**Supplemental Materials for Brest, Levinson, Balkin, Amar and Siegel**
**Processes of Constitutional Decisionmaking**
Kimel and Garrett– Reconstruction Power

**Note: *The Reconstruction Power, the Eleventh Amendment, and Sovereign Immunity*.**

*United States v. Morrison* limits Congress's power to regulate private parties. However, it may well turn out that the most important effect of the Court's new §5 jurisprudence is limiting civil rights suits against *States*. To understand why, it is necessary to discuss a few of the Rehnquist Court's other innovations in the federalism area.

The Eleventh Amendment prohibits suits for money damages in federal courts against nonconsenting states. Congress can pass legislation that abrogates that immunity if it clearly states its intention to do so, and it often extends national civil rights laws to State and local governments. For example, in 1972 Congress extended the Civil Rights Act of 1964 to prohibit employment discrimination by States on the basis of race, gender, religion, and national origin. In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court held that Congress could lift the Eleventh Amendment immunity in suits against states under Title VII. The Court reasoned that Congress's extension of Title VII to state employers was a proper exercise of its §5 power to enforce the Fourteenth Amendment, and that the Fourteenth Amendment gave Congress the power to abrogate the sovereign immunity of the States.

However, in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the same 5-4 majority that decided *Morrison*, *Lopez*, and *Printz* held that Congress cannot subject the states to lawsuits under its Commerce power. And in Alden v. Maine, 527 U.S. 706 (1999) the same 5-4 majority held that the "structure of the original Constitution" meant that if these suits were barred from the federal courts by the Eleventh Amendment, Congress could not require suits for money damages in state courts either. (See casebook at 608-611). After *Alden*, the Federal government could sue to enforce its laws, and private parties could still bring suits for injunctive relief. But private parties could not collect damages for violations of federal law in either federal or state court.

Read in light of the earlier decision in Fitzpatrick v. Bitzer, *Seminole Tribe* and *Alden* mean that Congress can subject states to suits for money damages only through legislation passed under its Reconstruction Power. For this reason, *Boerne*'s and *Morrison*'s limitation of the Reconstruction Power effectively determines when private parties can sue states for money damages when states violate federal law, including federal civil rights laws.

The Court began to draw out these implications in a patent infringement case, Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999). The Court rejected the argument that because patent infringements by the states constituted violations of the Due Process Clause of the Fourteenth Amendment, Congress could subject the states to patent infringement remedies under the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act). The Patent Remedy

Act failed the test of congruence and proportionality because "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." Moreover, because the Court doubted that many of the acts of patent infringement affected by the statute were likely to be unconstitutional it held that the scope of the Act was out of proportion to its supposed remedial or preventive objectives. Instead, "[t]he statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime." This was not a permissible remedial goal under §5.

After *Florida Prepaid*, can Congress subject states to liability for copyright infringement? Would Congress first have to show widespread violations of copyright by state employees? After *Morrison*, could Congress extend liability for copyright infringement to all states, or would its remedy be limited only to those states where it specifically found widespread violations of copyright?

The real bite of *Florida Prepaid* became apparent the following year, when the Court began to consider Eleventh Amendment challenges to civil rights laws. Most civil rights protections that apply to private actors are passed under Congress's Commerce Power. But *Seminole Tribe* and *Alden* mean that civil rights laws can't be applied to state governments (at least with respect to suits for money damages) unless they also fall within Congress's §5 powers.

In Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), the Court held that Congress could not abrogate the sovereign immunity of the states in suits under the Age Discrimination in Employment Act (ADEA). Justice O'Connor's majority opinion noted that the ADEA was proper legislation under the Commerce Clause, and it also noted that Congress made a clear statement that it wished to abrogate the states' Eleventh Amendment Immunity. However, Justice O'Connor argued, the ADEA was not a proper exercise of Congress's §5 powers. Classifications based on age, unlike those based on race or sex, are subject only to a test of rational basis.

> Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. ... Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*. The Act, 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.

In addition Justice O'Connor, argued, the ADEA could not be justified as a prophylactic measure to ensure against age discriminations that would fail the rational basis test.

> Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. ...Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.

Thus, Justice O'Connor concluded, the ADEA was not a genuine remedy for unconstitutional action by the states but "merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination."

Justice Stevens, dissented, joined by Justices Souter, Ginsburg and Breyer. He stated that he was

> unwilling to accept *Seminole Tribe* as controlling precedent. ... [T]he reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court. ...
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> The kind of judicial activism manifested in cases like *Seminole Tribe*, *Alden v. Maine*, [and] *Florida Prepaid* ... represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.

Justice Stevens did not discuss the Court's application of the "congruence and proportionality" test. Note that the original goal of the test in *Boerne* was to ensure that Congress was not attempting to change the substantive meaning of the Fourteenth Amendment under the pretext of remedying constitutional violations. In *Kimel* the Court holds that the level of scrutiny under Equal Protection doctrine is a substantive element of the Fourteenth Amendment. As a result, Congress may not subject the states to money damages for conduct that the Court would not hold violated the Equal Protection clause. The logic of *Kimel* seemed to dictate that Congress could not subject the states to money damages for discrimination on the basis of age, disability or sexual orientation because

these are not suspect classifications and states might "rationally" discriminate on the basis of these categories.

