EQUAL MEANS EQUAL: THE ARGUMENT IN SUPPORT OF HEIGHTENED SCRUTINY FOR DISABILITY DISCRIMINATION THROUGH A COMPARATIVE STATE CONSTITUTIONAL LENS

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I. INTRODUCTION

In 1996, a paraplegic man named George Lane was required to appear in a Tennessee court for a misdemeanor traffic violation.[1] The hearing was held on the second floor of the Polk County Courthouse in Benton,

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[1] The Associated Press, *Court Holds States Liable for Disabilities Compliance*, LAWRENCE JOURNAL-WORLD.COM (May 18, 2004, 12:00 AM), https://www2.ljworld.com/news/2004/may/18/court_holds_states/; *see also* David L. Schwan, *When You Come to a Fork in the Road, Take It:* Tennessee v. Lane *Takes a New Approach to Section Five Enforcement Powers*, 43 HOUS. L. REV. 235, 239 (2006).

Tennessee.[2] But this building, like many at its time, had no elevator.[3] Determined to comply, Lane crawled up two flights of stairs in a suit and leg braces just to reach the courtroom.[4] At a second court hearing, Lane refused to endure the same humiliation again – remaining on the first floor and seeking to be heard from there.[5] Instead of accommodating Lane and his disability, the state arrested him for failing to appear.

Two years later, Lane and another plaintiff, Beverly Jones, who also used a wheelchair, filed suit against the state of Tennessee under Title II of the Americans with Disabilities Act ("ADA").[6] Title II requires that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[7] The plaintiffs claimed that Tennessee's inaccessible courthouses violated their statutory rights under the ADA.[8] The case eventually reached the Supreme Court of the United States, which upheld Title II as a valid exercise of Congress's power under Section V of the Fourteenth Amendment,[9] at least regarding fundamental rights such as access to the courts.[10] The Court emphasized that Congress had documented widespread exclusion of disabled individuals from civic life, including the justice system.[11]

Yet this ruling revealed a constitutional contradiction. Lane and Jones were forced to rely on the ADA, not the Equal Protection Clause, because under Supreme Court precedent, disability is not a suspect or quasi-suspect classification under the Equal Protection Clause.[12] In *City of Cleburne v. Cleburne Living Center*, the Court held that disability-based classifications are reviewed under rational basis scrutiny, the most deferential standard of review.[13] Unless a fundamental right is implicated, the government need only offer a conceivable, legitimate reason for its action under rational

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[2] Schwan, *supra* note 1, at 239.
[3] Anne Gearan, *Disabled Can Sue States over Civil Rights*, GOUPSTATE (May 18, 2004, 12:54 AM), https://www.goupstate.com/story/news/2004/05/18/disabled-can-sue-states-over-civil-rights/29719577007/.
[4] Schwan, *supra* note 1, at 239.
[5] *Id.*
[6] Complaint, Lane v. Tennessee (M.D. Tenn. Aug. 10, 1998) (No. 3:98-cv-0731).
[7] Americans with Disabilities Act of 1990, 42 U.S.C. § 12132.
[8] Tennessee v. Lane, 541 U.S. 509, 513–14 (2004).
[9] *Id.* at 534.
[10] *Id.* at 533–34.
[11] *Id.* at 529.
[12] David Sunshine Hamburger, *30 Years After* Cleburne*: A Look Back at a Landmark Decision for Intellectual Disability Jurisprudence*, 2 PENN UNDERGRADUATE L.J. 123 (2015).
[13] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985).

basis scrutiny.[14] Without the protections of the ADA, Tennessee would have been allowed to force Lane to crawl up flights of stairs in order to accomplish everyday obligations.

The ongoing refusal to treat disability as a suspect or quasi-suspect classification shows a profound failure of the Equal Protection Doctrine. Unlike race, gender, or non-marital birth – which trigger heightened scrutiny because they target protected classes[15] – classifications based on disability do not receive heightened scrutiny and are generally provided only minimal constitutional safeguards. Yet despite this, disability-based classifications share the very same characteristics, like a history of discrimination, political powerlessness, and immutability, that justify heightened scrutiny for other protected classes.

This article argues that disability should be recognized as a protected class under the Equal Protection Clause, warranting heightened judicial scrutiny – just as some state courts and constitutions have already acknowledged. Part II will set the constitutional foundation of this article and its thesis by examining the text and purpose of the Equal Protection Clause, the development of judicial classifications emphasizing "suspectness," and how disability fits within this constitutional analysis under the 14th Amendment. Part III of this article examines the majority and dissenting opinions in *City of Cleburne v. Cleburne Living Center*, the seminal decision that continues to anchor the federal judiciary's refusal to apply heightened scrutiny to disability-based classifications. Part IV of this article examines how three states – two that explicitly protect disability in their constitutions and one that does not – have interpreted equal protection claims, revealing contrasting judicial approaches to disability-based classifications under state law. Finally, Part V will urge the federal judiciary to revisit and revise its current framework of disability and adopt a more protective constitutional standard – one that recognizes disability as a protected class deserving of heightened judicial scrutiny.

II. THE EQUAL PROTECTION CLAUSE

To understand why disability deserves heightened protection under the Equal Protection Clause, it is first necessary to trace how the Equal Protection Doctrine developed and how courts have come to evaluate different types of classifications. This section begins by unpacking the text and purpose of the Fourteenth Amendment's Equal Protection Clause, then

[14] Hamburger, *supra* note 12, at 126.
[15] *Cleburne*, 473 U.S. at 440–41.

follows the evolution of judicial scrutiny through landmark cases like *United States v. Carolene Products Co.* It explores how courts identify suspect and quasi-suspect classes, not by definition, but by applying a set of four factors. From there, the section shifts to the meaning of the term "disability" and how the term has evolved over the years. By examining how disability fits within the existing suspect classification framework, this section sets the stage for the argument that disability-based classifications should no longer be relegated to the lowest level of judicial review.

i. Suspect Class Designation Through 14th Amendment Jurisprudence

The Fourteenth Amendment of the United States Constitution's Equal Protection Clause states that "[n]o State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws."[16] Although the Equal Protection Clause applies directly to the states, the Supreme Court has held that the federal government is subject to the same equal protection standards through the Due Process Clause of the Fifth Amendment.[17] The Equal Protection Clause essentially directs both governments to treat all similarly situated persons alike.[18] While Section V of the Fourteenth Amendment grants Congress the power to enforce the equal protection directive,[19] courts have created the standard for deciding whether a challenged piece of legislation or an official action violates the Equal Protection Clause.[20]

While the central purpose of the Equal Protection Clause is to ensure that like cases are treated alike and that governments do not arbitrarily disadvantage certain classes without a legitimate justification, in practice,

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[16] U.S. CONST. amend. XIV, § 1 [hereinafter the Equal Protection Clause]. The full text of Section One of the Fourteenth Amendment reads:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (noting that the Fourteenth Amendment applies to the states and all of its "creatures").
[17] Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954).
[18] Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) ("The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'").
[19] U.S. CONST. amend. XIV, § 5. The full text of Section Five reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
[20] Lisa A. Montanaro, Comment, *The Americans with Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621, 625 (1995).

