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Disability Constitutional Law

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DISABILITY CONSTITUTIONAL LAW

Michael E. Waterstone[*]

ABSTRACT

As a result of fierce advocacy, people with disabilities have been uniquely successful in securing federal legislation protecting them from discrimination in all areas of life. The modern disability rights movement is engaged in a constant struggle to enforce these rights, both in and out of the courts. There has been little attention to directly using the Constitution to protect the rights of people with disabilities. In a recent project, I interviewed many of the key leaders of the disability rights movement, who confirmed that while they would like to devote more attention to constitutional issues, there is no current short- or long-term constitutional strategy. Rather, these lawyers take the Supreme Court's decision in City of Cleburne v. Cleburne Living Center, Inc., *holding that people with disabilities are only entitled to rational basis review under the Equal Protection Clause, as a given. Their attention has turned elsewhere.*

This deconstitutionalization has costs. State laws still facially discriminate against people with disabilities, often people with mental disabilities, in areas like family law, voting, commitment proceedings, and the provision of benefits and licenses. Federal legislation is an incomplete tool to challenge the exclusions these laws create. Progressive theorizing of constitutional law is happening, just not regarding disability. Although functionally justifiable, this reluctance to pursue constitutional claims impoverishes the disability rights movement, as constitutional claims engage courts in articulating our core values in a way that statutory claims do not. Disability law can and should do more to fulfill the Constitution's guarantees of equal protection and full citizenship. In this Article, I explore what a more progressive future for disability constitutional law might look like. Building on gains by the LGBT movement, I offer specific areas where courts should entertain a more contextualized application of the Equal Protection Clause in disability cases.

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INTRODUCTION

Modern disability law is primarily a statutory field. The main relevance of constitutional law is to provide the basis for congressional legislation, either through Section 5 of the Fourteenth Amendment, the Spending Clause, or the Commerce Clause. Although historically disability advocates pursued constitutional theories to reform institutions and achieve access to schools, today the key tool for disability rights is litigation under federal statutes. By and large, this strategy has been successful: the Americans with Disabilities Act (ADA) addresses discrimination in employment, government programs and services, and access to privately owned places of public accommodation.[1] The Fair Housing Act covers discrimination in housing,[2] and the Individuals with Disabilities in Education Act provides a right to education for school-age children with disabilities.[3]

This Article takes up the issue of whether, given the preeminence of a statutory strategy, there is any future for disability constitutional law. The largest constitutional "moment" for disability law was the Supreme Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.*[4] There, while ultimately striking down a zoning ordinance as infringing the Equal Protection rights of individuals with mental retardation, the Court held that the disability classification was only entitled to rational basis scrutiny.[5] In other state and federal constitutional contexts, *Cleburne* has been applied to achieve a more nuanced Equal Protection review of discriminatory state action.[6] But not with disability, where subsequent cases have confirmed only *Cleburne*'s most restrictive aspects.[7] Constitutional law has evolved, but it has stayed frozen in time for people with disabilities.

Disability advocacy has of course continued, but has been primarily focused on legislative reform, culminating with the ADA, and litigation enforcing these statutory rights. In a previous project, I interviewed many of the nation's leading disability rights lawyers, who all confirmed that there is currently no short- or long-term vision to challenge *Cleburne*, either as decided

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[1] 42 U.S.C. §§ 12101–12213 (2006 & Supp. V 2011).
[2] 42 U.S.C. §§ 3601–3631 (2006).
[3] 20 U.S.C. §§ 1400–1482 (2012).
[4] 473 U.S. 432 (1985).
[5] *See infra* Part I.
[6] *See infra* Part III.
[7] *See infra* Part II.

in or as applied in subsequent cases, or to mine its positive implications.[8] Correspondingly, almost all recent forward-looking disability scholarship has either helped provide a theoretical foundation for or analyzed statutory or other types of policy reform, with sparse discussion of disability constitutional law.[9]

Viewing disability advocacy in relation to the course charted by LGBT advocates highlights the deconstitutionalization of modern disability law. The year after *Cleburne* was decided, the LGBT community suffered a loss in the Supreme Court in *Bowers v. Hardwick*, which upheld Georgia's sodomy law as not violating the constitutional rights of homosexuals.[10] In the aftermath of *Bowers,* LGBT advocates pivoted to state constitutional law, challenging sodomy statutes in state court.[11] This shift influenced federal constitutional norms and helped pave the way for the Supreme Court's ultimate overturning of *Bowers* in *Lawrence v. Texas*[12] and the Court's recent decision in *United States v. Windsor*, holding that section 3 of the Defense of Marriage Act was unconstitutional under the Equal Protection Clause.[13] Similarly, in the (thus far unsuccessful) attempts to pass the Employment Nondiscrimination Act, which would extend employment antidiscrimination law to the LGBT classification, advocates carefully developed and presented Congress with support for the proposition that LGBT individuals were entitled to heightened scrutiny under the Equal Protection Clause.[14] At nearly the same time Congress heard testimony on the Employment Nondiscrimination Act, disability advocates were engaged in passing the ADA Amendments Act of 2008,[15] which, amongst

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[8] *See* Michael E. Waterstone, Michael Ashley Stein & David B. Wilkins, *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287, 1318 (2012) (noting the views of one lawyer, who stated "I live in an age when Federal courts are not going to interpret the Federal Constitution in ways that are going to assist me, and so unless I have a case that absolutely screams out for it, I'm not going to be looking for novel constitutional theories because all I'm likely to accomplish in doing that is to create a precedent that will foreclose those who come after me in what I hope will be a warmer judicial climate."); *see also infra* notes 172–73.

[9] *See, e.g.*, Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004) (focusing on future reform under the antidiscrimination and welfare models); Eve Hill & Peter Blanck, *Future of Disability Rights Advocacy and "The Right to Live in the World,"* 15 TEX. J. C.L. & C.R. 1 (2009) (discussing the wide-ranging future of disability litigation without discussion of constitutional advocacy).

[10] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[11] *See infra* Part II.B.

[12] 539 U.S. 558 (2003).

[13] 133 S. Ct. 2675 (2013).

[14] *See H.R. 3017, Employment Non-Discrimination Act of 2009: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. 46 (2010) (prepared statement of William Eskridge, Jr., John A. Garver Professor of Jurisprudence, Yale Law School), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Eskridge.pdf (original link to prepared statement provided in the hearing record no longer in service).

[15] ADA Amendments Act of 2008, Pub L. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101–12213 (Supp. V 2011)).

other things, removed the primary provision in the original ADA noting Congress's view that people with disabilities were entitled to heightened protection under the Equal Protection Clause.[16]

The LGBT and disability causes are of course different, operating in different political and legal spaces. What is good for the goose is not necessarily good for the gander. But the divergence of these two groups does present a stark contrast: LGBT advocates purposefully pursued change with the ultimate goal of having at least some constitutional reform on their agenda; disability advocates have not.[17] Given the success of a legislative strategy and the hostility of the current Supreme Court to expand the Equal Protection Clause, this move is certainly defensible. And the significant canon of disability law scholarship has mined many complex statutory and regulatory issues. This Article breaks new ground by suggesting that such a complete move away from constitutional law has costs and that the exclusion of the Constitution from disability advocacy is not inevitable.

As interpreted in disability cases, *Cleburne* has limited Congress's ability to legislate on behalf of people with disabilities. These challenges are likely to continue. And some segments of the disability community—specifically, individuals with mental disabilities—have been more at the fringes of statutory disability advocacy, and had a harder time translating legislative successes into the promises of full citizenship.[18] There are still areas where *Cleburne*, and its cramped vision of disability constitutional law, is used to sanction state action which operates to the exclusion of these groups.[19] Progressive theorizing about the Constitution is already happening, but these efforts thus far have not included disability-specific thinking.[20] Courts are actors in our evolving constitutional dialogue, but the conversation has been stilted regarding disability. Despite having much to offer in important discussions about stigma, animus, and exclusion, disability advocates have not been an active part of articulating these constitutional values. The result is that despite a nominal victory in *Cleburne*, its application has not lived up to its promise and potential, which the LGBT community has helped realize. Constitutional law is at least in part about recognizing past injustices and current prejudice against groups, but it is not being used at all in this way for people with disabilities.

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16 *See infra* notes 105–12 and accompanying text.
17 *See infra* Part III.
18 *See infra* Part I.
19 *See infra* Part I.
20 *See infra* Part I.

We should expect more from constitutional law on disability, and disability has more to offer constitutional law than is currently being realized.

Any arguments about disability constitutional law must be located within the context of modern disability rights advocacy. Thus, I seek to place this project within the growing body of scholarship demonstrating the crucial link between social movements and evolving notions of constitutional law.[21] Disability constitutional law will not casually develop; it will only happen when movement lawyers make a conscious decision to invest resources and manage the requisite legal risk. They have good reason to be a skeptical audience: part of what I and others have shown in previous work is that disability cause lawyers are quite pragmatic, and intensely focused on pursuing access to employment opportunities, government programs, and privately owned places of public accommodation, not abstract pronouncements of constitutional rights.[22] At the same time, a move toward the courts to declare new constitutional rights has moved out of vogue amongst progressive legal commentators, partially based on the perceived futility of litigating these cases in a conservative judicial era[23] and also in recognition of the "hollow hope" provided by Court victories.[24]

Despite this, operating within the practical nature of a highly evolved disability advocacy movement, and incorporating the literature on dynamic constitutionalism, this Article offers an optimistic (and hopefully realistic) assessment of what constitutional law could actually accomplish for people

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[21] *See, e.g.*, Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 427 (2007) (arguing "that a key element of constitutional interpretation is our attitude of attachment to the constitutional project and our beliefs about its ultimate trajectory"); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–68 (2001) (arguing that political appointments to the Court "best account [for] how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment"); Jack M. Balkin & Reva B. Siegel, Essay, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006) (arguing that political contestation can alter what people think constitutional principles mean and how principles should apply in practice).

[22] *See generally* Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658 (2010) (reviewing SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (2009)); *see generally also* Waterstone et al., *supra* note 8, at 1318.

[23] *See* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 218 (1994) ("It is not at all clear, from a progressive political point of view, that the development of a progressive constitutional paradigm—to which a conservative Court will be openly hostile—is a worthwhile project.").

[24] *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (discussing the tension between courts' need to act in the face of injustice and the actual social change effected by those decisions).

with disabilities. LGBT advocates have been successful in securing favorable decisions in lower courts, and most recently in the Supreme Court, in challenges to discriminatory marriage laws. In hindsight, it is easy to examine how this political and judicial strategy has been successful. And while *Windsor* was not a complete victory for the LGBT movement in the pursuit of marriage equality, and predictably did not result in a constitutional renaissance of new protected classes, this decision and the lower court cases leading up to it did create space in Equal Protection Clause jurisprudence.[25] Disability cause lawyers should pay careful heed, looking to adopt similar strategies as they are able.

I argue that, prompted by advocates, courts should adopt a more contextualized Equal Protection review for state laws that facially discriminate against people with disabilities (most often, people with mental disabilities). A contextualized review would acknowledge the history of prejudice and segregation against people with disabilities, as well as recognize the important ways that state classifications operate to their detriment. Too often, *Cleburne* is cited in disability cases for the simple holding that people with disabilities are not entitled to heightened scrutiny and that any state justification for discriminatory laws is constitutionally permissible. To challenge this simplistic application, advocates should consider more of a resource investment in state and federal court strategies that have proven successful with other groups. Even taking a long-term view, a move to argue for a different vision of *Cleburne* will not be uncontroversial or easily adopted. People with disabilities have achieved legislative success by joining separate communities with very different disabilities to gather requisite political support, uniting under the theory of the "social model" of disability to achieve pan-disability solutions.[26] In contrast, targeted constitutional strategies would likely only benefit certain communities. This approach will not be universally popular, but in my estimation, it is warranted. Applying *Cleburne* in disability law cases as it has been applied elsewhere corrects its primary error of refusing to acknowledge the role of stigma and prejudice against people with disabilities, and assuming that disability classifications are based on benevolent attitudes instead of being reflective of a history of discrimination.

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[25] *See infra* Part III.A.

[26] The social model of disability posits that disability is a socially constructed category created by the combination of an individual's impairments and society's response to those impairments. *See* SAMUEL R. BAGENSTOS, LAW AND CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 18 (2009).

This Article proceeds in three parts. Part I briefly traces the role of constitutional law in disability advocacy, starting with the right to treatment and education for children with disabilities movements, where constitutional law played an active role. It then discusses *Cleburne* and its subsequent extension by Court precedents, moving to the current statutory model of disability law. Part II takes on the question of why discussing disability constitutional law is worthwhile, given both the limited prospects of short-term success in the federal courts as well as the current robustness of the legislative model. Building on the idea that a long-term strategy to rehabilitate *Cleburne* is a worthwhile project, Part III suggests some steps that advocates should consider taking as a way to begin the process anew of framing the rights of people with disabilities in constitutional terms.

I. THE CONSTITUTIONAL PAST AND PRESENT OF THE DISABILITY RIGHTS MOVEMENT

A. *Constitutional History*

Like other social movements, the disability rights movement engaged in systemic constitutional litigation to accomplish some of its early objectives. The right to appropriate treatment, so important in early efforts to reform deplorable institutions,[27] was grounded in the Due Process Clause.[28] The recognition of this right spawned a wave of litigation to determine and give force to the contours of this right.[29] Similarly, special education law and

[27] For a complete history of the right to treatment and deinstitutionalization movements, see MICHAEL L. PERLIN, LAW AND MENTAL DISABILITY 166–90 (1994).

[28] The ideological foundations of this right are generally credited to Morton Birnbaum, who advocated "the recognition and enforcement of the legal right of a mentally ill inmate of a public mental institution to adequate medical treatment for his mental illness." Morton Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499, 499 (1960). Birnbaum drew inspiration from Justice Frankfurter's discussion of the Due Process Clause in *Solesbee v. Balkcom*, where Justice Frankfurter wrote, "the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history." *Id.* at 503 (quoting Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting)). Birnbaum hoped that, if the right to treatment were recognized, "our substantive constitutional law would then include the concept[] that . . . substantive due process of law does not allow a mentally ill person who has committed no crime to be deprived of his liberty by indefinitely institutionalizing him in a mental prison." *Id.* The constitutional right to treatment would eventually come to fruition in the landmark case of *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971) (finding patients "unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition"), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). This right was substantially affirmed by the Supreme Court in *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982).

[29] *See* PERLIN, *supra* note 27, at 182–90.

advocacy had its roots in *Brown v. Board of Education*, where the Supreme Court found that, although there is no constitutional right to education, "where the state has undertaken to provide it, [public education] is a right which must be made available to all on equal terms."[30] "[C]oincident with the independent living movement, courts in Pennsylvania and the District of Columbia issued landmark decisions requiring [the] education and integration of students with disabilities in public education."[31] In *Pennsylvania Association for Retarded Children v. Pennsylvania*, the court approved a consent decree providing that, having undertaken to provide a free public education, Pennsylvania must educate all children, including those with disabilities.[32] And in *Mills v. Board of Education*, the court held that the Equal Protection Clause required inclusion of children with disabilities in public education.[33]

These were not just constitutional movements. They were based on multiple forms of advocacy at all levels of government.[34] And from early legislative schemes focused on rehabilitation and benefits[35] to later laws taking

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[30] 347 U.S. 483, 493 (1954); *see also* PETER BLANCK ET AL., DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS 942 (2d ed. 2009) ("While this decision did not involve children with disabilities, its finding that segregation in education based solely on race was inherently unequal formed the basis for disability advocates to argue that unnecessary segregation or exclusion of children with disabilities was similarly violative of the Fourteenth Amendment's Equal Protection and Due Process Clauses."); Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 606 (1995) (discussing disability rights advocates' reliance on *Brown*).

