individuals with visual impairments to serve on juries violate the ADA and the Rehabilitation Act.¹⁸³ One case (*People v. Green*¹⁸⁴) holds that such a ban violates the New York constitution.¹⁸⁵

174. 568 F.2d 1128 (5th Cir. 1978), *withdrawn*, 573 F.2d 867 (5th Cir. 1978).

175. 600 N.E.2d 661 (Ohio 1992).

176. 480 N.Y.S.2d 426 (N.Y. Sup. Ct. 1984).

177. In *Ferelle*, the Fifth Circuit granted a deaf state prisoner a writ of habeas corpus because he was not provided a stenographer to simultaneously transcribe his murder trial. 568 F.2d at 1113. In *Schaim*, the Ohio Supreme Court held that the trial court should have held an evidentiary hearing in response to the Defendant's motion for a new trial because he had been unable to hear significant portions of the testimony at trial. 600 N.E.2d at 671-72. In *State v. Rivera*, the New York trial court held that a conviction obtained in the absence of a qualified sign-language interpreter could not be used for purposes of sentencing a deaf defendant as a second felony offender. 480 N.Y.S.2d at 434-40.

178. 29 F. Supp. 2d 525 (W.D. Ark. 1998).

179. 143 F.3d 469 (8th Cir. 1998).

180. In *Matthews v. Jefferson*, a federal district court in Arkansas held that the county violated the ADA and the Rehabilitation Act by failing to make the courthouse readily accessible to a paraplegic. 29 F. Supp. 2d at 531-34. In *Layton v. Elder*, the Eighth Circuit upheld the trial court's determination that Montgomery County, Arkansas had violated Title II of the ADA by not having an accessible courthouse. 143 F.3d at 472.

181. 816 F. Supp. 12 (D.D.C. 1993).

182. 703 F. Supp. 399 (W.D. Pa. 1989).

183. In *Galloway v. Superior Court of District of Columbia*, the D.C. Circuit held that the D.C. Superior Court's policy of excluding jurors violated the Rehabilitation Act, Title II of the ADA, and 42 U.S.C. § 1983. *Galloway*, 816 F. Supp. at 15-20. In *DeLong v. Brumbaugh*, a deaf woman sued the Commonwealth of Pennsylvania and a Pennsylvania Judge of Common Pleas, arguing that Pennsylvania's policy of excluding deaf jurors violated the Constitution and Rehabilitation Acts. 703 F. Supp. at 402. The Court held that the policy violated the Rehabilitation Act but not the Constitution. *Id.* The plaintiff's claims against the state were barred by the Eleventh Amendment. *Id.*

184. 561 N.Y.S.2d 130 (N.Y. Co. Ct. 1990).

185. In *People v. Green*, the court held that the district attorney and the county court violated a juror's rights under the New York Constitution when the district attorney issued a preemptory strike against a hearing impaired juror. 561 N.Y.S.2d at 131.

One case (*Pomerantz v. County of Los Angeles*¹⁸⁶) dealt with damages and mootness issues arising out of Los Angeles County's former practice (changed while the litigation was underway) of purging blind voters from the jury service lists.¹⁸⁷

Two state statutes prohibiting persons with disabilities from serving as jurors.¹⁸⁸

In the final ledger, of these decisions of "other courts," four cases (including the only two discussing courthouse physical accessibility) were decided *after* the ADA was enacted. These cases could therefore not have been used by Congress as evidence of constitutional violations justifying passage of the ADA. Only two cases considered constitutional issues, and these dealt with the provision of sign-language interpreters to criminal defendants, not courthouse access. So the first *Lane* lesson is that whatever else the Court may require of Congress, in cases involving fundamental rights, the Court will not require a pattern of unconstitutional state action in the precise right at issue.

Next, it is important to realize that six of these cases dealt with discrimination by non-state level actors.¹⁸⁹ In *Garrett*, the Court opined that considering discriminatory acts in the evidentiary record of county and local officials "would make no sense."¹⁹⁰ In *Lane*, the Court explicitly (albeit in a footnote) repudiated this part of *Garrett*,¹⁹¹ and treated this evidence as an important part of the gravity-of-the-harm analysis. The Court justified this departure on practical (local governments providing public services are typically treated as state actors for Eleventh Amendment purposes¹⁹²) and doctrinal (*Katzenbach* and *Hibbs* involved conduct of city and county offi-

186. 674 F.2d 1288 (9th Cir. 1982).

187. *Pomerantz v. County of Los Angeles* involved a challenge to the Los Angeles County Superior Court's policy of excluding all blind persons from jury service. 674 F.2d at 1289. Prior to commencement of the suit, a bill was introduced in the California State Senate making the blind eligible for jury service. *Id.* The bill was passed and became effective during the life of the case. *Id.* The Ninth Circuit held that the plaintiffs were not entitled to damages, and their claims for equitable relief were mooted by the legislation. *Id.* at 1290.

188. MICH. COMP. LAWS ANN. § 729.204 (West 2002) (stating that persons selected for inclusion on jury list may not be "infirm or decrepit"); TENN. CODE ANN. § 22-2-304(c) (1994) (authorizing judges to excuse "mentally and physically disabled" persons from jury service).

189. See these cases and the relevant actors: *Layton*, 143 F.3d 469 (County Judge of Montgomery County, Arkansas); *Matthews*, 29 F. Supp. 2d 525 (County Judge of Marion County, Arkansas); *Galloway*, 816 F. Supp. 12 (Superior Court of District of Columbia); *Pomerantz*, 674 F.2d 1288 (Los Angeles County Jury Commissioner); *Schaim*, 600 N.E.2d 661 (Hamilton County Court of Common Pleas); and *Green*, 561 N.Y.S.2d 130 (County Court, Westchester County).

190. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001). In *Lane*, the dissent confirms that it would treat parallel evidence as "irrelevant." *Tennessee v. Lane*, 124 S. Ct. 1978, 1999-2000 (2004).

191. *Lane*, 124 S. Ct. at 1991 n.16.

192. *Id.* (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Callahan v. Philadelphia*, 207 F.3d 668, 670-74 (3d Cir. 2000); *Kelly v. Mun. Courts of Marion Co., Ind.*, 97 F.3d 902, 907-908 (7th Cir. 1996); and *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995)).

cials, and even the private sector¹⁹³) grounds. So after *Lane*, congressional consideration of actions by non-state level officials is unmistakably on the table.

The Court also considered evidence it described as “statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services.”¹⁹⁴ This included: the Civil Rights Commission’s Report to Congress in 1983 showing that 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities;¹⁹⁵ testimony before Congress from persons “who described the physical inaccessibility of local courthouses;”¹⁹⁶ and testimony before a congressional task force, demonstrating

numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities.¹⁹⁷

This evidence shows differences in the ability of people with disabilities to access courts and courthouse services. But the Court, for good reason, was careful not to describe this as documenting *unconstitutional* state behavior. Even under heightened scrutiny, inaccessible courthouses do not necessarily violate the Constitution. People with disabilities, like everyone else, have certain rights to access courthouses and court services—though not necessarily to do so without assistance.¹⁹⁸ At the very least this is a grey

193. See *Lane*, 124 S. Ct. at 1991 n.16 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 312-15; and *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730-35).

194. *Lane*, 124 S. Ct. at 1992.

195. *Id.* at 1991. This report, *Accommodating the Spectrum of Individual Abilities*, was completed in 1986 by the National Council on Disability, an independent federal agency whose 15 members are appointed by the President and confirmed by the Senate.

196. *Id.* at 1991 (citing *Oversight Hearing on H.R. 4498 Before the House Subcommittee on Select Education of the Committee on Education and Labor*, 100th Cong. 40-41, 48 (1988) [hereinafter *Oversight Hearing*] (testimony of Emeka Nwojke)). In his testimony, Mr. Nwojke describes a particularly moving account of trying to get into an inaccessible courthouse: first being ushered through the back door where “handicapped” people were supposed to go, waiting at the back door for two hours until someone answered the bell to let him in, being positioned in the court where the judge could not see him, and being told by courthouse employees: ““You are not the norm. You are not the normal person we see every day. So, do not worry about this.”” *Oversight Hearing, supra*, at 48 (testimony of Emeka Nwojke).

197. See *Lane*, 124 S. Ct. at 1991. This is drawn out of the Government’s Lodging in the *Garrett* case, as well as a report of the Task Force on the Rights and Empowerment of Americans with Disabilities: *From ADA to Empowerment*, put together by the National Council on Disability in 1990.

198. The dissent in *Lane* makes this point when it states that

the mere existence of an architecturally “inaccessible” courthouse—i.e., one a disabled person cannot utilize without assistance—does not state a constitutional violation. A violation of due process occurs only when a person is actually denied the constitutional right to access a

zone, and therefore a far cry from the *Garrett* standard of “concrete and specific evidence of illegal conduct.”¹⁹⁹ So after *Lane*, the congressional record can at least partially rest on conduct that creates inequalities and difference, though not clear unconstitutionality.

Why is there so much distance between *Lane* and *Garrett*? And does this difference make *Lane* an aberration in new federalism jurisprudence? The Court’s only justification for the difference is the heightened standard of review for access to courts, which makes it “easier for Congress to show a pattern of state constitutional violations.”²⁰⁰ But, as discussed above, this “heightened scrutiny changes the rules” rationale does not really explain away inconsistencies with prior cases.²⁰¹ As Justice Kennedy notes in dissent in *Hibbs*, under *Garrett* the level of scrutiny should not be determinative in and of itself: “This consideration [that gender discrimination implicates a higher level of scrutiny than rational basis] does not divest respondents of their burden to show that ‘Congress identified a history and pattern of unconstitutional employment discrimination by the States.’”²⁰²

Clearly, *Lane* cannot be reconciled with *Garrett* if *Garrett* is viewed as holding that Congress must always demonstrate a pattern of actual constitutional violations by states. But there is another rationale running through the Court’s new federalism cases that helps harmonize the *Lane* “fundamental rights doctrine” with the Court’s earlier cases.

New federalism cases have always acknowledged that when Congress acts, there is a zone of uncertainty as to what if any constitutional transgressions have actually occurred. In *Boerne*, the Court noted that “[p]reventative measures prohibiting certain types of laws may be appropriate when there is *reason to believe* that many of the laws affected by the congressional enactment have a *significant likelihood* of being unconstitutional.”²⁰³ The language “significant likelihood” is different than the *Garrett* documented showing of actual unconstitutional wrongs. Similarly, in *Florida Prepaid*, the Court struck down the Patent Remedy Act because it was *unlikely* that “many of the acts of [patent] infringement affected by the” statute had any “*likelihood* of being unconstitutional.”²⁰⁴ *Kimel* also recognizes that when

given judicial proceeding. We have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance. Indeed, the fact that the State may need to assist the individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding. Nor does an ‘inaccessible’ courthouse violate the Equal Protection Clause, unless it is irrational for the State not to alter the courthouse to make it “accessible.” . . . Thus, evidence regarding inaccessible courthouses, because it is not evidence of constitutional violations, provides no basis to abrogate States’ sovereign immunity.

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

199. See Post & Siegel, *supra* note 78, at 14.

200. *Lane*, 124 S. Ct. at 1992 (citations omitted).

201. See Amar, *supra* note 83, at 353.

202. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 754 (2003) (Kennedy, J. dissenting) (citations omitted).

203. *City of Boerne v. Florida*, 521 U.S. 507, 532 (1997) (emphasis added).

204. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999)

gauging unconstitutionality, Congress is not dealing with scientific evidence: "The [ADEA], through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than *would likely* be held unconstitutional under the applicable equal protection, rational basis standard."²⁰⁵

Lane itself demonstrates this zone of uncertainty. Consider jury service, which is discussed in *Lane* and is another fundamental right covered by Title II of the ADA. The cases cited within *Lane* are ambiguous as to whether blanket policies invalidating people with disabilities from jury service actually violate the Constitution.²⁰⁶ *Lane* also seems split as to whether *Lane* himself was constitutionally wronged. By aligning *Lane* with other cases involving unconstitutional denial of public services,²⁰⁷ the majority implicitly but forcefully characterizes Tennessee's conduct as unconstitutional. But Justice Rehnquist, in dissent, strongly disagrees, writing that "[c]ertainly, respondents *Lane* and *Jones* were not denied . . . constitutional rights."²⁰⁸

How to deal with the reality that Congress faces uncertainty as to how courts will interpret whether state (or county or local) action is unconstitutional? *Lane*, and *Hibbs* before it, move away from the *Garrett* idea that Congress needs a list of court cases showing states being caught in the act of unconstitutional behavior (at least in cases involving statutes protecting fundamental rights). The *Lane* standard manages this zone of unconstitutionality by giving a presumption in favor of Congress's ability to use its Section 5 powers when it legislates to protect fundamental rights.²⁰⁹ Congress gets the benefit of the doubt when it compiles evidence showing unequal treatment, discrimination, and burdening of the exercise of fundamental rights. With all but explicit statements that the Court will rely on the level of scrutiny as a "shortcut" in second-guessing the appropriateness of congressional determinations of unconstitutionality, *Hibbs*, and especially *Lane*, make this concept an important part of new federalism.

Under this "presumption" model, Congress cannot simply pick any fundamental right and pass whatever legislation it chooses. Although not specifically set forth in *Lane*, the *Lane* presumption should be subject to defeat in three ways. First, if it is shown that Congress does not have a record of

(emphasis added and brackets omitted).

205. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000) (emphasis added).

206. *See Galloway v. Superior Court of District of Columbia*, 816 F. Supp. 12, 20 (D.D.C. 1993) (holding that categorically excluding blind persons from jury service violates the ADA and the Rehabilitation Act, but not the U.S. Constitution); *see also DeLong v. Brumbaugh*, 703 F. Supp. 399, 406 (W.D. Pa. 1989) (holding that categorically excluding deaf persons from jury service violates the Rehabilitation Act, but not the U.S. Constitution); *People v. Green*, 561 N.Y.S.2d 130, 133 (N.Y. Co. Ct. 1990) (holding that a New York ban excluding blind persons from jury service violates the New York Constitution, but not the U.S. Constitution).

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

208. *Id.* at 2000 n.4 (Rehnquist, C.J., dissenting).

209. This view of *Lane* therefore represents a pragmatic compromise between Caminker's view that the courts should use a relaxed means-ends scrutiny to evaluate Section 5 legislation, *see generally* Caminker, *supra* note 19, and new federalism's harsher pre-*Lane* principles.

unequal, discriminatory public treatment in the exercise of the fundamental rights targeted by the statute, the presumption is defeated. In these instances the possibility of public infringement of the right is too remote.²¹⁰ Second, if Congress passes a statute that explicitly reverses a Supreme Court case, the presumption should be defeated because there is no zone of uncertainty. The classic example of this would be *Boerne*, where Congress passed RFRA, which reversed the Supreme Court's then-recent decision in *Smith*.²¹¹ Finally, if the rights implicated by the statute are not fundamental, Congress should not get the benefit of this presumption.

This last principle is the trickiest. Like access to the courts, many of the other rights implicated by Title II may or may not be "fundamental," depending on the level of generality the Court uses to evaluate the right. Consider the right to travel. It is black-letter constitutional law that there is a fundamental right to travel and to migrate within the United States.²¹² Hypothetically, a state transportation commission's policies create more cumbersome or expensive travel options for people with disabilities, in some cases even requiring that they travel with a companion to combat inaccessibility. The *Garrett* view is that there is no right to travel interstate without assistance or even at a reasonable cost. Therefore, because this is not a clear constitutional violation, Congress cannot pass Section 5 legislation responding to this situation. The preferable way to define fundamental rights is the way the Court did in *Lane*, where the Court did not engage in such a specific constitutional inquiry. Rather, because at a reasonable level of generality the right is fundamental, Congress gets the benefit of the doubt on constitutional questions.²¹³ Viewed this way, *Lane* involves the right of access to courts, which is a fundamental right (not the right to access a courtroom without assistance, which may not be).²¹⁴ Similarly, the hypothetical above involves the right to interstate travel, which is a fundamental right (not the right to travel unassisted, which may not be).

This theoretical justification for the "heightened scrutiny changes the rules" view of *Lane* offers a response to the largest judicial and scholarly critique of *Garrett*. Commentators and the dissenting Justices have argued that it is unfair and unwise to require Congress to make a showing of unconstitutionality in the same way that courts would.²¹⁵ The Court's approach

210. This is certainly open to objection. Caminker, for example, would probably reject this as still being too intrusive on congressional Section 5 power. *See id.* at 1172-73.

211. *See Boerne*, 521 U.S. at 512; *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 890 (1990).

212. *See* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 827 (2d ed. 2002) ("The Supreme Court has held that there is a fundamental right to travel and to interstate migration within the United States. Therefore, laws that prohibit or burden travel within the United States must meet strict scrutiny.").

213. This also conforms with the argument advanced by Professors Tribe and Dorf that courts should define levels of generality using interpolation and extrapolation from enumerated rights. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1059 (1990).

214. *See Lane*, 124 S. Ct. at 2002 (Rehnquist, C.J., dissenting).

215. "There is simply no reason to require Congress, seeking to determine facts relevant to the exer-

in *Lane* gives Congress the ability to perform its legislative function and “gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy.”²¹⁶ This reflects the view that it is more useful for the Court to gauge whether a statute is roughly equivalent to the Court’s constitutional jurisprudence than to go digging through the legislative record in an attempt to pry into Congress’s mind. The *Garrett* approach of requiring the legislature to show a “Voting Rights Act” level of unconstitutional discrimination makes Congress too reactionary and operates on an outdated paradigm of states consistently and openly flouting constitutional guarantees.

2. *Consideration of State Violations of Peripheral Fundamental Rights*

In *Garrett*’s evaluation of the ADA’s evidentiary record, the Court credited only discrimination by the states in employment. It declined to consider other examples of states treating people with disabilities unequally in public services and public accommodations.²¹⁷ *Lane* changes this. When Congress passes a statute that protects several fundamental rights, the Court will consider discrimination and unequal treatment by public officials in other related fundamental rights besides the right at issue in the application of the statute to the particular case at bar.

Recall that in its discussion of a history of unconstitutionality in access to courts, the Court went beyond physical accessibility of courthouses and considered cases involving interpreters and jury service. The Court’s enlargement of the fundamental right at issue goes much further, however. In addition to the “access to courts” evidence, there are four other categories of evidence the Court considered in *Lane*. The first is unconstitutional state behavior in other areas besides access to courts. This includes Supreme Court decisions identifying unconstitutional discrimination against people with disabilities by state agencies in unjustified commitment,²¹⁸ abuse and neglect of persons committed to state mental health facilities,²¹⁹ and zoning.²²⁰

The next category is evidence relating to what the Court described as showing “pervasive unequal treatment in the administration of state services and programs, including systematic deprivation of fundamental rights.”²²¹

cise of its § 5 authority, to adopt rules or presumptions that reflect a court’s institutional limitations.” *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 384 (2001) (Breyer, J., dissenting); see also *id.* at 379-80 (“[A] legislature is not a court of law. And Congress, unlike courts, must, and does, routinely draw general conclusions . . . from anecdotal and opinion-based evidence . . .”); Amar & Estricher, *supra* note 112, at 352-53; Caminker, *supra* note 19, at 1198; Post & Siegel, *supra* note 78, at 14.

216. See *Garrett*, 531 U.S. at 385 (Breyer, J., dissenting).

217. *Id.* at 372 n.7.

218. See *Jackson v. Indiana*, 406 U.S. 715, 726 (1971).

219. See *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982).

220. See *Lane*, 124 S. Ct. at 1989 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)).

221. See *id.* at 1989.

This includes state laws categorically disqualifying “idiots” from voting, without regard to individual capacity,²²² and state laws prohibiting persons with disabilities from marrying.²²³

Lane’s use of these periphery rights is more than casual.²²⁴ Although the Court did not explain what precise weight it gave to this evidence, its discussion indicates that the Court views them as increasing the gravity of the harm that Congress was attempting to address with Title II of the ADA.²²⁵ These examples help provide *gravitas* to the “historical context” of the need for Title II, which gives Congress more latitude to employ “powerful remedies” to solve these “[d]ifficult and intractable problems.”²²⁶ *Lane*, therefore, stands for the principle that when a statute implicates a panoply of rights, many of which are fundamental, Congress gets the benefit of public officials’ transgressions in all of these rights, even when only one is at issue in a given case.

How to justify this departure from *Garrett*? In *Lane*, the Court did not even try. The answer to why this is the right approach has its roots in *Hibbs*, where Justice Rehnquist offered a justification (albeit in a footnote) for the Court’s reliance on discrimination in family leave policies for supporting congressional action to alleviate discrimination in parental leave policies. “Evidence pertaining to parenting leave is relevant here because state discrimination in the provision of both types of benefits is based on the same gender stereotype: that women’s family duties trump those of the workplace.”²²⁷

The same is true vis-à-vis discrimination against people with disabilities in other public services, like zoning, unjustified commitment, voting, and state employment. The Court has already recognized that prejudice against people with disabilities can be unconscious and pervasive.²²⁸ Social science

222. *Id.* (citing Justice Marshall’s concurrence and dissent in *Cleburne*, 473 U.S. at 464, which noted that as of 1979, most States still categorically disqualified “idiots” from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials; and two law review articles discussing laws disenfranchising people with mental disabilities).

223. *See Lane*, 124 S. Ct. at 1989 n.8 (citing D.C. CODE ANN. § 46-403 (2001) (declaring illegal and void the marriage of “an idiot or of a person adjudged to be a lunatic”); KY REV. STAT. ANN. § 402.990(2) (West 1992 Cumulative Service) (criminalizing the marriage of persons with mental disabilities); and TENN. CODE ANN. § 36-3-109 (1996) (forbidding the issuance of a marriage license to an “imbecile”).

224. The dissent certainly takes the majority’s consideration of peripheral rights seriously. It criticizes the majority for not limiting its discussion of the congressional record to violations of the due process rights on which it ultimately relies. State-sponsored discrimination in marriage, voting, and public education is not relevant because the “scope of the Constitutional right at issue” is access to courts. *See Lane*, 124 S. Ct. at 1998-99 (Rehnquist, C.J., dissenting) (quoting *Garrett*, 531 U.S. at 365).

225. The Court states that “[i]t is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs . . .” *Lane*, 124 S. Ct. at 1989. The Court then discusses the above peripheral rights, clearly weighing them as part of the gravity of the harm.

226. *Id.* at 1988-89.

227. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 732 n.5 (2003). *See Amar*, *supra* note 83, at 352 (arguing that this statement in *Hibbs* is inconsistent with the Court’s opinion in *Garrett*).

228. *See Garrett*, 531 U.S. at 374-75.

research indicates that all types of discrimination against people with disabilities are based on the same systematic misperceptions about the true abilities and potential of individuals with disabilities.²²⁹ Once this is accepted as true, the next logical step is that when one fundamental right is violated, it increases the likelihood that other fundamental rights will be similarly abridged. This is completely complementary to the principle discussed above: when fundamental rights are at issue, the Court needs to be increasingly deferential to congressional findings of difference being transformed into unconstitutional behavior.

In its consideration of the gravity of the harm to which the ADA was targeted, *Lane* considers public officials' discriminatory acts against people with disabilities in a wide array of rights implicated by Title II. Yet, in gauging the "appropriateness of the response," the Court declined the state's invitation to consider the constitutionality of Title II as one large bundle.²³⁰ The constitutional process implications of this move are beyond the scope of this Article.²³¹ As discussed below, this resulted in the largest criticism of *Lane*, even by commentators pleased with its result. Both states' and disability rights advocates would have liked more clarity and a broader scope to the Court's opinion.²³² Litigating the sovereign immunity implications of the fundamental rights covered by Title II one-by-one may be expensive and time-consuming.²³³

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

Id. (Kennedy, J., concurring).

