Reasonable Accommodations as Constitutional Obligations

By Sean Pevsner

Individuals with disabilities historically have not had equal access to education, employment, and community services. Those with disabilities require reasonable accommodations to gain access to many areas of public life. In *Garrett v. University of Alabama*,[1] however, the Supreme Court ruled that Congress cannot require states to provide reasonable accommodations to their disabled employees, even if the states have previously discriminated against disabled individuals in the employment context.[2] The *Garrett* Court ruled that Congress did not properly abrogate the states' Eleventh Amendment sovereign immunity by enacting Title I of the Americans with Disabilities Act (ADA), because reasonable accommodations are not a proper remedy for constitutional violations.[3] The Court, in effect, suggested that states do not have any constitutional obligation to provide equal access to education, employment, and community services to individuals with disabilities.

This essay demonstrates that states do indeed have a constitutional obligation to provide reasonable accommodations to people with disabilities in order to ensure that they have equal access to education, employment, and community services. Part I shows that the *Garrett* decision has unresolved tensions with other Supreme Court decisions in the area of disability rights. Part II explains how the Court could resolve these tensions by reevaluating its interpretation of its decision in *City of Cleburne v. Cleburne Living Center, Inc.*[4] and applying the resulting equal protection analysis to the reasonable accommodations provision of the ADA. Part III argues that Congress not only has a constitutional right, but a duty to require states to provide reasonable accommodations to individuals with disabilities.

I. The Inconsistency of the *Garrett* Decision

The Supreme Court decision in *Garrett* followed only two years after the Court's decision in *Olmstead v. L.C.*[5] The *Olmstead* case held

1. 531 U.S. 356 (2001).
2. *Id.* at 373.
3. *Id.*
4. 473 U.S. 432 (1985).
5. 527 U.S. 581 (1999).

that states must provide people with mental disabilities services in the community setting if: 1) state health professionals determine that such individuals can receive community services, and 2) such accommodations would not constitute a fundamental alteration in the state's health management system, and 3) community setting services would not cost the state substantially more than institutional services.[6] In other words, states must provide health services in the most integrated setting if providing such services would constitute a reasonable accommodation.

The *Garrett* majority, however, diverged significantly from the principles developed in *Olmstead*. The majority in *Garrett* held that individuals with disabilities cannot recover monetary damages for a state's failure to reasonably accommodate them.[7] The Court ruled that states had no constitutional obligation to provide reasonable accommodations.[8] This section reveals the inconsistencies between these cases. First, it will explain the legal foundations that gave rise to the present Supreme Court's views on the Americans with Disabilities Act. Second, it will show how the unresolved tensions between the *Garrett* and *Olmstead* decisions arose out of differing interpretations of those legal foundations.

The ADA is a civil rights law meant to ensure the constitutional rights of people with disabilities. The Act requires that both public and private entities provide reasonable accommodations to people with disabilities to allow them access to services and facilities otherwise unavailable. Public entities, such as states, must provide accommodations, including "making existing facilities used by employees readily accessible to and usable by individuals with disabilities,"[9] and providing "qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[10]

Congress passed the ADA to give people with disabilities more protection than did earlier Supreme Court cases. Prior to the ADA, the Supreme Court protected the constitutional rights of the disabled to a limited extent, but could only remedy past constitutional violations in a piecemeal fashion. Roger Hartley, in a short summary of the Supreme Court's rulings on disability-based state discrimination immediately preceding the passage of the ADA, notes that the Court "substantiated the presence of society-wide discrimination against persons with disabilities and state culpability."[11] In the 1985 case of *Alexander v.*

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6. *Id.* at 587.
7. *Garrett*, 531 U.S. at 373.
8. *Id.* at 367.
9. 42 U.S.C. § 12111(9) (1990).
10. *Id.*
11. Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity from Private Damage Suits After Boerne*, 24 N.Y.U. REV. L. & SOC. CHANGE 481, 517 (1998).

Choate,[12] for example, the Court "acknowledged for the first time the 'well-cataloged instances of invidious discrimination against the handicapped.'"[13] The Court's reach, however, was limited to individual cases and controversies, and to whatever larger implications lower courts chose to derive from them.

A. Legal Foundation for *Garrett* and *Olmstead*

Before Congress passed the ADA, the Supreme Court heard *City of Cleburne v. Cleburne Living Center, Inc.*,[14] an equal protection case involving individuals with disabilities. In *Cleburne*, the Court ruled that the City of Cleburne violated the constitutional rights of people with mental retardation by refusing to grant a permit for a group home.[15] The city required the group home to apply for a special permit in accordance with a city ordinance. The zoning ordinance in question allowed building use in the relevant city district for purposes of "[h]ospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts."[16] The Court did not rule that the ordinance was facially unconstitutional. Instead, the Court found that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment as applied to the plaintiffs in this particular case.[17]

Cleburne established the current standard of judicial review for people with disabilities. The Court stated that people with disabilities only warrant minimum rational basis review in determining if a law invidiously discriminates against them.[18] The Court added that it could not classify people with mental retardation as a quasi-suspect class on these grounds because the treatment of such individuals "under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."[19]

The minimum rational basis review only invalidates laws that irrationally discriminate against a certain class of people[20] and allows states to give almost any reason for their actions.[21] The *Cleburne* Court, however, did not actually use the minimum rational basis review. It ruled that the city's reasons for refusing to issue the permit were not

12. 469 U.S. 287 (1985).
13. Hartley, *supra* note 11, at 517-18 (citing Alexander v. Choate, 469 U.S. 287, 296 (1985)).
14. 473 U.S. 432 (1985).
15. *Id.*
16. *Id.* at 437.
17. *Id.* at 435.
18. *Id.* at 440-46.
19. *Id.* at 443.
20. *Garrett*, 531 U.S. at 367.
21. *See* notes 108-11 and accompanying text.

