

Current Case: *American Council of the Blind v. Paulson*—U.S. Currency and Disability-Discrimination Law*

I. Introduction

The United States is one of the only countries in the world that does not provide some nonvisual means of distinguishing its currency denominations.¹ Most countries provide some distinguishing features on their paper currency, such as different sizes for different denominations or tactile features such as raised lettering or micro-perforation.² Because the United States provides no such features, the 3.7 million Americans with severe visual impairments³ must resort to purchasing expensive electronic devices to distinguish between denominations; relying on (hopefully honest) cashiers and clerks to identify their money for them; or generally forgoing the use of paper currency in favor of debit or credit cards.

In *American Council of the Blind v. Paulson*,⁴ the D.C. Circuit held that, in light of these facts, the visually impaired lack “meaningful access” to U.S. currency⁵ and that this lack of meaningful access violates § 504 of the Rehabilitation Act⁶—the first and foundational federal law that protects the civil rights of the disabled in the United States.⁷ On remand, the D.C. District Court ordered the Treasury to redesign all U.S. paper currency to provide meaningful access to the visually impaired.⁸ Furthermore, the court ordered the Treasury to begin the redesign process immediately and to provide a public comment period after it completes a study of the best available

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1. COMM. ON CURRENCY FEATURES USABLE BY THE VISUALLY IMPAIRED, NAT’L RESEARCH COUNCIL, CURRENCY FEATURES FOR VISUALLY IMPAIRED PEOPLE 15 (1995) [hereinafter NRC REPORT].

2. See *id.* at 1–2 (noting that many countries have used “such features as variable size, variable color, and tactile markings”).

3. *Id.* at 1.

4. 525 F.3d 1256 (D.C. Cir. 2008).

5. *Id.* at 1274.

6. *Id.* at 1259.

7. See Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

8. *Am. Council of the Blind v. Paulson*, 581 F. Supp. 2d 1, 2 (D.D.C. 2008).

options for redesigning currency, but before it decides on its final course of action.⁹

The decision has already been hailed as a landmark.¹⁰ It has also prompted widespread speculation as to the economic implications of requiring the Treasury to redesign U.S. currency.¹¹ Though a significant currency redesign would be costly for the federal government, the D.C. Circuit held that the government had not proved that it would be unduly burdensome.¹² Perhaps more significant are potential far-reaching economic effects on third parties, such as the \$35 billion U.S. vending-machine industry.¹³

Given the considerable economic ramifications of the currency issue, the legal battle over *Paulson* is likely far from over. The Treasury chose not to appeal the D.C. Circuit's decision to the U.S. Supreme Court before undertaking the redesign process. This decision may signal that the Treasury intends to propose a rather modest redesign (or no redesign at all, opting instead for assistive technology for the blind). In that case, the legal issue would almost certainly be resolved via judicial review at the back end of the process, after the Treasury has sought public comment and developed its final proposal. Should this occur, it could be several years before *Paulson's* central question—whether and how the Treasury should be required to redesign its paper currency—is resolved.

This Note begins with the premise that the D.C. Circuit was correct in finding impermissible discrimination in the administration of U.S. currency. However, I argue that the ongoing currency controversy should be framed, discussed, and resolved on different terms: the basis of the resolution should be constitutional rather than statutory. Specifically, I argue that the currency question implicates individual due process rights and that the ongoing controversy should be conceived and resolved on those grounds.

My argument proceeds in three Parts. Part II analyzes the *Paulson* decision and its basis in the Rehabilitation Act of 1973. Part III asks why the currency controversy has thus far not been framed in constitutional terms. I argue that this is because the rights of the disabled have historically been legally conceptualized as “positive,” welfare-type rights (which are not constitutionally protected) rather than as “negative” rights (which are con-

9. *Id.*

10. See David Stout, *Blind Win Court Ruling on U.S. Currency*, N.Y. TIMES, May 21, 2008, at A18 (commenting that the decision could “radically change” the system of U.S. currency); accord Jan Crawford Greenburg, *Illegal Cash: Currency Discriminates Against Blind*, ABCNEWS.COM, May 20, 2008, <http://blogs.abcnews.com/legalities/2008/05/illegal-cash-cu.html>.

11. See *id.* (noting that Jeffrey Lovitky, counsel for the American Council for the Blind, estimated that changing U.S. currency to comply with the Rehabilitation Act would cost \$50 million).

12. *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1259 (D.C. Cir. 2008).

13. See generally Brief of National Automatic Merchandising Association as Amici Curiae Supporting Appellees, *Am. Council of the Blind v. Paulson*, 525 F.3d 1256 (D.C. Cir. 2008) (No. 07-5063), 2007 WL 2946625 (predicting devastating financial consequences for the vending-machine industry should any changes be made to U.S. currency).

stitutionally protected). Finally, in Part IV of this Note, I argue that the currency controversy can and should be conceived and resolved in terms of federal due process rights.

