

The Americans with Disabilities Act as a Civil Right Law: A Review of Developmental Principles and Supreme Court Decisions

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The protection of the fundamental rights of citizens of the United States has been a significant theme in the legislative and judicial history of the nation. These rights, largely derived from the Bill of Rights and augmented through decisions of the Supreme Court, allow individuals to realize the full benefits citizenship. The post-Civil War amendments to the Constitution legally defined citizenship and provided significant protections from denial of these rights by the states, and broad reading of the Commerce Clause of the Constitution allowed greater protections from private, rather than governmental, actors to be instituted through congressional action. The Americans with Disabilities Act of 1990 (ADA) attempted to apply both the Fourteenth Amendment of the Constitution and the Commerce clause as a justification for the protection of civil rights of persons with disabilities. This article reviews the development of civil rights law in the United States and those Supreme Court decisions that apply to persons with disabilities, and the way in which the Court has distinguished the protection of civil rights of persons with disabilities from other vulnerable groups.

The definition and meaning of citizenship, and the rights of citizens, have been a constant point of debate since the writing of the United States Constitution in 1787. The striving of various groups of traditionally under-empowered groups of citizens based upon race, gender, sexual orientation, national origin, and other indelible personal characteristics has been a continuous struggle, with a general movement over time toward greater recognition and protection of the basic privileges that citizenship should bring under the Constitution. While for some these struggles have been evident for more than 200 years, recognition of the rights of persons with disabilities has only come in recent decades. Perhaps the most significant protections come through the Americans with Disabilities Act (ADA) of 1990, Pub. L. 101-336, 104 Stat. 327(1990; codified at 42 U.S.C § 12101 *et. seq.*), but also through other legislative endeavors.

Because the United States is a federal system in which the federal (central) government theoretically possesses only limited power to enact legislation, there remain legal limits on the ability of the central government to grant protection to the rights of citizens. Concerning the protection of the civil rights of persons with disabilities, on occasion these limits have caused the Supreme Court of the United States, the final arbiter of legal questions, to determine that the fullest protections envisioned by the ADA and similar laws do not meet the scrutiny of constitutional requirements. Therefore, in many decisions the Supreme Court has limited the benefits of the ADA to persons with disabilities.

The ADA and its meaning as interpreted by the Supreme Court recalls a history that goes deep into the constitutional history of the nation. A full understanding of the rationale for the evolution of the Supreme Court's views on the meaning of citizenship and the capacity of the federal government to of the protection of the rights of citizenship requires an explanation of that history. The purpose of this

article is to examine that history as a backdrop to the discussion of the major cases heard by the Supreme Court in relation to persons with disabilities.

Federalism, Federal Powers, and State Powers

The Constitution of the United States as written in 1787 proposed a system of government in which a federal government consisting of a legislative, executive and judicial branch be established, with each branch having limited enumerated powers to establish laws applicable to the nation as a whole. State governments, meanwhile, created their own laws largely unhindered by the provisions of the Constitution, so long as those state laws did not interfere with the inherent enumerated powers of the federal government. This system remains largely intact today, although the scope of enumerated powers of the federal government has gradually increased through interpretation of federal law and through amendment to the Constitution itself.

Enumerated Powers of the Legislative Branch

The legislative branch is given the task of making law and the enumerated powers allocated to it to make law can be found in Article I, Section 8 of the Constitution, and each law that is proposed or passed must tie to one of the enumerated powers. U.S. Const., art. 1, § 8. Most of the enumerated powers relate to matters that seem rather limited in scope and some may seem anachronistic, and all relate to those things that states could not effectively oversee efficiently. Two of the enumerated powers, however, have been interpreted so broadly by the Supreme Court to give the legislative branch far greater power than is apparent on first glance. The first of these is the necessary and proper clause. This clause authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. 1, § 8, cl. 18. This power gives the legislative branch authority to create laws to enable it to efficiently carry out the other enumerated powers, but also to allow the other branches of government, the executive and the judicial, to carry out their enumerated powers. The necessary and proper clause was clarified in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 419 (1819) as a grant of implied powers to Congress to enforce its enumerated powers under the Constitution, and these powers were sacrosanct in that they could not be nullified or otherwise made moot by the action of the states.

