Hastings Constitutional Law Quarterly

Volume 48
Number 4 *Summer 2021*

Article 4

Summer 2021

Disability Rights and The Louisiana Constitution

Derek Warden

Disability Rights and The Louisiana Constitution

by DEREK WARDEN*

The Louisiana Constitution contains three Equal Protection Clauses. Article I, section 3 prohibits discriminatory laws; but, as an original matter, should prohibit both discriminatory laws and government conduct. Article I, section 12 prohibits discrimination by individuals (government or private) in regard to access to public places. Finally, article I, section 2, the Due Process Clause, also contains an Equal Protection component. Each clause prohibits discrimination on the basis of "physical condition," which contains a general "disability" component. Based upon statements from the Louisiana Constitutional Convention and other modalities of constitutional argument, this article concludes that these clauses—individually and in conjunction—contain prohibitions on the following forms of disability discrimination: disparate treatment, failure to make reasonable accommodations or modifications, disparate impact, and failure to integrate or "unjustified institutionalization." Realizing such components of the State Constitution could have significant and broad impacts—ranging from issues relating to accessible parking tags to the death penalty.

Introduction

The Constitution of Louisiana is an awe-inspiring document. Its provisions often resemble a civil code[1] and the Constitution of the United States. Its Declaration of Rights is the fraternal twin of the federal Bill of Rights and contains many of the same provisions. Nonetheless, the Louisiana Constitution goes further in the protection of individual rights than does the United

* Law Clerk to Associate Justice of the Louisiana Supreme Court, Honorable Piper Griffin. I received my J.D. and D.C.L. from LSU Paul M Hebert Law Center in 2016. I earned an L.L.M. from Tulane Law School in 2020. Currently, I'm an S.J.D. candidate at Tulane Law School. A special thank you is given to Dean David Meyer of Tulane Law School and Professor Margaret S. Thomas of LSU Law. I am very grateful to the staff of *Hastings Constitutional Law Quarterly* for their amazing work on this paper. The views expressed herein are my own.

1. The same can be said of a number of constitutions, including that of the United States. Derek Warden, *Secundum Civilis: The Constitution as an Enlightenment Code,* 8 J. CIV. L. STUD. 586 (2015).

States Constitution. Indeed, the Louisiana Supreme Court has not been shy about recognizing unwritten rights and using a multi-clausal approach to discover such expanded constitutional rights.[2] This power and interpretive method are no longer controversial. In fact, the people of Louisiana have acquiesced to this expansive approach by adopting the somewhat controversial Amendment One, which purports to prevent this method of analysis from being used to discover an unwritten right to abortion.[3] If this method were not legitimate or the discovery of unwritten rights not within the courts' powers, one would be hard pressed to answer why the people felt such an amendment is necessary.

In any event, while the Louisiana Supreme Court has no doubt found unwritten and expansive rights within the confines of the Louisiana Constitution, it has also read several textual provisions more broadly than their counterpart in the federal Constitution. Primary examples of this broad approach are found in our state's Equal Protection Clauses. These clauses contain something not found in the federal Constitution—a sort of heightened protection for people with disabilities.[4] Upon first discovering these clauses, I wrote a short article examining one potential relationship between federal disability rights laws and the Louisiana Constitution.[5] The question that was born by that article was this: how far does this relationship go?

This article seeks to answer that question inasmuch as a single law review article could answer such a question. Using well accepted modalities of constitutional interpretation,[6] I conclude that several aspects of federal disability rights laws are part of the Louisiana Constitution. In short, I conclude that, in respect to persons with disabilities, the Louisiana Constitution now prohibits state and local entities (and to a similar extent private entities) from committing acts of disparate treatment; acts with disparate impacts; failures to make reasonable accommodations, modification, and physical alterations; and contains an integration requirement, which also prohibits

2. *See* State v. Perry, 610 So. 2d 746 (La. 1992).

3. LA. H.R. 447, Reg. Sess. (LA. 2019) (enacted). This added article I § 20.1 to the Louisiana Constitution. Article I § 20.1 states, "nothing in the constitution shall be construed to secure or protect a right to abortion or require the funding of abortion; to provide for submission of the proposed amendment to the electors; and to provide for related matters."

4. *See* Albright v. Southern Trace Country Club of Shreveport, 879 So. 2d 121, 134 (La. 2004).

5. Derek Warden, *Decals and Discrimination: Accessible Parking Tags, the Americans with Disabilities Act, and the Louisiana Constitution,* 11 J. RACE GENDER AND POV. 1 (2020).

6. These are (1) historical, which means looking to history to determine what the framers or ratifiers thought; (2) textual, looking at the text of the document itself; (3) doctrinal, looking for rules from precedents; (4) structural, looking at the structure of the constitution and the structures it sets up; (5) prudential, weighing the costs associated with the right (this will happen when discussing the interests of the state below); and (6) American ethos, which focuses on looking at who we are as a society and what we regularly do. PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991). I note these interpretation tools here to say that they will be used throughout my article, but I will not undertake to identify each one as they arise.

unjustified institutionalization of persons with disabilities.

To set forth this argument, this article will be divided as follows. Part I will discuss the history of disability rights. Part II will then define "disability" for purposes of the Louisiana Constitution. Part III will examine the disparate treatment theory under the Louisiana Constitution. Part IV will examine the disparate impact theory under the Louisiana Constitution. Part V will examine the reasonable accommodations and alterations portion of the Louisiana Constitution. Part VI will examine why the Louisiana Constitution prohibits unjustified institutionalization of persons with disabilities. Finally, Part VII will discuss and respond to various objections to the arguments made in this article.

I. Historical Setting

A. In General

As is often noted, the history of disability rights is filled with terror, torment and tragedy, while simultaneously providing the greatest examples of hope and healing. Justice Thurgood Marshall famously summarized this history of disability discrimination in his *Cleburne* dissent.[7] What is most notable about the history of disability discrimination, as opposed to all others, is that disability discrimination arose most often from neglect, indifference, and disparate impact rather than from ill will or animus.[8]

I begin the discussion of history long ago. In pre-history, our human ancestors often accommodated those with impairments, such as individuals who had fought in wars or were born with serious physical illnesses.[9] This type of compassionate treatment is ingrained in human consciousness, though we have at times ignored it. The ancient Greeks condemned those with physical disabilities to death at infancy,[10] and Aristotle was known to have called for the execution of children with disabilities.[11]

During the Middle Ages, and until the Enlightenment, those with disabilities were treated as being possessed, held positions of power, or even became saints once abandoned by their families.[12] Seeking to provide some

7. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 462 (1985) (Marshall, J., concurring in part and dissenting in part).

8. Derek Warden, *Methods of Administration,* 10 HOUS. L. REV.: OFF RECORD 39, 53 (2020).

9. Andrew Curry, *Ancient Bones Offer Clues to How Long Ago Humans Cared for Vulnerable*, NPR, https://www.npr.org/section/goatsandsoda/2020/06/17/878896481/ancient-bones-offer-clues-to-how-long-ago-humans-cared-for-the-vulnerable (last visited Nov. 12, 2020).

10. John F. Muller, *Disability, Ambivalence, and The Law*, 37 AM. J. L. & MED. 469, 482 (2011).

11. *Id*.

12. Warden, *supra* note 8, at 43.

service for those who needed it, England recognized the royal prerogative, which solidified the right to protect those with impairments in the Crown.[13] This power, however, would soon be used for great evil.

The Monarchy's power *of parens patriae* was transferred to the States of the United States; and with this power, the States began to house individuals with disabilities in massive mental health asylums.[14] These places are too numerous to list in this article, however, suffice it to say that among the worst were: Willowbrook State School, Bridgewater Hospital, and Pennhurst State School.[15] Many patients were killed, abused, or shackled for days or weeks, and developed worse symptoms as a result of their treatment.[16]

A documentary exposing the horrors of Willowbrook led to numerous reforms, including the creation of the Protection and Advocacy Systems.[17] These are non-profits that exist in every state and territory. They exist to protect the legal and civil rights of persons with disabilities. Bridgewater was also the topic of a documentary that was prevented from public release by various courts—including the United States Supreme Court.[18] Pennhurst was the subject of a documentary and a landmark lawsuit. In *Suffer the Little Children*,[19] Pennhurst's tortuous treatment was shown for all the world to see. In two separate *Pennhurst* cases, however, the United States Supreme Court failed to protect those with disabilities from horrific treatment. In *Pennhurst* I, the Supreme Court held that the Bill of Rights provision of the Developmental Disabilities and Bill of Rights Act, which granted a right, *inter alia*, to proper treatment was not enforceable and did not actually create any substantive rights.[20] That Court then remanded the case, directing the lower court to consider whether state law prohibited the type of treatment and abuse the patients at Pennhurst were receiving.[21] When that case,

13. *See* McCord v. Ochiltree, 8 Blackf. 15, 19–21 (Ind. 1846), *overruled on other grounds by* Grimes' Ex'res v. Harmon, 35 Ind. 198 (1871).

