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Introduction

For civil rights lawyers who had toiled through the 1980s in the increasingly barren fields of race and sex discrimination law, the charmed passage of the Americans with Disabilities Act through the U.S. House and Senate and across a Republican president's desk must have seemed vaguely surreal. The strongly bipartisan House vote in the summer of 1990 was a remarkable 377 to 28, the vote in the Senate an equally overwhelming 91 to 6.¹ Rising to speak in favor of the bill, Republican cosponsor Orrin Hatch—not known for impassioned endorsements of new civil rights protections—had cried on the Senate floor.² Senator Tom Harkin, who had earlier delivered his floor remarks in American Sign Language, said of bill following the Senate vote, “It will change the way we live forever.”³

Signing the bill into law, President Bush was equally effusive. Describing the nation's historical treatment of the disabled as a “shameful wall of exclusion,” President Bush compared passage of the ADA to the destruction of the Berlin Wall:

Now I am signing legislation that takes a sledgehammer to another wall, one that has for too many generations separated Americans with disabilities from the freedom they could glimpse but not grasp. And once again we rejoice as this barrier falls, proclaiming together we will not accept, we will not excuse, we will not tolerate discrimination in America. . . . Let the shameful wall of exclusion finally come tumbling down.⁴

At the July 27 signing ceremony, held on the White House South Lawn to accommodate the large crowd of activists in attendance, President Bush cavalierly dismissed predictions that the law would prove too costly or loose an avalanche of lawsuits.⁵ Republican senator Bob Dole, a strong ADA supporter, admitted that the new law would place “some burden” on business, but found that burden justified because the act would “make it much easier” for America's disabled.⁶

For traditional civil rights lawyers, this was incongruous fare. For the previous two months, Senators Dole and Hatch, along with Vice President Quayle, President Bush, and others in his administration, had been sharply denouncing the Civil Rights Act of 1990,⁷ pejoratively labeling it a “quota bill.”⁸ The soon-to-be-vetoed legislation, which in much-diluted form eventually became the Civil Rights Act of 1991,⁹ sought to countermand a series of Supreme Court cases that, among other things, had virtually erased disparate impact theory,¹⁰ an accepted feature of Title VII jurisprudence since the early 1970s. The veto, which the Senate failed to override by one vote, represented a dispiriting defeat for traditional civil rights constituencies and their lawyers.

The Civil Rights Act of 1990 was not the only employment rights casualty of President Bush’s veto power. Just a year before he signed the ADA into law, the president had vetoed a bill that would have raised the minimum wage from \$3.35 an hour to \$4.55.¹¹ Stunning the congressional leadership, the veto came a mere fifty-one minutes after the bill had reached the president’s desk. On June 29, 1990, only two days after the ADA’s festive South Lawn signing ceremony, President Bush vetoed the Family and Medical Leave Act, which would have required covered employers to accommodate workers by providing up to twelve weeks of unpaid leave in cases of family illness or childbirth. In defense of the veto, Bush stated that such practices should not be mandated by the government, but should rather be “crafted at the workplace by employers and employees.”¹² Neither the minimum wage hike nor the FMLA, which Bush vetoed again in 1992, would become law until passed by the next Congress and signed into law in 1993 by newly inaugurated President William Jefferson Clinton.

It must have been difficult for traditional civil rights lawyers, reeling from these many setbacks, to comprehend the triumphal enthusiasm with which Republican senators and administration officials celebrated the passage of the ADA. How could such a transformative statute, requiring not only formal equality, as the nondiscrimination concept had traditionally been understood, but also structural equality—the accommodation of difference—have passed by such lopsided margins? How could it have garnered so much support from Republicans in the House and Senate, or from a Republican president who had in other contexts so vigorously resisted the expansion of civil rights protections? How could the president and the Republican congressional leadership embrace the disparate impact provisions of the ADA so readily, while at the same time sharply decrying them in the doomed Civil Rights Act of 1990?

There was incredulity in the traditional civil rights community, but

there was also hope—hope not only that the ADA would transform the lives of disabled Americans, but also that the theoretical breakthrough represented by reasonable accommodation theory would eventually play a role in solving other equality problems, which the more broadly accepted equal treatment principle had proven inadequate to address.

The Americans with Disabilities Act, and the administrative regulations that followed it, seemed to hold enormous practical and theoretical potential. The act's definition of disability had been drawn broadly, to cover not only the "traditional disabled," such as individuals who were blind, deaf, or used wheelchairs, but also people who had stigmatizing medical conditions such as diabetes, epilepsy, or morbid obesity. It covered not only people who were actually disabled, but those who had a record of a disability, such as cancer survivors, whom employers might be unwilling to hire for fear of increased medical insurance costs or future incapacity. The statute covered people who were not disabled at all, but were simply perceived as such, like people with asymptomatic HIV or a genetic predisposition toward a particular illness. It covered not only physical disabilities, but mental disabilities as well, arguably the most stigmatizing medical conditions in American society.

The ADA incorporated a profoundly different model of equality from that associated with traditional nondiscrimination statutes like Title VII of the Civil Rights Act of 1964.¹³ As a practical matter, those statutes, for the most part, required only *formal* equality: equal treatment of similarly situated individuals.¹⁴ As numerous legal scholars had observed, the equal treatment principle had not proven tremendously effective in addressing problems of equality and difference.¹⁵ The ADA required not only that disabled individuals be treated no worse than nondisabled individuals with whom they were similarly situated, but also that in certain contexts they be treated differently, arguably better, to achieve an equal effect.¹⁶

In this regard, the statute and its implementing regulations required covered employers to do something that no federal employment rights statute had required before: engage with a disabled employee or applicant in a good faith interactive process to find ways to accommodate the employee's disability and enable him or her to work.¹⁷ This "duty to bargain in good faith" represented a dramatic shift in the ordinary power relationship between employers and employees on such issues as shift assignments, hours of work, physical plant, or the division of job duties among employees. At least in the nonunion context, these had previously been aspects of the employer-employee relationship over which employers had exercised exclusive control, subject of course to the basic nondiscrimination princi-

ple that no applicant or employee could be treated less favorably for a reason specifically proscribed by law.

When enacted in the summer of 1990, the ADA was the only employment-related federal civil rights statute that centrally featured a structural theory of equality. Title VII's disparate impact theory, which had been under attack throughout the 1980s, had been all but obliterated by the Supreme Court's decision in *Wards Cove Packing Company v. Atonio*,¹⁸ and by the president's veto of the Civil Rights Act of 1990. Other Supreme Court cases had years before either strongly implied or explicitly precluded the assertion of disparate impact claims in Title VII pay equity cases,¹⁹ or in cases seeking to enforce constitutionally based protections against discrimination on the basis of race, sex, or national origin.²⁰ And, in *Trans World Airlines, Inc. v. Hardison*,²¹ the Court had so severely limited Title VII's religious accommodation principle as to render it virtually useless.

