A New Start on the Road Not Taken: Driving with *Lane* to Head Off Disability-Based Denials of Rights

Anita Silvers[*]
Leslie Pickering Francis[**]

The Americans with Disabilities Act (ADA) is the last of the major civil rights statutes passed by Congress, following statutes protecting people from discrimination based on race, color, religion, sex, and national origin[1] as well as age[2] and pregnancy.[3] In recent years, courts have increasingly moved toward constitutional and statutory interpretations that limit the ability of plaintiffs to bring suit for alleged violations of their civil rights under these statutes.[4] This movement has been especially problematic for ADA plaintiffs, who do not have the successes of the more robust earlier civil rights tradition behind them and who have been beset as well with misconceptualizations of disability, disability discrimination, and the ADA itself.

When civil rights plaintiffs bring cases alleging discrimination based on disability, even apparent victories have proven deeply problematic for subsequent plaintiffs claiming discrimination. This pattern antedates the ADA. The Supreme Court's holding in *City of Cleburne v. Cleburne Living Center* that the rational basis test applies to equal protection challenges arising from disability[5] has been far more devastating to subsequent plaintiffs than the benefit of the

* B.A., Sarah Lawrence College, 1962; Ph.D., Johns Hopkins University, 1967; Professor and Chair, Department of Philosophy, San Francisco State University.

** B.A., Wellesley College, 1967; Ph.D., University of Michigan, 1974; J.D., University of Utah, 1981; Alfred C. Emery Professor of Law and Professor and Chair, Department of Philosophy, University of Utah.

1. 42 U.S.C. § 2000e-2(a) (2000).
2. 29 U.S.C. § 623.
3. 42 U.S.C. §§ 2000e-2(a), 2000e(k).
4. *See, e.g.*, Sutton v. United Airlines, 527 U.S. 471 (1999) (defining disability to require assessment of actual disability while in a corrected state).
5. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

actual victory in the case. The Court ruled that the city's zoning ordinance requiring a permit for group homes as applied to a group home for people with mental retardation was invalid because the city had offered no reasonable basis for allowing some unrelated people to share a residence while denying people with mental retardation the same opportunity.[6] This victory proved pyrrhic, however, because the Court embedded a theory about disability classification into its favorable ruling that has effectively constricted even successful disability discrimination cases from securing broader liberating effects.[7]

The disappointing doctrine introduced in *Cleburne* was that finding a disability-based denial of a right to be wrongful in one case should not throw suspicion on similar disability-based denials of rights,[8] even under the same zoning ordinance that was the subject of litigation in *Cleburne*. If litigation victories are in principle not to be extrapolated heuristically, they cannot effectively discourage further disability discrimination. Judicial recognition of the pernicious influence of disability discrimination in one case therefore often goes very little distance, or nowhere at all, toward making other disabled people more secure in the exercise of rights. Thus, *Cleburne* forestalled the development of a prophylactic strategy that could have firmly attached the onus of discrimination to practices depriving disabled people of their opportunity to exercise a citizen's usual rights.

---

6. *Id*. at 450.

7. Other cases may or may not prove to have been pyrrhic, given later legal developments. Consider, for example, *Bragdon v. Abbott*, 524 U.S. 624 (1998). *Abbott*'s holding, that the HIV positive plaintiff was a person with a disability because her HIV status substantially affected her major life activity of reproduction, was a victory for Abbott and for people with HIV. *Id*. at 655. On the other hand, the individualized analysis performed by the Court in *Abbott* has been used in subsequent decisions to *narrow* the definition of "disability" to inquiries about the individual plaintiff's characteristics in a corrected state, an approach that is not required by *Abbott*. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 483 (1999) ("The definition of disability also requires that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the 'major life activities of such individual.' Thus, whether a person has a disability under the ADA is an individualized inquiry." (citations omitted)).

8. *See, e.g.*, Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 98 (2001).

The Supreme Court's recent holding in *Tennessee v. Lane* (a Title II ADA case) that Congress validly exercised its enforcement powers under section 5 of the Fourteenth Amendment to prohibit disability discrimination with regard to access to courts,[9] might also fall victim to courts' reluctance to generalize from disabled plaintiffs' wins. Title II of the ADA prohibits discrimination in the provision of public services.[10] The Eleventh Amendment bars suits by private individuals against states when their sovereign immunity has not been waived or abrogated.[11] *Lane* is understood to establish that Congress properly used its section 5 powers to abrogate the states' sovereign immunity with regard to Title II of the ADA as applied to access to courts.[12] The idea that affirmations of protection against disability discrimination ought not to be extrapolated goes badly wrong, we will argue, when courts suppose *Lane* to imply that only access to the courts, and no other kind of disability-based state-promoted exclusion, qualifies for congressionally crafted rights-based protection.

In this Article, our ultimate goal is to demonstrate how advocates for the civil rights of people with disabilities can use *Lane* to construct a successful rights-based strategy. In doing so, we will show that *Lane* embarks upon a palpable and promising (but yet to be explicitly announced) rights-based standard to which important kinds of differential treatment of people with disabilities should be held. This strategy maps the way for legal thinking about disability discrimination to return from the wrong road down which *Cleburne* drove the national effort to achieve integration for people with disabilities.[13] Our approach deflects disability discrimination and

9. Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

10. 42 U.S.C. § 12132 (2000).

11. *See* U.S. CONST. amend. XI; Alden v. Maine, 527 U.S. 706 (1999).

12. *See, e.g.*, United States v. Georgia (*Goodman*), 126 S. Ct. 877, 881 (2006).

13. *See* Leslie Francis & Anita Silvers, *Introduction* to AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS, at xiii–xxvii (Leslie Pickering Francis & Anita Silvers eds., 2000) (exploring the ADA as a culmination of a national effort at least a half a century long to integrate people with disabilities into mainstream social institutions); *see also* Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 841 (1966) ("[N]othing could be more essential to personality, social existence, economic opportunity—in short, to individual well-being and integration into the life of the community—than . . . public approval[] and the legal right to be abroad in the land.").

opens up opportunities for disabled people to exercise important rights that other citizens enjoy by turning attention to the public value of their doing so.

To reach our destination, we begin with accounts of *Cleburne* and then of *Lane* itself. *Cleburne*, decided before the ADA's enactment, advanced the claim that differential treatment of mentally disabled people under a zoning law violated constitutional equal protection requirements.[14] The city's defense was that it had a rational basis for the differential treatment.[15] In *Lane*, the Court applied a due process analysis to a case claiming that inaccessible courthouses violated Title II of the ADA.[16] Tennessee's response was that Title II had not validly abrogated state sovereign immunity protected by the Eleventh Amendment.[17] This response has gained momentum in the ten years since the Rehnquist Court's decision invalidating the Religious Freedom Restoration Act.[18] It was applied to the employment discrimination title of the ADA in the 2001 *Garrett* decision[19] and since then has cast a shadow over the prospects of achieving integration for people with disabilities, especially with regard to their being offered equitable opportunity when a program is operated by a state.

Suits by private individuals against states for money damages, which are barred by the Eleventh Amendment (except where Congress has acted validly under section 5 of the Fourteenth Amendment) are important for several reasons. They benefit individual plaintiffs economically and thus recompense them for the various challenges of undertaking litigation. They provide a resource through which lawyers for plaintiffs claiming discrimination can be paid, through a contingency fee arrangement or otherwise. The prospect of money damages therefore helps citizens seeking legal relief to gain access to representation.[20]

---

14. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 432–33 (1985).
15. *Id.* at 447–50.
16. Tennessee v. Lane, 541 U.S. 509, 511 (2004).
17. *Id*. at 514.
18. City of Boerne v. Flores, 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803.
19. Bd. of Trs. v. Garrett, 531 U.S. 356 (2001).
20. Ruth Colker, *The Section 5 Quagmire*, 47 UCLA L. REV. 653, 660 (2000).

It has long been established, since *Ex parte Young*,[21] that state actors may be sued in their official capacities for injunctive relief against illegal actions.[22] This legal fiction has the result of allowing plaintiffs to obtain injunctive relief against legally problematic state actions. However, suits for injunctions benefit individual plaintiffs only if they can meet the standard of the real and immediate likelihood of continuing harm;[23] they are thus harder for individual plaintiffs to win and do not provide any protection at all for plaintiffs alleging *past* acts of state discrimination. More generally, because suits by private individuals for money damages against states must find shelter under the Fourteenth Amendment to proceed, they can be crucial for clarifying the standard of reasoning that must be reached to exclude disabled people from access to fundamental services and rights. They therefore are a vehicle for eliciting and exploring influential views about the constitutionality of exclusionary treatment of people with disabilities.

As we bring *Lane* on stage, it nonetheless remains important to emphasize the limited confines of the dispute about state sovereign immunity. Eleventh Amendment immunity does not bar suits brought by the United States against states for money damages or suits by private individuals for injunctive relief against state officials acting in their official capacity.[24] Section 1983 suits for damages remain available to citizens suing state actors for violations of their constitutional rights.[25] The possibility of injunctive relief is not negligible, either for individual plaintiffs who can meet this showing or for class plaintiffs who can show ongoing discrimination that warrants correction.[26] The Eleventh Amendment also does not protect local governmental units such as municipalities; the shield it provides is peculiar to state governments.[27] Moreover, states may waive

21. *Ex parte* Young, 209 U.S. 123 (1908).
22. *Id*. at 168.
23. *See* Daan Braveman, *Enforcement of Federal Rights Against States:* Alden *and Federalism Non-Sense*, 49 AM. U. L. REV. 611, 620 (2000).
24. *Id.* at 627–28; *see also Garrett*, 531 U.S. at 374 n.9.
25. 42 U.S.C. § 1983 (2000).
26. Braveman, *supra* note 23, at 627.
27. Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 902 n.2 (6th Cir. 2004).

sovereign immunity, for example, by accepting federal funds, such as those distributed under the Rehabilitation Act or the Medicaid statute.[28] Even if difficult to penetrate, the shield of sovereign immunity does not repel the project of remedying disability discrimination that is embedded in public policy or practice. The significance of the cases we examine must be assessed with these limitations in mind.

We begin our analysis with *Cleburne*, the crucial seminal case in which the Supreme Court addressed the rights of (some) people with disabilities. We then turn to an examination of *Lane* against the background of *Cleburne*. Both *Cleburne* and *Lane* can be given either narrower, case-specific readings or broader, rights-protective readings. Before *Lane*, we will argue, some lower federal courts, with narrow readings of *Cleburne* in the background, had adopted the rejectionist conclusion that Title II of the ADA did not validly abrogate state sovereign immunity. Others had reached the opposite, rights-recognizing conclusion. This pattern has continued after *Lane*, with some courts applying their narrow rejectionist precedent (except in the exact circumstances of *Lane*), while other courts limit *Lane* to courthouse access, and still other courts read *Lane* as recognizing a broader scope of rights. We criticize the reasoning of the rejectionist courts, explaining how they have misunderstood both *Lane* and the structure of protection against discrimination claims by persons with disabilities that it advances. We shall then draw on the decisions of rights-recognizing courts to construct a template for a broader set of civil rights claims for people with disabilities under Title II of the ADA.

The misunderstandings shared by courts with a narrow reading of *Lane* run deep in two related ways, we shall argue. The initial misunderstanding arises from two theories introduced in *Cleburne*. The first is that government action that treats people differently based on disability is more likely than not to be beneficial to them, whereas

---

28. For an argument that federal policy goals can be largely achieved within the limits of current law and that the Eleventh Amendment rulings principally represent a shift in power from the legislative to the executive and judicial branches, see Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006).

differential treatment of people based on race or sex is more likely to harm them. The second is that disabilities are serious differences, whereas race- and sex-associated differences are not. The conjunction of these two theories drives the doctrine that disability-based classifications do not merit either the strict scrutiny standard accorded to race-based classifications or the heightened scrutiny standard accorded to sex-based classifications.[29] Courts sometimes have attached a curious corollary to this doctrine, one that cannot be justified by the theories alone, namely, that there should be broad acceptance of disability-based, differentially disadvantageous treatment as long as it is supplied with *some* rationale.[30]

A further misunderstanding, we contend, is that the ADA is not really a civil rights statute at all, but a "helping hand" to people who need assistance because of their own deficits. This misunderstanding begins with the observation that among civil rights statutes, the ADA is the only one requiring "reasonable accommodation" for otherwise-qualified individuals in employment (found in Title I of the ADA),[31] "reasonable modification" for otherwise-qualified individuals in public services (found in Title II),[32] or "readily achievable" removal of barriers in public accommodations (found in Title III).[33] This observation has led some commentators to conclude that courts have backed away from enforcing ADA rights because ADA cases are not about rights at all, but instead turn on judgments about how much special help is sufficient and how much is too much.[34]

Contrary to these misinterpretations, we will argue, the ADA *is* a civil rights statute. Understanding the ADA as a civil rights statute can be the basis for a carefully constructed post-*Lane* strategy that echoes the original and highly successful strategy of the NAACP Legal Defense Fund leading up to *Brown v. Board of Education*.[35]

---

29. The reasoning in *Cleburne* has been criticized by one of the authors. *See* Silvers & Stein, *supra* note 8, at 98.

30. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356, 367 (2001).

31. 42 U.S.C. § 12112(b)(5)(A) (2000).

32. *Id.* § 12131(2).

33. *Id.* § 12182(b)(2)(A)(iv).

34. *See, e.g.*, KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 176–77 (2006).

35. Brown v. Bd. of Educ., 347 U.S. 483 (1954). For an account of the *Brown* strategy, see JEROLD AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN

I. *CLEBURNE*: LOWER OR HIGHER PROTECTION?

Decided in 1985, twelve years after Congress amended the Rehabilitation Act with the protections against disability discrimination contained in sections 503 and 504[36] and seven years before the passage of the ADA, *Cleburne* was a landmark ruling because, for the first time, the Supreme Court fixed a disapproving gaze on disability discrimination.[37] Earlier Supreme Court engagements with disability are epitomized by the infamous 1927 *Buck v. Bell* decision, in which Justice Holmes upheld the sterilization of seventeen-year-old Carrie Buck—mistakenly diagnosed as "feebleminded"—by asserting that society has the right to deprive "deficient" people of reproductive liberty.[38] *Cleburne* marks the first explicit acknowledgement by the Supreme Court that the United States Constitution might offer disabled people judicial relief from public policy that enforced their exclusion.

Certain contextual elements illuminate the broader dilemmas faced by the Court in *Cleburne* and help to explain why, in that historical moment, the Court may have found disregarding disability discrimination to be an unacceptable option. At the time at least two broad considerations prompted by regard for the public good would have weighed against letting the City of Cleburne's ordinance stand. This was, first of all, an era of great effort to reverse the century-old policy of excising disabled people from the community by institutionalizing them.[39] Institutionalization had been undertaken in the name of relieving non-disabled people of the incursions that caring for the disabled imposed on their time and energy for productive work.[40] However, the burden of supporting disabled people in institutions eventually came to seem even more prohibitive than relying on their families for their care, especially as courts began

---

AMERICA (1976).

