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Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification

Anita Silvers

Michael Ashley Stein

DISABILITY, EQUAL PROTECTION, AND THE SUPREME COURT: STANDING AT THE CROSSROADS OF PROGRESSIVE AND RETROGRESSIVE LOGIC IN CONSTITUTIONAL CLASSIFICATION†

Anita Silvers*
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This Article compares current disability jurisprudence with the development of sex equality jurisprudence in the area of discrimination. It demonstrates that current disability law resembles the abandoned, sexist framework for determining sex equality and argues that disability equality cases should receive similar analysis as the more progressive, current sex equality standard. As such, the Article attempts to synthesize case law (14th Amendment Equal Protection jurisprudence) and statutory law (Title VII and the ADA) into a comprehensive overview of the state of current disability law viewed within the context of discrimination law in general.

INTRODUCTION

Disability as a classification for equal protection stands at a jurisprudential crossroads. The path traveled by the Supreme Court in the handful of cases addressing individuals with disabilities, whether Justice Holmes's infamous justification of state imposed sterilization on the ground that "[t]hree generations of imbeciles are enough,"[1] or its more recent holdings interpreting

* Professor of Philosophy, San Francisco State University. B.A. 1962, Sarah Lawrence College; Ph.D. 1967, The Johns Hopkins University.

** Assistant Professor of Law. B.A. 1985, New York University; J.D. 1988, Harvard Law School; Ph.D. 1998, Cambridge University (U.K.); College of William & Mary; National Institute of Disability Rehabilitation and Research Switzer Fellow (2001–02).

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1. Buck v. Bell, 274 U.S. 200, 207 (1927).

provisions under the Americans with Disabilities Act (ADA),[2] is analogous to the course pursued by the Court more than half a century ago when adjudicating women's rights.[3]

Specifically, the Court adopted biological classifications for disability and sex,[4] respectively, that were rooted in empirically incorrect stereotypes established by social convention, rather than based in fact.[5] Yet over the intervening half century, limitations on women's participation in society, based on unfounded stereotypes about their biological differences, have come to be viewed as unacceptable.[6] Enabling this transformation was a shift in the legal conceptualization of sex-based roles, facilitated by the Supreme Court's adoption of an empirically grounded methodology for claims about women and their abilities. For instance, the 1973 *Frontiero v. Richardson*[7] decision held as a general empirically verified proposition that one's sex was frequently unrelated "to ability to perform or contribute to society."[8] The Court's 1982 ruling in *Mississippi University for Women v. Hogan*[9] observed that certain sex-based differential treatment was not factually verifiable as related to an important governmental interest and was thus merely a codification of empirically unsubstantiated social conventions.[10] As a result, notions that automatically assigned women to certain roles,

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2. 42 U.S.C. § 12001 (1994). The Court's ADA opinions are set forth below in Part III.B.

3. Discussed below in Part I.

4. The term "sex" refers to biological difference, as opposed to "gender" which refers to assigned social roles. *See* SUSAN S.M. EDWARDS, SEX AND GENDER IN THE LEGAL PROCESS (1996); Katherine O'Donovan, *Legal Construction of Sex and Gender*, *in* SOURCEBOOK ON FEMINIST JURISPRUDENCE 171 (1997). A more general perspective is provided in KATHARINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY (2d ed. 1998).

5. A strong analogy also extends to race. Nevertheless, popular treatment of sex and disability (as opposed to race) dovetails more closely in that they are grounded in paternalism rather than in animus, *see generally* Michael Ashley Stein, *Employing People with Disabilities: Some Cautionary Thoughts for a Second-Generation Civil Rights Statute*, *in* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 51 (Peter David Blanck ed., 2000) [hereinafter Stein, *Employing People With Disabilities*]. As such, the majority of our assertions about disability classification are formulated through comparisons with the historical treatment of women.

6. *See generally* JUDITH A. BAER, WOMEN IN AMERICAN LAW: THE STRUGGLE TOWARD EQUALITY FROM THE NEW DEAL TO THE PRESENT (2d ed. 1996); ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES (1975); ALBERT KRICHMAR, THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES, 1848–1970 (1972); WOMEN'S RIGHTS IN THE UNITED STATES: A DOCUMENTARY HISTORY (Winston E. Langley & Vivian C. Fox eds., 1994).

7. 411 U.S. 677 (1973).

8. *Id.* at 686.

9. 458 U.S. 718, 718 (1982).

10. Ironically, the issue in *Hogan* was a policy of the state-sponsored university limiting enrollment in its nursing program to women. *Id.*

and precluded their participation in others based on stereotypes of their deficient competence, have been replaced by a standard which assumes that women as a class are as competent as men, notwithstanding that there are sub-classes of women who are not competent to perform some of the same tasks as most men.[11]

Thus, for over the past half century, jurisprudential methodology for deciding what properties are, in fact, collectively characteristic of women has progressed by adopting an empirically-based framework for making these judgments. No similar transformation has advanced jurisprudential methodology in regard to the disability classification. A medical account of disability,[12] one that resembles outdated medical views about the inherent frailty of women's bodies and instability of their minds and emotions,[13] remains influential in legal thinking. This persistence occurs despite mounting evidence, increasingly acknowledged in political, cultural, and academic realms, of the errors in equating biological atypicality with inherent limitation and inability.[14] This evidence

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11. An explanatory footnote on nomenclature is warranted. Throughout this Article, we give "incompetent" its common meaning of not possessing the necessary ability or capacity, rather than its specialized legal meaning of not possessing the ability or capacity to make decisions in one's own interest. We do, however, borrow the contextualization of competence from its legal usage. Thus, for us, competence is to be assessed relative to the kinds of activities in which an individual proposes to engage. For example, L.C., the plaintiff in *Olmstead v. L.C.*, 527 U.S. 581 (1999), which we discuss in greater detail in Part III, was competent to live in the community and receive medical services there. Some disability advocates may fear the implications for seriously disabled individuals, especially for mentally retarded people, of disconnecting the disability classification from characterizations of incompetence. To the contrary, doing so permits our thinking about these groups to expand by attending to how they express their personal agency. For instance, in *EEOC v. CEC Entertainment, Inc.*, 2000 U.S. Dist. LEXIS 13934 (W.D. Wis. March 14, 2000), an ADA employment action against the Chuck E. Cheese's restaurant chain, plaintiff was a retarded speech-impaired worker. Nevertheless, the court permitted the case to turn on evidence of the plaintiff's competent execution of his work and his competent choice to hold a job. *Id.* at *2, 15–17.

12. Particularly notable among the voluminous literature describing this model of disability are the writings of Paul K. Longmore and Harlan Hahn. A succinct exegesis is provided in Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341 (1993).

13. *See generally* Harlan Hahn, *Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN'S STUD. 97 (1994).

14. *See* Joetta L. Sack, *State Board Candidate Sets out to Defy Expectations*, 17 EDUCATION WEEK 36 (May 20, 1998), (recounting how Abbey Marie Sanchez, a college graduate with Down Syndrome, ran for election to the New Mexico Board of Education); Michael Arkush, *'Life' Fulfills her Dream*, L.A. TIMES, March 28, 1992, at F1 (describing the soap opera acting career of Andrea Friedman, a person with Down Syndrome). A good overview of what life with Down Syndrome may be like is provided, autobiographically, by JASON KINGSLEY & MITCHELL LEVITZ, COUNT US IN: GROWING UP WITH DOWN SYNDROME (1994). Although generally sanguine, the authors disagree with each other over the extent to which social awareness has improved.

has not overcome the continuing authority granted to the conceptual conventions of welfarist legal categories which cast people with disabilities in the role of social incompetents who are characteristically dependent upon public assistance.[15] As a result of these static underlying assumptions, the methodology for assessing disability as a classification still depends on out-of-date notions rooted in empirically unsubstantiated social conventions.

One of the clearest examples of this phenomenon was the Supreme Court's 1985 decision in *City of Cleburne v. Cleburne Living Center, Inc.*,[16] where the Court explicitly relied on custom and an existing welfarist statute to characterize the disability classification.[17] The Court failed to notice that the statute in question was based on unsubstantiated assumptions about disabled people's limitations and found it unnecessary to rule whether the permit requirement was facially invalid when the mentally retarded are involved.[18] The effect of allowing this retrogressive method of equating biological anomaly with generalized limitation has been the imposition of a disability classification that presupposes incompetence.[19]

The legislative history and findings of the ADA clearly demonstrate that Congress intended to rebut the assumptions underlying the *Cleburne* decision and establish for the disabled an antidiscrimination classification methodology analogous to that applied

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15. *See infra* Part III.

16. 473 U.S. 432 (1985).

17. In *Cleburne*, the Court ruled that "the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review." *Id.* at 442. Consequently, statutes and practices that disadvantage mentally retarded people by treating them differently do not have to meet the standard of substantially furthering an important governmental purpose. Instead, the classification need only be rationally related to a legitimate state purpose because individuals in the "group affected . . . have distinguishing characteristics relevant to interests the State has the authority to implement." *Id.* at 441. While it is true that the different standards of scrutiny partially account for the different ways in which the Court treats the sex and disability classifications, we argue that the Court's basis for applying different standards is flawed. We argue that in *Cleburne* and in subsequent decisions that deal with the disability classification, the Court uses retrogressive thinking, reminiscent of its earlier mistaken thinking about the characteristics of women, to mistakenly attribute characteristics that would justify disadvantageous differential treatment to the population of the disability classification. If the Court's thinking about the distinguishing characteristics of the population of the disability classification is mistaken, as we argue here, its basis for denying that differential treatment of the classified group need not meet the heightened scrutiny standard of substantially furthering an important governmental purpose is undercut.

18. *Id.* at 447–50. The *Cleburne* decision, and its consequences, are discussed in Part II. For a more thorough treatment of the artificial nature of limitations, see Anita Silvers, *Formal Justice, in* ANITA SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13 (1998).

19. We elaborate on this point in Parts I and II.

to groups differentiated on the basis of race or sex.[20] Nevertheless, Congress was negligent when drafting the statute, for it adopted without alteration (in part as the result of a political compromise among cross-disability rights groups and groups that represent people with specific disabilities)[21] the definition of disability from the Rehabilitation Act.[22] As a result, although the definition itself was meant to be neutral, that is, not read within the context of the Rehabilitation Act, the legal-cultural accretion of established welfarist classification continues to influence post-ADA Supreme Court decisions. Accordingly, the prevailing characterization of people with disabilities as a group is one of incompetence.[23]

The current disability classification, therefore, is analogous to the retrogressive conceptualization of sex that is now acknowledged as "outmoded." The Supreme Court's disparate jurisprudence regarding the constitutional classification of groups of biologically different individuals is not, however, unavoidable. As a matter of logical consistency and out of concern for judicial uniformity, the Court could acknowledge and amend the retrogressive methodology that continues to be applied to people with the biological differences that historically have been called disabilities.

Specifically, the Court could hold that when examining statutes or practices affecting the disabled, courts should begin from the same baseline utilized for assessing the rights of women. Subsequent examination of whether disabled individuals in general, as distinct from a carefully drawn and substantiated subcategory of the classification, are biologically unable to execute particular social functions would then be grounded in an empirical analysis rather than reliant upon social convention. Such action would be in line with the judicial conservatism typifying the majority of the current Justices,[24] for it would compel methodological consistency in the Court's treatment of groups that

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20. Discussed below in Part III.

21. *See generally* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991); Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP. L. REV. 471 (1991).

22. 29 U.S.C. § 794 (1974). The tripartate definition is also utilized in the Fair Housing Act, 42 U.S.C. § 3601 (1968).

23. *See infra* Part III.

24. *See* Richard J. Pierce, *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995) (criticizing the Court's unquestioning reliance "on the abstract meaning of a particular word or phrase").

are candidates for constitutional protection from discrimination. Nor would application of this standard require the Court to engage in dramatic social engineering, for only empirically proven premises about the disabled would be upheld.

Thus, we propose a uniform methodology that appeals to fact rather than to custom. While some legal scholars hold that all legal categories are nothing more than social construction,[25] we believe that no legal classification should impose unsubstantiated or stereotypical beliefs about the definitive characteristics of members of the class, or beliefs that cannot be generalized, even if such beliefs are customary or culturally embedded.[26] Our point here being strictly methodological, we have not attempted to construct the disability class or determine its attributes.[27] We treat these aspects elsewhere, with particular attention to the analogues between disability and genetic identity and race in the social construction of classifications.[28] For now, simply as a matter of juridical uniformity, we assert that the criteria for establishing whether a classification of citizens is accurately drawn should be applied in an unbiased and logically consistent manner.

We demonstrate that the methodology utilized by the Court in regard to the disability classification does not meet even this standard. Instead, the Court continues to rely upon an outmoded framework that is incompatible with the model they apply to

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25. For example, Kimberlé Crenshaw argues that even classifications meant to protect against social prejudice are not themselves free from bias because they are artifacts of a biased society. Thus, individuals who fall into the intersect of two minority categories, such as black women, may not be protected by legislation designed for either group because they are situated differently from white women with respect to suffering from sex-based harms, and differently from black men with respect to suffering from employment-related harms. *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

26. Thus, we agree with commentators asserting the social origins of many categories, but diverge from them to the extent that we believe classifications can and ought to be based upon empirical fact. *See generally* CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS (1988); Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237; Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusions, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

27. We also do not enter into the debate over the proper role of the Court in interpreting congressional intent. For differing accounts of what that role ought to be, *see generally* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION (2000); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS (1997); Ruth Colker & James Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).

28. Anita Silvers & Michael Ashley Stein, *An Equality Paradigm for Preventing Genetic Discrimination*, 55 VANDERBILT LAW REVIEW (forthcoming). The authors of this Article will pursue the analogue to race in a future collaboration.

women's biological differences. Consequently, we suggest an approach through which the Supreme Court can amend its retrogressive methodology and achieve jurisprudential consistency.

Part I of this Article compares concepts of discrimination arising from individuals' sex and disabilities as expressed in two contrasted Supreme Court opinions. Although facially dissimilar, both cases were governed by views restricting the social participation of certain individuals based on their group identities.

Part II continues this examination by explicating and critiquing the Court's classification of disability in *Cleburne*. This framework established incompetence as a presumptive characteristic of membership in the disability classification.

Part III describes Congress's intent to respond to the *Cleburne* framework in discrimination classification, as evidenced in its formulation of the ADA. In spite of this objective, Congress's wholesale adoption of the Rehabilitation Act's disability definition into the ADA classification imported an inappropriate conceptualization of disability into civil rights law.[29] While the definition itself is carefully neutral, the ADA has inherited not only the definition's language but also the social and juridical interpretations that contextualize it in the context of the Rehabilitation Act. The repercussions of that bequest are demonstrated by the post-ADA decisions wherein the Court has continued to apply the *Cleburne* framework which presumes incompetence as the dominant characteristic of a disability classification. As a result, judicial treatment of disability as a classification diverges illogically from its handling of other constitutional classifications.

Part IV advocates that the Court correct its logically inconsistent classification of biologically different groups by applying a uniform methodology. Such emendation will not result in special protections for the disabled. Rather, it will extend to that group the same model of factual enquiry applied to other classifications correlated with biological difference.

