The Irrational Rationality of Rational Basis Review for People with Disabilities: A Call for Intermediate Scrutiny

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Introduction

Legislative advocacy for people with disabilities culminated in the passage of the Americans with Disabilities Act ("ADA") in 1990.[1] The bipartisan bill passed with fanfare and celebration, 377 to 28 in the House and 91 to 6 in the Senate.[2] Speaking before more than 3000 people, President George H.W. Bush praised the ADA as a "historic new civil rights act" and "the world's first comprehensive declaration of equality for people with disabilities."[3] The statute endeavored to mitigate the high rates of poverty, joblessness, lack of education, and failure to participate in social life that were reported by people with disabilities in a 1986 nationwide poll.[4] As the Supreme Court had recognized in *Alexander v. Choate,* discrimination against individuals with disabilities reflects "thoughtlessness and indifference," and, prior to the ADA, represented one of America's "shameful oversights" relegating people with disabilities "to live among society 'shunted aside, hidden, and ignored.' "[5] The ADA responded to the concerns of Americans with disabilities by using its five titles—covering everything from employment to public accommodations—to transform existing paternalistic support structures into new initiatives designed to cultivate equal opportunity, independence, prevention of discrimination, and self-sufficiency.[6] Yet the potential of the ADA has been critically limited in practice because of the Supreme Court's holding in *City of Cleburne v. Cleburne Living Center* that constitu-

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[1] *See* 42 U.S.C. §§ 12101–12213 (2016).

[2] *See* Ruth Colker, The Disability Pendulum: The First Decade of the Americans with Disabilities Act 6 (2005).

[3] *See* President George Bush, Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990 2 (July 26, 1990) (on file with the Harvard Civil Rights-Civil Liberties Law Review).

[4] *See* Louis Harris et al., ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream (1986).

[5] Alexander v. Choate, 469 U.S. 287, 295–96 (1985) (describing the problems that motivated members of Congress to act to eliminate the "glaring neglect" of individuals with disabilities).

[6] *See* Nat'l Council on Disability, On the Threshold of Independence (1988), https://ncd.gov/publications/1988/Jan1988 [https://perma.cc/355K-SXC4].

tional challenges involving people with disabilities should be reviewed through the narrow lens of rational basis review.[7]

Nevertheless, the ADA remains the centerpiece of the modern disability rights struggle.[8] But this is by necessity, not choice. The Court's decision in *Cleburne* did more than limit the implementation of the ADA: It also rendered constitutional claims a conspicuously ineffective weapon in the armory of disability advocates who continue to fight for equal rights.

In *Cleburne,* a 5-4 decision, the Cleburne Living Center submitted a zoning application to build a group home for individuals with intellectual disabilities. The City of Cleburne, Texas denied the permit. On review, the Supreme Court found no rational basis to believe that the group home would pose any threat to the city's interests and concluded that the denial of the zoning permit "rest[ed] on an irrational prejudice against the mentally retarded."[9] Although the Court struck down the zoning ordinance as infringing on the Equal Protection guarantees, it was a superficial victory. The Court disagreed that intermediate scrutiny was the appropriate standard of review for laws affecting people with disabilities, and endorsed rational basis review instead.[10] The Court's holding has deprived individuals with disabilities and their advocates of a meaningful tool to achieve constitutional equal protection ever since.

Writing for the Court in *Cleburne*, Justice White's majority opinion concluded that rational basis review was appropriate because individuals with disabilities are a "large and diversified group" and were amply protected by state legislatures.[11] Ironically, with the passage of the ADA, state legislatures had abdicated their role in protecting people with disabilities

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[7] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (using rational basis review to evaluate claims that conduct towards people with disabilities is constitutionally impermissible). For an argument that the ADA has "generally" been a successful strategy for people with disabilities, *see* Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 529 (2014).

[8] Other federal laws exist which provide protections for people with disabilities. For example, Section 504 of the Rehabilitation Act prohibits discrimination against people with disabilities in programs that receive federal financial assistance. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112 §504, 87 Stat. 355 (1973), codified as amended at 29 U.S.C. § 704 (2016). Title II of the ADA extended these provisions to all state and local programs, services, and activities. *See* 42 U.S.C. §§ 12131–12165 (2016). The Individuals with Disabilities Education Act provides to parents procedural and substantive rights with the goal of including students with disabilities in the education system. *See* Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990), codified as amended at 20 U.S.C. §§ 1400–1482 (2016). The Fair Housing Act requires residential dwellings be designed and built in an accessible manner. *See* 20 U.S.C. §§ 3601–3619 (2016)

[9] *Cleburne*, 473 U.S. at 450.

[10] *Id.*

[11] The Majority further opined that "[h]ow 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. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation." *Id.* at 442–43.

because they assumed the ADA would create and protect federal civil rights for people with disabilities. Whether or not this was true in theory, the Supreme Court's endorsement of rational basis review in *Cleburne* has prevented federal rights protection from happening in practice. Due to its highly lenient posture, rational basis review results in irrational consequences for people with disabilities by favoring employers, obfuscating reasonable accommodations, and undermining the achievements of the ADA. Effectively, rational basis guts the ADA's effectiveness while lulling state legislatures into the false belief that people with disabilities are adequately protected by federal law.

This Note argues that the Court should recognize the inconsistency between rational basis review and the ADA and amend the standard of constitutional review for legislation affecting people with disabilities to intermediate scrutiny. This would provide a formidable constitutional instrument for the advancement of disability rights and more effective implementation of the ADA. This Note proceeds in five parts. Part I provides an overview of the tiers of scrutiny in constitutional cases and examines the Court's application of an increasingly pro-defendant rational basis review in disability rights cases since *Cleburne*. Part II uses the case of *Board of Trustees of the University of Alabama v. Garrett*[12] to examine the irrationality of rational basis review and the ways it subverts the purpose of the ADA. It then hypothesizes how rational basis review would have changed the outcome of a well-reasoned,[13] pre-*Cleburne* case, *Irving Independent School District v. Tatro*.[14] Part III introduces what this Note argues is the correct standard of review—intermediate scrutiny—and makes the constitutional argument in support of its implementation for disability rights cases. Part IV applies intermediate scrutiny to *Garrett* to emphasize how its irrational consequences would change, while well-reasoned decisions, such as *Tatro*, would not. Finally, Part V contends that the consequences of applying intermediate scrutiny for people with disabilities would not merely be symbolic, but practical and tangible, precluding state-enforced discrimination and removing rational basis review's significant limitations to the scope and impact of the ADA. Thus, through case analysis, examining the constitutional requirements for intermediate scrutiny, and evaluating pragmatic consequences, this Note argues in strong and enthusiastic support of intermediate scrutiny for people with disabilities.

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[12] 531 U.S. 356 (2001).

[13] *See* Judith Welch Wegner, *Variations on a Theme – The Concept of Equal Education Opportunity and Programming Decisions Under the Education For All Handicapped Children Act of 1975,* 48 L. & Contemp. Probs. 169, 212 (1985) ("The Court's decision in *Tatro* is a sound, well-reasoned one. The case's outcome reflected the balance of equities involved.").

[14] 468 U.S. 883 (1984).

I. Rational Basis Review and its Application to Disability Rights Cases Since *Cleburne*

Section 1 of the Fourteenth Amendment provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws."[15] However, equal protection exists against a backdrop that requires most legislation to classify individuals for some purpose or another.[16] The Court applies different levels of scrutiny when determining whether a classification violates the Fourteenth Amendment. To determine what level of scrutiny is appropriate, the Court first considers whether the affected group is a suspect class. Where prejudice against "discrete and insular minorities" undercuts the "operation of those political processes ordinarily to be relied upon to protect minorities," a "more searching judicial inquiry" is appropriate.[17] The Equal Protect Clause requires heightened judicial scrutiny for legislation that meet certain conditions, including laws which on their face violate a provision of the Constitution; attempt to distort the political process; or discriminate against minorities, particularly those who experience relative political powerlessness.[18] Justice Powell would later state that while a precondition of democracy requires that majorities govern, the Court must ensure that all groups, regardless of minority status, "can engage equally in the political process."[19] Consequently, the Equal Protection Clause obligates the Court to review legislation affecting minority groups unable to protect themselves through the political process with greater scrutiny.

The highest level of scrutiny, "strict scrutiny,"[20] applies to deprivations of rights and classifications grounded in race,[21] alienage,[22] and national ori-

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[15] *See* U.S. Const. amend. XIV, § 1. In *Bolling v. Sharpe*, the Supreme Court held that the requirement of equal protection of the laws applies against the federal government through the Due Process Clause of the Fifth Amendment. *See* 347 U.S. 497, 500 (1954). The analysis under the Constitution's Fourteenth Amendment Equal Protection Clause and the equal protection guarantee via the Fifth Amendment is the same. *See generally* Kenneth Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. Rev. 541, 542 (1977).

[16] *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010).

[17] *See id.*

[18] *See id.*

[19] *See* Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 Colum. L. Rev. 1087, 1088–89 (1982) ("The fundamental character of our government is democratic. Our constitution assumes that majorities should rule and that the government should be able to govern . . . But there are certain groups that cannot participate effectively in the political process and the political groups in the way it protects most of us . . . [there are] two special missions in our scheme of government: First to clear away any impediments to participation, and to ensure that all groups can engage equally in the political process; and second, to review with heightened scrutiny legislation inimical to discrete and insular minorities who are unable to protect themselves in the legislative process.").

[20] *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

[21] *See* Adarand Constructors v. Peña, 515 U.S. 200, 227 (1995).

[22] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (explaining that classifications based on race, alienage, or 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 . . . [T]hese laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest").

gin.[23] It requires such laws to be "narrowly tailored to further a compelling government interest."[24] Strict scrutiny is often said to be strict in theory, but fatal in fact.[25] Indeed, an empirical study reveals that laws only survive strict scrutiny approximately 30% of the time.[26] The Court has not applied strict scrutiny to legislation affecting people with disabilities, and is unlikely to do so in the future, for both jurisprudential and practical reasons. First, from a jurisprudential perspective, the Court would likely find that disability is relevant to the legislature's goals and decisions.[27] The state has a legitimate interest in providing an environment for people with disabilities to thrive, and when the legislature makes decisions that advance that goal, those decisions necessarily require a distinction on the basis of disability status. For example, for the legislature to establish Social Security benefits for people with disabilities, the law must be written to classify people with a disability as a class that will receive support. Strict scrutiny is a high bar to surpass, even for an advantageous benefits system,[28] and such a program would very likely fail strict scrutiny review.

By contrast, the most lenient standard of review, rational basis review, asks if there is *any* conceivable justification for the law or state action. Rational basis review merely requires that a law's classification be rationally related to a legitimate state interest.[29] Under this tremendously deferential standard, the government enjoys a "strong presumption of validity"[30] and

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[23] *See id.* at 440; Fisher v. Univ. of Tex., 570 U.S. 297, 310–11 (2013).

[24] *Fisher*, 570 U.S. at 301–11.

[25] *See Peña*, 515 U.S. at 268 (quoting Fulilove v. Klutznick, 448 U.S. 448, 519 (1980)).

[26] *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts,* 59 VAND. L. REV. 793, 796 (2006).

[27] Analogizing persons with disabilities to the elderly, a group to whom the Court declined to give heightened scrutiny in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), Justice White explained: "[W]here individuals in the group affected by a law have distinguishing characteristics relevant to the 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." *Cleburne,* 473 U.S. at 441–42. The Court further reasoned that "[b]ecause mental retardation is a characteristic that government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate." *Id.* at 446.

[28] *See* Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases,* 72 U. PITT. L. REV. 3, 17 (arguing that because strict scrutiny is "strict in theory, fatal in fact," benefits programs, like affirmative action programs, often fail despite the benefit they provide the suspect class). For the advantages of the Social Security program, see the Social Security website, which states: "The Social Security and Supplemental Security Income disability programs are the largest of several Federal programs that provide assistance to people with disabilities." *Benefits for People with Disabilities*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/ [https://perma.cc/7A85-NN3Y]. The website goes on to describe that Social Security Disability Insurance pays benefits to the insured and certain members of one's family. *See id.*

[29] *See* Craig v. Boren, 429 U.S. 190, 197 (1976); *see, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); McGowan v. Md., 366 U.S. 420, 425–26 (1961).