the level of protection afforded depends largely on whether the classification at issue is deemed suspect, quasi-suspect, or neither.[21]

Under the Equal Protection Clause, courts will apply one of three tiers of judicial scrutiny depending on the nature of the classification at issue.[22] The highest tier of judicial review is strict scrutiny, which applies to government classifications involving suspect classes or actions that infringe upon fundamental constitutional rights.[23] In order for the government to withstand strict scrutiny review, it must show that the suspect classification is narrowly tailored to serve a compelling governmental interest.[24] The next tier of judicial review is intermediate scrutiny, which applies to classifications involving quasi-suspect classes.[25] Intermediate scrutiny review requires that the classification be substantially related to an important governmental interest.[26] All other classifications under current federal doctrine are subject to rational basis review, which asks only whether the government's action is rationally related to a legitimate state interest.[27] This level of scrutiny is highly deferential and allows the court to supply any reasonable justification for the law under review, even those that the legislature itself may not have considered when it passed the law.[28]

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[21] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16, 28 (1973) (explaining that suspect classifications trigger strict scrutiny under the Equal Protection Clause, particularly when they relate to characteristics like race or national origin).

[22] *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755–57 (2011) (discussing in detail the three-tiered model of strict scrutiny, intermediate scrutiny, and rational basis review).

[23] *Id.* at 756; *Rodriguez*, 411 U.S. at 16.

[24] Grutter v. Bollinger, 539 U.S. 306, 326, 328 (2003) (affirming that governmental use of race must be narrowly tailored to achieve a compelling interest and holding that the University of Michigan Law School's limited use of race in admissions served the compelling interest of obtaining educational diversity).; *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

[25] Craig v. Boren, 429 U.S. 190, 197 (1976); Clark v. Jeter, 486 U.S. 456, 461 (1988).

[26] *Craig*, 429 U.S. at 197; *id.* at 218 (Rehnquist, J., dissenting) (highlighting the Court's application "of an elevated or 'intermediate' level scrutiny" for classifications involving gender and stating that the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives"); *Clark*, 486 U.S. at 461 ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy").

[27] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 437 (1985); *see also* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366–67 (2001) (holding that disability-based classifications by states are subject only to rational basis review under the Equal Protection Clause); *see also* FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993) (describing rational basis as satisfied if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

[28] *See generally* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

The landmark case of *United States v. Carolene Products Co.* began the era of strict scrutiny for laws burdening certain suspect classes. In *Carolene Products Co.*, the Supreme Court subjected a milk regulation to deferential rational basis review.[29] Although the case itself involved a Due Process challenge, the Court's opinion laid the groundwork for modern Equal Protection analysis by suggesting heightened scrutiny may be appropriate for laws disadvantaging "discrete and insular minorities."[30] An important aspect, if not the most important aspect coming from the *Carolene Products Co.* decision, was Justice Stone's famous footnote. It suggested that a more rigorous form of scrutiny would be applicable to laws that burdened religious, racial, or other national minorities.[31] Justice Stone explained, "Prejudice against 'discrete and insular minorities' may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[32] While the footnote lay dormant for nearly 30 years, in the late 1960s, the Court suggested the potential of a standard for determining suspect class status, bringing back the footnote as a source of guidance.[33] This revival led to the implementation of factors used to determine a specific class's "suspectness."

While the Supreme Court has not articulated a definition of what "suspect" means, the term has developed through judicial interpretation under the Equal Protection Clause of the Fourteenth Amendment. The Court has relied on several recurring factors, including: 1) a history of discrimination, 2) political powerlessness, 3) "immutability" or the presence of immutable characteristics, and 4) whether the characteristic is relevant or not to an individual's ability to contribute to society.[34] These factors most notably appear in Justice Powell's plurality in *San Antonio Independent School District v. Rodriguez*.[35] Justice Powell articulated that: "Traditionally, 'suspect' classes are classes saddled with such disabilities, or subjected to such a history of purposeful unequal treatment or placed in such a position of

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[29] United States v. Carolene Products Co., 304 U.S. 144, 154 (1938).
[30] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 602–03 (7th ed. 2023) (explaining how Footnote 4 became the foundation for suspect class analysis under the Equal Protection Clause).
[31] *Carolene Products,* 304 U.S. at 152 n.4.
[32] *Id.*
[33] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict scrutiny to racial classifications and citing the Equal Protection Clause as central to protecting minority groups).
[34] Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); *see also* Frontiero v. Richardson, 411 U.S. 677, 686–88 (1973).
[35] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 19–25 (1973).

political powerlessness as to command extraordinary protection from the majoritarian political process."[36]

A quasi-suspect class occupies a middle ground under the Equal Protection Clause, which triggers intermediate scrutiny, a more searching judicial standard than rational basis review, but is less demanding than strict scrutiny.[37] The Supreme Court has generally designated gender and illegitimate children as quasi-suspect classifications, citing the classifications' immutable characteristics and history of targeted discrimination.[38] With intermediate scrutiny, the government must show that the challenged classification is substantially related to an important governmental interest, which reflects the Court's recognition that though not as deeply rooted or politically disabled as racial discrimination, some discriminated groups still merit heightened judicial scrutiny against discrimination by the government.[39]

ii. The Meaning of Disability

"Disability" has not always been the term used to describe individuals who have certain impairments in everyday life. Since the early 20th century, the term(s) "handicapped" or "handicap" encompassed what is known today as "disabled."[40] By 1915, the term "handicapped" was applied to disabled children and was then used to describe all disabled persons – both adults and children with physical and mental impairments – by 1958.[41] As time progressed, and with the passing of the ADA in 1990, "handicapped" began to fall out of favor– some even equating its offensiveness to the "N" word used to describe African Americans.[42] Today,

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[36] *Id.* at 28 (holding that wealth is not a suspect classification and education is not a fundamental right under the Equal Protection Clause, thus applying rational basis review to Texas's public school funding system).
[37] Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 761 (2014).
[38] *See Frontiero*, 411 U.S. at 688; *see also* Mathews v. Lucas, 427 U.S. 495, 505–06 (1976) (considering illegitimate children as quasi-suspect).
[39] Yoshino, *supra* note 22, at 764–67 (describing quasi-suspect classes as those deserving of a highly calibrated scrutiny); *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982) (reaffirming the use of intermediate scrutiny in evaluating sex-based classifications and recognizing that such classifications often reflect outdated stereotypes); Craig v. Boren, 429 U.S. 190, 197 (1976).
[40] *The Origins of "Disability" and its Application Under the ADA*, ROCKY MOUNTAIN ADA CTR. (Nov. 14, 2019), https://rockymountainada.org/news/blog/origins-disability-and-its-application-under-ada.
[41] *Id.*
[42] *Id.*

many within the disability community refer to "handicapped" as the "H" word, as it implies being held back or made lesser by society.[43]

This section provides historical and legal context for how the term "disability" has evolved in both language and doctrine. By tracing shifts in terminology and examining the lack of a consistent constitutional definition, this section highlights the ambiguity courts face when evaluating disability-based classifications. This discussion is essential to framing the article's central argument: that despite definitional inconsistencies, individuals with disabilities share the same characteristics with other protected classes, thus justifying a heightened level of scrutiny and therefore, individuals with disabilities deserve equal constitutional protection under the Equal Protection Clause.

