Research Proposal
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The Americans with Disabilities Act and the United States Constitution: Whether and to What Extent the United States Constitution "Quasi-Incorporates" Four Concepts of Discrimination from Title II part A of the Americans with Disabilities Act: disparate treatment, disparate impact, failure to make reasonable accommodations, and failure to make buildings physically accessible.

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Research Topic and Statement of the Problem

In General

This dissertation seeks to answer whether certain principles from Title II part A of the Americans with Disabilities Act are "quasi-incorporated" (as defined below) into the Federal Constitution using the method of interpretation some have referred to as "rational continuum," "beyond the constitution but through the constitution," and "combining constitutional clauses." In short, the dissertation will examine whether the Constitution of the United States can prohibit disparate treatment of those with disabilities, require reasonable accommodations for those with disabilities, prohibit governmental actions that have a disparate impact on those with disabilities, and requires public entities to ensure that their buildings and constructions are physically accessible. This dissertation will also examine, in the context of disparate treatment, whether the "anti-social ills" theory of discrimination I have argued for elsewhere is also incorporated into the United States Constitution.[1]

People with disabilities have faced tremendous hardship and social stigma. While other groups of individuals have seen their status in society rise and fall with the help of constitutional law, those with disabilities have largely been left out of this protective judicial review. The Supreme Court, against the general trends of the time, held that people with disabilities can be forcibly sterilized simply because they have a disability. This case, *Buck v. Bell*,[2] was potentially reaffirmed by later cases. From my own personal knowledge Louisiana's law on forced sterilization was invoked as recently as 2018. Nevertheless, it has elsewhere been shown that forced sterilization of those with disabilities does, in fact, violate Title II of the Americans with Disabilities Act.[3]

But it is not just forced sterilization that has caused heartache to be people with disabilities. The Supreme Court has held that, as a class, people with disabilities are not protected by either strict scrutiny or intermediate scrutiny; but by mere rational basis scrutiny. While the plaintiffs in that case, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), won their claims, the precedent has been used to undermine other efforts at protecting those with disabilities.

No case exemplifies this more than in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001. There the Supreme Court held that Title I of the Americans with Disabilities Act did not properly abrogate state sovereign immunity, in part because those with disabilities are neither a suspect nor a quasi-suspect class. Reading *Garrett*, in conjunction with two later cases dealing with the abrogation of sovereign immunity under the ADA, the framework for judging such abrogation is as follows:

[1] 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 (2018)
[2] 274 U.S. 200 (1927)
[3] Derek Warden, *Ex Tenebris Lux: Buck v. Bell and the Americans with Disabilities Act*, 51 U. TOL. L. REV.57 (2019)

1. Does the conduct violate the Americans with Disabilities Act? If so, go to question 2. If no, there is no abrogation under the ADA.
2. Does the conduct also violate the Constitution of the United States? If so, there is proper abrogation of state sovereign immunity. If not, one must then go to the next question and its sub-questions.
3. If the conduct violates the ADA but not the Constitution, is abrogation otherwise still valid.
    a. One must then ask what right or rights congress was seeking to enforce.
    b. Depending on the breath of the rights at issue, one must then ask if Congress identified a widespread pattern of unconstitutional conduct. It appears that if the aim of the statute is broad, Congress needs only to have identified general widespread constitutional violation. But, if the focus of the statute is narrow, Congress would need to have had identified a history of violations of that specific type of right. It now appears that Title II of the ADA always meets this prong of the analysis.
    c. Is the statute, as applied in the case at hand, and in light of the rights and history at issue, a congruent and proportional means of enforcing those rights. This prong of the analysis often gives courts trouble.[4]

The point of this dissertation is then aimed at abrogation of sovereign immunity. If it can be shown that the general theories of discrimination found in Title II of the ADA (and also in Title I) are actually principles within the Constitution itself, then virtually every act that violates the ADA will also violate the Constitution, thereby allowing for near total abrogation of state sovereign immunity. This would likewise also have the effect of overruling *Buck v. Bell*, altering *Cleburne v. Cleburne*, and allowing people with disabilities to have a theory of constitutional discrimination not yet allowed anyone else—disparate impact.

