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Congress's Goal of the Protection of Civil Rights of Persons with Disabilities: Facing the Challenge of a Narrowing Supreme Court

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HONORS THESIS

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The Americans with Disabilities Act represents America at its best. Few, if any, pieces of legislation in the two centuries of our history have offered greater promise for so many of our fellow citizens. . . .And America will be a better, fairer, and a stronger nation because of it.

--Senator Edward Kennedy[1]

ADA will empower people to control their own lives. It will result in a cost savings to the Federal government. As we empower people to be independent, to control their own lives, to gain their own employment, their own income, their own housing, their own transportation, taxpayers will save substantial sums from the alternatives.

--Former Congressman Steve Bartlett[2]

The Americans with Disabilities Act of 1990 was enacted with lofty goals. One of them was to call to the attention of the American people that "disability is part of the human experience; all citizens have an interest in ensuring that the values that form the basis for the ADA pervade our national life."[3] More than ten years later, it cannot be correctly argued that complete equality of treatment and opportunity has been achieved for persons with disabilities through the ADA. When Congress created the act, as was seen in other federal civil rights legislation, it listed its prime mandate as to provide a clear and comprehensive

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[1] Quoted in The Americans with Disabilities Act: Ensuring Equal Access to the American Dream, National Council on Disability, January 26, 1995.
[2] Ibid.
[3] Ibid.

national mandate for the elimination of discrimination against individuals with disabilities.[4]

Unfortunately, these goals cannot be reached by way of this regulation alone, or on a reliance on the implementation power of the executive branch. This paper will further expound on the bill and the shortcomings of the powers of the Congress to create an act and then leave it alone, expecting that it will accomplish its goals without any notice of the changes that court interpretation creates. It will establish that the ADA exemplifies the structure of government by illustrating that a single federal law (no matter how comprehensive) is not sufficient to provide for the rights of disabled individuals and that support of the courts is necessary in order to be effective. The federal government cannot override state power sufficiently to enforce the 14th amendment through only this bill, as proven in the case of Alabama v. Garrett, as well as others, and it cannot interpret what constitutes equality (or other key terms) without the help of the Supreme Court, as Olmstead v. L.C. demonstrates. Because there is a lack of consensus between Congress and the Supreme Court, the goal of a clear national mandate is not being accomplished.

A small federal agency called the National Council on the Handicapped (now the National Council on Disability, and to be called the NCD echoing the method of historians and to preserve consistency) began laying the framework for the ADA in the early 1980s. They conducted a landmark study that reported that the National Policy on Disability must be built on the foundation of a philosophy of independent living, preserving the Reagan-era individualism while

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[4] **NCD, 1995 See Appendix I**

establishing that the Federal government still had a "critical role to play" in making that philosophy a reality.[5]

The National Council on Disability brought forth several recommendations to improve the efficacy of the ADA in 1995. Among them was to clarify and strengthen the legal framework surrounding the ADA. In their analysis, they concede that: "participants noted that the ADA was too big to be implemented solely from Washington D.C.," but that "no consensus was reached as to the best strategy for ensuring evenness in implementation across the nation."[6] It is clear that current actions, even seven years after the publishing of this report, have been insufficient to extend that type of protection to the citizens of all states.[7] Revisiting the problem in the year 2000, the NCD called for "cooperation, coordination, and collaboration among federal agencies for effective enforcement."[8] Although it is a federal agency and therefore will tend to focus on other federal agencies in making its policy recommendations, as they do have a "key responsibility"[9] in such enforcement, it would do well for the NCD to analyze the courts in determining the future of the ADA. With the reputation and political power of the NCD, such issues would be far more likely to receive the attention that they are due. However, the NCD, the most powerful actor in enforcement of the tenets of the ADA, mostly recommended in their latest

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[5] Jonathan Young. Equality of Opportunity: The Making of the Americans with Disabilities Act. National Council on Disability, D.C. 1997. 50

[6] National Council on Disability. "The Americans with Disabilities Act: Ensuring Equal Access to the American Dream." January 26, 1995. P. 15

[7] A landmark brief, complied by historians and scholars, was presented to the Supreme Court in the Garrett case, listing discriminatory statutes by states. It is available at www.ragged-edge-mag.com/garrett/statediscrim/index.html

[8] Breslin, http://www.bazelon.org/adatitl2.html#L.C.

[9] Ibid.

position paper addressing the issue on the federal level, by way of increased efficiency of federal agencies. Having stated that "implementation of the specific recommendations for each enforcement agency can be considered mid-course corrections along the way to a truly effective enforcement of the Americans with Disabilities Act,"[10] the NCD does not recognize some of the fundamental weaknesses of the Act. Without some way of addressing these weaknesses, they alone cannot make the ADA be effective, and it is vital that Congress recognize this.