[30] *See* Heller v. Doe*,* 509 U.S. 312, 319 (1993).

the state action "must be upheld against [an] equal protection challenge if there is any reasonably conceivable set of facts that could articulate a rational basis for the classification."[31]

Where a group bears indicia of historical discrimination and characteristic immutability,[32] as in the case of classifications rooted in sex or birth outside of wedlock, the Court has recognized a middle, "quasi-suspect classification," to which it has applied intermediate scrutiny.[33] Intermediate scrutiny requires that a law be "substantially related to an important governmental purpose."[34] In applying intermediate scrutiny, the court asks if the challenged law or state action furthers an important government interest and is substantially related to the achievement of that interest.[35]

Classifications on the basis of disability are currently subject only to rational basis review, the most lenient level of scrutiny. The enforcement of laws designed to help people with disabilities is significantly diminished under rational basis review, because almost any argument that the law is too onerous to apply will defeat a claim. Because rational basis usually sounds the death-knell for equal protection claims,[36] it provides virtually no protections for people with disabilities. This is critical because the courts are an essential vehicle for advocacy and the enforcement of rights of people with disabilities (such as those rights created by the ADA).[37]

In addition to nullifying constitutional remedies, rational basis effectively guts the statutory protections of the ADA, transforming it into a law that requires reasonable accommodations to people with disabilities in the workplace and school, so long as that accommodation bears zero cost burden on the accommodator. *Cleburne* also puts substantial limitations on Congress's ability to effectively legislate on behalf of people with disabilities more generally, because any law, like the ADA, will be less effective when enforced under a rational basis review paradigm. As Professor Michael E. Waterstone writes, "[n]ot gaining constitutional ground is tantamount to

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[31] *Id.* at 320 (quoting F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)); *see also* Edward L. Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications,* 68 Ky. L.J. 845, 860 (1980) (arguing that although the rational basis test in theory seeks to establish a connection between state interests and the classification, it is commonly applied without any bite); James W. Tortke, *The Judicial Process in Equal Protection Cases,* 9 Hastings Const. L.Q. 279, 282 (1982) (observing that "[t]he deferential technique . . . continues to permit considerable legislative latitude. Almost never will a legislative scheme fall before this mind wind").

[32] *See* Frontiero v. Richardson, 411 U.S. 677, 685–86 (1973) (plurality opinion) (agreeing that where historic discrimination and immutability exists, intermediate scrutiny is appropriate).

[33] *See Craig*, 429 U.S. at 197; *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982) (finding that intermediate scrutiny is a middle tier of review).

[34] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 444 (1985).

[35] *See Craig*, 429 U.S. at 197.

[36] *See* Kenneth Yoshino, *The New Equal Protection,* 124 Harv. L. Rev. 747, 750 (2011).

[37] *See* Kenneth J. Bartschi, *The Two Faces of Rational Basis Review,* 48 Fam. L.Q. 471, 473 (2014) (discussing rational basis review's detrimental consequences in the fight for sexual orientation equality under the law).

losing it," so *Cleburne* carried long-term costs for people with disabilities hoping to advocate for their rights.[38]

Under rational basis review, the ADA is an incomplete tool to comprehensively advocate for and achieve equity for people with disabilities. Effective advocacy requires more stringent constitutional tools than the flimsy system currently in place.[39] Under rational basis review, the plaintiff must overcome a strong presumption of constitutional validity. Under both intermediate and strict scrutiny, however, the government has the burden of establishing the law's constitutionality.

Both intermediate and strict scrutiny were explicitly rejected as the appropriate standard of review for equal protection challenges involving individuals with disabilities in *City of Cleburne v. Cleburne Living Center*. The Court is unlikely to move from a rational basis review to a strict scrutiny review,[40] and such a move might not ultimately be beneficial to people with disabilities. However, recognizing people with disabilities as a quasi-suspect class would mitigate the irrational consequences of rational basis review by applying a stricter standard for denials of reasonable accommodations under the ADA. Further, applying intermediate scrutiny would bring judicial review in line with Congress's intent to provide individuals with disabilities with parallel legal tools to those "afforded to persons on the basis of race, sex, national origin, and religion"[41] when the ADA was enacted.[42]

In the years following *Cleburne*'s decree of rational basis review for disability-rights cases, people with disabilities turned to the ADA to realize their rights, but under the very deferential rational basis standard, those efforts came up short. Justice Marshall, in *Cleburne,* recognized that "[i]t is natural that evolving standards of equality come to be embodied in legislation," and the Court should take notice "of such change as a source of guidance on evolving principles of equality."[43] But after the passage of the ADA, when the Court should have taken notice of Congress' recognition that

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[38] Waterstone, *supra* note 7, at 547.

[39] *See* Bartschi, *supra* note 37, at 473 (discussing rational basis review's detrimental consequences in the fight for sexual orientation equality under the law); Waterstone, *supra* note 7, at 531 ("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.").

[40] *See* Yoshino, *The New Equal Protection*, *supra* note 36, at 757 (arguing that new groups are unlikely to receive heightened constitutional protection due to the Court's wariness to recognize new classes, noting that the last classification to receive heightened scrutiny was in 1977).

[41] *See* 134 CONG. REC. 9383 (1988) (statement of Sen. Harkin).

[42] *Id.* (stating that the purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against persons with disabilities"; to provide a prohibition of discrimination that is "parallel in scope . . . with that afforded to persons on the basis of race, sex, national origin, and religion;" to provide clear and enforceable standards addressing discrimination; and to invoke Congress' Fourteenth Amendment powers to regulate and address major issues of discrimination against persons with disabilities).

[43] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).

equality means integrating people with disabilities into communities and providing meaningful access, the Court, particularly the Rehnquist Court, applied rational basis in such a way that stripped people with disabilities of their rights, rather than empowering them.

II. The Rehnquist Court's Irrational Economic Rationality Test

a. The Rehnquist Court's Quiet Changes to Rationality Review of Disability Rights Claims

Courts have struggled to define who is entitled to a reasonable accommodation, and when a reasonable accommodation is appropriate. In the employment context, the ADA forces judges to embark on the precarious tightrope of balancing the statute's competing requirements that workers be "disabled," yet remain capable of performing job functions at a satisfactory level. Shortly after *Cleburne*, the Rehnquist Court complicated this inquiry further by quietly transforming rational basis review into an even more deferential economic rational basis review, which effectively foreclosed recourse for many people with disabilities under the ADA.

The passage of the ADA in 1990, five years after *Cleburne*, gave voice to Congress's stern censure that the Court's choice of rational basis review for individuals with disabilities incorrectly addressed the characteristics and needs of the group. For a brief moment after the ADA's passage, this message seemed to resonate and the Act reflected a laudable achievement for people with disabilities. But shortly thereafter, disability-rights jurisprudence hit a wall with the Rehnquist Court. The Rehnquist Court relaxed the already-deferential standard of rational basis review in two ways.[44] First, the Court added an economic gloss to rational basis review as applied to people with disabilities.[45] Second, the Court began to demand that Congress have produced a robust legislative history for laws—like the ADA—that were passed under its 14th Amendment enforcement powers, regardless of when the law was enacted.[46] The Rehnquist Court's irrational application of economic rationality[47] limited the ADA in a way that undermined its central

[44] *See* Austin Raynor, *Economic Liberty and the Second-Order Rational Basis Test*, 99 Va. L. Rev. 1065, 1066–70 (asserting that where cases implicate economic interests, rational basis standard will be easier for the defendant to meet).

[45] *See, e.g.*, Ansonia Bd. Of Educ. v. Philbrook, 479 U.S. 60, 67 (1986) (citing Trans World Airlines v. Hardison, 432 U.S. 63, 74 n.9 (1977)) (finding that an accommodation causes "undue hardship" when the accommodation results in "more than a de minimis cost" to the employer).

[46] *See, e.g.,* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) (stating that the task of Congress is to search legislative intent based on the clear and plain language of the statute); *see also* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) (finding that legislative intent should be the beginning and end of the purpose of the statute).

[47] "Economic rationality" describes the approach taken by the Rehnquist Court with respect to rational basis review, requiring not only rational justifications but economically rational reasons, which has been followed by the lower courts. For examples of economic

purpose of protecting the rights of people with disabilities. The Court's continuing application of rational basis review, and the even more pro-defendant economic rational basis review, is misaligned with Congressional intent and guts the effectiveness of the ADA.

Before examining the impact of the Court's application of rational basis review to disability rights cases, this Note will briefly review some of the key provisions at issue in those cases. The ADA is comprised of five titles.[48] Title I of the ADA[49] requires an employer to provide a "reasonable accommodation"[50] to qualified employees with disabilities, except when such accommodation would cause an "undue hardship."[51] Title II of the ADA requires the same accommodations for public entities.[52] Title III includes public schools, and requires them to provide reasonable accommodations for students with disabilities unless such accommodations impact the health and safety of others.[53]

A reasonable accommodation under either Title I or II can be: (i) a modification or adjustment that enables a qualified applicant with a disability to be considered for a position; (ii) a modification that enables a qualified individual to perform the "essential functions" of a job; or (iii) a modification that enables an employee with a disability to enjoy equal benefits and privileges of employment as similarly situated employees.[54] An accommodation is "reasonable" if it is "feasible" or plausible."[55] As discussed below, since the Rehnquist Court first introduced an economic gloss to rationality review, these standards have been determined by comparing the costs of an accommodation with its benefits.[56] Under the ADA, an otherwise reasonable accommodation is not required if it poses an "undue hardship," which the Court has defined in terms of cost and difficulty,[57] virtually enshrining an

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rational basis review at the Supreme Court level, *see, e.g.*, U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 395 (2002) (finding that it would be an undue hardship for an airline company to change their seniority system to provide a reasonable accommodation under the ADA because changing the policy that had been in place for "decades" would cost money to the company); *Philbrook*, 479 U.S. at 67 (citing *Hardison*, 432 U.S. at 74 n.9) (finding that an accommodation causes "undue hardship" when the accommodation results in "more than a de minimis cost" to the employer"). For an application of economic rational basis review at the Court of Appeals level, *see, e.g.*, Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1184 n.10 (6th Cir. 1996); Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995). This economic analysis applied by the Rehnquist Court has no foundation in the statute, regulations, or legislative history of the ADA. *See* 42 U.S.C. § 12111 (10) (2016) (defining "undue hardship" as "an action requiring *significant* difficulty or expense" in light of the factors in 10(B) (emphasis added)); 29 C.F.R. § 1630.2(o), (p) (2017) (same).

[48] *See* 42 U.S.C. § 12101 (2016).

[49] *See id.* §§ 12111–12117.

[50] *See id.* § 12111(9).

[51] *See id.* § 12111(10).

[52] *See id.* §§ 12131–12165.

[53] *See id.* §§ 12181–12189.

[54] *See* 29 C.F.R. § 1630.2(o) (2017).

[55] *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 402 (2002).

[56] *See supra* note 47 (explaining economic rationality).

[57] *See* 42 U.S.C. § 12112(b)(5)(A) (stating that it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the

economic rationality review into the assessment of what constitutes a reasonable accommodation under the statute.

Traditional rational basis review was already inadequate to implement the ADA, but economic rational basis review led to results that were truly irrational. Under a traditional rational basis review, a classification need only be rationally related to a legitimate state interest.[58] The Rehnquist Court relaxed the already-deferential standard, first, by adding an economic gloss to rational basis review as applied to people with disabilities,[59] and second, by demanding that Congress have produced a robust legislative history for laws—like the ADA—that were passed under its 14th Amendment enforcement powers.[60] With these changes, the Rehnquist Court's version of rational basis review produced truly irrational decisions with respect to the ADA.

i. The Addition of an Economic Gloss to Rationality Review

The ADA generally requires employers, public entities, and public schools to provide a "reasonable accommodation" to qualified individuals with disabilities, except when such accommodation would cause an "undue hardship."[61] The Rehnquist Court interpreted undue hardship not as "significant expense," as defined in the statute, but as almost *any* expense,[62] which barred people with disabilities from integration in society and relief from historic discrimination under the ADA. Under this economic rational basis review, almost any economic justification for refusing an accommodation would be upheld.

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accommodation would impose an undue hardship . . ."); *see also id.* § 12111(10)(A) (defining "undue hardship" as "an action requiring *significant* difficulty or expense, when considered in light of the factors set forth in [§ 12111(10)(B))]." (emphasis added)); U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 395 (2002) (finding that it would be an undue hardship for an airline company to change their seniority system to provide a reasonable accommodation under the AADA because changing the policy that had been in place for "decades" would cost money to the company); Ansonia Bd. Of Educ. v. Philbrook, 479 U.S. 60, 67 (1986) (citing Trans World Airlines v. Hardison, 432 U.S. 63, 74 n.9 (1977)) (finding that an accommodation causes "undue hardship" when the accommodation results in "more than a de minimis cost" to the employer").

[58] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); McGowan v. Maryland, 366 U.S. 420, 425–26 (1961). For an example of Justice Rehnquist's application of a highly deferential rational basis review to ADA claims in the education context, *see* Bd. Of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 209 (1982) (noting that in order to determine if the requirement for an accommodation has been met, a school only needs to provide evidence of "some benefit" to the student).

[59] *See, e.g.*, *Philbrook*, 479 U.S. at 67 (citing *Hardison*, 432 U.S. at 74 n.9).

[60] *See, e.g.*, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) (stating that the task of Congress is to search legislative intent based on the clear and plain language of the statute); *see also* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) (finding that legislative intent should be the beginning and end of the purpose of the statute)

[61] *See* 42 U.S.C. §§ 12111–12117, 12131–12165, 12181–12189 (2016).

[62] *See id.* § 12111(10) (defining "undue hardship" as an action requiring *significant* difficulty or expense, when considered in light of the factors set forth in [§ 12111(10)(B))]." (emphasis added)); *Philbrook*, 479 U.S. at 67 (citing *Hardison*, 432 U.S. at 74 n.9); *see also* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 395 (2002).