In conclusion, Part V defends the Court against the charge of mistaking socially conventional classifications for natural kinds and argues that the Court's retrogressive logic is prompted by exactly the reverse error. Rectifying such error requires commitment to the principle that empirical reality overrides the stipulation of social conventions, as well as willingness to study how the general facts about the capabilities of disabled people have evolved over time.

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29. *See infra* Part III.

I. COMPARING CONCEPTS OF SEX AND DISABILITY DISCRIMINATION

In *Goesart v. Cleary*,[30] the Supreme Court upheld as obvious[31] the constitutionality of a Michigan statute requiring that bartenders be licensed but prohibiting the licensing of women as "barmaids,"[32] unless they were either the spouses or daughters of male liquor establishment owners.[33] The Court deemed Michigan reasonable in excluding all women lacking patronage from close male family members from this profession.[34] Despite acknowledging that the preceding (depression and war) years had brought "vast" social and legal changes to women's status,[35] the Court held that to restrict a profession mainly to men by state action does not violate the Constitution because equal protection does not mean equal treatment for individuals whose situations are "different in fact or opinion."[36]

No matter how adroit a woman might be at pouring drinks, or how competent at tallying sums, to the Court her situation could not help but be different from a man's.[37] For the Justices, the mere thought of a female dispensing drinks evoked the image of a "sprightly and ribald" Shakespearean alewife.[38] They believed that the mere presence of a female dispensing intoxicating beverages behind a bar could not help but raise "moral and social problems" which the state intended to prevent.[39] Only the "oversight" of a male with special interest in both the woman's welfare and the protection of bar room property, "assured through ownership of a bar

30. 335 U.S. 464 (1948).

31. Justice Frankfurter opined that the issue raised "need not detain us long," for it "is one of those rare instances where to state the question is in effect to answer it." *Id.* at 465.

32. Presumably the female equivalent of a male bartender, the Court refers to this job description as "a historic calling," once essential to the "social life of England." *Id.* Ironically, although this term does not appear in the gender-neutral language of the Michigan statute, 1945 Mich. Pub. Acts, No. 133, Sec. 19a, it is also utilized by Goesart's counsel. *See* Appellants' Brief, Goesart v. Cleary, 335 U.S. 464 (1948) (on file with authors).

33. The statute applied to cities having populations of 50,000 or more. *Goesart*, 335 U.S. at 465 (citing 1945 Mich. Pub. Acts, No. 133, § 19a).

34. *Id.* at 466.

35. These advances are described by the Court as "[t]he fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced. . . ." *Id.*

36. *Id.* (quoting Tigner v. Texas, 310 U.S. 141, 147 (1940)).

37. *See id.* at 465.

38. *Id.*

39. *Id.* at 466.

by a barmaid's husband or father,"[40] could be trusted to minimize "hazards" otherwise confronting an unprotected barmaid.[41]

Because the line drawn by the Michigan legislature was not wholly lacking reason,[42] the Court held that the disadvantage that the statute imposed on most women did not call its constitutionality into question. However possibly "unchivalrous" or exclusionary it might be,[43] equal protection consideration could not reach this purpose[44] because the state had a rational interest both in protecting women from the limitations of their ability to defend themselves[45] and in protecting the public from disruptions provoked by the mere presence of women in a potentially raucous, uncontrolled environment.[46]

Fifty years later, the Supreme Court first addressed the ADA in *Bragdon v. Abbott*.[47] In *Bragdon*, the Court held that Abbott, an HIV-positive dental patient, was disabled within the terms of the statute and therefore protected from disability discrimination. While the ultimate significance of the ruling has been subject to varying interpretations,[48] the assumptions underlying the decision are revealing. The Court found that Abbott, although asymptomatic, was disabled. The ADA's application of the Equal Protection Clause's general requirement of access to public accommodation compelled Bragdon to fill Abbott's cavities in his office rather than in a hospital setting,[49] unless objective medical evidence confirmed Bragdon's trepidation that treating Abbott in the office as other patients were treated fell beyond the ADA's reach because it

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40. *Id.*

41. *Id.*

42. The distinction between requiring women to withdraw from tending bar but not from serving as waitresses, was likewise challenged on Constitutional grounds, but summarily dismissed. *Id.* at 465 (1948).

43. Presumably the legislature's desire was to give returning male veterans a monopoly on the occupation of bartending. For an account of the role of women in the labor force during World War II, see PENNY COLMAN, ROSIE THE RIVETER: WOMEN WORKING ON THE HOME FRONT IN WORLD WAR II (1995); SHERNA BERGER GLUCK, ROSIE THE RIVETER REVISITED: WOMAN, THE WAR, AND SOCIAL CHANGE (1987).

44. *Goesart*, 335 U.S. at 466.

45. *Id.*

46. *Id.*

47. 524 U.S. 624 (1998).

48. A thoughtful treatment of this issue is pursued by Mark Kelman, *Does Disability Status Matter?*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 91 (Leslie Pickering Francis & Anita Silvers eds., 2000). Two other especially good analyses are Samuel A. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA. L. REV. 397 (2000), and Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279 (2000).

49. *Bragdon*, 524 U.S. at 629.

constituted a "direct threat" to his welfare.[50] As to this last matter, the Court remanded the case for a factual finding, but this action was largely pro forma, for the Center for Communicable Diseases and the American Dental Association were on record as finding ordinarily available office setting precautions to be adequate.[51]

Why, then, did Abbott's biological difference, an asymptomatic HIV infection, classify her as disabled?[52] The Court found that it substantially limited a major life activity, reproduction.[53]

There was no question, however, regarding Abbot's biological ability to reproduce, which even individuals with fully developed AIDS can do. As in *Goesart*, the issue in *Bragdon* turned on the social import of a biological difference: in *Goesart* the social implications of the difference between bar patrons' responses to female and male physiology; in *Bragdon* the social implications of the difference between being infected or not infected by the HIV virus.

Central to the Court's reasoning is not that Abbott could not reproduce, but rather that she ought not to do so, for fear of transmitting her infection to either a male partner or to their offspring.[54] For, although conception and childbirth were "not impossible" for individuals with HIV, they were unquestionably "dangerous to the public health," thus meeting the ADA's definition of a substantial limitation.[55] The Court wrote as if Abbott had recourse only to traditional methods of reproduction,[56] and therefore was unavoidably subject to the specific risks incurred through

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50. *Id.* at 648.

51. *Id.* at 650–52.

52. Even more oddly, why was a connection made between the unrelated acts of reproduction to cavity filling? *Id.* at 641.

53. *Bragdon*, 524 U.S. at 641. This in itself is interesting for it touches upon the highly contested (albeit unresolved) issue of whether infertility ought to be covered by insurance so far as the ADA is concerned. *See generally* Stephen T. Kaminski, *Must Employers Pay for Viagra? An Americans with Disabilities Analysis Post-Bragdon and Sutton*, 4 DEPAUL J. HEALTH CARE L. 73 (2000). On the broader issue of the effects of the ADA upon insurance provision, *see* Mary R. Anderlik & Wendy J. Wilkinson, *The Americans with Disabilities Act and Managed Care*, 37 HOUS. L. REV. 1163 (2000); Bonnie Poitras Tucker, *Individual Rights and Reasonable Accommodations under the Americans with Disabilities Act: Insurance and the ADA*, 46 DEPAUL L. REV. 915 (1997).

54. *Bragdon*, 524 U.S. at 639–40 (1998).

55. *Id.* at 641.

56. *See generally* Michelle R. King & Beth S. Herr, *The Consequences and Implications of a Case-By-Case Analysis Under the Americans with Disabilities Act for Asymptomatic HIV-Positive Gay Men and Lesbians Post* Bragdon, 8 LAW & SEX 531 (1998). Moreover, Kelman wonders whether a hypothetically post-menopausal Abbott would no longer be considered disabled and therefore will be unprotected against disability discrimination. He asks whether it is Abbott's (and other disabled people's) disability status rather than their being subjected to stigmatizing treatment that really matters when delineating discrimination. *See* Kelman, *supra* note 48.

this method.[57] Moreover, the Court adduced "economic and legal consequences" pertaining to her limitation. These included the "added costs for antiretroviral therapy, supplemental insurance, and long-term health care for the child who must be examined and, tragic to think, treated for the infection,"[58] as well as the fact that certain state laws prohibit HIV-infected people from engaging in sexual relations, regardless of their partners' consent.[59] Thus, it was not Abbott's biological difference, but a socio-economic assessment of that difference, that limited Abbott and was a definitive component of her disability.

Facially, the connection between these opinions may seem as far apart as the half century intervening between their decisions. Further, in the earlier case, beliefs that take a class's biological difference as a proxy for a social limitation defeat claims to similar treatment, while in the latter, claims to similar treatment are substantiated precisely because of such a limitation.[60] Yet uniting these two opinions are similar underlying notions regarding the relation between socially relevant competence and biological difference.

Central to both *Goesart* and *Bragdon* is identification of a class that historically has been deprived of opportunities because its members are imagined to be so vulnerable as to require and deserve protection from the state. Of note in this regard is the practice of limiting the class in general because of the deficits of some of its individual members. Thus, although some women are unlikely to evoke raucous reactions in men, and there also are women capable of quelling drunken disturbances, the *Goesart* Court believed women to be a general risk to themselves and the public if they try to preside over barrooms.[61] It therefore held that it was rational to discourage them from doing so.[62] Similarly,

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57. The Court first asserted that an HIV infected woman "who tries to conceive a child imposes on the man a significant risk of becoming infected," and then cited various statistics on the probability of HIV transmission. *Bragdon*, 524 U.S. at 639.

58. *Id.* at 641.

59. *Id.*

60. In ADA cases where plaintiffs seek access to the workplace, the Court's endorsement of biological difference as a proxy for social limitation plays out as it did for the plaintiffs in *Goesart v. Cleary*, 335 U.S. 464 (1948). In the two nonemployment ADA cases it has heard, the Court found for disabled plaintiffs. *See* Olmstead v. L.C., 527 U.S. 581 (1999); Bragdon v. Abbott, 524 U.S. 624 (1998). On the other hand, in all of the employment-related cases, the plaintiffs were denied relief. *See, e.g.*, Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Murphy v. United Parcel Serv., 527 U.S. 516 (1999); Sutton v. United Air Lines, 527 U.S. 471 (1999). We analyze the remaining ADA case, *Cleveland v. Policy Mgmt. Sys.*, 526 U.S. 795 (1999), in Section IV.

61. *See Goesart*, 335 U.S. at 466.

62. *Id.* at 467.

although some HIV-positive women can reproduce without transmitting their infection, the Court believed that women with HIV generally risk causing harm if they try to reproduce.[63] Even evidence of antiretroviral therapy lowering the risk of prenatal transmission to eight percent did not sway the Court's belief.[64] Consequently, the Court appears to have concluded that not reproducing is a rational limitation for HIV-positive people.[65]

In *Goesart*, the defense of such limitation is direct. In *Bragdon*, it is more subtle. Nevertheless, *Bragdon*, as forcefully as *Goesart*, presumes that an individual is significantly limited in her ability to carry out a common activity if her biological differences make her engagement in the activity a risk to herself or others. The same kind of assumption that seemed so reasonable to the Court fifty years ago as a basis for declaring women to be substantially limited continues to seem a reasonable basis to the present Court for declaring women with HIV to be substantially limited. In both cases, the overt issue is whether a class' members are capable of performing certain common functions, but the underlying issue is whether the state has a rational interest in their not doing so.

The persistence of this line of reasoning should not be a surprise. Historically, courts have addressed the constitutionality of limiting opportunity for classes delineated in terms of biological differences by considering two related questions. First, does the class members' biological difference relate to or signify some type of "reduced ability to cope with and function in the everyday world,"[66] so that class members generally need special protection? Second, does the class members' reduced ability to cope and function usually place the public in need of special protection?[67] Answering these questions turns on facts about the conditions under which class members or the public need special protection, the frequency with which these conditions occur, and the degree to which they can be averted. The questions are, therefore, empirical.

Consequently, courts should consider them to be open questions, with answers to be determined by establishing factual truths about the class, rather than as questions foreclosed by reliance on customary ideas about the disabled. What concerns us is the error of the Court, when dealing with disability, in preempting answers to these questions without examining the facts. This same error of reasoning led the *Goesart* Court to consider women's situation suf-

63. *Bragdon*, 524 U.S. at 643.
64. *Id.* at 641.
65. *Id.* at 647–48.
66. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985).
67. *Id.* at 443–44.

ficiently different as to justify withdrawing from them the occupation of bartending. Despite acknowledging "vast changes" that had occurred during the war years in women's social and legal position, the *Goesart* Court held that legislatures were not required "to reflect sociological insight, or shifting social standards,"[68] or "to keep abreast of the latest scientific standards"[69] when drawing lines between the sexes. During the half-century that separates *Bragdon* from *Goesart*, closer attention to the facts about women developed a perspective from which the characterization of them in *Goesart* seems "archaic and stereotypic."[70]

Fifty years later, very little, if anything, strikes us as a society as obviously warranting employment discrimination on the basis of sex. Accordingly, the Court has stated elsewhere that "the sex characteristic" does not reflect a woman's "ability to perform or contribute to society,"[71] and that sex-based distinctions characterizing relative capabilities are "outmoded notions."[72] Similar observations might be, but are not, made about disability. Neither Congress nor the Court consistently conceptualizes disability in a way that is constitutionally neutral.

Thus, if the statutory objective is to exclude or "protect" members of one sex because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.[73] In contrast, there has been no emancipation for the disabled similar to the post-*Goesart* cultural emancipation of women that disconnects the notion of incompetence from biological difference.[74] Disability discrimination law has been less successful than sex discrimination law, in part because it imports a conceptualization of disability from an area of law that has a purpose quite different from discrimination law.

The ADA's definition of disability is drawn directly from the Rehabilitation Act[75] which, because it operates from the baseline that assumes disabled people need rehabilitation, presumes their incompetence. Although the language of this definition is carefully

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68. Goesart v. Cleary, 335 U.S. 464, 466 (1948).
69. *Id.*
70. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1985).
71. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).
72. *Cleburne*, 473 U.S. at 441.
73. *Hogan*, 458 U.S. at 725.
74. *See generally* Stein, *Employing People with Disabilities*, *supra* note 5, at 51 (Peter David Blanck ed., 2000); Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 EMORY L.J. 247 (1994) [hereinafter Stein, *From Crippled to Disabled*].
75. 29 U.S.C. § 794 (1974).

neutral regarding their capabilities, the assumptions that pertain to disabled people's capability in the context of the Rehabilitation Act may affect the definition's interpretation in other contexts. The accretion of conceptualizations of disability drawn from social welfare law, and judicial interpretations that apply these conceptualizations to civil rights law, frustrate the expression of an evolved understanding of disability that resembles the changes in our thinking about women by restraining misjudgments of incompetence. This does not bode well for future interpretations of disability rights under the ADA, whether in the Court's recent opinion in *University of Alabama v. Garrett*,[76] or elsewhere. If the Court continues along its present course, operating from an assumption that disability as a classification is defined by a characteristic of incompetence such that states are justified in excluding disabled individuals from opportunities as a valid means of protecting their interests, then the ground for requiring equality of opportunity for people with disabilities might be undercut.

