Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care

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Introduction

When the Americans with Disabilities Act ("ADA")[1] was enacted in 1990, it was hailed as an emancipation proclamation for the disabled.[2] Passed with overwhelming majorities in both houses of Congress,[3] the employment provisions of the Act were intended to open up job opportunities for the disabled so as to integrate them into the workplace. To increase access to the workplace, the statute not only prohibits discrimination but it requires employers to provide reasonable accommodations to the disabled.[4] To the extent the employment provisions of the statute generated any significant controversy during the congressional deliberations, it was over the potential costs associated with the accommodation provision.[5]

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1 Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213, 47 U.S.C. § 225 (2000)).

2 *See* Edmund Newton, *Disabled: The Battle Goes On*, L.A. TIMES, Aug. 16, 1990, at E1 (describing the statute as "an 'emancipation proclamation' for 43 million disabled Americans"). The language is attributed to Senators Harkin and Kennedy. *See* 136 CONG. REC. 17,369 (1990) (statement of Sen. Harkin); 135 CONG. REC. 19,888 (1989) (statement of Sen. Kennedy).

3 The bill that became the ADA was passed by a vote of 91–6 in the Senate and 377–28 in the House. *See* 136 CONG. REC. 17,376 (1990) (Senate); 136 CONG. REC. 17,296–97 (1990) (House).

4 42 U.S.C. § 12112(a), (b)(5)(A).

5 As one example, coverage in the *Wall Street Journal* concentrated exclusively on the potential costs of the legislation, as well as the legislation's "astonishingly brief journey through the Washington process." Albert R. Karr, *Rights Bill for Disabled Seems Headed for Unusually Smooth, Quick Passage*, WALL ST. J., Aug. 15, 1989, at A12; *see also* Albert R. Karr, *Disabled-Rights Bill Inspires Hope, Fear*, WALL ST. J., May 23, 1990, at B1 ("Some employers are worried about whom they may have to hire, but much of the opposition boils down to money."); Jeanne

Fifteen years after its enactment, the experience under the statute has been quite different from what its advocates had expected and likely from what its critics feared. Recent studies suggest that the employment levels of the disabled may have decreased since the passage of the Act.[6] Several studies have also documented extremely low success rates among disability discrimination complaints filed in federal court.[7] Part of the low success rate is attributable to a series of Supreme Court decisions that have sharply limited the scope of the statute.[8] Yet, contrary to original expectations, the accommodation

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Saddler, *Small Firms Lobby to Revise Bill Helping the Disabled*, WALL ST. J., Feb. 23, 1990, at B2 (emphasizing potential costs to small businesses).

6 *See, e.g.*, Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 917 (2001); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693, 693–94, 701–05 (2000). Although employment data are only tangentially related to these articles, they have generated a considerable amount of controversy, so let me note that in addition to the flaws highlighted by others, these studies seem limited due to their lack of an explanatory theory. To suggest that the law has hurt those it intended to help implies that there was a group of individuals who required expensive accommodations and who previously obtained jobs that are no longer available to them. But if some employers have stopped hiring individuals for fear of the cost of accommodations, it leaves open the question of how those individuals were obtaining jobs previously. Perhaps employers are more willing to provide accommodations voluntarily without the threat of legal sanctions; but just as plausibly, something is amiss with the story that is being told in the decline of employment, and that may be a poor analysis of the data. For two critiques of the economic studies, see Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527 (2004) (reviewing THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE (David C. Stapleton & Richard V. Burkhauser eds., 2003)), and Peter Blanck et al., *Calibrating the Impact of the ADA's Employment Provisions*, 14 STAN. L. & POL'Y REV. 267 (2003). For a thorough discussion of the data sets and their limitations, see Richard V. Burkhauser et al., *Self-Reported Work-Limitation Data: What They Can and Cannot Tell Us*, 39 DEMOGRAPHY 541, 541–51 (2002).

7 Ruth Colker authored two articles, based on published court decisions, demonstrating the limited success of plaintiffs in disabilities cases, which she later incorporated into a book. *See* RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 69–95 (2005); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99–103 (1999). Colker's findings were largely replicated by two studies sponsored by the American Bar Association. *See* John W. Parry, *Trend: Employment Decisions Under ADA Title I—Survey Update*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 294, 294–98 (1999); *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (1998). Although the limits of relying on published opinions for empirical work are well known, no one has disputed the low success rate of disabilities claims, though it certainly may not be as low as the studies indicate.

8 *See infra* Part II. The cases most frequently cited as part of a judicial backlash are *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002), *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). *US Airways, Inc. v. Barnett*, 535 U.S. 391, 393–94 (2002), is also frequently criticized by commen-

provision of the statute has generated relatively little litigation or controversy.[9] Instead, much of the litigation has focused on the preliminary statutory definition of who is disabled, a question courts have generally answered in a restrictive fashion.

Explaining this unusual turn of events is not an easy task. Within the academic literature, a consensus has emerged that the ADA has been the subject of a judicial backlash against the disabled, either because the Supreme Court is unsympathetic to their plight or as a means of restricting the statute's potential costs. Professor Matthew Diller explains:

> The term "backlash" suggests a hostility to the ADA and towards those who seek to enforce it. The backlash thesis suggests that judges are not simply confused by the ADA; rather, they are resistant to it. It suggests that the courts are systematically nullifying rights that Congress conferred on people with disabilities.[10]

The judicial backlash theme has generated a cottage industry of scholarship that emphasizes the Court's narrow statutory interpretations, particularly in *Sutton v. United Air Lines, Inc.*,[11] and how those decisions deviate from congressional intent.[12]

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tators, but involves the issue of accommodation—specifically when an employer must override a seniority system to accommodate a disabled worker—and will not be discussed in this Article.

9 Courts have split over the proper legal standard to define an unreasonable accommodation with the dispute centering primarily on who has the burden of establishing what is reasonable. *Compare* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542–43 (7th Cir. 1995) (adopting a cost-benefit approach and placing the burden of proving reasonable accommodation on the employee), *with* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 139 (2d Cir. 1995) (shifting the burden of persuasion to the employer, and emphasizing the employer's burden to perform a "more refined" cost-benefit analysis). Although the *Vande Zande* case has received considerable attention, in part because it was written by Judge Posner, the more plaintiff-friendly *Borkowski* standard has drawn many adherents among circuit courts. *See* Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258 (1st Cir. 2001) (noting that the Third, Eighth, and Tenth Circuits have followed the *Borkowski* approach).

10 Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 22 (2000) (citation omitted). Diller's article was part of a symposium on the backlash thesis, and those articles were later collected in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., 2003).

11 Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

12 In addition to the sources cited above, see, for example, Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 539–46 (1997); Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What We Can Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 139–60 (2000); Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1304–06 (2000); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PENN. L. REV. 579, 631–36 (2004); Rebecca Hanner

In this Article, I offer an alternative story. Although it is true that the Supreme Court has read the ADA narrowly, and in a manner that is generally inconsistent with congressional intent, I contend that it is wrong to attribute the narrow interpretations to a judicial backlash. My thesis is that the Supreme Court has generally interpreted the statute consistent with congressional expectations even as it has deviated from those expectations as expressed in the statutory language, and more specifically in the legislative history. As discussed in more detail shortly, the overwhelming congressional support for the statute obscured a broad congressional indifference to the specifics of the legislation. Congress had a general intent to provide protection to the disabled without imposing excessive costs on employers, but beyond those general principles, Congress had few if any specific intentions, and the Supreme Court has effectively filled in the statute based on its own preferences, both ideologically and institutionally, as guided by reigning social norms. The statute the Court has constructed is not a bad statute, but it is certainly not the statute Congress passed. At the same time, it appears that the current Congress may prefer the Court's reconstruction given that it has not overturned any of the Court's decisions.[13]

The backlash thesis is attractive primarily because it is a relatively simple story that feeds into the pervasive sentiment among legal academics that the Court has interpreted the statute consistent with its own conservative political preferences. But that story proves too simple, as reflected in the important fact that most of the restrictive interpretations have been the product of a unanimous Supreme Court.[14] Indeed, a closer look at some basic facts reveals the inadequacy of a simple story and why the ADA poses a unique challenge for explana-

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White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 537–38 (2000). Other examples of articles critiquing the Supreme Court decisions will be cited throughout this Article.

13 One indication of this preference is that, until recently, there had been no movement within Congress to amend the ADA, even though many of what are generally considered the Court's most pernicious decisions, such as *Sutton v. United Air Lines*, could readily be nullified by simple legislative action. The *Sutton* case, which involved the important question of whether in defining disability an individual should be evaluated taking into account any available mitigation measures, is discussed further in Part II *infra*. In July 2007, the Americans with Disabilities Act Restoration Act of 2007 ("ADA Restoration Act") was introduced in both houses of Congress, and if passed, the Act would overturn several of the Court's narrow interpretations. *See* S. 1881, 110th Cong. (2007); H.R. 3195, 110th Cong. (2007).

14 The Court's most criticized decision, *Sutton v. United Air Lines*, was a 7–2 decision, with Justices Stevens and Breyer in dissent. *Sutton*, 527 U.S. at 474. The other cases typically associated with the backlash thesis were unanimous decisions. *See, e.g.*, Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002).

tory theories. The ADA was passed with virtually unanimous support in both houses of Congress, with the strong support of a Republican President as well as broad public support.[15] Since then, a near unanimous Supreme Court has rewritten the ADA in a restrictive fashion without any subsequent efforts to overturn those decisions. That sequence of events is not easy to explain, and as will become clear, the Court's decisions cannot be rationalized against any principled means of statutory interpretation.[16]

As discussed in more detail below, the passage of the ADA, like its predecessor the Rehabilitation Act ("Rehab Act"),[17] occurred through rather curious means. The statute was shepherded through Congress by Members who had personal experience with disabilities either in their own lives or with relatives, and the statute was enacted without the presence or aid of a substantial social movement.[18] As a result, Congress passed an extremely broad statute, modeled after the Rehab Act, and then turned over its particulars to agencies and interest groups.[19] And here is where the problems began: rather than push for narrow legislation that would have protected the individuals Congress principally desired to protect, the interest groups, along with interested congressional staff, opted for broad statutory language that could have brought a much larger group of individuals into the statute's scope—most of whom no one would have considered disabled prior to the passage of the Act.[20] It could be argued that this is what legislation is intended to do, create protections for those who were otherwise invisible; but the individuals I am referring to—those who wear glasses, sustain workplace injuries, or are allergic to perfume—were never intended to be the subject of the legislation. Moreover, there appears to be little public support for extending statutory pro-

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15 *See supra* note 3. Public opinion polls have long shown extremely high support for the ADA and the rights of the disabled more generally. For example, in 1991, 95% of those surveyed supported a prohibition on discrimination based on disability, and 83% supported requiring employers to provide accommodations. *See* Humphrey Taylor, *Overwhelming Majority of Americans Continue to Support the Americans with Disabilities Act*, The Harris Poll, May 12, 1999, http://www.harrisinteractive.com/harris_poll/index.asp?PID=63. The support has been consistent over time. *See* Elaine B. Sharp, *The Dynamics of Issue Expansion: Cases from Disability Rights and Fetal Research Controversy*, 56 J. POL. 919, 933 (1994) (discussing early polls and strong support for affirmative action measures).

16 *See infra* Part III.

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

18 *See infra* Part I.C (discussing the lack of social movement in further detail).

19 *See* RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE 174 (2001).

20 *See id.* at 174–79.

tections to those individuals. Significantly, most of the restrictive statutory interpretations have arisen in cases involving these sorts of nontraditional disabilities.[21]

One result of the Supreme Court's narrow approach to the statute—which was principally designed to eliminate those unintended, and often frivolous claims—is that the Court carved out a whole class of individuals who were intended to be covered by the statute, namely those whose disabilities can be controlled with medication, including those with epilepsy and depression, among others.[22] Although these decisions are problematic and contrary to the intent of the statute, I do not agree that they are the result of a backlash against those with disabilities. In fact, both the Supreme Court and lower courts have been reasonably protective of individuals with traditional disabilities[23]—it is only the attempted expansion of the disability definition that has been rejected. But that rejection was entirely predictable. Without broad public support or a strong social movement pushing to expand our notion of disabilities, it was simply too much to expect the Supreme Court to interpret the ADA expansively, or even to construe

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21 *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 76 (2002) (hepatitis C); US Airways, Inc. v. Barnett, 535 U.S. 391, 394 (2002) (bad back); Toyota Motor Mfg. v. Williams, 534 U.S. 184, 187 (2002) (work-related carpal tunnel syndrome); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 518 (1999) (hypertension); Sutton v. United Air Lines, Inc., 527 U.S. 471, 475–76 (1999) (myopia). Another case decided at the same time as *Sutton* involved a truck driver who only had vision in one eye, which would likely be considered a traditional disability although he was able to self-correct to improve his vision. *See* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 559–60 (1999).

