

## JUDICIAL REVERIES: THE SUPREME COURT ENCOUNTERS DISABILITY

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### INTRODUCTION

In his celebrated play, “Our Town” (1938), Thornton Wilder described the relationships of families and friends in mythical Grover’s Corners, New Hampshire. Wilder set his play in the early years of the last century. After seeing its opening performance 71 years ago, *New York Times* drama critic Brooks Atkinson called it a classic portrait of small-town American life, evoking a “universal reverie.”

Does the Supreme Court long for “Our Town,” for an iconic, yester-year America? This question can best be answered by reviewing the Supreme Court’s decisions interpreting the rights and relationships of persons with disabilities within the contexts of their families, the general population, and public and private entities.<sup>1</sup> The simple answer to this question is “yes.” The reasons, however, are far from simple, and the consequences of the answer require self-reflection by all of us about some of us.

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1. See Matthew J. Stowe, H. Rutherford Turnbull, III & Chad Sublet, *The Supreme Court, “Our Town,” and Disability Policy: Boardrooms and Bedrooms, Courtrooms and Cloakrooms*, 44 MENTAL RETARDATION: J. OF PRACTICES, POL’Y & PERSP. 83 (2006).

### THE SCOPE OF THE COURT'S DECISIONS: THREE ERAS

In 45 decisions spanning 33 years, the Court has addressed the claims of persons with disabilities within the areas of (1) businesses and their boardrooms, (2) states and their institutions, (3) teachers and their classrooms, (4) physicians and their hospitals, (5) litigants and their courtrooms, (6) families and their bedrooms, and (7) legislators and their cloakrooms.

#### *The First Era*

In the 1970s and early 1980's, the Court affirmed the rights of disabled persons to liberty from unwarranted institutionalization and unjustified restraint in institutions.<sup>2</sup> Encountering truly horrific fact situations, the Court relied on the long-established constitutional principle of the right to individual liberty, limiting states' practices of institutionalizing persons, often without justification, based on dangerousness to self or others. The public's shunning of individuals with disabilities found an ally in professionals' power to incarcerate those who were not demonstrably dangerous. The Court, however, refused to condone mere difference as a basis for deprivation of liberty. Liberty largely trumped state-sanctioned professional power.

#### *The Second Era*

During the 1980s and 1990s, the Court addressed discrimination in, access to, and rights within education,<sup>3</sup> social service and health-care systems,<sup>4</sup> public accommodations,<sup>5</sup> the criminal justice system,<sup>6</sup> and residential zones in communities.<sup>7</sup>

Faced with less egregious fact situations, the Court began a balancing approach that telegraphed its current response to disability. The Court struck down states' blatantly discriminatory policies and practices.<sup>8</sup> In doing so, the Court respected Congress's authority to prohibit discrimination by utilizing its

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2. *Jackson v. Indiana*, 406 U.S. 715 (1972); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Parham v. J.R.*, 422 U.S. 584 (1979); *Vitek v. Jones*, 445 U.S. 480 (1980); *Mills v. Rogers*, 457 U.S. 291 (1982); *Youngberg v. Romeo*, 457 U.S. 307 (1982).

3. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979); *Sch. Bd. v. Arline*, 480 U.S. 273 (1987); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Honig v. Doe*, 484 U.S. 305 (1988); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999).

4. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989); *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610 (1986).

5. *Bragdon v. Abbott*, 524 U.S. 624 (1998).

6. *Vitek*, 445 U.S. 480; *Ford v. Wainwright*, 477 U.S. 399 (1986); *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302 (1989); *Penry v. Jackson* (*Penry II*), 532 U.S. 782 (2001).

7. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Olmstead v. L.C.*, 527 U.S. 581 (1999).

8. See *Vitek*, 445 U.S. 480; *Ford*, 477 U.S. 399; *Lynaugh*, 492 U.S. 302; *Cleburne*, 473 U.S. 432; *Olmstead*, 527 U.S. 581.

powers under the 14<sup>th</sup> Amendment's Equal Protection provisions.<sup>9</sup> Moreover, the Court generally deferred to professionals' judgments about the nature of expert interventions.<sup>10</sup> In summary, the Court sent three messages: Animus is anathema as a basis for public policy; by and large, Congress is kingly; and professionals have considerable residues of power if their use of power is professionally defensible.