[31] BLANCK ET AL., *supra* note 30, at 942.

[32] 334 F. Supp. 1257, 1258, 1260 (E.D. Pa. 1971) (parties stipulating in consent decree that "placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training"); *see also* Melvin, *supra* note 30, at 607 (explaining that in a subsequent ruling upholding the consent decree, the court "[c]redit[ed] expert testimony that mentally retarded children can benefit from education and training . . . [and] decided that there was no rational basis for the school districts' complete denial of an educational opportunity to mentally retarded children" (citing Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 297 (E.D. Pa. 1972))). Upholding the consent decree, the court applied *Brown*, finding that the plaintiffs had raised a "colorable claim" that the exclusion of mentally disabled children from the classrooms lacked a rational basis. *Pa. Ass'n for Retarded Children*, 343 F. Supp. at 297.

[33] 348 F. Supp. 866, 874–76 (D.D.C. 1972). *Mills* also held that the additional cost of such education was not a defense. *Id.* at 876 ("If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.").

[34] *See, e.g.*, PERLIN, *supra* note 27, at 169 (discussing congressional hearings and state legislation); *see also* Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 7 (2012) ("[Deinstitutionalization] campaigns were fought, among other places, in state legislatures, state executive branches, and the federal courts.").

[35] *See, e.g.*, Social Security Act of 1935, ch. 531, §§ 511–515, 49 Stat. 620, 631–33, *amended by* Maternal and Child Health Services Block Grant Act, Pub. L. No. 97-35, §§ 2191–2194, 95 Stat. 357, 818–30 (1981) (codified as amended at 42 U.S.C. §§ 701–713 (2006 & Supp. V 2011)) (establishing federal funding

more of a civil rights approach,[36] a constitutional approach always worked along with a statutory one. But constitutional recognition and enforcement of rights under both the Equal Protection and Due Process Clauses were integral parts of these campaigns, although not all results were positive.[37]

B. City of Cleburne v. Cleburne Living Center, Inc.

The status of people with disabilities under the Equal Protection Clause was most clearly considered by the Supreme Court in *City of Cleburne v. Cleburne Living Center, Inc*.[38] There, a company seeking to open a group home for individuals with mental retardation challenged a city zoning ordinance that excluded group homes for people with mental retardation.[39] The Fifth Circuit held that mental retardation is a "quasi-suspect" classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose.[40] Justice White, writing for the majority, first explained why heightened scrutiny was appropriate for classifications based on race, alienage, national origin,[41] and gender,[42] but not for age.[43] Framing the issue, the Court wrote,

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for state systems of health services for "crippled" children); Vocational Rehabilitation Act, ch. 219, 41 Stat. 735 (1920) (providing vocational rehabilitation to individuals "disabled in industry or in any legitimate occupation"), *repealed and replaced by* Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–796*l* (2012)).

[36] *See, e.g.*, Education for All Handicapped Children Act of 1975, Pub L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1482 (2012)) (ensuring children with disabilities access in the public school system); Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified at 42 U.S.C. §§ 1973ee to 1973ee-6 (2006)) (ensuring polling places for federal elections are accessible to voters with disabilities); Architectural Barriers Act of 1968, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151–4156 (2006)) (requiring new facilities built with federal funds be accessible to people with disabilities).

[37] *See infra* notes 72–81 and accompanying text.

[38] 473 U.S. 432 (1985).

[39] *Id.* at 435–37.

[40] Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191, 198, 200 (5th Cir. 1984) (internal quotation marks omitted), *aff'd in part, vacated in part*, 473 U.S. 432 (1985).

[41] *Cleburne*, 473 U.S. at 440 ("[Race, alienage, and national origin] are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.").

[42] *Id.* at 441 ("Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.").

[43] *Id.* ("While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons . . . have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976)) (internal quotation marks omitted)).

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.[44]

Turning to how to characterize people with mental retardation under the Equal Protection Clause, the Court made several findings. It reasoned that people with mental retardation "have a reduced ability to cope with and function in the everyday world," that they are not "all cut from the same pattern," and that "[t]hey are thus different, immutably so."[45] Essentially, the Court reasoned that the state's interest in providing for and caring for people with mental retardation is a legitimate one, and the legislature is better suited to make what will be difficult determinations than the judiciary.[46] Infused in the Court's opinion is a pitying notion, so rejected by the modern disability rights movement,[47] that "one has to feel sorry for a person disabled by something he or she can't do anything about,"[48] and that legislators would and had appropriately responded with remedial legislation intended to help this group.[49] It also viewed this legislative response as belying any claims of

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[44] *Id.* at 441–42.

[45] *Id.* at 442.

[46] *Id.* at 442–43 ("How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.").

[47] *See, e.g.*, JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 41–73, 105–41 (1993) (documenting how those with disabilities have been able to succeed in life by using their perceived disability to their advantage in conducting disability activism and have otherwise maintained successful careers).

[48] *Cleburne*, 473 U.S. at 442 n.10 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 150 (1980)).

[49] *Id.* at 443–44 ("[T]he distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."). The Court discussed the Rehabilitation Act of 1973, Pub. L. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (1982)) (current version at 29 U.S.C. § 794(a) (2012)) (outlawing discrimination against people with mental retardation in federally funded programs); the Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 98-527, sec. 201, § 111(1), (2), 89 Stat. 486, 502 (1975) (codified as amended at 42 U.S.C. § 6009(1)–(2) (1982 & Supp. III 1985)) (repealed 2000) (providing a right to appropriate treatment, services, and habilitation); the Education of the Handicapped Act, Pub. L. 91-230, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. § 1412(5)(B) (1982)) (current version at 20 U.S.C. § 1412(a)(5)(A) (2012)) (making federal education funding contingent on states integrating children with mental retardation into schools); and the Mentally Retarded Persons Act of 1977 § 7, TEX. REV. CIV. STAT. ANN. art. 5547-300, § 7 (West Supp. 1985) (current version at TEX. HEALTH & SAFETY CODE ANN. § 592.013 (West 2010)) (providing people with mental retardation the right to living in the least restrictive setting appropriate to their individual needs).

political powerlessness.[50] Finally, the Court was concerned about the coherency of future lawmaking if it elevated the scrutiny of people with mental retardation.[51] Elevated scrutiny was therefore not appropriate.[52]

Many aspects of this holding are questionable. Justice Marshall's powerful concurrence and dissent, joined by Justices Brennan and Blackmun, challenged some of the majority's assumptions.[53] The Court made a somewhat casual assertion that while racial minorities and women are all monolithic for purposes of state classifications, people with mental retardation are not "cut from the same pattern."[54] But all groups are different in a way that can impact their relations with the state;[55] the relevant inquiry should be whether permissible distinctions drawn by states between persons bear the requisite relationship to their relevant characteristics.[56] As Justice Marshall wrote,

> If the Court's . . . principle were sound, heightened scrutiny would have to await a day when people could be cut from a cookie mold. . . . [T]hat some retarded people have reduced capacities in some areas does not justify using retardation as a proxy for reduced capacity in areas where relevant individual variations in capacity do exist.[57]

The Court also downplayed the "'lengthy and tragic history' of segregation and discrimination" faced by those with mental disabilities "that can only be called grotesque."[58] Far from the few benign laws the majority relied on, there is an unmentioned history of segregation, discrimination, eugenics, forced sterilization, and denial of rights of citizenship to those with mental

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50 *Cleburne*, 473 U.S. at 445.

51 *Id.* at 445–46 ("[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . , it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.").

52 *Id.*

53 *Id.* at 455–78 (Marshall, J., concurring in the judgment in part and dissenting in part).

54 *Id.* at 442 (majority opinion).

55 In the LGBT context, for example, the burdens of same-sex marriage bans fall differently on gays, lesbians, and bisexuals. *See, e.g.*, Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415 (2012) (arguing that bisexuals are uniquely situated in the same-sex marriage debate).

56 *Cleburne*, 473 U.S. at 468 (Marshall, J., concurring in the judgment in part and dissenting in part).

57 *Id.*

58 *Id.* at 461 (citation omitted) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U. S. 265, 303 (1978) (plurality opinion)).

disabilities.[59] Through this lens, Justice Marshall viewed remedial legislation not as evidence of political power, but rather an evolution of cultural, political, and social patterns that will naturally come to be embodied in legislation.[60] But he argued that it was not a faithful application of the Court's equal protection principles to characterize such progress as prohibiting heightened scrutiny.[61] The Court was also willing to acknowledge that "statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women,"[62] while seemingly ignoring that legislators might have dated and stereotypical assumptions of the capabilities of people with disabilities. This belies reality.[63]

Even under rational basis review, the Court ultimately struck down the zoning ordinance in *Cleburne*. The Court rejected the justifications offered by the City for the law, including the negative attitude of adjoining property owners, the home's proximity to a school, and the size of the home and the number of people that would occupy it, as not rational and resting "on an

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59 *Id.* at 461–64; *see also, e.g.*, STANLEY S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 18 (1983) (describing historical mistreatment and imprisonment of those with mental disabilities); J. H. LANDMAN, HUMAN STERILIZATION 302–03 (1932) (documenting state laws allowing human sterilization). The right to enforce forcible sterilization laws was upheld by the Supreme Court in *Buck v. Bell*, 274 U.S. 200 (1927).

60 *Cleburne*, 473 U.S. at 466 (Marshall, J., concurring in the judgment in part and dissenting in part) ("It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality.").

61 *Id.* at 467 ("[E]ven when judicial action *has* catalyzed legislative change, that change certainly does not eviscerate the underlying constitutional principle. The Court, for example, has never suggested that race-based classification became any less suspect once extensive legislation had been enacted on the subject.").

62 *Id.* at 441 (majority opinion).

63 When Congress originally passed the ADA, it included a finding that "individuals with disabilities are a discrete and insular minority who have been . . . relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7) (2006) (repealed 2008). This section was removed from the ADA with the passage of the ADA Amendments Act of 2008, Pub. L. 110-325, sec. 3, § 2(a), 122 Stat. 3553, 3555 (codified at 42 U.S.C. § 12101(a) (Supp. V 2011)), as discussed *infra* notes 105–12 and accompanying text. *See also* Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 112, 114–23 (2001) (canvassing empirical proof gathered by Congress demonstrating political powerlessness of people with disabilities, and demonstrating that laws designed to protect those with disabilities have been interpreted in ways that have in fact furthered stereotypes regarding those with mental disabilities); Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341 (1993) (arguing that disability laws crafted by Congress are defective because legislators view those with disabilities as inherently inferior).

irrational prejudice against the mentally retarded."[64] Justice Marshall argued that this was a striking departure from traditional rational basis review, characterizing it as something more akin to "second order" rational basis review.[65] In the wake of *Cleburne*, commentators agreed with this assessment, noting that despite purporting to apply rational basis scrutiny in *Cleburne*, the Court actually applied a heightened form of rational basis scrutiny,[66] often referred to as "rational basis with teeth."[67]

According to Justice Marshall, the Equal Protection Clause should involve more than three rigid tiers of analysis: "I have long believed the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'"[68] An attendant part of this contextualization was Marshall's more expansive view of history and stigma.[69] He also declined to link remedial legislation to requisite political power so as not to need heightened protection under the Equal Protection Clause.[70] Below, in Part III, I demonstrate that these are all themes that have been effective in subsequent cases, particularly in LGBT litigation, where state and federal courts have been willing to engage in more nuanced review of discriminatory state classifications. But generally, as shown in Part II, these principles have not been extended to constitutional claims on behalf of people with disabilities. In this context, *Cleburne* is usually cited for the simplistic assertion that people with disabilities are not entitled to

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[64] *Cleburne*, 473 U.S. at 448–50.

[65] *Id.* at 458 (Marshall, J., concurring in the judgment in part and dissenting in part) (internal quotation marks omitted) ("[T]he Court's heightened-scrutiny discussion is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny.").

[66] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 804 (4th ed. 2011) ("It can be argued that the Court's review was more rigorous than usual for rational basis analysis. Under traditional rational basis review significant underinclusiveness is tolerated and the government may proceed one step at a time.").

[67] *E.g.*, 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 n.5 (1998) ("Legislation has also been struck down on rational review, leading some commentators to believe that a fourth tier of review—the so called 'rational basis with teeth' standard—has been created." (internal citations omitted)); David O. Stewart, *Supreme Court Report: A Growing Equal Protection Clause?*, A.B.A. J., Oct. 1985, at 108, 112.

[68] *Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in the judgment in part and dissenting in part) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting)).

[69] *See id.* at 456, 461.

[70] *See id.* at 465–66.

heightened scrutiny. Unlike *Cleburne* itself, the classification is then upheld as valid.[71]

The *Cleburne* Court's analysis, and its extension to all people with disabilities as discussed below, created and perpetuated a harmful constitutional "otherness" to the disability classification. In writing that people with mental retardation have a "reduced ability to cope with and function in the everyday world,"[72] that "[t]hey are . . . different, immutably so,"[73] and that "legislation . . . singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others,"[74] Justice White's majority opinion "took mentally retarded people to be a class of naturally inferior people."[75] This viewpoint has been criticized as objectionable for assuming that society is made up of normal and abnormal people, and that people with mental retardation (as abnormal) are more like each other than the rest of the community.[76] It presumes too easily a causal relationship between difference and impairment, without adequately addressing how social prejudice exacerbates disability,[77] how new educational or medical techniques can change how it is experienced,[78] or that some difference associated with disability is not disability specific at all, but behavior (like, *Cleburne*'s terms, "reduced ability to cope and function in the everyday world"),[79] which could easily be attributed to larger categories of people (like "absent-minded professors, improvident artists, and unworldly *religieuses*").[80] Unfortunately, this rests uncomfortably close to the Supreme Court's other main constitutional pronouncement on disability—*Buck v. Bell*—where, in upholding the ability of states to forcibly sterilize people with mental disabilities, the Court noted that "[t]hree generations of imbeciles are enough."[81] Despite the ADA's attempt to

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71 *See infra* Part II.

72 *Cleburne*, 473 U.S. at 442 (majority opinion).

73 *Id.*

74 *Id.* at 444.

75 *See* Silvers & Stein, *supra* note 63, at 105.

76 *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 105–06 (1990).

77 *See* Silvers & Stein, *supra* note 63, at 114 ("In many instances, [repercussions of disability] are mitigated or thoroughly relieved when the social environment accommodates physical and cognitive difference.").

78 *See id.* at 107 ("[N]ew educational techniques defeat claims about the immutability of some retarded people's limitations.").

79 *Cleburne*, 473 U.S. at 442.

80 Silvers & Stein, *supra* note 63, at 106–07.

81 274 U.S. 200, 207 (1927).

alter the legal construction of disability, constitutionally, the distinctions *Cleburne* created have remained.

C. Cleburne*'s Aftermath, Federalism Decisions, and the Constitutional Foundations of the Americans with Disabilities Act*

Cleburne left some open questions. The first was whether traditional rational basis applied to people with disabilities, or whether they would receive some heightened form of review.[82] Two years after *Cleburne*, the Tenth Circuit applied some variant of "second order" rational basis scrutiny for reviewing the exclusion of people with mental and developmental disabilities from a federally funded housing project.[83] But most doubt was resolved with the Supreme Court's decision in *Heller v. Doe*, where the Court used traditional rational basis scrutiny to analyze the statutory scheme governing involuntary commitment of mentally disabled persons to state institutions.[84] The *Heller* majority disclaimed ever "purport[ing] to apply a different standard of rational-basis review" to cases involving people with mental retardation.[85] Justice Souter dissented that "[w]hile the Court cites *Cleburne* once, and does not purport to overrule it, neither does the Court apply it, and at the end of the day *Cleburne*'s status is left uncertain."[86] Justice Stevens later wrote that, after *Heller*, review of legislative distinctions under rational basis review once again became "tantamount to no review at all."[87]

The second open question was how broadly *Cleburne* applied to the diverse universe of people with disabilities. The *Cleburne* Court itself (and *Heller* Court after it) never purported to analyze the equal protection status of anything beyond people with mental retardation.[88] *Board of Trustees of the*

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[82] *See supra* notes 66 and 67.