II. *Paulson*, the Currency Controversy, and Federal Disability Law

A. American Council of the Blind v. Paulson

In *Paulson*, the American Council for the Blind and two individuals with visual impairments sued the U.S. Secretary of the Treasury, alleging that the physical design of U.S. paper currency unlawfully discriminates against the visually impaired.¹⁴ The D.C. District Court agreed and granted partial summary judgment in favor of the plaintiffs.¹⁵ The court based its decision on the grounds that the visually impaired lack “meaningful access” to a federal program or service (currency) in violation of § 504 of the Rehabilitation Act.¹⁶ Though the district court did not provide specific injunctive relief, it issued a declaratory judgment that the Treasury Department would have to take action to bring U.S. currency into compliance with § 504.¹⁷ The D.C. Circuit allowed the Treasury an interlocutory appeal, in which the court affirmed the district court’s holding in the main and remanded the case for the determination of the issue of injunctive relief.¹⁸ On remand, the district court ordered the Treasury to begin the process of redesigning U.S. paper currency,¹⁹ which the Treasury will ostensibly have to do because it did not seek Supreme Court review of the D.C. Circuit’s decision.²⁰

1. *U.S. Currency.*—*Paulson* brought to light some disturbing facts about the difficulties people with severe visual impairments encounter in using U.S. currency. As the court noted, “The current design of paper money springs from the world of the sighted.”²¹ U.S. currency is unique among most world currency in that it contains no distinguishing features in terms of size, color, shape, size of print, or tactile features.²² This means that persons with visual impairments are unable to identify different denominations of currency.²³ Hence, they are forced to rely on external mechanisms to distin-

14. *Paulson*, 525 F.3d at 1261.

15. *Id.* at 1264.

16. *Id.* Section 504 of the Rehabilitation Act of 1973 is codified at 29 U.S.C. § 794 (2000).

17. *Paulson*, 525 F.3d at 1259–60.

18. *Id.*

19. Am. Council of the Blind v. Paulson, 581 F. Supp. 2d 1, 1–2 (D.D.C. 2008).

20. The government had ninety days from the issuance of the D.C. Circuit’s opinion in May 2008 to file a petition for certiorari. Stout, *supra* note 10, at A18.

21. *Paulson*, 525 F.3d at 1268–69.

22. See NRC REPORT, *supra* note 1, at 101–04 (providing examples of worldwide currency that contain one or more of eight different distinguishing tactile features).

23. *Id.*

guish among currency denominations.²⁴ Commonly used external mechanisms for distinguishing among bills include reliance on portable electronic currency readers,²⁵ the use of credit cards as an alternative to cash,²⁶ and, most startlingly, reliance on sighted individuals to discern the denomination of bills.²⁷

2. *Rehabilitation Act § 504 and “Meaningful Access.”*—Section 504 of the Rehabilitation Act prohibits discrimination against persons with disabilities by federal agencies and by programs receiving federal funds:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.²⁸

The standard for discrimination under § 504 is whether disabled individuals lack “meaningful access” to federal programs. Courts ask whether the disabled individual has “meaningful and equal access” to a federal program²⁹ and whether the benefits were “meaningfully and equally offered” to all, regardless of disability.³⁰ When meaningful access is lacking, proof of discriminatory intent is not required to bring a claim under § 504.³¹ This is because “[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”³²

While the government is required to provide “meaningful access” to government programs or benefits to all persons, regardless of disability, the government is not required to provide new or different benefits to disabled individuals.³³ The seminal case that distinguishes “meaningful access” from “new benefits” is *Alexander v. Choate*.³⁴ In *Choate*, disabled recipients of Medicaid benefits sued the state of Tennessee for reducing from twenty to fourteen the number of days of inpatient care it would pay hospitals on behalf of Medicaid recipients.³⁵ The Court held that the disabled individuals in *Choate* were able to enjoy their fourteen days to the same extent as nondis-

24. See *id.* at 1 (“[U.S.] banknotes provide no basis for denominating by blind persons.”).

25. *Paulson*, 525 F.3d at 1259.

26. *Id.*

27. *Id.* at 1261.

28. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2000).

29. *Alexander v. Choate*, 469 U.S. 287, 306 (1985).

30. *Id.* at 308.

31. *Paulson*, 525 F.3d at 1260.

32. *Choate*, 469 U.S. at 295.

33. *Id.* at 303.

34. *Id.*

35. *Id.* at 289.

abled individuals.³⁶ However, the Court maintained, to require that disabled individuals receive *more* benefit based on their disabilities would alter the “fundamental nature” of the benefit, something that the Act does not require.³⁷

The distinction between “meaningful access” and provision of a “new benefit” under § 504 remains a contested issue,³⁸ but the *Paulson* court had no trouble finding that the visually impaired lack meaningful access to U.S. currency.³⁹ The Treasury argued that because various coping mechanisms are available to the visually impaired, including seeking the assistance of others to identify bills, they do not lack meaningful access to currency.⁴⁰ The Treasury also argued that the visually impaired can use credit or debit cards, rather than paper currency, to participate in economic activity.⁴¹ The D.C. Circuit scorned the Treasury’s meaningful access arguments, saying that “[t]he Secretary’s argument is analogous to contending that merely because the mobility impaired may be able either to rely on the assistance of strangers or to crawl on all fours in navigating architectural obstacles, . . . they are not denied meaningful access to public buildings.”⁴²

B. *The Problem with Paulson*

Despite the strong language the D.C. Circuit employed to rebuff the Treasury’s absurd and insensitive arguments, the holding does not make for good law as to the currency issue. It is unlikely that *Paulson* will later give meaningful guidance to the Treasury or a court considering the currency redesign. This is mostly owing to the nature of the Rehabilitation Act.