The ADA's embrace of structural equality seemed clear and unambiguous. Qualification standards, employment tests, or other selection devices having an unjustified disparate impact on disabled applicants or employees were clearly defined as discriminatory,²² as were standards, criteria, or methods of administration that had discriminatory effects.²³ The nondiscrimination principle unambiguously included a duty of reasonable accommodation, with which employers were required to comply even if the accommodation lowered an employee's net marginal productivity, so long as the expense incurred did not rise to the level of "undue hardship."²⁴

The ADA and its implementing regulations had yet another remarkable feature: they limited an employer's prerogative to exclude a disabled person from a particular job based on a scientifically unsound assessment of the risks to health and safety posed by the person's disability. Under the new law, an employer could exclude a disabled individual from a particular job on safety grounds only if the person presented a "direct threat"²⁵ to the health or safety of others in the workplace, as that term had been narrowly interpreted under the Rehabilitation Act of 1973.²⁶ Specifically, under the direct threat defense an employer could exclude a disabled individual from a particular job only upon a "reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence," taking into account the duration of the alleged risk, the nature and severity of the potential harm, the imminence and actual likelihood that the potential harm would occur.²⁷

Because stigmatizing conditions are so often associated with irrational perceptions of danger,²⁸ and because risk assessment in any context is more often based on popular myths and stereotypes than on sound scientific

analysis,²⁹ the ADA's direct threat defense was potentially transformative. No longer, it seemed, could a disabled person be excluded from a particular job because his or her presence was in good faith viewed as presenting an elevated health or safety risk. In making any such assessment, the ADA seemed to require that an employer replace an "intuitive" or "popular" approach to risk assessment with more scientific methods and standards.

In short, the Americans with Disabilities Act appeared to be a "second generation"³⁰ civil rights statute, advancing formal and structural models of equality by imposing both a duty of accommodation and a duty of formal nondiscrimination, regulating health and safety risk analysis in situations involving disabled employees or applicants, and extending these protections to an apparently wide class—a class ranging far beyond those traditionally viewed as disabled in legal and popular culture. Supporters hailed it as a triumph of a new "civil rights" or "social" model of disability over an older and outmoded "impairment" or "public benefits" model.³¹ The ADA promised to revive the concept of stigma as a powerful hermeneutic for the elaboration and judicial application of American civil rights law.³² Supporters and detractors alike predicted that the structural approach to equality advanced by the ADA might eventually diffuse into other areas of the law, eroding the entrenched understanding that equality always—and only—requires equal treatment under rules and practices assumed to be neutral.

The employment discrimination provisions of the ADA were phased in gradually between 1990 and 1994. The act, although passed in 1990, did not become effective until 1992,³³ at which point Title I, which prohibits discrimination in employment, covered employers with twenty-five or more employees.³⁴ In 1994, coverage was extended to employers with fifteen or more employees.³⁵ Within the disability activist community, expectations for the statute ran high. Within the employer community, so did concerns. Across the country, large law firms began running training sessions for their employer clients and strategy development workshops for employment defense lawyers, who would soon busy themselves preventing and defending cases brought under the new law.³⁶

Relatively quickly, as judicial opinions in Title I cases began to accumulate, it became clear that the act was not being interpreted as its drafters and supporters within the disability rights movement had planned. Indeed, by 1996 many in the disability community were speaking of an emerging judicial backlash against the ADA. Law review articles written by many of the statute's drafters described a powerful narrowing trend in the federal judiciary, especially on the foundational question of who was a "person with a

disability,” entitled to protection under the act. These articles, which told a consistent and to disability activists troubling story, bore titles such as

The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act³⁷

“Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability³⁸

Restoring Regard for the “Regarded as” Prong: Giving Effect to Congressional Intent³⁹

and, more recently,

Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination, and the Americans with Disabilities Act⁴⁰

The Supreme Court’s Definition of Disability under the ADA: A Return to the Dark Ages.⁴¹

Early on, one might have discounted these alarmist accounts on the grounds that partisans on one or another side of a disputed social issue often overestimate the strength of a hostile trend. But, as time went on, various developments suggested that something worthy of note was, in fact, happening with respect to judicial interpretation and application of the ADA. Systematic studies of ADA Title I cases published in 1998 and 1999 lent the first sound empirical support to the more impressionistic accounts of ADA advocates. In fact, as these studies showed, the overwhelming majority of ADA employment discrimination plaintiffs were losing their cases, and the federal judiciary was interpreting the law in consistently narrowing ways.

A study of federal district court decisions conducted by the American Bar Association reported in 1998 that, in a data set including all published ADA Title I cases that had gone to judgment either before or after trial, plaintiffs had lost 92 percent of the time.⁴² In the Fifth Circuit, the figure was a startling 95 percent.⁴³

Less than a year later, Ohio State law professor Ruth Colker published an even more comprehensive study of outcomes in federal district and appellate ADA Title I decisions.⁴⁴ Professor Colker’s two-part data set included

not only the cases analyzed in the American Bar Association study, but also published and unpublished federal circuit court decisions available through Westlaw or other electronic reporting services.⁴⁵ Before analyzing these data, Professor Colker excluded cases that could readily be identified as “frivolous,” including cases filed against a noncovered entity, cases challenging conduct that occurred before the act’s effective date, and cases otherwise asserting claims that could not possibly be covered by the ADA.⁴⁶

Colker’s results reinforced the American Bar Association findings. With respect to cases included in the appeals court data set, defendants had prevailed at the trial court level 94 percent of the time. As to that 94 percent, where plaintiffs were appealing an adverse district court judgment, defendants prevailed on appeal 84 percent of the time.⁴⁷ Of the 6 percent of circuit court cases in which plaintiffs had prevailed in the district court, almost half, or 48 percent, were reversed in defendants’ favor on appeal.⁴⁸ Colker’s reanalysis of the ABA data set largely confirmed the studies’ original conclusions; she found that defendants had prevailed 92.7 percent of the time.⁴⁹

Colker’s content analysis of courts’ opinions in these cases proved equally unsettling for disability rights advocates. Closely reviewing the decisions contained in the district and appellate court data sets, she demonstrated that courts were systematically deploying two strategies in ruling against plaintiffs. First, district courts were granting and appellate courts were confirming summary judgments against plaintiffs even in situations where material issues of fact were clearly present, thereby keeping cases from proceeding to jury trial.⁵⁰ Second, Colker showed, in construing the ADA’s many ambiguous provisions, courts were consistently refusing to follow either the act’s extensive legislative history or the administrative regulations and other interpretive guidance issued by the Equal Employment Opportunity Commission.⁵¹

Of course, one might attribute these results to the fact that, during the 1990s, the ADA was a new and complicated statute, with many ambiguous provisions. Accordingly, one might speculate, the pattern of negative outcomes might simply reflect the conditions of judicial uncertainty in which ADA claims were being adjudicated. However, in a more recent study, Colker disconfirmed this hypothesis, demonstrating that levels of judicial uncertainty did not significantly predict ADA appellate outcomes.⁵² Moreover, noted Colker, during the late 1960s and early 1970s, Title VII of the Civil Rights Act of 1964 was also a new and complex statute. However, Colker’s data showed that appellate outcomes in the early years of Title VII enforcement were decidedly proplaintiff, not prodefendant.⁵³

One might also attempt to explain these statistics by positing an adverse selection effect, caused by the more meritorious cases being resolved before any judicial complaint is filed. But as Steven Percy's essay later in this volume suggests, one finds little support for this view in statistics maintained by the EEOC.

