THE COST OF SCHOOL VOUCHERS: 14TH AMENDMENT PATHWAYS TO PROTECT DISABILITY RIGHTS

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ABSTRACT

Amidst a national expansion of school choice policies, concerns have been raised about the legal protections afforded to students with disabilities participating in these programs. In this paper, I will evaluate the constitutionality of voucher programs that require students to waive their rights under the Individuals with Disabilities Education Act of 2004 (IDEA) as a condition of their participation. Three pathways will be considered, all emerging from the 14th Amendment. First, I establish that based on the Court's Equal Protection jurisprudence, people with disabilities could be considered a quasi-suspect class given the history of class-based discrimination and the immutability of disability as a trait. Next, I will apply a rational basis "with a bite" test, where state law cannot designate a class for disfavored treatment. In this case, the state treats students with disabilities disfavorably by attempting to avoid the responsibility and burden of providing quality education to students with disabilities. Finally, I will consider education as a public right, establishing substantive due process protection for students participating in these voucher programs and determining whether the state is arbitrarily infringing on this right. I will then evaluate the benefits, challenges, and implications of these pathways for civil rights protections in education.

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I. An Introduction to School Choice and Disability Protections

Private school choice programs have proliferated in the United States, with 29 states and the District of Columbia now offering state funding for K-12 private education.[1] These choice programs vary in scope and the mechanism by which families receive funding, but all of these programs aim to offer parents an alternative to public schools by funding some or all of the cost of attendance at a private school. While these programs may provide some families with the opportunity to enroll in a school aligned with the needs of their student, choice programs present concerns for the protection of participating students' rights. For students with disabilities, the decision to enroll in a choice program is constrained by having to forfeit federal protections for special education. In all cases where students enroll in private school, students lose some protection under federal law, including portions of the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act (hereinafter ADA).[2]

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[1] Catrin Wigfall, *Map: School Choice Expansion Available to a Substantial Share of Students*, American Experiment (June 12, 2024), https://www.americanexperiment.org/map-school-choice-expansion-benefiting-substantial-share-of-students/.

[2] Claire Raj, *Coerced Choice: School Vouchers and Students with Disabilities*, 68 Emory L.J. 1037, 1042 (2019).

In the most extreme case, school voucher programs in Florida, Georgia, and Oklahoma require students to waive their rights under the Individuals with Disabilities Education Act (hereinafter IDEA).[3] IDEA ensures that schools provide individualized education plans to students in the least restrictive environment, meaning that students must be integrated into classrooms alongside their peers.[4] IDEA also provides paths for recourse for parents when their student's needs are not being met.[5] These provisions ensure that students with disabilities receive an appropriate education tailored to their individual needs. For students with disabilities, participation in the voucher program in Florida, Oklahoma, and Georgia is conditioned on their willingness to forfeit their rights.[6] Students with disabilities are either compelled to waive their rights to enroll in the school of their choice, or remain in their public school, where their right to individualized education is protected, yet there might be shortcomings causing them to seek an alternative school.

[3] *Id.* n. 27.
[4] Individuals with Disabilities Education Improvement Act of 2004. 20 U.S.C. § 1414(d) (2012).
[5] *Id*. at § 1415(b)(6).
[6] Raj, *supra* note 2.

II. Constitutional Pathways for Protection

A. Quasi-Suspect Classification for Disability

In the Court's jurisprudence applying the Equal Protection Clause, a law that differentiates based on group receives heightened scrutiny when the group is deemed a suspect class, which places the burden on the state to provide a compelling interest for the distinction. In *City of Cleburne v. Cleburne Living Center, Inc.* (1985), a landmark case for the Court's understanding of disability as it relates to Equal Protection, the Court determined that disability is not a quasi-suspect class subject to heightened scrutiny because people with disabilities constitute too "large and diverse" of a group.[7] Indeed, the Court has been inconsistent in determining exactly what characteristics are necessary for a group to be considered a suspect class, creating an "analytical muddle" in determining which groups meet the indicia for suspect classification.[8] This inconsistency creates some difficulty in determining which classes should receive heightened scrutiny, with different cases analyzing different criteria. In this article, I will apply the standard from *Frontiero v. Richardson (1973)*, which evaluated gender discrimination based on a history of discrimination and the immutability of