Rehabilitation Act (and ADA)⁴³ cases are “fact-specific” inquiries, and often provide little or no precedent to guide future decision making.⁴⁴ This fact can invoke a cynical relativism, as it seems at times that almost any case could have the opposite result if only the parties put different facts in “the record.” The fact-intensiveness of Rehabilitation Act cases comes from the

36. *Id.* at 303.

37. *Id.* at 300, 303–04.

38. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 531, 530–31 (2004) (contrasting “reasonable modification” of a government program with “[compromising the] essential eligibility criteria for public programs”); *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 857, 866–67 (10th Cir. 2003) (noting that there is a difference between reasonable accommodation with fundamental modification of a program).

39. *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1269 (D.C. Cir. 2008).

40. *Id.*

41. *Id.*

42. *Id.* (internal citations omitted).

43. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2000), followed the Rehabilitation Act. Title II of the ADA, which is interpreted *in pari materia* with the Rehabilitation Act, protects disabled individuals from discrimination by state and federal governments. *Id.* § 12131.

44. Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Addressing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. 217, 228 (2008).

structure of the statute. The relevant Rehabilitation Act inquiry is a burden-shifting analysis—the lack of access to the government program is to be weighed against the burden that would be placed on the government were it required to provide such access.⁴⁵ In these cases, once a plaintiff has met her initial burden of demonstrating a lack of meaningful access to a government benefit due to her disability status, the Government then must demonstrate that the accommodations requested would be unduly burdensome.⁴⁶ To show an undue burden, the Government must show that the accommodations impose “undue financial and administrative burdens” or that they constitute a “fundamental alteration in the nature of a program.”⁴⁷

Given the Rehabilitation Act’s fact-intensive, burden-shifting analysis, it is not difficult to see how *Paulson* could have come out in the Government’s favor instead. The *Paulson* plaintiffs were easily able to establish a lack of meaningful access to currency.⁴⁸ However, the Government did not fare so well in proving up its “undue burden” defense.⁴⁹ The D.C. Circuit indicated that this was not because the accommodations requested were *not* unduly burdensome as a matter of law, but instead because the Government mishandled the facts.⁵⁰ Specifically, the court held, the Government erred in including the alteration of the one-dollar bill in its cost-burden calculations, since the one-dollar bill constitutes approximately half of all currency in circulation.⁵¹ Further, the court held that the Government failed to adequately demonstrate that adding tactile features to paper currency would significantly decrease its useful life.⁵² The unspoken implication of the court’s discussion is that if the Government could have adduced more and better facts, it might have survived summary judgment and perhaps even won its case.

The *Paulson* court seemed to recognize this “fact-intensive” morass, as it hinted that the currency question should be considered outside of the traditional Rehabilitation Act–ADA framework of disability-rights law, noting the “constitutional underpinnings” of U.S. currency.⁵³ The court also discussed the fundamental importance of currency as “the universal medium or common standard, by a comparison with which the value of all merchandise may be ascertained.”⁵⁴ Thus, even while considering the currency issue in statu-

45. The Rehabilitation Act borrows this balancing test from the ADA. Rehabilitation Act § 504, 29 U.S.C. § 794 (2000) (citing 42 U.S.C. § 12111).

46. *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

47. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410, 412 (1979).

48. *See supra* notes 14–16 and accompanying text.

49. *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1271–72 (D.C. Cir. 2008).

50. *Id.*

51. *Id.* at 1271.

52. *Id.*

53. *Id.* at 1268 (citing U.S. CONST. art. I, § 8).

54. *Id.* (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1113).

tory terms, the court suggested that the plaintiffs should have brought their case on constitutional grounds.

III. A Conceptual Hurdle to a Constitutional Solution to the Currency Problem

The D.C. Circuit did not decide *Paulson* on constitutional grounds, though it hinted that such a holding would be appropriate given that currency occupies a special place in the constitutional structure. Ultimately, this Note agrees with the D.C. Circuit and proposes a viable constitutional basis for resolving the currency issue. First, though, this Part considers a conceptual hurdle to a constitutional resolution to the currency controversy: federal disability protections have been conceptualized in terms of “accommodation”—as gratuitous welfare benefits—and it is axiomatic in American constitutional law that the Constitution does not protect positive welfare rights. In subpart III(A), I describe the theoretical underpinnings of the accommodation–discrimination distinction. In subpart III(B), I examine the way in which Supreme Court disability-rights precedent underscores and reinforces this accommodation–discrimination distinction.

