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The Americans with Disabilities Act: The Opinions of Justice O'Connor

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Summary

The Americans with Disabilities Act (ADA) is a civil rights statute that has as its purpose “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹ Since its enactment in 1990, it has been the subject of numerous lower court decisions and the Supreme Court has decided nineteen ADA cases. Justice O'Connor has been in the majority in almost all of these decisions and has been a deciding vote in several 5-4 decisions, notably in the recent decisions of *Garrett v. University of Alabama* and *Tennessee v. Lane* regarding the application of the Eleventh Amendment to the ADA. This report will not be updated.

Justice O'Connor has taken part in every ADA case presented to the Supreme Court and her influence on ADA jurisprudence has been significant, if not always easy to categorize.² One commentator has described Justice O'Connor as “frequently sid(ing) with business interests against the interests of individuals with disabilities” but “nonetheless...sid(ing) with people with disabilities in a number of important disability rights cases.”³ Her approach has been labeled “pragmatic” and one where the specific issues were central to her decisions.⁴

¹ 42 U.S.C. §12101 *et seq.* For a detailed discussion of the ADA see CRS Report No. 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by (name redacted).

² For a discussion of the Supreme Court decisions on the ADA see CRS Report RL31401, *The Americans with Disabilities Act: Supreme Court Decisions*, by (name redacted).

³ “Significance of O'Connor Resignation for Disability Rights,” [<http://www.jfanow.org/jfanow/index.php?mode=A&id=2372;&sort=D>]

⁴ “Justice O'Connor's ADA Legacy Marked by Pragmatic Conservatism,” 30 *Disability Compliance Bulletin* (July 21, 2005).

One of the most discussed aspects of Justice O'Connor's legacy is her role in the Court's federalism decisions and a key question is to what extent her retirement will tip the delicate balance in these decisions.⁵ Justice O'Connor's vote in *Tennessee v. Lane*, 541 U.S. 509 (2004), finding that the ADA guarantees the access to court for individuals with disabilities, was critical to forging a majority opinion limiting the often referred to "federalism revolution." In her absence the results of subsequent cases relating to the ADA, especially those involving federalism, are uncertain.

Application of the Eleventh Amendment to the ADA

The impact of Justice O'Connor's views has been critical in the area of federalism. She voted with the majority in several decisions that placed limitations on federal power⁶ but in the recent decision of *Tennessee v. Lane* she was the swing vote in a case that found Congress had validly exercised its authority. In the ADA context, federalism issues have arisen regarding the circumstances where section 5 of the Fourteenth Amendment can be used to abrogate the Eleventh Amendment.

The Eleventh Amendment states: "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." The Supreme Court has found that the Eleventh Amendment cannot be abrogated by the use of Article I powers but that section 5 of the Fourteenth Amendment can be used for abrogation in certain circumstances. Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Recent Supreme Court decisions in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board*,⁷ *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*,⁸ and *Kimel v. Florida Board of Regents*⁹ reiterated the principle that the Congress may abrogate state immunity from suit under the Fourteenth

⁵ For a discussion of the future of the "federalism revolution" see Linda Greenhouse, "The Rehnquist Court and Its Imperiled States' Rights Legacy," *The New York Times* (June 12, 2005); and Herman Schwartz, "A Deeply Rooted Revolution: Rehnquist and O'Connor's Federalism Legacy will Thrive Long After They've Left," *Legal Times* (July 8, 2005)

⁶ For a discussion of this issue, with an emphasis on the Tenth Amendment, see CRS Report RS22199, *Federalism Jurisprudence: The Opinions of Justice O'Connor*, by (name redacted) and (name redacted).

⁷ 527 U.S. 666 (1999) (The Trademark Remedy Clarification Act, TRCA, which subjected states to suit for false and misleading advertising, did not validly abrogate state sovereign immunity; neither the right to be free from a business competitor's false advertising nor a more generalized right to be secure in one's business interests qualifies as a property right protected by the Due Process Clause).

⁸ 527 U.S. 627 (1999) (Congress may abrogate state sovereign immunity but must do so through legislation that is appropriate within the meaning of section 5 of the Fourteenth Amendment; Congress must identify conduct that violates the Fourteenth Amendment and must tailor its legislation to remedying or preventing such conduct).

