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Equal Protection from the Bus Stop to the Doorstep: A Case for the Application of Strict Scrutiny for Disability Classifications

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EQUAL PROTECTION FROM THE BUS STOP TO THE DOORSTEP: A CASE FOR THE APPLICATION OF STRICT SCRUTINY FOR DISABILITY CLASSIFICATIONS

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I. INTRODUCTION

Krystal Monteros, a wheelchair user, was on her way to an apartment tour of a building that was listed as wheelchair accessible.[1] A bus shuttled her over to the stop closest to the building, but when she got off the bus, she was trapped.[2] Ms. Monteros found herself surrounded by only gravel "sidewalks" that her wheelchair could not traverse.[3] To make matters worse, her path to the building was obstructed by a 6-inch drop-off with no curb ramp.[4] In an act of resignation to the physical barriers, she canceled the tour and waited for the same bus to come back to pick her up.[5]

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1. David Kroman, *WA Faces an Epidemic of Inaccessible Sidewalks*, SEATTLE TIMES (Oct. 3, 2022, 6:00 AM), www.seattletimes.com/seattle-news/transportation/wa-faces-an-epidemic-of-inaccessible-sidewalks/ [perma.cc/S9J4-992N].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

Federal laws require modifications to sidewalks and public ways that allow people with wheelchairs the ability to freely travel.[6] However, a review of more than thirty cities' and counties' assessments of sidewalk accessibility found that none of the jurisdictions had even fifty-percent of their sidewalks in compliance with the Americans with Disabilities Act ("ADA").[7] When responding to this massive discrepancy between the law and reality, many municipalities simply stated that the repairs were too expensive, with no regard to the human cost inflicted on people who use wheelchairs.[8]

To address the problem of a lack of legal remedies to combat systemic disability discrimination, courts should apply strict scrutiny to cases where government action discriminates on the basis of disability. The class of people with disabilities meets the definition of a "suspect class"[9] in need of heightened scrutiny and there are pressing public policy concerns regarding ongoing, pervasive discrimination against people with disabilities.[10] Part II of this comment explores the history of disability discrimination in the United States, a chronology of legislative and judicial actions that either strengthened or weakened disability rights and the pressing issues affecting people with disabilities in the twenty-first century. Part III analyzes why statutory remedies and rational basis review have proven inadequate in addressing the current inequities facing people with disabilities. Part IV provides a legal framework for how people with disabilities can be properly identified as a suspect class and will posit why the judiciary should apply strict scrutiny in disability discrimination cases.

II. BACKGROUND

This Section introduces Equal Protection Clause's level of protection of people with disabilities and explores the history of disability discrimination in the United States.[11]

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6. U.S. DEP'T OF JUSTICE, 2010 STANDARDS FOR STATE AND LOCAL GOVERNMENT FACILITIES: TITLE II (Sept. 15, 2010), www.ada.gov/law-and-regs/design-standards/2010-stds/ [perma.cc/8EW7-6WMJ].

7. Kroman, *supra* note 1 (highlighting that the violations are even more egregious in some jurisdictions, revealing 71% of sidewalks in Olympia, WA do not meet ADA standards.)

8. *Id.* (explaining that the cost to repair the more than 4,000 sidewalks in Olympia, WA without an adequate ramp is more than $100 million; meanwhile, the city has only budgeted $200,000 for its sidewalk repair program).

9. *See infra* Part IV.

10. *See infra* Section II.C.

11. Although inconsistent with how U.S. courts have defined disability, the United Nations Convention on the Rights of Persons with Disabilities defines people with disabilities as anyone with "long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder [a person's] full and effective participation in society on an equal basis with others." G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities

The Equal Protection Clause of the Fourteenth Amendment states that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[12] Courts have used the Equal Protection Clause to strike down state actions by applying heightened scrutiny when the law is facially discriminatory.[13] Under current jurisprudence, however, disability classifications are only subject to rational basis review – the lowest level of scrutiny.[14] Therefore, any state action that discriminates on the basis of disability only needs to be rationally related to a legitimate government interest.[15] As a result, progress in the area of disability rights is limited to the enforcement of state and federal statutes.[16]

Although federal statutes, including the ADA, have broadly prohibited many kinds of disability discrimination, gaps still remain in protecting people with disabilities from invidious discrimination at the hands of public entities.[17] The ADA, specifically Title II, which applies to public entities, has proven to be inherently limited in its statutory construction.[18] Additionally, the ADA's impact was reduced by the judiciary due to gatekeeping requirements.[19]

Section A will dive into how disability discrimination cases

(Jan. 24, 2007), www.refworld.org/docid/45f973632.html [perma.cc/Y25R-7LJF].

12. U.S. CONST. amend. XIV § 1.

13. *See* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 995 (2013) ("No law discriminating on the basis of race, sex, or religion should be upheld unless it survives strict scrutiny and serves a compelling and general governmental interest.").

14. *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (holding that people with disabilities are not considered as part of a quasi-suspect or suspect class which should be afforded a higher level of judicial scrutiny than what is normally given to economic and social legislation). *See generally* Meghan Boone, *Perverse & Irrational*, 16 HARV. L. & POL'Y REV. 393 (2022) (explaining rational basis review as an "extremely differential" standard to the government interests).

15. *Id.*

16. Michael Waterstone, *Classifications and Categories in the 1964 Act and in Subsequent Civil Rights Laws: Backlash, Courts, and Disability Rights*, 95 B.U. L. REV. 833, 841-42 (2015).

17. Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 Calif. L. Rev. 1315, 1318-19 (2022) (explaining that parents with intellectual disabilities are three times more likely to have their children taken away from them by a state agency than parents without a disability).

18. *See infra* Section III.A.

19. Cheryl Anderson, *Making "Meaningful Access" Even Less Meaningful: Judicial Gatekeeping Under Title II of the Americans with Disabilities Act*, 49 U. Mem. L. Rev. 635, 639-40 (2019) (explaining that courts have dismissed disability discrimination claims under Title II of the ADA solely based on whether the government activity was a "service, program, or activity" under the law).

have evolved over the course of American history. Section B will explain the efforts taken by legislatures and courts to protect people with disabilities from discrimination. Lastly, Section C will provide insight into some of the outstanding issues that the disability community faces despite the evolving legal landscape.

A. History of Disability Discrimination Jurisprudence in the United States

When people with disabilities turned to the courts for relief in the late nineteenth century, they were largely turned away.[20] An 1893 case, *Watson v. Cambridge*, determined that the plaintiff was too "weak-minded" to benefit from education and upheld a school's decision to reject a prospective student based on his developmental disability alone.[21] Furthermore, common law allowed defendants of negligence to raise a contributory negligence defense where a plaintiff was injured because of their own visual impairment.[22] However, courts as early as 1868 began to recognize that a person with impaired vision may operate with the presumption that the public way is safe.[23]

In the late nineteenth century, courts began to defend people with disabilities' right to travel.[24] In 1896, the Mississippi Supreme Court held that a person with a visual impairment could not be denied a ticket to board a train.[25] This right to travel was reaffirmed more broadly by courts in the early twentieth century.[26] However,

20. Robert L. Burgdorf Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 246-47 (2008).

21. Watson v. Cambridge, 32 N.E. 864, 864 (Mass. 1892) (holding that the trial court erred in reversing a school board's "good-faith" determination that a prospective student with a learning disability should not be allowed to attend the school); *see also* State ex rel. Beattie v. Bd. of Educ., 172 N.W. 153, 155 (Wis. 1919) (holding that a board of education had the authority to deny a student enrollment based on his condition as a "crippled and defective" child); Bd. of Educ. v. State, 191 N.E. 914, 917 (Ohio Ct. App. 1934) (determining that the family of a child with a mental disability who was denied enrollment did not have standing to sue prior to the state department of education making a determination regarding his disability).

