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Pamela Brandwein
University of Texas at Dallas

CONSTITUTIONAL DOCTRINE AS PARING TOOL: THE STRUGGLE FOR "RELEVANT" EVIDENCE IN *UNIVERSITY OF ALABAMA V. GARRETT*

Pamela Brandwein*

This Article examines the difficulties involved in translating the social model of disability into the idiom of constitutional law. The immediate focus is University of Alabama v. Garrett. *Both parts of this Article consider how disability rights claims collide with a discourse of legitimacy in constitutional law. Part I focuses on the arguments presented in several major Briefs filed in support of Garrett. Constitutional doctrines are conceived as paring tools and it is shown how the Court used these doctrines to easily pare down the body of evidence Garrett's lawyers sought to claim as relevant in justifying the ADA as Section 5 legislation. Among these doctrines are state sovereign immunity, state action, and disparate treatment. Part II examines how the language of equality, rights, and discrimination is used in a segment of the pre-*Garrett *disability literature. A contrast in the work of legal and non-legal academics is identified, namely, that legal academics tend to identify, to a much greater extent, the elements of the constitutional landscape that are inhospitable to constitutional claims to reasonable accommodation.*

What does the sociology of constitutional law have to contribute to discussion about the Americans with Disabilities Act (ADA)?[1] The sociology of constitutional law is a new area of inquiry and thus likely unfamiliar to members of the legal academy, much less disability scholars outside of law schools.[2] But this field, with its origins in the sociology of knowledge,[3] poses vital questions about the social-historical processes of construction and persuasion entailed in the production of official constitutional knowledge. Institutional analysis is central to the sociology of legal knowledge, and this Article examines the nature of the institutional difficulties involved in translating the social model of disability into the idiom

* Associate Professor of Sociology and Government & Politics, University of Texas at Dallas. B.A. 1986, University of Michigan; Ph.D. 1994, Northwestern University. I am grateful to Douglas Dow for his helpful comments and suggestions.

1. Pub. L. No. 101–336, 104 Stat. 327 (1990), (codified at 42 U.S.C. § 12101 (1994)).

2. *See* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH (1999) (examining the history of the canonical treatment of Fourteenth Amendment history by legal scholars and judges, including how this version survived even after it had been called into question by other scholarship) [hereinafter BRANDWEIN, RECONSTRUCTION]; *see also* Pamela Brandwein, *Disciplinary Structures and 'Winning' Arguments in Law and Courts Scholarship*, LAW & CTS., 11–19 (Summer 2000) [hereinafter Brandwein, *Disciplinary Structures*].

3. *See* BRANDWEIN, RECONSTRUCTION, *supra* note 2, at 18–20.

of constitutional law. The Article's immediate focus is *Board of Trustees of the University of Alabama v. Garrett.*[4]

This Article does not engage in traditional doctrinal analysis of *Garrett*, nor is it a normative defense of Garrett's claims. Part I focuses on the arguments presented in several major briefs filed in support of Garrett[5] and examines how Chief Justice Rehnquist, writing for the majority, easily mobilized several branches of doctrine to render irrelevant most of the evidence gathered by Garrett's attorneys.[6] It is useful to imagine established constitutional doctrines as paring tools, for Rehnquist essentially used these doctrines to pare down the body of evidence Garrett's lawyers sought to claim as relevant. An examination of the historical contexts and institutional mechanisms that worked to authorize the doctrines of state sovereign immunity, state action, and disparate treatment is beyond the scope of this Article, although such an examination would be part of a more complete sociological inquiry into Rehnquist's opinion.

The focus here is the collision in *Garrett* between disability rights claims and the discourse of legitimacy in constitutional law. Several decades ago, disability activists built the social model of disability, which was meant to displace the medical model.[7] The social model

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4. 531 U.S. 356 (2001). Respondents Patricia Garrett and Milton Ash filed separate lawsuits seeking money damages from state employers under the ADA. "The question, then," stated Justice Rehnquist, writing for the majority, "is whether Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the ADA." 531 U.S. at 364. The Court concluded that Congress assembled insufficient evidence of unconstitutional discrimination to warrant such suits. *Id.* at 373–74. For a brief summary of the majority opinion, see Michael H. Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission* 62 OHIO ST. L.J. 31, 105–07 (2001).

5. Brief for Respondents Patricia Garrett and Milton Ash, *Garrett* (No. 99-1240) [hereinafter Brief for Respondents]; Brief for the United States, *Garrett*, (No. 99-1240); Brief for Amici Curiae Law Professors in Support of Respondents, *Garrett*, (No. 99-1240) [hereinafter Brief for Law Professors]; Brief of Morton Horwitz, Martha Field, Martha Minow and over 100 Other Historians and Scholars, Amici Curiae in Support of Respondents, *Garrett*, (No. 99-1240) [hereinafter Brief of Morton Horwitz et al.].

6. Whether one conceives of judicial decision making along attitudinal lines, *see generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993), rational choice institutional lines, *see, e.g.*, Lee Epstein & Jack Knight, *The New Institutionalism, Part II*, LAW & CTS., 4–9 (1997), or interpretive-historical lines, *see, e.g.*, Howard Gillman, *The New Institutionalism, Part I*, LAW & CTS., 6–11 (1996), one needs an understanding of how arrays of legal resources are authorized and mobilized in law. The first part of this Article examines how the Rehnquist majority mobilized a powerful array of resources to pare down the body of evidence claimed to be relevant by Garrett's supporters.

7. *See* Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 522 (1997) ("A person may perform some mental or physical function in a way that falls short of most other people, but the limitations imposed upon that individual frequently result as much from the social context as from the impaired function itself."); *see also* ANITA SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON

of disability identifies contingent arrangements as the major source of disadvantage for people with disabilities, while the medical model of disability identifies an individual's condition as the major source of disadvantage.[8] More recently, activists have used this model to generate and justify claims for constitutional rights.[9]

The discourse of legitimacy in constitutional law poses problems for such claims. This discourse, made up of "meta" norms of persuasion and authority[10] along with established doctrine, official histories, and specific case law, makes it difficult to authorize claims like those of Patricia Garrett and Milton Ash, the original plaintiffs in *Garrett*.[11] In other words, while disability activists strive to translate the social model of disability into the idiom of constitutional law, the established constitutional context and the rules of persuasion in constitutional law permit only a partial translation at best. The established context includes the doctrines of state

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JUSTICE IN BIOETHICS AND PUBLIC POLICY 13, 75 (1998)[hereinafter SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION]("The social model of disability transforms the notion of 'handicapping condition' from a state of a minority of people, which disadvantages them in society, to a state of society, which disadvantages a minority of people. The social model traces the source of this minority's disadvantage to a hostile environment and treats the dysfunction attendant on (certain kinds of) impairment as artificial and remediable, not natural and immutable."). *See generally* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (1984).

8. *See* SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION, *supra* note 7, at 59–76.

9. In a classic law review article by Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966), tenBroek used the social model of disability to argue that rights for people with disabilities should be recognized under tort law. Disability activists represented this article as a source of authority on the question of constitutional rights. *See* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS xiii–xiv (Leslie Pickering Francis & Anita Silvers eds., 2000)[hereinafter AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS]; Burgdorf, *supra* note 7, at 514. In attempting to use tenBroek to argue questions of constitutional rights for people with disabilities, these activists have suppressed important differences between rights under tort law (tenBroek's main concern) and those under the Fourteenth Amendment.

10. By "meta" norms I mean the duty to appeal to such things as text, legislative history, and doctrine to legitimate outcomes. These are the general channels that may be used to gather sources of authority and establish legitimacy. The need to distinguish law from politics, of course, is what impels such practice. To a large degree, the debate over which legal methods are legitimate has been dominated by Herbert Wechsler's *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For a useful typology of constitutional arguments, see PHILIP BOBBITT, CONSTITUTIONAL FATE 3–119 (1982). On the use of doctrine, see EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949). For an argument that combines the doctrinal and historical approaches, see RONALD DWORKIN, LAW'S EMPIRE (1986). For a textualist perspective, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997). See also the prudential approach of ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

11. *See* Brief for Respondents, *supra* note 5, at 1, 3.

sovereign immunity, state action, formal equality, and disparate treatment. This context is built mainly of "round holes" into which the "square peg" features of the social model of disability do not fit.

In considering the nature of the constraints facing Garrett's attorneys, it is helpful to imagine a game of chess[12] wherein the black king has been backed into a corner with only a few moves available and only a few pieces to protect him. The weak positioning of the black pieces—a product of the game being played over time—is analogous to the position of Garrett's attorneys. Checkmate is not the determined outcome on the next move, but the moves available to each of the black pieces are highly constrained. Garrett's lawyers had only a few "degrees of freedom" within which to build their argument, and even then their argument remained vulnerable. For Justices whose initial sense of the case favored the University of Alabama, it was relatively easy to construct an argument using institutionally recognized rules and sources of authority.

Indeed, the shorter length of the majority opinion, relative to *City of Boerne*[13] and *Kimel*,[14] is evidence of this ease.[15]

The chess analogy has its limits, of course. One limitation is that in an actual game of chess, both sides begin at equal strength. Subsequent advantage of position is due to superior skill. As I intend it, the disadvantaged position of Garrett's attorneys is not due to inferior skill. Rather, it is due to the accumulated socially and historically contingent doctrines of state action, disparate treatment, state sovereign immunity, etc., as well as the current institutional dominance of the federalism vision of Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas.

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12. Robert Cover used a chess analogy to illuminate the institutional situation of judges. In examining claims of helplessness before the law by judges in slavery cases (the judges asserted that the law rendered them helpless to produce anything but a pro-slavery decision), Cover argued that law is not like chess, where the rules are fixed. Law is more like language, where the rules evolve. A departure from the rules in chess makes the game "not chess," but a departure in law is of uncertain status. Only future action, which might or might not endorse the departure, can determine the status of departures. Thus, certain departures can turn out to be "law" while others turn out to be "not law." *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 123–30 (1975).

13. City of Boerne v. Flores, 521 U.S. 507 (1997).

14. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

15. The majority and concurring opinions in *Garrett* totaled about sixteen pages. Univ. of Ala. v. Garrett, 531 U.S. 356, 360–76 (2001). In *City of Boerne*, the majority and concurring opinions totaled about thirty-three pages. 521 U.S. 507, 511–44 (1997). It is more difficult to count pages in *Kimel* since Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer) filed an opinion dissenting in part and concurring in part, 528 U.S. 62, 93–99 (2000). Justice Thomas (joined by Justice Kennedy) also filed an opinion concurring in part and dissenting in part. *Id.* at 99–109. O'Connor's majority opinion is about 15 pages. *Id.* at 66–92.

In short, the constitutional landscape imposed tight constraints on Garrett's lawyers while offering an array of powerful legal resources for those who argued in favor of the University of Alabama. It is vital to remember, however, that doctrinal context did *not* determine the outcome in *Garrett*.[16]

This Article next treats the resource arrays mobilized by Garrett's attorneys and by the Court majority as social-historical products. These arrays, and the varying amounts of symbolic power that attach to them, have been built, not found. A full articulation of the social-historical processes that established these resource arrays is beyond the scope of this article. However, enough evidence already exists to call the historical grounding of both the state sovereign immunity and state action doctrines into question, both of which imposed especially high hurdles for Garrett's attorneys. While such evidence would likely be enough to convince an audience in disability studies, a more exhaustive treatment of this issue would be needed to persuade an audience interested primarily in the relationship between constitutional law and society (e.g., the boundaries between the federal courts, academic disciplines, and the legal academy).

By focusing attention on the competing sets of resource arrays in play in this decision, and the nature of the obstacles faced by Garrett's lawyers, this Article attempts to advance understanding of the constitutional web in which the ADA is now caught. While dispute over disability rights, before *Garrett*, had been characterized by clashing perspectives about the meaning of disability[17] and the

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16. If Chief Justice Rehnquist retired tomorrow and events somehow produced a replacement resembling Justice Steven Breyer, the evidentiary record strategy would be strengthened for future ADA claims even though the established doctrines remained the same. Breyer perceives significant institutional differences between the Court and the Congress, *see infra* notes 130–32, 136 and accompanying text, and with this emphasis on institutional differences, obstacles are lowered to claims like Garrett's. The outcome in *Garrett* was not the inevitable result of established doctrine, but that doctrine supplied powerful, institutional resources for a slim majority whose sense of the case was against Garrett. If that doctrine were not available to the *Garrett* majority, a justification with a recognizable judicial imprimatur, i.e., an opinion using the language of judicial legitimacy, *see supra* note 10, would have been much harder to build.