Note on "Quasi-Incorporation"

Quasi-incorporation is an odd concept. Therefore, I believe it is appropriate to break down what I mean by "quasi-incorporation."

A brief discussion on "incorporation" is useful to fully understand the thesis of this dissertation. When lawyers and scholars discuss incorporation, they often think of selective incorporation of the Bill of Rights into the Fourteenth Amendment.[5] Prior to the Fourteenth Amendment, the Bill of Rights did not apply to the states or local governments.[6] Most now agree that it was the Fourteenth Amendment's privileges or immunities clause that was intended to hold the Bill of

[4] Derek Warden Four Pathways of Undermining Board of Trustees of the University of Alabama v. Garrett, 42 U. ARK. LITTLE ROCK L. REV. ____ (forthcoming 2020)
[5] I myself have elsewhere so discussed "incorporation." 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. 403-411-412 note 50 (2018)
[6] Id.

Rights against the states;[7] though the Court held otherwise.[8] Nevertheless, the Supreme Court slowly recognized a doctrine now known as "substantive due process."[9] This doctrine protected a number of unwritten rights,[10] many such rights are still controversial today.[11] On the other hand, substantive due process began to be used to "incorporate" various provisions of the Bill of Rights against the states.[12] This was so, according to the Court, not because those rights are found in the Bill of Rights, but because they are fundamental to our scheme of ordered liberty and deeply rooted in our American history.[13] For several years, however, the Court did not apply the rights incorporated against the states with the same force with which they were held against the federal government.[14] This, of course, has changed over the years. Now, where a right is incorporated against the states, it is interpreted the same as it is when asserted against the federal government.[15] Interestingly enough, the same words "due process" found in the Fifth Amendment have been used to "reverse incorporate" the Equal Protection Clause of the Fourteenth Amendment against the federal government.[16] In a way, then, "quasi-incorporation" is similar to, though not the same as, incorporation of the Bill of Rights against the states. It is similar because it is textual provisions being incorporated into the rules announced by other legal texts. However, I do not argue that the whole ADA is necessarily incorporated into the Federal Constitution. Moreover, I do not argue that the Federal Constitution has incorporated these forms of discrimination by virtue of their being deeply rooted in American history or fundamental to our scheme of ordered liberty. But rather, I argue they are a norm that all governments in the United States now accept;[17] and that this customary principle is part of the Ninth Amendment, which, in combination with other clauses (and principles therein) of the Constitution, necessarily mean that the four concepts of discrimination mentioned above are now part of the Constitution.

Nevertheless, we have seen how statutes, treaties, and customs have been virtually incorporated into constitutional provisions.[18] This is not incorporation in the sense as described above. Rather,

[7] McDonald v. City of Chicago, 561 U.S. 742, 756-757 (2010) (noting that scholars generally condemn the narrow reading given to the privileges or immunities clause).
[8] Id.
[9] Id. at 758-767 (discussing history of incorporation by why of the due process clause).
[10] Id.
[11] Such as the right to abortion found in Roe v. Wade, 410 U.S. 113 (1973)
[12] *McDonald* at Id. at 758-767
[13] Id. at 760
[14] Id. at 761
[15] Id. at 765
[16] Bolling v. Sharp, 347 U.S. 497 (1954)
[17] Virtually every state has a law similar to the ADA. The near unanimity in this can be seen a generally prevailing legal zeitgeist as to the compelling nature of government interest in prohibiting disability discrimination. Derek Warden, *Ex Tenebris Lux: Buck v. Bell and the Americans with Disabilities Ac*t, 51 U. TOL. L. REV. 57, 91 note 349 (2019)
[18] It's interesting to note that the U.S. Supreme Court has elsewhere noted a similar thing in respect to general "law of nations." *See*, The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.")

