Clearinghouse REVIEW
Journal of Poverty Law and Policy
September–October 2007
Volume 41, Numbers 5–6

LEGAL RESOURCE FOR PEOPLE WITH DISABILITIES

SHRIVER CENTER
Sargent Shriver National Center on Poverty Law

Scorched Earth and Fertile Ground: The Landscape of Suits Against the States to Enforce the ADA

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Under the leadership of Chief Justice William Rehnquist, the U.S. Supreme Court's conservative bloc of five justices strove to prevent individuals from suing states to enforce federal civil rights, disability rights, and safety-net statutes.[1] One of the primary judicial doctrines this bloc used to dismiss cases alleging that states were violating federal law was the principle of state immunity from suit.[2] While the doctrine of state sovereign immunity often cites the Eleventh Amendment as its basis, the conservative bloc expanded sovereign immunity beyond the text of the Eleventh Amendment.[3] The dismissal of suits against states was justified by the bloc's understanding of "fundamental postulates implicit in the constitutional design."[4]

Using this expansive notion of state autonomy, the Rehnquist Court held that "Congress does not have authority" under Article I of the Constitution, which includes the Commerce Clause, "to make the State suable in federal court" by private parties.[5] The Court acknowledged that Section 5 of the Fourteenth Amendment "allow[s] Congress to abrogate the immunity from suit guaranteed by" the Eleventh Amendment.[6] However, the Rehnquist Court drastically restricted Congress' power by holding that remedies enacted pursuant to Section 5 must be narrowly tailored.[7] The Court formulated the requirement that, in order for congressional abrogation of state sovereign immunity to be valid under Section 5, there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[8]

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[1]Many of these cases were 5-to-4 decisions in which the majority was composed of Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas, while Justices Stevens, Souter, Ginsberg, and Breyer vehemently dissented. See, e.g., Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 Texas Law Review 1097 (2006); Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 University of Pennsylvania Journal of Constitutional Law 537 (2003); Richard H. Fallon Jr., *The "Conservative" Path of the Rehnquist Court's Federalism Decisions*, 69 University of Chicago Law Review 429 (2002).

[2]Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stanford Law Review 1201 (2001).

[3]*Alden v. Maine*, 527 U.S. 706, 728–29 (1999) (Clearinghouse No. 52,332). The Eleventh Amendment to the U.S. Constitution states: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

[4]*Alden v. Maine*, 527 U.S. at 728–29.

[5]*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 75 (1996). The Supreme Court has permitted Congress to condition the grant of federal funds on compliance with federal directives, and thus Congress may use its Article I Spending Clause power to provide "encouragement" to the states. *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987). States waive their immunity to suit under Section 504 of the Rehabilitation Act by accepting federal funds, most courts of appeal hold. See *infra* note 32.

[6]*Seminole Tribe*, 517 U.S. at 59.

[7]Erwin Chemerinsky, *Court Revisits Sovereign Immunity in Discrimination Cases*, 42 Trial 70 (2006).

[8]*City of Borne v. Flores*, 521 U.S. 507, 520 (1997).

Recent cases deal with the validity of the explicit abrogation of state sovereign immunity in Titles I and II of the Americans with Disabilities Act (ADA). Title I prohibits employers from discriminating against employees and job applicants based on disability.[9] Title II prohibits exclusion, on the basis of disability, from participation in public programs or denial of benefits or services by a public entity.[10]

I. The Supreme Court's ADA Case Law

In a devastating blow to people with disabilities, a five-justice majority held in *Board of Trustees of University of Alabama v. Garrett* that Congress did not have constitutional authority to authorize employment discrimination suits against states for damages under Title I.[11] The Court found that, unlike race and gender discrimination, state discrimination based on disabilities merited no heightened scrutiny under the equal protection clause of the Constitution and therefore states had no constitutional obligation to accommodate disabilities as long as their actions were rational.[12] The Court ruled that Congress' extensive hearings and findings regarding disability-based discrimination by private and local government entities had no probative value regarding the existence of a pattern or practice of state-sponsored discrimination and that there was only anecdotal and scattered evidence of discrimination by state employers against persons with disabilities.[13] The Court concluded that the legislative history of the ADA failed to prove a history of irrational, unconstitutional discrimination by state employers against people with disabilities, and therefore the remedies in the ADA were not congruent and proportional to the injury documented in the evidence before Congress.[14]

