

# William & Mary Journal of Race, Gender, and Social Justice

---

Volume 6 (1999-2000)  
Issue 2 *William & Mary Journal of Women and  
the Law*

---

Article 2

February 2000

## Paths to Protection: A Comparison of Federal Protection Based on Disability and Sexual Orientation

Kyle C. Velte

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Fourteenth Amendment Commons](#)

---

### Repository Citation

Kyle C. Velte, *Paths to Protection: A Comparison of Federal Protection Based on Disability and Sexual Orientation*, 6 Wm. & Mary J. Women & L. 323 (2000), <https://scholarship.law.wm.edu/wmjowl/vol6/iss2/2>

Copyright c 2000 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
<https://scholarship.law.wm.edu/wmjowl>

# PATHS TO PROTECTION: A COMPARISON OF FEDERAL PROTECTION BASED ON DISABILITY AND SEXUAL ORIENTATION

KYLE C. VELTE\*

## I. INTRODUCTION

Over the past three decades, social movements in both the disability community and in the lesbian and gay community have taken a foothold in American society.<sup>1</sup> Activists in these two communities have raised awareness about the inequalities and discrimination that their members face. As a result, lawmakers in many jurisdictions, from local councils to the United States Congress, have enacted statutory protections for these two groups. This Article focuses on federal protections based on disability and sexual orientation by comparing and contrasting the protections accorded these two groups by the federal government.

Although these two groups may seem different and incomparable at first glance, the history of discrimination and oppression suffered by both groups is quite similar. Both groups have been systematically vilified and isolated from the mainstream of American society.<sup>2</sup> Both groups have been victims of violence based purely on their status as lesbians and gay men or as persons with disabilities.<sup>3</sup>

Part II briefly describes equal protection jurisprudence, which is the focus of this Article's analysis. This part explains the three levels of judicial scrutiny utilized in equal protection cases and discusses these levels vis-à-vis disability and sexual orientation.

---

\* Law clerk, Hon. Roxanne Bailin, Chief Judge, 20th Judicial District of Colorado, 1999-2000; J.D., *summa cum laude*, Washington College of Law, American University, 1999; B.A., *cum laude*, Hamilton College, 1993. The author would like to thank Robert Dinerstein, Associate Dean and Professor of Law, Washington College of Law, for his insights, guidance, and encouragement on this Article. This Article is dedicated to the memory of my grandfather, Henry Courtenay, who passed on his vision of social justice to me and who always supported my participation in the fight for social justice and equality.

1. Throughout the Article, I will refer to those in the disability community as "persons with disabilities" while I will refer to those in the lesbian, gay, bisexual, and transgendered community as "lesbians and gay men." I realize that these categories necessarily erase the diversity within the two communities, as well as the overlap between the two communities. My categorizations, however, are for the purposes of analyzing and comparing the treatment of these two groups on the federal level and are not meant to reflect any assumptions that the communities are homogeneous or mutually exclusive.

2. See *infra* Parts III and IV.

3. See *id.*

Parts III and IV then explore the history of the treatment of both of these marginalized groups, including the parallels in the legal developments and where federal protections diverge. Although there are many similarities in the way these groups are viewed by society, and in turn treated by different legislatures, there are some very important differences in how the groups are perceived and treated. Parts III and IV also discuss the current legal trends in each of these areas with a focus on the Americans with Disabilities Act (ADA)<sup>4</sup> and the Employment Non-Discrimination Act of 1997 (ENDA)<sup>5</sup> as points of divergence of the legal protection afforded these groups.

Using these two pieces of legislation as points of reference for the divergence of federal protection for these two groups, Part V analyzes possible reasons for such divergence. Part V explores the possibility of persons with disabilities and lesbians and gay men gaining heightened scrutiny under Equal Protection Clause analysis. This Part recommends that lesbians and gay men receive suspect classification, while recommending that persons with disabilities receive quasi-suspect classification. Part VI concludes with a discussion about the probability of such classifications, given the constitution of the current United States Supreme Court.

## II. EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>6</sup> The Equal Protection Clause seeks to ensure that legislation based on different kinds of classifications does not violate the United States Constitution. The Supreme Court has said, however, that "[t]he Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups

---

4. 42 U.S.C. §§ 12101-12213 (1994). The ADA provides persons with disabilities, for the first time in American history, equal opportunity in employment, public accommodation, state and local government services, transportation, and telecommunications. *See id.* *See generally* Lisa A. Montanaro, Comment, *The Americans with Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621 (1995) (describing the ADA, its history, and implications).

5. S. 869, 105th Cong. (1997); H.R. 1858, 105th Cong. (1997).

6. U.S. CONST. amend. XIV, § 1.

or persons."<sup>7</sup> In essence, the Supreme Court has held that the equal protection guarantee provides that similarly situated individuals or groups will be treated equally by the law.<sup>8</sup> Further, any classification that arbitrarily burdens one group vis-à-vis a similarly situated group is constitutionally infirm.<sup>9</sup>

The Constitution has empowered the United States Congress to enforce the Fourteenth Amendment's guarantee of equal protection,<sup>10</sup> but because Congress has never promulgated any standards or regulations controlling equal protection inquiries, the Supreme Court has developed a three-tiered analytic model to address these inquiries.<sup>11</sup> The three standards of review in equal protection cases are rational basis review, intermediate scrutiny review, and strict scrutiny review.<sup>12</sup>

Rational basis review is the lowest constitutional threshold that a law must meet.<sup>13</sup> Under this standard, legislation is presumed constitutional if the classification employed by the law is "rationally related to a legitimate state interest."<sup>14</sup> The Court previously has stated that a legitimate state interest and a classification are rationally related when "any set of facts reasonably can be conceived that would sustain it."<sup>15</sup>

The intermediate scrutiny standard of review is applied when a quasi-suspect classification is implicated.<sup>16</sup> Intermediate

---

7. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

8. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216 (1982).

9. *See Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955).

10. *See* U.S. CONST. amend. XIV, § 5.

11. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-43 (1985) (reviewing the history of equal protection jurisprudence and describing the three levels of judicial scrutiny). Some scholars and courts insist, however, that Congress did in fact provide guidance to courts and legislated that persons with disabilities constitute a suspect class, in the ADA's findings, which stated that persons with disabilities are a "discrete and insular minority." *See Montanaro, supra* note 4, *passim* (discussing standard of review and whether the disabled should be considered a suspect class). *See generally* Note, *Section 5 and the Protection of Nonsuspect Classes After City of Boerne v. Flores*, 111 HARV. L. REV. 1542 (1998) [hereinafter *Nonsuspect Classes*] (discussing Congress's ability to abrogate state sovereign immunity in legislation protecting non-suspect classes); Elizabeth Welter, Note, *The ADA's Abrogation of Eleventh Amendment State Immunity as a Valid Exercise of Congress's Power to Enforce the Fourteenth Amendment*, 82 MINN. L. REV. 1139 (1998) (discussing the ADA's abrogation of state sovereign immunity with respect to legislation affecting the disabled as a non-suspect class).

12. *See Cleburne*, 473 U.S. at 432, 439-43.

13. *See id.* at 440.

14. *Id.*

15. *Lindsey v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

16. A "quasi-suspect" class is one whose members share some characteristics of a suspect group, yet do not qualify as a "discrete and insular minority." Presently, only classifications based on gender and legitimacy have been accorded quasi-suspect status. *See Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976) (holding that illegitimacy-based classifications demand

scrutiny, also known as heightened scrutiny, requires that the quasi-suspect classification be substantially related to an important government interest.<sup>17</sup>

Finally, the strict scrutiny standard of review is the most difficult for a law to survive. This standard involves no deference to the legislature or electorate; instead, the judiciary undertakes an independent review of the law in question.<sup>18</sup> Strict scrutiny is triggered in two circumstances: when a fundamental right is implicated in the law or when the classification involved is deemed suspect.<sup>19</sup> The Court has determined that classifications based on race, alienage, and nationality are *per se* suspect.<sup>20</sup> In order for a law to survive strict scrutiny, it must be "suitably tailored to serve a compelling state interest."<sup>21</sup> The Court has created new fundamental rights and new suspect and quasi-suspect classes very sparingly and infrequently; it has been a very long time since a new fundamental right triggered strict scrutiny review.<sup>22</sup>

Although the Court has never articulated a precise test for determining when a group rises to the level of a quasi-suspect or suspect class, it has expressed factors to consider in defining a quasi-suspect or suspect class. These factors include: whether the group's defining characteristic is immutable;<sup>23</sup> whether the group has suffered a history of discrimination;<sup>24</sup> whether the group is in a position of political powerlessness;<sup>25</sup> whether the group's defining characteristic relates in any way to the individual's ability to participate in, and contribute to, society;<sup>26</sup> and whether the

---

heightened scrutiny); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1972) (holding that gender-based classifications demand heightened scrutiny); see also Raffi S. Baroutjian, Note, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis*, in *with Romer v. Evans*, 30 LOY. L.A. L. REV. 1277, 1292-93 (1997) (discussing the Supreme Court's apparent transition from the traditional three-tier approach to equal protection to a multi-factor, sliding scale approach in *Romer v. Evans*).

17. See *Cleburne*, 473 U.S. at 441.

18. See *id.* at 440-41.

19. See *id.* at 440.

20. See *id.*; *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (holding that alienage-based classifications demand strict scrutiny); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (holding that race-based classifications demand strict scrutiny).

21. *Cleburne*, 473 U.S. at 440.

22. The last quasi-suspect classification articulated by the Court was illegitimacy in 1976. See *Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976).

23. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). But see *Cleburne*, 473 U.S. at 442-43 n.10 (revealing some hesitancy about applying the immutability factor).

24. See *Cleburne*, 473 U.S. at 441; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976); *Frontiero*, 411 U.S. at 684-85.

25. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

26. See *Cleburne*, 473 U.S. at 441-44 (quoting *Mathews*, 427 U.S. at 505).

characteristic is beyond the control of the individual group member.<sup>27</sup>

As evidenced by this three-tiered system of analysis, the higher the level of scrutiny employed by a court in submitting it to an equal protection review, the more likely that the law will fail constitutional muster. The application of the rational basis test is almost never fatal to the legislation under review.<sup>28</sup> Conversely, the application of the strict scrutiny test is almost always fatal to the legislation under review, although the Court has upheld statutes on rare occasions.<sup>29</sup> As a result, groups, such as persons with disabilities and lesbians and gay men, will gain an advantage if classified as a quasi-suspect or suspect class. As discussed below, persons with disabilities and lesbians and gay men, as classes, rarely have been granted quasi-suspect or suspect classification, although there are strong arguments that each of these two groups should be accorded at least quasi-suspect classification.

### III. DISABILITY AND THE LAW: HISTORY AND CURRENT TRENDS

#### A. *Discrimination and Oppression of Persons with Disabilities*

The disabled community historically has endured discrimination and inequality. Persons with disabilities have been institutionalized and imprisoned against their will, isolated from their communities, and abused by purported caretakers.<sup>30</sup> Even the United States Supreme Court has recognized the historical and present oppression of persons with disabilities. In its seminal case to date on the issue of disability and equal protection, *City of Cleburne v. Cleburne Living Center*,<sup>31</sup> the Court addressed the City of Cleburne's denial of a zoning permit to a group home for mentally retarded individuals.<sup>32</sup> The Court specifically rejected quasi-suspect classification for persons with disabilities, considering the case

---

27. See *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982); *Frontiero*, 411 U.S. at 686.

28. See, e.g., *Murgia*, 427 U.S. at 317 (upholding a mandatory retirement age ordinance under a rational review analysis). But see *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (striking down a state constitutional amendment under the rational basis test); *Cleburne*, 473 U.S. at 450 (striking down an ordinance under the rational basis test).

29. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 221-24 (1944) (upholding an exclusion order based on ethnicity/ancestry under the "most rigid scrutiny").

30. See Montanaro, *supra* note 4, at 636 (describing the discrimination and mistreatment of persons with disabilities throughout American history).

31. 473 U.S. 432 (1985).

32. See *id.* at 435.

under rational review.<sup>33</sup> The *Cleburne* Court stated, "[t]he short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."<sup>34</sup> In his concurrence with the *Cleburne* majority, Justice Stevens added, "the Court of Appeals correctly observed that through ignorance and prejudice the mentally retarded 'have been subjected to a history of unfair and often grotesque mistreatment.'"<sup>35</sup> In the opinion's strongest language about the plight of the mentally retarded, Justice Marshall wrote in his dissent:

[T]he mentally retarded have been subject to a "lengthy and tragic history" of segregation and discrimination that can only be called grotesque. During much of the 19th century, mental retardation was viewed as neither curable nor dangerous and the retarded were largely left to their own devices. By the latter part of the century and during the first decades of the new one, however, . . . leading medical authorities and others began to portray the "feeble-minded" as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." A regime of state-mandated segregation and degradation soon emerged . . . Massive custodial institutions were built to warehouse the retarded for life . . . Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable . . . State laws deemed the retarded "unfit for citizenship."<sup>36</sup>

In addition, the United States Congress has recognized the history of discrimination against persons with disabilities. In its findings accompanying the ADA, Congress declared that discrimination against persons with disabilities continues today. Congress found that this discrimination occurs in many areas of life, including housing, employment, voting, and public accommodations and that this discrimination is the result of many factors, including "outright intentional exclusion"<sup>37</sup> as well as "overprotective rules"<sup>38</sup> and "exclusionary qualification standards."<sup>39</sup> The congressional findings further state that persons with disabilities "occupy an inferior status in our society"<sup>40</sup> and constitute a "discrete and

---

33. See *id.* at 442.

34. *Id.* at 450.

35. *Id.* at 445 (Stevens, J., concurring) (citation omitted).

36. *Id.* at 461-63 (Marshall, J., dissenting) (citations omitted).

37. 42 U.S.C. § 12101(a)(5) (1994).

38. *Id.*

39. *Id.*

40. *Id.* § 12101(a)(6).

insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and regulated to a position of political powerlessness.<sup>41</sup> Congress concluded that persons with disabilities, while facing "the continuing existence of unfair and unnecessary discrimination and prejudice,"<sup>42</sup> have "often had no legal recourse to redress such discrimination."<sup>43</sup>

### *B. Pre-ADA Federal Laws Protecting Persons with Disabilities*

The ADA is the most recent and most comprehensive federal law protecting persons with disabilities. Legislative attempts to protect persons with disabilities began, however, long before the ADA. As early as 1918, Congress passed the Vocational Rehabilitation Act,<sup>44</sup> which provided persons with disabilities discharged from the armed services with vocational rehabilitation in order to prepare them to return to civil employment.<sup>45</sup> Next, in 1920, Congress passed another Vocational Rehabilitation Act,<sup>46</sup> which set out to promote vocational rehabilitation for persons with disabilities who sustained their disability in the course of employment.<sup>47</sup> In 1936, the Randolph-Sheppard Vending Act<sup>48</sup> was passed and assisted the blind in finding employment.<sup>49</sup> In 1968, Congress passed the Architectural Barriers Act,<sup>50</sup> which required all new facilities built with public money to be accessible to persons with disabilities.<sup>51</sup> Further, Congress passed the Developmental Disabilities Services and Facilities Construction Amendments of 1970,<sup>52</sup> which granted federal monies to community-based living facilities established for persons with developmental disabilities.<sup>53</sup>

---

41. *Id.* § 12101(a)(7).

42. *Id.* § 12101(a)(9).

43. *Id.* § 12101(a)(4).

44. Ch. 107, 40 Stat. 617 (1918); *see also* Montanaro, *supra* note 4, at 637 (describing the history of pre-ADA federal legislation based on disability). In 1943 and 1954, Congress enacted amendments to the Vocational Rehabilitation Act that funded medical and rehabilitative services. *See id.*

45. *See* Montanaro, *supra* note 4, at 657.