A great deal of inspiration for all movements came from the Civil Rights Act of 1964, a sweeping piece of legislation that attempted to desegregate a large variety of public and publicly provided institutions and to allow for equality in the workplace. Activists of many different groups modeled their aspirations and goals on the Civil Rights Act[11]. Unfortunately, however, the civil rights that the Act attempted to preserve did not include people with disabilities, and the only significant protection made for people with disabilities during the Civil Rights decade was the Architectural Barriers Act of 1968, which mandated that all buildings constructed, funded, or altered by the Federal Government should be accessible.[12] An amendment was proposed to the Civil Rights Act in 1972 that would have included disability in the list of protected classes; however fear of delegitimizing the Act or threatening its tenets through an amendment process led many civil rights activists to shy away from supporting it.[13] The Rehabilitation

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[10] **Breslin; http://www.bazelon.org/adatitl2.html#L.C.**
[11] **Breslin**
[12] **Breslin**
[13] **Young, 12**

Act of 1973 provided for significantly better protection, including non-discrimination clauses (Section 504, specifically), and the legal foundation needed for a sweeping piece of legislation, when the right political climate made it feasible.[14] This section did help polarize the disabilities rights community like no other cause had or would for several years to come,[15] although enforcement in the form of allocation of resources and supporting regulations was also not seen for years.[16] As a sign of the influence legislation can have on social movements, the American Coalition of Citizens with Disabilities was formed for the purpose of lobbying and advocacy of enforcement of these regulations, especially Section 504. They stood against threats to them that came from the Reagan era and helped preserve its strength.

Historian Jonathan Young of the University of North Carolina characterizes the Civil Rights Act and the Rehabilitation Act as the "Twin Pillars" upon which the ADA was built on.[17] The ADA was made law in 1990, and called an "emancipation proclamation" for people with disabilities. [18] At the time the ADA was passed, Congress heard testimony, received evidence, and established that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and

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[14] Young, 13
[15] Michael Ashley Stein, "Employing People with Disabilities: Some Cautionary Thoughts for a Second-Generation Civil Rights Statute. *In Employment, Disability, and the Americans With Disabilities Act: Issues in Law, Public Policy,* and Research, *ed. Peter David Blanck (Evanston, Illinois: Northwestern University Press, 2000),* 54
[16] Young, 15
[17] Young, 20
[18] Stein, 51

economic self-sufficiency for such individuals."[19] For more of their findings, consult Appendix 1.

It important to note that the challenges faced in enforcement and implementation of the ADA echoes those seen earlier in the implementation of the Civil Rights Act[20], further proof that the Federal government alone is not sufficient to provide for the protection of rights in the absence of court and state support. National Guard troops may have been the enforcing factor in desegregating a few schools, but the cooperation of states was needed before real desegregation, including busing, would be ever implemented. When shortcomings of the reach of the act include a need for more police translators for the sensory disabled,[21] among others, needs that reaches to all levels of government are clearly in existence.

Discrimination can take several forms, including pity, paternalism, a label of inferiority and a need for "special help."[22] What is largely to blame for this attitude is the fact that the institutions in question, whether they are unemployment, transit, education, or communications, were conceived and built without a certain section of the population in mind. The same analysis applies to women entering the workplace and faced with facilities, rules, and other barriers that were only barriers because they were created with only men in mind. In the case of persons with disabilities, the assumption that all people function in the

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[19] NCD, 1995
[20] Stein, 51
[21] NCD, "Equal access to the American dream",19
[22] Wendy Wilkinson and Lex Frieden, "Glass-Ceiling Issues in Employment of People with Disabilities." *In Employment, Disability, and the Americans With Disabilities Act: Issues in*

same way and with the same ease is largely to blame both for the discrimination that they face and the perspective that any accommodation made for them is a special one, rather than a simple correction of an inherent problem with the system. That perspective lends itself to a perpetuation of the status quo that entrenches these stereotypes and biases. Historically, as mentioned above, people with disabilities not only experienced this discrimination, but became so demoralized by it that, rather than pursuing opportunities they might have been barred from, began to steer clear of such opportunities altogether, even when those opportunities would have been positive and would have improved their situation, such as education.[23] A 1986 Harris poll showed a significant poverty gap in persons with disabilities that followed from a higher unemployment rate. This is a problem that all institutions are responsible for, not only the federal government, and to call on the federal government to enact a law and assume that it will be the solution is unrealistic.

Some scholars have compared the ADA to Title VII of the Civil Rights Act of 1964, among them Michael Ashley Stein of Stanford Law, who noted that among the differences between the two, the ADA occurred before a raising of social consciousness. As previously mentioned, the Civil Rights Act helped pave the way for many pieces of federal legislation posed with the intent of using the power of the federal government to enforce the 14th amendment. The intent of the two bills is thus quite similar. Both groups experienced histories of

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***Law, Public Policy,* and Research, *ed. Peter David Blanck (Evanston, Illinois: Northwestern University Press, 2000),* p. 70**

[23] Wilkinson, 71

discrimination that have resulted in social movements and laws to address that discrimination.