22. Burgdorf Jr., *supra* note 20.

23. Davenport v. Ruckman, 37 N.Y. 568, 571 (1868) (determining that the trial court did not err in instructing the jury that "the circumstance that [the plaintiff] was partially blind, and fell into this opening in the day-light, was not of any importance").

24. Burgdorf Jr., *supra* note 20.

25. Zachery v. Mobile & O. R. Co., 21 So. 246, 247 (Miss. 1896) (reasoning that although a railroad argued that "infirm passengers require more and extra care, and for that reason railroad companies have the right to reject them[,]" the record did not show that the plaintiff-passenger ever required extra care, only that he was visually impaired).

26. *See* Balcom v. Independence, 160 N.W. 305, 308 (Iowa 1916) (reasoning that people with visual impairment have every right to use the street as those who have "possession of their faculties"). *See also* Sleeper v. Sandown, 52 N.H.

there are very limited historical instances where courts established legal rights for people with disabilities.[27] This has posed difficulties in developing a chronology showing a clear improvement in protections for people with disabilities.[28]

The Supreme Court decision in *Buck v. Bell* represented a substantial backslide for people with disabilities as a class worthy of full recognition by society as deserving of equality.[29] The petitioner, Carrie Buck, considered to be "feeble-minded" with a "feeble-minded" mother and an equally "feeble-minded" daughter, was committed to a state mental institution, where she was required to be sexually sterilized.[30] Ms. Buck challenged a Virginia statute permitting the sexual sterilization of inmates of institutions in order to promote the "welfare of society" as a violation of the Fourteenth Amendment Due Process Clause.[31] The court upheld the Virginia law with a disturbing rationale:

> 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. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[32]

Despite the progress made at the state level in the latter half of the nineteenth and twentieth centuries to ease the burden placed on people with disabilities,[33] the federal courts failed to recognize people with disabilities as having a right to autonomy over their own bodies.[34] Fortunately, this eugenics-laced jurisprudence, approving of forced sterilization, would be later reversed in *Skinner v. Oklahoma ex rel. Williamson*, where the Supreme Court held a state law that forced sterilization of inmates violated the

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244, 251 (1872) (overruling a contributory negligence defense in the case of a blind person who suffers injury due to their impaired vision and reasoning that a person who is blind should be entitled to the same relief as someone with full vision); Shields v. Consol. Gas Co., 193 A.D. 86, 90 (N.Y. 1920) (concluding that a person who is blind should not bear the burden of venturing into public way "at his peril").

27. *See* Burgdorf Jr., *supra* note 20, at 247 ("[The] very limited sampling of historical instances of legal advocacy to establish and implement legal rights for people with disabilities in America illustrates the haphazard occurrence and sometimes nebulous character of such actions, and points up the difficulty of establishing a clear starting point of disability nondiscrimination litigation activity.").

28. *See id.*

29. Buck v. Bell, 274 U.S. 200, 205 (1927).

30. *Id.* at 206

31. *Id.*

32. *Id.*

33. *See supra* note 21.

34. *See Buck*, 274 U.S. at 205.

Fourteenth Amendment's Due Process Clause.[35] However, although *Skinner* generally prevented forced sterilization laws, the opinion did little to recognize the unique harm that these laws had on people with disabilities who were institutionalized.[36] As a result, some scholars claim that *Buck v. Bell* remains good law since it is still cited for the proposition that a state has the power to impose medical care onto people.[37]

Regardless of where *Buck v. Bell* currently stands as "good law," the decision had a drastic, generational impact on people with disabilities. The Court granted the eugenics movement legitimacy and momentum that would lead to twenty-eight states passing sterilization laws similar to the Virginia statute.[38]

Between 1907 and 1983, Ms. Buck, along with more than 60,000 others, were forcibly sterilized.[39]

B. Legislative and Judicial Actions Mitigating Disability Discrimination

Disability discrimination law is rooted in a combination of statutes pertaining to government benefits and Fourteenth Amendment claims.[40] Activism in the late 1960s laid the groundwork for major disability rights legislation.[41] However,

35. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (holding that there is a fundamental right to procreation and that a state law that permitted sterilization for "habitual" crimes where a person commits two or more crimes amounting to moral turpitude violates due process because there is not a compelling state interest in forced sterilization) (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (establishing that the equal protection of the laws is "a pledge of the protection of equal laws" and "the questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of *every* citizen of the United States equally.") (emphasis added)); *but see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022) (recharacterizing the fundamental right to procreate outlined in *Skinner* as "the right not to be sterilized without consent.").

36. *See Skinner*, 316 U.S. at 541 (acknowledging "irreparable injury" to "man" but not to people with disabilities who have been specifically targeted by sterilization laws).

37. Derek Warden, *Ex Tenebris Lux: Buck v. Bell and the Americans with Disabilities Act*, 51 U. TOL. L. REV. 57, 57 (2019).

38. *See* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1986 (2019) (Thomas, J., concurring) (reasoning that even today, "the Court continues to attribute legal significance to the same types of racial-disparity evidence that were used to justify race-based eugenics . . . and support for the goal of reducing undesirable populations through selective reproduction has by no means vanished).

39. *Id.*

40. Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues?*, 22 AM. U. J. GENDER SOC. POL'Y & L. 519, 526 (2014).

41. CRIP CAMP (Higher Ground Productions 2020) (detailing how Camp Jened, a "loose, free-spirited camp designed for teens with disabilities" served as a catalyst for a disability rights movement focused on implementing federal

public attitudes were rooted in paternalism and the protection of people with disabilities – referred to as "the handicapped" – rather than ensuring equality of opportunity and access to public accommodations.[42] This approach, coined the "medical model," focused on the person with a disability's "infirmity" that prevented full participation in society.[43] As a result, government assistance conjoined with help from rehabilitation professionals, psychologists, and social workers was centered around "helping" people with disabilities adjust to a society that was built to support the conveniences of people without disabilities.[44] The most salient issue with the "medical model" is that it failed to recognize the need for the community of people with disabilities to have civil rights, and it did not question the harsh realities of the physical and social environments they were forced to "make do" with.[45]

Starting in the 1970s, the "civil rights model" came to prominence.[46] Under this approach, the role of government was transformed from one merely "providing for" the rehabilitation of people with disabilities to a government that acknowledged disability as a social and cultural construct.[47] As a result, the prominent federal laws passed in the latter half of the twentieth century focused on eliminating the legal, physical, economic, and social barriers that prevent people with disabilities from fully participating in society.[48]

In 1973, Congress passed amendments to the Vocational Rehabilitation Act, which proved to be the most consequential legislation so far, aimed at preventing disability discrimination.[49] The scope of the initial law was to provide funding for vocational training for people with disabilities.[50] Congress had to reauthorize funding for these programs on an annual basis.[51] As an afterthought to the Civil Rights Acts, in 1973, members of Congress expressed an interest in prohibiting federal agencies and contractors who receive federal funding from discriminating based on "handicap."[52] This idea would turn into Section 504 of the Rehabilitation Act, which

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accessibility legislation).

