The Rehabilitation Act at Fifty

Derek Warden*

A few years ago, I published, in this journal, an article on the thirtieth birthday of the Americans with Disability Act. That article, The Americans with Disabilities Act at Thirty, 11 CALIF. L. REV. ONLINE 308 (2020), has seen a great deal of success over the past three years. Inspired by that essay, this article celebrates the fiftieth anniversary of another very important disability rights law—the forerunner of the Americans with Disabilities Act—the Rehabilitation Act of 1973 (RA). On September 26, 2023, the RA will turn fifty years old. To fully celebrate this law and to properly wish it a happy fiftieth year and fiftieth birthday, this article will be divided as follows. Part I examines the history of disability rights prior to the adoption of the RA and the Section 504 sit-ins that led to the signing of the 504 regulations. Part II explores the standard doctrinal structure associated with the RA, particularly Section 504. Part III then briefly examines the relation between the RA and various other areas of law. Finally, Part IV looks at the future of the RA and offers several "gifts" society could give that law in its fiftieth year.

DOI: https://doi.org/10.15779/Z38DR2P96R

* J.D., G.D.C.L., LL.M., S.J.D., Attorney at Law, Career Clerk to Justice Griffin of the Louisiana Supreme Court. The views expressed herein are my own. Thank you to Evan Mantler and all the staff at the CALIFORNIA LAW REVIEW who worked on this paper. This article is dedicated to Judith Heumann. Her relentless advocacy led to the passage of the RA, the ADA, and the Convention on the Rights of Persons with Disabilities. Rest well, Judy. We got it from here.

I.
A GLIMPSE INTO THE PAST

From ancient times to the modern day, the history of disability discrimination is often terrifying, yet hopeful.[1] Because this essay concerns a 20th Century American statute, I begin this historical discussion with the United States in the 20th Century.

The 20th Century saw the rise of the eugenics movement, which sought to eradicate disability from the Earth. Dozens of states passed laws to compel disabled people to be sterilized.[2] From the start of the 20th century until 1927, most of these laws were struck down as unconstitutional under the Equal Protection Clause and other state and federal constitutional provisions.[3] However, the United States Supreme Court, in *Buck v. Bell*, broke with long-standing legal doctrine and (in a five paragraph opinion that cited only one case) upheld these laws.[4] Soon the opinion led to mass sterilization, served as a basis for the Nazis' eugenics laws, and was used in their defense at Nuremberg.[5]

Then, due to the atrocities of World War II, advances in science, and growing social awareness, eugenics largely faded. States, seeing the issues facing those with disabilities, enacted numerous pieces of legislation to protect disabled peoples' rights.[6]

Congress followed suit and enacted some laws to protect the rights of individuals with disabilities. Such early laws were the Vocational Education Act of 1917 (also known as the Smith-Hughes Act)[7] and the Vocational

1. I provided a detailed history of disability rights from Neanderthals to the modern day in my dissertation. *See* Derek Warden, Constitutionalizing Three Theories of Disability Discrimination—Disparate Treatment, Reasonable Accommodation, and Integration—Through A Jurisprudential Pluralistic and Constitutional Pluralistic Reading of the Ninth Amendment (2022) (S.J.D. Dissertation, Tulane University Law School), https://digitallibrary.tulane.edu/islandora/object/tulane%3A123747 at 5 [https://perma.cc/K626-9V8P] [hereinafter Three Theories].

2. Three Theories, *supra* note 1, at 11.

3. Stephen A. Siegal, *Justice Holmes,* Buck v. Bell*, and the History of Equal Protection*, 90 MINN. L. REV. 106, 108 (2005).

4. 274 U.S. 200 (1927).

5. Derek Warden, *Disenchanting Justice Holmes*, 2021 U. ILL. L. REV. ONLINE 330, 332 (2021).

6. *See* Derek Warden, *Fifty State Summary of Disability Rights Laws* (Jul. 28, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4175488 [https://perma.cc/V23B-8L46] for a summary of such laws.

7. For a good discussion of this law see Lia Epperson, *Bringing the Market to Students: School Choice and Vocational Education in the Twenty-First Century*, 87 NOTRE DAME L. REV. 1861, 1864 (2012).

Rehabilitation Act of 1920.[8] Decades later, Congress enacted three sweeping reforms. It enacted what is now called the "IDEA," which guarantees a free and appropriate education to children with disabilities.[9] Most important to this article, Congress enacted the Rehabilitation Act of 1973, which replaced the Vocational Rehabilitation Act.[10] § 504 soon became the most important provision of the Rehabilitation Act.[11] Years later, Congress adopted the Americans with Disabilities Act (ADA).[12]

Now a foundational piece of disability rights legislation, Richard Nixon vetoed the RA twice.[13] Only after countless activists such as Judy Heumann from Disabled in Action protested around the country did Nixon sign the act into law.[14]

But the most important provision of the RA, § 504, needed regulations to be signed by the Secretary for Health Education and Welfare (HEW) for the law to have any real force. The Nixon Administration and Ford administrations failed to sign the regulations.[15] Carter's administration was reluctant to sign.[16]

To address this lack of action, on April 5, 1977, disability rights activists occupied federal buildings across the country. The protest would eventually become known as the 504 Sit-Ins.[17] While most of these occupations lasted less than two days, the sit-in at the HEW building in San Francisco lasted for roughly a month.[18]

The Bay area was particularly well organized, in large part because of activist groups and student organizations at U.C. Berkeley.[19] The San Francisco sit-in, overseen by legendary activists Judy Huemann and Kitty Cone would

8. For a more detailed discussion, see Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1364–66 (1993).

9. Individuals with Disabilities Education Act. 20 U.S.C. §§ 1400–1482 (West 2019).

10. 29 U.S.C. §§ 701–796l.