[7] City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 443-445 (1985).
[8] Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 Cal. L. Rev. 1191, 1207 (July 2006).

the trait.[9] While a plurality in *Frontiero* found gender to be a suspect class, gender was eventually classified by the Court as a quasi-suspect class subject to intermediate scrutiny in *Craig v. Boren (1976)*. The decision in *Craig v. Boren* puts the burden on the state to provide an important state interest to justify differentiation based on gender in a statute.[10] The state must also demonstrate that the law is substantially related to achieving that interest.[11] Quasi-suspect classification, rather than suspect classification, is appropriate for disability because strict scrutiny would make it prohibitively difficult to provide necessary legal protections for people with disabilities.[12] Intermediate scrutiny, the level of review triggered by a quasi-suspect classification, would permit legislation such as the ADA that aims to provide necessary accommodations for people with disabilities, while subjecting laws such as these voucher programs, which unduly exclude students with disabilities, to a higher standard of review.

There is a clear history of discrimination against people with disabilities not accounted for in the decision in *Cleburne* which Justice Thurgood Marshall details in his concurrence-dissent. This history ranges

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[9] Frontiero v. Richardson, 411 U.S. 677, 684–688 (1973).
[10] Craig v. Boren, 429 U.S. 190, 197 (1976).
[11] *Id.*
[12] Jayne Ponder, *The Irrational Rationality of Rational Basis Review for People with Disabilities: A Call for Intermediate Scrutiny*, 53 HARV. C.R.-C.L. L. REV. 709, 715 (Fall 2018).

from exclusion from public institutions, including public schools and voting, to the United States' tragic history of eugenics practices.[13] Discrimination against people with disabilities is illustrated by the Court's decision in *Buck v. Bell*, (1927) –which has yet to be overruled. The Court found the forced sterilization of people with disabilities to be constitutional because "[t]hree generations of imbeciles are enough."[14] In an article making the case for quasi-suspect classification for disability, Jayne Ponder argues that disability, regardless of whether or not it is a visible trait, has been the target of impermissible stereotyping emerging from historical discrimination and present-day stigma.[15] Just because people with disabilities as a group have gained more acceptance over time, as some argue is the case with legislation such as the ADA, there still exists a stigma around disability that is the product of historical discrimination. This also ties to arguments around the political power of the group, a characteristic evaluated in several cases in determining a suspect classification. In the majority opinion in *Frontiero,* the Court conducts a broad analysis of political powerlessness by considering "societal power dynamics beyond legislative prejudice."[16] Ponder engages in a similar analysis of the political

[13] *Cleburne*, 473 U.S. at 461–465.
[14] Buck v. Bell, 274 U.S. 200, 207 (1927).
[15] Ponder, *supra* note 12 at 729-731.
[16] Geiger, *supra* note 8 at 1214.

powerlessness of people with disabilities: for decades, there were laws that prevented people with disabilities from voting or participating in governance. Still today, there exists stigma and ableism that may prevent full consideration of the breadth of political concerns faced by people with disabilities.[17] Similar to other groups, such as communities of color and women who have successfully advocated for large-scale political change, these groups still face historical discrimination and political powerlessness due to stereotypes and structural barriers to participation.[18]

Moreover, people with disabilities experience their disability as immutable, or unchangeable. In many cases, disabilities are an "accident of birth," which is the definition of immutability utilized in *Frontiero* and other earlier decisions.[19] When traits are innate, the Court has held that burdening or holding an individual responsible for this trait violates basic fairness.[20] However, in some instances, disability is not innate at birth and is rather developed over time. While this means disability is not necessarily unchangeable and an accident of birth, immutability still applies to disability as it is a condition that an individual does not choose, nor easily

