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Lisa A. Montanaro

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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

If you fail to see the person but only the disability, then, who is blind?

If you cannot hear your brother's cry for justice, who is deaf?

If you do not communicate with your sister but separate her from you, who is disabled?

If your heart and your mind do not reach out to your neighbour, who has the mental handicap?

If you do not stand up for rights of all persons, who is the cripple? Your attitude towards persons with disabilities may be our biggest handicap,

And yours too.¹

I. Introduction

At present, there are an estimated forty-three million Americans with disabilities² in the United States.³ Although persons with disabilities⁴ have been the subject of legislation since the early 1900s,⁵ Congress has often overlooked their

1. Tony Wong, *Who is Disabled?*, in *THE QUIET EAR* 235 (Brian Grant ed., 1988).

2. See *infra* text accompanying note 170 for the definition of a disabled individual under the Americans with Disabilities Act.

3. 42 U.S.C. § 12101(a)(1) (Supp. V 1993).

4. It is this author's belief, based on her experience working with "persons with disabilities," that this is the preferred terminology, as opposed to "handicapped," when referring to individuals with disabilities as a group.

5. See *infra* part II.B for a discussion of the history of legislation affecting persons with disabilities.

rights. Statutes aimed at enhancing the status of persons with disabilities have, for the most part, failed to provide comprehensive protection against widespread discrimination. The nation's courts have also failed to provide clear, strong, or consistent standards for combatting pervasive discrimination against individuals with disabilities. As recently as 1985, the United States Supreme Court in *City of Cleburne v. Cleburne Living Center*⁶ refused to accord governmental classifications based on disability the "quasi-suspect" status⁷ applied to classifications based on gender or illegitimacy.⁸ Instead, the Court relegated classifications based on disability to the lowest level of scrutiny, subject only to the "rational basis test."⁹

Then, in 1990, Congress passed the Americans with Disabilities Act (ADA),¹⁰ guaranteeing equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications.¹¹ The ADA affords civil rights protections to persons with disabilities, similar to those provided by the Civil Rights Act of 1964, to individuals on the basis of race, sex, national origin, and religion.¹² The ADA has revolutionized the extent of rights afforded the disabled based on their special status. Thus, it is understandable why commentators have labeled the ADA "the Emancipation Proclamation" of people with disabilities.¹³

6. 473 U.S. 432 (1985).

7. See *infra* part II.A.4 for a discussion of quasi-suspect class status.

8. See *Craig v. Boren*, 429 U.S. 190 (1976) (holding gender to be a "quasi-suspect" class); *Mathews v. Lucas*, 427 U.S. 495 (1976) (holding illegitimacy to be a "quasi-suspect" class).

9. *Cleburne*, 473 U.S. at 446; see *infra* part II.A.2 for a discussion of the rational basis test.

10. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12,101-12,213 (Supp. V 1993)).

11. 42 U.S.C. §§ 12,101-12,213 (Supp. V 1993).

12. See, e.g., Civil Rights Act of 1964 §§ 101-106 (codified at 42 U.S.C. §§ 2000a to a-6, 2000e to e-17 (1988)) (prohibiting discrimination in public accommodations and employment on the basis of race, color, creed, national origin, or sex).

13. See, e.g., Glen Elsasser, *Senate OK's Rights Bill for Disabled*, CHI. TRIB., Sept. 9, 1989, § 1, at 1. ("The ADA 'is a 20th Century Emancipation Proclamation for people with disabilities,' said Sen. Tom Harkin (D-Iowa), the bill's chief sponsor."); Tom Harkin, *Our Newest Civil Rights Law*, 26 TRIAL 56 (Dec. 1990); Edmund V. Ludwig and Suzanne E. Turner, *New Promises to Keep*, 13 PA. LAW. 15 (Jan. 1991).

Individuals with disabilities have been lobbying the nation's courts for decades to raise their status as a class for purposes of equal protection review, albeit unsuccessfully.¹⁴ By enacting the ADA, Congress has set forth a "sharp mandate" against disability discrimination¹⁵ that several courts have used as a guide to interpreting federal and state legislation, finding that the disabled are entitled to special protection from the courts.¹⁶

This Comment will examine whether Congress, in enacting the ADA, was attempting to mandate a heightened level of judicial scrutiny in cases dealing with a classification based on disability, and whether it has the authority to do so. It will also examine the issue of how the courts should view future alleged acts of discrimination against persons with disabilities, especially when the alleged discrimination does not fall under the prohibitions of the ADA. Since the ADA's passage in 1990, the Supreme Court has not addressed the question of whether the disabled now constitute a suspect class.¹⁷

Part II of this Comment will provide the reader with an overview of the rights afforded the disabled before the enactment of the ADA and will review the relevant Fourteenth Amendment jurisprudence surrounding this issue. Part III will present the statutory framework of the ADA and will explore leading federal and state court decisions involving the question of whether the disabled now constitute a suspect class for purposes of constitutional and statutory interpretation. Part IV will analyze whether Congress can create a suspect class by

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

15. Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 22 N.M. L. Rev. 13, 18 (1992).

16. See *infra* part III.B.1 for a discussion of case law using the ADA as a guide to interpreting various statutes.

17. The Court denied certiorari in January 1994 to the only case properly requesting review of this issue—*Ibarra v. Duc Van Le*, 114 S. Ct. 918 (1994). See *infra* part III.B.2.c for a discussion of the *Duc Van Le* case. See also *Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993) (refusing to address the issue of whether the mentally retarded, a sub-group of the disabled, constitute a quasi-suspect class, solely because the issue was not presented to any of the lower courts).

statute, thereby mandating that courts use the strict scrutiny standard of review. In Part IV's analysis, the implications of the Supreme Court's inevitable decision of this issue will be discussed. The analysis will conclude that the Court will most likely deem individuals with disabilities a quasi-suspect class, rather than afford individuals with disabilities full-fledged suspect class status. This Comment proposes that quasi-suspect class status would be most beneficial to individuals with disabilities. Finally, Part V will conclude that although Congress, using its enumerated powers, gave every indication of its desire to promote persons with disabilities to the status of "suspect class," it did not explicitly mandate a higher level of review on the nation's courts. As a result, the ultimate decision of whether the disabled will be raised to the judicially protected status of suspect or quasi-suspect class will be left to the discretion of the courts.

II. Background

A. What is a "Suspect Class"?

1. Fourteenth Amendment Jurisprudence

The Fourteenth Amendment of the United States Constitution 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."¹⁸ The Fourteenth Amendment's guarantee of equal protection applies to state governments.¹⁹ In addition, the Supreme Court in *Bolling v. Sharpe*²⁰ held that

18. U.S. CONST. amend. XIV, § 1 [hereinafter the Equal Protection Clause]. The full text of Section 1 of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

19. *Id.* ("[n]o State shall . . . deny . . ."). Local governments are considered to be subdivisions of the state. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (noting that the Fourteenth Amendment applies to the states and all of its "creatures").

20. 347 U.S. 497 (1954).

the federal government is bound by the same equal protection standard as the states.²¹

The Equal Protection Clause of the Fourteenth Amendment essentially directs the federal and state governments to treat all similarly situated persons alike.²² From the beginning, courts have interpreted the Equal Protection Clause to "impose a general restraint on the use of classifications" in legislation or through government action, "whatever the area regulated, whatever the classification criterion used."²³ Section Five of the Fourteenth Amendment grants Congress the power to enforce the equal protection mandate,²⁴ but absent controlling congressional direction, the courts have devised their own standards for determining whether challenged state legislation or other official action violates the Equal Protection Clause.²⁵ Therefore,

21. *Id.* at 500. In *Bolling*, the Court ruled that the federal government, specifically the District of Columbia, could not operate racially segregated schools any more than the states could. *Id.* On the same day as the *Bolling* decision, the Court also decided the seminal case of *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that the Equal Protection Clause prohibits the states from maintaining racially segregated public schools). The *Bolling* Court stated that "[i]n view of our decision that the Constitution prohibits the States from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling*, 347 U.S. at 500. Therefore, the Court held that when the federal government makes a classification which, if it were a state, would violate the Fourteenth Amendment's Equal Protection Clause, the courts will treat this classification as a violation of the Fifth Amendment's Due Process Clause, which is directly applicable to the federal government. *Id.* The Court reasoned that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Id.* at 499. Thus, although the Fifth Amendment does not expressly contain an equal protection clause, the *Bolling* Court, in essence, read an equal protection mandate into the spirit of the Fifth Amendment's Due Process Clause, imposing the same equal protection standards on the federal government as exist on the states through the Fourteenth Amendment. See generally *id.* at 499-500. *Accord* *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" (citing *Bolling*, 347 U.S. at 499)).

22. *Plyer v. Doe*, 457 U.S. 202, 216 (1982).

23. GERALD GUNTHER, CONSTITUTIONAL LAW 676 (10th ed. 1980).

24. U.S. CONST. amend. XIV, § 5. The full text of Section Five reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* Section Five is also referred to as the Enabling Clause.

25. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40 (1985) (referring to the three-tier approach of equal protection review devised over the years by the Supreme Court).

when Congress is silent, i.e., it has not used its authority under Section Five of the Fourteenth Amendment to pass appropriate legislation, then the courts do not engage in statutory interpretation when faced with an equal protection claim.²⁶ Rather, the courts interpret the Constitution itself by referring to the equal protection jurisprudence that has evolved throughout the Court's decisions involving the Equal Protection Clause.²⁷ However, when Congress enacts equal protection legislation pursuant to its Section Five power, the courts engage in mere statutory interpretation.²⁸ In other words, the courts use that statute to determine if the governmental action that is the subject of the case comports with the requirements of that statute or is in conflict with it.²⁹ If the governmental action at issue conflicts with an act of Congress or the Constitution, then that action must fall to the congressional legislation under the Supremacy Clause.³⁰

26. *See id.* (noting that when Congress is silent and there is no statute on point to review, the courts themselves determine the validity of action that is challenged under the Equal Protection Clause).

27. *See id.* at 440 (referring to the Fourteenth Amendment jurisprudence developed to interpret the Equal Protection Clause); *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25, at 479 (2d ed. 1988) (stating that courts assess the validity of state action in independent constitutional terms only when Congress is silent and has not legislated).

28. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966) (engaging in statutory interpretation of section 4(e) of the Voting Rights Act of 1965 enacted pursuant to Section Five of the Fourteenth Amendment).

29. *Id.*; *see also* NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 45.01, at 1 (4th ed. 1984) (stating that the particular language of a statute is always the starting point on any question concerning the application of the law).

30. U.S. CONST. art. VI, § 2 [hereinafter the Supremacy Clause]. The full text of the Supremacy Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. *See also Morgan*, 384 U.S. at 646-47 (holding that by force of the Supremacy Clause, New York's English literacy requirement cannot be enforced to the extent that it is inconsistent with the Voting Rights Act of 1965—a congressional act); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) ("[T]o such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the law of Congress, . . . the act of Congress . . . is supreme; and the law of the State . . . must yield to it.").

Generally, the Supreme Court determines which groups receive special protection under the Equal Protection Clause,³¹ while Congress customarily limits itself to creating enabling legislation based on the groups that the Court has singled out for special protection.³² However, this is not a firm rule. There have been situations where Congress has used its Section Five power to enact legislation concerning a class not yet afforded special protection by the Court.³³ For example, under its Section Five authority, Congress enacted the Age Discrimination in Employment Act (ADEA),³⁴ the 1972 amendments to Title VII of the Civil Rights Act of 1964,³⁵ and the Religious Freedom Restoration Act (RFRA)³⁶ to aid groups not yet given special

31. The Supreme Court has thus far set forth a limited and exclusive list of classifications for equal protection purposes: race, gender, illegitimacy, and alienage. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (gender); *Mathews v. Lucas*, 427 U.S. 495 (1976) (illegitimacy); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Korematsu v. United States*, 323 U.S. 214 (1944) (national origin). These classifications are given special protection in the courts of the United States. Courts engage in heightened forms of scrutiny when any governmental action or piece of legislation singles out a group of persons based on one of the above classifications or categories. See generally *Cleburne*, 473 U.S. at 440-41 (describing the protected classifications and the type of scrutiny afforded each one by the courts). For a thoughtful discussion of equal protection analysis, see J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

32. See, e.g., Civil Rights Act of 1964 §§ 101-106 (codified at 42 U.S.C. §§ 2000a to a-6, 2000e to e-17 (1988)) (prohibiting discrimination on the basis of race and gender, two classifications previously singled out for special protection by the Court); Voting Rights Act of 1965, 42 U.S.C. § 1973b (1988) (prohibiting interference with the right to vote based on race, an established suspect class); Equal Pay Act of 1963 § 3, 29 U.S.C. § 206(d) (1988) (prohibiting employment discrimination on the basis of gender, a protected class).

33. See Matt Pawa, *When The Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination Of Section 5 Of The Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993), for an in-depth discussion of Congress' power under Section Five and specific examples of Congress legislating in areas not yet recognized as protected classes. See also *infra* notes 309-25 and accompanying text.

34. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993)).

35. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000(e) (1988)).

36. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1 to -4 (Supp. V 1993)).

protection by the judiciary.³⁷ Furthermore, the Court has given Congress' actions under Section Five complete deference by raising the status of gender to that of a quasi-suspect class in the wake of Congress' enactment of the amendments to Title VII.³⁸ Thus, the Court has allowed Congress, through its legislation, to essentially add to the constitutional guarantees afforded under the Fourteenth Amendment.³⁹

*Katzenbach v. Morgan*⁴⁰ is generally recognized as the case in which the Court gave its greatest deference to Congress' expansive power under Section Five, by allowing Congress to basically define constitutional rights not yet identified by the courts.⁴¹ At issue in *Morgan* was section 4(e) of the Voting Rights Act of 1965.⁴² Section 4(e) provided that no person who successfully completed up to the sixth grade in a public or private school located in the Commonwealth of Puerto Rico, should be denied the right to vote because of his or her inability to read or write English.⁴³ Section 4(e) of the Voting Rights Act essentially nullified New York's English literacy voting requirement, as applied to persons who completed up to the sixth grade in a Puerto Rican school.⁴⁴ The State of New York argued that an exercise of congressional power under Section Five that prevents the application of a state law could only be valid if the judiciary determined that the state action prohibited by the con-

37. See *infra* notes 309-25 and accompanying text for a discussion of these statutes and how they relate to Congress' authority under Section Five of the Fourteenth Amendment.

38. See *infra* notes 309-18 and accompanying text; see also *Craig v. Boren*, 429 U.S. 190 (1976) (raising the status of gender to that of a quasi-suspect class after Congress passed the 1972 amendments to Title VII of the Civil Rights Act of 1964).

39. See *Pawa*, *supra* note 33, for examples of Congress legislating in areas not yet given special protection by the Supreme Court and the Court's subsequent approval of Congress' actions; see also *Craig v. Boren*, 429 U.S. 190 (1976) (raising the status of gender to a quasi-suspect class after Congress legislated under its Section Five power to amend Title VII of the Civil Rights Act of 1964 which outlawed gender discrimination); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (upholding Congress' use of its Section Five power to enact amendments to Title VII of the Civil Rights Act of 1964).

40. 384 U.S. 641 (1966).

41. See *Pawa*, *supra* note 33, at 1060; see also Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1229 (1978).

42. 42 U.S.C. § 1973b(e) (1988).

43. *Id.*

44. *Morgan*, 384 U.S. at 643-44.

gressional legislation is forbidden by the Equal Protection Clause itself.⁴⁵ The Court disagreed. The Court held that Congress had the authority to enact this legislation under Section Five,⁴⁶ even though the Court had not previously provided that the Puerto Rican community should be given special protection under the Equal Protection Clause.⁴⁷ The Court stated that Section Five "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."⁴⁸ The Court declared that Congress had the right, under Section Five, to enact laws that increase equal protection guarantees, although Congress may not "restrict, abrogate, or dilute these guarantees."⁴⁹

Commentators have referred to the Court's declaration in *Morgan* of Congress' expansive power under Section Five as the "Ratchet Theory," so called because it allows Congress to effect equal protection rights, but only one way.⁵⁰ Congress may increase equal protection rights, but not decrease or dilute them.⁵¹ While the Ratchet Theory appears to remain good constitutional law,⁵² the Supreme Court has never used it to expressly authorize Congress to create by statute a quasi-suspect or suspect class. Meanwhile, Congress has not explicitly used its power in this fashion either. This authority would appear to be inherent in the Ratchet Theory; however, Congress has thus far never required the Court to treat a class of people as a suspect or quasi-suspect class, thereby forcing the Court to use strict or heightened scrutiny. Instead, the Ratchet Theory appears to be limited to Congress enacting legislation to aid

45. *Id.* at 648.

