State Immunity from Federal Disability Discrimination Laws: Provisions of the ADA and Rehabilitation Act Declared Unconstitutional

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by Thomas Simmons*

In two sweeping decisions this summer, the 8th Circuit Court of Appeals, which hears federal cases appealed from seven states including South Dakota, ruled that key provisions of the ADA and the Rehabilitation Act are unconstitutional. The decisions interpret two amendments to the United States Constitution, the little known 11th Amendment, and the "equal protection" language of the 14th Amendment. The effect of these rulings is quite alarming, but straightforward: the state of South Dakota is now immune from federal lawsuits brought under these statutes. The decisions also apply in North Dakota, Minnesota, Iowa, Nebraska, Arkansas, and Missouri. This means that state agencies in these states, as well as city and county agencies within these states, can no longer be sued in federal court for violations of the ADA or the Rehabilitation Act. (The Rehabilitation Act is a statute similar to the ADA; it applies to entities that receive federal funding, such as schools.)

While the twin rulings themselves are easy to grasp, the logic behind them is mired in the technicalities of constitutional law. Some background, therefore, is necessary. In order to understand the court's reasoning, a brief sketch of both 11th Amendment immunity and the 14th Amendment's "Equal Protection" clause follows.

The 11th Amendment provides that as a general rule, persons may not sue states in federal court. The Amendment was enacted in 1797 in order to protect the dignity of states from having to defend lawsuits brought by its citizens, or citizens of other states, in the federal district courts. Federal suits are barred when a state government, acting through Congress, sometimes has the power to suspend states' 11th Amendment protections. The question in Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc) and Bradley v. Arkansas Dep't of Education, F.3d ___, 31 IDELR ¶26 (8th Cir. 1999) was whether Congress could suspend the states' 11th Amendment immunity when it enacted, respectively, the ADA and the Rehabilitation Act. The appeals court found that Congress lacked the power to do this.

The federal government, it is often said, is one of "enumerated powers." This means that when Congress passes a law, it must do so by relying on a specific power granted to it by the United States Constitution. The enumerated powers of Congress include the power to coin money, regulate interstate commerce, and declare war. If Congress cannot point to a certain power to support a given law, the courts will declare the law to be unconstitutional. The 14th Amendment commands that no state may "deny to any person within its jurisdiction the equal protection of the laws." Essentially, this directs states to treat all similarly situated persons alike. Section 5 of the Amendment empowers Congress to pass legislation to enforce this mandate. It was under this 14th Amendment enforcement power that Congress passed the provisions of the ADA and the Rehabilitation Act that apply against states. Congress reasoned that these statutes were necessary to enforce the Amendment's equal protection clause.

The Supreme Court has held that Congress may abrogate states' 11th Amendment immunity when it uses its 14th Amendment § 5 power. The theory is that the 14th Amendment, which was enacted with the approval of the states and restricts the states, overrides the earlier 11th Amendment. When Congress acts to suspend the 11th Amendment by way of § 5, however, it must be a valid exercise of that power. It therefore becomes important to determine just how far this § 5 power extends.

The Supreme Court has determined that certain classes of people deserve special protections under the 14th Amendment. Classifications based on race, alienage, or national origin are strictly scrutinized by the courts. These are called "suspect classes." Other classes of individuals, however, such as poor people or the elderly, will not receive any special equal protection protections. The reasoning is that these classes are not as discretely defined, and have not suffered the same history of unfair treatment as members of the suspect classes.

Many commentators believed that state classifications based on disability should receive heightened judicial scrutiny under the equal protection clause. But in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), the Supreme Court held that persons with mental retardation were not a "suspect class" requiring special equal protection considerations. After the Cleburne case, people with mental retardation (and presumably all individuals with disabilities) who challenged the actions of a state government under the 14th Amendment's equal protection clause would need to show that the state acted irrationally, arbitrarily, or with a desire to harm an unpopular group. This level of judicial review is very favorable towards states. It means that a state will win so long as the state's action was "rationally related to a legitimate state interest."

The ADA, of course, provides much more comprehensive protections for people with disabilities than the weak "rational basis review" that the 14th Amendment's equal protection clause provided after Cleburne. The ADA, for example, mandates "reasonable accommodations" and prohibits states from segregating individuals with disabilities unless to do otherwise would impose an "undue hardship" on the state. It follows that individuals with disabilities will be successful in challenging an action of state government under the ADA, where they might fail if they had merely relied on the weaker equal protection clause. This is the very reason advocates for individuals with disabilities praise the ADA: it provides more detailed and wider remedies for persons with disabi-
The future effect of *Alsbrook* and *Bradley* is uncertain. The parties in *Alsbrook* have asked the Supreme Court to review the decision. The Supreme Court has already agreed to hear a similar case from the 11th Federal Circuit. That appeals court held, as have the courts of appeals for the 5th, 7th, and 9th Circuits, that the ADA is constitutional as applied against states in the federal courts. These courts interpreted Section 5 more broadly than the 8th Circuit. It may be that the Supreme Court will ultimately reverse the holdings of Alsbrook and Bradley. Some theorize that Congress' Section 5 power should not be construed as narrowly as the 8th Circuit has done.

In the meantime, recourse may be had to South Dakota State law which contains disability discrimination provisions applicable against the state government. Unfortunately, South Dakota's laws offer less potent protections than federal laws. See S.D.C.L. Ch. 20-13. Also, it may still be possible to invoke federal disability discrimination laws against state governments in state, rather than federal, courts. In any case, the Supreme Court can be expected to issue a definitive ruling on these thorny 11th Amendment questions within a year. But at least for now, seeking the remedies of the ADA and the Rehabilitation Act against the state government in federal court is no longer an option in the 8th Federal Judicial Circuit.

*Thomas Simmons is a law clerk for Senior Federal District Court Judge Andrew Bogue in Rapid City. The views expressed are his personally and should not be attributed to the federal judiciary or any of its members.*

**Addendum:**

*As the South Dakota Report was going to press, SDAS received the following letter of clarification from the Office for Civil Rights:*

We are writing to you in the wake of *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) and *Bradley v. Arkansas Department of Education*, 1999 WL 673228 (8th Cir. August 31, 1999). As you know, *Alsbrook* and *Bradley* change the ability of private individuals in the 8th Circuit to bring suit for non-injunctive relief under title II of the ADA and Section 504 of the Rehabilitation Act of 1973. The government’s ability to investigate or bring suit on Title II or Section 504 grounds is not affected by the cases, however. That is why we are writing to you.

*Vada Kyle-Holmes*

*Regional Manager*