Nevertheless, in *Tennessee v. Lane*, Justice Sandra Day O'Connor swung out of the *Garrett* majority and provided the decisive fifth vote in favor of the validity of suits under Title II.[15] George Lane, a paraplegic who used a wheelchair, entered a state courthouse to answer criminal charges. The courthouse had no elevator, and Lane refused to crawl or be carried up two flights of stairs.[16] He was arrested and jailed for failing to appear in court.[17] The decision written by Justice Stevens emphasized that the case invoked "basic constitutional guarantees," including access to the courts as protected by the due process clause of the Fourteenth Amendment, the right to be present at one's own trial as guaranteed by the confrontation clause of the Sixth Amendment, and the right of the public to have access to criminal proceedings as secured by the First Amendment.[18] The Court held that Congress had ample evidence of discrimination in public accommodations to justify the ADA's remedial measures, including damages.[19] The Court concluded that "Title II's requirement of program accessibility is congruent and proportional to its object of enforcing the right of access to

[9] 42 U.S.C. §§ 12111–12117 (2000). See Barry C. Taylor, *"Should They Be Asking Me That?": Advising People with Disabilities About the ADA's Inquiry and Examination Provisions*, in this issue.

[10] 42 U.S.C. §§ 12132–12133, 12202 (2000).

[11] *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001). Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas constituted the majority. Justices Stevens, Souter, Ginsburg, and Breyer dissented.

[12] *Id.* at 366–68.

[13] *Id.* at 368–71.

[14] *Id.* at 372–74.

[15] *Tennessee v. Lane*, 541 U.S. 509 (2004) (Clearinghouse No. 55,480).

[16] *Id.* at 513–14.

[17] *Id.* at 514.

[18] *Id.* at 522–23, 533.

[19] *Id.* at 523–28.

the courts."[20] Without explicitly disagreeing with *Garrett, Lane* utilized a significantly more lenient evidentiary standard than the Court applied in *Garrett*.[21]

Although four justices vigorously dissented in *Lane*, the Supreme Court unanimously upheld Title II's abrogation of sovereign immunity in *United States v. Georgia*.[22] A paraplegic prison inmate alleged that he was confined for twenty-three hours a day in a cell so small he could not move his wheelchair, denied needed assistance to use the toilet and shower, denied physical therapy and medical treatment, and denied access to all prison programs on account of his disability.[23] Justice Scalia wrote for the unanimous Court in which Chief Justice Roberts replaced Chief Justice Rehnquist. The opinion distinguishes *Garrett* and *Lane* by characterizing the underlying facts in those cases as not involving constitutional violations, whereas in *United States v. Georgia,* the plaintiff alleged that the underlying facts violated not only Title II but also the Constitution.[24] Justice Scalia stated that while "Members of the Court" had disagreed in *Lane*, "no one doubts" that Congress had the power to abrogate sovereign immunity and permit suits for damages under Title II when states violate the Constitution, including the Eighth Amendment's prohibition on cruel and unusual punishment.[25] The Court remanded the case for a determination of whether any of the alleged conduct violated Title II but not the Constitution and, if so, whether Title II validly abrogated sovereign immunity for such conduct.[26] Thus the Court established that Congress had the power under Section 5 of the Fourteenth Amendment to abrogate sovereign immunity in order to redress conduct violating the Constitution.[27] Justice Scalia's characterization notwithstanding, *United States v. Georgia* significantly expanded the circumstances under which suits against the states may proceed.[28]

II. Lower Courts' Implementation

The Court's narrowly crafted unanimous opinion in *United States v. Georgia* did not resolve the tensions between the conflicting approaches of *Garrett* and *Lane*. Lower courts have applied *Garrett's* methodology in the employment context but have generally followed *Lane*'s reasoning in other factual circumstances.