42. Rothstein, *supra* note 40.

43. Peter David Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1, 2 (2000).

44. *Id.*

45. *Id.*

46. *Id.* at 3.

47. *Id.*

48. *Id.*

49. Rothstein, *supra* note 40.

50. *Id.*

51. *Id.*

52. *Id.*

marked the first instance of the federal government prohibiting disability discrimination.[53]

In 1975, Congress passed "The Education for All Handicapped Children Act" (later renamed the Individuals with Disabilities Education Act ("IDEA")) which mandated special education for all students with disabilities in public schools.[54] This statute also required public schools to provide "related services," which included "transportation, and such developmental, corrective, and other supportive services."[55] However, although IDEA provided many students with disabilities a guarantee of a "free appropriate public education" ("FAPE"), it also functioned as a major roadblock for plaintiffs because of an exhaustion clause.[56]

The ADA represents the federal government's most recent and expansive attempt to address discrimination against people with disabilities.[57] Title II of the ADA states clearly that "subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[58] To prevail on a Title II ADA claim, an individual must show: "(1) that he or she is a qualified individual with a disability, (2) who was

53. Rothstein, *supra* note 40; Section 504 of the Rehabilitation Act states that "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794 (2016).

54. Rothstein, *supra* note 40.

55. Ann K. Wooster, Annotation, *What Constitutes Services That Must Be Provided By Federally Assisted Schools Under The Individuals With Disabilities Education Act (IDEA), 20 U.S.C.A. § 1400 et seq.*, 161 A.L.R. Fed. 1 § 1 (2000) (explaining that other supportive services includes "speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only" and that schools must engage in services to identify and assess disabling conditions in children).

56. Claire Raj, *The Lost Promise of Disability Rights*, 119 MICH. L. REV. 933, 935 (2021) (arguing that because the IDEA requires plaintiffs to exhaust the state's administrative remedies before filing claims under other applicable laws, courts have "erroneously force[d] students to exhaust their IDEA rights before bringing claims under section 504 or the ADA" and that courts have also misconstrued "schools' affirmative obligations under disability rights laws" by imposing "unfounded limits on schools' duties to students with disabilities").

57. Ann K. Wooster, Annotation, *Where Are Public Entities Required to Provide Services, Programs, or Activities to Disabled Individuals Under Americans with Disabilities Act, 42 U.S.C.S. § 12132*, 160 A.L.R. Fed. 637 (2000) [hereinafter Wooster, *Where Are Public Entities Required to Provide Services*].

58. 42 U.S.C.S. § 12132 (1990).

excluded from participation in or was denied the benefits of services, programs, or activities of a public entity, and (3) that such discrimination was the result of the individual's disability."[59]

However, since the ADA's inception, there have been serious concerns as to who it covers and who is intended to be protected.[60] Prior to the ADA Restoration Act of 2006, courts were routinely limiting the scope of who was properly identified as sufficiently disabled as to be afford a cause of action under the ADA.[61] Efforts to reduce the amount of people covered by the ADA appeared to be rooted in the lingering "medical model" of disability.[62] At one point, plaintiffs who filed employment discrimination lawsuits under Title I of the ADA prevailed on only five-percent of cases.[63] In recent years, the percentage has only increased to eight-percent.[64]

The ADA provides three different theories of recovery to plaintiffs: "(1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable

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59. *Id*.

60. Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 182 (2008).

61. *Id*. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (holding that actions taken by a person with a disability to mitigate the effects of their disability must be considered when determining if they have a disability that substantially limits one or more major life activity). *But see* 527 U.S. at 498 (Breyer, J., dissenting) (arguing that the limitations of this requirement impose a risk that people reliant on self-improvement devices such as prosthetic limbs will lose ADA protection); Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (holding that "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives" in order to have a disability under the ADA). These Supreme Court decisions hamstringing the ADA's ability to provide protection for people with disabilities would be eventually overturned by the 2008 amendments to the ADA. *See* 42 U.S.C.S. § 12101 (LEXIS through Pub. L. No. 117-285) (setting forth the findings and purpose of the ADA Amendments Act of 2008).

62. Areheart, *supra* note 60, at 185-86 (reasoning that normative categories of "disabled" and "non-disabled" presume that someone's disability is a "a personal, medical problem, requiring but an individualized medical solution; that people who have disabilities face no 'group' problem caused by society or that social policy should be used to ameliorate" (quoting MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 237 (2003))).

63. Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1214 (2003) (arguing that the main hurdle keeping a plaintiff from prevailing in an ADA action was the constrained definition of disability).

64. Mark Pulliam, *The ADA Litigation Monster*, CITY J. (Spring 2017), www.city-journal.org/html/ada-litigation-monster-15128.html [perma.cc/4X5T-YXCP] (contending that despite the abysmal success rate, "the ADA's nebulous provisions get exploited by underperforming employees invoking a torrent of excuses," which highlights the hostilities that people with disabilities face while seeking remedies for discrimination).

modification, or (3) the defendant's rule disproportionately impacts disabled people."[65] However, there remains a big question regarding what affirmative steps public entities need to take to eradicate disability discrimination:

> Specific services, programs, and activities for disabled individuals may or may not be required by courts under § 12132, involving: access to public areas, child protection, community placement for mentally disabled individuals, immediate community placement for mentally disabled individuals, court systems, firefighting, open burning regulation, police force management, arrest of a disabled individual where courts have held such services required or not required and zoning where courts have held such services required or not required.[66]

Another critical limitation of Title II of the ADA comes in its regulatory language: "Title II's regulations require that services, programs, and activities in existing facilities be readily accessible when viewed in their 'entirety.' This allows courts to assess government functions from a global perspective, rather than requiring that each part of the service, program, or activity provide individuals with disabilities equal access."[67]

Even where a plaintiff has made a prima facie case of disability discrimination under a failure-to-accommodate theory, there are two "defenses" that can be brought up by a public entity. First, the public entity can claim that the requested action would create a "fundamental alteration in the nature of a service, program, or activity."[68] Second, the public entity can assert that the accommodation would result in "undue financial and administrative burdens."[69] However, in the context of disability discrimination in employment settings, these defenses are constrained by an interactive process requirement, which mandates employers to engage in a dialogue with the person asking for an

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65. A.H. by Holzmueller v. Ill. High Sch. Ass'n, 881 F.3d 587 (7th Cir. 2018) (quoting Washington v. Ind. High Sch. Athletic Ass'n, 181 F.3d 840 (7th Cir. 1999)).

66. Wooster, *Where Are Public Entities Required to Provide Services*, *supra* note 57.

67. Anderson, *supra* note 19.

68. 28 C.F.R. § 35.164 (2016).

69. *Id*. (explaining that "if an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity"). *See*, *e.g.*, Pascuiti v. N.Y. Yankees, 87 F. Supp. 2d 221, 225 (S.D.N.Y. 1999) (holding that when determining whether an undue burden existed which would preclude the City of New York from making physical modifications to Yankee Stadium to make it accessible, the court can consider the Park Department budget to "obtain a realistic picture of the resources available to the City for proposed modifications, while balancing the cost of those modifications against potential harms to other Parks Department programs").

accommodation to ascertain their specific need.[70] This requirement does not show up within either the statutory text or regulatory language accompanying either Title II or III of the ADA.