In constitutional analysis, the term "disability" has not been given a consistent definition or application. As will be discussed in *Part III* of this article, the Supreme Court in *City of Cleburne v. Cleburne Living Center Inc.,* dealt with classifications based on intellectual disability without offering a comprehensive definition of the term.[44] Instead, the Court referred to such individuals as those with "mental retardation," a term that is now widely regarded as obsolete and offensive, both within and outside the disability community.[45]

While the Constitution itself does not define "disability," courts and legislatures have developed definitions of their own.[46] Most prominently, the ADA defines disability as "a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment."[47] In addition, "disability" is defined by regulation under the Rehabilitation Act of 1973 to have the same meaning as it does under the ADA.[48]

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[43] *Id.*; *see* Joshua D. Winner, *Disabling Language: Why Legal Terminology Should Comport with a Social Model of Disability*, 61 B.C. L. REV. 1183, 1183–84 (2020) (tracing the shift from terms like "feebleminded", "moron", and "handicapped" to modern preferred terminology, and noting that "handicapped" has increasingly become viewed as stigmatizing).
[44] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985).
[45] *Id.*; Winner, *supra* note 43, at 1201.
[46] Leslie Francis & Anita Silvers, *Perspectives on the Meaning of "Disability"*, AMA J. OF ETHICS (Oct. 2016), https://journalofethics.ama-assn.org/article/perspectives-meaning-disability/2016-10.
[47] 42 U.S.C. § 12102(1) (defining "disability" under the ADA); *see also* U.S. DEP'T OF JUST. CIV. RTS. DIV., *Guide to Disability Rights Laws*, https://www.ada.gov/resources/disability-rights-guide/ (Feb. 28, 2020).
[48] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Employment Protections Under the Rehabilitation Act of 1973: 50 Years of Protecting Americans with Disabilities*,

The caselaw that will be analyzed in the following sections of this note focuses primarily on mental disability. However, the ultimate recommendation – that courts apply heightened scrutiny to classifications based on disability – extends to all forms of disability, including physical disabilities, learning disabilities, and chronic health conditions, each of which involves impairments that limit major life activities.[49]

III. *CITY OF CLEBURNE V. CLEBURNE LIVING CENTER, INC.*

The Supreme Court established its controlling precedent governing the Equal Protection framework for disability classifications in *City of Cleburne v. Cleburne Living Center, Inc.*[50] In 1980, Jan Hannah purchased property in Cleburne, Texas intending to lease it to the Cleburne Living Center (CLC), for use as a group home for individuals with intellectual disabilities.[51] Under the city's zoning ordinance, a special use permit was required for this type of facility,[52] which the city intended to classify the group home as a "hospital for the feebleminded."[53] After a public hearing was held, the Cleburne City Council denied the special use permit.[54] CLC filed suit against the city, alleging a violation of the Equal Protection Clause.[55]

The federal district court upheld the ordinance as constitutional under rational basis review.[56] The district court found that intellectual disability was not a protected classification and the ordinance was "rationally related to the city's legitimate interests in 'the legal responsibility of CLC and its residents, . . . the safety and fears of residents in the adjoining neighborhood,' and the number of people to be housed in the home."[57] However, the district court pointed that "[if] the potential residents of the . . . home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance[.]"[58] On appeal, the Fifth Circuit reversed, holding that "mental retardation"

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https://www.eeoc.gov/employment-protections-under-rehabilitation-act-1973-50-years-protecting-americans-disabilities (last visited June 21, 2025).

[49] *Id.*

[50] Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 536 (2014) (arguing that disability rights litigation under the U.S. Constitution has largely failed to produce heightened scrutiny and has instead relied on statutory protections).

[51] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985).

[52] *Id.* at 436

[53] *Id.* at 436–37.

[54] *Id.* at 437.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

constitutes a quasi-suspect classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose, applying intermediate scrutiny.[59] Therefore, the Fifth Circuit struck down the ordinance as unlawful, finding its general terms and applicability to disabled individuals as unconstitutional.[60] The holding of the appellate court highlighted disability and disabled individuals' (1) historical mistreatment such as their denied admittance into U.S. public schools, (2) housing discrimination compared to other groups reflecting deep-seated prejudice, (3) political powerlessness evidenced by their exclusion from the political process highlighted by their disqualification from voting, and (4) immutability of the intellectually disabled condition as being "irreversible"[61] as factors for determining the higher level of scrutiny (the same factors introduced in section II of this note).

After the Supreme Court granted certiorari in January 1985, it ultimately issued a mixed ruling.[62] While the Court unanimously agreed with the appellate court that the City's ordinance was unconstitutional, a 6-3 majority declined to recognize disability as a suspect or quasi-suspect classification.[63] Instead, the Court held that classifications based on disability are subject only to rational basis review.[64] The Supreme Court's decision to vacate the district court's ruling effectively upheld the longstanding discrimination faced by individuals with disabilities and has offered minimal judicial protection for such individuals in the years since.[65] To assess why the Court declined to accord disability classifications intermediate scrutiny - and why that conclusion warrants reconsideration - it is necessary to revisit the Court's analytical framework in *Cleburne*.

Justice Byron White, writing for the majority holding the ordinance unconstitutional but declining to find disability as a quasi-suspect class, provided insight into why a heightened level of scrutiny was appropriate

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[59] Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191, 198, 200 (5th Cir. 1984) (internal quotation marks omitted), *aff'd in part, vacated in part*, 473 U.S. 432 (1985).
[60] Lila H. Swann, *Changing Times - Changing Minds: The Importance of Fighting for Higher Constitutional Protection for People with Intellectual Disabilities*, 12 CHARLESTON L. REV. 295, 306 (2018).
[61] *Id.*
[62] *Cleburne*, 473 U.S. at 435; *id.* at 451, 455 (Stevens, J., concurring).
[63] *Id.* at 435, 450 (majority opinion); *id.* at 451, 455 (Stevens, J., concurring).
[64] *Id.* at 442 (majority opinion).
[65] Swann, *supra* note 60, at 307.

for other classifications based on race, alienage, national origin,[66] and gender,[67] but not age or specifically here, disability.[68] The Court wrote:

> "[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued."[69]

In writing for the Court's majority, Justice White cited four reasons for the decision on how to classify mental disability under the Equal Protection Clause.[70] First, in rejecting intermediate scrutiny, the majority leaned on broad generalizations about intellectual disability, portraying the group as possessing "a reduced ability to cope with and function in the everyday world", and asserting that they are not "all cut from the same pattern" and are "different, immutably so".[71] According to the Court, while the state of Texas does have a responsibility to care for its citizens who are mentally disabled, the policy determinations in this area should rest with the state legislature and not the courts.[72] Second, the Court stated that legislative action on both the national and state level "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[73] To support this argument for legislative protection, Justice White cited the Education of the Handicapped Act enacted in 1975, and the Developmental Disabilities Assistance and Bill of Rights Act enacted

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

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

[68] *Waterstone*, *supra* note 50, at 536.