Some similarities between the two are positive, and some negative. Like the Civil Rights Act, Title I did not have the immediate effect of significantly increasing employment of persons with disabilities. From the period of time 1991-1994, 52.0% employment rose to only 52.3%. During the same period, employment for non-disabled individuals rose by 1.6%, meaning that the ADA may have had no effect at all or whatever tangible effect that was seen was very small.[24] In addition, a study by Kathryn Ross of the Equal Opportunity Commission (EEOC) revealed that "of all ADA complainants whose charges were closed as of June 30, 1995, 16.2% received benefits of some type from filing a charge."[25] This amounted to around 8900 cases that were settled positively, an arguably large impact. The reason these effects have not reached the point of significantly raising employment is that most cases filed with the EEOC concern discharges or other discrimination that may occur post-hiring.[26] However, around 1,000 persons with disabilities were either hired or reinstated as a result of the law and the impact of the law on them is unquestionably positive.[27]

Both regulations have created a certain amount of backlash; the ADA seeing resentment for what is considered "special" treatment that occurs when

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[24] Stein, 52
[25] Kathryn Moss, "The ADA Employment Discrimination Charge Process." *In Employment, Disability, and the Americans With Disabilities Act: Issues in Law, Public Policy,* and Research, *ed. Peter David Blanck (Evanston, Illinois: Northwestern University Press, 2000),* 121
[26] Moss, 120

Titles II and III are followed with visibly expensive accommodations, for example in public transportation, [28] and yet the provision of integration in public accommodations, in both cases, was the most immediately successful part of the legislation.[29] Both were met with outcry from the states and subject to narrowing by the Supreme Court.

On the other hand, both have had a symbolic quality that has shown that the government is in support of equality for these groups. Stein cites Laura Edelman as stating that the changes in attitudes came about through "a process of institutionalization, whereby new forms of compliance are diffused among organizations and gradually become ritualized elements of organizational governance."[30] A survey of individuals with disabilities, their friends, and family members found that 96% felt that the ADA made a difference in the lives of people with disabilities. 46% cited greater acceptance by their communities and 24% cited increased employment. In addition, Titles II and III, those not focused on employment, have had a large effect in incorporating symbolic actions with including those with disabilities into the mainstream of society, e.g. entertainment events such as movies, sporting events, and concerts. Furthermore, the law's influence has led the government to take small steps in giving incentives for accommodations as according to Title III, such as tax credits for smaller businesses that make the effort to accommodate.[31] Such steps are vital in order to increase the efficacy of the legislation, by giving it the reinforcement that it

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[27] **Moss, 132**
[28] **Stein, 56**
[29] **Young,11**
[30] **Stein, 55**

needs in order to be successfully implemented and not exist as an exclusively symbolic action. However, the federal legislative and executive branches cannot make that transition without the assistance of other bodies of government. The courts are especially needed to interpret the laws into workable prescriptions for enforcement that the states then must use to implement the ADA.

Although the trend of putting people with mental disabilities into institutions is waning (only one fifth of the mental hospitals that were in use in the 1950s remain open today)[32] there are states that still use the presumption that that is the optimal form of treatment for persons with mental illnesses or developmental disabilities. As presented in Olmstead v. L.C., "An unusually vigorous grass-roots campaign," spearheaded by disability-rights advocates, led fifteen of the twenty-two states that had originally supported Georgia to disavow the state's position[33]. But those states that still supported Georgia's position exhibit that there are still states that are so comfortable with the status quo that they are not interested in establishing the new policies that the ADA requires without court interpretation that imposes a mandate for them to do so.

In Olmstead, by a 6-3 decision, the Supreme Court held that isolation of people with disabilities could constitute discrimination under Title II, which is

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[31] Americans with Disabilities Act: Annotated Bibliography of Resources.
[32] David G. Savage "A sense of normalcy " *ABA Journal 85*; May 1999; 34-39
[33] William D. McCants. "Disability & ADA: Supreme Court rules on institutional confinement of disabled." *The Journal of Law, Medicine & Ethics 27*, no. 31 (Fall 1999): 281-283

relevant to government-provided services.[34] Institutionalization of people with disabilities as a default method of care constituted discrimination because it furthered negative stereotypes and inhibited basic life activities of people with disabilities.

The ADA states that an accommodation is not reasonable if it requires an "undue burden" on or a "fundamental alteration" of the program that it is being requested of.[35] In evaluating whether a program constitutes a "fundamental alteration," courts are allowed to take into account the costs of providing services not only to the plaintiffs, but also to all similarly affected people. In addition, if the state is in the process of solving the problem, and to accommodate the plaintiffs creates unequal treatment between the plaintiffs and similarly situated individuals, it is not the state's obligation to provide that accommodation. In fact, to do so under such circumstances would itself constitute discrimination.