[83] *See* Knutzen v. Eben Ezer Lutheran Hous. Ctr., 815 F.2d 1343, 1354–55 (10th Cir. 1987). Some lower courts did the same. *See* Burstyn v. City of Miami Beach, 663 F. Supp. 528, 533 (S.D. Fla. 1987); *see also* Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 417, 422, 425 (N.D.N.Y. 1987), *vacated as moot*, 888 F.2d 230 (2d Cir. 1989); Coburn v. Agustin, 627 F. Supp. 983, 988–91 (D. Kan. 1985).

[84] 509 U.S. 312, 314, 319–21 (1993).

[85] *Id.* at 321.

[86] *Id.* at 337 (Souter, J., dissenting).

[87] FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in the judgment).

[88] Even within this category, *Cleburne* has been justifiably criticized for the overinclusiveness of the way it applied the Equal Protection Clause to the diverse category of people with mental retardation. *See* Silvers & Stein, *supra* note 63, at 106 (noting that, based on the *Cleburne* record, ninety percent of the individuals falling into the court's classification of "persons with mental retardation" were only mildly retarded). This analytical error was only compounded when *Cleburne*'s equal protection classification was extended to the more general category of "people with disabilities." *See infra* notes 89–92 and accompanying text.

University of Alabama v. Garrett involved a challenge to the constitutionality of Title I of the ADA, which prohibits discrimination on the basis of disability in employment.[89] The Court ultimately held that Congress did not validly abrogate state sovereign immunity, and thus Title I was unconstitutional insofar as lawsuits for damages were brought against states.[90] In evaluating the constitutional bases for congressional abrogation of state sovereign immunity, the Court cited *Cleburne* for the proposition that "[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational."[91] Apart from refusing to acknowledge any form of more contextualized review in *Cleburne*, without explanation or elaboration, the Court moved from *Cleburne*'s holding on mental retardation to the more general category of "the disabled."[92] The lack of any reasoning or coherence to this casual expansion was not noted anywhere in the opinion, not even in Justice Breyer's powerful dissent.[93]

Previously, in *City of Boerne v. Flores*, the Court had struck down the Religious Freedom Restoration Act, holding that Congress could only use its powers under Section 5 of the Fourteenth Amendment to provide remedies for constitutional rights recognized by the Courts.[94] In *City of Boerne*, the Court announced a new standard whereby it would evaluate legislation passed pursuant to Congress's Section 5 powers to determine if it was "congruent and proportional" to the constitutional wrong to be prevented.[95] This "new federalism"[96] raised the constitutional stakes, and meant *Garrett* more squarely questioned the ability of Congress to pass remedial legislation using its Section 5 powers. Once the Court took *Cleburne* to mean that government classifications on the basis of disability were only entitled to rational basis review, to meet congruence and proportionality, the question was framed as whether Congress, before passing the ADA, found a pattern of states

89 531 U.S. 356 (2001).

90 *See id.* at 374.

91 *Id.* at 367.

92 Perhaps the unstated assertion was that if people with mental retardation were not entitled to heightened scrutiny, no other category of people with disabilities conceivably could be. But there is no discussion of this in the opinion.

93 *Id.* at 376 (Breyer, J., dissenting). However, in his dissent, Justice Breyer does broadly discuss state-sponsored discrimination against wide ranges of people with disabilities. *Id.* at 378.

94 521 U.S. 507, 519, 536 (1997).

95 *Id.* at 530; *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (holding that the Age Discrimination in Employment Act was not a valid exercise of Congress's Section 5 power to enforce the Fourteenth Amendment).

96 For a more thorough review, see Michael E. Waterstone, Lane*, Fundamental Rights, and Voting*, 56 ALA. L. REV. 793 (2005).

irrationally discriminating against people with disabilities in employment.[97] The Court held that Congress did not.[98]

The next challenge to Congress's constitutional ability to support the ADA under Section 5 came in *Tennessee v. Lane*, which arose under Title II of the ADA, which prohibits discrimination on the basis of disability in state and local government programs, services, and activities.[99] While affirming the central holding of *Garrett* that "classifications based on disability violate that constitutional command [of congruence and proportionality] if they lack a rational relationship to a legitimate governmental purpose,"[100] the Court held that Title II did validly abrogate state sovereign immunity insofar as it sought to protect access to the justice system.[101] This was based on the fundamental nature of the access to justice right,[102] not on any heightened scrutiny for disability classifications. Similarly, in *United States v. Georgia*, the Court upheld the constitutionality of Title II insofar as it related to enforcing the Eighth Amendment's prohibition on cruel and unusual punishment.[103] So the lasting impact of *Cleburne* in these cases has been to enforce a limited view of *Cleburne* as only requiring rational basis scrutiny for disability classifications. This impacts Congress's ability to pass remedial legislation. Federalism challenges to the ADA have continued.[104]

When Congress originally passed the ADA, it was clear that it was using all of its constitutional powers. This manifested in two provisions: most expressly, where Congress stated that it was invoking "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of

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97 *See Garrett*, 531 U.S. at 368.

98 *Id.*

99 541 U.S. 509, 513 (2004).

100 *Id.* at 522.

101 *See id.* at 533–34.

102 *Id.* at 533.

103 546 U.S. 151, 159 (2006).

104 *Compare* Guttman v. Khalsa, 669 F.3d 1101, 1107, 1125 (10th Cir. 2012) (holding that Title II of the ADA did not validly abrogate state sovereign immunity in the realm of professional licensing), *and* Klinger v. Dir., Dep't of Revenue, 455 F.3d 888, 897 (8th Cir. 2006) (holding that Title II did not validly abrogate state sovereign immunity insofar as it related to claims that people with disabilities have been charged for handicap parking placards), *with* Bowers v. NCAA, 475 F.3d 524, 556 (3d Cir. 2007) (holding that Title II's abrogation of sovereign immunity was valid insofar as it applies to public education), *and* Toledo v. Sanchez, 454 F.3d 24, 40 (1st Cir. 2006) (holding the same as *Bowers*).

discrimination faced day-to-day by people with disabilities."[105] And in the original ADA, Congress included a finding that

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[106]

Although there is scant legislative history, this is loaded language. The term "discrete and insular minority" was drawn directly from the Court's language in *United States v. Carolene Products Co.*,[107] which is widely taken to be the seminal statement articulating bases of the different standards of equal protection review.[108] This language may have been intended to express Congress's view that people with disabilities were entitled to some form of heightened scrutiny under the Equal Protection Clause or, at the very least, draw attention to a history of segregation and discrimination.[109]

But when Congress passed the ADA Amendments Act of 2008 (ADAAA), this provision was removed.[110] The rationale was that it was a poor fit with the ADAAA's goals of broadening the narrow ways that courts had interpreted the

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105 Americans with Disabilities Act of 1990 § 2, 42 U.S.C. § 12101(b)(4) (2006).

106 *Id.* § 12101(a)(7) (repealed 2008).

107 304 U.S. 144, 153 n.4 (1938) ("Nor need we enquire . . . 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." (emphasis added)).

108 *See* CHEMERINSKY, *supra* note 66, at 552. For a robust treatment of the *Carolene* footnote, see Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985) and J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989).

109 *See* Brown v. N.C. Div. of Motor Vehicles, 987 F. Supp. 451, 457 (E.D.N.C. 1997) ("By invoking the language of suspect classification, the now-familiar mantra of 'discrete and insular minorities' from Footnote 4 of *United States v. Carolene Prods.*, Congress may have been attempting to force the courts to treat the disabled as a suspect class for equal protection purposes. . . . However, it seems more likely that Congress was merely availing itself of its fact-finding powers and pointing out to the courts that the disabled have suffered historically in this country." (citation omitted)), *aff'd*, 166 F.3d 698 (4th Cir. 1999); *see also* NAT'L COUNCIL ON DISABILITY, RIGHTING THE ADA 107 (2004), *available at* http://www.ncd.gov/publications/2004/Dec12004 ("The awkwardly worded finding was cobbled together from language of several different Supreme Court decisions establishing criteria for constitutionally 'suspect' classifications for equal protection purposes. It attempted to improve the chances that courts would subject discrimination on the basis of disability to heightened judicial scrutiny under the Equal Protection Clause. This congressional finding was intended to assist plaintiffs with disabilities seeking to invoke heightened equal protection scrutiny in lawsuits filed after the ADA took effect.").

110 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3354–55.

ADA's definition of disability.[111] This removal reflected tensions, which existed prior to and continued through the ADA's enactment, between using political power for a core group of people with disabilities and expanding the Act's protections to secure maximum coverage for the most people.[112] And in cases like *Garrett*, the Supreme Court had already demonstrated that it would pay no attention to this finding.[113] But if nothing else, this removal served as further evidence of the move away, by Congress and advocates that participated in the passage of the ADAAA, from a constitutional vision for even some categories of people with disabilities.

II. IS THERE A ROLE FOR DISABILITY CONSTITUTIONAL LAW?

Despite (and perhaps because of) constitutional setbacks, and as result of fierce advocacy and legislative prowess, modern advocates for the disability cause have a highly effective statutory scheme, which in many ways outpaces that of other groups. Title I of the ADA prohibits discrimination against people with disabilities in employment and provides that employers need to make reasonable accommodations, at their own expense, to facilitate the inclusion of people with disabilities in the workplace.[114] Section 504 of the Rehabilitation Act prohibited discrimination against people with disabilities in programs that received federal financial assistance,[115] and Title II of the ADA effectively extended these provisions to all state and local government programs, services, and activities.[116] Title III of the ADA is an analogue to Title II of the Civil Rights Act of 1964,[117] requiring that privately owned places of public accommodation not discriminate against people with disabilities, which includes making reasonable modifications to facilities and practices when doing so would not constitute an undue burden.[118] The Individuals with Disabilities Education Act gives parents a broad range of procedural and substantive rights with the goals of including students with disabilities in the educational system and getting them appropriate services to facilitate this

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[111] *See* NAT'L COUNCIL ON DISABILITY, *supra* note 109, at 108 ("The 'discrete and insular minority' language was not intended to be applied to the full scope of persons to whom the ADA provides protection from discrimination. Obviously, people who are merely regarded as having a disability are not such a discrete minority, because a mistaken perception of disability can happen to any American.").

[112] *See* BAGENSTOS, *supra* note 26, at 34–51.

[113] *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001).

[114] 42 U.S.C. § 12112(a), (b)(5)(A) (2006 & Supp. V 2011).

[115] 29 U.S.C. § 794(a) (2012).

[116] 42 U.S.C. § 12132 (2006).

[117] *Compare id.* § 12182(a), *with id.* § 2000a.

[118] *Id.* § 12182(b)(2)(A)(ii)–(iii).

inclusion.[119] The Fair Housing Act, as amended, requires that certain residential dwellings be constructed and designed in an accessible manner.[120] And the Help America Vote Act, amongst other things, requires that each polling place have one polling machine that enables people with disabilities to vote secretly and independently.[121]

These statutes go beyond what any heightened constitutional protection could provide because they extend deep into the private employment and accommodations spheres. Advocates have the challenging work of making sure these civil rights protections are enforced and implemented, which, as I have examined elsewhere, is a monumental task.[122] And the historic disinclination of public enforcement officials to take the lead in many areas of these laws both complicates this task and makes it more pressing.[123] This being the case, and given the disinclination of the current Supreme Court to expand heightened equal protection status to any new groups, is any discussion of disability constitutional law really worth having?

In this Part, I suggest why disability constitutional law should be part of the strategy to advance the rights of people with disabilities. This position has both a pragmatic and normative basis. Accepting and working within the constitutional framework established by *Cleburne* ultimately carries costs in the political and legislative arena. The ADA has already been challenged as exceeding its constitutional bases,[124] and such attacks will continue and intensify. Not gaining constitutional ground is tantamount to losing it,[125] and will ultimately undermine the success of any legislative strategy. And there are areas where *Cleburne* still operates to disadvantage categories of people with disabilities—particularly those with mental disabilities—in their interactions with the state. This happens in areas like family law, commitment proceedings, the provision of state benefits and licensing, and voting, amongst others.

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119 *See* 20 U.S.C. §§ 1400–1482 (2012).

120 42 U.S.C. § 3604(f)(3)(C)(i)–(iii).

121 *See id.* §§ 15421(b)(1), 15481(a)(3).

122 *See* Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434 (2007).

123 *See id.* at 436, 451, 457, 460.

124 *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S 356 (2001) (challenging the constitutionality of Title I of the ADA); *see also* Sarah E. Sutor & Susan Elizabeth Grant Hamilton, *Constitutional Status of the ADA: An Examination of* Alsbrook v. City of Maumelle *in Light of Recent Supreme Court Decisions Concerning the 11th Amendment*, 19 REV. LITIG. 485, 486–97 (2000).

125 *See* Doug NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 893 (2013) (reviewing JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011)) ("Social movement work on movement–countermovement struggles demonstrates the need for movement activists to meet their adversaries on all relevant battlegrounds.").

Reviewing recent constitutional litigation in both state and federal courts demonstrates that the more contextualized vision of equal protection, which some hoped *Cleburne* might stand for, is beginning to appear, just not for people with disabilities. More normatively, progressive theorizing about the Constitution is already happening, and the disability cause is diminished by not being a part of this conversation. Framing rights in constitutional ways carries a certain permanence and gravitas, and engages courts differently in the process of constitutional culture than bringing claims that a particular statutory right has been infringed.

A. *Doctrinally,* Cleburne *Still Matters*

Cleburne still casts a large shadow.[126] States still have laws that are facially discriminatory against people with disabilities, usually on the basis of mental disability. These exist in areas like family law, voting, commitment proceedings, and the provision of benefits. Within family law, some states require consideration of mental disability in determinations of parental fitness or otherwise link mental disability to a termination of parental rights.[127] For example, California has a statute that authorizes the superior court to set aside a decree of adoption within five years of its entry where the adopted child manifests a developmental disability or mental illness as a result of conditions that existed prior to the adoption and of which the adoptive parents had neither knowledge nor notice.[128] A different California statute requires reunification services for parents and children but denies them to mentally disabled parents.[129] Similar statutes exist in other states.[130] States also restrict the right

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[126] *See* Laura C. Bornstein, *Contextualizing* Cleburne, 41 GOLDEN GATE U. L. REV. 91, 118 (2010) ("[A]lthough *Cleburne* was a nominal victory for the operators and inhabitants of group homes, its legacy is one of anemic constitutional and statutory protections for the mentally retarded and other disabled individuals. In this legal landscape, government-sanctioned prejudice against mentally retarded persons has endured.").

[127] *See* Dale Margolin, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law*, 15 VA. J. SOC. POL'Y & L. 112, 154–169 (2007).

[128] *See* CAL. FAM. CODE § 9100 (West 2013).

[129] *See* CAL. WELF. & INST. CODE § 361.5(a), (b)(2) (West Supp. 2013).

[130] For example, Nevada's statute on termination of parental rights provides that

> In determining neglect or unfitness by a parent, the court shall consider, without limitation, the following conditions which may diminish suitability of a parent:
>
> 1. Emotional illness, mental illness or mental deficiency of the parent which renders the parent consistently unable to care for the immediate and continuing physical or psychological needs of the child for extended periods of time.