14. Derek Warden, *A Worsened Discrimination: How Exacerbation of Disabilities Constitutes Discrimination by Reason of Disability Under Title II of the ADA and § 504 of the Rehabilitation Act*, 46 S. U. L. REV. 14, 21 (2018).

15. *Id*. at 22.

16. *See id*. at 22–29.

17. Derek Warden, *The Americans with Disabilities Act at Thirty*, 11 CAL. L. REV. 308, 310 (2020), https://www.californialawreview.org/americans-with-disabilities-act-thirty/; *see* Kelsey McCowan Heilman, *The Rights of Others: Protection and Advocacy Organizations' Associational Standing to Sue*, 157 U. PA. L. REV. 237, 241 (2008) (discussing history of the Protection and Advocacy Systems).

18. Wiseman v. Massachusetts, 398 U.S. 960 (1970) (Harlan, J., dissenting from denial of cert.) (describing the film as "[portraying] patient-routine and treatment of the inmates [that is a] scathing indictment of the inhumane conditions that prevailed at the time of the film . . ."); TITICUT FOLLIES (Zipporah Films 1967) (documentary about Bridgewater Hospital).

19. SUFFER THE LITTLE CHILDREN (NBC 1968) (documentary about Pennhurst State School).

20. Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981).

21. *Id*. at 31 n. 24 ("On remand following our reversal, the Court of Appeals will be in a position to consider the state-law issues in light of the Pennsylvania's Supreme Court's recent

Pennhurst II, went back to the Supreme Court, the Court held that plaintiffs could not sue state actors for injunctive relief for violations of state law.[22]

Throughout this time, however, much more disability rights work was being done. Various federal laws were enacted to ease some suffering those with disabilities were facing. Chief among these were what is now called the Individuals with Disabilities Education Act[23] and the Rehabilitation Act of 1973—Section 504 of which prohibits discrimination against those with disabilities by entities receiving federal financial assistance.[24] Nonetheless, and for various reasons, these laws failed to adequately address the problems people with disabilities faced.[25] For this reason, Congress enacted (with widespread public support) the Americans with Disabilities Act of 1990 ("ADA" or "Americans with Disabilities Act").[26] Divided into five Titles, the ADA covers virtually all aspects of human life, and each part can be seen as working in unison with the others.[27] The ADA was modeled on the Rehabilitation Act, though the ADA applies to organizations and entities regardless of whether they receive federal financial assistance.[28]

B. The Louisiana Constitution

While the ADA is doubtlessly the most famous disability rights law and ranks among the most famous laws in American history, it is not alone in its efforts to protect those with disabilities. As noted above, we have numerous federal laws, state laws, state policies, and court decisions that have also helped. As this article will show, one such law that also helps is the Louisiana Constitution.

The Louisiana Constitution contains two express Equal Protection Clauses and each one lists various protected characteristics. Article I, section 3 prohibits discriminatory laws; and as such, it is said to apply only to laws—though as originally understood it was meant to apply to both law and conduct.[29] Article I, section 12, on the other hand, applies to those people who

decision.").

22. Pennhurst v. Halderman, 465 U.S. 89 (1984).

23. 20 U.S.C. §1400–82 (West 2019).

24. 29 U.S.C. § 794(a) (1973).

25. Warden, *supra* note 8, at 44–45.

26. *Id*.

27. *Id.* at 45 (discussing the various Titles of the ADA).

28. K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1099 (9th Cir. 2013).

29. "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime." LA. CONST. art. I, § 3. *See* Winn v. New Orleans City, 919 F. Supp. 2d 743, 751 (E.D. La. 2013) (collecting authorities). I note, however, that the original meaning of this clause (at least for "physical condition" discrimination) was for it

discriminate.[30] This provision is said to apply to government as well as private entities (e.g., schools, hospitals, stores, and so forth).[31] These two provisions contain mostly the same language. There is a different level of scrutiny depending on the characteristics. As relevant to this article, the clauses contain a prohibition on discrimination on the basis of "physical condition."[32] That type of discrimination is subject to "intermediate scrutiny;" which means that discrimination on that basis is prohibited unless such discrimination substantially furthers an important interest.[33] Furthermore, the two clauses are interpreted together.[34]

The debates surrounding these clauses were chaotic to say the least. There were two different versions of the "physical condition" discrimination provision in what is now article I section 12. The earlier version prohibited discrimination on the basis of "physical handicap." However, the Constitution eventually adopted the broader version of "physical condition" used in section 3. The substantive protection of the clause did not, however, change. And to the extent that it did change, the broader language necessarily includes the same or more protection than the original version. Therefore, this article will be referring to debates as to both provisions and versions for guidance throughout its pages.

The Constitution of Louisiana has another Equal Protection Clause. The Louisiana Constitution's Due Process Clause is said to have a substantive component.[35] The substantive component is said to include an Equal

to apply to laws or conduct because such was expressly stated and implied by other statements of the framers. Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts volume VI at 1021 (Aug. 29, 1973) [hereinafter Constitutional Convention Transcripts volume VI 38th Day]. At the constitutional convention, Delegate Roy stated that the article I, §3 provision applied to "In layman's language, this section [requires] equal protection of the law . . . [and applies to] state law *or conduct*." *Id.* (emphasis added); Delegate Roy went further and noted that the clause also applied to government employment practices as well. *Id*. at 1017 (stating, "Why should there be a law that prevents a physically handicapped person from working for the state of Louisiana . . . ."). Another discussion on this point came up in a dialogue between Delegates Avant and De Blieux where it was agreed that in order to invoke the protections of article I, §3 against employment practices, the plaintiff would still have to meet what amounts to the essential functions of the employment position. *Id.* at 1019 (noting that a bus driver had to be able to see and an individual must still "be able to do the job."). All these references to employment practices, moreover, make it clear that the framers intended these clauses to apply to the employment context.

30. "In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition." LA. CONST. art. I, § 12.

31. Lee Hargrave, *The Declaration of Rights of The Louisiana Constitution*, 35 LA. L. REV. 1, 37 (1974) (noting the debate around the clause applying to both government and private individuals).

32. *See supra* notes 29 and 30.

33. *Albright*, 879 So. 2d 121 at 134; Pace v. State Through Louisiana State Employees Retirement System, 648 So. 2d 1302, 1305 (La. 1995).

34. *Albright,* 879 So. 2d 121 at 134.

35. LA. CONST. art. I, § 2. Richard P. Bullock, *The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties*, 51 LA. L. REV. 787, 791–

Protection component. This is a carry-over from the previous Louisiana Constitution, which did not contain an Equal Protection Clause;[36] but an equal protection right was found in the Due Process Clause.[37] Because this theory has an equal protection component; and because laws on the same subject matter must be interpreted together, this suggests that the Due Process Clause protects people from "physical condition" discrimination from state conduct under a similar intermediate scrutiny as described above. Indeed, because the Due Process Clause is not limited to "laws" as in the article I, section 3 context nor limited to "access to public areas" as in article I, section 12, it appears that the Due Process Clause applies the general principles and requirements of the other two clauses to a broader array of government conduct. Thus, the debates over article I, section 3 and article I, section 12 will also help illuminate the meaning of the State's Substantive Due Process Equal Protection right insofar as it relates to "physical condition discrimination."

Lastly, the Louisiana Constitution was debated and adopted one year after the adoption of the Rehabilitation Act, in the midst of the rising disability rights movement and the de-institutionalization movement, and it was partially written by "one of the best friends" that the disability rights movement "ever had."[38] After looking at the express statements of the drafters and ratifiers of the Louisiana Constitution it becomes clear that the framers intended, and did, provide people with disabilities (against state and, to a similar extent, private entities) four disability specific rights: the right to be free from disparate treatment, the right to reasonable accommodations and modifications, the right to be free from disparate impact of otherwise neutral acts; and the right to integration, which includes a right to be free from unjustified

92 (1991) (discussing the substantive nature of the State Due Process clause and its expansion over the federal version).

36. James Harvey Domengeaux, *Native-Born Acadians and the Equality Ideal*, 46 LA. L. REV. 1151, 1189 (1986) (discussing the lack of an Equal Protection Clause in the 1921 Constitution).