Between 1992 and 1998, the Equal Employment Opportunity Commission resolved a total of 106,988 charges of discrimination under the ADA. Of these, only 4,027, or 3.8 percent, resulted in reasonable cause determinations, and only 14,729, or 13.8 percent, resulted in "merit resolutions" of any kind, including settlements, withdrawal with benefits, or determinations of reasonable cause.⁵⁴ The largest category of administrative dispositions consisted of "no cause" determinations, which accounted for 51.4 percent of all dispositions, followed by "administrative closures," at 34.9 percent, many of which result from a charging party obtaining a right to sue and commencing his or her own legal action before the EEOC has completed its investigation.⁵⁵ Although more detailed study and analysis would certainly aid our understanding of how ADA cases proceed from initial dispute to litigation, there is little in the EEOC data to support the theory that a disproportionate share of nonmeritorious cases were reaching the federal courts.

Oddly, during the years in which the cases analyzed in the Colker and ABA studies were accumulating, one could never have gleaned from popular media coverage of the ADA that the administrative and judicial tide was flowing so powerfully against ADA plaintiffs. The picture being painted in the media was in fact precisely the opposite—of a law and an administrative agency run wildly amuck, granting windfalls to unworthy plaintiffs and forcing employers to "bend over backwards"⁵⁶ to accommodate preposterous claims. Articles and commentary in the nation's leading newspapers bore headlines such as these:

The Disabilities Act's Parade of Absurdities⁵⁷

Disabilities Law Protects Bad Doctors⁵⁸

Disabilities Act Abused? Law's Use Sparks Debate⁵⁹

Negative media commentary crested after publication of the EEOC *Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* in March 1997.⁶⁰ Intended to help employers understand what the act did and did not require, the *Guidance* unleashed a torrent of rhetorical attacks on both the ADA and the EEOC. Leading newspapers in major metropolitan areas ran stories and commentary with headlines like, "Late for Work: Plead



Reprinted courtesy of Larry Wright and the *Detroit News*.

Insanity,”⁶¹ “Protection for the Personality-Impaired,”⁶² and “Gray Matter; Breaks for Mental Illness: Just What the Government Ordered.”⁶³ Cartoonists had a field day, as the above selection from the *Detroit News*⁶⁴ exemplifies.

The ADA’s “image problem” was not confined to the print media. The act was pilloried in television news and sitcom programming as well.⁶⁵ In all likelihood, many Americans’ understanding of the ADA was shaped by a *Simpsons* episode entitled “King Sized Homer,” in which Bart Simpson’s father attempted to eat himself to a weight of three hundred pounds, so that he could be diagnosed as “hyperobese” and use the ADA to avoid participation in an otherwise mandatory workplace exercise program. Others may have learned about the law while watching a *King of the Hill* episode entitled “Junkie Business,” in which a drooling, near catatonic addict-employee, who spent much of the work day in a fetal position, claimed protection of the ADA to avoid being fired. His “rights” to come in late, to have the lights dimmed, and to do little productive work are championed by a social worker, who, sporting a wrist brace for carpal tunnel syndrome, refers to himself and his addict-client as the “truly disabled.” One by one, other employees at the business follow suit, until no one but the beleaguered manager is doing any work. Everyone else is claiming to be disabled

and, under the sheltering wings of the ADA, immune from discipline or discharge.

Hopes that the United States Supreme Court might reverse the hostile judicial tide were temporarily buoyed in 1998, with the Court's decision in *Bragdon v. Abbott*,⁶⁶ which held that asymptomatic HIV infection constituted a disability within the meaning of the ADA from the moment of infection. But the hopes buoyed by *Bragdon* were dashed a year later, when in a trilogy of ADA Title I cases⁶⁷ the Court interpreted the act's definition of disability in the same crabbed manner as had the lower-court decisions so vehemently criticized by disability activists and advocates. The Court's decisions in *Sutton*, *Murphy*, and *Kirkingburg*, in a very real sense, gutted the ADA, leaving in a catch-22 vast numbers of disabled people whose impairments were sufficiently mitigated by medication and other assistive devices as to enable them to work: if mitigating measures or their own determination enabled disabled people to function without substantial limitation, they were considered "not disabled" within the meaning of the ADA and lost their federal statutory protection from discrimination. If their impairments, without mitigation, resulted in a functional limitation, they would in all likelihood be deemed "not qualified," and thus, not entitled to ADA protection either.

If the Court's decisions in the *Sutton* trilogy dashed ADA plaintiff advocates' hopes, the Court's next move swept up and tossed out the scattered pieces. In *Trustees of the University of Alabama v. Garrett*,⁶⁸ the Supreme Court held that by providing a disabled individual with a right to sue a state employer for damages resulting from employment discrimination based on disability, Congress, in enacting Title I of the ADA, had exceeded its authority under Section 5 of the Fourteenth Amendment⁶⁹ and had improperly attempted to abrogate the rights of the states as sovereign entities under the Constitution's Eleventh Amendment. More simply stated, in *Garrett* the Court held that, as applied to private actions for damages against the states, Title I of the ADA was unconstitutional.

In fairness, *Garrett* was about far more than the Americans with Disabilities Act. The Court's decision in that case was but one small part of a much larger political struggle between Congress and the Supreme Court, a struggle that extends far beyond any disagreement the two branches might have over the ADA. Throughout the 1990s, by a narrow five-to-four majority,⁷⁰ the most conservative justices on the Rehnquist Court had been systematically expanding state immunity from suit under the Eleventh Amendment and, in corresponding fashion, limiting Congress's authority to enact civil rights laws protecting from state discrimination groups that, in the Court's

view, were not entitled to heightened protection under the Fourteenth Amendment's Equal Protection Clause.⁷¹

The *Garrett* Court held that Congress could enact antidiscrimination legislation enforceable against the states in private suits for money damages only if, in passing the legislation, it was acting pursuant to its powers under Section 5 of the Fourteenth Amendment. Section 5 authorizes Congress to enforce, by "appropriate legislation," the provisions of Section 1, which includes the Equal Protection Clause. Following its earlier decision in *Kimel v. Florida Board of Regents*⁷² holding the Age Discrimination in Employment Act unconstitutional as applied against the states, the *Garrett* majority declared that only the Court, and not Congress, had the constitutional power to determine what Section 1 of the Fourteenth Amendment meant and what rights it conferred on members of the groups it protected.

