Reversing a Trend: an As-applied Approach Weakens the Boerne Congruence and Proportionality Test

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Note

REVERSING A TREND:
AN AS-APPLIED APPROACH WEAKENS THE
BOERNE CONGRUENCE AND PROPORTIONALITY TEST

In *Tennessee v. Lane*, the United States Supreme Court considered whether Title II of the Americans with Disabilities Act of 1990 (ADA) properly abrogated state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment. The Court held that Congress properly abrogated sovereign immunity pursuant to the enforcement provisions of the Fourteenth Amendment when it enacted Title II of the ADA, as applied to cases implicating the fundamental right of access to the courts. The Court based its decision on the history of discrimination by the states documented by Congress. The *Lane* Court’s as-applied approach deviates substantially from the proper application of the congruence and proportionality test first enunciated by the Court in *City of Boerne v. Flores*. None of the Court’s post-Boerne cases supports an as-applied approach to reviewing legislation enacted pursuant to Congress’s powers under Section 5 of the Fourteenth Amendment. The *Lane* Court’s novel as-applied approach undermines the restrictions placed on Congress’s Section 5 authority by a vigorous application of the congruence and proportionality test. As a result of the decision in *Lane*, the protections afforded states through the Eleventh Amendment may be significantly weakened.

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2. 42 U.S.C. §§ 12131-12165 (2000). Congress intended Title II to prevent discrimination against the disabled in any public service, program, or activity provided by a public entity. *Id.* §§ 12131-12134.
4. *Lane*, 541 U.S. at 532-34.
5. *Id.*
6. 521 U.S. 507, 530 (1997). *Boerne* requires that any legislation passed pursuant to Section 5 of the Fourteenth Amendment be a congruent and proportional response to the identified harm. *Id.; see infra* notes 230-245 and accompanying text.
7. *See infra* notes 246-278 and accompanying text.
8. *See infra* notes 279-289 and accompanying text.
9. *See infra* notes 290-300 and accompanying text.
I. THE CASE

Both George Lane and Beverly Jones are paraplegics who rely on wheelchairs for mobility. In 1996, the first respondent, Lane, went to Tennessee's Polk County Courthouse to face two misdemeanor charges. The courtroom in which Lane needed to appear was on the second floor of a building that had no elevator. Lane was forced to crawl up two flights of stairs to get to the courtroom. At his subsequent appearance, Lane refused to crawl up the stairs, and he refused the offer of two court officers to carry him up the stairs. Consequently, state officers arrested and jailed Lane for failure to appear in court on criminal charges.

During subsequent court proceedings, Lane waited on the first floor of the courthouse while his attorney represented him in the second-floor courtroom. His attorney periodically left the courtroom to relay messages concerning his defense. Finally, at Lane's arraignment, his attorney filed a motion for a continuance to stay the proceedings until the courthouse facilities were modified to conform to the ADA's requirements regarding access for the disabled. The court denied Lane's motion and scheduled the matter for trial. In April of 1997, Lane filed an application for extraordinary appeal contesting the denial of the motion for a continuance, which the Tennessee Court of Criminal Appeals denied. In June of 1997, Lane filed another extraordinary appeal application with the Supreme Court of the State of Tennessee, which the court denied in September of 1997. Following the unsuccessful appeal, Tennessee Circuit Court Judge Carroll Ross issued an order in December of 1997 staying all criminal proceedings in the Polk County Courthouse pending the installation of an ADA compliant elevator. Upon completion of the

10. Lane, 541 U.S. at 513.
12. Lane, 541 U.S. at 513.
13. Id. at 513-14.
14. Id. at 514.
15. Id.
17. Id.
18. Id. at 7-8.
19. Id. at 8.
20. Id.
22. Brief of Petitioner at 8, Lane (No. 02-1667).
elevator installation in June of 1998, the state continued its prosecution of Lane for the two misdemeanor charges pending against him.  

The second respondent was Beverly Jones, a certified court reporter whose practice serves the Polk County Courthouse as well as other courthouses in Tennessee.  Jones alleged that she lost work due to the failure of many Tennessee courthouses to comply with the accessibility requirements of the ADA.  

Lane and Jones jointly brought suit against the State of Tennessee and several Tennessee counties on August 10, 1998 in the United States District Court for the Middle District of Tennessee. They alleged past and ongoing violations of Title II of the ADA and its implementing regulations. Lane and Jones sought monetary damages for humiliation and embarrassment as well as equitable relief. Tennessee moved to dismiss the suit on the grounds that the Eleventh Amendment protects states from private suits for monetary damages filed pursuant to Title II. The district court denied the motion without issuing an opinion, and Tennessee appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit allowed the United States to intervene to defend Title II's abrogation of the states' Eleventh Amendment immunity.  

On April 28, 2000, the Sixth Circuit issued an order holding the case in abeyance until the resolution of Board of Trustees of the University of Alabama v. Garrett by the United States Supreme Court. In Garrett, the Court considered whether the Eleventh Amendment prohibits suits filed directly against state governments for violations of Title I of the ADA, and held that such suits are prohibited. Based on the Supreme Court's holding in Garrett and on the Sixth Circuit's subsequent ruling in Popovich v. Cuyahoga County Court of Common Pleas, which found that the ADA's abrogation of sovereign immunity was valid for claims arising out of the Due Process Clause but not for

23. Petition for a Writ of Certiorari at App. 17, *Lane* (No. 02-1667).  
25. *Id.*  
27. *Lane*, 541 U.S. at 513.  
28. Brief of Petitioner at 9, *Lane* (No. 02-1667). Additionally, Jones sought damages for lost income. *Id.*  
29. *Lane*, 541 U.S. at 514.  
30. *Id.*  
31. *Id.*  
33. *Lane*, 541 U.S. at 514.  
34. *Garrett*, 531 U.S. at 360.  
35. 276 F.3d 808 (6th Cir. 2002).
claims arising out of the Equal Protection Clause, a panel of the Sixth Circuit affirmed the district court's denial of Tennessee's motion to dismiss. The Sixth Circuit held that because the allegations made by Lane and Jones implicated the Due Process Clause, their claims could proceed.

The Sixth Circuit concluded that the Due Process Clause protects the right of access to the courts. Furthermore, the court stated that Congress determined that physical barriers in government courthouses had denied disabled people the opportunity "to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause" prior to the enactment of Title II of the ADA. Consequently, the panel concluded that Congress validly enacted Title II to protect disabled individuals' constitutional rights of access to courts. Nevertheless, due to the fact that Tennessee contested whether the allegations made by Lane and Jones amounted to due process violations, the Sixth Circuit remanded the case for further proceedings. The State appealed, and the Supreme Court granted certiorari to decide whether Title II of the ADA exceeded Congress's authority under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity.

II. LEGAL BACKGROUND

In 1990, Congress passed the ADA, which abrogated state sovereign immunity in an attempt to eliminate what Congress perceived as societal discrimination against the disabled. Although states maintained sovereign immunity prior to the ratification of the Constitution, the principles of state sovereign immunity only became actual constitutional doctrine with the ratification of the Eleventh Amend-

36. Id. at 811.
37. Lane, 541 U.S. at 515.
38. Id. Tennessee filed a petition for rehearing claiming that Popovich should not control because the initial complaint filed by Lane and Jones did not allege any due process violations. Id. The Sixth Circuit issued an amended opinion affirming the district court's denial of Tennessee's motion to dismiss and remanded the case for further proceedings. Id.
39. Id.
40. Id.
41. Id.
42. Id.
43. Id. at 513, 515.
44. 42 U.S.C. § 12101(b)(1), (b)(4); see infra notes 51-60 and accompanying text.
ment.\textsuperscript{46} It is now firmly established that the state sovereign immunity embodied in the Eleventh Amendment may be abrogated only through congressional legislation enacted to enforce the protections of the Fourteenth Amendment.\textsuperscript{47} Subsequent to the enactment of the ADA, the Court created the congruence and proportionality test in \textit{Boerne}, in order to determine whether congressional legislation enacted pursuant to the Fourteenth Amendment remedied and deterred actual constitutional violations committed by the states or impermissibly created new obligations for the states by redefining the substance of the Fourteenth Amendment.\textsuperscript{48} The Court's recent application of the congruence and proportionality test has narrowed Congress's ability to enact valid legislation under Section 5 of the Fourteenth Amendment.\textsuperscript{49} The judicial preference for reviewing legislation as applied to the facts of any one particular case has recently been applied to the congruence and proportionality test.\textsuperscript{50}

\textbf{A. The Americans with Disabilities Act of 1990}

In 1990, Congress passed the ADA to eliminate discrimination against individuals with disabilities.\textsuperscript{51} The ADA prevents discrimination against the disabled in three areas of public life. Title I prohibits discrimination in the workplace,\textsuperscript{52} while Title II forbids discrimination against the disabled in the operation of public services, programs, and activities.\textsuperscript{53} In addition, Title III prevents discrimination in public accommodations.\textsuperscript{54} Congress passed the ADA after finding that individuals with disabilities had been subjected to decades of discrimination based on intrinsic characteristics beyond their control.\textsuperscript{55} Specifically, Congress intended the ADA to create a "clear and comprehensive national mandate" to eliminate discrimination against the disabled.\textsuperscript{56}

\textsuperscript{46} See id. at 727-30 (discussing the Court's interpretation of the Eleventh Amendment); \textit{infra} notes 61-84 and accompanying text.