37. Hargrave, *supra* note 31. Further, I note that my "carry-over" theory of equal protection is not mere theory. The framers of the State Constitution expressly noted they were carrying this Substantive Due Process over. *Id.* at 4 (noting, "What was meant to be continued [was] the current status of the law . . . fundamental fairness."). Indeed, to say that substantive due process does not also contain a general equal protection component would be tantamount to legal heresy. After all, the schools of the District of Columbia were desegregated on a substantive due process equal protection ground. *See* Bolling v. Sharp, 347 U.S. 497 (1954). Recent Louisiana Appellate Court decisions appear to have continued the tradition of finding "equal protection" within "substantive due process." Melerine v. Jefferson Parish Sch. Bd., 210 So. 3d 929, 934 (La. App. 5th Cir. 2017) (citing Estay v. Lafourche Parish Sch. Bd., 230 So.2d 443, 447 (La. App. 1st Cir. 1969)); *see also* Plaquemines Parish Gov't v. River/Road Const. Inc., 828 So. 2d 16, 24 (La. App. 4th Cir. 2002) (noting the relevance of federal due process law which contains a substantive equal protection component in interpreting the state Due Process Clause).

38. Constitutional Convention Transcripts volume VI 38th Day, *supra* note 29, at 1020 (Delegate Rayburn stated, "They've got physically handicapped in here. I'm one of the best friends they've ever had.").

institutionalization.

II. Defining "Disability"

The reason why it is important to define "disability" here is that "disability discrimination" has a much different history than other forms of discrimination including that history based simply on one's current health or other physical attributes.[39] This history is the very reason why the ADA has legal theories that are either not found or cognizable in other laws.[40] Indeed, that history will later play hand-in-hand with the arguments made in this article, because the Louisiana Constitution of 1974 was adopted just one year after the Rehabilitation Act and during the early disability rights movement as well as the de-institutionalization movement.[41]

The term "physical condition" may appear, at face value to be limited to physical disabilities. However, such a limited reading is unjustified. First, Louisiana courts have already noted that the phrase clearly expands to discrimination based on one's "health or handicap,"[42] which would include mental illness as well. Second, the State Constitutional Convention is filled with phrases that suggest the clauses necessarily include mental disabilities as well as physical ones. For example, the clauses were clearly intended (because they expressly said so in the Convention) to also protect returning veterans who are widely known to suffer from both mental and physical disabilities.[43] Moreover, one author of the Equal Protection Clause who advocated for inclusion of a disability rights provision expressly noted that this clause would cover not just physical disabilities, but others as well.[44] Finally, it is well known that many psychiatric and developmental disabilities are

39. Alexander v. Choate, 469 U.S. 287, 295 (1985).

40. Warden, *supra* note 8, at 51–53 (discussing legitimacy and enforceability of methods of administration claims). Moreover, no one would say, for example, that denying someone entrance to a school because they had the flu has the same history as denying someone entrance to a school because they use a wheelchair.

41. *See* Samuel Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 16–17 (2012) (discussing the history of deinstitutionalization).

42. Revere v. Canulette, 715 So. 2d 47, 53 (La. App. 1st Cir. 1998) ("'Physical condition' refers to classifications on the basis of one's health or handicap."). The phrase "health or handicap" indicates that the clause has two separate components—one focused on health and one focused on disability.

43. Constitutional Convention Transcripts volume VI 38th Day, *supra* note 29, at 1021 ("Someone made mention about the handicapped. More than a hundred thousand of our young men are handicapped. Not because it was their desire to leave from home, but because of obedience to this country, go to war they are handicapped . . . they should not be denied a job because of this handicap. They should not be denied access to buildings because of handicapped."). This was said in relation to what is now article I, section 3.

44. *Id.* at 1017. When pressed on the issue, delegate Roy expressly stated, "There's no problem there . . . we have not [allowed such persons to] be denied the equal protection of the laws . . . ." This was said in regard to what is now article I, section 3.

caused by physical malformations in the brain.

Considering that we have shown the clauses protect the whole gamut of "disabilities," it is now useful to determine what "disabilities" are, for purposes of the Louisiana Constitution. There is no specific definition found in the Constitution. Thus, we must look to other sources for inspiration as to its meaning.

History certainly helps to understand what the framers of the Louisiana Constitution meant. During the debates, it was clear that the framers were drawing support from federal law; indeed, one member, when speaking about these Equal Protection Clauses, expressly noted that they were doing what federal statutes already did.[45] Thus, we could take some clues from the then recently (and very publicly) enacted Rehabilitation Act. We could also take notice from other statements made at the Constitutional Convention. In discussing the Constitution as a whole, it was noted that the state courts could draw on a number of sources to deduce the meaning of these clauses, and that these broad provisions could grow over time.[46] Other statements suggest that "disability" can be defined based on limitations of daily functions, or the perception of others.[47] Thus, the Constitution's definition of "disability" would seem to be a practical one, and not simply a legally technical one. As such, the standard definition of disability would seem to be applicable here: "a physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person's ability to engage in certain tasks or actions or participate in typical daily activities and interactions."[48]

Though I recognize the practical nature of the Constitution; I also recognize that it is a legal document filled with legal technicalities. There is, however, a general common legal definition of disability. Indeed, similar definitions of disability have existed in state laws for decades. That definition is

45. Delegate Jackson expressly stated, in regard to article I, section 3, "there have been laws enacted on the federal and state level [on these] classes and categories of people." *Id.* at 1027.

46. Records of the Louisiana Constitutional Convention of 1973: Journal of the Proceedings volume I (July 5, 1973) at 80 [hereinafter Constitutional Convention Transcripts volume I 10th Day] ("And while we are formulating this roadmap, let us not forget that this map is not just for us—it is going to be carefully scrutineer and effectively expanded upon by judges and professors, lawyers and politicians, and scholars . . . If worthy, [the Constitution] will create the legal mechanics whereby people of good will and industry may respond to the ills of society."); Hargrave, *supra* note 31, at 9 ("In the future, evolving standards of society as developed by the courts of the state will have to be taken into account along with those applied in development of federal standards. The background of the provision indicates that a grudging application of the guarantee is not warranted. Rather, an expansive application independent of, and, in some instances, beyond the federal standards is suggested.").

47. Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts volume VI (Aug. 31, 1973) [hereinafter Constitutional Convention Transcripts volume VI 40th Day] at 1089 (statement by delegate Willis suggesting that one does not have a disability based simply on a depreciation in physical condition that no-one could notice).

48. *Disability*, Merriam Webster, https://www.merriam-webster.com/dictionary/disability (last visited November 12, 2020).

now part of the ADA and the Rehabilitation Act. As such, in light of all of this, it seems clear, that the best definition of disability would be the one now used in the Americans with Disabilities Act.

While there are some caveats and exclusions, the general definition of disability under the Americans with Disabilities Act is: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[49] Nonetheless, I admit that the Louisiana courts, in their considered judgement, and with the wisdom of practice, may well see fit to alter such a definition.[50] Furthermore, it may well be easier to prove a disability under the Louisiana Constitution than under the Americans with Disabilities Act because our State Constitution is notorious for being more expansive than its federal counterparts. Such expansion would help fulfill the broad remedial purposes behind adding the "physical condition" provisions into our State Constitution.[51]

I turn now to the words of a Louisiana advocate for those who stutter as an example of "disability" under the Louisiana Constitution, and to suggest that Louisiana courts may take an even broader approach to "disability" in practice. That advocate, James Hayden, has expertly explained the impact disabilities have on individuals—even when those disabilities are not "active." Hayden, in a recent book, discusses his past stuttering. He offers two statements of great importance here. First, he states, "[t]here are some instances when people don't think you can or should give a presentation, be a tour guide, or do anything else that involves public speaking because of the fact that you stutter."[52] Second, Hayden states:

> I didn't participate in class because I was afraid [the stutter] would make an untimely visit. I had to write a script every time I wanted to talk on the phone in case it was a three-way conversation between [the stutter], me, and the person on the other end. I wouldn't order through a drive thru in case [the stutter] ordered something I didn't want.[53]

It would seem, based on the various and powerful statements made by the framers of our Louisiana Constitution, that they would look at Mr. Hayden's statements with legal horror. Thus, while there may be some who would say

49. 42 U.S.C. § 12102(1) (1990).

50. Hargrave, *supra* note 31, at 9.

51. Constitutional Convention Transcripts volume VI 40th Day, *supra* note 47, at 1087 (declaring such language was needed to fully bring people with disabilities into the polity of our state; and such was needed for people with disabilities to "be accepted as full citizens.").

52. JAMES HAYDEN, DEAR WORLD, I STUTTER: A SERIES OF OPEN LETTERS FROM A PERSON WHO STUTTERS 57 (2017).

53. *Id.* at 52.

Hayden's statements do not constitute a disability under the original Rehabilitation Act or the ADA,[54] there can be little doubt that our framers designed a constitution to obliterate the very social stigma that Hayden was addressing.[55]

III. Disparate Treatment

Having defined "physical condition" as including "disability," and having defined "disability" as essentially mirroring the Americans with Disabilities Act in part, it is now appropriate to consider the various theories of discrimination that may apply to the Louisiana Constitution, once it is recognized that these clauses protect individuals with disabilities from discrimination.