### *The Third Era*

During the last ten years, the Court has focused on discrimination in employment<sup>11</sup> and the justice system,<sup>12</sup> on rights within public education,<sup>13</sup> and on edges-of-life decision-making. In the employment cases, the Court affirmed the right of private and public employers to set the terms and conditions of employment even if they disadvantage people with disabilities. In only one case did the Court clearly affirm the right of a person with a disability to participate; that was not an employment case, however, but still was a business-related case.<sup>14</sup> Overall, the Court reinforced the old maxim that the business of America is business.

In the justice system cases, the Court continued to prohibit states from executing disabled persons unable to comprehend that their death signifies punishment for a crime.<sup>14</sup> It also required states to comply with the Americans with Disabilities Act (ADA) by assuring access to trials.<sup>15</sup> The Court's message was clear: Decency demands deference and a democratic society depends on peaceful dispute resolution.

In the education cases, the Court, echoing its earlier doctrine limiting rights to those explicitly granted by the Constitution or federal law and denying implicit rights,<sup>16</sup> required parents to shoulder the burden of proof<sup>17</sup> and absorb the costs of hiring expert witnesses in disability cases brought

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9. *See* *Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984); *Sch. Comm. of Burlington v. Dep't of Ed.*, 471 U.S. 359 (1985); *U.S. Dep't. of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Olmstead*, 527 U.S. 581.

10. *See* *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Se. Cmty. Coll v. Davis*, 442 U.S. 397 (1979); *Sch. Bd. v. Arline*, 480 U.S. 273 (1987); *Bowen v. Am. Hosp. Ass'n.*, 476 U.S. 610 (1986); *Bragdon*, 524 U.S. 624.

11. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Bd. of Tr. v. Garrett*, 531 U.S. 356 (2001); *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002).

12. *Tennessee v. Lane*, 541 U.S. 509 (2004); *Penry v. Johnson (Penry II)*, 532 U.S. 782 (2001); *Atkins v. Virginia.*, 536 U.S. 304 (2002). The latter two cases involved the death penalty for people with intellectual disabilities.

13. *Schaffer v. Weast*, 546 U.S. 49 (2005); *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291 (2006); *Winkelman v. Parma City Sch. Dist.*, 127 S.Ct. 1994 (2007).

14. *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

14. *See Penry II*, 532 U.S. 782; *Atkins*, 536 U.S. 304.

15. *Lane*, 541 U.S. 509.

16. *Smith v. Robinson*, 468 U.S. 992 (1984).

17. *Schaffer v. Weast*, 546 U.S. 49 (2005).

against public schools.<sup>18</sup> In the burden of proof case and the expert witness case, the Court interpreted the Individuals with Disabilities Education Act (IDEA) more strictly than it had in earlier cases.<sup>19</sup> However, in an access-to-justice case, the Court also affirmed the right of parents to represent themselves in federal court in IDEA claims.<sup>20</sup> Overall, the Court sent three clear messages: Costs count in judicial interpretation; teachers know best; and access to courts is vital in advocating for a familial and children rights.

Encountering edges-of-life issues, the Court reaffirmed the right of parents or legal guardians to make life-sustaining or life-ending decisions (subject to quantity-of-proof requirements imposed by the state to assure due process and preserve the sanctity-of-life doctrine)<sup>21</sup> and it protected legally authorized surrogates from federal intrusion into their privacy.<sup>22</sup> Yet the Court was unwilling to override state-imposed prohibitions against physician-assisted suicide (PAS), holding that a state does not violate the equal protection clause when it prohibits PAS but permits dying patients to refuse further life-sustaining treatment.<sup>23</sup> Moreover, the Court held that substantive due process does not create a liberty right to PAS, especially where the principle of federalism commands deference to state legislative decision-making on the matter.<sup>24</sup> In a different line of relevant cases, not explicitly considering disability, the Court elevated the liberty and privacy rights of families to determine who constitutes a family member.<sup>25</sup> The Court also protected the liberty and privacy rights of consenting adults to have homosexual relations.<sup>26</sup> In these cases, the Court protected personal and family autonomy, a quality of life concern, while using federalism principles to allow states to protect the sanctity of life.

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18. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

19. *See Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

20. *Winkelman v. Parma City Sch. Dist.*, 127 S.Ct. 1994 (2007).

21. *Cruzan v. Dir., Mo. Dep't. of Health*, 497 U.S. 261 (1990).