sufficient to outweigh the importance of a group home to people with mental retardation.[22] The Court noted the Fifth Circuit's finding that the group home was essential in order for individuals with mental retardation to live in the community.[23] The *Cleburne* Court did not question the Fifth Circuit's statement that, "[w]ithout group homes ... the retarded could never hope to integrate themselves into the community."[24] To question this statement would be to propose an implicit balancing test that cannot be reconciled with rational basis review.[25]

Congress passed the ADA under Section 5 of the Fourteenth Amendment in order to address the treatment of people with disabilities under the law, imposing a balancing test similar to that of the *Cleburne* Court. This test requires states to provide reasonable accommodations to people with disabilities to ensure that they have equal access to the community. Under Title I of the ADA, an employer must provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[26] Congress presumably established this balancing test to protect all employers from unreasonable financial burdens. In fact, the ADA defines "undue hardship" as "an action requiring significant difficulty or expense," considering the following factors, among others: 1) "the nature and cost of the accommodation needed,"[27] 2) "the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation [and] the effect... of such accommodation upon the operation of the facility,"[28] 3) "the overall financial resources of the covered entity,"[29] and 4) "the type of operation or operations of the covered entity."[30] In passing the ADA, Congress thus acted consistently with the *Cleburne* decision, because the *Cleburne* majority suggests that the legislature is more equipped to provide the legal tools by which social and economic balancing tests are administered. The *Cleburne* Court explained: "[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."[31]

B. The Interpretation of *Cleburne* and the ADA in *Garrett*

22. *Cleburne*, 473 U.S. at 448-50.
23. *Id.* at 438 (citing 726 F.2d 191, 199 (5th Cir. 1984)).
24. *Id.*
25. *Id.* at 440.
26. 42 U.S.C. § 12112(b)(5)(A) (1990).
27. 42 U.S.C. § 12112(b)(5)(B)(i) (1990).
28. 42 U.S.C. § 12112(b)(5)(B)(ii) (1990).
29. 42 U.S.C. § 12112(b)(5)(B)(iii) (1990).
30. 42 U.S.C. § 12112(b)(5)(B)(iv) (1990).
31. *Cleburne*, 473 U.S. at 440.

The majority in *Garrett* ruled that "[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational."[32] In *Garrett*, a nurse took time off work to get chemotherapy for breast cancer, and Ash, a corrections officer, suffered from chronic asthma and sleep apnea that affected his work. The nurse was demoted from her supervisory position, and the correctional officer was denied his request for a smoke-free workplace.[33] These plaintiffs sued the State of Alabama for monetary damages as a result of their lost work. Each claimant asserted that the state had a duty to provide reasonable accommodations under Title I of the ADA.[34] The Court used the traditional rational basis review test that it claimed to use in *Cleburne*, and ruled that states do not unconstitutionally discriminate against people with disabilities even when they do not provide reasonable accommodations.[35] The *Garrett* Court acknowledged that states "could quite hard-headedly—and perhaps hard-heartedly—hold to job qualifications requirements which do not make allowances for the disabled."[36] The *Garrett* majority, therefore, ruled that the provision providing for a monetary remedy in Title I of the ADA was not sufficient under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity from damages under the Eleventh Amendment.

The Eleventh Amendment of the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."[37] The *Garrett* majority viewed Title I of the ADA as a clearly illegitimate attempt to abrogate state sovereignty under the Eleventh Amendment. While earlier courts allowed Congress to "abrogate the states' sovereign immunity whenever it clearly expressed its intent to do so,"[38] after *Seminole Tribe of Florida v. Florida*,[39] "abrogation can only occur when the states have violated a federal constitutional provision, and the scope of the abrogation must be narrowly tailored to the problem represented by such violations."[40] The *Garrett* Court did not find that states violated constitutional provisions by not providing reasonable accommodations, in part because it did not

32. *See Garrett*, 531 U.S. at 367.
33. *Id.* at 361.
34. *Id.*
35. *Id.* at 367.
36. *Id.* at 368.
37. U.S. CONST. amend. XI.
38. Mitchell Berman, R. Anthony Reese, & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to 'Fix'* Florida Prepaid *(And How Not To)*, 79 TEX. L. REV. 1037, 1049 (2001).
39. 517 U.S. 44 (1996).
40. Berman, et al., *supra* note 38, at 1055.

employ heightened scrutiny when reviewing past state action for discriminatory effects on people with disabilities.

As in *Cleburne*, the Court refused to classify people with disabilities as a quasi-suspect or suspect class entitled to heightened scrutiny of laws or practices that might have a discriminatory effect. Citing *Cleburne*, the majority said, "if the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others. . . ."[41] In the end, the *Garrett* majority found no urgent reasons to provide people with disabilities with greater protection through heightened scrutiny.

In their brief for *Garrett*, the petitioners argued that people with disabilities have always received only the minimum rational basis review.[42] The petitioners relied on *Schweiker v. Wilson*[43] to show that the Court has historically been very hesitant to apply a higher level of scrutiny.[44] In *Schweiker*, the Court did not find an equal protection violation when the federal government gave supplemental social security benefits to people with mental disabilities in public institutions that received Medicaid funding while denying them to people with mental disabilities in private institutions that did not receive such funding. The petitioners used this case to support their argument that the Court should not "substitute . . . personal notions of good public policy for those of Congress."[45] The petitioners merged this argument with the *Cleburne* holding to show that, especially where social and economic legislation are at stake, the Court should only apply rational basis review.[46]

Even though the ADA specifically defines "discrimination" to include the failure to provide reasonable accommodations to qualified individuals with disabilities,[47] the *Garrett* Court suggests that "reasonable accommodations" constitute affirmative actions that a state may or may not choose to take.[48] Under this rationale, states can always conjure up some justification for their actions; under rational basis review, courts have few options outside of accepting these justifications.[49] As the *Garrett* Court itself admits, according to the rational basis test, "the burden is upon the challenging party to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'"[50] This statement suggests that states have

41. *Garrett*, 531 U.S. at 366.
42. Pet. Br. at 17, Garrett v. Univ. of Ala., 531 U.S. 356 (2000) (No. 99-1240).
43. 450 U.S. 221 (1981).
44. Pet. Br., *supra* note 42, at 24.
45. *Id.* (citing *Schweiker*, 450 U.S. at 234).
46. *Id.* at 25-26.
47. 42 U.S.C. § 12112(b)(5)(A) (1990).
48. *Garrett*, 531 U.S. at 367.
49. *See* notes 108-11 and accompanying text.
50. *Cleburne*, 473 U.S. 432 at 445.

almost free reign to determine what accommodations they will provide to individuals with disabilities.