In determining the "reasonableness" of a reasonable accommodation under the ADA, the Rehnquist Court prioritized concerns of costs to and economic hardship on the *accommodating* party (like the workplace or school) over the need for the accommodation, or what the individual with an accommodation could contribute to the workplace.[63] This resulted in a strong pro-employer orientation by the Court.[64] Where an accommodation was not "easily accomplishable," meaning "without much difficulty or expense," the Rehnquist Court found that it was not required by the ADA.[65]

Chevron U.S.A., Inc. v. Echazabal exemplifies the Court's shift to economic rational basis review.[66] Mario Echazabal worked as a contractor for Chevron and twice applied to the company for employment.[67] This application required physical examinations, which revealed some abnormalities in his liver.[68] When Mr. Echazabal's request for the reasonable accommodation of being reassigned to another area of the factory was denied,[69] Mr. Echazabal filed suit, alleging that Chevron had violated the ADA by refusing to hire him on account of his disability, or at the very least, by not allowing him to continue working as a contractor at Chevron due to his medical examinations.[70] The Supreme Court found that the ADA required no accommodation by Chevron after considering the economic arguments—such as: reduced time lost to sickness, excessive turnover from medical retirement or death, and litigation costs under tort law.[71] According to the Rehnquist Court, economic considerations provided valid rationales for denying Mr. Echazabal employment or an accommodation because they showed that the accommodation was not reasonable. In fact, the Court's analysis was really an application of economic rational basis review, rather than traditional rational basis review.[72] As *Echazabal* makes clear, the Rehnquist Court's shift to one of economic rationality severely hindered the protections instituted by the ADA.

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[63] *See generally,* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 Mich. L. Rev. 80, 85–86 (2001) (explaining that the Rehnquist Court focused on the burden brought by the individual with a disability, not their potential contribution).

[64] *See* Waterstone*, supra* note 7, at 531.

[65] *See* 28 C.F.R. § 36.304 (2017); *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372–74 (2001); Albertson's, Inc. v. Kirkingburg*,* 527 U.S. 555, 577 (1999) (unanimously reversing a Ninth Circuit decision that protected a commercial truck driver who was fired after failing basic vision standards required by federal regulation because accommodation was too expensive, even though the vision standard was not a requirement for working for the trucking company and the individual could have performed a number of other tasks); Bragdon v. Abbott, 524 U.S. 624, 658–62 (1998) (Rehnquist, C.J., dissenting) (exemplifying Justice Rehnquist's economic rationality standard by defining "major" under the statute to mean "greater in quantity, number or extent" and focusing on cost).

[66] *See* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002).

[67] *Id.* at 76.

[68] *Id.* at 73.

[69] *Id.*

[70] *Id.* at 76–77.

[71] *See id.* at 84.

[72] *Id.*

ii. The Addition of a Legislative History Requirement

The Rehnquist Court required not only that an accommodation under the ADA bear no economic burden to the employer. It also refused to enforce statutes without written proof of a robust legislative history whenever Congress sought to employ its 14th Amendment enforcement powers.[73] Only with this "crystal ball" could the legislature's action survive the Rehnquist Court's scrutiny under rationality review,[74] a hurdle which is often fatal, because it requires Congress to have provided a comprehensive rationale for passing remedial legislation.[75] The irrationality of such an inquiry becomes especially pronounced when one considers that, at least initially, Congress could not have anticipated such a review by the Courts, and thus, would not necessarily have stated its intentions in such an explicit way when passing a law.[76] An example of this situation can be found in *Board of Trustees of the University of Alabama v. Garrett*,[77] discussed at length in the next section,[78] where the Court required a robust legislative history of the ADA before it would attempt to discern Congress' intent.[79] This, of course, could not have been foreseen by Congress as they were enacting the statute in 1990,[80] before the Rehnquist Court adopted its microscopic approach to examining legislative purpose and intent.[81]

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[73] *See* Colker & Brudney, *supra* note 63, at 85 (describing the Rehnquist Court's "crystal ball" approach that "effectively penalizes the enacting Congress for failing to create a detailed legislative record, even though such a record requirement could not reasonably have been anticipated at the moment of legislative deliberation and enactment").

[74] *Id.*

[75] United States v. Morrison, 529 U.S. 598, 612 (2000) (finding that Congress did not create a sufficient legislative history to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment).

[76] This approach also departs from the understanding that Congress and the Court are coequal branches of government because it requires Congress to justify its standard and "micromanage[s]" the work of Congress. *See* Colker & Brudney, *supra* note 63, at 85.

[77] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

[78] *See infra* Part II(B).

[79] *Garrett*, 531 U.S. at 368 (stating that "[t]he legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled").

[80] *See id.*

[81] The ADA was enacted in 1990, five years before the Supreme Court initiated the series of decisions described in Part I that substantially re-configured its relations with Congress and defined what rights created by Congress applied to the states. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1990). *But see Garrett*, 531 U.S. at 389–91 apps. A, B (Breyer, J., dissenting) (listing thirteen congressional hearings on the ADA during 101st Congress, and prior federal statutes enacted between 1948 and 1988 addressing discrimination against individuals with disabilities); *see also* Colker & Brudney, *supra* note 63, at 118–19 ("At the time it enacted the ADA, Congress had little reason to foresee any constitutional requirement for detailed record building . . . But even if it had anticipated a need for more extensive evidentiary support, Congress in 1990 could not possibly have foreseen that its historic methods of educating itself outside the formalities of the hearing room, or its reliance on evidence of discrimination engaged in by closely analogous government actors at the local level, would be excluded from consideration when the record was being reviewed.").

By inappropriately scrutinizing the actions of a co-equal branch of government, the Rehnquist Court contravened the rationale that led Justice White to adopt rational basis review in *Cleburne* in the first place: deference to Congress. In his majority opinion, Justice White recognized that there could be distinguishing characteristics between individuals upon which the legislature can rightfully make classifications like disability.[82] However, he wrote, "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" because the legislature is better equipped to make such decisions.[83] While Chief Justice Rehnquist's opinion in *Garrett* relies on *Cleburne* to apply rational basis review, it simultaneously disregards the *Cleburne* rationale for why rational basis was appropriate—separation of powers. Even if one accepts *Cleburne*'s reasoning as correct, as the Rehnquist Court purported to do, one cannot follow its command to apply rational basis review while simultaneously "closely scrutiniz[ing]" the actions of the legislature.[84] But this is exactly what the Rehnquist Court did in *Garrett*, asking if there was any rational justification for the law, and simultaneously scrutinizing the legislature's proposed justifications and finding that the legislative history provided an incomplete rationale.[85]

b. The Impact of the Rehnquist Court's Changes to Rationality Review: University of Alabama v. Garrett

i. Garrett's *irrational application of rational basis review*

University of Alabama v. Garrett was a suit brought by plaintiffs Milton Ash and Patricia Garrett, who were both disabled employees of the University of Alabama.[86] Mr. Ash was a security guard with a lifelong history of asthma and Ms. Garrett was an emergency room nurse diagnosed with breast cancer that required aggressive treatment.[87] The University refused to enforce its previously adopted "no smoking" policy and required Mr. Ash to drive cars that leaked carbon monoxide fumes into the passenger department.[88] And Ms. Garrett, upon returning to her job after breast cancer treatment, was transferred from her job as a supervising nurse to a lower paying position with an order that she could either accept the new role or be

[82] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 432 (1985).
[83] *Id.* at 441–42.
[84] *See id.*
[85] *Garrett*, 531 U.S. at 368.
[86] *See id.* at 362.
[87] *Id.*
[88] Brief for United States at 5, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (No. 99-1240), 2000 WL 1178761.

fired.[89] Both filed suit under Title I of the ADA, claiming that the University had discriminated against them on the basis of their disabilities.

The Court held that the plaintiffs' claims were barred by state sovereign immunity.[90] The Court considered whether Congress could permissibly abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment, as it attempted to do under the ADA. This would require that the abrogation be congruent and proportional to a pattern of discrimination by the state.[91] Justice Rehnquist concluded that Congress had not abrogated state sovereign immunity through the ADA, so the Court could not reach the merits of Ms. Garrett and Mr. Ash's claims.[92]

Putting aside whether this holding was appropriate or whether Congress effectively abrogated its influence with the passage of the ADA, the case provides a glimpse into the Court's consideration of disability under an economic rationality standard. The Court speculated in dictum that "it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees able to use existing facilities," so it would be rational, according to the Court, to deny plaintiffs their accommodations if considerations of cost could justify hiring someone else.[93] If this case were considered under intermediate scrutiny, as this Note suggests it should have been, the Court would have been forced to examine the content of the accommodations requested by plaintiffs and whether they were required under federal law relative to the burden they placed on the state. In applying rational basis review, the Court departs both in theory and in practice from the spirit of the ADA by looking not to the potential contribution of the individual with a disability, but to the degree of economic hardship required of the employer.

One could imagine non-intrusive and even very reasonable accommodations that the University could have made for Ms. Garrett and Mr. Ash. Ms. Garrett merely asked to return to her previous position, the functions of which she was fully capable of performing, and Mr. Ash merely asked for the University to enforce its previously adopted no-smoking policy.[94] The accommodations requested by the Plaintiffs would require some effort on the part of the state, admittedly, but that effort would be very minimal and pales in comparison to the potential contribution those individuals might have made with the accommodations.

Chief Justice Rehnquist also referenced his "crystal ball approach" for rational basis review and found an incomplete legislative history to support

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[89] *Id.*

[90] *Id.*

[91] *See* City of Boerne v. Flores, 521 U.S. 507, 517–19 (1997) (holding that Congress may abrogate state sovereign immunity under the Fourteenth Amendment if the abrogation is congruent and proportional to a pattern of constitutional violations by the state); *see also* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[92] *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 370 (2001).

[93] *Id.* at 358.

[94] Brief for the United States, *supra* note 88, at 5.

the plaintiffs' argument that people with disabilities had experienced discrimination from the state (which would have been required to demonstrate a pattern of discrimination necessary for Congress to abrogate state sovereign immunity[95]). Asking that Congress do the impossible and travel back in time eleven years to create a robust legislative history supporting the ADA when none was required at its passage, Chief Justice Rehnquist noted that the ADA lacked the legislative history required for a law that affords protection for a class of individuals.[96] Justice Breyer, in dissent, found a history of discrimination documented in the legislative findings of Congress in passing the ADA, stating that Congress "reasonably could have concluded that the remedy [Title II of the ADA] [ ] constitutes an 'appropriate' way to enforce this basic equal protection requirement."[97] Justice Breyer urged the Court not to rest solely on the legislative findings of Congress in passing the ADA, but also to reference the more than 300 examples of discrimination by state governments against individuals with disabilities in the legislative record.[98]

In dissent, Justice Breyer also noted that, as the Fourteenth Amendment prohibits states from denying their citizens equal protection under the law, the argument that Alabama was entitled to deny a reasonable accommodation on the grounds of *federalism* made no sense.[99] The 14th Amendment was intentionally "designed as an expansion of federal power and an intrusion on state sovereignty,"[100] so the argument that Congress imposed on the states to protect people with disabilities from employment discrimination was not unconstitutional.

Garrett ushered in the erosion of equal protection for people with disabilities,[101] epitomizing the Rehnquist Court's signature interpretation of the ADA—applying economic rational basis or looking to notions of federalism to avoid providing redressability for rights created by Congress. Under this regime, any legislative victories won by people with disabilities are for naught. In an effort to advance notions of federalism and economic rationality, the Court branded the substance of equal protection rights as subservient to the federalist structure between the states and the federal government

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[95] *See Boerne,* 521 U.S. at 517–19 (holding that Congress may abrogate state sovereign immunity under the 14th Amendment if the abrogation is congruent and proportional to a pattern of constitutional violations by the state); *see also Fitzpatrick*, 427 U.S. 445.

[96] *Garrett*, 531 U.S. at 368 (stating that "[t]he legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled").

[97] *Id.* at 377 (Breyer, J., dissenting).

[98] *Id.* at 379.

[99] *See id.* at 377.

[100] *Id.* at 388 (Breyer, J., dissenting).

[101] *See, e.g.*, Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After* Garrett, 28 J.C. & U.L. 41, 44 (2001) (arguing that *Garrett* and cases of similar ilk "raised the bar making it more problematic than ever that Congress will be able to deploy Section 5" for civil rights, and thus, made it more difficult for people with disabilities to seek equal protection under the law through legislation or litigation).

under the Eleventh Amendment.[102] *Garrett* demonstrates in dictum the irrational outcomes of rational basis review under the ADA for people with disabilities, revealing absurd consequences—not effectuating the ADA for reasons of federalism—which are far from the intent of Congress in passing the statute.[103]

ii. Tatro*'s Well-Reasoned Outcome*

Prior to both the Court's decision in *Cleburne*—which established rational basis as the presumptive constitutional test for people with disabilities—and Congress' subsequent passage of the ADA, the Court considered several disability rights cases. A number of these cases, including *Irving Independent School District v. Tatro*[104] in 1984, are consistent with widely held understandings of equal protection and the positive externalities associated with integrating people with disabilities into communities and society writ large. As this section will show, *Tatro*'s well-reasoned outcome was only possible before *Cleburne*'s requirement of rational basis review for people with disabilities and the Rehnquist Court's introduction of economic rational basis review.