Moreover, if the Court persists in this approach, the path to Fourteenth Amendment equal protection for individuals with disabilities will be made so narrow, and their burden of disadvantageous conditions imposed or endorsed by the state so great, that opportunity will be a meaningless idea for them. Instead, the Court should, as it has in other instances, provide direction so that an historically oppressed class, denied the opportunity to demonstrate competence and reap its rewards, can be protected. Rather than defining the class in terms of limitation, we suggest that the Court adopt an alternative construction consistent with that applied to other groups of individuals with biological differences. Our proposal for how the Supreme Court can extricate itself from the bind of retrogressive logic are set forth in Parts IV and V. First, however, we describe the *Cleburne* Court's establishment of a disability classification in Part II, and Congress' inartful response, and the subsequent results in Part III.

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76. 535 U.S. 356 (2001) (holding that Congress's application of the ADA to states as employers was unconstitutional under the Fourteenth Amendment for reasons of sovereign immunity). The sovereign immunity issues are addressed with perspicacity in Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653 (2000), which offers a four-part framework for determining when Congress has abrogated state sovereignty in a constitutionally appropriate manner. More theoretical, and equally ingenious, is Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 U. MINN. L. REV. 1 (2000), which argues that the litmus test for whether a given state enactment violates equal protection is "the meaning or expressive content of the law or policy at issue." *Id.* at 2.

II. THE DISABILITY CLASSIFICATION AND THE *CLEBURNE* DOCTRINE

A clear illustration of the Supreme Court's reliance upon custom and existing welfarist statutes to shape the disability classification as a presumption of incompetence is the framework it established in *City of Cleburne v. Cleburne Living Center*,[77] one of the few pre-ADA cases to succeed in deploying the Fourteenth Amendment to the "benefit" of the disabled.

In *Cleburne*, a Texas town required special use zoning permits for group homes for people with mental retardation,[78] but not for housing the same number of unrelated unimpaired people, such as in a boarding house, apartment, fraternity house, or convalescent home.[79] Further, the special permit process required agreement from all neighbors living within 200 feet of the proposed home.[80] Not all of the neighbors agreed to a proposal by the Cleburne Living Center (CLC) to set up a group home for people with mild to moderate cognitive limitations.[81] Even had the permit been approved, it was good for one year only; therefore, after adding a half bath and making other remodeling investments, the CLC would have had to reapply annually.[82]

The permit was denied, and the CLC challenged the zoning process on Fourteenth Amendment grounds in federal district court. Stating that the zoning ordinance was rationally related to the state's legitimate interests, Judge Porter rejected the CLC's claim in an unpublished Memorandum Opinion.[83] On appeal to the Fifth Circuit Court of Appeals, a three judge panel disagreed, reasoning that mental retardation constituted a quasi-suspect category, subject to intermediate equal protection analysis.[84] The burden, therefore, shifted to the state to justify the necessity of the

77. 473 U.S. 432 (1985).

78. Zoning permits were also required for people with mental illness or addictions, and for correctional institutions. City of Cleburne v. Cleburne Living Ctr., Inc., 726 F.2d 191, 194 (5th Cir. 1984) [hereinafter *Cleburne* Appeal].

79. *Cleburne*, 473 U.S. at 447.

80. *Id.* at 436 n.3.

81. *See Cleburne* Appeal, 726 F.2d at 193–94.

82. *Cleburne*, 473 U.S. at 435–36.

83. City of Cleburne v. Cleburne Living Ctr., Inc., No. CA3-80-1576-F, slip. op. (N.D. Tex. 1984).

84. The appellate court affirmed in part, and reversed in part, the district court's opinion. City of Cleburne v. Cleburne Living Ctr., Inc., 726 F.2d 191, 195–98 (5th Cir. 1984) (holding "that mentally retarded persons are only a 'quasi-suspect' class and that laws discriminating against the mentally retarded should be given intermediate scrutiny").

classification which resulted in a higher barrier for unrelated people with mental retardation who desired to live in the same house than for boarders, fraternity brothers, or convalescents.[85] Upon review of the classification, it appeared to the Fifth Circuit that the policy had no substantial connection to an important interest of the city.[86] That is, no important interest was served by a classification that both imposed different treatment on people with mental retardation and, in doing so, disadvantaged them in comparison with boarders, fraternity brothers, convalescents, or similar groups of unrelated people who did not have to have neighbors' approval to share a house.[87]

Writing for a unanimous panel,[88] Judge Goldberg found four major flaws with the city's zoning requirement.[89] First, the city could have no substantial interest in responding to the private biases of the proposed group home's neighbors.[90] This was because irrational prejudices could not provide "legitimate bases for discrimination."[91] Second, the city's claim that the classification helped rather than harmed mentally retarded people was not credible.[92] Although the city claimed that students at the school across the street from the proposed group home might harass its occupants, that school already included a substantial number of mentally retarded individuals among its students, who presumably were not harassed.[93] Third, despite the city's claim that the site's location in a five hundred year flood plain constituted a danger to the prospective mentally retarded residents of the group home, the court found the possibility of a flood too remote to justify the discrimination.[94] Fourth, the city's concern with the density of occupancy of the proposed residence lacked merit.[95] Moreover, the city never justified its apparent view that other people can live under crowded conditions, but not the mentally retarded.[96] In sum, the four reasons given by the city to justify imposing a (prohibitively) high barrier on unrelated mentally retarded people who

85. *See id.* at 196, 200–02.
86. *Id.* at 200–02.
87. *Id.*
88. *Id.* at 192.
89. *Id.* at 200–03.
90. *Id.* at 202.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*

wished to share a house did not bear enough of a relation to any substantial legislative interests.

Each of these reasons construed the barrier as being protective of putatively weak and incompetent people whom the state had an interest in sheltering. However, the city placed no similar barrier as a shelter for other groups of similarly situated people. For instance, the ordinance explicitly permitted the presence of elderly or ill people and even assigned a group of identically disabled people—the mentally retarded students at the school—to be present in the neighborhood. This inconsistency undercut the idea that the classification permitted the city to fulfill its obligation to protect its weak and incompetent citizens by imposing an especially high barrier against mentally retarded people taking up residence in the neighborhood.[97]

The city, however, had also pursued a second line of argument, both at trial and on appeal. In addition to its interest in protecting retarded people, it also had an interest in protecting the public.[98] It claimed that the high barrier created by the special permit requirement protected the pubic against disruptions occasioned by the presence of mentally retarded people.[99] The city asserted that it was concerned about congestion on the streets, and about fire hazards.[100] The appellate court, however, was unconvinced by this assertion, because the city had failed to explain why residents of fraternity houses, apartment houses, boarding houses, and hospitals were so less likely than mentally retarded people to occasion these evils.[101] The city had also expressed concern about the serenity of the neighborhood, and about legal responsibility for actions the mentally retarded might take.[102] Again, this assertion was not deemed credible by the appellate court, for it was premised on the questionable claim that well-supervised mild to moderately retarded people are more likely to create commotion and public safety problems in a residential neighborhood than unsupervised fraternity brothers.[103]

In sum, these inconsistencies undercut the idea that the special use permit requirement was necessary to enable the city to protect its citizens against predictable disruptions. The classification

97. *Id.* at 201.
98. *Id.* at 200.
99. *Id.*
100. *Id.*
101. *Id.* at 201.
102. *Id.*
103. *Id.*

explicitly designated types of unrelated people, who were as likely as mentally retarded people to need to be sheltered or to be disruptive, as welcome in the neighborhood without special use permits.[104] Accordingly, although the holding of the district court was affirmed in part on other grounds,[105] the Fifth Circuit panel reversed the district court's holding that the zoning ordinance was constitutional.[106] After denial by the Fifth Circuit of both a petition and a suggestion for rehearing en banc, the Supreme Court granted certiorari.[107]

The Court affirmed one aspect of the appellate court's reasoning, while rejecting and vacating another.[108] All of the Justices agreed that the zoning ordinance deprived the prospective residents of the CLC group home of the equal protection of the laws.[109] This was because the record showed no way in which housing the disabled individuals in question threatened the legitimate interests of the state in a way that uses explicitly permitted by the ordinance did not.[110] Writing for the majority, Justice White held that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[111]

Thus, the Court affirmed the invalidation of the ordinance, but only insofar as it applied to the particular disabled individuals in this single case.[112] The Supreme Court rejected the Fifth Circuit's contention that the ordinance's classification scheme was quasi-suspect.[113] Instead, the Court proposed that, in contrast to race or gender classifications, neither the disability classification's appearance in the city's zoning ordinance or its general use in statutes was suspect.[114] Accordingly, the Court determined that there should be no general presumption that legislative action employing the classification makes unconstitutional distinctions regarding treatment, even if such legislation systematically disadvantages individuals who fall within the classification.[115]

Although the Court explicitly limited its diagnosis that prejudice against people with mental retardation lies behind the special

104. *Id.* at 201–02.

105. *Id.* at 203 (affirming the trial court's holding that the Johnson County Association of Retarded Citizens lacked standing).

106. *Id.* at 200.

107. City of Cleburne v. Cleburne Living Ctr., 469 U.S. 1016 (1984).

108. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1985).

109. *Id.* at 435.

110. *Id.* at 448.

111. *Id.* at 450.

112. *Id.*

113. *Id.* at 439–42.

114. *Id.* at 442–43.

115. *Id.*

permit requirement to "this case," the zoning requirement could hardly have some other motivation if it continued to be applied to raise the same high barrier against the presence of other group homes for other unrelated mentally retarded people in the Cleburne neighborhood. There are several reasons for looking closely at this element of the *Cleburne* decision.

First, we cannot ignore the role played by what clearly appears to be a heightened level of scrutiny in the final disposition of *Cleburne.* Had the appellate court not been free to scrutinize the presumption that differential treatment of mentally retarded people served a rational interest of the state, the city would not have had the burden of delineating what interests the high barrier of the special permit requirement furthered. If scrutiny had not been applied, the fact that the connection purported to hold between the ordinance's provisions and its purpose was illogical would not have become evident. By denying that statutory classifications disadvantaging mentally retarded people should prompt scrutiny, the Court made it much more difficult to test the equitability, as well as the validity, of claims that associate their exclusion from civic and commercial opportunity with benefits to the public interest.

Second, the Court's emphasis on the particularity of its decision seems odd in view of its analysis of the motivation behind the zoning ordinance restrictions. Its criticisms of the city's defense turned on the injustice of the zoning prohibition's form, not on the injustice of this particular application. Demonstrating the latter involved showing that the particular individuals expected to occupy this particular home did not deserve to fall under the ban. But the characteristics of those individuals—whether each needed protection or might be disruptive—were never taken to be relevant.

Instead, the Court rejected the ordinance's classification because it appeared seriously overinclusive in relation to its purported purposes. If the ordinance was meant to classify people in pursuit of the state's interest in protecting the weak and incompetent, it irrationally permitted many vulnerable types of people to be exposed to the dangers of the neighborhood. If the ordinance was meant to classify people in pursuit of the state's interest in protecting the tranquility of the neighborhood, it irrationally and explicitly excluded from the prohibition types of people more disruptive than the disabled classification it banned.

Under some circumstances, underinclusion does not constitute inequitable treatment. Underinclusiveness may be justified when it

is administratively impracticable to bring all relevant groups similarly under a statute,[116] but no such defense explained why the city did not bring boarding houses, fraternity houses, and convalescent homes, among other group uses explicitly permitted by the ordinance, under the special permit requirement. Underinclusiveness may also be justified when it is politically impracticable to bring all relevant groups similarly under a statute.[117] However, as Tussman and tenBroek remarked in 1949, the demand for equal laws is meaningless if politically strong groups are permitted to win favor in legislation.[118] This observation remains extremely pertinent to the status of individuals with disabilities (as well as to other categories).[119]

As the underinclusiveness of the ordinance's classification appeared to taint it inescapably, the Court's reluctance to acknowledge the injustice of future applications to prevent the establishment of homes for groups of mentally retarded citizens is disturbing. Nothing in the Court's own analysis suggested that future applications of the flawed law would not be propelled by the same irrational prejudice the Court found to be aimed at the Cleburne Living Center. Nor does the analysis indicate how, in future attempts to establish group homes for mentally retarded people, the city could rectify the glaring absence of legitimate state interests in requiring special use permits.

Third, what is especially illogical about the Court's reluctance to generalize is the impact of its approach on future litigation. Understandably, by determining that the special use permit requirement deprived particular respondents of the equal protection of the laws, the Court could evade deciding whether the special use provision was facially invalid in respect to the mentally retarded and avoid making broad constitutional judgments. The oddity is that the Court equated invalidating the existing ordinance with declaring that the city "may never insist on a special use permit for a home for the mentally retarded in an R-3 zone."[120] But to think that invalidating the ordinance had this implication was

116. *See* Joseph Tussman & Jacobus tenBroek, *Equal Protection of the Laws*, 37 CAL. L. REV. 341, 349 (1949).

117. *Id.* at 350–51.

118. They explained that "legislative submission to political pressure does not constitute a fair reason for failure to extend the operation of a law to those similarly situated whom it leaves untouched." *Id.* at 350.

119. *See* Adam Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 CATH. U. L. REV. 323 (2000); Fred R. Shapiro, *The Most Cited Law Review Article Revisited*, 71 CHI. KENT L. REV. 751 (1996) (ranking the Tussman & tenBroek article as the fourteenth most cited law review article of all time).

120. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447 (1984).

fallacious, for there were several ways in which a carefully tailored ordinance could avoid the inconsistencies, and thereby the inequities, to which the Court objected.

By the time of *Cleburne*, it was commonplace for the Court to exact careful tailoring.[121] However, prescribing careful tailoring requires believing either that the presence of mentally retarded people typically is no more burdensome on a neighborhood than that of convalescents, transients, or fraternity boys, so that high barriers are raised only against the sub-set of the classification who cannot be assimilated in these respects, or mentally retarded people are typically so much more burdensome that high barriers are needed to address burdensome traits demonstrably characteristic of most members of the classified group.

However, the majority seemed unwilling to commit to the first belief, refraining from declaring unequivocally that mentally retarded neighbors are generally not burdensome. On the other hand, the majority opinion is devoid of any systematic empirical demonstration of the truth of the alternative view, namely, that mentally retarded neighbors are typically more burdensome than the other categories of neighbor. Instead, the Court fell back on language in the Developmental Disabilities Act[122] and the Education of the Handicapped Act (now called the Individuals with Disabilities Education Act),[123] to the effect that mentally retarded people have a right to receive the educational, medical, and custodial benefits bestowed by these laws in the least restrictive setting appropriate to their individual abilities.[124]

The Court said that this language implicitly assumes the need for some restrictions.[125] But such an inference is misleading, if not deceptive. The statutory language cited is equally compatible with either the need for restrictions being typical of, or instead being relatively uncommon for, the classification.[126] That is, the way the statutory language is phrased assumes that there are some members of the classification who benefit from restrictive settings, but nothing in the language indicates whether such individuals are common or rare.