\textsuperscript{47} See Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976) (noting Congress's authority to invade the states' Eleventh Amendment protections through valid legislation passed pursuant to Section 5 of the Fourteenth Amendment); \textit{infra} notes 85-92 and accompanying text.

\textsuperscript{48} City of Boerne v. Flores, 521 U.S. 507, 530-32 (1997); \textit{see infra} notes 98-111 and accompanying text.

\textsuperscript{49} See \textit{infra} notes 112-152 and accompanying text.

\textsuperscript{50} See \textit{infra} notes 153-166 and accompanying text.

\textsuperscript{51} 42 U.S.C. § 12101(b)(1).

\textsuperscript{52} \textit{Id.} §§ 12111-12117. The Court struck down Title I's provision abrogating state sovereign immunity in \textit{Board of Trustees of the University of Alabama v. Garrett}, 531 U.S. 356, 360 (2001).

\textsuperscript{53} 42 U.S.C. §§ 12131-12165.

\textsuperscript{54} \textit{Id.} §§ 12181-12189.

\textsuperscript{55} \textit{Id.} § 12101(a)(7).

\textsuperscript{56} \textit{Id.} § 12101(b)(1).
Title II of the ADA 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." A "public entity" includes state and local governments as well as all instrumentalities of any state or local government. Through the express terms of the ADA, moreover, Congress indicated its intention to abrogate state sovereign immunity. Consequently, the ADA requires states to make reasonable modifications to the services they provide in order to accommodate individuals with disabilities, and it subjects to liability those states that fail to take such action.

B. State Sovereign Immunity

The Eleventh Amendment of the United States Constitution states 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." The Court's longstanding interpretation of the Eleventh Amendment prohibits a state's own citizens, or citizens of another state or foreign country, from filing suit in federal court against a state government.

In 1996, the Court reaffirmed this principle by holding that Congress lacked the authority under Article I of the United States Constitution to abrogate a state's sovereign immunity from suits commenced or prosecuted in federal courts. The Court issued this

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57. Id. § 12132. The statute defines a "qualified individual" as:

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

58. Id. § 12131(2).

59. Id. § 12131(1).

60. Id. § 12131.

61. U.S. CONST. amend. XI.

62. See Alden v. Maine, 527 U.S. 706, 727-30 (1999) (noting that since the Court's decision in Hans v. Louisiana, 134 U.S. 1, 21 (1890), the Eleventh Amendment has afforded the states sovereign immunity from private suits for monetary damages).

63. U.S. CONST. art. I. Article I sets forth the powers held by the legislative branch of the federal government. Id.

holding in *Seminole Tribe of Florida v. Florida*, a case filed by an Indian tribe against the State of Florida for alleged violations of the Indian Gaming Regulatory Act (the Gaming Act). Congress passed the Gaming Act pursuant to the Indian Commerce Clause to provide a legal basis for the operation and regulation of gaming by Indian Tribes. According to the Court, the Gaming Act passed the threshold requirement that Congress unequivocally state its intent to abrogate state sovereign immunity. However, the Court affirmed the court of appeals's holding that the case should be dismissed, and noted the longstanding principle that the Eleventh Amendment restricts the Article III jurisdiction of the judiciary by preventing private suits against state governments for monetary damages. The Court thus held that Congress did not have power under Article I to abrogate the prohibition placed on the federal courts by the Eleventh Amendment. In coming to this conclusion, the Court pointed out that Congress has no authority to expand the Article III jurisdiction of the judiciary past the boundaries set by the Constitution. Because the Eleventh Amendment set a constitutional limit on Article III jurisdiction, the Court determined that Congress could not legislatively expand that jurisdiction beyond those restrictions using Article I powers alone.

Moreover, in *Alden v. Maine*, the Supreme Court recognized that sovereign immunity prohibits the federal government from authoriz-
ing suits against state governments filed in a state court where the state has not consented to such suit.\textsuperscript{74} In \textit{Alden}, the Court dismissed a suit filed by state probation officers against the State of Maine that alleged violations of the Fair Labor Standards Act.\textsuperscript{75} The Court stated that giving Congress unlimited authority to abrogate state sovereign immunity would pose a severe danger to the state’s fiscal resources.\textsuperscript{76} In addition, the Court concluded that allowing the federal government to authorize suits against a state government places a strain on the state’s ability to govern according to the will of its people.\textsuperscript{77} The Court reasoned that if the states are to maintain their representative function, then the difficult decisions involving the distribution of limited fiscal resources must be made through the legislative branch established by each state, and not through federal intervention exploited by the citizenry.\textsuperscript{78}

The sovereign immunity embodied in the Eleventh Amendment is not simply an immunity from liability, but rather jurisdictional immunity from suit altogether. In 1993, the Court reaffirmed that the purpose of the Eleventh Amendment is “to prevent the indignity of submitting a State to the coercive process of judicial tribunals at the [insistence] of private parties.”\textsuperscript{79} In \textit{Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy}, a government instrumentality faced a suit by a private business for breach of contract and damage to its business reputation.\textsuperscript{80} The district court denied the state agency's claim of sovereign immunity, and the Court of Appeals for the First Circuit reversed, dismissing the subsequent appeal for lack of jurisdiction.\textsuperscript{81} The Supreme Court determined that a state entity may immediately appeal the denial of a motion for Eleventh Amendment immunity under the collateral order doctrine.\textsuperscript{82} The Court reasoned that the

\begin{itemize}
  \item \textsuperscript{74} 527 U.S. 706, 712 (1999).
  \item \textsuperscript{75} \textit{Id.} at 711-12. Initially, the petitioners filed the claim in federal court; however, once the Supreme Court rendered its decision in \textit{Seminole Tribe}, the district court dismissed the action on Eleventh Amendment grounds. \textit{Id.} at 712. Thereafter, the petitioners filed their claims in state court. \textit{Id.}
  \item \textsuperscript{76} \textit{Id.} at 749-50.
  \item \textsuperscript{77} \textit{Id.} at 750-51.
  \item \textsuperscript{78} \textit{Id.}
  \item \textsuperscript{79} \textit{P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy}, Inc., 506 U.S. 139, 146 (1993) (quoting \textit{In re Ayers}, 123 U.S. 443, 505 (1887)).
  \item \textsuperscript{80} \textit{Id.} at 141.
  \item \textsuperscript{81} \textit{Id.} at 142. The First Circuit determined that binding precedent prohibited states and their agencies from immediately appealing a claim for Eleventh Amendment immunity. \textit{Id.}
  \item \textsuperscript{82} \textit{Id.} at 147. The collateral order doctrine allows a party to immediately appeal a ruling that is not complete or final when an important right is at stake that is collateral to, and independent from, the cause of action. \textit{Id.} at 142-43.
\end{itemize}
Eleventh Amendment is intended to protect the states from suit altogether, not simply liability for damages. Furthermore, the Court concluded that much of the value of state sovereign immunity itself is lost if a suit proceeds far past the initial stages of litigation.

C. Congressional Abrogation of State Sovereign Immunity

Though the Supreme Court continues to recognize the importance of sovereign immunity, the Court has allowed Congress to abrogate sovereign immunity in discrete instances in order to remedy and deter actual violations of Fourteenth Amendment rights by the states. Congress maintains the authority to protect the substantive guarantees of the Fourteenth Amendment from state interference through Section 5 of the Fourteenth Amendment—the enforcement provision—which states that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” In Fitzpatrick v. Bitzer, the Court found in the enforcement provision a shift in the relationship between the federal and state governments: the Fourteenth Amendment expanded the authority of the federal government at the expense of state autonomy. Because of this shift, the Fitzpatrick Court reasoned that the federal government could invade the sovereignty guaranteed to the states by the Eleventh Amendment through “appropriate legislation,” in order to protect the substantive guarantees of the Fourteenth Amendment from state interference. Specifically, the Fitzpatrick Court held that Congress had the authority to allow private suits for monetary damages against states or state officials in order to enforce the provisions of the Fourteenth Amendment.

In Fitzpatrick, male employees of the State of Connecticut brought suit against the state government for alleged violations of Title VII of the Civil Rights Act of 1964. The Court concluded that Title VII was a valid exercise of Congress’s Section 5 enforcement power. The Court noted that no previous cases had dealt with the question of the relationship between the Eleventh Amendment and Congress’s Section 5 enforcement power, but concluded that state sovereign immu-

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83. Id. at 144.
84. Id.
85. U.S. Const. amend. XIV, § 5.
87. Id.
88. Id. at 456.
89. Id. at 448. The plaintiffs alleged that certain portions of Connecticut’s retirement plan discriminated against them because of their gender, in violation of Title VII. Id.
90. Id. at 456-57.
nity as embodied in the Eleventh Amendment is “necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.” Congress could then abrogate state sovereign immunity by legislation under Section 5 whenever necessary to enforce the obligations placed on the states through the Fourteenth Amendment.

D. Narrowing the Scope of Congress’s Power: Congruence and Proportionality

Since Fitzpatrick, the Supreme Court has limited Congress’s ability to abrogate sovereign immunity under Section 5 of the Fourteenth Amendment. In Boerne, the Supreme Court struck down the Religious Freedom Restoration Act of 1993 (RFRA) because it exceeded Congress’s Section 5 enforcement powers. Boerne involved a challenge to the denial of a church building permit by local zoning authorities under RFRA. In passing RFRA, Congress prohibited state governments from enforcing ostensibly neutral laws if such enforcement resulted in a substantial burden on religious exercise unless that burden furthered a compelling government interest and the law was the least restrictive means of achieving that interest.