Tatro was brought by plaintiff Amber Tatro, an eight year-old girl who was born with spina bifida. Among other things, her disability required catheterization several times a day to prevent kidney damage.[105] The catheterization procedure was a "simple one that may be performed in a few minutes by a layperson with less than an hour's training."[106] Amber's parents, babysitter, and teenage brother were all qualified to change her catheter and soon Amber would have been able to perform the catheterization procedure herself.[107] While Amber's school provided a number of special services, it refused to provide catheterization for Amber. Without it, Amber was not able to attend school at all.[108] Amber's parents brought the action for an injunction that would have required the public school district to provide the catheterization so Amber could attend school. Because Texas received federal funding under the Education of the Handicapped Act, the state was required to pro-

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[102] *See* Colker & Brudney, *supra* note 63, at 83 (arguing that the Rehnquist Court acted repeatedly to invalidate federal legislation to use notions of federalism to disempower Congress and its legislation).

[103] The ADA explicitly called people with disabilities a discrete and insular minority, referencing the group's "history of purposeful unequal treatment" and their position "relegated to a position of political powerlessness in our society based on those characteristics." 42 U.S.C. § 12101(a)(7) (1990) (amended and struck in 2008).

[104] Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984)

[105] *See id.* at 885.

[106] *Id.*

[107] *Id.* at 885 (Clean intermittent catheterization ("CIC") "is a simple [procedure] that may be performed in a few minutes by a layperson with less than an hour's training. Amber's parents, babysitter, and teenage brother are all qualified to administer CIC, and Amber soon will be able to perform this procedure herself.").

[108] *Id.*

vide Amber with a "free appropriate public education."[109] The Supreme Court, writing the year before *Cleburne*, unanimously held that providing clean, intermittent catheterization qualified as a "related service," and not a "medical service" under the applicable pre-ADA disability statute.[110] Thus, the school was required to make the accommodation and Amber would be able to attend school because catheterization was a reasonable accommodation. In its explanation, the Court reasoned that a physician need not provide that catheterization; a teacher or assistant, and soon Amber herself, could perform the procedure. Therefore, the effort of providing the accommodation for Amber was not sufficiently burdensome on the school such that it could legally be withheld.[111] Further, because "Congress sought primarily to make public education available to handicapped children . . . [and] to make such access meaningful,"[112] and because catheterizations were necessary for Amber to attend school, the Court found that they should be provided to her.[113]

At least one scholar has argued that *Tatro* reflects a "sound, well-reasoned" decision because it balances equities in a way that aligns with our normative understandings about integration and access to services for people with disabilities.[114] For these reasons, this Note will refer to *Tatro* as "well-reasoned" and "correctly"[115] decided, acknowledging that the "correctness" of any decision is subject to disagreement. If public education is to be available to children with disabilities, and if Congress intended to make such access meaningful, then it follows that a simple and medically necessary catheterization procedure during the day should be available to children like Amber Tatro. Refusing to allow that accommodation would bar her com-

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[109] *See id.* at 886; *see also* 20 U.S.C. §§ 1412(1), 1414(a)(1)(C)(ii) (2016).

[110] *Tatro*, 468 U.S. at 889–90. In addition, the Education for All Handicapped Children Act ("EAHCA") mandate requires that states and subsidiary educational actors, to qualify for federal assistance, must provide "special education" and "related services." 20 U.S.C. § 1401(18) (2016) (defining "free appropriate public education" as "special education and related services which (A) have been provided at public expense under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title").

[111] *Tatro,* 468 U.S. at 893.

[112] Bd. Of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 192–214 (1982); *see also Tatro,* 468 U.S. at 883. Children with serious medical needs are still entitled to an education. For example, the EAHCA specifically includes instruction in hospitals and at home within the definition of "special education." *See* 20 U.S.C. § 1401(16).

[113] *Tatro,* 468 U.S. at 883 (finding that an accommodation of catheterization was a reasonable accommodation).

[114] *See* Wegner, *supra* note 13, at 212 ("The Court's decision in *Tatro* is a sound, well-reasoned one. The case's outcome reflected the balance of equities involved."); *see generally* Mitchell L. Yell et al., *The U.S. Supreme Court and Special Education: 2005 to 2007*, 41 TEACHING EXCEPTIONAL CHILDREN 68, 68 (2009) (discussing the norms of pubic education and that inclusion of students with disabilities aligns to those normative values).

[115] *See* Wegner, *supra* note 13, at 212–13 (supporting the proposition that *Tatro* is "correctly" decided).

pletely from a public education. *Brown v. Board of Education* proclaimed that public education must be made available on equal terms.[116] And in *Pennsylvania Association for Retarded Children v. Pennsylvania,*[117] the Court found that Pennsylvania was required to educate all children, including children with disabilities.[118] The Court has also recognized that Congress sought to make "public education available to handicapped children" and "to make such access meaningful."[119] Denial of a public school education on the basis of a medical condition disrupts our understanding of what is "fair," a normative structure rooted deeply in the idea of school integration and not punishing individuals for circumstances outside their control.[120] Therefore, *Tatro*'s conclusion that catheterization was a reasonable accommodation was well-reasoned and correctly decided.

However, under traditional rational basis review, as subsequently required by *Cleburne*, *Tatro* would likely result in a different and quite irrational outcome. The School District in *Tatro* argued that a favorable verdict for the plaintiff would result in parental demands for every conceivable medical service.[121] In addition, it argued that introduction of disabilities into the school environment "creates numerous new possibilities for injury and liability,"[122] which would expose the School District to new and perhaps significant costs. The School District argued that Amber should be homeschooled because of the burden of having to provide the catheterization service.

By applying the Rehnquist Court's version of economic rational basis review to *Tatro*, the absurdity of economic rational basis review for people with disabilities becomes even more pronounced. The Court recommended in the actual *Tatro* opinion that the District could increase their liability insurance coverage, but this still results in additional costs for the school in the form of increased insurance premiums. An economic rational basis review

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[116] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[117] 343 F.Supp. 279 (E.D. Pa. 1972)

[118] *Id.* at 315.

[119] Bd. Of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 192 (1982); *see also* Jennifer Ludden, *The Best Way To Integrate Special Needs Students*, NAT'L PUB. RADIO (May 2, 2012), https://www.npr.org/2012/05/02/151867388/the-best-ways-to-integrate-special-needs-students [https://perma.cc/PF4L-R4NZ] (advocating for "mainstreaming" special needs students in classrooms and resulting educational benefits to both the special needs student and community at large which includes the unfairness of punishing a student through separation because of a disability).

[120] *See* Kenneth Pierce, *Thomas Reid on Character and Freedom*, 29 HIST. PHIL. Q. 159, 173 (2012) (observing that one cannot be blamed or punished for something outside of one's control so long as it was an unavoidable necessity).

[121] Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 893 (1984); *see also* Tatro v. Texas, 481 F.Supp. 1227, 1227 (N.D. Tex. 1979). The district court found that the related services that the applicable education act required were for (1) transportation and (2) related services that assist the child to benefit from education. The court found that the related services category might, if read literally, require schools to furnish "every necessary life support system." Therefore, the court adopted a narrower view that "to be related in the statutory sense the service requirement must arise from the effort to educate." *Tatro*, 481 F.Supp. at 1227.

[122] *Tatro*, 468 U.S. at 893.

applied to the facts of *Tatro* would balance these projected (and speculative) costs against the benefits of sending Amber Tatro to school with catheterization, and these costs would almost certainly tip the balance in favor of the School District. Were the case to be brought today, the Court, citing rational basis review (but likely applying the economic gloss introduced by the Rehnquist Court), could conclude that a *denial* of catheterization was rationally related to both of the school district's objections: limiting the onslaught of student accommodation requests and minimizing the school's liability exposure. Thus, under rational basis review, and especially under Chief Justice Rehnquist's economic rationality standard, Amber Tatro would very likely be denied an accommodation under the ADA. Even though *Tatro* reflects our normative understandings about the "correct" outcome for individuals with disabilities, *Cleburne* straps the Court into the regime of unreasonable, irrational, and ineffective constitutional tools for achieving that outcome.

III. The Case for Intermediate Scrutiny

In the years following *Cleburne*, efforts to enforce legislative tools like the ADA came up woefully short against the deferential rational basis standard and its focus on economic rationality. Given the absurd consequences of rational basis review, and the even greater incongruity flowing from the Rehnquist Court's economic rational basis review, a natural question became: what level of scrutiny would be more appropriate for the Court to apply in disability cases?

Because the level of scrutiny is often determinative of the outcome, one might envision a carefully concocted recipe for designating a quasi-suspect class. But in reality, the doctrine is a bit chaotic.[123] Even where the Court has agreed on the correct characteristics of a suspect class, it has not settled on a solid understanding of the required elements and the appropriate weight each element should receive.[124] However, a review of the jurisprudence over time

[123] *See* Cass Sunstein, *What did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 Sup. Ct. Rev. 27, 34 (2003) ("To say the least, the Court has not laid down a clear test for deciding when [strict] scrutiny will be applied" in equal protection cases."); *see also* Darren Lenard Hutchinson, *"Not without Political Power": Gays and Lesbians, Equal Protection,* 65 Ala. L. Rev. 975, 978 (2014) ("The suspect class doctrine suffers from several weaknesses. It is extraordinarily under theorized, inconsistently applied, and it operates primarily as a gatekeeper that limits the recognition of new suspect classes rather than extending judicial solicitude to additional vulnerable groups.").

[124] *See* Thomas Simon, *Suspect Class Democracy: A Social Theory,* 45 U. Miami L. Rev. 107, 141 (1990) ("[T]he Court uses a mixture of criteria to determine suspectness, creating an analytical muddle, and the boundary line between suspect classes and non-suspect classes is drawn in a haphazard way."); Marcy Strauss, *Reevaluating Suspect Classifications,* 35 Seattle U. L. Rev. 135, 138 (2011) ("Since the outcome of an equal protection case is largely determined by whether the group is designated as suspect, quasi-suspect, or non-suspect class, one may assume that the test for distinguishing between the three types of classes has been carefully crafted and precisely defined. But despite the decades of case law on this specific issue, nothing could be further from the truth. The Supreme Court has not provided a coherent explanation for precisely what factors trigger heightened scrutiny.").

indicates that the criteria for suspect classification may include: (a) discrete and insular minority status,[125] (b) historic discrimination,[126] (c) immutability of the trait,[127] and (d) relevance of the trait.[128] In practice, the Supreme Court has never required all of these factors for a class to be considered suspect.[129] Thomas Simon explains that these factors are part of the "discovery process" in determining whether a class of people warrants suspect class status.[130] However, it could also be argued that the Court first decides on the level of scrutiny before using these factors retroactively to justify its conclusion.[131]

The Courts should recognize the inconsistency between rational basis review and the spirit of the ADA and amend the standard of constitutional review for legislation affecting people with disabilities to intermediate scrutiny. While disability lacks many of the characteristics required for suspect classification, people with disabilities are a discrete and insular minority and have experienced a history of pervasive and egregious discrimination, and they merit quasi-suspect classification status on those bases. Recognizing people with disabilities as a quasi-suspect class would mitigate the irrational consequences of rational basis review and would better bring Congress's intent in enacting the ADA—to provide individuals with disabilities parallel legal tools to "those afforded to persons on the basis of race, sex, national origin, and religion"[132]—to fruition.[133]

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[125] *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (discussing the idea that "extraordinary protection from the majoritarian political process" serves as indicia of suspect classification).

[126] *See Rodriguez*, 411 U.S. at 28 (finding historic discrimination as a prong to determine suspect class status).

[127] *See* Parham v. Hughes, 441 U.S. 347, 351 (1979) (considering the importance to suspect classification of "certain . . . immutable human attributes"); *see also* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (observing that race, sex, and national origin are immutable characteristics).

[128] *See* Dean v. District of Columbia, 653 A.2d 307, 346 (D.C. 1995) (finding that immutability and relevance of a trait reflect a concern for stigma, and that the other factors relate more to the *Carolene Products* democratic process concern); *see also* Strauss, *supra* note 124, at 165–68.

[129] *See* Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982). For the proposition that the Supreme Court suggests that meeting *any of* the factors for suspect classification status is sufficient, *see* Strauss, *supra* note 124, at 139–40 n.23 ("A suspect class entitled to strict scrutiny is one 'saddled with such disabilities, *or* subjected to 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.'" (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973) (emphasis added)).

[130] *See* Simon, *supra* note 124, at 141; *see also* Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction,* 73 Geo. L.J. 89, 90 (1984) (arguing that the Court never sufficiently explained the factors and the need for stronger government interest and tighter fit).

[131] Simon, *supra* note 124, at 141.

[132] *See* 134 Cong. Rec. 9383 (1988) (statement of Sen. Harkin).