36. 29 U.S.C. §§ 793, 794.

37. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

38. Buck v. Bell, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles are enough.").

39. *See, e.g.*, JUDITH LYNN FAILER, WHO QUALIFIES FOR RIGHTS? HOMELESSNESS, MENTAL ILLNESS, AND CIVIL COMMITMENT (2002).

40. *See, e.g.*, JAMES W. TRENT, JR., INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES (1994) (especially chapters 1–4).

to rule out the cost-saving but cruel practices upon which the economic sustainability of state-run institutions had been built.[41] The public, therefore, had an interest in advancing the deinstitutionalization program, which depended on the establishment of small group homes in the community like the one that the City of Cleburne banned.

Second, *Cleburne* was litigated when the practice of zoning ordinances that segregated neighborhoods according to race had only recently been repudiated.[42] Although its subject was segregation by intellectual capacity rather than by race, *Cleburne* exhumed the possibility that some citizens could prevent other citizens from becoming their neighbors solely because of the potential newcomers' biological differences. Significantly, the city defended its ordinance with a set of reasons that attempted to shift away from this basis for exclusion by characterizing the group home's location as a threat,[43] but the Supreme Court rejected these reasons as pretextual.[44]

In *Cleburne*, the city claimed that denying residence to intellectually disabled people advanced several state interests.[45] One was to maintain the serenity of the neighborhood.[46] However, the zoning ordinance permitted fraternity houses to be established,[47] and fraternity houses are legendary for shattering serenity. Another was the concern about the legal responsibility of the group home's residents for their actions,[48] but the ordinance permitted nursing homes and hospitals, whose residents are not always fully competent

---

41. *See, e.g.*, Carol Appathurai et al., *Achieving the Vision of Deinstitutionalization: A Role for Foster Care?*, 3 CHILD & ADOLESCENT SOC. WORK J. 50 (1986); David Braddock, *Deinstitutionalization of the Retarded: Trends in Public Policy*, 32 HOSP. & COMMUNITY PSYCHIATRY 607 (1981); Paul G. Stiles et al., *Before and After Deinstitutionalization: Comparing State Hospitalization Utilization, Staffing, and Costs in 1949 and 1988*, 23 ADMIN. & POL'Y MENTAL HEALTH & MENTAL HEALTH SERVICES RES. 513 (1996).

42. *See* Shelley v. Kraemer, 334 U.S. 1, 20–21 (1948).

43. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) ("[T]he Council was concerned with . . . the fears of elderly residents of the neighborhood.").

44. *Id.* ("But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently . . . .").

45. *See id.* at 448–50.

46. *Id.* at 450.

47. *Id.* at 449.

48. *Id*.

and responsible adults. Other proposed justifications for the ordinance—dense occupancy, congested streets, fire hazards, and the avoidance of danger to other residents[49]—similarly could not be defended as pertaining only to the prohibited group. The city could not explain why thirteen mentally retarded people constituted a denser occupation than thirteen fraternity brothers in the same space or why they, who did not drive cars, would cause more traffic than thirteen occupants of a boarding house or apartment house.[50] Nor did the city offer evidence that the proposed residents of the group home were a greater fire hazard, or that fire posed a greater hazard to them, or that they were more dangerous to neighbors, or that they were in more danger from neighbors than some of the groups of other kinds of unrelated people whom the ordinance explicitly designated as being welcome to reside in the city.[51]

The city also contended that the exclusion had protection of mentally retarded people at its heart, since the area was prone to flooding that might drown them, and children at the neighborhood school might harass them.[52] But the Court observed that mentally retarded people were no more vulnerable to being drowned in floods than residents of nursing homes and hospitals, among the types of facilities which the ordinance explicitly permitted.[53] And if the school children presented such a hazard to mentally retarded people, why were about thirty mentally retarded students assigned to the school itself?[54] In sum, in *Cleburne* the reasons given to justify disadvantageously differential treatment of disabled people either did not apply to them or applied equally well to favorably treated people. Consequently, the Court provided equal protection to the mentally retarded individuals who were potential residents of the group home by invalidating the ordinance as applied to them.[55] It is the procedural right of equal protection (that is, the right to be treated equally before the law) and not a substantive right that the Court upheld in

49. *Id.* at 450.
50. *Id*.
51. *Id.* at 449.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 450.

Cleburne. This is not to say that *Cleburne* categorically ignored or denied mentally retarded people's substantive rights: "[T]he mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law."[56]

We may usefully consider the reasoning the Court found permissible in staking out the narrow procedural ground that enabled integration of deinstitutionalized mentally retarded people into residential neighborhoods. This reasoning goes to whether claims of a rational basis for excluding people based on disability are pretextual. Reasoning with such a pedigree should be a sure guide to sustaining complaints that certain differential treatments constitute or are importantly related to constitutionally prohibited disability discrimination.

Noticing the relationship between the Fifth Circuit's holding in *Cleburne* and the Supreme Court's subsequent response helps to understand how what was struck down differed from what remained. The Fifth Circuit offered two arguments for attending to the legitimacy of the reasons the city gave for disadvantageously treating unrelated mentally retarded people in regard to their establishing a home together.[57] The Supreme Court rejected the first—that mentally retarded people form a quasi-suspect class—by insisting that real differences between them and other people explain their being treated differently and that, on the whole, their differential treatment by the state either benefits them with special access to resources and opportunities, or otherwise benefits them by protecting them from themselves.[58] But the Supreme Court did not directly engage the second rationale advanced by the Fifth Circuit, namely, that the importance of the opportunity the state denies is relevant to how thoroughly courts may examine the purported reasons for doing so. Indeed, the Court appears to have proceeded under this notion to examine the city's reasons for denying a place to live to the mentally retarded people, but not to other unrelated groups of people.[59]

---

56. *Id.* at 447.
57. *Id*. at 435.
58. *Id.* at 442.
59. *Id.* at 449–50.

The idea that differences in treatment are not necessarily disability discrimination seems to have weighed so heavily with the Supreme Court as to have prompted embedding several discursive observations to this effect in the *Cleburne* decision. The Court listed and praised both federal and state policies that either provide special benefits for mentally retarded people or otherwise exempt them from ordinary standards and responsibilities:

> Such legislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others. That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable.[60]

In making this point less than a decade after *Regents of the University of California v. Bakke*[61] (concerns about the constitutionality of affirmative programs that appear to privilege minorities were also part of the historical context in which *Cleburne* was decided), the Court seemed most concerned with closing the door on reverse discrimination complaints against beneficial treatment specifically of the disabled.[62] Subsequently, Justice Stevens cited *Cleburne* in his dissents in both *Adarand Constructors v. Pena*[63] and *Wygant v. Jackson Board of Education*,[64] two cases where the

60. *Id.* at 444.
61. 438 U.S. 265 (1978).
62. *Cleburne*, 473 U.S. at 446.
63. *See* 515 U.S. 200, 242–64 (1995) (Stevens, J., dissenting). Justice Stevens wrote:

> Nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account. For example, if the Court in all equal protection cases were to insist that differential treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provide a legitimate basis for disparate treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only one Equal Protection Clause.

Id. at 246.
64. 476 U.S. 267, 313–20 (1985) (Stevens, J., dissenting).

> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a tradition of disfavor by our

majority opinion relied on equal protection considerations to rule against affirmative action plans.

The Court was emphatically concerned to proof restrictive aspects of beneficent legislation against equal protection challenges: "Much recent legislation intended to benefit the retarded also assumes the need for measures that might be perceived to disadvantage them."[65] For example, the federal government "provided the retarded with the right to receive 'appropriate treatment, services, and habilitation,'" but only in a setting that is "'least restrictive of [their] personal liberty.' In addition, the Government has conditioned federal education funds on a State's assurance that retarded children will enjoy an education that, 'to the maximum extent appropriate,' is integrated with that of non-mentally-retarded children."[66] These provisions quoted by the Court could be read as endorsements of limiting the integration and liberty of such statutes' beneficiaries, which the Court took to be a reasonable burden to place on mentally retarded people as the price of their being given access to treatment, services, and education.[67]

In sum, the Court believed that because "lawmakers have been addressing [mentally retarded people's] difficulties in a manner that belies a continuing antipathy or prejudice,"[68] there was no constitutionally impelled "need for more intrusive oversight by the judiciary"[69] and "even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all."[70] Therefore, differential treatment of mentally retarded people need only be rationally related to a legitimate governmental purpose and may burden this group singularly, but only "in what is essentially an

---

laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?

Id. at 313 n.1 (quotations and citation omitted).

65. *Cleburne*, 473 U.S. at 444.
66. *Id.* at 443 (citations omitted).
67. *Id.* at 444.
68. *Id.*
69. *Id.*
70. *Id.* at 443.

incidental manner."[71] That legislatures appeared at the time to be helping such people thus led the Court to rebuff the Fifth Circuit's characterization of the classification.

Yet there remains the question of a threshold—that is, how good must a reason invoking a rational relation to a government purpose be to permit harming rather than helping people based on their falling under a given classification. It may be thought that the standard is met as long as any rationale is invoked, or even that satisfactory rationales must be presumed without the state having to articulate them. But the *Cleburne* Court's view in this regard reflects the Fifth Circuit's. According to the *Cleburne* Court, "the State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[72]

In *Cleburne* the Court illustrates how to inspect rationales for differential treatment for irrationality or arbitrariness.[73] Of course, the state must articulate the reasons for the differential treatment, if the state's reasoning is to be available for inspection.[74] To escape charges of irrationality or arbitrariness, reasons must apply to the people disadvantaged by the policy, but not equally to (some) people favored under the policy.[75] Because the reasons asserted for the City of Cleburne's ordinance excluding mentally retarded people from residence in the neighborhood either did not apply to the prospective residents of the group home, or otherwise equally applied to other residents welcome under the ordinance, the *Cleburne* Court held that the application of the ordinance as it stood "appears to us to rest on an irrational prejudice against the mentally retarded."[76]

To be sure, the *Cleburne* Court explicitly declined to apply heightened scrutiny, which would have required a substantial connection between differential treatment and the public interest, as

---

71. *Id.* at 446.
72. *Id.*
73. *Id.* at 448–50.
74. If the state does not articulate its reasons for differential treatment—that is, remains silent about them—it will be impossible for the courts to inspect the state's actual reasons, although the courts could of course construct reasons on behalf of the state. *See, e.g.*, Williamson v. Lee Optical of Okla., 348 U.S. 483, 487 (1955) (stating "The legislature might have concluded that . . . .").
75. *Cleburne*, 473 U.S. at 447–48.
76. *Id.* at 450.

well as an interest of increased importance, to policies that invoked "mental retardation" as a differentiating classification.[77] But the *Cleburne* Court nevertheless carefully inspected whether there was a tenable connection between the policy abrogating mentally retarded individuals' access to fair—that is, non-segregated—housing and a legitimate public purpose.[78] No such tenable connection being discovered, the Court found that the ordinance's targeting of the mentally retarded people in question was pretextual.[79]

II. *LANE*: NARROWER OR BROADER?

In *Tennessee v. Lane*[80] the Supreme Court confronted whether Congress had properly used its enforcement powers under section 5 of the Fourteenth Amendment in enacting Title II of the ADA. Title II prohibits discrimination in the provision of public services to people who are otherwise eligible for them; it requires reasonable modification but not fundamental alteration of the services at issue.[81] The plaintiffs in *Lane* had sued the state because several state courtrooms were inaccessible to people with mobility impairments.[82] Several years before *Lane* the Court's *Garrett* decision had held that states were immune from suits for money damages under Title I of the ADA (the employment discrimination title).[83] *Garrett* had reasoned that Congress based the prohibition of employment discrimination on equal protection grounds, but had not relied on evidence sufficient to provide a rational basis for concluding that states were engaged in patterns of employment discrimination against people with disabilities that required remediation.[84] The Court's immediate conclusion in *Lane* was that Title II required access to the courts and was a permissible use of Congress's section 5 powers.[85]

77. *Id.* at 442.
78. *Id.* at 448–50.
79. *Id.* at 450.
80. Tennessee v. Lane, 541 U.S. 509 (2004).
81. 42 U.S.C. § 12131(2) (2000).
82. *Lane*, 541 U.S. at 513.
83. Bd. of Trs. v. Garrett, 531 U.S. 356, 374 (2001).
84. *Id.*
85. *Lane*, 541 U.S. at 531.

What the Court said in reaching this immediate conclusion has been given importantly different understandings, however.

The "broad" reading of *Lane* is that it allowed Congress's use of section 5 enforcement powers to enforce constitutional due process rights. The "narrow" reading of *Lane* is that it is specifically limited to the right of access to courts. In this section, we set out the Court's reasoning in *Lane*, showing how the majority opinion can be construed to support the broad reading, but also explaining why the opinion has been read more narrowly by some courts.

Lane came to the Court from the Court of Appeals for the Sixth Circuit;[86] some understanding of Sixth Circuit precedent is helpful in contextualizing the case. In a decision before *Lane*, the Sixth Circuit held in *Popovich v. Cuyahoga County Court of Common Pleas*[87] that *Garrett* barred all private ADA suits against states based on equal protection principles, but did not prohibit suits based on due process principles.[88] In its decision in the *Lane* litigation, the Sixth Circuit denied the state's motion to dismiss, following *Popovich*.[89] The Sixth Circuit's decision applied this general due process analysis to protect rights of access to the courts.[90] It emphasized that Congress's findings in enacting the ADA established that physical barriers in

86. *See* Lane v. Tennessee, 315 F.3d 680 (6th Cir. 2003).

87. Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002) (en banc). Popovich, a hearing-impaired plaintiff, alleged he had been denied hearing assistance in a child custody hearing. *Id*. at 811. The panel decision of the Sixth Circuit had dismissed the case on sovereign immunity grounds, reasoning that Congress had overstepped its section 5 enforcement powers in enacting Title II of the ADA because disability warrants only rational basis scrutiny. *Id*. The rehearing en banc, delayed until after the Supreme Court's decision in *Garrett*, analyzed the case on due process grounds. *Id*. at 812. The *Popovich* court concluded that the plaintiff had been deprived of the due process right to participate meaningfully in the custody hearing. *See id*. at 815. Relationships between parents and their children are fundamental rights protected by the Fourteenth Amendment; therefore, on a due process analysis, heightened scrutiny was appropriate and Congress had properly utilized its section 5 enforcement powers. *Id*. In cases involving such rights, Congress had not expanded the meaning of due process, but merely had enforced it. *Id*. Judge Moore, concurring in the judgment, argued that *Garrett* had not precluded a Title II equal protection analysis; her argument was that the classification in this case was so invidious (citing *Cleburne*) that it could not survive rational basis scrutiny and thus was a proper use of Congress's enforcement powers under an equal protection analysis. *Id.* at 818 (Moore, J., concurring).