The court also cautioned; "Nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings."[36] Fundamentally, although the states may rely on the judgment of its medical professionals as to what degree of integration is appropriate; the decision shifts the presumption to the judgment of those professionals and not the assumed policy of the state.[37] It does not attempt to substitute a bias toward community-based living when such a

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[34] See Appendix II for an explanation of the components of the ADA.
[35] *Anonymous.* "Prohibiting Discrimination in the Provision of Public Benefits and Services—Title II of the Americans with Disabilities Act." In *Judge David L. Bazelon Center for Mental Health Law.*[Online]. Updated 8 February 2001. [cited 29 April 2002.], available from http://www.bazelon.org/adatitl2.html#L.C
[36] Olmstead Decision

placement would be unsuitable, as "releasing individuals who require institutional care would thwart the essential purpose of patient protection."[38] Nor does it intend to impose deinstitutionalization without taking into account the wishes of the individual. To do so would constitute the "fundamental alteration" that is spoken of in the decision.[39] Another "fundamental alteration" could be brought about by broad deinstitutionalism. "If state programs are required to apportion funds to the community programs away from the institutional care programs, the remaining funds might be insufficient to maintain a viable institutional care facility. Closed institutions could harm the individuals who are medically better served by such care."[40]

Olmstead is an example of where the Federal government and the states can fall short, and the courts are required to clarify the laws into workable principles that enforcing bodies can understand and follow. To make the laws give such a clear mandate is necessary, however if done in the writing stages could be disastrous, as it would be impossible to predict and provide for every relevant circumstance. "The possibility of an unchecked Title II raises several questions. The Supreme Court's opinion in L.C. directly answers some of these questions, but the more difficult ones are left for future cases and

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[37] Anon, "Prohibiting. . ."
[38] Smith, Jefferson DE and Steve P Calandrillo. "Forward to fundamental alteration: Addressing ADA Title II integration lawsuits after Olmstead v. L.C. " *Harvard Journal of Law and Public Policy 24*; no. 3 Summer 2001. 696-769.
[39] Smith
[40] Smith.

controversies."[41] The need for further case law and analysis by the court shows that it must be the court who answers these questions.

> This phenomenon is analogous to what our country experienced during the Civil Rights Movement of the 1960s. States were the bodies causing the discrimination problem and showed little capacity to resolve it, due to a combination of political, social, and institutional inertia. Accordingly, it was the federal government, along with its courts, that instigated change, just as we have witnessed with the ADA and in L. C. The Supreme Court's holding in L.C. thus exemplifies federal intervention as a route to solve problems that trouble states.[42]

It is clear that Olmstead also shows that there are areas where states are still unwilling to make an effort to solve the problems of discrimination, where the federal government is unable, for one reason or another, to solve such problems. Despite the relative cost-efficiency of community-based services,[43] states defaulted to tradition and the conventional wisdom of the best way to provide for the needs of individuals with disabilities. The fact that the Supreme Court had to intervene and through its interpretation provide for a standard that states would obey shows the dependency of Congress on the Court and its willingness to uphold legislation.

Despite the positive effect of the Olmstead ruling, it would be far too hasty to regard the Supreme Court as a protector of the ADA. In fact, Jaclyn Okin of American Law School of Washington warns about the path that other rulings set us on, toward a possible abandonment of enforcement of any tenants of the

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[41] **Smith**
[42] **Smith**
[43] **Savage.**

ADA by states[44]. William McCants agrees, warning that " Such optimism must be tempered, however, in light of justice Kennedy's concurring opinion, because it is still unclear how this decision will square with the current Court's ongoing concern with protecting, or even enhancing, the right of states to allocate their own budgetary resources and to decide what phrases such as "needless institutionalization" actually mean in practice." Because of the very nature of the courts and their unique political power, rulings such as Sutton v. United Airlines and Alabama v. Garrett exemplify the power of the Supreme Court to diminish the ability of the ADA to accomplish its goals.

The attitudinal model of legal and constitutional issues describes judges as political actors like any other, with their own preferences and opinions on policy issues. The fact that they are not elected does not mitigate the fact that they act as though they are politicians and can, in fact, make them even more likely to indulge their individual preferences. They have no constituency to answer to and every reason to advance their own preferences.[45] Although the Constitution is intended to be an evolving document, there is evidence to discredit the theory that Constitutional interpretation follows with the evolvement of society, as posited by Bruce Ackerman.[46] A recent resurgence in federalism on the part of the Supreme Court has been inconsistent with previous precedent and judicial interpretation of the Constitution, enough to persuade Keith Whittington of Princeton University that there is doubt about the theory that the

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[44] Okin, Jaclyn A. "Has the Supreme Court gone too far? An analysis of University of Alabama v. Garrett and its impact on people with disabilities." *American University Journal of Gender, Social Policy, and the Law.* 663 (2001) 8

[45] Whittington, 4.

Court is not the active agent of constitutional change. Rather, it seems to be leading such movements toward increasing federalism's bias toward states. This is evidenced in some of the Court's other decisions in regards to the ADA, which have had the effect of narrowing the scope of who is covered as well as reducing enforcement capabilities.

