Comment

Creating Disability Rights: The Challenge for Disabled Americans*

Jacobus tenBroek Disability Law Symposium

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Although the Fourteenth Amendment to the Constitution of the United States declares that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[1] and although Section Five of the amendment declares that Congress has the power to enforce it by "appropriate legislation," what equality before the law means has been the subject of debate from the time of the beginning of our nation, and it remains a matter for interpretation by the courts. In considering equality before the law for disabled individuals, it is worth pondering whether the courts have been a help or a hindrance. If they have not been a help, it is worth considering what steps are required to change the judicial point of view.

In 1973, Section 504 of the Rehabilitation Act, 29 U.S.C. §794, became law. This section declared at the time of enactment that no otherwise qualified handicapped individual could be denied the benefits of or participation in any program or activity receiving federal financial

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[1] U.S. CONST. amend. XIV, § 1.

assistance. In 1985, the Supreme Court decided that this section of the rehabilitation act did not authorize individuals to recover damages against state institutions because claims for such damages were barred by the Eleventh Amendment.[2] Although the decision of the Supreme Court was later changed by congressional action in 1986, Justice Powell had declared that a state would be liable for damages only if it had waived sovereign immunity or Congress had authorized suits for damages pursuant to its power under the Fourteenth Amendment.[3] When the Americans with Disabilities Act (ADA) was enacted in 1990, Congress specifically included a reference to its enforcement power under the Fourteenth Amendment, "to invoke the sweep of congressional authority."[4] This should have ensured the broadest interpretation of enforceability for the act. However, in 2001 Chief Justice Rehnquist, writing for the Supreme Court, said that the Eleventh Amendment bars recovery of damages against states under the ADA because Congress had made an insufficient finding of a pattern of discrimination by the states against the disabled to invoke constitutional authority for abrogating sovereign immunity.[5]

In the history of the treatment of blind Americans, many states have adopted laws prohibiting blind Americans from serving on juries.[6] Federal law permits the disabled to be paid less than the minimum wage today.[7] In the interpretation of social welfare legislation, some states have required blind people to undergo sterilization operations if they wanted to receive public benefits or employment opportunities in certain state-run institutions.[8] The graduation rate for blind students from high school currently is at approximately 45%.[9] The unemployment rate for blind people currently is at approximately 70%.[10] More than 5,000 blind people are employed in sheltered workshops for the blind, where they

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[2] Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) *superseded by statute,* Civil Rights Remedies Equalization Act of 1986, Pub. L. No. 99–506, 100 Stat. 1845 (1986).

[3] *Scanlon*, 473 U.S. 234 at 235-236.

[4] Americans with Disabilities Act, 42 U.S.C. § 12101(b)(4) (1990).

[5] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

[6] *See, e.g., Blind Citizens One Step Closer to Jury Service in the District of Columbia,* THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), July 1993 at 815–819, *available at* http://www.nfb.org/Images/nfb/Publications/bm/bm93/brlm9307.htm#4; *Jury Service in Tennessee*, THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), July 1985 at 354–356, *available at* http://www.nfb.org/images/nfb/Publications/bm/bm85/bm8507/bm850713.htm.

[7] Fair Labor Standards Act, 29 U.S.C. § 214(c) (1938).

[8] SEVILLE ALLEN & CHARLES BROWN, NAT'L FED'N OF THE BLIND OF VA., VIRGINIA'S BLIND: FROM CUSTODIALISM TOWARD FREEDOM THROUGH THE NATIONAL FEDERATION OF THE BLIND (Jacqueline Brown ed., 2008).

[9] Fredric Schroeder, *Literacy, Learning, and Enlightenment*, THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), August/September 2008 at 666–669, *available at* http://www.nfb.org/images/nfb/Publications/bm/bm08/bm0808/bm080809.htm.

[10] *See, e.g., Unemployment Rate Soars as Literacy Rate Declines*, NAT'L FED'N OF THE BLIND, http://www.nfb.org/images/nfb/documents/pdf/Braille%20Literacy%20Crisis%20flyer.pdf (last visited Feb. 20, 2012).

have rarely had opportunities for advancement into management.[11] Until the mid 1970s, employees in these sheltered environments were prohibited from joining unions or exercising the rights of collective bargaining.[12] The inequities for blind workers in the sheltered workshop system are sufficiently long-standing and so thoroughly incorporated into the daily experiences of blind people that folk songs have been written. Two well-known examples are the *Blind Workshop Blues* and *I've Been Working in the Workshop* (sung to the tune of *I've Been Working on the Railroad*). One experience these types of songs highlight is the predicament of many blind workers: that their bosses cannot raise their wages lest the workers lose their Social Security.[13] However, no pattern of discrimination exists, says the Supreme Court.