46. Ch. 219, 41 Stat. 735 (1920) (codified as amended at 29 U.S.C. § 701 (1994)).

47. *See* Montanaro, *supra* note 4, at 637.

48. Ch. 638, 49 Stat. 1559 (1936) (codified as amended at 20 U.S.C. § 107 (1999)).

49. *See* Montanaro, *supra* note 4, at 637.

50. Pub. L. No. 90-480, 82 Stat. 718 (1968) (codified as amended at 42 U.S.C. §§ 4151-4156 (1999)).

51. *See* Montanaro, *supra* note 4, at 638.

52. Pub. L. No. 91-517, 84 Stat. 1316 (1970) (codified at 42 U.S.C. §§ 6000-6083 (1999)) [hereinafter *The Developmental Disabilities Act*].

53. *See id.*; *see also* Montanaro, *supra* note 4, at 638. *The Developmental Disabilities Act*



In 1975, Congress passed the Education of the Handicapped Act,<sup>54</sup> which was amended and renamed the Individuals with Disabilities Education Act in 1990.<sup>55</sup> This Act ensured children with disabilities access to a free, appropriate, public education.<sup>56</sup> Finally, in 1988 the Fair Housing Act<sup>57</sup> was enacted to prohibit discrimination against persons with disabilities in housing.<sup>58</sup>

Unlike the ADA, which is a broad, antidiscrimination statute, these early federal laws focused primarily on rehabilitating persons with disabilities in order to facilitate re-entry into the workforce.<sup>59</sup> It was not until 1973 that Congress passed a broad, antidiscriminatory statute protecting persons with disabilities. The Rehabilitation Act of 1973,<sup>60</sup> still effective today, prohibits discrimination against persons with disabilities by any program or facility that receives federal funds.<sup>61</sup> The Rehabilitation Act also extends to federal contractors and to those employed by federal government agencies.<sup>62</sup> Section 794 of the Rehabilitation Act provides that "no otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."<sup>63</sup> Protection is thus limited and does not extend to programs, services, or facilities in the private sector.<sup>64</sup> Further, none of these pre-ADA laws expressly attempt to define persons with disabilities as a quasi-suspect or suspect class for

---

was first passed in 1963 as a part of the Mental Health Retardation Facilities and Community Mental Health Centers Construction Act, which strove to deinstitutionalize and provide care to persons with mental disabilities through the creation of community mental health centers. See Pub. L. No. 88-164, 77 Stat. 282 (1963) (codified as amended in scattered sections of 42 U.S.C.); see also Fernando J. Gutierrez, *Who Is Watching Big Brother When Big Brother Is Watching Mental Health Professionals: A Call for the Evaluation of Mental Health Advocacy Programs*, 20 L. & PSYCHOL. REV. 57, 59 (1996).

54. Pub. L. No. 91-230, 84 Stat. 175 (1970) (codified as amended in scattered sections of 20 U.S.C.).

55. See Montanaro, *supra* note 4, at 638.

56. See *id.*

57. Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3619 (1999)).

58. See *id.*; see also Montanaro, *supra* note 4, at 638.

59. See Montanaro, *supra* note 4, at 637-38.

60. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 791, 793, 794 (1994 & Supp. 1998)).

61. See Montanaro, *supra* note 4, at 639.

62. See *id.*

63. 29 U.S.C. § 794(a).

64. See *id.*; see also Montanaro, *supra* note 4, at 639 (describing the limited scope of the Rehabilitation Act). But see Air Carrier Access Act of 1986, 49 U.S.C. § 41705 (1994) (barring discrimination by private air carriers based on disability).

equal protection purposes. As a result, the judiciary bears the responsibility of interpreting laws based on disability in the context of the Equal Protection Clause.

*C. Pre-ADA Case Law Interpreting Disability-Based Legislation on Equal Protection Grounds*

Three cases from the 1970s and 1980s illustrate the unsettled,<sup>65</sup> yet evolving, nature of equal protection jurisprudence in the context of disability.<sup>66</sup> In the 1975 case *Fialkowski v. Shapp*,<sup>67</sup> the United States District Court for the Eastern District of Pennsylvania considered the plight of two mentally retarded boys who claimed the state violated their equal protection rights by failing to provide appropriate education.<sup>68</sup> The plaintiffs argued that retarded children constitute a suspect class, and strict scrutiny equal protection analysis thus should apply.<sup>69</sup>

In its consideration of this issue, the court distinguished this case from *San Antonio Independent School District v. Rodriguez*,<sup>70</sup> in which the Supreme Court held that education is not a fundamental right.<sup>71</sup> The court relied, however, on the criteria for determining a suspect class set forth in *Rodriguez*, including a "history of purposeful unequal treatment," and the relegation to political powerlessness.<sup>72</sup> Further, the court discussed a North Dakota Supreme Court case that found "handicapped" individuals constituted a suspect class using the *Rodriguez* factors.<sup>73</sup> While quoting the North Dakota Supreme Court, the *Fialkowski* court stated:

"[W]e are confident that the same [United States Supreme] Court would have held that G.H.'s [the party in the North Dakota case] terrible handicaps were just the sort of 'immutable characteristics determined solely by the accident of birth' to which the 'inherently suspect' classification would be applied, and that depriving her of a meaningful educational opportunity

---

65. See Montanaro, *supra* note 4, at 644 (citing judicial discretion and multiple standards of review as the culprits).

66. Discussion is limited to three cases to provide an overview of the pre-ADA state of the law of disability, not an exhaustive review of the case law from this era.

67. 405 F. Supp. 946 (E.D. Pa. 1975).

68. See *id.* at 957.

69. See *id.* at 958.

70. 411 U.S. 1 (1973).

71. See *Fialkowski*, 405 F. Supp. at 957 (citing *Rodriguez*, 411 U.S. at 1).

72. *Id.* at 958-59 (quoting *Rodriguez*, 411 U.S. at 1).

73. See *id.* at 959 (citing *Interest of G.H.*, 218 N.W.2d 441 (N.D. 1974)).

would be just the sort of denial of equal protection which has been held unconstitutional in cases involving discrimination based on race and illegitimacy."

Although the present posture of this case does not require us to resolve this issue, we will say that depriving retarded children of all educational benefits would appear to warrant greater judicial scrutiny than that applied in *Rodriguez*.<sup>74</sup>

The court's reference to both illegitimacy, a quasi-suspect class, and race, a suspect class, reflects its indecision about whether persons with disabilities should be considered a quasi-suspect class or a suspect class.

Notwithstanding this statement, the court concluded that "there may be no rational basis" for providing education to most children while denying mentally retarded children appropriate education.<sup>75</sup> Nonetheless, the *Fialkowski* court apparently considered persons with disabilities a class deserving of some level of heightened scrutiny, while at the same time recognizing that heightened or strict scrutiny may not be necessary to prevail on an equal protection claim.<sup>76</sup> Though decided before *Cleburne*, this case is one of the few instances in which the rational basis test resulted in the invalidation of a statute.<sup>77</sup>

Four years after the *Fialkowski* decision, in 1979, the United States District Court for the Northern District of Illinois decided the issue of which level of equal protection review to accord to persons with mental illnesses in *Sterling v. Harris*.<sup>78</sup> The plaintiffs in *Sterling* were a group of aged, blind, and/or disabled persons. They challenged, under the Equal Protection Clause, certain sections of a federal law that prohibited them from receiving benefits under the federally funded Supplemental Security Income Program (SSI).<sup>79</sup> After discussing the three levels of equal protection review, the court decided that persons with mental illness constitute a quasi-suspect class.<sup>80</sup> The court noted that "[n]o Supreme Court or court of appeals case characterizing mental

---

74. *Id.* at 959 (quoting *G.H.*, 218 N.W.2d at 447).

75. *Id.*

76. *But see* Montanaro, *supra* note 4, at 644 (asserting that courts often apply heightened scrutiny "masquerading as the rational basis standard").

77. *See also* Montanaro, *supra* note 4, at 643-44 & n.149 (citing *O'Brien v. Skinner*, 414 U.S. 524 (1974), and *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), as two other instances).

78. 478 F. Supp. 1046 (N.D. Ill. 1979).

79. *See id.* at 1048 (noting that the plaintiffs were challenging 42 U.S.C. § 1382(e)(1)(A)-(B)).

80. *See id.* at 1053.

illness for purposes of equal protection analysis ha[d] been called to [its] attention,"<sup>81</sup> and in the absence thereof, the court applied the Supreme Court's factors for determining quasi-suspect classification to persons with mental illness.<sup>82</sup> In holding that persons with mental illnesses constitute a quasi-suspect class, the court stated, "it appears that mental health classifications possess the significant indicia of the suspect classifications recognized in other cases."<sup>83</sup>

In its summary of pre-1979 lower court decisions considering this same question, the *Sterling* court noted that two district courts had refused to classify persons with disabilities as quasi-suspect or suspect,<sup>84</sup> whereas two district courts had classified persons with disabilities as a quasi-suspect class.<sup>85</sup>

Finally, in the 1983 case of *J.W. v. City of Tacoma*,<sup>86</sup> the Ninth Circuit considered the issue of whether the denial of a zoning permit that would have allowed formerly institutionalized mental patients to reside in group homes in a residential district violated the Equal Protection Clause.<sup>87</sup> The court further considered the appropriate level of equal protection scrutiny to accord such a classification.

---

81. *Id.* at 1051.

82. The court noted that these factors include immutability, the level of the relationship between the classification and the "ability to perform or contribute to society," the fact that the group is a "politically impotent, insular minority" and that the group has a "history of purposeful unequal treatment." *Id.* at 1052 (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973), *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), and *Graham v. Richardson*, 403 U.S. 365 (1971)).

83. *Id.*

84. *See id.* The court cited *New York State Association for Retarded Children v. Rockefeller*, 357 F. Supp. 762 (E.D.N.Y. 1973), which held that the mentally retarded did not constitute a suspect class, based on the reasoning that the plaintiffs, residents of an institution for the mentally retarded, did not prove discrimination based on suspect criteria. Further, in *Rockefeller*, the court considered only the issue of classification under the traditional two-tier test and did not consider that disability may fall into a middle-tier test which later became more clearly recognized. The *Sterling* court also cited *Doe v. Colautti*, 454 F. Supp. 621 (E.D. Pa. 1978), which held that legislation limiting benefits for psychiatric care was not subject to strict scrutiny. The *Doe* court did note that intermediate, or heightened, scrutiny may have been appropriate, but concluded that the legislation would have survived such intermediate scrutiny.

85. *See Sterling*, 478 F. Supp. at 1052. The court cited *Frederick v. Thomas*, 408 F. Supp. 832 (E.D. Pa. 1976), which held that learning disabled children constituted a minority class that compelled the use of the "middle test" of equal protection analysis based on the children's political powerlessness and minority status, and *Fialkowski v. Shapp*, 405 F. Supp. 946 (E.D. Pa. 1975), which held that the mentally retarded were entitled to "greater judicial scrutiny," which the *Sterling* court interpreted as heightened scrutiny, based on political powerlessness and purposeful unequal treatment.

86. 720 F.2d 1126 (9th Cir. 1983).

87. *See id.* at 1127-28.

The court stated that the "ordinance may well result from 'archaic and stereotypic notions' and must therefore receive special judicial attention."<sup>88</sup> The court explained, however, that the class of former mental patients did not constitute a "full-fledged suspect class for purposes of constitutional analysis"<sup>89</sup> as factual circumstances may exist in which classifications based on mental illness would represent "special problems best addressed by special legislative measures."<sup>90</sup> The court held that "the discrimination against former mental patients embodied in the Tacoma zoning ordinance is valid if rational, but that it is rational only if it furthers some substantial goal of the municipality."<sup>91</sup> Although the court described its level of review as "rational," its requirement that the ordinance further a "substantial" state or municipal interest indicates that heightened scrutiny was applied.

Equal protection jurisprudence addressing disability was thus inconsistent and unsettled into the early 1980s.<sup>92</sup> Courts around the country held that persons with disabilities fell within all of the equal protection tiers.<sup>93</sup> This judicial confusion and lack of consistency disappeared, however, when the Supreme Court addressed the equal protection issue in *City of Cleburne v. Cleburne Living Center*.<sup>94</sup>

#### D. *City of Cleburne v. Cleburne Living Center*

In 1985, the Supreme Court seemingly resolved the issue of what level of scrutiny should be applied to legislation involving persons with disabilities. *Cleburne* involved the City of Cleburne's denial of a special use permit to the operator of a group home for mentally retarded adults.<sup>95</sup> The City based its denial on a zoning ordinance that required permits for such homes.<sup>96</sup>

In holding that the ordinance violated the Equal Protection Clause, the Fifth Circuit concluded that persons with mental retardation constitute a quasi-suspect class.<sup>97</sup> The Fifth Circuit applied the heightened scrutiny test to the ordinance and decided

---

88. *Id.* at 1129 (citation omitted).

89. *Id.* at 1129-30.

90. *Id.* at 1130.

91. *Id.* (relying on *Plyler v. Doe*, 457 U.S. 202, 224 (1982)).

92. See Montanaro, *supra* note 4, at 622.

93. See *id.* at 643-44.

94. 473 U.S. 432 (1985).

95. See *id.* at 435.

96. See *id.*

97. See *id.*

that it did not substantially further a legitimate government interest.<sup>98</sup> This opinion overturned the District Court, which had upheld the ordinance on the grounds that it did not violate any fundamental right, nor did it involve a quasi-suspect or suspect classification.<sup>99</sup>

Although the Supreme Court affirmed the circuit court's invalidation of the ordinance, it did so on different grounds. The Court rejected the Fifth Circuit's quasi-suspect classification of persons with disabilities and held instead that persons with disabilities constitute a non-suspect class, thereby necessitating application of the rational basis level of equal protection review.<sup>100</sup>

The *Cleburne* Court provided four reasons for its holding that persons with disabilities constitute a non-suspect class deserving only rational basis review. First, the Court stated that persons with mental retardation<sup>101</sup> are undeniably different as they have a "reduced ability to cope with and function in the everyday world."<sup>102</sup> As a result, the Court noted that persons with mental retardation are "thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one."<sup>103</sup> Thus, the Court decided that heightened scrutiny would frustrate legislative attempts to craft appropriate, nondiscriminatory laws addressing disability by frequently invalidating such laws.<sup>104</sup> Utilizing an institutional competence

---

98. *See id.*

99. *See id.* at 437-38.

100. *See id.* at 435.

101. I use the words "mentally retarded" and "persons with disabilities" interchangeably in my discussion of *Cleburne* because, although the Court addressed the issue of mental retardation in this case, its holding has been interpreted to deem all persons with disabilities as non-suspect for equal protection purposes. I do not necessarily agree with the conflation of mental retardation specifically and disability generally, although most post-*Cleburne* decisions reach this conclusion. I disagree with the conclusion because the Court supposedly strives to reach its decisions, especially those of constitutional import, on the narrowest grounds possible. *See, e.g.,* Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 184 (1999) ("It is, however, an established part of our constitutional jurisprudence that we do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground."). One of the methods of reaching the narrowest possible decisions is to confine a holding to its facts. In *Cleburne*, the individuals involved were mentally retarded, a sub-population of the diverse community of persons with disabilities. I find it surprising that more courts did not distinguish *Cleburne* on this basis and characterize persons with other types of disabilities as a quasi-suspect or suspect class. In fact, if *Cleburne* can be read as narrowly as I have proposed, the Court could declare persons with disabilities a quasi-suspect class without disturbing *Cleburne*. *See infra* Part V.B.