The Boerne Court acknowledged Congress’s prophylactic power under the Fourteenth Amendment to prohibit constitutional conduct by the states if Congress determined that the prohibition was necessary to deter or remedy actual Fourteenth Amendment violations by the states. The Court, however, went on to hold that congressional power to enact prophylactic legislation under Section 5 of the Four-

91. Id. at 456.
92. Id.
94. Boerne, 521 U.S. at 536.
95. Id. at 511.
97. Boerne, 521 U.S. at 518. As an example, the Boerne Court pointed to a series of literacy tests that many states required their citizens to take in order to vote, and which Congress prohibited through legislation passed pursuant to the Fourteenth and Fifteenth Amendments. Id. According to the Boerne Court, the literacy tests were not unconstitutional standing alone, but Congress could prohibit them because doing so was necessary to remedy and deter the constitutional violations documented by Congress. Id.
98. Id. at 518-19. As set forth by the Court, valid prophylactic legislation seeks to remedy past violations of the Fourteenth Amendment by the states and to prevent future ones. Id. at 519. The remedial nature of legislation ceases when Congress attempts to change the substantive protections of the Fourteenth Amendment. Id.
The Fourteenth Amendment is limited. The Court recognized that the Constitution creates a defined and limited federal government and consequently the judiciary must ensure that legislative acts are within the limited powers granted by the Constitution. The Court noted that the history and judicial interpretation of the Fourteenth Amendment shows that, even with its remedial powers, Congress does not have the authority to create through legislation new substantive constitutional rights. The Court, therefore, articulated a test in Boerne to determine whether congressional legislation enacted pursuant to the Fourteenth Amendment only protects recognized rights, rather than creating new ones. In order to pass the Boerne test, legislation enacted pursuant to Section 5 of the Fourteenth Amendment needs to exhibit a congruence and proportionality between the injury to be remedied or prevented and the means chosen to achieve that end.

Under the congruence and proportionality test, a court must examine congressional legislation to first determine what constitutional violations Congress intended to remedy. Next, a court must decide whether the means Congress chose to remedy the identified constitutional violations are congruent and proportional to the unconstitutional conduct.

The Court applied the congruence and proportionality test in Boerne and determined that RFRA was "so out of proportion" to the constitutional wrong that it purported to remedy that it was clearly an attempt to change the substantive law. Prior to the passage of RFRA, the Court had interpreted the Free Exercise Clause to allow generally applicable laws that are facially neutral toward religion to stand even if those laws indirectly infringed on the free exercise of religion. Under RFRA, those same laws could stand only if the government showed a compelling government interest and that those laws were the least restrictive means of achieving the government's interest. Such a drastic change demonstrated "a lack of proportionality or congruence between the means adopted and the legitimate

99. Id.
100. Id. at 516 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)).
101. Id. at 520-24 (describing how the Fourteenth Amendment in its original form was defeated out of fear that it would end up delegating full authority to Congress to create new rights).
102. Id. at 519-20.
103. Id.
104. Id. at 518.
105. Id.
106. Id. at 532.
107. Id. at 534.
108. Id. at 533-34.
While the Court noted that prophylactic legislation was appropriate under certain circumstances, it found that Congress did not point to any record of constitutional violations that justified a measure as sweeping and stringent as RFRA. It also emphasized the dissimilarities between RFRA and previous valid exercises of Congress’s Section 5 authority, which were more focused on actual constitutional violations and more limited in duration and scope.

E. Applying the Congruence and Proportionality Test

The Court has continued to apply the test articulated in Boerne to narrow Congress’s Section 5 authority. In Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, a case filed against an agency of the Florida government for patent infringement, the Court examined whether the Patent and Plant Variety Protection Remedy Clarification Act (the Patent Remedy Act), which amended federal patent laws, created a private right of action for monetary damages against the state government. College Savings Bank sued Florida Prepaid alleging that Florida Prepaid violated its patent on College Savings Bank’s financing methodology, which guaranteed its customers sufficient funds to finance a college education. The Court first determined that in the Patent Remedy Act Congress clearly expressed its intention to abrogate the sovereign immunity of the states. The Court then applied the Boerne test to determine whether Congress acted within its authority under the Fourteenth Amendment to abrogate state sovereign immunity.

According to the Court, the conduct that Congress attempted to prohibit was unconstitutional patent infringement on the part of the states, where the states claimed sovereign immunity and offered no compensation to the patent owners for their infringement. However, the Court determined that Congress failed to identify a pattern

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109. Id. at 533.
110. Id. at 530-33.
111. Id.
115. Id. at 631.
116. Id. at 635. The Patent Remedy Act stated, “Any State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for infringement of a patent under section 271, or for any other violation under this title.” 35 U.S.C. § 296(a).
118. Id. at 640.
of unconstitutional state patent infringement and had collected little evidence of such activity.\textsuperscript{119} Moreover, the Court found that Congress's response to the alleged constitutional violations swept too broadly. Congress did not confine the Patent Remedy Act to cover specific patent infringements that were most likely associated with constitutional violations, but had rather attempted "to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime."\textsuperscript{120} Consequently, the Court held that the Patent Remedy Act was not a valid exercise of power under Section 5 of the Fourteenth Amendment and thus did not authorize suits against state governments.\textsuperscript{121}

The Court returned to the Boerne analysis in its decision in Kimel v. Florida Board of Regents.\textsuperscript{122} Kimel arose from various consolidated age discrimination claims against universities in Florida and Alabama, as well as a correctional facility in Florida.\textsuperscript{123} The Court examined whether Congress validly abrogated state sovereign immunity when it passed the Age Discrimination in Employment Act of 1967 (ADEA).\textsuperscript{124} Based on the 1974 amendments to the ADEA, the Court determined that Congress unequivocally intended the ADEA, as amended, to allow for suits against state employers.\textsuperscript{125}

In analyzing the ADEA under Boerne, the Kimel Court determined that the burdens the ADEA imposed on state and local governments were disproportionate to any possible state unconstitutional behavior targeted by the Act.\textsuperscript{126} The Court noted that the Equal Protection Clause allows states and local governments to discriminate based on age when making employment decisions where such discrimination is rationally related to a legitimate government interest.\textsuperscript{127} The ADEA prevented all discrimination based on an individual's age when mak-

\textsuperscript{119} Id.
\textsuperscript{120} Id. at 647-48. For instance, the Court noted that Congress could have restricted the Patent Remedy Act to instances where a state refused to offer any remedy for patent infringement, and thus deprived its citizen-patentees of property without due process of law. Id. According to the Court, Congress could have additionally limited the remedy to non-negligent patent infringements or infringements committed pursuant to state policy. Id.
\textsuperscript{121} Id.
\textsuperscript{122} 528 U.S. 62 (2000).
\textsuperscript{123} Id. at 69-71.
\textsuperscript{125} Kimel, 528 U.S. at 75-76. Specifically, § 216(b) of the ADEA authorizes employee suits against states "in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b).
\textsuperscript{126} Kimel, 528 U.S. at 83.
\textsuperscript{127} Id.
ing employment decisions. Consequently, the Court concluded that the requirements of the ADEA were analogous to the requirements of equal protection cases applying heightened scrutiny. The Court examined the history of the ADEA to see if Congress documented a pattern of irrational age discrimination by the states that would likely fail constitutional scrutiny under the Court’s Fourteenth Amendment equal protection analysis. In its analysis of the legislative history, the Court found that Congress failed to pinpoint any pattern of unconstitutional discrimination by the states that would support the broad prophylactic prohibition against age discrimination in the ADEA. As a result, the Court held that the ADEA exceeded the scope of Congress’s power under Section 5 of the Fourteenth Amendment.

In Board of Trustees of the University of Alabama v. Garrett, the Court applied the Boerne test to determine whether congressional abrogation of sovereign immunity in Title I of the ADA was a valid use of Congress’s Section 5 power. Garrett involved state employees who filed claims for monetary damages against entities of the state government and alleged that the state discriminated against them in their employment due to their disabilities, in violation of Title I of the ADA. In applying the Boerne analysis, the Court noted that under the Equal Protection Clause, discrimination by the states against the disabled is subject to rational basis scrutiny. This fact required Congress to document a pattern of irrational discrimination by the states that would likely violate the constitution before legislation passed pursuant to the enforcement provisions of the Fourteenth Amendment would be warranted. The Court found that the legislative record compiled by Congress failed to document a widespread pattern of unconsti-

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128. Id. This rule is subject to narrow exceptions, but the standards to satisfy the exceptions are more stringent than the rational basis test. Id. at 86-88.
129. Id. at 87-88.
130. Id. at 88.
131. Id. at 88-91.
132. Id. at 86.
134. Id. at 360, 362-63. Title I of the ADA prohibits employers, including state governments, from discriminating against the disabled in employment related decisions. 42 U.S.C. § 12112.
136. Id. at 368. The Court noted that Title I of the ADA marked a substantial expansion of rights for individuals with disabilities beyond that found in the Constitution itself. Id. at 372. The ADA’s requirement that reasonable accommodations need to be taken for the disabled was pinpointed as evidence of this expansion of rights. Id.
stitutional employment discrimination by the states. Additionally, the majority stated that even if congressional documentation was enough to conclude that states were engaged in a widespread pattern of constitutional violations, the remedy that Congress chose failed the congruence and proportionality test. According to the Court, the ADA places a duty on employers that far exceeds what the Constitution requires under the Equal Protection Clause. Therefore, upholding Title I as valid Section 5 enforcement legislation would allow Congress to rewrite the Fourteenth Amendment. Accordingly, the Court held that Congress had not validly abrogated the states' sovereign immunity, and suits against state governments to recover monetary damages for violations of Title I of the ADA were barred.