[69] *Cleburne*, 473 U.S. at 441–42.

[70] Swann, *supra* note 60, at 307; *Cleburne*, 473 U.S. at 442.

[71] Swann, *supra* note 60, at 307, 315 (quoting *Cleburne*, 473 U.S. at 442).

[72] Waterstone, *supra* note 50, at 537 (quoting *Cleburne*, 473 U.S. at 442–43) ("How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.").

[73] *Cleburne*, 473 U.S. at 433.

in 2000.[74] Third, with limited reasoning, the Court found that the mentally disabled are not politically powerless based off of the legislative responses mentioned above, which would not have come to life without public support.[75] Finally, the Court determined that should governmental classifications based on mental disability be provided higher scrutiny, there would be difficulty distinguishing other groups (the aging, the disabled, and 'mentally ill')[76] "who have perhaps immutable disabilities setting them off from others who cannot mandate the desired legislative response, and who can claim some degree of prejudice from at least part of the public at large."[77]

In response to the majority's rejection of disability as a quasi-suspect class, Justice Thurgood Marshall – joined by Justices William Brennan and Harry Blackmun – wrote a powerful dissent that challenged three of the majority's assumptions – 1) the rigidity of the majority's logic, 2) the failure to recognize the historical discrimination of disabled individuals, and 3) the view of disability having "political power."[78]

First, Justice Marshall denounced the majority's logic – which reasoned that protecting the disabled is a job best suited for the legislature, not the judiciary – by expressing "if the majority's logic were followed [and sound], heightened scrutiny would have to await a day when people could be cut from a cookie mold: Women are hardly alike in all their characteristics, but heightened scrutiny applies to them . . .."[79] Justice Marshall continued his argument by concluding, "[that] some retarded people have reduced capacities in some areas does not justify using retardation as a proxy for reduced capacity in areas where relevant individuals variations in capacity do exist."[80]

Next, Justice Marshall, in responding to the Court's reasoning that intellectually disabled citizens deserve no more than rational basis review, stated the Court diminished the historical discrimination of disabled individuals in America.[81] He stated, "the mentally retarded have been subject to a 'lengthy and tragic history'[82] of segregation and discrimination that can only be called grotesque."[83] Here, Justice Marshall was referencing

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[74] *Id.*
[75] *Id.* at 445.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 456, 463–66 (Marshall, J., concurring in the judgment in part and dissenting in part).
[79] *Id.* at 468.
[80] *Id.*
[81] *Id.* at 470.
[82] *Id.* at 461 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978)).
[83] *Id.*

the latter part of the nineteenth century when the mentally disabled were institutionalized, sterilized, and excluded from education as proof of a history of discrimination.[84] The dissent furthered the point that the Court's majority opinion "significantly failed intellectually disabled individuals by avoiding mentioning or considering the history of discrimination and segregation these individuals endured."[85]

Justice Marshall also took issue with the majority's view that disabled people are not considered as politically powerless as other groups.[86] While the majority of the Court pointed out the pieces of legislation passed, which were mentioned earlier, the dissent viewed this remedial legislation not as evidence of political power, but rather an evolution of cultural, political, and social patterns that will naturally come to be embodied in legislation.[87] Justice Marshall argued that it was not a faithful application of the Court's equal protection principles to characterize such progress as prohibiting heightened scrutiny.[88]

In conclusion, the Court's reasoning in Cleburne ultimately reinforced a view of disability as a distinct classification set apart from others.[89] By characterizing individuals with mental disabilities as having "a reduced ability to cope with and function in the everyday world",[90] declaring that "[t]hey are . . . different, immutably so,"[91] and asserting that "legislation . . . singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others",[92] Justice White's opinion conveyed the premise that people with intellectual disabilities constitute "a class of naturally inferior people."[93] This approach has received criticism from the disability community for its underlying assumption that society can be split into groups – normal versus abnormal – with people

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[84] *Id.* at 461–63.
[85] Swann, *supra* note 60, at 309.
[86] *Cleburne*, 473 U.S. at 472–73 (Marshall, J., concurring in the judgment in part and dissenting in part).
[87] *Id.* at 466 ("It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality.").
[88] *Id.* at 467 ("[E]ven when judicial action has catalyzed legislative change, that change certainly does not eviscerate the underlying constitutional principle. The Court, for example, has never suggested that race-based classifications became any less suspect once extensive legislation had been enacted on the subject.") (emphasis omitted).
[89] Waterstone, *supra* note 50, at 541.
[90] *Cleburne*, 473 U.S. at 442.
[91] *Id.*
[92] *Id.* at 444.
[93] 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, 105 (2001).

with mental disabilities being placed in the latter group and being portrayed as more similar to one another than to everyone else.[94] This framework readily assumes difference as proof of impairment, without confronting the role that social attitudes play in magnifying disability or recognizing that the behaviors cited are not confined to disabled individuals.[95] Even *Cleburne*'s depiction of a "reduced ability to cope with and function in the everyday world"[96] might reasonably be applied to groups such as "absent-minded professors, improvident artists, and unworldly religieuses."[97]

IV. STATE APPROACHES TO DISABILITY PROTECTION

Although the Court's decision in Cleburne set a troubling precedent by denying heightened scrutiny for disability-based classifications, there remains an alternative path forward to secure stronger constitutional protections against discrimination.[98] In the same year *Cleburne* was decided and in the decades since the decision, several states have recognized that disability-based classifications warrant more protection under their own state constitutions.[99] These state courts have acknowledged the barriers and stigma faced by disabled individuals and, in doing so, have applied heightened scrutiny under their own equal protection principles and provisions.[100] This innovation by the states underscores that disability, like other classifications historically targeted by prejudice, deserves more searching judicial review under the Equal Protection Clause – one that affirms the constitutional promise of equal protection for all. By looking to these state court frameworks, the federal courts have a model for reevaluating the level of protection afforded to disability classifications and fulfilling the broader goals of the Fourteenth Amendment.