Not all persons who consider themselves disabled or who are considered by their treating professionals to have disabilities are protected under the ADA. Those who are protected, according to legal precedent and the lettering of the law, include:

- Individuals who are currently substantially limited in major life activities, either because
  - the measures they use do not fully control their disability
  - they experience intermittent periods during which they are substantially limited
  - the side effects of the mitigating measures themselves substantially limit the individual in major life activities
- Individuals who have a record of being substantially limited in major life activities.
- Individuals who are regarded as substantially limited in major life activities even though they are not, in fact, so limited.[47]

These criteria have been modified by decisions by the Supreme Court that have relevance to the ADA, including Sutton v. United Airlines, Inc, Murphy v.

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[46] **Quoted in Whittington, 6**
[47] **Bazelon**

United Parcel Services, Albertson's, Inc. v. Kirkingburg. The overarching principle of these cases was the ruling that if a person is controlling the effects of their disability, (e.g. through medication) than that must be considered in deciding whether the person has a disability.[48] This decision modifies those criteria by inserting another factor. This may mean that some people may lose their disability status, and it has also been warned that these rulings will constitute a "chilling effect"[49] that may lead to a reluctance to seek needed accommodations under the impression that such help may render them without coverage. If, for example, medications or prosthetics help a person control some of the effects of their disability and increase their functional ability, they might still face discrimination because of that disability (falling under the third criterion, of being regarded as having the disability). In that case, they might have no recourse. In order to have standing in court; they are put in the position of having to justify the seriousness of their condition. Some have gone so far as to suggest that people would opt to not take measures that could improve their quality of life in order to maintain ADA protection.[50] This is certainly not the intent of the statute and is most likely not the intent of the rulings, either. However, the effects must be noted when looking at these rulings. One of the most harmful effects, according to Douglas Baynton, [51] is that it puts the problem onto the individual, rather than society and discriminating institutions.

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[48] Jennifer Mathis, "The Supreme Court's 1999 ADA Decisions." In *Judge David L. Bazelon Center for Mental Health Law.*[Online]. Updated 5 May 2000. [cited 29 April 2002.], available from http://www.webcom.com/bazelon/sct99ada.html

[49] Wilkinson, 78

[50] Wilkinson, 78

Disabilities do not exist in a vacuum and people can experience a great deal of impairment in their "major life activities" because of the way that the institutions have been created and the stigma that is attached to their disability. Whether or not medication helps offset some of the effects of it, the disability remains and still clashes with certain parts of the whole of society. The court's narrowing of the coverage of the ADA therefore diminishes the ability of the Act to uphold its goal of prevention of discrimination of people with disabilities. It also does this in the ruling of Toyota v. Williams, in which a plaintiff was ruled to not have standing because her disability did not "prevent or severely restrict the individual from doing activities that are of central importance to most people's daily lives."[52] This also has the effect of narrowing coverage by not focusing the disability requirement on the employee's ability to perform their work, which would be a rather relevant issue in evaluating their employment discrimination claim.

Another ruling that showcases the threat that the Court could pose to the ADA is through a restriction of one means of enforcement, as exemplified by Board of Trustees of the University of Alabama in Birmingham v. Garrett (2001). On February 4th, 2001, the US Supreme Court ruled in a 5-4 decision (hereafter referred to as Alabama v. Garrett) that the 11th amendment prohibits state employees or prospective employees to sue states in federal court for money damages under Title I without the state's permission. Title I deals with

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[51] Douglas C. Baynton, "Bodies and Environments" *In Employment, Disability, and the Americans With Disabilities Act: Issues in Law, Public Policy, and Research*, ed. Peter David Blanck (Evanston, Illinois: Northwestern University Press, 2000), 392

[52] Quoted by Christine Vargas, Rebecca West Greenfield, Anna M. Piazza, and Jeremy Shure; "Select Recent Court Decisions." *American Journal of Law and Medicine 28*, no. 1. (2002) 124

employment discrimination, and was explicitly enacted with the intent of Congress of permitting lawsuits for employment discrimination claims.[53] This ruling is one sign of the lack of ability of Congress to enact laws that seek to protect civil rights by taking power away from the states. There is some indication that the Garrett rulings was part of a larger trend by the Supreme Court, and that it "can best be understood as a product of the Court's taking advantage of a relatively favorable political environment to advance a constitutional agenda of particular concern to some individuals within the Court's conservative majority."[54] With this political environment remaining favorable, there is nothing to say that this restriction would not reach next to Titles II and III, prohibiting states from being sued for any violation of the ADA at all.

It should be noted that the 11th amendment was not originally written to prevent individuals from suing their own states for money damages. The amendment reads: "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." As Chief Justice William Rehnquist stated: "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court."[55] According to the amendment, states have the power of sovereign immunity, which they must waive in order to be sued by a private citizen. The fact that Rehnquist, as well as

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[53] **See Appendix II**
[54] **Whittington, 3**
[55] **Rehnquist, Garrett, Findlaw**

Kennedy in a concurring opinion[56], qualifies his statement with "nonconsenting" indicates that such lawsuits would be legitimate if brought by the permission of the states.