C. Modern Disability Discrimination

Although amendments to the ADA in 2008 expanded the definition of disability, increasing the amount of people covered by the ADA, as a practical matter, the vast majority of ADA claims fail to gain traction in courts.[71] To be classified as having a disability under the ADA, the plaintiff must show that they are substantially limited in a major life activity.[72] Even though it was Congress's intent to allow for broad protection under the 2008 amendments, courts will routinely determine that someone lacks a qualifying disability as a matter of law, rather than allowing a jury to make a factual determination.[73]

A large gap also remains in the realm of family law concerning the protection for people with disabilities.[74] States have, and continue to, forcefully strip parents of custody rights solely based on their disability status.[75] A salient example of this when Between 2002 and 2006, Connecticut's Department of Children and Families ("DCF") removed three children from the care of their mother, Karin Hasemann, who suffered mental disabilities.[76] The first child, Kristina, was immediately removed from Ms. Hasemann's custody at birth after she wanted the child to be fed in an "unusual and inappropriate pattern."[77] DCF also took her two other children, Daniel and Joseph Jr., following their births, on a theory of "predictive neglect."[78] Ms. Hasemann had multiple intellectual

70. 29 C.F.R. § 1630.2 (2012) (establishing that "to determine the appropriate reasonable accommodation, it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.").

71. Stacy A. Hickox, *The Underwhelming Impact of the Americans With Disabilities Act Amendments Act*, 40 U. BALT. L. REV. 419, 424-25 (2011).

72. *Id.*

73. *Id.*

74. Lorr, *supra* note 17.

75. *Id.*

76. Watley v. Dep't of Child. & Families, 991 F.3d 418, 422 (2d Cir. 2021).

77. *Id.* (quoting a hospital official who contacted DCF).

78. *Id.* (explaining that "predictive neglect" allows a court to terminate parental rights when "it is more likely than not" that the child will be denied proper care and that "some academic scholars criticize the predictive neglect theory as 'effectively discriminatory and severely disadvantageous for parents with psychiatric disabilities'" (quoting Watley v. Dep't of Child. & Families, No. 3:13-cv-1858, 2019 U.S. Dist. LEXIS 219851, at *11 n.8 (D. Conn. Dec. 23,

disabilities, including a reported history of seizures, narcolepsy, "a schizotypal personality disorder," attention deficit disorder, and other disabilities.[79] Ultimately, the court terminated Ms. Hasemann rights to all three children.[80]

This example represents government conduct squarely aimed at making a classification based on a disability. Connecticut's DCF has created a pattern and practice of separately evaluating parents with disabilities in making determinations about the future custody of the children.[81] The ADA, as currently written, has not been construed as to interfere in a state's police powers in this instance.[82] However, parenting children is a cornerstone of participation in society and has historically been a fundamental right.[83] Thus, people with disabilities ought to be afforded stronger constitutional protections to defend that right in court. Many experts agree that people with disabilities should be afforded the same treatment as any other citizen concerning their fundamental rights.[84]

Simultaneously, litigation tends to muddle the very real human cost that people with disabilities still incur on a daily basis due to the inaccessibility of public spaces.[85] Accessibility comes in many different forms based on the needs of the person with a disability, and these different forms of accommodations are routinely overlooked.[86] Any excuse for failing to accommodate people with disabilities (too expensive, too much effort, not enough time, not our job, etc.) sends a clear signal that "disabled people are

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2019)).

79. *Id*.

80. Lorr, *supra* note 17.

81. *See Watley*, 991 F.3d at 422.

82. *Watley*, 991 F.3d at 427 (holding that the court was bound to the judgment of the Connecticut state court which determined that DCF made "reasonable efforts" to reunite the children with their parents while considering their "specific characteristics" such as their actual or perceived disabilities).

83. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (reaffirming that "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court").

84. *See, e.g.*, Lorr, *supra* note 17, at 1321 ("There is a significant body of existing scholarship that challenges and critiques the constitutionality of termination of parental rights statutes based on a parent's diagnosis with intellectual or cognitive disabilities.").

85. *See* EMILY LADAU, DEMYSTIFYING DISABILITY: WHAT TO KNOW, WHAT TO SAY, AND HOW TO BE AN ALLY 78 (2021).

86. *Id.* at 77-78 (explaining that examples of accommodations including "designating quiet rooms with dim lights to decompress from sensory overload at events, flexible hours to enable people to work on a schedule that's right for their body, sending a slide deck in advance of a meeting so people have extra time to process the information, providing a combination of live captioning and sign language interpreters to ensure that people with hearing and processing disabilities can follow what's being said during an event, designating seating areas that are easy for people with mobility disabilities to get to and spacious enough for people who use mobility equipment, offering large-print or Braille material for people with vision disabilities.").

unwelcome here."[87] An account from Rebekah Taussig, in her book *Sitting Pretty*, provides an insight into how people with disabilities grasp living in a world not built with their needs in mind:

> Many days, I feel too vulnerable to leave my house, too fed up to subject myself to the gamble of strangers interacting with me, too tired to fight to occupy a corner of space. Inaccessibility over time tells me that I do not matter, am not wanted, do not belong. This land wasn't made for me. So I stay in, keep to myself, avoid, cancel plans, carry anxiety in each fold and bend of my body, feel very alone and trapped and helpless.[88]

Taussig's reflection on the state of inaccessibility in the twenty-first century comes at a time where numerous federal statutes, such as the Rehabilitation Act, IDEA, and the ADA have ostensibly outlawed the kinds of discrimination which Taussig suffers from. It is abundantly clear that the status quo is insufficient and that more must be done to eradicate disability discrimination by compelling government entities to fully accommodate people with disabilities. Part III will explore in depth how the causes of action currently available to victims of disability discrimination do not provide similarly broad coverage afforded to other protected classes under the Equal Protection Clause.

III. ANALYSIS

Statutory remedies available to victims of disability discrimination have proven to be wholly inadequate to afford people with disabilities complete protection under the law. Furthermore, attempts by disability rights advocates to invoke constitutional claims during the litigation of disability discrimination have proven to be wholly ineffective. Section A will detail the inadequacies of the ADA as a tool to hold public entities accountable for disability discrimination. Section B will explain how constitutional claims under the Equal Protection Clause have been unsuccessful due to the high degree of deference afforded to public entities.

A. The ADA Is Ineffective at Providing People with Disabilities Complete Protection Under the Law

The first barrier that leads to a disability discrimination case

87. *Id.* at 79.

88. *Id.* at 80 (citing REBEKAH TAUSSIG, SITTING PRETTY: THE VIEW FROM MY ORDINARY, RESILIANT, DISABLED BODY 222 (2020) (articulating that her experience with inaccessibility is "cumulative" and "more than a string of inconveniences" because inaccessibility feels like "being in the world" but "just outside of the world)).

being thrown out is the definition of a disability. Under the ADA, a disability is defined as when someone has a "physical or mental impairment that substantially limits one or more major life activities."[89] This determination is made on a case-by-case basis.[90] The inherent ambiguity with such a bright line between who actually has a disability or not has led to challenges to the ADA as being unconstitutionally vague.[91]

Despite courts rejecting vagueness challenges to the ADA, a large patchwork of cases provide conflicting definitions of what constitutes a disability.[92] For instance, the federal trial court in *Burbach v. Arconic Corporation* held that contracting COVID-19 constituted a disability under the ADA.[93] The court reasoned that the plaintiff alleged sufficient facts to show that he could perform the "essential functions" of his job with an accommodation to work from home.[94] In contrast, the court in *Glover v. Rivas* held that seizures did not constitute a substantial limitation of a major life activity.[95] The plaintiff, a prisoner, suffered significant injuries to his head and back when he fell off a chair while attempting to climb to his top bunk.[96] After receiving medical treatment at an outside medical facility, the plaintiff was diagnosed with various medical conditions along with instructions for modifications to his cell conditions.[97] However, he did not receive the medical treatment

89. 42 U.S.C. § 12102 (2009).