[133] *Id.* (stating that the purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against persons with disabilities"; to provide a prohibition of discrimination that is "parallel in scope . . . with that afforded to

a. Cleburne *Is a Flawed Decision*

The case for intermediate scrutiny for people with disabilities begins with a recognition that the Court's reasoning in *Cleburne* was deeply flawed. First, the Court glossed over its critical assumption that people with disabilities were such a "large and amorphous" group that intermediate scrutiny would not be appropriate, without reconciling this assumption with the fact that other (quasi-) suspect classifications, like women and racial groups, are not monolithic. If a foundational justification for denial of intermediate scrutiny for people with disabilities is that people with disabilities are not "cut from the same pattern,"[134] the Court does not explain why this is different than any other group that has suspect classification status. Of course, a person with HIV does not share identical qualities with a person in a wheelchair, but this is not unlike women, with its countless subgroups, or immigrants, documented or undocumented, that have a diversity of needs and require different legislative solutions to address those needs. The LGBTQ community, for another example, has felt burdens imposed on the group as a whole by legislation and society, even though those burdens fall differently on gay, lesbian, bisexual, and transgender individuals.[135] All groups have internal diversity that may influence how legislation addresses their needs. Oddly, despite saying that people with disabilities are not all "cut from the same pattern,"[136] the Court also states a commonality shared by people with disabilities: they all "have a reduced ability to cope with and function in the everyday world."[137] The Court seems to both proclaim the diversity of people with disabilities and state that the group can be defined as a whole in the same breath. In doing so, the Court reveals a major vulnerability in its argument. In fact, the diversity among people with disabilities may be a strong rationale in favor of intermediate scrutiny. Intermediate scrutiny requires the court to look more closely at the state action, and as a consequence, will put a microscope to whether a given law actually addresses people with disabilities as a larger group or subgroup, whether it in fact discriminates against the group in an impermissible way or treats the entire group as monolithic.

Second, *Cleburne* blatantly ignores a history of gross mistreatment of people with disabilities, ranging from discrimination and segregation to eugenics. The Court itself has even perpetrated this historic mistreatment: Justice Oliver Wendell Holmes made the infamous statement, "three generations of imbeciles are enough," in finding that a statute that required forced

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persons on the basis of race, sex, national origin, and religion"; to provide clear and enforceable standards addressing discrimination; and to invoke Congress' Fourteenth Amendment powers to regulate and address major issues of discrimination against persons with disabilities).

[134] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985).

[135] *See e.g.*, Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415 (2012).

[136] *See Cleburne*, 473 U.S. at 442.

[137] *See id.*

sterilization for people with intellectual disabilities did not violate the Constitution.[138] The amicus brief written by the American Association on Mental Deficiency in *Cleburne* noted that people with disabilities were "erroneously believed to be a 'menace' to society and the principal source of immorality, prostitution, and crime," stereotypes which flourished due to the segregation of people with disabilities from society.[139]

A further flaw in *Cleburne* comes from the fact that the majority opinion overlooks the political powerlessness of people with disabilities. Thirty states retain laws on the books that deny the right to vote for people with intellectual disabilities.[140] For much of history, the impact of gross mistreatment on people with disabilities was exacerbated by the political process, which subordinated people with disabilities to a role where they were unable to effectively change discriminatory laws and policies that impacted them, and were stifled by uneducated stereotypes of their abilities as "imbeciles." People with disabilities reflect the very essence of political powerlessness.[141]

Additionally, *Cleburne*'s dictum expressed a damaging constitutional discrimination towards people with disabilities. The majority writes that people with disabilities are "different, immutably so."[142] The majority opinion has been criticized for sorting people into normal and abnormal as binary characterizations.[143] This action by the Court creates the very purposeful mistreatment and discrimination that the Court is tasked with policing through its Equal Protection jurisprudence, and lends further credibility to

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[138] Buck v. Bell, 274 U.S. 200, 207 (1927) (finding that a sexual sterilization statute for people with disabilities in prison did not violate the Constitution).

[139] Brief of Am. Ass'n on Mental Deficiency et al. as Amici Curiae in Support of Respondents at 2, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (No. 84-468), 1985 WL 669784; *see also Cleburne*, 473 U.S. at 441 (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) ("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.").

[140] *See e.g.,* Ala. Const. art. 8, § 177(b); Alaska Const. art. 5, § 2; Ariz. Const. art. 7, § 2(C); Ark. Const. amend. 51, § 11(a)(6); Cal. Const. art. 2, § 4; Del. Const. art. 5, § 2; Fla. Const. Art. 6 § 4(a); Ga. Const. art. 2, § 1, ¶ III(b); Iowa Const. art. 2, § 5; Ky. Const. § 145(3); La. Const. . art. 1, § 10(A); Md. Const. art 1, § 4; Mich. Const. art. 2, § 2; Minn. Const. art. 7, § 1; Miss. Const. art. 12, § 241; Mont. Const. art 4, § 2; Nev. Const. art. 2, § 1; N.M. Const. art. 7, § 1; Ohio Const. art 5, § 6; R.I. Const. art. 2, § 1; Tex. Const. art. 6, § 1(2); Vt. Const. ch. II, § 42; Wa. Const. art. 6, § 3; W. Va. Const. art. 4, § 1; Wis. Const. art. 3, § 2(4)(b); Wyo. Const. art. 6 § 6; Neb. Rev. Stat. § 32-313(1) (2016); N.J. Stat. Ann. § 19:4-1(1) (West 2010); S.C. Code Ann. § 7-5- 120(B)(1) (2016); Va. Code Ann. § 24.2-101 (2016).

[141] This has been recognized by Congress. *See* 42 U.S.C. § 12101(a) (2016) (acknowledging that people with disabilities have been "relegated to a position of political powerlessness in our society"); *see also* James Charlton, Nothing About Us Without Us: Disability, Oppression and Empowerment (1998) (chronicling the movement known as "Nothing About Us Without Us," which was unusual because it reflected a mobilization of people with disabilities and highlighted the many ways in which the group had been politically subjugated by laws and society).

[142] *See Cleburne*, 473 U.S. at 461–63.

[143] *See Cleburne*, 473 U.S. at 461–63.

the argument that people with disabilities have suffered historic mistreatment.

Finally, *Cleburne* eschews stereotypes, while relying on stereotypes of people with disabilities to formulate its opinion. As Professor Michael E. Waterstone frames it, the *Cleburne* Court acknowledged that statutes may permissibly distribute benefits and burdens among different people.[144] In doing so, the Court acknowledged as impermissible, for example, occasions where the distribution is made based on "outmoded notions of the relative capabilities of men and women."[145] Yet, despite the Court's admonishment of Texas's zoning ordinance for its stereotypical assumptions about people with disabilities, it announced rational basis review for people with disabilities going forward.[146] Rational basis review allows impermissible stereotypes to flourish in spite of judicial review purportedly attempting to police these assumptions.[147] The stereotypes looked at by the Court included fears that people with disabilities were uneducable and dangerous, and that non-disabled children needed to be protected from them.[148] The opinion in *Cleburne* is rife with stereotypes, such as saying those with disabilities "have a reduced ability to cope with and function in the everyday world,"[149] and was thus decided using the very reasoning it admonished. In sum, *Cleburne*'s announcement of rational basis review should be disregarded first and foremost because its internal reasoning is deeply flawed.

b. *People With Disabilities Meet the Criteria for Suspect Classification*

i. *People with Disabilities are a "Discrete and Insular Minority"*

The Court has consistently required that, to be categorized as a suspect class, a group must be a discrete and insular minority, and has found a suspect class where the group was a discrete and insular minority but lacked all other suspect classification factors.[150] Heightened protection for the politically powerless has strong textual foundations. Among the animating goals behind the Constitution, expressed through the Bill of Rights, was the pro-

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[144] *See* Waterstone, *supra* note 7, at 527.
[145] *See Cleburne*, 473 U.S. at 441.
[146] *See* Waterstone, *supra* note 7, at 539–40.
[147] *See id.*
[148] *See Cleburne*, 473 U.S. at 461–63 (discussing the "radical transformation" of societal views towards the intellectually disabled from "neither curable nor dangerous," to a "menace to society and civilization," leading to their "categorical[ ] exclu[sion] from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them").
[149] *See id.* at 442.
[150] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) (finding that alienage was a suspect class only based on the factor of being a discrete and insular minority, stating: "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate").

tection of property owners[151] and religious minorities against oppressive "factions."[152] Though many of the explicit constitutional protections for minority groups are structural, including a separation of powers that would, in Hamilton's conception, ward off "unjust and partial laws,"[153] it follows that those with demonstrated political powerlessness should be entitled to non-structural, judicial protections. Congress has recognized the political powerlessness of people with disabilities and invoked protections for them through its Fourteenth Amendment enforcement powers.[154] So, too, should the Court by announcing intermediate scrutiny as the standard of review for people with disabilities.

Congress recognized the discrete and insular minority status of individuals with disabilities in passing the ADA. The ADA explicitly refers to people with disabilities as a discrete and insular minority, referencing the group's "history of purposeful unequal treatment" and their relegation "to a position of political powerlessness in our society based on [those] characteristics."[155] Department of Labor statistics demonstrate that roughly two-thirds of working-age people with disabilities remain out of work (compared to roughly a quarter of working-age people without disabilities).[156] Although the Court has determined in previous Fourteenth Amendment jurisprudence that Congress does not have the authority to declare what constitutional rights and violations exist as a pretense to enforcing those rights through law, Congress is entitled to broad latitude to enforce the Fourteenth Amendment.[157] The Court has given Congress significant authority in this regard, requiring that there be "congruence and proportionality between the injury to be prevented . . . and the means adopted to that end."[158]

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[151] *See* Powell, *supra* note 19, at 1089–90 ("Where once the Court had championed rights of property, now—according to some—it should view its special function as the identification and protection of 'discrete and insular minorities.'").

[152] *See* William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. Pa. J. Const. L. 1239, 1244 (2009) (stating: "[i]n James Madison's terms, factions, which are temporary alliances of various groups, will tend to gang up on minorities such as property owners" and religious minorities); *see also* The Federalist No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

[153] The Federalist No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[154] *See* Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores,* 32 Ind. L.R. 163, 170 (1998) (observing that Congress used its powers under Section 5 of the Fourteenth Amendment to enact the ADA).

[155] 42 U.S.C. § 12101(a)(7) (2007) (amended and struck in 2008).

[156] Press Release, Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics – 2016 (June 21, 2017), https://www.bls.gov/news.release/pdf/disabl.pdf [https://perma.cc/L8FU-K5UL].

[157] *See* City of Boerne v. Flores*,* 521 U.S. 507, 517–19 (1997) (finding that Section Five of the Fourteenth Amendment is to be used to enforce the Amendment's other provisions, thereby giving Congress only remedial powers).

[158] *Id.* at 508 ("While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.").

Congress responded to the mandate required by the Court in *Cleburne* by enacting the ADA. In denying intermediate scrutiny for people with disabilities, one of the four reasons cited by the Court in *Cleburne* was that it was up to the legislature, not the judiciary, to decide how this large and diverse group should be accommodated.[159] Congress, in passing the ADA and making explicit that it intended for its contents to protect people with disabilities, merely followed the Court's guidance. Congress's representations that people with disabilities are a discrete and insular minority provides powerful evidence that people with disabilities meet this requirement for finding a suspect class.[160]

Some, including the Supreme Court, have expressed concern that intermediate scrutiny would require the legislature to justify all of its efforts to a greater extent, which in turn may deter or impede actions benefitting people with disabilities.[161] It is true that intermediate scrutiny requires an important governmental purpose, so any government action would need to be clearly justified for it to be upheld under this standard.[162] But because intermediate scrutiny is satisfied where the legislature shows an important reason,[163] and because the Court suggests that legislation *favoring* a suspect class will be reviewed less strictly than legislation discriminating against a suspect class,[164] this criticism lacks foundation in constitutional doctrine.

It could be argued that people with disabilities cannot be a "discrete and insular minority" because a politically powerless minority could not

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[159] *Cf.* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–43 (1985) (stating that addressing the problems of the "large and diversified group" of persons with disabilities "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").

[160] *See* 42 U.S.C. §§ 12101–12213 (2016) (demonstrating that in passing the ADA, Congress acted to protect people with disabilities, which was arguably a direct response to the Court in *Cleburne* asserting that this was the job of the legislature).

[161] *See Cleburne* at 444. *But see* Bd. of Regents v. Roth, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting) (stating that the government's burden is ameliorated where it decided the legislation carefully).

[162] *See* Craig v. Boren, 429 U.S. 190, 197–98 (1976).

[163] *See id.* (recognizing gender as a quasi-suspect class warranting intermediate scrutiny).