22 *See, e.g.*, Nese v. Julian Nordic Constr. Co., 405 F.3d 638, 639, 642–43 (7th Cir. 2005) (holding that plaintiff, who was able to control epilepsy with medication, was not disabled under ADA); Ristrom v. Asbestos Workers Local 34 Joint Apprentice Comm., 370 F.3d 763, 772 (8th Cir. 2004) (finding no evidence that plaintiff's treatable depression should qualify as a disability); Orr v. Wal-Mart Stores, Inc., 297 F.3d 720, 724 (8th Cir. 2002) (finding that diabetics are not disabled); Doyal v. Okla. Heart, Inc., 213 F.3d 492, 495, 499 (10th Cir. 2000) (holding that plaintiff's treatable depression did not constitute a disability). Many courts, however, have analyzed the particular circumstances of each case to determine whether, even with mitigating measures, the plaintiff is disabled, and have frequently found that the plaintiff was still limited in a major life activity under the terms of the statute. *See, e.g.*, Head v. Glacier Nw., Inc., 413 F.3d 1053, 1057, 1059–62 (9th Cir. 2005) (determining that individual's depression interfered with sleep and reading, thus qualifying him as disabled); Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 216 (2d Cir. 2001) (holding that epilepsy constitutes a disability); Lawson v. CSX Transp., Inc., 245 F.3d 916, 923–26 (7th Cir. 2001) (finding diabetic plaintiff to be disabled, even when on medication, because his diabetes substantially limited his ability to eat).

23 *See* Bragdon v. Abbott, 524 U.S. 624, 641–42, 655 (1998) (finding asymptomatic HIV-positive individual covered under ADA). A more surprising case was *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 802–03 (1999), where the Court held that an individual could pursue an ADA discrimination claim even while receiving disability Social Security benefits because the two statutes contained different definitions of disability.

the statute consistent with congressional intent so long as the statute provided interpretive room for judicial discretion, which it did.

In this Article, I first explore in Part I the history of disability rights legislation to describe Congress's general indifference to the substance of the ADA, and to explain that many of the controversies that have arisen over the ADA were also present with the Rehab Act. In Part II, I analyze several of the Supreme Court decisions that have restricted the scope of the statute to again show that the Court's actions were both predictable and consistent with existing social norms relating to our perceptions of the disabled. In the final section, Part III, I draw several lessons from the ADA case study, including how the decisions are not based on any principled theory of interpretation but might be better understood against the backdrop of positive political theory in which the Supreme Court is seen as a strategic actor seeking to impose its own preferences, only in this instance the Court appeared primarily concerned with institutional rather than political preferences. Finally, I suggest that the absence of an effective social movement has severely limited the success of the statute and has solidified the Court's interpretations because Congress has faced no significant pressure to overturn the decisions.

I. Towards Passage of the ADA

Although the ADA is the latest statutory manifestation of governmental prohibitions on discrimination against those with disabilities, disability issues have long been on the governmental agenda. For example, social security provides payments to those who are disabled and unable to work, and beginning in the 1950s, there have been concerted efforts to integrate the disabled both into the workplace and society more generally.[24] Those efforts have varied over time, as have social attitudes towards the disabled, but it is important to stress that issues relating to the disabled have a long and complex history even though the comprehensive antidiscrimination protections are relatively new. In addition, disability issues are implicated in a variety of statutory schemes, including workers' compensation, the Family and Medical Leave Act,[25] as well as the Social Security schemes.[26] In

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24 For discussions of how the ADA fits within other disability schemes, see generally Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1 (2004) (cash benefits and health care programs); Richard V. Burkhauser & Mary C. Daly, *Policy Watch: U.S. Disability Policy in a Changing Environment*, 16 J. ECON. PERSP. 213 (2002) (Social Security Disability Insurance and Supplemental Security Income).

25 Family and Medical Leave Act of 1993, 5 U.S.C. §§ 6381–6387, 29 U.S.C. §§ 2601–2654 (2000).

other words, the ADA forms one part of a complex regulatory scheme.

Before discussing the evolution of the ADA, it is important to highlight two fundamental issues that define and differentiate antidiscrimination protection for the disabled compared to other antidiscrimination mandates. First, unlike race, gender, or age where the protected class is reasonably well defined, the issue of disability protection begins with a threshold question of who qualifies as disabled. Indeed, defining disability has proved to be the most difficult judicial task and has, in turn, led to most of the controversial decisions.[27] Both the ADA, and its predecessor statute, the Rehab Act, rely on an unusual definition of disability, one that defines the disabled as an individual who has "a physical or mental impairment that substantially limits one or more of the major life activities of the individual."[28] The statutes also provide protection for those who are "regarded as" disabled.[29] These definitions are quintessentially legal in nature, requiring interpretation of virtually every term, but without much guidance either in the legislation or through social norms. In general, there is a core concept of disability for which a broad consensus exists, a category that is often defined as encompassing traditional disabilities. But once we move beyond that core, there appears to be little consensus regarding who ought to be defined as disabled. Relatedly, the heterogeneity of disability poses difficult interpretive and statutory problems. Disability can be permanent or temporary, arise at birth, stem from work-related incidents or other accidents, or develop later in life. Some disabilities are visible, whereas many are not; and conditions affect individuals differently, so what might be disabling in one person may not be to another. Together, these factors complicate both the very notion of disability and statutory enforcement efforts, which invariably require determining who is disabled for purposes of the statute.

There is another important way in which the issue of disability rights is distinct from most other antidiscrimination workplace mandates. For many, having a disability means having differential abilities that may render one less capable of performing certain jobs or functions unless the employer provides an accommodation. This is certainly not true of all disabilities but it is a background assumption that

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26 *See infra* Part II.B.1 (discussing the intersection of these three statutory schemes).

27 *See infra* Part I.A.

28 42 U.S.C. § 12102(2) (2000); *see* 29 U.S.C. § 705(9), (20)(B) (2000).

29 42 U.S.C. § 12102(2); *see* 29 U.S.C. § 705(20)(B).

underlies the need to provide reasonable accommodations to the disabled.[30] Although a rich literature has developed regarding the ADA's accommodation mandate, in particular how that mandate is similar to other antidiscrimination mandates,[31] there is little question that a public perception exists that disability accommodations are both necessary and potentially costly. Indeed, the public debate on the ADA focused almost exclusively on the costs of accommodation, rather than on the more important threshold question of who would qualify as disabled.[32]

These two differences—the need to define the class and the accommodation requirement—obviously run together. The broader the class, the greater the accommodation burden will be. It is also possi-

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30 It should be noted that within the disability rights movement, the need for an accommodation is often seen as a social construct, namely that society has been constructed around a limited norm of ability. *See, e.g.*, Kay Schriner & Richard K. Scotch, *Disability and Institutional Change: A Human Variation Perspective on Overcoming Oppression*, 12 J. DISABILITY POL'Y STUD. 100, 100 (2001) ("One key rationale for the ADA was that many of the problems associated with having a disability were not inevitable products of impairment, but rather were the result of a socially constructed environment that arbitrarily and perniciously excluded or limited social participation."). Given that the statute includes an accommodation requirement as well as a means for employers to avoid having to accommodate some disabilities, *see* 42 U.S.C. §§ 12112(b)–12113, it seems a stretch to suggest that this concern motivated the ADA. Nevertheless, there is no question that within the disability community, this was one of the intended purposes. For an extended treatment of the social model, see Ravi A. Malhotra, The Legal Politics of Globalization and Workers with Disabilities in Canada and the United States 2 (2004) (unpublished S.J.D. thesis, University of Toronto).

31 *See, e.g.*, Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003); Seth D. Harris, *Law, Economics, and Accommodations in the Internal Labor Market*, 10 U. PA. J. BUS. & EMP. L. (forthcoming 2008); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307 (2001); Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833 (2001); Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003); Stein, *supra* note 12; J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385 (2003).

32 This was apparent in the major newspaper coverage of the statute, almost all of which focused on the potential cost of accommodation, often in the area of public services. *See supra* note 5. To the extent there was any discussion regarding the potential breadth of the statute, it involved the incorporation of AIDS into the definition of disability. For a sampling of the newspaper coverage, see Marlene Cimons, *Far-Reaching Bill to Protect Disabled from Discrimination Gains Speed*, L.A. TIMES, July 30, 1989, at A6; Steven A. Holmes, *Rights Bill for Disabled Is Sent to Bush*, N.Y. TIMES, July 14, 1990, at A6; Sharon LaFraniere, *Doors Opening for the Disabled: New Law Would Require Sweeping Social Changes*, WASH. POST, May 25, 1990, at A1; Susan F. Rasky, *How the Disabled Sold Congress on a New Bill of Rights*, N.Y. TIMES, Sept. 17, 1989, at E5.

ble that the broader the class becomes, the less force the antidiscrimination mandate will have, particularly if the class is stretched to include individuals society would not otherwise identify as disabled. An expansive class may also diminish support for the accommodation mandate, especially if employers are asked to provide costly accommodations for all manner of health conditions.[33] With those background presumptions in mind, I now explore the origins of the federal statutes relating to disability in the workplace.

A. The Passage of the Rehab Act

Congress passed both the Rehab Act and the ADA under unusual circumstances. Both Acts received widespread support within Congress—each passed with overwhelming majorities in both houses—despite serious opposition from the business lobby.[34] This was true even though, at the time Congress passed the Rehab Act in 1973, the disability community formed only a loose advocacy coalition, one that was without substantial legislative experience.[35] Although much had changed by the time of the passage of the ADA, the disability community remained a loose confederation of groups primarily focused on specific disabilities, often with conflicting agendas.[36] The passage of the Acts, which came in the face of simultaneously broad congressional support and widespread congressional indifference, helps elucidate some of the problems that have arisen during the first decade of ADA implementation.

The Rehab Act was primarily staff-driven legislation, in which a handful of congressional staff members succeeded in ensuring the bill passed without much legislative attention, and then later helped shape

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33 In its decisions, the Court has addressed the issue of accommodation on two occasions, neither of which involved cost issues. In *US Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002), the Supreme Court held that, in the ordinary course, employers were not required to override a seniority system as a means of accommodating a disabled worker. At issue was the importance of seniority in a workplace and neutral workplace rules, but the case did not turn on the cost of the accommodation, which would have been trivial. *See id.* at 397–98, 403–05. The other case that implicates the accommodation mandate involved the professional golfer Casey Martin, who sought to use a golf cart on tour; Martin filed his claim under the public accommodation provisions, which, like the previous case, did not involve any direct costs. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 677, 681 (2001) (finding that the ADA covered Martin and the golf tournament, and Martin was entitled to an accommodation).

34 *See* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 55 (2d ed. 2001).

35 *See id.* at 82.

36 One example is that wheelchair advocates seek ramps although those ramps can make it more difficult for blind individuals to get around. Similarly, much of the deaf community has explicitly fought against assimilation into the hearing culture.

its direction by crafting extensive regulations.[37] As historian Ruth O'Brien has noted, the Rehab Act, also known as "section 504," arose "with little or no thought"; it just emerged.[38] Despite the statute's stealth nature, President Nixon twice vetoed the statute, although it was ultimately enacted in essentially its current form.[39] That form offers a very short directive applicable to the federal government and those receiving federal financial assistance.[40]

When the statute was initially passed, it contained a vague definition of handicap, the term that was in use at the time.[41] During the following year, a more comprehensive definition was fashioned at the agency level, and the statute was amended in 1974 to incorporate the definition that continues to define disability today.[42] The definition of "handicapped individual" was, and the definition of disability is:

> [A]ny person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, *or* (C) is regarded as having such an impairment.[43]

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37 The history of the Rehab Act is traced in SCOTCH, *supra* note 34. In general, I will avoid excessive citations and note that my description of the passage of the Act comes primarily from SCOTCH, *supra* note 34, and several law reviews cited therein, as well as O'BRIEN, *supra* note 19; JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993); and JACQUELINE VAUGHN SWITZER, DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY (2003).

38 O'BRIEN, *supra* note 19, at 120. Sociologist John Skrentny has explained the development of section 504 in a similar fashion: "There were no details or explanations as to what [section 504] would mean and what limits might be placed on the potential remedies for exclusion. Section 504 was simply a part of the politicians' repertoire for addressing a group that they then saw as analogous to black Americans. No one paid any attention to what would become a revolutionary new policy. There was never any discussion of [s]ection 504." JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION 269–70 (2002).

39 *See* O'BRIEN, *supra* note 19, at 121–23.

40 The language of section 504(a) is "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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." 29 U.S.C. § 794(a) (2000).

41 *See* Burgdorf, *supra* note 12, at 421 (discussing origins of the definition of disability within the Rehab Act).

42 *See id.* The language that now defines disability under the ADA was first enacted in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, tit. I, 88 Stat. 1617. *See id.* § 111(a), 88 Stat. at 1619 (codified as amended at 29 U.S.C. § 705(20)(B) (2000)).

43 Rehabilitation Act Amendments of 1974, § 111(a), 88 Stat. at 1619 (codified as amended at 29 U.S.C. § 705(20)(B) (2000)) (emphasis added); *see also* 42 U.S.C. § 12102(2) (2000) (definition of "disability").