90. *See* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999) (holding that individuals with monocular vision are not disabled "per-se" and must prove their disability on a case-by-case basis and that they have the burden of proving the degree to which one or more of their major life activities are limited).

91. *See* Botosan v. Paul McNally Realty, 216 F.3d 827, 837 (9th Cir. 2000) (concluding that, despite defendants' arguments that because the ADA covers so many kinds of disabilities, a reasonable business owner cannot adequately prepare to accommodate everyone, the ADA is not unconstitutionally vague because of regulatory language clarifying the definition of a disability).

92. *Id.*

93. Burbach v. Arconic Corp., 561 F. Supp. 3d 508, 520-21 (W.D. Pa. 2021) (holding that a farmer employee who was terminated after he sought to take leave and requested reasonable accommodations made a *prima facie* case showing that his reasonable accommodation was possible, and that the employer unreasonably failed to accommodate it).

94. *Id.* at 520 (clarifying that under federal regulations, "an employee is a 'qualified individual' under the ADA if they satisfy 'the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.' . . . and are able to 'perform the essential functions of the position held or desired, with or without reasonable accommodation.'" (quoting 29 C.F.R. § 1630 (2011))).

95. Glover v. Rivas, 536 F. Supp .3d 161, 164 (E.D. Mich. 2021) (concluding that although a prisoner suffered injuries which led to seizures, numbness, a concussion, and other accompanying pain, he could not be classified as having a disability under the ADA).

96. *Id*. at 165.

97. *Id*. at 172 (explaining that "details include accommodations for Plaintiff Richard Glover's physical handicaps resulting from his fall"). Further, "[e]xamples of medical details include privileges for the use of a bottom bunk,

requested by the outside hospital[98] Furthermore, the prison did not permit the plaintiff to use elevators and sit in handicapped-designated areas.[99] Regardless, the court cited precedent holding that the ADA does not provide a cause of action for medical malpractice as a basis for denying his ADA claim.[100]

Plaintiffs have greater success at achieving "disability" status as a matter of law where they can establish a documented history of impairment, but even a history of impairment is subject to the wobbly "substantial impairment" standard.[101] For example, in *Hentze v. CSX Transportation, Inc.*, the court ruled against the plaintiff-employee for failing to show substantial impairment was linked to a major life activity.[102]

The ADA provides that a major life activity includes "*but is not limited to*, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[103] Although this "major life activity" requirement is intentionally broad as to cover a lot of different bodily functions and activities that may be adversely affected by a disability,[104] courts have still denied ADA claims for failing to

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wheelchair, cane, elevator, and sitting in handicapped-designated areas of the dining hall." *Id.* at n.2.

98. *Id.* at 172.

99. *Id.*

100. *Id.* Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1137 (10th Cir. 2005); Baldridge-El v. Gundy, 2000 WL 1721014, at *2 (6th Cir. 2000).

101. *See* Hentze v. CSX Transp., Inc., 477 F. Supp. 3d 644, 660 (S.D. Ohio 2020) (holding that the employee-plaintiff's psychologist's diagnosis of "Adjustment Disorder With Emotional Features" was enough to satisfy that he had a disability); *but see* Mancini v. City of Providence, 909 F.3d 32, 48 (1st Cir. 2018) (determining that the officer-plaintiff was not required to present medical evidence to show that his knee injury physically impaired him); Munoz v. H&M Wholesale, Inc., 926 F.Supp. 596, 605-06 (S.D. Tex. 1996) (concluding that despite a well-documented history of back pain due to a work-related injury, plaintiff could not recover under the ADA because "a physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA; the statute requires an impairment that substantially limits one or more of the major life activities" (quoting Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 n. 5 (5th Cir. 1995))).

102. *Hentze*, 477 F. Supp. 3d at 664 (concluding that "test-taking" is not a major life activity that is covered by the ADA).

103. 42 U.S.C. § 12102(2) (2009) (emphasis added). Further, "a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* at (B).

104. *See* Bragdon v. Abbott, 524 U.S. 624, 638 (1998) (concluding that "nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the 'word major'").

identify a major life activity implicated by a disability.[105]

Since the 2008 amendments to the ADA, courts have begun applying the more expansive definition of disability, which now includes anyone who has been "regarded" as disabled.[106] On its face, the amended definition of a disability should have led to more people being defined as having a disability for the purposes of ADA claims. However, courts started applying an actual knowledge requirement which makes it difficult for plaintiffs to prevail on a "perceived disability" theory.[107]

Even if a plaintiff presents a *prima facie* case for disability discrimination, the defendant can assert, as an affirmative defense, that the request creates a fundamental alteration "in the nature of a service, program, or activity."[108] In *PGA Tour, Inc. v. Martin*, the Supreme Court weighed in to determine that the PGA violated the ADA by failing to allow a competitor suffering from Klippel-Trenaunay-Weber Syndrome to use a golf cart.[109] In its ruling, the

105. *See* Del-Villar-Rosario v. Puerto Rico Dep't of Just., 573 F. Supp. 2d 496, 502 (D.P.R. 2008) (holding that the plaintiff failed to establish that he qualified as disabled because he could not show how his dyslexia limited his ability to "perform manual tasks" and that the limitation on the major life activity must be "substantial"); Walker v. U.S. Sec'y of the Air Force, 7 F. Supp. 3d 438, 448 (D.N.J. 2014) (reasoning that an employee was not disabled under the ADA following a traumatic brain injury because he merely had "difficulties," such as fatigue, stress, and memory problems, and not a substantial limitation of his cognitive functioning); *contra* Wirey v. Richland Cmty. Coll., 913 F. Supp. 2d 633, 641 (C.D. Ill. 2012) (holding that plaintiff's chronic fatigue syndrome substantially limited three major life activities, such as working, thinking, and concentrating and that chronic fatigue syndrome "categorically" qualifies as a disability).

106. 42 U.S.C. § 12101(3)(A). "An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." *See* Widomski v. State Univ. of N.Y. (SUNY) at Orange, 933 F. Supp. 2d 534, 541 (S.D.N.Y. 2013), *aff'd*, 748 F.3d 471 (2d Cir. 2014) (holding that in light of the ADA Amendments Act of 2008, "the term disability as used in Title II of the ADA includes an individual 'regarded as' having a disability.").

107. *See* Est. of Burnett v. City of Colorado Springs, 2022 WL 2904705, 13-14 (D. Colo. July 22, 2022) (holding that a police officer could not be held as violating the ADA because he did not know that an accommodation was needed for the perceived mental illness); *see also*, Campbell v. Boies, Schiller, Flexner LLP, 543 F. Supp. 3d 1334, 1342 (S.D. Fla. 2021), *appeal dismissed sub nom.* Campbell v. Boies Schiller & Flexner, LLP, No. 21-12318-JJ, 2021 WL 4768096 (11th Cir. 2021) (concluding that the plaintiff's ADA claim fails because the defendant provided evidence that the person charged with the decision of terminating the plaintiff did not have actual knowledge of her disability).