22. *Bush v. Schiavo*, 543 U.S. 1121 (2005), denying cert. in *Bush v. Schiavo*, 885 So.2d 321 (Fla. 2004), appealed from *Schiavo v. Bush*, 2004 WL 980028 (Fla. Cir. Ct., 6<sup>th</sup> Cir., May 5, 2004). The issue in these cases was whether the Florida Legislature violated the separation of powers doctrine of the Florida constitution (Art. 2, Sec. 3). Both Florida courts held the Legislature violated the doctrine. By denying cert., the Supreme Court tacitly approved the Florida decisions and disapproved the Legislature's enactment of "Terri's Law," which authorized the Governor to issue a one-time stay of a lower court decision allowing withdrawal of nutrition and hydration from Terri Schiavo (a person in what was called "a persistent vegetative state").

23. *Vacco v. Quill*, 521 U.S. 793 (1997).

24. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

25. *Troxel v. Granville*, 530 U.S. 57 (2000); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

26. *Lawrence v. Texas*, 539 U.S. 558 (2003).

### EXPLAINING THE DECISIONS: A NARRATIVE BASED IN REVERIE ABOUT RELATIONSHIPS

It is true but facile to say that changes in the Court's personnel reflect changes in its jurisprudence. That truism applies, of course, to the principles of separation of power and federalism, as I will note below. There is, however, another interpretation. It is that the Court is deeply concerned with the effects of the law on the nature of this American life and the relationships among citizens and the government. By understanding the nature of the Court's concern, one can divine a rough consistency in the Court's disability jurisprudence.

#### *A Conserving Narrative: Preserve and Protect*

The Court's idealized version of America seeks to preserve traditional institutions at the expense of disabled persons. These citizens' efforts, if successful, would require accommodations to be made by public and private entities in places such as corporate boardrooms, colleges and schools, hospitals and clinics, and courtrooms and cloakrooms.

#### *A Liberating Narrative: Freedom from and Freedom to – Negative and Positive Protections*

At the same time, the Court's reverie for traditional America is liberating. The Court is unwilling to lock people with disabilities out of democratic institutions, namely, the courts and the judicial system; to subject them to indefensible deprivations of liberty via institutionalization or to cruel and unusual punishment via capital punishment; to permit local governments to practice segregation through zoning; and to allow states to intrude into matters reflecting individuals' and families' interpersonal relationships. In its liberating mode, the Court unshackles citizens from legacies of prejudice and the current stigma of difference. It acknowledges that disability, like race and sex, is not a chosen trait and therefore is supremely unfit for invidious state action.

In freeing people to make decisions about the meaning of family, criteria for edges-of-life decision making, and the nature of their intimate relationships, the Court also acknowledges that family and sexual relationships are the deepest and most fundamental expressions of individuals' liberty, privacy, and autonomy.<sup>27</sup> Sanctity and quality of life are among the Court's concerns,<sup>28</sup> with individual liberty forming the underlying legal principle. However, when a person seeks the assistance of a physician to die, the interest of the state in assuring sanctity of life prevails over individual liberty.<sup>29</sup>

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27. *Cruzan v. Dir., Mo. Dep't. of Health*, 497 U.S. 261 (1990); *Lawrence*, 539 U.S. 558.

28. *Bowen*, 476 U.S. 610; *Cruzan*, 497 U.S. 261.

29. *Vacco v. Quill*, 521 U.S. 793 (1997), *Washington v. Glucksberg*, 521 U.S. 702 (1997).

### EXPLAINING THE CONSERVING AND LIBERATING NARRATIVES: SIX EXPLANATIONS AND TWO THEORIES

How shall we explain these cases and their principles? Six analyses and two theories help us understand the Court's encounter with disability and its three-decade reverie for "Our Town," our America.

#### *Six Explanations*

First, the Court recognizes that there are times when a legislature must draw disability-based distinctions in order to provide benefits.<sup>30</sup> If the Court were to scrutinize all disability-related legislative judgments under the same stringent standards it applies to legislative judgments about racial minorities and women, it would impede a legislature that seeks to benefit those who have a great need for social supports and legislative protections. The Court teaches three lessons: Disability is a distinction that makes a difference; not all governmental discrimination is invidious; and paternalism has its place in public policy.