In the same case in which Chief Justice Rehnquist determined that no pattern of discrimination had been found, he implied that disabled individuals are by nature less capable of performance than others. He said, "It would be entirely rational, and therefore constitutional, for a state employer to preserve scarce financial resources by hiring employees who are able to use existing facilities...."[14] According to the Supreme Court, disabled individuals are more costly to employ than the nondisabled. Consequently, it is rational not to hire them—and constitutional. But there is no pattern of discrimination. I feel certain that the irony was lost upon the justices who employed a standard not supported by facts in the record and not offering equal protection to disabled and nondisabled individuals alike. The very language employed in this decision helps to establish the pattern of discrimination that was declared not to exist.

Dr. Jacobus tenBroek asserted that the Equal Protection Clause of the Fourteenth Amendment requires equality, which has been defined in three different ways.[15] One of these is that each person who is a citizen of the United States shall have equal opportunity to select government representatives without facing irrational burdens on the election process. One representation of this form of equality is captured in the phrase, "One person, one vote."[16] The second definition is that equal protection requires government guarantees of fundamental natural rights such as

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[11] Sheltered workshops for the blind receive federal contracts administered through an organization called National Industries for the Blind (NIB). The number of people employed in the workshops changes over time, NIB says it employed 6,100 people in 2011. *See 2012 Overview*, NAT'L INDUS. FOR THE BLIND, http://www.nib.org/sites/default/files/PublicPolicy/2012%20NIB%20Overview%20012412.pdf (last visited Feb. 20, 2012). For detailed information about conditions that have existed in the shops, *see* Jonathan Kwitny & Jerry Landauer, *Sheltered Shops Pay for the Blind Often Trails Minimum Wage at Charity Workrooms*, WALL ST. J., Jan. 24, 1979, at 1, 35; Jonathan Kwitny & Jerry Landauer, *Sheltered Shops How a Blind Worker Gets $1.85 an Hour After 20 Years on the Job*, WALL ST. J., Jan. 25, 1979, at 1, 31.

[12] Chi. Lighthouse for the Blind, 225 N.L.R.B. 46 (1976).

[13] NAT'L FED'N OF THE BLIND, NATIONAL FEDERATION OF THE BLIND SONG BOOK (1991).

[14] *Garrett*, 531 U.S. at 372.

[15] JACOBUS TENBROEK, EQUAL UNDER LAW 19 (Collier Books 1965) (1951).

[16] *Id.*

those denominated in the first eight amendments to the Constitution and other rights not listed in the document.[17] The third interpretation of this requirement is that all people similarly situated shall be treated equally by government. This interpretation of equality requires classification of individuals in accordance with characteristics that have a rational relationship to the classification.[18] A more rigorous test for classifications exists if those being classified are members of a "suspect class," but the disabled are not among this highly favored group.[19]

Much of the debate that occurred in fashioning the Fourteenth Amendment revolved around the proper classification of slaves. If slaves are property, the clause of the Fifth Amendment prohibiting the government from depriving an individual of property without due process of law protects the interests of the property owner in these slaves.[20] If the slaves are persons, the same clause of the Fifth Amendment prohibits slave holders from invoking governmental authority in support of their taking these persons who have a property interest in themselves, because these persons are protected against government-authorized taking without due process of law.[21]

Disabled individuals are bedeviled by arguments with respect to appropriate classification. Until 1990, the State Department refused to accept blind American citizens as applicants for the Foreign Service.[22] When protests regarding this policy incorporated reference to the nondiscrimination requirements of Section 504 of the Rehabilitation Act, officials of the State Department responded by agreeing to permit blind persons to apply. However, they said that strict equality would be required. Sighted people were offered the test for admission to the Foreign Service in print. Blind people would also be offered the test in print. Sighted people were not permitted to use the services of a reader during the administration of the test. Blind people would not be permitted to use the services of a reader during the administration of the test. If blind people could pass the test under these conditions, they would be accepted as employees of the service. Otherwise, they would not.[23]

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[17] *Id.* at 20.

[18] *Id.*

[19] City of Cleburne v. Cleburne Living Ctr., 473 U.S., 432 (1985).

[20] TENBROEK, *supra* note 15, at 42–56.

[21] *Id.*

[22] Rami Raby, *The Blind Applicant Rejected: Why Not Diplomacy for the Blind?*, THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), Nov. 1989 at 686–691, *available at* http://www.nfb.org/Images/nfb/Publications/bm/bm89/brlm8911.htm#7; Gerry Sikorski, *Blind Persons in the U.S. Foreign Service: A View from Congress*, THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), Nov. 1989 at 691–696, *available at* http://www.nfb.org/Images/nfb/Publications/bm/bm89/brlm8911.htm#8; Marc Maurer, *Presidential Report*, THE BRAILLE MONITOR (Nat'l Fed'n Of the Blind, Balt., Md.), Sept. 1990 at 513–524, *available at* http://www.nfb.org/Images/nfb/Publications/bm/bm90/brlm9009.htm#3.

[23] *See supra* note 22.