Because of the precedent established by *Cleburne*, numerous states have mirrored the Supreme Court's reasoning by applying only rational

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[94] *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 105–06 (1990).
[95] Silvers & Stein, *supra* note 93, at 114 ("In many instances, [repercussions of disability] are mitigated or thoroughly relieved when the social environment accommodates physical and cognitive difference.").
[96] *Cleburne*, 473 U.S. at 442.
[97] Silvers & Stein, *supra* note 93, at 107 (emphasis omitted); Waterstone, *supra* note 50, at 541 (emphasis omitted).
[98] Daly v. DelPonte, 624 A.2d 876, 883 (Conn. 1993); Breen v. Carlsbad Mun. Schs., 2005-NMSC-028, ¶ 28, 138 N.M. 331, 340–41, 120 P.3d 413, 422–23; Clark v. Manuel, 463 So. 2d 1276, 1285–86 (La. 1985).
[99] *See, e.g.*, Clark v. Manuel, 463 So. 2d 1276, 1285–86 (La. 1985); Aztec Mun. Schs. v. Cardenas, 2024-NMSC-015, 549 P.3d 488 (holding heightened scrutiny applies to classifications based on disabilities).
[100] *Id.* at 496.

basis review to disability classifications in their equal protection jurisprudence.[101] However, some states have departed from the *Cleburne* approach and applied heightened scrutiny to disability classifications, determining that disability meets the criteria for suspect or quasi-suspect classification based on the factors outlined in *Rodriguez*.[102] States that have recognized disability as a suspect or quasi-suspect classification have done so under two distinct circumstances: first, where the state constitution's equal protection clause explicitly includes "disability" as a protected class;[103] and second, where disability is not mentioned in the constitutional text, but the courts have nonetheless interpreted more generally equal protection provisions to extend heightened scrutiny to disability-based classifications.[104] In this section, caselaw from Louisiana (whose constitution includes protections for classifications based on 'physical condition,' interpreted by its Supreme Court to encompass disability), Connecticut (which explicitly references disability), and New Mexico (which lacks such constitutional provisions) will be examined to present contrasting state approaches to disability protection under the Equal Protection Clause.

i. Louisiana

Under the Louisiana Constitution (1974), the state's "Right to Individual Dignity" clause reads:

> "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations..."[105]

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[101] *See, e.g.*, Gluba v. Bitzan & Ohren Masonry, 735 N.W.2d 713, 720 (Minn. 2007) (quoting in part Tennessee v. Lane, 541 U.S. 509, 522 (2004)) (holding "courts have not subjected classifications based on disability to heightened scrutiny" and to violate equal protection, the disability classification must "lack a rational relationship to a legitimate governmental purpose"); *see also* State *ex rel.* N.R. v. State, 967 P.2d 951, 956–57 (Utah Ct. App. 1998) (holding classification of parents based on mental disability is not a quasi-suspect or suspect class, and "does not offend equal protection because it is rationally related to a legitimate statutory purpose"); *see also* Schuff Steel Co. v. Indus. Comm'n of Arizona, 891 P.2d 902, 910 (Ariz. Ct. App. 1994) (holding the "handicap of mental retardation" is subject only to the rational basis test and not any other form of heightened scrutiny per *Cleburne*).

[102] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[103] *See, e.g.*, Daly v. DelPonte, 624 A.2d 876, 883 (Conn. 1993).

[104] *See, e.g.*, Aztec Mun. Schs. v. Cardenas, 2024-NMSC-015, 549 P.3d 488.

[105] LA. CONST. art. I, § 3.

While the language of the clause does not appear to include the term disability, the First Circuit Court of Appeal of Louisiana held that the term "'physical condition' refers to classifications on the basis of one's health or handicap" in *Revere v. Canulette*.[106]

Nearly one year after the decision of the Fifth Circuit in *Cleburne*,[107] holding that disability was a quasi-suspect classification and subject to intermediate scrutiny, the Supreme Court of Louisiana heard *Clark v. Manuel*.[108] This case raised the question of whether disability qualifies as a protected class under the state's equal protection guarantee.[109]

The Louisiana Supreme Court addressed whether a community home for individuals with intellectual disabilities violated residential building restrictions and whether a state statute requiring local approval for such homes infringed upon constitutional equal protection guarantees.[110] The Lafayette Association for Retarded Citizens (LARC) leased a residence in the Westgate Subdivision of Scott, Louisiana, intending to establish a community home.[111] Neighbors, C.J. and Lois Clark, sought to enjoin this use, citing restrictive covenants limiting properties to "single family dwellings" and alleging LARC's failure to obtain required site approval under La. Rev. Stat. Ann. § 28:478(C).[112] The Louisiana Supreme Court eventually held that the restrictive covenants objected to were not violated,[113] but more importantly, the court held that the statutory requirement for local approval imposed an unconstitutional burden on individuals with disabilities, violating the right to individual dignity clause of the state constitution.[114] Further, in finding that the requirement violated the right to individual dignity clause, the court recognized that the statute imposed an undue barrier to residential opportunities for a quasi-protected class and applied an intermediate form of scrutiny ("means scrutiny") to strike down the requirement.[115]

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[106] 97-0552, p. 6 (La. App. 1 Cir. 5/15/98), 715 So. 2d 47, 53.
[107] Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191, 198 (5th Cir. 1984), *aff'd in part, vacated in part*, 473 U.S. 432 (1985).
[108] 463 So. 2d 1276 (La. 1985).
[109] *Id.*
[110] *Id.* at 1278–79, 1282, 1284.
[111] *Id.* at 1278.
[112] *Id.*
[113] *Id.* at 1279.
[114] *Id.* at 1286.
[115] *Id.* at 1285–86 (noting the discriminatory impact of the statutory scheme and its failure to advance an important governmental interest).

In this case, Louisiana's highest court performed the typical analysis for a violation of the Fourteenth Amendment of the U.S. Constitution.[116] The court first addressed whether the act in question – here La. Rev. Stat. Ann. § 28:478(C) which required approval by the governing authority in Scott, Louisiana before forming the community home – disadvantaged a suspect class or infringed upon a fundamental right.[117] If either were true, the statute would be subject to heightened scrutiny (strict or intermediate), and the state would bear the burden of demonstrating that the law was narrowly tailored to further a compelling (or important) governmental interest.[118] If no suspect class or fundamental right is impacted, rational basis review is implemented where the act must only rationally further some legitimate state purpose, which rarely renders an act unconstitutional.[119]

In *Clark*, the court used guidance from the Fifth Circuit's decision in *Cleburne* to analyze the claim of the mentally disabled as a protected class.[120] In analyzing the decision from the Fifth Circuit, the Louisiana Supreme Court pointed out that no other appellate opinion had ever addressed the issue, so the *Cleburne* decision was the best support for this court to pursue its analysis under the state constitution.[121] A section of the *Cleburne* decision that the Louisiana court emphasized in *Clark* was the examination of the "several indicia" found in suspect classes, or the *Rodriguez* factors.[122]

In evaluating whether mental disability warrants heightened scrutiny under Louisiana's state equal protection clause, the state supreme court in *Clark v. Manuel* adopted the traditional indicia of suspect classification drawn from federal jurisprudence. Specifically, the court focused on three factors: (1) a history of discrimination, (2) the immutability of the trait, and (3) political powerlessness.[123] The following analysis explains how the court applied each of these factors in concluding that mental disability deserved elevated constitutional protection.