It could also be appropriate for the federal government to abrogate the 11th amendment through the use of section 5 of the 14th amendment, which states that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." The criteria that the Supreme Court uses to determine when it is "appropriate" for the federal government to take away state immunity is: whether, when the statute was enacted, there was a significant problem of unconstitutional discrimination and whether the requirements of the statute are proportionate and reasonable responses to the problem.[57] This test was established in the case of the Seminole Tribe of Florida vs. Florida. If the legislation passed by Congress did no more than protect the rights as enumerated in the 14th amendment, it should have passed judicial review. However, the Court ruled that Congress made no formal finding of a "pattern" of discrimination, and therefore Congress could not take action to address a need that had not been established to exist, as the Task Force on the Rights and Empowerment of Americans with Disabilities, who compiled the filings, did not include findings on the subject of patterns of state discrimination in the area of

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[56] Kennedy, Garrett, Findlaw

[57] *Anonymous.* "The Garrett Case: New Challenge to the ADA." In *Judge David L. Bazelon Center for Mental Health Law.*[Online]. Updated 18 June 2001. [cited 29 April 2002.], available from http://www.webcom.com/bazelon/garrettcase.html

employment.[58] The court also found that the states did have more required of them by the ADA than was required of them by the Constitution. This is because the burden of explaining why an accommodation constituted an "unreasonable hardship" was placed on the employer.

The dissent argued that "hundreds of examples of discrimination by state and local governments" were submitted to Congress, but this was dismissed by the majority as anecdotal, not a pattern.[59] Anything that potentially revealed state patterns was considered to be too broad to justify the use of the power, according to the majority opinion[60] The dissent argued that Congress, by way of the Constitution, should only need to fulfill the standard of "appropriate legislation" (section 5 of the 14th amendment) and that the Supreme Court was attempting to hold Congress to a higher standard.[61] Because Congress had found that society had "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,"[62] those dissenting argued that the standard for "appropriate" should be considered to have been met. In addition, the majority did not address the precedent that they set in the case of City of Cleburne v. Cleburne Independent

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[58] Jaclyn A. Okin, *"Has the Supreme Court gone too far? An analysis of University of Alabama v. Garrett and its impact on people with disabilities."* American University Journal of Gender, Social Policy, and the Law. 663 *(2001)*, 6

[59] Neal Devins. "Essay: Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis." *Duke Law Journal, 50* (2001) 1169

[60] Okin, 6

[61] Shinavski, Joan. "Recent Decision: The Eleventh Amendment Bars Private Individuals from Suing State Employers for Money Damages Under Title I of the Americans with Disabilities Act: Board of Trustees of the University of Alabama v. Garrett." *Duquesne University Law Review 40* (Fall 2001) 161.

[62] Wilkinson, 90

Living Center, which stated that it is initially the purview of the legislature, not the judiciary, to determine how the Equal Protection Clause of the 14th amendment should be enforced.[63] They had done that, according to the brief of the Solicitor General filed with the Court, by showing that:

> The scope of the testimony offered to Congress regarding unconstitutional treatment swept so broadly, touching virtually every aspect of individuals' encounters with their government, as to defy isolating the problem into select categories of state action. Services and programs as varied as zoning; the operation of zoos, public libraries, public swimming pools and park programs and child custody proceedings exposed the discriminatory attitudes of officials.

This concept of pervasive discrimination was ultimately not effective in meeting the standard of the majority for state agent discrimination, however. Finally, it places the burden of the Congress to make official findings of every

It is too early to have evidence of the long-term effects of this decision on employment levels and other tangible factors. However, the symbolic meaning of the ruling has effects that are clear. State attorneys general can be sued for injunctive relief of discrimination, but not state agencies or entities associated with the state.[64] In addition, some organizations and individuals fear that without money damages, states have less incentive to accommodate employees. They have little to lose by risking an injunctive lawsuit. In fact, when the ADA was established, the Attorney General of Illinois, Neil Hartigan, stated that "The whole trick is to make it more expensive to break the law than to keep the law. It won't work without damages."[65] Furthermore, the recent ruling of the Court in Buckhannon v. West Virginia determined that civil rights litigants cannot collect

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[63] Okin, 7
[64] Okin, 12

attorney fees if "the defendant voluntarily ceases the practice complained of."[66] If this is extended to ADA litigants, plaintiffs can only gain injunctive relief and the defendant can drag the case out. There can be no satisfactory end result that would even allow the employee to recoup the attorney costs. It would have the effect of ensuring that states could operate with impunity, with no risk of any kind of loss if sued.