The consequences of *Kimel* became apparent the next year, when the Court considered another civil rights statute:

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA v. GARRETT

531 U.S. 356 (2000)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We decide here whether employees of the State of Alabama may recover money damages by reason of the State's failure to comply with the provisions of Title I of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 330, 42 U.S.C. §§ 12111-12117.[a] We hold that such suits are barred by the Eleventh Amendment.

The ADA prohibits certain employers, including the States, from "discriminating 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

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[a]Respondents' complaints in the United States District Court alleged violations of both Title I and Title II of the ADA, and petitioners' "Question Presented" can be read to apply to both sections. See Brief for Petitioners i; Brief for United States I. Though the briefs of the parties discuss both sections in their constitutional arguments, no party has briefed the question whether Title II of the ADA, dealing with the "services, programs, or activities of a public entity," 42 U.S.C. § 12132, is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject. We are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question. To the extent the Court granted certiorari on the question whether respondents may sue their state employers for damages under Title II of the ADA, see this Court's Rule 24.1(a), that portion of the writ is dismissed as improvidently granted.

privileges of employment." §§ 12112(a), 12111(2), (5), (7). To this end, the Act requires employers to "make 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." § 12112(b)(5)(A).

> "'Reasonable accommodation' may include --
> "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." § 12111(9).

The Act also prohibits employers from "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability." § 12112(b)(3)(A).

The Act defines "disability" to include "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." § 12102(2). A disabled individual is otherwise "qualified" if he or she, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." § 12111(8).

Respondent Patricia Garrett, a registered nurse, was employed as the Director of Nursing, OB/Gyn/Neonatal Services, for the University of Alabama in Birmingham Hospital. In 1994, Garrett was diagnosed with breast cancer and subsequently underwent a lumpectomy, radiation treatment, and chemotherapy. Garrett's treatments required her to take substantial leave from work. Upon returning to work in July 1995, Garrett's supervisor informed Garrett that she would have to give up her Director position. Garrett then applied for and received a transfer to another, lower paying position as a nurse manager.

Respondent Milton Ash worked as a security officer for the Alabama Department of Youth Services (Department). Upon commencing this employment, Ash informed the Department that he suffered from chronic asthma and that his doctor recommended he avoid carbon monoxide and cigarette smoke, and Ash requested that the Department modify his duties to minimize his exposure to these substances. Ash was later diagnosed with sleep apnea and requested, again pursuant to his doctor's recommendation, that he be reassigned to daytime shifts to accommodate his condition. Ultimately, the

Department granted none of the requested relief. Shortly after Ash filed a discrimination claim with the Equal Employment Opportunity Commission, he noticed that his performance evaluations were lower than those he had received on previous occasions.

I

The Eleventh Amendment provides:

> The 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.

Although by its terms the Amendment applies only to suits against a State by citizens of another State, our cases have extended the Amendment's applicability to suits by citizens against their own States. The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.

We have recognized, however, that 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." The first of these requirements is not in dispute here. The question, then, is whether Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the ADA.

Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I. Seminole Tribe [of Fla. v. Florida, 517 U.S. 44, 54 (1996)]. In Fitzpatrick v. Bitzer, 427 U.S. 445, (1976), however, we held that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." As a result, we concluded, Congress may subject nonconsenting States to suit in federal court when it does so pursuant to a valid exercise of its § 5 power.

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Congress' power 'to enforce' the 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." Kimel [ v. Florida Bd. of Regents, 528 U.S. 62, 72-73 (2000)]; City of Boerne [v. Flores, 521 U.S. 507 (1997)]. *City of Boerne* also confirmed, however, the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees. Accordingly, § 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit "congruence and proportionality between

the injury to be prevented or remedied and the means adopted to that end."

II

...

In Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), we [held] ... that mental retardation [was not] a "quasi-suspect" classification under our equal protection jurisprudence ... concluding instead that such legislation incurs only the minimum "rational-basis" review applicable to general social and economic legislation.[b] In a statement that today seems quite prescient, we explained that

> "if the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so."

Under rational-basis review, where a group possesses "distinguishing characteristics relevant to interests the State has the authority to implement," a State's decision to act on the basis of those differences does not give rise to a constitutional violation. "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Moreover, the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative "'any reasonably conceivable state of facts that could provide a rational basis for the classification.'"

JUSTICE BREYER suggests that *Cleburne* stands for the broad proposition that state decisionmaking reflecting "negative attitudes" or "fear" necessarily runs afoul of the

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[b]Applying the basic principles of rationality review, *Cleburne* struck down the city ordinance in question. The Court's reasoning was that the city's purported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects. Although the group home for the mentally retarded was required to obtain a special use permit, apartment houses, other multiple-family dwellings, retirement homes, nursing homes, sanitariums, hospitals, boarding houses, fraternity and sorority houses, and dormitories were not subject to the ordinance.