46. *Id.* at 646.

47. *See id.* at 648-49.

48. *Id.* at 651.

49. *Id.* at 651 n.10.

50. *See* Robert E. Rains, *A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications*, 11 ST. LOUIS U. PUB. L. REV. 185, 201 (1992); Pawa, *supra* note 33, at 1062; Sager, *supra* note 41, at 1212, 1230.

51. *Morgan*, 384 U.S. at 651 n.10.

52. *See, e.g.,* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982); *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970).

groups not yet afforded special protection by the Court,⁵³ thus providing legislation in areas where Congress believes that the Court has not yet fully recognized Fourteenth Amendment rights.

2. *Rational Basis Test: Traditional Review*

Under equal protection analysis, the states retain broad discretion to classify persons when enacting economic or social welfare legislation, as long as there is a legitimate state interest and the classification made is rationally or reasonably related to furthering that interest.⁵⁴ Courts refer to this as the "rational basis test" or traditional equal protection analysis.⁵⁵ Under rational basis review, there is a strong presumption of constitutionality placed on the governmental action; this grants an overwhelming amount of deference to the legislature. For example, in *Kotch v. Board of River Port Pilot Commissioners*,⁵⁶ the Court upheld the constitutionality of a Louisiana state law that required completion of an apprenticeship as a condition to becoming a licensed harbor pilot, despite an allegation that existing pilots selected "only [their] relatives and friends" to serve as such apprentices.⁵⁷ The Court upheld this socioeconomic law on the ground that "the benefits to morale and *esprit de corps* which family and neighborly tradition might contribute . . . *might* have prompted the legislature to permit . . . pilot officers to select those with whom they would serve."⁵⁸ In such cases where the rational basis test applies, the Court goes to the extreme of surmising what the legislature *might* have intended when enacting the legislation, and if the Court can ascertain any rational basis for the legislature's action, it will uphold the statute.⁵⁹

53. See Pawa, *supra* note 33; see also *infra* notes 309-25 and accompanying text.

54. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

55. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

56. 330 U.S. 552 (1947).

57. *Id.* at 555, 564.

58. *Id.* at 563 (emphasis added).

59. See *Duc Van Le v. Ibarra*, No. 91SC189, 1992 WL 77908, at *16 (Colo. April 20, 1992) (Quinn, J., dissenting) (explaining that under rational basis review, the Court often evaluates the constitutional validity of various forms of economic

3. *Strict Scrutiny Standard: Suspect Class Status*

The traditional rule, with its extreme deference, does not apply when a statute classifies people based on race, nationality, or alienage.⁶⁰ The Court's decisions establish that classifications based on race, nationality, or alienage are inherently "suspect" and, thus, subject to "strict scrutiny."⁶¹ To overcome strict scrutiny review, a governmental practice or statute containing suspect classifications must be specifically and narrowly tailored to further a compelling governmental purpose.⁶² As a standard of judicial review, strict scrutiny is usually "strict in theory and fatal in fact."⁶³ There have been only a few rare occasions where the Court has strictly scrutinized a statute and allowed it to survive.⁶⁴

The Supreme Court first used the term "suspect" in 1944 in *Korematsu v. United States*⁶⁵ to describe a classification based on race or nationality. Classifying a group as "suspect" does not infer anything sinister about the group; instead, it refers to the

and social classifications by considering whether there is "any rationally conceivable set of facts to support the classification"; see also *Lyng v. Castillo*, 477 U.S. 635, 642-43 (1986); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 528 (1959); *Tribe*, *supra* note 27, § 16-3, at 1443.

60. The Court has chipped away at the alienage classification since it was held to be a suspect class in *Graham v. Richardson*, 403 U.S. 365 (1971). As a result, it remains unclear whether alienage is still an explicit member of the elite suspect class categories. See generally *Plyer v. Doe*, 457 U.S. 202 (1982); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978).

61. See *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Korematsu v. United States*, 323 U.S. 214 (1944) (nationality).

62. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

63. Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1976).

64. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (strictly scrutinizing but upholding the federal ceiling on contributions to political campaigns); *Roe v. Wade*, 410 U.S. 113 (1973) (strictly scrutinizing but upholding state bans on post-viability abortions); *Korematsu v. United States*, 323 U.S. 214 (1944) (sustaining a military order excluding Americans of Japanese origin from designated Pacific Coast areas following the Pearl Harbor attack); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding military curfew on persons of Japanese ancestry on the Pacific Coast during the early months of World War II).

65. 323 U.S. 214 (1944).

motives of the legislature in singling that group out for separate or different treatment under the law.⁶⁶ Thus, it is the government's "suspect" or suspicious action which the Court closely scrutinizes.

The Court has stated that to be a suspect class, a group must have a history or pattern of past discrimination, be peculiarly disadvantaged, be subjected to systematic discriminatory treatment or otherwise be in need of special solicitude from the courts.⁶⁷ Based on *United States v. Carolene Products Co.*,⁶⁸ a suspect class has come to be known as one that is a "discrete and insular minority."⁶⁹ In *Carolene Products*, Justice Stone articulated the theory that discrete and insular minorities often cannot gain the attention of the legislature.⁷⁰ This "failure of the political processes" concept is the basis for courts using a heightened level of judicial scrutiny: to provide protection to these minorities that is often missing at the legislative level.⁷¹ As stated above, the Supreme Court has deemed only race, alienage, and national origin to be worthy of the elite status of suspect class.⁷² All other classifications, including those based on gender, age, disability, sexual orientation, and economic standing receive a lower level of scrutiny.⁷³

Once the Court declares a classification to be worthy of suspect class status, that class then receives the greatest protection the law allows against governmental infringement of equal

66. *People v. Green*, 148 Misc. 2d 666, 669 n.7, 561 N.Y.S.2d 130, 132 n.7 (Westchester County Ct. 1990).

67. *Craig v. Boren*, 429 U.S. 190, 219 (1976) (Rehnquist, J., dissenting).

68. 304 U.S. 144 (1938).

69. In what has become a very famous footnote by Justice Stone, he stated that "[p]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities, and which may call for a correspondingly more searching judicial scrutiny." *Id.* at 152 n.4 (citations omitted).

70. *Id.*

71. *Id.*

72. See *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Korematsu v. United States*, 323 U.S. 214 (1944) (national origin).

73. See *Pawa*, *supra* note 33, at 1077 n.298.

protection.⁷⁴ Therefore, laws that classify based on any of these "suspect classes" are subjected to strict scrutiny.⁷⁵

For example, in *McLaughlin v. Florida*,⁷⁶ the challenged statute prohibited "any negro man and white woman, or any white man and negro woman, who are not married to each other . . ." from living in or occupying the same room at night.⁷⁷ The Court struck down the statute as violative of the Equal Protection Clause, stating that the classification was based on race, "which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States."⁷⁸ The Court noted that the background of the Fourteenth Amendment renders racial classifications "constitutionally suspect . . . subject to the 'most rigid scrutiny' . . . and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose."⁷⁹ Therefore, the Court reviews legislation involving suspect classes using the most rigid scrutiny possible and, as a result, provides these special classes with the most judicial protection.

4. Heightened Scrutiny: Quasi-Suspect Status

The courts apply a middle level of review, known as "heightened" or "intermediate scrutiny,"⁸⁰ when faced with a classification based on gender, whether affecting males or females.⁸¹ This is because the Court considers gender a "quasi-

74. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (stating that when a statute classifies based on one of the protected suspect classes, there is so seldom a legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy warranting the highest protection by the courts—strict scrutiny).

75. See *id.* (noting that race, alienage, and national origin are suspect classes and, thus, are entitled to strict scrutiny).

76. 379 U.S. 184 (1964).

77. FLA. STAT. ANN. § 798.05 (repealed by 1969 Fla. Laws ch. 69-195, § 1), cited in *McLaughlin*, 379 U.S. at 192.

78. *McLaughlin*, 379 U.S. at 192.

79. *Id.* (citations omitted).

80. See *Craig v. Boren*, 429 U.S. 190 (1976) (formulating an intermediate level of scrutiny for gender-based classifications); see also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (where the Court remained committed to intermediate level of scrutiny of gender-based classifications).

81. See *Hogan*, 458 U.S. 718 (holding that denying a qualified male acceptance to an all-female nursing school based solely on his gender violates the Equal

suspect" class.⁸² Heightened scrutiny is more stringent than the rational basis standard, but less stringent than the strict scrutiny standard.⁸³ Under heightened scrutiny, a gender classification is held unconstitutional unless it is substantially related to an important governmental interest.⁸⁴

The Supreme Court developed this middle tier of review as a compromise when faced with a classification based on gender, rather than deeming gender to be a suspect class equivalent to race and national origin.⁸⁵ Since gender, however, is an "immutable characteristic"⁸⁶ like race, and women have been historically discriminated against, the Court found gender classifications to warrant some higher standard of scrutiny than mere rational basis.⁸⁷

Many statutes are enacted to improve the status of women in our society, and to counteract old notions of prejudice that tend to restrict roles and opportunities for women.⁸⁸ If legislatures only enacted this type of "benign" gender discrimination legislation, then the Court would only need to use rational basis review when faced with a gender classification; thus, allowing these remedial statutes to compensate for past prejudices

Protection Clause); *Craig*, 429 U.S. 190 (holding that the ability of females to purchase "nonintoxicating" beer at a younger age than males violates the Equal Protection Clause).

82. The Court has also held illegitimacy to be a "quasi-suspect class." See, e.g., *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Mathews v. Lucas*, 427 U.S. 495 (1976).

83. See *TRIBE*, *supra* note 27, § 16-33, at 1613-14.

84. *Hogan*, 458 U.S. at 724; *Craig*, 429 U.S. at 197.

85. Cf. *TRIBE*, *supra* note 27, § 16-33, at 1613-14 (stating that rules discriminating against gender and illegitimacy occupy an intermediate position because they are subjected to a judicial approach more demanding than rational basis, yet less demanding than strict scrutiny, which is used to review rules burdening racial and ancestral minorities).

86. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (stating that sex is an immutable characteristic and that classifications based on gender are inherently invidious).

87. See *Craig*, 429 U.S. at 197; *Frontiero*, 411 U.S. at 686.

88. See, e.g., Title VII of the Civil Rights Act of 1964 § 703(a)-(c), 42 U.S.C. § 2000e-2(a)-(c) (1988) (expressly declaring that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of race, color, religion, sex, or national origin) (emphasis added); Equal Pay Act of 1963 § 3, 29 U.S.C. § 206(d) (1988) (providing that no employer as defined by the Act shall discriminate against employees on the basis of sex).

against women.⁸⁹ However, because many differences in treatment based on gender injure the status of women while purporting to do just the opposite,⁹⁰ the Court must examine gender classifications more carefully than rational basis review warrants.⁹¹

The middle tier approach, therefore, gives a legislature wishing to combat gender discrimination greater flexibility than does strict scrutiny. The Supreme Court has held that there are some occasions where a legislature may enact remedial legislation to combat past discrimination based on gender, especially towards women.⁹² By avoiding strict scrutiny, the Court may uphold legislation that serves that laudatory purpose.⁹³ However, by using a higher standard than rational basis, the Court can delve into the legislature's motive to see if it was basing its classification on outdated notions of prejudice.⁹⁴

For example, in *Craig v. Boren*,⁹⁵ plaintiffs challenged an Oklahoma statute as a violation of the equal protection rights of males. The Oklahoma statute prohibited the sale of "nonintoxicating" 3.2% beer to males under twenty-one years of age, but only to females under eighteen years of age.⁹⁶ Oklahoma asserted traffic safety as its goal for enacting the statute, and offered a number of statistical surveys intended to demonstrate that females between the ages of eighteen and twenty-one posed

89. See *TRIBE*, *supra* note 29, § 16-27 for a discussion of "benign" gender discrimination.

90. *Cf. Cleburne*, 473 U.S. at 441 (noting that "statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women").

91. See *Hogan*, 458 U.S. at 725-26 (stating that heightened scrutiny is required "to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women").

92. See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974). In both cases, the Supreme Court upheld the use of gender-based classifications based on the perception that the laws at issue had the laudatory purpose of remedying disadvantageous conditions women suffered in military and economic life, thus, acting as compensation for previous deprivations. *Schlesinger*, 419 U.S. at 508; *Kahn*, 416 U.S. at 353-54.

93. See *Schlesinger*, 419 U.S. at 508; *Kahn*, 416 U.S. at 353-54.

94. See *Hogan*, 458 U.S. at 725 (stating that "care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions").

95. 429 U.S. 190 (1976).

96. *Id.* at 191-92 (citing OKLA. STAT. tit. 37, §§ 241, 245 (West 1958 & Supp. 1976)).

a lower risk of driving while intoxicated than males under the age of twenty-one did.⁹⁷ The Court rejected the state's statistical evidence as establishing "an unduly tenuous 'fit.'" ⁹⁸ The Court held that the gender based distinction did not closely serve the legislative objective and, therefore, the distinction could not withstand the equal protection challenge.⁹⁹ *Craig*, therefore, extended protection against gender discrimination to males. Additionally, the Court raised the level of scrutiny that applies to gender classifications from mere rational basis to a new category, created by the *Craig* Court, of heightened scrutiny. Since *Craig*, the Court has firmly established heightened scrutiny as a third tier of equal protection review.¹⁰⁰

B. *Statutory Rights of Persons with Disabilities Prior to the ADA*¹⁰¹

As Congress stated in the ADA, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."¹⁰² Individuals with disabilities have often been excluded from many facets of life within our society, being stigmatized and ostracized. As one commentator stated, "[t]he history of society's formal methods for dealing with handicapped people can be summed up in two words: segregation and inequality."¹⁰³ Often, people with disabilities were imprisoned, institutionalized, isolated from the community, or driven from the cities to wander in rural areas.¹⁰⁴ Congress

97. *Id.* at 200-02.

98. *Id.* at 202.

99. *Id.* at 200.

100. See, e.g., *Hogan*, 458 U.S. 718 (applying intermediate scrutiny to a classification based on gender).

101. For an in depth discussion of the history of statutory rights accorded persons with disabilities, see Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for Persons with Disabilities*, 40 UCLA L. REV. 1341 (1993).

102. 42 U.S.C. § 12101(a)(2).

103. Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 418 n.23 (1991) (citing ROBERT L. BURGDOFF, JR., *THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT* 51 (1980)).

104. See ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES*, 11-23 (2d ed. 1949); Barbara

first passed federal legislation directly aimed at aiding the disabled in 1918 with the enactment of the Smith-Sears Act (otherwise known as the Vocational Rehabilitation Act),¹⁰⁵ "[t]o provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces."¹⁰⁶ Thus, the first federal legislation addressing the disabled can be viewed as a legislative attempt to assist World War I veterans with "overcom[ing] the handicap of [their] disability," and reentering the work force.¹⁰⁷

Two years later, former President Woodrow Wilson signed the Smith-Fess Act,¹⁰⁸ which was designed, *inter alia*, "[t]o provide for the promotion of vocational rehabilitation of persons disabled in industry or in any legitimate occupation"¹⁰⁹ Then, in 1936, the Randolph-Sheppard Vending Act was enacted to aid blind people in obtaining employment.¹¹⁰ Subsequently, Congress added two more important amendments to the Vocational Rehabilitation Act, in 1943¹¹¹ and 1954,¹¹² to provide funding to increase medical and rehabilitative services for the disabled.¹¹³ Even a cursory review of these early federal

P. Ianacone, *Historical Overview: From Charity to Rights*, 50 TEMP. L.Q. 953, 953-54 (1977).

105. Vocational Rehabilitation Act, ch. 107, 40 Stat. 617 (1918) (amended 1919). This Act was based on vocational guidance laws such as the Smith-Hughes Act of 1917, ch. 114, 39 Stat. 929 (codified as amended at 20 U.S.C. §§ 11-28 (1988 & Supp. V 1993)); Drimmer, *supra* note 101, at 1364.