Perhaps the broadest power granted under the enumerated powers is the commerce clause. This clause states that Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art 1, § 8, cl. 3. This power seems on its face to be rather innocuous, and indeed, for approximately the first century and a half of the Constitution's existence this was the case, with a relatively strict interpretation of the application of the power. However, as will be discussed later in this chapter, over the last eighty years the Supreme Court has permitted a much broader interpretation of the commerce regulation power. This broader interpretation has allowed the legislative branch to create laws that impact many things that were not envisioned in the earlier era of the clause's interpretation. Most significant among these for the discussion in this article is the application of the commerce clause to civil rights legislation.

The Powers of the States

Federalism grants to the states the right to make all laws that did not conflict with the enumerated powers of the federal government, or that violate those restrictions placed on the states by in Article 1 of the Constitution (U.S. Const. art 1, § 10), most of which relate to commercial regulation with other states or foreign nations. Each state has its own constitution defining the government and the means of making laws within that state. Until after the time of the Civil War, state governments retained broad powers to govern citizens within their borders, including the regulation of civil rights and fundamental freedoms.

Structure and Development of Civil Rights Protections

The Bill of Rights

The Bill of Rights refers to the first ten amendments to the Constitution, ratified by the states in 1791. The Bill of Rights indicate certain specific rights of citizens that cannot be abridged by actions of the federal government, and as such may be considered the first guarantee of civil rights to citizens of the United States. The rights that are encompassed by these amendments are by and large stated in the negative, indicating not a grant of rights to citizens but rather an acknowledgement that certain rights exist and cannot be taken away. For example, the First Amendment to the Constitution states "Congress *shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" (emphasis added). U.S. Const. amend. I. Subsequent amendment protect a wide array of rights of citizens to legal process and property. Amendments Nine ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"), and Ten ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people") of the Constitution provide caveats to federal government power, indicating that the protections provided by the Bill of Rights are not an exhaustive list of rights of citizens. U.S. Const. amends. IX, X.

Although the Bill of Rights was ratified in 1791, it was not until the passage of the Fourteenth Amendment to the Constitution that it was possible to bind these rights to actions of individual states, and then this process was a gradual one that occurred over a number of decades. The Bill of Rights refers to *federal* action without reference to *state* action, and states themselves were not bound by its provisions. For example, the Fifth Amendment prohibition of seizure of private property for public use without just compensation ((U.S. Const. amend. V) was deemed to have not applied to the states in *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), with Chief Justice Marshall holding that "amendments (making up the Bill of Rights) contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them." *Barron* at 250. The individual states were free to enact their own protections for rights of citizens under their own individual constitutions, but state action itself was not limited by the protection of the Bill of Rights.

Sovereign Immunity and the Eleventh Amendment

Another early amendment which impacts upon civil rights and redresses against actions of the state or federal government is sovereign immunity. Sovereign immunity is the principle that the sovereign (in this case the state or federal government) cannot do wrong, and therefore cannot be forced to compensate a wronged party for their actions. The federal government has no specific constitutional protection related to sovereign immunity. Rather, it has been assumed by the courts that sovereign immunity existed for the federal government. State governments, likewise, have sovereign immunity against suits by citizens of the state. However, there were initially no provisions for states by suits from citizens of another state. This matter was at issue in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), a very early case in which it was held that suits of this type could stand. In response, the Eleventh Amendment to the Constitution was quickly proposed and ratified by the states, granting states the same protections in sovereign immunity against citizens of other states that it held over its own citizens. U.S. Const. amend. XI. The matter of sovereign immunity became an important consideration in the development of further civil rights protections and was a significant consideration in the development of the Fourteenth Amendment to the Constitution.

The Definition of Citizenship and the Reconstruction Amendments

Perhaps one of the great paradoxes of the creation of the Constitution is that while it, and the Bill of Rights, speak to the rights of citizens and their protections, in no place does the original draft of the Constitution define citizenship. It was assumed that free persons born in the United States were citizens, and Congress was given the power to provide procedures for naturalization of persons of foreign birth. It was not until the ratification of the Reconstruction Amendments (the name collectively given to the Thirteenth, Fourteenth, and Fifteenth amendments to the Constitution) that citizenship was finally defined.