In Nevada Department of Human Resources v. Hibbs, the Supreme Court examined whether former employees of the Nevada Department of Human Resources could recover monetary damages against the state for alleged violations of the Family and Medical Leave Act (FMLA). The FMLA allows certain employees to take up to twelve weeks of unpaid leave for a number of reasons, including illness of a spouse, child, or parent. The Court concluded that the FMLA was appropriate Section 5 legislation that enforced the constitutional right against sex discrimination. The Court found that Congress intended the FMLA to protect individuals from gender-based discrimination in the workplace. In examining the FMLA, the Court found that classifications based on gender must undergo heightened scrutiny by the courts. According to the Court, this heightened scrutiny made it more likely that incidents of discrimination documented by Congress amounted to constitutional violations that required remedial action.

The Court found that the legislative record behind the FMLA documented an extensive history of sex discrimination by the states in 137. Id. at 368. After excluding instances of discrimination committed by local governments, which are not protected by sovereign immunity, the congressional record only reflected six instances of state discrimination. Id. at 369.
138. Id. at 372.
139. Id.
140. Id. at 374.
141. Id.
144. 29 U.S.C. § 2612(a)(1).
145. Hibbs, 538 U.S. at 735.
146. Id. at 728.
147. Id. at 728-29.
148. Id. at 736.
the administration of leave benefits. The majority determined that the adopted means by Congress satisfied the congruence and proportionality requirement set forth in Boerne. Congress had narrowly targeted the FMLA to address the relationship between work and family, which is precisely the area where Congress documented a significant amount of discrimination on the part of the states. Accordingly, the Court held that Congress validly abrogated the states' sovereign immunity, creating a private right of action for monetary damages in federal court against state governments allegedly violating the FMLA.

F. The Judicial Preference for Reviewing Legislation As Applied

In 1960, the Supreme Court, in United States v. Raines, reviewed a facial challenge to the constitutionality of the Civil Rights Act of 1957 (the 1957 Act). Congress passed the 1957 Act to enforce the Fifteenth Amendment's voting rights protections. In Raines, the United States government sought an injunction against officials of the State of Georgia who allegedly took actions preventing African Americans from registering to vote, in violation of the 1957 Act. The district court struck down the 1957 Act as unconstitutional because it allowed the federal government to enjoin purely private conduct, in violation of the Fifteenth Amendment. The Supreme Court reversed and upheld the 1957 Act, noting that the federal government brought the case directly against state officials, which the Fifteenth Amendment allows, and did not file an action against private citizens. Thus, the Court upheld the 1957 Act as applied to the facts of Raines and refused to perform a broader substantive review of the 1957 Act.

149. Id. at 735. The Court pointed to instances where courts allowed states to discriminate based on gender in employment decisions. Id. at 729.

150. Id. at 737.

151. Id. at 738. Congress documented instances where women received substantially more leave benefits than men, and the FMLA allowed for twelve weeks of unpaid leave for all employees who had been with the employer for more than a year and exempted those individuals in high-ranking or sensitive positions. Id. at 731, 739.

152. Id. at 725.


156. Id. at 19.

157. Id. at 20.

158. Id. at 26.

159. Id.
While not citing Raines directly, the United States Court of Appeals for the Sixth Circuit used an as-applied approach in 2002 when it addressed the constitutionality of Title II of the ADA.\textsuperscript{160} In Popovich v. Cuyahoga County Court of Common Pleas, the Sixth Circuit examined whether the abrogation of sovereign immunity in Title II of the ADA was constitutional.\textsuperscript{161} In Popovich, a hearing-impaired parent brought both an equal protection and due process claim under Title II against a state court for failing to provide him sufficient hearing assistance in his child custody case.\textsuperscript{162}

The Sixth Circuit, sitting en banc, relied on Garrett and determined that Title II of the ADA did not properly abrogate the states' Eleventh Amendment immunity based on equal protection principles, because Title II redefined the rights of the disabled under the Equal Protection Clause.\textsuperscript{163} The court, however, went on to hold that the Eleventh Amendment does not bar private suits for monetary damages against the states based on violations of Title II of the ADA when the basis of such suits implicate principles embodied in the Due Process Clause of the Fourteenth Amendment.\textsuperscript{164} In particular, the court determined that Title II was appropriate Section 5 legislation as applied to the significant due process rights of a hearing-impaired parent at a child custody proceeding, and thus abrogation of sovereign immunity was appropriate.\textsuperscript{165} Consequently, the court allowed the plaintiff's suit to continue.\textsuperscript{166}

\section*{III. The Court's Reasoning}

In Tennessee v. Lane, the United States Supreme Court held that Title II of the ADA, as applied to cases in which the fundamental right of access to courts is implicated, constitutes a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity.\textsuperscript{167} Writing for the Court, Justice

\begin{itemize}
\item \textsuperscript{160} Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808, 811 (6th Cir. 2002).
\item \textsuperscript{161} \textit{Id.} at 811.
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Id.} at 812.
\item \textsuperscript{164} \textit{Id.} at 815.
\item \textsuperscript{165} \textit{Id.} at 815-16.
\item \textsuperscript{166} \textit{Id.} at 816.
\item \textsuperscript{167} 541 U.S. 509, 533-34 (2004).
\end{itemize}
Stevens' quickly concluded that Congress expressly intended to abrogate state sovereign immunity in Title II of the ADA.

The Court detailed the deliberations that Congress completed prior to enacting Title II. Then the Court examined the constitutional rights Congress attempted to protect by enacting Title II. According to the Court, Title II sought to enforce the equal protection guarantees of the Fourteenth Amendment in the same manner as Title I. However, the Lane Court distinguished Title II from Title I by pointing out that Title II sought to enforce five additional constitutional rights that receive a more stringent review by the courts, some of which implicate the Due Process Clause of the Fourteenth Amendment. According to the Court, the legislative history of the ADA indicated that Congress enacted Title II in direct response to the unequal treatment that the disabled systematically received in the administration of state services and programs affecting the fundamental rights of every citizen. The Court detailed the findings that Congress made before passing the ADA and specifically noted that a report before Congress documented that a substantial number of public

168. Id. at 513. Justices O'Connor, Souter, Ginsberg, and Breyer joined in Justice Stevens's opinion. Id.
169. Id. at 518. The statute states, "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.
170. Lane, 541 U.S. at 516-17.
171. Id. at 522-23.
172. Id. The Court, striking down Title I of the ADA as unconstitutional in Garrett, noted that classifications based on disability violate the Fourteenth Amendment if "they lack a rational relationship to a legitimate governmental purpose." Id. at 521-22.
173. Id. at 523. First, the Court identified the right of access to the courts protected by the Due Process Clause of the Fourteenth Amendment. Id. Second, it recognized the right of criminal defendants to be present at all stages of a criminal trial where absence would frustrate the fairness of the proceedings—a right protected by both the Due Process Clause and the Confrontation Clause of the Sixth Amendment. Id. Third, the Court noted the Due Process Clause requirement that states remove obstacles to the full participation by certain civil litigants in judicial proceedings. Id. Fourth, the Court stated that the Sixth Amendment guarantees a jury representing a fair cross section of the community to criminal defendants. Id. Finally, the Court noted that the First Amendment secures a right for the public to have access to criminal proceedings. Id.
174. Id. at 524. To support this contention, the Court identified state laws targeting the disabled for discrimination, including laws disqualifying "idiots" from voting, and laws preventing persons with disabilities from marrying or serving on juries. Id. The Court then highlighted Supreme Court cases that reflected state animus towards the disabled in such instances as unjustified commitment, state mental hospitals abusing and neglecting patients, and irrational discrimination in zoning decisions. Id. at 524-25. As further evidence of state discrimination against the disabled, the Court listed certain decisions of lower courts that documented discrimination in public services, programs, and activities administered by the states. Id. at 525 nn.11-14.
services and programs housed in state buildings were inaccessible to the disabled.\textsuperscript{175}

According to the Court, the record before Congress when it enacted Title II far exceeded the congressional record of gender discrimination compiled prior to the enactment of the Family and Medical Leave Act, which the Court upheld in \textit{Hibbs}.\textsuperscript{176} The majority noted that the decision in \textit{Hibbs} hinged on the fact that gender discrimination is subject to a heightened level of scrutiny, which makes it more likely that any documentation gathered by Congress would show a pattern of state constitutional violations.\textsuperscript{177} Because many of the rights protected by Title II demand a similar or higher level of scrutiny than gender discrimination, the Court determined that the congressional record relied upon by Congress was more than enough to justify prophylactic measures.\textsuperscript{178}

Lastly, the Court examined whether Title II was a valid congressional response to the well-documented history and pattern of unequal treatment against the disabled.\textsuperscript{179} The Court stated that Congress attempted to enforce numerous constitutional guarantees when it enacted Title II.\textsuperscript{180} However, in examining the claims of Lane and Jones, the Court focused on the narrow issue presented by the facts of the case, defining the issue as whether Congress had the authority under its Section 5 powers to enforce the constitutional right of access to the courts.\textsuperscript{181} The Court found that Title II is "unquestionably" appropriate legislation "as applied" to allegations that certain judicial proceedings and processes are inaccessible.\textsuperscript{182}

\textsuperscript{175} \textit{Id.} at 526. The Court also pointed out that Congress heard testimony from individuals with disabilities who described their inability to access courthouses. \textit{Id.} at 527. Moreover, the report the Court relied on contained instances of discrimination by the states and their political subdivisions against the disabled. \textit{Id.} Chief Justice Rehnquist disagreed with the majority including examples of discrimination committed by the political subdivisions of a state when determining whether abrogation of sovereign immunity is appropriate, given the fact that those political subdivisions are not protected by sovereign immunity. \textit{Id.} at 542 (Rehnquist, C.J., dissenting).