106. Vocational Rehabilitation Act, ch. 107, 40 Stat. 617 (1918).

107. Act of July 11, 1919, ch. 12, 41 Stat. 158, 159.

108. Act of June 2, 1920, ch. 219, 41 Stat. 735 (codified as amended at 29 U.S.C. §§ 731-741 (1988 & Supp. V 1993) (repealed 1973, and reenacted in the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355)).

109. *Id.* at 735.

110. Randolph-Sheppard Vending Act, ch. 638, 49 Stat. 1559 (1936) (codified as amended at 20 U.S.C. § 107 (1988)).

111. Vocational Rehabilitation Act Amendments of 1943, ch. 190, 57 Stat. 374, 374-80 (1943) (codified at 29 U.S.C. §§ 31-41 (1988 & Supp. V 1993)) (repealed 1973 and reenacted in the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355).

112. Vocational Rehabilitation Act Amendments of 1954, Pub. L. No. 565, 68 Stat. 652, 652-65.

113. See *Assistance and Rehabilitation of the Physically Handicapped: Hearings Before a Special Subcomm. of the House Comm. on Education and Labor*, 83d Cong., 1st Sess. 17 (1953) (statement of Roy W. Weir) (stating that the purpose of these amendments was to create "a program of rehabilitating the several million physically handicapped people in the United States that are a drain upon our resources rather than contributing to production").

statutes reveals that they were premised on vocational rehabilitation, and were not outright anti-discrimination statutes.

In 1968, the Architectural Barriers Act was enacted, requiring all new facilities built with public money to be accessible to people with disabilities.¹¹⁴ However, this statute, like the ones preceding it, was concerned with vocational rehabilitation and was enacted to ensure that people with disabilities were not excluded from entering the work force due to physical barriers.¹¹⁵ Also enacted was Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act),¹¹⁶ which prohibits discrimination on the basis of disability in matters relating to housing. Additionally, the Developmental Disabilities Act was enacted, providing federal funds for community-based living arrangements for people with developmental disabilities.¹¹⁷ Further, children with disabilities were guaranteed the right to a free and appropriate education through the Education of the Handicapped Act, enacted in 1975,¹¹⁸ and recently amended and renamed the Individuals with Disabilities Education Act, in 1990.¹¹⁹ Yet, none of these statutes either individually or collectively provided a comprehensive program outlawing discrimination against the disabled in our society.

In an attempt to address this problem, Senator Hubert Humphrey and Representative Charles Vanik, in 1972, attempted to amend the Civil Rights Act of 1964 by adding the term "physical or mental handicap" to the list of protected classes.¹²⁰ Adding disability to the list of protected classes

114. Pub. L. No. 90-480, 82 Stat. 718 (1968) (codified as amended at 42 U.S.C. §§ 4151-4157 (1988 & Supp. V 1993)).

115. Curtis Brewer, *Civil Rights Aspects of Disability*, in *DISABILITY: OUR CHALLENGE* 107, 107-23 (John P. Hourihan ed., 1979).

116. The Fair Housing Act of 1968, Title VIII, Pub. L. No. 90-284, 82 Stat. 81 (as amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619) (codified as amended at 42 U.S.C. §§ 3601-3631 (1988 & Supp. V 1993)).

117. Pub. L. No. 91-517, 84 Stat. 1316-1324 (1970) (codified at 42 U.S.C. §§ 2670-2677 (1988 & Supp. V 1993)).

118. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. §§ 1400-1485 (1988 & Supp. V 1993)).

119. Pub. L. No. 101-476, 104 Stat. 1141, 1142 (1990) (codified at 20 U.S.C. §§ 1400-1485 (Supp. V 1993)).

120. 118 CONG. REC. 525-26 (1972); see S. REP. No. 316, 96th Cong., 1st Sess. 53 (1979) (attempting to add "disability" to the list of protected classes under Title VII of the Civil Rights Act of 1964).

under the Civil Rights Act of 1964 would have made disability an improper basis for discrimination, similar to that of race and gender.¹²¹ However, the bill did not get very far. No hearings were held, and the attempt failed.¹²²

Finally, Congress passed the first large-scale statute dealing with the disabled, the Rehabilitation Act of 1973.¹²³ The Act was passed after opposition from former President Nixon, who had vetoed two prior versions of the bill before signing it in September of 1973.¹²⁴ The Rehabilitation Act, which is still in effect, does not prohibit the private sector from discriminating against persons with disabilities.¹²⁵ It is, therefore, limited in its scope. The Act was created under the Spending Clause of the United States Constitution¹²⁶ to extend only to persons with disabilities engaged in programs or activities "receiving financial assistance" from the federal government,¹²⁷ or to persons employed by federal agencies or federal contractors.¹²⁸ However, the Rehabilitation Act did provide persons with disabilities with their first major federal statute designed specifically to protect them against discrimination by the federal government. Furthermore, persons with disabilities have used the Act to

121. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a to a-6, 2000e to e-17 (1988 & Supp. V 1993)) (prohibiting discrimination in public accommodations and employment on the basis of race, color, creed, national origin, or sex); see also *supra* note 12 and accompanying text.

122. See Burgdorf, *supra* note 103, at 429 (postulating that the bill may have died due to liberal members of Congress who feared that adding "disability" to the Civil Rights Act of 1964 would dilute the protections already afforded by that Act).

123. Pub. L. No. 93-112, 87 Stat. 355 (1973). The anti-discrimination provisions are contained in Title V §§ 501, 503, and 504 (codified at 29 U.S.C. §§ 791, 793, 794 (1988)). Section 501 of the Act prohibits federal employers from discriminating against persons with disabilities; § 503 prohibits employers having contracts with the federal government in excess of \$2,500 from discriminating against persons with disabilities; § 504 prohibits recipients of federal financial assistance from discriminating against persons with disabilities. *Id.*

124. See Rains, *supra* note 50, at 189.

125. See 29 U.S.C. §§ 791, 793-794 (1988 & Supp. V 1993) (applicable only to federal employers, those contracting with the federal government in excess of \$2,500, and recipients of federal financial assistance).

126. U.S. CONST. art. I, § 8, cl. 1. The Spending Clause reads: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." *Id.*

127. 29 U.S.C. § 794.

128. *Id.* §§ 791, 793.

champion their rights by challenging alleged discriminatory action against them, although not always with success.¹²⁹

In addition to these federal statutes, many states also have laws that prevent some forms of discrimination against persons with disabilities.¹³⁰ However, these state laws have failed, for

129. See, e.g., *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986) (holding that the Rehabilitation Act of 1973, prohibiting discrimination against disabled individuals in any program or activity receiving financial assistance, does not apply to commercial airlines); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984) (holding that a suit for back pay could be maintained under the Rehabilitation Act for employment discrimination based on disability); *Gottfried v. FCC*, 655 F.2d 297 (D.C. Cir. 1981) (holding that the Rehabilitation Act does not require the Federal Communications Commission to review a public television station's license renewal application under a different standard than that which applies to a commercial licensee's renewal application and, therefore, the FCC was acting within its authority when it declined to impose a greater obligation to provide special programming for the hearing impaired on a public licensee than it did on commercial licensees), *rev'd on other grounds sub nom. Community Television v. Gottfried*, 459 U.S. 498 (1983); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (holding that the college did not engage in illegal discrimination under the Rehabilitation Act by denying a hearing impaired individual admission to the college's nursing program when that individual was not an "otherwise qualified handicapped individual" within the meaning of section 504 of the Rehabilitation Act); *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980) (holding that the district court properly granted injunctive relief directing the University of Texas, under the Rehabilitation Act, to procure and compensate a qualified interpreter to assist plaintiff, a deaf graduate student, in his classes during the 1978 school term), *vacated on other grounds*, 451 U.S. 390 (1981).

130. See, e.g., ALASKA STAT. § 18.80.210 (1991) (declaring that the opportunity to obtain employment, credit and financing, public accommodations, housing accommodations and other property without discrimination because of physical or mental disability is a civil right); ARIZ. REV. STAT. ANN. § 41-1492.02 (Supp. 1993) (prohibiting discrimination on the basis of disability in public accommodations and commercial facilities); ARIZ. REV. STAT. ANN. § 41-1492.05 (Supp. 1993) (prohibiting discrimination based on disability in public transportation services provided by private entities); COLO. REV. STAT. ANN. § 24-34-402 (West 1990 & Supp. 1994) (prohibiting discrimination based on disability in employment); MICH. COMP. LAWS ANN. § 37.1202 (West 1985) (prohibiting discrimination based on handicap in employment); N.H. REV. STAT. ANN. § 354-A:12 (Supp. 1993) (prohibiting discrimination based on disability in housing); N.H. REV. STAT. ANN. § 354-A:17 (Supp. 1993) (prohibiting discrimination based on disability in public accommodations); N.J. STAT. ANN. § 10:5-29.1 (West 1993) (stating that it is an unlawful employment practice to deny to an otherwise qualified handicapped, blind, or deaf person the opportunity to obtain or maintain employment); N.J. STAT. ANN. § 10:5-29.2 (West 1993) (prohibiting housing discrimination against handicapped, blind, or deaf persons); N.Y. CIV. RIGHTS LAW art. 4-B (McKinney 1992) (recognizing a broad range of civil rights, including specific rights for people with disabilities who use guide, hearing, or service dogs); N.Y. EXEC. LAW § 290 (McKinney 1993) (prohibiting dis-

the most part, to provide substantial relief, leaving persons with disabilities in an inferior position in our society.¹³¹ As a result, until the ADA, the majority of employers, program administrators, owners and managers of places of public accommodation, and most others were free to discriminate at will against people with disabilities without concern of redress.¹³² The ADA, therefore, was to reflect a dramatic change in the rights of the disabled.

C. City of Cleburne v. Cleburne Living Center

*City of Cleburne v. Cleburne Living Center*¹³³ represents the only occasion in which the issue of suspect or quasi-suspect sta-

crimination against persons with disabilities in many areas, including employment, housing, and public accommodations); TEX. LABOR CODE ANN. § 21.051 (West Supp. 1994) (prohibiting discrimination based on disability in employment); VA. CODE ANN. § 2.1-715 (Michie 1987) (declaring that it is the policy of the Commonwealth of Virginia to safeguard all individuals from unlawful discrimination because of disability in places of public accommodation and in employment); VA. CODE ANN. § 51.5-40 (Michie 1991 & Supp. 1994) (stating that no qualified person with a disability shall be subjected to discrimination under any program or activity receiving state financial assistance or conducted by any state agency); WASH. REV. CODE ANN. § 49.60.030 (West 1990 & Supp. 1994) (declaring that the right to be free from discrimination because of any sensory, mental, or physical disability is a civil right which includes the right to obtain and hold employment, to enjoy public accommodations, and to engage in real estate transactions). See also Rains, *supra* note 50, at 189 n.30 (stating that by 1986, forty-three states and the District of Columbia had passed statutes to protect disabled individuals from private employment discrimination).

131. See Tucker, *supra* note 15, at 16 n.7; see also Larry M. Schumaker, *The Americans With Disabilities Act of 1990*, 47 J. Mo. B. 542 (Oct.-Nov. 1991) (explaining that despite the prevalence of state laws addressing disability discrimination, there was not a widespread awareness that disability discrimination was illegal until the ADA was passed); the ADA, 42 U.S.C. § 12101(a) (5) & (6) (finding that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, . . . [and that] people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally").

132. See Tucker, *supra* note 15, at 16 n.7; see also the ADA, 42 U.S.C. § 12101 (a)(4) (finding that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals with disabilities have often had no legal recourse to redress discrimination against them"); Act of June 16, 1992, ch. 224, § 1(A), 1992 Ariz. Sess. Laws 941, 941 (stating that "discrimination against individuals with disabilities persists in critical areas of public accommodations, transportation and access to public services, and that these individuals often have had no legal recourse to redress this discrimination").

133. 473 U.S. 432 (1985).

tus of any disabled group has come squarely before the Supreme Court. In *Cleburne*, the City of Cleburne, Texas required a special use permit for the operation of a group home for the mentally retarded.¹³⁴ The city, after holding a public hearing, prohibited the formation of the group home based on a municipal zoning ordinance that required a permit to be issued for the construction of "[h]ospitals for the insane or feeble-minded"¹³⁵ The city claimed its interest in forcing the proposed group home to obtain a special use permit was, among other things, the negative attitude of nearby property owners, the proposed home's proximity to a junior high school, and the size of the home and the number of people to be housed there.¹³⁶ The Court of Appeals for the Fifth Circuit held that mental retardation was a quasi-suspect class, and that therefore, the Cleburne ordinance violated the Equal Protection Clause because it did not "substantially further an important governmental purpose."¹³⁷

The Supreme Court, however, overturned the Fifth Circuit's ruling, finding that the mentally retarded did not constitute a quasi-suspect class for purposes of equal protection review.¹³⁸ Instead, the Court specifically found the lesser rational basis standard to be the appropriate level of review for statutes affecting the mentally retarded, a sub-group of the disabled.¹³⁹ Despite this ruling, the Court struck down the ordinance and concluded that singling out the mentally retarded group home by requiring a special use permit rested on "[a]n irrational prejudice against the mentally retarded"¹⁴⁰ Thus, the Court found that the city's classification was not "rationally related to a legitimate governmental purpose" as is required under rational basis review.¹⁴¹ The Court reached its conclusion by examining the record and finding that it did not

134. *Id.* at 435-36.

135. *Id.* at 436-37.

136. *Id.* at 448-49. The municipal zoning ordinance also required the signatures of all property owners within two hundred feet of the property to be obtained, and limited the special use permits to one year. *Id.* at 436 n.9.

137. *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 193 (5th Cir. 1984).

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

139. *Id.* at 435, 446.

140. *Id.* at 450.

141. *Id.* at 446, 450.

support the particular classification, since other, similar uses faced no such requirement of a special use permit.¹⁴²

As previously discussed, application of the rational basis standard involves the Court's granting almost complete deference to the legislature, without delving into the legislative motive.¹⁴³ This deference may be the result of judicial recognition of the difficulty in determining legislative motive, or the result of a general belief in judicial restraint.¹⁴⁴ However, in *Cleburne*, the Court used a more sharply focused rational basis review in examining the statute.¹⁴⁵ Instead of deferring to the legislature, the Court actually scrutinized the legislative record,¹⁴⁶ something normally not done when applying the rational basis standard. There have been other occasions, in addition to *Cleburne*, where the Court has strayed from the traditional deferential approach, and has instead applied rational basis with a "sharper focus"¹⁴⁷ (or as some have called it, a form of heightened scrutiny *sub silentio*¹⁴⁸), striking down legislation even

142. *Id.* at 450. The Court noted that the city did not require a special use permit for hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane, feeble-minded, alcoholics, or drug addicts), boarding and lodging houses, fraternity and sorority houses, and many other uses. *Id.*

143. See generally *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *Vance v. Bradley*, 440 U.S. 93 (1979); *New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam).

144. *TRIBE*, *supra* note 27, § 16-2, at 1440; see also *infra* note 350 for a definition of judicial restraint.

145. See *Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in the judgment in part and dissenting in part) (stating that the majority definitely used a form of heightened scrutiny because the ordinance surely would have been valid if analyzed under the traditional rational basis test); see also *infra* note 272.

146. See *Cleburne*, 473 U.S. at 450.

147. *Craig v. Boren*, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring) (noting that "the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when [the Court] address[es] a gender-based classification"); see also *Mayfield v. Ford*, 664 F. Supp. 1285, 1289 n.3 (D. Neb. 1987) (recognizing the existence of "case law suggesting that the level of scrutiny given to cases involving the mentally impaired is more properly defined as a rational basis with 'a sharper focus'" (citing *Hickey v. Morris*, 722 F.2d 543, 546 (9th Cir. 1984) (noting that "recent decisions indicate that the [Supreme] Court sometimes applies the rational basis test with 'a sharper focus'" (citing *Craig*, 429 U.S. at 210 n.*; *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); *Michael M. v. Superior Court*, 450 U.S. 464, 468-69 (1981))).