Fourteenth Amendment. Although such biases may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make. As we noted in *Cleburne*: "Mere negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable in a zoning proceeding*, are not permissible bases for treating a home for the mentally retarded differently . . . ." Id. at 448. (emphasis added). This language, read in context, simply states the unremarkable and widely acknowledged tenet of this Court's equal protection jurisprudence that state action subject to rational-basis scrutiny does not violate the Fourteenth Amendment when it "rationally furthers the purpose identified by the State.

Thus, the result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. They could quite hard headedly -- and perhaps hardheartedly -- hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.[c]

III

[W]e [next] examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled. Just as § 1 of the Fourteenth Amendment applies only to actions committed "under color of state law," Congress' § 5 authority is appropriately exercised only in response to state transgressions. The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.

Respondents contend that the inquiry as to unconstitutional discrimination should extend not only to States themselves, but to units of local governments, such as cities and counties. All of these, they say, are "state actors" for purposes of the Fourteenth

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[c]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." Hearing on Discrimination Against Cancer Victims and the Handicapped before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 100th Cong., 1st Sess., 5 (1987). A number of these provisions, however, did not go as far as the ADA did in requiring accommodation.

Amendment. This is quite true, but the Eleventh Amendment does not extend its immunity to units of local government. See Lincoln County v. Luning, 133 U.S. 529 (1890). These entities are subject to private claims for damages under the ADA without Congress' ever having to rely on § 5 of the Fourteenth Amendment to render them so. It would make no sense to consider constitutional violations on their part, as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment.

Congress made a general finding in the ADA that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). The record assembled by Congress includes many instances to support such a finding. But the great majority of these incidents do not deal with the activities of States.

Respondents in their brief cite half a dozen examples from the record that did involve States. A department head at the University of North Carolina refused to hire an applicant for the position of health administrator because he was blind; similarly, a student at a state university in South Dakota was denied an opportunity to practice teach because the dean at that time was convinced that blind people could not teach in public schools. A microfilmer at the Kansas Department of Transportation was fired because he had epilepsy; deaf workers at the University of Oklahoma were paid a lower salary than those who could hear. The Indiana State Personnel Office informed a woman with a concealed disability that she should not disclose it if she wished to obtain employment.[d]

Several of these incidents undoubtedly evidence an unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA. Whether they were irrational under our decision in *Cleburne* is more debatable, particularly when the incident is described out of context. But even if it were to be determined that each incident upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based. Congress, in enacting the ADA, found that "some 43,000,000 Americans have one or more physical or mental disabilities." 42 U.S.C. § 12101(a)(1). In 1990, the States alone

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[d]The record does show that some States, adopting the tenets of the eugenics movement of the early part of this century, required extreme measures such as sterilization of persons suffering from hereditary mental disease. These laws were upheld against constitutional attack 70 years ago in Buck v. Bell, 274 U.S. 200 (1927). But there is no indication that any State had persisted in requiring such harsh measures as of 1990 when the ADA was adopted.

employed more than 4.5 million people. It is telling, we think, that given these large numbers, Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled.

JUSTICE BREYER maintains that Congress applied Title I of the ADA to the States in response to a host of incidents representing unconstitutional state discrimination in employment against persons with disabilities. A close review of the relevant materials, however, undercuts that conclusion. JUSTICE BREYER's Appendix C consists not of legislative findings, but of unexamined, anecdotal accounts of "adverse, disparate treatment by state officials." Of course, as we have already explained, "adverse, disparate treatment" often does not amount to a constitutional violation where rational-basis scrutiny applies. These accounts, moreover, were submitted not directly to Congress but to the Task Force on the Rights and Empowerment of Americans with Disabilities, which made no findings on the subject of state discrimination in employment.[e] And, had Congress truly understood this information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings. There is none. Although JUSTICE BREYER would infer from Congress' general conclusions regarding societal discrimination against the disabled that the States had likewise participated in such action, the House and Senate committee reports on the ADA flatly contradict this assertion. After describing the evidence presented to the Senate Committee on Labor and Human Resources and its subcommittee (including the Task Force Report upon which the dissent relies), the Committee's report reached, among others, the following conclusion: "Discrimination still persists in such critical areas as *employment in the private sector*, public accommodations, public services, transportation, and telecommunications." S. Rep. No. 101-116, p. 6 (1989) (emphasis added). The House Committee on Education and Labor, addressing the ADA's employment provisions, reached the same conclusion: "After extensive review and analysis over a number of Congressional sessions, . . . there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of *employment in the private sector*, public accommodations, public

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[e]Only a small fraction of the anecdotes JUSTICE BREYER identifies in his Appendix C relate to state discrimination against the disabled in employment. At most, somewhere around 50 of these allegations describe conduct that could conceivably amount to constitutional violations by the States, and most of them are so general and brief that no firm conclusion can be drawn. The overwhelming majority of these accounts 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.

services, transportation, and telecommunications." H. R. Rep. No. 101-485, pt. 2 p. 28 (1990) (emphasis added). Thus, not only is the inference JUSTICE BREYER draws unwarranted, but there is also strong evidence that Congress' failure to mention States in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action had been documented.

Even were it possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*. For example, whereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to "make existing facilities used by employees readily accessible to and usable by individuals with disabilities." 42 U.S.C. §§ 12112(5)(B), 12111(9). The ADA does except employers from the "reasonable accommodation" requirement where the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." § 12112(b)(5)(A). However, even with this exception, the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an "undue burden" upon the employer. The Act also makes it the employer's duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision.