Rehnquist himself acknowledged that the ruling, along with its earlier precedents, would allow 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." The United States government and the Equal Opportunity Commission can still bring lawsuits, but the limited resources of the government make that less likely. The only other recourse that an individual has is to sue the state on the basis of the state's disability laws, which may be less protective. Six states have no "reasonable accommodation" requirement for employees with disabilities. Others have less stringent protections as well, and narrower definitions of what constitutes a disability.[67]

The Civil Rights Act of 1964 faces similar narrowing by the courts, recent examples including Alexander v. Sandoval, which places a burden to show discriminatory intent, rather than merely discriminatory impact, in order for a

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[65] Quoted by Young, p. 111
[66] Leon Friedman, "Overruling the Court" *The American Prospect 12,* no. 15. June 27, 2001. P. 14
[67] Okin, 13

plaintiff to have a legitimate complaint. This seriously limits the number of people who qualify to sue under violations of Title VI, which prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin.[68]

As the majority and dissenting minority disagree strongly as to what constitutes "appropriate" abrogation of state powers in order to achieve as well as what the findings of Congress actually were, it would seem clear that a significant driving factor behind this ruling came from what the justices wanted to see and interpret.

If this is the case, then the ADA is left quite vulnerable to a hostile court. Whether the court in the year 2002 is hostile is open to some debate. After all, the far more ADA-friendly Olmstead decision was rendered by the same court. With this trend developing, safety of the ADA should be considered, however, when looking at the trends and precedents of the Supreme Court and in giving Congress and other branches of the government an initiative to act.

Leon Friedman, a professor of constitutional law at the Hoftstra University School of Law, prescribes that the Congress use federal funds to override the effects of Garrett.[69] Some states have taken actions to undo the effects of the Garrett decision, by formally waiving their sovereign immunity and allowing themselves to be sued under the ADA, including Minnesota, Missouri, and Alabama. Sample legislation from Minnesota reads: " An employee, former employee, or prospective employee of the state who is aggrieved by the state's

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[68] **Friedman, 13**
[69] **Friedman, 14**

violation of the Americans with Disabilities Act of 1990 may bring a civil action against the state in any court . . . "[70] States who have taken such action have largely done so to show their commitment to upholding the ADA. If states permit themselves to be sued, they are liable for monetary damages if discrimination is found. Friedman suggests that the federal government condition funding on adherence to the ADA. A more direct solution (although not mutually exclusive of the former) would be for the federal government to offer incentives to involve the states in the commitment to uphold the ADA, by following the lead of those states that have already permitted themselves to be sued.

Although it may seem like a counterintuitive prospect, there are two strong advantages to the states themselves in establishing these policies. The first is that states can continue to have access to the labor market that includes persons with disabilities, who would be more likely to seek and accept a state job if there was knowledge that that person could have the protection of the ADA. Therefore, state employers maintain their ability to draw from the same labor pool as the federal and local governments and private companies, which allows them greater choices and a greater chance to hire qualified candidates. The other reason is political. To show a commitment to a largely popular law engenders a lot of goodwill, and this law is a good example of that. Similar goodwill has been pointed to as a reason for an increased amount of sales seen in accommodating businesses, for example. These benefits should be part of a campaign by disabilities rights groups to encourage states to wave their

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[70] ***Anonymous.*** **"States pass laws to undo Supreme Court 'Garrett damage'" In *Ragged Edge Magazine* [Online]. May 2001. [cited 29 April 2002]; available from**

sovereign immunity, both for the benefit of the state itself and that of their constituency.

At the same time, there are reasons why only a handful of states has taken this measure. It is still expensive to be sued, and there is less incentive for an individual to sue if they cannot claim any money compensation. In addition, if lawsuits were largely successful, it could cause harm to the reputation of the state as an employer and of the politicians who help administer the workings of the state. So an incentive offered by the federal government, which cannot impose its will on the states but can use funding to involve them in this commitment, could be the needed solution to the negative effects of this ruling. Some States have taken action to lessen the effects of other decisions, by passing stronger state ADAs that allow for more coverage, for example California removed the word "substantially" to include anything that impairs a major life activity. Rhode Island allows for those who use technology or medication to "mitigate" their disabilities to continue to receive coverage.[71]

When the federal government enacted the Civil Rights Act of 1964, it named as one of its goals the elimination of discrimination in employment, and made continued commitments to this goal at every point it addressed the Act. When the Court does not interpret the laws in such a way as to remain consistent with congressional intent, it inserts rulings that seem neutral, but have the effect of discrimination.[72] The rulings that narrow the scope and depth of the

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http://www.raggededgemagazine.com/0501/0501ft1.htm

[71] Ragged edge

[72] Kevin Finnerty, "The Ninth Circuit does its homework and leaves the Supreme Court with an assignment." *Northwestern University Law Review 95.* No. 4. (Summer 2001) 1580

ADA do have such an effect, and Congress, as it has with the Civil Rights Act, needs to act to intervene and address the vulnerabilities in the Act, rather than leaving the NCD to attempt to accomplish its goals without the support necessary.

Fundamentally, the need for the existence of courts to interpret and evaluate the law, as seen in Olmstead, will always be there, as laws can never be specific enough to allow for every circumstance. If laws are too vague, they do not offer enough of a prescription to allow states and other levels of government to act. However, the importance of courts and the judicial review of the Supreme Court in particular do leave the laws vulnerable, as the Garrett and Sutton rulings demonstrate. Congress therefore should remain continually vigilant, using the Americans with Disabilities Act as a basis for continued action to achieve its goals. When it recognizes the need to adapt the implementation of the law to the findings of the court, better enforcement and coverage are possible. The role of Congress as legislator is not changed by the existence of the Court, but it is challenged. Congress has already met the challenge of implementing this landmark piece of legislation. Its next challenge is to keep it alive.