[164] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003). In *Grutter*, the Court reaffirmed its commitment to applying strict scrutiny to review racial classifications, but upheld an affirmative action policy. *See id.* at 326, 343. To achieve this result, the Court applied a lower level of scrutiny, though it said it was applying strict scrutiny. *See id.* at 309 (stating the test for strict scrutiny, but using a test more flexible than narrow tailoring and stating that "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative," which would typically be required). According to Calvin Massey, the Court "implicitly recognized (but refused to expressly acknowledge) that some uses of race are considerably more invidious than others, and explicitly recognized that some uses of race are not wrongful at all." Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?* 6 U. PA. J. CONST. L. 945, 976 (2004). The approach applied in *Grutter* to examine whether the non-minority racial classification was a suspect classification suggests that the Court will similarly examine laws which benefit a given suspect class less stringently than laws which discriminate against that class. *See, e.g.,* Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus,* 44 U.C. DAVIS L. REV. 213 (2010); *cf.* Shelby Cty. v. Holder, 570 U.S. 529 (2013) (applying strict scrutiny to find Section 4 of the Voting Rights Act unconstitutional, even though the Act benefits communities of color).

have been successful in passing a piece of legislation with the scope and force of the ADA.[165] Indeed, in 2007, 56.7 million people in the United States had a disability, representing 19% of the United States population.[166] This figure alone represents a significant voting block, and does not include the numerous other disability advocates and allies. Such an argument mirrors Justice Scalia's dissent in *Romer v. Evans*, in which he contended that queer individuals[167] did not lack political power in a way that rendered them discrete and insular, citing the example of the massive and well-funded efforts to defeat anti-LGBTQ state constitutional amendments.[168] Justice Scalia argued that the sheer economic power of the LGBTQ community was alone sufficient to remove them from the "discrete and insular minority" category.[169] However, the majority in *Romer* responded that it did not need to consider the political powerlessness of the LGBTQ community as a group because the law at issue's "sheer breadth" was "so discontinuous" with the reasons offered to justify it that it could only have been motivated by animus.[170]

With respect to disability, one need only look to empirical data to see that people with disabilities have some of the highest national unemployment rates and are among the most impoverished in the United States. The unemployment rate of people with disabilities aged 21–64 in 2016 was approximately 10.5% (including all disabilities within the national definition), compared to the United States average of approximately 4.6% in the same year.[171] People with disabilities thus fit cleanly within the definition of a politically powerless group. And as with the LGBTQ community, the assumption that all people with disabilities possess political power ignores the

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[165] *See* Cleburne, 473 U.S. at 445; *see also* Waterstone*, supra* note 7, at 538–39 (observing that the Court perceives legislative action as "bely[ing]" any claims of political powerlessness).

[166] Press Release, U.S. Census Bureau, Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports (July 25, 2012), https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html [https://perma.cc/3BA3-JA7B].

[167] Although the *Romer* Court uses terminology such as "gays and lesbians" and "homosexual persons," this Note uses the terms "LGBTQ" and "queer communities" to be more inclusive and more accurately reflect the diversity of the individuals directly affected by the Court's decision.

[168] *See* Romer v. Evans, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting) ("[B]ecause those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide." (internal citations omitted)). Although the opinion does not mention the term "discrete and insular" minority, it describes the qualities of discrete and insular minority in its reasoning.

[169] *Id.*

[170] *Id.* at 631.

[171] *See* News Release, Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics Summary, https://www.bls.gov/news.release/disabl.nr0.htm [https://perma.cc/AJ3J-NDSG] (citing data that was self-reported as part of the Current Population Survey, a monthly sample survey of about 60,000 households that provides employment and unemployment statistics for the Bureau of Labor Statistics).

diversity within the greater community and erases members of the group who are poor, persons of color, and members of other disadvantaged groups who may lack political power. As a result, characterizing people with disabilities as politically powerful entrenches the power of majority groups, such as white and wealthy individuals, without pursuing the animating goal of the suspect class doctrine—that is, to correct political process failures.[172] The critique's absurdity becomes even more pronounced when one considers how many other larger groups, like communities of color, women, and transgender individuals with disproportionately less political power, have collectively managed to accomplish enormous political feats, such as the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Civil Rights Act, and implementation of the Civil Rights Act to provide recourse for individuals discriminated on the basis of gender identity.[173] In light of Justice Marshall's argument in dissent, which cites the long and grotesque history of discrimination affecting people with disabilities,[174] it is clear that the passage of the ADA does not provide a persuasive argument that people with disabilities are not a discrete and insular minority.

Though the Court in *Cleburne* calls people with disabilities a "large and diversified group,"[175] almost no discussion is made as to the relevance of the group's size to its political clout. In other situations, like with women and aliens,[176] the Court has not been dissuaded by the large size of a group in identifying it as a quasi-suspect class.[177] The size of the class may have some bearing on the group's qualification for suspect class status, and individuals with different disabilities may experience the world differently. But "ableism"—notions about people with disabilities held by people without disabilities—rigs the political process in a way that subjugates the political power of people with disabilities consistently, like a de facto discrimination of women. Thus, the argument that the group is one of substantial size should not

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[172] *See* Hutchinson, *supra* note 123, at 979–81.

[173] For example, the Fourteenth Amendment was passed in 1868 at a time when African-Americans in the United States had almost no political power, because they were simultaneously given the right to vote. *See* U.S. Const. amends. XIII, IV. In addition, the Equal Employment Opportunity Commission ("EEOC") prohibits sex discrimination through Title VII. *See* 42 U.S.C. §§ 2000e–2000e-17 (2016). This has been interpreted to include discrimination on the basis of gender identity. *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82 (1998); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). It has also been interpreted to include discrimination against transgender individuals. *See* Chavez v. Credit Nation Auto Sales, LLC, 641 F. App'x 883, 892 (11th Cir. 2016) (reversing summary judgment for employer on plaintiff's claim that she was terminated from her job as a mechanic because she was transgender); *see also* Glenn v. Brumby, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (finding that the defendant discriminated against plaintiff because she was transitioning from male to female).

[174] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 461–65 (1985) (Marshall, J., concurring in part and dissenting in part).

[175] *Id.* at 442.

[176] *See* Graham v. Richardson, 403 U.S. 365 (1971).

[177] *See* Craig v. Boren, 429 U.S. 190, 218 (1976) (recognizing gender as a quasi-suspect class warranting intermediate scrutiny).

hinder the status of people with disabilities to receive intermediate scrutiny constitutional protection.

In further support of the argument that people with disabilities are a discrete and insular minority, the ADA's preamble recognizes the historic restrictions, limitations, and political powerlessness of the group writ large.[178] The Act enumerates examples of "intentional exclusion" in architectural, transportation, and communications design.[179] While the legislature cannot designate a group as a suspect class (although Congress can recognize a group to be protected under the Fourteenth Amendment), the examples cited by Congress serve as a formidable reminder that discrimination is not just historic, but contemporary, and relegates people with disabilities to a position of relative socio-political powerlessness.[180] The ADA continues to describe how, unlike individuals who have historically been excluded due to their race, gender, national origin, religion, or age, people with disabilities had no legal recourse for much of history to "redress such discrimination."[181] Moreover, the ultimate vehicle for political participation, voting, is still denied to people with intellectual disabilities in many states.[182]

ii. History of Discrimination

In *San Antonio Independent School District v. Rodriguez*, the Court suggested that a suspect class must have experienced a "history of purposeful unequal treatment."[183] The Court has emphasized historical discrimination in each and every recognition of a suspect or quasi-suspect class,[184] and it remains a critical consideration for equal protection recognition.

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[178] *See* 42 U.S.C. § 12101(a)(7) (2007) (amended and struck in 2008). This section was removed from the ADA with the passage of the ADA Amendments Act of 2008. *See* Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555 (2008). *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) (surveying Congress's justifications to show people with disabilities are politically powerless and arguing that laws designed to protect those with disabilities have been interpreted in ways that perpetuate stereotypes regarding those with mental disabilities).

[179] *See* 42 U.S.C. § 12101 (2016).

[180] *Id.* § 12101(a)(5) (citing examples up to the time of the ADA's passage of evidence of prevalent discrimination against people with disabilities).

[181] *Id.* § 12101(a)(4).

[182] *See* Barbara B. Green & Nancy K. Klein, *The Mentally Retarded & the Right to Vote,* 13 Polity 184, 185 (1980).

[183] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (finding that wealth was not a suspect class because the group lacked a history of discrimination).

[184] *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 427 (Conn. 2008) ("[The] Supreme Court has placed far greater weight—indeed, it invariably has placed dispositive weight—on . . . whether the group has been the subject of long-standing and invidious discrimination."); *see also* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (finding gender did not warrant rational basis scrutiny because of a long history of discrimination).

As described above, people with disabilities have undoubtedly experienced a history of pervasive discrimination.[185] The *Cleburne* majority and dissent agreed that the city's animus towards people with disabilities in its decision to strike down the city zoning regulation reflected a long history of "grotesque mistreatment."[186] In addition, the Court noted that the visibility of the trait and historic discrimination has bred impermissible stereotypes.[187] Like gender, disability can, though does not always, manifest in highly visible ways. And here, too, if the Court continues to be vigilant in ferreting out instances where laws are based on impermissible stereotypes about individuals, it is likely, in the case of disabilities, to find stereotypes as evidence of historic discrimination. For example, until as late as 1970, municipalities criminalized people with disability through "ugly laws," which prohibited people who were diseased, maimed, or in any way deformed from public spaces, as a mechanism to eradicate beggars from city streets.[188] And some state laws still prohibit people from having a family[189] or voting,[190] based on notions about the capabilities of people with disabilities. Historical evidence of discrimination weighs strongly in favor of a finding of quasi-suspect classification for people with disabilities and is perhaps the least controversial argument to that end.

iii. Immutability of the Trait

Immutability presents the most formidable challenge to quasi-suspect class recognition for people with disabilities. In earlier opinions, the Court has defined immutability as a characteristic "determined solely by accident of birth."[191] But in litigation about whether sexual orientation was a suspect

[185] Buck v. Bell, 274 U.S. 200, 207 (1927) (stating Justice Holmes's infamous words, "[t]hree generations of imbeciles are enough").

[186] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 438 (1985).

[187] *See Frontiero*, 411 U.S. at 686 (noticing that historic discrimination and impermissible stereotypes are related).

[188] *See* Susan M. Schweik, The Ugly Laws: Disability in Public (2010).

[189] *See generally* Adoption of Kay C., 278 Cal. Rptr. 907, 909–15 (Cal. Ct. App. 1991) (finding that California statute which allowed a court to set aside an adoption for a child with an undisclosed mental disability could be upheld 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" and "whether in fact the Act will promote [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"); *In re* Christina A., 261 Cal. Rptr. 903, 907 (Cal. Ct. App. 1989) (holding that the California Welfare and Institutions Code, which required reunification services for parents and children, but denied them to "mentally disabled parents" did not violate the constitutional guarantee of equal protection under a rational basis standard because "[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 would not"); *In re* Eugene W., 105 Cal. Rptr. 736, 739–41 (Cal. Ct. App. 1972) (rejecting an equal protection challenge to a law which authorizes the state to terminate the parental rights of an individual due to the individual's mental, not physical, illness).

[190] *See supra* note 140.

[191] *See Frontiero*, 411 U.S. at 686.

classification, federal courts adjusted their definition slightly, finding "immutability" to include defining traits of personhood "which may be altered only at the expense of significant damage to the individual's sense of self."[192]

At first glance, disability appears to be an immutable trait because, generally, a person with a disability cannot choose to rid him or herself of the disability.[193] However, many disabilities develop over time, meaning that they are by definition mutable. A person who previously lived without a disability may develop one later in life as a result of age, accident, or pregnancy. One in four twenty-year-olds in 2013 in the United States will develop a disability before they retire.[194] In developed nations such as the United States, where life expectancy exceeds seventy years, people spend an average of eight years, or 11.5% of their life, living with one or more disabilities.[195] This significantly erodes the argument that disability is a binary yes-no characterization, like race, and as a result, an immutable characteristic.

At the same time, with the exception of pregnancy, people have little control over and generally do not choose to incur a disability. In this sense, it is analogous to one's status as a documented or undocumented immigrant in the United States. When considering laws that discriminate on the basis of national origin, the court has not considered undocumented status to be an absolutely immutable characteristic,[196] since it might, in some cases, be the "product" of conscious action (that is, choosing not to become a citizen or overstaying a visa).[197] Therefore, the Court has denied suspect classification status for immigrant adults.[198] But, where undocumented immigrant children were excluded from public education, the Court in *Plyer v. Doe* nonetheless struck down the ordinance because the children had no control over their

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[192] *See* Jantz v. Muci, 759 F. Supp. 1543, 1548 (D. Kan. 1991), *rev'd on other grounds* 976 F.2d 623 (10th Cir. 1992).

[193] *See* Cleburne Living Ctr. v. City of Cleburne, 726 F.2d 191, 192 n.2 (5th Cir. 1984) (reprinting trial testimony of Dr. Roos). Dr. Phillip Roos, an expert on intellectual disabilities, testified at a *Cleburne* hearing that intellectual disability is an immutable condition, stating: "Mental retardation is a problem of a deficit in intellectual development and social adaption. Its onset is sometimes from birth or during childhood . . . it is irreversible. By which I mean there may be some amelioration, but to date it is not a curable condition." *Id.*

[194] U.S. Soc. Security Admin., Fact Sheet, https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf [https://perma.cc/PFC7-6BXR].

[195] *Disability Statistics: Information, Charts, Graphs and Tables,* Disabled World Towards Tomorrow, https://www.disabled-world.com/disability/statistics/ [https://perma.cc/4MJB-ET66].

[196] *See* Plyler v. Doe, 457 U.S. 202, 219–20 (1982) (showing that while the Court struck down both a state statute denying funding for education to illegal alien children and a school district's attempt to charge illegal aliens an annual tuition fee, the Court also acknowledged that aliens were protected under the Fourteenth Amendment).

[197] *Id.* (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977) (stating that even where aliens remain in the United States as a "product of their own unlawful conduct," these arguments do not apply to their children because children of "illegal entrants" did not elect to enter the United States in contravention of law because children "can affect neither their parents' conduct nor their own status").