After several years of delay, administrative regulations were developed to provide some guidance for interpreting the provisions of the Rehab Act,[44] but perhaps more important to the evolution of disability rights was the open-ended statutory language that went to the core of the statute's scope.

As noted previously, the need to define the protected class renders disability statutes different from other antidiscrimination statutes, and there is no accepted way to define disability.[45] One possible approach would be to list certain conditions or disabilities that qualify for coverage, but this approach would have the substantial disadvantage of requiring statutory amendments any time a new disabling condition arose. Given the way Congress or any legislature operates, it was therefore important to adopt language that was sufficiently open-ended to allow for necessary evolution. Another approach might be to provide a nonexclusive list of qualifying conditions while leaving courts to determine whether conditions that are not included on the list should be covered disabilities. This was, in fact, the approach taken in the regulations that were promulgated under the Rehab Act,[46] although those regulations were not ultimately incorporated in the statutory language of the ADA.

Not only is it difficult to define disability, but there is a significant dispute over what constitutes a disability, or how disability ought to be defined. The disability rights community generally favors a broad definition, one that is distinctly inclusive in nature.[47] Part of the impetus for a broad definition appears to stem from a desire to destigmatize the concept of disability: labeling more people as disabled may destabilize the existing norms regarding abilities and what it means to have a disability.[48] Although this might be a sound political project, it

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44 SCOTCH, *supra* note 34, at 117–20. The regulations were held up by the Carter administration and were promulgated following several high profile protests where disabled individuals occupied offices of the responsible agency (Health, Education, and Welfare). *See id.* at 112–18.

45 *See supra* pp. 529–30. This is true even within federal statutes because of the varying contexts. For example, the statute that governs education of the disabled focuses on functional issues relevant to schooling. *See generally* Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7 (2006) (discussing recent changes to the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400–1482, 9567–9567b (Supp. V 2005)).

46 The regulations are discussed extensively in *School Board of Nassau County v. Arline*, 480 U.S. 273, 277–86 (1987).

47 For an influential approach along these lines, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 29–31, 36–39 (1990). *See also* Burgdorf, *supra* note 12, at 539–44 (critiquing judicial restrictions of the disability definition).

48 *See* MINOW, *supra* note 47, at 31, 37–38.

makes for a difficult legal one. A broad definition, for example, might dilute the meaning of disability, particularly if virtually any individual can be defined as disabled, and it might also open the door to frivolous claims by individuals seeking to take advantage of an opportunity to enter the federal courthouse. This in turn might alter the public support for disability rights, especially taking into account the cost concerns that accompany the accommodation mandate.[49] At the same time, there is little question that the prospect of a broad and inclusive definition enlarged the statute's advocacy community and ultimately the push for a broad definition prevailed.[50]

With this background in mind, three features of the passage of the Rehab Act are noteworthy as they relate to the eventual passage of the ADA. First, the Rehab Act was pushed by a handful of Senators, and their aides, with a deep interest in the subject and who met very little opposition within Congress.[51] This intense but small support allowed interested congressional staff, and later agency staff, to shape the legislation without significant vetting or compromise.[52] Second, the bill was adopted without much public input, and without the development of any substantial social movement that may have helped increase both public awareness and a societal commitment to disability rights.[53] As a concept, there is very little opposition to providing rights to the disabled;[54] however, as evidenced by the two presidential vetoes of the Rehab Act, there are substantial concerns regarding the costs that might accompany those rights. Moreover, once the legislative initiative slides closer to the "special rights" or affirmative action category, public support weakens substantially.[55]

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49 *See* SWITZER, *supra* note 37, at 109–10.

50 *See id.* at 101 (noting that some of the statute was expanded to increase political support).

51 *See* SCOTCH, *supra* note 34, at 139–41.

52 *See id.*

53 Linda Krieger has noted, "[B]y the time the ADA was passed, relatively little popular consciousness-raising around disability issues had taken place." Linda Hamilton Krieger, *Sociolegal Backlash*, *in* BACKLASH AGAINST THE ADA, *supra* note 10, at 355–56; *see also* SHAPIRO, *supra* note 37, at 117 ("The fight for disability rights was a largely invisible, almost underground, movement.").

54 *See supra* note 15 (citing public opinion polls). In his work, Skrentny has concluded, "Among all the groups who were part of the minority rights revolution . . . Americans—or at least their government leaders—see disabled Americans as the most deserving." SKRENTNY, *supra* note 38, at 274. Obviously, this broad statement does not always accurately depict disabled Americans, as indicated by the infamous *Buck v. Bell* decision and the eugenics movement. *See* Buck v. Bell, 274 U.S. 200, 205–08 (1927) (noting that "[t]hree generations of imbeciles are enough" in upholding the sterilization of a mentally ill woman).

55 *See generally* Kelman, *supra* note 31. The Rehab Act, in fact, contains an affirmative

Third, and directly related to the cost issue, the government's interest in providing disability protections is multifaceted, and its varied interests can lead to conflicting statutory goals. There is undeniably a strong desire to prevent discrimination against the disabled, as well as a desire to aid their quest to enter the workplace so that they can obtain the benefits employment provides. The government, however, has another distinct interest in providing disability protections because moving disabled individuals into the workplace will often move them off the public welfare rolls.[56] It is not always clear how this interest plays out, but it is another factor that makes disability different from other protected categories and may help explain why these statutes faced so little opposition within Congress.[57]

B. From the Rehab Act to the ADA: The Rehab Act Cases

Although the ADA has generated a tremendous amount of controversy and litigation, the Rehab Act was a very modest statute that failed to produce a substantial body of case law. To offer one example, between 1973 and 1984, a total of 335 cases mentioning the Rehab Act appeared in the LEXIS federal appellate court file, and most of these cases did not involve the substantive aspects of the Act but instead focused on various jurisdictional issues.[58] There were, in fact, very few cases interpreting the definition of handicap.[59] In contrast, a similar search for the single year 1997 turned up more than 900 appel-

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action component requiring the federal government and those with federal contracts exceeding $10,000 to establish affirmative action programs for the disabled. *See* 29 U.S.C. §§ 791(b), 793(a) (2000).

56 *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 954–57, 969 (2003) (discussing Congress's interest in reducing welfare rolls).

57 A similar interest overhangs age discrimination, and Congress has, in fact, moved back the age of retirement as a way of limiting the costs of social security. *See* Sara E. Rix, *The Aging of the American Workforce*, 81 CHI.-KENT L. REV. 593, 602–03 (2006) (discussing increase in full retirement age to sixty-seven and its implications).

58 Search Lexis using the following search terms: "Rehabilitation w/2 Act" and date (bef 1/1/1985). Much of the case law involved educational issues and questions as to whether a private right of action existed under section 504 and whether the federal financial assistance had to be in a program related to the plaintiff.

59 To be sure, there were some isolated successes particularly in district courts. *See, e.g.*, Vickers v. Veterans Admin., 549 F. Supp. 85, 86 (W.D. Wash. 1982) (finding that individual with hypersensitivity to tobacco smoke falls within the meaning of handicapped); Davis v. Bucher, 451 F. Supp. 791, 796 (E.D. Pa. 1978) (holding that individual with history of drug use qualifies as handicapped). But for every successful case there was an equivalent number of failed claims. *See, e.g.*, de la Torres v. Bolger, 610 F. Supp. 593, 596 (N.D. Tex. 1985), *aff'd*, 781 F.2d 1134 (5th Cir. 1986) (finding left-handed individual not handicapped); Tudyman v. United Airlines, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (finding overweight individual not handicapped).

late cases mentioning the ADA, a substantial number of which involved the very definition of disability.[60]

Even though the case law was sparse, many of the issues that have surfaced with the ADA were also present under the Rehab Act, and examining these cases demonstrates that courts approached the issues quite similarly. For example, the first case the Supreme Court decided on the merits of the Rehab Act, *Southeastern Community College v. Davis*,[61] exposed many of the tensions that remain prominent in the disability rights debate. The case involved a deaf student who sought accommodations from her college's nursing program.[62] The Supreme Court found that she was not qualified for the position because she would be unable to perform the functions of a nurse, and as a result, the college was under no obligation to accommodate her disability.[63] In arriving at this conclusion, the Supreme Court rejected an agency interpretation as inconsistent with the statutory language, and also rejected the statements of interested members of Congress.[64] The unanimous opinion also distinguished between affirmative action obligations, which were not at issue in the case, and the statute's equal treatment mandate.[65] All in all, as will become clear shortly, the Court's decision had much in common with the contemporary cases decided under the ADA.

That was also true of the Court's next case, *Alexander v. Choate*,[66] although the results of this case were decidedly more mixed. Like *Davis*, *Choate* was not an employment case, but instead involved a challenge to a limitation on Medicaid reimbursement for hospital stays.[67] An important part of the case concerned whether the Rehab Act permitted disparate impact challenges, which the Court answered affirmatively.[68] In this unanimous opinion written by Justice Marshall, the Court also expressed a "desire to keep § 504 within manageable bounds,"[69] noting further that the statute did not guarantee equal re-

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60 Searching the following in the LEXIS federal appellate database produces 994 cases: "date (is 1997) and disability! and employ!". This statistic is not meant as anything other than a rough comparison, as it was done nonscientifically, and the nature of the reporting services has changed so that many more unreported decisions are now available electronically.

61 Se. Cmty. Coll. v. Davis, 442 U.S. 397 (1979).

62 *See id.* at 400–04.

63 *Id.* at 410–11.

64 *Id.* at 411 & n.11.

65 *Id.* at 409–11.

66 Alexander v. Choate, 469 U.S. 287 (1985).

67 *See id.* at 289.

68 *Id.* at 297–99.

69 *Id.* at 299.

sults.[70] Under these principles, the Court ultimately upheld the challenged regulation.[71]

If the first two cases were setbacks to a broad definition of disability, the third case may have appeared to have been the equivalent of a judicial home run, fueling false hopes, as it turns out, for an expansive judicial approach. In *School Board of Nassau County v. Arline*,[72] the Supreme Court held that contagious diseases, in this case tuberculosis, fell within the definition of "handicapped individual" under the Rehab Act, as defined by either the statute's substantial limitation or "regarded as" language.[73] The *Arline* case was undeniably significant, and almost certainly sealed the subsequent decision to incorporate the Rehab Act's definition into the ADA, if for no other reason than the case was decided during the Act's development in Congress.[74] At the same time, the success of *Arline* may have obscured some of the fundamental differences between the two statutes that would render an open-ended definition of disability less suited to the more comprehensive ADA statute, as well as the pattern of prior restrictive decisions that had arisen under the Act.

In addition to the cases discussed, Congress also passed three statutes in 1986 to override three Supreme Court decisions involving the rights of the disabled.[75] In these statutes, Congress overturned restrictive interpretations as applied to air carriers, sovereign immunity issues, and education remedial issues.[76] Contrary to the stated views of most disability advocates, very few cases brought under the Rehab Act sought to expand the definition of disability to include nontraditional disabilities, and the few cases that existed typically failed.[77]

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70 *Id.* at 304.

71 *Id.* at 306, 309.

72 Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

73 *Id.* at 284, 289.

74 A related case decided shortly after *Arline*, *Traynor v. Turnage*, 485 U.S. 535 (1988), suggested that the Court might be inclined to limit the definition of disability. In *Traynor*, the Supreme Court upheld a Veterans Administration regulation denominating most alcoholism as willful misconduct, and therefore not a disability, as consistent with the mandate of section 504. *Id.* at 551. The issue was decided over the vigorous dissent of Justice Blackmun, who was joined by Justices Brennan and Marshall. *See id.* at 552–67 (Blackmun, J., concurring in part, dissenting in part).

75 *See* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 630–33 (1991).

76 *See id.* (discussing the 1986 statutes).

77 As noted earlier, very few such claims arose in the appellate courts, *see supra* notes 58, 60 and accompanying text, and I could not find any claim involving high blood pressure, chemical sensitivity, or some of the other cases that have arisen with frequency under the ADA. At

As a result, by the time the ADA deliberations began, the Rehab Act offered a rather weak model, and a cautionary tale, for implementing broad disability protections. If anything, the experience under the Rehab Act should have offered caution, rather than unbridled optimism, about the future course of disabilities law,[78] particularly in the context of a disabilities statute that left substantial room for judicial interpretation. Indeed, as Professor Charles Craver has emphasized, the plaintiff ultimately lost her claim in *Arline* because the Court found that her disease rendered her unqualified to teach.[79]

C. The Passage of the ADA

The ADA was introduced in Congress in the late 1980s at the behest of a number of members who had particular experience with disabilities.[80] The primary House sponsor, Tony Coelho, suffered from epilepsy and had been subjected to discrimination in his youth as a result of his condition.[81] In the Senate, Tom Harkin, whose brother was deaf, took the lead, where he was joined by many other influential Senators who also had personal experience with disabilities: Senator Kennedy had a sister who suffered from mental retardation, Senator Bob Dole lost the use of his right arm in the military, and Senator Orin Hatch's brother-in-law suffered from polio.[82] These and other members would play critical roles in ensuring the passage of the

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the time of the Rehab Act, the claims that sought to stretch the statutory definition involved mental disabilities such as depression, which was not as well accepted as a disability at the time. *See, e.g.*, Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1404, 1412 (5th Cir. 1983) (finding employee's depressive neurosis rendered her no longer qualified for her job); Hart v. Mayor & City Council of Balt., 625 F.2d 13, 14 n.1, 15 n.3 (4th Cir. 1980) (noting that plaintiff abandoned at oral argument his claim of disability relating to chemical imbalance). On the flip side, some of the conditions that are now litigated were accepted as disabilities without question under the Rehab Act. *See, e.g.*, Bentivegna v. U.S. Dep't of Labor, 694 F.2d 619, 621 (9th Cir. 1982) (finding a diabetic unquestionably handicapped under the Rehab Act).