A. Accommodation, Public Welfare, and Affirmative Rights

The major conceptual hurdle to resolving the currency controversy on constitutional grounds is that disability rights traditionally have been normatively cast as providing *accommodation* rather than as protecting against *discrimination*.⁵⁵ Professor Jolls describes this canonical distinction as such: antidiscrimination “condemns the differential treatment of otherwise similarly situated individuals on the basis of race, sex, national origin, or other protected characteristics.”⁵⁶ By contrast, protections for the disabled have been conceptualized as “accommodations” for the “special, distinctive needs of particular groups . . . by providing additional benefits or allowances to them.”⁵⁷

1. *Special Accommodations and the Full-Employment Model of Public Welfare.*—In addition to the normative casting of disability-rights protection as “special accommodation” rather than as “antidiscrimination,” the historical origins of disability-rights laws also explain why disability rights are understood as welfare benefits rather than as civil rights. Disability-protection laws have their roots in the social-welfare movement of the 1960s

55. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 643 (2001). Professor Jolls takes umbrage with this distinction—she argues that this distinction between antidiscrimination and accommodation is a false opposition. See generally *id.* However, for the purposes of this Note, I am interested in this canonical view not because I endorse it, but because I believe it explains why disability rights are not now protected on constitutional grounds.

56. *Id.* at 643.

57. *Id.*

and 1970s, and early statutes like the Rehabilitation Act were conceptualized from their inception as public-welfare programs.⁵⁸ In particular, this analytic framework—understanding disability protection as a form of social welfare—is rooted in a conception of social-welfare programs as having the goal of promoting “full employment.”⁵⁹ This view was personified by proponents of the ADA, who argued that “‘reasonable accommodations’ could move people with disabilities off of the public assistance rolls and into the workforce in a way that would ultimately save the nation money In short, the ADA was sold to a significant extent as a means of welfare reform.”⁶⁰

The Rehabilitation Act is a prime example of a full-employment-model social-welfare law; the statutory language that describes the Act’s purpose is telling. One of the Act’s central purposes is expressed as “empower[ing] individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through . . . the guarantee of equal opportunity.”⁶¹ Another purpose of the Act was “to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with significant disabilities.”⁶² Additionally, all recipients of funds under the Act are required to carry out programs in activities in a way that is “consistent with . . . [the] pursuit of meaningful careers.”⁶³

Because the Act is ensconced in the rhetoric of the full-employment model of social welfare, it is no wonder that the rights conferred by the Act are conceptualized as affirmative “welfare” benefits, rather than civil rights. This is an ironic result considering that the Act was modeled after Title VI of the Civil Rights Act of 1964.⁶⁴ In fact, the Act was actually originally proposed as an amendment to the Civil Rights Act before Congress decided to pass the law as an independent Act.⁶⁵ One cannot help but wonder whether disability rights might have been conceptualized more as civil rights than as welfare benefits had § 504 been codified in the Civil Rights Act.

2. *No “Affirmative Rights” Under the Constitution.*—The fact that disability rights have been conceptualized as accommodations—legislative

58. Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 926–28 (2003).

59. *Id.*

60. *Id.* at 926–27.

61. 29 U.S.C. § 701(b)(1) (2000).

62. *Id.* § 701(b)(2).

63. *Id.* § 701(c).

64. See S. 3044, 92d Cong., 118 CONG. REC. 526 (1972); H.R. 12,154, 92d Cong., 117 CONG. REC. 45,945 (1971) (both proposing amendments to the Civil Rights Act of 1964 that would make discrimination on the basis of a handicap an unlawful employment practice); accord *Alexander v. Choate*, 469 U.S. 287, 295 n.13 (1985) (explaining that the “nondiscrimination principle later codified in § 504 was initially proposed as an amendment to Title VI”).

65. *Choate*, 469 U.S. at 295 n.13.

welfare entitlements—means that, like other affirmative rights, they ostensibly are afforded no constitutional protection. That the Constitution does not confer affirmative rights has become axiomatic in discourse regarding the constitutional aspects of the welfare state.⁶⁶ Professor Sunstein noted:

The conventional wisdom . . . has it that the Constitution is a charter of negative guarantees—rights against government interference—and that “affirmative” rights are exceptional or nonexistent. Thus it is said that government may not intrude on private rights, but there is no claim against the government if it has failed to act.⁶⁷

This sharp distinction between government action and inaction has echoes in disability-rights discourse. Statutes like the ADA or the Rehabilitation Act provide for accommodation of people with disabilities, but there is no “right” to such accommodation that the Constitution protects from government interference.

B. The Equal Protection Cases: Cleburne and Its Troubled Legacy

The Supreme Court has reinforced this accommodation–discrimination distinction with its decisions in *City of Cleburne v. Cleburne Living Center*⁶⁸ and *Board of Trustees of the University of Alabama v. Garrett*,⁶⁹ ultimately concluding that “[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational.”⁷⁰ These equal protection cases are ultimately inapposite to my solution to the currency question (because they are equal protection, rather than due process, cases). However, because these cases are seminal, and because they nicely demonstrate the accommodation–discrimination problem, I discuss them briefly below.