Thus, the majority in *Garrett* does not follow their own suggestion in *Cleburne* that courts should defer to the legislature and allow it to provide the appropriate legal treatment for people with disabilities. The *Cleburne* majority stated that, "[e]specially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts."[51] The *Garrett* Court interpreted the *Cleburne* decision to mean that states, not the federal government, are the only governmental bodies that should legislate the appropriate treatment of people with disabilities. The majority asserted that "where a group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation."[52]

The petitioners argued that upholding the applicability of the reasonable accommodations provision in Title I of the ADA to the states would require a higher level of scrutiny than the traditional rational basis interpretation of the Equal Protection Clause allows.[53] The petitioners pointed to the fact that the claimants said that they could not work due to their disabilities.[54] The petitioners argued that "it is not difficult to conclude that an employer acts rationally—and therefore constitutionally—by refusing to promote or hire individuals on the ground that they have a medical condition that 'limits' their ability to 'work.'"[55] They argued that on the particular facts in *Garrett*, "a motion to dismiss an equal protection claim would be compelled."[56] They further claimed that the ADA sets a higher standard of care than the standard established by the Equal Protection Clause.[57] Their argument rests on the notion that "the two mandates are worlds apart in their substantive rules, allocation of the burden of proof, system of adjudication and ultimate application [and that thus] ... [t]o respect the one standard of review invariably slights the other."[58] The petitioners did not leave any latitude for a more expansive and flexible interpretation of the Equal Protection Clause of the Fourteenth Amendment as suggested by the *Cleburne* Court.

In interpreting the Equal Protection Clause, the *Cleburne* Court hinted at this latitude by recognizing the legitimacy of earlier disability

51. *Id.*
52. *Garrett*, 531 U.S. at 366-67 (quoting *Cleburne*, 473 U.S. at 441).
53. Pet. Br. at 23, Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (No. 99-1240).
54. *Id.*
55. *Id.* at 29-30.
56. *Id.* at 29.
57. *Id.* at 24.
58. *Id.* at 30.

rights laws. The *Cleburne* majority specifically cited federal anti-discrimination laws such as Section 504 of the Rehabilitation Act of 1973,[59] which ensures that entities that receive federal funds do not discriminate against people with mental retardation.[60] Section 504 of the Rehabilitation Act laid the foundation for the accommodations provisions of the ADA. The *Cleburne* Court thought Congress acted appropriately when it created Section 504, in that the enactment provided an appropriate legal remedy for discrimination against individuals with disabilities.[61]

The *Garrett* majority, however, cites the Court's 1997 decision in *City of Boerne v. Flores*[62] as defining new criteria for legal remedies to qualify as appropriate corrections for constitutional violations. The Supreme Court in *Boerne* struck down the Religious Freedom Restoration Act (RFRA), enacted by Congress to correct the states' constitutional violations of individuals' First Amendment right to freedom of religion. Congress interpreted the Equal Protection Clause of the Fourteenth Amendment to provide a broader protection of this freedom than any the Supreme Court had previously deemed necessary. The *Boerne* Court, however, ruled that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[63] In other words, Section 5 of the Fourteenth Amendment does not give Congress an interpretive function, but rather only a remedial one. The Court in this case thus restricted Congress to addressing direct constitutional violations as revealed by judicial determinations.

In deciding that Congress did not provide proper remedies in enacting RFRA, the *Boerne* Court ruled that a remedy must be congruent and proportional to the relevant constitutional violation. The Court stated that "[i]n most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry."[64] The Court therefore thought that RFRA provided remedies that were too broad-based to constitute a response congruent and proportional to the harms committed.[65]

The *Garrett* majority followed *Boerne* in this regard, explicitly stating that Section 5 legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[66] The *Garrett* Court found that the reasonable accommodation mandate of the ADA was not in fact a

59. 29 U.S.C. § 794 (1976).
60. *Cleburne*, 473 U.S. at 443.
61. *Id.*
62. 521 U.S. 507 (1997).
63. *Id.* at 519.
64. *Id.* at 535.
65. *Id.* at 534.
66. *Garrett*, 531 U.S. at 365 (citing *Boerne*, 521 U.S. at 520).

congruent and proportional remedy to violations of the constitutional rights of states' employees with disabilities. The majority stated, "the accommodation duty far exceeds what is constitutionally required . . . ."[67] The Court bolstered this claim by pointing to flaws it perceived in Congress' handling of the historical record of disability discrimination.

The *Garrett* majority did not find any substantial historical evidence of unconstitutional employment discrimination by the states against people with disabilities. As the Court stated, "[t]he legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[68] Although the legislative record cited examples of such discrimination, the Court found those examples insufficient to support claims of constitutional violations.[69] Thus, the Court scrutinized the finding of facts behind the ADA, as well as the constitutionality of the law itself.

The *Garrett* majority read the legislative history of the ADA very narrowly. The Court admitted that there were some instances of discrimination by the states against individuals with disabilities, but it nevertheless stated that "even if it were to be determined that each incident upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based."[70] The majority went further in its review of the facts by stating that these incidents were reported not to Congress, but to the Task Force on the Rights and Empowerment of Americans with Disabilities, which on its own did not find evidence of employment discrimination by the states.[71]

The *Garrett* majority noted a specific lack of support in the legislative history for the charge of employment discrimination against the states. In fact, the majority claimed that Congress did not really address state employment discrimination against individuals with disabilities at all in the Congressional Record.[72] The Court supported this claim by citing the conclusions of the Senate Committee on Labor and Human Resources, which stated that "'[d]iscrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications.'"[73] Since the Committee did not expressly list employment discrimination in the public sector, the Court inferred that such employment discrimination was not a major concern of Congress.