148. See *Pawa*, *supra* note 33, at 1077 (using the phrase "heightened scrutiny standard *sub silentio*" to refer to the Court's use of heightened scrutiny under the guise of rational basis).

under the lowest standard of review.¹⁴⁹ The Court's failure to apply the traditional deferential approach in these situations seems to be a judicial response to statutes creating distinctions among classes that the Court deems "suspect" in nature, but yet appears unwilling to label as such.¹⁵⁰ The Court's failure to openly acknowledge its use of heightened scrutiny unfortunately submits these classes to the subjective discretion of judges operating with multiple standards of review, all masquerading as the rational basis standard.¹⁵¹

III. The Rights of Person with Disabilities Since the Enactment of the ADA

A. *The Americans with Disabilities Act*¹⁵²

The ADA was signed into law by former President George Bush on July 26, 1990.¹⁵³ As noted by President Bush upon signing the ADA, "[i]t signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."¹⁵⁴ For the forty-three million Americans with disabilities,¹⁵⁵ the ADA has been proclaimed to be the "Emancipation Proclamation" for the disabled,¹⁵⁶ and

149. The Court's use of heightened scrutiny under the guise of rational basis can be found in several cases. *See, e.g.,* O'Brien v. Skinner, 414 U.S. 524 (1974) (overturning a New York law which allowed incarcerated persons to vote by absentee ballot only if confined in a county where they were not a resident); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (invalidating a statute withholding food stamps from households where members were not related).

150. *Cf. TRIBE, supra* note 27, § 16-3, at 1444-46 (arguing that although there may be grounds for the Court's reluctance to add new categories overtly triggering heightened or strict scrutiny, the Court's covert use of this heightened form of scrutiny under the rational basis label presents dangers of arbitrariness).

151. *See id.*

152. It should be noted that even though enacted in 1990, the ADA has different effective dates for each of its major titles, the earliest of which is January 26, 1992. For a concise explanation of the effective dates, *see* John W. Parry, *The Americans With Disabilities Act, Effective Dates In Each Title*, 15 MENTAL & PHYSICAL DISABILITY L. REP. 13 (Jan.-Feb. 1991).

153. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12,213 (Supp. V 1993)).

154. *People v. Green*, 148 Misc. 2d 666, 670, 561 N.Y.S.2d 130, 133 (Westchester County Ct. 1990) (quoting Statement by former President George Bush upon signing S. 933, *reprinted in* 1990 U.S.C.C.A.N. 601, 602).

155. 42 U.S.C. § 12,101(a)(1).

156. *See supra* note 13 and accompanying text.

July 26, 1990 has been called "Liberation Day for the Disabled" ¹⁵⁷

Congress stated that the purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."¹⁵⁸ Congress intended to do this by "invok[ing] the sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment and to regulate commerce, in order to address the major areas faced daily by people with disabilities."¹⁵⁹ The ADA extends to the private sector under the Commerce Clause of the United States Constitution,¹⁶⁰ and to state and local governments under Section Five of the Fourteenth Amendment, the Enabling Clause.¹⁶¹ Thus, the provisions of the ADA extend to a wide range of entities, such as restaurants, hotels, doctors' offices, retail stores, museums, libraries, parks, private schools, and theaters.¹⁶² However, the ADA does not cover the executive branch of the federal government, which continues to be covered by the Rehabilitation Act of 1973.¹⁶³ The ADA does, however, apply to Congress and its instrumentalities.¹⁶⁴ The ADA contains five major titles prohibiting discrimination against persons with disabilities: Title I prohibits discrimination in the area of employment;¹⁶⁵ Title II in public

157. Stephen Chapman, *Waving a Magic Wand at the Needs of the Handicapped*, CHI. TRIB., Sept. 24, 1989, at 3.

158. 42 U.S.C. § 12101(b)(1).

159. *Id.* § 12101(b)(4).

160. U.S. CONST. art I, § 8, cl. 3. The ADA defines commerce as: "travel, trade, traffic, commerce, transportation, or communication—among the several States; between any foreign country or any territory or possession and any State; or between points in the same State but through another State or foreign country." 42 U.S.C. § 12181(1).

161. U.S. CONST. amend. XIV, § 5; see *supra* note 24 for the full text of Section Five.

162. 42 U.S.C. § 12181(7). Under 42 U.S.C. § 12187, private clubs and religious organizations are exempted from the ADA's provisions.

163. See *supra* notes 123-29 and accompanying text for a discussion of the Rehabilitation Act of 1973.

164. 42 U.S.C. § 12209(c)(4). Congress and its instrumentalities include the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, and the United States Botanical Garden. *Id.*

165. Pub. L. No. 101-336, 104 Stat. 327, 330-37 (1990) (codified at 42 U.S.C. §§ 12111-12117 (Supp. V. 1993)).

services;¹⁶⁶ Title III in public accommodations;¹⁶⁷ Title IV in telecommunications;¹⁶⁸ and Title V includes various miscellaneous provisions concerning the scope of the ADA.¹⁶⁹

1. *Disability Defined*

The ADA follows the Rehabilitation Act of 1973, its predecessor, in defining the term "disabled." Interpretation of a disability under the Rehabilitation Act, therefore, is likely to shape interpretation of the definition under the ADA. A disabled individual under both the ADA and the Rehabilitation Act is one who has "a physical or mental impairment that substantially limits one or more" of that individual's major life activities, has "a record of such an impairment," or is "regarded as having such an impairment."¹⁷⁰ For example, both the ADA and the Rehabilitation Act cover a deaf individual, an individual disfigured by burns, a Vietnam veteran with a severed hand, a cured cancer victim still regarded as having cancer, and any other individual who has a disability or is regarded as having one.¹⁷¹ This is a broad definition and one the courts have had to grapple with often under the Rehabilitation Act.¹⁷² Under the Rehabilitation Act, the question of defining who fits into the category of a "handicapped person" has been decided by the courts purely

166. Pub. L. No. 101-336, 104 Stat. 327, 337-53 (1990) (codified at 42 U.S.C. §§ 12131-12165 (Supp. V. 1993)).

167. Pub. L. No. 101-336, 104 Stat. 327, 353-65 (1990) (codified at 42 U.S.C. §§ 12181-12189 (Supp. V. 1993)).

168. Pub. L. No. 101-336, 104 Stat. 327, 366-69 (1990) (codified at 47 U.S.C. §§ 225, 611 (Supp. II 1990)).

169. Pub. L. No. 101-336, 104 Stat. 327, 369-78 (1990) (codified at 42 U.S.C. §§ 12201-12213 (Supp. V. 1993)). For a thorough analysis of the ADA's provisions, see Tucker, *supra* note 15.

170. 42 U.S.C. § 12102(2)(A)-(C); 29 U.S.C. § 706(8)(A) (1988).

171. See Tucker, *supra* note 15, at 18.

172. See, e.g., *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987) (tuberculosis); *Rezza v. United States Dep't of Justice*, 56 U.S.L.W. 2686 (E.D. Pa. 1988) (compulsive gambler); *Blackwell v. United States Dep't of Treasury*, 830 F.2d 1183 (D.C. Cir. 1987) (sexual preference); *Heron v. McGuire*, 803 F.2d 67 (2d Cir. 1986) (heroin addict). AIDS has been widely recognized as a disability under the Rehabilitation Act. See Robert A. Kushen, *Asymptomatic Infection with the AIDS Virus as a Handicap under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563 (1988). For a general discussion of the meaning of handicap under the Rehabilitation Act, see David A. Larson, *What Disabilities Are Protected Under The Rehabilitation Act of 1978?*, 16 MEMPH. ST. U. L. REV. 229 (1986).

on a case-by-case basis.¹⁷³ By contrast, the ADA limits the definition of a disabled person by excluding certain "disabilities" from the statute's coverage. These exceptions include homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from the current illegal use of drugs.¹⁷⁴ In addition, the ADA expressly includes alcoholics (both rehabilitated and non-rehabilitated) under the definition of a disabled individual,¹⁷⁵ whereas sections 503 and 504 of the Rehabilitation Act (through the 1978 amendments) exclude current alcohol or drug users whose use affects their job performance or the safety of others.¹⁷⁶

B. The Present Conflict Among Federal and State Courts Regarding the Status of Persons with Disabilities

The enactment of the ADA has resulted in confusion and conflict among federal and state courts with regard to the proper status to be given to persons with disabilities by the nation's courts, and what role the ADA should play in their decisions. The following selected cases highlight this conflict.

1. Courts Using the ADA as a Guide to Interpretation of Other Federal and State Legislation

Although the ADA was passed in 1990, its earliest effective date was not until January 26, 1992.¹⁷⁷ Consequently, very little case law has been generated interpreting the provisions of the ADA. Nonetheless, some courts have used the ADA to guide their interpretation of state and federal legislation, finding that persons with disabilities are entitled to special protection or solace from the courts.

173. *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986).

174. 42 U.S.C. § 12211(a), (b)(1)-(3).

175. *Id.* § 12114(c).

176. 29 U.S.C. §§ 793, 794 (1988).

177. *See* 42 U.S.C. § 12181; *see also* Parry, *supra* note 152, for effective dates of each title of the ADA.

a. *People v. Green: The ADA as a Guide to Interpretation of a State Constitution*

Some courts have looked to the ADA to guide their rulings when faced with governmental action based on disability. For example, in *People v. Green*,¹⁷⁸ a New York trial court opined that disabled persons in general, and hearing impaired persons in particular, could constitute a "suspect classification" entitled to the strict judicial scrutiny standard in view of the protections afforded them by New York law.¹⁷⁹ In *Green*, the court forbade an assistant district attorney from exercising a peremptory challenge to exclude a deaf person from jury service based solely on the juror's disability and not on any doubt of the juror's ability to communicate.¹⁸⁰ The court held that the peremptory challenge would violate the juror's right to equal protection of the laws under the New York State Constitution.¹⁸¹

Furthermore, the court stated that the ADA "must also be heeded even if not yet effective, and whether or not it would apply to comparable situations in the future."¹⁸² The court noted that the term "public entity" as defined by the ADA included "any department, agency . . . or other instrumentality of a State or States or local government" and, therefore, would apply to both the district attorney's office and the court.¹⁸³ The

178. 148 Misc. 2d 666, 561 N.Y.S.2d 130 (Westchester County Ct. 1990).

179. *Id.* at 669, 561 N.Y.S.2d at 132. The court listed several New York statutes, such as N.Y. EXEC. LAW §§ 290-292, 296 (McKinney 1982), N.Y. CIV. RIGHTS LAW § 47 (McKinney 1976), and N.Y. JUD. LAW § 390 (McKinney 1983), as well as the New York State Constitution, that afford protection to people with disabilities. *Green*, 148 Misc. 2d at 669, 561 N.Y.S.2d at 132.

180. *Id.* at 669, 561 N.Y.S.2d at 133.

181. *Id.* at 668, 561 N.Y.S.2d at 132. Section 11 of article I of the New York Constitution provides:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

N.Y. CONST. art. I, § 11. The court in *Green* found that the deaf juror did not fall into any of the categories mentioned in the second sentence of this section, but stated that it was still possible for her to have been denied equal protection under the first sentence if she was excluded from serving as a juror solely because of her disability. *Green*, 148 Misc. 2d at 668, 561 N.Y.S.2d at 132.

182. *Green*, 148 Misc. 2d at 670, 561 N.Y.S.2d at 133.

183. *Id.*

court stated that the deaf individual would be considered a "qualified individual" under the ADA, and would be permitted to use a qualified interpreter while serving as a juror.¹⁸⁴ The court concluded that the district attorney and the court should not contribute to keeping this individual from serving on a jury solely because of her deafness, when no inability to serve had been shown or even suggested.¹⁸⁵

The court ultimately ruled against the district attorney, finding that his action did not survive the court's rational basis review.¹⁸⁶ Consequently, the court's actual holding did not rely on strict scrutiny, but the court curiously engaged in a lengthy discussion of suspect class status and strict scrutiny in dicta.¹⁸⁷ Despite the judge's comments that the ADA was influential to his decision, and that under the ADA the disabled should be considered a suspect class, these comments were merely dicta because the ADA was not in effect at the time of the judge's ruling. Therefore, *Green* is an example of a state court using the ADA as an aid in its interpretation of a state's laws and constitution, but with the caveat that its interpretation of the ADA as transforming the disabled into a suspect class was not dispositive of the outcome in the case.

b. *Trautz v. Weisman: The ADA as a Guide to Interpretation of other Federal Legislation*

Courts have also used the ADA as a guideline to essentially reinterpret other federal statutes concerned with discrimination. For example, in *Trautz v. Weisman*,¹⁸⁸ the United States District Court for the Southern District of New York addressed the question of whether the disabled were to be considered a "class" under the conspiracy provisions of 42 U.S.C. § 1985(3).¹⁸⁹

184. *Id.*

185. *Id.*

186. *Id.* at 669, 561 N.Y.S.2d at 132.

187. *See id.*

188. 819 F. Supp. 282 (S.D.N.Y. 1993).

189. 42 U.S.C. § 1985(3) (1988). Section 1985(3) provides in relevant part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The plaintiffs were a group of disabled persons residing at an adult care facility who claimed that the defendant owners conspired to deny them equal protection of the laws based on their disability.¹⁹⁰ Defendants attacked plaintiff's § 1985(3) claim alleging that the plaintiffs, a group of disabled individuals, were not members of any protected class and, thus, the action should be dismissed.¹⁹¹ Courts interpreting § 1985(3) have stated that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions" for a § 1985(3) action to lie.¹⁹² In addition, courts have held that the protection under § 1985(3) extends to the "discrete and insular" minorities who receive special protection under the Equal Protection Clause because of inherent personal characteristics.¹⁹³ The *Trautz* court found that:

whether or not a disability is apparent to the naked eye or requires a medical examination to diagnose, it remains an inherent personal characteristic [A] disability by its very nature is an immutable obstacle often created only by an accident of birth, not unlike race, gender, or national origin, which cannot be erased, but must be surmounted.¹⁹⁴

The court recognized that the "idea of equal protection is enshrined in both [s]ection 1985(3) and the [F]ourteenth [A]mendment," and that its opinion, though not governed by Fourteenth Amendment jurisprudence, is definitely guided by it.¹⁹⁵

Id.

190. *Trautz*, 819 F. Supp. at 290. The *Trautz* court set forth the requirements for a § 1985(3) action as follows:

To state a claim under 42 U.S.C. § 1985(3), plaintiffs must show: (1) a conspiracy; (2) for the purposes of depriving, either directly or indirectly, any person or class of persons to the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is injured in his person or property or deprived of any right or privileges of a citizen of the United States.

Id.

191. *Id.*

192. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

193. *See Browder v. Tipton*, 630 F.2d 1149, 1150 (6th Cir. 1980).

194. *Trautz*, 819 F. Supp. at 292.

195. *Id.* at 291; *see also Triad Assocs. v. Chicago Hous. Auth.*, 892 F.2d 583, 593 (7th Cir. 1989), *cert. denied*, 498 U.S. 845 (1990).

The court noted that a number of cases have held that the disabled do not constitute a "class" for purposes of § 1985(3) protection,¹⁹⁶ but that nearly all of those cases predated the recent enactment of the ADA.¹⁹⁷ The court found that, to the extent that those cases rely upon conclusions that people with disabilities are not a class historically discriminated against, they are undercut by the ADA.¹⁹⁸ The court stated that "[t]he ADA represents a comprehensive national mandate to eliminate discrimination against [people] with disabilities, [and w]hile it may not provide heightened scrutiny for discrimination against individuals with disabilities under the Equal Protection Clause, it is relevant to Congress' [own intended] interpretation of § 1985(3)."¹⁹⁹ The court noted that § 1985(3) has been held to cover discrimination claims against classes other than race where courts have defined the class as a suspect or quasi-suspect class, or where Congress, by legislation, has indicated an intent that the class be given special protection.²⁰⁰ The *Trautz* court noted that Congress explicitly identified persons with disabilities as a discrete and insular minority; therefore, in order to give effect to both federal statutes—the ADA and § 1985(3)—it read them harmoniously, concluding that the disabled would now qualify as a protected class under § 1985(3).²⁰¹ As a result, the court held that a class of individuals with disabilities may be protected by § 1985(3), and refused to grant the defendant's motion to dismiss.²⁰²

As demonstrated, the courts have used the ADA as a guide to interpreting other federal discrimination statutes. These

196. *Trautz*, 819 F. Supp. at 292 (citing, *inter alia*, *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1486-87 (7th Cir. 1985); *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176-77 (10th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); *Downs v. Sawtelle*, 574 F.2d 1, 16 (1st Cir. 1977), *cert. denied*, 439 U.S. 910 (1978); *Herhold v. City of Chicago*, 723 F. Supp. 20, 35 (N.D. Ill. 1989); *Kolpak v. Bell*, 619 F. Supp. 359, 373 (N.D. Ill. 1985)).

197. *Trautz*, 819 F. Supp. at 293.