[17] Ponder, *supra* note 12 at 734-736.
[18] *Id.* at 735.
[19] Frontiero, 411 U.S. at 684–688. *See also* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).
[20] *Weber*, 406 U.S. at 175.

abandons.[21] Professor Jessica Clarke describes a standard of "new immutability"[22] which has found support among legal scholars for its potential to expand protections for gender identity and sexual orientation.[23] This standard has also been employed by lower courts, and was referenced by the Court in the *Obergefell v. Hodges (2015)* decision.[24] This new immutability asks if a trait is a core condition that an individual should not be asked to change; regardless of whether a trait is literally changeable, a trait is still considered immutable if it is not easily abandoned.[25] In Ponder's argument for disability as a quasi-suspect class, she employs a similar definition of immutability that considers whether someone can control whether or not they have a trait.[26] It does not matter if a trait is innate or unchangeable, but rather if an individual can choose to opt into or out of the group. This definition of immutability applies to disability– disability is not experienced as something one can choose to opt in or opt out of over time, nor is it a trait that someone should be asked to change.[27]

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[21] Jessica A. Clarke, *Against Immutability*, 125 YALE L. J. 2 (October 2015).
[22] *Id.*
[23] *Id.* at 6 n. 7.
[24] Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015), citing brief for American Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 7-17, Obergefell, (No. 14-556).
[25] Clarke, *supra* note 21 at 27.
[26] Ponder, *supra* note 12 at 739-740.
[27] *Id.*

Disability clearly meets the indicia for quasi-suspect classification established in *Frontiero*. However, the Court in *Cleburne* takes issue with another characteristic of suspect classifications not included in *Frontiero*– the discrete nature of the group.[28] In the majority opinion in *Cleburne,* Justice Byron White finds that if disability, which constitutes a "large and amorphous" group, was found to be a quasi-suspect class, it could lead to a variety of groups facing prejudice to seek out the protection of suspect classification, a path that Justice White declines to go down.[29] Justice White's reasoning in this decision is flawed in light of the Court's jurisprudence on quasi-suspect classification. First, other groups have been granted quasi-suspect classification, notably gender, and this constitutes an undoubtedly large and diverse class. Moreover, this case of IDEA protections and voucher programs demonstrates how people with disabilities can indeed be seen as a discrete group. A wide spectrum of disabilities are eligible for protection under the IDEA, and states must offer educational services to all students with disabilities.[30] Regardless of how large or diverse people with disabilities are as a group, students with disabilities are a discrete group as they are the only students affected by

[28] *Cleburne*, 473 U.S. at 445.
[29] *Cleburne*, 473 U.S. at 445-446.
[30] 20 U.S.C. § 1400.

the waiving of IDEA rights under these state voucher programs.[31] Because all students with disabilities in these states are potentially affected by the conditions of these state-provided voucher programs, these voucher programs should be seen as class-based discrimination against a quasi-suspect class that shares an immutable trait and has faced historic discrimination.

B. Rational Basis with a Bite

In Equal Protection cases, when the Court does not identify a group as a suspect class subject to heightened scrutiny, a rational basis test is applied to laws that differentiate based on class.[32] In this instance, a state must provide only a legitimate state interest to justify the statute. However, the Court has employed a higher standard of a rational basis review known as rational basis "with a bite" in cases where the state is motivated by animus toward a certain group. The Court's decision in *Cleburne* demonstrates the application of rational basis with a bite, with the Court striking down a zoning ordinance that restricted a group home for the disabled from being built on the basis that the town was acting with

[31] Raj, *supra* note 2 at 731-736.
[32] United States v. Carolene Products Co., 304 U.S. 144 (1938).