67. *Id.* at 372.
68. *Id.* at 368.
69. *Id.* at 369-70.
70. *Id.* at 370.
71. *Garrett*, 531 U.S. at 370-71.
72. *Id* at 371.
73. *Id.*

Thus, the Court did not find it constitutionally necessary to require the states to comply with the reasonable accommodation provision in Title I of the ADA.

In their brief, the petitioners argued that almost every state had laws that protected the rights of people with disabilities, even prior to the enactment of the ADA.[74] The petitioners noted that "[a]t several instances during the hearings on the ADA, national legislators and others complimented State efforts"[75] in the area of disability rights. For example, one legislator noted that "forty-five States [had] very similar laws" to the ADA before its passage.[76] The petitioners argued that Congress unnecessarily made the ADA applicable to the states when the states were already equipped with laws that protected the rights of people with disabilities.[77]

The *Garrett* Court held that the ADA should not apply to the states regardless of whether or not the states had such laws in place. In drawing the conclusion that Title I of the ADA should not apply to states, the *Garrett* majority looked only at the states' actions. The majority reasoned that a state's refusal to accommodate employees with disabilities and using disability as a factor in the hiring process "'cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'"[78] The majority further reasoned that "whereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to 'make existing facilities used by employees readily accessible to and usable by individuals with disabilities.'"[79] Thus, the *Garrett* majority refused to look at mechanisms such as reasonable accommodations that might protect the constitutional rights of people with disabilities.

The Court took the view that reasonable accommodations are not the constitutional right of people with disabilities. Rather, it viewed accommodations as privileges to be granted by legislatures. The Court asserted that "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."[80] According to *Garrett*, then, states are not obligated under Title I of the ADA to provide reasonable accommodations to their employees with disabilities.

The majority in *Garrett* based its conclusion on the fact that the *Cleburne* Court found that "[a]lthough the group home for the mentally

74. Pet. Br., *supra* note 42 at 2.
75. *Id.* at 31.
76. *Id.* at 32.
77. *Id.* at 31-35.
78. *Garrett*, 531 U.S. at 367 (citing Heller v. Doe, 590 U.S. 312 (1993)).
79. *Id.* at 372.
80. *Id.* at 368.

retarded was required to obtain a special use permit, apartment houses, other multiple-family dwellings, retirement homes, nursing homes, sanitariums, hospitals, boarding houses, fraternity and sorority houses, and dormitories were not subject to the ordinance."[81] The majority in *Garrett* interpreted the *Cleburne* decision to mean that the Court should only look at the states' actions in determining if they discriminate against people with disabilities. Therefore, the *Garrett* majority found that failure to provide reasonable accommodations to state employees with disabilities did not rise to the level of a constitutional violation.[82]

As Roger Hartley points out, the Court should defer to the legislature unless "the Court perceives that prejudice, antipathy or other prejudicial factors motivate legislation."[83] As he further notes, the *Cleburne* Court specifically concluded that, under these circumstances, "improvident legislation is 'unlikely soon to be rectified by legislative means.'"[84] Therefore, the Court should reserve any interference with the legislative process for these special circumstances.

Hartley argues that *Boerne* departs from this judicial maxim by establishing a higher judicial review for legislative actions. The *Boerne* Court perceived RFRA as a breakdown in the legislative process, and "this justified greater judicial scrutiny of Congress' judgment that RFRA was needed to prevent or remedy unconstitutional state action."[85] Hartley further claims that congruence and proportionality review is much higher than the rational basis review.[86] "The 'congruence and proportionality' test permits the Court to probe more deeply the telic relationship between the legislation that regulates constitutional conduct by the states and the Fourteenth Amendment violations to be prevented or remedied."[87] Hartley points out that rational basis review has a long line of precedents.[88] He thus contends that the *Boerne* Court abandoned the established review that gave substantial deference to legislatures for a judicial supremacy review that prevents Congress from passing remedial legislation under the Fourteenth Amendment. This argument keeps in step with the *Cleburne* ruling that gives substantial deference to the federal government and states in an effort to promote democratic processes. Therefore, the *Garrett* Court should have followed the precedent of *Cleburne*, not so much in terms of its superficial lip service to rational basis review for local governments only, but in terms of its deeper commitment to legislative deference to all levels of government. Instead, the *Garrett* Court applied minimum rational basis review to state

81. *Id.* at 366, n.4.
82. *Id.* at 367.
83. Hartley, *supra* note 11 , at 504.
84. *Id.* (quoting *Cleburne*, 473 U.S. at 440).
85. *Id.*
86. *Id.* at 495.
87. *Id.*
88. *Id.*

action while applying the more rigorous congruence and proportionality test to Congressional legislation, thus tipping the balance of power toward the states by judicial fiat.

C. The *Garrett* Decision is Inconsistent with the Decision in *Olmstead*

The *Garrett* holding is contrary to the Supreme Court's 1999 holding in *Olmstead v. L.C.*[89] In *Olmstead*, two women with mental disabilities sued the State of Georgia to move out of institutions and into the community. Both plaintiffs argued that the State of Georgia had a duty under Title II of the ADA to assist them in this effort.[90] The Supreme Court ruled that unnecessary institutionalization of people with mental disabilities was indeed discrimination based on disability.[91] Accordingly, states must provide reasonable accommodations to place people with mental disabilities in the community "when the State's treatment professionals have determined that community placement is appropriate, ... and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities."[92] The *Olmstead* Court recognized that reasonable accommodations are essential to place those with mental disabilities in a community setting.