229. See U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 22-23 (1983) ("Sociological studies . . . disclose[] some common strains and consistent patterns regarding prejudice based on handicap."); *id.* at 23 ("Discomfort. Psychological studies indicate that interaction with handicapped people, particularly those with visible handicaps, commonly produces feelings of discomfort and embarrassment in non-handicapped people."); *id.* at 24 ("Patronization and Pity. Research has documented that non-handicapped people often feel and act on moral obligations to help handicapped people."); *id.* at 25 ("Stereotyping. Frequently, the label of handicapped conjures up an image, and non-handicapped persons often relate to this stereotypic image more readily than to the flesh and blood individuals with whom they come into contact. The stereotypes take a number of different forms . . . Whatever the particular image, these caricatures of human beings are substituted for the real thing.") (citing ROBERT L. BURGENDORF, JR., *THE LEGAL RIGHTS OF HANDICAPPED PERSONS* 50 (1980)); *id.* at 25 ("Stigmatization. Perhaps the most significant attitude toward handicaps is that they are considered extremely negative characteristics.")

230. *Lane*, 124 S. Ct. at 1992-93.

231. The dissent views this as fundamentally unbalanced. *Id.* at 2005 (Rehnquist, C.J., dissenting).

232. See *infra* notes 363-65.

233. See *infra* notes 363-65.

3. *“Reasonable Accommodation” as a Positive Factor in the Appropriateness of the Remedy*

In its two “new federalism” cases dealing with the ADA, the Court has taken different approaches to the ADA’s “reasonable accommodation” principle. In *Garrett*, the Court had this to say about Title I’s requirement that employers make reasonable accommodations to employees in the workplace: “[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.”²³⁴ To the Court, this makes the ADA not congruent and proportional to problems that Congress found in state discrimination in employment.²³⁵

Lane takes a dramatically different approach. It characterizes Title II’s accessibility standards as providing a limited remedy. “[Title II] requires only ‘reasonable modifications’ that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service.”²³⁶ Here, the fact that the ADA requires only “reasonable” modifications is viewed as a limiting principle, not one that is unduly burdensome on states.

This difference in treatment is all the more striking considering the different sources of law for the two Titles’ reasonable accommodation requirements. Title I’s reasonable accommodation provision was considered and included by Congress in the text of the Act and is carefully calibrated into the analysis of what constitutes “discrimination.”²³⁷ In contrast, Title II has no statutory defense for undue burden or fundamental alteration. The idea that public entities do not need to take actions that fundamentally alter the nature of the program, service, or activity comes from the regulations and interpretive cases.²³⁸ Thus, *Lane*’s view that Title II’s reasonable accommodation provision was part of Congress’s carefully tailored plan to combat the precise discrimination it found is a bit of a sleight of hand.

Why the change from *Garrett*? This difference in treatment can be partially explained by the different levels of constitutional review as between discrimination in employment and access to courts (although, of course, the

234. 531 U.S. at 372.

235. *Id.*

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

237. A qualified individual with a disability, the only category of persons protected under Title I, is someone who can perform essential job functions with or without reasonable accommodations. 42 U.S.C. § 12111(8) (2003). Discrimination is defined as not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee, unless doing so would be an undue hardship for the employer. 42 U.S.C. § 12112(b)(5)(A) (2003).

238. See 28 C.F.R. § 35.130(b)(7) (2004) (stating that reasonable modifications must be made unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the program, service, or activity); see also *Olmstead v. Zimring*, 527 U.S. 581, 597, 603-04 (1999) (holding that modification will constitute fundamental alteration when the change will cause an undue financial or administrative burden).

reasonable accommodation principle extends to all Title II cases, even those not implicating fundamental rights). In employment, states are constitutionally compelled only to do what is “rational,” whereas with access to courts they are subject to a heightened standard. But the dissimilar approaches to reasonable accommodation signal a shift in viewpoints. State employers, like state officials responsible for courthouse access, never have to make changes under the ADA that are unduly burdensome or would eliminate essential functions of the employment position (or—in the case of Title II—the program, service, or activity). But far from offering comfort to the *Garrett* majority, this was a cause of congruence and proportionality concerns. The dissent in *Lane* finds similar fault with Title II, arguing that by requiring “special accommodation,” Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination.²³⁹

Whatever the rationale, after *Lane*, Title II’s reasonable accommodation requirement is a positive factor in evaluating congruence and proportionality.²⁴⁰ The significance of this to other “fundamental rights” claims under Title II will be explained in the discussion of voting below.

III. *LANE* AND VOTING

Part II suggested that *Lane* departs from earlier new federalism cases in three important ways. First, *Lane* changes Congress’s evidentiary burden for statutes targeting the protection of fundamental rights. Unequal and discriminatory treatment and state (or local or county) substantial impairment of the exercise of those rights serve as proxies for a pattern of clear unconstitutionality. Second, *Lane* indicates the Court’s willingness to construe “fundamental rights” broadly and to consider public discriminatory treatment in the exercise of related fundamental rights also covered by the statute at issue. These two principles combine to form a presumption of validity when Congress uses its Section 5 powers to vindicate fundamental rights. Third, *Lane* shows that while the Court views the ADA’s Title I reasonable accommodation mandate as a negative factor in the congruence and proportionality analysis, the Court takes the opposite approach under Title II.

This Part applies this view of *Lane* to claims under Title II of the ADA involving the right to vote. First, by way of introduction to readers that are new to this area, the issues inherent in voting for people with disabilities are discussed. Second, the civil rights laws that address voting and disability, including Title II of the Americans with Disabilities Act, are briefly introduced and explained. Next, this Part turns to the abrogation issue and suggests that under pre-*Lane* new federalism, the Court would likely have held that Title II did not validly abrogate the states’ sovereign immunity insofar as it related to voting. But the three principles that *Lane* stands for, dis-

239. *Lane*, 124 S. Ct. at 2003 (Rehnquist, C.J., dissenting).

240. *Id.* at 1986-87.

cussed above, compel the opposite conclusion. After *Lane*, courts should hold that Title II, as it relates to voting, is a valid exercise of Congress's Section 5 powers to abrogate the states' sovereign immunity. This section offers a response to criticisms, showing how this view of *Lane* softens the blow of the "as applied" approach the Court took in evaluating Title II. Finally, this Part suggests that *Lane* has implications for a larger universe of civil rights statutes, specifically the Help America Vote Act and its lack of a private damage remedy.

A. Voting for People with Disabilities

Before discussing the ADA and voting, it is important to explain the issues that people with disabilities face in voting.²⁴¹ The administration of elections is a massive, complicated, and largely diffuse enterprise.²⁴² Federal law provides only a baseline standard that the states must meet.²⁴³ Otherwise, states are largely free to administer elections as they see fit. States will typically delegate responsibility for administration of elections to localities and political subdivisions.²⁴⁴

In discussing voting and disability, it is useful to divide the people with disabilities into two groups: people with physical disabilities and people with mental disabilities. Unlike African Americans and women, there have not been formal barriers to people with physical disabilities voting. There is no legacy or current practice of state laws disenfranchising people with physical disabilities.²⁴⁵

Rather, people with physical disabilities face a different set of challenges exercising their fundamental right to vote. These challenges roughly fall into two categories. The first challenge involves the physical accessibility of polling places.²⁴⁶ Part of the reason Congress passed the ADA was to combat rampant inaccessibility in public places and privately owned places

241. For a more complete discussion of these concepts, see Michael E. Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353 (2003) [hereinafter *Voting Rights*]; Michael E. Waterstone, *Civil Rights and the Administration of Elections—Toward Secret Ballots and Polling Place Access*, 8 J. GENDER RACE & JUST. 101, 105-13 (2004); Kay Schriener et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437 (2000); Kay Schriener & Andrew Batavia, *The Americans with Disabilities Act: Does It Secure the Fundamental Right to Vote?*, 29 POL'Y STUD. J. 663 (2001).

242. See U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, VOTERS WITH DISABILITIES—ACCESS TO POLLING PLACES AND ALTERNATIVE VOTING METHODS (Oct. 2001) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d02107.pdf>.

243. For example, states are not allowed to condition the ability to vote on being of a certain race. See Voting Rights Act, 42 U.S.C. § 1973(a) (1982) (prohibiting racial discrimination in voting).

244. See GAO REPORT, *supra* note 242, at 16.

245. No state statute expressly disenfranchises people with physical disabilities, and a 2001 GAO Report of voting and disability offered no evidence of people with physical disabilities being intentionally turned away from polling places on the basis of disability. See GAO REPORT, *supra* note 242; see also H.R. REP. NO. 107-329, at 79 (2001) (additional views of Rep. Steny H. Hoyer) ("Most of the ongoing discrimination against people with disabilities concerning voting is no longer motivated by deliberate efforts [to] exclude.").

246. See *Voting Rights*, *supra* note 241, at 355-56.

open to the public.²⁴⁷ Polling places—which can fit into either category, and are typically schools, libraries, recreational centers, houses of worship, city and town halls, courthouses, police and fire stations, or private homes—are no exception. In some ways, accessibility for buildings used as polling places is even more difficult than in their primary use, because modifying temporarily borrowed buildings for use as polling places may be outside of the mandate of election officials or, even if allowed, may be prohibitively expensive.²⁴⁸

Research confirms the problem of polling place inaccessibility. In the 2000 presidential election, the General Accounting Office conducted a survey of accessibility of polling places.²⁴⁹ This study found that 84% of polling places had one or more features that could present challenges to physical access for voters with disabilities.²⁵⁰ Impediments included high door thresholds, ramps with steep slopes, and lack of accessible parking, among others.²⁵¹ Over a quarter of the counties choosing polling places did not use accessibility as a criterion in making their selection.²⁵² In 2000, a federal district court in New York cited the results of a study that found 100% of one New York county's polling places were inaccessible in its order issuing a preliminary injunction requiring the county to make the polling places accessible by election day.²⁵³

Other social science research on the voting experiences of people with disabilities confirms these problems. A 1999 survey found that people with disabilities were more likely than those without disabilities to have encountered or to expect difficulties in voting in a polling place.²⁵⁴ Of those voting in the past ten years, 8% of people with disabilities encountered such problems compared to less than 2% of people without disabilities.²⁵⁵ Among those not voting within the past ten years, 27% of people with disabilities would expect such problems compared to 4% of people without disabilities.²⁵⁶

247. See, e.g., 42 U.S.C. § 12101(a)(5) (2003).

248. See GAO REPORT, *supra* note 242, at 33-34 (“For publicly held buildings, we found that the county or local election office has the authority to order permanent modifications to public polling places in less than one-third of the counties. For privately held buildings, election officials generally need the owners’ permission to make temporary or permanent modifications.”); *id.* at 34 (“[S]ome state and county election officials indicated that funding constraints could also limit needed modifications.”).

249. See generally GAO REPORT, *supra* note 242.

250. *Id.* at 29.

251. *Id.*

252. *Id.* at 18.

253. See *New York v. County of Schoharie*, 82 F. Supp. 2d 19, 21 (N.D.N.Y. 2000) (citing survey findings that all 25 of Schoharie County’s 1998 polling places were inaccessible to the disabled).

254. See DOUGLAS L. KRUSE ET AL., EMPOWERMENT THROUGH CIVIC PARTICIPATION: A STUDY OF THE POLITICAL BEHAVIOR OF PEOPLE WITH DISABILITIES, FINAL REPORT TO THE DISABILITY RESEARCH CONSORTIUM BUREAU OF ECONOMIC RESEARCH OF RUTGERS UNIVERSITY AND THE NEW JERSEY DEVELOPMENTAL DISABILITIES COUNCIL, EXECUTIVE SUMMARY 4 (Apr. 1999).