The first theory up for discussion is "disparate treatment." In the language of Title II of the ADA (which involves government entities), it is said that "disparate treatment" is the same as "intentional discrimination."[56] However, this is a misnomer. One does not need to prove intent under Title II of the ADA, unless one is seeking damages.[57] It merely refers to treating people with disabilities in a discriminatory manner by reason of their disability.[58]

While admitting that the ADA would allow non-intentional disparate treatment claims, I do not believe it is possible at this juncture to say that the Louisiana Constitution does.[59] Moreover, because of what is said below, there is no practical reason to discuss the esoteric theory as to why disparate treatment need not be intentional for purposes of the Louisiana Constitution.[60]

As the doctrine currently stands, the Louisiana Constitution prohibits discrimination against those with disabilities unless the attorney defending the law or the person so discriminating can show that the law or act "substantially furthers an important interest."[61] One must show discriminatory

54. Medvic v. Compass Sign Co., LLC, Civ. No. 10-5222, 2011 WL 3513499, at *5 (E.D. Penn. Aug. 10, 2011) (noting disagreement on the issue of stuttering as a disability).

55. The anti-stigma idea is reflected in several portions of the Constitutional Convention. Constitutional Convention Transcripts volume VI 38th Day, *supra* note 29, at 1020 (Delegate Rayburn criticizing what some judges thought about people with some physical impairments); Constitutional Convention Transcripts volume VI 40th Day, *supra* note 47, at 1087 (statement by Delegate Bergeron condemning law firm for not hiring man, simply because he had a disability).

56. Derek Warden, *A Helping Hand: Examining the Relationship Between (1) Title II of the ADA's Abrogation of Sovereign Immunity Cases and (2) the Doctrine of Qualified Immunity in §1983 and Bivens Cases to Expand and Strengthen Sources of "Clearly Established Law" in Civil Rights Actions*, 29 GEO. MASON U. CIV. RIGHTS. L.J. 43, 65 (2018).

57. *Id.*

58. *Id.*

59. That is not to say such could never be proven under the Louisiana Constitution.

60. This is so because the State Constitution, as will be shown below, prohibits disparate impact of otherwise neutral laws. The Constitution also prohibits other forms of discrimination.

61. *Albright*, 879 So. 2d at 134.

intent under the current disparate treatment disability doctrine.[62] That intent can be shown in a number of ways. One such way is by showing that the law is facially discriminatory.[63] One example can be seen in the way Louisiana charges fees for accessible parking tags. The fees associated with these tags necessarily only apply to those with disabilities/physical impairments.[64] Moreover, it would seem unlikely that the state could show that these substantially further an important government interest. An argument could be made that the tags allow for the raising of revenue or covering costs of printing the tags. However, it is known that such interests are not "important" in the parlance of constitutional law, they are merely "legitimate"[65] and legitimate is not enough.

IV. Accommodation and Modification

A. Accommodation Requirements Generally

Leaving the standard form of discrimination behind, I come now to the accommodation and modification theory of discrimination protected under the Louisiana Constitution. Under federal, and many state, laws the concepts of "accommodation" and "modification" are actually one and the same.[66] Thus, it is said that while Title II of the Americans with Disabilities Act only contains a "modification requirement" and not an "accommodation requirement," the two actually mean the same thing.[67] As such, whether one is requesting a modification in a policy or procedure to accommodate their disability or asking for some structural alteration, the two are for the most part the same theory.

Moreover, at the federal level, the accommodation and modification provisions are limited by reasonableness rules. For example, it is said that the plaintiffs are entitled to only "reasonable accommodations;"[68] there are several exceptions to the modification and accommodation requirement that to many would seem to be perfectly *reasonable*. Indeed, even in the architectural requirements mandated as modifications, there are exceptions such as

62. Washington v. Davis, 426 U.S. 229 (1976); State v. Baxley, 656 So. 2d 973, 978 (La. 1995). The framers clearly intended this type of conduct to remain condemnable. *See* Constitutional Convention Transcripts volume VI 40th Day, *supra* note 47, at 1087 (statement by Delegate Bergeron discussing outright denial of employment opportunity).

63. *See* Warden, *supra* note 5.

64. Dare v. Cal., 191 F.3d 1167 (9th Cir. 1999).

65. Klinger v. Dir., Dep't of Revenue, State of Mo., 455 F.3d 888, 894 (8th Cir. 2006).

66. *See* Warden, *supra* note 56, at 61.

67. *See* Warden, *supra* note 56, at 61. For the principle that physical construction requirement constitutes "accommodations." *See* 42 U.S.C. § 12111(9) (noting that "reasonable accommodation" includes "making existing facilities used by employees readily accessible to and usable by individuals with disabilities").

68. *See* Warden, *supra* note 56, at 61.

where changes would work a fundamental alteration to the service, program, or activity;[69] to protect the historic nature of the building;[70] and where there is an impossibility of making certain places accessible due to the physical terrain.[71]

B. Accommodation Theory Under the Louisiana Constitution

The question this part seeks to answer then is this: is there an accommodation and modification component to the Louisiana Constitution's disability rights clauses? The answer is yes. There are numerous reasons why there is an unwritten right to accommodations and modifications in the Louisiana Constitution. For example, the state constitutional provisions on point prohibit discrimination by reason of a disability. It is now widely understood that discrimination that would not have been suffered without a disability is discrimination by reason of disability, especially when discussing public entities.[72] Thus, denying access due to physical inaccessibility is discrimination *by reason* of disability.

Moreover, American history and constant jurisprudence have shown that, without a reasonable accommodation or modification provision, any prohibition on discrimination against those with disabilities would be rendered a vain and idle enactment.[73] Considering that we are to construe laws as having an effect, this suggests that we must construe our state disability provisions as containing an accommodation and modification component.

This last point brings up another fact. As noted above, our State Constitution's framers intended for the document's rights provisions to help create justice and to cure various social injustices. That the entire country now recognizes accommodation and modifications are needed to cure the injustice and stigma faced by those with disabilities, such also suggests that accommodations and modifications are a part of the state disability rights provisions.[74]

Furthermore, there can be no doubt that the framers of our State Constitution believed that there should be an accommodation requirement. This is so because the drafters, when debating the disability rights provisions,

69. 28 C.F.R. § 35.150 (a)(3) (2012).

70. 28 C.F.R. § 35.150 (a)(2).

71. 28 C.F.R. § 35.151 (a)(2) (2011).

72. Derek Warden, *Ex Tenebris Lux: Buck v. Bell and the Americans with Disabilities Act*, 51 UNIVERSITY TOL. L. REV. 57, 68 (2019).

73. Bd. of Trs. of the Univ. of Ala. v. Garrett*,* 531 U.S. 356, 360–61 (2000) (noting the prohibition on discrimination in government employment cases, and that "to this end" the act requires reasonable accommodations, which may include making physical facilities accessible).

74. Indeed, there are laws similar to the ADA in every state of the Union. Brief for Petitioners at 49, Bd. of Trs. of the Univ. of Ala. v. Garrett*,* 531 U.S. 356, 360–61 (2000) (No. 99-1240), (listing such policies or laws in every state).

expressly noted that they would require alterations and accommodations.[75] The framers also indicated their desire to include an accommodation requirement because they said that the law would do what was being done with

75. Some delegates opposed the clauses because they would require such alterations; others supported the additions because they would require reasonable accommodations. In any event, it is clear from discussion as to the "physical condition" provisions and early versions thereof that the framers intended there to be a reasonable accommodation and modification theory in the Constitution of Louisiana. For the sake of clarity, those statements made on the 38th day of proceedings relate to § 3 and those made on the 40th day of proceedings relate to what is now§ 12. I list those statements here:

- Persons with disabilities "should not be denied access to buildings because of handicap." Constitutional Convention Transcripts volume VI 38th Day, *supra* note 29, at 1021.
- Persons with disabilities should have "adequate accesses and exits" and that these modifications should be reasonable without "substantial costs" and noting the right to physical access to "theatres, hotels, and restaurants." Constitutional Convention Transcripts volume VI 40th Day, *supra* note 47, at 1087.
- Requirements for alterations would apply to "new constructions going up." *Id.* at 1090. That this same conversation noted that the provisions would not change every building or alter the building code is of no moment. First, under my theory here, not every accommodation or alteration one seeks is required. Second, it is standard knowledge that neither the ADA nor the Rehabilitation Act are "building codes" either. Thus, the provisions under discussion here are not, in and of themselves, building codes.
- If people with disabilities are still able to "do the job" it is apparent that the delegates still wanted them to be accommodated otherwise such discrimination would be "unreasonable." Constitutional Convention Transcripts volume VI 38th Day, *supra* note 29, at 1019.
- "[W]hen it comes to the physically handicapped . . . that is done by an act of Congress . . . [the amendment may] require certain people to make certain accommodations for the physically handicapped…and now we are talking about a constitution for all the people, now, that requires that we must have a ramp . . ." Constitutional Convention Transcripts volume VI 40th Day, *supra* note 47, at 1087.
- Delegate Bergeron stated in regard to what is now article I, section 12:

> O.K. Well . . . we've just explained that that takes care of the employment section. Now let's get on to the public accommodations. Do you not feel that some of the larger industries such as theaters, such as restaurants, who have changed all over the country, why are they in business? They are in business to accommodate the public, are they not? That's why they are in business. Why should the physically handicapped be excluded form that category as the public? . . .
>
> I stress to you the point that the handicapped of our state want to become active citizens of our state. They want to play an equal role as tax paying, job working citizens. Just give them a chance . . . give them a chance to go to the places where we want to go . . . give them a chance to go to restaurants, to go to theatres, to go to hotels. I talked to one boy not long ago, and many of you might agree on this problem, he couldn't use the dressing room for eight hours. He couldn't get his wheelchair in the dressing room stall. I say that's a problem.