78 Chai Feldblum has argued that at the time of the ADA, the courts' interpretations of the Rehab Act had been generally favorable to an expansive interpretation. *See* Feldblum, *supra* note 12, at 106–07. Looking at the cases she relies on suggests that many, and perhaps most, of the claims involved traditional disabilities and were not particularly difficult cases. *See id.* at 107 n.86 (citing cases involving Parkinson's disease, multiple sclerosis, and heart disease). What would be important to know is whether certain conditions or impairments were defined as a disability under the Rehab Act that have not been so defined under the ADA. Even then, extending the Rehab Act into the private sector would create new issues for courts as a result of the Rehab Act's relative obscurity.

79 *See* Charles B. Craver, *The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act*, 18 LAB. LAW. 417, 423 (2003).

80 *See* SHAPIRO, *supra* note 37, at 117.

81 *See id.* at 117–18.

82 *See id.* at 118–19. In addition to the congressional members, President George H.W.

ADA, and perhaps because of the personal connections to issues of disability, there was virtually no opposition to the ADA in either the House or the Senate.[83]

Among advocates, the lack of legislative opposition is almost always seen as desirable because it speeds the bill's journey through the legislature. The lack of controversy, however, can just as easily lead to problems during the implementation phase of the statute—problems that might have been addressed through more careful congressional deliberation. This was particularly true for the ADA, which arose at an unusually complex time concerning the interaction between Congress and the courts. At the time the ADA was passed, Congress was largely receptive to the demands of civil rights groups, whereas the Supreme Court was not, resulting in a situation in which the courts, if given an opportunity, could readily take away what Congress had provided.[84] This tension between the branches should have counseled in favor of clear statutory language designed to limit judicial discretion. Yet, rather than craft specific language that would tie the Court's hands, the disability community quickly opted to import the broad definition of disability from the Rehab Act into the ADA.[85] This move may simply have proved too irresistible given that it would be difficult for Congress, or the statute's opponents, to object to a definition it had already adopted. At the same time, there were many reasons why a broad definition that relied on judicial interpretation would prove problematic for the ADA.[86]

Perhaps most significantly, a broad definition of disability was in clear tension with the tenor of the Supreme Court at the time. As a practical matter, an open-ended and potentially expansive definition of disability would have its best chance to flourish under a Court that was sympathetic to the statutory goals, or perhaps one that was determined to remain faithful to the congressional language. Yet, in 1988–1989 when the ADA was debated in Congress, there was no reason to see the Supreme Court as sympathetic to any aspect of civil

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Bush had a son with a severe learning disability, *id.* at 119, and Attorney General Thornburgh's son suffered significant head injuries in an accident, COLKER, *supra* note 7, at 5.

83 *See supra* note 3 and accompanying text.

84 *See* Eskridge, *supra* note 75, at 633 (noting that from 1985–1990, Congress had moved to the left on civil rights issues, while the Court continued to move to the right).

85 *See* Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive & Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 85 (2002).

86 *Cf. id.* (suggesting that Congress was negligent for adopting Rehab Act definition).

rights. The Civil Rights Acts of 1990 and 1991[87] were designed to overturn a series of hostile civil rights decisions,[88] and there was no reason to expect the Supreme Court of the early 1990s to interpret the ADA any differently than it had interpreted Title VII of the Civil Rights Act of 1964 ("Title VII").[89] In fact, there was reason to expect that the Court might treat the ADA even more hostilely because the ADA did not have the broad public support of Title VII, nor did it have a lobbying arm as powerful as the American Association of Retired Persons with respect to the Age Discrimination in Employment Act[90] or the traditional civil rights groups such as the NAACP for Title VII. The ADA was also a new and innovative statute that posed issues to which a conservative Court would naturally be skeptical, in large part because of the explicit cost considerations embodied in the accommodation mandate. After all, the Supreme Court's evisceration of the disparate impact standard in the notorious *Wards Cove Packing Co. v. Atonio* case,[91] which prompted the Civil Rights Act of 1991, arose primarily due to a judicial concern with the costs that the impact standard imposed on employers.[92] Looking to Title VII, as opposed to the Rehab Act, there was no reason to expect that the Supreme Court would be receptive to the far-reaching and novel aspects of the ADA.

At the same time, while the Supreme Court appeared to be in a hostile mood towards civil rights, Congress's disposition was almost exactly the opposite. In detailing the history of the passage of the ADA, one of the lobbyists noted that it was a very difficult time to move civil rights legislation through Congress,[93] but historically this was inaccurate. The Congress that passed the ADA was among the most prolific in our nation's history when it came to Civil Rights legis-

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87 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.); Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess.

88 *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 333 n.4 (1991). This is a part of the ADA story that is often overlooked by those who focus on the limitations of the ADA, without thinking more broadly about other civil rights statutes. The ADA was considered in Congress at the same time the highly controversial Civil Rights Acts of 1990 and 1991 were being debated, although virtually all of the public attention, and controversy, was focused on the Civil Rights Acts rather than the ADA. *See infra* p. 541.

89 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2000)). Title VII of the Act is codified at 42 U.S.C. § 2000e to 2000e-17.

90 Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2000)).

91 Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

92 *See id.* at 659–61.

93 *See* SWITZER, supra note 37, at 86.

lation, and undoubtedly the most prolific since the mid-1960s. During the time the ADA was under consideration, Congress passed the Civil Rights Restoration Act of 1987[94] (to override a Supreme Court decision); the Family and Medical Leave Act,[95] ultimately three times because of two presidential vetoes; substantial amendments to the Fair Housing Act ("FHA");[96] an important age discrimination bill;[97] a revision of the Rehab Act;[98] as well as the Civil Rights Acts of 1990 and 1991.[99] If ever there was a time for passage of civil rights legislation, it was in the late 1980s and early 1990s.

All of this legislative activity came with a downside that was particularly problematic for the ADA. Of all the civil rights statutes that were passed towards the end of the decade, the ADA was perhaps the least controversial. The Family and Medical Leave Act was vetoed twice by President Bush;[100] the Civil Rights Act of 1990 was likewise vetoed,[101] and the Civil Rights Act of 1991 was headed for a veto until the Clarence Thomas hearings intervened.[102] As a consequence, all of these statutes received more congressional attention, and more legis-

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94 Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20, 29, and 42 U.S.C.) (overriding Grove City Coll. v. Bell, 465 U.S. 555 (1984)).

95 Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654 (2000)).

96 Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 81 (1968), *amended by* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3631 (2000)).

97 Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended at 29 U.S.C. §§ 621, 623, 626, 630 (2000)).

98 Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344 (codified as amended in scattered sections of 29 U.S.C.).

99 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.); Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess.

100 Kara Swisher, *Twice-Vetoed Family Leave Act Takes Effect: Law Allows 12 Weeks of Unpaid Time Off Without Loss of Benefits*, WASH. POST, Aug. 5, 1993, at D8.

101 *See* 136 CONG. REC. 33,377 (1990) (presidential veto message on Civil Rights Act of 1990).

102 As a young attorney with the Lawyer's Committee for Civil Rights, I participated in the drafting of the Civil Rights Act of 1991. The bill was effectively stalled until the Clarence Thomas hearings brought attention to discrimination issues, in particular to the lack of damages for sexual harassment that did not result in the loss of a job. Senator Danforth, who was simultaneously shepherding his former aide Clarence Thomas through his contentious hearings while serving as the Republican leader on the Civil Rights Act, pledged to secure the passage of the Act regardless of the outcome of the confirmation hearings. With his leadership, the Act passed the day after the hearings concluded without any significant legislative record being developed. For a similar recollection, see Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459, 1469–70 (1994) (labeling the Thomas hearings as a "breakthrough" for the passage of the Civil Rights Act).

lative massaging, than the ADA. The Civil Rights Act of 1991, for example, provided very specific statutory language that has frequently guided the Supreme Court in a more moderate direction over the last decade.[103] Faced with this division between a receptive Congress and a hostile Supreme Court, the last thing one would want to do is draft a statute that was dependent on judicial interpretation; yet that is what was ultimately done.

The lobbying community also made an important strategic decision that may have further limited the possibility of an expansive judicial approach to the statute. Early on, the lobbying community decided not to mount a large publicity campaign for the ADA or to rally broad public support but instead opted to work solely within Congress.[104] This decision was primarily due to a belief that public support was unnecessary and that seeking public support might stir up unwanted opposition.[105] Congressional support was strong with very little open opposition to the goals of the ADA. What little opposition existed centered on questions relating to homosexuality, and a handful of conservative congressional members criticized the potential scope of the Act but to no persuasive effect.[106] In light of this broad support, the business lobby also decided early in the process to de-escalate its opposition and instead focus on fashioning a bill it could tolerate.[107]

The decision by the lobbying community to produce a statute under the public radar ultimately proved a mistake, and likely a serious one. Without broad public support and a coherent social movement pushing an expansive agenda, there was little reason to expect that the ADA could, by legislative fiat, expand the definition of disability to include nontraditional disabilities. Not only was there no apparent public support for an expansive definition of disability, but the

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103 *See infra* note 227 and accompanying text.

104 *See* SWITZER, *supra* note 37, at 107 ("Avoiding the media and any attempt to try to explain the legislation to the press became a key element of the fight for passage of the ADA.").

105 *See* Joseph Shapiro, *Disability Policy and the Media: A Stealth Civil Rights Movement Bypasses the Press and Defies Conventional Wisdom*, 22 POL'Y STUD. J. 123, 123–25 (1994) (discussing strategy and disregard for the media).

106 For discussion of the limited opposition, see Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 58–59 (2005); Susan F. Rasky, *Senate Adopts Sweeping Measure to Protect Rights of the Disabled*, N.Y. TIMES, Sept. 8, 1989, at A1 (discussing opposition among conservative Senators as to whether homosexuality would be treated as a disability).

107 *See* Paula Yost, *Business Not Fighting Bill for Disabled: Plan to Ensure Access, Affecting Phones to Buses, Raises Fears of Cost*, WASH. POST, Aug. 19, 1989, at A12 (explaining that business lobbyists decided to work towards a more palatable bill rather than opposing it outright).

statute's normative force was never adequately articulated in the public sphere. There was, for example, no public discussion of why the ADA did not involve "special rights," why the accommodation mandate was a product of right and equity rather than special treatment akin to affirmative action, or why disability rights ought to be seen as equivalent to earlier civil rights movements.[108] In a recent article, Professor Michael Stein notes that a public perception exists that the ADA involves special rights, but without a social movement to change that perception, there was very little the legislation could do to alter the public consciousness.[109] More was needed than new legislation, but more never materialized. Instead, the disability rights community appeared to fear a public dialogue and sought refuge in the courts—the wrong place, by almost any measure, for refuge.

Had there been a public dialogue, it is also quite likely that the disability community would have opted for a more narrow statutory definition because the community would have been required to articulate a justification for the statute—a justification that would have likely stemmed from discrimination, structural barriers that could be alleviated, or the needs of the disabled. This may, in turn, have also focused the advocacy community on justifying a broad definition of disability or to confront some of the many issues that have subsequently arisen, such as whether temporary disabilities, or disabilities that arise out of work, are deserving of statutory protection. Or whether individuals with rather minor conditions, such as allergies, ought to be treated as disabled. Given the apparent limited support for an expansive definition, it is worth noting that the public advocacy that did occur in support of the statute all focused on traditional disabilities. Deaf students at Gallaudet University mounted highly visible and successful protests calling for a deaf university president;[110] disabled individuals crawled up the Capitol Building to demonstrate its lack of accessibility, while others tied themselves to buses and engaged in similar protests centered around traditional disabilities.[111]

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108 *See* Shapiro, *supra* note 105, at 126–27.