the courts have used statutes to inform the meaning of broad constitutional texts. For example, the Court used the repeal of bans on homosexual conduct in *Lawrence v. Texas*[19] to interpret the word "liberty" in the Fourteenth Amendment.[20] The Courts have used general state practice to determine what constitutes "cruel and unusual punishment" for purposes of the Eighth Amendment.[21] Custom itself has also been read into the Federal Constitution.[22] Moreover, the courts have not shied away from using ancient English statutes to inform the meaning of constitutional texts; thereby imposing the rule of that legal text into the Constitution itself. For example, the *parens patriea* power of the States is developed from the Statute of Elizabeth,[23] the Magna Carta and English Bill of Rights have held sway over the meaning of our federal Constitution,[24] and the list may continue on for as long as legal problems remain.[25] My understanding of "quasi-incorporation" runs along these lines. Text, history, and more, all combined, mean that four concepts from the ADA mentioned in above are also part of the federal Constitution. This is much like how history and textual similarities have led the Court to impart parts of the English Bill of Rights (and the understanding of jurists at that time) onto the Federal Constitution.

But perhaps the most vivid example of "quasi-incorporation" comes not from statutes, commentary from jurists, or constitutions. Rather, it comes from how state courts treat restatements of laws. Restatements are not necessarily part of a state's common law.[26] However, they are persuasive authority as to what that law is.[27] Nevertheless, in practice and in time, many state courts expressly adopt parts of various restatements of the law.[28] When the courts so adopt that provision, the rule announced in that provision becomes part of that state's laws. This is, in effect, what the United States Constitution does with the Americans with Disabilities Act. The ADA was not necessarily part of the Federal Constitution, however, in time and with proper interpretation, the four forms of discrimination have become part of our Constitutional law.

To be clear, I am not the first to suggest that federal statutes have become "constitutionalized" in some way. Other scholars have argued that federal "superstatutes" have become "little 'c'

19 539 U.S. 558 (2003).
20 Id. at 570-579 (discussing historical setting both nationally and internationally).
21 Kennedy v. Louisiana, 554 U.S. 407, 422 (2008)
22 See, Dickerson v. U.S., 530 U.S. 428, 443 (2000) (reaffirming the *Miranda* ruling, in part, because it has become imbedded as "part of our national culture.")
23 Maragert S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 SMU L. REV. 759, 769 (2016) (noting that some scholars argue that the states' *parens patriae* power is derived from the Statute of Elizabeth).
24 District of Columbia v. Heller, 554 U.S. 570, 592-594 (2008) (using the English Bill of Rights to interpret the Second Amendment)
25 At some point, however, our Constitutional legal system may drift too far away from English antiquity for that same antiquity to be of much use anymore. I believe that a better system of interpreting the federal constitution is by using the method of "beyond the constitution but through the constitution" that I argue for here.
26 Bifolck v. Philip Morris, Inc., 324 Conn. 402, 413-414 (2016)
27 Gabaldon v. Erisa Mortgage Co., 128 N.M. 84, 90 (1999)
28 As has been done in many states for strict liability products liability issues as well as others. See, Am. L. Prod. Liab. 3d § 16:9

Constitutional" law.[29] For example, in A Republic of Statutes it was argued that some federal statues such as the Sherman Act, the Civil Rights Act, and the Voting Rights Act have become part of a "statutory constitution." According to those scholars, "A key feature of the statutory constitution is that non-Constitutional institutions and norms become entrenched in American political culture not as strongly as the primary features of the U.S. Constitution, such as the bicameralism requirement for enactment of legislation, but more strongly than ordinary and even some Constitutional rights."[30] Further still, it was argued that several interpretations of the federal constitution (and thus the constitutional rule itself) were driven by social consensus of the several states or driven by the passage of federal statutes.[31]

Therefore, my concept of "quasi-incorporation" is similar to all of these concepts though slightly different. I suggest that the Ninth Amendment supports the use of the interpretive method of "beyond the constitution but through the constitution." By this method, a court or scholar, can look at various provisions of the constitution—and the principles inherent within those provisions—to discover new rules of constitutional law. Further still, I argue that this method of interpretation happens to mean that the constitution now requires: (1) public entities to not commit disparate treatment of those with disabilities (2) requires public entities to refrain from acts that have a disparate impact on people with disabilities (3) requires public entities to reasonably accommodate those with disabilities and (4) requires public entities to make its facilities physically accessible to those with disabilities.