88. *Id.* at 811 (majority opinion).

89. *Lane*, 315 F.3d at 682 ("Among the rights protected by the Due Process Clause of the Fourteenth Amendment is the right of access to the courts.").

90. *Id*. at 683.

government buildings had denied essential services to people with disabilities—that is, were not beneficial but resulted from "unconstitutional animus" and "impermissible stereotypes."[91]

Justice Stevens authored the Supreme Court's five to four majority opinion in *Lane*, setting forth the issue under the broader analytical terms of the Sixth Circuit: "The question presented in this case is whether Title II exceeds Congress' power under § 5 of the Fourteenth Amendment."[92] The opinion then presents the litigation history, as is customary, but in a manner that echoes the lower court's broad framing of the issue, reasoning that *Garrett* barred ADA Title II suits based on equal protection but not those based on due process.[93] The Court approvingly quotes the Sixth Circuit's reasoning that the Due Process Clause protects the right of access to courts: barriers in "'government buildings, including courthouses . . . have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause'"; and that these failures may "'result directly from unconstitutional animus and impermissible stereotypes.'"[94] Following this history, Justice Stevens also characterizes the ADA broadly, as comprehensively addressing "discrimination against persons with disabilities."[95] He uses the classic language of civil

91. The court stated:

> The evidence before Congress when it enacted Title II of the Americans with Disabilities Act established that physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause. . . .
>
> . . . The record demonstrated that public entities' failure to accommodate the needs of qualified persons with disabilities may result directly from unconstitutional animus and impermissible stereotypes. Title II ensures that the refusal to accommodate an individual with a disability is genuinely based on unreasonable cost or actual inability to accommodate, not on inconvenience or unfounded concerns about costs.

Id. at 682–83.

92. Tennessee v. Lane, 541 U.S. 509, 513 (2004). Contrast the Court's later formulation of the issue in *United States v. Georgia* (*Goodman*): "We consider whether a disabled inmate in a state prison may sue the State for money damages under Title II of the Americans with Disabilities Act . . . ." 126 S. Ct. 877, 878 (2006). For a discussion of this case, see *infra* notes 181–88 and accompanying text.

93. *Lane*, 541 U.S. at 509.

94. *Id.* at 515.

95. *Id.* at 516.

rights in presenting the congressional findings in enacting the ADA, namely, that people with disabilities are a "discrete and insular minority" subjected to "purposeful unequal treatment," politically powerless and stereotyped.[96]

Under Supreme Court precedent, federal statutes that abrogate state sovereign immunity are subject to a two-step analysis.[97] Congress must first express unequivocally its intention to abrogate immunity,[98] and it did so clearly in the ADA.[99] In addition, Congress must act subject to a valid exercise of its section 5 enforcement power in the Fourteenth Amendment.[100] As described by Justice Stevens, this enforcement power is a "broad power indeed."[101] It reaches beyond prophylactic efforts to end practices with discriminatory intent, and even beyond the enforcement of rights specifically protected by the text of the Fourteenth Amendment.[102] This characterization relies on *Nevada Department of Human Resources v. Hibbs*, in which the Court upheld the dependent care provisions of the Family Medical Leave Act (FMLA) against a defense of sovereign immunity:

> We upheld the FMLA as a valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional . . . . When Congress seeks to

96. *Id.* Compare the Court's description in *Cleburne* of government treatment of people with disabilities:

> [T]he distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 443 (1985). Here, the Court views people with mental retardation as largely in need of protection and sees government efforts directed towards them as largely protective. The ADA was in part a response to the rose-colored glasses of *Cleburne.*

97. *See Lane*, 541 U.S. at 517.
98. *Id*.
99. *See* 42 U.S.C. § 12202 (2000).
100. *Lane*, 541 U.S. at 517.
101. *Id.* at 518 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982)).
102. *Id*. at 518–19.

> remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.[103]

Congress's enforcement powers are "not, however, unlimited."[104] Under Supreme Court precedent the limits of Congress's powers are set by "congruence and proportionality" between the injury identified and its purported remedy.[105]

In *Garrett*, the relevant precedent, the Supreme Court had applied a congruence and proportionality analysis to conclude that Congress did not properly exercise its section 5 enforcement powers in permitting suits against state governments for violations of Title I of the ADA (the employment discrimination title).[106] In prohibiting employment discrimination, Congress had sought to enforce the Fourteenth Amendment's guarantee of equal protection.[107] Classifications based on disability are subject to a rational basis test.[108] In enacting Title I of the ADA, however, Congress did not have extensive evidence that states had been engaging in patterns of unconstitutional employment discrimination.[109] Nearly all of Congress's evidence about disability discrimination referred to the provision of public services, according to the Court.[110] For all

---

103. 538 U.S. 721, 727–28 (2003). This citation is potentially disingenuous, since categorization based on sex is given heightened scrutiny, which the Court has specifically rejected for categorization based on disability, and the Court in *Hibbs* specifically referred to this heightened standard of scrutiny. *Id*. at 728. Categorization based on disability has been given only rational basis scrutiny since *Cleburne*. *See* Bd. of Trs. v. Garrett, 531 U.S. 356, 366 (2001). The Court's justification for relying on a heightened scrutiny standard, however, is that under a due process analysis it is the protection of rights that warrants heightened scrutiny. *See Lane*, 541 U.S. at 523.

104. *Id.* at 520. Note the double negative language, suggesting that the admission that Congress's powers are limited is grudging.

105. *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803.

106. *Garrett*, 531 U.S. at 365.

107. *Id.* at 368.

108. *Lane*, 541 U.S. at 540.

109. *Garrett*, 531 U.S. at 370 ("It is telling, we think, that given these large numbers, Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled.").

110. *Lane*, 541 U.S. at 521.

Congress knew, states might well have good reasons, rather than a discriminatory animus, for differential classifications based on disability; Congress, in the *Garrett* Court's judgment, was creating new rights rather than enforcing existing ones.[111]

By contrast, Justice Stevens reasons in *Lane* that Title II of the ADA not only prohibits classifications based on disability that "lack a rational relationship to a legitimate governmental purpose," but also seeks to "enforce a variety of other basic constitutional guarantees."[112] Some of these guarantees are protected by the Due Process Clause in the sense of access to process: access to courts, the right to confront accusers, the meaningful opportunity to be heard, the right to trial by jury, and the First Amendment right of access to criminal proceedings.[113] Other guarantees of rights involve protection against "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[114] It is important to note the Court's language: the Court uses "including," which implies a non-exclusive list is to follow. The list then continues by adding other rights: voting, marrying, and serving as jurors, protection against unjustified commitment, protection against abuse and neglect in state mental health hospitals, and even *Cleburne*'s protection against "irrational discrimination in zoning decisions."[115] In support of this non-exclusive list, the Court notes that "[t]he 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."[116]

---

111. *Id.* at 526.
112. *Id.* at 522.
113. *Id.* at 523.
114. *Id.* at 524.
115. *Id.* at 525 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)).
116. *Id*. In this discussion, several of the Court's citations are especially noteworthy. The Court cites *Cleburne* for a general prohibition against irrational discrimination in zoning, not for the conclusion that in the particular circumstances of the case the zoning was irrational. *Id.* The Court also approvingly cites Ruth Colker and Adam Milani, scholars well-known for their work against discrimination against people with disabilities, for their "comprehensive discussion of the shortcomings of state disability discrimination statutes." *Id*. at 526 n.15.

Before applying the congruence and proportionality analysis to the services in *Lane* itself, Justice Stevens pauses to respond to Justice Rehnquist's dissenting opinion.[117] Justice Rehnquist found insufficient evidentiary support for Congress's prophylactic action against discrimination in the provision of public services.[118] To Justice Rehnquist's concern that some of the evidence before Congress involved non-state actors, Justice Stevens replied that the "sheer volume" of the evidence was enormous.[119] The Court also favorably compared the evidence available to Congress in passing the ADA with the evidence available to Congress in enacting the FMLA, which had been upheld against a sovereign immunity challenge.[120] This comparison contained a subtle reply to Justice Rehnquist's complaint that Title II of the ADA could not pass the rational basis test:

> Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications.[121]

Thus, it is the *rights* at issue—not the classifications—that require more searching scrutiny than the rational basis test.[122] *Hibbs*, the FMLA case, is not inapposite because classifications based on sex command heightened scrutiny[123]: rights-denials command heightened scrutiny, too.

It is only *after* this broad portrayal of Congress's section 5 powers to guarantee due process, as well as of the evidence available to Congress, and the reply to Justice Rehnquist that due process heightens the level of scrutiny, that the Court turns to analyze the congruence and proportionality of Title II as a response "to this

117. *Id.* at 527 n.16.
118. *Id.* at 541–43 (Rehnquist, C.J., dissenting).
119. *Id.* at 528 (majority opinion).
120. *Id.*
121. *Id.* at 529.
122. *Id.*
123. *Id.* at 528.

history and pattern of unequal treatment."[124] At this point, the Court limits the scope of its inquiry, first, to "whether Congress had the power under § 5 to enforce the constitutional right of access to the courts."[125] The Court concludes that, given the right at issue and the evidence, Congress "unquestionably" had the power and that the Court's analysis on this point "need go no further."[126] Only at this point does the Court set aside the question of whether Congress had the power under Title II to prohibit discrimination in any and all public services and narrow the issue to access to the courts: "the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths."[127]

This is the passage—that the question is not hockey rinks or even voting—that some subsequent cases have relied on for the narrow interpretation of *Lane*: that *Lane* holds that Congress's valid exercise of section 5 enforcement powers extends *only* to the guarantee of access to courts.[128] To be sure, the Court is at pains here to clarify that it is addressing court services specifically; this is its response to the dissenting opinions, discussed shortly. To interpret this passage as a negative pregnant (that is, as implying that Congress's enforcement power does not extend beyond access to the courts), however would belie all of the text of the opinion that comes before. *Lane*, by its terms, is a holding about Congress's section 5 enforcement powers with respect to access to courts. It is not and should not be read as a holding about the limits of these powers in other cases.

The remedy selected—reasonable measures to make courtrooms accessible and reasonable modifications that do not fundamentally alter the nature of the services for persons who are otherwise eligible for these services—is the final aspect of the "congruence and proportionality" analysis.[129] The *Lane* Court finds that the remedy is proportional; the state is not required to adopt measures that are

124. *Id*. at 530.
125. *Id.* at 531.
126. *Id.*
127. *Id.* at 530–31.
128. *See infra* note 205 and accompanying text.
129. *Lane*, 541 U.S. at 530.

unreasonably costly, to compromise the fundamental nature of the service, or to open the service to people who are not otherwise eligible.[130] Here, too, the Court limits the scope of what it says: "Because this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne*'s prohibition on irrational discrimination."[131] This limit, too, must be read against the background of the full opinion. The Court has determined that the right of access to the courts is a due process right that warrants a heightened scrutiny analysis.[132] Other state services may or may not implicate rights that warrant heightened scrutiny; the Court is not expressing an opinion either on this point or on whether Title II more generally could survive a rational basis test analysis. These questions remain open. They are not foreclosed in *Lane*, despite what later courts might have said. Moreover, the Court in *Lane* has certainly suggested that there are other rights to which a due process analysis might be applied.[133]

Lane was neither univocal nor unanimous. The concurrences emphasized its expansiveness and elucidated aspects of this. Justice Souter's concurring opinion, joined by Justice Ginsburg, pointed out that of all governmental institutions, the courts should applaud the use of section 5 to address the situation of people with disabilities before the courts, given the courts' own histories of discrimination against people with disabilities.[134] Justice Ginsburg's concurrence, joined by Justices Souter and Breyer, construes the goal of the ADA as advancing equal citizenship for people with disabilities.[135] Achieving inclusiveness despite differences, Justice Ginsburg contends, may require a more comprehensive understanding of discrimination that extends to failures to provide reasonable accommodation.[136]

---

130. *Id.* at 532.
131. *Id.* at 533 n.20.
132. *Id.* at 522–23.
133. *Id.* at 524 (including voting, marrying, and serving as jurors).
134. *Id.* at 534–35 (Souter, J., concurring). Justice Souter cites Justice Marshall's *Cleburne* dissent for the history of unequal treatment of people with disabilities. *Id*. at 535 n.1.
135. *Id.* at 536 (Ginsburg, J., concurring).
136. *Id.* at 537. Justice Ginsburg relies principally on the subordination account of

Chief Justice Rehnquist's dissent, joined by Justices Kennedy and Thomas, begins by advancing the narrow view of *Lane*: that it holds only that Congress permissibly abrogated state sovereign immunity as applied to the circumstances in *Lane*, that is, with respect to cases implicating the right of access to courts.[137] Even this conclusion, in Justice Rehnquist's view, is mistaken. Congress may act prophylactically under section 5 only to remedy identified constitutional violations, in a manner that is congruent and proportional.[138] In his judgment, application of the congruence and proportionality test reveals that Congress redefined, rather than enforced, identified constitutional rights, even with regard to the situation in *Lane*.[139] The constitutional rights relied on by the majority were rights exercised through access to the courts: the right to be present, to have a meaningful opportunity to be heard, the right to trial by jury, and the public's First Amendment right of access to criminal proceedings.[140] Justice Rehnquist contends, however, that Congress had insufficient evidence to support the claim that states were systematically violating these rights, and chose a disproportionate remedy.[141]

Justice Rehnquist's claims about the evidence reveal assumptions about disability and about the law. About disability, he dismisses evidence of discriminatory state action against people with disabilities by maintaining it is "outdated" and "generalized."[142] This optimism is, to say the least, put at issue by Justice Souter's concurrence. About the law, in asserting that much of the evidence concerns non-state actors and is anecdotal at best, Justice Rehnquist reintroduces (from *Garrett*) his view of the rational basis test of *Cleburne*[143] without noting specifically the significance of this move. As we have already argued, the majority opinion reasons instead that

---

disability developed by Samuel Bagenstos, and on *Olmstead*'s holding that states were accountable for failures to provide community residential placements for people with disabilities. *Id.* at 536–37.

137. *Id.* at 538 (Rehnquist, C.J., dissenting).
138. *Id.* at 539.
139. *Id.* at 551.
140. *Id.* at 543.
141. *Id.* at 549.
142. *Id.* at 541.
143. *Id.* at 542–43.

the evidence meets the heightened level of scrutiny required when due process protects important rights.[144] Moreover, in assessing the evidence considered by Congress, Justice Rehnquist construes the right at issue differently from the majority and on a case-by-case basis: as the actual denial of "the constitutional right to access a given judicial proceeding."[145] This construction of the right is critical to Justice Rehnquist's contention that Congress has extended, rather than enforced, due process rights.