11. *Id.* § 794.

12. 42 U.S.C. §§ 12101–12213; 47 U.S.C. § 255.

13. Ryan H. Nelson, *Now and Again: Reappraising Disability Leave As an Accommodation*, 46 B.Y.U. L. REV. 1489, 1522 (2021).

14. *Disabled Tie up Traffic Here to Protest Nixon Aid-Bill Veto*, N.Y. TIMES, Nov. 3, 1972, at L43; Bob Williams, *The Rehabilitation Act of 1973: Independence Bound, Administration for Community Living*, ACL BLOG (Sep. 16, 2016), https://acl.gov/news-and-events/acl-blog/rehabilitation-act-1973-independence-bound [https://perma.cc/94ZM-KH9K].

15. Kitty Cone, *Short History of the 504 Sit-in*, Disability Rights Education and Defense Fund, https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/ [https://perma.cc/N6VK-FXXJ] [hereinafter *Short History*].

16. *Id.*

17. *Id.*

18. *Id.*

19. The place of U.C. Berkeley in the disability rights movement is difficult to overstate. Some have called it "the crips capital of the world." A documentary on U.C. Berkeley's website examines that history. *We Won't Go Away* (1981), https://revolution.berkeley.edu/wont-go-away/ [https://perma.cc/SP76-7Y7F].

prove successful.[20] The disability rights activists' resilience garnered public attention, and other groups soon showed up to support their effort. The Black Panthers, progressive church leaders, LGBTQ activists, musicians, veterans' groups, and the City of San Francisco all supported the cause.[21]

The protest lasted until April 28, 1977 and was certainly not an easy feat. Individuals went on hunger strikes.[22] The FBI turned off hot water, air conditioning, and telephone access.[23] Protesters ingeniously communicated to outside support through sign language.[24] After a sham hearing in San Francisco failed to produce results, some San Francisco activists traveled to D.C. to attempt to compel HEW Secretary Califano to sign the 504 regulations.[25] They followed President Carter to church and protested outside his home and the home of Secretary Califano.[26] Their tactics won out, and Califano signed the regulations on April 28, 1977.[27]

II.
UNDERSTANDING THE PRESENT

The Rehabilitation Act of 1973 is omnibus legislation. Section 1 of the law contains a short title and addresses Congressional findings, definitions, reports, evaluations, and how the law is to be administered among many other topics.[28] Title I of the law concerns "vocational rehabilitation services" and discusses topics such as payments to states with federal funds, transition services for people with disabilities, and vocational rehabilitation services for "American Indian[s]."[29] Title II governs research and training issues.[30] Title III governs "professional development."[31] Title IV establishes a National Council on Disability.[32] Title V, which will be discussed in more detail below, governs the specific rights of and advocacy for people with disabilities.[33] Title VI governs certain employment opportunities for people with disabilities.[34] Finally, Title VII governs independent living services.[35]

---

20. *Short History*, *supra* note 15.
21. *Id.*
22. *Id.*
23. An interesting documentary that goes even further into firsthand retellings of the events of the 504-Sit-in is CRIP CAMP (Higher Ground Productions 2020).
24. *Id.*
25. *Id.*
26. *Short History*, *supra* note 15.
27. Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 490 (2000).
28. 29 U.S.C. §§ 701-718.
29. *Id.* §§ 720-751.
30. *Id.* §§ 760-766.
31. *Id.* §§ 771-776.
32. *Id.* §§ 780-784.
33. *Id.* §§ 791-794g.
34. *Id.* §§ 795g-795o.
35. *Id.* §§ 796-796l.

In the realm of litigation, Title V is the most important. § 504 is the most impactful and most litigated provision of Title V and is the one to which this article now turns.

To win any claim under § 504, a plaintiff must prove that the entity who discriminated against them was a recipient of federal financial assistance, that they have a disability, that they are otherwise qualified for the program or service; that they suffered discrimination, and that the discrimination was solely by reason of their disability.[36]

As discussed more fully below, much of the legal doctrine of the RA has been developed in relation to the ADA, particularly Title II, which concerns public entities. This reflects the simple propositions that the ADA was established to expand upon the RA, they cover similar topics (disability rights in all areas of life for the ADA and disability rights as applied to entities that receive federal financial assistance for the RA), and they provide mostly the same substantive rights and remedies. To be sure, part of the reason advocates wanted the ADA was because the RA was very narrow in its application—i.e., it only applied to recipients of federal financial assistance.

The defendant entity in an RA claim must be a recipient of federal financial assistance.[37] For RA purposes, the recipient can be narrowed down to the specific entity.[38] For example, a state court system is not considered a recipient of federal financial assistance if the state's Department of Corrections receives federal funds, but not the court system.[39] Unlike Title II of the ADA, which applies only to government entities,[40] the RA applies to both government and private entities so long as they receive federal financial assistance.[41]

While the ADA came after the RA, the RA was amended to adopt the ADA's definition of an individual with disability, which uses a tripartite definition substantially similar to an earlier version of the RA, without the outdated language of "handicapped individual."[42] As such, under the RA, a person has a disability when they have one or more impairments that substantially limit a major life activity, have a record of such an impairment, or are regarded as having such an impairment. There are exclusions for certain conditions.[43]

---

36. *See* Biondo v. Kaledia Health, 935 F.3d 68, 73 (2d Cir. 2019).