Constitutional Convention Transcripts volume VI 38th Day, *supra* note 29, at 1089.

federal law at the time.[76] Federal law at the time, namely the Rehabilitation Act of 1973 (passed right before the Louisiana Constitution), contains an accommodation requirement.[77]

Even though the Louisiana Constitution does require accommodations and modifications, the discussion does not end there. Assuming that a plaintiff has shown they need an accommodation or modification, one would be forced to ask what arguments the State or other entities could offer in their defense against claims of failure to accommodate. The answer to this question is simple. The defendant, just as in standard Louisiana equal protection law, could show that the failure to provide the accommodation or modification substantially furthered an important interest. Such defenses could be that the accommodation sought would undermine the entire state program, that the modification would destroy the historic nature of the public or private building, or that the modification would be impossible or put other people's lives at risk.

As one could tell, these defenses would go hand in hand with the standard ADA requirement that the accommodation must be *reasonable*. Thus, the accommodation or modification requirements of our state's disability rights constitutional provisions are truly just a "reasonable accommodation and modification" provision. Such a notion reflects numerous facts about our jurisprudential and cultural history. First, at the Louisiana Constitutional Convention, the framers discussed the accommodation requirement in terms of reasonableness. For example, they said that provisions do not apply to bus drivers who have no vision.[78] They also said that any alteration requirements for physical structures would apply *going forward*.[79] Furthermore, as

76. Delegate Jackson expressly stated, in regard to Article I, section 3, "there have been laws enacted on the *federal* and state level [on these] classes and categories of people." Constitutional Convention Transcripts volume VI 38th Day, *supra* note 29, at 1027. Moreover, when first considering what is now article I, section 12, Delegate Soniat spoke in in support of the measure and literally stated, "[f]ederal law, at the time, prohibits discrimination . . . Since this is the federal law already . . . we want to bring our constitution up-to-date and our state up-to-date . . . This will make us in keeping with present law." Further still, Delegate Jackson also stated:

> when it comes to the physically handicapped . . . that is done by an act of Congress . . . [the amendment may] require certain people to make certain accommodations for the physically handicapped…and now we are talking about a constitution for all the people, now, that requires that we must have a ramp . . .

Constitutional Convention Transcripts volume VI 40th Day, *supra* note 47, at 1087.

77. Mark H. v. Hamamoto, 620 F.3d 1090, 1097 (9th Cir. 2010).

78. Constitutional Convention Transcripts volume VI 38th Day, *supra* note 29, at 1019.

79. Constitutional Convention Transcripts volume VI 40th Day, *supra* note 47, at 1090 (noting that requirements for alterations would apply to "new constructions going up"). Of course, those entities that are not bound by the physical construction principles I discuss herein, due to their age, may still be required to offer other reasonable accommodations in policies and practices, and must avoid acts of disparate treatment or acts with disparate impacts on those with disabilities.

noted above, the Rehabilitation Act of 1973 also only required reasonable modifications. Moreover, numerous states have statutes on point that require only "reasonable modification."[80] Potentially useful sources of reasonableness are the Attorney General regulations implementing the ADA and the various statements made by that office. The various regulations on the ADA and the Rehabilitation Act are very well researched and are generally controlling in most situations under federal law.[81] Louisiana Courts could always look to those regulations and the statements made by the Attorney General for guidance as to what constitutes reasonable modifications and accommodations. Finally, I note here that it would not be at all unusual for Louisiana courts to look to federal regulations for guidance as to what is reasonable for two reasons: (1) our courts have already looked to federal civil rights laws for guidance on the clauses at issue here[82] and (2) states, including Louisiana, already incorporate these regulations to a large extent in various statutes.[83]

One question I received when writing this paper was how the reasonable modification rule would apply to statutes or legal doctrines. The answer is simple. Assume that a Louisiana law or doctrine or a combination of laws and doctrines were to exclude one class (or classes) of persons with disabilities from legal remedies (as shown below in Part VII, however, disability

80. *Bd. of Trs. of the Univ. of Ala.,* 531 U.S. at 368 (2000) (noting that numerous states have adopted laws similar to the ADA).

81. *See* Warden*, supra* note 8 at 50–51.

82. *Albright,* 879 So. 2d at 132–33 (relying on authorities under federal law to interpret provisions of the state constitution).

83. LA. REV. STAT. § 49:148.1. Interestingly enough, Louisiana's statutory requirement for state owned buildings is older than the State Constitution for government buildings. LA. REV. STAT. § 49:148 (requiring accessible features after July 27, 1966). Another provision enacted in 1966 also specifically states that all political subdivisions and private entities were urged to comply with the same specifications. LA. REV. STAT. § 49:148.3.

Louisiana law specifically incorporates the ADA standards for accessibility by stating all standards "shall be complied with." LA. REV. STAT. § 40:1733. This provision relates specifically to Access to Governmental and Public Facilities for which the Community may gain access. Thus, it appears that all private buildings must be in compliance with the ADA's design standards even if they were not necessarily required to comply with those under the ADA originally. *See* Burns v. CLK Investments V, L.L.C., 45 So. 3d 1152, 1155 (La. App. 4th Cir. 2010) (noting Louisiana adopted ADA designs wholesale into its building code).

In regard to places of public accommodation generally, another provision of Louisiana Law specially prohibits discrimination on the basis of disability and refers to a definition of "disability" remarkably similar to that found in the ADA. LA. REV. STAT. §51: 2247 (referring to LA. REV. STAT. 51:2232). However, I note that the provisions of the Louisiana Constitution are not expressly limited to the same extent as in legislation. The Louisiana Constitution's clauses could still apply to those entities not covered by the positive legislation (e.g., private religious entities). At that point, the courts should still consider what is "reasonable." What is reasonable, depending on the circumstances, may still be what the ADA requires. In any event, those entities that receive federal financial support are still bound by the Rehabilitation Act. In that case, it would be perfectly reasonable to interpret the requirements of the Rehabilitation Act and the Louisiana Constitution as being the same.

claims can arise even without a comparator class, such as in intra-class discrimination cases, or in situations regardless of how anyone else is treated), but allow other types of physical conditions or disabilities to have some legal recourse. In that instance, a reasonable modification claim would require a court to allow a plaintiff to make their claims regardless of what the statute or doctrine says. Take for example a tort claim that says only people who see an accident can make a claim for emotional distress. An individual who is blind can still hear the accident and suffer the same type of emotional damages. As such, the reasonable modification rule would require—as a constitutional matter—that courts allow the blind individual a reasonable modification to the doctrine and allow him to make a claim just like those with sight.

V. Disparate Impact

I come now to the theory of disparate impact. Under federal ADA law, plaintiffs are able to make a claim that an otherwise neutral policy or practice has had a disparate impact on them regardless of the intent behind the law.[84] This type of claim generally requires the showing of a statistically significate impact.[85] However, under Title II of the ADA, plaintiffs have yet another option—the methods of administration provision.[86] This provision effectively prohibits matters that have a disparate impact on persons with disabilities regardless of any percentage requirement.[87] Because this latter provision is of relatively recent vintage, I do not undertake to argue here that it is part of the Louisiana Constitution.[88] However, I will argue that our state has a disparate impact claim for disability discrimination generally.

All three disability discrimination provisions of the State Constitution could be said to have a disparate impact component. Recall that article I, section 3 applies to laws that discriminate and originally (in relation to those with disabilities at least) was meant to apply to all government conduct as well as laws. Article I, section 12 applies to those who would discriminate in access to public places. Finally, the Louisiana Due Process Clause contains its own disability discrimination provision to fill in any gaps that are left or to simply double up on the protection of the others.