1. Cleburne: The Beginning and the End of Equal Protection and Disability Law?—In *Cleburne*, a nonprofit organization sought to lease a four-bedroom home in Cleburne, Texas, for the purpose of housing thirteen mentally retarded men and women.⁷¹ The city informed the organization that it would have to obtain a special permit to operate the home under a local ordinance requiring a special permit for the construction of “[h]ospitals for the insane or feeble-minded, or alcoholic [*sic*] or drug addicts, or penal or

66. See, e.g., *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989) (“[The Due Process Clause] forbids the State itself to deprive individuals of life, liberty, or property without ‘due process of law,’ but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.”).

67. Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 888 (1987).

68. 473 U.S. 432 (1985).

69. 531 U.S. 356 (2001).

70. *Id.* at 367.

71. *Cleburne*, 473 U.S. at 435.

correctional institutions.”⁷² The organization applied for the permit, and the city denied it.⁷³

The organization filed suit in federal district court against the city on equal protection grounds, alleging that the zoning ordinance discriminated against the mentally retarded, both facially and as applied.⁷⁴ The district court upheld the ordinance, but the Fifth Circuit reversed, holding that mental retardation is a quasi-suspect classification and that the ordinance did not pass muster under the requisite intermediate-level scrutiny.⁷⁵ The U.S. Supreme Court affirmed the judgment—invalidating the zoning ordinance—but it rejected the Fifth Circuit’s logic in reaching that result.⁷⁶

The *Cleburne* Court applied a mechanical, three-tiered equal protection analysis to explain its decision, starting with the “general rule . . . that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest,” and noting that particular latitude is due when the legislation in question is social or economic.⁷⁷ The exception to the general rule, the Court noted, is when “a statute classifies by race, alienage, or national origin,” or when the law impinges on “personal rights protected by the Constitution.”⁷⁸ These laws will receive heightened scrutiny, and can be sustained “only if they are suitably tailored to serve a compelling state interest.”⁷⁹ The Court noted that there is also an intermediate level of scrutiny reserved for classifications based on gender, and in these cases, the classification will fail unless it is “substantially related to a sufficiently important governmental interest.”⁸⁰

The Court ultimately held that the zoning ordinance in *Cleburne* was invalid under rational-basis review,⁸¹ but went to great lengths to explain why mental retardation was not a classification that merits heightened scrutiny.⁸² First, the Court noted that mentally retarded individuals are unquestionably different from other people, and the legislature has a strong interest in dealing with and caring for these individuals, and perhaps has more competency to do so than do the courts.⁸³ Second, public-welfare laws like the Rehabilitation Act belie any sort of antipathy toward the mentally retarded on the part of the legislature that would warrant heightened judicial

72. *Id.* at 436 (quoting the *Cleburne* zoning ordinance).

73. *Id.* at 436–37.

74. *Id.* at 437.

75. *Id.* at 437–38.

76. *Id.* at 450.

77. *Id.* at 440.

78. *Id.*

79. *Id.*

80. *Id.* at 441, 440–41.

81. *Id.* at 450.

82. *Id.* at 442.

83. *Id.* at 442–43.

oversight.⁸⁴ Third, the existence of such social-welfare legislation indicates that the mentally retarded are not a politically powerless group.⁸⁵ And finally, and perhaps most significantly, the Court held that if it were to hold mental retardation to be a quasi-suspect classification, “it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others.”⁸⁶

2. *The Legacy of Cleburne*: Board of Trustees of the University of Alabama v. Garrett.—The *Cleburne* Court ultimately held that there was no rational basis for the zoning ordinance’s requiring a special permit for homes to house the mentally retarded, and it struck down the legislation on the grounds that it “rest[ed] on an irrational prejudice against the mentally retarded.”⁸⁷ However, the outcome of *Cleburne* is seldom discussed. Instead, subsequent cases construing *Cleburne* have focused on its rejection of “mentally retarded” as a suspect classification, and have even construed “mentally retarded” more broadly to include all disabled individuals. Even further, the result has been to remove equal protection entirely from the analytic framework of disability rights.

To wit, six years later in *Board of Trustees of the University of Alabama v. Garrett*,⁸⁸ the Supreme Court construed *Cleburne* to stand for the principle that states are not required by the Fourteenth Amendment to make “special accommodations” for the disabled.⁸⁹ In *Garrett*, the plaintiffs were two disabled state employees⁹⁰ who sued the State of Alabama under the ADA.⁹¹ Patricia Garrett was a nurse at the University of Alabama hospital and Milton Ash was a security officer for the state Department of Youth Services.⁹² Both state employees filed suit under the ADA for the state’s failure to provide reasonable accommodation for their disabilities.⁹³

The district court in *Garrett* consolidated the cases and ruled in favor of the state on summary judgment on the grounds that the ADA is an invalid abrogation of the state’s sovereign immunity under the Eleventh Amendment.⁹⁴ The Eleventh Circuit reversed, holding that the ADA is a valid abrogation of states’ immunity under Section Five of the Fourteenth

84. *Id.* at 443–44.