When I was applying for admission to law school in the 1970s, I was told that because of my blindness I could not take the Law School Admissions Test. Today, the Law School Admissions Council (LSAC) permits blind applicants to take the test. However, the Council decides what kinds of access technology will be permitted to a blind applicant, and the LSAC website, a site that students must use for law school applications, has not been usable by blind applicants.[24] Similarly, until very recently, the National Conference of Bar Examiners (NCBE) decided how a blind person could take the bar exam.[25] Blind applicants seeking the opportunity to take the bar exam argued that they should have flexibility in what methods would be used to comprehend the content of the exam. Methods familiar to these blind applicants for comprehending the content of written material should be permitted. To insist that unfamiliar methods of understanding test content are required is to test the capacity of the applicant to learn how to use these methods rather than to determine their fitness to take the exam.

LSAC and NCBE may not harbor animus against the blind, but they do not appear to want to encourage blind people to participate in the legal profession. This is the inevitable conclusion of the decisions they have made to try to make it hard for the blind to get into law school and hard for the blind to get into the legal profession after graduation. They have classified blind people as undesirable, but there is no pattern of discrimination; the Supreme Court said so.

In 1927, the Supreme Court issued an opinion declaring that a Virginia statute authorizing forced sterilization of certain disabled individuals did not violate the Fourteenth Amendment.[26] In that case a woman denominated "feeble minded," who had born a child said to be "feeble minded" and who was the daughter of another woman said to be "feeble minded," faced involuntary sterilization. The court said, "Three generations of imbeciles are enough."[27] However, that decision was made more than eighty years ago. Surely, it may be argued, governmental interference with family and reproductive rights for disabled Americans is no longer tolerated.

In the spring of 2010, the newly born child of blind parents in Missouri was taken from them not because they were treating the child inhumanely; not because they were determined to be incapable of giving it love and affection; but because these parents are blind. [28]

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[24] In February 2009, a complaint entitled *National Federation of the Blind et al* v. *Law School Admissions Council* was filed in the Superior Court for the State of California, Alameda County, case number 09—436691. In this case complainants alleged a number of facts of discrimination against the Law School Admissions Council (LSAC). Although the defendants declined to acknowledge that these allegations are correct, the case is close to settlement with the understanding that access technology for the blind will be permitted to blind applicants.

[25] Enyart v. Nat'l Conference of Bar Examiners, Inc., 630 F.3d 1153 (9th Cir. 2011).

[26] Buck v. Bell, 274 U.S. 200 (1927).

[27] *Id.* at 207.

[28] Susan Donaldson James, *Baby Sent to Foster Care for 57 Days Because Parents Are Blind,* ABC

If disabled Americans are to have full access to government programs, public accommodations, and employment, the barriers to entry and use of such programs and facilities must be removed and a spirit welcoming participation must be created. The barriers to entry and use are physical, informational, and social. Physical barriers require redesign of doorways, entryways, bathrooms, and the like. They also require redesign of information management systems. Nonvisual access is needed for those who cannot effectively use print. This group includes the blind, those with severe dyslexia, those who cannot hold a book, and a number of others.

Although it is common to argue that the disabled are expensive, as Chief Justice Rehnquist did, it is less well-recognized that the nondisabled are also expensive. Because I am blind, I never use a computer screen, which costs money to construct and to operate. Nevertheless, the program which verbalizes information contained in my computer is regarded as an expensive accommodation, but the computer screen used by the sighted is not.

To welcome the disabled into the community on terms of equality with others demands an alteration of thought, and we who are disabled are the primary agents of change. If the rights of those possessing disabilities become the subject of discussion once every quarter century or so, they may be ignored with impunity. Consequently, if we want our fellow human beings to recognize our value and our right to exercise that value, we must take action to help them know this value exists. We must insist that we be admitted to the law schools, to the legal profession, and to the judiciary. We must befriend legislators and take office ourselves. We must draft legislation that protects our rights. When our rights are ignored, denied, or belittled, we must sue the people who do so. We must become acquainted with officials in the executive branch, and we ourselves must seek office in that branch of government to ensure that the administration of the legislation adopted fulfills the intent of legislators who direct that the disabled may not be subjected to discrimination.

Sometimes we will encounter members of the judiciary sufficiently benighted that they cannot imagine a pattern of discrimination, but sometimes we will get the justice we deserve. This cannot happen unless we demand it. We must insist upon respect at all levels of government and society, and we must welcome those who want to work with us to assure equality for all.

As we do all of these things, we will be regarded as uppity, pushy, obnoxious, and belligerent. This is unfortunate, but it is one element of the transition of a minority group to first-class status in any society. We will not always win. However, we cannot make progress unless we insist

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NEWS, July 28, 2010, http://abcnews.go.com/Health/missouri-takes-baby-blind-parents/story?id=11263491#.T0H2AvlsPz1.

that the value we represent is recognized. Consequently, we must constantly demand that we be given the equal protection that our Constitution guarantees. In the long run, tireless action will ensure the equality we demand.