The result of the Civil War necessitated the passage of the Reconstruction Amendments. The Thirteenth Amendment abolished slavery *de jure* in the United States, and the Fifteenth Amendment prohibited discrimination in voting against by reasons of race, color, or previous condition of servitude. U.S. Const. amends. XIII, XIV. Both of these Amendments provide invaluable protections of fundamental rights, and in particular the rights of racial minorities. However, of the three Reconstruction Amendments, the Fourteenth Amendment has had perhaps the greatest and most enduring impact on civil rights protections. U.S. Const. amend. XIV.

Section 1 of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

This section of the Fourteenth Amendment finally provided a constitutional definition of citizenship. The Amendment further indicates that states cannot create laws which violate the benefits of citizenship or deny these rights to persons without due process or equal protection of the laws. Sections 2 through 4 of the Fourteenth Amendment relate to specific consequences of the Civil War and by and large have little meaning in the current day. Section 5 of the Fourteenth Amendment, however, remains one of the most powerful means by which the legislative branch can influence civil rights protections. This section states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV § 5. This sentence in and of itself grants Congress a new power not included in the Constitution, that of policing actions by the states that seek to deny rights to citizens in a manner that is in conflict with the provisions of the Amendment. Perhaps the most significant use of this power in recent years has been its application in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the landmark decision desegregating public schools. The modern interpretation of this power by the Supreme Court was enunciated in *City of Boerne v. Flores*, 521 U.S. 507 (1997), holding that use of Section 5 of the Fourteenth Amendment must be congruent and proportional to the circumstances, and not sweeping; otherwise, the legislative branch could rewrite the balance between the federal government and the states to favor itself, going beyond the intent of the Fourteenth Amendment.

A final note on the Fourteenth Amendment concerns the incorporation of the provisions of the Bill of Rights to the states. The Supreme Court did not hold that the Bill of Rights immediately applied to the states upon the passage of the Fourteenth Amendment. Rather, it chose to follow a policy of selective incorporation, or attaching the protections of the Bill of Rights to the states as cases provided for the opportunity. This began with freedom of speech in *Gitlow v. New York*, 268 U.S. 652 (1925) and has continued over the years with the most recent case of incorporation being *McDonald v. City of Chicago*, 561 U.S. 742 (2010), concerning the Second Amendment. Nearly all of the substantive protections contained in the Bill of Rights have now been recognized as applicable to state action through the Fourteenth Amendment's due process clause.

Development of Commerce Power as a Means to Extend Protection of Civil Rights

Until the 1930s the power of the legislative branch to regulate interstate commerce and foreign trade was a relatively minor constitutional concern. With the coming of the Great Depression and the institution of programs under the New Deal and its sweeping regulatory provisions intended to help the recovery of the United States economy, the Supreme Court faced a number of decisions regarding application of the commerce power. Initially the Supreme Court held many of the provisions unc, but beginning in the mid-1930s the Supreme Court, under pressure from the executive branch, began to allow broader and broader application of the commerce power. One of the more commonly cited cases indicating this new acceptance of the broad commerce power was *Wickard v. Filburn*, 317 U.S. 111 (1942). This case involved a federal law, passed under the power of the commerce clause that awarded federal allotments permitting farmers to grow a certain amount of wheat and fined those who grew wheat without this allotment. A farmer had grown wheat on his farm for the purpose of feeding his livestock; none of the wheat left his farm for market. Nonetheless, the farmer received a fine for this action. The farmer challenged the law and this use of the commerce power. The Supreme Court upheld the law, and the fine, and stated in its holding:

Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be 'production' nor can consideration of its economic effects be foreclosed by calling them 'indirect.' (. . .) 'The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. (. . .) The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.' *Wickard* at 124 (Citations omitted).

The Supreme Court initially used this expanded commerce power for the purposes of economic regulation through the 1950s. In the 1960s, the commerce clause was the power applied to pass the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 481, which did much to desegregate private facilities. The rationale was that those entities and activities touched by the Act were entwined with interstate commerce, and Congress was thus able to mandate the actions encompassed in the Act using the broad interpretation of the commerce clause. A series of cases before the Supreme Court in the 1960s, beginning with *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), upheld the constitutionality of the Act as a legitimate use of the commerce power.