109 Stein, *supra* note 12, at 606–07, 629.

110 *See* SHAPIRO, *supra* note 37, at 74–85 (discussing Gallaudet University protests). For a book-length treatment on the Gallaudet protests, see JACK R. GANNON, THE WEEK THE WORLD HEARD GALLAUDET (1989). More recently, student protests erupted again at Gallaudet over the selection of a president who was not seen as sufficiently tied to the deaf community, in part because she did not learn sign language until her mid-twenties. *See* Susan Kinzie, Nelson Hernandez & David A. Fahrenthold, *Gallaudet Board Ousts Fernandes: As Protesters Cheer, Trustees Say Law-Breakers 'Will Be Held Accountable*,' WASH. POST, Oct. 30, 2006, at A1. The protests resulted in the trustees changing their decision. *Id.*

111 *See* SWITZER, *supra* note 37, at 80–82; Shapiro, *supra* note 105, at 130–31.

The members of Congress whose support was based on personal experiences were all likewise involved with traditional disabilities, including deafness, cancer, paralysis, and epilepsy.[112] In other words, entirely missing from the public debate was a discussion regarding the need for a broader definition of disability, one for which public support appeared to be missing and a public justification lacking.

Before discussing the Supreme Court cases interpreting the ADA, I want to highlight one other problem that was lurking in the background that should have provided additional caution to those seeking an expansive definition of disability. A broad interpretation posed particular problems for employers, not just in the immediate costs of accommodation, but in providing opportunities for workers to raise excuses for their workplace behavior. There are very few things that anger employers more than lazy workers or workers seeking to gain an unearned advantage in the workplace, and courts interested in protecting the interests of employers, as many are, would likely interpret the statute to ensure that it did not become a font for worker grievances.[113] Indeed, to the extent the ADA was perceived as providing statutory protections to lazy workers, malingerers, and whiners—those who have a difficult time coping with the everyday stresses of the workplace—it was a virtual certainty that courts would cut back on the statute to eliminate those protections.[114] In fact, that is what happened.

To date, the largest volume of ADA claims have been brought by individuals with bad backs, which is largely an extension of an issue that has long plagued social security and workers' compensation systems, where back injuries have generated a tremendous amount of litigation and controversy for decades.[115] Efforts to expand the FHA amendments to cover various conditions not typically thought of as disabilities, such as chemical sensitivity,[116] have met with strong resis-

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112 *See supra* notes 80–82 and accompanying text.

113 *See infra* pp. 546–47.

114 *See infra* pp. 546–47.

115 On its website, the Equal Employment Opportunity Commission reports that injuries to the back accounted for 11.2% of ADA claims filed with the agency between 1997–2006. U.S. Equal Employment Opportunity Comm'n, ADA Charge Data by Impairments/Bases—Merit Factor Resolutions, http://www.eeoc.gov/stats/ada-merit.html (last visited Jan. 12, 2008). Only two other categories involving nonspecific conditions, denominated "Other" and "Regarded As," had higher percentages. *See id.* On back injuries in other contexts, see David Mechanic & Ronald J. Angel, *Some Factors Associated with the Report and Evaluation of Back Pain*, 28 J. HEALTH & SOC. BEHAV. 131, 131 (1987) (discussing prevalence of back pain in disability and workers' compensation claims).

116 In addition to the experiences under Title VII and the Rehab Act, the nascent Fair

tance, and similar issues have arisen in the educational context, particularly as it relates to learning disabilities where the rise in the number of diagnosed disabilities has produced a sharp public reaction.[117] In a similar context, there have been widely publicized attacks on the work of Sigmund Freud and the efficacy of psychotherapy more generally,[118] including repressed memory syndrome,[119] as well as Ritalin and

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Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3631 (2000)), also should have given pause to the hope of an expansive judicial interpretation, although in fairness the statute was far too new to provide much guidance on the ADA. Nevertheless, the experience under the FHA is instructive because it has paralleled that of the ADA. Early in the life of the FHA amendments, many claims arose that sought to stretch the definition of disability to include chemical sensitivity to fertilizer. *See, e.g.*, Summers v. Mo. Pac. R.R. Sys., 132 F.3d 599, 603 (10th Cir. 1997) (labeling multiple chemical sensitivity a "controversial diagnosis"); Bradley v. Brown, 42 F.3d 434, 438–39 (7th Cir. 1994) (excluding evidence relating to multiple chemical sensitivity under the *Daubert* test); Gabbard v. Linn-Benton Hous. Auth., 219 F. Supp. 2d 1130, 1134, 1141 (D. Or. 2002) (excluding evidence and citing cases where theory has been rejected). Furthermore, to avoid no-pet policies in apartment complexes, some plaintiffs argued that their pets were support animals necessary to combat symptoms of depression. *See, e.g.*, Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995) (finding dog had "no . . . discernible skills" but was rather a "simple house pet and weapon against cranky landlord"); Wells v. State Manufactured Homes, Inc., No. 04-169-P-S, 2005 U.S. Dist. LEXIS 6048, at *7 (D. Me. Mar. 11, 2005) (holding plaintiff did not prove that "mental impairment substantially limits a major life activity," thus not reaching claim that pet was necessary accommodation to get around no-pet policy); Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua, 304 F. Supp. 2d 1245, 1257 (D. Haw. 2003) (finding bulldog was not a trained service animal). When the dog is trained to provide specific services, courts often will override no-pet policies. *See* Fulciniti v. Vill. of Shadyside Condo. Ass'n, No. 96-1825, 1998 U.S. Dist. LEXIS 23450, at *16 (W.D. Pa. Nov. 20, 1998) (permitting dog trained to help individual with multiple sclerosis); Green v. Hous. Auth., 994 F. Supp. 1253, 1254, 1257 (D. Or. 1998) (holding trained dog was permitted for hearing disabled child).

117 John Silber, former Boston University president, mounted a public attack on the concept of learning disabilities, one that was ultimately rejected in the district court. *See* Guckenberger v. Boston Univ., 974 F. Supp. 106, 153–54 (D. Mass. 1997) (finding BU's policy on learning disabilities in violation of ADA). Although Silber is a controversial figure, many mainstream and thoughtful academics have also questioned the rise of learning disabilities. *See, e.g.*, MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 6–16 (1997). For an overview of the issues relating to learning disabilities and accommodation, see John D. Ranseen & Gregory S. Parks, *Test Accommodations for Postsecondary Students: The Quandary Resulting from the ADA's Disability Definition*, 11 PSYCHOL. PUB. POL'Y & L. 83 (2005) (exploring the conflict between the legal definition of disability and the more inclusive view in educational and mental health practices).

118 In the left-leaning *New York Review of Books*, Frederick Crews mounted strong attacks on Freud that received widespread attention. FREDERICK CREWS ET AL., THE MEMORY WARS: FREUD'S LEGACY IN DISPUTE (1995) (discrediting psychoanalysis as a discipline that merely adapts to "changes in public sentiment"). An earlier critique by Jeffrey Masson became something of a bestseller. JEFFREY MOUSSAIEFF MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY (1984) (arguing that Freud suppressed the seduction theory because it became "such a liability," thus forcing him to accommodate to his peers' views); *see also* JEFFREY MOUSSAIEFF MASSON, FINAL ANALYSIS: THE MAKING AND UNMAKING

Attention Deficit Hyperactivity Disorder,[120] all of which suggest that society has not embraced the broad definition of disability pushed by advocates—a definition that could encompass somewhere between one-quarter and one-half of all Americans. Absent either inexplicably clear statutory language or broad public support, it was surely a mistake to think these nontraditional disability issues might be favorably received in the courts. And, true to form, they have not been.

Some of the first claims to arise under the ADA came from law students seeking additional time on the bar examination because they had bad memories; these claims generally failed.[121] My nonscientific review of the literature suggests that the most frequently requested workplace accommodation is a right to work at home, or in the alternative, a right to set one's own hours or to come in late.[122] Not surprisingly, these claims have uniformly failed. One reason for their failure is that they are precisely the kind of claims that the business community is most concerned about because, to them, these claims exude laziness or malingering, rather than any serious disability.[123]

OF A PSYCHOANALYST (1990) (exploring the cult-like aspects of the psychoanalyst profession, including its corruption and prejudice).

119 *See* ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY (1994) (contending that individuals often create false memories of childhood events).

120 *See, e.g.*, John Merrow, *Reading, Writing and Ritalin*, N.Y. TIMES, Oct. 21, 1995, at 21 ("Ritalin is so plentiful that in some junior high schools it's a 'gateway drug,' the first drug a child experiments with."); Rebecca Perl, *Atlanta Leads South in Ritalin Prescriptions: Critics Say Many Kids Don't Need the Drug*, ATLANTA J.-CONST., Nov. 8, 1992, at A1 (lead story on "Ritalin controversy"); Bill Scanlon, *Scamming for Ritalin: College Students Fake Attention-Deficit Disorder*, ROCKY MTN. NEWS (Denver), Mar. 8, 1998, at 54A (discussing students seeking Ritalin for its buzz effect).

121 *See, e.g.*, Christian v. N.Y. State Bd. of Law Exam'rs, 899 F. Supp. 1254, 1256 (S.D.N.Y. 1995) (dismissing case after plaintiff passed the bar examination); Argen v. N.Y. State Bd. of Law Exam'rs, 860 F. Supp. 84, 88 (W.D.N.Y. 1994) (finding that plaintiff failed to establish specific learning disability). There were also a series of early challenges to bar exam inquiries regarding mental health treatment, which ultimately led to modifications of most state policies. *See* Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 431 (E.D. Va. 1995).

122 *See, e.g.*, Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1124–25 (10th Cir. 2004) (denying right to work at home to individual suffering from post-traumatic stress syndrome); Rauen v. U.S. Tobacco Mfg., 319 F.3d 891, 896–97 (7th Cir. 2003) (finding request to work at home unreasonable as an accommodation); Moore v. Payless Shoe Source, Inc., 139 F.3d 1210, 1213 (8th Cir. 1998) ("An employee who is 'unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job in question . . . .'" (quoting Halperin v. Abacus Tech. Corp., 128 F.3d 191, 198 (4th Cir. 1997))); Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994) (coming to work regularly is an essential function of the job).

123 *See, e.g.*, *Rauen*, 319 F.3d at 896 ("The reason working at home is rarely a reasonable accommodation is because most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation." (citing Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995))); Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 213 (4th Cir. 1990) ("[A] regular and reliable level of attendance is a necessary element of most

These claims also reflect the way individuals, who have no other outlet for their workplace complaints, can abuse the disability statute, often as a result of the formidable employment-at-will rule, which sharply limits the common-law rights of workers. Because of this limitation, workers often search for any statutory grounds to state a claim that addresses a workplace grievance. Moreover, the malleable nature of the disability definition has led many employees—likely prompted by attorneys—to try to fit their claims under the ADA. Even though many individuals who brought such claims may have had legitimate health conditions that should have fallen within the literal scope of the ADA, there was little question that the claims would be received hostilely. But this is quite different from a backlash; or, if it is a backlash, it is one that is not unique to the courts as the effort to expand the definition of disability to reach nontraditional disabilities has failed to gain broad societal acceptance.

All of these factors rendered the prospects of an expansive, or literal, interpretation of disability remote at best. Instead, what should have been expected from broad statutory language was a substantial judicial rewriting of the statute, one that would likely mirror existing social norms, where there is generally broad support for protecting those with serious disabilities—even though there remain substantial concerns regarding the potential costs of accommodation—and little support for extending the statute to those who appear undeserving of protection.

II. The Cases: A Backlash?

The social backdrop presented above leads to a discussion of the Supreme Court cases typically defined as comprising the heart of the judicial backlash. In this Part, I explore these cases, with a particular focus on *Sutton v. United Air Lines*, and seek to explain the rationality of the decisions, or alternatively, why the decisions were highly predictable given the statutory directive and governing social norms.

A. Sutton v. United Air Lines*: Restricting the Scope of the Statute*

The case of *Sutton v. United Air Lines* involved twin sisters who worked as commuter airline pilots and sought to move up the professional ranks to fly commercial planes for United.[124] The Sutton sisters

jobs."). Extrapolating to the Supreme Court, the same reception was almost assured. After all, Justice Rehnquist died in office, Justices O'Connor and Ginsburg worked through serious illnesses, and Justice Stevens is still working at age 86.

124 *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 475–76 (1999).

suffered from severe myopia and were unable to satisfy the airlines' qualification standard of having uncorrected vision of 20/100.[125] When United rejected them based on their eyesight, the sisters sued, arguing that their condition rendered them disabled under the statute and therefore required the airline to provide a reasonable accommodation, presumably allowing them to wear corrective lenses while flying.[126] Alternatively, they argued that if they were not disabled under the terms of the statute, the employer was regarding them as disabled, because United was treating them as if their eyesight was a substantial limitation.[127]

With those facts in mind, it is difficult to conceive of a worse test case than the one the Suttons presented, and the only real surprise was how close the case ended up (and it was close only because the dissenters understood just how much was at stake).[128] Nevertheless, the *Sutton* case is generally identified as the critical backbone of the judicial backlash,[129] so a detailed analysis of the case will help demonstrate why it is a misnomer to label the interpretive developments as a backlash against the disabled. Rather, the *Sutton* case is best understood as the product of a poorly worded statute that too easily lent

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125 *Id.* Because the Supreme Court decided that the Suttons did not qualify as disabled under the statute, *see id.* at 494, the airline never had to justify its rule. Presumably the rule was based on safety concerns, particularly in the event of turbulence or some other disruption that might cause the pilot to lose her glasses. *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 175 (2006). Kenji Yoshino has suggested that, as an accommodation, the Suttons could have been allowed to bring an extra pair of glasses on the plane. *See id.* Having an extra pair of glasses may have helped in the event one pair broke (or contact lenses came out) but would not likely help in the more likely circumstance of turbulence or other disruption.