"irrational prejudice" against people with disabilities.[33] The Court determined that negative attitudes and fears toward the disabled motivated the city's unwillingness to allow for the group home to be built, which is not a legitimate state interest and thus unconstitutional.[34]

Similarly, the argument can be made that Florida, Georgia, and Oklahoma are motivated not by a legitimate state interest, but rather by targeting a group for disfavored treatment. These programs disproportionately affect students with disabilities, yet proving that the state is motivated by animus toward students with disabilities is a more challenging assertion to make. Nevertheless, Professor Claire Raj, a special education law scholar, presents an argument by which these types of school voucher programs fail a rational basis with a bite test because of disfavored treatment of students with disabilities.[35] The purported intent of school voucher programs is to expand educational offerings and the ability of families to choose how their child is educated.[36] Raj argues that when programs require families to waive IDEA rights, this measure is not rationally connected to the purpose of expanding choice: these interests can be readily achieved without restricting the educational opportunities of

[33] Raphael Holoszyc-Pimentel, *Reconciling Rational Basis Review: When Does Rational Basis Bite*, 90 N.Y.U. L. Rev. 2070, 2114 (December 2015).
[34] *Cleburne*, 473 U.S. at 448.
[35] Raj *supra* note 2.
[36] *Id.* at 1079.

students with disabilities.[37] Moreover, these programs target students with disabilities for disfavored treatment. Even if the state provided a fiscal rationale for these restrictions, claiming that funding the rights provided by the IDEA at private schools is too costly, this interest is the state attempting to shirk its financial responsibility to these students.[38] In public schools, states would be required to provide funding for the education of students with disabilities. However, in creating these voucher programs, the state strips students with disabilities of their protections under IDEA, therefore limiting the state's fiscal commitment to these students. These programs clearly have disparate consequences for students with disabilities, as the state deprives them of their federal and state guarantees of individualized education, sending them with state funding into private education where they have no assurance of adequate education and no paths for recourse.[39] More than that, the state's evasion of their financial commitment to educating students with disabilities suggests the disfavored treatment of students participating in these voucher programs. Therefore, Raj asserts that instead of providing a benefit with voucher programs, students with disabilities face the loss of important rights because of

[37] *Id.* at 1093.
[38] *Id.* at 1043, 1087.
[39] *Id.* at 1043.

targeted disfavored treatment from the state, which is unconstitutional under a rational basis with a bite test.[40]

It may be argued that the state is not restricting students' access to education as ensured by IDEA, as conventional public schools with IDEA protections are still available. Yet, the state is offering an educational program that is not equally available under the same conditions to all students. Students wishing to participate in these programs may have reasons compelling them to seek out alternatives to public schools. For students with disabilities, their decision to participate in these voucher programs is constrained by either staying in a public school and maintaining their IDEA rights or waiving their IDEA rights to enroll in the private school of their choice with state funding. Therefore, states are offering an educational program that has unequal access for students with disabilities, raising constitutional concerns when access is not impeded in the same way for students without disabilities.

C. Education as a Public Right

The final approach analyzed in this article emerges from a substantive due process claim that views education as a public right, which

[40] *Id.* at 1092-1096.

the state cannot arbitrarily infringe upon by offering educational benefits to some, but not to all. First, I argue that private education provided via state funding should be interpreted as public education, especially in the case of the provision of special education. In the context of these voucher programs, states are providing funding that would otherwise be allocated to public schools, creating a system by which there is public provision of private education. While private schools are not created by the state as public schools are, they are becoming increasingly reliant on vouchers as more students enroll in the programs. For example, in Florida, as of 2023, nearly 243,000 students used vouchers to enroll in 2,098 private schools.[41] Of the nearly 122,000 students new to the program in 2023, 69% of these students were already enrolled in private school.[42] Not only is there a high number of students utilizing vouchers in Florida, but private schools are increasingly funded by vouchers from students whose parents had previously been paying the cost of attendance.[43] Voucher programs create publicly-funded private school options; therefore, conditions of state

[41] Danielle Prieur, *Florida Policy Institute Asked for School Voucher Data. Here's What Step Up for Students Provided*, Central Florida Public Media (Sep. 14, 2023), https://www.cfpublic.org/education/2023-09-14/florida-policy-institute-school-voucher-data-step-up-for-students.
[42] *Id.*
[43] *Id.* (84,505 of these new recipients (69%) were already in private school, 16,096 (13%) came from public schools, and 22,294 are entering kindergartners).

funding applied to public schools should also apply to state-funded private schools.