198. *Id.*

199. *Id.* at 294.

200. *Id.*

201. *Id.* (citing Congress' language in 42 U.S.C. § 12101(a)(7) describing the disabled as a "discrete and insular minority with a history of purposeful unequal treatment"); see also *Chatoff v. City of New York*, No. 92 Civ. 0604, 1992 U.S. Dist. LEXIS 21662, at *1 (S.D.N.Y. June 26, 1992) (quoting a congressional statement identifying the disabled as a discrete and insular minority).

202. *Trautz*, 819 F. Supp. at 295.

courts have held that the ADA raises the status of the disabled to that of other classes historically discriminated against, such as race and gender, in the context of the application of those statutes.

2. *Courts Choosing Not to Use the ADA to Confer Special Status on the Disabled*

Several courts have reviewed the issue of whether persons with disabilities are a suspect or quasi-suspect class since the enactment of the ADA, and have found that they are not. Significantly, in two of the cases highlighted below, the courts specifically noted that their refusal to accord suspect or quasi-suspect class status to the disabled does *not* implicate the ADA because it was not yet in effect at the time of the underlying injury or at the time of trial. However, a third case specifically rejected the theory that the ADA has transformed the disabled into a suspect or quasi-suspect class. According to that court, the ADA does not change the status of the disabled for purposes of equal protection review.

a. *Tomsha v. City of Colorado Springs*

*Tomsha v. City of Colorado Springs*²⁰³ demonstrates how some courts have dismissed the question of whether the disabled constitute a suspect class by declaring the ADA inapplicable based solely on its effective date. In *Tomsha*, a workers' compensation case, petitioner challenged the constitutionality of the Colorado work-related stress statute²⁰⁴ as violative of the Equal Protection Clause.²⁰⁵ The statute required the testimony of a licensed physician or psychologist to support a claim for emotional or mental stress.²⁰⁶ The petitioner, a stress-disabled claimant, contended that the workers' compensation statute violated equal protection guarantees because it subjected stress-disabled claimants to a higher burden of proof than other claim-

203. 856 P.2d 13 (Colo. Ct. App. 1992).

204. Workers' Compensation Act of Colorado, ch. 62, 1990 Colo. Sess. Laws 468, 479 (codified as amended at COLO. REV. STAT. ANN. § 8-41-301(2)(a) (Supp. 1992)).

205. *Tomsha*, 856 P.2d at 13.

206. *Id.* at 14.

ants and, therefore, was discriminatory as applied.²⁰⁷ Additionally, petitioner claimed that the court should subject the statutory classification of stress-claimants to strict scrutiny because disabled persons are a suspect class under the ADA.²⁰⁸

The Court of Appeals of Colorado, however, rejected the plaintiff's claim that disabled persons are a suspect class under the ADA, and based this decision solely on the fact that the plaintiff had been injured before the effective date of the ADA.²⁰⁹ Instead, the court upheld the statute under the rational basis test, concluding that verification of the mental component of a stress claim by a physician or psychologist was rationally related to the legitimate legislative purpose of attempting to prevent frivolous and unnecessary claims.²¹⁰ The court did not suggest how it would have decided this challenge to the workers compensation statute if the ADA had been in effect at the time of petitioner's injury. Therefore, *Tomsha* provides no guidance as to how other courts should decide this issue.

b. *Contractors Association v. City of Philadelphia*

The case of *Contractors Association v. City of Philadelphia*²¹¹ demonstrates how a court specifically refused to afford the disabled quasi-suspect status in an affirmative action equal protection claim brought subsequent to the passage of the ADA. In *Contractors*, the City of Philadelphia enacted an ordinance²¹² to increase participation in city contracts by "disadvantaged business enterprises" (DBEs).²¹³ DBEs were considered to be those enterprises at least fifty-one percent owned by "socially and economically disadvantaged individuals," which included those individuals who had been subjected to racial, sexual, or ethnic prejudice or differential treatment because of a disability.²¹⁴

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 15.

211. 6 F.3d 990 (1993).

212. PHILA. PA., CODE § 17-500 (1982).

213. *Contractors*, 6 F.3d at 993.

214. *Id.* at 994 (citing PHILA. PA., CODE § 17-501).

On April 14, 1989, nine contractors associations brought suit in the United States District Court for the Eastern District of Pennsylvania challenging the Philadelphia ordinance as violative of the Equal Protection Clause of the Fourteenth Amendment.²¹⁵ The district court granted summary judgment for the contractors, invalidating the ordinance under the strict scrutiny standard as it applied to racial preferences;²¹⁶ under the intermediate scrutiny as it applied to gender preferences;²¹⁷ and under rational basis review as it applied to preferences for businesses owned by persons with disabilities.²¹⁸ The City of Philadelphia appealed, but the Court of Appeals for the Third Circuit vacated the district court's judgment on the merits as premature because of outstanding discovery between the parties, and remanded the case back to the district court.²¹⁹ On remand, the district court reaffirmed its prior decision.²²⁰ Once again, the City of Philadelphia appealed to the Third Circuit.²²¹

On appeal, the court of appeals reviewed the contractor's challenge with regard to the preferences the ordinance gave to businesses owned and operated by racial minorities, women, and disabled individuals.²²² The court applied strict scrutiny to the preference given to racial minorities,²²³ reversing the district court's grant of summary judgment to the extent it invalidated that portion of the ordinance.²²⁴ As for the gender preferences contained in the ordinance, the court applied intermediate scrutiny,²²⁵ affirming the district court's grant of summary judgment invalidating the gender preference for construction contracts.²²⁶

215. *See id.*

216. *See id.* at 995.

217. *See id.*

218. *See id.*

219. *See Contractors Ass'n v. City of Phila.*, 945 F.2d 1260, 1268 (3d Cir. 1991).

220. *See Contractors*, 6 F.3d at 995.

221. *Id.*

222. *Id.* at 999.

223. *Id.* at 999-1000.

224. *Id.* at 1009.

225. *Id.* at 1000-01 (relying on *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982)).

226. *Id.* at 1011.

As the district court had, the appellate court reviewed the preference for disabled business owners under the rational basis test.²²⁷ In selecting this standard of review, the appellate court relied on *Cleburne* as authority.²²⁸ The contractors, although acknowledging that *Cleburne* applied rational basis review, contended that the court should have reviewed the preference for disabled business owners under some form of heightened scrutiny.²²⁹ The contractors stated that *Cleburne* is "obviously contrary to the sense of American society as a whole" given the ADA.²³⁰ In short, the contractors asserted that the ADA overruled *Cleburne* and, therefore, required the circuit court to apply heightened scrutiny to the preference for disabled business owners.²³¹

The circuit court disagreed. Although the court cited from the congressional findings in the ADA, where Congress expressly found the disabled to be a "discrete and insular minority,"²³² the *Contractors* court refused to extend heightened scrutiny to the disabled.²³³ The appellate court stated that the contractors offered no evidence to bolster their argument that the ADA had overruled *Cleburne*.²³⁴ Furthermore, the appellate court cited *More v. Farrier*,²³⁵ where the Court of Appeals for the Eighth Circuit refused to extend heightened scrutiny to the disabled, stating that the ADA does not "alter the standard for constitutional equal protection claims."²³⁶ Therefore, the appellate court held that the district court chose the proper standard to review the ordinance's preference for disabled persons—rational basis.²³⁷

Accordingly, the appellate court upheld the ordinance's preference for disabled business owners under the rational basis standard, finding that the ordinance would encourage dis-

227. *Id.* at 1001.

228. *Id.* (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445 (1985)).

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* (citing 42 U.S.C. § 12101(a)(7)).

233. *Id.*

234. *Id.*

235. 984 F.2d 269 (8th Cir. 1993).

236. *Id.* at 271 n.4.

237. *Contractors*, 6 F.3d at 1001.

abled persons to form businesses to win city contracts.²³⁸ Thus, the appellate court reversed the district court's grant of summary judgment invalidating that portion of the ordinance pertaining to disabled business owners.²³⁹

Therefore, *Contractors* is the only example of a court squarely refusing to grant special status to the disabled subsequent to the enactment of the ADA. The Third Circuit specifically dismissed the contention that the ADA overruled *Cleburne*, maintaining that rational basis is the proper standard to be applied in cases classifying based on disability.

c. *Duc Van Le v. Ibarra*

The case of *Duc Van Le v. Ibarra*²⁴⁰ presents the confusion some courts have encountered when faced with an equal protection claim based on disability. *Duc Van Le* began at the trial level in the Denver District Court of Colorado as a class action suit, brought on behalf of a class of low income mentally ill persons.²⁴¹ The mentally ill class of persons alleged that the defendants, administrators of the Colorado Department of Social Services, violated the Equal Protection Clause of the United States Constitution and § 504 of the Rehabilitation Act of 1973 by failing to provide the mentally ill persons with the same Home and Community-Based Services (HCBS) program that was provided to the elderly, blind, and physically disabled.²⁴² The trial court, applying both strict scrutiny and rational basis review, found that the state failed to show either a compelling (strict scrutiny) or a legitimate (rational basis) governmental interest for its denial of social services benefits to the mentally ill class of persons.²⁴³ The trial court further held that the mentally retarded are entitled to the same HCBS programs that the state currently provides to the elderly, blind, and physically disabled persons.²⁴⁴ The trial court concluded that the state dis-

238. *Id.* at 1012.

239. *Id.*

240. No. 91SC189, 1992 WL 77908 (Colo. Apr. 20, 1992) (Opinion ordered withdrawn on grant of rehearing May 28, 1992, and judgment of the district court affirmed by operation of law, *Duc Van Le v. Ibarra*, 843 P.2d 15, 16 (1992)).

241. No. 88CV22641, slip op. at 1-2 (Denver Dist. Ct. Aug. 23, 1990).

242. 1992 WL 77908, at *1.

243. *Id.* at *5.

244. *Id.*

criminated against the mentally retarded class in violation of the Equal Protection Clause of the United States Constitution and § 504 of the Rehabilitation Act of 1973.²⁴⁵ In a decision and order dated August 23, 1990, the trial court ruled in favor of the plaintiffs on both claims and ordered the state social services program to provide HCBS benefits to the mentally ill class so long as the state provides HCBS benefits to elderly, blind and physically disabled persons.²⁴⁶ The Colorado Department of Social Services appealed and the Supreme Court of Colorado granted certiorari to determine whether the Equal Protection Clause or § 504 forbids Colorado from offering HCBS benefits to elderly, blind, and physically disabled persons without offering the same services to mentally ill persons.²⁴⁷

On appeal, the Supreme Court of Colorado reversed the judgment of the trial court, holding that the state did not violate the Equal Protection Clause or § 504 of the Rehabilitation Act by refusing to provide HCBS benefits to the mentally ill class of persons.²⁴⁸ The court refused to apply strict scrutiny to the Colorado government's action or hold that mentally ill persons are a suspect or quasi-suspect class, citing *Cleburne* as authority.²⁴⁹ The court stated that "to declare the mentally ill to be a suspect or quasi-suspect class would be contrary to previous decisions of the United States Supreme Court that have interpreted the Equal Protection Clause of the United States Constitution."²⁵⁰ The court further stated that the Supreme Court has so far set out only three categories which it terms suspect classes: race, alienage, and national origin; and two categories it terms quasi-suspect classes: gender and illegitimacy.²⁵¹ The court quoted at length from the congressional findings of the ADA, which describe the disabled as a discrete and insular minority.²⁵² However, the court dismissed the ADA as inapplicable because the

245. *Id.*

246. *Id.*

247. *Id.* at *2.

248. *Id.* at *12.

249. *Id.* at *8 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985)). The court also rejected the plaintiffs' claim under § 504 of the Rehabilitation Act based on the fact that the HCBS waiver program did not receive federal funds, a prerequisite to triggering the application of § 504. *Id.* at *12.

250. *Id.* at *9.

251. *Id.* (citing *Cleburne*, 473 U.S. at 440-41).

252. *Id.*

case was not brought under the ADA and the ADA was not in effect at the time of the trial in the lower court.²⁵³

The mentally ill plaintiffs then petitioned the Supreme Court of Colorado for a rehearing, which was denied on December 14, 1992.²⁵⁴ The court was equally divided on the issues involved in the case and, as a consequence, the judgment of the district court was affirmed by operation of law.²⁵⁵ As a result, the original trial court decision—that the state had violated the mentally ill persons' rights in violation of the Equal Protection Clause and § 504 of the Rehabilitation Act—has become the controlling decision in this case. The state social services program then petitioned the United States Supreme Court for a writ of certiorari. The Court denied the writ of certiorari to the Supreme Court of Colorado in January 1994.²⁵⁶ Therefore, the question of whether the disabled now constitute a suspect or quasi-suspect class due to the enactment of the ADA has once again been left unanswered.

IV. Analysis

A. *Elements of the Court's Decision in Cleburne*

Americans with disabilities have been lobbying the nation's courts for decades to raise the status of the disabled to that of a suspect class, albeit unsuccessfully.²⁵⁷ The Supreme Court, however, has only analyzed whether the disabled are to be afforded special status under the Equal Protection Clause on one occasion.²⁵⁸

253. *Id.*

254. 843 P.2d 15, 16 (Colo. 1992).

255. *Id.* at 16. Justices Lohr, Quinn, and Kirshbaum favored affirmance of the judgment of the Denver District Court. *Id.* Chief Justice Rovira, Justices Erickson and Mullarkey favored reversal. *Id.* Justice Volland did not participate. *Id.* Justice Erickson stated, "we were equally divided on the resolution of the issues in this case and the judgment of the trial court was affirmed by the operation of law." *Id.* at 17 (Erickson J., dissenting); see also *People ex rel. Link v. Tucker*, 42 P.2d 472 (Colo. 1934) (Colorado authority for affirming a lower court decision when appellate court is equally divided on the issues).

256. *Ibarra v. Duc Van Le*, 114 S. Ct. 918 (1994).

257. See *supra* note 14 and cases cited therein.

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

In *City of Cleburne v. Cleburne Living Center*,²⁵⁹ the Court held that the mentally retarded, a sub-group of the larger class of persons with disabilities, do not constitute a quasi-suspect class.²⁶⁰ The Court reasoned that the mentally retarded differ from other persons because of their reduced ability to cope with and function in the everyday world.²⁶¹ The Court opined that because of these unique characteristics, the state's interest in dealing with and providing for the mentally retarded as a separate class is plainly a legitimate one.²⁶² The Court went on to conclude that how the mentally retarded, a large and diversified group, are to be treated under the law is a difficult and often technical matter that goes beyond judicial "substantive judgments about legislative decisions," and is very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.²⁶³ If the Court had given the mentally retarded suspect or quasi-suspect class status, it would automatically have put itself in the position of heavily scrutinizing and, therefore, second guessing, what it deemed to be the legislature's much more informed decisions.

The Court also reasoned that since the mentally retarded have been the subject of considerable state and federal legislation addressing their difficulties "in a manner that belies a continuing antipathy or prejudice," the need for more intrusive oversight by the judiciary does not exist.²⁶⁴ The Court then stated that "[t]he legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers."²⁶⁵ Finally, in what has become much quoted dictum, the Court stated:

if the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the

259. 473 U.S. 432 (1985).

260. *Id.* at 435, 442.

261. *Id.* at 442-43.

262. *Id.*

263. *Id.* at 443.

264. *Id.*

265. *Id.* at 445.

desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the *disabled*, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.²⁶⁶

Numerous courts concerned with opening the floodgates of litigation have used that language to hold that the disabled are not a suspect or quasi-suspect class.²⁶⁷ Furthermore, since *Cleburne*, the Supreme Court has not issued a single decision which adds to the already existing suspect class categories.²⁶⁸

B. *Criticism of Cleburne*

The majority decision in *Cleburne* has been widely criticized, by the dissenters at the time it was decided²⁶⁹ and, subsequently, by legal scholars.²⁷⁰ Most of the criticism has focused on the reasoning the Court gave for refusing to provide quasi-suspect or suspect class status to persons with disabilities.²⁷¹ However, some of the criticism has taken issue with the Court's

266. *Id.* at 445-46 (emphasis added).