17. In response to court definitions of disability in ADA cases, much of the legal literature on disability has centered on definitions of disability. Disability legal scholars assert that court definitions depart significantly from those of the framers of ADA. *See, e.g.*, Burgdorf, *supra* note 7; Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans With Disabilities Act* 68 U. COLO. L. REV. 107 (1997); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53 (2000). Richard K. Scotch, a professor of sociology and political economy at the Universtiy of Texas, observes that prior to *Garrett*, "much of the larger disagreement over the Americans with Disabilities Act can be characterized as a clash

definition of discrimination,[18] opposing visions of federalism and separation-of-powers issues have now been added to the mix.[19] The *Garrett* case locates disability law squarely within the Court's enlarging federalism and separation-of-powers jurisprudence.[20]

Part I of this Article examines argument building and the constitutional landscape in *Garrett*. Section I.A identifies the low and high hurdles that confronted Garrett's attorneys as they tried to argue within the boundaries of the established constitutional landscape. After surmounting the low institutional hurdles, the main problem was establishing that a broad body of evidence warranted Title I of the ADA. Garrett's lawyers cast a wide net, claiming that multiple categories of evidence were relevant to this Section 5 inquiry.

Section I.B examines one of the few attempts Garrett's supporters made to challenge established doctrine. This was a historical challenge made by a group of law professors to the Fourteenth Amendment "state action" doctrine. The Court ignored this argument and the chances are low that the Court will endorse this sort of historical argument in the near future, however provocative the evidence presented.

Section I.C examines how Chief Justice Rehnquist's majority opinion used established doctrines as paring tools, essentially paring down the body of evidence that the Court regarded as "relevant" to the Section 5 inquiry. When Rehnquist was done, very little was left in the net of Garrett's lawyers.

Part II examines a segment of the pre-*Garrett* disability literature, especially the work of Robert Bugdorf, a law professor, and Anita Silvers, a philosopher. More specifically, variations are explored in

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of perspectives about the meaning of disability." Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213 (2000).

18. *See, e.g.*, Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000). Commentators on the conception of equality built into the ADA have identified the Court's colorblind, equal protection jurisprudence as a potential problem for supporters of reasonable accommodations for people with disabilities. Diller observes that "[m]any of the problems emerging from judicial decisions concerning the ADA stem from the ADA's reliance on a vision of equality that is particularly controversial—the principle that differential treatment, rather than the same treatment, is necessary to create equality." *Id.* at 40. An element of the case law that makes up colorblind jurisprudence appears in *Garrett*, namely, the majority's rejection of "societal discrimination" as a justification for Title I. *See Garrett*, 531 U.S. at 370–72.

19. For examples of the Court's rulings that Congress had encroached on states' rights or separation of powers, see *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). *See* Jeffrey Rosen, *The Next Court*, N.Y. TIMES, Oct. 22, 2000 (magazine), 74, 76; *see also* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).

20. *See* Gottesman, *supra* note 4, at 2.

how contributors to the pre-*Garrett* disability literature portrayed the constitutional landscape in their attempts to build constitutional authorization for disability rights claims. This variation tends to track, to some extent, membership in the non-legal academy versus the legal academy. Members of the legal academy tend to be more conversant with specific doctrinal content as well as the "meta" norms of constitutional argumentation, and this is not surprising given their institutional training. They also tend to be more likely than non-legal academics to present elements of the constitutional landscape that are unfriendly to their claims. For non-legal academics, successful "crossing over" requires adaptation to different norms of persuasion. The kind of crossing-over at issue here is social theory to law, not vice versa (though crossing over the other way would require adaptation as well).

I. ARGUMENT BUILDING AND THE CONSTITUTIONAL LANDSCAPE

A. Arguing for Garrett Within the Legal Landscape

Briefs filed on behalf of Patricia Garrett and Milton Ash relied primarily on a traditional style of argumentation,[21] which meant arguing within the established legal landscape.[22] This left the established doctrine mostly unchallenged.[23]

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21. *See* Brief for Respondents, *supra* note 5, at 10–50.

22. To argue within the boundaries of the established legal context is to argue in the traditional style. The very definition of an institution (patterned expectations, norms, and practices) ensures that this traditional style will be predominant. Of course, the boundaries can be challenged. It is a complex matter to explain the dynamics by which challenges to established doctrines are raised, *e.g.*, Justice Black challenging established Fourteenth Amendment incorporation doctrine in *Adamson v. California*, 332 U.S. 46, 71 (1947) (dissenting), rejected, *e.g.*, Justice Frankfurter in *Adamson*, 332 U.S. at 61 (concurring), and sometimes absorbed (challenges to *Plessy v. Ferguson*'s separate but equal doctrine were absorbed; there was no explicit statement of overruling in *Brown v. Bd. of Educ.* *See* Brown v. Bd. of Educ., 347 U.S. 483, 491–92 (1954) (citing Plessy v. Ferguson, 163 U.S. 537 (1896)). Because there is no scientific definition of "established" doctrine, and because the status of doctrine as "established" is sometimes contested, sociological analysis of the dynamics of doctrinal challenge must not reify the notion of established doctrine. Complicating matters is the fact that Courts may challenge doctrine without explicitly acknowledging it. The Warren and Rehnquist Courts have both *framed* their decisions in a traditional style, though both Courts have been perceived as activist. *But see generally* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2001) (arguing that the perception of activism ignores the essential partnership between the Court, the Congress, and the Kennedy and Johnson administrations, with all three branches acting in concert to impose national values on outliers).

23. There are, of course, variations in the kinds of arguments that might be brought within the established legal context. The choice to leave established doctrines unchallenged

For Garrett's attorneys, the current legal context rendered the traditional style both necessary and highly vulnerable. There were few easy issues for Garrett's lawyers—i.e., where the resources available to the Rehnquist majority would not pose threats to their arguments.

Perhaps the easiest hurdle for Garrett's lawyers was arguing that the ADA passed the "clear statement" test,[24] which requires Congress to make perfectly clear its intent to abrogate state immunity. Footnote three of the majority opinion reads, "It is clear that Congress intended to invoke Section 5 as one of its bases for enacting the ADA."[25]

Distinguishing *Seminole Tribe* appeared to be a second easy issue. In *Seminole Tribe*, the Court held that the Indian Commerce Clause of the U.S. Constitution could not authorize congressional abrogation of state immunity to claims under that clause.[26] The reason, according to the majority, was the Eleventh Amendment.[27] Had Congress relied only on the Commerce Clause in abrogating state immunity to claims under the ADA, the ADA would have fallen under *Seminole Tribe*.

But Congress relied on Section 5 of the Fourteenth Amendment, which permits abrogration.[28] Garrett's lawyers made a brief reference to *Seminole Tribe*, casting it simply as a case about congressional authority under the Commerce Clause[29] (and also signaling a refusal to challenge it).

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might be a result of habit or it might be strategic. Doctrine might be perceived as ungrounded in history or ungrounded in text, or both, but challenge might be perceived as a hopeless or unlikely strategy. Challenge is also time-consuming in that it requires extensive research.

24. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984).

25. Univ. of Ala. v. Garrett, 531 U.S. 356, 364 n.3 (2001) (citing the ADA at 42 U.S.C. § 12101(b)(4)).

26. 517 U.S. 44, 47 (1996).

27. "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. This language is specific, technical, limited, and does not appear controversial. However, Eleventh Amendment doctrine dating to *Hans v. Louisiana*, 134 U.S. 1 (1890), holds that a citizen of a state cannot sue that state, even though the text of the amendment appears to bar only suits by citizens of another state against a state. In *Hans*, a unanimous court held that the Eleventh Amendment bars suits in federal court by citizens against their states (without the states' consent), even for matters arising under federal law. *See id.* at 21. The *Hans* Court held that the Eleventh Amendment embodied the principle of sovereign immunity. *See id.* at 11. The context for *Hans* was debt repudiation by Southern states for Civil War debts and the Hayes-Tilden Compromise of 1877. It was clear that the Executive branch would not enforce judgments against states to pay their debts.

28. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 446 (1976).

29. *See* Brief for Respondents, *supra* note 5, at 12 ("[A]t the time the ADA was enacted, the governing law . . . was that Congress, when exercising its Article I legislative powers, may

It would be a mistake, however, to think that the ADA was safe from *Seminole Tribe*, for this decision signaled the emergent dominance of a way of thinking about federalism. In *City of Boerne*[30] and *Kimel*,[31] it became apparent that the Court's federalism jurisprudence was linked to its separation of powers jurisprudence. In 1985, the Court refused even to respond to challenges to the *Hans* decision,[32] and the *Garrett* opinion contains the now-standard one paragraph statement on the Eleventh Amendment: "Although by its terms the Amendment applies only to suits against a State by citizens of another State, our cases have extended the Amendment's applicability to suits by citizens against their own States." Citations to *Kimel*, *Florida Prepaid*,[33] *Seminole Tribe*, and *Hans* follow.[34]

The "clear statement" rule and the Commerce Clause ruling in *Seminole* exhausted the low hurdles for Garrett's attorneys. Their challenges began with the need to defend Congress' interpretation of the evidentiary record. The first step was defending Congress' role in enforcing the Fourteenth Amendment.

Garrett's lawyers had resources to draw upon for this task. There were clear statements from the voting rights decisions of the 1960s that Congress had a central role in determining the legislation that was needed to enforce the Fourteenth Amendment. "It is for Congress in the first instance to determine 'whether and what legislation is needed to secure the guarantees of the Fourteenth

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authorize private party suits against States to enforce the federal law. But this Court has since . . . [held] in *Seminole Tribe* that Congress is precluded by the Eleventh Amendment from authorizing private party suits against States, except when exercising its power, conferred in § 5 of the Fourteenth Amendment, to enforce by appropriate legislation that Amendment's substantive provisions. The question whether Congress had § 5 power to enact the ADA thus obtains.") (citations and footnotes omitted).

30. City of Boerne v. Flores, 521 U.S. 507 (1997).

31. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

32. *See* Atascadero v. Scanlon, 473 U.S. 234, 243 n.3 (1985). The Court dismissed Justice Brennan's historical and textual critique of state sovereign immunity doctrine:

> Justice Brennan long has maintained that the settled view of *Hans v. Louisiana*, . . . is wrong. . . . It is a view, of course, that he is entitled to hold. But the Court has never accepted it, and we see no reason to make a further response to the scholarly, 55-page elaboration of it today.

33. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669–70 (1999).

34. Univ. of Ala. v. Garrett, 531 U.S. 356, at 363–64. Justice Breyer's dissenting opinion in *Garrett* concluded with a poke at the *Seminole* decision. "Whether the Commerce Clause does or does not enable Congress to enact this provision, *see, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 100–85 (1996) (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting) (citation omitted), in my view, § 5 gives Congress the necessary authority." *Id.* at 976 (Breyer, J., dissenting).

Amendment.'"[35] In *Kimel*,[36] the Court reiterated that Congress is not limited to mere legislative repetition of the Court's constitutional jurisprudence. "Rather, Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[37]

Garrett's lawyers also called on *City of Cleburne v. Cleburne Living Center*,[38] a decision that remarked specifically on the institutional competence of Congress to deal with disability matters. In explaining its choice for rational tier scrutiny rather than heightened scrutiny, the Court explained in *Cleburne* that rational scrutiny would provide greater flexibility for lawmakers: "How this large and diversified group is to be treated 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 uninformed opinions of the judiciary."[39] The complex nature of discrimination based on disability was a reason for the Court "not to step out in front of the legislative process in *City of Cleburne*."[40]

While these past decisions affirmed an institutional role for Congress and were easily available precedent, it was nevertheless possible to drive a wedge between Congress' institutional role in theory and how Congress exercised this role in the particular instance of Title I of the ADA. In other words, it was possible to represent the voting rights decisions as merely the presumptive

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35. Brief for Respondents, *supra* note 5, at 14 (quoting *City of Boerne*, 521 U.S. at 536 (quoting *Katzenbach v. Morgan* 384 U.S. 641, 651 (1966))); *see also* Brief for Law Professors, *supra* note 5, at 13 (citing the same passage) ("This Court has in fact gone out of its way to repeatedly underscore that '[i]t is for Congress in the first instance to determine 'whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.'") (citations omitted).