The Supreme Court in *Olmstead* viewed its task as one of statutory interpretation of Title II of the ADA, rather than one of constitutional analysis.[93] The *Garrett* Court purportedly analyzed Title I of the ADA on constitutional grounds. While Title II solely covers public entities such as state and local governments and focuses mainly on benefits and services offered by these entities, Title I provides for monetary and injunctive remedies to people who prevail in employment discrimination claims.[94] Although Title II does have some monetary remedies, it provides primarily injunctive relief.[95] The *Garrett* Court at one level appeared to offer only a narrow ruling that monetary damages were unavailable in suits against the states under Title I. It gave a clear indication, however, of its intent to address the broader issue of the constitutionality of requiring states to provide reasonable accommodations. In its attack on the monetary remedies provision of Title I, the *Garrett* Court engaged in a full-blown equal protection analysis of the reasonable accommodation provision that left no doubt as to its opinion that the ADA is unconstitutional in its application to the

89. 527 U.S. 581 (1999).
90. *Id.* at 593.
91. *Id.* at 597.
92. *Id.* at 587.
93. *Id.* at 588.
94. *See* 42 U.S.C. § 12117(a) (1990).
95. *See* 42 U.S.C. § 12133 (1990).

states. By the same token, although *Olmstead* purports not to deal with constitutional issues at all, it nevertheless takes an approach that, if translated into a constitutional analysis, would clearly conflict with the *Garrett* stance.

The *Olmstead* Court deferred to Congress and used the guidelines established in Title II of the ADA to justify its ruling.[96] The Court found that these congressional guidelines were sufficient to show that the states were discriminating against citizens with mental disabilities.[97] The majority cited findings in the opening sections of the ADA that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[98] The Court stated that people with mental disabilities can enjoy "participation in community life [if they are] given reasonable accommodations."[99]

The *Olmstead* Court also cited the regulation promulgated by the Justice Department. The regulation stated that "a public entity shall administer services . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[100] The Court used this regulation to require states to place people with mental disabilities in the community, noting that "[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[101] Thus, the *Olmstead* decision did not rely exclusively upon judicial supremacy to draw its conclusions, and instead gave extensive weight to the judgment of both the legislature and the relevant government agency.

The *Garrett* decision substantially departs from the *Olmstead* approach by asserting judicial supremacy. The *Garrett* majority completely disregarded legislative judgment, substituting its own, even though Congress had more experience in dealing with people with disabilities and more information at its disposal. The Court proclaimed that "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."[102] Although the *Olmstead* decision involved statutory interpretation, it nevertheless took a different path from that eventually traveled by the *Garrett* Court in recognizing that it had to look at all the circumstances surrounding the issue, since statutory interpretation cannot be constructed in a vacuum. Similarly, this same argument can be made for constitutional interpretation. As

96. *Olmstead*, 527 U.S. at 589-90.
97. *Id.* at 588-89.
98. *Id.* at 600 (citing 42 U.S.C. § 12101(a)(2)).
99. *Id.* at 601.
100. *Id.* at 596 (quoting 28 C.F.R. § 35.130(d) (1998)).
101. *Id.* at 598 (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998)).
102. *Garrett*, 531 U.S. at 365.

Chief Justice Marshall noted in *McCulloch v. Maryland*,[103] a constitution's nature requires "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose these objects be deduced from the nature of the objects themselves."[104] Congress and government agencies are in a better position to ascertain the nature of those objects and identify the proper remedies to solve the problems that might arise around them.

The *Olmstead* decision suggests that people with disabilities should enjoy a higher standard of protection against discrimination than that which a *Garrett*-style minimum rational basis review would provide. If the *Olmstead* Court had used a constitutional interpretation instead of a statutory one, it would have taken into account the availability of reasonable accommodations when determining if states were unconstitutionally discriminating against people with mental disabilities. The *Olmstead* Court seems to view compelling states to provide reasonable accommodations as within the scope of Congress' constitutional authority under Section 5 of the Fourteenth Amendment. Although the *Olmstead* Court specifically confined its review to statutory construction,[105] and the statute itself defines "discrimination" as including failure to provide reasonable accommodations,[106] the Court endorsed this statutory view by holding that "unjustified isolation . . . is properly regarded as discrimination based on disability."[107]

The *Olmstead* approach differs further from that of *Garrett* in that it involved accepting the factual findings of Congress and validating the Congressional attempt to remedy the discriminatory acts of states. The Court noted that Congress passed the Developmentally Disabled Assistance and Bill of Rights Act to ensure that "[t]he treatment, services, and habilitation for a person with developmental disabilities . . . *should be* provided in the setting that is least restrictive of the person's personal liberty."[108] The Court also cited Section 504 of the Rehabilitation Act of 1973, which was the prototype for the ADA. This section states that "[n]o otherwise qualified individual with a disability in the United States . . . *shall*, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[109] The Court thus deferred to decades of anti-discrimination laws in order to extend protection to people with disabilities.

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103. 17 U.S. 316, 407 (1819).
104. *Id.*
105. *Olmstead*, 527 U.S. at 588.
106. 42 U.S.C. § 12112(b)(5)(A) (1990).
107. *Olmstead*, 527 U.S. at 597.
108. *Id.* at 599 (quoting 42 U.S.C. § 6010(2) (1976), emphasis added by Court).