Second, the Court is hostile to claims of people who either already have jobs or can get work at places where they experience the judgments of an employer who makes a principled, business-driven decision not to accommodate their disability. Indeed, by refusing to classify as disabled a person who has mitigated her disability,<sup>31</sup> the Court, in *Sutton v. United Air Lines, Inc.*, proclaimed: "Be non-disabled if you can be. If you cannot, then you are indeed a person with a disability and we will not impede Congress in protecting you from discrimination."<sup>32</sup> In *Sutton*, the Court teaches a single lesson: Persons with disabilities have responsibilities to themselves to gain employment but a concurrent duty not to overly burden businesses and their employees and customers.<sup>33</sup> Citizenship entails responsibilities, and these responsibilities extend both to one's self and other persons.

Third, the Court is shrinking the number of persons protected by the American with Disabilities Act (ADA) by excluding from ADA's protections those persons who can mitigate their impairments.<sup>34</sup> The Court is even questioning whether employment constitutes a "major life activity" covered by the ADA.<sup>35</sup> Assuming that work is such an activity, the Court is evermore inhospitable to cases that impose costs on businesses, shielding them from discrimination claims<sup>36</sup> provided that the employer makes an individualized

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30. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

31. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

32. H. Rutherford Turnbull, III et al., *The Core Concepts of Disability Policy Affecting Families Who Have Children with Disabilities*, 12 J. DISABILITY POL'Y STUD. 133 (2001).

33. See *Sutton*, 527 U.S. 471.

34. *Id.*

35. *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002).

36. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002).

decision as to each employee.<sup>37</sup> In these cases, the Court teaches three lessons: Capitalism merits conservation; class-based discrimination is constitutionally impermissible; and individualized decision-making is mandatory. Further, by limiting the class of ADA-protected individuals, the Court clarifies its fear that an ever-enlarging class of disability claimants will come out of the woodwork to seek special judicial protection and cause potential disruption of traditional business practices.

Fourth, the Court is no less protective of states than businesses, as they also are entities easily damaged by burdens on their fiscal resources. Relying on the Fourteenth Amendment,<sup>38</sup> the Court insists that Congress cannot abrogate states' immunity unless, first, it can point to a large body of evidence providing that states have discriminated in employment and, second it unmistakably abrogates their immunity.<sup>39</sup> When both of these conditions are met, the Court defers to Congressional abrogation and upholds the ADA's ban on such discrimination. Generally, this jurisprudence teaches two lessons: Legacies of state-sponsored intolerance are constitutionally intolerable, and there are strict limits on Congress' powers to affect states' rights.

Fifth, the Court adamantly protects familial and personal relationships. It creates a barrier around family decision-making in edges-of-life cases<sup>40</sup> that cannot be easily breached by relatives or the state, and it also preserves other family integrity against interested outsiders.<sup>41</sup> The Court has generally been wary of permitting outsiders to second-guess a family's decisions as to its children.<sup>42</sup> The Court also has granted parents the right to represent their own interests, without benefit of counsel, in their children's education.<sup>43</sup> Furthermore, the Court has safeguarded homosexual relations, reinforcing that proposition that individual liberty and privacy are precious to the American culture.<sup>44</sup> Like homosexuality, often wrongly stigmatized by society, the Court protects wrongly-stigmatized disabled persons whose fundamental personal interests are enlivening to American society. In these cases, the Court instructs us in a lesson about government's role: Quality of life and death qualify for the Court's protection against strangers at the bedside. But by preserving the state's interests against suicide and the involvement of a profession (against its ethical codes) in ending life, the Court makes it clear that sanctity of life is also

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37. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

38. *Pennhurst State Sch. v. Halderman* (Pennhurst I), 451 U.S. 1 (1981) *on remand*, 673 F.2d 647 (3d Cir. 1982), *rev'd* 465 U.S. 89 (1984).

39. *Bd. of Trs. v. Garrett* 531 U.S. 356, 363-64 (2001); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 725-26 (2003).

40. See *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610 (1986), *Cruzan v. Dir., Mo. Dep't. of Health*, 497 U.S. 261 (1990).

41. See *Troxel v. Granville*, 530 U.S. 57 (2000), *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S.1 (2004).

42. See *Bowen*, 476 U.S. 610; *Cruzan*, 497 U.S. 261; *Schiavo*, 2004 WL 980028; *Troxel*, 530 U.S. 57; *Newdow*, 542 U.S. 1.

43. *Winkelman v. Parma City Sch. Dist.*, 127 S.Ct. 1994 (2007).

44. *Lawrence v. Texas*, 539 U.S. 558 (2003).

a legitimate state interest and that professional ethics are entitled to deference.