While the Supreme Court in *Rendell-Baker v. Kohn* (1982) previously ruled that private schools receiving public funding are not state actors, the rationale in that decision warrants further consideration in the context of private school choice programs waiving individual rights. In *Rendell-Baker,* the Court determines that a private school receiving most of its funding from the state is not considered a state actor, as the public function of education that this school was performing was not the "exclusive prerogative of the state."[44] First, under the IDEA, the state is responsible for the education of students with disabilities.[45] Therefore, in the case of special education, the state does have the exclusive function of ensuring that the protections of the IDEA are provided to students in the state. Since the majority opinion clarified that private schools may be considered state actors when they carry out exclusive functions of the state, these voucher programs could be viewed as state-provided education, even under the *Rendell-Baker* decision. Moreover, Justice Thurgood Marshall argues in his dissent that the state has delegated its "statutory duty to educate children

[44] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).
[45] 20 U.S.C. § 1412 (a) (11) (2012).

with special needs" to this private school.[46] With this delegation, in addition to the significant funding provided by the state to this school, there is a nexus created between the state and the school substantial enough to consider the school's actions to be state action.[47] This is certainly the case in the voucher programs considered here, where the state is providing funding for private education while passing the responsibility to educate students with disabilities to private schools, albeit without the same IDEA protections.

The Court's decision in *San Antonio Independent School District v. Rodriguez* (1973) that education is not a fundamental liberty right has precluded substantive liberty claims for public education.[48] However, a novel approach from Professor Matthew Patrick Shaw identifies education not as a liberty, but as a property right that should be protected under both procedural and substantive due process.[49] The decision in *Goss v. Lopez (1975)* establishes that education is a property interest created by a state through its provision of education through state laws and regulations and constitutionally protected under due process.[50] In *Goss,* the Court

[46] *Rendell-Baker*, 457 U.S. at 844.
[47] *Id.*
[48] San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).
[49] Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. 1179 (September 2022).
[50] Goss v. Lopez, 419 U.S. 565, 574 (1975).

establishes that 14th Amendment Due Process protections of property are created and defined by the dimensions of state law; in this case, a state had conferred a property right to education through laws that provide a public education to students and require students to attend school.[51] While the Court in *Goss* did not specifically identify substantive due process protections for the state-created right of education, the Court has not foreclosed this pathway either.[52] Shaw argues that substantive due process should extend to education as a property interest, as education is "deeply rooted in the nation's history and tradition."[53] Both federal and state governments have long endeavored to offer public education, even conditioning admission to the Union on the establishment of public school systems in new and reconstructed states.[54] Additionally, although the Court has not recognized education as a fundamental right, the majority opinion in *Plyler v. Doe (1982)* situates education as an important right with a "fundamental role in maintaining the fabric of our society."[55] In *Plyler,* the Court finds that education is too important of a right for the state to categorically exclude a class of students, in this case undocumented

[51] *Goss*, 419 U.S. at 574.
[52] Shaw, *supra* note 49 at 1210.
[53] *Id.* at 1212-1213.
[54] *Id.* at 1212.
[55] Plyler v. Doe, 457 U.S. 202, 221 (1982).

immigrants, from participation.[56] Emerging from the property interest of education and the decision in *Plyler*, Shaw presents education as a public right, which under substantive due process, the state cannot arbitrarily infringe upon or categorically exclude students from participation.[57] While a liberty claim presents a negative right, or something that the state cannot take away, a public right is a state-created positive right: the state is providing a benefit that the state cannot arbitrarily restrict the enjoyment of. [58] With this public right approach, a state is required to provide what it has *already defined* through constitutional and statutory measures.[59] In all three states that require students to waive their IDEA rights to participate in voucher programs, IDEA rights are protected for students in public schools at the state level, with state funding for these measures.[60] In requiring students to waive these rights, the state is arbitrarily denying a benefit to students with disabilities participating in publicly-funded vouchers that would otherwise be provided to them. Under the heightened