\textsuperscript{176} \textit{Id.} at 528-29; Nev. Dep't of Human Res. v. \textit{Hibbs}, 538 U.S. 721 (2003).

\textsuperscript{177} \textit{Lane}, 541 U.S. at 528-29.

\textsuperscript{178} \textit{Id.} at 529.

\textsuperscript{179} \textit{Id.} at 530.

\textsuperscript{180} \textit{Id.}

\textsuperscript{181} \textit{Id.} at 530-31. The Court used \textit{Garrett} to support the proposition that a court can break a law down into its component parts to review it under the \textit{Boerne} test. \textit{Id.} at 531 n.18. Additionally, the Court cited \textit{United States v. Raines}, 362 U.S. 17 (1960), to support this manner of review. \textit{Lane}, 541 U.S. at 531 n.19.

\textsuperscript{182} \textit{Lane}, 541 U.S. at 531. The Court justified its conclusion that Title II is a congruent and proportional response to violations of the right of access to the courts by highlighting the difficulty of remedying the persistent pattern of discrimination against the disabled. \textit{Id.}
In support of this conclusion, the Court noted the limited nature of the remedy that Congress chose by pointing to the fact that Title II only requires "reasonable modifications" to remove barriers blocking access to the courts. The Court determined that the "reasonable modifications" required by Title II are congruent with the due process requirement that a state must take all practicable steps to allow every individual the right to be heard in its courts. Consequently, according to the Court, Title II is a congruent and proportional response to remedy and deter the unconstitutional denial of the right of the disabled to access the courts. The Court, therefore, affirmed the judgment of the court of appeals and concluded that Title II, as applied to the fundamental right of access to the courts, constitutes a valid exercise of Congress's Section 5 authority to enforce the guarantees of the Fourteenth Amendment.

Justice Souter wrote a concurring opinion in which Justice Ginsburg joined. Justice Souter noted that if the Court were to undertake the more expansive review of Title II urged by the Chief Justice in his dissenting opinion, the legislative history of the ADA alone would support Congress's abrogation of sovereign immunity with respect to Title II of the ADA.

Justice Ginsburg wrote a concurring opinion as well, in which Justice Souter and Justice Breyer joined. Justice Ginsburg's concurrence specifically rejected the notion that Congress must gather evidence, as if in a courtroom, to prove that a body of constitutional violations by the states had occurred, thus necessitating prophylactic legislation under Section 5 of the Fourteenth Amendment.

Chief Justice Rehnquist wrote a dissenting opinion in which Justice Kennedy and Justice Thomas joined. Chief Justice Rehnquist's dissent rejected the Court's holding as inconsistent with the Court's decision in Garrett as well as the principles that Garrett embodied.

183. Id. at 531-32.
184. Id. at 532.
185. Id. at 533.
186. Id. at 533-34.
187. Id. at 534 (Souter, J., concurring).
188. Id. at 534-35 (Souter, J., concurring). Specifically, Justice Souter pointed to the evidence in the record documenting judicial endorsement of laws compelling sterilization, indiscriminately requiring institutionalization, and prohibiting certain disabled individuals from marrying, voting, attending public schools, and even appearing in public as evidence of the necessity of congressional action. Id. (Souter, J., concurring).
189. Id. at 535 (Ginsburg, J., concurring).
190. Id. at 536 (Ginsburg, J., concurring).
191. Id. at 538 (Rehnquist, C.J., dissenting).
192. Id. (Rehnquist, C.J., dissenting).
The Chief Justice reasoned that a faithful application of the test set forth in *Boerne* to Title II indicated that Title II redefines rights protected by the Fourteenth Amendment instead of validly enforcing existing rights; thus, the dissent concluded that the abrogation of sovereign immunity in Title II was unconstitutional.

According to the Chief Justice, because the majority upheld Title II as applied to the class of cases implicating access to the courts, the proper inquiry into the legislative record developed by Congress should be limited to instances where the states, not their subdivisions, violated the rights of the disabled to freely access the courts. Accordingly, Chief Justice Rehnquist examined the legislative record to determine whether Congress identified a history and pattern of state violations of the rights of the disabled to access the courts. The Chief Justice argued that the majority erroneously relied on a broad accounting of society’s discrimination toward the disabled in the legislative record of the ADA instead of focusing on specific instances where the states violated the constitutional rights of the disabled to access the courts. Furthermore, the Chief Justice noted that the broad evidence the majority relied on was “unexamined” and “anecdotal,” and thus did not contain the detail necessary to document a pattern of irrational unconstitutional conduct by the states warranting Section 5 legislation.

Turning to the right of access to the courts, the Chief Justice found that there was nothing in the legislative record to indicate that states systematically denied individuals with disabilities access to the

193. *Id.* at 539 (Rehnquist, C.J., dissenting).
194. *Id.* at 538 (Rehnquist, C.J., dissenting).
195. *Id.* at 542 (Rehnquist, C.J., dissenting). According to the Chief Justice, the Court must discount instances of discrimination committed by the political subdivisions of a state when reviewing abrogation because those subdivisions do not enjoy the protection of sovereign immunity in the first place. *Id.* (Rehnquist, C.J., dissenting).
196. *Id.* at 540 (Rehnquist, C.J., dissenting). For a listing of the rights pinpointed by the majority, see supra note 173.
197. *Lane*, 541 U.S. at 541 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist stated that this is the crucial step in the process because it identifies whether the law in question is a legitimate attempt to remedy or prevent constitutional violations by the states or an attempt to redefine the constitutional rights the law is intended to enforce. *Id.* (Rehnquist, C.J., dissenting).
198. *Id.* (Rehnquist, C.J., dissenting). According to the Chief Justice, much of the generalized evidence taken into account by the majority was rejected in *Garrett*. *Id.* at 541-42 (Rehnquist, C.J., dissenting). Moreover, the dissent noted that the Court has repeatedly rejected evidence of constitutional violations by local government entities when conducting a congruence and proportionality inquiry. *Id.* at 542-43 (Rehnquist, C.J., dissenting).
199. *Id.* at 542 (Rehnquist, C.J., dissenting).
To support this contention, the Chief Justice characterized the evidence—purportedly documenting a pattern of state conduct denying the disabled the right to access the courts—as anecdotal, conclusory, and similar to the type of evidence rejected by the Court in *Garrett*.201

The Chief Justice then scrutinized Title II using the *Boerne* test and determined that the legislation was neither congruent nor proportional to the constitutional violations Congress intended to remedy.202 According to the Chief Justice’s interpretation, Congress passed Title II to remedy discrimination in all areas of public services without any limiting principle confining Title II to arguable constitutional violations.203 Chief Justice Rehnquist noted that Title II prohibits more state conduct than the Equal Protection Clause because it requires the states to make reasonable modifications in virtually every service provided by the state if those services have a disparate impact on the disabled.204 On the contrary, the Chief Justice noted that the Equal Protection Clause prohibits the states from actions that irrationally discriminate against the disabled.205 Therefore, the Chief Justice argued, Title II expands the obligations of the states beyond what is required of them under the Equal Protection Clause, and therefore is invalid for the same reasons the Court in *Garrett* struck down Title I.206

Moreover, the Chief Justice discounted the majority’s reliance on the fundamental rights protected by Title II which implicated the Due Process Clause, because Congress did not narrowly tailor Title II to address those rights specifically.207 The Chief Justice noted that instead of targeting those specific rights, Title II protects a broad cross section of rights implicated by any state entity that provides services, programs, or activities.208 Chief Justice Rehnquist, therefore, con-

200. *Id.* at 543 (Rehnquist, C.J., dissenting).
201. *Id.* at 545-46 (Rehnquist, C.J., dissenting). According to Chief Justice Rehnquist, the only evidence that the majority pointed to that showed relevant discrimination were a few judicial decisions that did not appear in the congressional record, a 1983 U.S. Civil Rights Commission Report, testimony before a House subcommittee regarding the physical inaccessibility of local courthouses, and evidence submitted to Congress’s designated ADA task force supposedly containing examples documenting the exclusion of individuals with disabilities from state services and programs. *Id.* at 544-45 (Rehnquist, C.J., dissenting).
202. *Id.* at 547-48 (Rehnquist, C.J., dissenting).
203. *Id.* at 550 (Rehnquist, C.J., dissenting).
204. *Id.* at 549 (Rehnquist, C.J., dissenting).
205. *Id.* at 550 (Rehnquist, C.J., dissenting).
206. *Id.* (Rehnquist, C.J., dissenting).
207. *Id.* (Rehnquist, C.J., dissenting).
208. *Id.* (Rehnquist, C.J., dissenting).
cluded that Title II is not congruent and proportional to the state violations the majority identified, and thus is unconstitutional.\textsuperscript{209}