85. *Id.* at 445.

86. *Id.*

87. *Id.* at 450.

88. The plaintiffs’ claims in *Garrett* were brought under the ADA, but courts have “tended to construe section 504 *in pari materia* with Title II of the ADA” because the statutes are so similar in substance as to operate interchangeably. *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1260 n.2 (D.C. Cir. 2008) (citing *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999)).

89. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367–68 (2001).

90. *Id.* at 362.

91. *Id.* at 362–63.

92. *Id.* at 362.

93. *Id.*

94. *Id.* at 362–63.

Amendment, and hence that plaintiffs may validly sue states for money damages under the ADA.⁹⁵ Relying on *Cleburne*, the Supreme Court reversed the Eleventh Circuit's judgment on the grounds that the ADA is not a valid exercise of Congress's Section Five authority under the Fourteenth Amendment.⁹⁶

Section Five of the Fourteenth Amendment gives Congress the power to enforce the substantive guarantees of Section One of the Fourteenth Amendment by "appropriate legislation."⁹⁷ This includes both the right to remedy and the right to deter violations of the Fourteenth Amendment by "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."⁹⁸ However, in its enforcement, Congress is limited by the Court's interpretation of the Fourteenth Amendment:

Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."⁹⁹

Hence, though *Garrett* involved complicated issues of federalism and sovereign immunity, these issues turned on one question: What is the substance of the Fourteenth Amendment's guarantees with regard to the rights of the disabled? Enter *Cleburne*. The *Garrett* Court explained that:

The result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. . . . If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.¹⁰⁰

In what might be termed a judicial sleight-of-hand, the *Garrett* Court reinforced the now-familiar equivalency between accommodation and antidiscrimination—between positive, non-constitutionally-protected rights, and negative, constitutionally protected rights. Given the factual differences between these two cases it is questionable that the *Garrett* Court chose *Cleburne* to define the "substance" of the Fourteenth Amendment's guarantees vis-à-vis the disabled. The most important of these differences was in the actual disabilities of the plaintiffs themselves. The *Cleburne* plaintiffs were all severely mentally retarded, while the *Garrett* plaintiffs were respectively a breast-cancer survivor and a sufferer of chronic

95. *Id.* at 363.

96. *Id.* at 374.

97. U.S. CONST. amend. XIV, § 5.

98. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

99. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

100. *Garrett*, 531 U.S. at 367–68.

asthma.¹⁰¹ Thus the *Garrett* court exploited *Cleburne*'s concern about giving heightened scrutiny to a potentially ill-formed and amorphous "class."

IV. The Special Case of Currency: Due Process as an Alternative Ground for Resolving the Currency Controversy

The *Paulson* court hinted that the currency question should be considered outside of the traditional Rehabilitation Act–ADA framework of disability-rights law. First, the court noted the "constitutional underpinnings" of U.S. currency.¹⁰² The court also discussed the fundamental importance of currency as "the universal medium or common standard, by a comparison with which the value of all merchandise may be ascertained."¹⁰³ Currency is also different among constitutional disability concerns because there is no "state action problem" with which to contend.¹⁰⁴

Picking up where the D.C. Circuit left off, I argue that the ongoing legal issue presented in *Paulson*—whether and how the rights of the blind vis-à-vis U.S. currency should be protected—should be resolved on due process grounds. In subpart IV(A), I articulate a due process conception of the currency controversy based on both the fundamentality of the public interest in the free exchange of goods and services, and on the federal government's monopoly over the production of currency. In subpart IV(B), I argue that the conventional wisdom that disability accommodations are "benefits," which are not constitutionally protected, is inapposite to the currency question.

A. A Due Process Analysis of the Currency Controversy

The Due Process Clause accords procedural protection to "liberty" and "property"—protection that sometimes extends to government benefits. However, as Professor Sunstein has noted, it is quite difficult to determine "which, if any, statutory benefits—those said to be 'conferred by the government'—are entitled to procedural protection."¹⁰⁵ In this subpart, I consider two Supreme Court cases dealing with procedural protections for government benefits and argue that their approach offers a promising way to consider the currency problem.

In *Boddie v. Connecticut*,¹⁰⁶ the Supreme Court held that denying a person a divorce based on her inability to pay a filing fee violates her due

101. *Id.* at 362.

102. *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1268 (D.C. Cir. 2008) (citing U.S. CONST. art. I, § 8).

103. *Id.* (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1113).

104. I recognize that, inasmuch as the lack of a state-action problem makes currency a special case in the realm of constitutional disability rights, it also makes my argument's portability limited to a small set of analogous situations.