126 *Sutton*, 527 U.S. at 476.

127 *Id.* The "regarded as" issue is discussed further below, but I also want to highlight a potential problem with the argument that rendered it ill-fitting for this case. Under one version of the statute, a plaintiff who is regarded as disabled should not need an accommodation because he or she is not actually disabled. The Suttons, however, would have needed an accommodation: they could not see sufficiently without their glasses, and thus would have needed to be allowed to wear them. Courts have split over whether an accommodation is required for those who are regarded as disabled. *See* D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005) (holding that employer must offer accommodations to employees regarded as disabled individuals, and discussing circuit split).

128 Justices Stevens and Breyer dissented. *Sutton*, 527 U.S. at 495–513 (Stevens, J., dissenting); *id.* at 513–15 (Breyer, J., dissenting).

129 For critiques of the *Sutton* case, see Samuel A. Marcosson, *Of Square Pegs and Round Holes: The Supreme Court's Ongoing "Title VII-ization" of the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 361, 366–78 (2004); Soifer, *supra* note 12, at 1303–08; White, *supra* note 12, at 537–39, 559–69.

itself to opportunistic plaintiffs who were never intended as its beneficiaries.[130]

The primary doctrinal issue presented in *Sutton* was whether, in determining if an individual is disabled, the Court should consider available mitigating measures or assess the plaintiff in his or her unmitigated state.[131] Within disability law, this is an enormous question because many potentially disabling conditions can be mitigated through various corrective measures such as hearing aids, prosthetic devices, and, perhaps most commonly, medication. Taking into account mitigating measures might exclude from the statute's protective scope individuals who formed the core group Congress intended to protect; this would include individuals with epilepsy, such as the original House sponsor Tony Coelho, because epilepsy can generally be controlled by medication.[132] Ignoring mitigating measures, on the other hand, would allow many individuals who would not be considered disabled in any ordinary sense of the word into federal court, and to the Supreme Court, this group included those who wear glasses. In the briefs and at the oral argument, it was repeatedly emphasized that as many as 100 million Americans used corrective lenses,[133] and the Supreme Court was exceedingly unlikely to open the door to all, or even some, of those individuals.

As a result, this was the kind of case that should have been anticipated by the legislative drafters but, if left unaddressed in the statute, would likely lead to a narrowing of the statute's scope. This was true not only because the potential class was enormous, but also because

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130 As noted previously, for a variety of reasons, the statute has generated an unusually large group of claims based on conditions not typically identified as a disability. For an additional sampling of cases, all of which were unsuccessful, see Nuzum v. Ozark Auto. Distrib., Inc., 432 F.3d 839, 841 (8th Cir. 2005) (tendonitis in left elbow); Anderson v. N.D. State Hosp., 232 F.3d 634, 635 (8th Cir. 2000) (fear of snakes); Sinkler v. Midwest Prop. Mgmt., 209 F.3d 678, 681 (7th Cir. 2000) (fear of driving in unfamiliar places); Land v. Baptist Med. Ctr., 164 F.3d 423, 424 (8th Cir. 1999) (peanut allergies); Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 719–20 (2d Cir. 1994) (asthma aggravated by work); Byrne v. Bd. of Educ., 979 F.2d 560, 562 (7th Cir. 1992) (allergy to fungus); Kristofor v. Schnibben, No. 02 C 1859, 2003 U.S. Dist. LEXIS 2809, at *2 (N.D. Ill. Feb. 26, 2003) (allergy to latex); Cormier v. Littlefield, 112 F. Supp. 2d 196, 197 (D. Mass. 2000) (temporary knee injury); Mescal v. Marra, 49 F. Supp. 2d 365, 369 (S.D.N.Y. 1999) (mental anxiety caused by interaction with supervisor); Cameron v. Navistar Int'l Transp. Corp., 39 F. Supp. 2d 1040, 1046 (N.D. Ill. 1998) (fear of being around suspended tools); Dewitt v. Carsten, 941 F. Supp. 1232, 1234 (N.D. Ga. 1996) (correctional officer's stress caused by interaction with inmates), *aff'd*, 122 F.3d 1079 (11th Cir. 1997).

131 *See Sutton*, 527 U.S. at 481–82.

132 *See* SHAPIRO, *supra* note 37, at 117.

133 *Sutton*, 527 U.S. at 487 ("[T]he number of people with vision impairments alone is 100 million.").

plaintiffs, like the Suttons, likely played on all of the Supreme Court's fears regarding the potential direction of the statute. For example, this case could be identified as falling within the special rights category, insofar as the plaintiffs could be perceived as undeserving plaintiffs seeking an unfair advantage in the workplace.[134] The Suttons already had very good jobs, and their vision posed a real safety issue to airplane passengers.[135] On this score, even if the Suttons had been defined as disabled, they ultimately would have lost their claim as a safety matter, given that the statute permits work rules necessary to ensure safety.[136]

The most important failing of the Suttons' claims, however, was that their condition had nothing to do with the underlying concept of discrimination. Schoolyard taunts aside, there is no basis for claiming that those who wear glasses are the victims of discrimination with which federal law ought to concern itself. Nor was there any sense that with their glasses on, the Suttons were limited in their ability to see. Rather, with their glasses on, they were like anyone else who regularly wears glasses, and their daily life was not generally affected in any substantial way.[137] From that perspective, there was no reason the Court would want to protect these individuals, and the reasonable fear that there were many more individuals like the Suttons waiting in the wings made the Suttons' claim even more precarious.

In their defense, the Suttons had extremely poor eyesight, and the Court certainly could have drawn a line designed to exclude from the statute's scope only those with less severe limitations. But the Court needed a reason to draw that line, and it never found one. At the oral argument, one of the Justices addressed this issue explicitly.[138] Even though the Suttons may have been more limited in their ability

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134 Although the Suttons were not demonstrably less qualified than other candidates, given that the vision requirement was a safety issue rather than one that went to the ability to fly a plane, it was easy to see this case as involving individuals seeking to take advantage of a statute that was not designed for their benefit. *But see* Karlan & Rutherglen, *supra* note 31, at 14 (equating duty to accommodate with affirmative action).

135 *See Sutton*, 527 U.S. at 513 (Stevens, J., dissenting).

136 *Id.* at 511 (emphasizing this point on safety). One might argue that the airlines should be required to prove the danger, but that would obviously be a significantly more expensive proposition if all such work rules had to be justified. Moreover, this seems like precisely the kind of claim where intuitive analyses are likely to prevail: although there may have been only a small risk of harm, the potential danger was tremendous, which is the very kind of situation that is most likely to be magnified.

137 The Suttons were not "substantially limited in any major life activity." *See id.* at 488–89.

138 *See* Transcript of Oral Argument at 4–9, *Sutton*, 527 U.S. 471 (No. 97-1943), 1999 WL 281310. Note that *Sutton* was decided at a time when the Justices were not identified by name in the oral argument transcripts.

to see than most people, the Justice noted, once they put on their glasses, they were effectively the same.[139] Why then should the severity of the underlying condition matter when the mitigating measures eliminated or equalized the severity? The answer proffered by the Suttons' attorney was wholly unpersuasive: he claimed that the statute told the Court to make that distinction,[140] an argument that was incorrect on two different levels. The statute said nothing about whether mitigating measures should be considered in the disability calculus; that issue was addressed specifically in the committee reports,[141] a place that a majority of the Court was reluctant to look.[142] More to the point, neither the statute nor the legislative history suggested that the severity of the unmitigated condition should be a relevant factor—from the legislative materials, the question was whether mitigating factors should be considered, not whether they should sometimes be considered.[143] A decision to focus on the severity of the underlying condition could only arise out of a pragmatic determination to limit the breadth of the disability class while preserving what might be considered core claims. The Suttons, however, were not within the core group, and, part of their argument, a part that went unarticulated, was that the Court should provide them statutory coverage as a way of preserving coverage for more deserving plaintiffs—those who use prosthetic devices, suffer from epilepsy, or experience other substantial conditions that can be treated with medication.[144]

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139 *See id.* at 6–7. A substantial portion of the oral argument was devoted to the question whether such a line was possible, and desirable.

140 *See id.* at 9.

141 *See Sutton*, 527 U.S. at 480–82.

142 Although by the time of *Sutton* a majority of the Supreme Court had become hostile to legislative history, the movement away from relying on legislative history was clearly present at the time the ADA was adopted. Both Judge Easterbrook and Justice Scalia had long and forcefully challenged the relevance of legislative history. *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 566–68 (1988) (Scalia, J.) (writing for the Court and rejecting committee reports); United States v. Taylor, 487 U.S. 326, 345 (1988) (Scalia, J., concurring in part) ("[I]t must be assumed that what the Members of [Congress] thought they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said."). Judge Easterbrook laid out his theory in a series of highly influential articles. *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60–61, 65 (1988); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539, 544 (1983); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 4–5, 45–46 (1984).

143 *See infra* note 147.

144 *See* Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 63 (2000).

Importantly, the Court sought to limit the potential damage of its ruling by noting that even those who have access to mitigating measures may still qualify as disabled so long as they remain limited in a major life activity.[145] This part of the Court's decision has diminished some of the fears of backlash critics. Moreover, plaintiffs with serious disabilities—for example, those who might use prosthetic devices or those with severe depression—have generally qualified as disabled even after *Sutton*.[146] In this way, the Court drew a line that sought to preserve at least some core claims while excluding those the Court considered beyond the proper scope of the statute. By proper, I do not mean that which was consistent with congressional intent. As alluded to above, the legislative history was reasonably clear that an individual should be considered in their unmitigated state.[147] By proper, I mean what the Court considered the proper scope of the disability statute, independent of Congress's actual intent.

There remains the complicated issue of the "regarded as" prong of the statute, which is where much of the criticism of the case has focused.[148] The Suttons argued that if they were not disabled under the statute, then by considering their eyesight as a substantial limiting condition United Air Lines was treating them as if they were.[149] Why else, one might ask, was United Air Lines restricting their job opportunities? This argument proved too clever by half, as the saying goes, though it certainly had some support in the statutory language. As a practical matter, however, this issue was destined to fail. If the Supreme Court had allowed a regarded-as claim in this particular case, all of the benefits of its initial holding on mitigating conditions would have been lost, because once it was determined that the plaintiff was not disabled, she would then simply move to a regarded-as claim. This

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145 *Sutton*, 527 U.S. at 488 ("The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under subsection (A) if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity.").

146 *See* cases cited *supra* note 22.

147 *See, e.g.*, H.R. REP. No. 101-485, pt. 2, at 52 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 334. ("Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."); S. REP. No. 101-116, at 23 (1989) ("[W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.").

148 *See, e.g.*, Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 110–11, 122–27 (2000) (critiquing *Sutton*'s interpretation of "regarded as" while supporting the Court's holding on mitigating measures); Parmet, *supra* note 144, at 63, 89–90 (criticizing Court for restricting definition of "regarded as"); Soifer, *supra* note 12, at 1304–06 (critiquing "regarded as" portion of the decision).

149 *See Sutton*, 527 U.S. at 492–93.

is, in fact, what happened in a large number of early disability claims where plaintiffs frequently tagged on a regarded-as claim as a safety valve.[150] Yet, just as the Court's holding on the glasses issue was inevitable, so too was its interpretation of the regarded-as prong, where the Court crafted the virtually impossible standard that an employee is regarded as disabled only to the extent that the employer regards her as unqualified from a broad class of jobs.[151]

Although the Court's decision has sharply limited the force of the regarded as prong, as a matter of discrimination, the Court's rationale was not so extreme. One of the problems with the regarded-as language is that it has always been difficult to know what protection the provision was intended to provide. The regarded-as prong probably could only work in the context of what courts would consider the most deserving of plaintiffs—those who are disabled but who do not need accommodations.[152] Let me offer an example from my own experience. Shortly after the ADA was passed, I noticed an airline ticket agent who had one arm. From what I could tell, he typed just as fast as someone with two arms, but prior to the ADA the airline likely would never have given him the opportunity to perform the job because of its perception that two arms were required for effective typing. In most instances, individuals with conditions such as this will succeed under the basic definition of disability and would not need to avail themselves of the regarded-as prong but that may not always be the case.[153]

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150 Prior to the Court's determination in *Sutton*, it was quite common for an individual who was found not to qualify as disabled to turn to a regarded-as claim, although most of those claims failed. *See, e.g.*, Talk v. Delta Airlines, Inc., 165 F.3d 1021, 1025 (5th Cir. 1999) (noting that plaintiff sought to establish regarded-as claim after failing to prove he had a substantial limitation); Newberry v. E. Tex. State Univ., 161 F.3d 276, 279 (5th Cir. 1998) (finding plaintiff unable to prove that his employer regarded him as disabled, which he argued after failing to establish that his behavior qualified as disabled); Robinson v. Global Marine Drilling Co., 101 F.3d 35, 37 (5th Cir. 1996) (holding that plaintiff's asbestosis was not a substantial limitation, and employer did not regard individual as disabled because he had asbestosis); Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995) (holding that employee on a light duty was neither disabled nor regarded as such). Courts frequently treat the regarded-as claim summarily and in unpublished opinions. *See, e.g.*, Gibbs v. St. Anthony Hosp., No. 96-6063, 1997 U.S. App. LEXIS 2362, at *8 (10th Cir. Feb. 12, 1997) (finding plaintiff could not establish employer regarded her as disabled when she failed to establish that her lifting restrictions constituted a disability); *see also* Issacharoff & Nelson, *supra* note 31, at 328 (discussing potentially circular nature of regarded-as claim).