In addition, the Chief Justice argued that Title II requires states to provide greater access to courts than required by the Due Process Clause.\textsuperscript{210} In particular, his dissent noted that the Due Process Clause is only violated when there is an actual denial of someone's right to participate in a judicial proceeding.\textsuperscript{211} In comparison, the Chief Justice maintained that Title II triggers liability if the state action subjects a disabled person to any form of discrimination, including mere inconvenience in accessing a courthouse, which in and of itself does not amount to a due process violation.\textsuperscript{212}

Finally, the Chief Justice criticized the majority's examination of the congruence and proportionality of Title II only as applied to the due process rights cited in the majority opinion.\textsuperscript{213} The Chief Justice stated that an as-applied approach has no place in the Court's Section 5 analysis.\textsuperscript{214} He argued that in conducting its as-applied review of Title II the Court created a statute that applies only to courthouses, and that Congress never contemplated such a statute when passing Title II.\textsuperscript{215} Chief Justice Rehnquist noted that an as-applied approach completely deviates from past precedent, and he argued that such an approach may have caused the Court to rule differently in prior Section 5 cases.\textsuperscript{216} Moreover, the Chief Justice argued that an as-applied approach to Section 5 legislation would allow Congress to pass broad laws abrogating state sovereign immunity, such as Title II, leaving it to the courts to sort out the instances in which the law is actually enforceable against the states.\textsuperscript{217}

Justice Scalia filed a dissenting opinion to express his disapproval of the use of the congruence and proportionality test to determine what congressional legislation is appropriate under Section 5 of the Fourteenth Amendment.\textsuperscript{218} Justice Scalia declared that the test created in \textit{Boerne} invited judicial activism and improperly placed the Court in the role of reviewing the record compiled by Congress to

\begin{enumerate}
\item \textsuperscript{209} \textit{Id.} (Rehnquist, C.J., dissenting).
\item \textsuperscript{210} \textit{Id.} at 553 (Rehnquist, C.J., dissenting).
\item \textsuperscript{211} \textit{Id.} (Rehnquist, C.J., dissenting).
\item \textsuperscript{212} \textit{Id.} at 554 (Rehnquist, C.J., dissenting).
\item \textsuperscript{213} \textit{Id.} at 551 (Rehnquist, C.J., dissenting).
\item \textsuperscript{214} \textit{Id.} (Rehnquist, C.J., dissenting).
\item \textsuperscript{215} \textit{Id.} (Rehnquist, C.J., dissenting).
\item \textsuperscript{216} \textit{Id.} at 551-52 (Rehnquist, C.J., dissenting).
\item \textsuperscript{217} \textit{Id.} at 552 (Rehnquist, C.J., dissenting). The Chief Justice worried that this approach would subject the states to substantial financial costs associated with piecemeal attempts to vindicate their sovereign immunity. \textit{Id.} (Rehnquist, C.J., dissenting).
\item \textsuperscript{218} \textit{Id.} at 557-59 (Scalia, J., dissenting).
\end{enumerate}
determine if it warranted Section 5 legislation. In its place, Justice Scalia described a test that would limit Congress to enacting legislation through Section 5 to enforce the rights guaranteed by the Fourteenth Amendment and eliminate Congress’s authority to enact prophylactic measures as a means of enforcing the Fourteenth Amendment. Justice Scalia’s new test would nonetheless continue to apply the congruence and proportionality test to Section 5 legislation passed in response to racial discrimination, because racial discrimination was the primary purpose of the Fourteenth Amendment.

Justice Thomas filed a dissenting opinion as well, in order to point out that he joined Chief Justice Rehnquist’s dissent because he believed Title II is not congruent and proportional to the states’ alleged practice of denying the disabled access to the courts. Justice Thomas, however, stated that he still believed that the Court wrongly decided Hibbs; therefore, he wrote separately to disavow any portion of the Chief Justice’s dissent that relied on that decision.

IV. ANALYSIS

In Tennessee v. Lane, the Supreme Court determined that Congress properly abrogated state sovereign immunity pursuant to the enforcement provisions of the Fourteenth Amendment when it enacted Title II of the ADA, as applied to cases implicating the fundamental right of access to the courts. In upholding Title II of the ADA, the Court for the first time incorporated an as-applied approach into its congruence and proportionality test. Specifically, the Court analyzed Title II’s protection of the right of access to the courts to determine if that portion of Title II was a congruent and proportional remedy to the identified harm of general disability discrimination.

Reviewing congressional legislation passed pursuant to Section 5 of the Fourteenth Amendment on an as-applied basis is necessarily flawed. Such an approach deviates from the Court’s precedent. Determining congruence and proportionality in an as-applied manner fundamentally weakens the Court’s scrutiny of Section 5 legisla-

219. Id. at 557-58 (Scalia, J., dissenting).
220. Id. at 558 (Scalia, J., dissenting).
221. Id. at 563 (Scalia, J., dissenting).
222. Id. at 565-66 (Thomas, J., dissenting).
223. Id. (Thomas, J., dissenting).
224. Id. at 533-34.
225. See infra notes 230-245 and accompanying text.
226. Lane, 541 U.S. at 531.
227. See infra notes 246-278 and accompanying text.
tion because the harm identified by Congress need only be sufficient to support abrogation in any one particular situation before the Court. Consequently, in using an as-applied approach, the Court will never weigh the full breadth of a congressionally enacted remedial scheme against the documented harm to determine if the totality of the remedy is congruent and proportional to the identified harm. As a result of this new as-applied approach, the restriction placed on Congress by the congruence and proportionality test, which ensures that legislation passed pursuant to Section 5 actually enforces Fourteenth Amendment rights instead of creating new legal obligations for the states, is significantly undermined. Consequently, the states will likely experience a significant erosion of their Eleventh Amendment protections as Congress continues to enact broad legislation pursuant to Section 5 of the Fourteenth Amendment.

A. Deviating from the Boerne Analysis

In Lane, the Court took a substantially different approach in its application of the congruence and proportionality test than its precedent dictated. The majority in Lane altered the congruence and proportionality test developed in Boerne by determining that Title II of the ADA is appropriate Section 5 legislation as applied to the right of access to the courts. In creating the congruence and proportionality test, the Supreme Court relied on the fact that the judiciary, not the legislative branch, defines the scope of constitutional rights. The Lane decision, however, threatens to weaken this principle by allowing Congress to structure Section 5 legislation in a way that could effectively shield it from meaningful judicial review. By incorporating an as-applied approach into the congruence and proportionality test, the Lane Court reshaped the Boerne test such that it never examines the totality of Section 5 legislation. Instead, the as-applied approach focuses on the specific remedy at issue in a particular case and not the entire remedy Congress actually enacted. This approach requires a court to determine whether the specific remedy before it is a congruent and proportional response to the entire record of constitutional violations that Congress documented, even if most of the violations are totally unconnected to the specific constitutional right at issue in the case at bar. Under this approach, not only is the totality of broad Section 5 legislation shielded from review, but the specific remedy at

228. See infra notes 279-289 and accompanying text.
229. See infra notes 290-300 and accompanying text.
230. Lane, 541 U.S. at 533-34.
issue in the case before the court never receives a focused inquiry to determine if that particular remedy is congruent and proportional to a documented pattern of states denying the specific constitutional right at issue.

The majority in *Lane* correctly began the *Boerne* analysis by identifying the rights that Congress intended to enforce through passage of Title II of the ADA and the congressional findings that compelled Congress to pass Title II.\(^{232}\) After the Court concluded that Congress aimed Title II at a variety of state services and that it protected a variety of constitutional rights, the majority framed the issue narrowly as whether Congress had the authority under Section 5 to enforce the constitutional right of access to the courts based on the broad accounting of discrimination against the disabled Congress documented when passing the entire ADA.\(^{239}\)

In doing so, the *Lane* Court ignored the fact that Congress chose to apply Title II broadly to all of the "services, programs, or activities" of the states, and not just to the right of access to the courts.\(^{234}\) In upholding Title II, as applied to the right of access to the courts, the Court failed to recognize that Congress found instances of discrimination by the states against the disabled in a number of different contexts and chose a broad remedial scheme in order to remedy and deter discrimination against the disabled in all of these contexts.\(^{235}\) Although Title II protects the fundamental right of access to the courts, Congress did not tailor the legislation specifically to ensure that the disabled had such access.\(^{236}\) Instead, Congress passed the ADA with the intention that it would create a comprehensive national mandate to eliminate discrimination against the disabled in all its forms.\(^{237}\)

Despite Congress's broad intent, the majority's as-applied approach to the congruence and proportionality test failed to determine whether the record of discrimination by the states supported the broad remedy chosen by Congress.\(^{238}\) Based on its narrow review of

\(^{232}\) *Lane*, 541 U.S. at 522-25. The Court deviated from its holding in *Garrett* in its determination that the legislative record supported congressional action to remedy and deter discrimination against the disabled. See *id.* at 528-29. As noted previously, the dissent interpreted the legislative record behind the ADA in a completely different manner. *Id.* at 542 (Rehnquist, C.J., dissenting).

\(^{233}\) *Id.* at 530-31.

\(^{234}\) 42 U.S.C. § 12132.

\(^{235}\) *Lane*, 541 U.S. at 549 (Rehnquist, C.J., dissenting).

\(^{236}\) *Id.* at 550 (Rehnquist, C.J., dissenting).

\(^{237}\) 42 U.S.C. § 12101(b)(1).