Thus, the keystone of the Court's reluctance to streamline constitutional protection for the mentally retarded, and by

121. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).
122. 42 U.S.C. § 6010 (1977).
123. 20 U.S.C. § 1400 (1975).
124. *Cleburne*, 473 U.S. at 444–45.
125. *Id.*
126. *Id.* at 445.

extrapolation for all disabled people, is the prevailing characterization of the properties that constitute the group's identity. As the *Goesart* Court characterized women collectively in terms of socially undesirable dependence and disturbance, so the *Cleburne* Court characterized mentally retarded people in the same terms. And as in *Goesart*, the Court evoked stereotypes and appealed to questionable inferences, rather than requiring demonstrable evidence that the classification's members are factually characterized as inherently disruptive and terribly vulnerable.

Parenthetically, to be as explicit as the *Cleburne* Court about particularizing a decision to a single case condemns every one situated similarly to the plaintiffs to litigating anew. In his partial dissent, Justice Marshall identified this problem as "the novel proposition that 'the preferred course of adjudication' is to leave standing a legislative Act resting on 'irrational prejudice,' thereby forcing individuals in the group discriminated against to continue to run the Act's gauntlet."[127] This problem has become endemic to disability discrimination law, where the same issues about access have to be litigated vendor by vendor, program provider by program provider, facility by facility, individually for each supplier of the same benefit or service, and may have to be revisited whenever the management of a facility or program changes hands. Ironically, the volume of litigation invited by the Court's reluctance to generalize disability discrimination findings is sometimes cited as evidence of the burdensomeness of the policy of providing equal opportunity for the disabled.[128] As we have seen, however, the problem of burgeoning litigation does not derive from the nature of disability nor from any special difficulties in knowing when people with disabilities have been harmed by discrimination. The problem is attributable to the way courts have approached the classification.

Close examination of the *Cleburne* Court's reasoning elucidates the problem. The *Cleburne* Court held that no heightened level of judicial review is demanded just because mentally retarded people are picked out for special statutory treatment.[129] That is because, the Court ruled, mentally retarded people are different from other people, and therefore states have wide latitude to treat them differently.[130] The presumption that differential treatment of mentally retarded people is warranted extends to treatment that harms them. On this reading of equal protection, a statute or policy that

127. *Id.* at 473–74 (Marshall, J., concurring in part and dissenting in part) (internal citations omitted).

128. *See id.*

129. *Id.* at 442–43.

130. *Id.* at 445.

picks out the population of mentally retarded people for disadvantageous treatment raises no constitutional warning flag. To free themselves of the restrictions of any such burdensome statute or policy, individuals with mental retardation have to pursue litigation to show that they, personally, do not merit being handicapped by it.

In refusing to affirm the lower court's judgment that the Cleburne ordinance compromised equal protection for a classification of people, the Court raised and resolved five issues about the classification. These may be recast as questions for which there will be affirmative answers if the equal protection standard is met in regard to a group that is being treated differently. This means that disadvantaging a group of citizens is presumptively justified and is not a violation of equal protection if the answer to the following questions about the group is "yes."

1. Is there a real difference between the group's members and other people?[131]
2. Does the difference affect people's ability to cope with and function in the every day world?[132]
3. In this regard, is the difference's impact immutable?[133]
4. Is the difference rationally related to a legitimate state interest?[134]
5. On balance, has the difference elicited more beneficial than burdensome statutory treatment?[135]

Thus, the *Cleburne* decision suggests a five-part test for statutory provisions which impose more disadvantages on some groups of citizens than on others. In respect both to cognitive impairment and to disability generally, the majority decision declared, the answers are affirmative.[136] Thus, in general, differential statutory treatment directed at disability is permissible.[137] Sometimes, however, there are instances in which the answer to the fourth question is "no." For example, no legitimate state interest was served by prohibiting the particular individuals with mental retardation who were slated to live in Cleburne from doing so.

131. *Id.* at 442.
132. *Id.* at 443.
133. *Id.* at 442.
134. *Id.*
135. *Id.* at 444.
136. *Id.* at 442.
137. *Id.* at 443.

Thus, a statute may pass the test but an application of it fail the test and therefore be properly subject to judicial correction.[138] Consequently, the nature of the disability category effectively decrees that each allegation of disability discrimination must be litigated independently rather than yielding to precedent. Case law therefore cannot effectively stimulate broader social policy reform.

The Court acknowledged that people who fall within the category of mental retardation differ from each other as much or more than some of them differ from non-retarded people.[139] Nevertheless, the opinion affirmed the constitutionality of mental retardation as a statutory classification.[140] The classification is necessary, the Court said, for the government to pursue policies designed to assist retarded people in realizing their full potential.[141] Thus, there can be no presumption that legislative action regarding retarded people is "rooted in considerations that the Constitution will not tolerate."[142] This is so even if, incidentally, the action patently disadvantages some retarded individuals.[143]

To put it in contemporary terms, the state may engage in broad disability profiling if there is some public purpose for separating out some disabled people for separate treatment.[144] Moreover, because the facts about mental retardation and disability in general are so complex, the Court thought legislatures were best suited to determine how people so classified should be treated. By implication, this deference would extend to determinations of the degree to which all members of the class may be burdened for purposes relating only to some.[145]

The *Cleburne* doctrine (which might also be called the *Goesart* doctrine because of its similar reasoning) calls out for critical analysis. Martha Minow offers an instructive commentary by articulating several different accounts of the values at issue in Justice White's majority opinion and the separate opinions of Justices Stevens[146] and Marshall.[147] While we admire the sweep of her approach, we think it may overlook or obscure a central disagree-

138. *Id.* at 446.
139. *Id.* at 442.
140. *See id.* at 442–46.
141. *Id.* at 445.
142. *Id.* at 446.
143. *See id.*
144. *See id.* However, in *Garrett* the Court appears to have changed its position on the deference due to the legislative process. *See* Univ. of Ala. v. Garrett, 535 U.S. 356, 376 (2001) (Breyer, J., dissenting).
145. *Cleburne*, 473 U.S. at 443.
146. *Id.* at 451 (concurring, joined by the Chief Justice).
147. *Id.* at 455 (concurring in part and dissenting in part, joined by Brennan, J., and Blackmun, J.).

ment over the logic of validly constructing constitutionally protected classes.

According to Minow, three different views of the matter of classification emerge from the *Cleburne* discussion.[148] Writing for the Court, Justice White took mentally retarded people to be a class of naturally inferior people, who "have a reduced ability to cope with and function in the everyday world."[149] As a group, he concluded, they are "different, immutably so, in relevant respects."[150] This difference is supposed to establish that a state's interest in providing for the retarded is legitimate.[151] That there is legislation "singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others. . . . [G]overnmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable."[152] In sum, the Court validated the classification because of its usefulness in "a wide range of decisions."[153]

To Minow, this means assuming that society is divided into two classes, normal and abnormal people, and that mentally retarded people are more like each other than like the rest of the community.[154] In the majority's view, people with mental retardation are different, and their difference warrants differential treatment whether or not they are disadvantaged by it.[155] On the other hand, Justice Stevens emphasized the similarity of mentally retarded people to the rest of the community. In his view, their similarity warranted equal treatment unless "[a]n impartial lawmaker—indeed, even a member of a class of persons defined as mentally retarded—could rationally vote in favor of a law" that provides for differential treatment.[156] Far from being presumed to be justified, statutory provisions that limit the opportunities of mentally retarded people must be perceived as rationally related not only to an impartial state interest but also to the interests of those who through its action will be deprived. For instance, Justice Stevens

148. *See* Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded,, Equal Protection and the Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 120–31 (1987) [hereinafter Minow, *When Difference Has Its Home*]. *See also* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 106 (1990) [hereinafter MINOW, MAKING ALL THE DIFFERENCE].

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

150. *Id.*

151. *Id.*

152. *Id.* at 444.

153. *Id.* at 446.

154. *See* MINOW, MAKING ALL THE DIFFERENCE, *supra* note 148, at 106.

155. *Cleburne*, 473 U.S. at 446.

156. *Id.* at 454 (Stevens, J., concurring).

thought that both an impartial legislator and a self-interested retarded person could support preventing retarded people from operating hazardous equipment.[157]

Minow objected that this way of thinking abstracts from and thereby disregards retarded people's real differences by assimilating them to the "rational man" standard that forms a community norm.[158] It is a mistake, however, to equate mental retardation with irrationality. As even Justice White agreed, the classification ranges over "those whose disability is not immediately evident to those who must be constantly cared for."[159] Further, the record established that nearly ninety percent of the individuals falling into the classification are only mildly retarded, and another six percent are moderately retarded.[160]

Being rational requires no great intelligence, especially when one is being rational about what is in one's self-interest. When Sandra Jensen, a woman with Down Syndrome, fought for a place on a heart transplant list, she not only understood that securing a new heart was in her rational self-interest but argued compellingly that she deserved this opportunity.[161] She argued with reference to the similarity of her situation to that of the nonretarded patients admitted without controversy to the list.[162] She used, in other words, a definitively rational form of argument.[163] When, as they often do, people with mild mental retardation object to being treated less favorably than nondisabled people, they are appealing to consistency and thereby demonstrating their grasp of a basic tenet of rationality.

Let us assume that retarded people as a class are different in some way from nonretarded people, for there is no controversy that the classification has some reference. Nevertheless, there is great controversy over the boundaries of the classification, as well as where, within the classification, individuals best fit. In *Cleburne*, the Court initially spoke as if the boundary is "a reduced ability to

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157. *Id.*

158. Review MINOW, MAKING ALL THE DIFFERENCE, *supra* note 148, at 115, 341–49, bearing in mind her treatment of *In re Phillip B.*, 156 Cal. Rptr. 48 (Cal. App. 3d. 1979), cert. denied, 445 U.S. 949 (1980), in which a trial judge used a similar device to introduce the "standpoint" of a mentally retarded fourteen year old.

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

160. *Id.* at 442 n.9.

161. *See* Celeste Fremon, "*We Do Not Feel that Patients with Down Syndrome are Appropriate Candidates for Heart-Lung Transplantation": These Words were a Death Sentence for Sandra Jensen, and That, She Decided, Just Wasn't Going to Happen*, L.A. TIMES, April 14, 1996, at 18.

162. *See id.*

163. Jensen succeeded, becoming "the first seriously retarded person in the United States to receive a major transplant." *New Heart for Retarded Woman*, N.Y. TIMES, January 24, 1996, at A16.

cope with and function in the everyday world."[164] But this characterization is as aptly applied to absent-minded professors, improvident artists, and unworldly *religieuses* as to mentally retarded people. All the latter can behave so incompetently and disruptively as to be burdensome, but all enjoy the scope of the equal protection standard that is denied to mentally retarded people.

Another formulation is "limitations on general ability to meet the standards of maturation, learning, personal independence, and social responsibility expected for an individual's age level and cultural group."[165] Surely this characterization is much too vague. It is the further idea that such limitations are immutable that seemed to sway the Court. But this is also an unclear attribution, for new educational techniques defeat claims about the immutability of some retarded people's limitations. A nineteen-year-old with Down Syndrome who is a high school graduate, enrolled in a community college, and earning a wage surely falls within societal standards. In her case, immutability pertains to the biological condition of her trisomy, not to her social limitations. Clearly, it is to her alterable social limitations, not to her immutable chromosomal trisomy, that any rational state interests pertain.

The Court also proposed that "the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates that they have unique problems. . . ."[166] This reasoning is, of course, circular, and it does not demonstrate that these problems arise from immutable deficits. In asserting that "legislation . . . singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others,"[167] the Court neglected to note the extent to which these differences are reified when legislatures or other social spokespersons single them out for special comment or treatment. Thus, even currently real social differences between retarded and nonretarded people may be mutable, depending on how cultural practice and habit address them. In this regard, Justice Marshall referred in his partial dissent to the history in which mentally retarded people were left to their own devices and were expected to be basically self-sufficient, until the later nineteenth

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

165. *Id.* at 442 n.9 (citing the brief submitted by the American Association on Mental Deficiency in order to define "deficits in adaptive behavior.") (internal quotation marks omitted).

166. *Id.* at 443.

167. *Id.* at 444.

century, when "[a] regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow" and "[m]assive custodial institutions were built to warehouse the retarded for life."[168] The results of this history continue to influence the extent to which mentally retarded people develop self-sufficiency today.

Marshall emphasized that a population's history contributes to the differences that currently are characteristics of the group. On Minow's interpretation, Marshall's account verges on a "social-relations" approach in which differences between groups are acknowledged and respected.[169] The meaning of such differences is always contextualized. Their import must be assessed with regard to power differentials and other relationships that exist between the groups.[170] Attributions of difference that fuel exclusionary practices are condemned as self-serving mechanisms for preserving the power of dominant classes. There is, instead, an emphasis on interconnectedness and on the multiplicity of avenues for contributing to the collective good.[171] The social-relations approach calls for reform of marginalizing practices so as to cultivate the freedom of diverse kinds of people to participate in both the rewards and the responsibilities of social interaction.[172]

In sum, the majority of the Court presumed that retarded people's differences, and by extrapolation the differences from species-typical biology displayed by other persons with disabilities, were legitimate proxies for social limitations.[173] Unless proven oth-

168. *Id.* at 462 (Marshall, J., concurring in part and dissenting in part).

169. MINOW, MAKING ALL THE DIFFERENCE, *supra* note 148, at 119.

170. *Id.* at 211–24.

171. *Id.*

172. *Id.* at 224.

173. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 535 U.S. 356 (2001) makes explicit the Court's intention to extrapolate across disabilities when invoking the *Cleburne* doctrine. In *Garrett*, the Court invoked the *Cleburne* doctrine to strip away much of the protection against disability discrimination the ADA had granted to state employees. *Garrett*, 535 U.S. at 365–66. Following *Cleburne*, the Court shifted the burden to disabled plaintiffs to establish that no state interest in excluding the disabled from the workplace was conceivable. *Id.* Further, the Court's description of disabled people as needing "allowances" and "special accommodations," terms that do not appear in the text of the ADA, is indicative of a presumption that disabled people are less competent than nondisabled people. *See id.* at 964. By characterizing disabled people as being in need of special treatment, the Court stipulated that refusing to include them in the workplace was prima facie rational, rather than considering this to be an open question awaiting empirical determination. Further, the Court's stipulation that "hiring employees able to use existing facilities," rather than qualified disabled employees who cannot, *id.* at 966, is rational underlines the great disparity between the treatment of disabled people and women. It is inconceivable that an employer's overt refusal to hire qualified women simply because the existing facilities have urinals would be upheld as nondiscriminatory.

erwise on a case by case basis, these differences are rationally related to interests of the state. Stevens' concurrence presumed exactly the opposite, that disabled people's differences are not relevant, unless proven otherwise. Marshall's partial dissent took the history of oppression of disabled people to be a lens that inexorably distorted assessments of their differences.