NEV. REV. STAT. ANN. § 128.106(1) (West 2013). For other examples, see CAL. FAM. CODE § 7827 (authorizing the state to terminate the parental rights of an individual based in part on the individual's mental,

of people with mental disabilities to get married. For example, Tennessee law provides that "[n]o [marriage] license shall be issued when it appears that the applicants or either of them is at the time drunk, insane or an imbecile."[131] Kentucky law provides that "[a]ny person who aids or abets the marriage of any person who has been adjudged mentally disabled, or attempts to marry, or aids or abets any attempted marriage with any such person shall be guilty of a . . . misdemeanor."[132] Based on laws like this, parents with disabilities face state proceedings to remove children from their care.[133] The National Council on Disability recently issued a report, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, concluding that "[c]learly, the legal system is not protecting the rights of parents with disabilities and their children."[134]

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not physical illness); GA. CODE. ANN. § 15-11-94(b)(4)(A)(ii), (B)(i) (2012); and MISS. CODE ANN. § 93-15-103(3)(e)(i) (2012).

[131] TENN. CODE ANN. § 36-3-109 (2010).

[132] KY. REV. STAT. ANN. § 402.990(2) (West 2006). The federal government itself has a marriage penalty for people with disabilities. The Supplemental Security Income (SSI) Program provides cash benefits to eligible individuals with disabilities who fall below a federal means test. *See* 42 U.S.C. § 1382 (2006). To qualify, an adult with a disability must meet the Social Security definition of disability, including an inability to do any substantial gainful activity. *Id.* § 423(d)(1)–(2). If two people receiving SSI get married, they will receive 25% less in benefits than they did as individuals, and one or both of them may also lose eligibility for Medicaid. *See* RICHARD BALKUS & SUSAN WILSCHKE, SOC. SEC. ADMIN., ISSUE PAPER NO. 2003-01, TREATMENT OF MARRIED COUPLES IN THE SSI PROGRAM 1 (2003), *available at* www.ssa.gov/policy/docs/issuepapers/ip2003-10.pdf. This creates difficult choices for people with disabilities (albeit choices that SSI recipients in other categories, including the poor and elderly, face as well). *See* B.J. Stasio, *People with Disabilities and the Federal Marriage Penalties*, IMPACT, Spring/Summer 2010, at 26, 26 ("People with disabilities want to get married. We fall in love and want to make a commitment to the person that we love and become a family. For many it is a religious choice to get married. Yet, too many people with disabilities must choose between getting married and continuing to receive the benefits they need to live from federal programs . . . .").

[133] For example, Erika Johnson and Blake Sinnett had their baby, Mikaela, removed from their custody by the State because they were blind. Tom Henderson, *Blind Couple Reunited with Baby Taken Away by State*, PARENTDISH (July 23, 2010, 5:09 PM), http://www.parentdish.com/2010/07/23/blind-couple-reunited-with-baby-taken-away-by-state/; Bonnie Rochman, *Why Parents with Disabilities Are Losing Custody of Their Kids*, TIME (Nov. 27, 2012), http://healthland.time.com/2012/11/27/why-parents-with-disabilities-are-losing-custody-of-their-kids/. They were only reunited fifty-seven days later. Henderson, *supra*; Rochman, *supra*.

[134] NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 14 (2012), *available at* http://www.ncd.gov/publications/2012/Sep272012/ ("[P]arents [with disabilities] are the only distinct communities of Americans who must struggle to retain custody of their children. Removal rates where parents have a psychiatric disability have been found to be as high as 70 to 80 percent; where the parent has an intellectual disability, 40 percent to 80 percent. In families where the parental disability is physical, 13 percent have reported discriminatory treatment in custody cases. Parents who are deaf or blind report extremely high rates of child removal and loss of parental rights. Parents with disabilities are more likely to lose custody of their children after divorce, have more difficulty in accessing reproductive health care, and face significant barriers to adopting children.").

Some of these statutes have been challenged under the federal Equal Protection Clause. In most instances, courts cite *Cleburne* for the proposition that people with disabilities are not a protected class, and exercise almost unlimited deference to the state's purported justifications as rational. For example, in *Adoption of Kay C.*, plaintiffs challenged California's statute authorizing a court to set aside an adoption for a child with an undisclosed mental disability.[135] After noting that people with disabilities were not entitled to heightened scrutiny under *Cleburne*, California offered the justification of promoting the state's interest in adoption.[136] In response to the plaintiff's argument that there was no evidence the statute actually functioned to this end, in upholding the statute the court reasoned,

> We need not state our opinion on the matter, because "most fundamentally, the constitutionality of a measure under the equal protection clause does not depend on a court's assessment of the empirical success or failure of the measure's provisions. . . . 'Whether *in fact* the Act will promote [the legislative objectives] is not the question: the Equal Protection Clause is satisfied by our conclusion that the [state] Legislature *could rationally have decided* that [it] . . . might [do so].'"[137]

Other cases follow a similar course.[138] In no instance is there any application of the type of "rational basis with teeth" analysis as evidenced in *Cleburne*. Simply stated, *Cleburne* provides no help in these cases: "[N]o court to date has struck down on the basis of irrationality any child custody or child welfare law alleged to discriminate against parents with disabilities."[139] But

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[135] 278 Cal. Rptr. 907, 909 (Ct. App. 1991).

[136] *Id.* at 914–16.

[137] *Id.* at 915 (alterations in the second sentence in original) (quoting Am. Bank & Trust Co. v. Cmty. Hosp., 683 P.2d 670, 679 (Cal. 1984)).

[138] In *In re Christina A.*, 216 Cal. Rptr. 903, 905 (Ct. App. 1989), a parent challenged section 361.5 of the California Welfare and Institutions Code, requiring reunification services for parents and children but denying them to mentally disabled parents. Applying rational basis, the court held the statute did not violate the constitutional guarantee of equal protection, stating "[i]t is reasonable for the state, before expending its limited resources for reunification services, to distinguish between those who would benefit from such services and those who would not. One of those classes of parents [who would not benefit] is those with a sufficient degree of mental disability . . . ." *Id.* at 907.

Similarly, in *In re Eugene W.*, 105 Cal. Rptr. 736, 738–39, 741 (Ct. App. 1972), the court rejected an equal protection challenge to the then existing California law, CAL. CIV. CODE § 232 (codified as amended at CAL. FAM. CODE § 7827 (West 2013)), authorizing the state to terminate the parental rights of an individual based in part on the individual's mental, not physical, illness. The court stated that "[t]he distinction between physical and mental illness . . . is amply warranted" by "reason of the differing nature of the two disabilities" and the effect it would have on one's ability to parent. *In re Eugene W.*, 105 Cal. Rptr. at 741.

[139] *See* NAT'L COUNCIL ON DISABILITY, *supra* note 134, at 301.

these laws would appear not at all related to the objective of promoting child welfare, as the social science research suggests "*there is no evidence that child maltreatment is more prevalent among parents with disabilities*."[140]

Commitment proceedings are also examples of state statutory schemes that facially discriminate against people with mental disabilities. For example, *In re Harhut* considered a Minnesota statute allowing for indefinite commitment of persons with mental retardation.[141] Individuals who were substance abusers were not subject to a similar indefinite commitment under the statute.[142] Citing *Cleburne*, the court held that

> [T]he distinction between commitment periods [between mental disability and substance abuse] is based on the legislative judgment that mental retardation is, unlike chemical dependency or mental illness, a condition not usually susceptible of great or rapid improvement. The legislature decided that indeterminate commitment subject to judicial review on the motion of the patient was the more effective and efficient way to deal with the state's responsibility to treat mentally retarded persons. This is a legitimate public purpose, and it is not clear beyond a reasonable doubt that indeterminate commitment is an unreasonable means of assuring the state's interest.[143]

This application of *Cleburne* undertakes no meaningful review of the propriety of these legislative determinations.

There are other state laws that have expressly discriminated on the basis of disability in the provision of state benefits or licenses. For example, from 1995 to 1997, Hawaii's General Assistance Statute limited the duration of benefits to one year for people with disabilities who were unable to provide sufficient support for themselves; benefits to persons with dependent children had no

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[140] *Id.* (citing Kate Judge, *Serving Children, Siblings, and Spouses: Understanding the Needs of Other Family Members*, *in* HELPING FAMILIES COPE WITH MENTAL ILLNESS 161, 161–83 (Harriet P. Lefley & Monay Wasow eds., 1994), and Carol G. Taylor et al., *Diagnosed Intellectual Impairment Among Parents Who Seriously Mistreat Their Children: Prevalence, Type and Outcome in a Court Sample*, 15 CHILD ABUSE & NEGLECT 389, 395 (1991)).

[141] 385 N.W.2d 305, 306 (Minn. 1986).

[142] *See id.* at 311.

[143] *Id.* Similarly, in Georgia, once an individual with mental retardation is involuntarily committed to an institution, he or she may never have the opportunity to be heard in court again. *See* GA. CODE ANN. § 37-4-42 (2012); *see also* Laura W. Harper, Comment, *Involuntary Commitment of People with Mental Retardation: Ensuring All of Georgia's Citizens Receive Adequate Procedural Due Process*, 58 MERCER L. REV. 711, 718, 726 (2007).

time limitation.[144] When challenged, this law was held not to violate Title II of the ADA, because the court reasoned that Hawaii's general assistance scheme was not required to provide equal categories of benefits to all of the citizens it deemed needy.[145] In considering the plaintiff's Equal Protection Clause challenge, the court cited *Cleburne* for the proposition that people with disabilities do not constitute a suspect class.[146] Hawaii's justification—the "preservation of . . . fiscal integrity . . . while providing benefits to the greatest number and the most needy"—was legitimate and rationally related to its actions.[147]

Many state-based professional licensing processes ask questions that screen for disability in different ways.[148] In *Guttman v. Khalsa*, a physician with a history of depression and post-traumatic stress disorder had his license suspended by the New Mexico Board of Medical Examiners.[149] In evaluating his claim for damages under Title II of the ADA, without extensive analysis, the court cited *Cleburne* for the proposition that the action was rational.[150] Similarly, state bar organizations routinely ask questions and deny bar admissions based on a history of treatment for mental disability.[151]

Voting is another area where laws expressly disenfranchise individuals with mental disabilities.[152] Kentucky's constitution provides that "idiots and insane persons" shall not have the right to vote.[153] Iowa has a constitutional provision that "[a] person adjudged mentally incompetent to vote or a person

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[144] Does 1–5 v. Chandler, 83 F.3d 1150, 1151–52 (9th Cir. 1996) (describing the disparity in the 1995 law); *see* Act of June 16, 1997, act 200, sec. 7, § 346-71(b), 1997 Haw. Sess. Laws 379, 385 (codified as amended HAW. REV. STAT. § 346-71 (West 2008)) (eliminating the maximum duration of benefits for disabled recipients).

[145] *Chandler*, 83 F.3d at 1155–56.

[146] *Id.* at 1155.

[147] *Id.* at 1556 (internal quotation marks omitted).

[148] For example, in *Medical Board of California v. Hason*, "[t]he Medical Board of California denied Dr. Michael J. Hason a medical license because of his history of depression. A graduate of Yale College and New York Medical College, Dr. Hason received a medical license in New York and worked successfully as a physician at [hospitals in New York, Connecticut, and even California]." Brief of Respondent at 1–2, Med. Bd. of Cal. v. Hason, 538 U.S. 958 (2003) (No. 02-479), 2003 WL 1090215, at *1–2 (footnote omitted).

[149] 669 F.3d 1101, 1106–07 (10th Cir. 2012).

[150] *Id.* at 1116.

[151] *See, e.g.*, Stephanie Denzel, *Second-Class Licensure: The Use of Conditional Admission Programs for Bar Applicants with Mental Health and Substance Abuse Histories*, 43 CONN. L. REV. 889, 892–93 (2011); Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities out of the Stigma Straitjacket*, 79 UMKC L. REV. 123, 124 (2010).

[152] *See* Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 940 (2007).

[153] KY. CONST. § 145, cl. 3.

convicted of any infamous crime shall not be entitled to the privilege of an elector."[154] Here, there have been some successful constitutional challenges, though not because of any judicial inquiry into legislative classifications or a record of discrimination on the basis of disability.[155] In *Doe v. Rowe*, there was a challenge to the Maine Constitution, which stated that all persons were eligible to vote except "those under guardianship by reason of mental illness."[156] Because of the fundamental nature of the right to vote, the court applied strict scrutiny.[157] Thus framed, the court struck down the constitutional provision, reasoning that

> Maine's voting restriction may very well have constituted equal treatment when it was passed in 1965. Nonetheless, this historical perspective does not guide the Court's inquiry. Rather, present day understandings of equal treatment must guide the Court's scrutiny of the voter eligibility lines drawn by the State of Maine.[158]

The court held that the term "mental illness" was too broad to meet the state's compelling interest in ensuring that voters have the mental capacity to make their own decisions by being able to understand the nature and effect of the voting act itself.[159] Following similar reasoning, a recent decision by a Minnesota state court struck the part of the state's constitution that denied the vote to "a person under guardianship, or a person who is insane or not mentally competent."[160]

This is where the federalism cases, discussed above, become especially relevant. Through the Court's new federalism jurisprudence, *Cleburne* has also limited the ability of Congress to pass remedial legislation predicated on a damage remedy against states.[161] The constitutionality of the ADA is part of a

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154 IOWA CONST. art. II, § 5. For examples of similar language in other state constitutions, see KY. CONST. § 145, cl. 3; MISS. CONST. art. 12, § 241; NEV. CONST. art. 2, § 1; N.J. CONST. art. II, § 1, para. 6; N.M. CONST. art. VII, § 1; OHIO CONST. art. V, § 6.

155 As discussed below, there is potential for disability rights advocates, as in other movements, to combine Equal Protection and Due Process Clause protections to secure some form of heightened scrutiny. *See infra* Part III.B.

156 156 F. Supp. 2d 35, 46 (D. Me. 2001).

157 *Id.* at 51.

158 *Id.* (citation omitted).

159 *Id.* at 52–54.

160 *In re* Guardianship of Erickson, No. 27-GC-PR-09-57, slip op. at 6, 26 (Minn. Dist. Ct. Oct. 4, 2012) (italics removed) (quoting MINN. CONST. art. VII, § 1).

161 *E.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360, 366 (2001) (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985)) (holding that suits to recover monetary damages from states for failing to comply with Title I of the ADA are barred by the Eleventh Amendment).

larger struggle going on in the federal courts about Congress's ability to legislate pursuant to its powers under Section 5 of the Fourteenth Amendment.[162] While there may not be an organized "anti–disability rights" movement with a primary agenda of limiting Congress's ability to legislate to protect the rights of people with disabilities,[163] in cases involving damages challenging a state's classification of people with disabilities, state actors typically challenge the ADA's constitutionality.[164] And because of *Cleburne*, the ADA remains uniquely vulnerable to these attacks. In an environment where government enforcement officials and public interest organizations have limited resources, restrictions on a damage remedy create a powerful incentive for underenforcement of key guarantees of the statute.[165]

To be sure, many of the barriers encountered by people with disabilities exist in employment and in accessing privately owned places of public accommodations, areas for which the ADA is a far better tool than constitutional law. And even in the interaction of people with disabilities with the state, many of the current challenges faced by people with disabilities involve states not meeting the needs of people with disabilities (usually through resource allocations), not outright exclusions.[166] Barriers to accessing polling places[167] and the current iteration of the deinstitutionalization movement[168] are examples of these types of challenges. Although there may be a role for constitutional law in these campaigns, these are not challenges to facially discriminatory laws.[169] Under *Washington v. Davis*, these types of

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[162] *See supra* notes 83–90 and accompanying text.

[163] *Cf.* Shauna Fisher, *It Takes (at Least) Two to Tango: Fighting with Words in the Conflict over Same-Sex Marriage*, *in* QUEER MOBILIZATION: LGBT ACTIVISTS CONFRONT THE LAW 207, 218–24 (Scott Barclay et al. eds., 2009) (analyzing the impact of movement-countermovement dynamics surrounding marriage for same-sex couples).