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Appendix 1: Congressional Goals in enacting the ADA[73]

Congressional Findings:

- 43,000,000 Americans have one or more disabilities;
- historically, society has tended to isolate and segregate individuals with disabilities;
- discrimination against individuals with disabilities negatively affected areas such as employment, housing, public accommodations, education, transportation, communication, etc.;
- individuals with disabilities have no legal recourse to redress such discrimination;
- individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion as well as the negative effects of discrimination such as relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
- national data indicate that individuals with disabilities occupy an inferior status in society and are severely disadvantaged socially, vocationally, economically, and educationally;
- as a group, individuals with disabilities have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness; and
- The continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue opportunities, costing the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

Goals in Enacting the ADA:

- provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- provide clear, strong, consistent, enforceable standards addressing discrimination;
- ensure that the Federal government plays a central role in enforcing the standards against discrimination; and

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[73] NCD 1995

- invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce

Appendix 2: Components of the ADA:

The Americans with Disabilities Act has five major tenets that are designed to enact a greater amount of freedom, equality, and opportunity for persons with disabilities.

Title I: The first section, Title I, prohibits discrimination in employment against people with disabilities and included the definition of disability as a "physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."[74] It required employers to make reasonable accommodations to allow a person with a disability to be able to become employed and overcome any problems with access to that employment. To avoid the possibility of discrimination in hiring, prospective employers are not permitted to ask questions or perform tests in interviews that are done with the purpose of determining whether an employee has a disability. This section applies to the majority of businesses, all with fifteen employees or more. Those employees who experience discrimination as a result of their disability have the ability to sue their employer or prospective employer for injunctive relief (a correction of the problem) or money damages, or both. As a result of the *Garrett v. Alabama* decision, which will be further explained later, states, in their capacity as employers, can only be sued for injunctive relief.

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[74] **Stein, 58**

Accommodations have become an issue in the discussion and enforcement of Title I. There are two tests for what constitutes an accommodation: reasonableness and whether it poses an undue hardship (significant difficulty or expense) on the employer. There have been objections on the grounds that accommodations are too expensive and unfairly put a burden on an employer,[75] however studies by the President's Committee's Job Accommodation Network show that:

- 21% of accommodations cost nothing.
- 49% cost between $1 and $500
- 11% cost between $501 and $1000
- 19% cost more than $1000[76]

These accommodations, rather than being economically inefficient, have actually been shown to save employers money in the long run.

- 34% saved from $1 to $5000
- 16% saved from $5001 to $10,000
- 19 % saved from $10,001 to $20,000
- 25% saved from $20,001 to 100,000[77]

In addition, the fact that accommodations cost money is not at all unique to the ADA. Stein points out that firms that integrate racially stand to lose money from lost clients and that women's restrooms and other facilities cost money to

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[75] Ibid. 56
[76] Source: "Myths and Facts about Employees with Disabilities, ADA: Focus on Employment"
[77] Stein, 56

build. In addition, businesses that go to the effort of accommodating workers, clients, and customers with disabilities can see a benefit in an increased customer volume.

Title II: This section of the ADA is relevant to publicly provided services and states that the services of governments should be accessible to people with disabilities. Transportation, roads and other such services are taken into account, as is health care, which may be one of the more controversial aspects. This decision was affected by the Olmstead v. L.C. decision, which will also be further discussed later, by placing a priority on integration of persons with disabilities into society to the extent that it is practical. Public Agencies are required to identify their policies that exclude people with disabilities from participation in public programs and develop plans to eliminate these barriers[78]. If they can show that they are making a reasonable effort to allow for a variety of publicly provided services with the goal of allowing as much access as possible, even if they have not yet reached that goal, they are considered to be compliant.

Title III: Title III regards public accommodations, compelling reasonable modifications to policies, practices, and procedures, unless they are fundamentally altering to the program or modification would create an inequitable situation between similarly situated individuals. This extends beyond services that are provided by the government and becomes relevant to institutions such as movie theaters, sporting events, musical performances, education, and retail sales.

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[78] **Bazelon**

Title IV amends the Communications Act of 1934 to require that telephone companies provide telecommunications relay services. This title is relevant to the hearing impaired and deaf community and is vitally important in allowing for unimpaired access to a communication system that was built with the assumption that all users would and could hear. Other relevant access issues, such as public phones that can be reached by persons in wheelchairs, are covered by Titles II and III.

Title V includes miscellaneous provisions, including some that are relevant to insurance. One section states that the ADA should not be construed to disrupt current, accepted insurance practices. Another specifically spells out the intent to allow states to be sued by private citizens, which was also modified by the Garrett ruling.