With that general understanding in mind, I turn now to show why the Louisiana Constitution contains a simple disparate impact claim. First, the clauses themselves speak to equal protection, and by its terms does not

84. Am. with Disab. Pract. & Compl. Man. § 2:199.

85. *Id.*

86. *See e.g.,* Warden, *supra* note 8.

87. *Id.* at 55.

88. Of course, I do not believe that, at this juncture, it is appropriate to say that such theory could never apply under the Louisiana Constitution.

exclude a disparate impact claim.

Second, at the time of the framing of our Louisiana Constitution, many believed that the federal Equal Protection Clause contained a disparate impact component.[89]

Third, many statements from the framing already mentioned above, and more, discuss forms of disability discrimination that are now widely regarded as having "the indicia of disparate impact."[90]

Fourth, it is now beyond dispute that the framers of our Louisiana Constitution looked to the Rehabilitation Act and other federal laws for inspiration for the Louisiana Constitution. Thus, because the Rehabilitation Act has long been believed to contain a disparate impact theory, so too should the Louisiana Constitution.[91]

Relatedly, unlike virtually all other forms of discrimination, disability discrimination has resulted most often not from animus or ill will, but from indifference, neglect, apathy, and the disparate impact of otherwise neutral laws. This type of widespread discrimination against people with disabilities is now "clear beyond peradventure."[92] This was widely understood in regards to the Rehabilitation Act (indeed, it was part of Congress's explicit understanding as well as the Supreme Court's).[93] Considering that the framers of our Louisiana Constitution wished to rid persons with disabilities of the stigma and discrimination associated with their conditions,[94] and further considering that the hallmark of disability discrimination and stigma is disparate impact—it appears only logical that the framers of our Louisiana Constitution intended to, and by the words they wrote did, provide persons with disabilities a straight forward disparate impact theory of discrimination.

Finding that persons with disabilities have a disparate impact claim is not far outside the norm. Many state laws and, of course, federal laws allow such theories.[95] Such a theory is also not too far outside what is already done at the federal constitutional level and Louisiana constitutional level. Both

89. The Supreme Court of the United States would not conclusively answer that Equal Protection requires intent until years after the adoption of the Louisiana Constitution. *Washington*, 426 U.S. at 229.

90. *Cf. supra* note 77 (discussing types of accommodations and modifications) *with* Nunes v. Mass. Dep't of Correction, 766 F.3d 136, 145 (1st Cir. 2014) (noting such claims have the indicia of disparate impact claims).

91. Am. with Disab. Pract. & Compl. Man. § 1:266. That one court has held there is no disparate impact claim under the Rehabilitation Act is of no moment here. The point is that most people believed that there was such a claim that influenced the thoughts of those who framed the Louisiana Constitution.

92. Tenn. v. Lane, 541 U.S. 509, 529 (2004).

93. *Alexander*, 469 U.S. at 295.

94. *See* Constitutional Convention Transcripts volume VI 38th Day, *supra* note 29, at 1020; *see also* Constitutional Convention Transcripts volume VI 40th Day, *supra* note 47, at 1087.

95. *Nunes*, 766 F.3d at 145.

allow disparate impact to be evidence of intent.[96] Thus, where there is enough disparate impact, they would allow claims of intentional discrimination.[97] Moreover, the history of disability discrimination demonstrates why persons with disabilities should have a straightforward "disparate impact" claim, even while others do not, i.e., disability discrimination most often resulted from neglect, apathy, and the disparate impacts of otherwise neutral actions and laws. That history is the express reason why disparate impact type regulations have been upheld in the ADA context.[98]

The next question to be considered is how large of a disparity there must be for a plaintiff to make a claim that an otherwise neutral law, policy, or practice, has had a disparate impact on them. Unfortunately, even under well-established federal law, there is no clear answer, and the disparity may well change depending on the circumstance.[99] Thus, the same can be said of our Louisiana Constitution. There is no clear disparity that must be ascertained, and reasoned judgment must guide the courts in making their decisions. Of course, in situations where the harm falls on a group of individuals, one hundred percent of whom have disabilities, there could be little doubt that there has been a disparate impact.

As in discussing the reasonable modifications rule above, finding that there is a disparate impact claim that persons with disabilities can assert begets another question: what defenses could the state raise when confronted with such claims? The answer is rather straightforward. Under the Louisiana Constitution, discrimination against persons with disabilities is allowed where the discrimination substantially furthers an important government interest. This seems to track the standard defense asserted in federal disparate impact claims which holds that, "if a plaintiff makes a prima facie showing of a disparate impact, the burden shifts to the defendant to prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect."[100] But because the Louisiana Constitution uses intermediate scrutiny for its disability rights provisions, the discrimination must substantially further an important interest, not simply a legitimate and bona fide one.

One potential area where disparate impact on the basis of disability could come into play is in the death penalty arena. As evident from above, the claim could arise from article I, section 3 (applicable to laws or, as originally understood, to conduct as well) or article I, section 2's Due Process Clause

96. *Washington*, 426 U.S. at 241–42; *Baxley*, 656 So. 2d at 978.

97. *Id.*

98. *See generally* Warden, supra note 8 (discussing the Methods of Administration regulation under the ADA being valid to do disparate impact type of history of disability discrimination), and *see Alexander*, 469 U.S. at 295 (noting the history of neglect, apathy, and indifference associated with disability discrimination).

99. Jones v. City of Boston, 752 F.3d 38, 51 (1st Cir. 2014).

100. Am. with Disab. Pract. & Compl. Man. § 2:199.

(applicable to government conduct as a whole). The act of execution would be the neutral policy or practice. Virtually everyone on death row in Louisiana has a disability.[101] In other words, as described above, one hundred percent of those potentially suffering the harm of execution have a disability, while, in the general population, only about twelve percent of the population have disabilities.[102] Therefore, the current policy or practice of execution—if carried out—could potentially be said to have an unconstitutional disparate impact on those with disabilities.

Assuming the death penalty context would be subject to a disparate impact claim, the state would still be able to show that the act of execution substantially furthers an important government interest. Without the benefit of an evidentiary hearing, or being involved in any specific litigation, it is difficult to determine if the state has an important interest here, or if it has only a legitimate interest. However, in the context of disability discrimination, it is unlikely the state has a sufficiently important interest to justify the discrimination here. For example, the state could argue that execution would substantially further its interest in carrying out sentences. However, such an argument would lead to absurdity. If carrying out sentences were an important enough interest to discriminate against those with disabilities, then it would be important enough for the state to criminalize having a disability. Thus, the state could go so far as to argue that its interest would be furthered by convicting people with disabilities and incarcerating them. Because interpretations that lead to absurdity must be avoided,[103] the ability of the state to assert carrying out of sentences as an important interest here must also be denied. Neither can the state argue that the disparate impact caused by execution furthers its interest in separating these inmates from the general population. Denying the state the right of execution says nothing about whether they can segregate death penalty inmates. It means only that, until such time as the disparate impact has passed, the state cannot carry out executions.[104]

VI. Integration and Unjustified Institutionalization

Finally, I come to the issue of institutionalization and integration.[105] In

101. Warden, *supra* note 17.

102. Kristen Bialik, *7 Facts about Americans with Disabilities*, PEW RES. CTR, https://www.pewresearch.org/fact-tank/2017/07/27/7-facts-about-americans-with-disabilities/ (last visited Nov. 14, 2020).

103. La. Civ. Code 9.

104. In the disparate impact situation as described above, it would remain to be seen how long the State would have to wait to again try to execute someone. It would seem absurd and a burden on judicial resources if the State could return every week declaring that there is no longer a disparate impact in its death penalty practices.

105. Integration is the flip side of institutionalization. In other words, the integration mandate is used to justify the prohibition on unjustified institutionalization. Olmstead v. L.C. ex rel.

the history of disability discrimination, there is no act of government more grotesque than the acts that occurred as a result of mass institutionalization in either mental health asylums or other institutions.[106] It is a shame upon our nation that the people who suffered torturous and heinous conditions in these places were sent there for help, but received only pain instead.[107] Because of societal neglect, indifference, and the disparate impact of polices tolerated by the general public, they were subject to malnourishment, beatings, sexual assault, and death.[108]

This last fact brings us to the first justification as to why the Louisiana Constitution's provisions regarding disability discrimination must include a provision that prohibits institutionalization. That our framers were seeking to rid us of the stigma and injustice that so prolifically surrounded disability discrimination and disabilities as such, almost necessarily means they meant to do *something* about the horrors of mass institutionalization. Indeed, they made comments about the right to participate as full citizens, which suggest a right to community existence should be found within the Constitution.[109] To be clear, the framers of the Louisiana Constitution were no doubt aware of what had happened in mental health asylums at the time. The entire country was aware, and that is why beginning around the time of the Louisiana Constitution, the de-institutionalization movement was reaching a fever pitch.[110] Furthermore, the Rehabilitation Act of 1973, passed just before the Louisiana Constitution, contains a provision that was often thought to prohibit unjustified institutionalization as being a form of disability discrimination.[111] As such, our framers, looking to federal law to achieve what the anti-discrimination provision of the Act did, strongly suggests that they intended, and by their words did, provide some form of prohibition on institutionalization and segregation.