This is what makes *Garrett* important from a disability studies perspective. The degree of protection against state-sponsored discrimination conferred on members of a particular social group depends on whether that group is deemed to constitute a "suspect" or "quasi-suspect" class for equal protection purposes. Unless a class is deemed "suspect" or "quasi-suspect," the Equal Protection Clause of the Fourteenth Amendment provides its members with little protection indeed. So long as discriminatory state treatment of a nonsuspect or non-quasi-suspect class has a "rational basis," the Equal Protection Clause is not violated.

Race has long been considered a "suspect classification" for equal protection purposes.⁷³ To pass constitutional muster, a racial classification must be narrowly tailored to achieve a compelling state interest.⁷⁴ Sex has long (although less long than race) been considered a "quasi-suspect" classification.⁷⁵ To survive equal protection scrutiny, a sex-based classification must be "substantially related" to the achievement of an "important state objective."⁷⁶ In 1985, in *City of Cleburne v. Cleburne Living Center*,⁷⁷ the Supreme Court held that mentally retarded persons did not constitute a "suspect" or "quasi-suspect" class for equal protection purposes. So long as discriminatory state action toward the mentally retarded had a "rational basis," held the *Cleburne* Court, the discriminatory treatment was permissible under the Equal Protection Clause.

In the years following *Cleburne Living Center*, disability studies scholars and disability rights activists advocated a minority group model of disability. The minority group model frames the problem of disablement as a product not of impairment per se, but of discrimination against persons with impairments. As Harlan Hahn, Matthew Diller, Kay Schriener, and Richard Scotch later in this volume explain, the minority group model of

disability galvanized communities of disabled people, sparked a period of political activism, and ultimately informed the contours of disability discrimination legislation and administrative regulations.

Congress wrote the minority group model of disability into the ADA's preamble, making abundantly clear its position that, *Cleburne Living Center* notwithstanding, people with disabilities should be viewed as a suspect class entitled to the highest level of Fourteenth Amendment protection. Specifically, in the preamble, Congress wrote that people with disabilities constituted "a discrete and insular minority," historically subjected to isolation, segregation, and "purposeful unequal treatment" that relegates them to a position of "political powerlessness in our society."⁷⁸ To anyone familiar with the Court's equal protection jurisprudence, this language unmistakably signals suspect classification status. In Congress's view, unambiguously expressed in the language of the ADA, discriminatory state treatment of disabled people should be subjected to the highest level of scrutiny under the Equal Protection Clause.⁷⁹ So, on the eve of the Court's decision in *Garrett*, Congress has taken the position, stated in the ADA's preamble, that people with disabilities should be viewed, for Equal Protection purposes, as a subordinated minority group. The Court, in *Cleburne*, had stated that they should not. *Garrett*, then, like *Kimel* before it, represented a high stakes political struggle between Congress and the Supreme Court over who would have the authority to determine who was entitled to protection from "rational" discrimination under the Equal Protection Clause, and who was not.

In *Garrett*, the Court arrogated this constitutional authority to itself, and itself alone. Congressional findings that people with disabilities were a discrete and insular minority, subject to a history of purposeful discriminatory treatment by the states did not matter, stated the *Garrett* majority. The Court, and the Court alone, had the constitutional authority to determine who is a member of a subordinated minority, and who is not. And disabled people are not. Accordingly, since Section 1 of the Fourteenth Amendment does not protect disabled people from "rational" discrimination, including failure to make reasonable accommodations (which, after all, cost money) or the use of disability as a statistically useful proxy (no matter how over- or underinclusive) for some other trait, Congress could not, under its Section 5 powers, enact legislation prohibiting the states from doing something they would otherwise be permitted to do under the Fourteenth Amendment. *Garrett*, in short, represents a clear, judicial rejection of, one might say a judicial backlash against, the minority group model of disability.

The Supreme Court's 2001–2002 term brought further setbacks for disability rights activists. Maintaining its crabbed approach to the definition of disability displayed in the *Sutton* trilogy, in January 2002, the Court ruled in *Toyota Motor Manufacturing v. Williams*, that an ADA plaintiff with severe carpal tunnel syndrome and other musculoskeletal disorders, which limited her ability to perform manual tasks involved in playing with her children, shopping, doing housework and gardening, and working, had not established that she was a “person with a disability” within the meaning of the ADA.⁸⁰

Three and a half months later, in *US Airways v. Barnett*, the Supreme Court held that absent special circumstances, accommodation in the form of reassignment to a vacant position is *per se* unreasonable within the meaning of the ADA if another employee would otherwise be entitled to the position under the terms of a seniority system.⁸¹ Although not unexpected, the Court's decision in *Barnett* seemed plainly wrong as a matter of statutory interpretation. Unlike other federal employment discrimination statutes, the ADA contains no defense for seniority systems, and the act's legislative history makes abundantly clear that this legislative omission was deliberate. That the Court would decide against the ADA plaintiff in the face of the statute's text and legislative history provided additional support for the backlash thesis.

Predictions that a public and judicial backlash against the ADA might occur emerged as early as 1994. Perhaps the first such concern was voiced that year by Joseph Shapiro. In an article that troubled many ADA activists, Shapiro cautioned that, because passage of the ADA was not preceded by a well-publicized social movement, the act, along with the people who mobilized or enforced it, might be particularly vulnerable to misinterpretation, hostility, resentment, and other backlash effects.⁸² Shapiro reiterated these concerns the same year, in his landmark book about the modern American disability rights movement.⁸³

Additional predictions of backlash followed in the law review literature. The first surfaced in 1995, in an article by Professor Deborah Calloway on the potential implications of new structural theories of equality.⁸⁴ Calloway's prediction was soon followed by claims that a judicial and media backlash against the ADA was in fact already under way.⁸⁵ By the time the American Bar Association study was released, many within the disability advocacy community were speaking openly of a growing backlash against the ADA.