Justice Rehnquist's case-by-case construction of the right of access to courts also reveals his understanding of claims of illegal discrimination. One of the plaintiffs in *Lane* was able to make his way up the stairs into the courtroom by crawling; when he refused to crawl a second time, Tennessee offered to hold the hearing in an alternative location, which he also refused.[146] The other plaintiff sought to function as a court reporter but could not enter various courtrooms.[147] In both cases, Justice Rehnquist contends, the state had a rational basis for failing to alter the courthouses: the expense of modifications.[148] When states act in this way, they are not "discriminating," according to Chief Justice Rehnquist.[149] To say that states are discriminating, he asserts, would be to allow plaintiffs to challenge "any sort of inconvenience."[150]

This is to misunderstand the claim to constitutional rights, however. The constitutional right at issue is the accessibility of courts to people with a variety of differences who may need to use the courts. The discrimination was a failure to design courts inclusively, not merely a failure to rig an alternative for a particular disabled person who might request one.[151] In requiring only reasonable modifications to existing facilities, Congress both compromised and

144. *Id.* at 528–29 (majority opinion).
145. *Id.* at 546 (Rehnquist, C.J., dissenting).
146. *Id.* at 514 (majority opinion).
147. *Id*.
148. *Id*. at 547 (Rehnquist, C.J., dissenting).
149. *Id.*
150. *Id.* at 553.
151. Two years after Lane refused to crawl up the stairs, Polk County installed an elevator in the courthouse. Bill Mears, *Disabled Win Victory in Ruling Over Access to Government Buildings*, CNN.COM, May 17, 2004, http://www.cnn.com/2004/LAW/05/17/scotus.disabled/index.html.

observed the structure of proportionality by taking into account the expenses of redesign. The result should not be to trivialize claims of discrimination as mere preferences or objections to inconvenience.

Finally, Justice Rehnquist characterizes the remedy in Title II as disproportional because it requires "special accommodation and the elimination of programs that have a disparate impact on the disabled . . . ."[152] Here, too, Justice Rehnquist paints a picture of special help, not of civil rights. Justice Rehnquist's further objection is that Title II is far too broad in scope.[153] Title II applies to all public services.[154] As we shall argue below, a due process analysis extends beyond the issue of access to courts involved in *Lane*. Given current Supreme Court jurisprudence, on even this analysis the permissible scope of Congress's section 5 enforcement powers will not reach the full scope of Title II, however. Justice Rehnquist contends that the very fact of Title II's broad scope should doom it because it will require states to defend a multitude of cases, public service by public service, from access to voting booths to access to hockey rinks.[155] This, he contends, is a disproportional remedy.[156] The starting place of his objection to Title II is his construction of *Lane* as simply an "as applied" holding,[157] a picture we have criticized. But the cornerstone of the objection is that he does not accept how the majority's due process analysis provides a principled basis for defining the scope of Congress's section 5 enforcement powers as extending far more broadly than to access to courts. Our discussion will show how *Lane*'s due process analysis builds this principled basis while avoiding the flood of litigation that Justice Rehnquist feared.

Justice Scalia's dissent rejects the entire structure of the Supreme Court's section 5 jurisprudence.[158] He regards the *Hibbs* and *Lane* decisions as *reductios* of the "congruence and proportionality" test

152. *Lane*, 541 U.S. at 549.
153. *Id.* at 550–51.
154. *Id.* at 550.
155. *Id.* at 551 ("Title II . . . applies indiscriminately to all 'services,' 'programs,' or 'activities' of any 'public entity.'").
156. *Id.* at 554.
157. *Id.* at 551–52.
158. *Id.* at 557–58 (Scalia, J., dissenting) ("The 'congruence and proportionality' standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking.").

that the Court has developed for section 5 analysis.[159] Justice Scalia maintains that the Court's analyses in these cases reveal that the test is unprincipled.[160] This contention, like the contentions in Justice Rehnquist's dissent, reveals how Justice Scalia understands disability and the law. In Justice Scalia's view, Congress may only use its section 5 power to enforce rights explicitly enumerated in the Fourteenth Amendment itself,[161] such as the authorization of a cause of action against persons for violating constitutional rights or the implementation of reporting requirements designed to bring such rights violations to light.[162] The initial Court decisions approving broader congruent and proportional prophylactic measures, so long as they were congruent and proportional, involved allegations of racial discrimination by states, the "principal evil" the Fourteenth Amendment sought to cure.[163] Moreover, at the time of these decisions, the incorporation doctrine had not been developed and the understanding of the rights protected by the Fourteenth Amendment was thereby quite limited. These points lead Justice Scalia to continue to accept the congruence and proportionality test for cases alleging racial discrimination, but not for any other kinds of cases.[164] Justice Scalia thus rejects any analogy between racial discrimination and discrimination based on other categorizations.[165] Rejection of this analogy leads him to refuse to consider whether prophylactic action might be as necessary when states categorize on grounds other than race.[166]

III. AFTER *LANE*, IN THE COURTS

Lane came as a surprise to many commentators, who had feared the Court would apply its rejectionist analysis of Title I in blanket fashion to Title II.[167] Both before and after *Lane*, the lower federal

159. *Id.* at 555–58.
160. *Id.* at 558.
161. *Id.* at 559–60. Thus Justice Scalia endorses 42 U.S.C. § 1983. *Id*.
162. *Id.* at 560.
163. *Id.* at 563.
164. *Id.*
165. *Id.*
166. *Id.*
167. *See, e.g.*, Russell Powell, *Beyond* Lane*: Who Is Protected by the Americans with*

courts had been grappling with many kinds of Title II suits, including suits by disabled prisoners claiming rights to accommodations,[168] suits by students claiming disability discrimination by state universities,[169] and suits claiming rights to state services such as Medicaid.[170]

At the time of the *Lane* decision, several cases in which disabled prisoners had sued under Title II were pending before the lower federal courts.[171] These cases are difficult for the already-unsympathetic plaintiffs, both because the state can claim a rational basis for restrictions that protect safety and because courts defer to these legislative and executive judgments. On the other hand, at least some rights claims by prisoners rest directly on the Eighth Amendment's ban on cruel and unusual punishment and thus are based on constitutional rights akin to the due process right of access to courts.[172] In several of these prisoner suits, appellate courts read *Lane* as limited to the right of access to courts and therefore as not extending Title II's coverage.[173] These courts undertook congruence and proportionality analyses, concluding that Congress had overstepped its section 5 authority by prohibiting disability discrimination in prison services.[174]

The Supreme Court decided one of these cases, *United States v. Georgia* (*Goodman*),[175] about a year and a half after *Lane.* Tony Goodman, a paraplegic inmate, brought suit challenging the conditions of his confinement, seeking, among other claims, to

---

Disabilities Act, Who Should Be?, 82 DENV. U. L. REV. 25, 37 n.135 (2004).

168. *E.g.*, Cochran v. Pinchak, 401 F.3d 184 (3d Cir. 2005), *vacated and reh'g granted by* 412 F.3d 500 (3d Cir. 2005); Miller v. King, 384 F.3d 1248 (11th Cir. 2004), *vacated*, 449 F.3d 1149 (11th Cir. 2006).

169. *E.g.*, Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 109 (2d Cir. 2001).

170. Circuits were also split on issues such as whether suits could be brought under Title II against states charging for disabled parking placards. *Compare* Thompson v. Colorado, 278 F.3d 1020 (10th Cir. 2001) (no valid abrogation for a $2.25 charge), *and* Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) (no valid abrogation for a $5 charge), *with* Dare v. California, 191 F.3d 1167 (9th Cir. 1999) (valid abrogation of the state's sovereign immunity defense to a claim that a $6 biennial charge violated ADA Title II).

171. *E.g.*, *Cochran*, 401 F.3d 184; *Miller*, 384 F.3d 1248.

172. *See* United States v. Georgia (*Goodman*), 126 S. Ct. 877, 881 (2006).

173. *See Cochran*, 401 F.3d at 193; *Miller*, 384 F.3d at 1277–78.

174. *Cochran*, 401 F.3d at 191; *Miller*, 384 F.3d at 1269.

175. *Goodman*, 126 S. Ct. 877.

recover money damages from the state of Georgia for violations of Title II of the ADA.[176] Goodman asserted that he was unable to turn his wheelchair in his cell, was forced to sit in his own waste because he could not use the toilet facilities provided, and that prison guards had ignored his medical needs.[177] The district court granted summary judgment to the state, holding that Goodman's Title II claims were barred by sovereign immunity.[178] The Eleventh Circuit affirmed, holding that, under *Lane*, Congress's extension of Title II to prison services was not a proper exercise of its section 5 enforcement powers.[179]

In *Goodman*, Justice Scalia wrote a limited decision for a unanimous Court.[180] He stated the issue narrowly: "[w]hether a disabled inmate in a state prison may sue the State for money damages under Title II" of the ADA[181] and "whether Title II of the ADA validly abrogates state sovereign immunity with respect to the claims at issue here."[182] Because the state of Georgia did not contest Goodman's claim that there had been Eighth Amendment violations, Justice Scalia characterized Goodman's claims for money damages under the ADA as "evidently based, at least in large part, on conduct that independently violated the provisions of § 1 of the Fourteenth Amendment."[183] Justice Scalia's analysis proceeds on this basis,

176. *Id*. at 879.

177. *Id*. at 880.

178. *Id.*

179. *Miller*, 384 F.3d at 1276–78. This decision had given *Lane* the narrowest possible reading, reading it solely as an "as applied" case. *Id*. at 1271 n.26. It identified the right at issue as the Eighth Amendment right to be free of cruel and unusual punishment. *Id*. at 1272. It opined that the *Lane* Court had "little documentation" of a history of discrimination in prisons, but conceded that the Court had resolved that issue. *Id.* at 1271 n.25. However, it concluded that the remedy of Title II was not "congruent and proportional" to the discrimination Congress had found, because the prohibition on cruel and unusual punishment is a "markedly narrow restriction on prison administrative conduct" and does not affect the wide range of prison services and programs. *Id.* at 1247. The Eighth Amendment prohibits the wanton infliction of pain on inmates, in the Eleventh Circuit's reasoning, but not exclusion of prisoners with disabilities from most prison services. *Id*. at 1275.

180. *Goodman*, 126 S. Ct. at 878.

181. *Id.*

182. *Id.* at 880.

183. *Id*. at 881. This is a non sequitur, as the Eleventh Circuit's ruling on remand recognizes. Some refusals to provide access to prison services to people with disabilities, such as refusal to provide medical care, clearly are also Eighth Amendment violations. Other refusals to provide access to people with disabilities may not be, on the other hand. If prisons are not

establishing an important caveat to the opinion's significance. Justice Scalia's dissent in *Lane* had made clear his view that Congress may not act prophylactically but may only act under section 5 to enforce explicit constitutional guarantees enumerated in the Fourteenth Amendment.[184] Although this particular view is unique to Justice Scalia, no Justices, he says, now doubt that Congress may go at least this far.[185] Justice Scalia's opinion concludes: "Thus, insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."[186]

The Supreme Court's order to the Eleventh Circuit on remand clearly indicates that Justice Scalia's opinion should not be taken to establish a negative pregnant, however. The order directs the Eleventh Circuit to direct the district court to determine, claim by claim, which of Goodman's allegations violates the ADA, which of these also violate the Fourteenth Amendment, and whether the claims that violate the ADA but not the Fourteenth Amendment are claims for which Congress validly abrogated state sovereign immunity.[187] As Justices Stevens and Ginsburg noted in concurrence, the Court's decision does not define the outer limits of sovereign immunity, but "wisely" permits the lower courts to sort out a very messy factual record.[188]

It is presently unclear whether the Eleventh Circuit or other lower courts facing similar questions will be willing to entertain the possibility that Congress validly abrogated sovereign immunity for prison programs generally[189] or in the case of other rights.[190] In

required by the Eighth Amendment to provide certain educational services, it would not violate the Eighth Amendment for the prison to offer these services to inmates generally but not to provide, for example, hearing assistance to deaf prisoners who are otherwise qualified for the services but cannot take advantage of them because of deafness.

184. Tennessee v. Lane, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting).

185. *Goodman*, 126 S. Ct. at 881.

186. *Id.* at 882.

187. *Id.*

188. *Id.* (Stevens, J., concurring).

189. Miller v. King, 449 F.3d 1149 (11th Cir. 2006). The earlier decision in *Miller* was vacated in light of *Goodman*. *Id*. at 1150. The Eleventh Circuit's directions to the district court followed the guidelines in Justice Scalia's opinion but expressed no specific opinion on whether the district court should limit abrogation of sovereign immunity to claims violating the Eighth Amendment. *Id.* at 1151.

prisoner's rights cases there may be allegations of clear Eighth Amendment violations such as the refusal to provide medical care because of a disability. There may also be allegations of Title II violations that do not rise to the level of a constitutional violation, such as a failure to make recreational opportunities accessible to prisoners with disabilities. The First Circuit appears to have read *Lane* and *Goodman* to establish the negative pregnant that, in cases of prisoners' complaints about disability discrimination, only Eighth Amendment violations can be the basis for valid abrogation of sovereign immunity.[191]

The Sixth Circuit also appears to have construed the cases as limited to their circumstances.[192] Rachel Haas sought to sue multiple defendants under ADA Title II for her sentence to a drug and alcohol rehabilitation facility that required her to ascend six floors of stairs to reach her room, even though she was forced to crawl due to serious injuries she suffered in an accident.[193] In the case, the Sixth Circuit

190. Some commentators have framed this as whether *Lane* and *Goodman* are "as applied" rulings. *See, e.g.*, Meredith S. Byars, Comment, *The Supreme Court's Section 5 Analysis in* Tennessee v. Lane*: Considering the Future of State Sovereignty, Public Policy, and the Treatment Needs of Mentally Ill Prisoners*, 80 TUL. L. REV. 947 (2006); David L. Schwan, Note, "*When You Come to a Fork in the Road, Take It!": Tennessee v. Lane Takes a New Approach to Section Five Enforcement Powers*, 43 HOUS. L. REV. 235 (2006).

191. The First Circuit characterized *Lane* as "as applied": "holding that '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' § 5 authority to enforce the guarantees of the Fourteenth Amendment.'" Kiman v. N.H. Dep't of Corr., 451 F.3d 274, 281 (1st Cir. 2006) (quoting Tennessee v. Lane, 541 U.S. 509, 533 (2004)). It also quotes language from *Goodman* that suggests the negative pregnant implication: "'insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.'" *Id.* (quoting *Goodman*, 126 S. Ct. at 882).