\(^{238}\) *Lane*, 541 U.S. at 551 (Rehnquist, C.J., dissenting).
Title II, the Court determined that Congress did not substantively redefine the fundamental right of access to the courts because Title II was "unquestionably" a congruent and proportional response to the "history and pattern" of discrimination against the disabled identified by Congress when passing the entire ADA. In effect, the Court applied the congruence and proportionality test to a statute that Congress never debated nor voted on. Congress did not document a widespread pattern of states denying the disabled their fundamental right to access the courts. Congress documented a broad general pattern of state discrimination against the disabled to support broad legislation to remedy that problem. The Court's acceptance of the congressional documentation as is, and its dissection of the remedy chosen by Congress, essentially tipped the congruence and proportionality test substantially in favor of upholding Congress's abrogation of sovereign immunity. Prior to Lane, the Court applied the Boerne test to determine whether Congress's chosen remedy taken as a whole and applied in all possible contexts was justified by the record of unconstitutional conduct produced by Congress. In contrast, the Lane

239. Id. at 531.
240. Id. at 551 (Rehnquist, C.J., dissenting).
241. This conclusion is questionable. Chief Justice Rehnquist makes a compelling case that the congressional record did not support abrogating state sovereign immunity even in the limited area of access to the courts. Id. at 543-48 (Rehnquist, C.J., dissenting). According to the Chief Justice, if the Court analyzes a statute as applied to a particular right within a broader statute, the Court should only look at the portion of the congressional record that documents state violations of the particular right at issue. Id. at 542 (Rehnquist, C.J., dissenting). The Chief Justice noted that the congressional record did not support a finding that the disabled were systematically denied their rights of access to the courts. Id. at 543 (Rehnquist, C.J., dissenting).
242. Id. at 551 (Rehnquist, C.J., dissenting).
243. Id. at 541 (Rehnquist, C.J., dissenting).
244. Id. (Rehnquist, C.J., dissenting).
245. See supra notes 112-152 and accompanying text.
decision allows a court to consider the entire history of unconstitutional conduct documented by Congress, but instead focuses the inquiry on whether the remedy is justified in one specific context.

B. An As-Applied Approach Is Not Supported by Precedent

There is nothing in the Court’s prior Section 5 precedent supporting the *Lane* Court’s dissection of a broad remedial statute to isolate the fundamental right protected therein in order to apply the congruence and proportionality test.246 Although the majority in *Lane* relied heavily on the severance of Title I of the ADA from Title II in *Garrett* to support the incorporation of the as-applied approach into the congruence and proportionality test, the Court failed to recognize the difference between titles within a statute—which have different remedial objectives—and provisions within one title all aimed at remedying the same identified problem.247 By overlooking this difference, the majority ignored the fundamental aspect of the congruence and proportionality test that requires the courts to review the entire remedial scheme enacted to address the particular problem identified by Congress.248 The problem Congress sought to address through Title II of the ADA was discrimination against the disabled in the provision of services, programs, or activities by any public entity,249 whereas Congress sought through Title I to prevent employment discrimination against the disabled.250 Thus, separating Title I from Title II still allowed the Court to determine whether the differing remedial schemes within each title were congruent and proportional to the differing harms addressed by each title. The *Lane* Court’s approach, however, never allows for a determination of whether the actual remedy of Title II was a congruent and proportional response to the actual objectives of Title II.

The *Lane* Court’s as-applied approach is inconsistent with prior Section 5 precedent where the Court applied the congruence and proportionality test to either the entire statute or title of the statute at

246. Brief for the United States at 39, *Lane* (No. 02-1667). Even the United States government, which argued to uphold Title II, conceded that an as-applied approach deviates from the Court’s precedent. *Id.* at 38-41. In fact, the United States argued that the Court should not incorporate an as-applied approach into its Section 5 analysis as the Sixth Circuit did in *Popovich*. *Id.* Instead, the United States attempted to convince the Court to uphold Title II of the ADA on its face. *Id.* at 7.

247. See *Lane*, 541 U.S. at 531 n.18 (noting that *Garrett* supports the notion that courts need not examine Section 5 legislation all at once).

248. *Id.* at 551 (Rehnquist, C.J., dissenting).

249. *Id.* at 513.

issue. If the Court restricted its analysis in *Florida Prepaid*, *Kimel*, and *Garrett* to the specific facts in each case, the pieces of legislation at issue may have survived the congruence and proportionality inquiry as-applied to the particular factual circumstances of those cases.\(^{251}\)

For instance, in *Florida Prepaid*, the Court reviewed the entire Patent Remedy Act and concluded that the Act was out of proportion to the remedial or preventive object of the statute.\(^{252}\) The Court first pointed out the broad nature of the Patent Remedy Act, which allowed private suits against a state for direct, indirect, and contributory patent infringement.\(^{253}\) The Court then struck down the Patent Remedy Act because its broad remedy was not a congruent and proportional response to the record of violations documented by Congress, which did not include sufficient evidence that states were infringing patents without due process of law.\(^{254}\) The only allegations in *Florida Prepaid* were that the State of Florida directly infringed on a patent held by College Savings Bank.\(^{255}\) The Court, however, did not examine whether the congressional record would support abrogation as applied to situations where states directly infringed on privately held patents,\(^{256}\) which if proven true might amount to a violation of the Fourteenth Amendment. Instead, the Court focused on the totality of the broad remedial scheme instituted by Congress and struck down the Patent Remedy Act.\(^{257}\) Following the as-applied approach created in *Lane*, the Court might have upheld the Patent Remedy Act as applied "to intentional, uncompensated patent infringements."\(^{258}\)

In *Kimel*, the Court struck down the abrogation provision of the Age Discrimination in Employment Act because Congress failed to document any significant pattern of unconstitutional age discrimination by the states.\(^{259}\) This led the Court to its conclusion that the broad remedy of the ADEA was unnecessary.\(^{260}\) In coming to this conclusion, the Court did not examine whether the limited congressional

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253. *Id.*
254. *Id.*
255. *Id.* at 631.
256. *Id.* at 646-47.
257. *Id.* at 647-48.
258. *Tennessee v. Lane*, 541 U.S. 509, 552 (2004) (Rehnquist, C.J., dissenting). In particular, reviewing a portion of the means chosen by Congress makes those means appear limited and thus more congruent and proportional to the instances of unconstitutional conduct on the part of the states that Congress identified.
260. *Id.*
record supported abrogation of sovereign immunity as applied to the allegations of arbitrary age discrimination of the case at bar, which if proven true would likely amount to a violation of the Fourteenth Amendment. Instead, the Court examined the totality of the ADEA and struck it down as overly broad given the scarce legislative record compiled by Congress in passing the ADEA. Had the Court followed the approach set forth in Lane and restricted its review of the ADEA as applied to the allegations of discrimination before the Court, it is possible the Court might have determined that the scant legislative record supported abrogation as applied to arbitrary age discrimination by the states.

Once more, in Garrett, the Court struck down legislation passed pursuant to Section 5 of the Fourteenth Amendment without determining whether the congressional record supported abrogation as applied to the allegations of the respondents that their state employers made arbitrary discriminatory employment decisions because of their disabilities. The Court determined that Congress failed to identify a pattern of irrational discrimination against the disabled committed by the states in employment related decisions. Because of this finding, the Court held that Title I did not properly abrogate sovereign immunity. Again, the Court did not examine whether the limited legislative record supported abrogation as applied to allegations of irrational employment discrimination before the Court in Garrett, which if proven true would likely amount to a violation of the Fourteenth Amendment. If the Court had focused only on instances of irrational employment discrimination, it is possible the Court would have upheld Title I of the ADA in Garrett because the limited means reviewed by the Court would appear more congruent and proportional to the legislative record than the broad means actually enacted by Congress.

Even in Hibbs, where the Court upheld the Family and Medical Leave Act as a valid exercise of Congress's Section 5 power, the Court scrutinized the totality of the means adopted by Congress to achieve

261. Id.
262. Id.
263. See Lane, 541 U.S. at 552 (Rehnquist, C.J., dissenting) (hypothesizing about the possible outcome of prior Eleventh Amendment cases had Lane controlled).
265. Id. at 368.
266. Id. at 371-74.
267. Id. at 373-74.
268. Lane, 541 U.S. at 552 (Rehnquist, C.J., dissenting).
its stated purpose. In fact, the Court determined that the legislative history of the FMLA documented a record of unconstitutional gender discrimination by the states. This finding compelled the Court to uphold the FMLA after it determined that Congress structured the entirety of the FMLA to narrowly address its stated objective. In coming to this conclusion, the Court did not analyze whether the congressional record supported abrogation as applied to the respondent’s allegations that the Nevada Department of Human Resources fired the respondent in violation of the FMLA for failing to report to work after exhausting his twelve weeks of leave mandated by the FMLA. Instead, the Court concluded that abrogation of sovereign immunity was an appropriate remedy for any violation of the FMLA, and thus the entire FMLA passed constitutional scrutiny. In fact, the majority implicitly rejected an approach that would consider the particularized situations of each case by discounting the dissent’s analysis of Nevada’s specific leave policies. Instead, the majority focused on the general nationwide deficiency in state leave policies regardless of the generosity of Nevada’s specific leave policies.