⁹ 528 U.S. 62 (2000).

Amendment and found that there were three conditions necessary for successful abrogation.

- Congressional power is limited to the enactment of “appropriate” legislation to enforce the substantive provisions of the Fourteenth Amendment.
- The legislation must be remedial in nature.
- There must be a “congruence and proportionality” between the injury to be prevented and the means adopted to that end.

The ADA uses both the Fourteenth Amendment and the Commerce Clause of the Constitution as its constitutional basis.¹⁰ It also specifically abrogates state immunity under the Eleventh Amendment.¹¹ The ADA, then, is clear regarding its attempt to abrogate state immunity; the issue is whether the other elements of a successful abrogation are present. The Supreme Court in *Garrett v. University of Alabama*, 531 U.S. 356 (2001), found that they were not with regard to title I¹² while in *Tennessee v. Lane*, the Court upheld title II¹³ as it applies to the access to courts.¹⁴

In *Garrett v. University of Alabama*, a 5-4 decision where Justice O’Connor was the swing vote, the Court held that the Eleventh Amendment bars suits to recover monetary damages by state employees under title I of the Americans with Disabilities Act (ADA). *Garrett* involved two consolidated cases brought by separate Alabama employees. One of the employees, Patricia Garrett, had been undergoing treatment for breast cancer when, she alleged, she was transferred to a lesser position after having been told that her supervisor did not like sick people. The second plaintiff, Milton Ash, alleged that the Alabama Department of Human Services did not enforce its non-smoking policy and that, therefore, he was not able to control his asthma. The Eleventh Circuit held that the state was not immune from suits for damages. The Supreme Court reversed stating that “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....”¹⁵

In *Tennessee v. Lane*, another 5-4 decision where Justice O’Connor was the swing vote, the Supreme Court retreated somewhat from its recent approaches to the application

¹⁰ 42 U.S.C. §12101(b)(4). The Commerce Clause would not be sufficient authority on which to abrogate state sovereign immunity since the Supreme Court’s decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

¹¹ 42 U.S.C. §12202.

¹² Title I of the ADA prohibits discrimination against a qualified individual with a disability in employment. 42 U.S.C. §12111 *et seq.*

¹³ Title II of the ADA prohibits discrimination by a state or local government. 42 U.S.C. §12131 *et seq.*

¹⁴ It should be noted that the Eleventh Amendment applies only to states, not municipalities. See e.g., *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901 (6th Cir. 2004).

¹⁵ *Id.* at 374.

of the Eleventh Amendment, holding that Title II of the ADA, as it applies to the fundamental right of access to the courts, constitutes a valid exercise of congressional authority under section 5 of the Fourteenth Amendment.¹⁶ *Lane* was an action brought by George Lane and Beverly Jones, both paraplegics who use wheelchairs for mobility, against the state of Tennessee. Mr. Lane alleged that he was compelled to appear in court to answer criminal charges and had to crawl up two flights of stairs to get to the court room. Ms. Jones, a certified court reporter, alleged that she was been unable to gain access to a number of county courthouses, thus losing employment opportunities. The Court noted that when analyzing an Eleventh Amendment immunity issue, first the issue of whether Congress unequivocally expressed its intent to abrogate must be resolved. The ADA specifically provides for abrogation¹⁷ so the Court then applied the test set out in *City of Boerne v. Flores*,¹⁸ which found that legislation enacted pursuant to section 5 of the Fourteenth Amendment is valid if it had “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁹

Justice Stevens’ opinion found that title II of the ADA, like title I, sought to prohibit irrational discrimination but noted that title II also sought to enforce a variety of basic constitutional guarantees, including the right of access to the courts. Noting the pattern of disability discrimination that led to the enactment of the ADA, and the “sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services,” the Court held that the inadequate provisions of public services and access to public facilities was an appropriate subject for remedial prophylactic legislation. The final issue was whether title II was an appropriate response to this history and pattern of discrimination. Although the Court had been urged to consider the entire sweep of title II, Justice Stevens declined to broaden the ruling beyond the issue of the accessibility of judicial services. The Court held that the remedies were congruent and proportional to the goal of enforcing the right of access to the courts and emphasized that title II of the ADA requires only “reasonable modifications” that would not fundamentally alter the nature of the service provided and that do not impose an undue financial or administrative burden, or threaten historic preservation interests. Thus, the Court concluded, title II “as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress’ section 5 authority to enforce the guarantees of the Fourteenth Amendment.”