The ADA also forbids "utilizing standards, criteria, or methods of administration" that disparately impact the disabled, without regard to whether such conduct has a rational basis. § 12112(b)(3)(A). Although disparate impact may be relevant evidence of racial discrimination, see Washington v. Davis, 426 U.S. 229 (1976), such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny. See, e.g., ibid. ("Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact").

The ADA's constitutional shortcomings are apparent when the Act is compared to Congress' efforts in the Voting Rights Act of 1965 to respond to a serious pattern of constitutional violations. In South Carolina v. Katzenbach, 383 U.S. 301 (1966), we considered whether the Voting Rights Act was "appropriate" legislation to enforce the Fifteenth Amendment's protection against racial discrimination in voting. Concluding that it was a valid exercise of Congress' enforcement power under § 2 of the Fifteenth Amendment, we noted that "before enacting the measure, Congress explored with great

care the problem of racial discrimination in voting."

In that 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-percentage-point gap in the registration of white and African-American voters in some States. Congress' response was to promulgate in the Voting Rights Act a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified.

The contrast between this kind of evidence, and the evidence that Congress considered in the present case, is stark. Congressional enactment of the ADA represents its judgment that there should be a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here, and to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*.[f] Section 5 does not so broadly enlarge congressional authority. The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, concurring.

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[f]Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under Ex parte Young, 209 U.S. 123 (1908). In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

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. There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.

One of the undoubted achievements of statutes designed to assist those with impairments is that citizens have an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with impairments or disabilities into the larger society. The law works this way because the law can be a teacher. So I do not doubt that the Americans with Disabilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society.

It is a question of quite a different order, however, to say that the States in their official capacities, the States as governmental entities, must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens. It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws, particularly where the accusation is based not on hostility but instead on the failure to act or the omission to remedy. States can, and do, stand apart from the citizenry. States act as neutral entities, ready to take instruction and to enact laws when their citizens so demand. The failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause.

... If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations. This confirming judicial documentation does not exist. That there is a new awareness, a new consciousness, a new commitment to better treatment of those disadvantaged by mental or physical impairments does not establish that an absence of state statutory correctives was a constitutional violation.

[W]hat is in question is not whether the Congress, acting pursuant to a power granted to it by the Constitution, can compel the States to act. What is involved is only the question whether the States can be subjected to liability in suits brought not by the

Federal Government (to which the States have consented, see Alden v. Maine, 527 U.S. 706, 755 (1999)), but by private persons seeking to collect moneys from the state treasury without the consent of the State. ...

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

Reviewing the congressional record as if it were an administrative agency record, the Court holds the statutory provision before us, 42 U.S.C. § 12202, unconstitutional. The Court concludes that Congress assembled insufficient evidence of unconstitutional discrimination, that Congress improperly attempted to "re-write" the law we established in Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), and that the law is not sufficiently tailored to address unconstitutional discrimination.

Section 5, however, grants Congress the "power to enforce, by appropriate legislation" the Fourteenth Amendment's equal protection guarantee. As the Court recognizes, state discrimination in employment against persons with disabilities might "'run afoul of the Equal Protection Clause'" where there is no "'rational relationship between the disparity of treatment and some legitimate governmental purpose.'" In my view, Congress reasonably could have concluded that the remedy before us constitutes an "appropriate" way to enforce this basic equal protection requirement. And that is all the Constitution requires.

I

The Court says that its primary problem with this statutory provision is one of legislative evidence. It says that "Congress assembled only . . . minimal evidence of unconstitutional state discrimination in employment." In fact, Congress compiled a vast legislative record documenting "'massive, society-wide discrimination'" against persons with disabilities. In addition to the information presented at 13 congressional hearings, and its own prior experience gathered over 40 years during which it contemplated and enacted considerable similar legislation, Congress created a special task force to assess the need for comprehensive legislation. That task force held hearings in every State, attended by more than 30,000 people, including thousands who had experienced discrimination first hand. The task force hearings, Congress' own hearings, and an analysis of "census data, national polls, and other studies" led Congress to conclude that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. § 12101(a)(6). As to employment, Congress found that "two-thirds of all disabled

Americans between the age of 16 and 64 [were] not working at all," even though a large majority wanted to, and were able to, work productively. And Congress found that this discrimination flowed in significant part from "stereotypic assumptions" as well as "purposeful unequal treatment." 42 U.S.C. § 12101(a)(7).

The powerful evidence of discriminatory treatment throughout society in general, including discrimination by private persons and local governments, implicates state governments as well, for state agencies form part of that same larger society. There is no particular reason to believe that they are immune from the "stereotypic assumptions" and pattern of "purposeful unequal treatment" that Congress found prevalent. The Court claims that it "makes no sense" to take into consideration constitutional violations committed by local governments. But the substantive obligation that the Equal Protection Clause creates applies to state and local governmental entities alike. Local governments often work closely with, and under the supervision of, state officials, and in general, state and local government employers are similarly situated. Nor is determining whether an apparently "local" entity is entitled to Eleventh Amendment immunity as simple as the majority suggests -- it often requires a "'detailed examination of the relevant provisions of [state] law.'"