Sixth, the Court inclines toward “the establishment” when balancing entities’ and individuals’ competing equities; the employment, public accommodations, and education cases demonstrate that fact. Here, there are two lessons. First, economic impact is a criterion in the Court’s jurisprudence. Dollars drive decisions; rights run with revenues. Second, professionals’ judgments are presumptively valid.

However, the Court affirms individual autonomy against the entities that display animus against an individual’s fundamental rights, preserving access to courtrooms<sup>45</sup> and communities,<sup>46</sup> public institutions (the education cases), and public accommodations (the anti-discrimination cases), and safeguarding the closest traditional relationships (familial and sexual relationships). Paradoxically, the Court values both institutional and individual autonomy.

### ***Two Theories: Remission to Majoritarian Decision Making and Preservation of Chosen Relationships***

On what theories does the Court proceed in these seemingly competing conserving and liberating paths? There are two such theories. First, the Court acknowledges that all rights and equities are relative and varied in definition. The Court’s role is to compel individuals to confront each other, their established institutions, and their differences and to address those differences within broad liberty-privacy-autonomy boundaries.<sup>47</sup> Here, the Court relies on the theory of “remission to majoritarian processes,” reminding us that, as in *Brown v. Topeka Board of Education*, 348 U.S. 886 (1954), compelled confrontations around differences may be resolved if the decision-making process is fair and open.<sup>48</sup>

Second, the Court recognizes that total abdication to majoritarian processes may undermine some of our country’s most valued principles. There can indeed be a tyranny of the prejudiced and bigoted. So it declines to command, or let states command, the nature of citizens’ relationships in familial and sexual contexts.<sup>49</sup> Instead, the Court preserves chosen relationships in a manner consistent with the long-standing liberty-privacy-autonomy principle. Especially where rights are “fundamental” in the sense that they are essential to a free society and the sanctity and quality of life in

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45. *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004).

46. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

47. See Robert A. Burt, *Retardation, Legal Rights and the Communal Ideal*, in *THE LEGAL RIGHTS OF CITIZENS WITH MENTAL RETARDATION*, 32 (Lawrence A. Kane, Jr., Phyllis Brown & Julius S. Cohen eds., 1988).

48. *Lane*, 541 U.S. 509; *Winkelman v. Parma City Sch. Dist.*, 127 S.Ct. 1994 (2007).

49. See *MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); *Cruzan v. Dir., Mo. Dep’t. of Health*, 497 U.S. 261 (1990); *Troxel v. Granville* 530 U.S. 57 (2000); *Elk Grove Unified School Dist. V. Newdow*, 542 U.S. 1 (2004); *Lawrence v. Texas*, 539 U.S. 558 (2003).

that society, the Court safeguards them.<sup>50</sup>

The second theory is consistent with the Court's concern for the welfare of traditional institutions. In striking down challenges to family decision making ostensibly based on professional judgment;<sup>51</sup> relying on the standards of a profession to determine whether discrimination has occurred;<sup>52</sup> and upholding state laws prohibiting physician-assisted suicide,<sup>53</sup> the Court preserves the traditional ethics of the health care profession. Likewise, the Court has generally, but not always, upheld the practices of another profession – education—that is critical to our future as an educated democracy.<sup>54</sup> Finally, the Court's protection of traditional institutions explains why it defers to the prerogatives of those who drive the capitalist economy.<sup>55</sup>

### TWO CONSTITUTIONAL PRINCIPLES AND THEIR ROLE IN CONSERVING AND LIBERATING JURISPRUDENCE

However, there is more to the Court's encounter with disability—separation of powers and federalism. The Court's recent activist stance, arguably at hands of recent Court personnel changes, declines to defer to Congress as much as prior Courts.<sup>56</sup> For many in the disability community, the current Court often reaches the “wrong results” for citizens with disabilities. But at least the Court has a principle – separation of powers – on which to proceed. Similarly, the Court's malleable sense of the boundary between federal and states' rights sometimes reaches the “wrong results” for those same citizens. But again, the Court relies on federalism in choosing how to proceed, albeit sometimes seemingly in face of *stare decisis*. These two principles (separation of powers and federalism) form the foundation for the Court's current narrative and have the real power to shape “Our Town,” today's America.

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50. *Ford v. Wainwright*, 477 U.S. 399 (1986); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Cruzan*, 497 U.S. 261; *Troxel*, 530 U.S. 57; *Newdow*, 542 U.S. at 1; *Lawrence*, 539 U.S. 558.