Thus, the legislative branch of the federal government in the current day has acquired significant and powerful tools to protect the rights of individuals from discrimination by both state actors and private parties. The Fourteenth Amendment and the expanded powers of the commerce clause have permitted the development of civil rights protections for vulnerable groups and both are recognized by the Supreme Court, within climits and bounds, as legitimate means of creating a more equitable society. Both the Fourteenth Amendment and the commerce clause were cited as the means by which the federal government could enact the Americans with Disabilities Act.

Determining if a Law is Discriminatory: The Tests for Scrutiny and the Rational Basis Test

Under the Fourteenth Amendment a law passed by a state or the federal government cannot be upheld if it violates the rights of individuals as citizens. Therefore, any law that makes a distinction be-

tween groups of people and attempts to assign a right or deny a right on the basis of group membership is likely to be suspect from a legal perspective. The Supreme Court has developed a test for the review of such laws, and only in the most unusual of circumstances would such laws be allowed to stand.

The origins of this judicial reasoning can be found in an otherwise obscure New Deal-era case, *United States v. Carolene Products*, 304 U.S. 148 (1938). The case itself was one of a number of cases involving the expanding commerce power, in this case an adulterated form of milk which had been banned from interstate shipment by a federal law. The holding of the case indicated that legislatures may pass laws for the public health or safety so long as they have a rational relation to a legitimate interest of the government. This was the first application of what has become known as the rational basis test of a law. The footnote expands upon this decision to describe circumstances that might cause the Supreme Court to apply stricter standards:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. (...) It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. (...) Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious (...) or racial minorities (...) whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. *Carolene Products* at 152. (Citations omitted).

The footnote indicates that the Fourteenth Amendment would call for the Supreme Court to examine laws that make distinctions on membership in "discrete and insular" minority groups with heightened scrutiny. What has emerged from the Supreme Court is the concept of strict scrutiny review should a law be passed which makes distinctions based solely on membership in these groups. Strict scrutiny is applied when a law makes distinctions based on suspect classifications such as race, religion, national origin, or when fundamental rights are impinged by a law. Any such law must have a compelling basis for its passage, must be very narrowly tailored to achieve its objective, and must employ the least restrictive means of achieving its objective. The rule was first expounded in *Korematsu v. United States*, 323 U.S. 214 (1944), considering the internment of Japanese-Americans during World War II. Interestingly, this is the only occurrence when a law that facially makes distinctions based on race or national origin of citizens has been allowed to stand by the Supreme Court. Heightened scrutiny by the Supreme Court represents a final means through which laws that intrude upon fundamental rights or which place burdens on groups of people based upon indelible characteristics can be mooted. It is an extension of the Supreme Court's interpretation of the provisions of the Fourteenth Amendment that prevent violations of due process or the rights of citizenship.

The Americans with Disabilities Act

The Americans with Disabilities Act of 1990, Pub. L. is codified at 42 U.S.C. § 12101 *et seq.* As with any other law, Congress indicated the authority under which it was able to pass the law, stating its intent "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 126 § 12101(b)(4). The codification of the Act begins with congressional findings, each clause of which recognizes either historical discrimination burdening persons with disabilities, the need for equal opportunity for persons with disabilities, or Congress's intention to create a legal framework for addressing this discrimination. From a legal perspective, the ADA is unequivocally a civil rights law, which on its face recognizes persons with disabilities as a suspect class deserving of special protection and recourse as a result of class membership.

The ADA is also a law with a comprehensive scope. It provides protections for persons with disabilities in employment (Title I, codified at 42 U.S.C. 126 § 12111 *et seq.*), public services and public transportation provided by public entities, and public transportation by intercity and commuter rail (Title II, codified at 42 U.S.C. 126 § 12131 *et seq.*), public accommodations and services operated by private entities (Title III, 42 U.S.C. 126 § 12181 *et seq.*), and telecommunications (Title IV, codified by amending the Communications Act of 1934, Pub. L. 73-416, 38 Stat. 1064, 47 U.S.C. 151 *et seq.*, with these amendments codified at 47 U.S.C. § 225). The following is a review of the Supreme Court cases concerning civil rights protections of the ADA, their holdings and impact on the power of the Act.

