DISABILITY RIGHTS · CONSTITUTIONAL LAW

1985 TO TODAY · THE PREMISE HAS NEVER BEEN REVISITED

The Coherence Gap

How Spending Clause Carveouts Undermine Cleburne's Premise and Expose Disability Doctrine to Constitutional Revisitation

In 1985 the Supreme Court denied disabled Americans heightened constitutional protection, reasoning that Congress had already protected them. The Court has spent the forty-one years since narrowing that protection through a set of carveouts. It cannot honor both commitments at once.

Travis Gilly · Real Safety AI Foundation · Working paper, v2, May 2026

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

THE BARGAIN

The deal the Court made in 1985

City of Cleburne asked whether disabled Americans deserve the heightened constitutional protection that race and sex receive. The Court said no.

Its reason was not that disabled people had never faced discrimination. It was that Congress had already answered the problem, through Section 504 and the statutes around it. Constitutional protection, the Court held, was no longer needed.

SOURCES City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 443-46 (1985).

THE CLAIM

The protection it pointed to is the protection it narrowed

The same Court that called Section 504 sufficient has spent four decades narrowing what Section 504 reaches.

If that protection still delivers what was promised, the narrowings must give way. If it does not, the constitutional question Cleburne closed has to be reopened. The Court cannot keep both. That contradiction is the coherence gap.

SOURCES City of Cleburne, 473 U.S. at 443; Rehabilitation Act §504, 29 U.S.C. §794.

THE STRUCTURE

How the argument runs

01

The premise (1985)

No heightened scrutiny, because the statutes already suffice.

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02

The erosion (1986 to today)

Four carveouts shrink Section 504 below what was promised.

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03

The bind (now)

Restore the statute, or reopen the Constitution. Not both.

SOURCES City of Cleburne, 473 U.S. 432 (1985); Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597 (1986); Cummings v. Premier Rehab Keller, 596 U.S. 212 (2022).

THE PREMISE

A promise that was supposed to be enough

Cleburne leaned on one finding above all. The legislative response to disability discrimination had been, in the Court's word, emphatic: Section 504, the education statute, the architectural-access law. With protection like that on the books, heightened judicial scrutiny would be redundant.

Justice Marshall warned that the promise was fragile. Legislative protection can be narrowed, he wrote, and a right that depends on political goodwill is not secure. Forty-one years have proven him right.

SOURCES City of Cleburne, 473 U.S. at 443; id. at 462-64 (Marshall, J., concurring in part and dissenting in part).

THE REPRESENTATION

What the United States told the world in 2012

In 2008 Congress passed the ADA Amendments Act to restore disability protections the Court had cut. In 2012 the Executive Branch told the United Nations, in formal ratification proceedings, that American law meets or exceeds the strongest international standard for disability rights.

That statement describes the architecture Congress had just built. It is the political branches' own measure of what the law was supposed to deliver.

SOURCES ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; Convention on the Rights of Persons with Disabilities, 2515 U.N.T.S. 3; Hearings Before the S. Comm. on Foreign Rels., 112th Cong. (2012).

II

PART II

The Carveouts

Four doctrines, each reasonable alone, narrowing the statute together.

Section 504 covers less than its text promises, because the Court built walls around it one case at a time.

THE MECHANISM

Four ways the Court walled off Section 504

Section 504 bars disability discrimination in any program that receives federal funds. Four doctrines, each defensible on its own, have shrunk what that reach covers.

01 **The recipient-beneficiary line** COVERAGE

A duty attaches only to the entity that takes federal money directly. Benefit from a federally funded program without signing for the funds, and you owe nothing.

02 **The tax-expenditure exemption** COVERAGE

A federal tax credit is not federal assistance, even a credit paid out specifically for hiring disabled workers.

03 **Procurement at market value** COVERAGE

Selling goods to the government at the market price is treated as an arm's length sale, triggering no programwide duty toward disabled customers.

04 **The contract-reading remedy limit** REMEDY

Even where the duty applies, emotional-distress damages are unavailable, because the statute is read like a contract.

SOURCES Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605-07 (1986); Regan v. Taxation With Representation, 461 U.S. 540, 544-46 (1983); 45 C.F.R. §84.10; U.S. Dep't of Justice, Title VI Legal Manual §VI.B; Cummings v. Premier Rehab Keller, 596 U.S. 212, 220-22 (2022).

III

PART III

The Proof: Walmart

One company, five federal entanglements, no programwide duty.

Walmart shows the gap in operation, a federally woven commercial actor that Section 504 never reaches.

THE CASE STUDY

Federally woven, formally untouched

Walmart sits inside five federal programs. Under current doctrine, none of them makes it a Section 504 recipient.

01 **Federal contractor**
Sells to federal agencies above the ten-thousand-dollar contract line, which triggers only narrow employment duties under Section 503 and nothing for disabled customers.

02 **Tax-credit recipient**
Collects Work Opportunity Tax Credits for hiring disabled workers, with no civil rights duty attached to the subsidy.

03 **SNAP infrastructure**
The largest SNAP retailer in the country, essential to delivery in food-desert markets, yet treated as a mere beneficiary.