51. *Bowen v. American Hospital Ass'n*, 476 U.S. 610 (1986)

52. *Bragdon v. Abbott*, 524 U.S. 624 (1998)

53. *Vacco v. Quill*, 541 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

54. *Compare* *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982), *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979), *Schaffer v. Weast*, 546 U.S. 49 (2005), *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291 (2006), *with Sch. Bd. v. Arline*, 480 U.S. 273 (1987), *Honig v. Doe*, 484 U.S. 305 (1988), *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984), and *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999).

55. *Compare* *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), *Bd. of Tr. v. Garrett*, 531 U.S. 356 (2001), *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002), *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002), *with* *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001)).

56. *Compare* *Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984), *Sch. Comm. of Burlington v. Dep't of Ed.*, 471 U.S. 359 (1985), *U.S. Dep't. of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986), *and Dellmuth v. Muth*, 491 U.S. 223 (1989), *with* *Pennhurst State Sch. v. Halderman (Pennhurst I)*, 451 U.S. 1 (1981) *on remand*, 673 F.2d 647 (3d Cir. 1982), *rev'd* 465 U.S. 89 (1984), *and* *Smith v. Robinson*, 468 U.S. 992 (1984).

Like citizens' rights, separation of powers and federalism are relative, not absolute, principles. The Court acknowledges as much by protecting citizens' fundamental interests (their liberty, privacy, and autonomy) while deferring to Congress' evidence-based policy (laws based on well-documented discrimination<sup>57</sup>). The Court does not uniformly permit confrontations and relationships to occur and develop in a vacuum. Most troublingly in cases where federal and state government budgets and private sector economies are involved, the Court becomes the "prudent trustee," relying on the separation of powers principle to safeguard public and private assets unless Congress justifiably and clearly directs it not to do so.

One may well quarrel with the Court for considering the cash consequences of Congress' and its own decisions. Considerations of cost arguably are properly reserved for the Legislative Branch. Unfortunately, time after time, the Court's jurisprudence involves such considerations, adhering to the originalist and strict-constructionist approaches to the federal law. Equally troubling is the Court's recent disregard for previous cases interpreting the principles of federalism and separation of powers. Without doubt, the Court's originality and strict constructionist approaches account for these changes. Activism is activism even if it is disguised by appeals to proper approaches to judicial interpretation. The point here is not to debate whether a specific interpretation is correct, but to illustrate that the Court's cost-sensitivity and strict construction approaches reveal the current Court's views of "this America."

#### **REVERIES, VISIONS, AND TWO QUESTIONS FOR THE CITIZENS OF OUR TOWN: OUR ENCOUNTERS WITH DISABILITY**

The Court's reverie – its memory for what has been and its vision for what ought to be—conserves a "town" in which established institutions deserve protection, people and institutions are compelled to confront their differences and competing equities, dollars drive decisions, and cost-free personal autonomy is valued.

The Court's reverie and its vision also liberate those with un-chosen traits – disability – from historical stigma and today's most invidious majoritarianism. Nowadays, however, the Court's federalism theory remits citizens with disabilities to the legislative processes and atomizes their traditional appeals for constitutional protection, diminishing their federal constitutional claims and requiring them to engage in citizen-to-citizen confrontation at state and local levels. These are where the meaning of quality of life is determined and where disability advocacy must occur. That is one of the most penetrating lessons of the Court's edges-of-life decisions. Grover's Corners is now each of "Our Towns."

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57. *Bd. of Tr. v. Garrett*, 531 U.S. 356 (2001); *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004).

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The ultimate meaning of the Court's encounter with disability is personal to each of us in every one of the Grover's Corners where we live. That is so because the Court requires us to make our own judgments about our fellow citizens' worth. In making those judgments, it is well to bear in mind that disability is a democratic experience – it can visit any one of us at any time, no matter how we might try to insulate ourselves from it. And as we age, it becomes the most natural of human experiences.

What is the nature of our reverie and our vision? That's the question the Court requires us to answer. Below it is yet a more challenging one: Does less able mean less worthy? I have not thought so,<sup>58</sup> and my scholarship and advocacy have consistently reflected that belief and always will.

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58. H. Rutherford Turnbull, *Report of the parents' committee: Families in Crisis, Families at Risk*, in. INTERVENTION STRATEGIES FOR HIGH RISK INFANTS AND YOUNG CHILDREN 765 (Theodore D, Tjossem ed., 1976).