Most of us involved in this or other social justice struggles have at one time or another referred to resistance to civil rights initiatives as a “back-

lash.” Whether working to advance the rights of women, to win basic civil rights for lesbians and gay men, to defend affirmative action, or to bring about the full integration of people with disabilities into every facet of economic, political, cultural, and social life, referring to resistance as backlash is, among other things, a good way to blow off steam. Of course, it is one thing to blow off steam and quite another to think systematically about precisely what backlash might be, what causes it to occur, and how it might be prevented or reckoned with if and when it emerges.

The articles collected in this book represent an attempt to encourage this sort of systematic thinking. The book brings together the reflections of a distinguished group of disability activists, lawyers, and scholars from the fields of law, sociology, psychology, political science, economics, history, and English literature, whose work has centered on disability rights issues. The book attempts to address, from a variety of perspectives, the following issues and questions, among others:

What is “backlash?” Can it meaningfully be distinguished from other forms of retrenchment or resistance to social change initiatives?

Is there in fact an ongoing backlash against the ADA and related disability rights initiatives?

If so, how is that backlash manifest in the media, in judicial decision making, and in academic or other social commentary?

Assuming some discrete phenomenon that could be called a backlash exists, to what factors might it reasonably be attributed? How can our efforts to understand this phenomenon be informed by insights from legal studies and from other disciplines, such as sociology, psychology, political science, economics, history, or disability studies?

What are the implications of public, media, and judicial responses to the ADA for future strategies in disability advocacy and policymaking, or for strategy in social justice movements generally?

Three of the papers explore patterns of judicial response to the ADA from a legal studies perspective. In “Judicial Backlash, the ADA, and the Civil Rights Model of Disability,” Matthew Diller provides a broad overview of these patterns and suggests two partial explanations for them. First, in interpreting the ADA, judges are continuing to rely on an outdated

impairment model of disability, rather than a civil rights or sociopolitical model. This old impairment model of disability, Diller suggests, leads to a highly restrictive approach to statutory coverage. Second, by advancing a structural rather than merely formal model of equality, the ADA stands beside affirmative action on the front lines of a cultural war about the meaning of equality in a diverse society and about the legal interventions properly taken to effectuate it.

In her contribution, law professor and ADA lawyer Wendy Parmet⁸⁶ continues the inquiry with an examination of the “mitigating measures” controversy culminating in the Supreme Court’s decisions in the *Sutton* trilogy, and shows how the mitigating measures issue operated to narrow the scope of ADA coverage. Parmet’s investigation reveals a consistent pattern of judicial refusal to utilize either the Act’s legislative history or the administrative regulations promulgated by the EEOC in defining disability for ADA coverage purposes. She explores this pattern’s connection with the “new textualist”⁸⁷ school of statutory interpretation championed by conservative Supreme Court associate justice Antonin Scalia, and concludes that, in focusing on the purported “plain meaning” of statutory terms, textualist methodology necessarily enmeshes the interpreter in the same stereotypic understandings of relevant constructs that a transformative statute like the ADA was designed to destabilize and displace.

Broadening the legal lens to incorporate a political science perspective, Professor Anita Silvers, a philosopher, and Michael Stein, a legal historian, focus on the Supreme Court’s decision in *Trustees of the University of Alabama v. Garrett*. They trace the logic of the *Garrett* majority’s decision back into the retrogressive ideological framework and empirically unsound assumptions supporting such now discredited equal protection cases as *Plessy v. Ferguson*, which ushered in the “separate but equal” doctrine ultimately rejected in *Brown v. Board of Education*, and *Goesart v. Cleary*, which justified discriminatory state classification by sex under the “separate spheres” rationale rejected in cases like *Reed v. Reed*⁸⁸ and *Frontiero v. Richardson*.⁸⁹

Professors Diller, Parmet, Silvers, and Stein all describe a startling disconnect between the understanding of the ADA shared by the activists and legislative aides who drafted the statute and that of the private lawyers and judges who eventually shaped its interpretation. Insights into the various factors contributing to this conceptual disconnect are developed in another set of papers, which includes contributions by political scientist Harlan Hahn, psychologist Kay Schriener and sociologist Richard Scotch, and English literature scholar Lennard Davis.

In “Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?” Professor Hahn argues that the crabbed judicial interpretations of the ADA described by Professors Diller, Parmet, Silvers, and Stein stem from three fundamental sources: (1) widespread judicial confusion over the relationship between impairment and disability; (2) the failure or refusal of judges to adopt a sociopolitical conception of disability; and (3) judicial resistance to the “minority group” approach to disability policy issues. He traces the enduring influence of paternalism and covert hostility toward the disabled on judicial responses to disability discrimination claims, and proposes a principle of “equal environmental adaptations” as a tool for slicing through attitudinal and conceptual barriers to full implementation of the policy goals underlying the ADA.

Professor Davis continues this excavation of judicial attitudes toward people with disabilities in his intellectually playful and engaging essay, “Bending Over Backwards: Disability, Narcissism, and the Law.” Bringing Freud and Shakespeare to bear on the reading of ADA cases as narrative texts, Davis demonstrates that ADA plaintiffs are being portrayed in federal case law in much the same way as people with disabilities have been depicted in English literature and Freudian theory—as narcissistic, self-concerned, and overly demanding. Davis’s observations echo Harlan Hahn’s claim that popular and legal discourse on disability remains heavily freighted with covert hostility and resentment directed toward the disabled.

Readers unfamiliar with the social model of disability will appreciate the concise and accessible overview of that subject provided by Kay Schriener and Richard Scotch’s “The ADA and the Meaning of Disability.” As Schriener and Scotch explain, under an older “impairment” or “rehabilitation” model, disability is discursively located within the disabled individual. Under this approach, an impairment is seen as causing disability if it prevents the disabled person from functioning effectively in the world as it is. If the individual can be retrained or cured, he or she is no longer considered disabled. If neither retraining nor cure is possible, social welfare benefits provide the disabled person with a subsistence income. Under this older model, which still underlies the federal Social Security disability system, a certification of disability operates as a kind of ticket into the system of rehabilitation or support, and signals to both the disabled individual and to members of the surrounding polity that the individual is neither expected nor entitled to function fully in the larger socioeconomic world.

The model of disability reflected in the ADA represents a fundamentally different theoretical framework. Under the social model, disability is seen as resulting not from impairment per se, but from an interaction between

the impairment and the surrounding structural and attitudinal environment. Under this approach, *environments*, not simply *impairments*, cause disability.

Two consequences flow from this conceptual understanding, one implicated in the definition of disability and the other in ascertaining society's proper response to it. First, under a social approach to disability, determining whether a particular condition is disabling requires an examination of the attitudinal and structural environment in which a person functions, not merely an examination of the person him- or herself. Accordingly, an impairment may be disabling in one structural and attitudinal environment but not in another. Second, once disability is no longer located entirely within the impaired individual, but in the environment as well, the presence of an impairment can be seen as triggering societal obligation to *change* the environment, so that a disabled individual can function despite his or her impairment. As the articles by Professors Hahn, Davis, and Schriener and Scotch demonstrate, appreciating the differences between the impairment and social models of disability is central to understanding the Americans with Disabilities Act.