192. Haas v. Quest Recovery Servs., Inc., No. 05-3147, 2006 U.S. App. LEXIS 7570 (6th Cir. Mar. 27, 2006).

193. *Id.* at *2–*3. In the case, Haas raised a complex set of federal and state claims against the state, the facility, and various individual defendants. *Id*. at *6. The count relevant here is an ADA count against the State of Ohio, which had two alleged bases: the action of an arm of the state (the municipal court) in sentencing Haas to the treatment facility, and the state's ownership of the building in which the facility was located (the facility leased the building from the state). *Id.* at *8–*9. The district court ruled that both of these claims were deficient and that, in any event, the state would be entitled to Eleventh Amendment immunity. *Id.* at *9–*13. The count against the municipal court for sentencing Haas to the facility was, in reality a challenge to the order of the judge and thus came within the protection of judicial immunity. *Id.* at *10–*11. The claim against the state as landlord was deficient because Hass did not argue sufficiently that the facility was acting as an arm of the state. *Id.* at *11–*13. Perhaps because this analysis would appear to leave open the question of whether the state had violated the ADA

read *Lane* as "expressly limited" to the question of access to courts, and thus as not providing relevant guidance.[194] Haas was thus forced to argue her case against the state on equal protection grounds.[195] This was a losing strategy given the Sixth Circuit's view that alleged equal protection violations do not warrant abrogation of sovereign immunity because disability as a category demands only rational basis scrutiny, a view reached by the Sixth Circuit without further examination of whether the state in fact had a rational basis for the implicit categorizations it employed.[196] The United States Supreme Court granted certiorari in *Haas*, vacated the Sixth Circuit's judgment, and remanded for consideration of whether, under *Goodman*, the court had properly held that Haas failed to state a claim for relief under ADA Title II.[197]

Lower courts have also disagreed over whether students claiming discrimination by state higher education institutions[198] may bring suit under Title II without being barred by sovereign immunity. Access to higher education is not a right enumerated in the Constitution or otherwise given fundamental constitutional status.[199] It is, however, an important means of social inclusion; discrimination in public education was a core focus of congressional attention in the findings that led to the ADA.[200] In a pre-*Lane* case brought by a student claiming disability discrimination in his dismissal from a state medical school, the Second Circuit held that sovereign immunity is validly abrogated if there is an allegation of discriminatory animus, applying an equal protection "rational basis" analysis to Title II.[201]

---

by leasing an inaccessible property to a facility not acting as an arm of the state, the district court opinion completed its analysis of the Eleventh Amendment immunity issue for ADA claims against states outside of the circumstances of access to courts.

194. *Id.* at *15.

195. *Id.* at *16.

196. *Id*. at *16–*18.

197. *See* Haas v. Quest Recovery Servs., Inc., No. 06-263, 2007 U.S. LEXIS 1150 (Jan. 16, 2007).

198. *See, e.g.*, Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ., 405 F.3d 954 (11th Cir. 2005); Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 109 (2d Cir. 2001).

199. Handberry v. Thompson, 446 F.3d 335, 352 (2d Cir. 2006) ("The Fourteenth Amendment does not protect a public education as a substantive fundamental right.").

200. *See* Tennessee v. Lane, 541 U.S. 509, 525 (2004).

201. *Garcia*, 280 F.3d at 109.

The court interpreted the rational basis test leniently: state statutes are presumed to be constitutional; any conceivable set of facts will support that presumption; and a challenger must refute all conceivable sets of such facts.[202] Because Title II requires reasonable modifications unless they would work a fundamental alteration in a state program, it disallows many reasons that states might have for treating people with disabilities unequally, even reasons that are hard-headed or hard-hearted. It thus goes too far. But actual discriminatory animus cannot ever be a justifiable state reason, so suits based on this allegation may go forward.[203]

Realizing that evidence of discriminatory animus may be difficult for the plaintiff to unearth, the Second Circuit allows a burden-shifting analysis.[204] If the plaintiff can produce prima facie evidence of animus, the burden shifts to the state to produce a reasonable basis for its action, but the plaintiff must then bear the ultimate burden of persuasion on the issue of animus.[205] The court recognizes that this analysis differs from its general approach to application of the rational basis test,[206] because it does not require the plaintiff to refute every conceivable reason that the state might have had for its action. It accepts this result, however, because it believes the aim of the Fourteenth Amendment was to root out discriminatory animus.[207] If the plaintiff can advance evidence of a bad state motive, the state should at least have to answer it, although the ultimate burden of proving the bad motive rests on the plaintiff.[208] Thus the Second Circuit, although not recognizing Title II as a rights-protective statute, does realize that government actions that treat disabled people

---

202. *Id*.; *see also* Harris v. N.Y. State Educ. Dep't, 419 F. Supp. 2d 530 (S.D.N.Y. 2006); Press v. State Univ. of N.Y. at Stony Brook, 388 F. Supp. 2d 127 (E.D.N.Y. 2005).

203. *Garcia*, 280 F.3d at 111.

204. *Id.* at 109–10.

205. The Second Circuit does, however, have a post-*Lane* and post-*Goodman* holding that education is not a fundamental right protected by the Due Process Clause. *See* Handberry v. Thompson, 446 F.3d 335 (2d Cir. 2006). Moreover, one district court decision asserted that *Goodman* modified *Lane* by moving from a *Boerne* congruence and proportionality test to an actual violation of a constitutional right test. *See* Degrafinreid v. Ricks, 417 F. Supp. 2d 403, 410 (S.D.N.Y. 2006).

206. *Garcia*, 280 F.3d at 110.

207. *Id.* at 112.

208. *Id*.

differently may not be benevolent in intent.[209] District court decisions in the Second Circuit after *Lane* are split on whether a narrow reading of *Lane* counsels rejection of the *Garcia* animus strategy on sovereign immunity grounds.[210]

By contrast, the Eleventh and Fourth Circuits have held that states may be sued under Title II of the ADA for discrimination in the provision of services in public higher education. In the Eleventh Circuit case, *Association for Disabled Americans, Inc. v. Florida International University*, the plaintiffs sued Florida International University (FIU) for violating Title II of the ADA and the defendants claimed sovereign immunity.[211] FIU allegedly failed to provide qualified sign language interpreters, other aids and services, and physical access to some programs for students with disabilities.[212] The theoretical structure of the Eleventh Circuit's analysis was instructive, identifying the right at issue in Title II as protection against irrational disability discrimination.[213] *Lane* applied due process analysis with a fundamental right at stake—access to courts—but *Lane* did not require a fundamental right to conclude that sovereign immunity had been properly abrogated.[214] To be sure, under the Equal Protection Clause, differential classifications in education are subject to the rational basis test, but, according to the Eleventh Circuit, this is not the end of the story.[215] Because education is so important to our basic institutions and has such a lasting impact it is not quite like other rights subject to rational basis review, according to the Eleventh Circuit.[216] In making this claim, the

209. Garcia lost the case on summary judgment; however, a refusal to make a requested accommodation for a learning disability did not by itself show discriminatory animus. *Garcia*, 280 F.3d at 112–13.

210. *See, e.g.*, Press v. State Univ. of N.Y. at Stony Brook, 388 F. Supp. 2d 127 (E.D.N.Y. 2005). A district court in the Seventh Circuit agreed with *Press*. *See* Doe v. Bd. of Trs., 429 F. Supp. 2d 930 (N.D. Ill. 2006).

211. Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ., 405 F.3d 954, 956 (11th Cir. 2005).

212. *Id.*

213. *Id.* at 957.

214. *Id.* at 957 n.2.

215. *Id*. at 959.

216. *Id*. ("Discrimination against disabled students in education affects disabled persons' future ability to exercise and participate in the most basic rights and responsibilities of citizenship . . . .").

Eleventh Circuit relies on *Brown v. Board of Education*.[217] Congress found a history of discrimination in public education and the *Lane* court described this history, together with a history of litigation involving discrimination in education, as a critical example of discrimination in public services.[218] Finally, the Court found that Title II was a proportional remedy, since it was limited to discrimination on the basis of disability and did not otherwise impinge on states' discretion to differentiate for other lawful reasons.[219]

In the Fourth Circuit case, *Constantine v. Rectors and Visitors of George Mason University*, a law student sued George Mason University for damages for failing to accommodate her intractable migraine headache syndrome in a final exam.[220] George Mason argued that the suit was barred by sovereign immunity.[221] The Fourth Circuit relied on *Florida International*, but reasoned somewhat differently.[222] It characterized the congruence and proportionality analysis of *Lane* as guiding but not resolving the question of Title II's application to public services in higher education.[223] *Lane*, by its terms, only resolves the application of Title II to access to the courts.[224] The analysis in *Lane* allows prophylactic legislation that prohibits state conduct that is not unconstitutional, but that reaches beyond the explicit rights of the Fourth Amendment.[225]

Applying this analysis to public higher education, the Fourth Circuit identifies the right enforced by Title II as protection against irrational discrimination based on disability, that is, as the right to equal protection.[226] According to the court, education is not a

217. *Id.* at 957–58.
218. *Id.* at 958–59.
219. *Id*. at 959. For an argument that the *Florida International* decision correctly read *Lane* broadly, see Camille L. Zentner, Note, *Between the Hockey Rink and the Voting Booth: The ADA and Abrogation of Sovereign Immunity in the Educational Context*, 71 BROOK. L. REV. 589 (2005).
220. Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 478 (4th Cir. 2005).
221. *Id.* at 479.
222. *Id.* at 490.
223. *Id.* at 486.
224. *Id.* at 488.
225. *Id*. at 484–85.
226. *Id.* at 486.

fundamental right so disparities of treatment are subject to the rational basis test of equal protection analysis.[227] Nonetheless, Title II's response to pervasive, unconstitutional discrimination in the provision of public services includes prophylactic measures.[228] The inclusion of a prohibition on disability discrimination in public higher education is such a proper prophylactic, according to the Fourth Circuit, because it is a limited requirement.[229] States are only required to make reasonable modifications; they are not required to alter programs fundamentally or to undertake expensive structural changes to existing facilities if other methods of accommodation are less financially burdensome.[230] While the court acknowledges that these requirements go beyond the Fourteenth Amendment, the court also holds that they are proportional to the requirement to root out irrational discrimination in public higher education.[231] The court's model is *Olmstead*, not *Garrett*.[232] The Fourth Circuit, therefore, finds that broader prophylactics may be enacted to guard against discrimination that is irrational[233]; its analysis is based on the rational basis test applied to allegations of disability discrimination under the Equal Protection Clause, not on any form of heightened scrutiny.

Other circuits have addressed sovereign immunity defenses on a range of important public services. For example, the Eighth Circuit, relying on a narrow construction of *Lane*, held that sovereign immunity was not properly abrogated in a suit alleging that Nebraska's refusal to fund community-based Medicaid services was a violation of Title II of the ADA.[234] The Supreme Court vacated and remanded the decision, instructing the Eighth Circuit to follow the *Goodman* analysis of whether the claim alleged the violation of a constitutional right and, if it alleged a Title II violation that was not also a violation of a constitutional right, whether sovereign immunity

227. *Id.* at 486–87.
228. *Id*. at 487.
229. *Id.* at 488–89.
230. *Id.*
231. *Id.* at 489.
232. *Id.*; *see also* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581 (1999).
233. *Constantine*, 411 F.3d at 487 & 488 n.10.
234. *See* Bill M. *ex rel*. William M. v. Neb. Dep't of Health & Human Servs. Fin. & Support, 408 F.3d 1096 (8th Cir. 2005), *vacated and remanded sub nom. by* United States v. Neb. Dep't of Health & Human Servs. Fin. & Support, 126 S. Ct. 1826 (2006).

had been properly abrogated.[235] This order at least suggests room for discussion of the justifiability of abrogation of sovereign immunity in the absence of an explicit constitutional right. However, the plaintiffs in the case decided not to pursue this particular claim.[236]

A district court decision in the First Circuit has refused to abrogate sovereign immunity in a claim for public mental health services under Title II of the ADA.[237] Additionally, a district court in the Seventh Circuit has considered whether a state's failure to provide access to public transportation is a proper basis for the abrogation of state sovereign immunity.[238] In analyzing this question, the district court carefully distinguished differential treatment that might impinge on a fundamental right to interstate travel from the asserted right to travel on public transportation.[239] According to the district court, the state is not obligated to provide public transit, but if it does, it must provide it in a manner that is free of irrational disability discrimination.[240] Where there is not a fundamental right, the rational basis test applies and expenses that are burdensome to the state can meet that test. This district court explicitly compared public transportation to education in importance, and joined those courts that have rejected the position that Title II validly abrogates sovereign immunity with respect to access to education.[241]

In sum, after *Lane*, and especially after *Goodman*, the lower federal courts are struggling with the extent to which claims under Title II must fall under explicit constitutional guarantees to avoid a defense of sovereign immunity. Some courts are hewing to a very narrow reading of *Lane* to uphold the defense. Other courts, however, are finding that sovereign immunity is abrogated when important, albeit not enumerated, rights such as education are at stake, or when the state appears to have acted irrationally. *Cleburne* thus reappears, but with a twist: the sharp scrutiny afforded rights under *Lane*'s due

235. *Nebraska*, 126 S. Ct. at 1826.
236. *Id.*
237. Buchanan v. Maine, 377 F. Supp. 2d 276 (D. Me. 2005).
238. Everybody Counts, Inc. v. N. Ind. Reg'l Planning Comm'n, No. 2:98 CV 97, 2006 U.S. Dist. LEXIS 39607, at *29 (N.D. Ind. Mar. 30, 2006).
239. *Id.*
240. *Id.* at *29–*30.
241. *Id.* at *39–*40.

process analysis can cut through many rationales about furthering states' interests through incursions on the exercise of rights by people with disabilities. It is to the development of this strategy that we now turn.

IV. FROM PROTECTING GROUPS TO PROTECTING RIGHTS

The theme of beneficent treatment of mentally retarded people by the state is a strong presence throughout the *Cleburne* decision. It is used not only to explain holdings that government's reasons for dealing differently with these citizens should be presumed to be benign, but also to assert that mentally retarded people must bear the burdens states place on them because of their differences. The claims about benefits and burdens appear to be tightly tied, as if the benefits of special provisions such as being exempted from federal civil service exams must be reciprocated by abandoning liberties or other rights. How heavy those burdens may be made to grow, what they may consist of, or how broadly they may extend before becoming illegitimate (or exceeding the worth of their reciprocal benefits), is unclear. In some places, the language suggests that only treatment the Constitution itself will not bear is prohibited to government in its dealings with mentally retarded people, so very heavy burdens may be imposed on them, but in other places the language assumes that burdens imposed legitimately by the state on mentally retarded people are just "incidental" ones.[242] Whether the degree of burden is high or low, however, *Cleburne* appears to assume that some standard must exist to limit the burdens placed on the mentally retarded.

---

242. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985). In *Cleburne* the Supreme Court stated:

> To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner.

Id.