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

103. *Id.*

104. *See id.* at 443 ("[H]eightedened judicial scrutiny inevitably involves substantive

argument, the Court denied quasi-suspect classification to persons with disabilities.<sup>105</sup>

A second reason the Court offered for using rational basis review was the presence of state and national laws addressing disability which attempted to right historical wrongs against the mentally retarded.<sup>106</sup> The Court stated that "lawmakers have been addressing their [persons with mental retardation] difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."<sup>107</sup> The Court pointed to these laws as examples of desirable outcomes of legislative involvement with issues of disability, stating that such laws are "not only legitimate but also desirable."<sup>108</sup> The Court also stressed the importance of legislative flexibility in crafting such laws.<sup>109</sup> While treating the *Cleburne* ordinance as an anomaly in disability law, the Court distinguished it from the "big picture" of disability law and invalidated it on the rational basis level.

The third reason offered by the Court to deny heightened scrutiny to persons with disabilities was that the presence of many laws protecting persons with disabilities disabused any notion that this group was politically powerless.<sup>110</sup> The fourth and final reason proffered by the Court was that vast diversity within the community of persons with disabilities would make quasi-suspect classification of this group unwieldy, unmanageable, and impractical.<sup>111</sup> The Court opined:

[I]t would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.<sup>112</sup>

---

judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.").

105. *See id.*

106. *See id.*

107. *Id.* (citing the Rehabilitation Act of 1973, the Developmental Disabilities Assistance and Bill of Rights Act, and the Education of the Handicapped Act as examples).

108. *Id.* at 444.

109. *See id.*

110. *See id.* at 445.

111. *See id.*

112. *Id.*

This reasoning also can be labeled the "slippery slope" argument.<sup>113</sup> The Court asserted all of these reasons while recognizing that discrimination against persons with disabilities continues. The Court therefore concluded:

Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.<sup>114</sup>

The Court then considered the four government interests offered by the City and rejected all of them under the rational basis test, invalidating the ordinance as applied in this case.<sup>115</sup>

The *Cleburne* dissent, however, sharply disagreed with the majority's opinion. In the dissent, written by Justice Marshall and joined by Justices Brennan and Blackmun, Marshall criticized the majority's reasoning as inconsistent with prior rational basis equal protection cases.<sup>116</sup> The dissent accused the majority of applying heightened scrutiny under the guise of rational basis.<sup>117</sup> Justice Marshall called for what legal scholars have labeled the "multi-factor, sliding scale" model of equal protection review.<sup>118</sup> According to Justice Marshall, "the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'"<sup>119</sup> Similarly, Justice Stevens's concurrence stated his belief that equal protection cases should be based on a test more fluid than the traditional, rigid three-tiered model.<sup>120</sup> Justice Stevens wrote, "[o]ur cases reflect a continuum of judgmental responses to differing classifications. . . . I have never been persuaded that these so-called 'standards' adequately explain the

---

113. The "slippery slope" has been described as "[t]he tendency of a principle to expand itself to the limit of its logic." *Washington v. Glucksberg*, 521 U.S. 702, 733 n.23 (1997).

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

115. *See id.* at 447-50.

116. *See id.* at 455-60 (Marshall, J., dissenting).

117. *See id.* at 456 (Marshall, J., dissenting).

118. *See, e.g., Baroutjian, supra* note 16, at 1316-17 n.314 (citing Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17-18 (1972)).

119. *Cleburne*, 473 U.S. at 460 (Marshall, J., dissenting) (citations omitted).

120. *See id.* at 451 (Stevens, J., concurring).



decisional process."<sup>121</sup> According to Justice Marshall, heightened scrutiny was the correct level of scrutiny to be applied to persons with disabilities and the correct result would have been an invalidation of the ordinance on its face, in contrast to the majority's result of an invalidation of the ordinance as applied.<sup>122</sup>

The *Cleburne* decision engendered much discussion, debate, and criticism. Many commentators and scholars considered the decision disingenuous, because it seemed to apply heightened scrutiny while claiming to apply rational basis.<sup>123</sup> *Cleburne's* legacy, however, is that persons with disabilities are considered a non-suspect class for equal protection purposes.<sup>124</sup>

### E. The ADA

When Congress passed the ADA in 1990, persons with disabilities for the first time had legal recourse for a wide array of discrimination, against both public and private actors. The law quickly became known as the "Emancipation Proclamation" for persons with disabilities.<sup>125</sup> The ADA consists of five titles and reaches all areas of life.

Title I prohibits discrimination in employment.<sup>126</sup> Title I mandates that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation,

---

121. *Id.* It was Justice Stevens's adherence to a more fluid notion of equal protection scrutiny that allowed him to join in the majority's holding. Stevens stated:

In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases, the answer to these questions will tell us whether the statute has a "rational basis."

*Id.* at 453 (citations omitted). Thus, Stevens concluded: "I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case. Accordingly, I join the opinion of the Court." *Id.* at 455.

122. See *id.* at 474-76 (Marshall, J., dissenting).

123. See Baroutjian, *supra* note 16, at 1311-12 (citing Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 794 (1987), and Sande Buhai Pond, *No Dogs Allowed: Hawaii's Quarantine Law Violates the Rights of People with Disabilities*, 29 LOY. L.A. L. REV. 145, 191-92 (1995)).

124. See Montanaro, *supra* note 4, at 644.

125. See *id.* at 622 (citing Glen Elasser, *Senate Ok's Rights Bill for Disabled*, CHI. TRIB., Sept. 9, 1989, at 1, and Tom Harkin, *Our Newest Civil Rights Law*, 26 TRIAL 56 (Dec. 1990)).

126. See 42 U.S.C. §§ 12111-12117 (1999).

job training, and other terms, conditions, and privileges of employment<sup>127</sup> and applies to employers of fifteen or more employees.<sup>128</sup>

Title II prohibits discrimination against persons with disabilities in public services.<sup>129</sup> Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or activities of a public entity, or be subjected to discrimination by any such entity."<sup>130</sup> This title thus prohibits discrimination by state or local governments against persons with disabilities.

Title III prohibits discrimination against persons with disabilities in public accommodations.<sup>131</sup> Public accommodations include services and facilities operated by private, non-government entities. Hotels, restaurants, movie theaters, banks, museums, day care centers, and golf courses are all examples of public accommodations.<sup>132</sup> Title III states, "[n]o individual shall be discriminated against on the basis of disability in the full enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."<sup>133</sup>

Title IV prohibits discrimination against persons with disabilities in telecommunications.<sup>134</sup> Title IV states that the "[Equal Employment Opportunity] Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States."<sup>135</sup>

Finally, Title V contains miscellaneous provisions addressing the scope of the ADA.<sup>136</sup> Two particular provisions in Title V are important to note in this Article. First, Title V provides that "[a] State shall not be immune under the eleventh amendment . . . from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."<sup>137</sup> As discussed below, this provision becomes important in analyzing equal protection cases involving persons with disabilities under the ADA.

---

127. *Id.* § 12112(a).

128. *See id.* § 12111(5)(A).

129. *See* 42 U.S.C. §§ 12131-12165 (1999).

130. *Id.* § 12132.

131. *See* 42 U.S.C. §§ 12181-12189 (1999).

132. *See id.* § 12181(7)(A)-(C), (F), (H), (K), (L).

133. *Id.* § 12182(a).

134. *See* 47 U.S.C. § 225 (1999).

135. *Id.* § 225(b)(1).

136. *See* 42 U.S.C. §§ 12201-12213 (1999).

137. *Id.* § 12202.

Second, Title V states that homosexuality and bisexuality are "not impairments and as such are not disabilities" under the ADA.<sup>138</sup> Further, this section of Title V states "the term 'disability' shall not include: transvestism, transsexualism [and] gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."<sup>139</sup> As discussed below, these provisions are important in an analysis of the disparate federal treatment of persons with disabilities and lesbians and gay men.

*F. Post-ADA Case Law: Equal Protection Revisited*

Many persons with disabilities have brought suits under the ADA since its passage. These cases often involve relatively straightforward legal challenges under only the ADA and no other statutory or constitutional claims. Each case requires a fact-intensive inquiry; the court must determine whether the plaintiff meets the ADA definition of a person with a disability, must determine which title of the ADA is implicated, must consider any defenses available to the defendant, and must reach a decision under the statute.<sup>140</sup> Although the process is not merely a simple, mechanical application of the statute, ADA cases involving no more than the ADA statute itself are relatively more straightforward than cases involving equal protection claims alone, or equal protection claims in addition to other statutory claims such as the ADA or the Rehabilitation Act.<sup>141</sup>

In these more complicated cases, disabled plaintiffs often have attempted to use the ADA, particularly the congressional findings included in Title I, to claim that persons with disabilities are now entitled to heightened scrutiny in equal protection cases.<sup>142</sup> No discussion of this issue would be complete without mention of the recent Supreme Court decision in *City of Boerne v. Flores*.<sup>143</sup> *Boerne* involved neither disability nor sexual orientation, but it did address the issue of whether Congress can legislate substantive rights resulting from the Fourteenth Amendment. The issue in *Boerne*

138. *Id.* § 12211(a).

139. *Id.* § 12211(b)(1).

140. *See, e.g.,* *Bryant v. Better Bus. Bureau of Greater Md.*, 923 F. Supp. 720, 734-38 (D. Md. 1996).

141. *See, e.g.,* *Bartlett v. New York State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1116-31 (S.D.N.Y. 1997), *aff'd in part, vacated in part and remanded*, 156 F.3d 321 (2d Cir. 1998).

142. *See, e.g., id.* at 1132 (noting that language employed in the congressional findings was intended to force courts to subject litigation or behavior respecting disabled persons to a strict scrutiny review).

143. 521 U.S. 507 (1997).

was the constitutionality of the Religious Freedom Restoration Act (RFRA) of 1993, a federal law requiring courts to use the compelling interest test in cases involving laws, even neutral laws, that burden the exercise of religion.<sup>144</sup>

The *Boerne* Court held the RFRA to be an unconstitutional exercise of Congress's powers under Section 5 of the Fourteenth Amendment.<sup>145</sup> The Court held that Congress may not legislate substantive Fourteenth Amendment rights; in fact, Congress may not expand the substantive rights ensured under the Fourteenth Amendment more broadly than those already set forth by the Supreme Court.<sup>146</sup>

The *Boerne* Court also articulated a complex test for determining when Congress has exceeded its Section 5 powers. The test, known as the "congruence and proportionality" test,<sup>147</sup> requires a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."<sup>148</sup> The future impact of *Boerne*, especially on the ADA, is uncertain.<sup>149</sup> Courts considering equal protection claims under the ADA now do so through the lens of *Boerne*.

Another issue plagues ADA cases. Courts are split on whether the ADA overrules *Cleburne's* holding that persons with disabilities are a non-suspect class. A small minority of courts have held that the ADA, with its use of the language "discrete and insular minority," overruled *Cleburne* and created a suspect classification for

---

144. *See id.* at 512. The Court noted that Congress enacted the RFRA in response to a prior Supreme Court decision with the express goal of increasing the level of equal protection scrutiny in this way. *See id.*

145. *See id.* at 513-25. Section 5 of the Fourteenth Amendment grants Congress the power to enforce the amendment's guarantees: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend XIV, § 5.

146. *See Boerne*, 521 U.S. at 536.

147. *See id.* at 508.

148. *Id.*

149. A complete consideration of *Boerne* and its impact on the constitutionality of the ADA is beyond the scope of this Article. Instead, I will discuss *Boerne* as one factor, albeit an important one, to consider in the future of equal protection claims for both persons with disabilities and lesbians and gay men. *See infra* Part V. For a more detailed discussion of *Boerne* and its implications for the ADA, *see generally* Ronald D. Rotunda, *The Americans with Disabilities Act, Bar Examinations, and the Constitution: A Balancing Act*, B. EXAMINER, Aug. 1997, at 6; *Nonsuspect Classes*, *supra* note 11; Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163 (1998) [hereinafter Rotunda, *The Powers of Congress*]; Welter, *supra* note 11.

persons with disabilities.<sup>150</sup> In *Martin v. Voinovich*,<sup>151</sup> the plaintiffs, a group of persons with mental retardation or developmental disabilities, claimed violations of several federal laws, including the ADA, as well as violation of the Equal Protection Clause. The plaintiffs based their claims on the State of Ohio's denial of community housing.<sup>152</sup>

The District Court relied on Congress's findings contained in Title I of the ADA to hold that heightened scrutiny was required in this case. The court stated that "classifications for purposes of providing community residential services through existing state programs . . . are subject at least to intermediate heightened scrutiny based on Congress' findings in [section] 12101 [of the ADA]."<sup>153</sup> *Martin*, however, was decided before *Boerne* and, therefore, may not be decided the same way today.

Most other courts, in contrast, have held that the ADA did not alter the level of equal protection scrutiny accorded to persons with disabilities. In *Brown v. North Carolina Division of Motor Vehicles*,<sup>154</sup> a class of persons with disabilities challenged the fee levied against them for the issuance of parking placards that enabled them to park in handicapped parking spaces.<sup>155</sup> The plaintiffs challenged the fee under the ADA, specifically under a regulation promulgated under the ADA that prohibits public entities from charging a fee to recoup the cost of programs ensuring accessibility for persons with disabilities.<sup>156</sup>

Although the plaintiff did not assert an equal protection violation, the court considered the issue of Congress's power under Section 5 of the Fourteenth Amendment, specifically under the Equal Protection Clause. The *Brown* court held that the regulation at issue was an unconstitutional exercise of Congress's Section 5 power.<sup>157</sup> The court stated:

A congressional attempt to redefine the holding of *Cleburne* abounds. For example, in *Cleburne*, the Supreme Court declared that the mentally disabled were a "large and diversified group" and "doubt[ed] that the predicate for [heightened

---

150. See, e.g., *Trautz v. Weisman*, 819 F. Supp. 282, 293-94 (S.D.N.Y. 1993); *People v. Green*, 561 N.Y.S.2d 130, 133 (N.Y. County Ct. 1990).

151. 840 F. Supp. 1175 (S.D. Ohio 1993).

152. See *id.* at 1180-81.

153. *Id.* at 1209.

154. 166 F.3d 698 (4th Cir. 1999).

155. See *id.* at 701.

156. See *id.* (noting that the regulation being challenged was 28 C.F.R. § 35.130(f)).

157. See *id.* at 706.

scrutiny] is present." The ADA, by contrast, specifically takes issue with the Court's definitional choice and declares that "individuals with disabilities are a discrete and insular minority." This declaration evinces an intent not to remedy violations of the standard of *Cleburne*, but rather to effect a "substantive alteration of its holding." In striking state legislation that is clearly rationally grounded, Congress sought to do what *Cleburne* said it may not do—establish a new suspect or quasi-suspect protection classification.<sup>158</sup>

Another case that exemplifies the majority view is *Bartlett v. New York State Board of Law Examiners*.<sup>159</sup> In *Bartlett*, a bar examination applicant brought suit claiming, among other things, violation of the ADA and the Equal Protection Clause.<sup>160</sup> The plaintiff claimed that the Board of Law Examiners failed to provide reasonable accommodations during the bar examination.<sup>161</sup> The court noted that many courts were uncertain about whether Congress could legislate, through the ADA, a level of scrutiny higher than that deemed proper by the Supreme Court. The *Bartlett* court then relied on *Boerne* in stating:

The Supreme Court's recent invalidation of RFRA in *City of Boerne v. P.F. Flores* suggests an answer to the question whether Congress has the authority under § 5 of the Fourteenth Amendment to declare what level of scrutiny should be employed in equal protection cases. Although *Boerne* involved religious liberty and the Due Process, not the Equal Protection, Clause of the Fourteenth Amendment, the Supreme Court's holding that Congress does not have the power to declare substantive protections, but only has the power to enforce them, is easily applicable to the instant question, particularly given Congress' § 5 power is the same under both clauses.<sup>162</sup>

After declaring that the ADA thus did not alter the level of scrutiny applicable to persons with disabilities, the court applied the rational basis test as mandated by *Cleburne*.<sup>163</sup> Recognizing the unsettled state of equal protection law since the enactment of the ADA, the court concluded:

---

158. *Id.* at 708.