255. *Id.*

256. *Id.*

The second area of inequality people with disabilities face in voting relates to the actual process of voting.²⁵⁷ Simply put, voting machines have not been designed with universal access in mind. More than 1.2 million Americans have a hand or arm disability that prevents them from using a pen or pencil, which is essential to “traditional” or “mark sense” balloting.²⁵⁸ This also creates problems for these voters in pinpointing the stylus on punch-card ballots, pressing the appropriate buttons on an electronic system, or manipulating the handles on lever machines.²⁵⁹ Voters with visual disabilities face a separate set of challenges, including reading the text on any of these machines.²⁶⁰ The physical configuration of machines can also cause problems for voters in wheelchairs. Almost half of the polling places with sit-down voting stands visited by the GAO researchers had insufficient room for a wheelchair.²⁶¹ Electronic voting, which has the technology to allow most people with disabilities to vote secretly and independently, is the future in this area. But this future has been slow in coming, delayed by funding issues, fraud concerns, and inadequate poll worker training.²⁶²

Social science research demonstrates that the cumulative effect of these problems is decreased voting levels for people with disabilities. The 2000 National Organization on Disability/Harris Survey found that voter registration is lower for people with disabilities than for people without disabilities (62% versus 78%, respectively).²⁶³ A different survey in 1999 found that people with disabilities were on average about twenty percentage points less likely than those without disabilities to vote and ten points less likely to be registered to vote, even after adjusting for differences in demographic characteristics (age, sex, race, education, and marital status).²⁶⁴ There was additional evidence of political isolation and marginalization.²⁶⁵

People with mental disabilities have been more formally disenfranchised. States have used their constitutional powers to regulate their elec-

257. See *Voting Rights*, *supra* note 241, at 356-57.

258. See James Dickson, *Universal Right for All but the Blind: Not-So-Secret Ballot*, 10 ELECTIONS TODAY 6, 6 (Winter 2002) (referring to a Harris Survey conducted during December 2000).

259. See GAO Report, *supra* note 242, at 31 tbl.5.

260. *Id.*

261. *Id.* at 32. But see The League of Women Voters, *Election Reform Survey: Summary Findings*, available at <http://www.lwv.org/join/elections/goodenough.pdf>. (Nov. 2001) (finding that 88% of election officials in reporting jurisdictions believed that voting technology at polling places was accessible to voters in wheelchairs).

262. See *Voting Rights*, *supra* note 241, at 102 n.3.

263. See 2000 NAT'L ORG. ON DISABILITY/HARRIS SURVEY OF AMERICANS WITH DISABILITIES 83 (2000).

264. See KRUSE ET AL., *supra* note 254, at 5. “If people with disabilities voted at the same rate as those without disabilities, there would have been 4.6 million additional voters in 1998, raising the overall turnout rate by 2.5 percentage points.” *Id.* at 3.

265. People with disabilities were less likely to be contacted by political parties. *Id.* at 5. They were less likely to view the political system as responsive “to people like me.” *Id.* at 5. They were less likely to have contributed money to a political party or candidate, written or spoken to an elected representative or official, attended a political meeting, written a letter to a newspaper, or contributed money to an organization trying to influence governmental policy or legislation. *Id.* at 5.

tions and to determine the qualifications of their voters (in federal and state elections) to restrict the franchise of people with cognitive and emotional impairments.²⁶⁶ One researcher found that a total of 44 states have either statutes or constitutional provisions permitting disenfranchisement for some people with disabilities.²⁶⁷ The basis for such disenfranchisement ranges from being an “idiot,” “insane,” “lunatic,” “mental incompetent,” “mentally incapacitated,” and of “unsound mind,” to “not quiet and peaceable.”²⁶⁸ These laws have a long tradition in our country. As early as 1860, 14 of 34 states then in the Union did not allow “insane people” or “idiots” to vote.²⁶⁹

B. *The ADA and Voting*

1. *Other Laws Impacting the Voting Rights of People with Disabilities*

The ADA is the primary federal legal and policy statement of the rights of people with disabilities.²⁷⁰ But the ADA does not draw on a blank canvas in legislating on the voting rights of people with disabilities. There are three pre-ADA laws that address voting and disability. The Voting Rights Act of 1965 (as amended in 1982) provides:

Voting Assistance for blind, disabled or illiterate persons. Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.²⁷¹

This statute applies only to federal elections.²⁷²

The Voting Accessibility for the Elderly and Handicapped Act provides that “[w]ithin each State . . . each political subdivision responsible for conducting elections shall assure that all polling places for Federal elections are accessible to handicapped and elderly voters.”²⁷³ This statute also applies only to federal elections.²⁷⁴ Giving substance and meaning to “accessibility” is left to the states.²⁷⁵

266. U.S. CONST. art. II, § 1 (stating that state legislatures have the exclusive power to appoint electors in presidential elections); *see also* *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (connecting the power of states to regulate elections to the Tenth Amendment's reservation of rights to the states); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 625 (1969).

267. *See* *Schriner & Batavia*, *supra* note 241, at 439.

268. *Id.*

269. *Id.* at 442.

270. *See* 42 U.S.C. § 12101(b)(1) (2003) (“It is the purpose of this chapter to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”).

271. 42 U.S.C. § 1973aa-6 (2003).

272. *See In re Thirteen Ballots Cast in the 1985 General Election*, 507 A.2d 314 (1985) (holding VRA applies to only federal, rather than state and local, elections).

273. 42 U.S.C. § 1973ee-1(a).

274. *See NAACP v. Phila. Bd. of Educ.*, No. 97-7085, 1998 WL 321253, at *3 (E.D. Pa. June 16,

The Rehabilitation Act of 1973 is a broad anti-discrimination statute like the ADA. Section 504 provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁷⁶

The last federal law impacting the voting rights of people with disabilities is the recently-passed Help America Vote Act (HAVA).²⁷⁷ This post-dates the ADA. A full discussion of this exciting, landmark law is beyond the scope of this Article. Still, several provisions are worth briefly noting. First, the Act provides funds to make polling places, including the path of travel, entrances, exits, and voting areas of each polling facility, accessible to individuals with disabilities, in a manner that provides the same opportunities for access and participation (including privacy and independence) as for other voters.²⁷⁸ States and local government units can receive these funds by submitting an application.²⁷⁹ Second, a different part of the Act provides that voting systems shall be accessible for individuals with disabilities, including non-visual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.²⁸⁰ As written, HAVA contains no private right of action.²⁸¹ It is enforced by the Attorney General’s Office and a state-based administrative grievance procedure.²⁸²

2. *The ADA*

The most-litigated law impacting voting for people with disabilities is the ADA. There are actually two provisions in the ADA that could affect voting. The first, Title II, prohibits discrimination in the provision of public services. It provides that

no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits

1998) (“The VAEH deals only with federal elections. Congress could amend the VAEH to apply to non-federal elections, but has not chosen to do so.”).

275. In the statute, accessibility is defined as “accessible to handicapped and elderly individuals for the purpose of voting or registration, as determined under guidelines established by the chief election officer of the State involved.” 42 U.S.C. § 1973ee-(6)1.

276. 29 U.S.C. § 794(a) (1998).

277. 42 U.S.C. §§ 15301-545 (2004).

278. *Id.* § 15421(b).

279. *Id.* § 15423.

280. *Id.* § 15481(a)(3)(A).

281. In the lead-up to the 2004 Presidential Election, the Sixth Circuit held that the provisional ballot provisions of HAVA (§ 302) are enforceable by a private right of action under § 1983. *See Sandusky Co. Democratic Party v. Blackwell*, 2004 WL 2384445, *5-*6 (6th Cir. 2004). But this case only involved claims for injunctive relief, not damages.

282. 42 U.S.C. §§ 15511, 15512.

of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.²⁸³

Although voting is not specifically mentioned in the ADA as a “service, program, or activity,”²⁸⁴ for purposes of Title II, courts have uniformly held that it is.²⁸⁵ This means that the voting “service[s], program[s], or activity[ies]”²⁸⁶ offered by states, when viewed in their entirety, must be readily accessible to and usable by people with disabilities, unless to do so would result in a fundamental alteration or cause an undue financial administrative burden.²⁸⁷

Title III of the ADA prohibits discrimination on the basis of disability in public accommodations. The key discrimination provision provides:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.²⁸⁸

Modifications do not have to be made if it can be shown that they would “fundamentally alter” the nature of the goods, services, facilities, privileges, or accommodations; if the modification would be an undue burden; or in certain circumstances involving the removal of architectural barriers, if such removal is not “readily achievable.”²⁸⁹ Some structures used for polling places—such as schools and recreational centers—are covered by Title III independent of their use as polling places. But many other types of structures, such as private residences, may not be independently covered by Title III. Even if these structures fall within the ambit of Title III in their use as

283. *Id.* § 12132.

284. 28 C.F.R. § 35.150(a) (2004).

285. *See* 42 U.S.C. 12101(a)(3) (2003) (“[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”) (emphasis added); *see also* *New York v. County of Schoharie*, 82 F. Supp. 2d 19, 25 (N.D.N.Y. 2000) (holding that accessibility to polling places qualifies as a “service, program, or activity”); *Am. Ass’n of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226, 1234 (M.D. Fla. 2004).

286. 28 C.F.R. § 35.150(a) (2004).

287. The Act is not this specific as to what “discrimination” means. The DOJ Title II Regulations give context to discrimination for Title II purposes. *See id.*

A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not . . . [r]equire a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

Id.

288. 42 U.S.C. § 12182(a) (2003).

289. *Id.* § 12182(b)(2)(A)(i)-(v).

polling places, the officials using them for polling places may not have the authority or the funds to modify them to be accessible.²⁹⁰

By far, the most actively litigated area in voting and disability has been the program access standard of ADA Title II and the Rehabilitation Act. These cases fall into three categories, which are largely reflective of the challenges facing people with disabilities in voting discussed above. The first is cases challenging physically inaccessible polling places, the second is cases arguing that Title II requires secret and independent voting opportunities for people with disabilities, and the third involves challenges to curtailment of voting opportunities for people with mental disabilities.

a. Physical Accessibility

Several cases have challenged the accessibility of polling places. In *New York ex rel Spitzer v. County of Schoharie*,²⁹¹ the State of New York, acting in the capacity of *parens patriae*, argued that the County of Schoharie violated the ADA by having habitually inaccessible polling places. The court agreed that this could be a violation of the ADA and granted the plaintiffs a preliminary injunction ordering the county to comply with the ADA's building guidelines.²⁹² In *Lightbourn v. County of El Paso, Texas*,²⁹³ the court rejected the plaintiffs' arguments that El Paso County had discriminated against people with disabilities by not providing accessible polling places.²⁹⁴ The Rehabilitation Act was inapplicable because the Texas Secretary of Elections did not receive federal funds, and the ADA was not violated because the Texas Secretary of Elections had only a duty to enforce "election laws," a category that did not include the ADA.²⁹⁵

As these cases reflect, there continues to be a divide between advocates and scholars who believe the ADA should be interpreted to provide absolute access to polling places (absent undue hardship or fundamental alteration) and those who believe alternative voting procedures, such as curbside or absentee voting, are sufficient.²⁹⁶ For the time being, the Department of

290. One of the biggest challenges cited by election officials is their inability to procure accessible buildings as polling places. See GAO REPORT, *supra* note 242, at 33. This study also notes that county and local election officials have the authority to order permanent modifications to public polling places in less than one-third of the counties. *Id.* at 34. This is despite the fact that the regulations promulgated under Title III specifically provide that when a public accommodation is located in a private residence, the portion of the residence used exclusively in the operation of the public accommodation and any portion used both as a private residence and as a public accommodation are covered under Title III. 28 C.F.R. § 36.207 (2004).

291. 82 F. Supp. 2d 19 (N.D.N.Y. 2000).

292. *Id.* at 25.

293. 118 F.3d 421 (5th Cir. 1997).

294. *Id.* at 430-32.

295. *Id.* at 426-27, 430.