II. Resolving the Tensions Between *Garrett* and *Olmstead* Through a Reevaluation of *Cleburne*

In his partial dissent in *Cleburne*, Justice Marshall argued that cases involving claims of discrimination against people with mental retardation should receive heightened scrutiny review.[110] Marshall thought that the majority should have invalidated the city ordinance on its face, contending that, although the majority claims to employ minimum rational basis review, "Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny."[111] This argument has validity because a rational basis review essentially automatically rubber-stamps laws unless they are completely irrational. As Marshall noted, "Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation."[112] Marshall uncovered the underlying principle that would render the majority's view truly coherent, which is to apply heightened scrutiny to people with mental retardation. The majority could easily have deferred to this ordinance and ruled it constitutional under the rational basis test. After all, the City of Cleburne could plausibly argue that people with mental retardation were a threat to the community. However, the majority uncovered the gross discrimination in the ordinance by extending its review beyond the minimum rational basis review used in earlier cases like *Williamson v. Lee Optical*.[113]

In *Lee Optical*, the Court ruled that the State of Oklahoma was not acting irrationally by prohibiting the fitting of eyeglass frames without the prescription of a licensed optometrist or ophthalmologist.[114] An optician challenged this state law under the Fourteenth Amendment. The Court ruled that "[t]he legislature might have concluded that the frequency of occasions when [an eyeglass] prescription is necessary was sufficient to justify . . . regulation of the fitting of eyeglasses."[115] It stated that "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[116]

The main reason that the *Cleburne* majority did not label its review as one of "heightened scrutiny" was because it did not want to fetter the governmental bodies by preventing them from passing laws that protect

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109. *Id.* at 599-600 (quoting 29 U.S.C. § 794 (1976), emphasis added by Court).

110. *See* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 464-65 (1985) (Marshall, J., partial dissent).

111. *Id.* at 458.

112. *Id.* at 456.

113. 348 U.S. 483 (1955).

114. *Id.* at 487-88.

115. *Id.* at 487.

116. *Id.* at 488.

the rights of people with mental retardation.[117] Marshall, however, contends that heightened scrutiny does not restrict governmental bodies from passing laws that address the legal problems of disabled individuals. He stated that "[h]eightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group like the retarded, but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day."[118] The majority addressed this problem by explaining that the legislature is better equipped to handle the legal rights of people with mental retardation. Therefore, the *Cleburne* Court essentially employed heightened scrutiny review for people with mental retardation in the guise of rational basis review.

Marshall also argued that courts should look at the evolution of society when evaluating constitutional principles. He noted that "history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time."[119] Therefore, Marshall argued that the Supreme Court should not appeal to an abstract principle of equality divorced from any investigation of contemporary circumstances in reviewing laws that might have a discriminatory effect on people, but should instead look at the whole gamut of modern experience to judge whether a law is constitutional under the Equal Protection Clause of the Fourteenth Amendment.[120] Ultimately, the *Cleburne* majority applied Marshall's approach to reviewing laws by tailoring their "minimum rational basis review" to the specific facts and circumstances of the situation.[121]

The *Olmstead* Court followed Marshall's approach in *Cleburne* in deciding that states must provide reasonable accommodations to people with mental disabilities to enable them to live in the community. The Court looked at the specifics of the situation of people with mental disabilities and drew a fairly balanced conclusion. The *Olmstead* ruling concluded that the placement of people with mental disabilities in community settings is proper when

> the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[122]

117. *See Cleburne*, 473 U.S. at 442-44.
118. *Id.* at 471 (Marshall, J., partial dissent).
119. *Id.* at 466.
120. *Id.*
121. *See, e.g., Cleburne*, 473 U.S. at 449-50.
122. *Olmstead*, 527 U.S. at 587.

While the Court ruled that the states must place individuals with mental disabilities in community settings, it also gave states something of a defense if they failed.[123] This ruling is consistent with the Marshall approach, and ultimately with the *Cleburne* majority, in that it takes into account the modern problems at issue for both disabled plaintiffs and defendant states when evaluating the remedies for both past and present discrimination by the states. The same issue concerning modern problems was at stake in the equal protection analyses of *Cleburne* and *Garrett*.

The *Olmstead* Court used Marshall's evolutionary notion of constitutional rights to balance the civil rights of individuals with mental disabilities against the rights of the states to handle their fiscal responsibilities in their own way. In the past, society did not expand its notion of equality to include individuals with mental disabilities. This was clearly shown in the Supreme Court's 1927 decision in *Buck v. Bell*, where it upheld a Virginia law that mandated sterilization for people with mental retardation.[124] The *Buck* Court reasoned that "three generations of imbeciles were enough."[125] They claimed that Virginia had to protect itself from people with mental retardation by controlling their procreation.[126] The *Olmstead* Court, however, recognized that modern society had a more expansive view of equality, which it considered when balancing the rights of individuals with mental disabilities against the legitimate interests of the states.[127]

The Court of Appeals for the Eleventh Circuit took an approach that insufficiently balanced these rights in *Olmstead*. The Eleventh Circuit, in an earlier stage of the *Olmstead* litigation, held that the District Court must "measure the cost of caring for [the plaintiffs] in a community-based facility against the State's mental health budget."[128] The Supreme Court thought this ruling was too unduly burdensome to the states. In its holding, the Court in *Olmstead* ruled that the District Court "must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably."[129] This holding is directly consistent with the *Cleburne* majority's idea that courts should defer to federal and state legislatures to provide the proper legal remedies for people with mental retardation. The *Olmstead* Court's deference to these legislatures, elected democratically and thus

123. *Id.*
124. 274 U.S. 200 (1927).
125. *Id.* at 207.
126. *Id.* at 205-06.
127. 527 U.S. 581 (1999).
128. *Id.* at 597.
129. *Id.*

ostensibly more attuned to changes in community values, shows even more clearly its commitment to Marshall's evolutionary approach.

In *Garrett v. University of Alabama*,[130] however, the Supreme Court reversed its direction and declined to follow the evolutionary approach set out in *Olmstead*, and ultimately in *Cleburne*.[131] The *Garrett* majority applied true minimum rational basis review in its ruling. The Court did not look at the issues at hand in a modern context. Instead, it took the view that it should uphold any state law or practice that does not directly run afoul of the Equal Protection Clause of the Fourteenth Amendment, construing the principle of equality as a set ideal unaffected by changes in circumstances over time. It is true that the Court, at first glance, appeared to defer to the legislature by employing the same logic that it used in *Williamson v. Lee Optical*.[132] The Court in *Garrett*, after all, refused to limit state legislatures by validating an ADA that "makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' upon the [states]."[133] The *Garrett* Court's refusal, however, to defer to Congress (which has broader access to changing views of equality and rights within the community and society at large) is clear evidence of its unwillingness to follow Marshall's evolutionary approach with regard to equality. Because people with disabilities are not considered a quasi-suspect class, the current Court insisted that both courts and Congress should defer to states with regard to the legal remedies available to disabled individuals.