159. 970 F. Supp. 1094 (S.D.N.Y. 1997), *aff'd in part, vacated in part, and remanded*, 156 F.3d 321 (2d Cir. 1998).

160. *See id.* at 1098.

161. *See id.*

162. *Id.* at 1134.

163. *See id.* at 1135.

*Boerne* tells us that Congress may not, under the ADA, directly alter the level of scrutiny afforded the disabled under the Equal Protection Clause. What remains to be seen, however, is what will be done with Congress' fact-driven suggestion in the ADA that courts themselves change the level of scrutiny afforded handicapped persons. For these reasons to be discussed, in the end, the question must be left for the Supreme Court to decide.<sup>164</sup>

As a result of these varying views of the *Boerne* case, the future of equal protection claims in the context of the ADA is uncertain, and the ultimate resolution of the issue can come only from the Supreme Court.

#### IV. SEXUAL ORIENTATION AND THE LAW: HISTORY AND CURRENT TRENDS

##### A. *Discrimination and Oppression of Lesbians and Gay Men*

Like the position and plight of persons with disabilities, the place and stature of lesbians and gay men in American society has risen to the forefront of the legal and cultural discourse over the past several decades.<sup>165</sup> There is little disagreement that lesbians and gay men, like persons with disabilities, have been vilified, hated, and discriminated against throughout American history.<sup>166</sup> This discrimination has pervaded all aspects of the lives of lesbians and gay men, including employment, family life, involvement in political organizations, and at times has caused them to fear for their physical safety.<sup>167</sup> More importantly, this discrimination emanates from both institutions and individuals.<sup>168</sup>

A recent case from Ohio articulated well the discrimination faced by lesbians and gay men. *Equality Foundation of Greater Cincinnati v. City of Cincinnati*<sup>169</sup> (*Equality Foundation I*) involved

164. *Id.*

165. See generally Tressa M. Bruce, *Neither Liberty Nor Justice: Anti-Gay Initiatives, Political Participation, and the Rule of Law*, 5 CORNELL J.L. & PUB. POL'Y 431 (1996) (noting the rise of the lesbian and gay rights movement from the 1960s into the 1990s and the resultant struggle for legal and social protections for this class of Americans).

166. See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 426 (S.D. Ohio 1994). See generally Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1993).

167. See generally Schacter, *supra* note 166.

168. See *Equality Foundation*, 860 F. Supp. at 426.

169. 860 F. Supp. 417 (S.D. Ohio 1994).

a challenge to a municipal ordinance enacted through a ballot initiative.<sup>170</sup> The ordinance, known as Issue 3, prohibited any entity of the municipality from enacting, adopting, enforcing, or administering any "ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have a claim of minority or protected status."<sup>171</sup> Issue 3 also had the effect of deeming null and void a preexisting city ordinance known as the Human Rights Ordinance which prohibited private actors from discriminating on the basis of sexual orientation in housing, employment, or public accommodation.<sup>172</sup> The plaintiffs, a class of lesbians and gay men, challenged Issue 3 on several grounds, including equal protection grounds.<sup>173</sup>

In finding that lesbians and gay men constitute a quasi-suspect class,<sup>174</sup> the District Court made extensive findings of fact. The court found that discrimination against lesbians and gay men has caused, and continues to cause, "profound negative psychological" harm to homosexuals.<sup>175</sup> The *Equality Foundation I* court described the testimony of George Chauncey, one of the plaintiffs' witnesses:

He described the pervasiveness of the discrimination, both public and private, and how this anti-gay bias was perpetuated throughout all levels of society and government, from state and local law enforcement activities to a former presidential directive against homosexuals from government employment and private employment by government contractors. He also described how local laws were employed to crush early gay political organizations, and how public antipathy and stereotyping was prevalent. He also described the prevalence of anti-gay violence.<sup>176</sup>

---

170. *See id.* at 421.

171. *Id.* at 422 (citing Issue 3 ordinance).

172. *See id.* at 422.

173. *See id.*

174. This holding was subsequently overruled by the Sixth Circuit, which ruled that lesbians and gay men do not constitute a quasi-suspect or suspect class for equal protection purposes. *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995). The Supreme Court granted certiorari, only to vacate and remand to the Sixth Circuit for reconsideration in light of the then-recent Supreme Court decision in *Romer v. Evans*. On remand, the Sixth Circuit again held that lesbians and gay men are a non-suspect class under the Equal Protection Clause. *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).

175. *Equality Foundation*, 860 F. Supp. at 424-26.

176. *Id.* at 425; *see also* WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 336-60 (2d ed. 1997); Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984) [hereinafter *Heightened Scrutiny*].



Further, the words of Justice Marshall's dissent in *Cleburne*<sup>177</sup> regarding persons with mental retardation applies equally well to the current status of lesbians and gay men:

For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; out-dated statutes on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people. Heightened judicial scrutiny of action appearing to impose unnecessary barriers to the retarded is required in light of increasing recognition that such barriers are inconsistent with evolving principles of equality embedded in the Fourteenth Amendment.<sup>178</sup>

If one substitutes the words "lesbian" or "gay man" for the word "retarded" in Justice Marshall's statement, one would have an accurate depiction of the state of the law and the social climate for lesbians and gay men today. Lesbians and gay men, like persons with disabilities, have seen much change in the recent past, specifically in the legal realm, where they have won the right to adopt children,<sup>179</sup> to be protected from discrimination in employment, housing, and public accommodation,<sup>180</sup> to serve in the military,<sup>181</sup> and to obtain "domestic partner" benefits.<sup>182</sup> However, like persons with disabilities in *Cleburne*, "much remains the same" for lesbians and gay men. Violence motivated by hatred for

177. 473 U.S. 432 (1985).

178. *Id.* at 467 (Marshall, J., dissenting).

179. *See, e.g., In Re Adoption of Evan*, 583 N.Y.S.2d 997 (N.Y. Surrogate's Ct. 1992) (holding that the lesbian life partner could legally adopt her partner's child without severing the biological mother's parental rights); *see also* RUBENSTEIN, *supra* note 176, at 846-74 (discussing adoption by lesbians, gay men, and bisexual parents and examining relevant case law).

180. *See generally* RUBENSTEIN, *supra* note 176, at 416-31 (discussing the experiences of lesbians and gay men in the workplace).

181. *See, e.g., Watkins v. United States Army*, 837 F.2d 1428, *amended*, 847 F.2d 1329 (9th Cir. 1988).

182. *See, e.g., Gay Teachers Ass'n v. Board of Educ. of City Sch. Dist. of N.Y.*, 585 N.Y.S.2d 1016 (N.Y. App. Div. 1992) (affirming lower court's denial of summary judgment to defendant, City of New York, which had denied health insurance coverage to partners of lesbian and gay teachers). The case later settled, with the City agreeing to provide full benefits to the partners of lesbian and gay teachers. *See Mireya Navarro, New Choices in Care: New York Extends Health Benefits to Domestic Partners of City Employees*, N.Y. TIMES, Dec. 27, 1993, at B1; *see also* RUBENSTEIN, *supra* note 176, at 789 (noting a Washington, D.C. ordinance that "requires private employers to provide certain benefits to lesbian/gay couples").

homosexuals is still commonplace.<sup>183</sup> In many jurisdictions, lesbians and gay men can be fired from their jobs or evicted from their homes because of their sexual orientation.<sup>184</sup> Some gay and lesbian parents still lose custodial or visitation rights based on their sexual orientation.<sup>185</sup> Further, lesbians and gay men cannot marry under the laws of any state, or under federal law.<sup>186</sup> And, like persons with disabilities, much of society's discrimination against lesbians and gay men is rooted in "irrational fears or ignorance, traceable to the prolonged social and cultural isolation" of homosexuals.<sup>187</sup>

Finally, the same year that the Supreme Court decided *Cleburne*, it denied certiorari to *Rowland v. Mad River Local School District*.<sup>188</sup> In his dissent of the Court's denial of certiorari, Justice Brennan stated lesbians and gay men "constitute a significant and insular minority of this country's population. . . . Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'"<sup>189</sup> Although a dissent from a denial of certiorari has no precedential value, and is in fact a rare occurrence, the language of this particular dissent is noteworthy in that it provides an unusual glimpse into the thinking of at least two members of the Court (Justice Marshall joined in Justice Brennan's dissent) on the issues raised concerning homosexuality and the Constitution.

The trend in the law with regard to sexual orientation has differed from the trend in disability law. Like the *Cleburne* case for persons with disabilities, the 1986 Supreme Court decision in *Bowers v. Hardwick*<sup>190</sup> created a benchmark for equal protection jurisprudence for lesbians and gay men. Although *Bowers* stated

---

183. See Margaret Carlson, *Laws of Last Resort*, TIME, Oct. 26, 1998, at 40, 40 (discussing hate crimes against lesbians and gay men); Steve Lopez, *To Be Young and Gay in Wyoming*, TIME, Oct. 26, 1998, at 38, 38-40 (describing the brutal murder of a young, gay man, Matthew Shepard, in Wyoming, and citing a TIME/CNN poll showing that 68% of those polled believe an attack on a gay person could occur in their own community).

184. See Schacter, *supra* note 166, at 298.

185. See *id.*

186. See John Cloud, *For Better or Worse: In Hawaii, A Showdown over Marriage Tests the Limits of Gay Activism*, TIME, Oct. 26, 1998, at 43.

187. See *Equality Foundation*, 860 F. Supp. at 437 ("We conclude that it is a matter of fact beyond dispute that gays, lesbians and bisexuals have suffered a history of discrimination based on inaccurate, stereotyped notions of their sexual orientation.").

188. 470 U.S. 1009, 1009 (1985).

189. *Id.* at 1014 (Brennan, J., dissenting) (citations omitted).

190. 478 U.S. 186 (1986).

that homosexuality does not constitute a quasi-suspect or suspect class for due process purposes, it is still relied on by many courts today to deny heightened scrutiny in equal protection cases.

*B. Pre-Bowers Federal Laws and Policies Based on Sexual Orientation*

Although gay men and lesbians have been subject to overt public discrimination since the 1940s, "[f]or the pre-World War II generations, however, there is little . . . evidence of discrimination. Homosexuality was a far less visible phenomenon. . . . The laws and public policies of a later time had not yet taken shape."<sup>191</sup> In the 1950s, gay groups began to organize around the country, mostly in urban areas. As lesbians and gay men became increasingly visible, the federal government began promulgating discriminatory policies toward this group.

In the 1960s, the United States Civil Service Commission promulgated a policy, which was published in a Federal Personnel Manual Supplement and stated: "*Homosexuality and Sexual Perversion*—Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal Employment."<sup>192</sup> After this policy was challenged in *Society for Individual Rights, Inc. v. Hampton*, the Civil Service modified its regulation and personnel manual.<sup>193</sup> The new policy, announced in 1973, stated:

Accordingly, you may not find a person unsuitable for Federal employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on such a conclusion that a homosexual person might bring the public service into public contempt. You are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person's homosexual conduct affects job fitness—excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal service.<sup>194</sup>

---

191. John D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay History and Politics*, in RUBENSTEIN, *supra* note 176, at 681, 681.

192. *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247, 254 (9th Cir. 1976).

193. *See id.* at 255.

194. *Id.* at 254.

Finally, in 1975, regulations addressing "Suitability Disqualification" were modified to read, in part, "[c]ourt decisions require that persons not be disqualified from Federal employment solely on the basis of homosexual conduct. . . . [A] person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness."<sup>195</sup>

Military service also has been closed to lesbians and gay men for quite some time. The military has had a ban on lesbians and gay men serving in the armed forces since World War I.<sup>196</sup> In 1981, the Department of Defense promulgated regulations defining homosexuality and stating that homosexuality was incompatible with military service.<sup>197</sup> In 1994, the policy was amended into what has become known as the "Don't Ask, Don't Tell, Don't Pursue" rule. This new rule purports to modify the previous policy by expelling only those members of the armed services who state that they are homosexual, or who engage in homosexual behavior, or who attempt to marry someone of the same gender.<sup>198</sup>

Some significant strides have been made. Since 1992, several federal agencies have adopted nondiscrimination policies that include sexual orientation. These agencies include the Departments of Agriculture, Commerce, Education, Energy, Environmental Protection Agency, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury, and the White House.<sup>199</sup>

These pre-*Bowers* policies are noteworthy in their scope. They were not federal laws, but were instead policies. They did not apply to private actors or even to federal actors outside of employment within the federal government. In these ways, they were markedly different than the pre-*Cleburne* laws for persons with disabilities.

### C. *Bowers v. Hardwick*<sup>200</sup>

In *Bowers*, the Court addressed the constitutionality of a Georgia statute outlawing sodomy.<sup>201</sup> A gay man named Michael Hardwick, arrested for violating the statute, subsequently chal-

---

195. *Id.* at 255.

196. See RAND CORPORATION REPORT TO THE SECRETARY OF DEFENSE, U.S. MILITARY POLICY ON HOMOSEXUALITY AND SODOMY—1916-1993, in RUBENSTEIN, *supra* note 176, at 585, 585.

197. See *id.* at 590.

198. See 10 U.S.C.A. § 654 (1995), in RUBENSTEIN, *supra* note 176, at 592-95.

199. See RUBENSTEIN, *supra* note 176, at 523-24.

200. 478 U.S. 186 (1986).

201. See *id.* at 187.

lenged the law based on Fourteenth Amendment Due Process grounds.<sup>202</sup> The Supreme Court held that there is no substantive due process right under the Fourteenth Amendment to engage in private, consensual homosexual sodomy, even in the privacy of one's home.<sup>203</sup>

The Court rejected Hardwick's claim that there is a fundamental right to engage in private, consensual homosexual sodomy and that laws implicating this right are subject to heightened judicial scrutiny.<sup>204</sup> The Court also rejected Hardwick's alternative claim that the sodomy statute failed even rational basis review, because the law, according to Hardwick, was based only on "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."<sup>205</sup> The Court responded: "The law is . . . constantly based on notions of morality."<sup>206</sup> The Court explained, as a basis for its decision, that "[p]roscriptions against [homosexual] conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States . . . . In fact, until 1961, all 50 States outlawed sodomy."<sup>207</sup>

Equal protection cases based on sexual orientation that followed *Bowers* relied on *Bowers* as holding that lesbians and gay men are a non-suspect class. *Bowers*, however, dealt only with sexual privacy in the context of a constitutional due process claim at a time in our cultural and legal history when the nature of sexual orientation as a factor in our society was still emerging and was largely misunderstood.<sup>208</sup> Today, sexual orientation is seen more and more as an integral and core component of democratic process and participation, against a backdrop of deeply rooted, societal discrimination.<sup>209</sup> Further, contrary to the case law asserting that *Bowers* rejected the claim that lesbians and gay men are a suspect or quasi-suspect class, that case instead merely held that there is no fundamental, due process right for homosexuals to engage in private, consensual sodomy. *Bowers* did not address the issue of whether homosexuals constitute a suspect class for the purpose of

---

202. See *id.* at 194-96.

203. See *id.* at 191-93.

204. See *id.* at 192.

205. *Id.* at 196.

206. *Id.*

207. *Id.* at 192-93.