108. 28 C.F.R. § 35.164.

109. PGA Tour, Inc., v. Martin, 532 U.S. 661, 662 (2001). Klippel Trenaunay Weber Syndrome is a degenerative circulatory disorder that obstructs the flow of blood from the extremities to the heart. *Id.* The Court acknowledged that "the fatigue [Plaintiff] suffers from coping with his disability is 'undeniably greater' than the fatigue his able-bodied competitors endure from walking the course."

Court recognized Congress's findings that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem[,]" to explain the impetus for passing the ADA.[110]

However, despite the Court's decision in *PGA Tour, Inc.*, the same high bar for determining whether a fundamental alteration exists has not been equally applied to public entities. In *A.H. by Holzmueller v. Illinois High School Association*, the Seventh Circuit held that the high school was not required to create a new division of para-ambulatory runners because it would fundamentally alter the nature of the high school racing competitions.[111]

In determining whether a particular accommodation is unreasonable, courts look to whether it creates a financial or administrative burden or a fundamental alteration in the nature of the program.[112] Additionally, courts purportedly engage in a "highly fact-specific inquiry and requires balancing the needs of the parties."[113] However, as demonstrated, courts have been inconsistent in determining whether a fundamental alteration exists, depriving certain people with disabilities of a remedy to remove social and physical barriers. For instance, in *Scalerio-Isenberg v. Port Authority of New York and New Jersey*, a commuter with a physical disability that prevented her from using the stairs

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Id. at 672. On this basis, the Court found that Plaintiff having access to a golf cart is not a fundamental alteration to the nature of the PGA Tour. *Id*. at 688-89.

110. *Id.* at 674 (reasoning that people with disabilities suffer from discrimination in the form of "intentional exclusion" along with "the failure to make modifications to existing facilities and practices").

111. *A.H. by Holzmueller*, 881 F.3d at 595 (reasoning that the creation of a new division would fundamentally alter the races because "the essential nature of a track and field race is to run a designated distance in the shortest time possible; the IHSA's time standards, which govern which runners can qualify for the State championship, underscore the essence of the sport: one must run as fast as possible to achieve the predetermined times; according to the IHSA, the qualifying time standards ensure a certain level of competition and maintain a necessary scarcity of opportunity."); *see also* Se. Cmty. Coll. v. Davis, 442 U.S. 397, 414 (1979) (holding that Section 504 of the Rehabilitation Act does not mandate a school "to lower or to effect substantial modifications of standards to accommodate a handicapped person"), *compare with,* Knapp v. Nw. Univ., 101 F.3d 473, 482-83 (7th Cir. 1996) (arguing that "legitimate physical qualifications may in fact be essential to participation in particular programs").

112. Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002)

113. *Id.* "[T]he City's own engineer testified that the proposed group home would not have a significant adverse impact on traffic and therefore will not, in this fashion, impose any financial or administrative burdens on the City." *Id.* at 786.

brought suit against the city public transit authority.[114] The commuter alleged that reducing the accessibility of a bus line by removing saw-tooth gates, accessible by elevator, and replacing them with pull-through gates which he could not use was discriminatory.[115] The plaintiff requested that the transit authority move the affected bus lines back to the ADA complaint saw-tooth gates.[116] However, the court held that there was no genuine issue of material fact that granting such a request would "fundamentally alter the nature of the service[s] provided, or impose an undue financial or administrative burden" on the Port Authority.[117]

As a result, it is clear the ADA does not provide people with disabilities an effective method of ameliorating the effects that societal and physical barriers have on their enjoyment of places of public accommodation. *Scalerio-Isenberg* illustrates that any attempt to ensure that the government builds spaces that are inclusive to people with physical disabilities can be shut down due to concerns about ill-defined "administrative or financial burdens."[118]

B. People With Disabilities Are Denied A Viable Cause of Action Under the Fourteenth Amendment

Jurisprudence surrounding Fourteenth Amendment claims regarding disability discrimination has effectively left people with disabilities without a cause of action because disability classifications are subject only to rational basis review.

The Fourteenth Amendment, through the Equal Protection Clause, imposes a duty on the government to treat all similarly situated persons alike.[119] When a law creates a classification by treating one group differently from the rest of the population, courts review the law to determine whether it can withstand judicial scrutiny.[120] In order to guard against prejudice, "presumptions of

114. Scalercio-Isenberg v. Port Auth. of New York & New Jersey, 487 F. Supp. 3d 190, 195 (S.D.N.Y. 2020), *appeal dismissed* (2020) (explaining that saw-tooth gates allow buses to pull into the platforms diagonal in order to pick up and drop of passengers).

115. *Id.*

116. *Id.* at 204.

117. *Id.* at 196 (contending that the "Port Authority's expert report, prepared by Studio 5, outlines in detail how the 2012 'Quality of Commute Gate Reallocation Study' and 2015 gate reallocations were the product of years of research aimed at '[i]ncreas[ing] bus gate efficiencies, enhance[ing] safety and decreas[ing] traffic and pollution.'"). As represented in the Studio 5 Report, "Plaintiff's request to move Lakeland Bus Lines back to a saw-tooth gate would undo many of the critical life-safety and pedestrian / vehicular congestion improvements that were realized with the Gate Change of 2015." *Id.*

118. *Id.* at 204.

119. Collin Callahan & Amelia Kaufman, *Constitutional Law Chapter: Equal Protection*, 5 GEO. J. GENDER & L. 17, 20-21 (2004).

120. *Id.*

the validity of legislation are weakened for legislation that makes questionable distinctions between groups or burdens fundamental rights."[121] The Supreme Court has adopted different levels of scrutiny depending on the classification at issue: rational basis, intermediate scrutiny, and strict scrutiny.[122]

Rational basis review provides the most deference to the government and will uphold a law if it is rationally related to a legitimate government interest, whereas strict scrutiny requires that the law at issue is necessary to achieve a compelling government interest through the least restrictive means.[123]

When the government makes a classification based on disability, the Supreme Court has held that only rational basis review applies.[124] In *City of Cleburne v. Cleburne Living Center*, the proposed operator of a group home for people with disabilities sued the city to challenge the validity of a zoning ordinance that excluded the operation of a group home.[125] For the group home to lawfully operate, it would have to get a special use permit and have it approved on an annual basis.[126] The City Council of Cleburne voted 3 to 1 to deny the living center's special use permit, and that decision "was motivated primarily by the fact that the residents of the home would be persons [with mental disabilities]."[127]

While the application of the ordinance was struck down as arbitrary and unreasonable, the majority opinion concluded that "disability" is a class that is only deserving of rational basis review.[128] The Supreme Court believed heightened scrutiny was inappropriate on the grounds that 1) the class of people with disabilities are so immutably different as to make it impossible to group them into one class for purposes of Fourteenth Amendment protection, and 2) because of the fact that legislation had been passed to help protect people with disabilities from discrimination (*i.e.,* the Rehabilitation Act).[129] Notably, Section 504 of the Rehabilitation Act did not provide the Cleburne Living Center with any relief.[130] As a result of this ruling, "most disability-based progress has been made by challenging statutes, not by bringing claims under the Fourteenth Amendment."[131] The Court reaffirmed