[56] *Id.* at 223-224.
[57] Shaw, *supra* note 49 at 1189.
[58] *Id.* at 1186-1187.
[59] *Id.* at 1187.
[60] 34 CFR § 300.705(a). *See also* Okla. State Dep't of Educ., *Special Education Finance*, (May 19, 2025) https://oklahoma.gov/education/services/special-education/finance.html#:~:text=Funds%20are%20awarded%20to%20the%20OSDE%20by,funds%20are%20awarded%20based%20on%20non%2Dcompetitive%20applications; Ga. Comp. R. & Regs. r. 160-4-7-.02.(3); Fla. Dep't of Educ., *IDEA-Funded State Project Guide* (October 2024), https://www.fldoe.org/file/7567/IDEAFundedStateProjectGuide.pdf.

scrutiny demanded by the infringement of a substantive property interest, the state must present a compelling interest in denying IDEA protections statutorily guaranteed to students.[61] Shaw recognizes that federal courts have already ruled that interests of "fiscal integrity" are insufficient to justify the denial of educational opportunities for a group of students.[62] Therefore, even if a state were to provide a fiscal justification for not funding the measures required by IDEA at voucher-funded schools, this interest would not stand under heightened scrutiny. As such, if the Court recognizes education as a public right and determines that voucher programs extend the state's responsibility for public education to private institutions, these three voucher programs could be found unconstitutional under a substantive due process analysis.[63]

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[61] Shaw, *supra* note 49 at 1185.
[62] *Id.,* citing *Thompson*, 394 U.S. at 633 (1969).
[63] Even if one does not accept the contention that private school choice programs should be seen as public provision of private education, Shaw clarifies that students maintain a public right to education regardless of their enrollment in public school, stating that for a student who relies on state funding to attend private institution, "has the right to choose any school that meets the state's standards and obligations." (Shaw, *supra* note 49 at 1185 n. 37). In this case, the state has an obligation to provide IDEA protections for students, which students are compelled to waive to participate in these programs.

III. Evaluating Constitutional Pathways: Benefits, Challenges, and Promise for Disability Rights in Education

In this article, I present three potential pathways for constitutional protection of the rights of students with disabilities participating in voucher programs. Establishing people with disabilities as a quasi-suspect class would have the benefit of expanding the rights of people with disabilities beyond education. Ensuring protections for disability as a class could lead to increased enforcement of existing legislation like the ADA and striking down discriminatory measures such as sub-minimum wage pay for workers with disabilities.[64] The primary challenge with this pathway is that it would require *Cleburne* to be overturned, and the Court would have to identify a new group for suspect classification, which the Court has been reluctant to do for years.[65] The rational basis with a bite test has the benefit of operating within the framework established by the Court in *Cleburne*. However, the argument that these states are targeting students with disabilities for disfavored treatment may be viewed by the Court less as animus against these students and more as a fiscal interest of the state. Even though the Court has found that "fiscal integrity" may not

[64] Ponder, *supra* note 12 at 746-748.
[65] Emily K. Baxter, *Rationalizing away Political Powerlessness: Equal Protection Analysis of Laws Classifying Gays and Lesbians,* 72 Mo. L. Rev. 891, 894 (2007).

be an acceptable interest for denying educational benefits to a group of students,[66] other Equal Protection cases since *Cleburne* have recognized states' economic interests as legitimate when dealing with cases related to disability.[67] As such, under the rational basis test that the Court has applied to disability cases, this rational basis with bite argument may be infeasible.[68] Finally, presenting education as a public right has the benefit of extending educational protections beyond students with disabilities, including to other groups such as LGBTQ+ students and religious minorities who face discrimination in voucher programs.[69] Additionally, a public right to education would subject these voucher programs to heightened scrutiny, where the state must provide a compelling interest.[70] This prevents the state from justifying the voucher restrictions with fiscal interests based on the decision in *Shapiro v. Thompson (1969)*, whereas this rationale may stand under a rational basis test.[71] This pathway presents a challenge insofar as it requires state-funded voucher programs to be held to a similar standard as public schools, which may be a reasonable claim