Supreme Court Decisions and Civil Rights Protections of the ADA

Title I, Sovereign Immunity, and the Fourteenth Amendment

Title I of the ADA attempts to curb discrimination against persons with disabilities in employment. Work is not a fundamental right protected by the Bill of Rights or any other constitutional provision; however, discrimination in employment based on indelible personal characteristics is unlawful under the provisions of various civil rights laws. Congress can reach private employers in this manner through the commerce power, and, in theory, attempted to bar discrimination against persons with disabilities through the powers of Section Five of the Fourteenth Amendment. The Supreme Court, however, has indicated that unlike other potentially suspect classes, persons with disabilities are not due the same protections from discrimination in employment by the states under the Fourteenth Amendment.

The case which prohibited congressional authority in Title I matters related to the states was *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001). Two state employees filed ADA claims after having acquired disabilities during the course of their employment and experiencing negative consequences from their employers. As part of their suit they sought monetary damages from the state of Alabama. To do so would require the abrogation of the sovereign immunity of the state by Congress through the ADA using Section 5 of the Fourteenth Amendment, and for the courts to apply heightened scrutiny to the state's actions. While lower courts permitted the case to go forward, the Supreme Court reversed. The reasoning of the Court was based upon persons with disabilities not having suffered historical discrimination in employment. Also key to the decision was the holding in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), which held that only rational basis review was necessary in matters concerning persons with disabilities. The holding in *Garrett* states in relevant part:

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 toward such individuals are rational. They could quite hardheadedly—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. (...) 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(.) *Garrett* at 367-68; 374.

This decision eliminated one remedy for persons with disabilities, monetary damages, in employment by state government, but it should be noted that other relief, including injunctive relief requiring the state to provide accommodations or take other corrective action, might still be available. However, the breach of sovereign immunity of the states in regard to employment discrimination under the ADA was viewed as an overreach by Congress in applying its powers under the Fourteenth Amendment. In regard to other matters concerning civil rights of persons with disabilities and state actions, espe-

cially those that burden fundamental constitutional rights, the Supreme Court has been receptive of this congressional power.

Title II, Public Accommodations, and Fundamental Rights

While the Supreme Court's reception of congressional action regarding employment, especially when employment is considered in the context of a civil right, has not resulted in positive results for persons with disabilities, in regard to other forms of discrimination the Supreme Court, and by and large lower courts, have, in contrast, stalwartly defended the protections of the ADA. The explanation can be that working is not recognized as a fundamental right while the protections offered by Titles II, III, and IV of the ADA concern rights that are considered to be the privileges of citizenship. Laws or actions that burden such rights will be subjected to heightened scrutiny. Two cases of interest, *Tennessee v. Lane* and *Olmstead v. L. C.*, demonstrate this contrast in the opinions of the Supreme Court.

Tennessee v. Lane. *Tennessee v. Lane*, 541 U.S. 509 (2004) was a case concerning access to public facilities, specifically, the right to physical access to a court. Two plaintiffs who used wheelchairs were unable to access courtrooms in a courthouse that had no elevator. The first was called to answer a criminal charge. On his first appearance he crawled up two flights of stairs. On the second he refused to crawl or to be carried to the courtroom and was jailed for failure to appear. The other plaintiff was a court reporter who had encountered this matter at various courthouses in the state and had lost work as a result. The state attempted to assert sovereign immunity as a defense, citing *Garrett*. The trial court and the Sixth Circuit Court of Appeals refused to dismiss the complaint, indicating that their reading of *Garrett* would permit a defense of sovereign immunity in equal protection claims due to a lack of historically unconstitutional discrimination in employment on the basis of disability, but in regard to due process claims that include access to a court to be heard sovereign immunity could be abrogated by Congress through Section 5 of the Fourteenth Amendment.

The Supreme Court indeed held that this was the case. While Title I claims did not rise to the level that would permit congressional application of Fourteenth Amendment protections, the Supreme Court, pointing to its ruling in *Garrett*, noted that this was not the case in regard to other titles of the ADA. The Sixth Amendment confrontation clause ("in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him") was bound to the states to the Fourteenth Amendment, as well as the right to public access to courts under the First Amendment. Using the rule developed in *City of Boerne v. Flores*, 521 U.S. 507 (1997) that congressional measures under the Fourteenth Amendment must be "congruent and proportional," the Supreme Court found that Title II of the ADA was an appropriate use of this power. Justice Stevens, writing for the majority, stated evidence of the extent of the denial of due process rights to persons with disabilities:

It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, "[a]s of 1979, most States . . . categorically disqualified 'idiots' from voting, without regard to individual capacity." The majority of these laws remain on the books, and have been the subject of legal challenge as recently as 2001. Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying and serving as jurors. The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, the abuse and neglect of persons committed to state mental health hospitals, and irrational discrimination in zoning decisions. The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting. Notably, these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice. (. . .)