208. See generally Bruce, *supra* note 165.

209. See generally John Leland, *Shades of Gay*, NEWSWEEK, Mar. 20, 2000, at 46 (commenting on the unprecedented profile of lesbians and gay men in politics, the force of lesbians and gay men at the polls, and shifting attitudes toward homosexuality).

equal protection analysis and did not need to do so to uphold the Georgia sodomy law at issue in that case. Instead, it was the Court's hesitance to create or extend a fundamental right that seemed to inform its decision to decline to apply heightened scrutiny in a due process inquiry. This doctrinal challenge faced by the *Bowers*'s Court has been described in *Watkins v. United States Army*.<sup>210</sup> The *Watkins* court stated:

While it is not our role to question *Hardwick's* concerns about the substantive due process and specifically the right to privacy, these concerns have little relevance to equal protection doctrine. . . . This principle of equal treatment, when imposed against majoritarian rule, arises from the Constitution itself, not from judicial fiat. . . . [T]he practical difficulties of defining the requirements imposed by equal protection, while not insignificant, do not involve the judiciary in the same degree of value-based line-drawing that the Supreme Court in *Hardwick* found so troublesome in defining the contours of substantive due process. In short, the driving force behind *Hardwick* is the Court's ongoing concern with the expansion of rights under substantive due process . . . .<sup>211</sup>

Thus, any inference that *Bowers* precluded a finding of suspect classification for lesbians and gay men in an equal protection context is inaccurate. This distinction, however, is one not embraced by a majority of courts considering equal protection claims by lesbians and gay men.

#### D. Post-Bowers Cases: Equal Protection Revisited

Many lower courts have considered *Bowers* in deciding equal protection claims based on sexual orientation. These cases held that homosexuals do not constitute a quasi-suspect or suspect class and, therefore, applied the rational basis test.<sup>212</sup> *Padula v. Webster*<sup>213</sup> was one of the first cases decided after *Bowers* that relied on *Bowers* to deny lesbians and gay men suspect classification in the

---

210. 837 F.2d 1428, *amended*, 847 F.2d 1329 (9th Cir. 1988).

211. *Id.* at 1439.

212. See, e.g., *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 266-67 (6th Cir. 1995) ("[I]t is resolved that, under *Bowers v. Hardwick*, . . . and its progeny, homosexuals did not constitute a 'suspect class' or a 'quasi-suspect' class because the conduct which defined them as homosexuals was constitutionally proscribable." (citations omitted)).

213. 822 F.2d 97 (D.C. Cir. 1987).

equal protection realm.<sup>214</sup> In *Padula*, the plaintiff, a lesbian applicant for a position as a Federal Bureau of Investigation (FBI) special agent, brought suit against the FBI after she was denied the position based on her sexual orientation.<sup>215</sup> She claimed, among other things, that the FBI violated her equal protection rights.<sup>216</sup> The United States Court of Appeals for the District of Columbia rejected *Padula's* claim that lesbians and gay men constitute a quasi-suspect or suspect class.<sup>217</sup> In holding that the proper standard was rational basis review, the court stated:

[I]n *Hardwick*, to be sure, plaintiffs did not rely on the equal protection clause, but after the Court rejected an extension of the right to privacy, it responded to plaintiffs' alternate argument that the Georgia law should be struck down as with rational basis (under the due process clause) . . . . The Court summarily rejected that position . . . . We therefore think the [Court's] reasoning in *Hardwick* . . . forecloses appellant's efforts to gain suspect class status for practicing homosexuals.<sup>218</sup>

Under this reasoning, the court upheld the FBI's decision.

In *Ben-Shalom v. Marsh*,<sup>219</sup> the plaintiff was a lesbian reserve sergeant in the United States Army.<sup>220</sup> Under its regulations addressing lesbians and gay men, she was discharged and then denied reenlistment.<sup>221</sup> She challenged the Army regulation on equal protection grounds.<sup>222</sup> Relying on *Bowers*, the Seventh Circuit held that the rational basis test was the proper one and upheld the regulation as constitutional.<sup>223</sup> The court stated that, "[a]lthough the [Bower's] Court analyzed the constitutionality of the [Georgia sodomy] statute in a due process rather than an equal protection basis, *Hardwick* nevertheless impacts on the scrutiny aspects under an equal protection analysis."<sup>224</sup>

---

214. *See id.* at 103.

215. *See id.* at 98.

216. *See id.*

217. *See id.* at 104.

218. *Id.* at 103.

219. 881 F.2d 454 (7th Cir. 1989).

220. *See id.* at 456.

221. *See id.* at 456-57.

222. *See id.* at 457.

223. *See id.* at 464.

224. *Id.*

Finally, in *Jantz v. Muci*,<sup>225</sup> the Tenth Circuit held consistently with the majority of courts in rejecting suspect classification for lesbians and gay men.<sup>226</sup> The defendant, a state school system, refused to hire the plaintiff as a teacher and coach based on the perception that the plaintiff was a gay man.<sup>227</sup> The court stated that, although *Bowers* did not consider an equal protection claim, it did "cast enough shadow on the area [of lesbians and gay men and equal protection] so that any unlawfulness in [d]efendant's actions was not 'apparent.'"<sup>228</sup> The principal of the school was immune from the suit.<sup>229</sup>

As these cases indicate, lesbians and gay men have been confined by the holding in *Bowers* much like persons with disabilities have been confined by the holding in *Cleburne*. Further, just as the ADA has created new possibilities, although still uncertain ones, that the non-suspect classification for persons with disabilities may be changing, the Supreme Court's 1996 holding in *Romer v. Evans*<sup>230</sup> has created similar and exciting opportunities for lesbians and gay men.

#### E. *Romer v. Evans*

In 1996, the Supreme Court decided its first case involving lesbian and gay issues since *Bowers* ten years earlier. *Romer* involved a Colorado ballot initiative that was successfully passed by the people of Colorado.<sup>231</sup> The initiative, known as Amendment 2, repealed all existing antidiscrimination laws protecting lesbians and gay men at every level of the state, as well as prohibited any future action by any state or local government that would protect on the basis of sexual orientation.<sup>232</sup>

The Supreme Court struck down Amendment 2 as violative of the Equal Protection Clause.<sup>233</sup> In a much-criticized opinion,<sup>234</sup> the

---

225. 976 F.2d 623 (10th Cir. 1992).

226. *See id.* at 630.

227. *See id.* at 625.

228. *Id.* at 630.

229. *See id.* at 630-31.

230. 517 U.S. 620 (1996).

231. *See id.* at 623.

232. *See id.* at 624.

233. *See id.* at 623.

234. *See generally, e.g.,* Caren G. Dudnoff, *Romer v. Evans: A Legal and Political Analysis*, 15 LAW & INEQUALITY 275 (1997); Katherine M. Hamill, *Romer v. Evans: Dulling the Equal Protection Gloss on Bowers v. Hardwick*, 77 B.U. L. REV. 655 (1997); Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection*, 45 UCLA L. REV. 453 (1997); William M. Wilson, III, *Romer v. Evans: "Terminal Silliness," or*



majority never mentioned *Bowers* and purported to apply the rational basis test. The Court did admit, however, that "Amendment 2 fails, indeed defies, even . . . conventional [equal protection] inquiry."<sup>235</sup> The Court found that there was no legitimate state interest being served by Amendment 2,<sup>236</sup> striking it down using rational basis review.

*Romer* has been criticized, as was *Cleburne*, for purporting to use the rational basis test, while in reality using a higher level of judicial scrutiny.<sup>237</sup> The *Romer* Court glossed over its choice of rational basis review and spent the majority of the short opinion justifying its reasons for finding the governmental interests offered by the State of Colorado unpersuasive and violative of rational basis review. The Court also wrote at length about the animus behind Amendment 2, stating, "[Amendment 2's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects[;]"<sup>238</sup> "laws of the kind before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."<sup>239</sup> Finally, the Court expressed concern about the sweeping nature of Amendment 2, which would effectively cut lesbians and gay men out of the political process. The Court stated,

Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution . . . . This is so no matter how local or discrete the harm, no matter how public or widespread the injury.<sup>240</sup>

As a result, scholars and commentators are uncertain after *Romer* about the state of equal protection law in the context of sexual orientation.<sup>241</sup>

---

*Enlightened Jurisprudence?*, 75 N.C. L. REV. 1891 (1997); Baroutjian, *supra* note 16.

235. *Romer*, 517 U.S. at 632.

236. *See id.*

237. *See sources cited supra* note 234.

238. *Romer*, 517 U.S. at 632.

239. *Id.* at 634.

240. *Id.* at 631.

241. *See Baroutjian, supra* note 16, at 1278.

*F. Federal Laws Impacting Lesbians and Gay Men: DOMA and ENDA*

Like the evolution of protection for persons with disabilities over the past two decades, many laws forbidding discrimination based on sexual orientation have been adopted at many levels of government, from local ordinances to state-wide laws.<sup>242</sup> Some groups of citizens have objected to such laws and organized to repeal them.<sup>243</sup> However, a major difference between protection based on disability and protection based on sexual orientation is found at the federal level. Whereas a myriad of federal laws have been enacted with the goal of protecting or serving persons with disabilities,<sup>244</sup> no federal law has ever been enacted to protect or provide services for lesbians and gay men.

There has been, however, federal legislation enacted that harms lesbians and gay men. In 1996 Congress passed, and President Clinton signed, the Defense of Marriage Act (DOMA).<sup>245</sup> DOMA defines marriage as "only a legal union between one man and one woman as husband and wife"<sup>246</sup> and defines a spouse as "a person of the opposite sex who is a husband or a wife."<sup>247</sup> This legislation precludes lesbians and gay men from claiming the many societal and legal benefits of the institution of marriage. Further, DOMA relegates the relationships of lesbians and gay men to an invisible status. DOMA's purpose, according to a report from the House of Representatives, is to protect the institution of marriage.<sup>248</sup> Further, the House report stated that the two governmental interests driving the law were defending traditional notions of marriage and protecting the rights of states to make their own policy regarding marriage.<sup>249</sup> DOMA illustrates the continued animus toward and fear of lesbians and gay men.

Recently, there have been attempts to enact federal legislation to protect lesbians and gay men from discrimination. However, in contrast to the ADA, these legislative attempts have been aimed at

---

242. See Bruce, *supra* note 165, at 443-44 (explaining that over the past several decades, antidiscrimination laws or policies based on sexual orientation have been enacted in 119 localities and at least 20 states).

243. See *id.* (stating that citizens opposed to legal protection based on sexual orientation placed ballot initiatives repealing such protections in 38 communities that had enacted such laws and that the repeal efforts were successful in 34 of the ballot initiatives).

244. See *supra* Part III.B.

245. 1 U.S.C. § 7 (1996).

246. *Id.*

247. *Id.*

248. See H.R. REP. NO. 104-664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906.

249. See *id.*

providing very narrow protections for lesbians and gay men, predominantly in employment.

In the 103rd Congress, members introduced the Employment Non-Discrimination Act (ENDA).<sup>250</sup> The most recent attempt to pass ENDA occurred in the 106th Congress in 1996, where it failed to pass the Senate by one vote.<sup>251</sup> ENDA provides protection in the workplace for lesbians and gay men, but it is limited in scope and remedies. ENDA prohibits employers from considering sexual orientation, real or perceived, in hiring, firing, promotion, and compensation decisions.<sup>252</sup> Further, employers cannot discriminate against employees based on the sexual orientation of those with whom the employee associates.<sup>253</sup> For example, an employee cannot be fired because he or she has a lesbian or gay child. ENDA provides for the same remedies that are available under Title VII and under the ADA.<sup>254</sup>

Although ENDA is a landmark piece of legislation for lesbian and gay civil rights, it is notable also for what it does not provide. Unlike the ADA, ENDA does not permit a disparate impact claim similar to that available under Title VII of the Civil Rights Act of 1964.<sup>255</sup> ENDA also does not require an employer to provide benefits for the same-sex partner of an employee, does not apply to the military, does not apply to businesses with fewer than fifteen employees, prohibits quotas, and is not retroactive.<sup>256</sup>

---

250. See Kenneth A. Kovach & Peter E. Millspaugh, *Employment Nondiscrimination Act: On the Cutting Edge of Public Policy*, BUS. HORIZONS, July 17, 1996, at 65, 65 (noting that ENDA was first introduced in the 103rd Congress; it was introduced in the House as bill number 4636 and in the Senate as bill number 2238); see also Carolyn Lochhead, *Vote Stalled on Gay Marriages, Democrats Work on Job-Bias Rider*, SAN FRANCISCO CHRON., Sept. 5, 1996, at A6 (noting that a version of ENDA was introduced in 1975 by Rep. Bella Abzug but the bill never reached the Senate floor for debate).

251. See *Discrimination: Senate Rejects by 50-49 Bill to Ban Job Bias Based on Sexual Orientation*, EMPLOYMENT POL'Y & L. DAILY (BNA), Sept. 12, 1996, at 11.

252. See Human Rights Campaign, *ENDA Summary* (visited Mar. 28, 1999) <<http://www.hrcusa.org/issues/workplc/enda/endasum.html>>.

253. See *id.*

254. See *id.*

255. See *id.*

256. See *id.* Although the ADA contains some of the same limitations, such as the application to small businesses, the ADA is still a far more overarching protective civil rights law than ENDA will ever be. See *id.*

## V. AN ANALYSIS OF THE DIFFERENT PATHS TO PROTECTION AND RECOMMENDATIONS FOR THE FUTURE

The Equal Protection Clause is an important mechanism to protect and ensure civil rights in our democracy. The Equal Protection Clause and the body of law that has grown up around it illustrate the notion that equal protection is fundamental to our notions of fairness, citizenship, and justice. As the Court stated in *Romer*, "[o]ne century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake."<sup>257</sup>

The Equal Protection Clause is thus an important tool for persons with disabilities and lesbians and gay men, because both are groups that have been, and still are to some extent, subject to intense societal discrimination, exclusion, and vilification. An important step in securing further civil rights and ending discrimination would be to elevate these two groups from the non-suspect classes they currently occupy into the more protected classes—either quasi-suspect or suspect classes.

### A. *Is it Possible to Legislate Heightened Scrutiny?*

The *Boerne* case makes it unclear whether Congress can establish quasi-suspect or suspect classifications through legislation.<sup>258</sup> It is clear from the *Boerne* holding, however, that Congress cannot dictate the substantive rights of the Due Process Clause of the Fourteenth Amendment, for it was on this ground that the Supreme Court invalidated the RFRA.<sup>259</sup>

As seen by several ADA cases, some courts interpret *Boerne* as prohibiting Congress from legislating suspect classification for persons with disabilities through the ADA.<sup>260</sup> Although the Supreme Court will be the ultimate arbiter of this issue, it seems that the RFRA in *Boerne* can be distinguished from Congress's ADA findings that persons with disabilities are a "discrete and insular minority." For example, the RFRA purported to apply to all laws,

---

257. *Romer v. Evans*, 517 U.S. 620, 623 (1996) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)) (citations omitted).