37. 42 U.S.C. § 794(a).

38. 1 AMERICANS WITH DISAB.: PRACT. & COMPLIANCE MANUAL § 1:77 (collecting authorities) [hereinafter COMPLIANCE MANUAL].

39. *Id.*

40. 42 U.S.C. §§ 12131-32.

41. Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind., 786 F.3d 510, 525 (7th Cir. 2015) (noting that the RA applies to even private clubs not open to the public).

42. 29 U.S.C. § 705(20)(B) (referring to 42 U.S.C. § 12102); 28 C.F.R. § 41.31(a) (regrettably, this regulation still uses the outdated language).

43. COMPLIANCE MANUAL, *supra* note 38, § 1:23.

"Otherwise qualified" means that the individual, with or without a reasonable accommodation, can meet the essential qualifications of the program, service, or employment position.[44] This is often a very easy bar to meet. For example, an individual is otherwise qualified to attend court hearings because they are member of the public who wants to attend court proceedings.[45]

Discrimination under the RA is a very broad concept. It includes disparate treatment, disparate impact (many courts have concluded), failure to make reasonable accommodations,[46] and, in large part because Title II of the ADA establishes the same rights as the RA, unjustified institutionalization.[47] In practice, it also may include violations of regulatory provisions that place certain obligations and prohibitions on recipients of federal funds.[48]

At face value, the RA's causation standard appears extremely high, but in practice many theories and claims of discrimination pass muster. The ADA says that discrimination must be "by reason of disability,"[49] while the RA says that the discrimination must be "*solely* by reason of" the disability.[50] While statements from some courts make the causation standard seem rather high,[51] there are two theoretical bases for why "solely by reason of" is not as difficult of a standard as it appears at first: (1) the standard is essentially a "but for" standard in disparate treatment situations and (2) the rules under both the ADA and the RA create affirmative obligations, such that when a defendant fails to live up to those obligations, the cause of that failure is irrelevant.

As to the first, the "solely by reason of" standard does not require that a person's disability be the only factor in a disparate treatment discrimination claim, but it must be a "but for" factor. In other words, if the disability had not been present, the plaintiff would not have suffered the discriminatory harm.[52] Any other factors for a defendant's conduct become irrelevant in RA claims because they cannot be said to have "caused" the harm. This standard is distinct from and slightly more stringent than other standards of causation in disability rights law, which require only that the disability be one factor—possibly one of

44. 28 C.F.R. § 41.32(a), 28 C.F.R. § 41.32(b).

45. Prakel v. Indiana, 100 F. Supp. 3d 661, 681-682 (S.D. Ind. 2015).

46. Davis v. Shah, 821 F.3d 231, 260 (2d Cir. 2016).

47. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999) (recognizing ADA theory of unjustified institutionalization); Frederick L. v. Dep't of Pub. Welfare of Com. of Penn., 364 F.3d 487, 491–492 (3d Cir. 2004) (recognizing ADA and RA contain *Olmstead* claims); Sanchez v. Johnson, 416 F.3d 1051, 1062 (9th Cir. 2005) (recognizing in cases regarding *Olmstead* claims, the RA and the ADA are interpreted together); Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 460 (6th Cir. 2020) (same); *see also* Smith v. Harris Cnty., 956 F.3d 311, 317 (5th Cir. 2020) (recognizing precedent under Title II extends to the RA).

48. Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 288-289 (5th Cir. 2005).

49. 42 U.S.C. § 12132.

50. 29 U.S.C. § 794(a).

51. *See e.g.,* Houston v. Texas Dep't of Agric., 17 F.4th 576, 586 (5th Cir. 2021).

52. A.H. by Holzmueller v. Illinois High Sch. Ass'n, 881 F.3d 587, 593 (7th Cir. 2018).

many—but not a but-for cause.[53] Thus, while the ADA and other laws may allow claims where a person still would have suffered harm without the disability, the RA does not allow such claims and requires but-for causation.[54] In other words, ADA plaintiffs may meet their causation requirement with either but-for or motivating factor, but RA plaintiffs only have but-for.

One example shows this distinction clearly: unjustified institutionalization. No one doubts that both the ADA and RA prohibit unjustified institutionalization.[55] Many states violate the unjustified institutionalization prohibition due to a lack of adequate service providers or concerns about money.[56] One would be hard-pressed to find a situation were the only reason a state commits unjustified institutionalization is because they simply dislike people with disabilities. Thus, interpreting the causation standard to prohibit claims where any other motivation played a role in the conduct would render unjustified institutionalization claims nearly impossible under the RA. However, when one understands that the "solely by reason of disability" language of the RA is a but-for standard, unjustified institutionalization claims are possible, regardless of the presence of other factors, because but for the individual's disability, they would not have been institutionalized.

Further, depending on the theory of discrimination asserted, causation may become totally irrelevant. In addition to its prohibition on intentional discrimination (i.e., disparate treatment), the RA places certain affirmative obligations on recipients, such as reasonable accommodations and architectural requirements for buildings.[57] If an entity fails to provide reasonable accommodations, alterations, or to live up to standards announced by the Attorney General in regulatory provisions, it has failed to abide by an affirmative obligation.[58] At that point, the reason for the defendant's failure is irrelevant.[59] In short, at this point in American jurisprudence, courts (and society as a whole) have realized that Congress had a broad idea of disability discrimination in mind when it enacted the RA—one more expansive than the often-quoted "solely by reason of" language would, in isolation, seem to include.