The *Olmstead* Court rejected this sort of selective deference by endorsing the congressional view that a state's refusal to provide reasonable accommodations to people with mental disabilities did indeed constitute discrimination. The Court examined the purpose behind the integration mandate in Title II of the ADA and set a standard for states to follow in implementing this provision. By implementing Title II regulations while simultaneously taking into account legitimate state interests, the *Olmstead* Court followed its previous decision in *Cleburne* by giving deference to both the state and federal legislatures in a balanced way.

If the *Garrett* Court had truly followed the spirit of its decision in *Cleburne*, it would have ruled that Title I of the ADA was within the proper sphere of Congress' Section 5 powers to remedy violations of the Equal Protection Clause. The *Cleburne* Court emphasized the importance of limiting the Supreme Court's role to monitoring legislative matters, and implicitly tapped into the dissent's ideas on the ever-changing contemporary world. To follow *Cleburne*, the *Garrett* Court would have had to take an approach similar to *Olmstead*. It would have

130. 531 U.S. 356 (2001).
131. *Id.*
132. 348 U.S. 483 (1955).
133. *Garrett*, 531 U.S. at 372.

had to reconcile the language of the ADA regarding the civil rights of disabled individuals with the rights of the states to avoid the imposition of undue burdens on the states.

In the *Garrett* brief, the respondents argued that the *Cleburne* precedent was not a well-established equal protection review for people with disabilities.[134] The respondents noted that, in the 1993 case *Heller v. Doe,*[135] the Court declined "to decide whether Cleburne remains the standard for mental retardation, perhaps because of Congress' intervening factual findings in the ADA."[136] Furthermore, the respondents argued that "[e]ven if rational basis scrutiny applies, it is unsettled whether, in the case of disability, the rationality of the state action turns on a balancing test, weighing the justification for the classification against the degree of injury it would inflict, as the controlling votes in Cleburne declared."[137] Their argument implies that the *Cleburne* majority did not apply the sort of selective rational basis review to state action that forecloses judicial deference toward Congress, as the *Garrett* Court did. It also suggests that *Garrett* was decided on this selective approach with no precedential foundation in the area of disability rights.

III. Congressional Authority and Affirmative Rights

The ADA is the first comprehensive civil rights act for people with disabilities that covers both private and public sectors.[138] Its purpose was to improve the civil rights of disabled individuals granted by Section 504 of the Rehabilitation Act of 1973.[139] Congress recognized that Section 504 did not give these individuals the type of equality afforded to other minorities like African Americans; it simply covered entities that received federal funds.[140] Congress used the Fourteenth Amendment and the Commerce Clause of the United States Constitution to extend the scope and application of its disability rights legislation to state and local governments.[141]

The following section will show that Congress had the right, and indeed the obligation, to pass the ADA. First, it will examine the findings of Congress that led to the passage of the ADA. Second, it will

134. Resp't Br. at 16, Garrett v. Univ. of Alabama, 121 S.Ct. 955 (2000) (No. 99-1240).
135. 509 U.S. 312 (1993).
136. Resp't Br., *supra* note 134, at 16, note 18.
137. *Id.*
138. *See, e.g.*, 42 U.S.C. § 12101(b)(4) (1990).
139. *Id.*
140. *Id.*
141. Because the Commerce Clause does not allow congressional abrogation of the Eleventh Amendment, it lies outside the scope of this paper. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Berman, *supra* note 38, et al., 79 TEX. L. REV. at 1049.

explain why Congress must use a conception of affirmative rights to give real equality to individuals with disabilities.

A. The Right and Obligation of Congress to Pass the ADA

Congress recognized the pervasive, arbitrary, and invidious discrimination by the states against people with disabilities. Even though states claimed to have their own laws to protect the civil rights of disabled individuals, discrimination against the disabled was still prevalent. As the Respondents' Brief for *Garrett* notes:

> Congress in its extensive 'findings' in § 12101 of the ADA, found, inter alia, that isolation and segregation of persons with disabilities 'continue to be a serious and pervasive problem' (§ 12101(2)), and that 'the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis...' (§ 12101(9)).[142]

The respondents further noted that employment was listed in the congressional record of the Senate Committee on Labor and Employment as a critical area in which discrimination still remained.[143] Contrary to what the *Garrett* majority stated, the respondents pointed out that "Congress had before it voluminous evidence of employment discrimination against persons with disabilities in both [private and public] sectors."[144] The fact that Congress did not explicitly list state employment discrimination in the legislative record does not bar Congress from correcting this kind of discrimination, nor does this fact give the Supreme Court the right to conclude that Congress did not intend Title I of the ADA to apply to states as employers. Congressional authority to pass legislation to address constitutional violations has long been recognized as reasonably broad.

The dissent in *Garrett* recognized that Section 5 of the Fourteenth Amendment does indeed give Congress the authority to pass Title I of the ADA. The dissent argued that, where there is no rational basis for a state to discriminate against people with disabilities, Congress has a rational basis for concluding that "the remedy before us [of monetary damages for a private claim of discrimination] constitutes an 'appropriate' way to enforce this basic equal protection requirement."[145] The dissent followed the underlying rationale of the *Cleburne* majority, even though that majority purported to use the rational basis test to come

142. Resp't Br., *supra* note 134, at 17.
143. *Id.*
144. *Id.*
145. *Garrett*, 531 U.S. at 377 (Breyer, J., dissenting).

to its conclusions. In keeping with the reasoning of the *Cleburne* case that the Court should allow the legislature to provide the proper legal treatment of people with disabilities, the dissent noted, "[n]or has the Court traditionally required Congress to make findings as to state discrimination, or to break down the record evidence, category by category."[146] The dissent also noted that Congress found prevalent discrimination against people with disabilities by states. It concluded that "Congress followed our decision in Cleburne, which established that not only discrimination against persons with disabilities that rests upon 'a bare... desire to harm a politically unpopular group,' . . . but also discrimination that rests solely upon 'negative attitude[s],' 'fea[r],' . . . or 'irrational prejudice.'"[147] Thus, the dissent followed the *Cleburne* criteria for judging whether certain state justifications for discrimination against individuals with disabilities are invalid on their face.