04 **Voc-rehab destination**
Takes federally funded vocational-rehabilitation placements into a duty no court has fixed.

05 **Subsidy beneficiary**
Built stores on federal pass-through development funds, store by store, invisible to any customer.

SOURCES USASpending.gov (2026); 26 U.S.C. §51; 7 C.F.R. §278.1; 29 U.S.C. §§720 et seq.; 42 U.S.C. §§5301 et seq.; Good Jobs First, Shopping for Subsidies (2004).

THE RESULT

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programwide Section 504 duties Walmart owes, despite five distinct federal entanglements. The recipient-beneficiary line, the tax-expenditure rule, and the market-value exemption each close a door. Together they leave a disabled customer with no programwide claim.

SOURCES Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597, 605-07 (1986); 45 C.F.R. §84.10.

PART IV

The Closed Loop

A choice the Court built and cannot avoid.

Put the premise and the carveouts side by side and only two honest exits remain.

THE TRILEMMA

Three options, one of them impossible

A **Read the carveouts narrowly** PRESERVES CLEBURNE

Restore Section 504 to what was promised. Cleburne stands, and the 2012 representation holds true.

B **Keep the carveouts** REOPENS THE QUESTION

Concede the protection fell short, and the heightened-scrutiny question Cleburne closed must be reopened.

C **Keep both at once** CONTRADICTION

Hold the full carveouts and the promise of sufficiency together. This is the present posture, and it cannot stand.

SOURCES City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); analysis per The Coherence Gap (working paper, v2, 2026).

NO EXIT

The contradiction has no escape hatch

The Court might wave the 2012 statement away because the Senate never ratified the treaty. But the failure to ratify does not erase what the Executive Branch represented domestic law to do.

It might call the legislative-protection point in Cleburne mere dicta. It was not. The refusal of heightened scrutiny rested on it. Each available evasion collapses on inspection, which is why the choice is real.

SOURCES City of Cleburne, 473 U.S. at 443; Convention on the Rights of Persons with Disabilities, 2515 U.N.T.S. 3.

V

PART V

The Exit

The resolution that keeps the promise.

Read the carveouts narrowly, and back the reading with a few targeted reforms.

THE NARROW READING

The exit that overrules nothing

Option A asks the Court only to read its prior decisions no wider than their facts require. Paralyzed Veterans narrows to the diffuse beneficiary it actually involved. The tax-expenditure rule stops short of credits aimed at a protected class. The market-value exemption yields where a contractor turns federal endorsement into commercial value. Cummings stays put and does not spread.

No precedent is overruled. Section 504 expands back toward what the political branches said it covers.

SOURCES Dep't of Transp. v. Paralyzed Veterans, 477 U.S. at 605; Regan v. Taxation With Representation, 461 U.S. 540 (1983); Cummings v. Premier Rehab Keller, 596 U.S. 212 (2022).

THE BACKSTOP

Three repairs where doctrine cannot reach

Where the narrow reading is not enough, targeted reform conditions a federal benefit on the civil rights duty that should travel with it.

01 **Tax credit**
Condition the Work Opportunity Tax Credit on accepting Section 504 duties toward the workers it subsidizes.

02 **SNAP authorization**
Condition retailer authorization on accessibility at the point of sale.

03 **Contractor enforcement**
Enforce Section 503 against the large contractors it already covers.

SOURCES 26 U.S.C. §51; 7 C.F.R. §278.1; 7 U.S.C. §§2011 et seq.; 29 U.S.C. §793.

THE CHOICE

The Court cannot keep both forever

In 2012 the political branches told the United Nations that American law meets or exceeds the strongest international standard for disability protection. The carveouts make that representation untrue.

So the choice is closed. Read the carveouts narrowly and restore Section 504 to what was promised. Or concede the protection fell short and reopen the heightened-scrutiny question *Cleburne* closed. Holding both at once is contradiction.

Justice Marshall predicted this erosion in 1985. The path that keeps the promise is the narrow reading, with targeted reform behind it.

SOURCES City of Cleburne, 473 U.S. at 462-64 (Marshall, J., concurring in part and dissenting in part); Convention on the Rights of Persons with Disabilities, 2515 U.N.T.S. 3; ADA Amendments Act of 2008, Pub. L. No. 110-325.

REFERENCES

Travis Gilly, The Coherence Gap: How Spending Clause Carveouts Undermine *Cleburne*'s Premise and Expose Disability Doctrine to Constitutional Revisitation.

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CASES

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Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983).

Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022).

STATUTES, RULES AND STANDARDS

Rehabilitation Act of 1973 §504, 29 U.S.C. §794; §503, 29 U.S.C. §793.

ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

Work Opportunity Tax Credit, 26 U.S.C. §51.

Supplemental Nutrition Assistance Program, 7 U.S.C. §§2011 et seq.; 7 C.F.R. §278.1.

Rehabilitation Act state grants, 29 U.S.C. §§720 et seq.; Community Development Block Grants, 42 U.S.C. §§5301 et seq.

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