36. 528 U.S. at 81.

37. *Id.* Given the *Garrett* outcome, it is unclear what the Court means by "a somewhat broader swath of conduct," since the Court appears to be limiting Congress's power to enforce the Amendment to what is forbidden by Section 1 of the Amendment. *See infra* notes 130–32, 136 and accompanying text.

38. 473 U.S. 432 (1985) (invalidating an ordinance that used mental retardation as a classification).

39. *Id.* at 442–43. Garrett's lawyers stated with respect to disability law, that "as this Court has recognized, the legislature's superior institutional capacity" to determine remedies "is at its zenith" with respect to disability law. Brief for Respondents, *supra* note 5, at 38 (citing *Cleburne*, 473 U.S. at 443).

40. Brief for Law Professors, *supra* note 5, at 27. "[B]oth the nature of disability and the nature of discrimination based on disability are complex, and it is in these circumstances that the legislative process is particularly well suited to remediation." *Id.* at 26. See also *infra* notes 130–32, 136, and accompanying text, on defenses of the ADA that center on the special institutional competence of Congress.

starting point of the Court's Section 5 analysis, one that did not guarantee deference to Congress' conclusions. This "wedge" move, of course, is an attempt to render the voting cases fully consistent with decisions that strike down Congressional Section 5 legislation. How could Garrett's attorneys defend themselves from such a move?

The Court's definition of "relevant" evidence was crucial because the ADA faced a potential separation of powers problem like that faced by the Age Discrimination in Employment Act (ADEA) in *Kimel*.[41] In *Kimel*, the Court determined that there was insufficient evidence to justify a remedy (the ADEA) and that Congress, in providing rights under the ADEA, had usurped the judicial role of defining constitutional guarantees.[42]

Briefs supporting Garrett argued that the legislative record of the ADA easily provided the requisite level of "identified discrimination" to pass the *Boerne/Kimel* test of "congruence and proportionality"[43] and thus avoided the usurpation problem. Garrett's attorneys argued that the record supporting the ADA was the "polar opposite"[44] of that supporting the Age Discrimination Employment Act in *Kimel*.[45]

The Brief for Respondents Garrett and Ash divided the evidence into three major categories.[46] The first category was evidence of unconstitutional discrimination by state and local governmental employers.[47] The second category was evidence that identified the roots of that disability discrimination in feelings of discomfort, aversion, stigmatization, false stereotyping, and paternalism.[48] The third category was evidence gathered by Congress of disability discrimination by state and local government in areas apart from

41. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

42. *Id.* at 91.

43. City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (holding that Section 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"). The Court associated the congruence and proportionality test with the Voting Rights cases from the 1960s, although these cases did not themselves explicitly articulate such a test. *Id.* at 518.

44. Brief for Respondents, *supra* note 5, at 19.

45. The Court in *Kimel* invalidated the Age Discrimination in Employment Act on the grounds that there was no evidence of age discrimination that warranted congressional action. 528 U.S. at 89.

46. *See* Brief for Respondents, *supra* note 5, at 8.

47. *See id.* at 20–25. The brief of Morton Horwitz and others cited the underrepresentation of people with disabilities in state employment. *See* Brief for Morton Horwitz et al., *supra* note 5, at 5.

48. *See* Brief for Respondents, *supra* note 5, at 26–36.

employment (e.g., housing, education, voting, adopting/raising children, and mistreatment in state institutions).[49]

How did Garrett's attorneys and *amici* defend their expansive net of relevant evidence? First, they rhetorically buttressed it, stating that the "identified conduct" prong of the two-part test for Section 5 legislation was "straightforward in concept."[50] The Brief also attempted to rhetorically suppress any disagreement that might exist over the ADA.[51] But there were several key substantive moves that deserve note: (1) the attempt to claim as relevant evidence pertaining to cities and counties, (2) the attempt to deflect a potential rational-basis scrutiny problem, and (3) the attempt to deflect a potential "state action" problem.

1. The Attempt to Claim Relevance for Local Evidence—In an important move, Garrett's attorneys attempted to mobilize Fourteenth Amendment "state action" doctrine to support their inclusion of incidents involving cities and counties in the evidentiary record, because local governments count as "state actors" under Fourteenth Amendment state action doctrine:[52] "Congress found that employment disability discrimination by State and other public employers was, at the time of passage of the ADA, a serious and pervasive problem, rooted in deeply and widely-held prejudices regarding persons with disabilities."[53] It was important to establish the relevance of local evidence, as much of the extensive record before Congress was comprised of this sort of evidence.

Other Briefs included local actions in their discussion of "state discrimination." For example, the incidents cited by legal scholar

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49. *See id.* at 31–34. The Brief of Morton Horwitz and others similarly included evidence of state discrimination in areas outside state employment. *E.g.*, 1895 CONN. PUB. ACTS 667 (marriage); Thomas *ex rel.* Thomas v. Davidson Acad., 846 F. Supp. 611 (M.D. Tenn. 1994)(education); Boyd v. Bd. of Registrars of Voters, 334 N.E.2d 629, 632 (Mass. 1975) (voting); Bednarski v. Bednarski, 366 N.W.2d 69, 73 (Mich. Ct. App. 1985)(parenting); Coalition for Accessible Political Elections, REPORT OF THE NATIONAL VOTER INDEPENDENCE PROJECT, Feb. 1999 (inaccessible polling places and state buildings). *See* Brief for Morton Horwitz et al., *supra* note 5, at 17–22.

50. Brief for Respondents, *supra* note 5, at 13.

51. *See id.* at 10:

> There are occasions in the public life of the Nation when the evidence of pervasive public and private oppression of a group of citizens is so plain and so compelling that a consensus emerges for a national response in the form of a comprehensive federal legislative remedy—a consensus that knows no partisan political conflict, no ideological disagreement, and no Federal/State divide. The enactment of the Americans with Disabilities Act in 1990 was such an occasion.

52. *Id.* at 15. The Brief asserted, however, that "much of the evidence relates to employment discrimination by the States themselves." *Id.* at 15 n.16.

53. *Id.* at 7.

Morton Horwitz under "Case Law Establishing State-Sponsored Employment Discrimination" involved local governments (e.g., teachers and police officers).[54] Horwitz et al. also described discrimination in zoning as the action of states, although zoning ordinances are city ordinances.[55] These categorizations make sense if state action doctrine is the sorting or categorizing mechanism. But there are other sorting mechanisms, i.e., the Eleventh Amendment, as becomes clear in *Garrett*, and this sorting mechanism puts state and local action into different categories, rendering local action irrelevant.[56]

2. Attempting to Deflect a Potential Rational-Basis Scrutiny Problem— In building their evidentiary case, Garrett's attorneys might have worried about a rational basis scrutiny problem.[57] They tried to address this potential problem in two ways, namely, by appealing to the evidentiary record and by declaring certain questions unsettled.[58] They argued that Court decisions "establish that at a minimum the Equal Protection Clause forbids three categories of public conduct."[59] The first category was conduct that disfavors

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54. Brief of Morton Horwitz et al., *supra* note 5, at 6.

55. *Id.* at 12–14. *Cleburne*, for instance, involved a city ordinance. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985). The review of judicial opinions on public housing includes primarily the actions of city public housing authorities. The Brief also describes discrimination in education as state discrimination, although the vast majority of the examples cited involved cities and districts. *Id.* at 14–15.

56. *See infra* notes 100–02 and accompanying text.

57. Garrett's lawyers might have worried that the Court would identify a rational tier scrutiny problem for the ADA like the one it had identified for the ADEA in *Kimel*. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000). Employer actions based on age, like those based on disability, are given rational tier scrutiny. *See id.* at 83. And the common thinking is that all challenged action survives under rational scrutiny. In *Kimel*, the Court ruled that the ADEA prohibited action that would be constitutional under a rational tier standard and that this was prohibited. *Id.* 528 U.S. at 86. That is, the ADEA was more like "heightened scrutiny" legislation. *Id.* at 88. As in *Kimel*, the Court might perceive the ADA as "heightened scrutiny" legislation creating a gulf between the rights given under the ADA and the rights given under the Equal Protection Clause. This rational tier scrutiny problem is really a separation of powers problem because the Court is declaring that Congress has usurped its role in defining the substance of Fourteenth Amendment rights.

58. Brief for Respondents, *supra* note 5, at 16. It was unsettled if rational basis scrutiny was a question only of judicial restraint or whether it bound Congress as well. The Law Professors Brief alluded to the institutional difference between Congress and the courts when it stated that "rational basis review is not a reflection of the severity or pervasiveness of constitutional injuries, but rather of the appropriate branch of government to redress such injuries." *Id.* at 21. The *Garrett* dissenters elaborated a related institutional analysis. *See infra* notes 130–32, 136, and accompanying text. Also unsettled, according to the Respondents Brief, was the question of whether claims of disability discrimination were governed by rational basis scrutiny or by heightened scrutiny. *See* Brief for Respondents, *supra* note 5, at 16 n.18.

59. Brief for Respondents, *supra* note 5, at 15–16.

persons with disabilities that is motivated by negative attitudes or fears.[60] The second category was conduct that is irrational and/or arbitrary.[61] The third was conduct that treats such persons and similarly situated groups unequally.[62]

The potential rational basis scrutiny problem was also addressed in the Law Professors' Brief (submitted by Professors Susan Stefan, Robert Hayman, William C. Banks, Daan Braveman, Robert Burt, Erwin Chemerinsky, John Hart Ely, Martha A. Field, Sylvia Ann Law, Martha Minow, Martha I. Morgan, and Leonard Strickman).[63] The brief framed *Cleburne* strategically by emphasizing that under rational basis review, violations *can* in fact occur.[64] The professors defended the ADA by mobilizing the reasons cited in *Cleburne* for selecting rational basis standard, e.g., that the rational basis standard permits flexibility.[65] (The Court in *Cleburne* stated that it was making the rational basis finding "absent controlling congressional direction."[66]) Thus, Garrett's supporters attempted to mobilize *Cleburne* to authorize a fact-finding role for Congress and to deflect the "rational tier scrutiny" problem that hobbled the ADEA.

3. The Attempt to Deflect State Action Doctrine—Garrett's lawyers, as previously noted, tried to use state action doctrine to help their case (i.e., to argue that city and county governments counted as "state actors" and thus that evidence involving them should be considered relevant in assessing the legitimacy of the ADA as Section 5 legislation).[67] But state action doctrine posed a significant problem for the claim that the reasonable accommodation requirement of the ADA remedied and prevented Fourteenth Amendment violations.[68]

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60. *Id.* at 15 (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448–49 (1985), and Romer v. Evans, 517 U.S. 620, 635 (1996)).

61. Brief for Respondents, *supra* note 5, at 15–16 (citing *Romer*, 517 U.S. at 635, Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988), and Lindsey v. Normet, 405 U.S. 56, 79 (1972)).

62. Brief for Respondents, *supra* note 5, at 16 (citing Olmstead v. L.C., 527 U.S. 581, 613 (1999) and *Cleburne*, 473 U.S. at 439–40).

63. Brief for Law Professors, *supra* note 5, at app.1.

64. Brief for Law Professors, *supra* note 5, at 22 ("[A]s the Court's decision in *City of Cleburne* shows, the rational basis standard of review does not give States a free pass to engage in widespread invidious and arbitrary discrimination.").

65. *See id.*

66. 473 U.S. at 439–40.

67. *See supra* notes 52–53 and accompanying text.

68. *See* Brief of Morton Horwitz et al., *supra* note 5, at 5–6 (arguing that reasonable accommodation provisions were necessary given a lack of state awareness about the work capabilities of persons with disabilities). The Brief for the National Associated of Protection and Advocacy Systems and United Cerebral Palsy Associations, *Garrett*, (No. 99-1240) [hereinafter Brief for Nat'l Prot. & Advocacy Sys.], filed on behalf of Garrett, cites many state failures to provide adequate coverage, accommodation, and protection against false stereo-

Under state action doctrine,[69] state inaction, e.g., omission to act[70] or mere state acquiescence,[71] cannot be claimed as a Fourteenth Amendment violation. Garrett's lawyers did not challenge state action doctrine. They appealed to the low cost of accommodation and Congress' prerogative to adopt appropriate prophylactic legislation,[72] and argued that conduct motivated by negative attitudes and irrational fears counted as an equal protection violation.[73] The Brief of Morton Horwitz et al. classified state failures to remove architectural and communications barriers in court as a form of state discrimination,[74] without addressing the state action problem.