258. See *supra* text accompanying note 146.

259. See *id.*

260. See *supra* notes 154-164 and accompanying text.

even laws of general application.<sup>261</sup> On the contrary, the ADA's findings would seem to mandate that only laws specifically addressing persons with disabilities should trigger suspect classification.<sup>262</sup>

The line between creating new rights under Section 5 and interpreting existing ones is far from clear. Prior to the *Boerne* decision, there were several theories for congressional enforcement of the Fourteenth Amendment. The "ratchet" theory, articulated in *Katzenbach v. Morgan*<sup>263</sup> by Justice Brennan, is a substantive one which allows Congress to increase but not decrease Fourteenth Amendment protections.<sup>264</sup> The "remedial" theory limits Congress to enforcing Fourteenth Amendment rights already recognized by the Supreme Court.<sup>265</sup> Finally, the "fact-finding theory, interprets Section 5 as allowing Congress, for reasons of institutional competence, to identify and invalidate neutral laws that effectuate an impermissible discrimination in violation of the Fourteenth Amendment."<sup>266</sup>

The *Boerne* decision rejected the ratchet theory of *Morgan* and instead stated that *Morgan* stood for the fact-finding theory.<sup>267</sup> This dicta in *Boerne* is important in the context of the ADA because Congress made such findings when enacting the ADA. The congressional findings that introduce the ADA state that persons with disabilities constitute a "discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness."<sup>268</sup>

The language of "discrete and insular minority" echoes the language in *United States v. Carolene Products*.<sup>269</sup> In *Carolene*

261. Laws of general applicability are those that are neutral, meaning that they do not classify among particular groups. See Rotunda, *The Powers of Congress*, *supra* note 149, at 178-79. For example, in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the case that prompted the RFRA's enactment, the challenged law banned the use of peyote, an illegal drug. See *id.* at 874. Although the law was neutral and one of general applicability, meaning that it applied to everyone regardless of their religious affiliation, it interfered with the exercise of religion of the Native American Church, whose members used peyote as a sacrament. See *id.* at 903.

262. See, e.g., *Bartlett v. New York State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1132-34 (S.D.N.Y. 1997) (noting the possible intent of Congress's use of "discrete and insular minority" in its findings).

263. 384 U.S. 641 (1966).

264. See *Nonsuspect Classes*, *supra* note 11, at 1542.

265. See *id.*

266. *Id.* at 1542-43.

267. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2167-68 (1997).

268. 42 U.S.C. § 12101(a)(7) (1994).

269. 304 U.S. 144 (1938).

*Products*, Justice Stone included a now-famous footnote in which he coined the term "discrete and insular minority."<sup>270</sup> In that footnote, Justice Stone wondered "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."<sup>271</sup> This footnote is credited with initiating the concept of heightened judicial scrutiny for such minority groups. Thus, Congress's use of this language was significant—it may suggest that Congress intended that persons with disabilities be considered a suspect class.

The *Boerne* decision gives some guidance on how congressional findings should be evaluated, implying that "the adequacy of congressional findings may depend on whether Congress exercised its Section 5 fact-finding or remedial powers."<sup>272</sup> *Boerne* seems to suggest that if congressional findings are made pursuant to its fact-finding power, the Court will look more closely at such findings than the Court would if the findings were made pursuant to Congress's remedial power.<sup>273</sup> The important inquiry in the context of the ADA thus becomes whether Congress was exercising its fact-finding power when it made its findings that persons with disabilities are a discrete and insular minority.

It is unclear from the legislative history of the ADA whether Congress was acting under its fact-finding powers when it made its findings. As the *Bartlett* court stated:

Several questions arise from Congress' invocation of this language [of discrete and insular minority:] . . . whether Congress intended to force the courts to subject legislation or behavior respecting disabled persons to strict scrutiny review or whether the Congress merely desired to send a message to the courts that a heightened level of review of the claims of disabled individuals was appropriate.<sup>274</sup>

The same court noted that there does not seem to be any legislative history directly discussing Congress's choice of the discrete and insular minority language.<sup>275</sup> However, the court compared the

---

270. *Id.* at 153 n.4.

271. *Id.*

272. *Nonsuspect Classes*, supra note 11, at 1549.

273. *See id.* at 1550.

274. *Bartlett v. New York State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1132 (S.D.N.Y. 1997).

275. *See id.* at 1133.

ADA's findings with the RFRA's findings and concluded that whereas the RFRA expressly declared the level of scrutiny to be applied to laws implicating religious freedom, the ADA did not make such a declaration.<sup>276</sup> In reference to the ADA's findings, the court noted that "Congress appears to be utilizing its recognizably superior fact-finding function, providing to the Court data from which it hopes the Court will arrive at the conclusion that disabled persons should be given heightened scrutiny under the Equal Protection Clause."<sup>277</sup> If this court is correct in its assessment of the ADA's findings, the ADA will escape *Boerne's* constrictive holding.

Even if the Court were to hold that *Boerne* extends to the ADA, the Court could still find that sexual orientation constitutes a suspect class, because there is no legislation like the ADA that purports to define lesbians and gay men as a "discrete and insular minority." Assuming that the Court finds that *Boerne* extends to the ADA, it would send a message to those drafting legislation aimed at protecting lesbians and gay men that any such findings will not result in heightened scrutiny. Instead, a presumption that the Court will hold that *Boerne* prohibits Congress from defining suspect classifications requires that advocates for persons with disabilities and lesbians and gay men find another method of elevating their constituents' equal protection status—through the judiciary, which under *Boerne* is the appropriate institution to make such determinations. As a result, the Court would have to overturn both *Cleburne* and *Bowers*.

#### *B. Overcoming Case Law To Reach and Surmount Non-Suspect Class Status*

The doctrine of stare decisis requires courts to abide by, and adhere to, decided cases.<sup>278</sup> Stare decisis is essential to the continued respect for, and legitimacy of, the decisions of the judiciary. The Supreme Court and every court below it are bound by this doctrine, and the Supreme Court defers to the doctrine by seldom overturning its own cases. It is the principle of stare decisis that led most lower courts to adhere to *Bowers* and *Cleburne* in holding that lesbians and gay men, as well as persons with disabilities, are non-suspect classes. Therefore, Supreme Court decisions expressly overturning these two cases, though unlikely,

---

276. *See id.*

277. *Id.* at 1134.

278. *See* BLACK'S LAW DICTIONARY 978 (6th ed. 1991).

seem to be the only way these two groups will ever attain heightened scrutiny.

An argument may be made, however, that a Supreme Court holding that lesbians and gay men constitute a suspect class is not governed by any *stare decisis* principles. None of the Court's prior decisions have addressed the issue of the appropriate level of equal protection scrutiny to be applied to legislation implicating lesbians and gay men as a class. Even the Court's decision in *Romer*, hailed as a victory by many lesbians and gay men,<sup>279</sup> though criticized by many legal scholars,<sup>280</sup> does not present a *stare decisis* problem. *Romer* did not go so far as to address the issue of suspect classification squarely, for such an inquiry was deemed unnecessary to resolve that case. Although it is true that the Court applied rational basis scrutiny to the amendment in *Romer*, a subsequent inference that *Romer* held that lesbians and gay men do not constitute a quasi-suspect or suspect class, however, is unfounded. *Romer* stated that Amendment 2 "defie[d] even this conventional [rational basis] inquiry"<sup>281</sup> and "confound[ed] this normal process of judicial review."<sup>282</sup>

The proper reading of *Romer*, therefore, is that the Court utilized the rational basis standard of review not because the targeted group—lesbians and gay men—was undeserving of quasi-suspect or suspect classification, but because the sweeping nature of the amendment in that case failed even the most deferential standard of equal protection review. As a result, the Court did not need to reach the question of suspect classification for lesbians and gay men. Similar to the Court's decision in *Cleburne*, the holding in *Romer* has been criticized for injecting power into the rational basis test<sup>283</sup>—a test without any vitality before the *Cleburne* and *Romer* decisions. In this way, *Romer* has shaken equal protection jurisprudence at its roots by taking the rational basis test, under which all previous classifications based on sexual orientation were upheld, and reaching the completely unpredictable result of striking down the amendment. Such an application of the rational basis test—in both *Cleburne* and *Romer*—left lower courts confused and without much concrete direction or guidance.<sup>284</sup>

---

279. See Baroutjian, *supra* note 16, at 1278-79, 1300.

280. See *id.*

281. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

282. *Id.* at 633.

283. See generally Baroutjian, *supra* note 16, at 1319-30.

284. See *id.* at 1314; Montanaro, *supra* note 4, at 660-61.



In *Bowers*, the Court merely held that there is no fundamental, due process right under the Fourteenth Amendment to engage in private, consensual, homosexual sodomy. Due process and equal protection are distinguishable, and as a result, so too are decisions regarding those concepts. Historically, the Due Process Clause has been interpreted to "protect traditionally recognized rights from state and federal power"<sup>285</sup> and, in that regard, the clause "has an important backward looking dimension."<sup>286</sup> However, the Equal Protection Clause protects a different set of purposes in that it "is emphatically not an effort to protect traditionally held values."<sup>287</sup> Instead, the Equal Protection Clause functions to protect oppressed groups from past and future discrimination by political majorities.<sup>288</sup> In sum, the Equal Protection Clause is rooted in a "principle of equality that operates as a criticism of existing practice. The clause does not safeguard traditions; it protects against traditions, however long-standing and deeply rooted."<sup>289</sup>

Thus, an argument exists that *Bowers*, when confined to its facts and its holding, does not implicate equal protection in any way, and thus, there never has been a Supreme Court ruling addressing the equal protection status of lesbians and gay men. Since many courts have interpreted *Bowers* as precluding heightened scrutiny for lesbians and gay men,<sup>290</sup> however, it is unlikely that the Court will agree that stare decisis is not triggered.

The *Cleburne* decision may present more of a challenge to persons with disabilities than *Bowers* presents for lesbians and gay men. For, unlike *Bowers*, *Cleburne* decided the issue of the level of scrutiny that persons with disabilities should be accorded in equal protection cases; or, if one looks to *Cleburne* in its narrowest possible light, the Court decided the issue of the level of scrutiny

285. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1170 (1988).

286. *Id.* at 1171 (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855)); see also *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (basing the holding on references to "tradition," "history," "ordered liberty," and/or "fundamental principles"); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (same); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (same); *Twining v. New Jersey*, 211 U.S. 78 (1908) (same).

287. Sunstein, *supra* note 285, at 1174.

288. See *id.*

289. *Id.* (citing *Brown v. Board of Educ.*, 347 U.S. 483 (1954)); see also *Plyler v. Doe*, 457 U.S. 202 (1982) (relying on the notion of protecting disadvantaged groups against traditions); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (same); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (same); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956) (same).

290. See, e.g., *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) (relying on *Bowers* to find the proper equal protection analysis for homosexuality to be rational basis).

that *persons with mental retardation* should be accorded in equal protection cases. In fact, the Court devoted a great deal of the opinion to its discussion of why persons with disabilities, or at least persons with mental retardation, are not a suspect class, therefore creating binding common law which must now be expressly overturned by the Court.

There may be an argument, however, that courts have improperly analyzed *Cleburne* in the same way it has been argued that courts have improperly analyzed *Bowers*. Because *Cleburne* addressed persons with mental retardation specifically, its application to all subsequent cases addressing various types of disabilities is an improper broadening and extension of that holding. Further, *Cleburne* held the ordinance at issue unconstitutional only as applied, as opposed to striking it down entirely, making the holding even narrower.<sup>291</sup> All of these arguments suggest that *Cleburne* has been analyzed incorrectly and thus the Supreme Court could correct this problem while not overturning *Cleburne* entirely.

Notwithstanding all of these arguments, lower courts *have* considered *Cleburne* in deciding equal protection claims based on disability and *have* considered *Bowers* in deciding equal protection claims based on sexual orientation. With respect to sexual orientation cases, courts have held that homosexuals do not constitute a quasi-suspect or suspect class and, therefore, have applied the rational basis test.<sup>292</sup> In addition, many lower courts have relied on *Cleburne* in deciding that persons with disabilities do not constitute a suspect class.<sup>293</sup> In order for the Supreme Court to declare that lesbians and gay men or persons with disabilities do constitute a quasi-suspect class, the Court would have to state why its decision does not subvert the doctrine of *stare decisis*.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>294</sup> the Supreme Court addressed the issue of *stare decisis*. In *Casey*, the Court articulated several factors to consider when

---

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

292. See, e.g., *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 266 (6th Cir. 1995) (resolving that under *Bowers v. Hardwick* and its progeny, homosexuals did not constitute "a suspect class or a quasi-suspect class[ ] because the conduct which places them in that class is not constitutionally protected"); *Ben-Shalom v. Marsh*, 881 F.2d 454, 461, 464-65 (7th Cir. 1989) (same); *Padula v. Webster*, 822 F.2d 97, 102, 103 (D.C. Cir. 1987) (same).

293. See, e.g., *Suffolk Parents of Handicapped Adults v. Wingate*, 101 F.3d 818, 825-27 (2d Cir. 1996) (relying on *Cleburne* to apply rational basis to disability); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1155 (9th Cir. 1996) (same); *Spragens v. Shalala*, 36 F.3d 947, 950 (10th Cir. 1994) (same).

294. 505 U.S. 833 (1992).

reexamining a prior holding. The Court described these factors as a "series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."<sup>295</sup> These considerations include

whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.<sup>296</sup>

The response to each of these inquiries reveals that the Court can hold that lesbians and gay men, as well as persons with disabilities, are a quasi-suspect or suspect class for equal protection review, consistent with the doctrine of stare decisis.

### *1. Whether the Rule Has Proven To Be Intolerable Simply in Defying Practical Workability*

Although often reversed on appeal, some courts have properly distinguished *Bowers* from equal protection cases involving lesbians and gay men and found that this group constitutes a quasi-suspect or suspect class.<sup>297</sup> Notwithstanding the fact that these disparate outcomes are not *per se* evidence that *Bowers* is "unworkable," they do reveal a lack of clarity in this area of the law that has engendered a wide spectrum of decisions.

The decisions in the area of disability have been far more consistent in their holdings that persons with disability are subject to rational basis review based on *Cleburne*, however, the ADA has created new issues for the Court's review. More specifically, the ADA's findings that persons with disabilities are a "discrete and

---

<sup>295</sup> *Id.* at 854.

<sup>296</sup> *Id.* at 854-55 (citations omitted).

<sup>297</sup> See, e.g., *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991) (finding homosexuality a suspect class), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992); *Watkins v. United States Army*, 837 F.2d 1428, *amended*, 847 F.2d 1329 (9th Cir. 1988) (same), *aff'd on different grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc). See generally Sunstein, *supra* note 285 (distinguishing equal protection doctrine from due process doctrine and arguing that homosexuals as a class require suspect classification).

insular minority" have caused confusion in the judiciary regarding the equal protection status of persons with disabilities.<sup>298</sup>

Further, it could be argued that the ADA's findings directly address an issue raised by the *Cleburne* majority. In *Cleburne*, the Court noted that although Congress has Section 5 power to enforce the Equal Protection Clause, "absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation . . . that is challenged as denying equal protection."<sup>299</sup> Its seems that the ADA's finding that persons with disabilities constitute a discrete and insular minority, language renowned for triggering heightened scrutiny, answers the *Cleburne* Court's request for congressional direction. Seen from this perspective, *Cleburne* is unworkable in light of the ADA findings.<sup>300</sup>

The ADA thus has caused a previously settled area of equal protection law to become unsettled. Therefore, Supreme Court decisions holding lesbians and gay men and persons with disabilities a quasi-suspect or suspect class, to the extent that they clarify *Bowers* and *Cleburne*, are consistent with this aspect of stare decisis.

*2. Whether the Rule is Subject to a Kind of Reliance that Would Lend a Special Hardship to the Consequences of Overruling and Add Inequity to the Cost of Repudiation*

This prong of stare decisis inquiry is concerned with judicial consistency. It considers the impact that a change in the rule of law would have on those who have relied on the existing rule of law.<sup>301</sup> In the area of sexual orientation law, reliance by lower courts on the tenuous assertion that *Bowers* stands for the proposition that homosexuals do not enjoy heightened scrutiny creates a negative impact only upon those lesbians and gay men. Further, any effect of past reliance would be minimal, since such reliance in prior decisions resulted, for the most part, in injury to lesbians and gay men.<sup>302</sup>

State interests offered to justify the continuation of rational basis review in the analysis of anti-gay legislation are weak and

---

298. See *supra* text accompanying notes 150-64.

299. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40 (1985).