"Psychiatric Disabilities, the Americans with Disabilities Act, and the New Workplace Violence Account," by Vicki Laden and Gregory Schwartz, excavates the depiction of psychiatric disability in the media and then traces those depictions into ADA jurisprudence and human resource management discourse. Specifically, they explore the impact of one particular discursive frame on judicial and public responses to the ADA. Identifying a rhetorical construct they refer to as the *new workplace violence account*, Laden and Schwartz examine its use in attempts to delegitimize the ADA. They argue that the account's depiction of the volatile, psychotic employee, poised to explode in lethal violence, is used by media critics who claim that the ADA has deprived employers of the ability to protect employees from a potent workplace threat. They go on to describe a new violence prevention industry, composed of defense-side employment lawyers, security experts, and consultants, who counsel employers on "how to identify and remove potentially violent workers in the hands-tied era of the ADA." This rapidly expanding industry, Laden and Schwartz contend, advances bold claims about the enormity and severity of the problem, reinforcing a key premise of ADA critics, that the act unreasonably subordinates interests in public safety to the "special rights" of the mentally ill. Through a close examination of judicial decisions and defense firms' training materials on the one hand, and a review of relevant, current social science research on the other, Laden and Schwartz both expose the

flawed empirical basis undergirding claims relating to prediction of dangerousness and explore the implications of current scientific knowledge for compliance with the ADA and for administrative and judicial interpretation of its direct threat defense.

Laden and Schwartz's observations about the impact of media depictions on public attitudes toward the ADA are profoundly important. Popular attitudes toward legal rights and obligations are likely influenced more by people's *beliefs* about what legal and regulatory schemes require, how they are enforced, and the effects of enforcement on individuals and society than by actual legal doctrine, enforcement activities, or (to the extent they can be accurately measured) practical effects. Popular beliefs about law are shaped by many factors, including media coverage, through which a particular set of scripts, symbols, and condensing themes is transmitted to the reading and viewing public.

To the extent that a particular law or regulatory regime is politically controversial, that controversy will be enacted in the print and broadcast media, as positive and negative scripts, symbols, and condensing themes compete for audience attention. The particular condensing themes that prevail in this contest become the dominant cognitive and attitudinal frames through which people assign meaning to the law and construe efforts to mobilize or enforce it. These *media frames*⁹⁰ organize the relevant discourse, both for the journalists who create the coverage and for the public, which reads, hears, or views it. Eventually, sociocultural dissemination of particular media representations proceeds to the point that it becomes meaningful to refer to these representations not only as media frames, but also as broader *discursive frames*, which influence popular attitudes toward the law, its enforcers, and its beneficiaries.

Bringing radical theory to bear on the ADA backlash problem, Marta Russell argues in "Backlash, the Political Economy, and Structural Exclusion" that public hostility toward the ADA is driven in large measure by the high levels of job instability and worker displacement characterizing American labor markets. These conditions, she contends, breed insecurity, fear, and resentment toward employment protections extended to members of disadvantaged groups. Russell suggests that hostility toward identity group-based employment protections will persist until employment at a living wage and access to health care are treated as fundamental rights attending membership in society, rather than as incidents of increasingly unstable employment status.

The next two papers extend the investigation to areas beyond Title I of the ADA. Political scientist Stephen Percy opens with an analysis of admin-

istrative enforcement activities by the EEOC and the Department of Justice, identifying key areas of dispute or analytical difficulty. Professor Percy's exploration raises a number of intriguing questions about the problems associated with the use of indeterminate legal standards in complex regulatory regimes. Both the Rehabilitation Act and the ADA incorporate standards that might reasonably be described as "complex," or "tempering." Figuring out how to comply with these standards, which include "reasonable accommodation," "undue hardship," even "disability" as defined in the ADA and the Rehabilitation Act, often requires a complex, situation-specific balancing of underspecified factors by unsophisticated legal actors.

Professor Percy's investigation suggests that, even setting aside the tug-of-war often associated with implementation of a new regulatory regime, hostility toward the ADA may reflect, at least in part, the negative affective response generated by a regulatory combination of normative uncertainty and potential liability. When one crafts laws utilizing complex tempering principles, how do they work? Do indeterminate standards function effectively in guiding statutory compliance, enforcement, or judicial interpretation? What strains do underspecified legal standards place on courts and administrative agencies, whose legitimacy often depends on perceptions that they are "applying" rather than "making" the law?

These questions bring us full circle to the project's central questions. In the specific context of disability rights, and also more generally, what is the relationship between law and social change? When are legal strategies relatively more effective in moving social justice movements forward, and when relatively less so? What is the significance of backlash in this context? Is it a meaningful construct, or merely an epithet used by social change activists to describe the arguments and activities of their opponents? If it is a meaningful construct, how and why does it emerge? And finally, how do these questions relate to public, judicial, and media responses to the Americans with Disabilities Act?

In closing the volume, law professor Linda Hamilton Krieger offers a theoretical framework for addressing these questions, and for applying it to various observations and insights offered by the book's other contributors. Her central premise is simple: to understand the role of law in effecting social change, one must consider the relationship between formal legal rules and constructs on the one hand, and informal social norms and institutionalized practices on the other. At its root, backlash, whether directed against the ADA or against any other transformative legal regime, is about this relationship and can be avoided or addressed only through careful attention to the complex processes that mediate it.

NOTES

1. Pub. L. No. 101-336, 104 Stat. 327 (1990); see also FRED PELKA, *THE ABC-CLIO COMPANION TO THE DISABILITY RIGHTS MOVEMENT 20* (1997).

2. Elaine S. Povich, *Senate OK's Bill Fixing Rights of the Disabled*, CHI. TRIB., July 14, 1990, at 1.

3. *Bush Eager to Sign Bill Opening Doors for 43 Million Disabled*, ORLANDO SENTINEL TRIB., July 14, 1990, at A1.

4. *Knocking Down a Barrier*, NEWSDAY (Nassau and Suffolk Edition), July 27, 1990, at 7.

5. President Bush was quoted in the Boston Globe as stating, "We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation, and we've been committed to containing the costs that may be incurred." John W. Mashek, *To Cheers, Bush Signs Rights Law for Disabled*, BOSTON GLOBE, July 27, 1990, at 4.

6. *Id.*

7. See, e.g. 136 CONG. REC. S10287-01 (statement of Senator Metzenbaum, citing *A Red Herring in Black and White*, N.Y. TIMES, July 23, 1990 at 14); 136 CONG. REC. S9809, S9814; 136 CONG. REC. S10321.

