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 GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring.

For the reasons stated by the Court, and mindful of Congress' objective in enacting the Americans with Disabilities Act—the elimination or reduction of physical and social structures that impede people with some present, past, or perceived impairments from contributing, according to their talents, to our Nation's social, economic, and civic life—I join the Court's opinion.

The Americans with Disabilities Act of 1990 (ADA or Act), 42 U. S. C. §§12101–12213, is a measure expected to advance equal-citizenship stature for persons with disabilities. See Bagenstos, Subordination, Stigma, and "Disability," 86 Va. L. Rev. 397, 471 (2000) (ADA aims both to "guarante[e] a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities, and [to] protec[t] society against the loss of valuable talents"). As the Court's opinion relates, see *ante*, at 5, the Act comprises three parts, prohibiting discrimination in employment (Title I), public services, programs, and activities (Title II), and public accommodations (Title III). This case concerns Title II, which controls the conduct of administrators of public undertakings.

Including individuals with disabilities among people who count in composing "We the People," Congress under-

stood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation. Central to the Act's primary objective, Congress extended the statute's range to reach all government activities, §12132 (Title II), and required "reasonable modifications to [public actors'] rules, policies, or practices," §§12131(2)–12132 (Title II). See also §12112(b)(5) (defining discrimination to include the failure to provide "reasonable accommodations") (Title I); §12182(b)(2)(A)(ii) (requiring "reasonable modifications in [public accommodations'] policies, practices, or procedures") (Title III); Bagenstos, *supra*, at 435 (ADA supporters sought "to eliminate the practices that combine with physical and mental conditions to create what we call 'disability.' The society-wide universal access rules serve this function on the macro level, and the requirements of individualized accommodation and modification fill in the gaps on the micro level." (footnote omitted)).

In *Olmstead* v. *L. C.,* 527 U. S. 581 (1999), this Court responded with fidelity to the ADA's accommodation theme when it held a State accountable for failing to provide community residential placements for people with disabilities. The State argued in *Olmstead* that it had acted impartially, for it provided no community placements for individuals without disabilities. *Id.*, at 598. Congress, the Court observed, advanced in the ADA "a more comprehensive view of the concept of discrimination," *ibid.*, one that embraced failures to provide "reasonable accommodations," *id.*, at 601. The Court today is similarly faithful to the Act's demand for reasonable accommodation to secure access and avoid exclusion.

Legislation calling upon all government actors to respect the dignity of individuals with disabilities is entirely compatible with our Constitution's commitment to federalism, properly conceived. It seems to me not conducive to a harmonious federal system to require Congress, before it

exercises authority under §5 of the Fourteenth Amendment, essentially to indict each State for disregarding the equal-citizenship stature of persons with disabilities. But see *post*, at 11 (SCALIA, J., dissenting) ("Congress may impose prophylactic §5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations."); *Nevada Dept. of Human Resources* v. *Hibbs,* 538 U. S. 721, 743 (2003) (SCALIA, J., dissenting) (to be controlled by §5 legislation, State "can demand that *it* be shown to have been acting in violation of the Fourteenth Amendment" (emphasis in original)). Members of Congress are understandably reluctant to condemn their own States as constitutional violators, complicit in maintaining the isolated and unequal status of persons with disabilities. I would not disarm a National Legislature for resisting an adversarial approach to lawmaking better suited to the courtroom.

As the Court's opinion documents, see *ante*, at 12–18, Congress considered a body of evidence showing that in diverse parts of our Nation, and at various levels of government, persons with disabilities encounter access barriers to public facilities and services. That record, the Court rightly holds, at least as it bears on access to courts, sufficed to warrant the barrier-lowering, dignity-respecting national solution the People's representatives in Congress elected to order.