ness, not sex. The plurality observed that paid sick leave and disability protection were almost universally available to state employees without intended or incidental gender bias. The addition of unpaid self care leave to this state benefit might help some women suffering pregnancy related illness, but the establishment of a broad self care leave program under the FMLA was not a proportional or congruent remedy to protect any constitutionally based right under the circumstances.[2163]

The Court in *Tennessee v. Lane* [2164] held that Congress could authorize damage suits against a state for failing to provide disabled persons physical access to its courts. Title II of the Americans with Disabilities Act provides that no qualified person shall be excluded or denied the benefits of a public program by reason of a disability,[2165] but since disability is not a suspect class, the application of Title II against states would seem questionable under the reasoning of *Garrett*.[2166] Here, however, the Court evaluated the case as a limit on access to court proceedings, which, in some instances, has been held to be a fundamental right subject to heightened scrutiny under the Due Process Clause.[2167]

Reviewing the legislative history of the ADA, the Court found that Title II, as applied, was a congruent and proportional response to a Congressional finding of "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." [2168] However, as Justice Rehnquist pointed out in dissent, the deprivations the majority relied on were not limited to instances of imposing unconstitutional deprivations of court access to disabled persons.[2169] Rather, in an indication of a more robust approach where protection of fundamental rights is at issue, the majority also relied more broadly on a history of state limitations on the rights of

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[2163] Justice Ginsburg, writing for herself and three others, extensively reviewed the historical and legislative record and concluded that the family care and the self care provisions were of the same cloth. Both provisions grew out of concern for discrimination against pregnant workers, and, the FMLA's leave provisions were not, in the dissent's opinion, susceptible to being rent into separate pieces for analytical purposes.

[2164] 541 U.S. 509 (2004).

[2165] 42 USCS § 12132.

[2166] 531 U.S. 356 (2001).

[2167] *See, e.g.,* Faretta v. California, 422 U.S. 806, 819, n.15 (1975) (a criminal defendant has a right to be present at all stages of a trial where his absence might frustrate the fairness of the proceedings).

[2168] 541 U.S. at 524.

[2169] 541 U.S. at 541–42 (Rehnquist, J., dissenting).