296. This author has previously suggested that curbside and absentee balloting are no substitute for polling place access, both as a matter of policy and under the ADA. See *generally Voting Rights*, *supra* note 241. The ADA's regulations provide that discrimination includes affording "a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others." 28 C.F.R. § 35.130 (2004). Curbside and absentee voting are not "equal"

Justice's position has been the latter, issuing letters of finding that curbside voting complies with the ADA's access requirements and does not constitute discriminatory treatment.²⁹⁷

b. Secret and Independent Voting

The issue of whether the ADA requires secrecy and independence in voting for people with disabilities has also been litigated. The early cases came down uniformly against interpreting Title II to require secret and independent voting. In *Lightbourn*, discussed above, the Rehabilitation Act was held inapplicable because the Texas Secretary of Elections did not receive federal funds, and the ADA was not violated because that officer did not have an obligation to enforce it.²⁹⁸ In *Nelson v. Miller*,²⁹⁹ a Michigan district court held that the ADA was not intended to modify older, more specific laws like the VRA and the VAEH, and create a secret voting standard.³⁰⁰ The Seventh Circuit affirmed on the alternative grounds that the Michigan Constitution did not guarantee a secret vote, and therefore the state had not denied its visually impaired citizens a right that it had given to its other citizens.³⁰¹

Recent cases have had more mixed results. In *American Association of People with Disabilities v. Hood*, a district court in Florida held that the Supervisor of Elections for Duval County, Florida, had violated Title II of the ADA by purchasing a voting system that was not readily accessible to people with disabilities without third-party assistance.³⁰² But in *American Association of People with Disabilities v. Shelley*, a district court in California held that the ADA does not provide the right to a secret and independent vote for people with disabilities.³⁰³ This important Title II ADA debate remains an open one.

to polling place voting because of the intrinsic social value of voting in a polling place and the possibility that absentee voters will be forced to vote before key elections. See *Voting Rights*, *supra* note 241, at 364-69 (arguing for the importance of ensuring equality in the voting process).

297. See DOJ Letter of Finding No. 18 (Aug. 25, 1993), <http://www.usdoj.gov/crt/foia/lofc018.txt>; DOJ Letter of Finding No. 21 (Sept. 10, 1993), <http://www.usdoj.gov/crt/foia/lofc021.txt>; DOJ Letter of Finding No. 23 (Sept. 30, 1993), <http://www.usdoj.gov/crt/foia/lofc023.txt>.

298. 118 F.3d at 428-31.

299. 950 F. Supp. 201 (W.D. Mich. 1996).

300. *Id.* at 204-05.

301. *Nelson v. Miller*, 170 F.3d 641, 649-53 (6th Cir. 1999).

302. *Am. Ass'n of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226 (M.D. Fla. 2004). The court held that at the time that the city purchased its optical scan system, it was technologically and financially feasible to employ a voting system readily accessible to visually impaired voters. *Id.* at 1240.

303. *Am. Ass'n of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120, 1126 (C.D. Cal. 2004). "Nothing in the Americans with Disabilities Act or its Regulations reflects an intention on the part of Congress to require secret, independent voting." *Id.*

c. *Challenges to State Disenfranchisement of People with Mental Disabilities*

There are nearly no ADA or constitutional challenges to state disenfranchisement of people with mental disabilities. One notable exception is *Doe v. Rowe*,³⁰⁴ which challenged a Maine statute expressly disenfranchising persons under guardianship for mental illness. The court held that the statute's lack of procedural safeguards violated the Equal Protection Clause and Title II of the ADA.³⁰⁵

C. *The Abrogation Issue*

As discussed above, the largest issue concerning the ADA and voting has been whether Title II's program access standard should be interpreted to provide people with disabilities full polling place access and a secret and independent ballot. At first glance, *Lane* and new federalism do not have much to do with these issues.

But the reality is that *Lane* and new federalism are incredibly important to disability and voting. First, if Congress did not validly abrogate the states' sovereign immunity insofar as Title II of the ADA relates to voting,³⁰⁶ private individuals can only bring suits for prospective relief under the *Ex parte Young* doctrine, and damages are not available. Commentators have argued that a damages remedy is necessary to vindicate ADA Title II rights.³⁰⁷ The limited success of (and noncompliance with) Title III of the ADA—which provides only for injunctive relief—suggests that injunctive relief, standing alone, is an ineffective remedy for individuals vindicating ADA rights.³⁰⁸ Without the potential for damages, plaintiffs are less likely

304. 156 F. Supp. 2d 35 (D. Me. 2001).

305. *Id.* at 56-59.

306. No court has decided the abrogation issue. Only one case even came close. In *Nelson v. Miller*, 170 F.3d 641, 647 (6th Cir. 1999), the State of Michigan argued that the plaintiffs' case should be dismissed because Congress had not validly abrogated Michigan's Eleventh Amendment immunity with the ADA. The court avoided the issue on two fronts. First, it held that because the plaintiffs only sought claims for prospective relief, the case falls within the *Ex parte Young* exception to sovereign immunity. *See id.* Second, the court's holding that the plaintiffs could not state a claim for a violation of the ADA made it unnecessary for the court to reach the abrogation issue. *Id.* at 648.

307. *See* Ruth Colker, *The Section 5 Quagmire*, 47 UCLA L. Rev. 653, 660 (2000) [hereinafter *Section 5 Quagmire*] ("A damages cause of action provides a financial incentive for plaintiffs to bring cases to enforce their rights under ADA Title II and creates the possibility of contingent fee arrangements."); *see also* Laurence Paradis, *Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services, and Activities Accessible to All*, 14 STAN. L. & POL'Y REV. 389, 391-93 (2003) (discussing the importance of compensatory and punitive damages in the ADA's remedial structure); Michael E. Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. (forthcoming 2005) [hereinafter *The Untold Story*] (arguing that, given relatively passive Department of Justice enforcement, the damage remedy needs to be extended beyond cases of "intentional discrimination" for ADA Title II to reach the effectiveness that its framers envisioned).

308. *See Section 5 Quagmire, supra* note 307, at 660 ("A remedial scheme consisting exclusively of injunctive relief under ADA Title II has proven to be ineffective."); *see also* Ruth Colker, *A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 377 (2000).

to bring ADA claims. This helps explain the low number of Title III cases compared with ADA Title I cases.³⁰⁹ Even under existing ADA Title II caselaw that allows for damages for certain violations of Title II,³¹⁰ there is still relatively little ADA Title II voting litigation³¹¹ compared with the high incidence of potential ADA violations found by the General Accounting Office.³¹² Committed advocates have brought suits in the largest jurisdictions, but state-by-state litigation is an expensive, disjointed, and time consuming process. Unless states are faced with the prospect of money damages, they will have no incentive to prioritize these changes.

Second, given recent Commerce Clause cases, this may be a larger and more important debate than damages versus injunctions. Rather, it is possible that these issues of new federalism may impact Congress's ability to pass Title II of the ADA at all (or at least to enforce Title II in the context of voting claims). *Lane's* abrogation analysis, discussed above, is essentially the same as the larger issue of whether Congress is constitutionally empowered, under Section 5 of the Fourteenth Amendment, to pass Title II of the ADA.³¹³ If courts hold that ADA Title II is not a constitutional exercise of Congress's powers under Section 5 of the Fourteenth Amendment, the only source of congressional power for the ADA would be the Commerce Clause.³¹⁴ However, Congress's Commerce Clause authority may soon be

309. See Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 245 (2001) (showing that through 2001, there were 720 Title I cases—published and unpublished—that had made it to the Court of Appeals level); see also *The Untold Story*, *supra* note 307 (showing that through 2004, there were 79 Title III cases—published and unpublished—that had made it to the Court of Appeals level).

310. See, e.g., PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW & POLICY* § 16.3 (2003) (discussing Title II damage remedies).

311. A 2004 Westlaw search revealed only 13 ADA cases involving voting rights claims. See *AAPD v. Shelley*, 324 F. Supp. 2d 1120 (C.D. Cal. 2004); *Troiano v. Supervisor of Elections in Palm Beach County*, 382 F.3d 1276 (11th Cir. 2004); *Westchester Disabled On the Move, Inc. v. County of Westchester*, 346 F. Supp. 2d 473 (S.D.N.Y. 2004); *AAPD v. Hood*, 278 F. Supp. 2d 1345 (M.D. Fla. 2003); *AAPD v. Smith*, 227 F. Supp. 2d 1276 (M.D. Fla. 2002); *Doe v. Roe*, 156 F. Supp. 2d 35 (D. Me. 2001); *Nat'l Org. on Disability v. Tartaglione*, 2001 WL 1258089 (E.D. Pa. 2001); *People of N.Y. v. Schoharie County*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000); *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999); *Nat'l Coalition for Students with Disabilities Education & Legal Defense Fund v. Allen*, 152 F.3d 283 (4th Cir. 1998); *Jacobs v. Philadelphia County Bd. of Elections*, 1995 WL 639747 (E.D. Pa. 1997); *Lightbourn v. Garza*, 127 F.3d 33 (5th Cir. 1997); *McKay v. Count Election Comm'rs for Pulaski County*, 158 F.R.D. 620 (E.D. Ark. 1994).

312. See GAO Report, *supra* note 242.

313. *Boerne*, for example, did not involve the issue of whether Congress could validly abrogate sovereign immunity—rather, it discussed whether the Religious Freedom Restoration Act was a “congruent and proportional” response to any alleged constitutional violations that Congress found. It was not until *Florida Prepaid* that the congruence and proportionality test was applied to an Eleventh Amendment sovereign immunity abrogation scenario. There, as in *Lane*, the Court considered Congress's attempted abrogation to be a particular iteration of the larger *Boerne* constitutional inquiry. Technically, it is more appropriate to say that the abrogation analysis is a subset of the larger constitutional issue. For abrogation purposes, courts must consider congressional findings only of unconstitutional acts by state-level actors (at least pre-*Lane*, see *supra* Part II.C.1), but for the purpose of constitutional validity the court should consider unconstitutional acts by state and local actors. See *McCarthy v. Hawkins*, 381 F.3d 407, 422 (8th Cir. 2004) (concurring and dissenting opinion of Judge Garza).

314. See 42 U.S.C. § 12101(b) (1994) (“It is the purpose of this chapter . . . (4) to invoke the sweep of congressional authority, including the power . . . to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”).

subject to challenge. In *United States v. Lopez*³¹⁵ and *United States v. Morrison*,³¹⁶ the Supreme Court struck down federal statutes as exceeding Congress's Commerce Clause authority. In at least one case, the Eighth Circuit, applying *Lopez* and *Morrison* to ADA Title II, held that Congress lacked power under the Commerce Clause to prohibit Missouri's assessment of a \$2.00 fee for handicapped parking placards.³¹⁷ If similar cases involving the Commerce Clause and Title II's regulation of elections follow, Title II as applied to elections would be completely constitutionally invalid.³¹⁸

1. *After Lane, Courts Should Hold that Title II Validly Abrogates Sovereign Immunity in Cases Involving the Right to Vote*

It is useful to begin by speculating how the Court, pre-*Lane*, would have viewed the abrogation issue with regards to voting. Following *Garrett*, the right at issue would be the obligation of states to make "special accommodations" for the disabled in voting. What is this obligation? The answer is somewhat unclear. At first glance, it seems that states have more of an obligation to ensure a fundamental right, like voting, than those rights afforded only rational basis scrutiny, like employment. While this may be true as an abstract principle, it loses traction when applied to the challenges faced by people with disabilities in voting. The dissent in *Lane*, in describing a state's obligations relating to the fundamental right of courthouse access, takes the *Garrett* position that a "violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding. We have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance."³¹⁹

Garrett thus frames the question as whether people with disabilities have been "actually denied the constitutional right" to vote.³²⁰ Said differently, do state laws and practices providing unequal voting procedures for people with disabilities, discussed above, trigger strict scrutiny? This is complicated. Voting is unquestionably a fundamental right,³²¹ and government action that impairs the exercise of the right to vote is subject to strict judicial scrutiny.³²² In a long line of cases, when certain groups of citizens

315. 514 U.S. 548 (1995).

316. 529 U.S. 598 (2000).

317. See *Klinger v. Director, Dep't of Revenue*, 366 F.3d 614, 614 (8th Cir. 2004).

318. For an example of this argument on the Title II institutionalization context, see *McCarthy*, 381 F.3d at 417-35 (concurring and dissenting opinion of Judge Garza).

319. *Tennessee v. Lane*, 124 S. Ct. 1978, 2002 (2004) (Rehnquist, C.J., dissenting).