A. Employment Discrimination

While *Garrett* barred all Title I damages actions against the state by private litigants, it explicitly did not reach the question of whether damages for employment discrimination are available under Title II.[29] In the wake of *Garrett*, courts generally hold that Congress lacks the power to authorize damage suits against state employers under Title II.[30] Holding that, under the reasoning of *Garrett*, states have sovereign immunity, courts have similarly rejected employment discrimi-

[20]*Id*. at 531. Justice Scalia dissented, stating that the test of congruence and proportionality "has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed." *Id*. at 558. Justices Rehnquist, Kennedy, and Thomas also dissented.

[21]William D. Araiza, *The Section 5 Power After* Tennessee v. Lane, 32 Pepperdine Law Review 39, 49 (2004).

[22]*United States v. Georgia*, 126 S. Ct. 877 (2006) (Clearinghouse No. 55,981).

[23]*Id*. at 879.

[24]*Id*. at 881.

[25]*Id*. at 881–82.

[26]*Id*. at 882. The Eleventh Circuit decision on remand is *Goodman v. Ray*, 449 F.3d 1152 (11th Cir. 2006).

[27]Anthony Kovalchik, *Judicial Usurpation of Legislative Power: Why Congress Must Reassert Its Power to Determine What Is "Appropriate Legislation" to Enforce the Fourteenth Amendment*, 10 Chapman Law Review 49, 100–101 (2006).

[28]Chemerinsky, *supra* note 7, at 71–72.

[29]*Garrett*, 531 U.S. at 360 n.1.

[30]See, e.g., *Clifton v. Georgia Merit System*, 478 F. Supp. 2d 1356 (N.D. Ga. 2007); *Lightsy v. Hawaii*, 2006 WL 314335 (D. Haw. 2006); *Leverette v. Alabama Revenue Department*, 453 F. Supp. 2d 1340 (M.D. Ala. 2006), contra *Olson v. New York*, 2007 WL 1029021 (E.D.N.Y. 2007).

nation suits for damages brought under the self-care provisions of the Family and Medical Leave Act.[31] Damages still remain available against state employers who accept funds under the Rehabilitation Act because the waiver of sovereign immunity is a condition for providing federal financial assistance.[32]

Garrett's final footnote indicated that people with disabilities could sue state officials for prospective injunctive relief to remedy employment discrimination under the doctrine of *Ex Parte Young*.[33] In cases wherein plaintiffs are no longer employed by the state employer, district courts have rejected attempts to obtain injunctive relief. For instance, in one case an employee alleged that she took early retirement in response to employment discrimination and sued for retirement benefits that she would have received if she had retired later.[34] The district court held that the request for injunctive relief was retrospective, not prospective, and barred by *Garrett*'s holding that states are immune from suits for money damages.[35] In contrast, cases seeking injunctive relief under Title I to alter an employer's policy for individuals who remain employed have withstood motions to dismiss. In a case brought by state troopers for a change in police policy that officers must disclose the nature of their disability when taking sick leave, the district court held that the Title I claim was prospective in nature and could proceed.[36]

B. Education

All four post-*Lane* court-of-appeals cases involving higher education hold that Title II's abrogation of state sovereign immunity is valid for suits regarding discrimination against university students based on their disabilities.[37] Three circuits framed the question broadly to include public elementary and high school education.[38] Two of the courts found that the right to equality in education, "though not fundamental, is vital to the future success of our society."[39] Utilizing the more lenient evidentiary standard of *Lane*, all four courts held that Congress was justified in enacting Title II in response to evidence of "a widespread pattern of states unconstitutionally excluding disabled children from public education and irrationally discriminating against disabled