As illuminating as Marshall's analysis is, it addressed the assessment rather than the construction of the relevant class. The analysis assumed that the disabled are different but did not ask which of their differences are relevantly and responsibly referenced as traits definitive of the class. People can differ from one another biologically or socially. We already have seen that biological properties, such as a certain level of intelligence or the absence or impairment of a corporeal component, are essential to the disability classification but are not socially relevant unless they are linked to limitations that render individuals burdensomely dependent or disruptive. Essential biological properties may be shared by all who are subject to the classification, but not all the classification's members may be socially burdensome or disruptive. Only a minority may be so.

A similar clarification applies to the sex classification at issue in *Goesart.* To be sure, certain biological properties are essential to the female sex classification, but any link these might have to dependency and disruptiveness is a mere contingency. The *Goesart* Court stipulated that dependency and disruptiveness are inexorably linked to being female by invoking an essentialist definition, but there is no better witness to the tenuousness of the link the *Goesart* Court took to be unquestionable than the *Cleburne* Court, which insisted that statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.[174]

It took no more than three decades for beliefs that were patent to the *Goesart* Court to seem outmoded to the *Cleburne* Court. There are two matters on which these Courts do agree: that there is a difference between women and men, and that for a sub-set of women, this difference is associated with dependent or disturbing behavior. Yet for the *Goesart* Court, the sub-set that is saliently dependent or disturbing is representative of the classification, while for the *Cleburne* Court thinking of this same sub-set of women as representative of the female classification is retrogressive thinking.

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

At the heart of the *Cleburne* decision lie questions of fact and justice about the latitude with which the states' interests in constraining or excluding a sub-set of a classification may be served by activities that impose special burdens on, and reduce opportunity for, the entire membership of the class. The classification employed by the Cleburne ordinance was underinclusive because it did not burden many groups touched by its rationale, and it was also overinclusive because some, and perhaps the majority, of individuals subjected to its burden are not touched by its rationale. Let us now assume not only that retarded people are different from nonretarded people in some respects, but that a sub-set of the classification differs precisely in the respect of being strongly linked by empirical evidence to dependency and disturbance. Even so, as Tussman and tenBroek pointed out, overinclusiveness is a more egregious violation of the standards of reasonable classification than underinclusiveness because "overinclusive classifications reach out to the innocent bystander, the hapless victim of circumstance or association."[175] To the *Cleburne* Court both the underinclusiveness and the overinclusiveness of the sex classification embraced by the *Goesart* Court reflected "outmoded notions" that violated standards of reasonable classification.[176] To the *Cleburne* Court, the under-inclusiveness of the disability classification violated reasonable classification standards, but its overinclusiveness did not.[177]

What we have seen so far is that the *Cleburne* Court's confidence in affirmatively answering the second, third and fourth questions of its doctrinal test is warranted only if an overinclusive classification is drawn. This point should make us wary of embracing the *Cleburne* doctrine without careful examination of its inherent logic, for the point suggests that the doctrine does not promote constitutionally neutral classification. Further, giving an affirmative answer to question five, regarding the balance of beneficial overburdensome statutory treatment, is also problematic. An affirmative answer may be true only of a minority of the membership of a classification, the relatively small number who are the beneficiaries of rehabilitative or other special services. To better understand the persistence of overinclusiveness in constructing the disability classification, we now turn to a description of Congress's inartful attempt to rebut the *Cleburne* doctrine, and the results that followed.

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175. Tussman & tenBroek, *supra* note 116, at 351.
176. *Cleburne*, 473 U.S. at 441.
177. *Id.* at 442–46.

III. CONGRESS'S RESPONSE TO THE *CLEBURNE* DOCTRINE AND ITS AFTERMATH

A. The Americans With Disabilities Act

Congress passed the ADA primarily because it saw the systematically inferior treatment of disabled people as rising to the level of unconstitutional discrimination. To ameliorate this problem, it attempted to rebut the Supreme Court's *Cleburne* doctrine, which denied the disabled constitutional scrutiny, by creating a heightened level of statutory scrutiny. Nevertheless, Congress was inartful in drafting the ADA. The problem lies in the wholesale incorporation of the definition of disability from the Rehabilitation Act. Although the definition itself, which focused on "substantial limitations of major life activities," was facially neutral regarding the capability of the protected class to perform social functions, it carried with it culturally retrogressive notions about the disabled. Thus, despite including language regarding its clear intention to rebut the *Cleburne* framework in its findings, Congress did not succeed in blocking this retrogressive conceptualization of disability. In fact, the *Cleburne* doctrine continues to control post-ADA Supreme Court decisions. Nevertheless, in drafting the ADA, Congress explicitly challenged at least three claims made by the *Cleburne* Court.

First, the *Cleburne* Court saw legislative efforts to apply the disability category as being mainly for positive purposes.[178] Because people classified as mentally retarded enjoyed the purported benefits of this classification, the *Cleburne* Court declared that these individuals must be politically powerful.[179] By implication, then, people classified as eligible for various kinds of disability programs are to be considered politically powerful[180] as long as legislation purported to be beneficial is specially targeted at them.[181]

178. City of Cleburne v. Cleburne Living Ctr, Inc., 473 U.S. 432, 444 (1984).

179. *Id.* at 445.

180. *But see* Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361 (1996).

181. This implication is strongly rebutted by the work of two philosophers writing on the "politics of resentment." *See* WENDY BROWN, STATES OF INJURY (1994); WILLIAM CONNOLLY, IDENTITY /DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX (1991). Within the context of the ADA, the subject of backlash was addressed in a symposium published by the *Berkeley Journal of Employment and Labor Law*, wherein the introduction offers a superlative overview. *See* Linda Hamilton Krieger, *Foreword: Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

In contrast, Congress addressed this matter empirically.[182] The findings of an independent nationwide poll of Americans with disabilities conducted in 1986 by Louis Harris and Associates showed the disempowerment of the disabled.[183] The ICD Survey found that two-thirds of working age individuals with disabilities are unemployed,[184] while two-thirds of non-working disabled individuals want to work.[185]

Having amassed evidence that controverted the *Cleburne* Court's presumption, Congress declared in its findings that historically the disability category has been invoked for the purpose of denying liberties and opportunity to people assigned to it.[186] Testimony gathered during its hearings also led Congress to find, explicitly, that people with disabilities have been "relegated to a position of political powerlessness in our society."[187] This last phrase, as well as those surrounding it in Congress's legislative finding, were specifi-

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182. For a thorough overview by one of the ADA's drafters, *see* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute* 26 HARV. C.R.-C.L. L. REV. 413 (1991). A very good journalistic account of the politics behind the passage of the ADA is JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993). *See also* Stein, *From Crippled to Disabled*, *supra* note 74.

183. LOUIS HARRIS & ASSOCIATES, THE INTERNATIONAL CENTER FOR THE DISABLED SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986) [hereinafter ICD SURVEY]. The results of this poll were often cited by organizations concerned with the status of individuals with disabilities. *See, e.g.*, NATIONAL COUNCIL ON DISABILITY, IMPLICATIONS FOR FEDERAL POLICY OF THE 1986 HARRIS SURVEY OF AMERICANS WITH DISABILITIES (1988); NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE (1988). In addition, the results of the survey were summarized to Congress by the President of Louis Harris and Associates during hearings on the ADA. *See Guaranteed Job Opportunity Act of 1987: Hearing on S. 777 Before the Subcomm. On Employment and Productivity and Subcomm. on the Handicapped of the Comm. On Labor and Human Resources*, 101st Cong. S. Hrg. 166, pt. 2, at 9 (1987) (statement of Humphrey Taylor) (*quoted in* S. REP. No. 101-116, at 8 (1989); *also quoted in* H.R. REP. No. 101-485, at 31 (1990)). *See also* H.R. REP. No. 101-485, pt. 3, at 25 (1990).

184. See ICD SURVEY, *supra* note 183, at 47.

185. *Id.* at 50–51.

186. 42 U.S.C. § 12101(a)(5)(1994) (stating that "individuals with disabilities continually encounter various forms of discrimination," including those arising from "overprotective rules and policies."). *See generally* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (2d ed. 2001); Drimmer, *supra* note 12.

187. 42 U.S.C. at § 12101(a)(7). Congress's difference with the *Cleburne* Court may be a matter of having different reference classes rather than outright denial. The *Cleburne* Court looked to the evidence of public programs lobbied for primarily by interest groups of families of people with certain kinds of impairments and the professionals who work with them. Such groups, which sometimes but not always are guided by disabled people themselves, continue to be active. The very broad-based organization of disabled people to pursue civil rights protection, however, was a unique occurrence. This action cannot itself be evidence of the political power of disabled people. It would be circular to argue so, for then any effective political effort to protect a group's civil rights could be undermined on the ground that its imminent success demonstrates its disproportionateness.

cally taken from Supreme Court decisions approving equal protection classifications.[188] The use of this specific language in the ADA, responding to what the Supreme Court, circa 1990, required for heightened constitutional scrutiny, demonstrates that Congress was consciously attempting to rebut the *Cleburne* framework.

Moreover, Congress cited the "continuing existence of unfair and unnecessary discrimination and prejudice" denying disabled people equal opportunities in society,[189] noting that this disparate treatment persisted in areas which states sponsor or control, including education, transportation, access to public services, and voting.[190] Again, the fact that Congress specifically cited the existence of this type of social exclusion evidences its intention to empower disabled people through the ADA by bestowing upon them a heightened level of statutory scrutiny. To counteract this phenomenon, Congress explicitly defined "public entity" in Title II of the ADA to mean "any State or local government," including all their departments and agencies.[191]

The continuation through to the present of state-legislated policies was recently documented by Justice Breyer's eloquent dissent in *Garrett*.[192] Reviewing the record of legislative hearings and the findings presented therein, Justice Breyer concluded that "Congress compiled a vast legislative record" which documented extensive and "powerful evidence of discriminatory treatment" of the disabled that "implicate[d] state governments."[193] To support this argument, Justice Breyer appended to his opinion an extensive catalogue of state-sponsored enactments which violated the rights of the disabled.[194] Also notable is that in spite of Congress's having specifically directed that people with disabilities not be prevented from exercising their franchises, as many as one-third of the country's 120,000 polling places nationwide still lack full access.[195]

Second, the ADA's statement of purpose proclaims a categorical antidiscrimination directive by the federal government on behalf of disabled Americans. Specifically, Congress declared that the statute's main purpose was "to provide a clear and comprehensive

188. *See* Burgdorf, *supra* note 182, at 436.
189. 42 U.S.C. § 12101(a)(9).
190. *Id.* § 12101(a)(3).
191. *Id.* § 12131(1)(A)–(B).
192. *See* Univ. of Ala. v. Garrett, 535 U.S. 356, 376 (2001) (Breyer, J., dissenting).
193. *Id.* at 969–70.
194. *Id.* at 977–93.
195. As a result, in 1996 only thirty percent of voting-age disabled people cast ballots, compared to forty-nine percent of the nondisabled voting population. *See* David Cracy, *Disabled Voters Roused to Action*, AP NAT'L WIRE, Nov. 2, 2000.

national mandate for the elimination of discrimination against individuals with disabilities,"[196] by promulgating "clear, strong, consistent, enforceable standards addressing" both individual and systematic forms of discrimination.[197] Congress also stated that part of its purpose in promulgating the legislation was "to ensure that the Federal Government plays a central role in enforcing the standards" established by the ADA.[198] This language indicates that policies and practices are to be enjoined if they are found to invite or facilitate discriminatory actions. *Cleburne* excepted any state policies or practices that could be rationally related to a state interest and required that relief be sought application by application,[199] and therefore with very little potential for stimulating social transformation. In a contrasting response, Congress, through passage of the ADA, said it would bring about sweeping changes in social policy.[200] Hence, Congress's overt intention in promulgating the statute was to raise the level at which social exclusions of the disabled would be examined by courts in the future.

Third, the *Cleburne* test presumes that disability immutably diminishes people's capacity to cope with and function in the world.[201] On the other hand, the ADA is premised on the belief that the repercussions of disability often are mutable.[202] In many instances, they are mitigated or thoroughly relieved when the social environment accommodates physical and cognitive difference.[203] Here again, legislative history shows that Congress was presented with a prodigious body of evidence—case after case in which being disabled resulted in capable citizens being denied opportunity and excluded from social participation.[204]

The more compelling anecdotal evidence[205] included testimony: by a wheelchair-using future under-secretary of the Department of Education who was removed from an auction house for being

196. 42 U.S.C. § 12101(b)(1) (1994).

197. *Id.* § 12101(b)(2).

198. *Id.* § 12101(b)(3).

199. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 474 (1985) (Marshall, J., concurring).

200. 42 U.S.C. § 12101.

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

202. *See generally* SILVERS, *supra* note 18.

203. Ironically, the Supreme Court's holdings in *Sutton*, *Murphy*, and *Albertson* can be interpreted to mean that for ADA purposes, the use of mitigating measures by disabled people transmogrifies them into "normal," non-disabled people bereft of antidiscrimination protection. *See generally* Soifer, *supra* note 48.

204. *See generally* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393 (1991).

205. Compiled in S. REP. No. 101–116 (1989).

deemed "disgusting to look at;"[206] about individuals with Down Syndrome who were banned from a zoo because of the keeper's fear they would frighten the chimpanzees;[207] that an academically competitive and nondisruptive child was barred from attending public school because of a teacher's allegation that his physical appearance "produced a nauseating effect" upon classmates;[208] and of the denial of a job to a competent arthritic woman by a college because of its trustees' belief that "normal students shouldn't see her."[209] As a result of its extensive hearings, Congress found, as an empirical matter, that disabled individuals have been subject to many forms of discrimination, "including outright intentional exclusion"[210] as well as more invidious forms of exclusion arising through policies, practices, and "exclusionary qualification standards and criteria."[211]

In sum, the fact that Congress compiled extensive evidence of discrimination, endorsed remedies to ameliorate this condition in the form of an antidiscrimination law, and specifically utilized language in its Findings which reflects 1990 constitutional theory, all evidence its intention that courts utilize a raised level of scrutiny when examining the exclusion of the disabled.

B. The Judicial Response to the ADA

Despite the vast evidence compiled by Congress in support of the ADA's passage, recent Supreme Court jurisprudence makes it questionable whether any factual demonstrations of the competence of people with disabilities could ever incline this Court to accept the beliefs that frame the ADA.[212]

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206. *Id.* at 6–7 (testimony of Judith Heumann).

207. *Id.* at 7.

208. *Id.*

209. *Id.* at 7–8.

210. 42 U.S.C. § 12101(a)(5) (1994).