151 *See Sutton*, 527 U.S. at 493.

152 As noted previously, there is currently a debate occurring in the lower courts concerning whether employers must offer accommodations to individuals who are regarded as disabled. *See* D'Angelo v. ConAgra Foods, 422 F.3d 1220, 1235 (11th Cir. 2005); *supra* note 127.

153 The ADA's legislative history mentioned a situation in which children with Down syn-

More to the point, this is precisely the kind of condition or situation the ADA was intended to address: the employer's misperception of the ability of an individual with a disability. Though many different interests and motives lay behind the statute, a central goal was to overcome those misperceptions, the lack of understanding of the abilities of those with disabilities, and perhaps that is the best way to conceive of the regarded-as prong. In contrast, one would have to look far and wide to find any collective sense that the ADA was intended to help those who wear glasses overcome the stigma and travails that comes along with the glasses, and I think the same can be said of those with high blood pressure, chemical sensitivity, and the like.[154] In the end, this may be a limited concept of what the regarded-as prong was intended to encompass, but it seems likely the best judicial interpretation one could hope for absent a more pointed and specific statutory directive.

In discussing the inevitability of the Supreme Court's decision in *Sutton*, it is equally important to emphasize how the Court reached its conclusion that mitigating measures were to be considered: the Supreme Court ignored statutory language, legislative history, and an Equal Employment Opportunity Commission ("EEOC") regulatory interpretation, focusing instead on language from the statutory preface—language it never adequately dealt with.[155] In its opinion, the Court emphasized the statute's prefatory language, which states that forty-three million individuals were disabled, concluding that not requiring mitigating measures would greatly expand the statute's coverage beyond forty-three million.[156] Yet, under the Court's interpretation, the number of individuals covered by the statute now certainly falls well below forty-three million, given that the legislative history

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drome were denied admission to a zoo so as not to upset the animals. *See* H.R. REP. No. 101-485, pt. 2, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 312. This, too, seems an unusual situation for the regarded-as prong because presumably the child would qualify as disabled under the statute. The House Report also identified a severe burn victim as falling within the category of a physical impairment that does "not in fact result in a substantial limitation of a major life activity." *Id.* at 53.

154 Compare Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 401, 445–52 (2000), which argues for an antisubordination approach. Professor Bagenstos and I differ in some significant respects on what conditions would fall within such an approach.

155 Both the EEOC and the Justice Department had issued regulations stating that an individual should be assessed in her unmitigated state, but the Court rejected that interpretation. *See Sutton*, 527 U.S. at 482 ("We conclude that respondent is correct that the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA.").

156 *Id.* at 484, 487.

demonstrates Congress intended to include in that original number at least some individuals who can mitigate their disabling condition.[157] Without some explanation, it is difficult to see how an interpretation that restricts the intended scope of the statute should have any priority over one that expands that scope.

When statutory language is ambiguous, as it decidedly is in the definition of disability, and without guidance from some alternative source, the Court will be left with its own normative vision of how the statute ought to be interpreted. In the case of the ADA, the Court has frequently accomplished its statutory objective by rejecting administrative interpretations. Relevant to the *Sutton* case, the EEOC and the Justice Department had both promulgated regulations directing that the determination of whether an individual is disabled should exclude mitigating measures.[158] Indeed, in *Sutton*, one can plausibly claim that the Court focused on irrelevant language at the expense of more clear language and legislative history, and disregarded agency interpretations to read the statute consistent with its own normative vision. Although this is hardly an example of neutral reasoning, it was highly predictable nevertheless.[159]

B. Exposing the Limits of the Backlash Thesis

1. Toyota Motor Manufacturing, Inc. v. Williams

Another case that has come in for considerable scholarly criticism, *Toyota Motor Manufacturing, Inc. v. Williams*,[160] was decided shortly after *Sutton* and fits within the framework described above of a fully predictable judicial result, one that again has narrowed the scope of the statute. Unlike *Sutton*, which presented a terrible test case, the carpal tunnel syndrome at issue in *Toyota* was an issue that cried out for Supreme Court resolution. Ella Williams worked on the assembly line at a Toyota plant, and like many individuals working in similar positions, she suffered injuries to her hands, arms, and wrists

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157 In his dissent, Justice Stevens criticized this aspect of the majority's opinion. *See id.* at 498 (Stevens, J., dissenting).

158 *See id.* at 480.

159 Jim Brudney and Corey Ditslear make a similar argument with considerable focus on the *Sutton* decision. The authors conclude their study by noting, "[T]he Court's reliance on canon-based reasoning can seem plausible and 'objective' under one set of conditions, unpredictable and inconsistent in a second setting, and strategic or ideologically driven in a third." James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 112 (2005).

160 Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184 (2002).

from the repetitive motion of the line.[161] Toyota's own doctor diagnosed Williams with carpal tunnel syndrome, and her personal physician placed her on permanent work restrictions.[162] For the next two years, Williams worked on modified light duty but still missed some work, and she ultimately filed a workers' compensation claim that the parties settled.[163] Williams was then assigned to a quality control line, where she worked without problem for a few years, until she was later required to rotate through all of the various job tasks, which included certain manual tasks she could not perform without significant pain.[164] At this point, she was again placed on a work restriction, and her employer later terminated her purportedly for poor attendance.[165]

The *Toyota* case fell at the ill-defined intersection of three different statutes: workers' compensation, long-term disability under Social Security, and the ADA. From an institutional standpoint, the idea that carpal tunnel syndrome is generally not covered by the ADA fits the Supreme Court's interests in two distinct ways. First, carpal tunnel syndrome is typically a work-related injury, and would generally be covered under the more limited workers' compensation system, which provides a no-fault scheme for injuries suffered in the course of employment, and does so by providing limited statutory remedies for the injuries in state administrative forums.[166] Just as the Court was hesitant to open the door to nontraditional disabilities in *Sutton*,[167] the Court was also understandably reluctant to turn the ADA into an alternative forum for workers' compensation claims, not just because it would prefer to keep the cases out of federal courts but also because allowing such claims would eviscerate the exclusivity of workers' compensation.[168]

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161 *Id.* at 187.

162 *Id.*

163 *Id.* at 188.

164 *Id.* at 188–89.

165 *Id.* at 189–90.

166 Because workers' compensation provides limited remedies, as part of the no-fault bargain, many employers tell their employees to file workers' compensation claims at the first sign of carpal tunnel syndrome as a way of limiting their exposure. Ergonomics injuries comprise a substantial portion of compensation claims. *See* Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1095–97 (2005) (discussing ergonomics in context of workers' compensation).

167 *See supra* Part II.A.

168 Now-Chief Justice Roberts emphasized this point towards the end of the brief he filed on behalf of Toyota Motors. *See* Brief for Petitioner at 31, *Toyota*, 534 U.S. 184 (No. 00-1089) (noting that the lower court's decision "upsets the statute's interaction with workers' compensation laws"). At oral argument, one of the first questions that came from the Court involved the relationship between workers' compensation and the ADA, and the issue reappeared through-

The second factor counseling against ADA coverage of carpal tunnel syndrome relates back to what I earlier discussed as the concerns of business. Carpal tunnel syndrome is among those ergonomic injuries that the business community fought so strongly against for years, including by blocking the development of an ergonomics standard in the Department of Labor.[169] Those efforts were led by Eugene Scalia, son of Justice Scalia, who cut his teeth as a labor lawyer by becoming one of the most prominent critics of the presence of ergonomic injuries—a task that earned him the brief reward of Labor Department solicitor.[170] Given the controversy surrounding ergonomics injuries, it seems likely that at least some members of the Court would greet the issue of carpal tunnel syndrome with skepticism, whereas others would see it as potentially transforming the ADA into an alternative form of workers' compensation. In the context of the judicial backlash story, it is worth emphasizing that the Supreme Court decision in *Toyota* was unanimous.[171]

Most of the criticism of the *Toyota* decision ignores the workers' compensation aspect of the case to focus on the Court's restrictive interpretation of the statute, which required individuals to establish that they are limited in performing tasks that are of "central importance to most people's daily lives."[172] This restriction has forced

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out the argument. *See* Transcript of Oral Argument at 6, 36–42, *Toyota*, 534 U.S. 184 (No. 00-1089), 2001 WL 1453954. As a general matter, when an employee is injured on the job, she is able to obtain prompt relief from the workers' compensation scheme. *See* MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, WORK LAW 875 (2005). Though certainly not without its problems, that scheme represents a deliberate and careful compromise in that the employee does not have to prove the employer was at fault, and in return the remedies are quite limited. *See id.* The remedy is also exclusive; in other words, it is generally easy for an employee who is injured on the job to get into the system, but it is intentionally very difficult to get out of the established compensation scheme.

169 *See* CRAIN, KIM & SELMI, *supra* note 168, at 926–27 (discussing battle over ergonomics standards).

170 *See* Christopher Marquis, *Bush Bypasses Senate on 2 More Nominees*, N.Y. TIMES, Jan. 12, 2002, at A1 (noting that Eugene Scalia, who had previously denounced a Clinton administration regulation on ergonomics as "quackery," had received a recess appointment). Because I emphasized the workers' compensation aspects of the case, I should note that at the oral argument, there was no discussion relating to the nature of carpal tunnel syndrome, although the issue was raised specifically in the amicus brief filed on behalf of the petitioner by Levi Strauss. Brief of Amicus Curiae, Levi Strauss & Co., in Support of Petitioner at 22–28, *Toyota*, 534 U.S. 184 (No. 00-1089), 2001 WL 747848.

171 *See Toyota*, 534 U.S. at 186.

172 *Id.* at 198. For criticisms of the case, see Kathleen Hale, Toyota v. Williams*: Further Constricting the Circle of Difference*, 4 J.L. SOC'Y 275, 286–87, 300–02 (2003); Jeffrey W. Larroca, Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*: Disabling the Americans with Disabilities Act*, 19 J. CONTEMP. HEALTH & POL'Y 363, 367–72 (2002).

courts into awkward inquiries concerning whether individuals are capable of brushing their teeth or hugging their spouses to determine whether they are disabled.[173] Although this inquiry has led to excluding some individuals who were likely intended to be covered by the ADA, the case is a natural extension of the concerns addressed in *Sutton*. Part of the Court's decision in *Sutton* was necessary to keep anyone with a medical condition the employer sought to consider from raising a regarded-as claim;[174] it was necessary in *Toyota* to restrict the definition of "major life activity" to close the workers' compensation door.[175] Reminiscent of its decision in *Sutton*, reaching its conclusion in *Toyota* required the Court to disregard an EEOC guidance and more logical textual analysis as the price of ensuring there was "a demanding standard for qualifying as disabled."[176] Despite the Court's circuitous path, there is little question that its decision was ultimately consistent with the purpose of the ADA, which no one could plausibly contend was intended to supplant workers' compensation or to allow those with work-related injuries to seek accommodations in addition to the remedies available under workers' compensation.[177]

2. Chevron U.S.A. Inc. v. Echazabal

Two other cases deserve mention within the framework of this Article. In *Chevron U.S.A. Inc. v. Echazabal*,[178] the Court addressed whether the statutory language permitting employers to restrict ac-

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173 *See, e.g.*, Heiko v. Colombo Sav. Bank, F.S.B., 434 F.3d 249, 255 (4th Cir. 2006) (holding that ability to eliminate bodily waste is a major life function); Nuzum v. Ozark Auto. Distribs., Inc., 432 F.3d 839, 846 (8th Cir. 2005) (considering but not deciding whether hugging is a major life activity); Rooney v. Koch Air, LLC, 410 F.3d 376, 381 (7th Cir. 2005) (concluding that individual was not disabled because he was able to crawl and bend, functions necessary for his job); Guzmán-Rosario v. United Parcel Serv., Inc., 397 F.3d 6, 10–11 (1st Cir. 2005) (finding plaintiff's ovarian cysts did not interfere with sitting down or doing housework); McGeshick v. Principi, 357 F.3d 1146, 1150–51 (10th Cir. 2004) (working in stairwells and cleaning ledges is not a major life activity). A substantial number of cases, with conflicting results, have involved interpersonal skills raising the question of whether getting along with others or belonging is a major life activity. *See* Ann Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217, 221–26 (2004) (advocating a broad approach that belonging falls within "the Court's understandings of major life activities").