In any event, there is no need to rest solely upon evidence of discrimination by local governments or general societal discrimination. There are roughly 300 examples of discrimination by state governments themselves in the legislative record. I fail to see how this evidence "falls far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based."

The congressionally appointed task force collected numerous specific examples, provided by persons with disabilities themselves, of adverse, disparate treatment by state officials. They reveal, not what the Court describes as "half a dozen" instances of discrimination, but hundreds of instances of adverse treatment at the hands of state officials -- instances in which a person with a disability found it impossible to obtain a state job, to retain state employment, to use the public transportation that was readily available to others in order to get to work, or to obtain a public education, which is often a prerequisite to obtaining employment. State-imposed barriers also frequently made it difficult or impossible for people to vote, to enter a public building, to access important government services, such as calling for emergency assistance, and to find a place to live due to a pattern of irrational zoning decisions similar to the discrimination that we held unconstitutional in *Cleburne*.

As the Court notes, those who presented instances of discrimination rarely provided additional, independent evidence sufficient to prove in court that, in each instance, the discrimination they suffered lacked justification from a judicial standpoint. Perhaps this explains the Court's view that there is "minimal evidence of unconstitutional

state discrimination." But a legislature is not a court of law. And Congress, unlike courts, must, and does, routinely draw general conclusions -- for example, of likely motive or of likely relationship to legitimate need -- from anecdotal and opinion-based evidence of this kind, particularly when the evidence lacks strong refutation. In reviewing § 5 legislation, we have never required the sort of extensive investigation of each piece of evidence that the Court appears to contemplate. Compare ante, with Katzenbach v. Morgan, 384 U.S. 641, 652-656 (1966) (asking whether Congress' likely conclusions were reasonable, not whether there was adequate evidentiary support in the record). Nor has the Court traditionally required Congress to make findings as to state discrimination, or to break down the record evidence, category by category. Compare ante, (noting statements in two congressional Reports that mentioned state discrimination in public services and transportation but not in employment), with *Morgan*, *supra*, at 654 (considering what Congress "might" have concluded); 384 U.S. at 652 (holding that likely discrimination against Puerto Ricans in areas other than voting supported statute abolishing literacy test as qualification for voting).

Regardless, Congress expressly found substantial unjustified discrimination against persons with disabilities. 42 U.S.C. § 12101(9). Moreover, it found that such discrimination typically reflects "stereotypic assumptions" or "purposeful unequal treatment." 42 U.S.C. § 12101(7). In making these findings, Congress followed our decision in *Cleburne*, which established that not only discrimination against persons with disabilities that rests upon "a bare . . . desire to harm a politically unpopular group," violates the Fourteenth Amendment, but also discrimination that rests solely upon "negative attitudes," "fear," or "irrational prejudice." Adverse treatment that rests upon such motives is unjustified discrimination in *Cleburne's* terms.

The evidence in the legislative record bears out Congress' finding that the adverse treatment of persons with disabilities was often arbitrary or invidious in this sense, and thus unjustified. For example, one study that was before Congress revealed that "most . . . governmental agencies in [one State] discriminated in hiring against job applicants for an average period of five years after treatment for cancer," based in part on coworkers' misguided belief that "cancer is contagious." A school inexplicably refused to exempt a deaf teacher, who taught at a school for the deaf, from a "listening skills" requirement. A State refused to hire a blind employee as director of an agency for the blind -- even though he was the most qualified applicant. Certain state agencies apparently had general policies against hiring or promoting persons with disabilities. A zoo turned away children with Downs Syndrome "because [the zookeeper] feared they would upset the chimpanzees." There were reports of numerous zoning decisions based upon "negative attitudes" or "fear," such as a zoning board that denied a permit for an obviously pretextual reason after hearing arguments that a facility would house

"'deviants'" who needed "'room to roam,'" [Justice Breyer appended a long list of "hundreds of examples of discrimination by state and local governments" submitted to the task force appointed by Congress as Appendix C to his opinion.] Congress could have reasonably believed that these examples represented signs of a widespread problem of unconstitutional discrimination.

II

The Court's failure to find sufficient evidentiary support may well rest upon its decision to hold Congress to a strict, judicially created evidentiary standard, particularly in respect to lack of justification. JUSTICE KENNEDY's empirical conclusion -- which rejects that of Congress -- rests heavily upon his failure to find "extensive litigation and discussion of constitutional violations, " in "the courts of the United States." And the Court itself points out that, when economic or social legislation is challenged in court as irrational, hence unconstitutional, the "burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." ...

The problem with the Court's approach is that neither the "burden of proof" that favors States nor any other rule of restraint applicable to judges applies to Congress when it exercises its § 5 power. "Limitations stemming from the nature of the judicial process . . . have no application to Congress." Oregon v. Mitchell, 400 U.S. 112, 248 (1970) (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part). Rational-basis review -- with its presumptions favoring constitutionality -- is "a paradigm of *judicial* restraint." FCC v. Beach Communications, Inc. , 508 U.S. 307, 314 (1993) (emphasis added). And the Congress of the United States is not a lower court.