In practice, there is virtually no functional difference between causation under the RA and the ADA. As noted above, both statutes contain affirmative obligations, and ADA plaintiffs often prove but-for causation anyway, as it is generally not a difficult standard to meet. Indeed, outside of intentional disparate

53. *See* Baird ex rel. Baird v. Rose, 192 F.3d 462, 469-470 (4th Cir. 1999) (adopting motivating factor as the standard of causation in ADA Title II employment case and rejecting the "solely" standard of the RA).

54. *Id*.

55. *See* note 47, *supra*.

56. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 597 (1999) (noting that resources available to the state must be taken into account).

57. Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 454–55 (5th Cir. 2005).

58. *Id*.

59. *Id*.

treatment in employment claims under the RA, I see basically no need for courts to analyze the distinction in causation standards.

III.
THE RA'S RELATIONSHIP TO OTHER DISABILITY RIGHTS LAWS

The first relationship to mention is the RA's relationship to the constitutional rights of people with disabilities. For example, under *City of Cleburne v. Cleburne Living Center*,[60] disabled people are protected under only a rational basis test, which means laws and state conduct that discriminate against people with disabilities are constitutional so long as they bear some rational relationship to any conceivable legitime government interest. This is unlike other groups who are protected by either strict scrutiny (e.g., racial groups), under which virtually all discriminatory laws are struck down or intermediate scrutiny (e.g., sex-based classifications) which allow only those laws that are sufficiently tailored to achieve an important government interest.[61] While people with disabilities often lost constitutional claims under equal protection of the law, they did win claims under the Eighth Amendment.[62] This is so because people with disabilities in prisons are more likely to be harmed by prison practices—and these practices put their rights to be free from cruel and unusual punishment at serious risk.[63] The RA increased the rights protections for people with disabilities above these constitutional minimums. It expanded requirements for reasonable accommodations in the prison setting and made unlawful state conduct that would otherwise be legal under the rational basis test.

Second, the RA and related statutes also provide a route to damages claims against state entities that receive federal funds by waiving sovereign immunity. Under the doctrine of sovereign immunity, a state or arm of a state cannot be sued by a citizen unless one of several exceptions is met. "Abrogation" is one of these exceptions, but it is a difficult framework to meet.[64] The ADA abrogates sovereign immunity only in limited situations,[65] but the RA and its partner statute (Title VI of the Civil Rights Act of 1964) take a different route. A section tacked onto the end of Title VI commands that entities waive their sovereign immunity

60. *See generally* 473 U.S. 432 (1985).

61. *Id*.

62. Derek Warden, *Ending the Charade: The Fifth Circuit Should Expressly Adopt the Deliberate Indifference Standard for ADA Title II and RA Section 504 Damages Claims*, 9 TEX. A&M L. REV. 437, 458 (2022) [hereinafter *Ending the Charade*].

63. *Id*.

64. *See generally* Derek Warden, *Four Pathways of Undermining* Board of Trustees of the University of Alabama v. Garrett, 42 U. ARK. LITTLE ROCK L. REV. 555 (2020) (discussing doctrine associated with sovereign immunity, the ADA, and the RA).

65. Title I of the ADA does not abrogate state sovereign immunity absent a constitutional violation. Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001). Title II abrogates sovereign immunity in many more situations. *See e.g.*, Tennessee v. Lane, 541 U.S. 509 (2004); United States v. Georgia, 546 U.S. 151 (2006).

to § 504 (and other) claims when they accept federal funds,[66] which helps cure the sovereign immunity problem left by the ADA. Therefore, in situations where the ADA does not validly abrogate sovereign immunity, an entity that receives federal financial assistance may still be sued without courts needing to conduct the abrogation analysis.

Because the RA contains a grant and empowerment provision for Protection and Advocacy Systems, the final relationship to discuss is the relationship between the RA and the Protection and Advocacy (P&A) Systems.[67] Congress created the P&A System after the horrific documentary, Willowbrook: The Last Great Disgrace was released. P&As are entities in every state that protect and advocate for the human and civil rights of disabled people. They are empowered by federal grants and given certain "superpowers." For example, typically, P&As may access any place an individual with a disability is housed, provided they believe some abuse or violation of rights is occurring.[68] One of the primary statutes that P&As sue under is § 504 of the RA.

IV.
THE PATH FORWARD

This part briefly looks to the future of the RA by discussing several fiftieth birthday gifts that American society could give the law that has given us so much. The gifts outlined below are strategies to further develop the RA and its application in order to expand disability rights protections.

A. Deliberate Indifference for Damages Claims

The first major gift would be a recognition of the ordinary deliberate indifference standard for damages under the law. Currently, circuit courts are split as to what level of intent an individual must prove in order to obtain damages under Title II of the ADA and § 504 of the RA.[69] Most say it is deliberate indifference.[70] One says it is animus.[71] The Fifth Circuit has not explicitly adopted any standard,[72] but I have elsewhere argued that it implicitly operates under an ordinary deliberate indifference standard.[73]

Deliberate indifference means that a defendant had knowledge of facts that presented a substantial risk of harm to an RA or ADA right, and that the

66. 42 U.S.C. § 2000d-7.

67. A very detailed discussion of the P&A systems can be found in Kelsey McCowan Heilman, *The Rights of Others: Protection and Advocacy Organizations' Associational Standing to Sue*, 157 U. PA. L. REV. 237 (2008).

68. *Id.* at 244.