320. *Id.*

321. The Supreme Court has described the importance of the right to vote in the following terms: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Court has also stated that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

322. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-6 to -7 (2d ed. 1988); see also

are denied the right to vote, strict scrutiny (and usually a judicial determination of unconstitutionality) follows.³²³

Yet somewhat puzzlingly for a right that is “preservative of all other rights,” the Court has declined to apply strict scrutiny to challenges to certain restrictions on the franchise.³²⁴ In particular, the Court has been reluctant to apply strict scrutiny in challenges to restrictions on the franchise that the Court views as impacting only the “administration of elections”—in particular, when a challenge is of a particular voting procedure.³²⁵

The differences in voting opportunities between people with physical disabilities and the general population are susceptible to being lumped into this category. There are no signs that read “people with disabilities, go home,” nor are there formal disenfranchisement laws. Instead, people with disabilities face different voting choices. They receive curbside assistance instead of polling place voting. They are offered voting with assistance instead of secret and independent voting. If all else fails, absentee balloting is usually an option. *Garrett*'s claim that there is no constitutional right to

Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (requiring a state to show a substantial and compelling reason for imposing durational residence requirements on the right to vote).

323. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969) (property ownership); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (poll tax).

324. See Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 330-31 (1993).

It is . . . surprising to discover that the Supreme Court has evidenced in its right-to-vote jurisprudence what may be characterized as a limited view of the value of voting. The Court tends to rely implicitly on an ‘instrumental’ view of the franchise in which voting is seen solely as a societal tool for exerting political power.

Id.

325. See *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 808 (1969) (applying rational basis scrutiny to a challenge to an Illinois statute not allowing felons to file absentee ballots); *Burdick v. Takushi*, 504 U.S. 428, 432 (1992) (declining to apply strict scrutiny to a challenge to Hawaii’s prohibition on write-in voting, stating: “Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold.”). This deference in “administration” cases is a function of the states’ traditional control over the machinery of their elections. This control has several dimensions. As courts have recognized, the Constitution provides that states may regulate their elections. U.S. CONST. art. II, § 1 (stating that state legislatures have the exclusive power to appoint electors to presidential elections); see also *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (connecting the power of states to regulate elections to the Tenth Amendment’s reservation of rights to the States). States have an inherent obligation “to preserve the basic conception of political community.” *Dunn v. Blumstien*, 405 U.S. 330, 344 (1972). And real life administration concerns suggest that states need to make the nuanced decisions as to how their elections will be run. See *Burdick*, 504 U.S. at 433.

Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”

Id. (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). The exception, of course, is *Bush v. Gore*, 531 U.S. 98 (2000), which held that standardless recounts violate the Equal Protection Clause. Only time will tell if this case truly signals that the Equal Protection Clause will be extended to the administration of elections. One cause for hesitation is *Bush v. Gore*'s explicit statement of its lack of precedential value. See *id.* at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”). For an argument that *Bush v. Gore* gives strength to the constitutional claims of people with disabilities in the voting process, see *Voting Rights*, *supra* note 241, at 376.

unassisted courtroom access probably applies with equal vigor to voting. Secret and unassisted ballots, while having a long and storied tradition in our country (as well as being so obviously desirous from a policy perspective),³²⁶ have no discernable roots in constitutional law.

So, following *Garrett*, it is likely that the Court would have looked for cases of people with disabilities being denied the right to vote, because this is the only behavior that would be a clear violation of the Constitution. Framed this way, the abrogation question would be decided against congressional abrogation of state sovereignty. The ADA congressional record relating to discrimination in voting breaks down into three areas. Only the third comes close to demonstrating a clear constitutional-level violation of actual vote denials.

The first area involves general statements regarding societal discrimination against people with disabilities, which place voting in some type of larger list:

Statement of Rep. Tony Coelho (D-VA): "As the Council found, unfair discrimination is the daily experience of many of the 43 million Americans with disabilities. Every sphere of life is affected; housing, employment, recreation, transportation; even the ability to operate independently in the commercial sphere, or to vote"³²⁷

Statement of Rep. James Jeffords (D-VT): "As has been pointed out, individuals with disabilities have been denied for so long services, jobs, housing, transportation, hotel rooms, a means to communicate, access to Government officials, voting polls, and yes, even restrooms."³²⁸

Statement of Jo Holzer, Executive Director, Council for Disability Rights:

There is enormous need for barrier-free public accommodations. These are the barriers that impact most heavily on the family unit and prevent families from participating in normal public events, civic activities, voting, community affairs, and other regular activities like shopping, movies, entertainment, and sports.³²⁹

326. See *Voting Rights*, *supra* note 241, at 106.

327. *Joint Hearing Before the Senate Subcomm. on the Handicapped of the Comm. on Labor & Human Res. and the House Subcomm. on Select Educ. of the Comm. on Educ. & Labor on S.2345*, 100th Cong. (1988) [hereinafter *Joint Hearing*] (statement of Rep. Tony Coelho), reprinted in LEGISLATIVE HISTORY OF PUB. L. NO. 101-336, at 941 (1990).

328. *Id.* at 948.

329. *Hearing Before the House Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary on H.R. 2273*, 101st Cong. (1989) [hereinafter *Hearing on H.R. 2273*] (statement of Jo Holzer, Executive Director of the Council for Disability Rights), reprinted in LEGISLATIVE HISTORY OF PUB. L. NO. 101-336, at 2143 (1990).

Statement of Congressmen Atkins (R-AZ):

Discrimination is the daily experience for 36 million Americans. And it affects every aspect of our lives. . . . It is time to move forward, to make real progress in areas ranging from housing, employment, recreation, transportation, to basic rights like voting and living independently. . . . By removing discriminatory barriers, the Congress, the next President, and all of society can fulfill a promise, a promise of genuine opportunity and justice at home, in the work place, at school, at ball parks and movie theaters, in the voting booth and in every facet of daily life.³³⁰

The second category involves more personal anecdotes about the actual voting experiences of people with disabilities, and statements about the importance for full inclusion into society of voting for people with disabilities:

Statement of Mary Custis Straughn: "Personally, I look forward to the day when I can have an accessible polling place that will accommodate my electric wheelchair. Crawling or hiring an ambulance (as I did during the last general election) isn't really my style."³³¹

Senate Committee Report:

[The Illinois Attorney General] also focused on the need to ensure access to polling places: "You cannot exercise one of your most basic rights as an American if the polling places are not accessible." The Committee heard about people with disabilities who were forced to vote by absentee ballot before key debates by the candidates were held.³³²

Statement of Laura D. Cooper, Attorney, Pettit & Martin, San Francisco, California: "I was told I was 'lucky' because I was allowed to vote outside my inaccessible polling place."³³³

Statement of Stephen B. Fawcett, Ph.D., Professor of Human Development and Research Associate of the Research and Training Center on Independent Living (RTCIL) and Barbara Bradford, Training Associate, RTCIL, University of Kansas, Lawrence, Kan-

330. *Joint Hearing, supra* note 327, at 1036-37.

331. Statement provided in letter to Senator Joe Biden, as recounted in 135 CONG. REC. S19892 (daily ed. Sept. 7, 1989) (statement of Sen. Biden).

332. SENATE COMM. ON LABOR AND HUMAN RESOURCES, S. REP. NO. 101-116, at 12 (1st Sess. 1989).

333. *Hearing on H.R. 2273, supra* note 329, at 1984.

sas: "Local governments are unresponsive to disability issues, especially if solutions cost money. For example, disabled citizens are discouraged from registering and voting by inaccessible registration sites, polling places, and lack of transportation."³³⁴

Statement of Rima Sutton, Service Coordinator, National Multiple Sclerosis Society, Manchester, New Hampshire: "I know a man who went to city hall to vote . . . and was forced to vote outside in his wheelchair in the middle of the winter."³³⁵

Statement of Sandy Gorski, Portsmouth, New Hampshire:

[R]ecently, a couple of months ago, I went down to Portsmouth city hall and I was not able to register to vote . . . I had to sit on the lift and get registered. They could not let me in . . . It was cold that morning and I had to sit out on the lift to register for voting. And that was not to my satisfaction at all.³³⁶

Statement of Matthew Chao, Legislative Committee Chair for the Bay State Council for the Blind, Newton, Massachusetts:

This is an election year. As a responsible voter, I feel that it is important to fully understand the issues on both a state and Federal level before casting my vote. However, if you are blind or visually impaired, much of the information you need is inaccessible because most of it is in print.³³⁷

Statement of Senator Gore (D-TN):

One of the key rights of Americans is the right to exercise judgment to select the officers and officials who will make up our Government. That is the right to vote. Here again, the right of access to the ballot box is one of the cornerstones of our American system . . . As a practical matter, many Americans with disabilities find it impossible to vote. Obviously, such a situation is completely unacceptable and unconscionable. We must take strong action to end the tradition of blatant and subtle

334. Yolanda Suarez et al., *Common Concerns of Disabled Americans: Issues and Options*, 19(2) SOCIAL POLICY 29, 31 (1988), reprinted in *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Comm. on the Judiciary*, 101st Cong. 245 (1989).

335. *Joint Hearing*, supra note 327, at 1146.

336. *Id.* at 1167.

337. *Id.* at 1185.

discrimination that has made people with disability second-class citizens.³³⁸

These examples show difference and even discrimination³³⁹ in voting for people with disabilities. But they do not show a concrete pattern of vote denial, which is the only clear constitutional violation. Under a faithful reading of *Garrett*, this is what would be needed (and by state actors, which again this record does not show).

The third area of the ADA's legislative record relating to voting involves testimony regarding the disenfranchisement of individuals with mental disabilities:

Statement of James W. Ellis, President, American Association on Mental Retardation; Professor of Law, University of New Mexico: "Because of their disability, people with mental retardation have been denied the right to marry, the right to have children, the right to vote"³⁴⁰

Statement of Nancy Husted-Jensen, Chairman, Governor's Commission on the Handicapped, Providence, Rhode Island:

I spoke to one of the social workers who came to me and explained to me that in the group homes, the people who were running the group homes, the social workers and the supervisors, were deciding who they deemed competent to vote and who they deemed not competent. They were not telling all the people about this opportunity to be registered.³⁴¹

U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*: "Handicapped persons are frequently denied other rights and opportunities that nonhandicapped persons take for granted. These include the right to vote"³⁴²

This comes closer to describing an actual constitutional violation, but it is still susceptible to the *Garrett* criticism of being "unexamined, anecdotal

338. 135 CONG. REC. S10753 (daily ed. Sept. 7, 1989) (statement of Sen. Gore).

339. Discrimination in the sense of being afforded worse voting opportunities.

340. *The Americans with Disabilities Act of 1988: Hearing on H.R. 2273 Before the House Subcomm. on Civil and Constitutional Rights of the Judiciary Comm.*, 100th Cong. (1989) (statement of James W. Ellis, President, American Association on Mental Retardation), reprinted in LEGISLATIVE HISTORY OF PUB. L. NO. 101-336, at 2241 (1990).

341. *The Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the House Subcomm. on Select Educ. of Comm. on Education and Labor*, 100th Cong. (1989) (statement of Nancy Husted-Jensen, Chairperson, Governor's Comm'n on the Handicapped of R.I.), reprinted in LEGISLATIVE HISTORY OF PUB. L. NO. 101-336, at 1219 (1990).

342. U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 39-40 (1983) (citing articles and research relating to disenfranchisement of individuals with mental disabilities).

accounts of adverse, disparate treatment by state officials³⁴³ that are so general and brief that no firm conclusion as to unconstitutionality can be drawn.

Similarly, with the exception of state disenfranchisement of individuals with mental disabilities,³⁴⁴ there are no cases holding that states have excluded people with physical disabilities in violation of the Constitution. The challenges that have been brought in courts involve vote difference, not vote denial, claims. As discussed above, these cases include challenges to polling place accessibility, although there is no claim that plaintiffs could not vote absentee or curbside,³⁴⁵ and challenges to state practices of not affording people with visual and mobility impairments a secret and independent vote.³⁴⁶ Again, nothing in these cases suggests that these groups are being “completely” denied the right to vote, just the right to vote in a particular (albeit superior) way.

Many of the people responsible for election choices are local and county officers.³⁴⁷ Under *Garrett*, the actions of these county officers would not be considered probative in the abrogation analysis. Only state-level infringements of the rights of people with disabilities would be considered.