Indeed, the Court in *Cleburne* drew this very institutional distinction. We emphasized that "courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices." Our invocation of judicial deference and respect for Congress was based on the fact that "[ § ]5 of the [Fourteenth] Amendment empowers *Congress* to enforce [the equal protection] mandate." Id. at 439 (emphasis added). Indeed, we made clear that the absence of a contrary congressional finding was critical to our decision to apply mere rational-basis review to disability discrimination claims -- a "congressional direction" to apply a more stringent standard would have been "controlling." Ibid. See also Washington v. Davis, 426 U.S. 229 (1976) (refusing to invalidate a law based on the Equal Protection Clause because a disparate impact standard "should await legislative prescription"). Cf. *Mitchell*, supra, at 284 (Stewart, J., concurring in part and dissenting in part) ("Congress may paint with a much broader brush than may this Court, which

must confine itself to the judicial function of deciding individual cases and controversies upon individual records"). In short, the Court's claim that "to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*," is repudiated by *Cleburne* itself.

There is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its § 5 authority, to adopt rules or presumptions that reflect a court's institutional limitations. Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy. Unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification. Unlike judges, Members of Congress can directly obtain information from constituents who have first-hand experience with discrimination and related issues.

Moreover, unlike judges, Members of Congress are elected. When the Court has applied the majority's burden of proof rule, it has explained that we, i.e., the courts, do not "'sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations.'" To apply a rule designed to restrict courts as if it restricted Congress' legislative power is to stand the underlying principle -- a principle of judicial restraint -- on its head. But without the use of this burden of proof rule or some other unusually stringent standard of review, it is difficult to see how the Court can find the legislative record here inadequate. Read with a reasonably favorable eye, the record indicates that state governments subjected those with disabilities to seriously adverse, disparate treatment. And Congress could have found, in a significant number of instances, that this treatment violated the substantive principles of justification -- shorn of their judicial-restraint-related presumptions -- that this Court recognized in *Cleburne*.

III

The Court argues in the alternative that the statute's damage remedy is not "congruent" with and "proportional" to the equal protection problem that Congress found. The Court suggests that the Act's "reasonable accommodation" requirement, 42 U.S.C. § 12112(b)(5)(A), and disparate impact standard, § 12112(b)(3)(A), "far exceed what is constitutionally required." But we have upheld disparate impact standards in contexts where they were not "constitutionally required." Compare Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), with Washington, supra, at 239, and City of Rome v. United States, 446 U.S. 156, 172-173 (1980), with Mobile v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion).

And what is wrong with a remedy that, in response to unreasonable employer behavior, requires an employer to make accommodations that are reasonable? Of course, what is "reasonable" in the statutory sense and what is "unreasonable" in the constitutional sense might differ. In other words, the requirement may exceed what is necessary to avoid a constitutional violation. But it is just that power -- the power to require more than the minimum- that § 5 grants to Congress, as this Court has repeatedly confirmed. As long ago as 1880, the Court wrote that § 5 "brought within the domain of congressional power" whatever "tends to enforce submission" to its "prohibitions" and "to secure to all persons . . . the equal protection of the laws." Ex parte Virginia, 100 U.S. 339, 346 (1880). More recently, the Court added that § 5's "draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18." Morgan, 384 U.S. at 650 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

In keeping with these principles, the Court has said that "it is not for us to review the congressional resolution of "the various conflicting considerations -- the risk or pervasiveness of the discrimination in governmental services . . . the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected." [*Morgan*] "It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." See also South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (interpreting the similarly worded enforcement Clause of the Fifteenth Amendment to permit Congress to use "any rational means to effectuate the constitutional prohibition"). Nothing in the words "reasonable accommodation" suggests that the requirement has no "tendency to enforce" the Equal Protection Clause, *Ex parte Virginia*, that it is an irrational way to achieve the objective, *Katzenbach* , that it would fall outside the scope of the Necessary and Proper Clause, *Morgan*, or that it somehow otherwise exceeds the bounds of the "appropriate," U.S. Const., Amdt. 14, § 5.

The Court's more recent cases have professed to follow the longstanding principle of deference to Congress. See Kimel v. Florida Bd. of Regents; Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank. And even today, the Court purports to apply, not to depart from, these standards. But the Court's analysis and ultimate conclusion deprive its declarations of practical significance. The Court 'sounds the word of promise to the ear but breaks it to the hope.'

IV

The Court's harsh review of Congress' use of its § 5 power is reminiscent of the similar (now-discredited) limitation that it once imposed upon Congress' Commerce Clause

power. Compare Carter v. Carter Coal Co., 298 U.S. 238 (1936), with United States v. Darby, 312 U.S. 100, 123, (1941) (rejecting *Carter Coal*'s rationale). I could understand the legal basis for such review were we judging a statute that discriminated against those of a particular race or gender, or a statute that threatened a basic constitutionally protected liberty such as free speech; see also Post & Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel, 110 Yale L. J. 441, 477 (2000) (stating that the Court's recent review of § 5 legislation appears to approach strict scrutiny). The legislation before us, however, does not discriminate against anyone, nor does it pose any threat to basic liberty. And it is difficult to understand why the Court, which applies "minimum 'rational-basis' review" to statutes that burden persons with disabilities, subjects to far stricter scrutiny a statute that seeks to help those same individuals.