The Louisiana court looked to the factors of a history of unequal treatment or discrimination and immutability.[124] Relying on the Fifth Circuit's analysis in *Cleburne*, the court emphasized the pervasive and entrenched

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[116] *Id.* at 1284.
[117] *Id.* at 1282, 1284.
[118] *Id.* at 1284.
[119] *Id.*
[120] *Id.* at 1285.
[121] *Id.* at 1284–85.
[122] *Id.* at 1284–85; *see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973).
[123] *Clark*, 463 So. 2d at 1285.
[124] *Id.*

mistreatment of individuals with mental disabilities throughout the twentieth century.[125] It noted that until the 1970s, mentally disabled children were systematically excluded from public schools across the United States.[126] The court also pointed to the existence of mid-century efforts by some organizations to eliminate individuals with mental disabilities through euthanasia and compulsory sterilization.[127] Through this pattern of mistreatment, the court held that "mentally [disabled] persons have been segregated in remote, stigmatizing institutions, which has perpetrated the historical misunderstanding of such individuals and led to widespread fears and uncertainty."[128] The court held that a key element in the group's "quest for special consideration" was the immutability of their condition as mentally disabled individuals—meaning the trait cannot be changed or avoided by choice or effort—thus warranting special constitutional consideration.[129]

The court also evaluated the factor of political powerlessness. It recognized that individuals with mental disabilities have historically lacked meaningful access to the political process.[130] The court specifically observed that in many states, mentally disabled individuals had been categorically barred from voting.[131] This exclusion from one of the most fundamental mechanisms of democratic participation reinforced the court's conclusion that the group lacks sufficient political power to protect its own interests through the ordinary political process.[132] Because of this combination of factors, the Fifth Circuit concluded that any legislation that discriminates against persons with mental disabilities calls for heightened scrutiny.[133]

Additionally, the Louisiana court emphasized that heightened scrutiny is especially appropriate where, as in *Cleburne* and here in *Clark*, the statute makes it more difficult for a group to enjoy meaningful access to everyday aspects of community life – such as the ability to reside in a safe and inclusive home environment.[134] For the mentally disabled who are without

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[125] *Id.* at 1285.
[126] *Id.*
[127] *Id.* at 1285 n.13 (citing Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191, 197 (5th Cir. 1984)) ("Although euthanasia was rejected, thirty-two states have had statutes providing for the sterilization of [mentally disabled] individuals").
[128] *Id.* at 1285.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 1285–86.
[134] *Id.* at 1285 n.14. The Louisiana law reflected a pronounced legislative commitment to protecting the autonomy of individuals with mental disabilities. In La. Rev. Stat. Ann. § 28:476,

the care or presence of loved ones, or who lack access to other supportive living arrangements, resources like group homes are a principal, alternative option of living – providing stability, safety, and community.[135] When state law requires group homes to secure local governmental approval, it introduces obstacles that, as the Court recognized, "serve to exclude mentally [disabled] individuals from the community" and frustrate the "development of normal living patterns."[136] In the end, this circumstance justifies the application of heightened judicial review to classifications based on disability.

Several months after the Louisiana Supreme Court decision in *Clark*, the First Circuit Court of Appeal of Louisiana was posed with a similar question – whether a state regulation that required neighbor approval before the issuance of an occupancy permit to a group home violated the Louisiana Right to Individual Dignity Clause.[137] In *Special Children's Village, Inc. v. Baton Rouge*,[138] the Special Children's Village (hereinafter called the "Village") purchased three residential homes in Baton Rouge to provide living facilities for no more than six mentally disabled persons.[139] Despite the three facilities being in "substantial compliance" with State Department of Health and Human Resource requirements, the department refused to fully license the facilities since the city of Baton Rouge had refused to issue a permit to the Village.[140] The reasoning for the city's refusal was because the Village had not complied with a city ordinance which required special homes to submit "...verification and petition(s) of endorsement bearing the names, addresses, lot numbers and suitable property descriptions, and signatures of 51% of the property owners of record within a 1,000-foot radius of the proposed site," in order to be permitted.[141] After the Village sought and was granted a preliminary injunction to restrict the enforcement of the zoning ordinance as it pertained to the establishment of special homes, the city appealed.[142]

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the legislature expressly stated that people with mental handicaps should be able to live under conditions that impose the fewest necessary restrictions – specifically, within ordinary residential settings in the communities they called home. This declaration is also framed as a means of advancing the constitutional promise of personal dignity guaranteed by Article I, § 3 of the Louisiana Constitution of 1974.

[135] *Id.* at 1285.

[136] *Id.* at 1285–86.

[137] Special Child.'s Vill., Inc. v. City of Baton Rouge, 472 So. 2d 233, 235 (La. Ct. App. 1985); LA. CONST. art. I, § 3.

[138] 472 So. 2d 233, 234 (La. Ct. App. 1985).

[139] *Id.*

[140] *Id.*

[141] *Id.* (*quoting* BATON ROUGE, LA., CODE OF ORDINANCES, tit. 7, ch. III, §§ 2.119, 2.201) (1981)).

[142] *Id.*

On appeal, Louisiana's First Circuit affirmed the trial court's issuance of the preliminary injunction relying on the Louisiana Supreme Court's reasoning and analysis in *Clark*.[143] The court adopted the holding in *Clark* that mentally disabled persons are a "quasi-suspect" class and such government classifications are subject to heightened scrutiny.[144] In applying heightened scrutiny to the ordinance, the court found that it did not serve an important governmental objective and was not substantially related to achieving that objective.[145] While the city did not address an objective in enforcing the ordinance in its brief, the court discerned that the primary role of the ordinance was to give property owners the opportunity to approve or disapprove of the establishment of a special home in the neighborhood.[146] Comparing this objective to the objective from *Clark*, where § 28:476 gave the power of site approval to local governing authorities, the appellate court held the requirement of approval from neighbors was only to burden the mentally disabled citizens "quest to live in normal residential surroundings."[147] Thus, the ordinance failed heightened judicial review and was found constitutionally infirm.[148]

Notably, the U.S. Supreme Court issued *Cleburne* just one week after the Louisiana First Circuit's decision in *Special Children's Village, Inc.*—a ruling that applied heightened scrutiny to disability classifications.[149] Despite Cleburne's rejection of disability as a suspect class, the Louisiana Supreme Court reinforced the state's commitment to stronger state constitutional protections for individuals with disabilities by denying certiorari in *Special Children's Village, Inc.* on May 8, 1987.[150]

ii. Connecticut

The Connecticut Constitution's Equal Protection Clause reads: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."[151]

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[143] *Id.* at 235.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 432 (1985). *Special Children's Village, Inc.* was decided on June 25, 1985; *Cleburne* was decided on July 1, 1985.
[150] Special Child.'s Vill., Inc., v. City of Baton Rouge, 505 So. 2d 1144 (La. 1987).
[151] CONN. CONST. art. I, § 20.