The *Garrett* dissent also discussed the way that the majority applied the minimum rational basis review. The dissent noted that the Court usually uses the rational basis review in the absence of Congressional direction, but "a 'congressional direction' to apply a more stringent standard would have been 'controlling.'"[148] This statement clearly suggests that the Court ought to be bound to follow the standards established by Congress. The dissent, therefore, argued in essence that Congress should be free to evaluate the facts presented to it in terms of its own set of standards developed for that purpose. The fact that the *Garrett* majority "found" that the facts did not support discrimination claims shows that the majority evaluated the facts with a standard different from that employed by Congress. In doing so, the Court essentially preempted the traditional congressional role in constructing public policy. As Akhil Reed Amar notes that, "in a close case, the Court might in the absence of a congressional declaration decide that a given right was not fundamental, but if Congress were to weigh in on behalf of the right, the Court would consider the issue afresh in light of this new evidence."[149]

B. Congress Must Recognize Affirmative Rights In Order to Give True Equality to Individuals with Disabilities

Congress had to recognize the existence of affirmative rights to pass the ADA. Unlike the Civil Rights Act of 1964, the ADA forces public and private entities to perform affirmative actions, such as making

146. *Id.* at 380.

147. *Id.* (quoting *Cleburne*, 473 U.S. at 447-48).

148. *Id.* at 383.

149. Akhil Reed Amar, *Intertextualism*, 112 HARV. L. REV. 747, 824 (1999); *see also* Michael W. McConnell, *Institutions and Interpretations: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 189-95 (1997).

their buildings fully accessible to people with mobility impairments. Title I of the ADA requires that both private and public entities provide reasonable accommodations, defined in part as "making existing facilities used by employees readily accessible to and usable by individuals with disabilities."[150] Other reasonable accommodations may include "job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position . . . ."[151] This requirement is essential to provide true equality to disabled individuals.

The reasonable accommodations provisions in the ADA are protections for positive rights. Positive rights are rights to receive specific benefits from other members of society and are distinct from negative rights in that the latter simply protect individuals from some sort of invasion by others.[152] Traditionally, our society has respected primarily negative rights. However, such programs as affirmative action and welfare have recently provided protection for positive rights.[153]

Henry Shue, in his article *A Basic Right to Subsistence*,[154] lays out a criterion for determining which positive rights require protection alongside negative rights. Shue identifies a set of rights that he calls "basic," in that without these rights people could not enjoy most of the other rights in society.[155] He reasons that if people do not have these basic rights, they cannot take advantage of the same rights that others enjoy, even if they can assert them verbally. Shue notes that "rights are basic in the sense used here only if enjoyment of them is essential to the enjoyment of all other rights."[156] Shue thus argues that societal rights (like freedom of association) cannot be enjoyed without these basic rights.[157]

Individuals with disabilities cannot fully enjoy their constitutional rights without reasonable accommodations, which allow people with disabilities to take advantage of such rights as the freedom of association and the freedom to assemble peacefully. Congress noted that the disabled have historically been isolated and segregated.[158] It recognized that reasonable accommodations would provide the essential elements to those with disabilities so that they could take full advantage of their constitutional rights and participate actively in the community. Congress realized that "no one can fully, if at all, enjoy any right that is supposedly

150. 42 U.S.C. § 12111(9)(A) (1990).

151. 42 U.S.C. § 12111(9)(B) (1990).

152. *See* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 4 (Leslie Pickering Francis & Anita Silvers, eds., 2000).

153. *Id.* at 7.

154. Henry Shue, *A Basic Right to Subsistence*, *reprinted in* SOCIAL ETHICS: MORALITY AND SOCIAL POLICY 359-65 (Thomas Mappes & Jane S. Zembaty, eds., 1992).

155. *Id.* at 362-63.

156. *Id.* at 360.

157. *Id.* at 361.

158. 42 U.S.C. § 12101(a)(2) (1990).

protected by society if he or she lacks the essentials for a reasonably healthy and active life."[159]

In *Olmstead*, the Supreme Court recognized that a person with a mental disability often cannot live or fully participate in the community without reasonable accommodations.[160] The Court found these accommodations essential in order for an individual with a mental disability to take an active role in society. The *Garrett* Court, on the other hand, suggests that such accommodations are unnecessary to ensure constitutional rights. The conclusion drawn by the latter Court stems from its failure to recognize that full protection of constitutional rights requires protection of basic positive rights.

IV. Conclusion

It has been well established that the right to live in a community that is not segregated and the right to work in any job for which one is fully qualified cannot be derailed by discrimination. Since 1954, the Supreme Court has protected these rights. In that year, the Court found segregation in public schools to be unconstitutional under the Fourteenth Amendment.[161] This ruling marked the first substantive action by the federal government to address racial inequality. Congress finally supported this Supreme Court ruling by enacting the Civil Rights Act of 1964. With regard to disability rights, however, the Court tends to lag behind Congress.

The Court has taken crab steps to protect the rights of the disabled, while keeping in step with the will of the people. Congress enacted the ADA by an overwhelming majority. The Court cannot simply disregard the popular will and replace it with its own. Congress represents people with disabilities, and it responded to these citizens' concerns with legislation to protect them from invidious discrimination. The ADA gives people with disabilities the mechanisms to secure their constitutional rights to live and work in an integrated community without being subjected to arbitrary discrimination.

159. Shue, *supra* note 154, at 363.
160. *Olmstead*, 527 U.S. 581 (1999).
161. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).