Finally, recent evidence, in the form of the GAO Report and similar studies discussed above suggests that the challenges people with disabilities face in the voting process are not vote denials, but vote differences. Taken together, this indicates that pre-*Hibbs* and *Lane*, the Court would have found the congressional record lacking in actual constitutional violations, calibrated to the requisite level of detail, to justify abrogation. Therefore, Title II as applied to voting would have been struck down. Even in the case of people with mental disabilities, Title II would likely have been struck down insofar as it related to a targeted exclusion of blanket disenfranchisement of people with disabilities. Although there is a record of state unconstitutional behavior, it is within the *Garrett* de minimus standard and post-dates the ADA.

Lane, however, compels a different conclusion as to the state of the congressional record and relevant caselaw. In *Lane*, the Court looked at inequities (in the ADA legislative record and court cases) existing when people with disabilities attempted to access courts. Situations like *Lane* itself, where the assistance offered (to be carried up the stairs) offends the dignity of individuals with disabilities, are probative. Instead of looking for

343. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001).

344. *See Doe v. Rowe*, 156 F. Supp. 2d 35, 49 (D. Me. 2001) (holding that state disenfranchisement of those under guardianship because of a mental illness is unconstitutional).

345. *See New York v. County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000).

346. *See Lightbourn v. Texas*, 118 F.3d 421 (5th Cir. 1997); *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999); *Am. Ass'n of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226 (M.D. Fla. 2004); *Am. Ass'n of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120 (C.D. Cal. 2004).

347. In *County of Schoharie*, for example, the plaintiffs were the state. 82 F. Supp. 2d at 21. The defendants were the county and county officers sued in their individual capacities. *Id.*

behavior that the Court will be *sure* is unconstitutional, the Court implicitly recognizes a constitutional zone of uncertainty.

Because access to courts involves a fundamental right, Congress is allowed a presumption that unequal access may be constitutionally troubling. This is a key distinction. As in *Lane*, where the Court gave weight to public officials substantially impairing the right to access courts (accessing a courthouse with dignity-impairing assistance) even though that might not be strictly speaking unconstitutional, the Court should give weight to public officials substantially impairing the right to vote (voting with dignity-impairing assistance). Much of the evidence in the legislative record (cases and congressional testimony) relates to actions of county and local officials. This is probative because both *Hibbs* and *Lane* considered such evidence.³⁴⁸

In *Lane*, unlike in *Garrett*, the Court considered the “statistical, legislative, and anecdotal evidence of the widespread exclusion of people with disabilities” regarding access to courthouses.³⁴⁹ The record of exclusion and disparate treatment of people with disabilities in voting fares well in comparison. The *Lane* Court first considered decisions of other courts that showed public actors substantially impairing the exercise of the right to access courts and courthouse services. The voting cases discussed above—*County of Schoharie*, *Nelson*, *Lightbourn*, *Hood*, and *Shelley*—all show, at a minimum, that public entities are impairing the right to vote for people with disabilities through inaccessible polling places and unequal voting methods. The fact that many of these cases postdate the ADA is no bar after *Lane*.³⁵⁰ Similarly, the GAO Report and related social science surveys showing public officials impairing the equal exercise of the right to vote³⁵¹ for people with disabilities serve a similar purpose, and should carry similar weight, as the *Lane* statistical findings that people with disabilities were impaired in their ability to access courthouses and courthouse services.³⁵²

The ADA should also be viewed as a legislative judgment that previous federal civil rights statutes did not ensure equality of access in voting. This method of analysis is sanctioned in *Hibbs*, where the Court viewed positively the fact that Congress’s first legislative attempt to remedy gender discrimination in the workplace (through Title VII) had failed to correct the problem of discrimination in family leave policies.³⁵³ In this regard, voting parallels family leave policies. For over twenty years, there have been two federal statutes on the books relating to equal treatment for people with disabilities in voting.³⁵⁴ Like the FMLA in *Hibbs*, the ADA should be viewed as a legislative acknowledgement that existing statutes were not successful

348. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730-31 (2003) (noting discrimination in the “public sector”); *Lane*, 124 S. Ct. at 1991 n.16.

349. *Lane*, 124 S. Ct. at 1992.

350. *Id.* at 1989-90 (discussing at least four cases that were decided after the ADA was enacted).

351. See *supra* notes 242-265 and accompanying text.

352. See *Lane*, 124 S. Ct. at 1990-91.

353. See *Hibbs*, 538 U.S. at 737.

354. See *supra* notes 270, 272.

in creating true equality of access in voting.³⁵⁵ And *Garrett* views state laws protecting people with disabilities as evidence that Congress could not demonstrate a pattern of constitutional violations.³⁵⁶ The converse should also be true. The Court has already noted the important shortcomings in state anti-disability law, which render them “inadequate to address the pervasive problems of discrimination that people with disabilities are facing.”³⁵⁷

Lane teaches that where fundamental rights are concerned, the Court will expand the scope of what evidence it will consider. In addition to unequal treatment in voting, courts will consider differential treatment in related fundamental rights to gauge the gravity of the harm Congress attempted to remedy. Again, the rationale for this, as stated in *Hibbs*, is that the risk of unconstitutional state behavior is increased because the stereotypical assumptions are similar in these related fundamental rights. The same record of other fundamental rights used in *Lane*—relating to discrimination in unjustified commitments, abuse and neglect in mental hospitals, zoning, marriage, and jury service—can be used to support the case for voting. Indeed, voting was used as a related fundamental right to support access to courts.³⁵⁸

In the post-*Lane* world, it should be clear that the record of unequal treatment in voting is commensurate with access to courthouses. The gravity of the harm is comparably serious, both in terms of the importance of the right and the unequal way in which states have afforded the exercise of the right. The heightened level of scrutiny associated with voting enlarges Congress’s acceptable zone of action.

The final step in the Court’s analysis is whether Title II, insofar as it relates to voting, “is an appropriate response to this history and pattern of

355. There is support for this in the ADA’s legislative history. See *Hearing on H.R. 2273, supra* note 329, at 2143 (statement of Nanette Bowling, Staff Liaison to the Mayor’s Advisory Council for Handicapped Individuals, Office of Mayor Bob Sargent, Kokomo, Indiana). In order to meet the requirements of the Voting Accessibility for the Elderly and Handicapped Act, some jurisdictions were merely encouraging people with disabilities to vote by absentee ballot, even though the Act requires that polling places be accessible. The Act

deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day to cast their ballot. Other jurisdictions create a public spectacle of the person with a disability by having a voting machine taken to the person’s vehicle for him or her to vote. These mechanisms are demeaning to the disabled person. These methods for accessibility create a loss of dignity and independence for the disabled voter.

Id.

356. See *Garrett*, 531 U.S. at 365 n.5.

It is worth noting that by the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures. At least one Member of Congress remarked that “this is probably one of the few times where the States are so far out in front of the Federal Government, it’s not funny.”

Id.

357. *Lane*, 124 S. Ct. at 1990 (quoting S. REP. NO. 101-116, at 18 (1990)); see also Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075 (2002).

358. See *supra* note 15.

unequal treatment.”³⁵⁹ We know from *Lane* that although the Court will consider a whole range of state-sponsored discrimination against people with disabilities for the purposes of the gravity of the harm, it will not take as broad of a focus when evaluating the appropriateness of Congress’s response.³⁶⁰ The Court will consider Title II only as applied to the right at issue—in this case, voting.

Here, *Lane*’s third point of departure from *Garrett* becomes relevant. The Court views the ADA’s reasonable accommodation requirement as a positive factor in evaluating congruence and proportionality.³⁶¹ The changes the ADA requires for voting are not unlimited; only reasonableness is required.³⁶² Much to the chagrin of disability rights advocates, public entities will not have to make changes that involve an undue financial or administrative burden, or effect a fundamental alteration in the nature of the service.³⁶³ The Department of Justice has issued its advice on the types of accommodations that public entities responsible for polling places need to make to be ADA compliant.³⁶⁴ These recommended accommodations are all well within the idea that entities responsible for polling places need only to take reasonable steps that do not bankrupt state and county coffers.

In sum, courts should be faithful to *Lane* when evaluating challenges to voting under Title II of the ADA. If they do so, they will hold that Title II is a “congruent and proportional” response to inequities for people with disabilities in the fundamental right to vote. Congress’s abrogation of the states’ sovereign immunity is valid in the class of cases dealing with voting under Title II of the ADA.

2. *Criticism of This View of Lane Applied to Voting*

There are two major criticisms of this view of *Lane* applied to voting. These criticisms come from both sides of the issue—the first comes from proponents of “new federalism,” and the second from disability rights advocates. Although both have merit, they are each ultimately unpersuasive.

359. *Lane*, 124 S. Ct. at 1992.

360. *Id.* at 1993 (“Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.”).

361. *Id.* at 1993-94.

362. *Id.* at 1993.

363. See Remarks of Jim Dickson, Symposium, *The End of the Beginning for Election Reform: Lawsuits and Legal Actions Relating to Election Reform*, 9 GEO. J. ON POVERTY L. & POL’Y 285, 340 (2002) [hereinafter Dickson’s Symposium Remarks] (“Another problem with the ADA in terms of voting is the undue burden defense. A community can say it’s going to cost too much to make the polling place accessible. It’s an undue burden.”).

364. See DOJ Letter of Finding No. 18 (Aug. 25, 1993), <http://www.usdoj.gov/crt/foia/lofc018.txt>; DOJ Letter of Finding No. 21 (Sept. 10, 1993), <http://www.usdoj.gov/crt/foia/lofc021.txt>; DOJ Letter of Finding No. 23 (Sept. 30, 1993), <http://www.usdoj.gov/crt/foia/lofc023.txt> (showing the DOJ’s position that curbside voting is compliant with Title II of the ADA); see also U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, DISABILITY RIGHTS SECTION, ADA CHECKLIST FOR POLLING PLACES (2004), available at <http://www.ada.gov/votingserm.pdf> (discussing solutions such as ramps and additional parking spaces for people with disabilities).

a. *First Criticism—This Interpretation of Lane Is Inconsistent with New Federalism*

The view of *Lane* presented herein is that in cases involving fundamental rights, there is a presumption of the validity of congressional action taken pursuant to Section 5 of the Fourteenth Amendment to protect fundamental rights under Section 1. Critics will contend that this is flatly inconsistent with *Boerne*, which also involved a fundamental right—the First Amendment right to practice religion. In *Boerne*, even though the right at issue received heightened scrutiny, the Court struck down RFRA as an unconstitutional use of Congress's Section 5 powers.³⁶⁵ The concern is that Congress can use its Section 5 powers to impose its own definition of due process or equal protection on the states.³⁶⁶

Although there may be truth to the idea that *Lane* really represents a bit of “buyer’s remorse” on the part of one Justice (O’Connor), the view of *Lane* endorsed herein can still be reconciled with *Boerne*. *Boerne* stands for the principle that when Congress explicitly overrules Supreme Court decisions, it has gone too far under Section 5, even where fundamental rights are concerned.³⁶⁷ As discussed above, a *Boerne* scenario defeats the *Lane* presumption of congressional Section 5 abrogation immunity. But where it is less clear that Congress is acting to overturn Supreme Court authority, *Lane* gives a presumption of constitutionality to Congress’s actions in cases involving fundamental rights.

To be sure, with both the FLMA (*Hibbs*) and the ADA (*Lane*), Congress may have been exercising an aggressive interpretation of what behavior might be unconstitutional. Such is their due.³⁶⁸ But this is a far cry from the scenario in *Boerne*, where Congress dramatically and squarely reversed a recent Supreme Court equal protection case.³⁶⁹ In this way, *Boerne* re-

365. See *City of Boerne v. Florida*, 521 U.S. 507, 533-35 (1997).

366. See Caminker, *supra* note 19, at 1167.

367. This is consistent with the statement in *Boerne*:

The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.

Boerne, 521 U.S. at 519.

368. See generally Caminker, *supra* note 19 (arguing that the Court’s Section 5 action should only have to meet the “rational relationship” test). Every new federalism case enshrines the idea that Congress is not limited to parroting Supreme Court cases. Congress can pass prophylactic legislation that deters conduct which the Court has not held unconstitutional. See *Boerne*, 521 U.S. at 520 (“Congress must have wide latitude in determining where [the line between measures that remedy or prevent unconstitutional actions and those that make a substantive change in the governing law] lies”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (“Congress’ power to enforce the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.”) (internal quotations omitted); *Garrett*, 531 U.S. at 365 (“Congress is not limited to mere legislative repetition of this Court’s constitutional jurisprudence.”); *Hibbs*, 538 U.S. at 727-28 (“Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”).