211. *Id.*

212. *See* Univ. of Alabama v. Garrett, 535 U.S. 356, 360–61 (2001). Moreover, the issue of legislative history and intent being rendered impotent goes beyond the field of disability law. In an insightful article entitled "Dissing Congress," Professors Colker and Brudney argue that during the 1990s (a period coinciding with the post-ADA cases) the Court developed a dual methodology for assessing the constitutional adequacy of federal antidiscrimination laws that is almost impossible for Congressional enactments to withstand. *See* Colker & Brudney, *Dissing Congress*, *supra* note 27, at 85 (2001). They demonstrate, in the context of age discrimination, how the Court has developed a "phantom legislative history approach." *Id.* Under this framework, "the Court expresses interest in considering legislative history when assessing constitutionality, but then establishes and applies a legal standard

Here we may recall that while acknowledging the "vast changes in the social and legal position of women,"[213] the *Goesart* Court held that "the fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the states from drawing a sharp line between the sexes."[214] The *Cleburne* Court permitted benefits and burdens to be distributed differently to disabled and nondisabled persons because of the presumed difference in their capabilities.[215] In the spirit of *Goesart*, the current Court may continue to draw sharp lines between species-typical and biologically anomalous people regardless of technological, social, and legal changes that permit disabled people to achieve the capabilities long practiced by the nondisabled.[216] Much effort by the current Court has gone into pressing the disability category into conformity with the framework on which *Cleburne* was built. By disregarding Congress's attempt to throw off the *Cleburne* framework, the Court may have disabled Congress. For it may be impossible to legislate remedies for disability discrimination without breaking out of *Cleburne*'s straitjacket of reasoning.

The construction of the *Cleburne* Court's reasoning places on the conceptualization of disability is guided by the judicial emphasis on the centrality of being dysfunctional to being disabled. This is the message of five of the six cases the Court has heard since passage of the ADA. (The sixth, *Olmstead*, centered on individuals who are mentally retarded and in extended medical dependence, and who therefore conformed ideally to the *Cleburne* template.) In *Bragdon*, decided in 1998, perceived limitation of reproductive function qualified an individual as disabled.[217] As we showed in Part I, the source of this limitation lay in social convention rather than biological fact. The following year, plaintiff Cleveland was deemed to have ADA protection in retaining employment, even though she

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for review that even a detailed legislative record could not possibly satisfy." *Id.* at 85–86. This is precisely the concern voiced by Justice Breyer in his *Garrett* dissent. *See Garrett*, 535 U.S. at 376–79 (Breyer, J., dissenting). Even when Congress established a detailed and lengthy record of state-sponsored discrimination against the disabled, the current Court's majority was entrenched so deeply in retrogressive methodology that it categorized the historical evidence as failing to prove systematic discrimination by the states. *See id.* at 960.

213. Goesart v. Cleary, 335 U.S. 464, 465–66 (1948).

214. *Id.* at 466.

215. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 444 (1985).

216. The current Court, as evidenced through the 1999 trio of holdings in *Sutton, Murphy,* and *Albertson's* discussed *infra* in Part III, appears to deal with advances in pharmaceutical and prosthetic technology by holding that disabled people who use them may fall beyond disability discrimination protection because their impairments are mitigated.

217. Bragdon v. Abbott, 524 U.S. 624, 637 (1998).

had exercised a statutory entitlement to Social Security Disability Insurance.[218] However, the burden shifted to her to show that with reasonable accommodation she could overcome the crucial aspects of the employment-related dysfunction on which her SSDI application was based.[219] Thus, the Court preserved the *Cleburne* principle, where assignment to the disability classification carries a presumption of incompetence, and continued to expect individuals so classified to prove themselves exceptions to the presumption in order to gain access to the normal opportunity range. In the same year as *Cleveland*, plaintiffs Sutton,[220] Kirkingburg[221] and Murphy[222] were all disqualified from protection against disability discrimination because in the eyes of the Court, the limitations occasioned by their impairments could be overcome.[223]

A curious digression may give the influence of *Cleburne* over *Sutton* away. Although *Sutton* concerns the classification of myopia as a disability, the Court goes out of its way to illustrate its point by discussing diabetes.[224] Diabetes also should not be viewed categorically as a disability, according to the opinion, despite the clarity with which the ADA's legislative history shows Congress's intent to address disability discrimination against people with diabetes.[225] Because diabetes may or may not affect an individual's performance of major life activities, the Court declared it impermissible to treat people with this condition as prima facie falling into the disability category.[226] Instead, how each citizen with diabetes handles her condition must be assessed individually, application by application, in order to learn whether that particular citizen is protected against disability discrimination.[227]

Why digress to disassociate the diagnosis of diabetes from disability? There are two important ways in which diabetes differs from mental retardation, which is the paradigm for the *Cleburne* doctrine. First, mental retardation more commonly diminishes people's ability to cope with and function in the every day world

218. Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999).
219. *See id.* at 798.
220. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).
221. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).
222. Murphy v. United Parcel Serv., 527 U.S. 516 (1999).
223. The myth of a disabled person "overcoming" his or her disability, and the catch-22 that ensues, is discussed in Stein, *From Crippled to Disabled*, *supra* note 74.
224. *Sutton*, 527 U.S. at 483.
225. *Id.* at 501.
226. *Id.* at 478.
227. *Id.* at 483.

than does diabetes.[228] This was not always so, but has become the case because contemporary medications directly mitigate some of diabetes' effects.[229]

Suppose now that Congress' explicit intention to include people with diabetes in the disability category were to be honored. In other words, for purposes of the ADA, biologically anomalous but mainly functional individuals who experience differential treatment by the state primarily in respect to being blocked from pursuing opportunities available to biologically species-typical and fully functional people, are included in the disability category. If the disability category is understood in this way, there is an empirical question about whether it is populated mostly by individuals who are mainly dysfunctional because of their biological anomalies, and who experience differential treatment by the state primarily in regard to receiving protective benefits not available to species-typical people.

In the absence of facts establishing that this is so, there is reason to agree with the conclusion voiced by the Ninth Circuit in *Kirkingburg*, namely, that in order to prevent unconstitutional behavior, the ADA's provisions may prohibit some state conduct that might pass muster under rational basis review.[230] This is because what is perceived as the rational treatment of any class of diverse individuals is affected by which among them is taken to be paradigmatic of the class. Thus treatment that might be rational in respect to a small sub-set of biologically anomalous people could be unconstitutionally burdensome when applied broadly by virtue of people's biological anomalies.

Minow observed that the play of categorization in law and public policy often fails to distinguish speculative from actual ramifications of biological variation.[231] Anthony Amsterdam and Jerome Bruner explain why this is so: legal categories function to regulate risk by sorting people into those who have an affinity within the system and those who threaten it.[232] The more prominently a classification is thought of in terms of members' potential

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228. *See generally* AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (1992). On the intersection of mental retardation and the ADA, see PETER DAVID BLANCK, THE AMERICANS WITH DISABILITIES ACT AND THE EMERGING WORKFORCE: EMPLOYMENT OF PEOPLE WITH MENTAL RETARDATION (1998).

229. *Sutton*, 527 U.S. at 501 (suggesting that the effects of diabetes can be controlled).

230. Kirkingburg v. Albertson's Inc., 143 F.3d 1228 (9th Cir. 1998).

231. *See* MINOW, MAKING ALL THE DIFFERENCE, *supra* note 148, at 174.

232. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE LAW AND OURSELVES 25 (2000).

for dependency or disruptiveness, the more important the interest of the state in treating the class dissimilarly is presumed to be.[233] Such differential policies will be understood as strategies for addressing the moral or social problems attributed to the class.

Congress defined the disabled as that group of people who have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual[s],"[234] those who have a history of such impairment,[235] or are regarded as having them.[236] This language references limitation of major life activities, which means constriction of one of the principal processes or performances of life.[237] The language does not, however, directly reference the capabilities of those individuals to execute social functions, such as work. Individuals limited in respect to a particular major life activity may execute social functions associated with that activity through performances of other major life activities. For example, people who are substantially limited in the major life activity of seeing can obtain information from texts by touching (Brailled text) or hearing (voice output of electronic text).

The tripartite definition was imported from the Rehabilitation Act to the ADA.[238] In the context of the Rehabilitation Act, limitation of major life processes or performances may be associated prominently with the dependency that providing the special benefit of rehabilitation services is supposed to overcome. Beyond the context of the Rehabilitation Act, however, this association is not necessarily prominent. In fact, the ADA's legislative findings demonstrate clearly that Congress differentiated between being substantially limited in a major life activity (for example, being unable to walk)[239] and being competent so far as being capable of performing social functions (working, for instance).[240] That Congress so distinguished between the two concepts of function and competence in promulgating the ADA, a discernment attributed to it by two of the ADA's drafters,[241] is demonstrated by the statute's

233. *Id.*

234. 42 U.S.C. § 12102(2)(A) (1994).

235. *Id.* § 12102(2)(B).

236. *Id.* § 12102(2)(C).

237. *Id.*

238. *See* 29 U.S.C. § 794 (1974).

239. *See supra* text accompanying notes 200–10.

240. *See generally* Amartya Sen, *Editorial: Human Capital and Human Capability*, 25 WORLD DEV. 1959 (1997) (explaining a technical term created by Amartya Sen for a function that can be achieved through a variety of alternative activities. Thus, the function of mobilizing can be competently achieved either through walking or by wheeling).

241. Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 447–62 (1991). *See also*

own terms. After delineating disability through the terms borrowed from the Rehabilitation Act, Title I extended its coverage to any qualified individual with disabilities, which it defined as those individuals who either with or without reasonable accommodations can perform the essential functions of a given job.[242] This last section from the ADA clearly demonstrates that Congress presumed certain disabled people were, either with or without accommodations, competent to work (and by extension, engage in other social functions). It could not then, in any sense, have equated the functional limitations which it delineated as defining the class with the characteristic of incompetence. So, contrary to the *Cleburne* Court, beyond the context of the Rehabilitation Act and statutes conferring similar special benefits, we may not presume that differences in abilities to perform life activities entail differences in abilities to cope with the world.

Congress imported the Rehabilitation Act's three-prong definition of disability as a matter of political expediency. Regulations issued in 1977 by the Department of Health, Education, and Welfare (HEW) (now the Department of Health and Human Services (HHS)) specifically enumerated who was considered "handicapped" under the Rehabilitation Act's definition.[243] The extensive HEW regulations were utilized, fairly uniformly, by both agencies and courts enforcing the Rehabilitation Act.[244] Thus, although legislators excluded several controversial conditions from ADA coverage,[245] incorporating the terms of the Rehabilitation Act was viewed as a quick and convenient way to delineate which individuals would come under the statute's auspices.[246] Adopting the terms and usage from the Rehabilitation Act was not, however, an endorsement of context, especially as it relates to the capabilities of the protected class. Thus, although social custom may view the terms as reflecting the competence of the protected group, Congress did not intend to endorse that custom when utilizing otherwise neutral language from the different context of the Rehabilitation Act.

Along with the wholesale importation of the definition of disability from the Rehabilitation Act into the ADA, Congress also

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Arlene Mayerson, *Title I—Employment Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 499 (1991).

242. *See supra* text at notes 233–36.

243. 45 C.F.R. § 84.3 (2000).

244. *See* Chai R. Feldblum, *The Americans with Disabilities Act Definition of Disability*, 7 LAB. LAW J. 11, 12–13 (1991). Feldblum was actively involved in negotiating aspects of the ADA.

245. Among the excluded groups were homosexuals, transvestites, pedophiles, kleptomaniacs, and exhibitionists. A comprehensive list is provided in 42 U.S.C. § 12211 (1994).

246. *See generally* Burgdorf, *supra* note 182.

imported that statute's formulation of what comprises disability-based discrimination. This was neither an obvious, nor an unopposed choice for Congress to have made. Dissatisfied with the scope of pre-ADA civil rights statutes affecting the disabled,[247] academic commentators[248] and disability rights groups[249] advocated amending the 1964 Civil Rights Act through addition of the term "handicapped" since the mid-1980s. The result of this emendation would have been protections against discrimination paralleling that of other groups, in other words, "on the basis of" having a disability, a formula utilized in some other disability-related antidiscrimination statutes[250] This formulation would also have mirrored that applied to people covered by the Civil Rights Act of 1964 (Title VII).[251] By contrast, the Rehabilitation Act (as well as a handful of statutes modeled after it)[252] requires that those individuals defined as having a disability must also satisfy a second requirement, that they be "qualified" individuals with disabilities.[253] The Rehabilitation Act formulation requiring disabled plaintiffs to prove their qualifications was incorporated into Titles I and II of the ADA.

The implication of this standard was substantial for judicial methodological (as well as practical pleading) purposes because, as

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247. *See* Janet Flaccus, *Discrimination Legislation for the Handicapped: Much Ferment and Erosion of Coverage*, 55 U. CIN. L. REV. 81 (1986); Janet Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 ARK. L. REV. 261 (1986).

248. *See, e.g.*, Robert L. Burgdorf & Christopher Bell, *Eliminating Discrimination Against Physically and Mentally Handicapped Persons: A Statutory Blueprint*, 8 MENTAL & PHYSICAL DISABILITY L. REP. 64 (1984).

249. Most prominent was the National Council on the Handicapped's strong opposition to the Rehabilitation Act model: "Proof of class membership is not required under other types of nondiscrimination laws, and statutes guaranteeing equal opportunity for persons with disabilities need not have such a requirement either." NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE, *supra* note 183, at A-25.

250. Examples include the prohibition of discrimination on the basis of disability for the purposes of Foreign Service employment, 22 U.S.C. § 3905(b)(1) (1988); participation in any pursuit funded under the Full Employment and Balanced Growth Act, 15 U.S.C.§ 3151(a) (1988); activities of labor organizations, 5 U.S.C. § 7116(b)(4) (1988); and the sale or rental of housing, 42 U.S.C. § 3604(f)(1)–(2) (1988).

251. Pub. L. No. 88-352, §§ 701–16, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (1994)).

252. *See, e.g.*, 49 U.S.C. § 1374(1) (1988) (prohibiting air carriers from discriminating against qualified individuals with handicaps).

253. *Id.* A clear demonstration of this standard, as well as the circularity of its reasoning, can be seen in *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 397 (1979), where the Court held that because a student with a profound hearing disorder could not be reasonably accommodated in a clinical nurse training program, adverse actions taken against her could not be construed as disability discrimination because she was not an "otherwise qualified handicapped individual" under the terms of the statute.

a result of the inclusion of this requirement, disabled individuals have in practice been under a greater burden of beginning their prima facie assertions of Title I and II civil rights claims than have Title VII litigants.

Both ADA claimants, because of the "qualified disabled" language, and Title VII claimants, due to the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*,[254] are required under their respective burdens of production to plead prima facie cases of discrimination in order to avoid summary judgment. Nevertheless, while the Court held in *McDonnell Douglas* that the level required of women plaintiffs be "minimal," the parallel burden has in practice been much higher among ADA Title I plaintiffs.

Empirical studies by Ruth Colker substantiate this point. Following a report by the American Bar Association that employers prevailed in over ninety-two percent of Title I cases over the period 1992–97,[255] Colker created her own database of all Title I claims filed over this period.[256] Colker concluded that under the ADA, "[c]ourts are abusing the summary judgment device" both by refusing to send normative factual questions to juries as well as by "creating an impossibly high threshold of proof for defeating" summary judgment claims, including the burden of proving prima facie competence.[257] Colker has also examined appellate decisions, and found that the success rate of ADA appellants also pales in comparison to Title VII appellants.[258]

As an example, if a woman with a doctorate in nuclear physics sues an employer after being denied a job as a nuclear physicist, the initial presumption under Title VII which this employer may or may not rebut is that she was discriminated against because of her sex.[259] By contrast, as has been empirically proven, the same job

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254. 411 U.S. 792 (1973).