As the previous discussion indicates, the Court’s application of the Boerne test, prior to Lane, examined either a complete piece of legislation or a complete title of a broader legislative enactment, in an attempt to ensure that Congress was acting to remedy or deter actual constitutional violations when it passed legislation pursuant to Section 5 of the Fourteenth Amendment. Prior to Lane, the Court applied the Boerne test without any review of whether the identified harm warranted abrogation as applied to the facts of a particular case. The incorporation of an as-applied approach into the Boerne test in Lane without even acknowledging that such an approach alters the previous application of the Boerne test undermines the test’s legitimacy. Doing so furthers the perception that the congruence and proportional-

270. Id. at 735.
271. Id. at 738.
272. Id. at 725.
273. Id. at 740.
274. Id. at 732-34.
275. Id. at 734.
276. Id. at 727-28.
277. After the decision in Lane, broad Section 5 legislation affecting numerous rights is more likely to pass constitutional scrutiny than Section 5 legislation that narrowly focuses on one specific constitutional right. See infra notes 279-289 and accompanying text.
ity test is a malleable one that is open to manipulation by judges and offers no guidelines for Congress or the states to follow.²⁷⁸

C. An As-Applied Approach Circumvents the Restrictions of the Boerne Test

The Lane Court's application of the Boerne test to only a portion of such a broad law makes it virtually impossible for the Court to determine if the remedy chosen by Congress was a congruent and proportional response to the identified harm and thus within Congress's constitutional authority. The vigorous application of the congruence and proportionality test to either an entire section or piece of legislation allows the Court to determine if Congress was taking remedial measures for past wrongs or imposing new legal obligations on the states and thus exceeding its Section 5 authority.²⁷⁹ The Lane Court's decision undercuts the basis for the Boerne test. For instance, without a forceful application of the Boerne test, the incentives the Court sought to place on Congress so it would not pass broad statutes abrogating state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment are virtually gone.²⁸⁰ Congress can now pass broad legislation affecting a wide variety of rights knowing that the courts will sort through the statute on a case-by-case basis to determine what situations exhibit congruence and proportionality to the identified harm.²⁸¹ Accordingly, allowing Congress this authority places the states' Eleventh Amendment immunity in doubt because the states must defend their sovereign immunity in court multiple times for one piece of legislation.²⁸² This conflicts with the notion that the states enjoy jurisdictional immunity from suit altogether pursuant to the Eleventh Amendment.²⁸³ Consequently, states will have to struggle to vindicate their sovereign immunity in the years ahead as litigation arises from the other rights protected by Title II.

²⁷⁸. See Tennessee v. Lane, 541 U.S. 509, 557-58 (Scalia, J., dissenting) (criticizing the congruence and proportionality test as an "invitation to judicial arbitrariness and policy-driven decisionmaking").


²⁸⁰. Lane, 541 U.S. at 552 (Rehnquist, C.J., dissenting).

²⁸¹. Id. (Rehnquist, C.J., dissenting).

²⁸². See id. (Rehnquist, C.J., dissenting) (describing the increased amount of litigation the Lane decision will cause the states when attempting to defend their sovereign immunity).

²⁸³. See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146-47 (1993) (noting that the essence of the Eleventh Amendment is to prohibit the states from being subjected to the judicial process at the insistence of a private party).
The Lane Court's incorporation of an as-applied approach into the congruence and proportionality test eases the requirement placed on Congress to draft legislation enacted pursuant to the enforcement provisions of the Fourteenth Amendment in a way that would specifically target enforcement of the Fourteenth Amendment guarantees.\(^{284}\) This, in turn, allows Congress to expand the guarantees of the Fourteenth Amendment.\(^{285}\) In fact, the as-applied approach adopted in Lane encourages Congress, when contemplating passing Section 5 legislation, to document instances of discrimination in a wide variety of areas affecting numerous constitutional rights and then enact broad prophylactic legislation implicating all of those constitutional rights.\(^{286}\) The precedent set in Lane encourages this approach because the Court accepts the historical documentation of discrimination in its entirety, but determines whether the means chosen by Congress are congruent and proportional to the documented harm on a case-by-case basis.\(^{287}\) As discussed above, reviewing the legislation in this manner makes the means chosen by Congress appear limited and thus more likely to pass the congruence and proportionality test.\(^{288}\) Accordingly, instituting an as-applied approach to the congruence and proportionality test has the potential to nullify the limitations placed on Congress by the Court's recent Fourteenth Amendment jurisprudence.\(^{289}\)

D. Weakening the Congruence and Proportionality Test Dilutes the States' Eleventh Amendment Protections

Sovereign immunity protects the states from unnecessary federal intrusion and ensures that the states will maintain authority over the difficult decisions associated with distributing their limited resources.\(^{290}\) The Lane Court's incorporation of an as-applied analysis into the congruence and proportionality test greatly expands the au-

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284. See Lane, 541 U.S. at 552 (Rehnquist, C.J., dissenting) (stating that the congruence and proportionality inquiry can only be answered by measuring the breadth of the statute against the record of unconstitutional conduct that Congress sought to remedy); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 758-59 (2003) (Kennedy, J., dissenting) (describing the difference between legislation enacted to enforce existing rights and legislation enacted to place new substantive obligations on the states).
285. Lane, 541 U.S. at 552 (Rehnquist, C.J., dissenting).
286. Hibbs, 538 U.S. at 746 (Kennedy, J., dissenting).
287. Lane, 541 U.S. at 541 (Rehnquist, C.J., dissenting).
288. See id. at 551 (Rehnquist, C.J., dissenting) (noting that the as-applied approach rigs the congruence and proportionality test in a way that makes purportedly remedial laws more likely to pass constitutional scrutiny).
289. Id. at 552 (Rehnquist, C.J., dissenting).
290. See supra notes 61-84 and accompanying text.
authority of Congress to create broad remedial schemes to address perceived constitutional violations, thus decreasing the protections that the states maintain from their sovereign immunity. An as-applied approach to the *Boerne* test makes the remedy chosen by Congress appear limited because courts may overlook the true breadth of the actual statute. The appearance of a limited remedy increases the likelihood that a court will determine that the chosen remedy is a congruent and proportional response to the harm documented by Congress because the documentation need only support one portion of a broader statutory scheme.291 Furthermore, determining whether congressional legislation redefines the rights protected by the Fourteenth Amendment requires examining the entire remedial objectives at issue against the scope of the constitutional rights the legislation intends to enforce.292 Restricting the scope of the statute to a clearly defined constitutional right within a broad statute makes the congruence and proportionality inquiry a mere formality. Allowing this goes against the Court's recent Fourteenth Amendment precedent, which required Congress to narrowly target legislation enacted pursuant to Section 5, to address a documented pattern of unconstitutional conduct on the part of the states.293 This allows Congress to invade the autonomy of the states and further interfere with their governing authority. The decision in *Lane* undermines the notion, stressed by the Court in creating the congruence and proportionality test, that this test ensures that Congress does not pass legislation authorizing suits against the states through Section 5 of the Fourteenth Amendment as a pretext to substantively redefine the obligations placed on the states by the Fourteenth Amendment.294

By weakening the congruence and proportionality test, the *Lane* Court gives Congress greater leeway to redefine the obligations placed on the states, which in turn blurs the line of accountability a state has towards its own citizens and thus weakens the state's Eleventh Amendment protection.295 In particular, states could face numerous suits stemming from a single piece of legislation, which compromises the immunity from suit that the states maintain from the Eleventh Amendment.296 Additionally, if the states must litigate each claim

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292. See *id.* at 530 (summarizing petitioner's argument that Title II's broad applications should be examined all at once).
293. *Id.* at 551 (Rehnquist, C.J., dissenting).
294. *Id.* at 539 (Rehnquist, C.J., dissenting).
arising out of Section 5 legislation as applied to the particular facts of each case, the value of Eleventh Amendment sovereignty diminishes significantly. This situation will require states to attempt to vindicate their sovereign immunity in an incremental fashion, which places a severe drain on their treasuries. Consequently, the Lane Court’s as-applied approach poses a problem for the autonomy of the states, because determining how to distribute a state’s fiscal resources is an attribute that is fundamental to sovereignty. If the states are to maintain their representative function, these difficult decisions must be made through the normal legislative process and not imposed on the states by the federal government unless necessary to enforce the Fourteenth Amendment. Consequently, courts should aggressively resolve abrogation questions as early as possible to protect the total immunity from suit that the states are entitled to. The Lane decision, however, opens the states to numerous suits stemming from a complex piece of congressional legislation before the abrogation question is ultimately determined conclusively.

V. Conclusion

In Tennessee v. Lane, the Supreme Court held that Title II of the ADA, as applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress’s Section 5 enforcement power under the Fourteenth Amendment. In upholding Title II as applied to the right of access to the courts, the Court altered the congruence and proportionality test by incorporating an as-applied approach into its analysis. The Court’s prior Section 5 precedent does not support an as-applied approach to the application of the congruence and proportionality test. This approach increases the likelihood that Congress will continue to enact broad legislation through its Fourteenth Amendment powers, which contradicts the recent trend by the Court to attempt to narrow Congress’s Section

298. Id.
299. Id. at 751.
300. See P.R. Aqueduct & Sewer Auth., 506 U.S. at 147 (holding that parties may immediately appeal Eleventh Amendment immunity rulings regardless of whether further factual development may be necessary to determine the connection between the state and a seemingly independent organization).
302. See supra notes 230-245 and accompanying text.
303. See supra notes 246-278 and accompanying text.
Expanding Congress's Section 5 authority necessarily threatens to weaken state sovereign immunity. The Court should have adhered to the principle set forth in *Boerne* and reviewed Title II of the ADA in its entirety, thus, fully respecting both the Fourteenth Amendment and the Eleventh Amendment sovereign immunity maintained by the states.

MICHAEL J. NEARY

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304. See supra notes 279-289 and accompanying text.
305. See supra notes 290-300 and accompanying text.