We can look to the context of *Cleburne* to discern the kind of standard presupposed. The district court in *Cleburne* held that the opportunity the zoning ordinance curtailed—that of living in a home—was not a fundamental right.[243] But the Court of Appeals in *Cleburne* emphasized, and the Supreme Court did not demur, that a very important right, albeit not a fundamental one, was involved.[244] By refusing to permit mentally retarded citizens to occupy a group home, the city ordinance withheld an opportunity "which, although not fundamental, was very important to the mentally retarded."[245] Without group homes, the Court of Appeals stated, "they can never hope to adapt" to life in the community.[246] Little thought is needed to realize further that only by living in the community can citizens with mental retardation enjoy the fundamental liberty of associating with other citizens in valuable civic enterprises, a liberty previously stripped from them by oppressive institutionalization.

Thus the history of differential state treatment of mentally retarded people, coupled with their biological differences, made the ability to occupy group homes very important to mentally retarded people's liberty to exercise their fundamental right to associate with other people. For mentally retarded people, the important right is crucial to the fundamental right because for them the former is instrumental for the latter, just as a wheelchair-accessible courtroom is instrumental for those in wheelchairs to exercise their fundamental right to confront accusers. Given the instrumental importance of the right that would be lost immediately, and the fundamental nature of the right that subsequently would be lost, the city's rationale for denial of community living to mentally retarded people was subjected to a substantially elevated standard.

Once invocation of such a standard occurs, examination of the public interests at stake is unavoidable. The city at least should have been able to advance important reasons for denying such an

243. *Id.* at 437.

244. *Id.* at 437–38; *see also* Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191, 199 (5th Cir. 1984) ("The Cleburne ordinance as applied withholds a benefit which, though not fundamental, is very important to the mentally retarded."), *aff'd in part and rev'd in part*, 473 U.S. 432 (1985).

245. *Cleburne*, 473 U.S. at 438.

246. *Cleburne*, 726 F.2d at 199.

important opportunity to citizens. It is the application of this standard by both the appellate court and the Supreme Court in *Cleburne* that exposes the extraordinary attenuation of the city's rationale, laying bare at least three different indicators of the breadth of the city's breach of equal protection. First, the city's purported interest in protecting the plaintiffs from floods and schoolchildren did not cause it similarly to insulate other equally vulnerable groups. Second, the city's worries about the potential for disruptive events did not cause it similarly to prohibit more likely disruptive groups. Third, the city's responsiveness to a group of citizens who did not desire mentally retarded people as neighbors allowed one group of citizens to use the law as a tool for their bias against another group.

Lane reveals a similar pattern. Access to courtrooms is an important right because it is instrumental for exercising the fundamental right to confront accusers. Thus, the state of Tennessee's reasons for denying Lane the right of access, and in doing so eliminating his opportunity to exercise his right to confront his accusers, must appropriately further an important state interest. The interests asserted by the state ranged from the reluctance to modify historic buildings to the financial burdens of installing elevators and ramps.[247] Beautification and budgets are no doubt legitimate state interests. But it is dubious at best to claim that they possess sufficient importance to eliminate the right of confrontation. It is comparatively unimaginable that a state would deny a defendant her right to confrontation because her trial exceeded the funds provided to operate the courts in the state's annual budget, or because of the cost of installing a woman's restroom in the courthouse, or that her right to trial by jury would be compromised because the jury members might damage the antique jury chairs.

To exemplify denials of rights that demand and have received inspection, we need go no further than *Lane* itself. In *Lane*, the Court identifies a range of cases protecting important rights, including the

247. *See* Lane v. Tennessee, No. 3:98–0731, 2004 U.S. Dist. LEXIS 25369, at *9–*11 (M.D. Tenn. Aug. 17, 2004). Whether the state was overburdened by building an elevator might be assessed in light of the fact that two years after the incident that triggered *Lane* an elevator had been installed. Mears, *supra* note 151.

right to vote,[248] the right to interstate travel,[249] and the right to reproductive liberty,[250] as well as rights that hew more closely to enumerated constitutional rights such as freedom of expression[251] or the participation in judicial proceedings[252] that was at stake in *Lane*. The Court states explicitly that the role of Title II is not only to enforce a "prohibition on irrational disability discrimination"—that is, to insist on a genuine rational basis for the state's treatment of people with disabilities (or for that matter anyone else)—but also to "enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review."[253] The Court thus shifts the Title II analysis from people to their rights, and identifies many rights that call for careful inspection of the reasons if the rights are to be denied.

Consider voting, which was the right at issue in the first of the Court's citations, *Dunn v. Blumstein*.[254] The state of Tennessee had insisted on a year-long residency requirement for voting.[255] The lower court concluded that this requirement impermissibly interfered with the right to vote and created a "suspect classification" of the state's new arrivals.[256] The Supreme Court, however, never mentioned the *classification* question. Nor does it even refer to its earlier decisions upholding the Voting Rights Act as a proper exercise of Congress's power to enforce the Fifteenth Amendment—that is, of Congress's power to enforce the Reconstruction amendments because of the importance of guarding against discrimination.[257]

Instead of looking at the need to protect a group against discrimination, the Court in *Dunn* rested its rejection of durational

248. Tennessee v. Lane, 541 U.S. 509, 520 (2004).
249. *Id.* at 523.
250. *Id.*
251. *See* Press-Enter. Co. v. Superior Court of Cal. *ex rel.* County of Riverside, 478 U.S. 1, 8–15 (1986).
252. *See* Faretta v. California, 422 U.S. 806, 819 n.15 (1975); Boddie v. Connecticut, 401 U.S. 371, 379 (1971).
253. *Lane*, 541 U.S. at 522.
254. Dunn v. Blumstein, 405 U.S. 330 (1972).
255. *Id.* at 331.
256. *Id.* at 332.
257. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

residency requirements on the importance of the rights at stake.[258] States may not impinge on these rights unless their restrictions are "necessary to promote a compelling state interest," the standard format of heightened equal protection scrutiny.[259] Voting is foundational to participation in a democratic society. Without the right to vote, people are excluded from having a say in the decisions that will govern their lives; the right to vote is thus implicit in the Constitution (and the Fifteenth Amendment clarifies that people may not be denied the vote on grounds of race[260]). In sum, voting is the right that is "preservative" of all other rights.[261]

Interstate travel, which is burdened by a durational residency requirement, has long been recognized as essential to the structure of a federal society. The leading case protecting the right to travel is *Shapiro v. Thompson*,[262] the second of the rights-protective cases cited in *Lane*. The plaintiffs in *Shapiro* claimed that durational residency requirements for welfare impermissibly burdened that right to interstate travel.[263] The state claimed that the requirements were critical to protecting their "fiscal integrity."[264] The Court, although recognizing that statutes imposing waiting periods for welfare created different classifications of citizens, rejected the statute, resting its holding on the importance of interstate travel:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.[265]

---

258. *Dunn*, 405 U.S. at 336.
259. *Id.* at 337.
260. U.S. CONST. amend. XV.
261. *Dunn*, 405 U.S. at 336 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)).
262. Shapiro v. Thompson, 394 U.S. 618 (1969).
263. *Id.* at 623.
264. *Id.* at 627.
265. *Id*. at 629.

The Court defended the right to travel in terms of personal liberty.[266] But it offered a deeper defense as well: that the nature of our political society—a "Federal Union"—requires recognition of this right.[267]

The third rights-protective case cited in *Lane* protects people against involuntary sterilization. In *Skinner v. Oklahoma*, the petitioner challenged Oklahoma's law requiring involuntary sterilization for "habitual criminals" convicted of offenses of "moral turpitude."[268] Someone convicted twice or more of crimes such as robbery—but not of embezzlement, which the state apparently did not regard as involving moral turpitude—could be sentenced to sterilization.[269] The Court began its opinion simply: "This case touches a sensitive and important area of human rights."[270] It reinforces its argument that a sterilization law warranted strict scrutiny:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[271]

The likelihood that sterilization may be used against disfavored groups is at the forefront of the Court's decision, but it is clear that these groups are not thought of only in racial terms; the Court refers to "types" of people and indeed cited the case in which the Court permitted sterilization of people believed to be mentally retarded.[272] At the forefront for the Court, however, is the importance of the

266. *Id.*
267. *Id.*
268. Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 536 (1942).
269. *Id.* at 537.
270. *Id.* at 536.
271. *Id.* at 541.
272. Buck v. Bell, 274 U.S. 200 (1927).

rights themselves—to marry and have a family—to the individuals who might wish to exercise them.[273] In the case of reproductive rights, moreover, the Court recognizes the right to the individual as linked to the betterment of society as well.[274]

V. STANDARDS FOR DENYING RIGHTS

The ADA's protection of access to public services in Title II may be seen as guaranteeing important civil rights to all citizens with disabilities, along the lines we have outlined for the right to access the courts. In this section, we consider some aspects of the tradition of protecting rights as applied to people with disabilities. In the next section, we take three different examples (the right to vote, the right to a public higher education, and disabled veterans' right to employment protection) to demonstrate how arguments can be developed aligning Title II (and perhaps even Title I) as congruent and proportional to the protection of such rights.

Before turning to these cases, however, we should consider the difficulty of freeing judicial thinking from the notion, embedded in and by *Cleburne*, that citizens who are disabled receive special benefits bestowed by virtue of their differences and that the door is thereby opened to imposing special burdens on their exercise of rights.[275] Disabled people commonly are stereotyped this way, as deficient in their contributions to the community and consequently as failing to reciprocate sufficiently to deserve robust protection of their rights.[276] This picture is at the core of much disability discrimination.

---

273. *Skinner*, 316 U.S. at 541.

274. *Id.*

275. In oral arguments in *Lane*, William J. Brown, representing Lane and Jones, properly (in our opinion) resisted Justice Ginsburg's construal that to provide elevators is to treat a class of people specially, and, more broadly, her suggestion that to respect the dignity of disabled people requires a kind of permanent affirmative action. *See* Transcript of Oral Argument at 34–35, Tennessee v. Lane, 541 U.S. 509 (2004), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1667.pdf. Given the *Cleburne* idea that positive special treatment reciprocally opens the door to the imposition of special burdens, the idea that disabled people are given special benefits when they are enabled to exercise ordinary rights should be resisted.

276. *See generally* Anita Silvers & Leslie Pickering Francis, *Justice Through Trust: Disability and the "Outlier Problem" in Social Contract Theory*, 116 ETHICS 40 (2005) (supporting this viewpoint).

The influential philosopher John Rawls, for example, limited obligations of justice to fully cooperating members of society.[277]

Obvious counterexamples to such fictions are war veterans with service-incurred disabilities, who are considered to be citizens who deserve full opportunity to exercise the rights they sacrificed to sustain. To counter the stereotype, we address in the discussion in the next section how important a right must be to prevent states from maintaining barriers that curtail a disabled veteran's opportunity to exercise it and how strong a public interest a state must have in maintaining the barrier to do so at the expense of a veteran with a service-related disability. These questions cannot be answered without careful attention to the rationales states offer for disability-based denials of rights. They address the criteria associated with the standard of "rational basis."

What standards must such denials meet? The majority in *Cleburne* states that "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[278] Moreover, in his concurrence in *Cleburne*, Justice Stevens proposes an additional test to flesh out the standard. Returning to the close tie the Court exposited between special benefits and special burdens, he advances a "rational person" test against which to measure whether the latter are properly levied.[279] The test determines whether a public interest is sufficiently great, or whether a rights denial burden is too great, to curtail various kinds of rights.[280] An impartial legislator, Justice Stevens says, indeed "even a member of a class of persons defined as mentally retarded," could rationally vote in favor of laws that offered special benefits needed by mentally retarded people and, concomitantly,

> [A] mentally retarded person could also recognize that he is a member of a class that might need special supervision in some

277. *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 18–19 (Erin Kelly ed., 2001). For criticisms of this view, see MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP, at ch. 3 (2006) and Silvers & Francis, *supra* note 276.

278. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985).

279. *Id.* at 452 (Stevens, J., concurring).

280. *Id.*

> situations, both to protect himself and to protect others. Restrictions on his right to drive cars or to operate hazardous equipment might well seem rational even though they deprived him of employment opportunities and the kind of freedom of travel enjoyed by other citizens.[281]

This "rational person" test has broad application. Every citizen can make use of such a process in acknowledging his obligations to limit his own liberty in deference to the public interest. Self-recognition of one's own limiting differences, gained through self-awareness of one's own deficits or needs, should rationally lead a person to concur in the limitation of his own opportunities and curtailment of his own rights. The test suggested by Justice Stevens thus interpolates the perspectives of subjects with disabilities as premises in valid arguments about constraints on themselves.

Of course, a class's boundaries must be carefully drawn if the acquiescence of its members to incursions on their rights is rational. The "rational person" test requires that there be positive and plausible reasons for policies sacrificing disabled people's opportunity to exercise important or fundamental rights. The illustration given above suffers in this regard by stereotyping people with mental retardation—even mild retardation—as unsafe to drive. This is not always the case, and someone with a cognitive disability is not rationally obligated to agree to be classified in a group that is unsafe to drive if he is a good driver, even if he shares some other group characteristics with typically bad drivers, unless there is no independent way to distinguish competent from incompetent drivers within the group.

Disabled people thus would be rational in endorsing curtailment of their own freedom of travel only if a public value—embracing both their own and other people's interests—is advanced thereby, and only if the deprivation is narrowly tailored to reduce freedom by no more than is needed, and to deprive the smallest population necessary to secure the relevant interest. These features of the "rational person" test indicate what is at stake in justifying disability-based denial of rights: the exclusion of disabled people (or a subset of the disabled)

---

281. *Id.* at 454.

from exercising the right in question must strengthen, rather than diminish, the public value of the right. Concomitantly, denying disabled people (or a subset) opportunity to access the right will be contra-indicated if doing so decreases the public value of the right.

VI. LATENT IN *CLEBURNE*, PATENT IN *LANE*: THE IMPORTANT RIGHTS MODEL

In this section we apply the model we found latent in *Cleburne*, and then patent in *Lane*, to consider three kinds of important rights that courts should not presume states may compromise without careful inspection of the purported rationales. The first is the right of access to the secret ballot, which is instrumental for maintaining constitutionally protected voting rights. The second is the right of access to public higher education, which is instrumental for maintaining an inclusive, productive and public-spirited citizenry. The third is the right of access to post-military service employment, which is instrumental for maintaining a military reserve that is important to both the nation's and the states' defense. In all three cases, we maintain, disability discrimination that denies instrumental rights places a substantial burden on disabled people and concomitantly requires evidence of a substantial state interest pursued neither arbitrarily or irrationally. As well, in all three cases, excluding disabled people from the opportunity to exercise the right detracts from its value to everyone.