[164] *E.g.*, *Garrett*, 531 U.S. at 362.

[165] *See* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1092, 1119 (2007) (surveying two hundred public interest organizations and concluding that the greatest negative impact of *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), is on class actions seeking relief against government actors); *see also* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 207–08.

[166] *See* Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353, 364 (2003).

[167] *Id.* at 355–56.

[168] *See generally* Bagenstos, *supra* note 34.

[169] For example, a recent case challenged the inaccessibility of New York's polling places for people with physical disabilities. *See* United Spinal Ass'n v. Bd. of Elections, 882 F. Supp. 2d 615 (S.D.N.Y. 2012). Plaintiff claimed that the defendant Board of Elections had a responsibility to administer elections, which it had not discharged, in a way that was consistent with Title II of the ADA's requirement that people with

disparate impact challenges are largely foreclosed under existing conceptions of constitutional law, especially when there are benign purposes that could be offered for many of these laws and resource allocation decisions.[170] Yet even with these limitations, there are still facially discriminatory laws, which can and should be candidates for constitutional challenges.

B. A Progressive Vision of Disability Rights Framed in Constitutional Terms

Disability rights advocates, like other cause lawyers, are pursuing change through multiple forms of advocacy, utilizing an array of tools. These include political mobilization, communication through the media, public education, legislative reform, and enforcement efforts.[171] Understandably, pursuing constitutional claims is not high on the agenda of leading disability rights advocates.[172] There is a premium on expending valuable movement resources on strategies that have the most immediate chance of success. People with disabilities need employment opportunities and access to health care just as much, if not more, than abstract pronouncements of constitutional rights. And because the ADA was passed pursuant to Congress's constitutional powers, pursuing justice under it is one (indirect) form of articulating a constitutional vision of the rights of people with disabilities.

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disabilities be able to access polling places to exercise their right to vote. *Id.* at 616–17. There was no state statute that formally disenfranchised people with disabilities; rather, it was the implementation of the Board's existing duty under state law that created the cause of action. *See id.* at 623. By way of disclosure, the author was an expert witness for the plaintiffs in this case. Similarly, in *Disability Advocates, Inc. v. Patterson*, 653 F. Supp. 2d 184, 314 (E.D.N.Y 2009), *vacated sub nom.* Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012), the court found that that New York State officials and agencies discriminated against thousands of people with mental illness by administering the state's mental health service system in a manner that segregates them in large, institutional adult homes and denies them the opportunity to receive services in the most integrated setting appropriate to their needs. Again, there was no formal statute drawing classifications on the basis of disability; rather, it was the implementation of the state's overall scheme for administering to this population that was at issue. *See id.* at 187–88. On appeal, the court of appeals ultimately vacated the district court's decision for lack of jurisdiction. *Disability Advocates, Inc.*, 675 F.3d at 152.

[170] 426 U.S. 229, 239 (1976) ("But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

[171] *See* Waterstone et al., *supra* note 8, at 1323–27 (discussing different advocacy strategies as reported by disability cause lawyers).

[172] *Id.* at 1317 ("No lawyers we interviewed brought constitutional cases as a regular part of their practice. A poll showed a near-uniform consensus among the lawyers that constitutional litigation was not a priority or even a significant item on the litigation agenda."); *see also id.* at 1317–18 (noting views of one lawyer that "I would totally use the Constitution if it helped us. . . . [T]he Constitution is very weak on this, and so I've thrown it in, but mostly it hasn't been the lead for us because it's weak on disability and [is even] used against us on disability issues." (alterations in original)).

I am not suggesting that making advances under constitutional law should be the only, or even the primary, goal of the disability rights movement. Commentators, and even some disability cause lawyers, sensibly express trepidation about the use of courts to advance movement goals.[173] Myopically pursuing constitutional change to create real reform on the ground is an incomplete and dangerous strategy for any group and can lead to a "hollow hope."[174] But the disability community does not find itself put to that choice: it has a highly evolved advocacy movement, which has grassroots support and is effective at, and across, multiple levels of government.[175] Using courts for the selected claiming of constitutional rights should be part of that effort.[176] Pursuing constitutional change is not the complete answer to this open space, but over the long term, it should not be neglected as part of the effort.

Legislative lawyering should not be the only tool; statutory claims are fundamentally different from constitutional ones.[177] Claims brought under the ADA often turn on technical issues of statutory interpretation: which individuals are covered under the ADA's definition of disability,[178] where the line between reasonable and unreasonable accommodations lies,[179] and what

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173 *See* WEST, *supra* note 23, at 218–19; *see also* Waterstone et al., *supra* note 8, at 1318 n.151 (noting views of one lawyer that "I don't see how you can do constitutional litigation in the disability area until you have judges whose perception[s] of disability move[] away from the sympathy narrative to the rights narrative." (alterations in original) (internal quotation marks omitted)). Another lawyer noted that the level of scrutiny is reflective of the fact that "people don't think about disability rights on the same level as racial discrimination or race-based civil rights." *Id.*

174 *See* ROSENBERG, *supra* note 24. In a thoughtful recent article, Professor Samuel Bagenstos discusses, within the disability context, how the constitutional theories and advocacy of the deinstitutionalization movement were better at moving people out of institutions than providing them appropriate care when they were in the community, a task for which other forms of advocacy are better suited. *See* Bagenstos, *supra* note 34, at 6, 11–12.

175 *See* Waterstone et al., *supra* note 8, at 1323–27.

176 *See* NeJaime, *supra* note 125, at 879 (reviewing BALKIN, *supra* note 125, and suggesting that "by decentering courts in his analysis and instead looking to social movement contestation happening both in and out of court, Balkin advises us to be skeptical of the claims animating the turn away from courts").

177 *See* Brief of the American Ass'n on Mental Retardation et al. in Support of Respondents at 19, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008437, at *19 ("For people with disabilities, constitutional protection against discrimination by governmental actors remains crucial even in light of . . . legislative developments, because the scope of the statutory protections is incomplete.").

178 *See, e.g.*, Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566–67 (1999) (holding that an individual with amblyopia, an uncorrectable eye condition, was not covered by ADA's definition of disability); Sutton v. United Air Lines, Inc., 527 U.S. 471, 494 (1999) (holding that twin sisters with myopia were not covered by ADA's definition of disability).

179 *See, e.g.*, US Airways, Inc. v. Barnett, 535 U.S. 391, 403 (2002) (holding that exception to seniority policy was not a reasonable accommodation).

exactly an employer must offer to prove defenses under the Act.[180] Even in claims against state and local governments under Title II of the ADA, courts rarely need to discuss the role of history of discrimination or stigma against the disability classification in anything except the most cursory terms. This engages courts in a different way than the Fourteenth Amendment, which by definition goes more to the heart of a group's claim for full citizenship under our nation's governing charter. It is the Constitution that is our "basic law" (setting a framework of governance), our "higher law" (setting the values to which the country aspires), and "'our law'—an object of attachment that Americans see as the product of their collective efforts as a people."[181] There is something important—some would say redemptive—about using the Constitution to try to achieve a more progressive vision of society.[182] And the current posture of disability constitutional law does not adequately acknowledge the depth of historical prejudice against people with disabilities (mental disabilities in particular) and how a faithful vision of the Equal Protection Clause would recognize that state classifications grow out of that mindset.[183] There is also a practical dimension to this: despite fluctuations in the Court's constitutional doctrines, constitutional law generally has a permanence and gravitas that statutory law does not.[184]

It is axiomatic that the social movement of people with disabilities, and the lawyers who both serve and lead that movement, are a crucial part of how

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180 *See, e.g.*, Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542–43 (7th Cir. 1995) (holding that plaintiff must first make facial showing of proportionality of accommodation to costs and then defendant must show undue burden).

181 BALKIN, *supra* note 125

182 *Id.* at 118.

183 *See* Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1105 n.72 (1982) (defining discrete and insular minorities as those "groups that are not embraced within the bond of community kinship but are held at arm's length by the group or groups that possess dominant political and economic power"). This construction can and should apply to people with disabilities, especially mental disabilities, in the United States and in the greater world community. *See, e.g.*, GERARD QUINN & THERESIA DEGENER, HUMAN RIGHTS AND DISABILITY: THE CURRENT USE AND FUTURE POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENTS IN THE CONTEXT OF DISABILITY, at 15, U.N. Doc. HR/PUB/02/1, U.N. Sales No. E.02.XIV.6 (2002) ("[P]eople with disabilities were often virtually invisible citizens of many societies. They have been marginalized in nearly all cultures throughout history."); Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997, 1027 (2004) ("Deviating from [social norms] (as with a discredited condition like a disability) often leads to isolation, impaired status and social condemnation.").

184 *See* Brief of the American Ass'n on Mental Retardation et al. in Support of Respondents, *supra* note 177, at 19–20 ("The equal protection doctrine that applies to people with disabilities is also important because, unlike racial and gender civil rights laws, the statutory protections for people with disabilities remain controversial and vulnerable to attack in the political arena."); s*ee also, e.g.*, 141 CONG. REC. 4839–40 (1995) (statement of Rep. Philip M. Crane) (arguing for amending the ADA to reduce its impact on professional sports).

disability law continually unfolds.[185] By pursuing justice through popular movements and legislative reform, advocates are certainly helping the American people with their obligation "to flesh out and implement the Constitution's guarantees in their own time."[186] By going to the legislature, advocates have played to their strengths.[187] And this type of broad mobilization is essential to any type of constitutional progress.[188] Yet, by abandoning constitutional claiming, advocates have allowed the pendulum to swing too far in the nonconstitutional direction. At present, disability advocates are creating an articulation of constitutional values without the Constitution, which is an incomplete mission. One harmful legacy of this acceptance of the limited application in *Cleburne* is that constitutional rights claiming and the trope of constitutional dialogue regarding disability have been completely stilted.[189] Courts and constitutional law are both part of, and responsive to, culture.[190] But without having a disability constitutional law agenda there is no dialogue occurring, and courts cannot and will not have this conversation in a vacuum.

And this is a key moment to begin. Below, I discuss why there are fertile doctrinal grounds to make selected gains. But, as laws like the ADA have increased society's acceptance—although incompletely—of people with

[185] *See* NeJaime, *supra* note 125, at 877 (reviewing Balkin's *Constitutional Redemption* and noting that "[Balkin] exposes the feedback loop between social movements and courts: courts respond to claims and visions crafted by movements, and court decisions in turn shape the claims and visions of those movements and alter the political terrain on which those movements operate").

[186] *See* Jack M. Balkin, *Fidelity to Text and Principle*, *in* THE CONSTITUTION IN 2020, at 11, 11 (Jack M. Balkin & Reva B. Siegel eds., 2009) (noting that this is done through "building political institutions, through passing legislation, and through creating precedents, both judicial and nonjudicial").

[187] *See* Robin West, *The Missing Jurisprudence of the Legislated Constitution*, *in* THE CONSTITUTION IN 2020, *supra* note 186, at 79, 79 ("[P]rogressive lawyers should take this opportunity of their respite from judicial power and attend to the development of that [legislative] Constitution . . . .").

[188] *See* Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020, *supra* note 186, at 25, 31 ("Academic theories of legal justification do not mobilize public opinion; they do not inspire popular political campaigns to 'take back the Court.' Academic arguments may ultimately help transmute practical aspirations and grievances into legal form, but constitutional mobilization begins far outside the domain of jurisprudence.").

[189] In explaining the extension of *Boerne* to *Garrett*, Robert Post characterizes the ADA as a statute of "low political salience." Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 23 & n.102 (2003). While the nation has the "conviction that an essential mission of the federal government is the prevention of racial and gender discrimination," *id.* at 23, the same cannot be said of disability.

[190] *See id.* at 8 ("[T]he Court in fact commonly constructs constitutional law in the context of an ongoing dialogue with culture, so that culture is inevitably (and properly) incorporated into the warp and woof of constitutional law."); *see also* NeJaime, *supra* note 125, at 878 ("Legal scholars have increasingly focused on the role of social movements to understand both the way in which constitutional meaning is constructed and the role of courts in that process of construction.").

disability and sensitivity to their needs,[191] an opportunity should be taken to include this cultural shift in constitutional doctrine and values, and to push the "membrane separating constitutional law from constitutional culture."[192] The movements to eliminate discrimination on the basis of sex and sexual orientation have made similar jumps.[193] And progressive theorizing about the Constitution is already happening, just not with any vision of disability constitutional law at the table.[194] And while this is a longer-term project, it should not be considered futile to believe that some universe of people with disabilities should find greater protection in a progressive vision of the Constitution: Justices Marshall[195] and Blackmun[196] indicated acceptance for a heightened review of some state action on the basis of disability; in his *Garrett* dissent, Justice Breyer (joined by Justices Souter, Ginsburg, and Stevens) demonstrated an amenability to a more nuanced consideration of the constitutional dimension of state discrimination on the basis of disability;[197] and several state supreme courts have shown a willingness to raise the standard of review for certain disability considerations.[198]

This progressive vision of disability rights, framed in constitutional terms, should happen under state constitutions as well. In other movements, state constitutions have served as important vehicles to express evolving notions of equality, even in the face of rigid federal doctrine.[199] The gay rights movement

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191 The return from war of soldiers with disabilities has led to an important coalition that has increased social acceptance of those with disabilities. *See* David A. Gerber, *Heroes and Misfits: The Troubled Social Reintegration of Disabled Veterans in* The Best Years of Our Lives, *in* DISABLED VETERANS IN HISTORY 70, 73–75 (David A. Gerber ed., 2000) (describing the postwar response to the needs of injured veterans). *See generally* Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081 (2010) (discussing the impact of veterans returning on disability law).

192 Post, *supra* note 189, at 9.

193 *See* BALKIN, *supra* note 125, at 70 ("When social movement contestation succeeds in delegitimatizing a practice sufficiently, it also usually succeeds in getting courts to ratify that conclusion through their interpretations of the Constitution."); *see also infra* Part III.

194 The vanguard of this movement, the anthology THE CONSTITUTION IN 2020, *supra* note 186, and its larger project, THE CONSTITUTION IN 2020, http://www.constitution2020.org (last visited Jan. 11, 2014), does not currently include any specific discussion of disability.

195 *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 456 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

196 *See* Heller v. Doe, 509 U.S. 312, 334–35 (1993) (Blackmun, J., dissenting) (arguing for heightened scrutiny for laws that "discriminate against individuals with mental retardation").

197 *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 376–77 (2001) (Breyer, J., dissenting).

198 *See infra* Part III.

199 *See* Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 873–74 (1999) ("[R]ecent legal and political developments at the state levels, including recent efforts by Congress to 'devolve' social programs, give new relevance to this legal and judicial activity. State supreme court efforts to restructure educational finance, to confront racial and economic segregation in

made a conscious turn to focus on state-level actors in the face of the loss before the Supreme Court in *Bowers*.[200] Recognizing that "state courts [are] important parts of a national dialogue about American constitutional principles,"[201] advocates engaged in a deliberate campaign to challenge state sodomy and discriminatory marriage laws. Apart from changing laws in these states, this effort helped pave the way to the Court's overruling of *Bowers* in *Lawrence v. Texas*.[202] Justice Kennedy acknowledged this in *Lawrence* when he noted the evolution of state sodomy law.[203] As discussed below, there have been some limited challenges to laws that discriminate on the basis of disability under state constitutions, a development that I argue should be noted and extended. But there has been no coherent strategy in this context. And academic commentary on state disability law has been focused on securing a broader definition of "disability" under state antidiscrimination law,[204] a problem which had vexed disability advocates until the passage of the ADAAA. But this is still a legislation-centered view of even state court litigation.