[31] *Toeller v. Wisconsin Department of Corrections*, 461 F.3d 871 (7th Cir. 2006); *Tourell v. Ohio Department of Mental Retardation and Developmental Disabilities*, 422 F.3d 392 (6th Cir. 2005), cert. denied, 126 S. Ct. 1339 (2006); *Brockman v. Wyoming Department of Family Services*, 342 F.3d 1159 (10th Cir. 2003), cert. denied, 540 U.S. 1219 (2004). The Supreme Court held in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (Clearinghouse No. 54,329), that Congress validly abrogated state sovereign immunity in passing the family care provision of the Family and Medical Leave Act. The decision, in which Justices Rehnquist and O'Connor sided with Justices Stevens, Souter, Ginsburg, and Breyer, was based on heightened scrutiny for gender discrimination when a man was denied paternity leave, thereby stereotyping women. Courts have not been willing to extend *Hibbs* to the Act's self-care provisions, which provide for sick leave to take care of one's own disability.

[32] 29 U.S.C. § 794 (1999). The Rehabilitation Act prohibits discrimination against people with disabilities. Regarding waiver of immunity as a condition for federal financial assistance, see, e.g., *Miller v. Texas Tech University Health Services*, 421 F.3d 342, 349 (5th Cir. 2005), cert denied, 126 S. Ct. 1332 (2006); *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161, 1170 (D.C. Cir. 2004), cert. denied, 544 U.S. 904 (2005). For a discussion of the overlap and distinctions between the Americans with Disabilities Act (ADA) and the Rehabilitation Act, see Drew S. Days III, *"Feedback Loop": The Civil Rights Act of 1964 and Its Progeny*, 49 St. Louis University Law Journal 981, 992–93 (2005).

[33] *Garrett*, 531 U.S. at 374 n.9; *Ex Parte Young,* 209 U.S. 123 (1908).

[34] *Leverette v. Alabama Revenue Department*, 453 F. Supp. 2d 1340, 1343 (M.D. Ala. 2006).

[35] *Id*. at 1344. See also *Lightsy*, 2006 WL 314335 at *6.

[36] *Pennsylvania State Troopers Association v. Pennsylvania*, 2007 WL 853958, at *4 (M.D. Pa. 2007). See also *Mendez-Vazquez v. Tribunal General De Justicia*, 477 F. Supp. 2d 406, 411 (D. P.R. 2007).

[37] *Bowers v. National Collegiate Athletic Association*, 475 F.3d 524 (3d Cir. 2007); *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006), cert. denied, 2007 WL 789372 (2007); *Constantine v. Rectors and Visitors of George Mason*, 411 F.3d 474 (4th Cir. 2005); *Association for Disabled Americans Incorporated v. Florida International University*, 405 F.3d 954 (11th Cir. 2005) (Clearinghouse No. 55,931).

[38] *Toledo*, 454 F.3d at 36. Accord *Bowers*, 475 F.3d at 555 n.35; *Florida International University*, 405 F.3d at 958–59 n.4. Cf. *Constantine*, 411 F.3d at 487–88.

[39] *Florida International University*, 405 F.3d at 958. Accord *Toledo*, 454 F.3d at 36.

students within schools."[40] These courts all concluded that the remedies in Title II were congruent and proportional to the harm since Title II merely required reasonable modification to avoid irrational discrimination.[41]

In a post-*Garrett*, pre-*Lane* case, the Fifth Circuit held that Title II's requirement of reasonable accommodation in education was not congruent and proportional to the legislative findings of unconstitutional discrimination by the states.[42] After *Lane*, in an *en banc* decision, a majority of the Fifth Circuit questioned its prior holding in the education context and noted that the court must look at the ADA's legislative history not only regarding states but also concerning "nonstate government entities."[43] Thus the court suggested that, for Title II, *Lane's* broader review of the evidence was controlling.