From the cry of "no taxation without representation," the importance of the ability to vote for representatives of one's choosing has been central to American democracy. The Fifteenth Amendment singled out the right to vote. Women's suffrage became the rallying point for changing the status of women. The Voting Rights Act,[282] recently renewed for twenty-five years with a unanimous vote in the United States Senate,[283] protects people against discriminatory practices infringing on the right to vote. Many states, especially in the

282. 42 U.S.C. § 1973 (2000).

283. Carl Hulse, *By a Vote of 98–0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES, July 21, 2006, at A16.

West, have robust traditions of citizen-initiated legislation and constitutional amendment processes that depend on the vote.

For people who have been historically excluded, as the disabled have been,[284] the ability to exercise the right to vote is especially important. Voting symbolizes inclusion in the citizenry, and voting citizens influence policy both through the vote itself and by swaying candidates who seek their vote. People with physical disabilities have had to endure the practical barriers of inaccessible voting places.[285] People with mental retardation or mental illness have been deprived of the right to vote simply by virtue of their classifications, regardless of their actual ability to understand and participate in the political process.[286]

Michael Waterstone has recently detailed the importance of the right to vote for people with disabilities.[287] Waterstone argues convincingly that voting is a fundamental right and therefore warrants the heightened scrutiny that would extend the analysis of *Lane* to it.[288] We agree with Waterstone's conclusion, but suggest that the analysis should be pushed further, to fundamental rights rather than to a somewhat broader group of important rights, and finally to a related group of instrumental rights, as the *Lane* Court's list of rights-protective cases suggests.

Voting rights are fundamental, but the status of associated rights that are instrumental to the exercise of the franchise is less clear. This issue looms large for people with disabilities who cannot read a

284. *See, e.g.*, Olmstead v. L.C. *ex rel*. Zimring, 527 U.S. 581, 588–89 (1999).

285. *See, e.g.*, Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353, 355–57 (2003).

286. *See, e.g.*, Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437 (2000).

287. *See* Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV. 793 (2005). Waterstone's article, which we discovered when our article was virtually complete, argues, as we do, for the role rights can play in the development of a heightened scrutiny analysis after *Lane*. His principal case study is voting rights. While we agree with his analysis as far as it goes, it does not point out the critical importance of the shift from classes of persons to rights, nor does it embed an understanding of where the Court went wrong in the reasons the Court afforded only rational basis scrutiny for classifications of people with disabilities in *Cleburne*.

288. *Id*. at 824–49.

printed ballot or who cannot use a stylus to punch out a chad.[289] Although some state constitutions specifically guarantee the right to a secret ballot,[290] it has not been specifically identified as a fundamental federal constitutional right.[291] Voters who cannot vote secretly, however, may be subject to intimidation or ridicule. Furthermore, they may worry that those who know their votes may act clandestinely to destroy ballots with disfavored choices. These risks press especially seriously when some people, already marginalized, cannot keep their ballots secret while others, not marginalized, can routinely and easily do so. Such disparate access to the instrument so crucial to exercising the right compromises both the value of the right to those denied access to secret balloting and its public value, because the ballet's secrecy is important to its integrity.

The Help America Vote Act (HAVA)[292] directs that secret balloting be available to citizens with disabilities. This legislation has prompted commercial development of various kinds of adaptive voting machines and devices, accompanied by energetic marketing efforts by manufacturers.[293] The response to HAVA is a striking example of progress in law promoting progress in fact: technological potential to make crucial activities accessible to the disabled is being transformed to technological reality far more vigorously as a result of the legislation. The problem of states permitting the practice of

289. One appellate court decision rejected a lawsuit against Texas's voting procedures under the ADA on the somewhat curious theory that the ADA is not a voting rights statute. Lightbourn v. County of El Paso, 118 F.3d 421 (5th Cir. 1997). Title II of the ADA does not specify a particular list of public services for coverage; the Court could have similarly asserted that the *Lane* litigation should have been rejected because the ADA is not a courthouse statute. For an account of the *Lightbourn* litigation, see James C. Harrington, *Pencils Within Reach and a Walkman or Two: Making the Secret Ballot Available to Voters Who Are Blind or Have Other Physical Disabilities*, 4 TEX. F. ON C.L. & C.R. 87 (1999).

290. *See, e.g.*, Michael Waterstone, *Civil Rights and the Administration of Elections—Toward Secret Ballot and Polling Place Access*, 8 J. GENDER RACE & JUST. 101, 105–06 (2004); Waterstone, *supra* note 285, at 359.

291. For a discussion of the state of Washington's explicit constitutional guarantee, see Erik Van Hagen, Note, *The Not-So-Secret Ballot: How Washington Fails to Provide a Secret Vote for Impaired Voters as Required by the Washington State Constitution*, 80 WASH. L. REV. 787 (2005).

292. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.).

293. *See, e.g.*, Trace Center, Accessible Voting, http://trace.wisc.edu/world/kiosks/ez/voting/ (last visited Feb. 16, 2007).

compromising disabled people's right to secret balloting remains, however. Waterstone thinks *Lane* argues for amending HAVA to enable suits for private damages.[294] But such a piece-meal strategy risks dispersing integration efforts into a fractured and untimely pattern of statutes that sows even more confusion about how courts will address disability-based denials of important rights.

Wheelchair-accessible courtrooms and court proceedings accessible to hearing-impaired citizens are (in *Cleburne*'s terms) instrumental for accessing fundamental constitutionally guaranteed rights. The right to a secret ballot is similarly important because it is also instrumental to exercising fundamental constitutionally guaranteed rights. Education is also a very important and instrumental, but not fundamental, right.[295] In *Plyler v. Doe*,[296] a decision striking down on equal protection grounds a Texas ban on the use of state education funds for schooling children not legally admitted to the United States, the Supreme Court held education to be sufficiently important to the well-being of both individuals and society to call for careful examination of a state's interest in denying education to certain children.[297] Unlike access to courtrooms and secret balloting, however, education is not instrumental to a constitutionally enumerated right.

The crucial features leading to the *Plyler* decision were (1) that the children deprived of opportunity had little control over their immigration status;[298] (2) that depriving them of the specific opportunity threatened to have lasting negative impact on their lives;[299] (3) specifically that denying the opportunity deprived them of "the basic tools by which individuals might lead economically productive lives to the benefit of us all";[300] (4) "for transmitting 'the values on which our society rests";[301] and (5) because "education has

294. *See* Waterstone, *supra* note 287, at 825.

295. *See, e.g.*, Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006). Liu, in a footnote, suggests the possibility of characterizing *Lane* as recognizing rights to national citizenship, the possibility we are developing in this article. *Id.* at 408 n.367.

296. Plyler v. Doe, 457 U.S 202 (1982).

297. *Id.* at 230.

298. *Id.* at 220.

299. *Id.* at 221.

300. *Id.*

301. *Id.* (quoting Ambach v. Norwick, 441 U.S. 68, 76 (1979)).

a fundamental role in maintaining the fabric of our society."[302] These crucial considerations, the Court found, trumped the state's economic interest in not educating the undocumented children in Texas's school systems.[303]

Analogous elements to *Plyler* are readily apparent in many Title II claims by disabled students for access to public higher education that traditionally has been made available by states for their citizens to achieve productive lives and be well instructed in public values. After the American Revolution states began to organize publicly controlled institutions.[304] The federal government supported states' higher education efforts with the Morrill Act of 1862,[305] explicitly "to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."[306] In describing the legislation's purpose in 1887, Senator Morrill explained:

> The land-grant colleges were founded on the idea that a higher and broader education should be placed in every State within the reach of those whose destiny assigns them to, or who may have the courage to choose industrial locations where the wealth of nations is produced; where advanced civilization unfolds its comforts, and where a much larger number of the people need wider educational advantages, and impatiently await their possession.[307]

Speaking before the Vermont Legislature in 1888, Morrill observed: "The fundamental idea was to offer an opportunity in every State for a liberal and larger education to larger numbers . . . ."[308]

Although *Plyler* did not involve access to higher education, its conclusions about primary education are paralleled by the role played by higher education for people with disabilities. Higher education makes possible the lifelong productivity of many disabled people

---

302. *Id.*
303. *Id.* at 221–23.
304. *See* The Land-Grant Tradition, http://www.nasulgc.org/publications/Land_Grant/Development.htm (last visited Feb. 16, 2007).
305. *See, e.g.*, Backgrounder on the Morrill Act, http://usinfo.state.gov/usa/infousa/facts/democrac/27.htm (last visited Feb. 16, 2007).
306. *Id.* (quoting Morrill Act of 1862, 12 Stat. 503 (codified at 7 U.S.C. § 301)).
307. *Id.* (quoting an 1887 address of Hon. Justin W. Morrill).
308. *Id.*

who cannot do manual jobs. Because universities prepare students for many kinds of professions not requiring manual labor, the right to access higher education is especially important to disabled people. Denying access to a university education deprives disabled people of the tools for economically productive lives.

The extent of the disability-based denial of higher education opportunity that still exists, more than three decades after the amended Rehabilitation Act directed federal funding recipients to take remedial steps,[309] cannot help but raise the specter of animus-propelled neglect.[310] Against this background, courts may not simply presume that states have sufficiently substantial reasons for denying equitable access to higher education on the basis of disability. Inspection of the important state interests being served is appropriate when states continue to deny disabled students' claims to instruments for accessing education such as sign language interpreters, screen-reader compatible instructional software, and ramps and elevators for classroom buildings. Judicial inspection of states' rationales should exhibit the degree of care the Supreme Court took in *Plyler* in examining Texas's reasons for denying a public education to children not legally admitted to the United States.

Further evidence of the central importance of higher education may be found in the history of United States veterans' benefits. The main tools deployed by the Service Members' Readjustment Act of 1944 to help veterans assimilate into civilian life were funding for college education and home loan guarantees.[311] Higher education benefits remain a crucial means by which the nation thanks veterans for their service.[312] For veterans with service-related disabilities,

309. *E.g.*, Laura F. Rothstein, *The Affirmative Action Debate in Legal Education and the Legal Profession: Lessons from Disability Discrimination Law*, 2 J. GENDER RACE & JUST. 1 (1998) (querying indicators used in law school admissions).

310. When a state distributes benefits unequally, the lines it draws between classes of beneficiaries are subject to scrutiny under equal protection principles. *See* Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985). The difference in allocation must further an important or legitimate state purpose. *Id*. But it is difficult to see what state purpose is furthered by not allocating access to higher education to disabled people while other groups are given access.

311. *See, e.g.*, Democratic GI Bill of Rights for the 21st Century, http://kendrickmeek.house.gov/GIBill.shtml (accessed January 2007).

312. *Id.*

higher education has had strongly documented importance in maintaining access to opportunity and a return to productive lives.[313]

The right to educational benefits for disabled veterans, however, can be exercised successfully only by making universities accessible. We note in this regard how intricately the treatment of disabled veterans is intertwined with civil rights protections. And so it is out of concern about what awaits disabled veterans that we turn, finally, to the boldest of our proposals extrapolating from *Lane* stronger protection against disability-based denial of rights.

To set the scene, we consider what welcome will greet returning veterans whose lives have become profoundly different because of service-incurred disabilities. The difficulties disabled veterans of past wars have faced in obtaining employment are legendary but also true. A useful reminder of what life has been like for them is the 1951 film *Bright Victory*[314] (based on a 1945 Baynard Kendrick novel called *Lights Out*[315]) in which a white soldier, blinded in battle, subsequently finds himself as decisively rejected by his pre-war employer as African Americans also were in the World War II era United States.

Today, the Uniformed Services Employment and Reemployment Rights Act of 1997 (USERRA)[316] is meant to prevent discrimination against individuals who have had to leave their jobs for active service in the armed forces. Jobs must be held open for veterans upon their return from service, even if their absence has been prolonged by hospitalization for injuries.[317] Employers must provide reasonable accommodations for veterans with service-incurred or aggravated disabilities, including helping an employee who cannot pursue the previous line of work become qualified for the closest workable

313. For a survey of federal support for educational opportunity, including the GI Bill, see Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American "Ownership Society,"* 79 S. CAL. L. REV. 45, 145 & n.299 (2005).

314. BRIGHT VICTORY (Universal Pictures 1951). For a description of the film, see Classic Film Guide, http://www.classicfilmguide.com/index.php?s=pageA&item=79 (last visited Feb. 16, 2007).

315. BAYNARD KENDRICK, LIGHTS OUT (1945).

316. Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (codified as amended in scattered sections of 5, 10, and 38 U.S.C.).

317. 38 U.S.C. § 4312 (2000).

position equivalent in seniority, status, and pay to what the individual would otherwise be entitled.[318] USERRA applies these requirements to all employers, including state governments.[319] Congress designed USERRA so that it should prevent state employees who are temporarily absent from work due to service-incurred disability from suffering the harm that befell the lead plaintiff in *Garrett*, a state employee who was demoted on return to work from an absence due to disability.[320]

It is uncertain whether courts will recognize Congress's power to protect state employees from disability discrimination as USERRA is designed to do, even employees who have been disabled in service of their country. In 1998 the Seventh Circuit held that sovereign immunity bars USERRA suits by private individuals against state government employers.[321] Although USERRA suits may be brought in state courts they are limited by what each individual state permits.[322] Further, in 2002, a federal district court in Texas followed *Cleburne*'s reasoning by holding that veterans are not a suspect class and thus discrimination against them need have only a rational basis.[323] Congress's attempt through USERRA to give veterans employment protection from disability discrimination appears to be subject to the same treatment courts gave Congress's attempt to protect citizens generally through Title I of the ADA.

In pursuing this course, courts should not fail to examine state rationales for discriminating against disabled veterans. A clear record of employment discrimination against disabled veterans can be traced from the Civil War through the war in Vietnam.[324] In light of that record, citizens understandably may be reluctant to volunteer for

---

318. *Id*. § 4312(e).

319. *Id*. § 4323.

320. Bd. of Trs. v. Garrett, 531 U.S. 356, 362 (2001) (Garrett was informed she would need to give up her director of nursing position after a leave for treatment for breast cancer).

321. Velasquez v. Frapwell, 160 F.3d 389, 393 (7th Cir. 1998).

322. *Id.* at 394.

323. Howard v. United States, No. SA-01-CA-1165-OG, 2002 U.S. Dist. LEXIS 26535 (W.D. Tex. Nov. 22, 2002).

324. The Veterans' Readjustment Act of 1974 was a response to the difficult employment situation faced by disabled veterans of the Vietnam War. Cornelius J. Peck, *Employment Problems of the Handicapped: Would Title VII Remedies Be Appropriate and Effective?*, 16 U. MICH. J.L. REFORM 343, 344 n.9 (1983); *see also* Ann Hubbard, *A Military-Civilian Coalition for Disability Rights*, 75 MISS. L.J. 975 (2006).

service, since doing so increases their chances of becoming disabled and, correspondingly, the probability of becoming vulnerable to disability discrimination. Indeed, Congress guaranteed employment protection in USERRA explicitly to induce citizens to enlist in the national reserve.[325]

It is difficult to imagine what interest states might claim to justify disability-based discrimination against veterans. States' interests in facilitating a strong military reserve can be no less great than Congress's. Both state and nation equally have an interest in protecting a right to employment for individuals who voluntarily jeopardize their future productivity for the good of the nation. Both equally have an obligation to acknowledge the contributions of veterans with service-incurred disabilities, and courts legitimately may turn a spotlight on states' reasons for not doing so.