[198] *Id.* at 220.

documentation status—their parents did.[199] Similarly, in *Obergefell v. Hodges,* Justice Kennedy recognized that sexual orientation and sexual identity are immutable characteristics, citing the *Amicus* brief from the American Psychological Association that stated that most gay men and lesbians[200] do not experience their sexual orientation as a "voluntary choice."[201] Considered from the control-based definition of immutability, individuals with disabilities also lack the agency over the characteristic that the Court attempts to police with the immutability criteria.[202] In situations where someone cannot control their membership in the group, like disability, the case for agency—and thus, mutability—is weak. One cannot choose to opt into a disability (again, with the exception of pregnancy) or opt out.[203] The unfairness of being discriminated against for something outside of one's control "suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[204]

Further, the Court has seemed to retreat from the immutability factor and many scholars have called for its elimination altogether because immutability presents so many conceptual difficulties.[205] In *San Antonio Independent School District v. Rodriguez*, where Plaintiffs challenged a local property tax regime, the Court completely ignored immutability as a qualification for suspect classification.[206] Instead, it focused on the "traditional" criteria for suspect classification (i.e., discrete and insular minority status and historic discrimination).[207] In addition, qualities once thought immutable by the Court may no longer be appropriately labeled as such, like gender. In *Frontiero v. Richardson,* which considered whether a law providing military benefits to wives, but not husbands, was constitutional, the plurality wrote

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[199] *Id.*

[200] This word choice is employed in the *Amicus* brief.

[201] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015) (citing Brief of the Am. Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 7–17, Obergefell v. Hodges, 135 S. Ct. 2584 (Nos. 14-556, 14-571, 14-574), 2015 WL 1004713).

[202] Jessica A. Clarke, *Against Immutability,* 125 YALE L.J. 2, 16 (2015) (arguing for the abolition of immutability as a criterion for equal protection because it presents ambiguities like this one and arguing that immutability as a factor is more closely tied to agency over the characteristic than immutability in the technical sense).

[203] In some situations, such as substance abuse or a reckless driving accident, an individual makes a conscious choice that results in their disability, but this is not the norm. Moreover, it seems unlikely that individuals who opt into potentially dangerous conduct see themselves as affirmatively 'opting in' to becoming disabled.

[204] *Plyler*, 457 U.S. at 217 n.14*; see also* Clarke, *supra* note 202*,* at 16.

[205] *See generally* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability,* 46 STAN. L. REV. 503 (1994) (emphasizing the problematic nature of immutability as a characteristic); Cass R. Sunstein, *Homosexuality and the Constitution,* 70 IND. L.J. 1, 9 (1995) (stating that "[i]mmutability is neither a necessary nor sufficient basis for treatment as a 'suspect class' "); 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, 494–95 (1998) (asserting that "courts have begun to withdraw the immutability factor and. . . recent academic commentary seems univocal in calling for its retirement").

[206] *See* 411 U.S. 1, 28 (1973).

[207] *Id.*

that, "sex, like race and national origin, is an immutable characteristic determined solely by accident of birth."[208] However, gender is now generally understood as a spectrum, and something that can be changed.[209] Many courts now ask whether the characteristic is a core trait or condition that one cannot or should not be required to abandon,[210] a definition which has been called the "new immutability" standard.[211] Under this approach, disability should be considered immutable because it is not something that one can abandon, nor something one should be forced to abandon. Thus, disability, whether under the control theory or the new immutability standard, qualifies as an immutable trait, providing strong support for intermediate scrutiny review. But the importance of immutability, and even whether it is a workable standard for finding suspect class status, has been called into question.[212]

iv. Relevance of the Trait to the Classification

When determining suspect classification, the Court pays some consideration to whether a group's defining characteristic is relevant to the legislation in question. With respect to disability, the Court asks if the characteristic (that is, the disability) is relevant to a person's ability to perform or contribute to society.[213] As the Court has announced, "the basic concept of our system [is] that legal burdens should bear some relationship to individual responsibility."[214] The qualities on which suspect classifications are

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[208] Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

[209] *See* Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 L. & Soc. Inquiry 1, 31 (2003) (lauding the new immutability for its potential to expand protection to transgender identity); *see also* Zachary A. Kramer, *The New Sex Discrimination*, 63 Duke L.J. 891, 949 (2014) (arguing that "[m]aybe we need a softer definition of immutability" to address discrimination on the basis of sex, transgender status, sexual orientation, and religion); Anthony R. Enriquez, Note, *Assuming Responsibility for Who You Are: The Right To Choose "Immutable" Identity Characteristics*, 88 N.Y.U. L. Rev. 373, 373 (2013) (arguing that the new immutability "resolves inconsistencies in traditional equal protection jurisprudence caused by a biological immutability standard and . . . harmonizes recent lower court opinions discussing race- and gender-related equal protection in an era of increased multiracial, intersex, and transgender visibility").

[210] *See* Clarke, *supra* note 202, at 27; *see also Whitewood v. Wolf*, 992 F. Supp. 2d 410, 429 (M.D. Pa. 2014) (holding that sexual orientation is "so fundamental to one's identity that a person should not be required to abandon [it]").

[211] *See* Clarke, *supra* note 202, at 6–7 (describing the "new immutability" standard, which asks not whether the characteristic is not changeable, but whether it is a core characteristic to one's person).

[212] Yoshino, *Assimilationist Bias*, *supra* note 205, at 494–95 (asserting that "courts have begun to withdraw the immutability factor and . . . recent academic commentary seems univocal in calling for its retirement").

[213] *See* Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens, and the Future of Same-Sex Marriage,* 12 U. Pa. J. of Const. L. 1, 3 (2009) ("Other scholars have noted that immutability seems to be a proxy for the relevance of a particular trait to a given governmental enactment, and a poor proxy at that.").

[214] *See* Plyler v. Doe, 457 U.S. 202, 220 (1982) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

founded—race, gender, alienage, for example—"tend to be irrelevant to any proper legislative goal."[215]

Admittedly, the presence of a disability is often highly relevant to the legislature's interest, particularly in the workforce. This is the very goal of the reasonable accommodation, which aims to bring a person's functionality to par with the requirements of the job.[216] Also, as the Court acknowledged in *Cleburne*, the legislature may have an interest in providing a social safety net for people with disabilities,[217] including through housing and workplace supports. However, invidious stereotypes about one's ability, rather than the relevance of a particular trait, may never justify legislation, even under rational basis review.[218] For example, in *United States v. Virginia*, the Court analyzed a policy of the Virginia Military Institute ("VMI") of admitting only male students.[219] The State had established a separate university for women, but it was found to be unequal in opportunity and rigor.[220] The Court found that VMI's admissions policy was based on impermissible stereotypes about the relevance of gender to the task of attending a military institution.[221] A tradition of discriminating against women, which resulted in stereotypes that guided policy, provided an insufficient justification for perpetuating this status quo in VMI's admissions.[222] Similarly, in *Frontiero,* the Court found that traditional notions of gender roles in generating family income were an impermissible basis upon which to write a law about dependent military ben-

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[215] *Id.* at 217 n.14.

[216] *See, e.g.*, 42 U.S.C. § 12111(9) (2016) (defining reasonable accommodation as: "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities").

[217] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 444 (1985) (stating that legislation supporting people with disabilities is "not only legitimate but also desirable").

[218] *See id.* at 441–42 (striking down city ordinance founded upon impermissible assumptions about people with disabilities); *see also* Romer v. Evans, 517 U.S. 620, 632 (1996) (invalidating a Colorado constitutional amendment that repealed all state and local laws protecting homosexuals from discrimination because the "sheer breadth" of the law was "so discontinuous" with reasons offered for it that the amendment seemed inexplicable as anything other than animus towards the class it affected); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 883 (1985) (invalidating an Alabama tax burdening statute directed at foreign companies); Dep't of Agric. v. Moreno, 413 U.S. 528, 535 (1973) (stating that unfounded stereotypes of "unrelated households" and their tendency to perpetrate fraud was impermissible even under rational basis review).

[219] 518 U.S. 515, 523–25 (1996).

[220] *See id.* at 526–27 (finding that the parallel program was unequal because of lower average SAT entrance scores, fewer faculty members with a Ph.D., teachers with lower salaries, and limited degree offerings for students).

[221] *See id.* at 549 (rejecting the state's assertions that differences in training between men and women were "'justified pedagogically' based on 'important differences between men and women and developmental needs,'" and finding that these were instead stereotypes based on women as a group).

[222] *See id.* at 566.

efits.[223] And in *Mississippi University for Women v. Hogan*, where a male qualified applicant was denied admission to a nursing program on the basis of sex, the Court found that differential treatment between women and men lacked a factual foundation and instead reflected impermissible social assumptions about women's capability in the educational environment.[224] Therefore, in determining the standard of review applicable to people with disabilities, the Court must remain vigilant to calibrate the standard to the relevance of the trait in question, and not, as the defendants in *Virginia* and *Frontiero* tried to argue, to invidious stereotypes about the relevance of a particular trait.

Disability may, in some cases, bear a relationship to the ability of the individual. For example, a city ordinance requiring wheelchair ramps on public buildings reflects an understanding that individuals in wheelchairs cannot traverse up steps. Similarly, an accommodation for Braille books recognizes that a blind student does not have the same ability to read a textbook as a non-blind student. However, these changes do not assume that the person in a wheelchair's contribution once up the stairs will be lesser than that of a non-wheelchair bound person, nor that the child with a Braille book is any less capable of academic success than a child with a non-Braille book. Where assumptions are made about one's capability based on a trait, the Court should continue to find those justifications impermissible.

Disability may be a trait that bears so heavily on ability that the equal protection framework is inapplicable, because people with disabilities cannot be treated equally, and if they were, there could be no accommodation at all. However, given that this argument serves no productive purpose in harnessing the capabilities of people with disabilities for productive social purposes, the Court is unlikely to find it compelling. Through intermediate scrutiny, the Court is best positioned to police invidious and impermissible stereotypes about the capabilities of people with disabilities.

v. Intermediate Scrutiny is Appropriate for People with Disabilities

By the early 1980s, the Supreme Court had developed several key criteria for identifying a suspect or quasi-suspect class. To decide whether a group was a suspect class, the Court looked to: (1) whether the group was a discrete and insular minority caused by political powerlessness, (2) there was a history of discrimination against the group, (3) the immutability of the trait, and (4) the relevance of that trait to legitimate legislative goals.[225] The Court has never required all of these factors for a class to be considered suspect,[226] and it appears that factors one and two are the most important to

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[223] *See* Frontiero v. Richardson, 411 U.S. 677, 677 (1973).

[224] *See* 458 U.S. 718, 730 (1982); *see also Frontiero*, 411 U.S. at 686–87.

[225] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–43 (1985).

[226] *See* Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982). For the proposition that the Supreme Court suggests that meeting *any of* the factors for suspect classification status is sufficient, *see*

and the most closely scrutinized.[227] While disability may lack some of the characteristics required for suspect classification, people with disabilities are a discrete and insular minority and have experienced a history of pervasive and egregious discrimination. The application of the suspect class factors indicates that the Court should consider people with disabilities a quasi-suspect class warranting intermediate scrutiny.

IV. Under Intermediate Scrutiny, *Garrett* would result in a Rational Outcome

a. Applying Intermediate Scrutiny to the facts of Board of Trustees of the University of Alabama v. Garrett

Had the plaintiffs in *Garrett*,[228] a nurse with breast cancer and an asthmatic security guard, had their ADA claims considered under an intermediate scrutiny regime, this Note contends that the Court would have allowed them a reasonable accommodation from the State.[229] Under intermediate scrutiny, a state must provide a substantive justification for a policy that discriminates against a group of individuals and may not rely on the presumptive permissibility of its program. This is unlike rational basis review, where the plaintiff must overcome a strong presumption of constitutional validity. Thus, under intermediate scrutiny, the State of Alabama would likely lose.

Though the litigants in *Garrett* were not able to expound on the State's purported justifications (because they would not have been required under rational basis review had the Court reached the merits), one can imagine what justifications the state of Alabama may have advanced. For example, the state could have justified the denial of accommodations on the basis of administrative efficiency, economic feasibility, state fiscal responsibility, or all three. The state may also have advanced an interest in an uninterrupted state work force, an interest particularly strong in hospitals given the necessity of continuous and quality care for patients by employees like Ms. Garrett. While these arguments might have succeeded under rational basis review, the Court has consistently rejected purported interests such as administrative convenience under intermediate scrutiny.[230] Therefore, if the

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Strauss, *supra* note 124, at 139–40 n.23 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973) ("A suspect class entitled to strict scrutiny is one 'saddled with such disabilities, *or* subjected to 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.'" (emphasis added)).

[227] *See* Strauss, *supra* note 124, at 148–49 (stating that the Court emphasizes discrete and insular minority status and history of discrimination most in its opinions).

[228] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

[229] This is ignoring for the purposes of argument the Eleventh Amendment questions presented by the case in *Garrett* and assuming the Court had reached the merits.

[230] *See* Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973).

Court had reached the merits, the State's justifications would very likely have failed intermediate scrutiny review and the plaintiffs would have been permitted their employment accommodation.