This is unfortunate, as state constitutions are a particularly fertile ground for expressing constitutional values. As Douglas Reed argues, "The differing institutional contexts of state constitutions and their far greater popular dimensions mean that the higher law tradition of the U.S. Constitution is less central to the state court experience."[205] Across campaigns for different movements, state court constitutional theories can gain acceptance where they

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education and housing, and—most prominently—to allow marriage between same-sex couples all point to a continuation or expansion of the dynamics of the 'new judicial federalism.'" (footnotes omitted)); *see also* Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 UTAH L. REV. 527, 539 ("Even when a group is recognized [under equal protection law], the courts will be loath to move too quickly if not enough state laws have moved in its favor.").

[200] *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 989 (2011).

[201] *Id.* at 990 n.234 (citing JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 20 (2005)).

[202] 539 U.S. 558, 578 (2003); *see* NeJaime, *supra* note 200, at 992.

[203] *Lawrence*, 539 U.S. at 573 ("In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.").

[204] *See generally* Sande Buhai, *In the Meantime: State Protection of Disability Civil Rights*, 37 LOY. L.A. L. REV. 1065 (2004) (advocating the use of state laws to protect the disabled from discrimination and provide effective workplace remedies to them).

[205] Reed, *supra* note 199, at 875. *See generally* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) (discussing the reemergence of state constitutions, instead of the Fourteenth Amendment, as guarantors of individual rights).

might not under the federal constitution.[206] The pieces are in place, as disability advocates exist in every state, and they are mobilized at multiple levels of state and local government.[207] Even given restrictive interpretations of *Cleburne* at the state and federal levels, there is as of yet unfulfilled potential to use movement capital on state constitutional politics.[208] While advocates are uniquely situated by having a formidable federal civil rights statute, they should not neglect the potential of state constitutional litigation to help (over time) create a more progressive vision of disability constitutional rights.

Politically, pursuing disability constitutional law will involve some different and perhaps difficult choices for the disability rights movement. Although there were some limited coalitions,[209] people with disabilities have traditionally been parts of discrete constituencies organized around separate lived experiences, often advocating for separate goals.[210] People in the deaf community may not, at first blush, have much in common in advocacy goals with people with mobility impairments.[211] The modern disability rights

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206 *See* Justin R. Long, Essay, *Demosprudence, Interactive Federalism, and Twenty Years of* Sheff v. O'Neill, 42 CONN. L. REV. 585, 588 (2009) (noting that, in the education rights context, "state constitutional jurisprudence can usefully function as a site of resistance to federal constitutional interpretations"); *see also* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 97 (2000) ("[I]n acknowledging the value of dialogue, a state court not only honors the authority of its institutional role within the federal scheme, it also engages the U.S. Supreme Court in discourse about the interpretive possibilities inherent in [contested] constitutional provisions . . . .").

207 The Protection and Advocacy System is a federally mandated network of organizations that exists to protect and advance the interests of people with developmental disabilities and has a least one office in every state. 42 U.S.C. §§ 15041, 15043 (2006).

208 *See* Reed, *supra* note 199, at 886 ("The meanings of state constitutions often do not rest on judicial interpretations, but on particular forms of political imagining: political mobilization and organization."). *But see* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 n.73 (2011) (acknowledging that "[i]n some cases, state courts interpreting state constitutions have gone further in their grants of heightened scrutiny than have federal courts interpreting the United States Constitution," but observing that "the slack created by the federal equal protection jurisprudence has not been fully picked up by the states' equal protection jurisprudence").

209 *See* PAUL K. LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 32–101 (2003) (detailing vignettes of earlier disability rights activities and arguing for a comprehensive disability rights legal history).

210 *See, e.g.*, GARY L. ALBRECHT, THE DISABILITY BUSINESS: REHABILITATION IN AMERICA 281 (1992) ("These diverse groups, while sharing common interests, do not constitute a united lobby. Rather, they seek their own objectives, often competing with one another for resources."); SHARON BARNARTT & RICHARD SCOTCH, DISABILITY PROTESTS: CONTENTIOUS POLITICS 1970–1999, at 109–38 (2001) (discussing unity and disunity within the disability rights movement and noting differences between lived experiences and political goals).

211 *But see* Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 901 (2006) (introducing the concept of "pandisability," recognizing that eradication of "group-based stigma and subordination" begins with group-based litigation).

movement, generally thought of as starting in the 1970s, attempted to unite these different groups.[212] The common frame was one of independence, described as "the ability of people with disabilities to make their own choices concerning how to live their lives, what services to receive, and how and where to receive them."[213] Apart from appealing to a broad coalition of people with disabilities, this was a useful political frame, aligning with American ideals of independence and self-reliance.[214] This ideology (and political power) was reflected in the passage of the ADA, which takes an empowering civil rights and antidiscrimination approach, seeking to remove barriers that keep people with disabilities from being full participants in national life.[215]

Most federal court litigation has focused on the ADA's definition of disability, and the driving impetus of the ADAAA was to "restore" an expanded construction of that definition.[216] But any realistic assessment of disability constitutional rights needs to acknowledge that not everyone covered by the ADA would or should align with heightened constitutional analysis.[217] Rather than pursuing heightened status for a broad category of "people with disabilities," a progressive vision of disability constitutional law should unfold as it has in other contexts: responding to discriminatory state statutes that themselves define the class of people that they impact. As discussed above, states still have statutes that are facially discriminatory against individuals with mental and developmental disabilities.

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212 *See* BAGENSTOS, *supra* note 26, at 30 ("When the modern American disability rights movement began in the early 1970s, movement leaders believed that a significant part of their task was to forge a collective identity of 'people with disabilities' from that disparate collection of impairment-specific identities.").

213 *Id.* at 25.

214 *Id.* at 31.

215 The ADA opens with congressional findings that "physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination." 42 U.S.C. § 12101 (a)(1) (Supp. V 2011).

216 *See* BLANCK ET AL., *supra* note 30, at 70–71.

217 As amended by the ADAAA, the ADA's definition has been interpreted to include individuals with diabetes, *see* Berard v. Wal-Mart Stores E., L.P., No. 8:10-cv-2221-T-26MAP, 2011 WL 4632062, at *1–2 (M.D. Fla. Oct. 4, 2011) (denying defendant's motion for summary judgment), sleep apnea, *see* Johnson v. Farmers Ins. Exch., No. CIV-11-963-C, 2012 WL 95387, at *1 (W.D. Okla. Jan. 12, 2012) (denying defendant's motion for summary judgment), and a chronic ankle injury causing difficulties walking, *see* Fleck v. Wilmac Corp., Civil Action No. 10-05562, 2012 WL 1033472, at *7 (E.D. Pa. Mar. 27, 2012) (denying defendant's motion for summary judgment), as well as other conditions. This is not to suggest that these decisions were wrongly decided, or that a broader construction of the ADA's definition of disability is undesirable. Rather, it is essential to carrying out the statute's remedial purpose, and a reflection of the fact that widespread discrimination against individuals with broad types of disabilities still exists. But the ADA definition of disability need not correlate perfectly with heightened constitutional analysis.

The ADA has been a transformative statute, opening up opportunities in public and private life for people with disabilities. And the gains it has helped secure for people with mental disabilities in employment, independent living, and other areas should not be trivialized. But the unfortunate reality is that the omnibus civil rights approach has not worked as well for people with mental disabilities, who still remain the most stigmatized population of people with disabilities.[218] Even with the ADA, people with mental disabilities still remain vulnerable to thoughtless and outdated state statutes precluding their independence. The unifying frame has its utility, but it has been misused in constitutional law: the analysis of people with mental retardation in *Cleburne* was extended to all people with disabilities in *Garrett* without any discussion or analysis. A return to fragmentation of strategies is not costless—it dilutes political power by taking away from a big-tent approach. But it is practically and doctrinally worthwhile. Below I turn to what opportunities exist under federal and state constitutional law to chart a different course forward on disability constitutional law.

III. THE EXAMPLE OF MARRIAGE EQUALITY AND THE PATH FORWARD FOR DISABILITY CONSTITUTIONAL LAW: MOVING BEYOND A SIMPLISTIC VIEW OF *CLEBURNE*

For disability law purposes, *Cleburne* has been the end-all–be-all statement of the constitutional rights of people with disabilities. And, despite the holding in *Cleburne* itself, which provided constitutional protection to people with mental disabilities, it has been nearly uniformly applied to deny people with disabilities any protection under the Equal Protection Clause. Advocates for other groups (most recently, those arguing for marriage equality) have

[218] *See, e.g.*, Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585, 587 (2003) ("[P]eople with mental disabilities are more feared, more stigmatized, discriminated against more often, and are seen as more likely to commit acts of violence than are people with physical disabilities."); *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 6 (1999) (noting that, although for people with physical disabilities the most common form of discrimination is paternalism, in the case of mental disability, "[discrimination] is manifested by bias, distrust, stereotyping, fear, embarrassment, anger, and/or avoidance"). Courts have recognized this. *See, e.g.*, Breen v. Carlsbad Mun. Sch., 120 P.3d 413, 422 (N.M. 2005) ("[P]ersons with mental illness are often the poor stepchild, and remain the last hidden minority." (quoting Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15, 20 (1993–1994)) (internal quotation mark omitted)). The ability of policymakers to target people with mental disabilities was unfortunately again on display in the aftermath of the recent tragedy in Newtown, Connecticut. *See* Wayne LaPierre, Statement at NRA Press Conference 3 (Dec. 21, 2012), http://home.nra.org/pdf/Transcript_PDF.pdf (criticizing lack of a national registry for the mentally ill).

mobilized more effectively and done more with *Cleburne* and the Equal Protection Clause in both federal and state courts. Their campaigns offer important lessons for disability advocates.

A. *Litigation Under the Federal Constitution—Rehabilitating* Cleburne

In *Cleburne*, Justice Marshall suggested that the Court was not faithfully applying rational basis scrutiny and, in striking down the statute, was actually elevating the standard of review without being willing to acknowledge doing so.[219] As part of this argument, he noted that *U.S. Department of Agriculture v. Moreno*[220] and *Zobel v. Williams*,[221] which the majority cited as supporting its application of rational basis, "must be and generally have been viewed as intermediate review decisions masquerading in rational-basis language."[222] *Moreno* invalidated Congress's decision to exclude from the food stamp program households containing unrelated individuals on the basis that it represented "a bare congressional desire to harm a politically unpopular group."[223] This holding in *Moreno* was cited in *Romer v. Evans*, a challenge to amendment 2 to Colorado's constitution, which prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination.[224] Citing *Moreno*, the Court struck down amendment 2 as violating the Equal Protection Clause, failing rational basis scrutiny.[225] *Romer* was influential in *Lawrence v. Texas*, where the Court held that Texas's sodomy law was unconstitutional.[226]

This more nuanced vision of the Equal Protection Clause, as set forth in *Moreno* and developed in *Cleburne*, *Romer*, and *Lawrence*, provided part of the ideological foundation for the federal constitutional strategy of challenging

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[219] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 459–60 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

[220] 413 U.S. 528 (1973).

[221] 457 U.S. 55 (1982).

[222] *Cleburne*, 473 U.S. at 459 n.4 (Marshall, J., concurring in the judgment in part and dissenting in part) (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1090 n.10 (1978)).

[223] 413 U.S. at 534. *Zobel* struck down an Alaskan dividend distribution program, holding that the only apparent justification for the plan's retrospective aspect was to favor established residents over new residents, which was constitutionally unacceptable. 457 U.S. at 65.

[224] Romer v. Evans, 517 U.S. 620, 623–24, 634–35 (1996).

[225] *Id.* at 634–35. A number of disability rights organizations filed an amicus brief in *Romer* deemphasizing the formal three tiers of review and arguing that, under *Cleburne*, laws that discriminate on the basis of archaic and false stereotypes should not withstand Equal Protection Clause review (a category that they believed properly included people with disabilities and homosexuals). Brief of the American Ass'n on Mental Retardation et al. in Support of Respondents, *supra* note 177, at 4, 17.

[226] Lawrence v. Texas, 539 U.S. 558, 574–76 (2003) (discussing *Romer*).

the Defense of Marriage Act (DOMA). Built on earlier state and federal constitutional advocacy, a series of recent cases challenged section 3 of DOMA, which denies same-sex couples lawfully married under state law the federal marriage-based benefits that are available to similarly-situated heterosexual couples.[227] In *Massachusetts v. U.S. Department of Health and Human Services*, the First Circuit held that section 3 of DOMA violated equal protection principles.[228] The court first "declined to create a major new category of 'suspect classification' for statutes distinguishing based on sexual preference," both out of a sense of judicial modesty and because of binding First Circuit (and arguably Supreme Court) precedent.[229] Yet the court continued that "[w]ithout relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications."[230] The court then considered three cases—*Moreno*, *Cleburne*, and *Romer*—where "the Supreme Court . . . struck down state or local enactments without invoking any suspect classification. In each, the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible."[231]

The court noted that these decisions "did not adopt some new category of suspect classification or employ rational basis review in its minimalist form; instead, the Court rested on the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered."[232] What tied these cases together was "historic patterns of disadvantage suffered by the group adversely affected by the statute."[233] Having thus framed that, in this more contextualized fashion, it would evaluate the burdens and justifications, the court found the burdens comparable with those in *Moreno*, *Cleburne*, and *Romer*.[234] On the legislative justification, the court accepted the stated

[227] Defense of Marriage Act (DOMA) § 3, 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

[228] 682 F.3d 1, 15, 17 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2884, *cert. denied*, 133 S. Ct. 2887, *and cert. denied*, 133 S. Ct. 2887 (2013).

[229] *Id.* at 9.

[230] *Id.* at 10.

[231] *Id.* The court also considered the extent to which Supreme Court precedent related to federalism-based challenges to federal laws reinforced the need for some form of heightened scrutiny. *Id.* at 7–8. But it does not appear that the court's Equal Protection Clause holding rested on that analysis.

[232] *Id.* at 10.

[233] *Id.* at 11.

[234] *Id.*

rationale of preserving scarce government resources.[235] Yet, unlike in "traditional" rational basis,[236] the court did not take this as an end to the inquiry; instead, the court reasoned that this undermines, rather than bolsters, the distinction of historically disadvantaged groups[237] because these groups have historically been less able to protect themselves in the political process.[238] After expressing similar skepticism of the other legislative justifications (supporting child-rearing and moral disapproval of homosexuality), the court was clear that it was not relying on hostility to homosexuality.[239] The court went on to hold section 3 unconstitutional under the equal protection principles of the Fifth Amendment's Due Process Clause.[240]

Similarly, in *Dragovich v. U.S. Department of the Treasury*,[241] the court noted that "rational basis review is not 'toothless.'"[242] The court went through the justifications for section 3 of DOMA and found them unsupported and unconvincing.[243] And in *Golinski v. U.S. Office of Personnel Management*,[244] the court reasoned that "no federal appellate court ha[d] meaningfully examined the appropriate level of scrutiny to apply to gay men and lesbians."[245] Endeavoring to do so, the court held that heightened scrutiny should apply.[246] The court reasoned that there was a history of discrimination against gay men and lesbians;[247] that sexual orientation has no relevance to a person's ability to contribute to society;[248] that sexual orientation is recognized as a defining and immutable characteristic because it is so fundamental to one's identity;[249] and that, despite some political gains, gay men and lesbians continue to suffer discrimination "unlikely to be rectified by legislative

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235 *Id.* at 9.

236 *Id.* (noting that under traditional rational basis, cost justifications would defeat plaintiff's case).

237 *Id.* at 14 (citing Plyler v. Doe, 457 U.S. 202, 227 (1982); Romer v. Evans, 517 U.S. 620, 635 (1996)).

238 *Id.* (citing *Plyler*, 457 U.S. at 218 n.14; United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

239 *Id.* at 16 ("In reaching our judgment, we do not rely upon the charge that DOMA's hidden but dominant purpose was hostility to homosexuality.").