I recognize nonetheless that this statute imposes a burden upon States in that it removes their Eleventh Amendment protection from suit, thereby subjecting them to potential monetary liability. Rules for interpreting § 5 that would provide States with special protection, however, run counter to the very object of the Fourteenth Amendment. By its terms, that Amendment prohibits States from denying their citizens equal protection of the laws. Hence "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty." And, ironically, the greater the obstacle the Eleventh Amendment poses to the creation by Congress of the kind of remedy at issue here -- the decentralized remedy of private damage actions -- the more Congress, seeking to cure important national problems, such as the problem of disability discrimination before us, will have to rely on more uniform remedies, such as federal standards and court injunctions, which are sometimes draconian and typically more intrusive. For these reasons, I doubt that today's decision serves any constitutionally based federalism interest.

The Court, through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress. Its decision saps § 5 of independent force, effectively "confining the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch [is] prepared to adjudge unconstitutional." Whether the Commerce Clause does or does not enable Congress to enact this provision, in my view, § 5 gives Congress the necessary authority. For the reasons stated, I respectfully dissent.

*Discussion*

1. *Converting scrutiny rules into substantive limitations*. *Garrett* is a logical extension of the Rehnquist Court's (and more specifically, the five Justice majority's) desire to rein in federal interference with state governments. The Court does this by converting its own self-imposed tests of *judicial scrutiny* into substantive limitations on *Congressional power*.

The Court explains that much discrimination against the disabled is rational (because, for example, it saves states money) even if it is unfair. Even if it is based on stereotypes it would almost always pass the test of minimum rationality. Hence a general prohibition on discrimination can't possibly be "congruent and proportional" to the goal of prohibiting the small number of cases that would flunk the rational basis test.

However, as Justice Breyer suggests, the court applies minimal scrutiny in most cases of social and economic regulation in order to give legislatures breathing room. Refusal to look behind most social and economic legislation for violations of due process or equal protection shows respect for democratic processes and is consistent with the basic vision of judicial review after *West Coast Hotel* and *Carolene Products*. Put another way, limited judicial scrutiny respects the separation of powers between courts and legislatures. Similar considerations are often used to explain why the Court does not hold that there is a violation of Equal Protection without a showing of discriminatory intent. But the rationale of respect for democratic authority does not explain why the same scrutiny rules should bind Congress' determination that States have violated guarantees of due process and equal protection. Congress, after all, is a democratically elected body. The Court doesn't explain why rules designed to keep judges from interfering too much with legislatures should be used to limit legislative power.

Under this way of looking at things, the scrutiny rule that judges apply isn't the constitutional guarantee itself; it just represents the limits of judicial authority to enforce the constitutional guarantee. It's possible that lots of state legislative and executive decisions violate due process and equal protection but that courts simply lack the institutional ability to discover which ones are which. Hence they defer to almost all of them. But Congress might not have to be so limited in its protection of constitutional rights because it has greater institutional resources and it is a representative body. So the separation of powers argument might seem to cut in the other direction.

However, it is likely that the Court's real concern is not separation of powers but federalism. Because it has not yet decided to limit or overrule Fitzpatrick v. Bitzer, the scope of the Eleventh Amendment immunity is determined by the scope of § 5 power. Hence it must limit § 5 power if it wants to preserve that immunity. If Congress could determine for itself what state activities violated equal protection and due process-- or

what prophylactic restrictions were necessary to prevent such violations– there would be virtually no limits to Congressional power to regulate the states under § 5. (Recall the fear expressed by Justice Bradley in *The Civil Rights Cases*). Almost everything that states do can be seen to affect the due process or equal protection interests of some class of persons. Then Congress would be able to abrogate the Eleventh Amendment protections of states entirely.

In order to prevent this, the Court employs the limitations on judicial review that apply to judges– created for quite different purposes-- to limit Congress. If the state's activity conceivably involves race or sex discrimination, the Court will allow some prophylactic legislation under § 5, but if the state's activity would only be tested by rational basis, general prophylactic legislation is not a proper exercise of Congress's § 5 powers. In this way, the Eleventh Amendment immunity determines the scope of the § 5 power.

This is a makeshift solution that creates its own problems. In many cases the Court has withheld judicial protection of civil rights while allowing the political branches to move forward. A good example is pregnancy discrimination. The court has held as a constitutional matter that discrimination on the basis of pregnancy is not sex discrimination that is subject to heightened scrutiny. Geduldig v. Aiello, 417 U.S. 484 (1974). As a result, discrimination on the basis of pregnancy must only meet the test of rational basis. Suppose that states discriminate against women on the basis of pregnancy, in violation of the Pregnancy Discrimination Act of 1978? Could a state employee recover money damages for such a violation? Can the PDA be justified as a prophylactic measure because it is too difficult to prove when pregnancy discrimination is actually a cover for sex discrimination?