300. Of course, these findings and their impact on *Cleburne* or other cases, hinge on how the Court will interpret them in light of the *Boerne* decision. See *supra* Part V.A.

301. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855 (1992).

302. See *supra* Part IV.D.

unconvincing. Such interests include the preservation of the traditional nuclear family, the protection of children, and the preservation of traditional, Judeo-Christian morality.<sup>303</sup> However, upon closer examination antidiscrimination statutes protecting lesbians and gay men, or suspect classification for lesbians and gay men, will not undermine any of these state interests, because such interests are based on myths and fears about homosexuality.<sup>304</sup> As a result, this aspect of the stare decisis doctrine is satisfied in the context of sexual orientation and the law.

Similar reasoning applies to the issue of persons with disability and the law. It is true that in the wake of *Cleburne*, many courts have held that persons with disabilities warrant only rational basis review.<sup>305</sup> However, like the effects of laws on lesbians and gay men, the effects of past reliance would be minimal. As stated above, there have been many positive federal laws passed regarding disability.<sup>306</sup> These surely would pass heightened scrutiny. At the same time, however, there have been other classificatory laws passed by states or other government actors that have been upheld, having a negative impact on persons with disabilities.<sup>307</sup> With heightened scrutiny, only these hurtful laws and acts would violate the equal protection rights of persons with disabilities. As a result, this aspect of the stare decisis doctrine is satisfied in the context of disability law.

*3. Whether Related Principles of Law Have So Far Developed as To Have Left the Old Rule No More than a Remnant of Abandoned Doctrine and Whether Facts Have So Changed, or Come To Be Seen So Differently, as To Have Robbed the Old Rule of Significant Application or Justification*

In the context of sexual orientation and the law, the "old rule" is the one articulated in *Bowers*, namely that the right to engage in private, consensual, homosexual sodomy is not a fundamental right protected by the Constitution. This prong of the stare decisis inquiry considers whether an "evolution of legal principle has left [*Bowers's*] doctrinal footings weaker than they were in [1986]."<sup>308</sup>

---

303. See *Baehr v. Miike*, 23 Fam. L. Rep. (BNA) 2001, 2002 (Haw. Cir. Ct. 1996); JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* 105-144 (1996).

304. See *Baehr*, 23 Fam. L. Rep. (BNA) at 2009-10; STACEY, *supra* note 303, at 128-144.

305. See cases cited *supra* note 293.

306. See *supra* Parts III.B & E.

307. See *supra* Part III.C.

308. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 857 (1992).

Legal principles regarding sexual orientation, specifically homosexuality, have "evolved" in the dozen years since the Court handed down *Bowers*. In that time, numerous laws, regulations, and ordinances have been passed at all levels of government protecting lesbians and gay men from discrimination.<sup>309</sup> Further, *Romer* illustrates the movement this area of legal doctrine has undergone. Finally, lesbians and gay men have made significant, although limited, progress in areas of the law, including family law and employment law.<sup>310</sup> All of these shifts in the law should compel the Court to find that the "old rule" articulated in *Bowers* is, in fact, an abandoned doctrine.

In the context of disability and the law, the inquiry into whether the "evolution of legal principle has left [*Cleburne's*] doctrinal footings weaker than they were in [1985]"<sup>311</sup> produces a similar conclusion. The ADA is the most important and striking example of this "evolution." Even a decade ago, such a sweeping civil rights law for persons with disabilities was unimaginable.

Further, these shifts in the law demonstrate that "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."<sup>312</sup> For, the law often changes in response to shifts in cultural attitudes, or sometimes precedes such shifts. For example, the era in which the Court decided *Brown v. Board of Education*<sup>313</sup> was the beginning of a fundamental shift in this nation's perception about the place of African-Americans in American society. The *Brown* decision reflected the growing, and now accepted, belief that segregation not only violated equal protection, but that it represented invidious and harmful discrimination against African-Americans. *Brown* specifically repudiated the holding in *Plessy v. Ferguson*,<sup>314</sup> which held that racial segregation was not a "badge of inferiority."<sup>315</sup> *Brown* therefore reflected that "[s]ociety's understanding of the facts upon which a constitutional ruling was sought in 1954 was

---

309. See Bruce, *supra* note 165, at 443-44 (explaining that, in the last 20 years, 119 localities have enacted antidiscrimination laws or ordinances based on sexual orientation and noting that many of these have been repealed in recent years).

310. See *id.* (discussing the limited gains lesbians and gay men have made in the legal arena).

311. *Casey*, 505 U.S. at 857.

312. *Id.*

313. 347 U.S. 483 (1954).

314. 163 U.S. 537 (1896).

315. *Brown*, 347 U.S. at 494-95.

thus fundamentally different from the basis claimed for the decision in 1896.<sup>316</sup>

It may be argued that these changes suggest the absence of a need to raise the level of judicial scrutiny, as reasoned by the *Cleburne* Court. An equally strong argument to the contrary is that the sweeping changes in the area of sexual orientation have merely exposed the oppression and discrimination faced by this group. The increased visibility of lesbians and gay men in the mainstream of American life has not resulted in them being embraced and celebrated by American society. In fact, the opposite has happened in many cases—the increased visibility and small gains in legal protections for lesbians and gay men in some communities has engendered a severe backlash that cries out for heightened judicial scrutiny. Colorado's Amendment 2 illustrates the severity of the backlash and the need for suspect classification.<sup>317</sup>

Another example is the Hate Crimes Prevention Act of 1997 (HCPA), which seeks to add gender, sexual orientation, and disability to existing federal hate crime legislation.<sup>318</sup> Such inclusion signals two important messages. First, crimes against these groups are prevalent. Second, the inclusion of gender signals that increased protections are not inconsistent with heightened judicial scrutiny.

Similarly, the facts and understanding surrounding homosexuality have changed from those even a mere thirteen years ago when the Court considered *Bowers*. In those years, lesbians and gay men have "come out of the closet"<sup>319</sup> in greater numbers than ever before.<sup>320</sup> This increased visibility has led to the destruction of

316. *Casey*, 505 U.S. at 863.

317. I realize that the *Romer* Court reached its decision under the rational basis test, at least in theory. However, many scholars have criticized *Romer* for applying heightened scrutiny under the guise of rational basis. Although the Supreme Court successfully invalidated Amendment 2 under its version of the rational basis test, it is unlikely that lower courts will begin to strike down anti-gay legislation based on *Romer*. See, e.g., *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 295-301 (6th Cir. 1997) (upholding Issue 3 notwithstanding the U.S. Supreme Court's holding in *Romer*).

318. See H.R. 3081, 105th Cong., 1st Sess. (1997).

319. The term "coming out" refers to the public declaration that one is lesbian or gay. See generally Mark Chekola, *Equality Foundation v. City of Cincinnati: Invisibility and Identifiability of Oppressed Groups*, 6 LAW & SEX 141, 149-151 (1996) (explaining the role that the "closet" plays in the struggle for lesbian and gay legal rights); John D'Emilio, *Capitalism and Gay Identity*, in THE POLITICS OF SEXUALITY (Ann Snitow et al. eds., 1983) (describing the history of the lesbian and gay community in the United States).

320. See generally Jackson, *supra* note 234 (noting that the lesbian and gay rights movement has encouraged increased visibility of lesbians and gay men, including the creation of more opportunities for lesbians and gay men to reveal their sexual orientation publicly).

many of the myths and fears society held against homosexuality. For example, it has been proven that, contrary to the perception of many in the era of *Bowers*, and even the perception of some people today, that children of lesbians and gay men are no more likely to be gay themselves than children raised by heterosexual couples.<sup>321</sup>

Outside of the law, but also connected to the law, persons with disabilities have become more visible in the mainstream of society. For example, persons with disabilities now regularly appear on television programming, news, and commercials with no fanfare—they simply appear as part of the plot, as the anchor of the news, or as the customer in a commercial. They are seen as people first, with their disability a secondary characteristic; in the past, the disability would have been the primary characteristic, erasing the rest of the person.<sup>322</sup> The ADA has created opportunities for non-disabled persons to interact with persons with disabilities to an extent never experienced before its passage. In this way, many persons with disabilities have been able to “come out of the closet” and reveal their disability in a way analogous to lesbians and gay men “coming out of the closet” and revealing their sexual orientation.<sup>323</sup> As a result, myths and stereotypes regarding persons with disabilities, though not eradicated, have been improved to a great extent.<sup>324</sup>

Such emancipation, and subsequent legislative protections, however, does not imply that persons with disabilities no longer need heightened scrutiny, as reasoned in *Cleburne*.<sup>325</sup> Such reasoning is flawed because

this formulation would work to the disadvantage of groups in our society. Once the legislature succeeds in its efforts to

---

321. See generally David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345 (1994) (noting that children of lesbians and gay men are no more likely to be gay themselves than children raised by heterosexual partners).

322. See Jonathon 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, 1358-59 (1993) (noting that cultural attitudes with regard to persons with disabilities have shifted over the last 20 years).

323. See, e.g., Paul Steven Miller, *The Americans with Disabilities Act in Texas: The EEOC's Continuing Efforts in Enforcement*, 34 HOUS. L. REV. 777, 789 (discussing a story shown on 20/20, a nationally televised news magazine, about persons who do not have “traditional” disabilities); see also Drimmer, *supra* note 322, at 1407 (stating that persons with disabilities must “continue to ‘come out of the closet’ and affirm themselves as equal citizens deserving equal rights” (emphasis added)).

324. See Drimmer, *supra* note 322, at 1408 (noting that “[o]nly recently has the disabled culture begun to be explored”).

325. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 443 (1985).



provide protective legislation for a particular group, that group would then be in danger of receiving less judicial protection. For example, if the *Cleburne* Court's reasoning was followed, African Americans and women would lose their special judicial protection solely because they gained the attention of the legislature. . . . The branches of government should share the function of protecting disadvantaged groups in our society, not rescind their effort once another branch has contributed to those protections.<sup>326</sup>

There are, however, some distinct differences between society's perception of disability and sexual orientation. Persons with disabilities have gone from being viewed as "other," lacking feelings, lacking humanity, and in need of segregation, institutionalization, and even mistreatment to being viewed as full, important, and meaningful members of society. Although societal fears of and discrimination against persons with disabilities continue, these attitudes and actions are increasingly frowned upon and corrected, both in the law and in the mainstream of society. People are coming to see that these attitudes are wrong, to the extent that Congress proscribed the manifestation of these attitudes through the ADA. In fact, discrimination against and negative attitudes toward persons with disabilities are beginning to be viewed as egregious as discrimination against and fear of persons of color and women.

This is not the case for sexual orientation. Whereas society's perception and treatment of persons with disabilities has improved, the same is not true of society's, and the law's, perception and treatment of lesbians and gay men. Notwithstanding, or perhaps because of, the passage of dozens of civil rights laws and ordinances protecting lesbians and gay men, a serious and even violent backlash has emerged against this group. In many sectors of American society, including the United States Congress,<sup>327</sup> it is acceptable and even applauded to discriminate against and vilify lesbians and gay men. Stereotypes abound about the nature of lesbians as man-hating feminists out to destroy the institution of the family.<sup>328</sup> Similar stereotypes exist regarding gay men as

---

326. Montanaro, *supra* note 4, at 662.

327. See, e.g., DOMA, 1 U.S.C. § 7 (1996) (making same-sex marriage illegal).

328. See, e.g., Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755, 791 (1993) (recognizing the "power of dominant culture to impose on lesbians the images of 'predatory, possessive, promiscuous, jealous, sadistic, masochistic, unhealthy, bitter, man-hating, masculine, aggressive, frustrated, over-sexed' people").

pedophiles, as the cause of AIDS, and as a threat to masculinity and thus to the continued dominance of patriarchy.<sup>329</sup>

Many of these attitudes are based on notions of morality. Opponents of homosexuality, and thus of laws protecting lesbians and gay men, base many of their views and arguments on a belief that homosexuality is morally and religiously wrong, corrupt, and evil.<sup>330</sup> It is this conceptualization of homosexuality as immoral and corrupt on which many of the laws criminalizing homosexual conduct and denying lesbians and gay men certain rights and opportunities, such as marriage, child-rearing, and employment, are based. A synonymous vilification of persons with disabilities, based on notions of morality, does not exist to the same extent it does against lesbians and gay men.

This important difference leads to a conclusion that the proper result is the classification of lesbians and gay men as a suspect class and the classification of persons with disabilities as a quasi-suspect class.<sup>331</sup> As stated by the Supreme Court, there are inevitably reasons for classifications in legislation. There are real and valid circumstances that would lead legislators to classify based on disability, because it is undisputed that some disabilities, such as mental retardation, limit persons with disabilities in ways that would make classifications legitimate. However, legislation based on sexual orientation is not based on any real limitation, but instead reflects a legislating of morality, often expressed as pure animus. There is never any reason to classify on the basis of sexual orientation; however, because hatred and violence toward lesbians and gay men is still prominent, legislators at all levels of local, state, and federal governments continue to enact discriminatory laws against lesbians and gay men. Only suspect classification will protect lesbians and gay men. On the contrary, because there are legitimate reasons for classifying based on disability, quasi-suspect classification will protect persons with disabilities.

---

329. See, e.g., Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL'Y & L. 479, 490 (1997) ("Part of the stereotype contained in homophobia, for example, is that gay men are pedophiles . . . .")

330. See Larry Catá Backer, *Constructing "Homosexual" for the Constitutional Theory: Sodomy Narrative, Jurisprudence and Antipathy in the United States and British Courts*, 71 TUL. L. REV. 529, 543-44 (1996).

331. See generally Montanaro, *supra* note 4.

*C. Determining Quasi-Suspect Classification for Persons with Disabilities and Suspect Classification for Lesbians and Gay Men*

The Supreme Court considers several factors when determining whether a group should be considered as a quasi-suspect or suspect class. These factors include: whether the group's defining characteristic is immutable,<sup>332</sup> whether the group has suffered a history of discrimination,<sup>333</sup> whether the group is in a position of political powerlessness,<sup>334</sup> whether the group's defining characteristic relates in any way to its members' ability to participate in, or contribute to, society,<sup>335</sup> and whether the characteristic is beyond the control of the individual group member.<sup>336</sup> None of these factors are dispositive, and all are considered in such a determination.

*1. Immutability of Sexual Orientation and Disability*<sup>337</sup>

As to the defining characteristics of homosexuality, the District Court in *Equality Foundation I* found that "[s]exual orientation is a characteristic which exists separately and independently from sexual conduct or behavior."<sup>338</sup> The District Court further found that lesbians and gay men constitute between five percent and thirteen percent of the population<sup>339</sup> and that sexual orientation is a "deeply rooted, complex combination of factors including a predisposition towards affiliation, affection, or bonding with members of the opposite and/or same gender."<sup>340</sup> Although lesbians and gay men come in all colors and stripes, and occupy all walks of life, there is a defining characteristic that unites them into a

332. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (finding immutability as a factor in determining the proper level of scrutiny). But see *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442-43 n.10 (1985) (revealing some hesitancy about applying the immutability factor).

333. See *Cleburne*, 473 U.S. at 441; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Frontiero*, 411 U.S. at 684-85;

334. See *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

335. See *Cleburne*, 473 U.S. at 441-44; *Matthews v. Lucas*, 427 U.S. 495, 505 (1976); *Murgia*, 427 U.S. at 310-11; *Frontiero*, 411 U.S. at 686.

336. See *Cleburne*, 473 U.S. at 441 (citing *Lucas*, 427 U.S. at 505); *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982); *Frontiero*, 411 U.S. at 686.