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *City of Cleburne*, 473 U.S. at 436.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. Sara Wilson, *State-Level Activism in the Disability Context: Ensuring Protections for People with Disabilities Through American Federalism and the*

this holding in *Heller v. Doe by Doe* and it has not been challenged since.[132]

However, even when both *City of Cleburne* and *Heller* were decided, members on the Court opposed applying rational basis review to disability classification cases. In Justice Marshall's concurring opinion in *City of Cleburne*, he argued that although the majority opinion was correct in striking down the zoning practice under rational basis review as irrational, "the Equal Protection Clause requires us to do more than review the distinctions drawn by Cleburne's zoning ordinance as if they appeared in a taxing statute or in economic or commercial legislation."[133] He concluded that heightened scrutiny was necessary in this case considering the long history of discrimination that people with disabilities have endured.[134] Justice Marshall cautioned that Cleburne's "vague generalizations" for classifying people with mental disabilities and excluding them from certain parts of town were not substantial enough to overcome the suspicion that such classifications were based on invidious stereotypes.[135]

Although the outcome in *City of Cleburne* was favorable to people with disabilities, the adoption of rational basis review is inconsistent with recognition of people with disabilities as a protected class.[136]

Thus, the Fourteenth Amendment, as currently interpreted by the Court, does not provide an adequate basis for a cause of action to address the gaps created by relevant federal statutes such as the ADA. In the case of *University of Alabama v. Garrett*, the Court found that Congress had not abrogated state sovereign immunity through the ADA, preventing plaintiffs who were employees of the University of Alabama from recovering damages due to discrimination based on their disabilities.[137] The case involved two employees – one with a history of asthma and one with a breast cancer diagnosis – who were forced to work in an environment

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Fourteenth Amendment Equal Protection Clause, 15 J. HEALTH & BIOMED. L. 173, 177-78 (2019).

132. Heller v. Doe by Doe, 509 U.S. 312, 319 (1993) (reasoning that "even if respondents were correct that heightened scrutiny applies, it would be inappropriate for [the Court] to apply that standard here. Both parties have been litigating this case for years on the theory of rational-basis review, which, as noted below, does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required for these statutes to survive heightened scrutiny. It would be imprudent and unfair to inject a new standard at this stage in the litigation.").

133. *City of Cleburne*, 473 U.S. at 464 (Marshall, J., concurring).

134. *Id.*

135. *Id.*

136. Jayne Ponder, *The Irrational Rationality of Rational Basis Review for People with Disabilities: A Call for Intermediate Scrutiny*, 53 HARV. C.R.-C.L. L. REV. 709, 711 (2018).

137. Ponder, *supra* note 136; *Bd.* of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 375 (2001).

where the "no smoking" policy was not enforced.[138] Even though the court did not adjudicate this case on the merits because of sovereign immunity, in dicta, the Court speculated that "it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees able to use existing facilities."[139] Taken to its logical end, this would mean that when evaluating a potential equal protection violation, as long as the state can provide economic reasoning for the classification based on disability, then the state action can pass rational basis review.[140]

For these reasons, the Fourteenth Amendment does not currently provide an adequate basis for a cause of action that addresses the gaps created by relevant federal statutes. It is clear that for people with disabilities to consistently obtain relief from discrimination in public spaces, courts must begin applying heightened scrutiny. Part IV will show not only that applying strict scrutiny to disability classifications cases is consistent with Fourteenth Amendment precedent, but also why it is necessary as a matter of public policy.

IV. PROPOSAL

People with disabilities make up a suspect class and, therefore, strict scrutiny should apply to cases where the government creates a classification based on disability – of any type – in order to mitigate systemic deprivation of access to government services and benefits.

In determining when to scrutinize laws or government conduct that appear on their face to violate the Equal Protection Clause, the Supreme Court first established a test in *U.S. v. Carolene Products Co.* to increase the level of scrutiny.[141] In footnote 4, the Court identified that courts should determine "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[142] Throughout the twentieth century, jurisprudence would evolve to create a factor test for determining whether a particular class is a "suspect class" and deserving of higher levels of scrutiny: "(1) prejudice against a discrete and insular minority; (2) history of discrimination against the group; (3) the ability of the group to seek

138. *Bd. of Trustees of Univ. of Ala.*, 531 U.S. at 375.

139. *Id.*

140. *Id.*

141. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 223 (1991).

142. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

political redress (i.e., political powerlessness); (4) the immutability of the group's defining trait; and (5) the relevancy of that trait."[143] The weight of these factors in the context of disability classifications necessitates the application of strict scrutiny.

The term "discrete and insular minority" has raised many questions for both courts and academics due to its vagueness.[144] However, the most widely accepted definition is that "a group is discrete if they are visible in a way that makes them 'relatively easy for others to identify'" and "a group is insular if they tend to interact with each other with "great frequency in a variety of social contexts."[145]

This factor, on its face, poses the greatest problem for a strict scrutiny analysis because of the plethora of physical, developmental, behavioral, or emotional disabilities that may or may not be "relatively easy for others to identify."[146] However, that argument only acknowledges disabilities as medical issues rather than an issue of people with disabilities collectively striving for civil rights. As explained above, the adoption of the "civil rights model" for understanding disabilities has resulted in the push for federal statutes prohibiting disability discrimination. Under this approach, "disability is a social and cultural construct."[147]

In other words, our society has been built around the conveniences of able-bodied and typically-developing individuals largely at the cost of people with disabilities. Even though there are laws aimed at compelling employers, government entities, and public accommodations to make physical modifications and reasonable accommodations, *City of Cleburne* illustrates an inherent tension in doing so.[148] The judicial history of splitting hairs over the definition of what a disability is and who is disabled enough to warrant protection has undercut efforts to protect people with disabilities as a whole.[149] Thus, for purposes of an Equal Protection analysis, it should be understood that society, and especially the courts, can readily identify the obstacles in place for a person with a disability and that there is a shared struggle between all those with a disability.

As to the history of discrimination against people with disabilities, for most of American history,

> [T]he laws of the United States devalued persons with disabilities as society as a whole viewed such persons as a group of people to be

143. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 Seattle U. L. Rev. 135, 146 (2011).

144. *Id.*

145. *Id.* (quoting Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 713-14 (1985)).

146. *Id.*

147. Blanck & Millender, *supra* note 43.

148. *See supra* Part III.

149. *Id.*

> pitied, ridiculed, rejected, and feared, or as objects of fascination. Persons with disabilities were seen as objects of charity or welfare or as needing to be subjected to medical treatment or cure. As a result of these views, persons with disabilities were denied basic human rights (as is quite frequently still the case today).[150]

Of particular historic concern was the rise of the eugenics movement in the late 1800s and early 1900s.[151] As part of this movement, government officials blamed social problems such as poverty and crime on people with physical and mental impairments.[152] By 1897, half of the states passed laws deeming marriages between people deemed "insane" or "feebleminded" null and void.[153] Additionally, laws authorizing sterilization of those with mental disabilities represented a widespread intrusion their rights with virtually no accountability.[154]

Courts have traditionally reserved strict scrutiny only for classifications based on race, national origin, and religion.[155] However, the history of discrimination that people with disabilities faced mirrors the history of discrimination that the other protected classes who are already afforded strict scrutiny. The clearest analogy comes from miscegenation statutes, which prevented marriage between people of different races.[156] Despite this, there are those that argue that extending strict scrutiny to other classes would "dilute" the history of discrimination experienced by African Americans.[157] The largest flaw in that line of reasoning is that courts have applied strict scrutiny to all races, including Caucasians who could not reasonably be considered to be a "discrete and insular" minority stigmatized by a history of discrimination.[158] Thus, the "history of discrimination" factor should be interpreted broadly to include many different types of classes that have historically been discriminated against in the United States. The equality of one class is not harmed by promoting the equality of another.