Note moreover that the Court's approach collapses two distinct questions: the question of Congress's § 5 power and the scope of Congress's power to abrogate the states' Eleventh Amendment immunity from money judgments. If one rejects the Court's narrow construction of § 5 power, one still has to face the question of how wide the Eleventh Amendment immunity should be. Do you think that Congress should be able to abolish this immunity completely? If not, should Congress' ability to force the states to pay money damages be limited only to violations of "civil rights" and "civil liberties?" How, precisely, should those be defined?

2. *Anecdotal evidence.* Chief Justice Rehnquist dismisses the record of evidence of discrimination against the disabled as "anecdotal." Yet anecdotal evidence is a standard way that legislatures find facts upon which to justify the passage of legislation. It is also a standard way that courts find facts justifying generally rules. In *Bush v. Gore*, (discussed *infra*) for example, the Court uses illustrative anecdotes to demonstrate that

the Florida recount process was arbitrary. Rehnquist may have meant that the evidence of discrimination was sparse or isolated. Given the voluminous record, how did he arrive at this conclusion?

3. *Divide and conquer*. Note closely the rhetorical techniques through which Chief Justice Rehnquist reaches the conclusion that Congress's findings are insufficient to justify a prophylactic remedy. First he suggests that *Cleburne* is a standard minimum rationality case; in fact, as we shall see in Chapter 7, it is one of a small number of cases that apply a more exacting standard-- sometimes called "rational basis with a bite"-- to strike down government action. Arguably, then, *Cleburne* is not a simple minimum rationality case-- it prohibits discrimination based on ignorance and outmoded stereotypes against the mentally retarded. Because these are often difficult to prove in the individual case, Congress might reasonably conclude that a general prohibition against discrimination was necessary. That would help distinguish *Garrett* from *Kimel*, because the Court has not applied the same logic to discrimination against the aged.

Second, Rehnquist argues that only examples of discrimination by state actors should count, but not those involving local, county, and municipal officials. This shrinks the number of relevant cases drastically. Rehnquist's justification is that only higher level state officials enjoy the Eleventh Amendment immunity. Isn't this a non-sequitur? After all, the real question for determining §5 power should be whether local, county and municipal officials engage in state action under the meaning of the *Fourteenth Amendment*, which they clearly do. Once that Fourteenth Amendment power is established, the Eleventh amendment immunity (which applies only to states) dissolves. By contrast, in *Garrett*, Chief Justice Rehnquist uses the doctrines applicable to the Eleventh Amendment immunity to circumscribe the nature of the §5 power *generally*. In any case, why isn't the evidence he excludes highly probative of what state officials are doing? If there is substantial evidence of discrimination at the county and municipal level, it stands to reason that there will be discrimination at the state level, since one might assume that similar people staff these different levels of state government.

Third, Rehnquist argues that only examples of employment discrimination should count. This excludes an enormous number of cases found in the record. But couldn't one argue that if state actors were prejudiced in one area they would be prejudiced others as well? After all, discrimination against African-Americans tends to cut across many different areas of social life. For a more detailed discussion of Chief Justice Rehnquist's rhetorical techniques in *Garrett*, see Vikram Amar and Samuel Estreicher, The Supreme Court in *Garrett*: Conduct Unbecoming a Coordinate Branch, 4 Green Bag 2d 347 (2001).

3. *Title II of the ADA*. The Court specifically stops short of deciding whether plaintiffs can sue states for violations of Title II of the ADA, which 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." For example, Title II might be implicated if a disabled person is injured in attempting to use or gain access to a public service because the public facility it was located in was not wheelchair accessible. Can you think of a reason why Title II would be a proper exercise of Congress's § 5 powers if Title I is not?

One reason might be that much of the evidence in the record that Rehnquist excludes concerns denial of access to facilities. That means that the record might have been substantial enough to uphold Title II. If so, this suggests that the exclusion of Title II from the case was crucial to making the Court's reasoning about Title I plausible. If Title I and Title II had been considered together as a part of a single act (i.e., the Americans with Disabilities Act), the whole mass of evidence would be relevant and it would be much harder to conclude that Congress's findings were insufficient.

From another perspective, however, it is simply irrelevant how much evidence Congress found of failure to accommodate the disabled in public facilities. *Garrett* stands for the proposition that Congress may not use its § 5 powers to convert "rational" basis scrutiny into something more searching. Given the Court's conclusion that discrimination against disabled persons is often "rational" if it saves money, wouldn't it be equally "rational" for states to save money by not investing in structural improvements that would make their public services fully and equally accessible to disabled persons?

4. *"Old" discrimination versus "new" discrimination.* Justice Kennedy and O'Connor argue that failure to accommodate the disabled is a "new" kind of discrimination and that states can't be held accountable under § 5 for failing to avoid it. Do you agree? The passage of new civil rights legislation often signals a change in popular consciousness about what liberty and equality require. Should Congress be prohibited from applying a national standard of civil rights to state governments because the federal judiciary has not yet caught up? Do Kennedy and O'Connor's arguments ring particularly hollow when a standard argument for judicial restraint in the civil rights arena is that legislatures should be encouraged to solve problems creatively instead of relying on courts to protect civil rights? For more on the dialectic between courts and legislatures in § 5 cases, see Robert C. Post and Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After *Morrison* and *Kimel*, 110 Yale L. J. 441 (2000).