The second justification for finding that the State Constitution's anti-disability discrimination provisions contain a prohibition on institutionalization comes from the simple fact that, as Justice Ginsburg noted in her now canonical *Olmstead v. L.C.* opinion, often institutionalization is a form of

Zimring, 527 U.S. 581 (1999).

106. Warden, *supra* note 14, at 21–29.

107. *Id.* at 22.

108. *Id.* at 21–29.

109. This is most evident from the reference to full citizenship. Full citizenship is logically impossible where someone is unjustifiably institutionalized. Constitutional Convention Transcripts volume VI 40th Day, *supra* note 47, at 1087.

110. *See* Bagenstos, *supra* note 41, at 7 ("[F]rom the early 1970s until the 1990s, the deinstitutionalization movement centered around two major campaigns: the campaign to close large state mental hospitals, and the campaign to close large state facilities housing people with intellectual and developmental disabilities.").

111. *See Olmstead*, 527 U.S. at 600 (noting use of the Rehabilitation Act but noting its mixed successes as well). It is now settled that the Rehabilitation Act does contain such a community-based setting and integration requirement. Am.with Disab.: Pract. & Compl. Man.§ 1:80.

dissimilar or disparate treatment. As she so aptly wrote:

> Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.[112]

Of course, this rule focuses on the treatment disparity between those with some disability and those without either that disability or any disability at all. However, it is now widely understood that disability discrimination can occur even without a comparator class.[113] Put another way, some forms of discrimination (institutionalization specifically) can occur regardless of how anyone else is treated.[114]

Finally, understanding that our State Constitution was intended to draw on other sources of law for its interpretation;[115] and understanding that the wisdom of other courts and legislatures can help us interpret what "equal protection" means for purposes of disability discrimination under the Louisiana Constitution,[116] I note that *every* single state has either a policy or law favoring de-institutionalization or integration of persons with disabilities.[117]

Thus, for the reasons set forth above, our Louisiana Constitution prohibits institutionalization and favors integration under its three Equal Protection Clauses in this way. First, article I, section 3 prohibits laws (and as originally understood government action) that would deny integration of persons with disabilities or cause institutionalization. Second, article I, section 12 prohibits government actors and private business from failing to integrate persons with disabilities in places of public access (and thus may require, in appropriate circumstances, community placement by the state in order for there to ever be a chance of access to these places). Finally, article I, section 2's Due Process Clause would likewise prohibit the government from

112. *Olmstead*, 527 U.S. at 601.

113. Amundson ex rel. Amundson v. Wis. Dep't of Health Serv., 721 F. 3d 871, 874 (7th Cir. 2013) (overruling prior precedent, acknowledging there is no longer any need to show a comparison to others outside the protected class, recognizing the *Olmstead* rule that "undue institutionalization of disabled persons" constitutes discrimination "no matter how anyone else is treated," and recognizing that other circuits had done the same) (citing *Olmstead*, 527 U.S. at 597–603).

114. *Amundson ex rel. Amundson*, 721 F. 3d at 874.

115. Constitutional Convention Transcripts volume I 10th Day, *supra* note 46, at 80.

116. The Louisiana Supreme Court has already done so in other contexts, in fact. State v. Perry, 610 So. 2d 746, 756 (La. 1992).

117. Brief for Petitioners at 49 1a, Appendix A, Bd. of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) (listing such policies or laws in every state).

institutionalizing persons with disabilities.[118]

Accepting that our State Constitution contains a prohibition on institutionalization of persons with disabilities, it remains to be seen what limits exist on that rule. In other words, while there is a right to community treatment under the Louisiana Constitution, one must still ask what limits are placed on that right. As noted above, the limit is simple: the right can be denied if to do so substantially furthers an important government interest. While one could philosophize to infinity about what is or is not an important government interest, the United States Supreme Court has already handed us a very good guide as to what important government interests may be at issue here. To this, Justice Ginsburg wrote that community placement (i.e., deinstitutionalization) is appropriate:

> . . . when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[119]

The need for expert decision-making substantially furthers the State's interest in insuring that persons with disabilities receive appropriate care. The requirement that the transfer is not opposed by the affected individual substantially furthers the important interest in protecting the wishes and decision making of individuals. The "reasonably accommodated" requirement that takes into account the resources of the state and the needs of others substantially furthers the important interest in maintaining adequate and appropriate services for others with disabilities. Therefore, the Louisiana Constitution's prohibition on institutionalization is more aptly called a prohibition on *unjustified* institutionalization.

VII. Responses to Objections

This part considers certain ancillary issues that arose during the research and writing of this article. Special gratitude is given here to Dean Meyer of Tulane Law School who proposed a number of these issues to me during our discussions regarding this article.

118. Substantive Due Process may, apart from its equal protection component, prohibit unjustified institutionalization as well. For a discussion on State Constitutional rights to integration, *see* Anthony B. Klapper, *Finding a Right in State Constitutions for Community Treatment of the Mentally Ill*, 142 U. PA. L. REV. 739 (1993).

119. *Olmstead*, 527 U.S. at 587.

First, as shown above, the idea that the Constitution of Louisiana contains these various theories of disability discrimination appears to be quite clear. The question this prompts is why the framers of the Louisiana Constitution did not expressly say that these theories were part of the Constitution and not leave their discovery to future generations. The response to this objection is that, in writing the Constitution, the framers wanted to keep it as short as possible and wanted the courts, scholars, and lawyers to help develop its content through argument and research. This last point is not mere conjecture or an observation that I think should be made—the framers of our Louisiana Constitution expressly said as such themselves.[120]

A second objection to my theory is that these rights I discuss appear to be unwritten. If they are unwritten, what clause should be said to protect them, or what cause of action is there for these rights to be enforced? The answer to this objection is that these are not unwritten rights in the traditional sense. Rather, they are simply reasonable constructions of the state's various Equal Protection Clauses. Thus, these rights are enforceable just as those other clauses are. Second, rights of the Louisiana Constitution are said to be self-executing.[121] Thus, there would be no need for additional legislation for the theories of this article to be enforced. Third, it may be argued as an interpretive matter that our article I, section 24, which resembles the federal Ninth Amendment, ought to be construed as a cause of action in the event that the above rights require an independent cause of action.[122] Fourth and finally, like all constitutional rights, these rights can be asserted as a defense in criminal or civil proceedings.

Another objection was that it seems odd that persons with disabilities should have these various extra theories of discrimination, even though the clauses of the Constitution that contain the "physical condition" or "disability" classification are the same ones that contain the various other protected classifications.[123] There are two answers to this objection. First, the very nature and history of disability discrimination means that it is perfectly reasonable that those with disabilities should have these additional theories of

120. Constitutional Convention Transcripts volume I 10th Day, *supra* note 46, at 80.

121. John Devlin, *Louisiana Constitutional Law*, 54 LA. L. REV. 683, 730–31 (1994).

122. That clause states, "The enumeration in this constitution of certain rights shall not deny or disparage other rights retained by the individual citizens of the state." U.S. CONST. AMEND. IX. *See e.g.*, Derek Warden, *The Ninth Cause: Using the Ninth Amendment as a Cause of Action to Cure Incongruences in Current Civil Rights Litigation*, 64 WAYNE L. REV. 403 (2018). Another potential area for a "cause of action" similar to the Ninth Amendment argument I have made elsewhere is from article I, section 22 of the Louisiana Constitution, which reads like its own cause of action in part: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights." LA. CONST. art. I, § 22. Though Louisiana courts have tended to foreclose that path. Sons v. Inland, Marine Service, Inc., 577 So. 2d 225, 230 (La. App. 1st Cir. 1991).

123. *See supra* notes 29 and 30 (listing the characteristics protected by these clauses).

protection and the others do not. For example, persons with disabilities often require accommodations to truly enjoy equality within society; whereas an accommodation to someone's race is not necessarily needed for individuals to enjoy equality. Second, the framers of the Louisiana Constitution were well aware of other federal laws that prohibited discrimination on the basis of various characteristics. One primary example of such laws is Title VII, which prohibits discrimination on the basis of numerous characteristics. Some classifications under Title VII have theories and rights not found in the others.[124]

A fourth objection was lodged against my article as follows: the Constitution prohibits discrimination on the basis of "physical condition;" thus, by saying that persons with disabilities have these various other rights protections, are we not thereby discriminating on the basis of "physical condition?" In other words, those with physical impairments have these rights discussed above, while those without impairments do not. There are two answers to this objection. First, physical condition discrimination is allowed where such substantially furthers an important government interest. Allowing individuals with disabilities to have these theories at their disposal would no doubt substantially further the government's compelling and overriding interest in curing the harm that years of discrimination that persons with disabilities faced throughout history and would also substantially further the compelling or overriding interest in protecting those with disabilities from the social stigma associated with their conditions.[125] Second, Constitutions can have two seemingly contradictory parts.[126] Here, while true there is a general prohibition on physical condition discrimination, the Constitution also has these specific rights for those with disabilities. Thus, the latter would control. In other words, what would otherwise be unconstitutional, the Constitution can make constitutional.