255. *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL AND PHYSICAL DISABILITY L. REP. 403, 403 (1998). A subsequent study of 1998 outcomes indicates that the employers' win rate increased to ninety-five percent.

256. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants?*, 34 HARV. C.R.-C.L. L. REV. 99 (1999).

257. *Id.* at 101–102.

258. Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001).

259. *See generally* TRIBE, *supra* note 121; McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Views strongly diverge on *McDonnell Douglas*. Compare, for example, Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2237–38 (1995) (arguing for the abandonment of *McDonnell Douglas* for a "less structured approach to disparate treatment cases"), with William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It is Not Time to Jettison* McDonnell Douglas, 2 EMPLOYEE RTS. & EMP. POL'Y J. 361 (1998) (arguing that *McDonnell Douglas* is still valuable for both structural and symbolic reasons).

applicant with a disability, while also having to assert her qualifications, would have a much more difficult time surviving summary judgment because of judicial presumption regarding her competence. The scenarios are the same, yet the initial juridical presumptions regarding competence are diametrically opposed.

In sum, having first brought into the ADA welfarist notions of the disability classification through the adoption of the Rehabilitation Act's definition of disability, Congress then further reinforced the *Cleburne* framework by adopting the Rehabilitation Act's requirement that Title I and II claimants also prove their qualifications. Thus, although Congress very clearly intended to rebut the presumptions utilized by the *Cleburne* Court, and although the ADA's defining language does not reference competence, because of poor drafting it unintentionally bolstered stereotypes of incompetence and the methodology which embeds such stereotypes in interpretations of the law.

C. The Disability Classification

There remains the question of the justice of reducing opportunity for all of a class to protect some of its members or to protect the public from some of them. This is the fundamental question of when the state may reduce opportunities for all of a group as a strategy for constraining some of its members. To illustrate, the dissenting Justices in *Goesart* question whether there is arbitrary discrimination between male and female bar owners and the burden the state's preventative measures place on the latter.[260] While the former might be absent from their bars irresponsibly, leaving wives, daughters, and female employees "without such protecting oversight,"[261] the latter are not free to tend their own bars nor employ their daughters to do so "even if a man is always present in the establishment to keep order."[262]

A seemingly logical, but ultimately fallacious, method of avoiding the problem of categorically burdening members of the class is to make properties associated with dependency and disruptiveness definitive of the classification. To do so would mean that only dependent or disruptive individuals would meet the definition for membership in the classification. Whoever does not display

260. Goesart v. Cleary, 335 U.S. 464, 468 (1948) (Rutledge, J., dissenting).
261. *Id.* at 466.
262. *Id.* at 468.

dependency or disruptiveness would fall outside the classification and in theory would not be burdened by restrictions placed on the classification's population.

If the class protected by the ADA is constructed this way, logic places asymptomatic individuals with HIV, for example, within the classification in view of the kinds of moral and social considerations that weighed heavily in *Bragdon*, even if these are individuals who defer the disease's symptoms with medication. On the other hand, there are few if any similar moral and social problems associated with individuals who mitigate their diabetic symptoms with medication, and these individuals fall outside the classification. Thus, the construction of the disability classification within the *Cleburne* framework appears able to exclude by stipulative definition people who are biologically anomalous but who are of a kind that presently does not present moral or social problems to the state. Drawing the classification this way makes the states' interest in special treatment of the class a logical certainty rather than an open empirical question. Arguably, maintaining the rationality of the state's interest in treating some citizens differently requires empirical proof that the state's characterizations of them are true. It follows that questions about whether the state has a rational interest in treating some citizens differently should not be resolved simply by stipulating class characteristics or acceding to customary characterizations, regardless of whether these truly describe most members of the class.

Relying on stipulated characterizations of classes invites stereotyping the classes' members. Therefore, answers to such questions should be determined empirically by unbiased, systematic, comprehensive examination of facts about the class's extension. Interpretation of the disability classification should be subject to a similar fact-finding process, rather than to the stipulative methodology imposed by the *Cleburne* framework. The *Goesart* Court turned aside such appeal to fact about the classification of women.[263] Evidence adduced by exactly such fact-finding about women impelled the *Cleburne* Court to draw the line it did between gender and disability classifications. It drew this line because it took empirical evidence about the competence of women to be relevant to the female classification, but disregarded the relevance of empirical evidence of competence to the disability classification.

For political reasons, neither Congress nor the political arm of the disability community has faced the question of whether the

263. *See* discussion of *Goesart supra* Part I.

concept of disability has to have a univocal statutory meaning.[264] Only if it does must the class of people eligible for protection from discrimination aimed at their physical or mental anomalies be identical, or even intersect significantly, with the class of people who receive monetary benefits or special services from being classified as disabled. Almost no one asks whether the class of disabled eligible for special educational services should be identical to the class of disabled protected against exclusion from ordinary educational services. Clearly both the reasons and the methods for selective treatment for one purpose—compensating for dysfunction due to disability—are enormously different from the reasons for selective treatment for another purpose—protecting against discrimination due to disability. As the criteria for class membership should be related to the purpose for which the class is delineated, there is no reason to think that the classes relevant to different types of legislation are identical, or reducible to one another, even if it happens that their members are the same (they are extensionally equivalent).

It is now well established that we tend to form categories around prototypical experiences of salient instances that serve as emblematic of the categories.[265] That is to say, we take the properties of individuals who stand out in a category or capture our attention, and make these properties boundary markers of the entire category, so that all its members are assumed to possess them. This cognitive tendency may be magnified when we imagine the most salient members of a category to be the most in need, or otherwise deserving of attention.[266] So, in an era like our own that is

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264. A dispositive answer to this question is far beyond the ambition of this Article. Some initial takes on the matter are included in Part B of AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 87–162 (Leslie Pickering Francis & Anita Silvers eds., 2000).

265. Eleonor Rosch, *Principles of Categorization*, *in* COGNITION AND CATEGORIZATION 27–48 (Eleanor Rosch & Barbara B. Lloyd eds., 1978).

266. The Court's discussion in *Garrett* illustrates how the salience of instances of great neediness captures attention even when they do not relate to the case in hand. In *Garrett*, the Court stipulated that it is rational to hire employees who can use existing facilities and to hold to "job-qualification requirements which do not make allowance for the disabled." Univ. of Ala. v. Garrett, 121 S.Ct. 955, 959 (2000). The Court thus made remodeling facilities and revising job qualifications emblematic of what it takes to give disabled people access to the workplace.

However, when Director of Nursing Patricia Garrett attempted to return to work after treatment for breast cancer, she was "informed . . . she would have to give up her Director position," *id.* at 961, even though having had breast cancer in no way diminished her qualifications or competence, nor did her illness affect her use of existing facilities. *See id.* Neither did prison guard Milton Ash, an asthmatic whose case was consolidated with Garrett's, seek facilities remodeling or job qualification allowances. *See id.* His physician

entranced with difference, justice may seem to require attention to the greatest differences that distinguish groups from one another.[267] The greatest gap that may seem to exist between people with and without disabilities is the distance between the latter's species-typical capability to function independently, and the incapability and consequent dependence of the most dysfunctional members of the former group. Some may think that responses to disability are insensitive if they do not focus on the welfare of that subset of individuals in the disabled population who are most dysfunctional in the sense of having the least potential to function independently.[268]

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recommended that he not be assigned to work in areas polluted with cigarette smoke and to drive cars with carbon monoxide leaking into the interior compartment. *Id.* Arguably, compliance with these recommendations required no "special" accommodation because the pollutants Ash sought to avoid were already prohibited by "no smoking" and vehicle maintenance standard regulations. Nevertheless, in determining the justice of Garrett's and Ash's claims to equality of treatment in the workplace, the Court took needs atypically greater than what is usual for the classification as paradigms. *See id.* at 958–69.

267. Some theorists believe that dominant groups secure their identity and elicit solidarity by constructing negative accounts of the similarities among their members. Thus, whiteness "has no content but is rather a negation, the identity of not-being-black." Orlando Patterson, *America's Worst Idea*, N.Y. TIMES BOOK REV., Oct. 22, 2000, 51, at 15 (reviewing SCOTT L. MALCOMSON, ONE DROP OF BLOOD (2000)). Iris Marion Young also provides an analysis of abjection to explain why the majority of people treat individuals with disabilities as "other." IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE, 141–48 (1990). Also of interest is David Mitchell's and Sharon Snyder's claim that the record of representing disability in the visual and literary media is a history of "metaphorical opportunism." David T. Mitchell & Sharon L. Snyder, *Introduction: Disability Studies and the Double Bind of Representation*, *in* THE BODY, IN THEORY: HISTORIES OF CULTURAL MATERIALISM 1, 17 (David T. Mitchell & Sharon L. Snyder eds., 1997). Mitchell and Snyder believe that there is a "pervasive cultural and artistic dependency upon disability," *id.* at 12, and they indict the culture for colonizing people with various kinds of impairments and exploiting their images in order to nourish nondisabled people's fictions about their own perfections. *See id.* at 15 ("Readers' experience of the dual pleasures of fascination and repulsion [with physical difference] also evolve out of an ability to leave the site of a fiction with our own membership in normalcy further consolidated and assured."). However, for a critique of some of Mitchell & Snyder's theoretical claims, *see* Anita Silvers, *From the Crooked Timber of Humanity, Beautiful Things Can be Made*, *in* BEAUTY MATTERS: NEW THEORIES OF BEAUTY (Peg Zeglin Brand ed., 2000). Theories on which dominant group identities are constructed oppositionally, based on denials of unfavorable attributes assigned to subordinate classifications, necessarily focus on salient differences, even if these do not truly characterize the minority groups' members.

268. *See generally* HANS S. REINDERS, THE FUTURE OF THE DISABLED IN LIBERAL SOCIETY: AN ETHICAL ANALYSIS (2000). Reinders argues that tension exists between genetic screening used to give parents the option of terminating a pregnancy upon the discovery of a genetic defect and the view we have as members of a society towards disabled citizens. Part of the weighing process used to decide whether to have a child with a genetic defect is to imagine living with a disabled child, which requires making a judgment on the value of a disabled person. *Id. See also* ROBERT M. VEATCH, THE FOUNDATIONS OF JUSTICE: WHY THE RETARDED AND THE REST OF US HAVE CLAIMS TO EQUALITY (1986) (arguing for an egalitarian response to the needs of the disabled, grounding the approach in both religious and secular premises).

There is, then, an understandable inclination to imagine the main usage of the disability classification to be in support of the state's interest in responding to these members' special needs. But the most conspicuous differences are not always the fairest markers of the boundaries between groups. Further, only if the groups are logically identical, rather then merely contingently intersecting, can it be fair to visit burdens on members of one group as the price of benefits allocated to members of the other group.

IV. REVISING THE DISABILITY CLASSIFICATION

We demonstrated above that the methodology utilized by the Supreme Court in conceptualizing the disability classification is retrogressive, closely analogous to the one it applied to women more than fifty years ago in *Goesart*.[269] We also illustrated how the framework annunciated in *Cleburne* perpetuated differential treatment under the law of people with disabilities based upon custom and convention, rather than upon an empirical enquiry about what is factual.[270] We now turn to the question of what kind of change would be required to amend the Court's incongruent jurisprudence and achieve methodological consistency in the mode of analysis it applies to groups of biologically different individuals.

As a matter of logical consistency and judicial conservatism, the Court could hold that when examining statutes or practices affecting the disabled as a group, courts ought to proceed from the same baseline utilized for assessing the rights of women. As a practical matter, this would entail an initial presumption that the prevalent characteristic of members of the disability classification is their competence to perform the social function at issue, with a sub-category of individuals within the classification who will be unable to so function. This presumption will either be borne out or disproved by empirical evidence when particular state actions are challenged.

We do not, therefore, argue for the abolition of "rational" discrimination, nor of classification on the basis of characteristics that act as proxy where there are not empirical indicators of those

269. *See supra* Parts I and II.
270. *See supra* Part II.

characteristics.[271] What we take issue with is the selection of proxy characteristics based upon empirically unfounded stereotypes[272] that lead to the general exclusion of all people with disabilities,[273] regardless of competence or qualification. We urge that generalizations about whether the disabled, as distinct from a carefully drawn and substantiated sub-category of the classification are biologically unable to perform particular social functions, should be grounded in an empirical analysis rather than reliant upon social convention.

To adopt this approach fits comfortably with the judicial conservatism typifying the majority of current Justices, for it imposes methodological consistency on the Court's treatment of groups that are candidates for constitutional protection from discrimination. Nor would application of this standard require the Court to engage in dramatic social engineering, for the only current practice that would not prevail would be that founded on empirically unproven generalizations and stereotypes about the disabled. Adopting a constitutionally neutral disability classification that does not stipulate its members' incompetence, and therefore does not make the benefits of differential treatment based on the classification presumptive, would jettison outmoded ideas about the disabled on the same basis that prompted the *Cleburne* Court to jettison outmoded ideas about women.

Unless the Court does so, judicial consideration of disabled people will be mired in circularity. Applied to the disability classification, the methodology we recommend would ensure that judicial examinations of whether disabled individuals are biologically able to execute particular social functions are not

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271. *See generally*, GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971) (seminal treatment of the effects of discrimination, written by a Nobel Prize winning economist).

272. Unfounded labor productivity assumptions are discussed in Michael Ashley Stein, *Market Failure and ADA Title I, in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 193 (Leslie Pickering Francis & Anita Silvers eds., 2000). *See generally*, Heidi M. Berven & Peter David Blanck, *The Economics of the Americans with Disabilities Act Part II—Patents and Innovations in Assistive Technology*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 85–89 (1998) (recognized as the seminal work on accommodation costs); Peter David Blanck & Mollie Weighner Marti, *Attitude, Behavior, and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345 (1997) (exploring the concept of accommodation costs); Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 887 (1997) (same).

273. This is so, even when the authors attempt what they perceive to be a pro-disability rights position. *See, e.g.*, Scott A. Moss & Daniel A. Malin, *Public Funding For Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197, 200–01 (1998); Sue A. Krenek, Note, *Beyond Reasonable Accommodation*, 72 TEX. L. REV. 1969, 1975–78 (1994).

mere reflections of precisely those constrictive conventions or customs whose truth plaintiffs with disabilities are trying to challenge at trial. Such a methodological adjustment will not result in special protections for the disabled but will simply extend the same protections against biased characterization granted to other groups that historically have been deprived of opportunity by the conventionalization of false beliefs about them.

We argue that such rigorous reconstruction of the disability classification is required to avoid the artificial imposition of limitations implicit in categorizations devised for narrow legislative purposes from being mistaken for natural constraints on the potential and freedom of people with disabilities. The practical effects of realizing the kind of methodological consistency we are urging can be illustrated by a comparison of the influence of the *Cleburne* doctrine in *Cleveland v. Policy Management Systems Corp.*[274] with what might change were a *Cleveland* decision developed within a neutral framework.