With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court pro-

ceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs might be restructured or relocated to other parts of the buildings. Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities. *Lane* at 524-27. (Citations omitted).

The Supreme Court's decision points to the distinction it will draw between employment protections and other elements of the ADA. Congress clearly identified the history of inequitable treatment of persons with disabilities in public accommodations and thus was justified in its application of Fourteenth Amendment power to abrogate state sovereign immunity. The denial of fundamental rights, such as those found in the Bill of Rights, by state governments will not be allowed to stand by the Supreme Court.

Olmstead v. L. C. A final example of the Supreme Court's interpretation of the rights encompassed by the ADA was demonstrated in *Olmstead v. L.C. ex. rel. Zimring*, 527 U.S. 581 (1999). The plaintiffs were two women from the state of Georgia who had dual diagnoses of intellectual disability and mental illness. The professionals working with them had stated that they could be cared for in a community group home setting, but nonetheless continued to be institutionalized. The plaintiffs, through their guardian *ad litem*, brought suit under Title II of the ADA, seeking placement in a community-based setting. The state argued that their continued institutionalization was not a matter of intentional discrimination but rather a question of lack of available funds. The trial court rejected this defense. The Eleventh Circuit Court of Appeals affirmed the decision, yet remanded the case to the trial court pending an analysis of the state's cost-based defense. Such a defense could hold, reasoned the appeals court, if it burdened the state's health budget to such a degree that it would alter services provided by the state in a fundamental manner.

The Supreme Court, in its holding, disagreed with the state's argument that this was not a form of discrimination, pointing to language in the ADA itself that noted specified institutionalization as a form of discrimination. However, it recognized that the ADA was not a mandate to close institutions, as institutions were the proper treatment venue for many persons with disabilities, either temporarily or longer term. The Supreme Court recognized that the state may have a cost-based defense, but that the proper test would be to show that granting relief to the two plaintiffs would be inequitable given the diverse array of services it must provide to a large number of similarly situated persons with disabilities with differing needs. However, the Supreme Court concluded that states have the obligation under the ADA to provide community-based services when such services are desired by the person with a disability, are appropriate, and can be reasonably accommodated given the cost and array of services offered by the state.

Olmstead appears to recognize that the ADA, while not mandating universal deinstitutionalization, encourages community participation to the fullest extent possible for persons with disabilities. The benefits of citizenship include the capacity to participate in one's community to the fullest extent possible. Integration of persons with disabilities into the community through such measures does much to assure that these benefits are realized.

Conclusions

American history has seen the development of a system of government that has slowly yet steadily moved in the direction of equal justice under the law for all persons regardless of their personal characteristics. The gradual recognition and enshrinement of protections of the rights of citizenship has

moved toward greater inclusion and increased protection for those who have traditionally suffered discrimination and injustice from either state or federal actors or private parties. The tools at the disposal of Congress to address such concerns have increased and can be used to powerful effect, with the judicial branch of government providing proper bounds to permit this power from being misused.

The Supreme Court has not heard a significant Americans with Disabilities Act case in the last decade, yet the precedents of *Garrett*, *Lane*, and *Olmstead* continue to have force of law in the treatment of persons with disabilities. The broad outlines of the limits of ADA protections have been addressed by the Supreme Court. The Americans with Disabilities Act recognizes the rights of persons with disabilities to the benefits of full citizenship. The Supreme Court has not found agreement with Congress in providing certain protections for employment; however, state action that has the effect of burdening fundamental rights of persons with disabilities, has been quashed when it has come to the Court's attention. While the disability rights community would hope for greater protections from the Court, the Court's actions have attempted to balance the rights of the states with the potentially vast power of Congress to rewrite law under the Fourteenth Amendment.

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- United States v. Carolene Products*, 304 U.S. 148 (1938).
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- U.S. Const. amend V (1791).
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- U.S. Const. amend. XI (1795).
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U.S. Const. art. 1, § 8, cl. 18 (The Necessary and Proper Clause) (1788).

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