Tennessee v. Lane did not settle all the issues regarding when Congress may use section 5 of the Fourteenth to abrogate the Eleventh Amendment; on its face, it limited its holding to access to courts. Currently pending before the Court, and scheduled for oral argument November 9, 2005, are the consolidated cases of *United States v. Georgia* and

¹⁶ The Court has upheld the Family and Medical Leave Act, 29 U.S.C. §2601 *et seq.*, as a valid exercise of congressional power pursuant to section 5 of the Fourteenth Amendment. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). The majority opinion for this 6-3 decision was written by Chief Justice Rehnquist and joined by Justice O’Connor.

¹⁷ 42 U.S.C. §12202.

¹⁸ 521 U.S. 507 (1997).

¹⁹ *Id.* at 520.

*Goodman v. Georgia*²⁰ which raise the issue of whether Congress has validly abrogated state immunity from damage suits under title II of the ADA in situations involving accommodations for prisoners with disabilities. Whether the reasoning of *Tennessee v. Lane* will be found to be applicable in the context of prisons or whether the Court will continue its previous trend of deference to states is unclear but what is certain is the fact that the loss of Justice O'Connor's pivotal vote makes the Court's direction even less certain.²¹

Other ADA Decisions

In *Sutton v. United Airlines*, 527 U.S. 471 (1999), Justice O'Connor wrote the decision for the Court which limited the definition of disability. Since being defined as a person with a disability is a threshold issue in any ADA complaint, the *Sutton* holding that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment...."²² was an interpretation with important ramifications. This decision limited who would be considered to be a person with a disability thus decreasing the number of potentially successful suits.²³ Similarly, in *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), Justice O'Connor penned the Court's unanimous decision, holding that to be an individual with a disability under the ADA, an individual must have substantial limitations that are central to daily life, not just limited to a particular job.

In *U.S. Airways v. Barnett*, 535 U.S. 391 (2002), Justice O'Connor was again with the majority in 5-4 decision concerning reasonable accommodations under the ADA. In *Barnett* the Court held that an employer's showing that a requested accommodation by an employee with a disability conflicts with the rules of a seniority system is ordinarily sufficient to establish that the requested accommodation is not "reasonable" within the meaning of the ADA. Thus, the times when an employer must provide reasonable accommodation were limited. In her separate concurrence, Justice O'Connor stated that she would prefer to say that the effect of a seniority system on the ADA depends on whether the seniority system is legally enforceable but that since the result would be the same in most cases as under the majority's reasoning, she joined with the majority to prevent a stalemate.

However, in the landmark case of *Olmstead v. Georgia*, Justice O'Connor voted with the majority in a 6-3 decision widely heralded as an important expansion of the rights of individuals with disabilities. *Olmstead* held that title II of the ADA requires states to place individuals with mental disabilities in community settings rather than institutions.

²⁰ 120 Fed. Appx. 785 (2004), *cert. granted*, 161 L.Ed.2d 1052; 1255 S.Ct. 2256; 73 U.S.L.W. 3671 (2005).

²¹ For a discussion of this issue see Tony Mauro, "An Early Crucible," *The Legal Times* (Aug. 8, 2005), reprinted at [<http://www.jfanow.org/jfanow/index.php?mode=A&id=2457;sort=D>]

²² 527 U.S. 471, 475 (1999). See also *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), where the mitigating measure at issue was high blood pressure medication. Justice O'Connor also authored this decision.

²³ See National Council on Disability, *Righting the ADA* (Dec. 1, 2004), which called for legislation to change the result of this definitional interpretation.

However, there were certain limitations imposed on this right: the state's treatment professionals have to determine that community placement is appropriate, community placement cannot be opposed by the individual with a disability, and the placement must be reasonably accommodated. Nonetheless, the *Olmstead* decision has been a significant factor in the movement toward community based services for individuals with disabilities.²⁴

²⁴ See "Long-Term Care: Implications of Supreme Court's *Olmstead* Decision Are Still Unfolding," GAO-01-1167T (September 24, 2001).

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