There are a number of provisions in the Constitution that can be seen to support this; and I discuss a few here.

(1) The Ninth Amendment has a second component, in that, it allows custom to influence constitutional law. All states now have versions of the ADA, which contain these various forms of discrimination mentioned in the preceding paragraph. But custom alone does not appear to be enough to support a finding that these drastic departures from standard constitutional law are now part of the constitutional system. Further reading from other provisions is likely required.

(2) The Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fifth Amendment, should be read not as mere prohibitions on certain classification, but also as supporting an "anti-subordination" theory of equal protection.

(3) The notion that governments are constitutionally required to have accessible features is not entirely foreign and supported by some provisions of the Constitution already. This is most apparent in the Eighth Amendment context where the Court has already held that violations of the ADA may also violate the Eighth Amendment.

[29] William N. Eskridge Jr., John Ferejohn, A REPUBLIC OF STATUTES (YALE UNIVERSITY PRESS) (2010)

[30] Id. at 165

[31] Id. at 9 (suggesting that Loving v. Virginia, 388 U.S. 1 (1967) and Green v. School Board of New Kent County, 391 U.S. 430 (1968) were the result of consensus from the states and the principles in federal statutes respectively).

Breakdown of Chapters

Chapter 1

This chapter will begin with a more thorough discussion of "quasi incorporation." It will describe instances where courts have conducted similar analyses with statutes and constitutional texts before, as generally described above.

This chapter will then give a general overview of the United States Constitution, from its historical foundations, to the various theories of interpretation used throughout its existence. This chapter examines originalism (in its various forms), textualism, and "living constitutionalism." The chapter will also introduce a discussion about the dichotomy between "anti-subordination" and "anti-classification" under the Fourteenth Amendment's Equal Protection Clause. This part will follow the "anti-subordination" and "anti-classification" discussion by introducing the historical failures of equal protection (and due process) to actually protect those with disabilities.

This chapter will end by introducing and justifying the use of the method of analysis I call "beyond the constitution, but through the constitution" or "combining constitutional clauses."

Chapter 2

This chapter will largely set the federal Constitution aside briefly and examine the history of disability discrimination. Understanding the history of disability discrimination is fundamental to undertesting why the protections of the ADA should be held as a constitutional matter. This chapter examines in detail the plight of those with disabilities from European antiquity into the modern day. It will focus heavily on the 20th Century and its sterilization laws, forced abortion laws, segregation and institutionalization practices, the general failures of the Constitution in the disability rights context, and the existence of state laws and other federal laws leading up to the Americans with Disabilities Act.

Chapter 3

This chapter will examine the Americans with Disabilities Act. It will address standard doctrinal issues from Titles I, II, III, IV, and V of the ADA. It will also address issues found in the introductory parts of the ADA (i.e., who is protected and what is a disability). After such general introductions, the chapter will move into an in dept discussion about Title II of the ADA. This part will discuss the main theories of discrimination plaintiffs use (disparate treatment, disparate impact, failure to make reasonable accommodations, and failure to make buildings physically accessible). The part will also, for completeness, look at various regulatory provisions that have also had significant impact on the legal rights of those with disabilities.

Chapter 4

This chapter examines whether and to what extent the ADA's theories of discrimination can be said to be "quasi-incorporated," using the method of "beyond the constitution but through the constitution," into the United States Constitution. This chapter will, in so doing, examine principles inherent in various clauses of the Bill of Rights and the Equal Protection Clause.