In 1984 – the year prior to the U.S. Supreme Court's decision in *Cleburne* - Connecticut amended its state constitution to include "physical or mental disability" as a protected category, with the measure passing by a margin of 77.9% in the general election.[152] In 1993, eight years after the *Cleburne* decision, the Connecticut Supreme Court first addressed whether disability constituted a protected class under the state constitution in *Daly v. DelPonte*, a case involving a classification based on physical disability.[153]

In *Daly*, the plaintiff's (Edward Daly) operator's license was suspended by the defendant-commissioner of motor vehicles in August 1989 after the department was made aware that the plaintiff had suffered three seizures over a period of 33 months between 1987 and 1989.[154] The plaintiff requested a hearing to contest the suspension, and the hearing officer rendered a decision in January 1990 affirming the department's suspension.[155] The decision found that the plaintiff was not "a proper person to hold a Connecticut operator's license.[156] The plaintiff appealed the decision to both the superior court and the appellate court in Connecticut arguing that the decision to suspend his license lacked statutory authority and prejudiced the substantial rights afforded to him.[157] Both courts upheld the suspension and dismissed the plaintiff's appeal.[158] The plaintiff subsequently appealed to the Connecticut Supreme Court, who granted the petition for certiorari.[159]

On appeal, the Connecticut Supreme Court reversed, holding that the suspension of the plaintiff's driver's license violated his equal protection rights under the state constitution.[160] First, the court acknowledged that it was undisputed that the Department of Motor Vehicles' decision to impose conditions on the plaintiff's license was based solely on his status as a person with a medical disability.[161] Because the policy classified based on disability, the court held that the classification warranted strict scrutiny

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[152] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 432 (1985); *Commission on Human Rights and Opportunities: Connecticut Civil Rights Law Chronology*, CONN.'S OFF. STATE WEBSITE, https://portal.ct.gov/chro/commission/commission/connecticut-civil-rights-law-chronology (last visited June 15, 2025).
[153] 624 A.2d 876, 877, 880 (Conn. 1993).
[154] *Id.* at 878–79. The plaintiff was diagnosed with epilepsy during this 33-month period. *Id.* at 877.
[155] *Id.* at 879.
[156] *Id.*
[157] *Id.* at 879–80.
[158] *Id.*
[159] *Id.* at 880.
[160] *Id.*
[161] *Id.* at 882.

since any "state action [that] invidiously discriminates against a suspect class or affects a fundamental right . . . [must] pass[] constitutional muster" under the highest form of judicial scrutiny to be upheld.[162]

In coming to this decision, the court analyzed "amendment twenty-one," which added the disability language to the state equal protection clause.[163] In this analysis, the court concluded that the amendment's "explicit prohibition of discrimination because of physical disability defines a constitutionally protected class of persons whose rights are protected by requiring encroachments on these rights to pass a strict scrutiny test."[164] Thus, the Connecticut Supreme Court held where a statute designates certain individuals as protected from discrimination, any actions by the government which disadvantages that group are to be viewed as inherently suspect.[165] Additionally, the court examined the legislative history of the amendment, which supported the court's decision overall to apply heightened scrutiny.[166] Senator Howard T. Owens Jr. stated during Senate debates that "[w]here the court finds significant state action[,] it will subject...discrimination complaints to strict judicial scrutiny."[167] Additionally, the court observed that Representative Richard D. Tulisano described the amendment on the House floor as one that would mandate strict-scrutiny review of classifications involving physical or mental disability.[168] From this legislative insight, the court concluded that the amendment's "protection for those possessing . . . disabilities identifies the members of this class as a group especially subject to discrimination and requires the application of the highest standard of review to vindicate their constitutional rights."[169]

After deciding the classification was suspect and strict scrutiny review was warranted, the court held that while the state had a compelling interest in highway safety, it found that the Department's action was not narrowly tailored to serve that interest.[170] The Department's order suspending the plaintiff's license was defective because "it lack[ed] support from an appropriately structured administrative inquiry into the proper scope of post

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[162] *Id.* at 883.
[163] *Id.* at 883–84.
[164] *Id.* at 883 (footnote omitted). *See generally* Robert I. Berdon, *Connecticut Equal Protection Clause: Requirement of Strict Scrutiny when Classifications Are Based upon Sex, Physical Disability or Mental Disability*, 64 CONN. BAR J. 386, 386–94 (1990).
[165] *Daly*, 624 A.2d at 883.
[166] *Id.*
[167] *Id.* at 883–84; 26 S. Proc., Pt. 9, 1983 Sess., p. 3170, remarks of Senator Howard T. Owens, Jr.
[168] *Daly*, 624 A.2d at 884; 26 H.R. Proc., Pt. 11, 1983 Sess., p. 3975, remarks of Representative Richard D. Tulisano.
[169] *Daly*, 624 A.2d at 884.
[170] *Id.* at 884–85.

reinstatement conditions tailored to the condition of this plaintiff."[171] For this reason, the classification failed strict scrutiny.

iii. New Mexico

As seen above, states like Louisiana and Connecticut have language in their state constitutions which include protections for individuals with disabilities ("physical condition" in Louisiana, "disability" in Connecticut) and apply heightened judicial review to such classifications under equal protection principles.[172] However, the state of New Mexico lacks any mention of disability in its state equal protection clause, but its courts apply heightened scrutiny to disability claims under the clause.[173]

The New Mexico equal protection clause reads: "...nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person."[174]

In April 2024, the New Mexico Supreme Court granted certiorari to review a decision concerning whether provisions in the Workers' Compensation Act, which "treat[ed] workers with mental impairments differently than workers with physical impairments" or able-bodied workers, violated the equal protection clause of the New Mexico Constitution.[175]

In *Aztec Mun. Sch. v. Cardenas*, the plaintiff injured her knee in the course of her employment as a special education teacher.[176] As a result of her injury, the plaintiff had a physical impairment to her knee and a secondary mental impairment, both caused by the injury to her knee.[177] After the plaintiff filed a workers' compensation claim, a Workers' Compensation Judge awarded the plaintiff permanent partial disability (PPD) benefits for her knee injury for a duration of 150 weeks, as allowed under statute.[178] Additionally, the act limits the maximum period of PPD benefits for a secondary mental impairment to "the maximum period allowable for the

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[171] *Id.* at 885.
[172] Revere v. Canulette, 97-0552, p. 4-5 (La. App. 1 Cir. 5/15/98), 715 So. 2d 47, 51–52. *Daly*, 624 A.2d at 882–84.
[173] N.M. CONST. art. II, § 18. Aztec Mun. Schs. v. Cardenas, 2024-NMSC-015, ¶¶ 9, 17, 549 P.3d 488, 493, 495.
[174] N.M. CONST. art. II, § 18 (stating both the state's equal protection clause and due process clause).
[175] *Cardenas*, 2024-NMSC-015, ¶ 1, 549 P.3d 488, 491.
[176] *Id.* at ¶ 2, 549 P.3d at 491.
[177] *Id.* at ¶ 2, 549 P.3d at 491.
[178] *Id.* at ¶ 3, 549 P.3d at 491; *see* N.M. STAT. ANN. § 52-1-43(A)(30) (2003) (limiting the compensation benefits a worker may receive for a knee injury to 150 weeks).