105. Sunstein, *supra* note 67, at 884–85.

106. 401 U.S. 371 (1971).

process rights.¹⁰⁷ In *Boddie*, the State had denied a number of indigent women divorces on the sole ground that their filings could not be accepted until the required fee had been paid.¹⁰⁸ The Supreme Court found Connecticut's actions unconstitutional:¹⁰⁹

[G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.¹¹⁰

Thus, though the legal institution of marriage dissolution is undeniably a statutory "benefit" conferred by the government, the government is not free to deny it to citizens on the basis of inability to pay. And, two important factors separate divorce from other statutory benefits: the fundamentality of the interest, and the government's monopoly over the benefit.

In contrast to *Boddie*, in *United States v. Kras*,¹¹¹ the Court held that it was *not* a due process violation for the government to deny the government benefit of bankruptcy based on a person's inability to pay a filing fee.¹¹² Robert Kras was an indigent petitioner in a bankruptcy proceeding who, though he filed the necessary petitions and affidavits seeking discharge of his debts, could not afford to pay the necessary filing fees.¹¹³ Kras argued that he should be exempted from the filing fees based on his indigence, and the district court agreed.¹¹⁴ The court held that to deny Kras relief based on his inability to pay the filing fee would violate his due process rights.¹¹⁵ However, the Supreme Court disagreed, holding that requiring an indigent to pay a filing fee in order to receive relief in a bankruptcy proceeding was not a due process violation.¹¹⁶

What is the difference between the government benefit of a divorce in *Boddie* and the entitlement to file for bankruptcy in *Kras*? Why does due process protect one and not the other? According to the *Kras* Court, the "alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level [as other fundamental interests]."¹¹⁷ By contrast to the interest in "elimination

107. *Id.* at 374.

108. *Id.* at 373.

109. *Id.* at 374.

110. *Id.*

111. 409 U.S. 434 (1973).

112. *Id.* at 449-50.

113. *Id.* at 437-38.

114. *Id.* at 440.

115. *Id.*

116. *Id.* at 449-50.

117. *Id.* at 445.

of debt,” “the marital relationship” interest and “the associational interests that surround the establishment and dissolution of that relationship” *are* fundamental, and rise to the level of due process protection.¹¹⁸ The Court reasoned that Kras’s position would not be “materially altered in any constitutional sense” if he did not receive a discharge—there would be “no change with respect to basic necessities.”¹¹⁹ With regard to the “government monopoly” rationale articulated in *Boddie*, the Court held that this concern was not nearly so pronounced in *Kras*.¹²⁰ It reasoned that, as opposed to marital dissolution, a debtor has multiple other avenues for the “adjustment of his legal relationship with his creditors.”¹²¹

Kras, then, stands for the proposition that bankruptcy relief is an “affirmative” statutory right; by contrast, the right of free formation and dissolution of marriage is a “negative” right, which is accorded due process protection. How did one become treated as positive and the other negative? Consider Professor Sunstein’s theory:

Whether rights are treated as “negative” or “positive” turns out to depend on antecedent assumptions about baselines—the natural or desirable functions of government. State protection of private property and contract appears to be a “negative” guarantee because it is so usual, indeed built into the very concepts of property and contract. Provision of welfare is treated differently because it is in some respects new and in any event hedged with limitations and reservations.¹²²

By Sunstein’s logic, then, marriage is a fundamental, negative right because it is rooted in contract, and hence it is desirable for the State to protect people’s interest in it. By contrast, bankruptcy relief is not only *not* a protection of contract, it is redistributive in nature, making it even less likely to fall within a baseline notion of the proper functions of government.

What, then, of currency? Though there is an argument to be made to the contrary, *Paulson* could have been decided, with the same result, on due process grounds under *Boddie*. The success of due process as a ground for equal access to currency depends on whether currency is more like the divorce proceeding in *Boddie* or the discharge of debt in *Kras*. I argue that the currency problem is more like *Boddie*—because the government has an undoubted monopoly over currency, and more importantly, because of the fundamentality of the interest in currency.

As to monopoly, the first factor for whether a benefit is entitled to due process protection, currency falls squarely within the purview of *Boddie*, rather than *Kras*. The government—specifically the federal government—

118. *Id.* at 444–45.

119. *Id.* at 445.

120. *Id.*

121. *Id.*

122. Sunstein, *supra* note 67, at 889.

has a monopoly over the production of paper currency.¹²³ Similarly, in *Boddie*, the state held a total monopoly over marriage dissolution. Ostensibly, too, this distinguishes currency from the bankruptcy process in *Kras*. The Treasury in *Paulson* did try to advance a *Kras*-like argument that paper currency is not the only means of exchange—because of the advent of debit and credit cards¹²⁴—but the Government’s comparison there was inapposite. In the thousands of everyday situations in which paper currency is the only means to complete a transaction, the government has a definite monopoly over the mechanism of the exchange.

Even more important to articulating a due process basis for the currency problem is the fundamentality of the interest involved. Aristotle noted that “all things that are exchanged must be somehow commensurable. It is for this end that money has been introduced”¹²⁵ Further, there is a deep-seated and fundamental antipathy over the government wrongfully separating a man from his money, with deep roots in American culture and history. Below, I outline a few historical examples to illustrate the fundamentality of interest in currency.