Questions to be Answered

Various questions will be answered throughout this dissertation:

1. Whether "beyond the constitution but through the constitution" is a legitimate form of constitutional interpretation.
2. Whether the principles inherent within the ADA can be said to be incorporated into the Constitution as an original matter.
3. Whether the practices of the several states in protecting people with disabilities inform whether the U.S. Constitution also protects people with disabilities in a similar manner.
4. Whether the four theories of discrimination—disparate treatment, disparate impact, failure to make reasonable accommodations, and failure to make buildings physically accessible—are incorporated into the United States Constitution.

Hypothesis

The Constitution of the United States now contains certain principles inherent within Title II part A of the Americans with Disabilities Act: a prohibition on disparate treatment, a prohibition on disparate impact, a reasonable accommodation requirement, and a physical accessibility requirement.

Research Method

My research will use a historical and socio-legal method of analysis to examine the questions presented and validate the hypothesis. This approach will require me to use various law review articles, books, constitutional convention records, Supreme Court and lower court opinions, state house legislative records, and more.

Key Literature and Bibliography

Key Law Review Articles

Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397 (2000)

Professor Bagenstos offers some comforting words about several of the Supreme Court's worst disability rights cases (this was pre-ADAAA). In so doing, he provides perhaps the clearest example of the definition of disability that I believe should be incorporated into the federal constitution's prohibition on disability discrimination (disparate treatment, disparate impact, reasonable accommodations, and architectural requirements).

According to professor Bagenstos, the proper understanding of disability is as follows:

> …disability should be understood as a socially defined group status. The distinctive characteristic of that group status is systematic, socially contingent disadvantage. "Disability" is a condition in which people--because of present, past, or perceived "impairments"--are viewed as

> somehow outside of the "norm" for which society's institutions are designed and therefore are likely to have systematically less opportunity to participate in important areas of public and private life. Even though people with "disabilities" may have vastly different medical conditions--indeed, many may experience no medical limitations at all--they have one crucial thing in common: a socially assigned group status that tends to result in systematic disadvantage and deprivation of opportunity.

In short, he argues that disability discrimination should be viewed as a form "subordination." He appears to draw this idea from another scholar's view of anti-subordination. See, *Id*. at 420 note 79 Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007-10 (1986). Unfortunately, Professor Bagenstos does not argue that this definition should be part of any constitutional definition, but, instead argues that it should guide courts in their interpretation of the word "disability" in ADA cases. Neither does Bagenstos argue that the requirements of the ADA are somehow part and parcel with the federal Constitution.

Mario Barnes, *The Once and Future Equal Protection Doctrine*, 43 CONN. L. REV. 1059 (2011)

The essay looks at the issues surrounding the Supreme Court's tiered method of analyzing equal protection claims. In collecting various authorities, the words of other scholars, and various cases, the essay will serve as a further, and useful research tool in the future. Most notably, the essay argues for a more substantive (i.e., anti-subordination) model of equal protection that could take account of various social ills that people with disabilities have faced.

The essay does not, however, address what effect this would have on people with disabilities as a class, what definition of disability could be, nor whether other provisions of the constitution could instruct whether various aspects of the ADA are incorporated into the U.S. Constitution.

Sergio J. Campos, *Subordination and the Fortuity of our Circumstances* 41 U. MICH. J. L. REFORM 585 (2008)

Part of my overall dissertation is that these four theories of discrimination are incorporated into the Constitution because, at least in part, the Constitution's Equal Protection Clause contains an "anti-subordination" component. This would be helpful because by denying access to public buildings, the governmental has no doubt subordinated persons with various disabilities.

This article is an excellent articulation of the "anti-subordination" principle. However, it does not go far in addressing the rights of people with disabilities, and makes scarce mention of the *Cleburne*.

Nevertheless, the conception of anti-subordination and its relationship to those with disabilities is mentioned; Campos then goes on to describe the theory of anti-subordination in ways that mirror the accommodation concept in the ADA:

> The anti-subordination principle not only describes an ideal, but also asks individuals to make reasonable sacrifices to realize it. These sacrifices create a tension between the anti-subordination principle and the antidiscrimination principle. The anti-subordination principle will require affirmative action that presumptively violates the antidiscrimination principle since it gives preferential treatment to those subordinated.

Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067 (2016)

Coenen does an excellent job of articulating the "combination analysis" whereby the court looks to several provisions of the constitution to support the existence of a constitutional right or a constitutional rule. For example, state sovereign immunity (in the state's own courts) is protected not by the text of the Eleventh Amendment, but by various other clauses within the constitution itself. He points out that the court has used this type of multi-clause reasoning in numerous other areas such as in *Griswold* where the Court discovered a right to privacy.

Coenen does not, however, argue for the recognition of any particular rights with respect to those with disabilities. Rather, he asserts this theory of combination analysis, which resembles my article *Secundum Civilis (infra)*; and leaves the creation of new rights to later scholars and courts.

This method of analysis will be looked to in my dissertation to justify finding of new rules and for "incorporating" parts of the Americans with Disabilities Act into the federal constitution.

David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights,*19 HARV. J. L. & PUB. POL'Y 795 (1996)

Crump seeks to categories the ways courts truly divine rights; and makes no mistake in describing these findings of various rights in the vein of natural law. "To put the matter another way, although the inference of natural rights merely from the existence of the Constitution may not persuade the Court today, open-textured provisions such as those of the Fourteenth Amendment have allowed the Court to supplement the text with rights that powerfully resemble the natural rights that Justice Chase advocated and Justice Iredell denied." *Id.* at 817

Crump looks at the various justifications and methods for discovering unwritten rights with references to: The Ninth Amendment, the Due Process Clause, Clauses Considered together, and "originalist intentionlism."

Stephen Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 UNIV. PENN. J. CONST. LAW 281 (2002)

Griffin makes an argument that the American people should not rely on the Supreme Court to protect the equal protection of laws as guaranteed by the Fifth and Fourteenth Amendments. Importantly for my paper, Professor Griffin addresses the case of *Board of Trustees of the University of Alabama v. Garrett*; and argues that this case exemplifies what he describes as the Court attacking the democracy of rights. Instead, he argues for "the adoption of a deferential standard of review toward the exercise of Congress' power to enforce the Fourteenth Amendment." Id. at 312.

Griffin does not consider, however, a different approach—simply having the various rules of the ADA incorporated in the Federal Constitution. Indeed, one could argue that the various rules of the ADA have been adopted by the states and that this represents a "custom" enforceable through the Ninth Amendment. This Ninth Amendment custom, in relation to principles from other provisions of the Constitution, could well supply the necessary protection for people with disabilities, without taking the Court and its heightened equal protection scrutiny out of our constitutional system.

Laura L. Rover, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043 (2004)

One primary aspect of my dissertation will be to determine what the constitutional definition of "disability" would have to be. Rover articulates three separate models of definitions: the medical model, the socio-political model, and the minority group/civil rights model. The article goes on to define and justify each of these models, and contends that the Court used the medical model erroneously in *Garrett*.

Rover attacks *Garrett*, not on the terms I will in my dissertation, but by saying it failed to properly understand "disability" (i.e., the medical model) and because it failed to properly analyze the equal protection clause. In arguing that the requirements of the ADA are part and parcel with the Constitution, my dissertation will take all the power away from *Garrett*, for once state action violates both the constitution and the ADA, there is valid abrogation. *U.S. v. Georgia* (*infra*).

Derek Warden, *The Americans with Disabilities Act and the Louisiana Constitution (in progress)*
This is my LL.M. thesis. I argue based on a "beyond the constitution but through the constitution" method of analysis and with support from the state constitutional convention that the very theories of discrimination argued for in this dissertation are also incorporated into the Louisiana Constitution.

The article does not go as a far as this dissertation is intended to go, neither did it address the various theories of equal protection that are a part of the federal Constitution but not necessarily a part of the Louisiana Constitution or its legal history.