69. *Ending the Charade*, *supra* note 62, at 437.

70. *Id.* at 444–450 (collecting authorities and discussing doctrine from Second, Third, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits).

71. *Id.* at 443–444 (discussing the First Circuit).

72. *Id.* at 450–456 (collecting authorities).

73. *Id.* at 462.

defendant failed to act appropriately to address that risk.[74] There are three interrelated reasons why deliberate indifference is the best approach for damages claims under the RA.

First, deliberate indifference fits best with the general purposes of the law. When Congress adopted the RA and later the ADA, it was fully aware that disability discrimination results often not from animus but from deliberate indifference, neglect, disparate impact, and so forth. There are aspects of these disability rights laws that support this purpose-driven understanding.[75]

Second, the deliberate indifference standard is a better fit because of the RA and ADA's relationship to Eighth Amendment claims. The Eighth Amendment, which prohibits cruel and unusual punishment, was one area where disability rights advocates often found success without the help of the ADA or RA. In order to win damages under the Eighth Amendment, one need only show deliberate indifference. The RA and ADA, of course, were meant to increase protections for people with disabilities over and above that of existing law. Therefore, it would seem absurd to say that the ADA and RA, which were meant to increase prior protections, somehow require a greater showing of intent than the Eighth Amendment.[76]

Third and finally, the RA was enacted under the Spending Clause. Historically, to win damages under Spending Clause legislation, a plaintiff must show some element of knowledge on the part of the defendant. A standard for ADA or RA claims lower than deliberate indifference would not meet this historical requirement. Yet something higher would violate the considerations above.[77] Therefore, the "Goldilocks point" between all these considerations is the ordinary deliberate indifference standard.

B. Disparate Impact Theory

A second and extremely important gift would be for the U.S. Supreme Court to recognize that the RA contains a disparate impact theory. Thus, plaintiffs could address wide-spread systemic issues where a defendant's policy or practice disproportionately impacts disabled people without the need for individualized litigation.[78] There have been some objections to disparate impact claims recently. For example, the Sixth Circuit recently found that no disparate impact claims are cognizable under the RA,[79] because (according to that court) the Act bars discrimination "solely by reason of" the disability and does not encompass neglect and indifference.[80] One lawsuit reached the United States

74. *Id*. at 463.
75. *Id*. at 457-458 (collecting authorities and explaining doctrinal history).
76. *Id*. at 458-459.
77. *Id*. at 459-460.
78. COMPLIANCE MANUAL, *supra* note 38, § 1:266 (collecting authorities and discussing doctrine).
79. Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235 (6th Cir. 2019).
80. *Id*. at 242

Supreme Court on the question of whether plaintiffs can bring disparate impact claims at all, but that lawsuit was settled out of court.[81]

There are countless reasons why the RA should recognize a disparate impact theory, I summarize only a few here.

First, recognizing a disparate impact theory fits far better with the purposes, history, and theoretical structure of disability rights laws than saying no such claim exists. Courts have long since recognized that the RA and ADA were meant to address discrimination that resulted not just from animus, ill-will, or intent, but from neglect, indifference, and the disparate impact of otherwise facially neutral laws.[82] For this reason, excluding disparate impact would eviscerate the ADA and the RA.[83] The most obvious example of this point comes from the reasonable accommodation context. Reasonable accommodation claims, by and large, have the indicia of disparate impact.[84] They often result from systemic non-intentional conduct (e.g., sidewalks not being accessible, medical programs not accommodating people with disabilities, and so forth.)[85] As such, if the RA does not recognize claims that result from neglect or indifference, then (1) much of what Congress sought to do with the RA and (2) countless claims that no one seriously denies exist, would all die.

Second, a related argument for recognizing disparate impact theory under the RA arises from the causation standard discussion above.[86] As in disparate treatment cases, disparate impact claims can survive the "solely by reason of" standard (which is what opponents of disparate impact claims have relied upon) because: (1) but for the individual's disabilities, they would not have felt the discriminatory harm, and (2) the disparate impact prohibition is properly understood as an affirmative obligation to provide services and programs in a way that does not have an unlawful disparate impact on people with disabilities.[87] Therefore, like the reasonable accommodation claim, the cause of

81. CVS Pharmacy, Inc. v. Doe, One, 142 S. Ct. 480 (2021) (dismissing writ).

82. Alexander v. Choate, 469 U.S. 287, 295 (1985); Payan v. Los Angeles Cmty. Coll. Dist., 11 F.4th 729, 738 (9th Cir. 2021); *S*.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 264 (3d Cir. 2013), Lacy v. Cook Cnty., 897 F.3d 847, 863 (7th Cir. 2018).
Indeed, the Sixth Circuit itself has recognized that like the RA, "Title II [of the ADA] imposes affirmative obligations on public entities and does not merely require them to refrain from intentionally discriminating against the disabled." Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 910 (6th Cir. 2004); *see also* Disabled in Action v. Bd. of Elections, 752 F.3d 189, 200–01 (2d Cir. 2014); Toledo v. Sanchez, 454 F.3d 24, 32 (1st Cir. 2006); Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 454–55 (5th Cir. 2005); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 488 (4th Cir. 2005) (noting that public entities must be "proactive."); Clemons v. Dart, 168 F.Supp.3d 1060, 1068–69 (N.D. Ill. 2016).

83. Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 668, 687-88 (E.D. Pa. Feb. 7, 2022) (citing Helen L. v. DiDario, 46 F.3d 325, 335 (3d Cir. 1995)).