First, Washington’s Secretary of Treasury, Robert Morris, spoke of the importance of currency’s being “perfectly intelligible to the whole People.”¹²⁶ Morris wrote to the Continental Congress about the importance of making currency easily usable by “the great mass of people.”¹²⁷ He almost anticipated the instant controversy in *Paulson* when he noted that when it is difficult for people to distinguish between denominations of money, “the greater number who do not know, are made the dupes of the lesser number who do.”¹²⁸ This is precisely the peril that the visually impaired face today because they are denied meaningful access to currency: being made the dupes of unscrupulous people.

The fundamentality of interest in currency also has its roots in American ideals regarding liberty of contractual relations. At one time, the Supreme Court held that the federal government’s issuance of paper currency *in the*

123. See U.S. CONST. art. I, § 8, cl. 5 (“The Congress shall have the power to . . . coin money, regulate the value thereof, and of foreign coin”); *id.* art. I, § 10, cl. 1 (“No state shall . . . coin money; emit bills of credit; [or] make anything but gold and silver coin a tender in payment of debts”); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 49 (1820) (opinion of Story, J.) (concluding that powers granted to Congress in the Constitution are exclusive only in three situations, one of which being when “the exercise of a like power is prohibited to the States,” such as “the prohibition of a State to coin money or emit bills of credit”).

124. *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1269–70 (D.C. Cir. 2008).

125. 2 ARISTOTLE, *Nicomachean Ethics*, in THE COMPLETE WORKS OF ARISTOTLE V.5.1133a18–1133a20, at 1728, 1788 (Bollingen Series No. 71, Jonathan Barnes ed., rev. Oxford trans. 1984).

126. Letter from Robert Morris to the Continental Congress (Jan. 15, 1782), reprinted in GRAND COMM. OF THE CONTINENTAL CONG., PROPOSITIONS REFLECTING THE COINAGE OF GOLD, SILVER, AND COPPER 3, 5 (1785).

127. *Id.*

128. *Id.*

first place violated the Due Process Clause.¹²⁹ To wit, Chief Justice Chase wrote that the government's issuance of paper currency, to pay contracts that existed previously, interfered with the right of contractual relations between men and deprived them of their due process rights.¹³⁰ Chief Justice Chase reasoned that:

[a] very large proportion of the property of civilized men exists in the form of contracts. These contracts almost invariably stipulate for the payment of money. And we have already seen that contracts in the United States, prior to the act under consideration, for the payment of money, were contracts to pay the sums specified in gold and silver coin. And it is beyond doubt that the holders of these contracts were and are as fully entitled to the protection of this constitutional provision as the holders of any other description of property.¹³¹

Though *Hepburn* is no longer good law, it demonstrates an understanding of due process that lives on today, and its correlation to the facts in *Paulson* is strong. The visually impaired, by virtue of their lack of access to U.S. currency, are deprived of property that "exists in the form of contracts."¹³² Thus, by function of the government's issuance of a currency that they are unable to access, they are deprived of their right to property without due process of the law.

These historical examples are only two illustrations of the fundamental nature of the public interest in currency. However, they demonstrate that this fundamentality makes *Paulson's* currency issue closely aligned with *Boddie*, and presents a solid case for an alternative due process basis for *Paulson*.

B. The Irrelevance of the Accommodation–Discrimination Problem Under this Analysis

The benefit of a due process approach in the area of currency is that it avoids the traditional accommodation–discrimination problem. This is because, under a due process analysis, the government "benefit" in question is not "special protection" for the disabled. Rather, the benefit is the administration of currency itself. In the strictest sense, currency is a "gratuitous" government benefit (a positive right). That is to say that, in theory, the federal government could decide to get out of the currency business entirely and leave people to determine their own methods of exchanging goods and services. In this case, the blind would have no special due process claim

129. See *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 625 (1869) ("[A]n act making mere promises to pay dollars a legal tender in payment of debts previously contracted . . . is prohibited by the Constitution."), *overruled by The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870).

130. *Id.* at 624.

131. *Id.*

132. *Id.* Cass Sunstein has traced the legacy of *Lochner* and the supposedly bygone era of "liberty of contract," concluding that these principles are in fact alive and well in American jurisprudence. See generally Sunstein, *supra* note 67.

against the government for their lack of access to currency. Hence, by locating the gratuitous government benefit in currency itself, my proposal avoids the sticky accommodation–discrimination problem inherent in federal disability statutory analysis.

V. Conclusion

The ongoing controversy over the discriminatory nature of U.S. currency should be framed and resolved on due process grounds. Because of the fundamentality of a person's interest in currency, and the government's monopoly thereof, the present system of currency violates the due process rights of the visually impaired. Though *Paulson* had the right result, the case represents a missed opportunity for disability-rights law in general to move beyond past disappointments like *Cleburne* and *Garrett* and hold that, at least in some instances, the rights of the disabled should be afforded constitutional protection.

—*Emily Baker Falconer*