Derek Warden, *The Ninth Cause: Using the Ninth Amendment as a Cause of Action to Cure Incongruence in Current Civil Rights Litigation Law* 64 WAYNE L. REV. 403 (2018)

In this paper, I argued the Ninth Amendment acted as a cause of action for violations of the Constitution. This article was an expansion of the principles I argued for in my thesis, *Secundum Civilis* (*infra*).

The article did not address the Americans with Disabilities Act, and as such, the Article fell far short of what I am arguing for in this dissertation.

Derek Warden, *Secundum Civilis: The Constitution as An Enlightenment Code* 8 J. CIV. L. STUD. 586 (2015)

This article was my J.D. thesis. I examined the history, text, and structure of the federal Constitution and concluded that it was proper to use civilian methods of interpretation in understanding our fundamental law. Most notable of these methods of interpretation are (1) use of custom and (2) "beyond the civil code but through the civil code."

Both of these methods will be useful in my dissertation as I plan to argue that the method of "beyond the constitution but through the constitution" allows the four principles of the ADA discussed in this dissertation to be "incorporated" into the federal constitution. This method uses the texts and principles from various provisions of a legal document to divine new rules of law. One such principle inherent in our constitution, as I will argue is "custom" found in the Ninth Amendment.

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

In this article, I explored whether or not Title II part A of the Americans with Disabilities Act prohibited states from forcibly sterilizing people with disabilities. Concluding that it so did, I also concluded that such a rule would be constitutional even in light of the Supreme Court's ruling that people with disabilities could be forcibly sterilized without violating the Equal Protection Clause or the Due Process Clause. The article also concluded that that case was wrongly decided.

This article began to pave the way for my thesis here: Title II and the Constitution can and should do much of the same thing. The paper did not go as far as I seek to go with this dissertation—I did not examine any "incorporation" of the ADA into the federal constitution.

Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L. J. 527 (2014)

Waterstone makes interesting claims about the disability rights movement, and observes that virtually all disability constitutional advocacy was foreclosed in *Cleburne*. He argues for a new type of constitutional strategy by disability advocates and suggests that those advocates model their efforts on the gay rights cases. According to Waterstone, whatever standard emerges from his arguments, not all people with disabilities will be protected, and courts would instead wade into the history and stigma associated with various disabilities.

While this is interesting, and the article serves as a useful tool for historical research, it ultimately does not address the question I have sought to answer with my dissertation—whether certain principles in the Americans with disabilities Act are now a part of the United States Constitution. Indeed, the full article appears to be focused on the Equal Protection Clause without considering what other provisions of the Constitution may aid disability rights advocates.

Other Law Review Articles and Books

Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003)

Samuel R. Bagenstos, *The Supreme Court, the Americans With Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923 (2004);

Jack M. Balkin, Reva B. Siegel, *The American Tradition: Anticlassification or Antisubordination?,* 58 U. MIAMI L. REV. 9 (2003)

Owen M. Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFF. 107 (1976)

Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 ALA. L. REV. 997 (2004)

Amy Raub et. al., *Constitutional Rights of Persons with Disabilities: An Analysis of 193 National Constitutions*, 29 HARV. HUM. RTS. J. 203 (2016)

Neil S. Seigel, "*Equal Citizenship": Justice Ginsburg's Constitutional Vision*, 43 NEW ENG. L. REV. 799 (2009)

Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004)

Derek Warden *Four Pathways of Undermining Board of Trustees of the University of Alabama v. Garrett*, 42 U. ARK. LITTLE ROCK L. REV. ____ (forthcoming 2020)

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 (2018)

Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357 (2017)

Constitutional and Statutory Provisions

Constitutional Provisions

U.S. Const. Amend. I

> This amendment contains various protections for speech, press, religion, and so forth. It has been interpreted as also containing a right of association and to petition the government. I believe these latter rights could be read in combination with others to support the right to integration found in *Olmstead*.
>
> Right of access to courts also suggests that the Court has already recognized an accessibility component.

U.S. Const. Amend. II

> The Supreme Court appears to have allowed direct bans on people with mental illness owning fire arms. This is a form of disparate treatment and runs directly counter to my arguments as I see them. I will have to deal with this in my dissertation.
>
> The Court has also struck down laws that have the effect of banning certain firearms; thus, the court has recognized a form of disparate impact.