VII. CITIZENS' RIGHTS VERSUS STATES' RATIONALES

The ADA is well-known as the last of the major civil rights laws and as Congress's strongly supported effort to protect citizens against disability discrimination. Less well appreciated, however, is the taxonomy of rights needed to understand both what occurs in disability discrimination and how the ADA can work to deal with it. Along the path from *Cleburne* to *Lane*, we have identified two important categories of rights that are compromised by disability discrimination. One category includes constitutionally enumerated, fundamental, and other rights that are intrinsically important because they are needed to maintain the nation's values and traditions. The second category consists of instrumental rights that are derivatively important because they are necessary to exercise rights in the former category.[326] The two categories are so intimately related that Congress either has the power to abrogate state immunity in both categories, or in neither.

---

325. 38 U.S.C. § 4301(a)(1) (2000).

326. The instrumental/intrinsic distinction should not be confused with the inherent/extrinsic distinction. The latter marks a metaphysical difference, distinguishing whether the good-making characteristic resides in the object or separate from it. The former, which is the distinction used in this article, differentiates between the means and end.

As their name implies, the instrumental rights in the latter category offer access to the tools and venues needed for exercising the intrinsic rights in the former category. Disability discrimination that deprives disabled people of instrumentally important rights therefore imposes much more than an incidental burden, for the loss of intrinsically important rights will follow upon the loss of the instrumentally important rights necessary to use them. Understanding that intrinsically valuable rights depend upon instrumentally valuable ones for their implementation, and that instrumentally valuable rights depend on intrinsically valuable ones for their worth, explains why the roster of relevant rights vulnerable to disability discrimination is large and complex.

Rights in both categories—not just in the former—are entitled to special solicitude by courts, we have argued. In this regard, *Lane* initiates a welcome change of direction in the dialogue about disability discrimination. *Lane* attempts to move beyond debating *who* has been victimized by disability discrimination (and who the victimizers have been) to discerning *how* disabled people have been victimized; that is, to better understanding how people's liberties have been and continue to be abridged based on disability.

Disabled people, and disability itself, are so variable that courts have tended to individualize, and thereby circumscribe the influence of, their decisions that wrongful disability discrimination has occurred. We saw this way of thinking initiated prior to the passage of the ADA in *Cleburne*, where a zoning ordinance was invalidated as applied to thirteen mentally retarded people, but where the finding of wrongful treatment was explicitly prevented from casting a protective arm around the entire classification of mentally retarded people.[327] The approach in *Lane* also has been characterized as "as applied."[328] But unlike *Cleburne*, *Lane* does not hypothesize that there may be other individuals who also are wheelchair users but whose exclusion on that basis from courtrooms that could be made

327. *See supra* Part I.

328. *See*, *e.g.*, Schwan, *supra* note 190, at 239 ("[W]hile *Lane* was seemingly a victory for the rights of the disabled, its new as-applied approach will continue to create confusion among lower courts attempting to analyze other sovereign immunity disputes.").

accessible still can be explained away sufficiently by some state rationale.[329]

In general, on the conceptualization for which we find support in *Lane*, deprivation of an important instrumental right such as access to courtrooms generally merits suspicion and careful inspection of the rationale. The judgment that a disability-based deprivation of a right was wrongful can be extrapolated logically in two different ways. It can be extrapolated to cases about other rights that are instrumentally important for the same intrinsically important purpose. And it also can be extrapolated to cases where the same instrumental right is important for exercising other intrinsically important rights.

The importance of the right to physically access courtrooms is instrumental to the intrinsically important right to confront one's accuser, and both kinds of importance spill over to rights beyond those explicitly considered in *Lane.* Other instrumental rights pertaining to this intrinsic one share the importance *Lane* accorded access to courtrooms. The *Lane* Court inspected Tennessee's rationale for curtailing courtroom access to wheelchair using citizens. It would be perverse to hold that other rights of access to the same intrinsically important right—for example, the instrumental right to have court proceedings communicated in an understandable way—do not merit similar scrutiny because *Lane* only addresses access to entering a courtroom and does not address access to what is being said during proceedings in the courtroom, or because *Lane* addresses wheelchair users rather than American Sign Language interpreter service users.

It would be perverse as well to scrutinize blocked access to courtrooms but reject similarly scrutinizing disability-based denials of access to other physical venues where the state conducts business. For the state does not restrict its conduct of important business to courtrooms alone, and so a high degree of burden may be imposed on

329. *Lane* does, of course, provide that it may not be possible, or may be unduly burdensome, to make some courtrooms wheelchair accessible, pointing out this qualification in the ADA goes to its proportionality. But for *Lane* (and for the ADA) the alternatives are wheelchair accessibility if possible or no accessibility if impossible, not wheelchair accessibility for some wheelchair users but not others. *Cleburne*, in contrast, provides for access to residency for thirteen members of this classification (disabled) but explicitly resists committing to access for more than the particular thirteen.

citizens excluded from other state venues because of their disabilities if these are venues where citizens must go to exercise intrinsically important rights. This observation suggests the mode in which the constitutional umbrella shelters the ADA, namely, by pursuing prophylactic questions and answering them in regulations developed by the appropriate agencies. To illustrate, regulation makers must decide whether proportionality is served or disturbed by requiring accessibility for facilities such as public hockey rinks in preparation for a time when the facilities are pressed into service to shelter citizens in a hurricane or heat wave. While it might seem excessive to suppose citizens in wheelchairs have a right to attend hockey games, death is an excessive burden to impose on wheelchair-using citizens (but not others) because the inaccessible recreational facilities do double duty as state-designated emergency shelters.[330] The rationale permitting their exclusion from recreational events does not reach to rationalizing the special burden of exclusion from emergency shelters at the risk of their lives. Extrapolated forethought is called for in cases like this because citizens sitting in their wheelchairs outside the shelters cannot in that moment obtain legal relief on an "as applied" basis.

Following *Lane*, we believe, courts may therefore increase the roster of disability-based rights deprivations that merit scrutiny. We have indicated above how these might be extrapolated from *Lane* or from other cases like some of those cited in *Lane*. But what to anticipate from scrutiny? Several basic questions to pose about states' rationales for abridging their disabled citizen's rights suggest themselves.

First, how important to citizens generally is the public interest secured by sacrificing disabled citizens' rights? Second, to gain more precision, is the public interest to which disabled citizens' interests are sacrificed of greater value than the valuable rights or liberty they are being asked to forgo? Third, is the prevailing public interest of similar value to disabled and non-disabled citizens alike, as assessed

330. For an overview of the failure to include people with disabilities in emergency preparedness planning, see NAT'L COUNCIL ON DISABILITY, SAVING LIVES: INCLUDING PEOPLE WITH DISABILITIES IN EMERGENCY PLANNING (2005), *available at* http://www.ncd.gov/newsroom/publications/2005/pdf/saving_lives.pdf.

by Justice Stevens's "rational person" test, pointing out that people both with and without cognitive disabilities have the same interest in allowing only competent drivers on the road. Fourth, are the assignments of burdens and the presumptions about who will sacrifice rights irrational or arbitrary? And fifth, is there no other route to securing the public interest than diminishing the liberty and opportunity of disabled citizens?

VIII. CONCLUSION: THE COURTS' ROLE

Answers to all these questions are affected by the uneasy interaction between perceptions of the public interest and disabled people's rights. Courts can construe these as complementary or instead as competitive. *Lane*'s future impact will be mediated by the care with which courts address this dynamic.

An infamous Supreme Court ruling about disability illustrates the result of conceiving of disabled people's liberty as pitted against the public good. The state of Virginia won the decision in *Buck v. Bell*,[331] a case that upheld the state's policy of sterilizing "feebleminded" people in the name of the public good. Seventy-five years later, however, Virginia apologized to those citizens whose reproductive liberty the state had denied with the policy defended in *Buck*.[332] As even the winning party now holds the policy to have been wrong, it is hard to see how the case was not wrongly decided. As history shows, the aftermath of the case was that (some) states imposed heavy burdens on the liberty of disabled people.

During the twentieth century, a number of states curtailed the reproductive freedom of disabled people by sterilizing them.[333] "Feebleminded" people most often were targets of this practice. Feeblemindedness, an artificial classification that mixed biological and moral notions, was a quintessential stereotype, applied to people with cognitive disabilities, hearing impairments, seizure disorders, oddly shaped jaws or large ears, or tendencies toward fecundity

331. 274 U.S. 200 (1927).

332. *See Virginia Governor Apologizes for Eugenics Law*, USA TODAY, June 2, 2002, at http://www.usatoday.com/news/nation/2002/05/02/virginia-eugenics.htm.

333. *See generally* TROY DUSTER, BACKDOOR TO EUGENICS (1st ed. 1990).

outside marriage (this last was the symptom that earned the diagnosis of "feeblemindedness" for the plaintiff in *Buck*).[334] Feeblemindedness was made the occasion of much loss of other liberties as well. We saw the tendency to scapegoat "feeblemindedness" manifested in the language of the city of Cleburne's zoning ordinance, which explicitly banned hospitals for feebleminded people from being established without a special use permit. To ban the mildly retarded individuals who would live in the group home, the city stereotyped them as "feebleminded."[335]

"Feeblemindedness" was not the only disability that occasioned the burden of reproductive liberty being curtailed. California, for example, also sterilized visually impaired people, including many whose blindness was acquired, not inherited.[336] Visually impaired people also were vulnerable to the rationale to which Justice Holmes gave voice in *Buck*: "the public welfare may call upon the best citizens for their lives" so "it would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence."[337] Over 60,000 Americans with disabilities lost their reproductive liberty because of sterilization laws that were sheltered by the kind of rationale articulated by Justice Holmes.[338] States' sterilization programs continued through the 1970s.[339] The abrogation of reproductive freedom in the different states targeted somewhat different diagnoses,[340] advanced different rationales (sometimes a eugenics theory, sometimes a paternalistic theory about denying children to

334. *Buck*, 274 U.S. at 205–06.

335. Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191, 193 (5th Cir. 1984).

336. *See, e.g.*, Alexandra Minna Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California*, 95 AM. J. PUB. HEALTH 1128 (2005); *see also* ANITA SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 42 (1998); Daniel J. Kevles, *Grounds for Breeding: The Amazing Persistence of Eugenics in Europe and North America*, TIMES LITERARY SUPPLEMENT, Jan. 2, 1998, at 3.

337. *Buck*, 274 U.S. at 207.

338. *See* Stern, *supra* note 336, at 1128.

339. *See* DUSTER, *supra* note 333, at 30; DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 275 (1995).

340. *See* DUSTER, *supra* note 333, at 30.

incompetent parents),[341] and took different measures (some states sterilized disabled people to prevent their reproducing while others simply locked them up).[342]

Even the Supreme Court's recognition in 1942 in *Skinner* that the right to have offspring is "basic to the perpetuation of a race and an important area of human rights" went no distance toward protecting the disabled. Thirty-seven years elapsed between *Skinner* (an equal protection case invalidating Oklahoma's policy of sterilizing recidivist robbers[343]) and the year (1979) when Virginia ended its state policy of sterilizing disabled people.[344] For the *Skinner* Court carefully crafted its ruling so as to embrace the finding of *Buck* and to distance convicted criminals, whom the Constitution protected against sterilization, from "feebleminded" people whom, according to *Buck*, the Constitution did not.[345] Although taking reproductive liberty to be an important public value and (in the words of one of the concurrences) taking eugenics programs to be "biological experiments at the expense of the dignity and personality and natural powers of a minority,"[346] the Justices in *Skinner* accepted that states had a rational interest in disabled people's being burdened with deprivation of this right.[347] *Skinner* thus deferred to an error the Court embraced in *Buck*, namely, by presuming that states normally may impose disability-based liberty-curtailing burdens by appeal to the public interest without scrutinizing whether the rationale invoked is wrongly informed about disability.

---

341. *Id.* at 32; *see also* EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH (1995).

342. DUSTER, *supra* note 333, at 31 (discussing *Skinner*).

343. The plaintiff in *Skinner* had two strikes, having been convicted of chicken thieving and then of armed robbery. Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 537 (1942). Both the majority decision in *Skinner*, and the two concurrences, take pains to distance convicted criminals, whom the majority took to be protected from sterilization for reasons of equal protection and the concurrences believed to be protected as a matter of due process, from "feebleminded" people who had no constitutional protection according to *Buck v. Bell*.

344. Dave Reynolds, *Virginia Governor Apologizes for Eugenics*, INCLUSION DAILY EXPRESS, May 6, 2002, http://www.inclusiondaily.com/news/advocacy/vaeugenics.htm#050602.

345. *Skinner*, 316 U.S. at 539.

346. *Id.*

347. *Id*. at 540.

Patent in the history of *Buck* and its half century aftermath is that the courts themselves are not immune from wrongful disability-based rights deprivation. When courts scrutinize states' rationales for disability-based rights deprivation, there is a historically demonstrated possibility that bias and pretexts about disability will prevail. Over the decades following *Skinner*, public knowledge eventually improved sufficiently to reveal that states' policies for sterilizing people based on disability had to be extremely narrowly tailored to serve a legitimate public purpose because disability was not to blame for the civic problems invoked in the *Buck* winner's rationale. But this was too late for many individuals against whom the Supreme Court had given states the latitude to act within the broad permission accorded states in *Buck.*

This history makes it all the more vital for courts to tailor narrowly permissions implicit in disability-based abrogations or abbreviations of important rights. The presumption should not be, as it was in *Buck* and then again in *Cleburne*, that there is an inherent conflict between the public interest and disabled people's exercising citizens' important rights, and that therefore it is normal for states to compromise the liberty of and impose special burdens on citizens on the basis of their disabilities. *Lane* opens a new road for ADA plaintiffs, a road that is illuminated by the importance of rights. Nonetheless, misunderstanding about the bearers of these rights remains a danger, even if some of the old misleading ways of referring to them, such as "feebleminded," have been abandoned.

The half-century-old project of achieving integration for disabled people will continue to thread its way around judicial road blocks until better knowledge and acceptance of disabled people and disability informs the courts as well as the culture. Until then, courts need to be attentive, rather than relaxed, when states expect disabled citizens to bear special burdens. And courts ought to be rigorously wary when the burdens states impose based on disability curtail important rights.