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150. Rhonda Neuhaus et al., *Equality for People with Disabilities, Then and Now*: *Disability Rights Through the Mid-20th Century*, 31 GP SOLO 6, 46 (2014).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. Strauss, *supra* note 143 (citing Adarand Constructors v. Pena, 515 U.S. 200 (1995) (discussing race); *see generally* Graham v. Richardson, 403 U.S. 365 (1971) (discussing national origin/alienage); Loving v. Virginia, 388 U.S. 1 (1967) (discussing race); Korematsu v. United States, 323 U.S. 214 (1944) (discussing race)).

156. *Loving*, 388 U.S. at 6 (explaining that Virginia, the state at issue, was one of sixteen states at the time which prohibited and punished marriages on the basis of racial classifications).

157. Strauss, *supra* note 143.

158. *Id.*

The ability for people with disabilities to seek political redress has arguably improved over time.[159] However, there has been lingering social tension because of a "societal realization that the costs of alleviating many of the barriers faced by [people with disabilities] can be high, both in terms of monetary expenditures and impositions on majoritarian lifestyles."[160] The aforementioned story about Ms. Monteros in Part I concerning the state of accessible public ways provides a modern example of how this is still playing out.[161]

Laws such as the ADA were passed with the intention of compelling government entities to take affirmative steps to ensure that public ways were accessible for people with disabilities.[162] However, administrative hurdles and other budgetary priorities have gotten in the way of that being a reality. The "financial or administrative burden" defenses to ADA claims provide too much deference to government entities who are not making it a priority to remove physical barriers from places of public accommodation.[163] In the context of public transit, courts have only interpreted the Rehabilitation Act as requiring public entities to take "modest, affirmative steps to accommodate [people with disabilities]" and that Department of Transit regulations cannot be enforced because they "require extensive modifications of existing systems and impose extremely heavy burdens on local transit authorities."[164] As a result, political redress has ultimately fallen flat for people with disabilities. A higher level of judicial scrutiny should be applied to force state and local governments to remove the structural

159. *See supra* Part II.

160. Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1440 (1986) (citing Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" under the Equal Protection Clause*, 15 SANTA CLARA L. 855, 906-07 (1975) (noting that many states deny voting rights to mentally handicapped and fail to provide access to polling places for physically handicapped.")).

161. *See supra* Part I.

162. *See supra* Part II.

163. *See supra* Part III.

164. Michael Lewyn, "*Thou Shalt Not Put A Stumbling Block Before The Blind": The Americans With Disabilities Act And Public Transit For The Disabled*, 52 HASTINGS L.J. 1037, 1062 (2001) (citing Am. Pub. Transit Ass'n (APTA) v. Lewis, 655 F.2d 1272, 1280 (D.C. Cir. 1981) (holding that the Department of Transportation exceeded its statutory authority by promulgating regulations which required all transit systems that received federal financial assistance to make each mode of transportation offered to constituents accessible by May 31, 1982)); *see also*, Am. Disabled for Accessible Pub. Transp. v. Skinner, 881 F.2d 1184, 1203 (3d Cir. 1989) (concluding that while a 3% municipal expenditure "safe harbor" requirement for operating costs on services for people with disabilities was arbitrary and capricious, a "local option" rule which allowed municipalities to choose just one method of transportation to make accessible was permissible because Section 504 of the Rehabilitation Act does not mandate "mainstreaming," or giving people with disabilities equal access to all public services).

impairments they placed on people with disabilities by constructing inaccessible public spaces.

This reasoning also provides an explanation as to why the "immutability of the group's defining trait" factor and the "relevancy of the trait" factors weigh heavily in favor of defining the class of people with disabilities as a suspect class.[165] In the case of people with disabilities, discrimination comes both in the form of intentional discrimination, mostly observed in the context of employers, but more broadly discrimination based on a failure to accommodate.[166] When a public entity maintains a public space that creates a barrier to someone with a physical disability or is inaccessible to someone with a mental, behavioral, or emotional disability, they are excluding them from that space based on an immutable characteristic.

Critics have suggested (including the court in *City of Cleburne*) that the immutability factor cannot be satisfied because of the difficulties with defining what constitutes a disability.[167] Additionally, there is the fact that certain qualifying disabilities are not permanent, meaning they lack immutability.[168] However, that line of reasoning essentially stands for the proposition that the Equal Protection Clause should not necessitate the suspension of a particular practice or a modification of a particular public space solely on the grounds that not all people with disabilities need the modification or accommodation at issue. There is no jurisprudence to support the premise that strict scrutiny cannot apply to an instance of racial discrimination solely because some members of that race might not be affected by the discriminatory policy or practice at issue. It is assumed that if government conduct discriminates based on race, then everyone in that race is

165. Strauss, *supra* note 143 (arguing that immutability has been found as a critical factor to an analysis of judicial scrutiny since "distinct groups are politically powerless because, inter alia, they cannot evade discrimination. When confronted with discrimination, an indistinct group may temporarily or permanently escape by changing or hiding its defining trait. Distinct groups do not have this chameleon like ability and thus are subject to the full force of discrimination" (quoting Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 488 (1998)).

166. Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and The Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 837 (2003).

167. *Cleburne*, 473 U.S. at 442 n.9 (explaining that people with mental disabilities are not "all cut from the same pattern" because "they range from those whose disability is not immediately evident to those who must be constantly cared for" and referencing the American Association on Mental Deficiency which recognizes four distinct categories of intellectual impairment – "mild," "moderate," "severe," and "profound" based on IQ).

168. *Id.*

implicated.[169] Employing the civil rights model of disability, when banding every person with a disability together under a wide umbrella, there is an expectation and an entitlement to equal protection under the law which must be upheld by the courts using strict scrutiny.

V. CONCLUSION

It is without doubt that in 2024, the lives of people with disabilities are, across the board, substantially better off than in 1897 when states prevented people with mental disabilities from marrying. However, even though expansive federal laws such as Section 504 of the Rehabilitation Act, IDEA, and the ADA have made some progress to level the playing field for people with disabilities, there are still huge gaps in protection.

The Equal Protection Clause's essential function is to ensure that government conduct does not disadvantage a minority for the betterment of the majority. Unfortunately, everything from government policies concerning the execution of public services to the design of public spaces has been designed largely only with the majority in mind. The Equal Protection Clause should be given full effect, by applying strict scrutiny, to make public entities show a compelling government interest for failing to create physical modifications or reasonable accommodations to procedures. Then, courts may be able to expedite the complete and total removal of barriers for people with disabilities to engage, as equals, with public spaces.

For these reasons, courts should begin applying strict scrutiny to cases where the government discriminates based on disability because the class of people with disabilities meets the definition of a "suspect class" in need of heightened scrutiny. Furthermore, pressing public policy concerns regarding ongoing, pervasive discrimination against people with disabilities, such as Ms. Monteros and Ms. Hasemann, necessitate greater judicial intervention.

169. Bagenstos, *supra* note 166.