[66] Shaw, *supra* note 49 at 1185*,* citing Shapiro v. Thompson, 394 U.S. 618, 633 (1969).
[67] Ponder, *supra* note 12 at 716-718.
[68] *Id.* at 723-724.
[69] Bayliss Fiddiman & Jessica Yin, *The Danger Private School Voucher Programs Pose to Civil Rights*, Center for American Progress (May 13, 2019), https://www.americanprogress.org/article/danger-private-school-voucher-programs-pose-civil-rights/.
[70] Shaw, *supra* note 49 at 1226.
[71] *Thompson*, 394 U.S. at 633; Ponder *supra* note 12 at 716-718.

but comes into conflict with the decision in *Rendell-Baker*. Furthermore, the public right to education that Shaw presents would require an extension of substantive due process, which the Court has hesitated to expand.[72]

I see the quasi-suspect classification and the public right to education approach as the two most promising pathways. Both the quasi-suspect classification and public right approach have the benefit of subjecting these voucher programs to heightened scrutiny, and both would expand the rights of students with disabilities with broader societal implications: the quasi-suspect class path would expand disability rights; whereas the public right path would expand education rights.[73] Both of these pathways require innovation in the law, with the quasi-suspect classification overturning *Cleburne* and the public right to education being a novel approach.[74] Selecting a preferred pathway hinges on the perceived feasibility for each pathway. From my perspective, the public right to education is more feasible because this pathway has not been foreclosed in the way the Court has already decided that disability is not a quasi-suspect class in *Cleburne*.[75] Additionally, the Court's resistance to expanding new

[72] Collins v. Harker Heights, 503 U.S. 115, 125 (1992).
[73] Ponder, *supra* note 12 at 746-748.
[74] *Id.* at 729; Shaw *supra* note 49 at 1183.
[75] *Cleburne*, 473 U.S. at 432.

liberties under substantive due process is rooted in the desire to not have the Court extend its power into the legislative affairs of states, acting as unelected legislators in determining which laws can and cannot stand.[76] However, in the case of education as a public right, this is a state-created right. Rather than the judiciary deciding which liberties are protected or not, courts are only evaluating if the state is arbitrarily infringing on a right as the state has already defined it through its laws.[77] If these voucher programs in Florida, Oklahoma, and Georgia are seen as an extension of the public right to education offered by the state, denying IDEA benefits to participants with disabilities would be seen as an arbitrary infringement of this benefit.

Given the Court's recent trajectory, it may be somewhat infeasible to mount a successful challenge to these programs. First, the Court has not expanded the scope of suspect classification since gender was classified as a quasi-suspect class in 1976 in *Craig v. Boren,* suggesting that the Court would hesitate to introduce disability as a quasi-suspect class today.[78] Moreover, the Court has recently enabled the expansion of school choice programs that allow for different standards for private and public schools.

[76] Bowers v. Hardwick, 478 U.S. 186, 195 (1985).
[77] Shaw *supra* note 49 at 1186-1187.
[78] Suzanne B. Goldberg, *Equality without Tiers*, 77 S. CAL. L. REV. 481, 485 (March 2004).

Notably, the decisions in *Espinoza v. Montana Department of Revenue* (2020) and *Carson v. Makin* (2022) require that school choice programs include religious private schools, showing deference to private schools to educate in the manner they see fit.[79] Extending this pattern to these voucher programs in question, it may be likely that the Court would be unwilling to regulate how private schools operate. Regardless, states, including Florida, Georgia, and Oklahoma, may wish to evaluate how their voucher programs create disadvantages for students with disabilities and consider preemptive reform. By eliminating this arbitrary infringement upon the rights of students with disabilities, states have the chance to provide school choice programs that provide opportunities for students with disabilities– indeed, all students– to participate, with the anti-discrimination protections offered to them in public schools.

[79] Espinoza v. Montana Department of Revenue, 591 U.S. 464 (2020); Carson v. Makin, 596 U.S. 767 (2022).