84. *Payan*, 11 F.4th at 738, Nunes v. Mass. Dep't of Correction, 766 F.3d 136, 145 (1st Cir. 2014).

85. *Nunes* at 145 n. 7.

86. Part II, *supra*.

87. Plaintiffs will sue for disparate impact for the same conduct that offends other affirmative obligations. *See e.g*., *Perkiomen Valley*, 585 F. Supp. 668 at 689.

the defendant's failure to live up to this obligation is irrelevant for purposes of the prima facie case.

Third, it appears that the U.S. Attorney General has long since believed both the RA and ADA contain a disparate impact theory. Indeed, the AG has issued regulations under both the ADA[88] and RA[89] that can only be considered valid if a disparate impact theory exists. Not only would finding no disparate impact theory under the RA violate the accepted rule that the AG's opinions are worthy of respect,[90] it would also undermine a regulatory framework that has allowed systemic issues to be tried in discrete cases, without the need for thousands of individual cases that would strain judicial resources.[91]

Fourth, considering the countless disparate impact claims that have existed throughout the years, the regulatory claims that rely on disparate impact theories under both the ADA and RA, the statements by the Attorney General, and the numerous opinions by federal courts allowing disparate impact type claims in the disability rights context—if Congress did not believe the RA or ADA contained a disparate impact theory, it certainly would have acted by now.[92]

Fifth, principles of statutory interpretation strongly support the finding of a disparate impact claim under the RA. The words of a statute should be understood in their generally accepted meaning, read in context,[93] and in a way that effectuates the statute's purpose.[94] With these rules and the RA's broad remedial purpose in full view, it is beyond time for courts to recognize that "disability discrimination," regardless of the standard of causation one uses, necessarily contains claims for (1) disparate treatment, (2) disparate impact, (3) failure to make reasonable accommodations, and (4) unjustified institutionalization and lack of integration. Without any one of these, the others become less effective and potentially useless. Further, the ADA, which is interpreted alongside the RA, is well known to have a disparate impact claim,[95] and numerous states have expressly incorporated that law into their prohibitions on disability discrimination, which suggests a general understanding that the

88. Derek Warden, *Methods of Administration*, 10 HOUSTON L. REV.: OFF THE RECORD 39 (2020) (discussing the so-called methods of administration regulation under Title II of the ADA) [hereinafter *Methods of Administration*].

89. 34 C.F.R. § 104.4 (b)(4), 28 C.F.R. § 42.503(b)(1)(3). *See also Methods of Administration,* at 50-52.

90. *See* Frame v. City of Arlington, 657 F.3d 215, 225 (5th Cir. 2011).

91. *Methods of Administration*, *supra* note 88, at 59–66 (discussing the history of the methods of administration theory in prison class actions).

92. Int'l Ass'n of Fire Fighters, Loc. 50 v. City of Peoria, 193 N.E.3d 1208, 1215 (2022) (using legislative acquiescence); Kenshoo, Inc. v. Aragon Advert., LLC, No. 22-CV-764 (BMC), 2022 WL 504189, at *9 (E.D.N.Y. Feb. 18, 2022) (same). I admit legislative silence is not always controlling. However, in the case of disparate impact under the RA, the wealth of jurisprudence and understanding on that point is so vast, the interpretive method is useful and valid.

93. *See, e.g.,* MCI Tel. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 226–28 (1994); Nixon v. Missouri Mun. League, 541 U.S. 125 (2004) (discussing meaning of the term "an entity").

94. Johnson v. Runyon, 47 F.3d 911, 917 (7th Cir. 1995).

95. *See e.g.,* Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003).

concept of disability discrimination includes disparate impact.[96] The most obvious example of this may be statements made contemporaneously with the Louisiana Constitutional Convention of 1973.[97] International law—namely the Convention on the Rights of Persons with Disabilities—now expressly recognizes that disability discrimination includes conduct that has a discriminatory effect on people with disabilities.[98]

Sixth, and finally, § 504 is not as limited as other Spending Clause statutes, which sometimes do not allow for disparate impact claims. Arguments to the contrary rely too heavily on § 504's relationship to Title VI (which the Supreme Court has already said courts should not do),[99] and fail to take into account the numerous considerations listed above. Taken to its logical conclusion, this would undermine the key purpose of the RA—the elimination of discrimination that results not just from animus or ill will, but from neglect, indifference, and the disparate impact of otherwise neutral policies and practices.

For all these reasons, the RA, in addition to the ADA, should be recognized as having a disparate impact claim.

C. Emotional Distress Damages

Similarly, another very important gift that society should give the RA is recognition that the law allows for emotional distress damages—in other words, an abrogation of the Supreme Court's opinion in *Cummings v. Premier Rehab*.[100] Without emotional distress damages, the RA will become useless to millions of Americans it otherwise would have protected in situations that result in dignitary or emotional harm. For example, situations where an individual is denied access to a building or courthouse that they had to go to once but will not be returning to again. Other situations include those where a failure to accommodate during an arrest forces a disabled individual to urinate on themselves or fall out of a wheelchair. Without the ability to obtain non-economic damages, these plaintiffs will likely have no standing to bring a claim under the RA, even assuming the defendant's conduct violated the RA.

In *Cummings*, the Court ruled that the Rehabilitation Act, the Affordable Care Act, and Title VI of the Civil Rights Act (and potentially numerous other pieces of Spending Clause legislation) do not allow for the recovery of emotional

96. Derek Warden, *Fifty State Summary of Disability Rights Laws*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4175488 [https://perma.cc/V23B-8L46].