A fifth objection came in the following form: some of my argument focuses on the need to create various causes of action for disability plaintiffs as opposed to other "physical condition" types of discrimination. However, this would mean that the same words of the same clauses have two components. The response to this objection is that we have seen time and again that in constitutional law, the same clauses can have two separate and at

124. For example, there is a right to accommodation for religion but not others under Title VII. Welsh v. U.S., 398 U.S. 333 (1970); *see also*, EEOC v. Abercrombie & Fitch Stores Inc., 135 S. Ct. 2028 (2015).

125. Warden, *supra* note 72, at 91 (noting compelling and overriding nature of interest to prevent disability discrimination in light of history of disability discrimination).

126. Just as Section 5 of the Fourteenth Amendment is contradictory to the Eleventh Amendment to the Constitution, though there is room for both in constitutional jurisprudence, and both are still valid parts of the Constitution. *See* U.S. v. Georgia, 546 U.S. 151 (2006) (discussing how the two clauses relate to one another).

times diametrically opposed components.[127]

A sixth objection came in this form: I have argued that article I, section 3 and article I, section 12, and the Due Process Clause all combine to prohibit disability discrimination generally—section 3 as to laws, section 12 as to persons who discriminate (private or public), and Due Process as to both (except private conduct). This argument thus means that the Due Process Clause can duplicate the work done by the other clause. This would mean that the clause is superfluous, and because superfluity must be avoided, so too should my interpretation.

There are three responses to this objection. First, that two clauses can, on occasion, do the same thing does not mean that they are superfluous. Substantive Due Process and Equal Protection are notorious for requiring the same result in the same cases—most notable in the canonical *Loving v. Virginia*.[128] Second, the rule against superfluity is, much like other rules under stare decisis, not a hard and fast rule. There are many reasons why additional and seemingly superfluous clauses are added. For example, it is now known that, for the Louisiana Constitution, the framers added the Equal Protection Clauses in order to help illuminate the equal protection rules that seemingly would have applied under an Equal Protection Due Process theory.[129] Indeed, take for example, the death penalty issue above. It is difficult to see how article I, section 12, which discusses access to public areas, would apply in that situation. However, the Due Process Clause's Equal Protection component, illuminated by the terms and statements surrounding section 12 and section 3, shows that disparate impact is a valid Substantive Due Process Equal Protection claim for those with disabilities against public entities generally. Third, and finally, it is now well established that plaintiffs may have multiple avenues of relief, even under the same act, and especially in the disability rights arena.[130]

A seventh objection was this: the forms of discrimination that I am discussing seem to include "intra-class" discrimination. In other words, it appears that disability discrimination need not contain a comparator class at all. My response to this, as noted above, is that "disability discrimination" has now long been regarded as not requiring a comparator class—i.e., actions can count as disability discrimination regardless of how anyone else is

127. *See e.g.*, Jamal Green, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253 (2016) (discussing "substantive due process" and "procedural due process" even though they come from the same two words "due process").

128. 388 U.S. 1 (1967).

129. *See* Hargrave, *supra* note 31, at 7 (after discussing the confusing history of Due Process and Equal Protection, stated, "[R]ather than leaving the development of the forbidden classifications solely to the courts, the choice was made to list a number of discriminatory bases which are prohibited . . . [and] instead of depending on the legal construction of terms of art.").

130. Currie v. Group. Ins. Comm'n., 290 F.3d 1, 6–7 (1st Cir. 2002) (specifically discussing the ADA).

treated.[131] This concept is well entrenched in disability discrimination theory and practice. For example, failure to make buildings physically accessible counts as disability discrimination, even though only those with physical impairments feel the discriminatory effects—not those with other disabilities.

The eighth and final objection was this: the theories proposed in this article are effectively the exact same as those already protected under some state law and federal law; therefore, what is the point of finding these rights in the Louisiana Constitution? There are a number of responses to this objection. First, states are free to enact their own legislation that expressly tracks or expands upon federal disability rights laws.[132] Second, having these theories as a state law matter would allow our courts to decide issues on state law alone, thereby at times avoiding additional expensive litigation through the various federal courts or the Supreme Court. Third, as evident in the disparate impact arena, due to the nature of the Louisiana Constitution using intermediate scrutiny for disability claims, the rights protected under the Louisiana Constitution can be different than those protected under federal law. Fourth, Title II of the ADA (applicable to government entities) is often times limited to public services, programs, or activities that are styled as "out-puts" and not "in-puts."[133] This distinction has led to confusing nit-picking in federal litigation. The Louisiana Constitution's prohibitions described in this article would apply bar none to the state and, as such, there would be no need to determine whether the conduct was an "in-put" or an "out-put." Third, the Rehabilitation Act is limited to those entities that receive federal financial assistance.[134] Not every state agency receives federal financial assistance. Thus, while those agencies would be free from restraint under the Rehabilitation Act, they would be bound by the Louisiana Constitution. Fourth and finally, the State of Louisiana has some sovereign immunity left against federal anti-discrimination laws,[135] but has waived that

131. *Amundson ex rel.*, 721 F. 3d at 874 (7th Cir. 2013). Of course, this does not mean that every law that touches on disabilities will necessarily fail constitutional muster. There must always be some causal connection between the discrimination and the disability or condition. Discrimination based simply on where one developed the same disability or condition would not count for purposes of disability discrimination. The general concept of workers' compensation is a good example of this. Individuals who develop a disability at work can obtain workers' compensation benefits, while individuals who develop the same disability unrelated to work generally cannot. However, I do not mean to suggest that all workers' compensation laws will always pass constitutional muster for every potential plaintiff. The state cannot be allowed to hide disability discrimination in the guise of workers' compensation. Indeed, the Louisiana Supreme Court has already struck down a provision of workers' compensation law under the age provision of article I § 3. Pierce v. Lafource Parish Council, 762 So. 2d 608 (La. 2000).

132. 42 U.S.C. § 12201(b).

133. Derek Warden, *Four Pathways of Undermining Board of Trustees of the University of Alabama v. Garrett*, 42 U. ARK. LITTLE ROCK L. REV. 555, 572–74 (2020).

134. 29 U.S.C. § 794(a).

135. For example, they still have sovereign immunity from most disability-based employment claims under Title I of the ADA. Bd. of Trs. of Univ. of Ala., 531 U.S. at 356 (2001).

immunity for many state law claims—potentially those types of claims discussed in this article.[136]

Conclusion

This article has shown the Louisiana Constitution contains three Equal Protection Clauses. The first is found in article I, section 2, the Due Process Clause, which has a "substantive component" that contains an equal protection component. This clause is active against government generally. The second is found in article I, section 3 and prohibits discrimination by laws. While, in relation to those with disabilities specifically, the clause was originally intended to apply to both laws and conduct, state courts have tended to say it applies to laws. The third is in article I, section 12 and prohibits discrimination in access to public places. This applies to governments and private entities alike. All three clauses are interpreted together. As shown in this article—and based on statements from the framing of the Louisiana Constitution—they each prohibit disability discrimination unless the conduct can be said to substantially further an important interest. This broad anti-discrimination prohibition includes: a prohibition on disparate treatment; a prohibition on the failure to reasonably accommodate or make reasonable modifications; a prohibition on neutral acts that have a disparate impact on those with disabilities; and an integration requirement, which includes a right to be free from unjustified institutionalization.

These requirements may appear differently depending on the circumstances. For example, they prohibit the imposition of certain fees. They would also prohibit public or private institutions (including schools, hospitals, and other establishments) from failing to make reasonable accommodations or modifications—such as where schools or hospitals deny admission to those with disabilities due to physical inaccessibility. Identifying a right to be free from disparate impact of otherwise neutral laws may also impact the criminal justice system insofar as persons with disabilities are concerned.

Finally, in recognizing these broad theories of disability discrimination—disparate treatment; disparate impact; reasonable accommodation, modification, and alterations; and integration or unjustified institutionalization—the Louisiana Constitution has recognized the principles that mental illness is not mental fault, physical disability is not physical fault, and developmental disability is not developmental fault. It is time our Louisiana courts recognize the same principles.

136. LA. CONST. art. XII, § 10.