369. As discussed above, in *Boerne*, Congress passed RFRA in direct response to the Supreme

mains a useful and viable tool even after *Lane*'s modification of new federalism in cases involving fundamental rights, and one that still serves to validate the new federalism concern that Congress, not the Courts, is the ultimate arbiter of Fourteenth Amendment jurisprudence. Said differently, *Boerne* still protects Congress from making an end run around Supreme Court caselaw.³⁷⁰ This view of *Lane* will allow Congress to be a partner, but not the final arbiter, of constitutional principles relating to equal protection and due process.³⁷¹

b. *Second Criticism—This Interpretation of Lane Makes Title II Fundamental Rights Expensive and Time Consuming to Litigate and Dooms Non-Fundamental Rights*

This criticism by disability rights advocates has two parts. First, critics will contend that this interpretation of *Lane* still requires a case-by-case litigation of fundamental rights claims under the ADA. Secondly, it does nothing for cases not involving fundamental rights. The first criticism is overstated, and the second, although sadly true, is an inevitable fact of the constitutional times that we live in.

The disability rights community viewed *Lane* as a mixed blessing. Before the case was argued, there was a vigorous debate as to whether to argue the case to the Court in the "as applied" manner it was ultimately presented (inviting the Court to judge only the constitutionality of Title II as applied to cases involving access to courts), or to ask the Court to review Title II in its entirety.³⁷² When *Lane* was decided, the disability community was far from joyous, largely because it realized the time and expense involved in vindicating fundamental rights under Title II one-by-one.³⁷³ States would also have liked more clarity.³⁷⁴

Court's decision in *Employment Div. Dep't of Human Res. v. Smith*, 494 U.S. 872, 885 (1990). *Boerne*, 521 U.S. at 507.

370. This view of *Lane* therefore squares with Caminker's thesis that the Court should only be reviewing congressional Section 5 action for a rational relationship with legitimate ends—insofar as fundamental rights are concerned. See Caminker, *supra* note 19, at 1331.

371. This concept has been forcefully advocated by commentators. See Caminker, *supra* note 19, at 1172-73; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 519-21 (2000).

372. These two approaches were reflected in the *Lane* briefing. George Lane's brief primarily argued the "as applied" approach, and the Solicitor General's office mainly argued the "Title II as a whole" approach. See Panel Discussion, *supra* note 137, at 18.

I think that regardless of the wisdom involved in the choices, and regardless of whether one was right or one was wrong, . . . as a movement lawyer, it was a very sad day—sad day in May to have to have, rightly or wrongly—and I'm not saying it was wrong—but to have to pare down the argument to such an extent in order to address the very, very conservative and narrow view that the Court has about the rights of people with disabilities to equal protection under the law.

Id. (remarks of Arlene Mayerson).

373. See Marcia Coyle, *More Litigation Seen Over Court Access: Scope of Title II Still Unclear After 'Lane'*, 26 NAT'L L.J. 1 (May 24, 2004).

This as applied approach to the constitutionality of Title II was not the favored approach of disability advocates, except as a fallback position, said Arlene Mayerson "It leaves dis-

The view of *Lane* endorsed herein should create sufficiently predictable results to assuage at least some of these fears. The application of *Lane* to voting demonstrates that ADA Title II cases involving fundamental rights should be resolved in favor of congressional abrogation. It is beyond the scope of this Article to consider all of the other fundamental rights implicated under Title II of the ADA. In evaluating these rights, courts should follow this Article's view of *Lane*, and instead of looking for concrete evidence of state unconstitutionality, (1) look at instances of local and county officials treating individuals with disabilities unequally in the exercise of these fundamental rights; (2) look at unequal treatment in related fundamental rights; and (3) view Title II's reasonable accommodation provision as a positive factor in the congruence and proportionality analysis. If the legislative and case record for these rights shows unequal public administration in the access of these fundamental rights, and there are no Supreme Court cases holding that this unequal treatment is constitutional, the *Lane* presumption should ensure that Congress's Title II abrogation was valid insofar as these rights are concerned.³⁷⁵

Second, disability rights advocates will contend that this view of *Lane* offers little for rights covered by Title II that do not involve fundamental rights, such as zoning, licensing, and access to publicly-owned sporting venues.³⁷⁶ This is probably, although not necessarily, true.³⁷⁷ But until the composition of the Court changes or advocates and scholars convince the Court to completely abandon new federalism,³⁷⁸ this is the world we live in, and it behooves us to make the best of it.³⁷⁹

abled people uncertain of their rights and leaves advocates uncertain of the results of any particular case," she said. "It's extremely cumbersome and cost and court-time inefficient to litigate every single issue. In that sense, the decision is a setback."

Id.

374. *Id.* (noting that Tennessee's Attorney General "had hoped for a ruling that would resolve states' liability for damages under the ADA, across the board").

375. *Id.* (comments of Professor Ruth Colker) (opining that *Lane* is broad enough to cover jury service). The hope would be that at least one opinion, potentially in a voting case, would be clear enough that states eventually will not bother to challenge abrogation in future cases.

376. *Id.* (noting that areas like transportation and higher education might not be considered fundamental rights).

377. In at least one post-*Lane* case, the Eleventh Circuit held that as applied to public education, which the Court acknowledges is not a fundamental right, Title II of the ADA is valid Section 5 legislation. See *AADA v. Florida Int'l Univ.*, 2005 WL 768129, *4 (11th Cir. 2003). Cases involving various claims by prisoners have been less successful. See *Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005) (equal protection claims); *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004) (Eight Amendment claims).

378. For persuasive arguments to this end, see generally Caminker, *supra* note 19; Jackson, *supra* note 22; Chemerinsky, *supra* note 22; Noonan, *supra* note 22.

379. Coyle, *supra* note 373 (comments of Professor Peter Blanck) (noting that this outcome was "clearly better" than the alternative from the perspective of the disability rights community and that narrowing the ruling to court access was what it took to get Justice O'Connor's vote).

3. *Beyond the ADA—The Help America Vote Act and State Sovereignty*

The view of *Lane* discussed herein has implications for other civil rights laws besides the ADA. One would understand if in recent years, Congress had been reticent to pass civil rights laws with private damage remedies against states. Prior to *Hibbs*, Congress had lost every Section 5 battle before the Rehnquist Court.³⁸⁰ But *Lane* suggests that there is a new set of rules for cases dealing with fundamental rights. Congress should respond to this zone of freedom given to it by the Courts and reconsider including private damage remedies in its civil rights laws.

A prime example of this is the Help America Vote Act.³⁸¹ Although ADA Title II is still an important part of the legislative landscape related to voting and disability, it is no longer the only or even primary piece. The Help America Vote Act for the first time provides that people with disabilities *shall* receive a secret and independent ballot.³⁸² For this and other reasons, it has been called “the first true civil rights legislation of the 21st century.”³⁸³

Yet HAVA is not nearly as robust as the ADA insofar as remedies are concerned. HAVA does not provide for a private cause of action at all, let alone for damages.³⁸⁴ An aggrieved voter must file an administrative complaint or convince the Department of Justice to prosecute the case.³⁸⁵ It is this feature that isolates HAVA from the Eleventh Amendment strand of new federalism. Commentators are just starting to discuss HAVA’s anemic remedy structure.³⁸⁶ Surely one reason Congress did not provide a private cause of action against violating states was that it was concerned of running afoul of the Court’s new federalism principles.³⁸⁷

But after *Lane*, this merits reconsideration. Perhaps HAVA can and should be amended to include a private right of action for damages. The larger policy discussion that this entails will be left for another day. In terms of the federalism implications of doing so, however, the discussion herein is directly relevant. If a damages provision were added to HAVA, and if the Court were only to consider the provisions affecting voting and disability,

380. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 372 (2001) (Title I of the ADA); *United States v. Morrison*, 529 U.S. 598, 610 (2000) (the Violence Against Women Act); *Kimel*, 528 U.S. at 73 (ADEA); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999) (Patent Remedy Act); *Boerne*, 521 U.S. at 533 (RFRA).

381. 42 U.S.C. §§ 15301-545 (2004); see *supra* notes 277-82.

382. See 42 U.S.C. § 15481(a)(3)(A) (2004).

383. Letter from the Leadership Conference on Civil Rights to Dennis Hastert, the Speaker of the House (July 26, 2002), available at http://www.nlchp.org/content/pubs/CR_voting_letter.pdf.

384. But see *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (holding that the provisional ballot provision of HAVA is enforceable by a private right of action under § 1983).

385. See 42 U.S.C. §§ 15511, 15512 (2004).

386. See *Voting Rights*, *supra* note 241, at 382.

387. At least in one case, the courts have held that HAVA creates a private right of action pursuant to § 1983, though just for injunctive relief, not for damages. See *Sandusky County Democratic Party v. Blackwell*, 340 F. Supp. 2d 815, 816 (N.D. Ohio 2004); *aff’d*, 387 F.3d 565 (6th Cir. 2004).

would HAVA be a legitimate abrogation pursuant to Congress's Section 5 powers?

After *Lane*, courts would say yes. The ADA discussion above concerning the scope of the right and gravity of the harm would be similar, although HAVA's legislative record would need to be combed. *Hibbs* teaches that Congress would get the benefit of the ADA's legislative record, because in *Hibbs* the Court considered Title VII's legislative record as a positive factor in evaluating FMLA.³⁸⁸ On the negative side, it might be more difficult to convince the Court to consider violations of other fundamental rights of people with disabilities, because this statute is clearly limited to one issue area (voting), and the "appropriateness of the response" analysis would be different. Like the ADA, HAVA has no limiting principles,³⁸⁹ but it offers one important carrot that the ADA does not: money.³⁹⁰ Time will tell what difference, if any, this makes.

CONCLUSION

Even after *Lane*, new federalism is not perfect. For those (of us) that see this line of cases as unjustly giving power to the states at the expense of the federal government, even *Lane* is bittersweet. Piecemeal litigation over the propriety of Title II's abrogation, even with the *Lane* presumption, may still be expensive and cumbersome, at least at first. And cases that do not involve fundamental rights could get the same harsh treatment afforded in *Garrett*. It is this author's hope that other commentators are addressing these important issues.³⁹¹

Imperfect as it is, *Lane* is what we have. Working within the parameters of new federalism's "congruence and proportionality" standard, this Article has suggested that *Lane* dramatically alters the playing field for cases involving fundamental rights. The Court will not require a documented pattern of state constitutional violations in the precise right at issue. Rather, it will look for instances of state-sponsored (or local or county-sponsored) unequal treatment in the exercise of that fundamental right. The Court will look at differential treatment in related fundamental rights also targeted by Congress's statute. Even within new federalism's principles, the presumption in favor of Congress this creates is justified by the increased likelihood of the unconstitutionality of state difference and discrimination in the exercise of fundamental rights. More specifically to the ADA, *Lane* establishes that the Court views the ADA's reasonable accommodation requirement as

388. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729-30 (2003).

389. See Dickson's Symposium Remarks, *supra* note 363, at 340 ("We believe and the drafters of the Senate legislation [of the Help America Vote Act] concur that voting is a higher standard. You can't plead it costs too much.").

390. See *Voting Rights*, *supra* note 241, at 377-80 (discussing HAVA appropriation provisions).

391. Another intriguing, and as of yet unexplored, justification for *Lane*'s departure from earlier new federalism cases is that a critical mass of Justices may be leaning toward reconsidering *Cleburne*'s holding that discrimination against people with disabilities is only entitled to rational basis scrutiny.

a positive factor in evaluating congruence and proportionality. This view of *Lane* has implications for other fundamental rights claims under Title II and other civil rights statutes.

For cases involving voting challenges under Title II of the ADA, these changes make all the difference. In the near future, courts will face the issue of whether Title II validly abrogates states' sovereign immunity insofar as Title II relates to voting. Following *Lane*, courts should hold that this abrogation is valid. In so doing, they will help enable the ADA to serve its purpose of creating a world where people with disabilities live with dignity, respect, and equal rights.