97. *See generally*, Derek Warden, *Disability Rights and the Louisiana Constitution*, 48 HASTINGS CONST. L.Q. 578 (2021).

98. Convention on the Rights of Persons with Disabilities, Effective May 3, 2008, https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html [https://perma.cc/94E8-6UXL].

99. Alexander v. Choate, 469 U.S. 287, 294 n.7 ("[T]oo facile an assimilation of Title VI law to § 504 must be resisted.")

100. 142 S. Ct. 1562 (2022).

distress damages.[101] Referencing contract law principles (which are often used to judge Spending Clause statutes), the majority so held because recipients of federal funds (those subject to these laws) could not have been on notice that they were potentially liable for emotional distress damages for violations of these statutes.[102]

Of course, even taking the majority at face value, and accepting that contract law principles should govern interpretation of these laws, the majority wrongly decided the issue. As Justice Breyer correctly noted in his dissent, certain contracts have always allowed for recovery of emotional distress damages—those where breach is substantially likely to cause such harms.[103] Violations of civil rights statutes certainly fall into this category,[104] and courts had awarded emotional distress damages under these and similar laws for decades.[105] Therefore, the recipients of federal funds were on notice that compensatory damages (including emotional distress) would be available under the RA.

Aside from its incorrect contract law analysis, the majority failed to properly use standard interpretative doctrines. First, as noted above, civil rights statutes are to be interpreted broadly to help them achieve their remedial purposes. As noted by the dissent in *Cummings*, emotional distress damages are often the only damages individuals suffer in disability discrimination situations. Thus, if plaintiffs have no claim for these damages, they cannot seek redress in courts for violations of their rights under the RA—effectively rendering it useless for countless Americans. Therefore, *Cummings* greatly undermines the purposes of these laws: the eradication of disability discrimination.

Second, the Court failed to use the standard interpretive doctrine of *in pari materia*—laws on the same subject matter should be interpreted similarly. Other civil rights laws (prohibiting the same types of discrimination),[106] and indeed other provisions of the RA itself,[107] allow for recovery of emotional distress damages. As such, even if Title VI does not allow for emotional distress damages, the Court relied too heavily on the contract law underpinnings of the RA and failed to focus enough on its purposes and historical contexts.[108] Thus, for all these reasons, *Cummings* was wrongly decided.

On a more positive note, because *Cummings* is a statutory opinion, it could be overturned by legislation. Thus, Congress could give a great gift to the RA by

---

101. *Id.*
102. *Id.*
103. *Id.* at 1579 (Breyer J., dissenting).
104. *Id.* at 1579.
105. *See generally* Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173 (11th Cir. 2007).
106. *Cummings*, 142 S. Ct. at 1582 (Breyer J., dissenting).
107. 29 U.S.C. §§ 794a(a)(2), 794a(a)(1); 42 U.S.C. § 1981a(a)(1).
108. *Choate*, 469 U.S. at 294 n.7 ("[T]oo facile an assimilation of Title VI law to § 504 must be resisted.").

expressly abrogating the opinion, much the same way that it statutorily abrogated other Supreme Court opinions with the ADA Amendments Act of 2008.[109]

Litigants and lower courts could also undermine *Cummings* by interpreting economic damages (which *Cummings* held were the only damages allowed in RA and similar cases) broadly. For example, they should argue that economic damages include lost wages, costs of changing service providers, costs associated with the need for medical expenses, psychological care costs, costs for lost time, and more. All of these, which could theoretically fall under emotional distress damages if they arise from psychological trauma, have a direct economic cost to the plaintiff resulting from the defendant's discriminatory conduct.

D. Qualified Immunity Does Not Apply to RA Claims

Another gift that American courts should give the RA is recognition that qualified immunity does not apply to RA claims. Qualified immunity shields government officials when they are named as defendants and sued for damages in their individual capacities.[110] Some courts have held that qualified immunity can block RA and Title II ADA claims.[111] Other courts have disagreed, and found that because entities, not individuals, are the proper targets of RA and Title II ADA claims, there is no qualified immunity defense available.[112] Title II of the ADA specifically applies to "public entities," and the Supreme Court has expressly recognized as much.[113] Similarly, the RA applies to the entity that receives the federal financial assistance[114]—where a party merely works at such an entity, they (as an individual) are not a proper party to an RA suit.[115] As such, there is no qualified immunity for purposes of the RA and the ADA because there are no individual capacity claims possible under those statutes. The courts

109. *See* 42 U.S.C § 12101 (Findings and Purposes of the ADA Amendments Act of 2008, Pub. L. 110-325 § 2, Sept. 25, 2008, 122 Stat. 3553, part (b) (rejecting U.S. Supreme Court decisions in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002)).

110. *See* Ajaj v. Fed. Bureau of Prisons, 25 F.4th 805, 813–14 (10th Cir. 2022).

111. Roberts v. City of Omaha, 723 F.3d 966, 972 (8th Cir. 2013); Key v. Grayson, 179 F.3d 996 (6th Cir. 1999); Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995); Lue v. Moore, 43 F.3d 1203 (8th Cir. 1994).