In *Cleveland*, the Court settled a growing inter-circuit conflict[275] arising from circumstances in which disabled individuals claimed statutory protections under the differing definitions of disability contained in the ADA and the Social Security System.[276] At issue was whether the assertion, made for the purposes of receiving Social Security Disability Income (SSDI), that a person was completely disabled from working[277] precluded the same individual from later asserting in an ADA complaint that she was a work capable (and thus qualified) person with a disability.[278] The Court held, unanimously, that disabled plaintiffs were under a burden of showing that their work dysfunctions (which made them eligible for public benefits) could be nullified by ADA-mandated reasonable accommodations.[279]

The Court found that the ADA and SSDI classifications were not co-extensive, but merely overlapping.[280] The Court further found that an "SSA representation of total disability differs from a purely factual statement."[281] Nevertheless, Carolyn Cleveland was placed under a burden of constructing an explanation, sufficient to meet

274. 526 U.S. 795 (1999).

275. *See id.* at 800.

276. *See generally* Anne E. Beaumont, *This Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act*, 71 N.Y.U. L. REV. 1529 (1996).

277. *Cleveland*, 526 U.S. at 797.

278. *Id.*

279. *Id.* at 798, 806.

280. *Id.* at 803.

281. *Id.* at 802.

a reasonable juror standard, of the discrepancy between her declaration of eligibility for disability benefits granted to those whose impairments make them too dysfunctional to work and her declaration of being able to work if reasonable adjustments to work sites or practices were made. By extrapolation, a similar burden would be borne by other people with disabilities who can be productive under appropriate working conditions, but not under the barrier-ridden conditions maintained by their current employers.

Yet it is unclear as to why these individuals are required to carry such a burden at the summary judgment level.[282] Why should they carry the burden of explaining away presumptive inconsistencies when the Court's own analysis shows that the claims at issue are not inconsistent? According to the Court, the first claim, on which disability is equivalent to the inability to work, refers to an administrative classification and often is determined to be true as a matter of definitional convention.[283] The second claim, on which disability is not equivalent to the inability to work, refers purely to facts about a particular person's competences and is always determined to be true as a matter of empirical observation and demonstration rather than definitional convention. As on the Court's own analysis these claims make logically different kinds of attributions and mean different things in their references to disability,[284] the logical conclusion of the Court's holding should be that no burden exists on the plaintiff to prove that she did not contradict herself. This is borne out by its ruling that the claim to be a member of the SSDI disability classification is not a claim about being disabled in fact, but is instead a claim about satisfying a certain procedure. Thus, on the Court's own analysis, the claim that one is ADA-eligible is a factual one, but the claim that one is SSDI eligible is a contextually-related legal construction. They are no more contradictory than saying "I am tall and green," as opposed to saying "I am red all over and green all over."

Writing for the Court, Justice Breyer reasoned that Cleveland could in fact be eligible under the ADA because a reasonable accommodation could enable her to prove competence.[285] But it would not be in the state's interest to have to make determinations, for each of the 2.5 million annual seekers of various SSA benefits, about whether there are specific accommodations that might enable that individual to work.[286] More than sixty percent of

282. *See id.* at 798.
283. *Id.* at 804.
284. *Id.* at 801–07.
285. *Id.* at 803.
286. *Id.*

the decisions that individuals cannot work at all, and therefore are disabled for SSDI purposes, are made because the applicant has a condition that the SSA lists as disabling, even though people with these conditions may participate successfully in the workforce.[287] Despite the nonfactual basis of the disability classification for purposes of SSDI, *Cleveland* affirmed that courts should therefore defer to this proxy for work incapability. Thus, while explicitly recognizing that the class of disabled people referred to by the ADA is not factually co-extensive with the class eligible to depend on disability benefits, the Court decided that the ADA definition of disability should be viewed as stipulatively coextensive with SSA classifications, with the burden falling on individual litigants to prove otherwise in particular cases.[288]

What results from this stipulation of counterfactual coextensivity? Under this holding, members of the class of people with biological anomalies are faced with a preponderance of burdens over benefits, for they are individually placed under the onus of proving competence, rather than having this presumption made in their favor. With its *Cleveland* ruling, the Supreme Court reaffirmed its commitment to the *Cleburne* framework which postulates a class of disabled individuals who cannot effectively function in society, with an ancillary sub-class who can. In contrast, the methodologically consistent approach that we advocate would have compelled the Supreme Court in *Cleveland* to presume that individuals claiming equal protection from discrimination under the ADA are competent, unless employers or others could show that they really were not. This presumption is reflective of known facts about the class in question.

Quantitative examination of current definitions of disability utilized by the state for social welfare programs allocating disability benefits, and for legal protections such as the ADA, produces a chart constituted by overlapping Venn circles rather than a mutually inclusive classification. From an empirical perspective, the class of people who receive benefits from various state operated programs (such as SSI or vocational rehabilitation), and the class of people with biological anomalies usually identified as "disabled" at times overlap, but are not coterminous. At present, the Census Bureau classifies nearly twenty percent of Americans, or some 54

287. *Id.* at 804.
288. *See id.* at 805–06.

million people, as having some kind of disability.[289] At the same time, the number of individuals with disabilities receiving disability payments based on their own disability was 9.1 million as of December 1999.[290] Although some adjustment must be made to harmonize the samples so that their cohorts are coterminous, what is clear is that these two figures are neither equal nor coextensive, the overall disability figure eclipsing the benefits figure.

This categorical overlap, i.e., the existence of some portion of people with disabilities receiving social benefits for a state-acknowledged inability to work who are functionally capable of working, has been well documented.[291] At the forefront of empirical findings is research emanating from the Cornell Rehabilitation Research and Training Center for Economic Research on Employment Policy for Persons with Disabilities.[292] In sum, the findings of economists funded by the Center demonstrate that the poor business cycle of the early 1990s, in combination with the protected nature of SSI/SSDI recipients during the concurrent welfare reforms, and favorable health benefits provided under those public assistance programs, induced disabled individuals to forego entering the labor market.[293] What is crucial to this analysis is the factual existence of a "transfer population": individuals with

289. Census Bureau, U.S. Dep't of Commerce, Census Brief 97-5, Disabilities Affect One-Fifth of All Americans, *available at* http://www.census.gov/prod/3/97pubs/cenbr975.pdf.

290. *Id.*

291. Neither the general public nor the disability community takes sufficient care to distinguish between disability benefits and reasonable accommodations. The former constitute differential treatment to compensate disabled people for their personal limitations. The latter constitute equal treatment to indemnify disabled people against social limitations. To illustrate, for several years San Francisco airport was required to charge the lower long-term parking lot fees to drivers with disabilities who parked in the short-term parking lot. This was an accommodation made because the shuttles from the long-term parking lot were not wheelchair accessible. The solution was unsatisfactory, however, because many of the drivers classified as disabled did not use wheelchairs and were capable of using existing shuttles. Here, holding a disabled parking placard was made a proxy for the disability classification but this created an overinclusive classification and exposed all members to lengthy eligibility checks. The problem finally was resolved with the purchase of wheelchair accessible long-term parking shuttles and the consequent elimination of the need to accommodate long-term disabled parkers in the short-term lot.

292. The website and research papers are available online at http://www.ilr.cornell.edu/rrtc/.

293. *See, e.g.*, Richard V. Burkhauser et al., *How Policy Variables Influence the Timing of Social Security Disability Insurance Applications*; Richard V. Burkhauser et al., *How Working Age People With Disabilities Fared Over the 1990's Business Cycle*; David C. Stapleton et al., *Transitions from AFDC to SSI Prior to Welfare Reform*; David C. Stapleton & Adam F. Tucker, *Will Expanding Health Care Coverage For People With Disabilities Increase Their Employment and Earnings? Evidence From An Analysis of the SSI Work Incentive Program.* These papers are all available at http://www.ilr.cornell.edu/ped/dep/rrtc.html.

disabilities who were employable, but nonetheless remained eligible for SSI/SSDI benefits under those programs' definitions.[294]

The category of individuals with disabilities receiving public assistance who are functionally capable of working was recognized by national policymakers in passage of the Ticket to Work and Work Incentives Improvement Act, which extended the length of time that people with disabilities receiving public assistance could continue to receive health care coverage after obtaining gainful employment.[295] Coinciding with the tenth anniversary of the ADA, on July 26, 2000, the Clinton Administration announced a series of policy initiatives intended to allow people with disabilities currently receiving Social Security disability-related benefits to earn more income without losing cash benefits.[296] It is reasonable to suppose that further empirical study will show similar results for more specialized disability benefits programs. It is also reasonable to suppose that the majority of individuals who find themselves identified with the disability classification do not benefit from this assignment.

Had the Court pursued a fact-based enquiry about the part of the population reported to be identified as disabled in the Census, it would have discovered several bases for the logical disconnect between the disability classification that has burdened people classified as disabled, and the disability classification emanating from state activities that offer material benefits to people classified as disabled. First, statutory definitions of "disability" vary among state and federal definitions.[297] Second, many disabled people acquired

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294. Anticipating this result, economists Marjorie Baldwin and Richard Burkhauser have been critical of the ADA and its lack of workplace initiatives. *See* Marjorie L. Baldwin, *Can the ADA Achieve its Employment Goals?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (1997); Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 71 (1997).

295. Section 202(a), for example, extends Medicare coverage for SSDI recipients returning to work to six and one-half years. *See* Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860 (1999).

296. Full details of the increase in the allowable substantial gainful activity level (SGA) under SSDI and SSI are set forth in a White House press release. *See* Press Release, White House, Clinton-Gore Administration Announces New Action Promoting Home and Community Based Services and Housing Options for People with Disabilities (July 25, 2000), *available at* http://www.pub.whitehouse.gov/ uri-res/I2R?urn:pdi://oma.eop.gov.us/2000/7/25/10.text.1. Further information on SGA and trial work period changes are available through the Social Security Administration's website at http://www.ssa.gov/pressoffice/newsga.htm.

297. These are laid out in Maureen C. Weston, *The Road Best Traveled: Removing Judicial Roadblocks that Prevent Workers from Obtaining Both Disability Benefits and ADA Civil Rights Protection*, 26 HOFSTRA L. REV. 377 (1997). Their intersection, as well as a pre-*Cleveland* proposal

their disabilities after the times of life when participation in disability programs, such as special education, was appropriate.[298] Third, many disabled people maintain employment free of involvement with vocational rehabilitation services. Fourth, and most pertinently, neither degree nor kind of biological anomaly determines productivity and other competencies.[299] Two individuals may have identical physical limitations. One of them may be designated incapable of employment and thus is classified as disabled for purposes of receiving income support, while the other, identically disabled as far as vulnerability to disability discrimination goes, holds a job and thus is not classified as disabled for purposes of receiving income support.

Accordingly, an empirical examination by the *Cleveland* Court into the characteristics of members of the disability classification would have resulted in a holding grounded in the fact that people with disabilities as a class are capable of engaging in the social function of work, even if a subset categorically are not. When Cleveland and others like her assert membership in an administratively defined SSA disability classification, they would be understood as claiming to conform to one of the designations of biological anomaly stipulated by the SSA as entitling entry into the classification.[300] As well, they would be presumed to contend their inability to perform their own jobs, or others for which they are qualified, not categorically but under contingently existing workplace conditions. Because the ADA construes failure to change certain kinds of exclusionary conditions as discriminatory, ADA plaintiffs' burden of proof at trial usually is in regard to the reasonableness of accommodating their biological anomalies by changing such conditions. Thus, ADA plaintiffs also contend the inability to perform their jobs under existing workplace conditions, but not categorically. They make a further claim, not at issue in regard to SSA classifications, about the reasonableness of altering certain of the conditions that currently obtain in a specific workplace.

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for how to reconcile potential conflicts, is set forth in Beaumont, *This Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act*, *supra* note 276.

298. For example, 52.5% of people become disabled after the age of 65, 18.7% from ages 15 through 64. These, as well as additional facts regarding the age of 'onslaught" of disability are set forth by the Census Bureau, and are available online at http://www.census.gov/prod/3/97pubs/cenbr975.pdf.

299. For a discussion of current economic assumptions about productivity, *see* Michael Ashley Stein, *Labor Markets, Rationality, and Workers with Disabilities*, 21 BERKELEY J. EMP. & LAB. L. 314 (2000).

300. To prove her general inability to work under SSA procedures, Cleveland simply addressed "the extent of her injuries." *Cleveland*, 526 U.S. at 799.

Contrary to the *Cleveland* Court, ADA plaintiffs should in the main be permitted to ignore their previous SSDI contentions, yet survive summary judgment motions. First, there is no inconsistency in principle between SSDI eligibility contentions and ADA reasonable accommodation contentions. Second, by extending the *Cleburne* framework, the *Cleveland* decision has bolstered categorical presumptions against the competence of disabled individuals. This raises a public policy consideration, for employers encouraged by such legal presumptions may take a worker's biological anomaly as a proxy that permits or invites expulsion from the workplace.

V. CONCLUSION: DISABILITY CLASSIFICATIONS AND NATURAL KINDS

An often voiced criticism of the Court's constitutional jurisprudence is that it illegitimately converts legal categories into "natural kinds."[301] That is, the Court is thought to take as "natural" fact the deficiencies of certain groups of people who are subject to disadvantageous statutory treatment and to suppose that they are of a kind naturally deserving of such burdens. The criticism is that such assertions do not refer to independent facts but instead are expressions prompted by cultural lacks and biases. To illustrate, Amsterdam and Bruner comment that "[a] 'cripple' becomes a less natural category to the extent that prosthetic technologies become available; it is a particularly natural category when a culture not only lacks technological resources but regards physical afflictions as punishments for one's misbehavior in a prior life."[302]

Our analysis indicates that this criticism may not be completely on target. A kind is natural if it exists independent of human classificatory processes. That is, natural kinds are described rather than defined. The properties of any natural kind are a matter of fact, to be determined through the empirical study of that kind. The Court's retrogressive methodology in the wrongly decided and problematic cases we have examined was the opposite of what we would expect if the classifications at issue were being treated as natural kinds. The Court viewed legislative or administrative stipulation or definition, not empirical study, as the decisive factor in

301. AMSTERDAM & BRUNER, *supra* note 232, at 50, 247. *See also* MINOW, MAKING ALL THE DIFFERENCE, *supra* note 148, at 106.

302. AMSTERDAM & BRUNER, *supra* note 232, at 50.

these cases in determining the properties of members of the class under consideration. Thus, the Court was led to characterize the larger group of people with disabilities in terms of properties drawn from the stipulated definition of disability embedded in welfarist legislation rather than in terms of properties verified by open-minded empirical study.

We recognize that reconceiving the disability classification as an empirical category is not a simple task. Like general facts about other empirical kinds, what is generally true of disabled people evolved historically as physical and social conditions changed over time. To learn these truths requires careful empirical study of the capabilities of disabled people today. Yet to respect these truths and stimulate the learning process, the Court need only commit itself to the principle that empirical reality overrides stipulative convention.