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types. *See* Brief for Nat'l Prot. & Advocacy Sys. at 4–7, 12–19. The Brief claims that the findings "capture the essence of what this Court has consistently defined as the violation of the Fourteenth Amendment right to the equal protection of the laws." *Id.* at 10.

69. See the *Civil Rights Cases*, 109 U.S. 3 (1883), for the first full-dress treatment of "state action" doctrine. For an important though neglected assessment of the ambiguity and open-ended nature of this case, see Charles Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967). Black's article is famous for concluding that state action cases lack analytic coherence and thus are a "conceptual disaster area." *Id.* at 95. For historical evidence that the Republican framers of the Fourteenth Amendment understood the Amendment to cover at least some kinds of state failures to act, see FRANK J. SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION 68–133 (2001). For a discussion of *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282), a lower federal court case stating that "denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection," see ROBERT KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, THE DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS (1985). So far, the Supreme Court has not accepted the evidence presented by Kaczorowski and Scaturro.

70. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

71. *See* Blum v. Yaretsky, 457 U.S. 991 (1982).

72. Brief for Respondents, *supra* note 5, at 38–48. The Law Professors Brief also defended prophylactic legislation under *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). "When 'previous legislation has proved ineffective,' broader prophylactic legislation is justified." Brief for Law Professors, *supra* note 5, at 20.

73. Brief for Respondents, *supra* note 5, at 15–16 (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448–49 (1985)).

74. Brief of Morton Horwitz et al., *supra* note 5, at 24.

B. Arguing the Untraditional Way: Challenging the Established Constitutional Landscape

The Law Professors' Brief did challenge state action doctrine. First the Brief asserted that "traditional concepts of discrimination developed in the context of race discrimination are not completely suited as a mode of analysis for people with disabilities."[75] Following this was a direct historical challenge to state action doctrine.

The Law Professors' Brief argued that the original and historical understanding of the scope of congressional power under Section 5 supported the validity of the ADA.[76] They argued that Section 5 was intended to vest Congress with plenary power to remedy state discrimination.[77] They also argued that the framers intended to vest Congress with the power to provide protection that the states fail to afford.[78] The Brief cites Republican interpretations of the Equal Protection Clause made in 1871, presumably during debate over the Ku Klux Klan Act,[79] which brought private, racially motivated deprivations of rights under the direct reach of federal prosecution: "A state denies equal protection where it fails to give it. Denying includes inaction as well as action."[80] And furthermore:

> It is said that the States are not doing the objectionable acts. This argument is more specious than real. Constitutions and laws are made for practical operation and effect .... What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislations of a State?[81]

The handful of statements cited in the Law Professors' Brief have never "won" institutionally. The Supreme Court struck down

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75. Brief for Law Professors, *supra* note 5, at 25. *See also* Brief for Respondents, *supra* note 5, at 39 (arguing that the "nature and dimension" of disability discrimination "does not bow to a simple general anti-discrimination command").

76. Brief for Law Professors, *supra* note 5, at 3.

77. *Id.* at 4–8.

78. *Id.* at 8 ("The record before the Thirty-Ninth Congress was replete with instances not merely of official acts of discrimination against the freedmen, but of official failures to prevent or remedy 'private' acts of oppression, perpetrated under the watch of indifferent state officials, or with their acquiescence or active support.").

79. Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13 (1871).

80. *Id.* at 9 (citing CONG. GLOBE, 42d Cong., 1st Sess. 501 (1871) (statement of Sen. Frelinghuysen)).

81. *Id.* at 10 (citing CONG GLOBE, 43d Cong., 1st Sess. 412 (1871) (statement of Rep. Lawrence)).

a key section of this Act as unconstitutional under the Fourteenth Amendment in *United States v. Harris.*[82]

The Law Professors' Brief did not challenge the historical basis of the formal equality (anti-differentiation) model of equal protection, but this doctrine might also be challenged on such grounds.[83]

The doctrine of state sovereign immunity might have been challenged as well. Many legal scholars assert that this doctrine is unsupported by history or text.[84] The legal criticism of *Hans v. Louisiana* (1890), the decision that first established this doctrine, is surprisingly uniform (surprising, that is, given the division among Fourteenth Amendment scholars). Justice Brennan launched a critique of this Eleventh Amendment doctrine in his dissenting opinion in *Atascadero v. Scanlon.*[85] According to Brennan, the settled view of *Hans* was wrong: the Eleventh Amendment was simply a diversity restriction and did not apply to federal question jurisdiction; the doctrine of state sovereign immunity articulated in

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82. 106 U.S. 629, 637 (1883). *Harris* held Section 5519 of the Revised Statutes, ch. 7, § 5519, 18 Stat. 1067, 1070 (1878), unconstitutional, which had made it a criminal offense for two or more persons in a state or territory to conspire to deprive any person of the equal protection of the laws of the State. Section 5519 was originally part of Section 2 of the Act of April 20, 1871. *See Harris*, 106 U.S. at 629; *see also* United States v. Guest, 383 U.S. 745 (1966); United States v. Cruikshank, 92 U.S. 542 (1875) (involving an indictment under Section 6 of the Act of 1870, which in general brought private violations of Fifteenth Amendment rights within direct reach of the federal government). For arguments that Republicans understood and/or intended the Fourteenth Amendment to cover at least some kinds of state failures to act, see KACZOROWSKI, *supra* note 69, and SCATTURO, *supra* note 69.

83. Scholars generally trace the notion of colorblindness to Justice Harlan's famous comment, "[o]ur constitution is color-blind," in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). For an argument that two readings of this comment are possible, an anti-differentiation interpretation and an anti-caste interpretation, see T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism and Citizenship*, 1992 U. ILL. L. REV. 961; *see also* GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 94–95 (Teachers Manual, 1997); ANDREW KULL, THE COLORBLIND CONSTITUTION (1992).

84. *See, e.g.*, CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972); JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES (1987); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61 (1984); *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 98–185 (1996) (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting); Atascadero v. Scanlon, 473 U.S. 234, 247–302 (1985) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting).

85. 473 U.S. 234 (1985).

Hans was not grounded on text, history, or essential principles of the Constitution.[86]

In his *Seminole Tribe* dissent, Justice Souter elaborated on Brennan's argument. Like Brennan, Souter argued that the Eleventh Amendment did not constitutionalize the doctrine of sovereign immunity, a common law doctrine dating back to the 1300s, and that states surrendered sovereign immunity (at least as to federal question cases) in acceptance of the constitutional plan.[87]

Such historical challenges are not consigned forever to defeat. Things can change. More justices like Souter might arrive on the Court. Or law students (who become judicial clerks and judges) might come to get wider exposure to legal scholarship that questions the historical basis for Fourteenth Amendment and Eleventh Amendment doctrine. There have been instances where the legal academy has imported "regular" academic history that has undercut official court history, at least in law schools. Eric Foner's history of Reconstruction became the standard history in the 1980s and was transported into law schools via the Fourteenth Amendment legal scholarship of scholars such as Akhil Reed Amar, Robert Kaczorowski, Michael Kent Curtis, and Richard L. Aynes.[88]

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86. *Id.* at 247–302. There is also a great deal of oddness to Eleventh Amendment doctrine that renders it suspect in the view of many scholars. For example: (1) states cannot consent to a suit under Article III but can under the Eleventh Amendment, *see* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 527 (3d. ed. 2000); (2) judicial power under Article III cannot be expanded by consent of the parties, but the Eleventh Amendment, despite identical language, has been interpreted to allow suit if a state consents, *see id.*; (3) state action under the Eleventh Amendment is much narrower than state action under the Fourteenth Amendment, *see id.* at 535, 557; and, (4) the Supreme Court routinely reviews state court decisions involving claims against states for damages that raise federal questions, yet there is no original jurisdiction in federal courts for the same claim.

87. *Seminole Tribe*, 517 U.S. at 150–59. Alexander Hamilton is quoted in both the majority and dissenting opinions in *Seminole Tribe*. *See id.* at 54, 70, 142–50; *see also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 263–80 (1985), (Brennan, J., dissenting). While the majority quotes only the first sentence of Hamilton's statement below, *see Seminole Tribe*, 517 U.S. at 54, Souter's dissenting opinion provides the statement in its entirety, emphasizing Hamilton's point that states surrendered immunity (as to federal question cases) when they adopted the Constitution:

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal.

Id. at 144 (quoting THE FEDERALIST NO. 81, at 548–49 (Alexander Hamilton) (J. Cooke ed., 1961)).

88. *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (1986); KACZOROWSKI, *supra* note 69; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment* 101 YALE L.J.

The boundaries between the "regular" academic disciplines, the legal academy, and the federal courts have been permeable in some instances.[89] These spheres are not hermetically sealed. Understanding the nature and conditions of that permeability remains a sociological challenge. If this untraditional, historically-based style of argument is ever to be successful, it likely will be when Newtonian conceptions of Court legitimacy,[90] under threat since the 1930s, have been displaced.[91] Inquiries into the nature and conditions of permeability between academic disciplines, the legal academy, and constitutional law are much needed. We need to understand how established constitutional contexts have been changed via interchange with the academic disciplines and the legal academy. We also need to understand how that interchange might help establish particular contexts in the first place.

Studies in the sociology of constitutional law would help address the question of how attempts to defend congressional authority to pass the ADA came to be so constrained. Such studies, while contributing to knowledge about the U.S. constitutional system, might themselves become resources in legal argumentation.

C. The Garrett Majority

We turn now to the Court's response to the arguments of Garrett's lawyers (the Court ignored the historical challenge to state action). While Garrett's attorneys sought to cast as wide an evidentiary net as possible, it became immediately clear that the ADA faced an evidentiary problem (a Section 5/separation of powers problem) when the Court confirmed "the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."[92] Ultimately the

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1193 (1992); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627 (1994).

89. For examples, see the Court's reference to the Brandeis Brief in *Mueller v. Oregon*, 208 U.S. 412, 419 (1908), and the use of social science in *Brown v. Board of Education*, 348 U.S. 886 (1954). Court references to law review articles are also not unusual. For an example, see *Bush v. Vera*, 517 U.S. 952 (1996).

90. *See* Michael Kammen, A Machine That Would Go of Itself: the Constitution in American Culture (1986).

91. *See* Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30 (1993).

92. Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001) (citing *City of Boerne*, 521 U.S. at 519–24).

Garrett Court concluded that "the legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of *irrational state* discrimination in *employment* against the disabled."[93] In finding that the record lacked the requirements of irrationality and state action and included areas beyond employment, the Court essentially deemed irrelevant large portions of the evidentiary record that Garrett's lawyers sought to include. This was accomplished using established elements of the constitutional landscape.

Table 1 represents this paring process. An extended discussion of Rehnquist's opinion along with relevant citations follows a narrative summary of Table 1.

93. *Id.* at 368 (emphasis added).

TABLE 1

PRO-GARRETT BRIEFS	*Garrett* MAJORITY'S PARING TOOLS: 11TH AND 14TH AMENDMENT DOCTRINE
Evidence of discrimination by state and local government.	Only discrimination by *states* is relevant since only states have 11th Amendment immunity. Cities and counties enjoy no 11th Amendment immunity from lawsuits.
Evidence of discrimination by state government in employment, housing, education, voting, sterilization laws, inaccessible polling places, public services, public accommodations, etc.	Only discrimination in *employment* (Title I) is relevant. Discrimination in employment cannot be inferred from discrimination in other areas. Harsh sterilization laws are no longer in effect. Public services are covered under Title II. Public accommodations are covered under Title III. "No party has briefed the question of whether Title II of the ADA, dealing with the 'services, programs, or activities of a public entity' is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject."
Evidence of discrimination in state employment including failures to provide reasonable accommodation.	Failure to provide reasonable accommodation is state *in*action; only state *action* is covered by the 14th Amendment. Disability classifications receive only rational scrutiny, and it is "entirely rational. . .to conserve scarce financial resources by hiring employees who are able to use existing facilities."
Evidence of discriminatory action in state employment rooted in animus, thoughtlessness, and insensitivity.	Only *animus* defines discrimination under the 14th Amendment (disparate treatment doctrine). Thoughtlessness and insensitivity are not actionable.
Evidence of state action in employment motivated by animus.	Only *official, legislative findings* count; cited instances are "unexamined" and "anecdotal."