In another decision handed down between *Garrett* and *Lane* involving education, the Second Circuit held that Title II exceeded congressional authority to the extent that it permitted damages for disparate effects rather than intent.[44] The Second Circuit ruled that Title II suits alleging "discriminatory animus or ill will based on disability" would comport with congressional authority under the Fourteenth Amendment.[45] This decision seems unlikely to be sustained given subsequent Supreme Court cases. Yet, lacking appellate guidance regarding the impact of *Lane* and *United States v. Georgia* on Second Circuit precedent, district courts in the Second Circuit have reached conflicting conclusions regarding whether Title II validly abrogated sovereign immunity in the context of education.[46]

C. Access to Community-Based Services

Approximately a year before *Lane*, the Ninth Circuit held that Title II validly abrogated sovereign immunity in a case in which residents of state psychiatric hospitals alleged that the state failed to provide community-based treatment.[47] A few months after *Lane*, the Fifth Circuit similarly concluded that the Eleventh Amendment did not bar a suit seeking prospective relief under Title II and alleging that the state failed to provide adequate community-based living options to individuals with mental retardation and developmental disabilities.[48] A year after *Lane*, the Eighth Circuit disagreed, narrowly construing *Lane* to apply only to the denial of access to the courts and holding that the state had sovereign immunity in a Title II case challenging the lack of funding for community-based services for people with disabilities.[49] The Supreme Court vacated the Eighth Circuit decision and remanded the case for reconsideration in light of *United*

[40] *Toledo*, 454 F.3d at 38–39. Accord *Bowers*, 475 F.3d at 555 n.35; *Constantine*, 411 F.3d at 487 n.9; *Florida International University*, 405 F.3d at 958–59. See Shawna L. Parks & Maronel Barajas, *School Discipline and Special Education*, in this issue.

[41] *Constantine*, 411 F.3d at 489. Accord *Bowers*, 475 F.3d at 555–56; *Toledo*, 454 F.3d at 39–40; *Florida International University*, 405 F.3d at 959.

[42] *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001) (Clearinghouse No. 54,370).

[43] *Pace v. Bogalusa City School Board*, 403 F.3d 272, 277 (5th Cir. 2001) (Clearinghouse No. 55,218). Six Fifth Circuit judges dissented and stated that "apart from the *Lane* scenario, [Title II] does not validly abrogate States' Eleventh Amendment immunity." *Id*. at 303 (Jones, J., dissenting).

[44] *Garcia v. State University of New York Health Sciences Center of Brooklyn*, 280 F.3d 98, 110 (2d Cir. 2001) (Clearinghouse No. 54,225).

[45] *Id*. at 111–12.

[46] Cf. *Goonewardena v. New York*, 475 F. Supp. 2d 310, 326 (S.D.N.Y. 2007), with *Press v. State University of New York at Stony Brook*, 388 F. Supp. 2d 127, 133 (E.D.N.Y. 2005).

[47] *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1185 (9th Cir. 2003) (Clearinghouse No. 54,481).

[48] *McCarthy v. Hawkins*, 381 F.3d 407, 414 (5th Cir. 2004), rehearing and rehearing en banc denied, 391 F.3d 676 (5th Cir. 2004).

[49] *Bill M. v. Nebraska Department of Health and Human Services Finance and Support*, 408 F.3d 1096 (8th Cir. 2005), judgment vacated and case remanded sub nom. *United States v. Nebraska Department of Health and Human Services*, 547 U.S. 1067 (2006).

States v. Georgia.[50] Thus the Supreme Court signaled that both *Lane* and *United States v. Georgia* reached beyond their factual situations and were applicable to a wide range of cases.

D. Prisoner Treatment and Services

United States v. Georgia has made a huge difference in the success of cases alleging Title II violations for mistreatment of prisoners and denial of services to prisoners. For instance, the First Circuit, reversing its previous decision, denied summary judgment and remanded the case for consideration of the prisoner's claims regarding the lack of access to prescription medication and the lack of reasonable accommodation in providing accessible shower facilities, front cuffing, and a lower-tier and bottom-bunk placement.[51] Similarly a district court granted a motion for reconsideration and reversed its previous dismissal of a prisoner's Title II claims in a case involving destruction of a prisoner's hearing aid by prison guards.[52]