U.S. Const. Amend. III

> The rights recognized in the Third Amendment are the right to be free from the quartering of troops. This recognizes the sanctity of the home; and further supports the *Olmstead* decision being incorporation into the Constitution.

U.S. Const. Amend. IV

> Numerous rights are protected here; and it is a major source of the "right to privacy." Certain aspects of unreasonable search and seizure may relate to a form of "reasonable accommodation."

U.S. Const. Amend. V

> Numerous rights are protected here. The courts have read this clause alongside various other rights and to sustain the constitutionality of the ADA.

U.S. Const. Amend. VIII

> In *U.S. v. Georgia* (*infra*) the Court held Title II part A of the ADA constitutionally abrogated state sovereign immunity where the state conduct violated both the ADA and the Constitution. The Court gave examples of ADA claims lying at the heart of Eighth Amendment claims. This strongly suggests that, at in least in the prison setting, the ADA's physical features component and reasonable accommodation component are already part of the Eighth Amendment.

U.S. Const. Amend. IX

> This amendment indicates that there are numerous other unwritten rights. I have elsewhere shown that this clause includes protecting constitutional "customs" and a "beyond the constitution but through the constitution" method of analysis. The principle inherent in the Ninth Amendment's protection of "custom" is that the customs of the states can become a custom that is also protected by the Constitution.

U.S. Const. Amend. XI

> The Eleventh Amendment and sovereign immunity cast a long shadow over my dissertation. The court's sovereign immunity doctrine is a major catalyst for my wanting to incorporate the ADA into the federal constitution. Furthermore, the method I argue for in this dissertation was actually used by the Court to expand the protections of sovereign immunity for the states. *Alden* (infra)

U.S. Const. Amend. XIV

> Provision contains numerous rights protections: privileges or immunities, equal protection of laws, due process, citizenship, and so forth. These either separated out or in conjunction with each other protect support the protection of a number of principles form the ADA: disparate impact and reasonable accommodation (through resort to anti-subordination), physical accessibility (due process and the right to travel).

La. Const. Art. I § 3

> Protects persons with "physical conditions" from discrimination.

La. Const. Art. I § 12

> Further protections for persons with "physical conditions" from discrimination.

La. Const. Art. I § 24

> Louisiana Constitutional analog to the Federal Ninth Amendment. This clause in conjunction with the other two Louisiana Constitutional clause mentioned above was used to "quasi-incorporate" various provisions of the ADA into the federal Constitution.
>
> My suspicion is that similar concepts can be found in the provisions of other state constitutions and statutes; thereby suggesting a "constitutional custom."

Statutory Provisions

The Americans with Disabilities Act, 42 U.S.C. §§ 12101—1289, 12201—12213

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794

Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1482

42 U.S.C. § 1983

Fair Housing Act, 42 U.S.C. §§ 3601—3619

Architectural Barriers Act of 1968, 42 U.S.C.A. §§ 4151—4157

Key Judicial Opinions

Marbury v. Madison, 5 U.S. 137 (1803)

Plessy v. Ferguson, 163 U.S. 537 (1896)

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

Brown v. Board of Education, 347 U.S. 483 (1954)

Griswold v. Connecticut, 381 U.S. 479 (1965)

Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972))

Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972).

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion)

Youngberg v. Romeo, 457 U.S. 307 (1982).

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

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

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

Employment Division v. Smith, 494 U.S. 872 (1990).

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

Pennsylvania v. Yetsky, 524 U.S. 206 (1998)

Alden v. Maine, 527 U.S. 706 (1999)

Olmstead v. L.C., 527 U.S. 581 (1999)

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001)

Atkins v. Virginia, 536 U.S. 304 (2002)

Tenness v. Lane, 541 U.S. 509 (2004)

U.S. v. Georgia, 546 U.S. 151 (2006)

Obergefell v. Hodges, 135 S. Ct. 2584 (2015)