Even if an important state interest is recognized under intermediate scrutiny, the state must still establish that the denial of the accommodation is reasonably related to the important interest proffered.[231] Under this hypothetical, the State of Alabama could have argued that limiting the scope of reasonable accommodations was substantially related to reducing administrative costs and increasing the State's efficiency in its program delivery because reasonable accommodations cost money and take time. Allowing Ms. Garrett time off for medical treatments would likely necessitate temporary workers and additional training, or enhance the burden on the remaining employees by requiring shift coverage, possibly impacting workplace morale. Similarly, enforcing the University's no smoking policy for Mr. Ash's benefit would require time and manpower that could be invested elsewhere (policing offenders, placing signs, etc.). The State of Alabama could have contended that its systems were reasonably designed to promote administrative efficiency and proper functioning of state government, both important government interests.[232] Even if those interests were accepted as important, the denial of the requested accommodations would likely have failed the "substantially related" requirement under intermediate scrutiny.[233] It would be difficult to argue that not enforcing a no-smoking policy would advance administrative functions. In fact, having a rule that is effectively and consistently carried out, like a no-smoking policy, may actually advance those functions. More importantly, the Court has consistently rejected as "substantially related" arguments related to advancing administrative functions.[234]

Therefore, if the Court had reached the merits in *Garrett* and considered it under intermediate scrutiny, it would almost certainly have resulted in a different outcome. As a result, the State of Alabama would likely have been required to make reasonable accommodations for both plaintiffs. This would be more in line with the spirit of the ADA, which intended to remedy historic discrimination and provide accommodations for people with disabilities to contribute to the workplace, exactly as the plaintiffs in *Garrett* requested. This hypothetical underscores the inherent limitations of rational basis review when applied to disability-rights claims and its practical significance in limiting people with disabilities from accessing their full suite of rights under the ADA. Failure to recognize people with disabilities as a suspect or

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[231] *See* Craig v. Boren, 429 U.S. 190, 204 (1976).

[232] *See* Orr v. Orr, 440 U.S. 268, 280–82 (1979) (articulating that intermediate scrutiny requires the law be "reasonably designed" to promote the important interest).

[233] *Id.* (finding that, where the purpose could have been served by a gender-neutral means, it was not substantially related).

[234] *See Frontiero*, 411 U.S. at 688–89.

quasi-suspect class subverts the purpose of the Equal Protection Clause,[235] both by refusing to treat individuals who meet the criteria for suspect classification with the greater protection that the Constitution guarantees, and by limiting the ADA from fulfilling its rights-protective legislative purpose.

b. *Reconsidering* Irving v. Tatro *Under Intermediate Scrutiny*

Lending further credence to the practical benefits of the intermediate scrutiny approach, under an intermediate scrutiny regime, *Tatro*'s well-reasoned outcome would not have changed. In *Tatro*, the Court did not apply rational basis review, and Amber Tatro was provided the accommodation of catheterizations that allowed her to attend school.[236] Under rational basis scrutiny, however, her claim would have very likely failed in light of the School District's stated objections that such an accommodation would lead to an onslaught of requests for every conceivable medical service and expose it to increased liability for injury or accident.[237]

If *Tatro* had been decided on Equal Protection grounds under intermediate scrutiny review, the result would likely have been consistent with the Court's actual result because the school district's justifications would likely not be considered important interests. In terms of limiting the number of medical services required, the Court has consistently found interests of administrative convenience and reducing costs to be insufficient under intermediate scrutiny.[238] While the School District's interest in limiting liability could be characterized as an effort to reduce costs (which would probably also fail under intermediate scrutiny,[239]) this second justification could also be considered an important state interest because the time and energy not spent litigating could be spent on the central mission of the District: educating and developing young citizens. However, this argument would essentially amount to facilitating the administrative convenience of the government's mission, an interest which has consistently failed under intermediate scrutiny.[240]

Even if the District's interest in reducing its liability exposure were considered an important interest by the Court, the challenged policy in *Tatro*

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[235] The Equal Protection Clause of the Fourteenth Amendment requires that no state deny any person equal protection of the laws. *See* U.S. CONST. amend. XIV, § 1. After *Carolene Products*, courts began building a framework for heightened scrutiny of laws that may violate the Equal Protection Clause by considering history of discrimination, political powerlessness, and immutability. *See* Waterstone, *supra* note 7, at 545 (finding that the bases for suspect scrutiny were drawn directly from *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)).

[236] *See* Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984).

[237] *See id.* at 893.

[238] *See Frontiero*, 411 U.S. at 690.

[239] *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (establishing that intermediate scrutiny requires an important government interest).

[240] *Id.*

would likely not be considered substantially related to that interest. If the District were concerned with its liability exposure, there existed better, more closely related policies to meet this objective, including purchasing additional liability insurance or outfitting the school with safety measures like ramps, nursing stations, and elevators for future medical services requests. On balance, it is unlikely *Tatro*, a well-reasoned decision, would have resulted in a different outcome under intermediate scrutiny review, providing a further indication that intermediate scrutiny advances equities for people with disabilities.

V. Practical Burdens of Rational Basis Scrutiny for People with Disabilities

Piling on to the absurd consequences of the rational basis standard of review for people with disabilities, the highly deferential standard creates other deleterious downstream consequences. Though one may question whether quasi-suspect class recognition for people with disabilities reflects a mere symbolic gesture without any real consequences, this is patently incorrect. In reality, the continued application of the rational basis standard to disability cases has numerous practical and significant consequences. People with disabilities remain underrepresented and marginalized, not only through their lack of protection in the legal system, but also by laws about voting, life choices, and education.[241]

Many people with disabilities reside at the outer ambit of statutory protection.[242] A New York judge described people with disabilities as "the most discriminated minority in our nation."[243] While an individual might be entitled to protection under the Equal Protection Clause, the flimsy rational basis review standard required after *Cleburne* means that the Supreme Court often interprets the ADA to deny that protection through the refusal of a reasonable accommodation in the workplace or school. The absence of any rigorous constitutional protection allows the Supreme Court and other actors to narrow the scope of ADA protections through interpretations of "reasonable accommodation" and "undue hardship" that do not comport with the broader protections Congress intended.[244]

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[241] *Id.*

[242] *See* Waterstone, *supra* note 7, at 531 (observing that members of the disability community "have been more at the fringes . . . and had a harder time translating legislative success into the promises of full citizenship").

[243] *See* Robert L. Burgdorf Jr., *Why I Wrote the Americans with Disabilities Act,* Wash. Post (July 24, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?utm_term=.0a4fba5d7e48 [https://perma.cc/5PVG-GSJQ].

[244] *See* 42 U.S.C. § 12201(h) (2016); *see also* Robert S. Greenberger, *Supreme Court Narrows Scope of Federal Disabilities-Bias Law*, Wall St. J. (June 23, 1999), https://www.wsj.com/articles/SB930063866727187974 [https://perma.cc/3G3C-NPBR]; *High Court Narrows Scope of Disabilities Act,* PBS News Hour (Apr. 29, 2002), https://www.pbs.org/newshour/politics/law-jan-june02-scotus_04-29 [https://perma.cc/L4EC-2ES4].

Additionally, the ADA is currently unable to protect people with disabilities from state law regimes due to the high degree of deference given to defendants under rational basis review.[245] This has had detrimental consequences for many people with disabilities.[246] While recent data is lacking, a survey of voting regulations in all fifty states and Washington, D.C. in 1976 revealed that nineteen states denied the right to vote to those defined as "idiots," two denied the right to vote to anyone institutionalized, and two denied the right to vote to those adjudicated as incompetent.[247] In Justice Marshall's words, "prejudice, once let loose, is not easily cabined,"[248] and with respect to the enfranchisement of people with disabilities, prejudice has systematically isolated people with disabilities from political participation. Not until 1982 were public education opportunities available to people with disabilities,[249] despite an awareness that "lengthy and continuing isolation of the [intellectually disabled] has perpetuated ignorance, irrational fears, and stereotyping that long have plagued them."[250] Even as late as 1950, twenty-eight states retained sterilization statutes in their laws.[251] Many states still have laws prohibiting marriage with handicapped persons or between handi-

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[245] *See generally* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (deferring to the University of Alabama under the doctrine of state sovereign immunity); *see also* KY CONST. § 145(3) (providing that "idiots and insane persons" shall not have the right to vote); Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (holding that the state deserves "a degree of deference" under constitutional tests).

[246] *See* Adoption of Kay C., 278 Cal. Rptr. 907, 915 (Cal. Ct. App. 1991) (stating, where plaintiffs challenged a state statute authorizing a court to set aside adoption of a child with undisclosed mental disabilities, and California offered justification in promoting the state's interest in adoption, that "[w]e 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 provision . . ."); Does 1-5 v. Chandler, 83 F.3d 1150, 1151–56 (9th Cir. 1996) (reviewing a Hawaii licensing statute under the Equal Protection Clause, citing *Cleburne* and upholding "preservation of . . . fiscal integrity" as a legitimate and rationally related public purpose); *In re* Harhut, 385 N.W.2d 305, 311 (Minn. 1986) (considering a state statute allowing for indefinite commitment of persons with mental retardation, citing *Cleburne* and replying, "the distinction between commitment periods 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 states 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 interests").

[247] *Section VII: Items of Interest*, 1 MENTAL DISABILITY L. REP. 231, 236 (1976).

[248] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 464 (1985) ("As of 1979, most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials.").

[249] *See generally* Bd. Of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982) (finding that statutory law protected child's right to appropriate education, interpreted as education adequate enough to learn and enable her to earn a diploma).

[250] *Cleburne*, 473 U.S. at 464.

[251] *See generally* Irwin N. Perr, *Epilepsy and the Law,* 7 CLEV.-MARSHALL L. REV. 280 (1958).

capped persons.[252] State laws prohibit people with disabilities from entering the courts for protection of parental rights.[253] Despite the best efforts of people with disabilities and their allies, efforts to challenge state laws have been largely unsuccessful, in large part due to the precedent established by *Cleburne*.[254] A regime of intermediate scrutiny would mobilize and effectuate efforts to reverse the perverse and antiquated laws that remain on the books and make substantial strides towards reforming the prejudicial attitudes that underpin them.

Conclusion

Constitutional law speaks to our normative identity as a community in a way that statutory law is unable to do. Symbolically, intermediate scrutiny would reflect the history of discrimination and relative political powerlessness of people with disabilities, motivate social consciousness towards equal opportunities for this group, and prevent the rights recognized by Congress in the ADA from becoming nullities. Practically, without intermediate scrutiny review of legislative action, people with disabilities will likely continue to struggle to attain the "promises of full citizenship"[255] because their arse-

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[252] *See, e.g.,* Ky. Rev. Stat. Ann. § 402.020(1)(a) (West 1998); Mont. Code Ann. § 40-1-402 (2017)*; see also* D.C. Code § 46-404 (2018) (allowing annulment for marriage with a person with mental illness or disability); Beddow v. Beddow, 257 S.W.2d 45, 48 (Ky. 1952) (quoting Jenkins v. Jenkins' Heirs, 32 Ky. 102, 104 (1834) (stating that "[a] person 'of unsound mind'—an idiot, for example, is, as to all intellectual purposes, dead; and such a being, destitute of intellectual light and life, is as incapable as a dead body of being a husband or a wife in a legal, rational, or moral sense"); Marissa DeBellis, *A Group Home Exclusively for Married Couples with Developmental Disabilities: A Natural Next Step,* 28 Touro L. Rev. 451, 455 (2012) (arguing that state statutes that disallowed marriage for people with disabilities were premised on the ideas of social productivity and eliminating people with disabilities).

[253] *See generally* Adoption of Kay C., 278 Cal. Rptr. 907, 909–15 (Cal. Ct. App. 1991) (finding that California statute allowing a court to set aside an adoption for a child with an undisclosed mental disability could be upheld 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" and "whether in fact the Act will promote [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"); *In re* Christina A., 261 Cal. Rptr. 903, 907 (Cal. Ct. App. 1989) (holding that California Welfare and Institutions Code, which required reunification services for parents and children, but denied them to "mentally disabled parents" did not violate the constitutional guarantee of equal protection under a rational basis standard because "[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 would not"); *In re* Eugene W.*,* 105 Cal. Rptr. 736, 739–41 (Cal. Ct. App. 1972) (rejecting an equal protection challenge to a law which authorizes the state to terminate the parental rights of an individual due to the individual's mental, not physical, illness).

[254] *See generally* Cal. Ass'n of the Physically Handicapped v. FCC, 721 F.2d 667, 670 (9th Cir. 1983) (refusing to hold that disabled individuals are a suspect class); Brown v. Sibley, 650 F.2d 760, 766 (5th Cir. 1981) (holding that disabled individuals are not a suspect class); Upshur v. Love, 474 F. Supp. 332, 337 (N.D. Cal. 1979) (commenting that physical handicap is more analogous to age than race and, therefore evokes only the rational basis standard).

[255] *See* Waterstone*, supra* note 7, at 531.

nal of legal tools remains incomplete. To provide people with disabilities the self-determination and independence to which they are entitled, it is critical that this community has meaningful access to mainstream political, social, and economic systems. The application of rational basis review to claims under the ADA keeps people with disabilities from fully accessing the legal system to enforce their rights and advocate for accommodations that foster integration. This access can be recognized symbolically and practically by recognizing that rational basis review, as applied to disability, is quite simply irrational.