267. *See, e.g.,* *Lussier v. Dugger*, 904 F.2d 661, 671 (11th Cir. 1990) ("*Cleburne* . . . clearly indicates that legislation affecting persons suffering from a physical handicap . . . is to be judged, in the face of an equal protection challenge, in terms of the rationally related, and not a higher standard."); *Pendleton v. Jefferson Local School District*, 754 F. Supp. 570 (S.D. Ohio 1990) (following *Cleburne* and *Lussier* in holding that the disabled are not a suspect or quasi-suspect class and, therefore, are only subject to the rational basis standard); *American Veterans v. United States Dep't of Veteran Affairs*, 962 F.2d 136, 142 (2d Cir. 1992) (applying the rational basis standard to legislation denying disability benefits to certain mentally incompetent disabled veterans); *Story v. Green*, 978 F.2d 60, 64 (2d Cir. 1992) (noting that disability has not generally been considered a suspect or quasi-suspect classification under the Equal Protection Clause).

268. Neil D. O'Toole, *The ADA: Strict Scrutiny For Disabled Workers*, 21 COLO. LAW. 733, 734 (1992).

269. *See Cleburne*, 473 U.S. at 455-78 (Marshall, J., joined by Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

270. *See Rains, supra* note 50, at 198-99 nn. 85-88 (criticizing many aspects of the *Cleburne* decision); *see also* TRIBE, *supra* note 27, § 16-3, at 1444-46; Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 116 (1987).

271. *See Cleburne*, 473 U.S. at 455-78 (Marshall, J., joined by Brennan, and Blackmun, JJ., concurring in part and dissenting in part); *see also Rains, supra* note 50, at 198-99 nn. 85-88.

failure to admit that it performed a higher degree of scrutiny than what it claimed it was using—rational basis.²⁷²

The Court in *Cleburne* placed considerable weight on the fact that there was a distinctive legislative response to the plight of the mentally retarded.²⁷³ It, therefore, concluded that more intrusive oversight by the judiciary was unnecessary when faced with a classification based on the mentally retarded.²⁷⁴ The Court appeared to be using the so-called “political processes” argument found in Justice Stone’s renowned *Carolene Products* footnote,²⁷⁵ where he stated:

Legislation which restricts those *political processes* which can ordinarily be expected to bring about repeal of undesirable legislation, [may] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . [and] 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.²⁷⁶

Strict scrutiny, which Justice Stone advocated for discrete and insular minorities,²⁷⁷ places a considerable amount of power in the judiciary, allowing it to intrude into the political process and examine whether it is working properly.²⁷⁸ Thus, such a level of scrutiny is normally used only for groups in our society that have faced persistent prejudice and have been rele-

272. See *Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in the judgment in part and dissenting in part). “The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet *Cleburne*’s ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation.” *Id.*; see also *TRIBE*, *supra* note 27, § 16-3, at 1444-45; Minow, *supra* note 270, at 116 (stating that the *Cleburne* majority “actually offered a beefed up version” of the rational basis test).

273. *Cleburne*, 473 U.S. at 443.

274. *Id.*

275. See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938); see also *supra* notes 68-71 and accompanying text.

276. *Carolene Prods.*, 304 U.S. at 152 n.4 (emphasis added) (citations omitted).

277. *Id.*

278. See *TRIBE*, *supra* note 27, § 16-6, at 1451-54 (explaining strict scrutiny and its degree of intrusion into the legislative province).

gated to an inferior societal position.²⁷⁹ In contrast, the *Cleburne* Court suggested that when the legislature gives attention to a specific group by enacting legislation designed to improve that group's status, strict scrutiny is not needed and should not be applied.²⁸⁰ The *Cleburne* Court's reasoning, however, is flawed because this formulation would work to the disadvantage of groups in our society. Once the legislature succeeds in its efforts to provide protective legislation for a particular group, that group would then be in danger of receiving less judicial protection.²⁸¹ For example, if the *Cleburne* Court's reasoning was followed, African Americans and women would lose their special judicial protection solely because they have gained the attention of the legislature. Major federal civil rights statutes, as well as constitutional amendments, have been enacted to enhance the status of African Americans and women in our society;²⁸² yet, they properly continue to be viewed as suspect and quasi-suspect classes, respectively.²⁸³ 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.

Since *Cleburne*, the ADA has been passed. Its passage may be viewed as only broadening the *Cleburne* Court's conclusion: that the disabled are getting enough legislative attention and, therefore, do not need special protected class status. The Supreme Court would likely argue that the enactment of the

279. See *TRIBE*, *supra* note 27, § 16-6, at 1453-54; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (noting that strict scrutiny is used for suspect classes, which have been subject to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection).

280. See *Cleburne*, 473 U.S. at 443 (commenting that the distinctive legislative response afforded to the mentally retarded demonstrates that the lawmakers have been addressing their problems and obviates the need for strict scrutiny).

281. See *TRIBE*, *supra* note 27, § 16-31, at 1593-94 n.18.

282. See, e.g., U.S. CONST. amends. XIII, XIV, XV (enacted to aid African Americans in attaining equal status in society after the Civil War); U.S. CONST. amend. XIX (granting women the right to vote); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 to -6, 2000e-1 to -17 (1988 & Supp. V 1993) (prohibiting discrimination in public accommodations and employment on the basis of race, color, creed, national origin, or sex) (emphasis added).

283. See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (treating race as a suspect class); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (treating gender as a quasi-suspect class).

ADA serves as *prima facie* evidence that the plight of the disabled is being addressed by our country's lawmakers. Again, however, this argument is weak because the Civil Rights Act of 1964 and numerous constitutional amendments²⁸⁴ primarily address discrimination against African Americans and, nevertheless, the Court properly treats race as a suspect class.²⁸⁵

C. *Congress' Attempt to Statutorily Impose a Standard of Judicial Review*

By adopting the ADA, Congress apparently attempted to utilize the *Carolene Products* discrete and insular minority theory²⁸⁶ to imply that a heightened level of scrutiny should be used in disability discrimination cases.²⁸⁷ Some courts have suggested that heightened scrutiny should be used²⁸⁸ because Congress welcomed this interpretation by its choice of language used to describe the disabled in the ADA findings:

[I]ndividuals with disabilities are a *discrete and insular minority* faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.²⁸⁹

This language echoes the precise language used consistently by the Court to describe a suspect class.²⁹⁰ In addition, the Court has used the phrase "discrete and insular minority" when ad-

284. See, e.g., U.S. CONST. amends. XIII, XIV, XV; Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 to -6, 2000e-1 to -17 (1988 & Supp. V 1993).

285. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (applying strict scrutiny to statutory scheme preventing mixed-race marriages); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (applying strict scrutiny to child custody award based on perceived racial discrimination due to mixed-race parents).

286. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

287. See 42 U.S.C. § 12101(a)(7) (finding that individuals with disabilities are a "discrete and insular minority").

288. See, e.g., *Trautz v. Weisman*, 819 F. Supp. 282, 294 (S.D.N.Y. 1993); *People v. Green*, 148 Misc. 2d 666, 669, 561 N.Y.S.2d 130, 132 (Westchester County Ct. 1990) (both suggesting a heightened level of scrutiny should be used by the courts when faced with a disability discrimination claim).

289. 42 U.S.C. § 12101(a)(7) (emphasis added).

290. See, e.g., *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (stating that a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of

ding a new classification to the list of suspect categories.²⁹¹ Therefore, it is not surprising that courts have used the ADA's description of persons with disabilities as evidence that Congress' intent was to transform the disabled into a suspect class for purposes of constitutional and statutory interpretation, and to put the disabled on equal grounds with other protected classes in our society.²⁹² Congress may have been trying to broaden the constitutional guarantees of the Fourteenth Amendment by its description of persons with disabilities in the ADA and, thus, "force" courts into holding that the disabled constitute a protected class for purposes of constitutional and statutory interpretation. In addition, the ADA is essentially Congress' stamp of approval on the lower court's analysis in *Cleburne*, which held persons with disabilities to be a quasi-suspect class.²⁹³

The ADA was passed under Section Five of the Fourteenth Amendment, which grants Congress the power to enact legislation to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]."²⁹⁴ As stated earlier, the Court has allowed Congress to expand constitutional guarantees under the Fourteenth Amendment through its use of Section Five, even when the Court itself has not defined the right at issue as

political powerlessness as to command extraordinary protection from the majoritarian process").

291. The elements of "discreteness and insularity" have been relied upon mostly in recognizing aliens to be a suspect class. See, e.g., *Bernal v. Fainter*, 467 U.S. 216, 220 (1984) (using "discrete and insular minority" to describe aliens as a suspect class); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (discussing how aliens are a perfect example of a "discrete and insular minority"). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics, and the rationale of discrete and insular minority has never been invoked by the Court as a prerequisite to subjecting racial and ethnic distinctions to strict scrutiny. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 290 (1978).

292. See *Trautz v. Weisman*, 819 F. Supp. 282, 294 (S.D.N.Y. 1993) (citing Congress' language in 42 U.S.C. § 12101(a)(7) describing the disabled as a discrete and insular minority with a history of purposeful unequal treatment); see also *Chatoff v. City of New York*, No. 92 Civ. 0604, 1992 U.S. Dist. LEXIS 21662, at *1 (S.D.N.Y. June 26, 1992) (quoting a congressional statement identifying the disabled as a discrete and insular minority).

293. *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191 (5th Cir. 1984); see also *O'Toole*, *supra* note 268, at 734.

294. U.S. CONST. amend. XIV, § 5. For the full text of Section Five of the Fourteenth Amendment, see *supra* note 24.

guaranteed under the Equal Protection Clause.²⁹⁵ Some Justices have disagreed with this approach, stating that Congress simply has no authority to legislate until and unless the Supreme Court first guarantees a right.²⁹⁶ Some may view the Court's deference to congressional determinations as a threat to the fundamental principle set forth in *Marbury v. Madison*²⁹⁷ that "[i]t is emphatically the province and duty of the judicial department to say what the law is."²⁹⁸ However, it is not difficult to harmonize *Marbury* with the Ratchet Theory of *Katzenbach v. Morgan*.²⁹⁹

Under *Marbury*, the Court devised the power of judicial review to strike down acts of Congress which it finds repugnant to the Constitution.³⁰⁰ In defining the power of judicial review, the Court has stated: "*Marbury v. Madison* . . . declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system."³⁰¹ As such, *Marbury* has been recognized as granting the Supreme Court the authority to be the ultimate interpreter of the Constitution—the *last word*. However, *Marbury* does not stand for the proposition that the Court is the *only* interpreter of the Constitution. In other words, "being 'ultimate interpreter' . . . is not

295. See *supra* notes 33-53 and accompanying text.

296. See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 260 (1983) (Burger, C.J., dissenting).

297. 5 U.S. (1 Cranch) 137, 146-80 (1803).

298. *Id.* at 177.

299. 384 U.S. 641, 651 n.10 (1966). See Stephen L. Carter, *The Morgan "Power" and the Forced Reconsiderations of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 824 (1986) (arguing that *Morgan* is "best understood as a tool that permits the Congress to use its power to enact ordinary legislation to engage the Court in a dialogue about our fundamental rights, thereby 'forcing' the Justices to take a fresh look at their own judgments"); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 610-12 (1975) (arguing that *Morgan* follows the general proposition that the courts will not limit congressional power based on concepts of federalism because the political constraints on Congress are sufficient to protect against imprudent congressional action). See also *supra* notes 40-53 and accompanying text for a discussion of the *Morgan* case and the Ratchet Theory.

300. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For a learned discussion of the *Marbury* decision and the power of judicial review, see TRIBE, *supra* note 27, § 3-2.

301. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

the same as being exclusive interpreter."³⁰² As one famous constitutional scholar notes:

Judicial review does not require that the Constitution always be equated with the Supreme Court's view of it. It is the Court's responsibility, under *Marbury*, to strike down acts of Congress which the Court concludes to be unconstitutional—nothing more. *Marbury* implies nothing about the criteria by which the Court should determine whether an act of Congress is unconstitutional; it requires only that such criteria should exist.³⁰³

Accordingly, Congress can establish statutory rights in areas not yet recognized by the Court when it has the authority under its constitutionally enumerated powers and is not prohibited by another constitutional provision.³⁰⁴

Congress passed the ADA pursuant to Section Five of the Fourteenth Amendment—a congressionally enumerated power of the Constitution.³⁰⁵ The ADA serves to expand constitutional rights of the disabled, not to diminish them. This expansion helps to ensure that the disabled receive equal protection of the laws, and places individuals with disabilities on equal footing with other protected classes.³⁰⁶ As a result, the ADA constitutionally expands the rights previously guaranteed to persons with disabilities under the Fourteenth Amendment to help ensure that their rights are similar to the rights of other citizens.³⁰⁷ By enacting the ADA, Congress has shared the responsibility of defining and protecting individual's rights under the Equal Protection Clause with the judiciary. The question remains, however, whether the Court will fully effect-

302. Louis Fischer, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 715 (1985) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

303. See *TRIBE*, *supra* note 27, § 5-14, at 349.

304. See *Pawa* *supra* note 33, at 1100 (citing *The Freedom of Choice Act of 1991: Hearings on H.R. 25 Before the House Subcomm. on Civil and Constitutional Rights*, 102 Cong., 2d Sess. (1992) (statements of Professor Laurence H. Tribe)); see also *Morgan*, 384 U.S. at 651; *supra* notes 40-53 and accompanying text.

305. U.S. CONST. amend. XIV, § 5. For the full text of Section Five of the Fourteenth Amendment, see *supra* note 24.

306. See 42 U.S.C. § 12101 (findings and purposes of the ADA).

307. See Penn Lerblance, *Introducing the Americans With Disabilities Act: Promises and Challenges*, 27 U.S.F. L. REV. 149 (1992) (stating that the ADA gives protections to the forty-three million Americans with disabilities that are similar to those provided to individuals subjected to racial, sexual, or religious discrimination).

ate Congress' intent or preference that the disabled be given this higher status in equal protection cases.³⁰⁸ Since Congress did not explicitly mandate in the ADA that the disabled should be transformed into a suspect class or expressly state what standard of review the Court should use when faced with future classifications based on disability, Congress has left the ultimate decision to the Court's discretion.

Congress has often legislated under its Section Five power to outlaw discrimination *before* the Court has accepted a particular class as protected.³⁰⁹ Congress has previously enacted legislation, leaving an area of equal protection open for the Court's subsequent approval; most notably in the areas of gender and age discrimination.³¹⁰

For example, before the Court held gender to be a quasi-suspect class, rational basis review was used in gender discrimination cases, albeit with a sharper focus.³¹¹ Before the Supreme Court elevated the status of gender to that of a quasi-suspect class, Congress amended Title VII of the Civil Rights Act of 1964,³¹² under its Section Five power, extending Title VII's coverage to the states.³¹³ Subsequent to the amendments, the

308. See 42 U.S.C. § 12101(b)(2)-(3) (stating that it is the purpose of the ADA to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities . . . [and] to ensure that the Federal Government plays a central role in enforcing those standards . . .").

309. See, e.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 to -6, 2000e-1 to -17 (1988 & Supp. V 1993) (outlawing discrimination on the basis of gender even though the Court had not embraced gender as a protected class for equal protection purposes); see also Pawa, *supra* note 33, for examples of Congress legislating in areas not yet given special status by the Supreme Court.

310. See Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993) (federal legislation outlawing age discrimination in employment); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-1 to -6, 2000e-1 to -17 (1988 & Supp. V 1993) (federal legislation outlawing gender discrimination in public accommodations and employment).

311. See, e.g., *Stanton v. Stanton*, 421 U.S. 7, 17 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971) (all stating that they were using the rational basis standard to review gender discrimination claims, while actually applying a stricter form of scrutiny more in line with heightened scrutiny); see also *Craig v. Boren*, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring) ("[C]andor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification.").

312. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000(e) (1988)).

313. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976).

Court reviewed a gender discrimination case, *Fitzpatrick v. Bitzer*,³¹⁴ where it upheld Congress' use of Section Five of the Fourteenth Amendment in enacting the amendments to Title VII.³¹⁵ Then, approximately six months later, the Court held gender to be a protected class for purposes of equal protection review in *Craig v. Boren*.³¹⁶ Consequently, Congress prohibited gender discrimination using its power under Section Five of the Fourteenth Amendment *before* the Court embraced gender as a quasi-suspect class. The Court not only allowed Congress to do so, but subsequently, in *Fitzpatrick* changed its own standard of review in gender cases, elevating gender to the level of a protected class in *Craig*, thus, placing its imprimatur on Congress' action. The Court, therefore, has used congressional legislation on occasion to guide its decisions. As Justice Marshall stated in his *Cleburne* dissent:

It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance [T]he Court reached this very conclusion when it extended heightened scrutiny to gender classifications and drew on parallel legislative developments to support that extension³¹⁷

In addition, the Court in *Frontiero v. Richardson* stated that when Congress, as a co-equal branch of government, concludes that a classification is inherently invidious, that finding is not without significance.³¹⁸

There are other examples of Congress legislating to protect classes where the Court had not yet defined that particular class as worthy of protected class status under the Equal Protection Clause. The Age Discrimination in Employment Act (ADEA) was first passed in 1967, and subsequently amended

314. *Id.*

315. *Id.* at 456.