8. On July 19, 1990, Vice President Dan Quayle said of the act, "[T]he Administration is not going to have a quota bill crammed down its throat disguised as a civil rights bill." Steven A. Holmes, *Accord Is Sought on Rights Measure to Avert a Veto*, N.Y. TIMES, July 20, 1990, at A1. Quayle's comments followed upon those of White House chief of staff John Sununu, who on July 17, stated, "The bill, as crafted right now, is a quota bill . . ." Steve Gerstel, *Senate Limits Debate on Civil Rights Bill; Veto Threatened*, UNITED PRESS INT'L, July 17, 1990. Senator Hatch referred to the bill as "terrible," even "heinous," and predicted that it would "create a litigation bonanza." Concluded Hatch in one interview, "Even a cursory review reveals that (the bill) is simply and unalterably a quota bill." In his veto statement, delivered on October 20, 1990, President Bush justified his action by stating, "I will not sign a quota bill." George Archibald, *Special Report: The Bush Record*, WASH. TIMES, September 13, 1992, at A8.

9. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

10. The disparate impact case was *Wards Cove Packing Company v. Atonio*, 490 U.S. 642 (1989).

11. President Bush vetoed the minimum wage bill on June 13, 1989. See 135 CONG. REC. H2498-03 (1989).

12. See 136 CONG. REC. H24451-02 (1990).

13. 42 U.S.C. § 2000e (1994) (as amended).

14. Title VII's disparate impact theory does represent a structural model of equality. However, that theory can be applied only in very narrow circumstances. For a discussion of this issue, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1162 n.3 (1995).

15. See, e.g., Martha Minow, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (exploring problems of gender equality and

difference); Linda J. Krieger & Patricia Cooney, *The Miller Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women's Equality*, in D. KELLY WEISBERG, *FEMINIST LEGAL THEORY: FOUNDATIONS* 156 (1993).

16. The term “discriminate,” which was not defined at all in the Civil Rights Act of 1964, is defined in a highly detailed and multifaceted way in § 102 of the ADA. With respect to reasonable accommodation, § 102 provides that the term “discriminate” includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.” 42 U.S.C. § 12112(b)(5)(A). The meaning of “undue hardship” is defined in the statutes implementing regulations at 29 C.F.R. § 1630.2(p).

17. The “interactive process duty” is described at 29 C.F.R. § 1630(o)(3):

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

18. 490 U.S. 642 (1989).

19. Although the issue was not directly before it, the Supreme Court in *County of Washington v. Gunther*, 452 U.S. 161, 170 (1981) suggested that Title VII’s Bennett Amendment, 42 U.S.C. § 2000e-2(h), which incorporated into the statute the affirmative defenses contained in the Equal Pay Act of 1963, would in all likelihood preclude the use of disparate impact theory in Title VII pay equity cases. This has been, and continues to be, the approach taken in a majority of the circuits. *See, e.g.,* *Auto Workers v. Michigan*, 886 F.2d 766, 769 (6th Cir. 1989); *State, County, & Municipal Employees v. Washington*, 770 F.2d 1401, 1405, 1408 (9th Cir. 1985).

20. *Washington v. Davis*, 426 U.S. 229 (1976) (holding that disparate impact theory unavailable in cases asserting rights under the equal protection clause of the Fifth and Fourteenth Amendments).

21. 432 U.S. 63 (1977).

22. 42 U.S.C. § 12112(b)(6).

23. 42 U.S.C. § 12112(b)(3)(A).

24. 42 U.S.C. § 12112(b)(5). The meaning of “undue hardship” is spelled out in the ADA’s implementing regulations at 29 C.F.R. § 1603.2(p)(1).

25. The direct threat defense is found in § 103 of the Americans with Disabilities Act, 29 U.S.C. § 12113(b).

26. Section 501 of the ADA provides: “Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973; (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.” The direct threat defense had been defined for § 504 purposes in terms virtually identical to those incorporated into the ADA Regulations in *School Board v. Arline*, 480 U.S. 273, 288 (1987).

27. 29 C.F.R. § 1630.2(r).

28. In connection with this aspect of stigma, see generally, ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963). This point is developed later in this volume in Vicki A. Laden & Gregory Schwartz, *Psychiatric Disabilities, the Americans with Disabilities Act, and the New Workplace Violence Account*.

29. For an interesting exploration of this phenomenon and its broader implications for governmental risk regulation, see Timur Kuran & Cass Sunstein, *Availability Cascades and Risk Regulation*, 51 *STAN. L. REV.* 683 (1999) (describing the threats to rational regulatory activity posed by popular dynamics of risk perception).

30. I borrow here from Robert Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 *HARV. C.R.-C.L. L. REV.* 413 (1991).

31. See, e.g., 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, 1357–58 (1993); Richard K. Scotch & Kay Schriener, *Disability, Civil Rights, and Public Policy: The Politics of Implementation*, 22 *J. POL'Y STUD.* 170 (1994). For a thorough treatment of the development of the civil rights and social models of disability within the disability rights movement, see RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* (1984) (focusing on events connected with the passage and implementation of § 504 of the Rehabilitation Act of 1973). In this volume, see Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*

32. See, e.g., Jonathan Drimmer, *Cripples, Overcomers, and Civil Rights*, *supra* note 31, at 1349–51 (discussing concept of stigma in relation to disability rights law and policy); see generally Harlan Hahn, *The Appearance of Physical Difference: A New Agenda for Political Research*, *J. HEALTH & HUM. RESOURCES ADMIN.* 391 (1991) (discussing stigma and other aspects of the attitudinal environment in relation to the concept of discrimination).

33. P.L. 101–336, Title I, § 108, 104 Stat. 337 (1990) (“This Title [42 U.S.C. §§ 12111–12117] shall become effective 24 months after the date of enactment”).

34. 42 U.S.C. § 12111(5).

35. *Id.*

36. For further discussion of these developments, see Chai Feldblum, *The Definition of Disability Under Federal Anti-discrimination Law: What Happened? Why? And What Can We Do About It?* 21 *BERKELEY J. EMP. & LAB. L.* 91 (2000).

37. Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 *COLO. L. REV.* 107 (1997).

38. Robert Burgdorf, “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 *VILL. L. REV.* 409 (1997).

39. Arlene Mayerson, *Restoring Regard for the “Regarded as” Prong: Giving Effect to Congressional Intent*, 42 *VILL. L. REV.* 587 (1998).

40. Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination, and the Americans with Disabilities Act*, 52 *ALA. L. REV.* 271 (2000).

41. Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000).
42. American Bar Association Commission on Mental and Physical Disability, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL AND PHYSICAL DISABILITY L. REP. 403.
43. *Id.*
44. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999).
45. *Id.* at 103.
46. *Id.* at 106 n.39.
47. *Id.* at 108.
48. *Id.*
49. *Id.* at 109. For a variety of reasons, these results probably *overestimate* plaintiffs' rates of success. While a discussion of these reasons is beyond the scope of this paper, interested readers are referred to Colker's discussion at pp. 104–5 and 108–9. Her reasoning in this regard parallels earlier observations in Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133 (1990).
50. *Id.* at 101.
51. *Id.* at 102.
52. Ruth Colker, *Winning and Losing Under the ADA*, 62 OHIO ST. L. J. 240 (2001).
53. *Id.* at 260.
54. United States Equal Employment Opportunity Commission, *Americans with Disabilities Act of 1990 (ADA) Charges FY 1992–1998* (EEOC 1999), available at <http://www.eeoc.gov/stats/ada.html>.
55. *Id.*
56. I nod here to Lennard Davis, later in this volume, *Bending Over Backwards: Disability, Narcissism and the Law*.
57. James Bovard, *The Disabilities Act's Parade of Absurdities*, WALL ST. J., June 22, 1995, at A6.
58. Walter Olson, *Disabilities Law Protects Bad Doctors*, N.Y. TIMES, November 28, 1997, at A39.
59. Stephanie Armour, *Disabilities Act Abused? Law's Use Sparks Debate*, USA TODAY, September 25, 1998, at 1B.
60. United States Equal Employment Opportunity Commission, *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (EEOC 1997), available at <http://www.eeoc.gov/docs/psych.html>.
61. Dennis Byrne, *Late for Work? Plead Insanity*, CHI. SUN-TIMES, May 8, 1997, at 39.
62. George Will, *Protection for the Personality-Impaired*, WASH. POST, Apr. 4, 1996, at A31.
63. Sheryl Gay Stolberg, *Week in Review Desk: Gray Matter; Breaks for Mental Illness: Just What the Government Ordered*, N.Y. TIMES, May 4, 1997, at A1 (Week in Review, § 4).
64. Larry Wright, ©DETROIT NEWS, 1997. Reprinted with permission.

65. Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung, and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television*, 21 BERKELEY J. EMP. & LAB. L. 223 (2000).

66. *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998).

67. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (severe myopia); *Murphy v. United Parcel Serv. Inc.*, 527 U.S. 516 (1999) (hypertension); and *Albertson's v. Kirkingburg*, 527 U.S. 555 (1999) (monocular vision).

68. 531 U.S. 356 (2001).

69. Section 5 of the Fourteenth Amendment provides:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article [the Fourteenth Amendment].

U.S. CONST. amend. XIV, § 5.

70. The conservative majority, familiar to anyone who followed the fall 2000 presidential recount controversy culminating in *Bush v. Gore*, 531 U.S. 98 (2000), consists of Justices Rehnquist, Scalia, Thomas, O'Connor, and Kennedy, opposed by a minority including Justices Souter, Breyer, Stevens, and Ginsburg.

71. Section 1 of the Fourteenth Amendment provides, in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

For an excellent analysis of the nature and profound significance of this line of Supreme Court cases, interested readers are referred to Robert C. Post and Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

72. 528 U.S. 62 (2000).

73. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500.

74. *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984) (phrasing the test as requiring a “compelling governmental interest” that “must be ‘necessary . . . to the accomplishment’ of their legitimate purpose”) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 186 (1964)).

75. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

76. *Id.*

77. 473 U.S. 432 (1985).

78. 42 U.S.C. § 12117 (1994).

79. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1937).

80. 112 U.S. 681 (2002).

81. 112 U.S. 1516 (2002).

82. Joseph P. Shapiro, *Disability Policy and the Media: A Stealth Civil Rights Movement Bypasses the Press and Defies Conventional Wisdom*, 22 POL'Y STUD. J. 123 (1994).

83. Joseph P. Shapiro, NO PITY: PEOPLE WITH DISABILITIES FORGING A CIVIL RIGHTS MOVEMENT 70–73, 328 (1994) (discussing potential for backlash against disability rights advocacy).

84. Deborah A. Calloway, *Dealing with Diversity: Changing Theories of Discrimination*, 10 ST. JOHN'S J. LEG. COMMENTARY 481, 492 (“Expansive reading of the

ADA definition of disability combined with demands for equal employment opportunity through workplace accommodation for individuals currently outside of ADA coverage may create a backlash against the rights granted under the ADA similar to the backlash against affirmative action”). For later references to potential ADA backlash, see, e.g., Wendy E. Parmet, Mark A. Gottlieb, and Richard A. Daynard, *Accommodating Vulnerabilities to Environmental Tobacco Smoke: A Prism for Understanding the ADA*, 12 J. L. & HEALTH 1, 3–4, 21 (1997–98) (discussing the connection between an expansive definition of disability and attacks on the ADA); Christopher Aaron Jones, *Legislative Subterfuge? Failing to Insure Persons with Mental Illness Under the Mental Health Parity Act and the Americans with Disabilities Act*, 50 VAND. L. REV. 753, 785 (1997) (noting that by failing to define key statutory terms and provisions with sufficient specificity, Congress gives lip service to broad social ideals, but foists key controversial decisions and the hostility those decisions generate onto courts and administrative agencies).

85. For examples of these claims, see, e.g., Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities: Illness and Parenting Responsibilities Under United States Law*, YALE J.L. & FEMINISM 213 (1997) (“The backlash against the Americans with Disabilities Act . . . has been immediate and strong”); Paul Steven Miller, *The Americans with Disabilities Act in Texas: The EEOC’s Continuing Efforts in Enforcement*, 34 HOUS. L. REV. 777, 779 (1997) (citing Kathi Wolf, *Bashing the Disabled: The New Hate Crime*, THE PROGRESSIVE, Nov. 1995, at 24); Paul Steven Miller, *The EEOC’s Enforcement of the Americans with Disabilities Act in the Sixth Circuit*, 48 CASE W. RES. 217, 218 (1998).

86. Wendy Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*.

87. I nod here to William Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

88. 404 U.S. 71 (1971).

89. 411 U.S. 677 (1973).

90. This term is taken from TODD GITLIN, *THE WHOLE WORLD IS WATCHING: MASS MEDIA IN THE MAKING AND UNMAKING OF THE NEW LEFT* (1980). Gitlin defines media frames as “persistent patterns of cognition, interpretation, and presentation, of selection, emphasis, and exclusion, by which symbol-handlers routinely organize discourse, whether verbal or visual.” *Id.* at 7. Gitlin’s construction draws on the earlier work of Erving Goffman, who in more general terms described frames as implicit theories about the nature of reality, used heuristically to comprehend, manage, and respond to it. See Erving Goffman, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE*, 10–11 (1974).