E. Fees for Handicapped Parking Placards

Congress did not validly abrogate state sovereign immunity for damages under Title II, courts held, in recent cases challenging fees charged for handicapped parking placards. The *de minimis* charges for the placards do not implicate fundamental rights and do not significantly impair the rights of people with disabilities, courts concluded.[53] However, courts held, plaintiffs are entitled to prospective declaratory and injunctive relief prohibiting states from charging the fees.[54]

F. Professional Licensing

Cases against professional licensing boards for prospective injunctive relief under Title II, such as cases seeking reinstatement of a license or additional time to take an examination, have survived motions for summary judgment.[55] In one case, the Wisconsin Board of Bar Examiners required a bar applicant to obtain a psychological evaluation (costing approximately $2,000) at her own expense, based entirely upon her admission that she received disability benefits for medical conditions including depression. Holding that possible injunctive relief could include requiring consideration of her application without the evaluation or relieving her of the obligation to pay for the evaluation, the court denied summary judgment.[56] However, claims for damages in that case and similar cases have been dismissed.[57]

■ ■ ■

The Roberts Court is likely to continue to view states' sovereign immunity expansively.[58] However, *Lane* and *United States v. Georgia* have opened doors to suits to improve participation by people with disabilities in public programs, including accessing courts, voting, education, and transportation.[59] Although dam-

[50]*Id*. The Eighth Circuit took up both *Lane* and *United States v. Georgia* in *Klingler v. Director, Department of Revenue, State of Missouri*, 455 F.3d 888 (8th Cir. 2006).

[51]*Kiman v. New Hampshire Department of Corrections*, 451 F.3d 274, 290 (1st Cir. 2006) (Clearinghouse No. 54,862).

[52]*Degrafinreid v. Ricks*, 417 F. Supp. 2d 403, 410–13 (S.D.N.Y. 2006).

[53]*Klingler*, 455 F.3d at 893; *Keef v. State of Nebraska*, 716 N.W.2d 58, 65–66 (Neb. 2006).

[54]*Klingler*, 455 F.3d at 891; *State Department of Highway Safety and Motor Vehicles v. Rendon*, 2007 WL 521156 (Fla. Dist. Ct. App. 2007).

[55]*Guttman v. Khalsa*, 446 F.3d 1027 (10th Cir. 2006); *Simmang v. Texas Board of Law Examiners*, 346 F. Supp. 2d 874, 886 (W.D. Tex. 2004).

[56]*Brewer v. Wisconsin Board of Bar Examiners*, 2006 WL 3469598, at *5 (E.D. Wis. 2006).

[57]*Brewer v. Board of Bar Examiners*, 2007 WL 527484, at *7 n.6 (E.D. Wis. 2007); *Roe v. Johnson*, 334 F. Supp. 2d 415, 422 (S.D.N.Y. 2004).

[58]See Kevin Johnson & Bill Hing, *The Immigrant Right Marches and the Prospects for a New Civil Rights Movement*, 42 Harvard Civil Rights–Civil Liberties Law Review 99, 132 (2007); Michael Gerhart, *What's Old Is New Again*, 86 Boston University Law Review 1267, 1275 (2006).

[59]Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 Vanderbilt Law Review 1807, 1832–33, 1857–58 (2005).

ages against states have been precluded by the Supreme Court under Title I and frequently denied by lower courts under Title II, injunctive relief remains viable under both titles. Injunctions and declaratory relief "are powerful tools in preventing future misconduct and in securing governmental compliance with constitutional norms" and statutory mandates.[60]

People with disabilities are disproportionately poor, and public interest lawyers must help enforce the ADA.[61] Recent case law establishes that the ADA can be a viable tool to protect the rights of people with disabilities.

Author's Note

For public interest advocates, the National Senior Citizens Law Center's Federal Rights Project hosts a listserv providing timely case summaries of cases pertaining to access to the courts. To join the listserv, e-mail rbobroff@nsclc.org.

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[60]Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 University of Illinois Law Review 1199, 1235 (2005).

[61]Louis S. Rulli & Jason A. Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and Its Impact on the Poor*, 8 Journal of Gender, Race and Justice 595, 652 (2005).

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