316. 429 U.S. 190 (1976).

317. *Cleburne*, 473 U.S. at 466-67 (Marshall, J., joined by Brennan, & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

318. See *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973) (plurality opinion) (holding that gender is a class worthy of middle level scrutiny). A majority of the Court has since held that gender is a well-established middle-tier class under the Equal Protection Clause. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

throughout the next three decades.³¹⁹ However, the Court has never held age to be a protected class. The Court has consistently examined classifications based on age under the rational basis standard, refusing to accord age suspect class status.³²⁰ Therefore, simply because Congress has seen fit to pass legislation to improve the status of a particular class has not inevitably led the Court to change its previous position, or to adopt a new position it had not previously embraced. Hence, it appears that *both* Congress and the Court have been advancing equal protection rights while influencing each other to a significant extent.

The Religious Freedom Restoration Act (RFRA)³²¹ was specifically designed to overturn a prior Supreme Court decision, *Department of Human Resources v. Smith*,³²² in which the Court held that the government may prohibit religious conduct within religion-neutral legislation without showing a compelling interest for doing so.³²³ In other words, the Court refused to use strict scrutiny when examining legislation based on religious freedom. The RFRA prohibits a government from restricting religious freedom unless it can show a compelling governmental interest.³²⁴ In effect, the RFRA represents Congress' attempt to legislatively overrule the Court's previous decision in *Smith* and mandate strict scrutiny. The Supreme Court has not yet reviewed this recently enacted statute.³²⁵ It, therefore, remains unclear whether the Court will give effect to the distinct congressional intent embodied in the RFRA and overturn the *Smith* decision. However, the RFRA serves as a powerful example of Congress' ability to legislate under Section Five of the

319. Pub. L. No. 90-202, 81 Stat. 602 (1967), amended in 1974 by Pub. L. No. 93-259, 88 Stat. 74, amended in 1978 by Pub. L. No. 95-256, 92 Stat. 189, amended in 1986 by Pub. L. No. 99-592, 100 Stat. 3342, amended in 1989 by Pub. L. No. 101-239, 103 Stat. 2233, amended in 1990 by Pub. L. No. 101-433, 104 Stat. 978 (codified as amended at 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993)).

320. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 109-12 (1979) (upholding a retirement provision under the rational basis standard); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-14 (1976) (holding that age discrimination need only pass the rational basis, rather than strict scrutiny standard).

321. 42 U.S.C. § 2000bb-1 to -4 (Supp. V 1993).

322. 494 U.S. 872 (1990).

323. *Id.* at 886 n.3.

324. See 42 U.S.C. § 2000bb-1.

325. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

Fourteenth Amendment and expand constitutional rights, even when the Court has previously refused to recognize them.

The ADEA, the RFRA, and the amendments to Title VII all demonstrate that Congress has the authority to legislate in areas not yet defined by the Court as protected for purposes of equal protection. Congress was using this expansive authority when it enacted the ADA. However, Congress did not phrase its findings in such explicit language as it did in the RFRA.³²⁶ On the other hand, the ADA's language was more persuasive and expansive than the ADEA, which limited its purpose to prohibiting age discrimination only in employment.³²⁷ Congress expressly stated that the purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities . . . [and] to ensure that the Federal Government plays a central role in enforcing the standards established in this [statute] on behalf of individuals with disabilities."³²⁸ Of course, the federal judiciary is part of the federal government, and, as a result, must enforce Congress' mandate that the federal government play a central role in enforcing the ADA.

In the ADA, Congress stated that people with disabilities have often had "no legal recourse to redress such discrimination,"³²⁹ recognizing the courts' ineffective treatment of the disabled in the past.³³⁰ Most importantly, however, is the

326. Compare the RFRA, 42 U.S.C. § 2000bb-1 to -4 (stating as its purpose "to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened) (citations omitted) with the ADA, 42 U.S.C. § 12101(a) (devoid of any explicit language mandating a particular test or standard to be used when faced with an equal protection challenge based on disability).

327. Compare the ADEA, 29 U.S.C. § 621(b) (stating as its purpose "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment") with the ADA, 42 U.S.C. § 12101(a) (stating that the purpose of the ADA is to address the *major areas* of discrimination faced daily by persons with disabilities—not just employment).

328. 42 U.S.C. § 12101(b)(1)-(2).

329. 42 U.S.C. § 12101(a)(4).

330. See, e.g., *California Ass'n of the Physically Handicapped v. FCC*, 721 F.2d 667, 670 (9th Cir. 1983) (refusing to hold that disabled individuals are a suspect class); *Brown v. Sibley*, 650 F.2d 760, 766 (5th Cir. 1981) (holding that disabled individuals are not a suspect class); *Upshur v. Love*, 474 F. Supp. 332, 337

language used in the ADA to describe persons with disabilities as a class—"a discrete and insular minority . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society . . ."³³¹ Congress was apparently using the *Carolene Products* formulation to mandate a heightened level of judicial scrutiny in cases of discrimination based on disability.³³²

The Supreme Court denied certiorari to the only case properly requesting review of the issue of whether the disabled constitute a suspect or quasi-suspect class, *Ibarra v. Duc Van Le*³³³—thereby leaving the issue unresolved. The vagueness of the congressional language in the ADA has left the issue obscure enough that courts have fallen on both sides of the issue: some finding that a protected class has been created,³³⁴ some not.³³⁵ This split in judicial decisions³³⁶ will inevitably widen and force the Court to decide the issue.

(N.D. Cal. 1979) (commenting that physical handicap is more analogous to age than race and, therefore, evokes only the rational basis standard).

331. 42 U.S.C. § 12,101(a)(7); see also *supra* text accompanying note 289 for the full congressional description of individuals with disabilities as a class.

332. See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938); see also *supra* text accompanying note 276 for the content of the *Carolene Prods.* footnote.

333. 114 S. Ct. 918 (1994) (denying writ of certiorari to the Supreme Court of Colorado); see *supra* part III.B.2.c for a discussion of *Duc Van Le*; see also *Heller v. Doe*, 113 S. Ct. 2637, 2642 (refusing to address whether the disabled constitute a quasi-suspect class based on the failure to raise the issue in any of the lower courts).

334. See, e.g., *Trautz v. Weisman*, 819 F. Supp. 282 (S.D.N.Y. 1993); *People v. Green*, 148 Misc. 2d 666, 669, 561 N.Y.S.2d 130, 132 (Westchester County Ct. 1990).

335. See, e.g., *Contractors Ass'n v. City of Phila.*, 6 F.3d 990 (3d Cir. 1993); *More v. Farrier*, 984 F.2d 269 (8th Cir. 1993); *Tomsha v. City of Colorado Springs*, 856 P.2d 13 (Colo. Ct. App. 1992).

336. The few courts that have reached the issue demonstrate the inconsistency of judicial opinion regarding the status of the disabled in light of the ADA's enactment. See, e.g., *Contractors Ass'n v. City of Phila.*, 6 F.3d 990 (3d Cir. 1993) (refusing to apply heightened scrutiny to a classification based on disability even after the ADA's enactment); *More v. Farrier*, 984 F.2d 269 (8th Cir. 1993) (stating that the ADA does not alter the standard for constitutional equal protection claims); *Trautz v. Weisman*, 819 F. Supp. 282 (S.D.N.Y. 1993) (holding the disabled to be a protected class under federal conspiracy statute, 42 U.S.C. § 1985(3), relying on the ADA); *Duc Van Le v. Ibarra*, No. 91SC189, 1992 WL 77908 (Colo. App. 20, 1992) (using both strict scrutiny and rational basis review to determine that the state had violated the equal protection rights of the disabled); *Tomsha v. City of Colorado Springs*, 856 P.2d 13 (Colo. Ct. App. 1992) (rejecting a claim that

A review of the decisions refusing to hold that the disabled are a suspect class reveals that some courts have based their refusal either on the effective date of the ADA or that the particular claim was not brought under the ADA.³³⁷ Moreover, these decisions do not provide any insight into how the courts would have held if the ADA had been in effect.³³⁸ These decisions, therefore, do not provide a strong argument for refusing to grant persons with disabilities special judicial protection.³³⁹ Thus, having no guidance from the Supreme Court as to whether the disabled now constitute a suspect class since the passage of the ADA, lower courts have relied upon *Cleburne* as authority. These courts have used the rational basis standard of review enunciated in *Cleburne*, refusing to confer suspect class status on the disabled.³⁴⁰ Therefore, if the Supreme Court overturned *Cleburne*, then the lower courts would be forced to change their position.

D. Predictions of the Supreme Court's Ultimate Decision

In predicting whether the Supreme Court necessarily will decide that the disabled are now a suspect class, several argu-

the disabled are a suspect class, solely because the ADA was not yet in effect); *People v. Green*, 148 Misc. 2d 666, 561 N.Y.S.2d 130 (Westchester County Ct. 1990) (noting in dicta that persons with disabilities should be treated as a suspect class for equal protection review); see also *supra* part III.B and notes 177-256 for an examination of these decisions involving the question of whether the disabled now constitute a quasi-suspect or suspect class for purposes of constitutional and statutory interpretation.

337. See *supra* part III.B.2.a and part III.B.2.c for a discussion of the *Tomsha* and *Duc Van Le* cases, which were decisions based on timing, as opposed to the merits.

338. See, e.g., *Tomsha*, 856 P.2d at 14 (failing to comment how the court would have decided the case if the ADA had been in effect).

339. See, e.g., *id.* at 14 (summarily dismissing the argument that the disabled plaintiff should be given suspect class status solely because the ADA was not in effect at the time of plaintiff's injury).

340. See, e.g., *Contractors Ass'n v. City of Phila.*, 6 F.3d 990, 1001 (3d Cir. 1993) (relying on *Cleburne* as authority to apply rational basis review to a classification based on disability and to reject application of heightened scrutiny); *Lussier v. Dugger*, 904 F.2d 661, 671 (11th Cir. 1990) ("*Cleburne* . . . clearly indicates that legislation affecting persons suffering from a physical handicap . . . is to be judged, in the face of an equal protection challenge, in terms of the 'rationally related', and not a higher, standard."); *Pendleton v. Jefferson Local Sch. Dist.*, 754 F. Supp. 570, 578 (S.D. Ohio 1990) (following *Cleburne* and *Lussier* in holding that the disabled are not a suspect or quasi-suspect class and, therefore, are only subject to the rational basis standard).

ments must be considered. For example, the conservatism of the present Court,³⁴¹ as compared with the *Cleburne* Court, decreases the likelihood that it will expand the protections of the Equal Protection Clause to the extreme of granting suspect class status to individuals with disabilities.³⁴² Rather, it will more likely uphold *Cleburne*, leaving the disabled at the lowest level of scrutiny, or at the most, hold them to be a quasi-suspect class.³⁴³

Another argument to be considered is that Congress passed the ADA to aid the disabled in attaining equality in society.³⁴⁴ This may influence the Court into believing that the system is working, and that strict exacting scrutiny is not necessary to protect a group that inspires so much political attention, and is obviously using the political process to its advantage.³⁴⁵ However, this argument is untenable considering that other classes, such as race and gender, have certainly gained the attention of the political process, yet are still entitled to the special protection of the courts.³⁴⁶

341. The present Court can be considered more "conservative" than the *Cleburne* Court, since Justices Marshall, Brennan, and Blackmun, three of the great liberals, have stepped down. See Joan Biskupic, *New Justices May Shift Supreme Court Balance on Pending Racial Issues*, WASH. POST, Jan. 8, 1995, at A1 (stating that the high Court has seen the retirements of the "most articulate and eloquent voices on behalf of equal protection and equal rights"—Justices Brennan, Marshall, and Blackmun). In addition, the two new Justices named by President Clinton—Justices Breyer and Ginsberg—are cautious thinkers who prefer to leave difficult social questions to elected officials and, therefore, will not significantly tip the balance of the present Court. See Ana Puga, *Top Court Stays a Cautious Course, Observers Say*, BOSTON GLOBE, May 23, 1994, at 1 (discussing the current Court's attitude of judicial restraint and cautiousness demonstrating a tendency to avoid dramatic pronouncements as much as possible).

342. See, e.g., *Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993) (refusing to address the issue of whether a distinction based on mental retardation should be given heightened scrutiny solely because the issue was not presented to any of the lower courts, thus evidencing the current Court's reluctance to even address the issue).

343. See *infra* part IV.E for a discussion of quasi-suspect class status as the best solution for persons with disabilities.

344. See 42 U.S.C. § 12,101(a)(8) (stating that the nation's proper goals regarding individuals with disabilities are to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals").

345. See *United States v. Carolene Prods.*, 304 U.S. 144, 152-53 n.4 (1938) (suggesting that when the political process is working, strict exacting scrutiny is unnecessary).

346. See, e.g., Civil Rights Act of 1964 §§ 201-716, 42 U.S.C. §§ 2000a to d-4, 2000e to e-15, 2000g to h6 (1988) (prohibiting discrimination on the basis of race,

In addition, if the Supreme Court overturns *Cleburne* based on the congressional findings and purposes language of the ADA,³⁴⁷ it may be surmised that the legislative branch has encroached on the judiciary's authority.³⁴⁸ However, the Court often relies on the congressional findings and purposes language of a statute as a guide to reinterpreting past decisions.³⁴⁹ On the other hand, the Court may be reluctant to hold that the disabled are a suspect class simply because Congress has essentially labeled them as such.

In the lower courts, ultimately, the question will become whether judicial restraint³⁵⁰ or judicial activism³⁵¹ is appropriate. If a court interprets its responsibility as following the will of the people as expressed by the elected officials of Congress, then it may hold that the disabled are a suspect class, and refrain from interfering with the implicit intent of Congress.³⁵² Alternatively, if a court takes the position that it is uniquely the judiciary's responsibility to impose a standard of review on a particular class, and not the responsibility of the legislature, it may refuse to afford persons with disabilities suspect class sta-

color, creed, national origin, or sex) (emphasis added); see also *supra* notes 282-83 and accompanying text; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (intermediate scrutiny for gender); *Loving v. Virginia*, 388 U.S. 1 (1967) (strict scrutiny for race).

347. 42 U.S.C. § 12101(a)(7) (stating that the disabled are a discrete and insular minority with a history of purposeful unequal treatment).

348. See *infra* notes 350-55 and accompanying text, discussing the theories of judicial restraint and judicial activism and their relation to the separation of powers between the judicial and legislative branches.

349. See *supra* notes 309-25 and accompanying text for examples of the Court relying on congressional legislation to reinterpret past decisions.

350. "Judicial self-restraint" is defined as a "[s]elf-imposed discipline by judges in deciding cases without permitting themselves to indulge their own personal views or ideas which may be inconsistent with existing decisional or statutory law." BLACK'S LAW DICTIONARY 849 (6th ed. 1990).

351. "Judicial activism" is defined as

a [j]udicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions into legislative and executive matter.

BLACK'S LAW DICTIONARY 847 (6th ed. 1990).

352. See ALICE FLEETWOOD BARTEE, CASES LOST, CAUSES WON 104 (1984) (stating that judicial restraint is the belief that the Court should not interfere with Congress).

tus. Accordingly, the exchange of ideas between the legislative and judicial branches will play an integral part in how this issue is ultimately resolved. There is a strong argument for heeding the mandate of Congress—the elected officials in a democratic society.³⁵³ Congress has better fact-finding abilities than the Supreme Court—it may hold hearings, conduct studies, and subpoena witnesses, as it often does.³⁵⁴ One can argue that this enables Congress to be more in touch with the views of the general public and, in turn, be better equipped at meeting the needs and wishes of society as a whole through its legislation.³⁵⁵

Nevertheless, only the Supreme Court itself can properly answer this question.³⁵⁶ The Court may choose to treat the disabled as it did gender, and allow Congress to effectively define the guarantees afforded that group under the Equal Protection Clause, and then subsequently place its approval on Congress' action by raising the standard of review afforded to persons

353. See, e.g., *Frontiero*, 411 U.S. at 691-92 (Powell, J., concurring) (arguing that "democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when [the Court] appear[s] unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes"); see also *TRIBE*, *supra* note 27, § 16-6, at 1451 (stating that there is a case to be made for a significant degree of judicial deference to legislative choices).