Row 1 identifies the broadest possible net of evidence (evidence of discrimination by state and local government) and Chief Justice Rehnquist's use of the Eleventh Amendment to "pare out" evidence of city and county government. Row 2 identifies the next broadest possible net of evidence after city and county actors have been excluded (evidence of state discrimination in a variety of areas including employment and voting, along with discrimination in public accommodations) and Rehnquist's "paring" of most of this evidence except that pertaining to state employment. Row 3 identifies the next broadest possible net of evidence after Rehnquist has excluded evidence in non-employment areas and in public accommodations (evidence of discrimination in state employment including failures to provide reasonable accommodation. Here, the important move is the attempt to claim state failures to provide reasonable accommodation as an equal protection violation). After Rehnquist nullifies this move with state action doctrine and a definition of rational action, Row 4 represents the next broadest possible net of evidence: state action in employment rooted in animus, fear, and insensitivity. After Rehnquist uses disparate treatment doctrine to "pare out" all except animus-based action, what is left is represented in Row 5 (evidence of state action in employment motivated by animus). Even this evidence is subject to exclusion, for Rehnquist concludes that only official findings are relevant and that "anecdotal" evidence must be discounted.[94]

To summarize, the majority cited Eleventh Amendment doctrine in categorizing evidence of city and county discrimination as irrelevant.[95] The majority referred to Fourteenth Amendment state action doctrine in making evidence of "the failure to act or the omission to remedy" inconsequential.[96] Rational basis scrutiny worked to dismiss evidence where accommodations had not been provided. The Court declared it rational to "conserve scarce financial resources by hiring employees who are able to use existing facilities."[97] The Court used disparate treatment doctrine (ani-

94. *Id.* at 370.

95. They stated that cities and counties:

> are subject to private claims for damages under the ADA without Congress' ever having to rely on [Section] 5 of the Fourteenth Amendment to render them so. It would make no sense to consider constitutional violations on their part, as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment.

Id. at 368–69.

96. *Id.* at 375 (Kennedy, J., concurring); *see also id.* at 367–68.

97. *Id.* at 372.

mus/intent) to render evidence of prejudice arising from insensitivity, thoughtlessness, or insecurity, inconsequential.[98]

Other paring tools were used as well, such as demands of proof and the unwillingness to infer discrimination in one area (employment) from evidence in other areas. What follows is a more extended discussion of this paring process.

1. Limiting "Relevant" Action to That of States—Regarding the first issue (the classification of local action as state action) the majority agreed with Garrett's lawyers that the city and county actions were "state action" for the purposes of the Fourteenth Amendment.[99] But this, the majority stated, was not relevant in the present Eleventh Amendment context.[100] The majority argued that it made "no sense to consider constitutional violations on their part" because cities and counties could be sued under the ADA without any special Section 5 authorization, since they do not enjoy Eleventh Amendment immunity.[101] Because Section 5 abrogation of state immunity was at issue, relevant evidence was limited to only those actions opened to suit by such abrogation.[102]

2. Limiting "Relevant" Action to That of States in Employment—Once the majority limited relevant evidence to that which concerned states, it could easily dismiss much of the record assembled by Congress and cited in the Briefs supporting Garrett. The Court also discounted historical evidence of egregious state discrimination, arguing that such practices had ceased. In footnote 6, the Court acknowledged that states in the early part of the twentieth century adopted the tenets of the eugenics movement and enacted sterilization laws—laws that were upheld by the Supreme Court itself in 1927.[103] But the majority endorsed the position of the University of Alabama,[104] stating "there is no indication that any State

98. *Id.* at 372–74; *see also id.* at 374–76 (Kennedy, J., concurring).

99. *See id.* at 368–70.

100. *Id.* (citing Brief for Respondents, *supra* note 5, at 8).

101. *Id.* at 368–70.

102. In his dissenting opinion, Justice Breyer rejected this argument, noting that "[l]ocal governments often work closely with, and under the supervision of, state officials .... Nor is determining whether an apparently 'local' entity is entitled to Eleventh Amendment immunity as simple as the majority suggests—it often requires a 'detailed examination of the relevant provisions of [state] law.'" *Id.* at 378 (Breyer, J., dissenting) (alteration in original) (citations omitted).

103. *Id.* at 369 n.6 (citing Buck v. Bell, 274 U.S. 200, 208 (1927)); *see also* Brief of Morton Horwitz et al., *supra* note 5, at 9, 15–17.

104. Brief for Petitioners, *Garrett* (No. 99-1240), 32–33, 37.

had persisted in requiring such harsh measures as of 1990 when the ADA was adopted."[105]

Rehnquist also excluded evidence pertaining to public services and public accommodations.[106] Such evidence, in Rehnquist's view, said nothing about the likelihood of discrimination in state employment. This unwillingness to infer discrimination in employment from evidence of discrimination in other areas is important to note.[107]

It is also important to note that the Complaints in this consolidated case alleged violations of both Title I and Title II of the ADA.[108] Garrett's attorneys argued that state employees might sue their employers for damages under both Title I and Title II.[109] The Court, however, declined to rule on the "constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under [Section] 5 of the Fourteenth Amendment."[110] The reason was that "no party ha[d] briefed the question whether Title II of the ADA, dealing with the 'services, programs, or activities of a public entity,' is available for claims of employment discrimination when Title I of the ADA ex-

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105. *Garrett*, 531 U.S. at 359 n.6.

106. Rehnquist stated:

> Only a small fraction of the anecdotes Justice Breyer identifies in his Appendix C relate to state discrimination against the disabled in employment.... The overwhelming majority of these accounts pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA.

Id. at 371 n.7. The Court limited the issue in *Garrett* to the Title I claims of Garrett and Ash even though Garrett's lawyers made both Title I and Title II claims. *Id.* at 360 & n.1.

107. *See infra* Part I.C.5.

108. For a description of elements of the Complaints, see Brief for Respondents, *supra* note 5, at 1–6, particularly notes 5 and 6 concerning Title II. Title I deals exclusively with employment and covers private, state, and local governmental employers. It requires reasonable accommodation, which includes making existing facilities used by employees readily accessible and usable. 42 U.S.C. §§ 12111–12117 (1994). Title II prohibits discrimination against people with disabilities by public entities with respect to any of their programs, services, or activities. It applies to many areas in addition to employment. 42 U.S.C. §§ 12131–12165 (1994).

109. *See* Brief for Respondents, *supra* note 5, at 6 (relying on the Attorney General's understanding that Title II applies to employment practices of public employers: "In the case of employment, the Attorney General—who is charged in § 12134 with responsibility for promulgating regulations to implement Title II—has issued a regulation declaring that, insofar as the titles overlap (i.e., in their coverage of employment discrimination by public employers of 15 or more employees), Title II's substantive provisions are to be interpreted in haec verba with Title I's substantive provisions.") (citing 28 C.F.R. 35.140); *see also id.* at 6 n.5 (citing the Eleventh Circuit, which shared this understanding).

110. Garrett, 531 U.S. at 960 n.1.

pressly deals with that subject [citation omitted]."[111] The Court's refusal to include Title II claims was significant because it worked as another paring device. The exclusion of evidence involving public accommodations worked to further cut down the evidence regarded as relevant.

3. Limiting "Relevant" Evidence to Irrational Action in State Employment—Once relevant evidence was limited to the area of state employment, the requirement of irrationality was the next paring tool. Rehnquist cited the requirement of "irrationality" to argue that the desire to conserve money is rational, and that this justifies a refusal to provide accommodations. "Several of these incidents undoubtedly evidence an unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA. Whether they were irrational under our decision in *Cleburne* is more debatable, particularly when the incident is described out of context."[112] According to Rehnquist, the cost of accommodations made it "entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities."[113] Even with the "undue burden" exception of the ADA,[114] "the accommodation duty far exceeds what is

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111. *Id.* The Supreme Court noted the disagreement among the Courts of Appeal on the question of whether state employees may sue for damages under Title II, and dismissed that portion of the writ of certiorari that dealt with this question as "improvidently granted." Id. It is unclear if the Supreme Court simply rejects the view of the Attorney General and Eleventh Circuit, or if the Court's reference to the "somewhat different remedial provisions" of the titles supplies grounds for distinguishing the titles. (Title I is enforced pursuant to the remedial scheme of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 12117(a) (1994). Title II is enforced pursuant to the remedial scheme of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 12133 (1994)).

112. *Id.* at 370.

113. *Id.* at 376. Garrett's attorneys had argued that the cost of accommodation was "often minor" and cited the Congressional finding that "many typical accommodations can be provided for under $50." Brief for Respondents, *supra* note 5, at 45. They also tried to argue that prejudice, not cost, underlay many if not most accommodation refusals:

> Given the pervasiveness of prejudice against persons with disabilities, when a state actor fails to do what a civilized and decent society expects, and cites costs that are not an undue hardship as the ground for rejecting the applicant who would otherwise be most qualified, there is every reason to conclude that prejudice and not cost underlies the refusal.

Id. at 46 (citation omitted).

114. The ADA exempts employers from the "reasonable accommodation" requirement where the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 121112(b)(5)(A) (1994).

constitutionally required."[115] The Court, then, used a definition of rational that would be sensitive to even the smallest of cost-saving accommodation refusals.[116]

4. Limiting "Relevant Evidence" to Irrational Action in State Employment Motivated by Animus—The animus requirement of disparate treatment doctrine was yet another paring tool. A concurring opinion by Justice Kennedy, joined by Justice O'Connor, explicitly discusses prejudice against people with disabilities: "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. . . . There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will."[117] Indeed, disability activists have long explained how architectural barriers and the like are the product of thoughtlessness, not animus. But Kennedy and O'Connor then cite the "intent" standard of equal protection to lessen the constitutional weight of non-animus based action: "The failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause."[118] With the invocation of disparate treatment doctrine, very little was left of the evidence Garrett's attorneys initially sought to include.

5. Limiting "Relevant Evidence" to Irrational Action in State Employment Confirmed by Official Findings—Even then, Rehnquist challenged the validity of evidence that had emerged as yet unscathed. Addressing the handful of incidents cited in Breyer's Appendix C[119] dealing with state employers, Rehnquist argued that "Appendix C consists not of legislative findings, but of unexamined, anecdotal accounts of 'adverse, disparate treatment by state officials.' "[120]

This demand for a very tight fit between remedy and evidence is reminiscent of *City of Richmond v. J.A. Croson Co.*, in which the Court struck down a set-aside plan in city construction contracts.[121] Justice Marshall, in his dissenting opinion (joined by Justices Brennan and Blackmun), argued that proof of race discrimination

115. *Garrett*, 531 U.S. at 372.

116. *See id.* at 373–74.

117. *Id.* at 374–75 (Kennedy, J., concurring).

118. *Id.* at 375 (citing Washington v. Davis, 426 U.S. 229 (1976)).

119. Breyer's Appendix C listed about 500 submissions made by individuals to the Task Force on Rights and Empowerment of Americans with Disabilities. *Id.* at 390–424.

120. *Id.* at 370.

121. 488 U.S. 469 (1989).

in the national construction industry, in Richmond housing, voting, and school desegregation, and in uncontradicted testimony of discrimination in Richmond construction, warranted the conclusion that race discrimination existed in the local construction industry.[122] The majority opinion rejected Marshall's conclusion and demanded proof of discrimination in the local construction industry. According to Justice O'Connor, writing for the majority, there was no reasonable basis for inferring discrimination.[123]

O'Connor labeled Marshall's evidence as merely that of "societal discrimination" which was too amorphous to justify a remedy.[124] (The phrase "societal discrimination" came to be used as a rhetorical tool as early as *Bakke v. University of California Regents*,[125] where Justice Powell rejected Brennan's appeal to societal discrimination as a justification for affirmative action plans.[126]) For Marshall, if court cases established that people in Richmond used anti-black sentiments in housing, voting, and school desegregation, and if anti-black sentiments were proven to exist in the national construction industry, it was more than likely that such sentiments existed in Richmond's local construction industry. O'Connor, though, held a different view of race (race-as-culture) which led her to believe that group distributions in jobs were the result of skill sets and voluntary choices.