337. See *Frontiero*, 411 U.S. at 686. Although the Court has revealed some hesitancy about applying this particular factor, see *Cleburne*, 473 U.S. at 442-43 n.10, it is important to address it in the context of homosexuality, given the fierce public debate about the role of biology and genetics in sexual orientation and identity.

338. *Equality Found. of Greater Cincinnati, Inc. v. Cincinnati*, 860 F. Supp. 417, 426 (S.D. Ohio 1994).

339. See *id.*

340. *Id.*

suspect group. Dr. John Gonsiorek, one of the petitioner's expert witnesses in *Equality Foundation I*, noted that sexual orientation is characterized by "a predisposition towards erotic, sexual, affiliation or affection relationship towards one's own and/or other gender."<sup>341</sup> Finally, although the specific roots of sexual orientation are not fully known, experts agree that, once established, sexual orientation is very difficult to alter.<sup>342</sup>

Similarly, disability is, for the most part, immutable. In passing the ADA, Congress found that forty-three million Americans have "one or more physical or mental disabilities."<sup>343</sup> Many persons with disabilities are born with such disabilities. Others acquire disabilities later in life due to an illness or accident; many such disabilities are permanent or long-term. Some disabilities, however, are not permanent. Additionally, some disabilities can be mitigated or treated in ways that diminish or make invisible the disability. Although the ADA does not take into account mitigation,<sup>344</sup> the fact that it includes a requirement for "reasonable accommodation"<sup>345</sup> suggests that disability is not always immutable, or if it is, it can be accommodated in a way that makes it a non-issue for employment or other purposes. In contrast, homosexuality never changes,<sup>346</sup> and no accommodation will ever engender such a change.

A further distinction lies in the definition of these two groups. Whereas the definition of sexual orientation generally, and homosexuality specifically, is quite narrow,<sup>347</sup> the definition of disability in the ADA is quite broad.<sup>348</sup> The narrow nature of the definition of homosexuality produces the result that the same

---

341. *Id.* at 437.

342. *See id.*; *see also Heightened Scrutiny*, *supra* note 176, at 818-20 (discussing research that indicates that sexual orientation develops early in life, usually by a person's fifth or sixth birthday, and that "[s]exual orientation is generally impervious to change").

343. 42 U.S.C. § 12101(a)(1) (1999).

344. *But see* *Sutton v. United Air Lines*, 527 U.S. 471 (1999) (holding that a determination of impairment under the ADA should be made only after mitigating or corrective measures that may diminish such impairment have been effected); *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998) (noting that, although the plaintiff's brain made corrections of his visual impairment to, in essence, mitigate his disability, he was still disabled under the ADA), *rev'd*, 527 U.S. 555 (1999).

345. 42 U.S.C. § 12111(9) (1999).

346. Although some claim that homosexuality can be "cured," the weight of authority suggests that this position is incorrect and based on religion and morality. *See, e.g.*, Backer, *supra* note 330, at 556 n.82 (noting the "modern religious version of the notion that homosexuality can be 'cured'").

347. *See* *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994).

348. *See infra* text accompanying note 349.

group, consisting of the same individuals, are always burdened by laws implicating homosexuality, and because these laws are based on animus and stereotype, this narrow class demands suspect classification.

The ADA defines a disability with respect to an individual as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."<sup>349</sup> The breadth of this definition results in a great number of persons with varying levels, types, and degrees of disability being included in any class of persons with disabilities in an equal protection review. Because there are so many types and degrees of disability, more deference to the legislature is warranted; thus quasi-suspect classification is appropriate.

## 2. *Political Powerlessness of Lesbians and Gay Men and Persons with Disabilities*

Lesbians and gay men are, in many regards, politically powerless.<sup>350</sup> Justice Brennan's dissent from the denial of certiorari in *Rowland v. Mad River Local School District*<sup>351</sup> is instructive. Even in 1985, two members of the Court<sup>352</sup> believed that, "[b]ecause of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena."<sup>353</sup>

Fear, hatred, and discrimination aimed at homosexuals makes coalition-building, an often essential element to passing legislation, difficult if not impossible.<sup>354</sup> The court in *Equality Foundation I* noted that "undisputed evidence was offered demonstrating that gays, lesbians and bisexuals are confronted with distinct obstacles in the political arena."<sup>355</sup> The court further noted that witnesses for both parties testified that it is "crucial for political minorities to

349. 42 U.S.C. § 12102(2)(A)-(C).

350. See *Equality Foundation*, 860 F. Supp. at 425, 437-39; see also Richard Lacayo, *The New Struggle: The Wyoming Lynching Is Enraging, But It Hides a Deeper Truth; Gay Life, and Gay Politics, Has Changed*, TIME, Oct. 26, 1998, at 32, 32-36 (noting that, even after 25 years in existence, the most prominent gay-rights organization in the United States has "virtually no lobbying presence in Capitol Hill").

351. 470 U.S. 1009 (1985).

352. Justice Marshall joined in this dissent. See *id.* at 1014 (Brennan, J., dissenting).

353. *Id.* at 1014 (Brennan, J., dissenting).

354. See *Equality Foundation*, 860 F. Supp. at 426, 437-39.

355. *Id.* at 438.

form coalitions in order to achieve legislative success. . . . Evidence revealed that even those groups that need the help of gays, lesbians and bisexuals refuse to form coalitions with them because of their strong feeling of dislike for these groups."<sup>356</sup>

The number of openly gay legislators is also indicative of the lack of political power held by lesbians and gay men as a group. The court in *Equity Foundation I* found that of the 497,155 elected officials in the United States, only seventy-three were openly gay; none of the United State senators were openly gay; only two members of the United States House of Representatives were openly gay; and only twelve of the 7,461 state legislators were openly gay.<sup>357</sup>

Finally, the recent national trend in passing anti-gay ballot initiatives indicates that, even though lesbians and gay men are occasionally able to win the passage of protective legislation, those protections are often short-lived. For example, the *Equality Foundation I* court noted that, of the thirty-eight anti-gay ballot initiatives that recently emerged around the country, voters approved thirty-four.<sup>358</sup> The court concluded that the success of these anti-gay initiatives reveals "hostility towards gays, [as well as] the fact that whatever political gains they have made are in peril. Thus, whatever bona fide legislative victories gays, lesbians and bisexual[s] may have achieved in recent years, those victories are being 'rolled back' at an unprecedented rate and in an unprecedented manner."<sup>359</sup>

Persons with disabilities, though not an all-powerful lobby on Capitol Hill, nonetheless have more political clout than lesbians and gay men.<sup>360</sup> Legislators often see the plight of persons with disabilities as a sensitive and politically wise topic to address and

---

356. *Id.*; see also Lacayo, *supra* note 350. Lacayo notes that:

Largely because of opposition from unions, blacks and church groups, it was not until 1983 that a gay organization, the National Gay and Lesbian Task Force, was admitted to the Leadership Conference on Civil Rights, one of Washington's most liberal legislative coalitions. It was 11 years more before the group took a consensus position on anything involving gay rights.

*Id.*

357. See *Equality Foundation*, 860 F. Supp. at 439 n.20.

358. See *id.* at 439.

359. *Id.* See generally Bruce, *supra* note 165 (describing the lack of political power held by lesbians and gay men as a group).

360. See, e.g., Shawn M. Filippi & Edward J. Reeves, *Equality or Further Discrimination?: Sexual Orientation Nondiscrimination in Oregon Statutory Employment Law After Tanner v. OHSU*, 3 J. SMALL & EMERGING BUS. L. 269, 275 (1999) ("[S]exual orientation is one of the last bastions of 'safe' discrimination in our society.").

support. Several of the members of Congress who supported the ADA had family members with disabilities.<sup>361</sup> The sheer numbers of federal laws protecting persons with disabilities illustrate that they hold some political power, or have an impact on, and a voice with, those who hold political power. On the contrary, legislators often shy away from, or expressly distance themselves from and vote against, legislation protecting lesbians and gay men.<sup>362</sup>

### 3. *Ability of Lesbians and Gay Men and Persons with Disabilities to Perform, Participate in, or Contribute to Society*

The *Equality Foundation I* court concluded that "sexual orientation, whether heterosexual, homosexual, or bisexual, bears no relation whatsoever to an individual's ability to perform, or to participate in, or contribute to, society."<sup>363</sup> The court relied, in part, on the American Psychological Association's assertion of this fact in reaching its conclusion.<sup>364</sup> The lack of a near consensus on this position reveals that legislation singling out lesbians and gay men is rooted in prejudice and stereotype, rather than based on fact.<sup>365</sup> As the court in *Equality Foundation I* so accurately stated, "[i]f homosexuals were afflicted with some sort of impediment to their ability to perform and contribute to society, the entire phenomenon of 'staying in the Closet' and 'coming out' would not exist; their impediment would betray their status."<sup>366</sup>

---

361. See JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 117-18 (1993) (stating that Rep. Chelho, an ADA sponsor, had epilepsy, Rep. Weicker's son had Down Syndrome, Rep. Hoyer's wife had epilepsy, Sen. Harkin's brother was deaf, Sen. Kennedy's son had a leg amputated due to cancer, Sen. Dole's arm was paralyzed, and President Bush had a daughter who died of leukemia, a son who had colon cancer, and an uncle who had polio).

362. The plight of persons with disabilities is seen as more sympathetic by lawmakers than the plight of lesbians and gay men, as reflected in the differing impact each of these communities has in their lobbying and protesting efforts. Shapiro notes that "[m]any disability activists were envious of the public fascination with the gay rights movement," and that during the passage of the ADA, ACT-UP, a gay, AIDS activist organization received front-page coverage on a national news weekly. SHAPIRO, *supra* note 361, at 136. It is ironic that the more visible group—lesbians and gay men—receives fewer protections. This lower level of protection illustrates the role that morality and religion play in legislating protections. As one disability activist stated, "[a]lthough the gay rights movement was far more visible, more cohesive, and much more in the public conscience, gays and lesbians in the 1990s could only dream of the type of national antidiscrimination legislation that was moving quickly through Congress for disabled people." *Id.* at 137.

363. *Equality Foundation*, 860 F. Supp. at 437.

364. See *id.*

365. See *Watkins v. United States Army*, 837 F.2d 1428, *amended*, 847 F.2d 1329 (9th Cir. 1988), *aff'd on different grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc).

366. *Equality Foundation*, 860 F. Supp. at 437.

Although scores of persons with disabilities can, and do, perform, participate in, and/or contribute to society, there is a subset of persons with disabilities who are so incapacitated by their disability that they cannot.<sup>367</sup> As a result, there are some circumstances in which legislation could legitimately classify on the basis of disability, making quasi-suspect classification appropriate.

#### 4. *Involuntary Nature of Disability and Sexual Orientation*

Finally, the sexual orientation of lesbians and gay men, like the sexual orientation of heterosexuals, is beyond their control; lesbians and gay men do not choose to be homosexual.<sup>368</sup> On the contrary, sexual orientation, whether heterosexual or homosexual, is "set in at a very early age—3 to 5 years—and is not only involuntary, but is unamenable to change."<sup>369</sup>

Like sexual orientation, most disabilities are immutable. Many develop prior to birth and continue throughout a person's life. Those disabilities that emerge through illness or accident later in life are also often immutable after onset. However, some disabilities are temporary, and thus, some level of legislative discretion in classifying on the basis of disability is permissible.

This discussion has focused on overcoming the challenge of *stare decisis* for *Bowers* and *Cleburne*. Implicit in this discussion is the notion that the Supreme Court would overturn these prior decisions on *substantive* grounds, as opposed to overturning the prior ruling as a judicially derived *interpretive test*. This distinction is important, for overruling a prior judicial test may be seen as not as sweeping, and therefore not as improper, as overturning a prior substantive decision. Within this framework, the Court also would probably consider whether the history of post-*Bowers* and post-*Cleburne* protections for these groups indicates that heightened scrutiny is unnecessary. This history would show that protections based on sexual orientation are inconsistent and that many anti-gay laws still stand today because of the non-suspect nature of that class, notwithstanding *Romer*. The history would show that protections based on disability are also inconsistent in equal

---

367. Many, including the author, would argue that all persons, regardless of disability, perform, participate in, and contribute to society by their mere presence in the lives of their friends and loved ones. However, such an argument is unlikely to persuade a court in an equal protection review.

368. See *Heightened Scrutiny*, *supra* note 176, at 818-19.

369. *Equality Foundation*, 860 F. Supp. at 426.



protection cases,<sup>370</sup> notwithstanding new statutory protections under the ADA. On these grounds, overruling the judicial test employed (rational basis) as opposed to overruling the substance of the decisions (striking down the *Cleburne* ordinance as applied and upholding Georgia's sodomy statute) may be appropriate and more palatable to the current Court.

## VI. CONCLUSION

Sexual orientation should receive suspect classification, whereas disability should receive quasi-suspect classification. Suspect classification for lesbians and gay men will ensure that almost all legislation discriminating against lesbians and gay men will be struck down. Further, suspect classification will place lesbians and gay men on the same scrutiny level as race, alienage, and national origin vis-à-vis legislation. However, "establishing a bright-line rule that all statutes classifying based on disability are to be strictly scrutinized may harm the disabled more than it would help them because benign, remedial statutes designed to aid the disabled, when strictly scrutinized, may be struck down."<sup>371</sup> Quasi-suspect classification would place disability on the same scrutiny level as gender, in which some remedial statutes are permissible. The results attained by classifying lesbians and gay men as suspect and persons with disabilities as quasi-suspect will thus reflect society's, and the Court's, commitment to eradicating inequality and achieving justice for both of these groups.

Although the arguments for creating these new quasi-suspect and suspect classes are reasoned and reflect an accurate reading of case law, statutory law, and rules of judicial interpretation, one must also consider whether the current Court will accept such arguments. The current Court is unlikely to create these new classifications for lesbians and gay men and persons with disabilities. Since *Cleburne*, the Court lost three of its most liberal justices—Blackmun, Brennan, and Marshall. Further, since *Cleburne* the Court has become more conservative, heralding judicial restraint.<sup>372</sup>

370. Compare *J.W. v. City of Tacoma*, 720 F.2d 1126, 1131-32 (9th Cir. 1983) (finding a violation of equal protection based on disability), with *Bartlett v. New York State Bd. of Law Exam'rs*, 970 F. Supp 1094, 1137 (S.D.N.Y. 1997) (finding no violation of equal protection based on disability).

371. Montanaro, *supra* note 4, at 676 (citation omitted).

372. See Joan Biskupic, *New Justices May Shift Supreme Court Balance on Pending Racial Issues*, WASH. POST, Jan. 8, 1995, at A1; Ana Puga, *Top Court Stays a Cautious Course, Observers Say*, BOSTON GLOBE, May 23, 1994, at 1.

The Court's possible, perhaps even probable, rejection of heightened scrutiny for lesbians and gay men and persons with disabilities has drastically different impacts on the two communities. If the Court rejects heightened scrutiny for persons with disabilities, the ADA will remain as a comprehensive civil rights law that covers most areas of discrimination against persons with disabilities in American society. In contrast, if the Court rejects strict scrutiny for lesbians and gay men, this group is left with no federal protection against discrimination, and with only a patchwork of state and local protections that vary widely from state to state and community to community. Thus, lesbians and gay men and their advocates should focus on a federal antidiscrimination bill similar to the ADA that would provide sweeping protections against discrimination based on sexual orientation.<sup>373</sup>

---

373. The pursuit of an ADA-like law for lesbians and gay men, although prudent, is likely to meet many of the same challenges that the struggle for strict scrutiny will meet, namely conservatism of Congress and rampant homophobia. Thus, the probability of such a bill passing is low. However, such efforts, coupled with efforts to win strict scrutiny, increase the chance that lesbians and gay men will receive the protections they deserve.