112. Walker v. Snyder, 213 F.3d 344, 346 (7th Cir. 2000) (abrogated on other grounds as recognized in *Glover v. Carr*, 949 F.3d 364, 368 (7th Cir. 2020); Mason v. Stallings, 82 F.3d 1007, 1009 (11th Cir. 1996); Armstrong v. Whalen, 465 F. Supp. 3d 1165, 1175 (W.D. Wash. 2020); Miller v. Singh, No. CV 17-1677-BAJ-RLB, 2019 WL 2479304, at *5 (M.D. La. Jan. 3, 2019); Trujillo v. Rio Arriba Cnty., No. CIV 15-0901 JB/WPL, 2016 WL 4035340 (D.N.M. Jun. 15, 2016).

113. 42 U.S.C. § 12132; City of San Francisco v. Sheehan, 575 U.S. 600, 610 (2015) ("Only public entities are subject to Title II.").

114. T.O. v. Fort Bend Indep. Sch. Dist., 2 F.4th 407, 417 n. 40 (5th Cir. 2021) ("Unlike the ADA, § 504 is applicable only to entities receiving federal funds.")

115. Lollar v. Baker, 196 F.3d 603, 609 (5th Cir. 1999). Indeed, because the terms of the RA apply it only to entities, even where an individual actor receives the federal funds for their programs or services, they are properly considered "an entity" for purposes of the RA. See 29 U.S.C. § 794(a)and (b). As such, they are not entitled to qualified immunity.

that have decided differently are simply wrong. Correcting this error would be a great fiftieth birthday present for the RA because it would eliminate one confusing area of law that incorrectly hinders some RA claims and delays the RA's success. Further, it would eliminate a legal defense that structurally and doctrinally makes no sense.

E. Vicarious Liability Under the RA

Some courts have held that, to bring an RA claim, a plaintiff must show some policy maker's decision led to the discrimination (such as a Sheriff or Warden or the like).[116] Other courts have said that an individual need not point to a specific policy maker—when a state actor violates the RA or the ADA, their fault is automatically imputed to their employer through "vicarious liability."[117] The second strand of jurisprudence is correct.

There are several reasons for this conclusion. First, as discussed above, both the RA and the ADA address violations of disabled peoples' rights by entities, which act purely through their employees; and neither statute textually requires the plaintiff to identify a responsible "policy maker." Second, a restrictive rule requiring identification of a policy maker and their unlawful decision undermines the broad remedial purposes of the law, by making claims to enforce the law more difficult to bring. Thus, the requirement would allow countless violations of the RA to go unremedied simply because intentional violations were not committed because of some high-ranking government actor but according to decisions by those with whom disabled people most often interact.[118] Third, the courts that have denied the existence of vicarious liability rely almost exclusively, and thus much too heavily, on the connection between the RA and other contract-law based claims, such as Title VI of the Civil Rights act.[119] Fourth, and relatedly, some have argued that because the RA adopts the remedies, procedures, and rights under Title VI of the Civil Rights Act, which does not have vicarious liability, then the RA cannot have vicarious liability. While it is true that § 504a of the RA says the remedies, procedures, and rights of Title VI of the Civil Rights Act "shall be available" under the RA, it does not limit vicarious liability, because vicarious liability is not a remedy, procedure, or right—it is a theory of liability. To deny the existence of vicarious liability claims under the RA based on its relationship to Title VI would be to twist the English language and well understood legal terms. Fifth, the United States Supreme Court has already accepted parties' concessions that a public "entity

116. Ingram v. Kubik, 30 F.4th 1241 (11th Cir. 2022); Jones v. City of Detroit, 20 F.4th 1117 (6th Cir. 2021).

117. *See T.O.*, 2 F.4th at 417; Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1141 (9th Cir. 2001); Rosen v. Montgomery Cnty., 121 F.3d 154, 157 n. 3 (4th Cir. 1997).

118. COMPLIANCE MANUAL, *supra* note 38, § 1:1.

119. *Choate*, 469 U.S. at 294 n. 7 ("[T]oo facile an assimilation of Title VI law to § 504 must be resisted.").

can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees."[120] Sixth and finally, given the widespread acceptance of vicarious liability under these statutes, if Congress believed these decisions were wrong, it certainly would have acted by now. In sum, courts should endorse vicarious liability under the RA and Title II of the ADA, and decisions finding the opposite should be immediately and emphatically overruled.

F. Ratification of the Convention on the Rights of Persons with Disabilities

I end this article on the same note as the one on which I ended my *Americans with Disabilities Act at Thirty* article—calling for ratification of the United Nations Convention on the Rights of Persons with Disabilities.[121] The Convention is meant to protect the rights and human dignity of people with disabilities.

While the United States, through President Obama, has signed the convention, our Senate has not yet ratified it.[122] As I briefly mentioned in my prior article, ratifying the Convention would not only solidify America's leadership role in the area of disability rights, but it could also solidify and amplify the role of the RA in American law.[123] Asserting that a law or right is recognized as part of international law has practical, moral, sociolegal, and normative consequences.[124]

CONCLUSION

The Rehabilitation Act of 1973 is omnibus legislation. It made many promises to disabled people and their allies. It certainly helped change the nation and has had a tremendous impact around the globe. As such, on behalf of all those who love this statute, I wish the Rehabilitation Act a happy fiftieth birthday, and I hope its birthday gifts arrive promptly!

120. City of San Francisco v. Sheehan, 575 U.S. 600, 610-11 (2015).

121. *See* Convention on the Rights of Persons with Disabilities, Effective May 3, 2008, https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html [https://perma.cc/94E8-6UXL].

122. Derek Warden, *The Americans with Disabilities Act at Thirty*, 11 CALIF. L. REV. ONLINE 308, 317 (2020).

123. *Id.*

124. *Id.* (discussing various potential consequences of ratification).