Garrett's attorneys had argued that the nationwide scope of disability discrimination justified the ADA,[127] and they coupled this with a claim that the nature of prejudice against people with disabilities justified an inference that these attitudes existed in state employment across the nation. "The prevalence of disability prejudice that Congress found knows no geographic bounds .... It was more than reasonable for Congress to conclude that the prophylactics in the ADA should have nationwide application."[128]

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122. *Id.* at 530–48.

123. *Id.* at 498–506. O'Connor asserted that there was no reason to assume that minorities would enter the trades in lockstep proportion to their number in the population. For a critique of O'Connor's "race-as-culture" conception, see Reva Siegel, *The Racial Rhetoric of Colorblind Constitutionalism: The Case of* Hopwood v. Texas, *in* RACE AND REPRESENTATION 29–72 (Robert Post & Michael Rogin eds., 1996).

124. 488 U.S. at 504, 505.

125. 438 U.S. 265 (1978).

126. *Id.* at 295 n.34, 297 n.36.

127. Respondents cited *Oregon v. Mitchell*, 400 U.S. 112, 147, 216, 236, 283–84 (1970), where eight Justices concluded that it is within Congress' Section 5 power to enact nationwide prophylactic provisions where the evidence before Congress suggests that a problem is widespread, even though Congress lacks specific evidence that every State has or is likely to engage in unconstitutional behavior. *See* Brief for Respondents, *supra* note 5, at 49.

128. Brief for Respondents, *supra* note 5, at 49.

Justice Breyer accepted this argument in his dissenting opinion.[129] In his opinion, Justice Breyer criticized the majority for imposing on Congress the kinds of strict evidentiary requirements that were appropriate only for courts. It was a matter of institutional difference.[130] According to Breyer: "There is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its § 5 authority, to adopt rules or presumptions that reflect a court's institutional limitations."[131] Drawing on precedent from the voting rights cases and distinguishing between the institutional competence of Congress and that of the courts, Breyer argued that Congress could have reasonably concluded that discrimination in state employment was a problem.[132]

Rehnquist responded to Breyer's institutional analysis by calling his inference of discrimination "unwarranted."[133] Rehnquist asserted that Congress never made a conclusion that discrimination by state employers was a problem. He stated that "[a]lthough Justice Breyer would infer from Congress' general conclusions regarding societal discrimination against the disabled that the

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129. Univ. of Ala. v. Garrett, 531 U.S. 356, 378 (2001) (Breyer, J., dissenting):

> The powerful evidence of discriminatory treatment throughout society in general, including discrimination by private persons and local governments, implicates state governments as well, for state agencies form part of that same larger society. There is no particular reason to believe that they are immune from the "stereotypic assumptions" and pattern of "purposeful unequal treatment" that Congress found prevalent.

130. Post and Siegel articulate a similar institutional critique of the Court. *See* Post & Siegel, *supra* note 19.

131. *Garrett*, 531 U.S. at 384. Breyer continued:

> Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy. . . . Unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification. . . .
>
> . . . [U]nlike judges, Members of Congress are elected. . . . [W]e, *i.e.*, the courts, do not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." To apply a rule designed to restrict courts as if it restricted Congress' legislative power is to stand the underlying principle—a principle of judicial restraint—on its head.

Id. at 384–85 (citations omitted).

132. "In reviewing § 5 legislation, we have never required the sort of extensive investigation of each piece of evidence that the Court appears to contemplate." *Garrett*, 531 U.S. 356 at 380. Breyer cites *Katzenbach*, which asked "whether Congress' likely conclusions were reasonable, not whether there was adequate evidentiary support in the record." *Id.* (citing Katzenbach v. Morgan, 384 U.S. 641, 652–56 (1966)).

133. *Id.* at 372.

States had likewise participated in such action . . . the House and Senate committee reports on the ADA flatly contradict this assertion."[134] According to Rehnquist, these reports proved that discrimination in *private* sector employment, public services, and public accommodations were the main problem, not discrimination in state employment.[135]

While Garrett lost, it is important to recognize that the legal landscape did not foreclose an institutionally plausible defense. By "institutionally plausible" I mean arguments that draw on conventional legal resources, such as precedent and legislative history. The problem for Garrett's attorneys was *not* an utter lack of conventional resources. The problem was that their mobilization of conventional resources was premised on a set of norms for Section 5 jurisprudence that was rejected by a majority of the Court. These rejected Section 5 practices were tied to the view that there are important institutional differences between the legislative branch and the judicial branch.[136] The majority's Section 5 norms, however, did not permit Congress greater leeway than the courts in interpreting evidence. The result was that the legal resources gathered by Garrett's lawyers looked weak and inapposite.

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134. *Id.* at 371.

135. The Court cited a conclusion of the Senate Committee on Labor and Human Resources: " 'Discrimination still persists in such critical areas as *employment in the private sector*, public accommodations, public services, transportation, and telecommunications.' " *Id.* (citing S. REP. No. 101–116, at 6 (1989)). The Court also cited a similar conclusion of the House Committee on Education and Labor. *Id.* at 371–72 (citing H.R. REP. No. 101-485, pt. 2, p. 28 (1990)).

136. *See* Post & Siegel, *supra* note 19; *see also* Brief for Law Professors, *supra* note 5, at 21 ("Rational basis review is not a reflection of the severity or pervasiveness of constitutional injuries, but rather of the appropriate branch of government to redress such injuries.") (emphasis omitted). This institutional critique by Post and Siegel (and the Garrett dissenters) easily looks right. But the contexts in which this set of norms was/is articulated should be kept in mind. The first context is a progressive Court justifying progressive congressional legislation, i.e., *Katzenbach v. Morgan*. The second context is a progressive Court minority seeking to uphold progressive congressional legislation, i.e., *Garrett*. It is unclear if a progressive Court majority assessing the legislation of a conservative Congress would articulate the same norms of judicial restraint and deference to legislatures. Thus, it is unclear if Post, Siegel, and the Garrett dissenters would remain convinced of the correctness of this institutional analysis if the ideological compasses of the Congress and the Court were spun differently.

II. THE LEGAL LANGUAGE OF EQUALITY AND RIGHTS AND THE "RULES OF THE GAME"

Part II of this Article shifts gears and turns to the pre-*Garrett* disability literature. The language of equality, rights, and discrimination appears frequently in this literature. This language is used in the articulation and defense of Fourteenth Amendment rights for people with disabilities.

As noted, the social model of disability, tied to a theory of justice, was actively forwarded by disability rights advocates in the 1960s, 1970s, and 1980s. Advocates succeeded in gaining passage of the Rehabilitation Act of 1974.[137] However, the early application of the social model of disability in the Rehabilitation Act of 1974 is different in a number of ways from its application in a constitutional context. For example, the 1985 decision *Alexander v. Choate*,[138] which upheld reasonable accommodations under the Rehabilitation Act of 1974, might look to suggest that reasonable accommodations are also required under the Fourteenth Amendment. However, this is not inevitably so, as Fourteenth Amendment doctrine imposes much tighter constraints on claims than the stautory provisions of the Rehabilitation Act. Further, it may be noteworthy that the length of time in which things can change is much shorter in law than in social theory and philosophy.[139] The year 1985 might look recent or current to a social theorist, though it may be outdated in law.

As stated earlier, variation exists in the way disability scholars portrayed the constitutional context in the pre-*Garrett* literature. This variation appears to track, to some extent, the institutional training of contributors to this literature. In the first group are disability scholars trained in philosophy, social theory, and political science. These scholars, such as Harlan Hahn[140] and Anita Silvers,[141] use the language of constitutional law (e.g., equal protection and the Fourteenth Amendment) in making equality and rights claims. Significantly, they tend to treat these claims as derived directly from the established constitutional context. They tend not to

137. Pub. L. No. 93-112, 87 Stat. 355, 357 (1973) (current version at 29 U.S.C. § 701 (1998)).

138. 469 U.S. 287 (1985).

139. Thanks to Doug Dow for this observation.

140. Harlan Hahn, Accommodations and the ADA: Unreasonable Bias or Biased Reasoning, 21 BERKELEY J. EMP. & LAB. L. 166 (2000).

141. *See infra* notes 160–66, 177–79, 181–82, 186, 188–91 and accompanying text.

identify nondiscrimination law as a potential obstacle to certain kinds of claims under the ADA.[142]

In contrast, professors of law[143] tend to discuss the limitations of traditional civil rights law and the difficulties imposed in a post-*Croson* legal context. For example, Matthew Diller states that the ADA relies on especially controversial notions of equality, and as a result, "people with disabilities find themselves on the front lines of a legal and cultural war."[144] Diller's work is notable in that it consistently uses phrases such as "conceptions of equality" and "visions of equality."[145] These phrases make clear the contested definitions of this crucial term. Patricia Illingworth and Wendy Parmet[146] explain that the ADA is a hybrid statute, melding positive and negative rights. Diller, Illingworth, and Parmet are characteristic members of this group in identifying the "limitations of the civil rights model"[147] and the hurdles inherent in the established legal context, e.g., the "equal-opportunity-as-negative-rights model represented by Title VII."[148] In general, law professors tend to show greater awareness that the social model of disability cannot be translated in its entirety into the established idiom of constitutional law.

Tort law is a different matter. It is worthwhile to note that a classic article in the disability legal literature by Jacobus tenBroeck was concerned primarily with common law, e.g., negligence and liability and the duty of care owed by common carriers, not constitutional law.[149] In an article spanning 79 pages, tenBroek makes about five references to the U.S. Constitution,[150] including one specific assertion that the right to bring guide dogs into places of public accommodation and onto common carriers "[u]ltimately . . . may be seen as a mandate of the equal protection clause of the fourteenth amendment."[151] tenBroek wanted the rights secured by the Civil Rights Act of 1964 extended to people with disabilities,

142. *See infra* Parts I.A.1–I.A.3, Part I.C.

143. There are law professors such as Robert Burgdorf, *supra* note 7, whose work bears the features of both groups.

144. *See* Diller, *supra* note 18, at 44.

145. *Id.* at 40, 42, 47.

146. Patricia Illingworth & Wendy E. Parmet, *Positively Disabled: The Relationship between the Definition of Disability and Rights under the ADA*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS, *supra* note 9, at 3–17.

147. Diller, *supra* note 18, at 37–47.

148. Illingworth and Parmet, *supra* note 146, at 8.

149. *See* tenBroek, *supra* note 9.

150. *Id.* at 848, 850, 858, 859, 918.

151. *Id.* at 859.

and he asserted that "integrationism, . . . a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so . . . is now, and for some time has been, the policy of the nation."[152]

Subsequent authors have taken selectively from tenBroek's article. Francis and Silvers cite a handful of statements about the law, legal rights, and integration as the policy of the nation, although they do not explain that the rights tenBroek claimed were considerably more narrow than the rights claimed in their edited collection.[153] Peter David Blanck cites tenBroek's assertion of "integrationalism" as national policy.[154] Robert Burgdorf states, "tenBroek posited that people with disabilities have a constitutional right to freedom of movement and argued that artificial barriers that keep such individuals from moving throughout society are illegal."[155] For support, Burgdorf cites a passage from tenBroek's *The Right to Live in the World*, "noting denial of equal access to public places is unconstitutional as well as socially and morally wrong."[156] All of these articles misrepresent the handful of statements tenBroek made about constitutional law as his inquiry almost exclusively concerns tort law (e.g., his question is: "Has the law of torts been redirected and remolded according to the prescriptions of the [integration] policy?").[157] My point is not to argue against tenBroek's statements about constitutional law. It is only to observe that the current attempt to authorize tenBroek's article involves suppressing the fact that tenBroek's main concern was tort law, not constitutional law.

In examining a segment of pre-*Garrett* scholarship, my goal is to treat it as a form of *work*.[158] Like any kind of work, the work of each group involves cognitive habits, modes of persuasion, modes of competition, and hierarchies of prestige.