240 *Id.* at 15, 17.

241 872 F. Supp. 2d 944 (N.D. Cal. 2012).

242 *Id.* at 954 (citing Mathews v. De Castro, 429 U.S. 181, 185 (1976)).

243 *Id.* at 962–63.

244 824 F. Supp. 2d 968 (N.D. Cal. 2012), *appeal dismissed per stipulation*, 724 F.3d 1048 (9th Cir. 2013).

245 *Id.* at 985.

246 *Id.*

247 *Id.* at 985–86.

248 *Id.* at 986.

249 *Id.* at 986–87.

means."[250] The court also held, in the alternative, that section 3 of DOMA would be unconstitutional under rational basis scrutiny for similar reasons set forth in *Massachusetts v. U.S. Department of Health and Human Services*, *Golinski*, and *Dragovich*.[251]

In *Windsor v. United States*,[252] while referencing *Cleburne* for the proposition that courts are reluctant to create new suspect classes,[253] the district court distinguished between economic legislation that "normally pass[es] constitutional muster [under rational basis review], and 'law[s that] exhibit[] . . . a desire to harm a politically unpopular group,' which receive 'a more searching form of rational basis review . . . .'"[254] For this latter category of cases, like *Massachusetts v. U.S. Department of Health and Human Services*, the court cites *Cleburne*, *Romer*, and *Moreno* (as well as *Lawrence v. Texas*).[255] The court concluded that "[i]t is difficult to ignore this pattern, which suggests that rational basis analysis can vary by context."[256] The court then engaged in a similar analysis to *Massachusetts v. U.S. Department of Health and Human Services* in evaluating legislative justifications. It was similarly skeptical of the "conserving the public fisc" rationale, noting that "[a]n interest in conserving the public fisc alone, however, 'can hardly justify the classification used in allocating those resources.' After all, excluding any 'arbitrarily chosen group of individuals from a government program' conserves government resources."[257] The Second Circuit affirmed,[258] and the Supreme Court granted certiorari.[259]

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[250] *Id.* at 989 (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)) (internal quotation marks omitted).

[251] *See id.* at 999–1002.

[252] 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

[253] *Id.* at 401 (citing *Cleburne*, 473 U.S. at 441).

[254] *Id.* at 402 (all but first alteration in original) (quoting Lawrence v. Texas, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring)) (internal quotation mark omitted).

[255] *See id.*

[256] *Id.*

[257] *Id.* at 406 (citation omitted) (quoting first *Plyler v. Doe*, 457 U.S. 202, 227 (1982), and second *Dragovich v. U.S. Department of the Treasury*, 764 F. Supp. 2d 1178, 1190 (N.D. Cal. 2011)).

[258] Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

[259] United States v. Windsor, 133 S. Ct. 786 (2012). The Supreme Court also granted certiorari in *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012), a challenge to California's proposition 8, requiring that a lawful marriage be between a man and a woman, 133 S. Ct. 2652, 2659 (2013). The Court held that the proponents did not have standing to appeal the district court's order declaring the proposition unconstitutional. *Id.* at 2668.

The Supreme Court, per Justice Kennedy, first held that it had jurisdiction and that the United States had standing.[260] The Court then held that section 3 of DOMA was unconstitutional,[261] although it did not explicitly adopt the reasoning of any of the lower court opinions. The Court first went through the history of states passing marriage equality statutes,[262] and noted the traditional power and authority of states over marriage.[263] It then cast DOMA as rejecting "the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State."[264] But rather than base its decision on federalism principles, the Court was clear it was not doing so: "[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."[265]

Rather, the Court provided this background because it framed DOMA as a law intentionally disrupting certain marriages, where in contrast the state had "used its historic and essential authority to define the marital relation in this way . . . [to] enhance[] the recognition, dignity, and protection of the class in their own community."[266] By imposing restrictions and disabilities on a class that the state had chosen to protect, Congress's action with DOMA was analogous to Colorado's action in *Romer*, which the Court cited, noting that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[267] In making this determination, the Court discussed the importance of the right to marry,[268] the harm DOMA does to the families of same-sex couples,[269] and Congress's discriminatory purpose in enacting the

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260 United States v. Windsor, 133 S. Ct. 2675, 2886–88 (2013).

261 *See id.* at 2696.

262 *Id.* at 2689–90.

263 *Id.* at 2691–92.

264 *Id.* at 2692.

265 *Id.*

266 *Id.*

267 *Id.* (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)) (internal quotation marks omitted).

268 *Id.* ("The States' interest in defining and regulating the marital relation . . . is more than a routine classification for purposes of certain statutory benefits. . . . By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. . . . This status is a far-reaching legal acknowledgement of the intimate relationship between two people . . . .").

269 *Id.* at 2694–95.

legislation.[270] Ultimately, the Court struck DOMA down as denying "the liberty protected by the Due Process Clause of the Fifth Amendment"[271] and noted this liberty "contains within it the prohibition against denying to any person the equal protection of the laws."[272]

The ink is barely dry on the *Windsor* decision, and much is still unknown about how it will be interpreted in lower courts. Although specifically declining to rule on the constitutionality of state laws that reject same-sex marriage, Justice Kennedy's ruling, noting that New York's law "reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality,"[273] in the early analysis has given marriage equality advocates hope for the future.[274] Perhaps intentionally, *Windsor* defies easy and conventional constitutional analysis. In a strong dissent challenging many aspects of the majority opinion, Justice Scalia criticized the constitutional rationale as "rootless and shifting."[275] He chastised the majority for giving contradictory signals as to whether it was relying on the Equal Protection Clause or something coming closer to substantive due process under the Fifth Amendment.[276] And if indeed it was equal protection, Justice Scalia would have upheld the law under rational basis scrutiny.[277] Certainly post-*Windsor*, claims under *Cleburne* to extend heightened scrutiny generally to classifications on the basis of disability appear less promising.

In that way, the Court's opinion validates and tracks the analysis of Professor Kenji Yoshino, who, noting that the Supreme Court last accorded heightened scrutiny to a classification in 1977, opines that "with respect to federal equal protection clause jurisprudence, this canon has closed."[278] Yoshino does not advocate a move away from constitutional change generally; rather, he criticizes the formal distinction between equality claims under the

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[270] *Id.* at 2694 ("DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like government efficiency.").

[271] *Id.* at 2695.

[272] *Id.*

[273] *Id.* at 2692–93.

[274] *See, e.g.*, Linda Hirshman, *The Gay-Marriage Victory Is Bigger than You Think: How the DOMA Ruling Creates a Path for Nationwide Marriage Equality*, NEW REPUBLIC (June 26, 2013), http://www.newrepublic.com/article/113643/supreme-court-defense-marriage-decision-its-bigger-you-think.

[275] *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting).

[276] *Id.* at 2705–06.

[277] *Id.* at 2706–07.

[278] *See* Yoshino, *supra* note 208, at 757.

Equal Protection Clause and liberty claims made under the Due Process Clause or other guarantees, and demonstrates how the Court has moved away from abiding by this distinction.[279]

What does this mean for disability advocates? The application of *Windsor* to disability rights cases is inexact but, I would suggest, promising. In striking down section 3 of DOMA, the Court considered the nature of the right (marriage), the severe impact on same-sex couples and their families, and the intentional nature of the law. This inquiry tracks lower court decisions, flowing from equal protection precedents (which often themselves cite *Cleburne*) examining the "case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered."[280] With facially discriminatory laws, there is explicit disparate treatment. Many of the rights involved (including parental rights and voting) have independent Due Process protection[281] and are thus amenable to a Yoshino-style dignity-type analysis. There are certainly potential severe burdens—under these laws, people with mental disabilities can be prohibited from marrying, voting, and receiving certain government benefits. The DOMA cases are less deferential to the "public fisc" rationale than in traditional rational basis, or at least rational basis as typically applied in ADA cases where this concern, even without more, carries the day.[282] The DOMA cases also, in one form or another, reference *Moreno*'s principle that a "bare congressional desire to harm a politically unpopular group" is not a legitimate state interest.[283] Indeed, this idea was part of *Cleburne* itself, where, after rejecting heightened scrutiny, the Court reasoned that "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as 'a bare . . . desire to harm a politically unpopular group,'—are not legitimate state interests."[284]

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279 *Id.* at 749.

280 Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 10 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2884, *cert. denied*, 133 S. Ct. 2887, *and cert. denied*, 133 S. Ct. 2887 (2013).

281 *See, e.g.*, CHEMERINSKY, *supra* note 66, at 802–11 (discussing parental rights); *id.* at 872–73 (discussing voting rights).

282 *See Massachusetts*, 682 F.3d at 9, 16; Windsor v. United States, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

283 *E.g.*, United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)).

284 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446–47 (1985) (alteration in original) (citations omitted) (quoting *Moreno*, 413 U.S. at 534).

There is not an exact parallel between laws like DOMA, explicitly enacted to prevent gays and lesbians from having their marriages recognized, and laws that seek to regulate the behavior of people with disabilities, where states will offer the justification that they are trying to protect people with disabilities or protect the general welfare from people with disabilities. But it is unclear why legislation based on stereotypical and outdated assumptions about ability should not be characterized as, for purposes of a contextualized equal protection analysis, just as problematic as a legislative desire to harm.[285] Legislators defending DOMA or state marriage laws offer rationales why certain rights should not be conferred to gays and lesbians, based on their understandings of what is desirable public policy, which runs through views on ways that gays and lesbians interact with the world.[286] The same could be said about disability: laws that restrict access to government benefits, voting, or community living on the basis of disability are based on legislative understandings of how people with various disabilities interact with the world. The labels of "desire to harm" and "paternalism" are in the eye of the beholder.

All movements are different, and to the extent any gains for the LGBT community have been realized in this line of cases, they are built on advocacy

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[285] *See* Brief of the American Ass'n on Mental Retardation et al. in Support of Respondents, *supra* note 177, at 16, 1995 WL 17008437, at *16 (arguing that "[d]ifferent groups in contemporary society encounter invidious discrimination in different ways, and [the] Court must be sensitive to these differences in ascertaining whether legislation violates the Equal Protection Clause"); *see also* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1002–03 (N.D. Cal. 2010) (holding proposition 8 unconstitutional and detailing the extent to which it was based on stereotypes about same-sex couples), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

[286] *E.g.*, 159 CONG. REC. H4168 (daily ed. June 28, 2013) (statement of Rep. Michele Bachmann) (arguing that courts recognizing same-sex marriages "denie[s] equal protection rights to every American by taking away our ability to elect our representatives, [to] have them give voice to what our opinion is"); *id.* at H4165 (statement of Rep. Louie Gohmert) (arguing that once marriage is extended to same-sex couples it will be impossible to justify outlawing bigamy and polygamy); 150 CONG. REC. 15,065–66 (2004) (statement of Sen. Jim Bunning) ("Only a man and a woman have the ability to create children. . . . Traditional marriage has been central to the understanding of family in Western culture from the very beginning, and the central reason for marriage has been for the rearing of children."); Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1 ("'God, not Albany, has settled the definition of marriage, a long time ago,' [Sen. Ruben] Diaz [Sr.] said."); Baird Helgeson, *Gay Marriage Clears Crucial House Hurdle*, STAR TRIB. (Minneapolis), May 10, 2013, at 1A ("Rep. Glenn Gruenhagen, R-Glencoe, said he fears that schools eventually will be forced to teach students about homosexuality in sex education classes, normalizing what he considers deviant behavior. 'Think about what's best for the children,' Gruenhagen said. 'Please vote for the children.' Rep. Kelby Woodard, R-Belle Plaine, said the measure stigmatizes Minnesotans who oppose same-sex marriage. 'We are classifying half of Minnesotans as bigots in this bill—and they are not,' he said. Rep. Tony Cornish, R-Vernon Center, said he was raised by a mother and a father and continues to believe that is best for children. 'I am not a homophobe or a Neanderthal or a hater,' he said.").

across multiple fronts.[287] And even under a more contextualized analysis, it is entirely likely that courts may choose (perhaps even correctly) to uphold some line drawing on the basis of disability.[288] But this strategy represents the best chance to incrementally expand the meaning of *Cleburne* and correct its most egregious errors in refusing to acknowledge the history of discrimination against people with disabilities, in particular mental disabilities. Current disability cases offer no expression of the "case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered"[289] or the "historic patterns of disadvantage suffered by the group adversely affected by the statute"[290] as reflected in the DOMA cases. If federal courts are willing to entertain a more nuanced vision of the equal protection status of people with disabilities, it could also mitigate the harmful effects of federalism decisions like *Garrett*, expanding the opportunities for Congress to legislate on behalf of people with disabilities.

That this is a long-term project with uncertain prospects of success should not counsel away from its pursuit. No movement pursuing its view of

[287] For example, in the LGBT context, during the pendency of the DOMA cases, the Department of Justice announced that, in its view, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. *See* Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. Although the full historical account of how this change in policy developed is unclear, it certainly was based on advocacy by lawyers and activists both inside and outside the government. *See* Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649, 691–98 (2012).

[288] *Kolton v. County of Anoka*, 645 N.W.2d 403 (Minn. 2002), is an imperfect example of this point. There, a public employer limited long-term disability benefits for disability due to mental illness. *Id.* at 403. The plaintiff brought a challenge under the state and federal constitutional equal protection clauses. *Id.* at 411. The court acknowledged that there were potentially two forms of rational basis scrutiny that could apply, the federal (more deferential) version, and the "Minnesota" articulation, where

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Id. (quoting State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991)). The court maintained that it did not matter which version was applied—because the statute passed constitutional muster either way—and engaged in a close review (including expert proof) of the employer's justifications for the policy. *Id.* at 412.

[289] Massachusetts v. U.S. Dep't Health & Human Servs., 682 F.3d 1, 10 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2884, *cert. denied*, 133 S. Ct. 2877, *and cert. denied*, 133 S. Ct. 2877 (2013).

[290] *Id.* at 11.

constitutional justice proceeds unimpeded, and progress takes time.[291] And the reality is that the immediate risks are low, because, as discussed above, the constitutional starting place is fairly bleak. *Cleburne*, as applied, offers nothing positive for people with disabilities.

B. Litigation Under State Constitutions—Challenging Cleburne

It is unlikely that *Cleburne*, holding that people with disabilities are only entitled to rational basis review, will be overturned any time soon in federal court. In recognition of this, the analysis thus far has focused on securing more favorable interpretations of *Cleburne* in federal court. But state constitutional law offers additional opportunities to argue for heightened scrutiny in a way that is not likely possible under the federal constitution. Again, LGBT advocates have proven particularly adept at showing what is possible under state law. They have used *Cleburne* to help secure heightened scrutiny for marriage laws that discriminate on the basis of sexual orientation. *Kerrigan v. Commissioner of Public Health*, a case challenging Connecticut's marriage laws,[292] demonstrates this. The Supreme Court of Connecticut expressly recognized that it had greater latitude than would be possible under the federal Equal Protection Clause:

> [T]he [state] constitution was not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness. . . . The Connecticut constitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens.[293]

The Connecticut court was clear that unlike Supreme Court Equal Protection Clause jurisprudence, which it characterized as putting dispositive weight on only two factors (history of invidious discrimination and whether the characteristics that distinguish the groups' members bear no relation to their ability to perform or contribute to society), it would consider the additional two factors that, while cited, appear to not be that relevant to the Supreme Court's

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[291] *See* NeJaime, *supra* note 125, at 901 ("[S]ome LGBT gains were met with backlash and setbacks, but that is the constitutional and political system in which we live. A longer view suggests that constitutional and social change is always a process of push and pull, of intense conflict and contestation. . . . Judicial decisions are significant points along the way to constitutional and social change, but they are only points.").

[292] 957 A.2d 407, 411 (Conn. 2008).

