SUPREME COURT OF THE UNITED STATES

No. 02–1667

TENNESSEE, PETITIONER *v.* GEORGE LANE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 17, 2004]

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring.

I join the Court's opinion subject to the same caveats about the Court's recent cases on the Eleventh Amendment and §5 of the Fourteenth that I noted in *Nevada Dept. of Human Resources* v. *Hibbs,* 538 U. S. 721, 740 (2003) (SOUTER, J., concurring).

Although I concur in the Court's approach applying the congruence-and-proportionality criteria to Title II of the Americans with Disabilities Act of 1990 as a guarantee of access to courts and related rights, I note that if the Court engaged in a more expansive enquiry as THE CHIEF JUSTICE suggests, *post*, at 15 (dissenting opinion), the evidence to be considered would underscore the appropriateness of action under §5 to address the situation of disabled individuals before the courts, for that evidence would show that the judiciary itself has endorsed the basis for some of the very discrimination subject to congressional remedy under §5. *Buck* v. *Bell*, 274 U. S. 200 (1927), was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities. See *id.*, at 207 ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three genera-

tions of imbeciles are enough"). Laws compelling sterilization were often accompanied by others indiscriminately requiring institutionalization, and prohibiting certain individuals with disabilities from marrying, from voting, from attending public schools, and even from appearing in public. One administrative action along these lines was judicially sustained in part as a justified precaution against the very sight of a child with cerebral palsy, lest he "produc[e] a depressing and nauseating effect" upon others. *State ex rel. Beattie* v. *Board of Ed. of Antigo*, 169 Wis. 231, 232, 172 N. W. 153 (1919) (approving his exclusion from public school).[1]

Many of these laws were enacted to implement the quondam science of eugenics, which peaked in the 1920's, yet the statutes and their judicial vindications sat on the books long after eugenics lapsed into discredit.[2] See U. S. Civil Rights Commission, Accommodating the Spectrum of Individual Abilities 19–20 (1983). Quite apart from the fateful inspiration behind them, one pervasive fault of these provisions was their failure to reflect the "amount of flexibility and freedom" required to deal with "the wide variation in the abilities and needs" of people with disabilities. *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U. S. 432, 445 (1985). Instead, like other invidious discrimination, they classified people without regard to individual capacities, and by that lack of regard did great harm. In sustaining the application of Title II today, the Court takes a welcome step away from the judiciary's prior endorsement of blunt instruments imposing legal handicaps.

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[1] See generally *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 463–464 (1985) (Marshall, J., concurring in judgment in part and dissenting in part); Burgdorf & Burgdorf, A History of Unequal Treatment, 15 Santa Clara Law. 855 (1975); Brief for United States 17–19.

[2] As the majority opinion shows, some of them persist to this day, *ante*, at 12–14, to say nothing of their lingering effects on society.