It is a larger project to examine the effectiveness of disability activists' social theory in the constitutional realm. As already mentioned, it is vital to investigate the boundaries between "regular" academic disciplines, the legal academy, and the federal

152. *Id.* at 843.

153. *See* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS, *supra* note 9, at xii–xiv.

154. Peter David Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109, 215 (2001).

155. Burgdorf, *supra* note 7, at 514 (citing tenBroek, *supra* note 9, at 849–50).

156. Burgdorf, *supra* note 7, at 514 n.550.

157. tenBroek, *supra* note 9, at 847.

158. *See* Brandwein, *Disciplinary Structures*, *supra* note 2, for a treatment of law and courts scholarship in the academic discipline of political science as a form of work.

courts. These spheres are not hermetically sealed, but their relationship remains poorly understood. We need to understand how established constitutional contexts have been changed via interchange with the academic disciplines and the legal academy. We need, too, to understand how that interchange might help establish particular contexts in the first place. It is certainly possible that the social theory of activists might have greater impact on future constitutional cases than it has had on cases of the recent past.

*A. Pre-*Garrett *Discourse on Constitutional Rights in the Disability Literature*

This section offers an in-depth examination of the constitutional language of two high-profile academics in the pre-*Garrett* literature, Robert Burgdorf and Anita Silvers, a law professor and a philosopher, respectively. Both use the legal language of equality, rights, and equal protection in their pre-*Garrett* work. They are representative in presenting a constitutional claim to reasonable accommodation for people with disabilities as a claim to legal equality.

1. Translating the Social Model of Disability into the Idiom of Constitutional Law—Robert Burgdorf explicitly uses language from the social model of disability in presenting a conceptual foundation for a right to reasonable accommodation. That is, he uses the language of integration, full participation, a spectrum of abilities, the role of context in determining impairment, the need for flexibility in structuring tasks and programs, and the construction of environments according to the needs of "normal" users.[159]

Silvers uses the social model of disability as well. She describes the ADA as "making the equal protection guaranteed to citizens by the U.S. Constitution's Fourteenth Amendment meaningful to individuals" with disabilities.[160] She refers to "social arrangements,"[161]

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159. Burgdorf, *supra* note 7, at 513–24.

160. Anita Silvers, *Disability Rights*, *in* ENCYCLOPEDIA OF APPLIED ETHICS 781, 789 (Ruth Chadwick ed., 1998); *see also* SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION, *supra* note 7, at 120 ("The ADA constitutes an attempt to make the equal protection guaranteed to citizens by the U.S. Constitution's Fourteenth Amendment meaningful to individuals" with disabilities.).

161. SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION, *supra* note 7, at 15, 34, 76; Silvers, Disability Rights, *supra* note 160, at 786, 789–90.

"exclusionary circumstance" and past practice,[162] the actions of "the nondisabled majority,"[163] and the "artificial" disadvantage and inequality imposed by society[164] that exclude and bar people with disabilities.

In all these references, state and private action are grouped together. The state is merged with private society. In the constitutional context, however, a distinction between state and private action has been long established. Silvers does not acknowledge this state action problem.[165]

The problem, in short, is that the social model of disability conflates state and society.[166] This might be less important in the institutional context in which the social disability model was developed. But it is highly important in the constitutional law and policy contexts in which the model is now applied. The boundaries of the state certainly may be contested in a theoretical way. However, once legal argument is entered, the tremendous ramifications of such a move must be addressed.

2. On Equality and Discrimination—Robert Burgdorf, an attorney and major figure in the disability legal literature, uses the language of equality and discrimination in casual ways. For example, he uses the terms equal and equality in different senses without flagging their shifting usage and without noting that one of his definitions is at odds with traditional conceptions. Compare two statements: "Nondiscrimination is a guarantee of equality"[167]

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162. Silvers, *Disability Rights*, *supra* note 160, at 786; *see also* SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION, *supra* note 7, at 35.

163. Silvers, *Disability Rights*, *supra* note 160, at 789.

164. *Id.* at 786, 789; SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION, *supra* note 7, at 14.

165. *See supra* notes 69–71.

166. In her discussion of rights, Silvers does not distinguish between those held against state/public actors and those held against private actors:

> Claims made by and for persons with disabilities as to their rights arrange themselves in two broad categories, each with its own history and each reflecting a different model of disability. Into the first category fall rights assigned to compensate impaired individuals for their natural disadvantages. In contrast, rights encompassed by the second category protect against artificial disadvantages, those society imposes on disabled people because of their impairments.

Silvers, *Disability Rights*, *supra* note 160, at 786.

Silvers is not writing primarily for a legal audience here, and so her readers will likely not realize that her second broad category of rights must be broken down and the history of rights against private and state actors distinguished. Even if Silvers uses her own, non-institutionalized definition of "thick" negative rights, this still does not address the state action problem under the Fourteenth Amendment.

167. *See* Burgdorf, *supra* note 7, at 568.

and "[E]qual treatment may be a form of discrimination."[168] The meaning of equal/equality cannot mean the same thing in both sentences, yet Burgdorf does not acknowledge his shifting meanings.

Burdorf identifies two types of discrimination[169] as if this were a conventional, institutionally accepted delineation. In the first type, people with disabilities are singled out, made the object of stereotypes, pity, or other negative attitudes, and "shunned," "excluded" and "otherwise channeled away" from participation.[170] An example would be someone rejected for a job because of myths, fears, or stereotypes associated with disability.

But the term equality, of course, carries not only connotations of exemption from exclusionary practices but of the actual capacity to participate. Thus, a second type of discrimination results from "ignoring the actual differences in mental and physical attributes and structuring services, facilities, programs and opportunities as if everyone were an 'ideal user'. . . . This form of discrimination often stems not so much from prejudice or antipathy, but from 'simple thoughtlessness' and 'oversight.'"[171] Burdorf attributes to *Choate* this rough identification of two different dynamics of discrimination. But it is significant that *Choate* is a statutory case, not a constitutional case. Burgdorf ignores the fact that this rough identification has not been established in Fourteenth Amendment case law.

These problems are somewhat surprising, for in an earlier, oft-cited article,[172] Burgdorf distinguishes the ADA from prior civil rights statutes, explaining that the ADA "constitutes a second-generation civil rights statute that goes beyond the 'naked framework' of earlier statutes and adds much flesh and refinement to

168. *Id.* at 525.

169. *Id.* at 517.

170. *Id.*

171. *Id.* (citations omitted). *See also* Alexander v. Choate, 469 U.S. 287, 295 (1985) (noting that invidious discrimination against the disabled is "most often the product, not of invidious animus, but rather thoughtlessness and indifference.") Referring to *Choate*, Burgdorf states: "In analysis that roughly identifies these two different dynamics of discrimination, the United States Supreme Court recognized 'well-catalogued instances of discrimination against the handicapped' that exist alongside discrimination that is the product 'of thoughtlessness and indifference—of benign neglect.'" Burgdorf, *supra* note 7, at 518.

172. Robert L. Burgdorf Jr., The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

traditional nondiscrimination law."[173] Burgdorf refers to a report by the National Council on the Handicapped,[174] which had outlined:

> some of the problems raised by attempting a straightforward application of legal standards from other laws to the disability context. Among the problems it discussed were that analysis under traditional civil rights standards would not account for some of the key concepts necessary to redress discrimination against individuals with disabilities—individualized "reasonable accommodations" [and] the removal of architectural, transportation, and communication barriers in buildings and other facilities . . . .[175]

Pamela Karlan and George Rutherglen, more like the early than later Burgdorf, explain that ADA adopts both sameness and difference models of equality and that the difference model has not yet been constitutionally established.[176]

Silvers' discussions of equality and rights, too, encounter problems. The first results from her use of the language of formalism. She uses the terms "formal justice," "formal redress," and "formal equality"[177] and characterizes the ADA as "emphasiz[ing] formal rather than material equality."[178] Silvers seeks to establish a robust conception of formal equality. She states, "the ADA does not reduce equality of treatment to any treatment that is the same. To do so would be to impoverish how we conceptualize formal equality."[179]

However, Silvers does not acknowledge that the constitutional context provides a very different conventional meaning to these terms. As a result, it looks like she is simply "wrong" when she describes the ADA as emphasizing formal equality. If she wants her robust conception of formal equality to be persuasive in a legal

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173. *Id.* at 415.

174. NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE (1986). Burgdorf was the staff author for the National Council on the Handicapped's Report.

175. *Id.* at 430 n.92.

176. Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation* 46 DUKE L. J. 1, 10 (1996). Karlan and Rutherglen observe that the ADA contains both sameness and difference models. The sameness part of the ADA can more easily fit within established constitutional doctrine, or as Karlan and Rutherglen put it, in "prior legal regimes." *Id.* at 2.

177. Silvers, DISABILITY, DIFFERENCE, DISCRIMINATION, *supra* note 7, at 121, 126, 127.

178. *Id.* at 120.

179. *Id.* at 126.

context, she must at a minimum engage the conventional conception of legal formalism.[180]

Silvers presents a right to reasonable accommodation as deriving from a traditional legal conception, namely, negative freedom, i.e., the right to be free from intrusion:

> Although the right to be protected against discrimination based on one's perceived or actual disability may not seem to be an aggressively affirmative approach to equalizing, it actually is quite a "thick" right. For the ADA famously designates as discriminatory failures to adjust environments that otherwise exclude the participation of qualified individuals with disabilities. So equal protection here gives people with physical, sensory, and cognitive limitations claim under American law to extensive modifications of existing practices and sites that currently debar them . . . .
>
> Failure to provide accommodation illegitimately impinges on the negative freedom of disabled users. That is, the absence of access to transportation limits impaired people's ability to compete for employment and other social goods. . . . As an expression of the right to equal protection, the ADA requires that the disabled be given at least whatever access is readily achievable. . . .[181]

This "thick" negative conception of rights, however, is not smoothly derivative from the legal context, a context that includes state action doctrine. Patricia Illingsworth and Wendy Parmet have pointed this out.[182]

In another context, Jennifer Nedelsky, a political scientist, traces this traditional negative conception of rights back to the framers

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180. On legal formalism, see Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 WISC. WOMEN'S L. J. 59, 59–60 (1987), *reprinted in* D.K. WEISBERG, FEMINIST LEGAL THEORY: FOUNDATIONS 288 (1993) ("[I]t is often the principle of anti-differentiation [that underlies equal protection doctrine]. The anti-differentiation principle seeks a color blind and sex blind society where racial and sexual differentiations do not exist." (citation omitted)). Colker discusses equal protection jurisprudence and the anti-differentiation model in the context of disability-based discrimination in Ruth Colker, *The Section Five Quaqmire*, 47 UCLA L. R. 653 (2000).

181. Silvers, *Disability Rights*, *supra* note 160, at 790. A similar statement about negative freedom appears in SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION, *supra* note 7, at 127.

182. *See supra* note 146.

and examines how the notion of rights as limits or boundaries rests on a flawed conception of autonomy.[183] This conception is "captured, amplified, and entrenched by its association with property."[184]

> The primary content of this conception of autonomy was protection from the intrusion and oppression of the collective. The autonomy the Madisonian system sought to protect could be achieved by erecting a wall of rights between the individual and those around him. Property was the ideal symbol for this vision of autonomy, for it could both literally and figuratively provide the necessary walls. The perverse quality of this conception is clearest when taken to its extreme: the most perfectly autonomous man is the most perfectly isolated.
>
> When the understanding of autonomy changes, the relation between the individual and society looks different, and the conceptual structure of constitutionalism must shift.
>
> A proper conception of autonomy must begin with the recognition that relationship, not separation makes autonomy possible. This recognition shifts the focus from protection against others to structuring relationships so that they foster autonomy. . . . The whole conception of the relation between the individual and the collective shifts: the collective is a source of autonomy as well as a threat to it.[185]

This sort of analysis is crucial in the disability rights literature. When Silvers articulates her conception of thick negative rights, she expands the traditional conception of what counts as an intrusion or exclusion. While she keeps the traditional term "negative," she substitutes the traditional conception of autonomy/intrusion with a conception from the social model of disability, and she collapses a distinction relevant in Fourteenth Amendment doctrine between state and private society.