[293] *Id.* at 421 (all but first alteration in original) (quoting State v. Dukes, 547 A.2d 10, 19 (1988)) (internal quotation marks omitted).

analysis (immutability and political powerlessness).[294] It expressly cited Justice Marshall's dissent and concurrence in *Cleburne* as the guiding principle for how it would interpret its equal protection clause, focusing on the social and cultural isolation of the excluded group.[295] Framing the issue that way, the court found that gays and lesbians had a history of invidious discrimination, their defining characteristic did not relate to their ability to contribute to society, their sexual orientation was central to their identity, and they met the political powerlessness test because they could show a pervasive and sustained nature of discrimination that could not necessarily be immediately or permanently resolved through the political process.[296] In the last factor, the court viewed protective legislation as acknowledging, not marking the end of a history of, purposeful discrimination.[297]

Many of the arguments that *Kerrigan* accepted and endorsed could be applied to certain categories of people with disabilities.[298] The most challenging aspect is the second factor: many judges would no doubt reason (as did the majority in *Cleburne*) that mental disability impacts a person's ability to contribute to society in a way that sexual orientation does not.[299] But

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[294] *Id.* at 427 ("It is evident, moreover, that immutability and minority status or political powerlessness are subsidiary to the first two primary factors . . . .").

[295] *Id.* at 429 n.22 ("Our application of the test for determining whether a group is entitled to heightened protection under the state constitution, and, in particular, our consideration of the two subsidiary criteria of immutability and status as a minority or politically powerless group, is informed by the following observations of former United States Supreme Court Justice Thurgood Marshall about that test in his concurring and dissenting opinion in *Cleburne*." (citation omitted)).

[296] *Id.* at 435, 438, 444, 461.

[297] *Id.* at 450.

[298] *See, e.g.*, *id.* at 430 (citing *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, ¶ 29, 138 N.M. 331, 120 P.3d 413, discussed below, which held that people with disabilities are entitled to heightened scrutiny under the New Mexico equal protection clause).

[299] A disability rights critique of this view, as originally articulated in *Cleburne*, would be that it is based on a cramped understanding of human variability and ability to contribute to society. To be sure, people with mental disabilities may occupy a different place in the spectrum of human ability. But to let this difference completely determine policy, or constitutional doctrine, ignores the role of socially constructed barriers to participation in society and full citizenship. *See, e.g.*, *Breen*, 2005-NMSC-028, ¶ 20 ("[C]ourts should be sensitive to classes of people who are discriminated against not because of a characteristic that actually prevents them from functioning in society, but because of external and artificial barriers created by societal prejudice. The historical treatment of . . . persons with mental disabilities makes clear that courts should be sensitive to classes of people who are discriminated against in this manner."); MICHAEL OLIVER & BOB SAPEY, SOCIAL WORK WITH DISABLED PEOPLE 29 (3d ed. 2006) (describing the social model of disability as "nothing more or less fundamental than a switch away from focusing on the physical limitations of particular individuals to the way the physical and social environments impose limitations on certain groups or categories of people"); Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 814 (1966) ("A disability is a condition of impairment, physical or mental, having an objective aspect that can usually be described by a physician. . . . A handicap is the cumulative result of the obstacles which

giving weight to all four factors deemphasizes the importance of that factor. And as the social model of disability has made inroads on public consciousness with laws like the ADA, our notions of the ability of people with disabilities to contribute to society have evolved from *Cleburne*'s time.

Many states, when evaluating disability-based classifications under their state constitutions, cite *Cleburne* to align their state constitutions with the federal standards that only rational basis scrutiny applies.[300] But some state courts have been willing to move beyond *Cleburne* and hold that people with disabilities are entitled to heightened scrutiny under their state's equal protection clause. These cases are small in number, which simultaneously shows the promise of this litigation and the challenges of it. In *Daly v. DelPonte*, the plaintiff challenged a decision of the Commission of Motor Vehicles suspending his driver's license and requiring periodic medical reports as condition for reinstatement.[301] The plaintiff argued that because this decision was based on his disability (seizure disorder), it violated the Connecticut constitution's equal protection clause.[302] The Connecticut constitution provides that "[n]o person shall be denied the equal protection of the law nor be subjected to segregation of discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."[303]

The court found that this constitutional provision compelled the application of strict scrutiny, whereby a state action resulting in unequal treatment can

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disability interposes between the individual and his maximum functional level." (quoting KENNETH W. HAMILTON, COUNSELING THE HANDICAPPED IN THE REHABILITATION PROCESS 17 (1950))); Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 859 (1966) ("Architectural barriers . . . make it very difficult to project the physically handicapped into normal situations of education, recreation, and employment." (quoting AM. STANDARDS ASS'N, AMERICAN STANDARD SPECIFICATIONS FOR MAKING BUILDINGS AND FACILITIES ACCESSIBLE TO, AND USABLE BY, THE PHYSICALLY HANDICAPPED 3 (1961))).

300 *See, e.g.*, *In re* Harhut, 385 N.W.2d 305, 311 (Minn. 1986) (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)) ("The legislature decided that indeterminate commitment subject to judicial review on the motion of the patient was the more effective and efficient way to deal with the state's responsibility to treat mentally retarded persons. This is a legitimate public purpose, and it is not clear beyond a reasonable doubt that indeterminate commitment is an unreasonable means of assuring the state's interest. We hold, therefore that [the statute in question] is not in violation of the equal protection clauses of the federal and state constitutions.").

301 624 A.2d 876, 877 (Conn. 1993).

302 *Id.* at 882.

303 CONN. CONST. art. XXI. For the history of this provision, see Robert I. Berdon, *Connecticut Equal Protection Clause: Requirement of Strict Scrutiny When Classifications Are Based upon Sex, Physical Disability or Mental Disability*, 64 CONN. B.J. 386 (1990).

only survive constitutional scrutiny if it serves a compelling state interest and is narrowly tailored to serve that interest.[304] The plaintiff conceded that the state's interest in highway safety was a compelling state interest, but challenged the classification as insufficiently tailored to meet this interest.[305] Specifically, the plaintiff argued that the decision had not been based on any administrative inquiry into the prognosis for his having future seizure episodes.[306] The court agreed, holding that the decision was not narrowly tailored because it did not directly address the plaintiff's particular medical condition and circumstances.[307]

At least one other plaintiff prevailed on a constitutional theory even where the state constitution did not explicitly include people with disabilities in its equal protection clause. In *Breen v. Carlsbad Municipal Schools*, the plaintiffs challenged classifications under the New Mexico Workers' Compensation Act, which granted compensation for life for total permanent disabilities and up to 700 weeks for permanent partial physical disabilities, yet capped compensation for all primary mental disabilities at 100 weeks.[308] The court of appeals rejected their challenge, holding that the New Mexico constitution required only rational basis scrutiny (which the classification passed), and that the ADA only prohibits discrimination against people with disabilities in comparison to people without disabilities.[309] In considering the equal protection challenge, the New Mexico Supreme Court noted that "[w]hile we take guidance from the Equal Protection Clause of the United States Constitution and the federal courts' interpretation of it, we will nonetheless interpret the New Mexico Constitution's Equal Protection Clause independently when appropriate."[310] At issue was whether intermediate scrutiny applied, which the court reasoned would be appropriate where the legislation at issue "(1) restrict[s] the ability to exercise an important right or (2) treat[s] the person or persons challenging the constitutionality of the legislation differently because they belong to a sensitive class."[311]

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304 *Daly*, 624 A.2d at 884.
305 *Id.*
306 *Id.*
307 *Id.* at 885.
308 2005-NMSC-028, ¶ 1, 138 N.M. 331, 130 P.3d 413.
309 *Id.* ¶ 6.
310 *Id.* ¶ 14. The court went on to note that "[i]n analyzing equal protection guarantees, we have looked to federal case law for the basic definitions for the three-tiered approach, but we have applied those definitions to different groups and rights than the federal courts." *Id.*
311 *Id.* ¶ 17.

The court held that people with mental disabilities were indeed a sensitive class and intermediate scrutiny applied.[312] In so holding, the court explicitly departed from the customary *Cleburne* analysis in several important ways. It took as its guiding principle the strict scrutiny justification of "a discrete group saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[313] Analogizing from the Court's treatment of women in *Frontiero v. Richardson*,[314] the court reasoned that it would "apply intermediate scrutiny even though the darkest period of discrimination may have passed for a historically maligned group."[315] The court also noted that "[i]ntermediate scrutiny should still be applied to protect against more subtle forms of unconstitutional discrimination created by unconscious or disguised prejudice," and "[t]hus, the courts should be sensitive to classes of people who are discriminated against not because of a characteristic that actually prevents them from functioning in society, but because of external and artificial barriers created by societal prejudice."[316] Thus, the court analogized the treatment of people with mental disabilities to that of women.

The court also drew from Justice Marshall's opinion in *Cleburne*, where he detailed a "'grotesque' history of discrimination against persons with mental disabilities."[317] The court reasoned that laws like the ADA were recognition of the pervasive historical discrimination against people with disabilities, of which "persons with mental illness are often the poor stepchild, and remain the last hidden minority."[318] The court acknowledged that protective laws of this type demonstrated that people with mental disabilities were not completely shut out of the political process, but explicitly stated that the relevant inquiry was whether effective advocacy was hindered by the need to overcome the

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312 *Id.* ¶ 20.

313 *Id.* ¶ 18 (quoting Richardson v. Carnegie Library Rest., Inc., 763 P.2d 1153, 1161 (N.M. 1988), *overruled by* Trujillo v. City of Albuquerque, 1998–NMSC–031, 125 N.M. 721, 965 P.2d 305) (internal quotation marks omitted).

314 411 U.S. 677, 686 (1973).

315 *Breen*, 2005-NMSC-028, ¶ 20.

316 *Id.*

317 *Id.* ¶ 22 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 461 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part)).

318 *Id.* ¶ 24 (quoting Perlin, *supra* note 218, at 20) (internal quotation mark omitted).

already deep-rooted prejudice against their integration in society.[319] Thus, the court held that intermediate scrutiny was appropriate.[320]

New Mexico argued that the governmental interest in treating workers with mental disabilities differently was to protect the financial viability of workers' compensation.[321] New Mexico was particularly concerned about fraudulent claims for mental disability, which the state viewed as harder to diagnose.[322] While acknowledging financial solvency as a proper goal for legislation and an important interest, the court rejected the argument that the differential treatment was substantially related to this interest.[323] Rather, the court reasoned that there were other, less restrictive mechanisms to defend against fraudulent claims, and that the stated purpose of the law was to provide compensation for all injured workers.[324] Thus, the court held that the differential treatment failed intermediate scrutiny.[325]

Other cases, while not explicitly holding that people with disabilities are entitled to heightened scrutiny under state constitutional equal protection clauses, have indicated at least amenability to the argument. In *People v. Green*, a juror was struck by a peremptory challenge solely because she was hearing impaired.[326] While holding that this violated the juror's right to equal protection under the state constitution because there was no rational basis for the action,[327] the court noted that "[d]isabled persons in general and hearing impaired persons in particular may constitute a 'suspect classification' in view of the protection afforded to them by New York Statutes."[328] And in *Donley v. Bracken*, a case involving West Virginia's tolling of medical malpractice claims for legally incompetent persons,[329] the West Virginia Supreme Court,

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319 *Id.* ¶ 29 ("The gains in societal acceptance and political advocacy made by the disability rights movement today could easily be reversed through discriminatory laws in the future. Just as classifications based on gender continue to warrant a heightened scrutiny even though women have become much more integrated into the political arena in recent decades, similar gains by persons with mental disabilities do not obviate the need for heightened scrutiny to examine legislation that draws distinctions based on mental disabilities." (citation omitted)).

320 *Id.* ¶ 20.

321 *Id.* ¶ 33.

322 *Id.*

323 *Id.* ¶¶ 34, 44.

324 *See id.* ¶ 44.

325 *Id.* ¶ 50.

326 561 N.Y.S.2d 130, 131 (Westchester Cnty. Ct. 1990).

327 *Id.* at 133.

328 *Id.* at 132 (footnote omitted) ("If so classified, state action affecting them as a group would be subject to an exacting degree of judicial scrutiny.").

329 452 S.E.2d 699, 701–02 (W. Va. 1994).

citing Justice Marshall's dissent in *Cleburne*, noted in dicta that "[t]he nature of the allegedly discriminated-against class, the mentally disabled, arguably calls for some heightened level of scrutiny."[330]

Both the licensing statute in *Daly* and the compensation law in *Breen* had legitimate reasons behind them: public safety and concern for the public fisc, respectively. Under a traditional rational basis standard, the inquiry would have ended there. But the application of heightened scrutiny in each case was able to ferret out legislative motives that were based in part on stereotypes, generalization, or stigma. In *Daly*, the assumption was that all persons with seizure disorders were potential unsafe drivers, a view the court saw as not necessarily correct for all individuals. In *Breen*, basing overall benefits on the fear of people faking mental disability was found to be unwarranted, at least when there were other less restrictive ways of policing fraud. In each case, it was the application of some version of heightened scrutiny that allowed the uncovering of these bases for the legislation, and opened the door for other options that could still protect legitimate legislative choices while not having as much of an impact on the general community of people with disabilities. This journey into legislative motive and impact was deemed warranted given the historical patterns of discrimination and prejudice against people with disabilities. *Breen* was particularly significant: using the language of constitutional law, the court decoupled disability and reduced ability or inability to contribute to society, noting that barriers to being a part of society are socially created.[331]

This formula—elevated scrutiny based on historical segregation and stigma, which leads to a deeper inquiry into legislative motive—could be useful in other state cases to uncover legislation that disadvantages people with disabilities in their interactions with the state, particularly where there might be less restrictive alternatives. As discussed above, many such scenarios exist.[332] Often, even in state court and under state constitutional theories, *Cleburne* is applied in these cases to justify state decisions without even a basic inquiry into any outdated assumptions that these statutes are based on. Not all of these

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[330] *Id.* at 706.

[331] *See* Breen v. Carlsbad Mun. Sch., 2005-NMSC-028, ¶ 20, 138 N.M. 331, 130 P.3d 413 (referring to people with disabilities as being "discriminated against not because of a characteristic that actually prevents them from functioning in society but because of external and artificial barriers created by societal prejudice").

[332] *See supra* notes 141–43 (discussing commitment proceedings); *see also supra* notes 127–30 (discussing family rights); *supra* notes 131–32 (discussing marriage rights); *supra* notes 144–47 (discussing state insurance and benefits programs); *supra* notes 152–60 (discussing voting rights).

statutory schemes would be invalidated by heightened applications of state equal protection clause scrutiny, but it would facilitate a deeper inquiry into these legislative judgments.

CONCLUSION

Disability advocates have been uniquely successful in pursuing legislative reform and using these statutes to improve the lives of people with disabilities. And while any critique of their efforts must be tempered by these gains, the current trajectory of disability rights advocacy has been to create a constitutional vacuum for people with disabilities. This has let courts off too easy in evaluating and considering the constitutional rights of people with disabilities. Justice Marshall's vision of a more contextualized application of the Equal Protection Clause, as set forth in *Cleburne*, has developed and grown in other areas. In this Article, I suggest that the time has come to carry the torch forward with regard to disability. The marriage equality campaign offers important lessons and a blueprint for the efforts of disability cause lawyers.

And it is needed. State statutes still expressly discriminate on the basis of disability, often mental disability, in important areas like family law, commitment proceedings, voting, and the provision of public services. Both practically and normatively, federal statutory law is an incomplete tool to remedy these injustices. Laws like the ADA have helped show that people with disabilities can and should be full members of our society. Constitutional law should require greater judicial consideration of state laws that are based on outmoded perceptions, stigma, and prejudice. *Cleburne* itself, and our evolving notions of constitutional justice and fairness, require no less.