disability produced by the physical impairment."[179] Therefore, since the maximum period allowed for her physical injury to her knee was 150 weeks, the judge limited the plaintiff's recovery for her secondary mental impairment to 150 weeks.[180] The plaintiff appealed the decision – arguing that limiting the duration of the allowed benefits for secondary mental impairments to the maximum allowable duration of benefits for the original physical impairment violated the equal protection clause of the New Mexico Constitution.[181] Further, the plaintiff argued that this decision violated the equal protection clause because subsequent physical impairments are assessed as separate and distinct injuries, while secondary mental impairments are not.[182] The New Mexico Court of Appeals agreed, holding that the provisions of the Workers' Compensation Act that limited the compensation allowed for disability benefits violated the state equal protection clause since "the duration of compensation for workers who have secondary mental impairments is determined differently than it is for workers with subsequent physical impairments."[183]

After the New Mexico Supreme Court granted certiorari, it affirmed the decision of the appellate court holding that the Workers' Compensation Act violated the state constitution's equal protection clause.[184] The court performed a three-step equal protection analysis examining 1) whether the legislation creates a class of similarly situated individuals who are treated differently, 2) what level of constitutional scrutiny should be applied to the disparate treatment created by the statutory provisions, and 3) whether the disparate treatment created is properly related to the government's interest.[185]

First, the court found that the plaintiff, who had a secondary mental impairment, was similarly situated to workers with secondary physical impairments because both suffered distinct, compensable injuries stemming from work-related incidents that impaired their ability to earn a wage.[186] Further, the court concluded that the plaintiff was disparately treated, as her PPD benefits for her secondary mental impairment were limited to the

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[179] *Cardenas*, 2024-NMSC-015, ¶ 3, 549 P.3d 488, 491; s*ee* N.M. STAT. ANN. § 52-1-42(A)(4) (2015).
[180] *Cardenas*, 2024-NMSC-015, ¶ 3, 549 P.3d 488, 491–92.
[181] *Id.* at ¶ 4, 549 P.3d at 492.
[182] *Id.* at ¶ 4, 549 P.3d at 492.
[183] *Id.* at ¶ 4, 549 P.3d at 492.
[184] *Id.* at ¶ 23, 549 P.3d at 497–98.
[185] *Id.* at ¶ 11–21, 549 P.3d at 493–97.
[186] *Id.* at ¶ 11–12, 549 P.3d at 493–94.

duration of the original physical injury, whereas employees with secondary physical impairments are compensated separately.[187]

Second, after finding that the state statute created a class of similarly situated individuals who were treated differently, the court moved on to determining what level of constitutional scrutiny should be applied to the classification.[188] In the past, the court had applied intermediate scrutiny to classifications based on mental disabilities since "such persons are a sensitive class."[189] In *Breen v. Carlsbad Mun. Sch.*, the court found that intermediate scrutiny was most applicable to such classifications since "[t]he historical discriminatory treatment of persons with mental disabilities shows that the courts should be sensitive to possible discrimination...contained in legislation that purports to treat them differently based solely on the fact that they have a mental disability."[190] In addition, courts should be sensitive to such persons not because their characteristics prevent them from functioning in society, but "because of [the] external and artificial barriers created by societal prejudice."[191] The stigma associated with mental disability has also caused such individuals to be excluded politically "based on a characteristic beyond their control."[192] Thus, the court in *Cardenas* reaffirmed that the pervasive stigma and entrenched societal barriers facing individuals with mental disabilities continue to justify the application of intermediate scrutiny to laws that classify on this basis.[193]

Third, in applying intermediate scrutiny, the court analyzed whether the classification under the statute is substantially related to the government's interest.[194] The court held that the government's interest in "contain[ing] costs" did not justify the disparate treatment caused by the provisions of the statute.[195] Because of this, the Workers' Compensation Act failed intermediate scrutiny, and was thus unconstitutional.[196]

In conclusion, the state of New Mexico, under its equal protection clause, has prioritized protecting individuals with mental disabilities by

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[187] *Id.* at ¶ 13–16, 549 P.3d at 494–95.
[188] *Id.* at ¶ 17, 549 P.3d at 495.
[189] *Id.* at ¶ 17, 549 P.3d at 495–96.
[190] Breen v. Carlsbad Mun. Schs., 2005-NMSC-028, ¶ 28, 138 N.M. 331, 340–41, 120 P.3d 413, 422–23.
[191] *Cardenas*, at ¶ 18, 549 P.3d at 496 (quoting *Breen*, at ¶ 20, 138 N.M. at 338, 120 P.3d at 420).
[192] *Id.* at ¶ 18, 549 P.3d at 496 (quoting *Breen*, at ¶ 22, 138 N.M. at 339, 120 P.3d at 421).
[193] *Id.* at ¶ 17–18, 549 P.3d at 496.
[194] *Id.* at ¶ 19–21, 549 P.3d at 496–97.
[195] *Id.* at ¶ 21, 549 P.3d at 497 (citing Rodriguez v. Brand W. Dairy, 2016-NMSC-029, ¶¶ 33, 34, 378 P.3d 13, 27–28; *Breen*, at ¶¶ 34, 47, 138 N.M. at 342, 344, 120 P.3d at 424, 426).
[196] *Id.* at ¶¶ 22–23, 549 P.3d at 497–98.

employing heightened scrutiny since the group has been "subjected to a history of discrimination and political powerlessness based on a characteristic or characteristics beyond the individuals' control . . . ."[197]

V. CONCLUSION

The Supreme Court's refusal in *City of Cleburne v. Cleburne Living Center* to recognize disability as a suspect or quasi-suspect classification has left millions of Americans vulnerable to government-sanctioned discrimination with minimal to no judicial oversight.[198] By relegating disability-based classifications to rational basis review, federal equal protection doctrine continues to reflect outdated assumptions rather than modern understandings of disability as a historically marginalized and socially constructed identity.[199]

In contrast, a growing number of state courts and legislatures have taken a more proactive, progressive approach. Jurisdictions such as Louisiana, Connecticut, and New Mexico have interpreted their state constitutions to apply heightened scrutiny to disability classifications, acknowledging the long history of discrimination, political powerlessness, and immutable nature of disability.[200] These decisions reveal a critical disconnect between federal doctrine and the lived realities of disabled Americans.

The federal judiciary should take note. Recognizing disability as at least a quasi-suspect class would not only align equal protection doctrine with Congress's intent in enacting the ADA, but would also restore a meaningful judicial check against discriminatory laws by employing a heightened level of judicial scrutiny. Until then, state constitutional law may continue to serve as both a refuge and a roadmap—offering insight into how federal courts might one day correct course and fulfill the Fourteenth Amendment's promise of equal protection for all.

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[197] *Breen*, at ¶ 21, 138 N.M. at 338–39, 120 P.3d at 420–21.
[198] *See supra* note 50 and accompanying text.
[199] *See supra* note 50 and accompanying text.
[200] *See supra* notes 118, 137, 163 and accompanying text.