Silvers is a philosopher, and her contributions to the literature are concerned with democratic morality and what she calls "rectificatory justice."[186] When she steps into the legal arena, her roots in theory promise to bring new and useful vocabularies to legal dis-

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183. Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism: the Madisonian Framework and its Legacy (1990).

184. *Id.* at 272.

185. *Id.* at 272–73.

186. SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION, *supra* note 7, at 139.

cussion. Indeed, a Burgdorf/Silvers conception of equality may be "richer"[187] and more just. But if it is clear that democratic morality and justice "require[ ] us to act affirmatively by enlarging the artificially depressed social opportunities available to people with physical, sensory, and cognitive impairments,"[188] it is not clear that the constitutional context permits a smoothly derived legal justification.

3. On Sources of Authority—The work of Robert Burgdorf and Anita Silvers is similar also in that both identify pieces of the legal context that are hospitable to their conception of equality, i.e., one that includes reasonable accommodation. Neither, however, engages major elements of the legal context that are largely inhospitable. To the extent that inhospitable elements of the legal context are not engaged in the disability rights legal literature and to the extent that they are suppressed in representations of the legal landscape, constitutional arguments in favor of reasonable accommodations will not likely persuade judges.

Silvers refers to certain elements of the legal landscape to justify a right to reasonable accommodation: the Architectural Barriers Act of 1968,[189] the Air Carriers Access Act of 1986,[190] and in another context, *Lloyd v. Regional Transportation Authority.*[191] But these are the elements of the legal context that are friendly to the

187. Diller, *supra* note 18, at 44.

188. SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION, *supra* note 7, at 17.

189. *See id.* at 118; 42 U.S.C. §§ 4151–54, 4154a, 4155–57 (1994).

190. Silvers cites the 1986 Air Carriers Access Act as legislation related to the ADA that "offers added insight into the discrimination against disability that must be arrested if the disabled are to increase their social participation." *Silvers, Disability Rights, supra* note 160, at 790 (citing 49 U.S.C. § 41705); *see also* SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION, *supra* note 7, at 125. Again, the Air Carriers Access Act is certainly on the books. But in order to legitimate a "thick" negative conception of rights, Silvers must engage the entire legal context, especially the post-*Croson* (1989) landscape in which the formalism of Scalia and Rehnquist emerges forcefully.

191. In a philosophical essay, Silvers examines the usefulness of a politics of recognition for people with disabilities. In the course of arguing that responsiveness to difference is necessary and does not entail the privileging of any group's perspective, Silvers offers a concrete example drawn from legal doctrine. She writes, "recent [U.S.] civil rights history illustrates that, to be meaningful, equality must be responsive to difference." Anita Silvers, *Double Consciousness, Triple Difference: Disability, Race, Gender and the Politics of Recognition, in* DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE 78 (Melinda Jones & Lee Ann Basser Marks eds., 1999). As evidence she refers to the circuit court case *Lloyd v. Regional Transportation Authority,* 548 F.2d 1277, (7th Cir. 1977), in which the Seventh Circuit ruled that public transportation systems have an affirmative duty to provide wheelchair lifts. While *Lloyd* is certainly part of case law, it is not representative of recent U.S. civil rights history. Silvers' characterization of the legal context here is overly broad.

conceptualizations of the social model of disability. The unfriendly elements are ignored. These friendly elements, too, are largely legislative.

For his part, Burgdorf consistently cites the U.S. Commission on Civil Rights[192] as legal authority to establish that courts have largely misread concepts underlying disability nondiscrimination statutes. He adds that "Congress and other governmental bodies have come down solidly" in favor of integration and full participation.[193] He also provides citations to the Senate Committee report in 1974,[194] provisions of the U.S. Code,[195] and Regulations to Implement the Equal Employment Provisions of the ADA.[196]

These sources of authority and legislative history are without a doubt appropriate and essential to Burgdorf's argument. Again, it is significant that none of them are judicial. When Burgdorf does cite cases, they tend to be state cases or statutory cases from the pre-*Croson* era.[197]

In 1991, Burgdorf also identified the Commerce Clause as a source of constitutional authority for the ADA. This was a way, he thought, to get around the problem state action doctrine poses to the application of the ADA to the private sector.[198] Given that he was writing before the recent federalism cases, his broad rendering of doctrine on this subject is understandable. It also may not have been apparent in 1991 that *Croson* marked a significant shift in constitutional law.

The bulk of the writing by Silvers and Burgdorf considered here, however, is recent. The unfriendly elements of the constitutional context have been apparent for many years. Largely unaddressed in their writings is the deep institutionalization of the

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192. U.S. Comm'n On Civil Rights, Accommodating the Spectrum of Individual Abilities (1983).

193. Burgdorf, *supra* note 7, at 514–15 (citing 29 U.S.C. § 701(a)(b)(B)(1994), 42 U.S.C. § 12101(a)(8)(1994)).

194. *Id.* at 514 (citing S. REP. No. 93-1297, at 34 (1974)).

195. *Id.* at 514–15 (citing 29 U.S.C. § 701(a)(b), 29 U.S.C. § 760(i), and 29 U.S.C. § 796).

196. *Id.* at 529 (citing 29 C.F.R. § 1630.2(o)(1)(1997)).

197. For example, he cites the Supreme Court of Washington, stating, "[i]dentical treatment may be a source of discrimination." Holland v. Boeing Co., 583 P.2d 621, 623 (Wash. 1978); *see also supra* notes 159, 171–75 and accompanying text.

198. *See* Burgdorf, *supra* note 172, at 497 ("Given the broad scope of congressional authority under modern interpretations of the commerce clause, particularly in prohibiting discrimination, restrictive conceptions of congressional authority to guarantee equal access to public accommodations are anachronistic."). He cites Laurence Tribe, who noted in 1988 that "[c]ontemporary commerce clause doctrine grants Congress such broad power that judicial review of affirmative authorization for congressional action is largely a formality." *Id.* at 497 n.454. Of course, since *Seminole Tribe*, the Court has reigned in Congress' Commerce Clause power.

traditional, negative conception of rights and the conceptions of intrusion and autonomy to which that conception of rights is tied.

4. Reasonable Accommodation and Affirmative Action—In Alexander v. Choate,[199] a unanimous Court (which included Rehnquist and O'Connor) upheld a reasonable accommodation provision, stating that reasonable accommodation "relates to the elimination of existing obstacles against the handicapped."[200] In *School Board v. Arline*, the Court declared: "Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee."[201] Indeed, Burgdorf cites both of these cases[202] in both his 1991 and 1997 articles. But both of these cases were pre-Croson. Moreover, they were statutory claims under the Rehabilitation Act of 1974, not constitutional claims under the ADA.

This discussion of *Choate* and *Davis* should not be construed as an argument against reasonable accommodation as a constitutional right. Rather, my argument is that disability activists are "constructing" *Choate* as they attempt to make it authority for constitutional claims to reasonable accommodation. In other words, Silvers' and Burgdorf's citations and readings of *Choate* as authority for their claims do not emerge directly or inevitably from the text of the case itself. In fact, the case itself can be easily interpreted to provide little benefit for their constitutional claims.

A footnote in *Choate* is particularly significant. In this footnote, the Court attempted to clarify language it had used six years earlier in *Southeastern Community College v. Davis*.[203]

In *Davis*, a case involving Section 504 of the Rehabilitation Act of 1974,[204] Justice Powell wrote for a unanimous Court, frequently using the language of affirmative conduct and affirmative action. He used this language in discussing whether Southeastern was required under Section 504 to modify its program to permit participation by the plaintiff and disabled people generally. Powell stated

> situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate

199. 469 U.S. 287 (1985).

200. *Id.* at 300 n.20.

201. 480 U.S. 273, 289 n.19 (1987).

202. *See* Burgdorf, *supra* note 7, at 460, 530; Burgdorf, *supra* note 172, at 417, 450.

203. 469 U.S. at 300–01 n.20 (clarifying *Davis*, 442 U.S. 397 (1979)). *See infra* text accompanying note 206.

204. 442 U.S. at 402 (citing 29 U.S.C. § 794 (1976 ed., Supp. III)).

> the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of [the Department of Health, Education, and Welfare].[205]

In *Choate*, Justice Marshall's opinion (again for a unanimous Court) included a footnote that referred back to *Davis*' use of affirmative action language. Marshall responded to criticism of the use of this language in *Davis*. He wrote:

> Regardless of the aptness of our choice of words in *Davis*, it is clear from the context of *Davis* that the term 'affirmative action' referred to those "changes," "adjustments," or "modifications" to existing programs that would be "substantial," or that would constitute "fundamental alteration[s] in the nature of a program . . . rather than to those changes that would be reasonable accommodations."[206]

In the previous footnote, Marshall had stated, "the ultimate question is the extent to which a guarantee [of federal funds] is required to make reasonable modifications in its programs for the needs of the handicapped.[207]

Thus, it would appear from *Choate* that the Court distinguished affirmative action from reasonable accommodation. However, *Choate* does not establish this distinction once and for all. Contrary to Marshall's assertion, it is not clear in *Davis* that the term affirmative action applies only to changes that are substantial and fundamental and not just reasonable.[208]

More importantly, post-*Croson* formalism makes the *Choate* footnote vulnerable. There are indications that reasonable accommodation is regarded not as the "usual" nondiscrimination duty but as something more.[209] In *Doll v. Brown*, the Seventh Circuit

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205. 442 U.S. at 412–13.

206. 469 U.S. at 301 n.20 (citations omitted).

207. *Id.* at 299 n.19.

208. *See Davis*, 442 U.S. at 409–12.

209. *See, e.g.*, Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) ("[The ADA does not require] affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less."); Pierce v. King, 918 F. Supp. 923, 940 (E.D.N.C. 1996) ("Although framed in terms of addressing discrimination, the Act's remedial provisions demand not equal treatment, but special treatment tailored to the claimed disability."); Robinson v. City of Friendswood, 890 F. Supp. 616, 620 (S.D. Tex. 1995) (stating that the purpose of ADA is to ensure that individuals with disabilities "receive the same treatment as those without disabilities" (quoting Chiari v. City of League City, 920 F.2d 311, 315 (5th Cir.

stated: "[T]he Rehabilitation Act imposes on federal employers a positive duty . . . of accommodation to any known physical or mental handicap of a qualified applicant or employee, as well as the usual negative duty of nondiscrimination."[210] Claims to reasonable accommodation run against the grain of a negative conception of rights, and this conception of rights is at the core of legal liberalism.

In sum, the attempts of Burgdorf and Silvers to claim reasonable accommodation as a constitutional right, i.e., their conceptions of discrimination and rights and their sources of legal authority for these conceptions, will likely be unpersuasive to judges for reasons having nothing to do with old, medical conceptions of disability. This is because they do not engage the established elements of the constitutional context that are inhospitable to their claims. If Silvers and Burgdorf want to persuade judges, they must engage this context, i.e., they must adapt to the "meta" norms of constitutional argumentation.

III. CONCLUSION

Just a few years ago, Matthew Diller forecasted an inhospitable legal context for claims to reasonable accommodation:

> The ADA relies on notions of equality that have proven to be especially controversial. The ADA's requirement of "reasonable accommodation" rests on the idea that in some circumstances people must be treated differently from others in order to be treated equally. This "different treatment" form of equality has long been contested and in the context of affirmative action has met with deep resistance from the courts.[211]

It is now clear that Eleventh and Fourteenth Amendment doctrines pose institutional obstacles as well. It is vital that studies be done of the complex processes by which the historically questionable doctrines of state sovereign immunity and state action, mobilized by the Court in *Garrett*, came to be institutionally dominant. Such studies would help illuminate the nature of the

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1991))); Emrick v. Libby-Owens-Ford Co., 875 F. Supp. 393, 398 (E.D. Tex. 1995) ("[I]t is the aim of the ADA to merely ensure equality and not preference to disabled employees.").

210. 75 F.3d 1200, 1203 (7th Cir. 1996).

211. Diller, *supra* note 18, at 23.

difficulties involved in translating the social model of disability into the idiom of constitutional law. *Garrett* will make it more likely that the constitutional landscape will receive greater and more detailed attention by disability activists. This, however, guarantees no legal "wins" for the ADA, as the attorneys for Garrett and Ash, experts in constitutional law, recently discovered.