354. See *Pawa*, *supra* note 33, at 1067-68, for a discussion of Congress' broad fact-finding abilities. The Supreme Court has frequently commented on its lack of an equivalent fact-finding capability. See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 249 n.31 (1970) (essentially contending that the Court should defer to congressional choices over the Court's own interpretations when Congress is able to "unearth new evidence in its investigation").

355. See, e.g., *Pawa*, *supra* note 33, at 1067 (arguing that "Congress is a more appropriate institution for investigating widespread social problems such as racial, gender, and religious inequality, and for devising solutions to those problems"); see also *Mitchell*, 400 U.S. at 206-07 (Harlan, J., dissenting) (stressing that the decisions Congress makes based upon its factual investigations are moral in dimension and that judgments of that sort are beyond the institutional competence and constitutional authority of the judiciary).

356. Cf. *Pawa*, *supra* note 33, at 1072 n.276 (citing *The Freedom of Choice Act of 1991: Hearings on H.R. 25 Before the House Subcomm. on Civil and Constitutional Rights*, 102d Cong., 2d Sess. (1992) (statements of Professor Laurence H. Tribe) ("Congress may not legislatively 'create' constitutional rights as a means of circumventing the authority of the Supreme Court as final expositor of the meaning of the Constitution."))

with disabilities in a later decision.³⁵⁷ Conversely, the Court may treat the disabled as it did age discrimination, and refuse to change its prior stance even after Congress has enacted legislation enlarging the protections afforded that class under the Equal Protection Clause.³⁵⁸ If the Court does hold the disabled to be a suspect or quasi-suspect class, then Congress will have effectively expanded the rights of persons with disabilities under the Equal Protection Clause by its actions and, thus, "forced" the Court to take a fresh look at its own decisions.³⁵⁹

E. *Quasi-Suspect Class Status for Persons With Disabilities As the Best Solution*

The argument for holding that the disabled are a suspect class is based on the notion that if the disabled were so deemed, they would be given the ultimate level of protection by the courts.³⁶⁰ If persons with disabilities were given suspect class status, governments would not be capable of enacting legislation that classifies based on disability absent a compelling governmental interest.³⁶¹ 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,³⁶² when strictly scrutinized, may be struck down. This may be especially true with statutes or governmental action

357. See *supra* notes 309-18 and accompanying text for a discussion of how the Court raised the status of gender after Congress passed legislation granting women more protection.

358. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). See *supra* notes 321-22 and accompanying text for a discussion of how the Court failed to raise the status of age even after Congress passed special legislation protecting that classification.

359. See *Carter*, *supra* note 299, at 824 (arguing that Congress can use its Section Five power to engage the Court in a dialogue and "force" the Court to take a fresh look at its own judgments).

360. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (noting that suspect class status warrants strict exacting scrutiny by the courts, which is the highest level of protection given by the courts in equal protection cases).

361. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

362. See, e.g., ARK. CODE ANN. § 20-47-220 (Michie 1991) (benign, remedial statute ensuring appropriate commitment and treatment of the mentally ill).

meant to aid the mentally retarded and the mentally ill, a group with special characteristics, as the Court has already noted.³⁶³

If the disabled were to be deemed a quasi-suspect class, however, they would still be given more protection by the courts than if they were left with no special status at all.³⁶⁴ Accordingly, some scholars believe that the Supreme Court's opinion in *Cleburne* was too harsh in failing to grant the disabled even quasi-suspect status, when the *Cleburne* Court actually employed heightened scrutiny *sub silentio*.³⁶⁵ If the Court accorded the disabled quasi-suspect class status, then statutes classifying based on disability would be placed on the same par with gender and illegitimacy,³⁶⁶ rather than being left at the lowest level of review along with economic legislation.³⁶⁷ Additionally, quasi-suspect class status for the disabled would prevent courts from striking down remedial legislation in a similar manner as with gender.³⁶⁸ Such a standard could provide the courts with enough scrutiny to protect against suspicious legislation that is discriminatory in its application, while at the same time upholding remedial legislation that classifies based on real differences between a disabled group and the general population.³⁶⁹

363. See *Cleburne*, 473 U.S. at 442 (referring to the unique characteristics of the mentally retarded and the state's interest in dealing with and providing for them separately); see also ARK. CODE ANN. § 20-47-220 (Michie 1991) (dealing with commitment and treatment of the mentally ill).

364. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (protecting gender as a quasi-suspect class); *Craig v. Boren*, 429 U.S. 190 (1976) (protecting gender as a quasi-suspect class); *Mathews v. Lucas*, 427 U.S. 495 (1976) (protecting illegitimacy as a quasi-suspect class).

365. See, e.g., *TRIBE*, *supra* note 27, § 16-3, at 1444-45; Minow, *supra* note 272, at 116.

366. See, e.g., *Hogan*, 458 U.S. 718 (1982) (protecting gender as a quasi-suspect class); *Craig*, 429 U.S. 190 (1976) (protecting gender as a quasi-suspect class); *Mathews v. Lucas*, 427 U.S. 495 (1976) (protecting illegitimacy as a quasi-suspect class).

367. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding an economic regulation of the Maryland Department of Public Welfare under the rational basis standard).

368. See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975); *Kahn v. Shevin*, 416 U.S. 351, 353-54 (1974) (both upholding remedial legislation designed to redress past disadvantageous conditions faced by women in military and economic life).

369. Cf. ARK. CODE ANN. § 20-47-220 (Michie 1991) (classifying based on mental disability, but distinguishing between the mentally ill and the general population based on benign, remedial purpose of ensuring appropriate commitment and treatment of the mentally ill).

The Court has never provided a direct explanation of what characteristics trigger heightened scrutiny. However, it has noted certain factors that it has used to determine whether a particular group is eligible for quasi-suspect status. For example, personal immutability, the inability to change a personal characteristic or trait, has been used by the Court as a factor in determining quasi-suspect status.³⁷⁰ As the *Trautz* court noted, "a disability by its very nature is an immutable obstacle often created only by an accident of birth, not unlike race, gender, or national origin, which cannot be erased, but must be surmounted."³⁷¹ Frequently, the cause of a disability is outside the control of the individual, and the disability itself has no bearing on that individual's capability to participate in society.³⁷² However, there may be circumstances where a disability is relevant to an individual's performance in society,³⁷³ but heightened scrutiny allows some latitude on the part of the government adopting the legislation to account for that type of situation. Under heightened scrutiny, if the government has an important interest and the classification based on the disability is substantially related to that important governmental interest, the legislation would be allowed to stand.³⁷⁴ Therefore, heightened scrutiny would allow the Court to examine the governmental action, keeping in mind that the disabled may have some real differences, both physically and intellectually, that may be relevant to particular legislation or governmental activity.³⁷⁵

370. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (holding sex is an immutable characteristic and classifications based on gender are inherently invidious); *Webster v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 176 (1972) (suggesting that heightened scrutiny is triggered by invidious discrimination based on "status of birth"); see also *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting) (arguing that suspect class status should be found only where the status of an individual cannot be altered and that alienage is, therefore, not a suspect class). It is interesting to note that in *Cleburne*, no Justice questioned the fact that mental retardation is an immutable trait, yet the Court still found that the mentally retarded were not a quasi-suspect class. *Cleburne*, 473 U.S. at 442.

371. *Trautz v. Weisman*, 819 F. Supp. 282, 292 (S.D.N.Y. 1993).

372. For example, disfiguring birth defects are outside the control of the individual and may not interfere with that individual's capacity to adequately participate in society.

373. Most notably with a disability limiting certain life functions.

374. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

375. For example, a deaf individual and a paraplegic will have physical differences that may need to be taken into consideration by a government enacting legis-

These factors were discussed and discarded, however, as incapable of elevating the status of the disabled to that of a quasi-suspect class,³⁷⁶ despite the fact that the Court there purported to be applying rational basis review, but instead engaged in heightened scrutiny.³⁷⁷ The enactment of the ADA can be read as congressional approval of the *Cleburne* dissent, with Congress trying to force the Court to use more than mere rational basis review, or to at least openly acknowledge that it had used heightened scrutiny.³⁷⁸

Placing the disabled into the quasi-suspect class category would be the best approach the Court could take when faced with the issue of which level of review should be afforded to the disabled. It would allow benign legislation, drawing legitimate classifications predicated on real differences to remain,³⁷⁹ while ridding society of the statutes that perpetuate outdated notions of inequality.³⁸⁰ Quasi-suspect status would also be the best compromise, especially given that the Court is reluctant to add

lation based on disability. Similarly, a severely mentally retarded individual may be properly treated differently from a highly intelligent person disfigured by burns.

376. The Court in *Cleburne* declined to find the mentally retarded to be even a quasi-suspect class. The Court made reference to the "unfair and often grotesque mistreatment" of the mentally retarded, *Cleburne*, 473 U.S. at 438, 454 (Stevens, J., concurring) (quoting *City of Cleburne v. Cleburne Living Center*, 726 F.2d 191, 197 (5th Cir. 1984)), as well as to their "immutable characteristics," *id.* at 472 n.24 (Marshall, J., concurring in the judgment in part and dissenting in part), but yet still declined to admit it was using heightened scrutiny.

377. See *supra* notes 270, 365 and accompanying text, explaining that the *Cleburne* Court used a form of heightened scrutiny under the guise of rational basis review.

378. See *Cleburne*, 473 U.S. at 466-67 (Marshall, J., joined by Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (arguing that evolving standards of equality come to be embodied in legislation and that courts should view this as a sign of change, allowing it to influence their decisions).

379. See, e.g., *Schlesinger*, 419 U.S. at 508; *Kahn*, 416 U.S. at 353-54 (both upholding remedial legislation classifying based on gender).

380. The Supreme Court has invalidated a broad range of statutes that relied on outdated notions of prejudice and inequality between the sexes. See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (invalidating a statute granting only husbands the right to manage and dispose jointly owned property without their wives' consent); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (striking down a statute that required a widower, but not a widow, to show he was incapacitated from earning to recover benefits for a spouse's death under worker's compensation laws); *Orr v. Orr*, 440 U.S. 268 (1979) (declaring unconstitutional a statute providing that only men could be ordered to pay alimony following a divorce); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (annulling a statute allowing widows, but not widowers, to collect survivors' benefits under the Social Security Act).

to the already existing categories of suspect classifications.³⁸¹ Quasi-suspect status would give effect to the congressional language used in the ADA, where Congress states that the disabled are a discrete and insular minority with a history of purposeful unequal treatment.³⁸² Courts are not bound by congressional findings, but the weight of Congress' intentions nevertheless can help change judicial opinion,³⁸³ making such an interpretation that the disabled are entitled to heightened scrutiny more likely. Allowing the courts and the legislature to work together to further equal protection rights can only forge respect between two co-equal branches—the judiciary and the legislature.

F. *Implications if the Supreme Court Were to Refuse to Grant Special Status to the Disabled*

The Supreme Court will eventually review the issue of which level of scrutiny to apply to governmental action affecting the disabled. If the Court refuses to hold that the disabled are a suspect or quasi-suspect class, the decision would send a message to the nation's courts that persons with disabilities should not receive the same protections as those given to race and gender, despite the ADA. However, the disabled would still have the ADA, a major comprehensive statute designed to assist them, which, given the chance to develop, would provide much needed protection to persons with disabilities.³⁸⁴ Because of its broad reach, the ADA has the potential to cover most areas of discrimination in our society, leaving few gaps where the courts would need to use their own standards of review.³⁸⁵ For

381. See O'Toole, *supra* note 268, at 734 (stating that since *Cleburne*, the Court has not issued a single decision which expands traditional suspect classifications).

382. 42 U.S.C. § 12101(a)(7).

383. See *Cleburne*, 473 U.S. at 466-67 (Marshall, J., joined by Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part); see also *supra* notes 309-18 and accompanying text for a discussion of how the Court changed the scrutiny given to gender discrimination cases after Congress had legislated to outlaw gender discrimination, thereby acknowledging congressional intent.

384. See 42 U.S.C. §§ 12101-12213 (prohibiting discrimination on the basis of disability in employment, public services, public accommodations, and telecommunications to both the states and the private sector).

385. See 42 U.S.C. §§ 12101-12213; see also *supra* notes 158-69 and accompanying text for a discussion of the wide coverage of the ADA.

the most part, courts will be engaging in statutory interpretation when faced with an ADA issue in the future and, thus, will merely be applying the statute to the particular facts of a given case.³⁸⁶ However, when faced with a non-ADA question, (such as a general equal protection claim not falling within the specific provisions of the ADA), the courts will have to engage in their own scrutiny,³⁸⁷ and only then will suspect class status, or lack thereof, become a major issue.

V. Conclusion

The question of whether the disabled will be transformed into a suspect or even a quasi-suspect class, now that Congress has passed the ADA, is a perplexing one based on the split decisions that have emerged on both sides. Although the courts have not had many occasions to address this issue, a few courts have already spoken. Based on these cases, it appears that the courts which are refusing to hold that the disabled are a suspect or quasi-suspect class are not specifically basing their reasoning on the ADA, but rather are following the Supreme Court's lead in *Cleburne*. There, the Court stated in dictum that it refused to go down the path of granting the disabled suspect class status for fear of having to give other classes the same status.³⁸⁸ *Cleburne* was decided in 1985, five years prior to the ADA's passage and, therefore, does not definitively answer the question posed.

Since the enactment of the ADA, the United States Supreme Court has never ruled on this particular issue, denying certiorari in the only case that properly requested review, *Ibarra v. Duc Van Le*.³⁸⁹ Because the Supreme Court has de-

386. See SINGER, *supra* note 29, § 45.01, at 1 ("When an authoritative written text of the law has been adopted, the particular language of the text is always the starting point on any question concerning the application of the law."); see also *supra* notes 28-30 and accompanying text for a discussion of statutory interpretation.

387. See *Cleburne*, 473 U.S. at 439-40 (stating that absent congressional direction, the courts have devised their own standards for reviewing legislation under the Equal Protection Clause—the three-tier approach of equal protection review).

388. *Cleburne*, 473 U.S. at 446-47.

389. 114 S. Ct. 918 (1994); see also *Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993) (refusing to address the issue of whether the disabled constitute a quasi-suspect class based on the failure to raise the issue in any of the lower courts).

nied certiorari in *Duc Van Le*, the question remains unanswered. Each court, whether federal or state, is therefore free to decide the issue as it sees fit. This can only cause further confusion in the nation's courts as they try to harmonize pre-ADA decisions, such as *Cleburne*, and the ADA itself, and come to conclusions as to what type of judicial protection should be given to persons with disabilities. At some point, the Supreme Court will have to resolve the confusion and provide a definitive answer to guide the lower courts.

When the Court finally does review the issue, if it grants persons with disabilities a higher standard of review based on Congress' language in the ADA describing the disabled as a "discrete and insular minority," then Congress, with the help of the Court, will have effectively expanded the rights of persons with disabilities under the Equal Protection Clause within the meaning of the Court's decisions. Quasi-suspect class status would provide the best solution for persons with disabilities, because it would enable the courts to strike down discriminatory legislation based on notions of inequality, while upholding benign legislation based on real and meaningful differences between persons with disabilities and the general population. Heightened scrutiny would give effect to the congressional intent in passing the ADA—to provide clear, strong, and consistent standards addressing discrimination against individuals with disabilities—while allowing the Court, which may be reluctant to deem the disabled a suspect class, to grant some form of special protection to the disabled beyond mere rational review.

Whether or not the Supreme Court decides that Congress has now mandated suspect or quasi-suspect class status to the disabled, the fact remains that the ADA will provide the support of a major comprehensive statute. Ultimately, the decision of whether the disabled will be raised to the level of suspect or quasi-suspect class status will be left to the discretion of the Supreme Court. Until then, persons with disabilities are at the mercy of all lower courts. Hopefully, each new decision will provide some insight into the web of confusion that has resulted from the various courts attempting to decide the issue, and re-

veal what the future holds for people with disabilities in the area of Fourteenth Amendment jurisprudence.

*Lisa A. Montanaro**

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