174 *See supra* pp. 553–54.

175 *See supra* text accompanying note 168.

176 *Toyota*, 534 U.S. at 197.

177 This latter point is perhaps more controversial. One might arguably maintain that the accommodation provision of the ADA should enable one otherwise unable to work as a result of a workplace injury to return to employment in some more limited capacity.

178 Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002).

tions when an employee posed a danger to others could be stretched to include danger to oneself.[179] The case posed an unusual situation because Echazabal had a serious illness (Hepatitis C), and Chevron contended that allowing him to continue working would pose a risk to his life.[180] Most individuals in these circumstances would not want to continue working, and it seems, on the merits alone, the Supreme Court would likely side with the employer who was engaging in paternalistic rather than obviously discriminatory actions. Yet, of the cases discussed in this Article, *Echazabal* presented the most difficult path for the Court to reach its desired result, namely that employers could exclude individuals who posed a danger to their own health.[181]

The Court's path was tortured because the language of the statutory affirmative defense at issue in the case did not say anything about posing a risk to oneself, specifically mentioning only "a direct threat to the health or safety of other individuals in the workplace."[182] An EEOC regulation supported Chevron's interpretation,[183] but having just ignored EEOC regulations in *Sutton* and *Toyota*,[184] one might have thought the Court would be constrained to again disregard the regulation, particularly given that the statutory language was unequivocal. A second, and in some ways even more problematic, hurdle was the parallel to the Court's earlier decision in *UAW v. Johnson Controls, Inc.*,[185] where the Supreme Court had invalidated an employer's practice of excluding women from a battery-making facility as a way to protect their fetuses from lead exposure.[186] A central premise of *Johnson Controls* was that women should be able to choose for themselves how to protect their bodies and potential fetuses, and in many ways, it seemed an easier determination that employees should be able to decide whether they wanted to continue working knowing the risks the work presented to their own health.[187] As a matter of expressed judicial policy and clear statutory language, Echazabal should have prevailed, but that was not to be.[188]

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179 *See id.* at 76.

180 *Id.*

181 *See id.* at 87.

182 42 U.S.C. § 12113(b) (2000).

183 *See Echazabal*, 536 U.S. at 77.

184 *See supra* notes 155, 176 and accompanying text.

185 UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

186 *See id.* at 190–91, 211.

187 *See Echazabal*, 536 U.S. at 86 n.5 (discussing Echazabal's analogy to *Johnson Controls*).

188 Professor Sam Bagenstos, who was counsel to Echazabal in the Supreme Court, analyzed this case in Samuel R. Bagenstos, *The Supreme Court, The Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923, 930–34 (2004).

In its unanimous decision in *Echazabal*, the Supreme Court dismissed the parallel to *Johnson Controls* in a footnote,[189] and had little trouble finding that the employer's actions were permissible.[190] Equally clear, the Court's decision evinced a paternalistic attitude, an attitude that has long prevailed when it comes to the disabled, and one that demonstrates that, certainly to the Court, disability discrimination is different from discrimination based on gender or race, or the other traditional categories. This latter point ties into the lack of a social movement on disability, as it suggests that we have failed to move the debate forward regarding the treatment of those with disabilities and instead remain locked in what should be an outdated viewpoint. Thus, in *Echazabal*, not even clear statutory language made a difference as the Supreme Court instead chose to follow the EEOC interpretive guideline.

3. Bragdon v. Abbott

This leads to the final case I want to highlight to show how the Supreme Court has interpreted the ADA consistent with broad social norms.[191] *Bragdon v. Abbott*[192] has been one of the few notable successes under the ADA in the Supreme Court. In *Bragdon*, the Court found that an asymptomatic HIV-positive individual was covered by the statute because she was limited in the major life activity of procreation.[193] Although on the surface it may seem obvious that someone who is HIV-positive should be treated as disabled, it was not such an easy conclusion given that the statute requires the individual be limited in a major life activity, and one definition of being asymptomatic is that an individual is not so limited.

As a way of bringing the claim within the statute, the court defined reproduction as a "major life activity," and did so based on agency interpretations, experience under the Rehab Act, and an opinion by the Office of Legal Counsel.[194] Although the Court's decision

189 *Echazabal*, 536 U.S. at 86 n.5.

190 *See id.* at 87.

191 The one case that does not necessarily fit within this schema is *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 807 (1999), where the Court held that it was possible that an individual could be disabled for the purposes of obtaining Social Security disability insurance and therefore unable to "engage in gainful work" while simultaneously pursuing a claim under the ADA. What was perhaps most surprising about this decision was that it was unanimous, *id.* at 796, as was true for *Echazabal* and *Toyota*, *see supra* notes 171, 190 and accompanying text.

192 Bragdon v. Abbott, 524 U.S. 624 (1998).

193 *Id.* at 637–38.

194 *See id.* at 638–39, 642–47.

is intuitively appealing, it creates some curious theoretical difficulties in cases involving menopausal women or others who are not capable of reproducing.[195] At the same time, the Court's decision seems entirely consistent with congressional intent and broader social norms, which almost certainly would conclude that those who were HIV-positive were among the group that ought to be protected by the disability laws.[196]

III. Understanding the Evolution of the ADA

To this point, I have been telling a story that serves primarily as a counter story to the prevailing theme of judicial backlash. As just discussed, there is little question that the Supreme Court has narrowed the scope of the statute, and I have suggested that it has done so to bring the statute in line with broad social norms regarding what ought to be defined as a disability. The Court accomplished this feat without substantial regard for legislative intent or a principled approach to statutory interpretation. Nevertheless, in doing so, the Court appears to have drafted a statute Congress prefers, as evident by Congress's failure to override the judicial interpretations, or more specifically, by the lack of any effort, until recently, to override those interpretations. In this Part, I explore what additional lessons the case study might present regarding statutory interpretation and the limits of seeking social change through litigation. Although one must always be cautious about drawing broad conclusions from a single case study, the evolution of the ADA provides keen insights into the Court's methodologies and how it can impose its own preferences—preferences that will often follow rather than transform social norms.

A. Can the Court's Approach Be Reconciled with Theories of Statutory Interpretation?

1. Normative Theories of Interpretation

The ADA poses a particularly difficult challenge for the reigning theories of statutory interpretation. Within contemporary legal de-

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195 Mark Kelman has noted the potential absurdity of the Court's interpretation: *Bragdon* might suggest that the statute would not cover a post-menopausal woman, yet would require a court to ignore the fact that Dr. Bragdon, the dentist, would have refused to treat someone who had full-blown AIDS. *See* Mark Kelman, *Does Disability Status Matter?*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 91, 91 (Leslie Pickering Francis & Anita Silvers eds., 2000).

196 *Bragdon* also followed from the Supreme Court's earlier decision in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), discussed in Part I.B *supra*.

bates, the various theories of interpretation can be roughly divided into two camps: (1) the textualists, who emphasize the statutory text and eschew dependence on legislative history; and (2) the intentionalists, who prefer methods of interpretation designed to divine the intent of Congress and are far more willing to probe into legislative materials beyond the statutory text. The last decade has seen a lively debate arise over the merits of the two approaches,[197] but in the context of the ADA, neither approach provides a satisfactory means of interpreting the statute, leaving courts to their own normative framework in defining the statute's scope.

The goal of textualists is to arrive at an objective intent embodied in the words of the statute as reasonably understood by an observer given the context of the statute's passage.[198] As should be evident from the statutory language discussed earlier, an interpretation based on the reasonable understanding of the text is likely to run aground quickly—no one would think to define disability as a "substantial limitation on a major life activity," and even if someone did, each word would still require interpretation. Similarly, the ambiguity present throughout the text cannot easily be resolved by any objective practices, such as turning to a dictionary or various canons of construction. In *Sutton*, the Court resorted to a grammatical construction of the statute,[199] and although its interpretation was plausible, other interpretations were equally plausible. Indeed, the Justice Department and the EEOC both interpreted the same language differently than the Court, without resorting primarily to legislative history.[200]

Intentionalists would not fare much better in *Sutton*. Even though the legislative history provided some answers to general ques-

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197 The literature is expansive and mostly centered on normative considerations. As is widely recognized, Justice Scalia and Judge Easterbrook are the best known judicial proponents of a textualist method, and their arguments have been extremely influential. *See supra* note 142. Among academics, John Manning has emerged as the leading defender of textualism. A good summary of the debate and the purported differences between textualism and intentionalism can be found in Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005), though Nelson argues that the two camps are not as different as their various proponents state. *See id.* at 349. In this Part, I use the term intentionalism, which seems currently to be the most common contrast to textualism, whereas others might use purposivism. For an argument similar to Nelson's but invoking purposivism, see Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

198 *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 421 (2005) ("Textualists thus aspire 'to read the words of [a statutory] text as any ordinary Member of Congress would have read them, and apply the meaning so determined.'" (quoting Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting))).

199 *See supra* p. 555.

200 *See supra* note 158 and accompanying text.

tions—particularly on the mitigating measures issue—it failed to address most of the difficult specific questions. Some earlier versions of intentionalism required courts to ask how Congress would have addressed the issues that later arose,[201] and it would have been very difficult to apply the general answers found in the legislative history to the specific problems that have emerged. For example, although Congress suggested that an individual ought to be assessed in his or her unmitigated state, it almost certainly did not mean to include individuals who wear glasses within that determination.[202] More likely, had they considered the issue with more care, Congress would have concluded that mitigating measures should only be disregarded when assessing individuals with traditional, or serious, disabilities.[203] But that is, at best, just a guess, and even if Congress had made that determination, there would still have been a question how to define a serious or traditional disability, thus leaving substantial room for judicial interpretation. A similar analysis would apply to carpal tunnel syndrome, and canvassing the legislative history provides no definitive answer to whether workplace injuries were intended to be covered or whether they ought to be left to the workers' compensation remedial scheme.

One reason both of the common interpretive approaches fail to yield useful results is that both approaches assume there is some discoverable legislative intent either from the text or other legislative materials.[204] With the ADA, however, it is a mistake to assume there was any such intent other than in a most general way. If one were to ask members of Congress what they intended when they passed the ADA, the vast majority would have been unable to say anything more than that they intended to prohibit discrimination based on disability. If they were pressed to offer an opinion on what they meant by disa-

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201 This approach is sometimes referred to as imaginative reconstruction, and is tied to older theories of interpretation designed to further congressional purpose. *See* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) ("I suggest that the task for the judge called upon to interpret a statute is best described as one of imaginative reconstruction. The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar." (footnote omitted)).

202 *See supra* note 147.

203 This was a position staked out by the Fifth Circuit prior to the Court's decision in *Sutton*. *See* Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 470–71 (5th Cir. 1998) (holding that only some impairments should be evaluated in their uncorrected state).

204 Textualists typically eschew any notion of a collective congressional intent, but they do believe that legislative intent can be discerned from the language and other objective practices. *See* John F. Manning, *supra* note 198, at 424 ("Textualists . . . deny that Congress has a collective will apart from the outcomes of the complex legislative process that conditions its ability to translate raw policy impulses or intentions into finished legislation.").

bility, virtually none would have been able to offer a reliable answer, and instead would likely have pointed to the sponsors[205] as offering an authoritative guide.

From this perspective, relying on legislative history might be most consistent with congressional intent. Daniel Rodriguez and Barry Weingast have developed a theory of statutory interpretation that emphasizes the important role played by pivotal legislators in ensuring passage of legislation.[206] They focus in particular on the critical role conservative Democrats played in ensuring the passage of the Civil Rights Act of 1964 to suggest that the views of those legislators, rather than the views of the bill's sponsors, provide the best guide to legislative intent.[207] This theory is premised on a better, and more realistic, view of Congress than most theories of statutory interpretation, but it remains problematic from a variety of perspectives. Perhaps the most significant limitation surrounds defining pivotal legislators: though Rodriguez and Weingast typically look to the final legislators who sign onto legislation, relying on the interpretation of those last legislators may neglect the view of the more liberal legislators, who may have withdrawn their support of legislation that only went as far as that supported by the most conservative members.[208] In any event, turning the theory upside down, when a bill has no substantial opposition,[209] the views of the sponsors might offer the best evidence of legislative intent if for no other reason than that the other members of Congress would likely have no developed views. Yet, in the case of the ADA, focusing on the views of the bill's sponsors would not have provided much more than a general directive, and that directive would have suggested little beyond that the statute ought to be construed broadly to further the statute's remedial goals.[210]

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205 *See supra* text accompanying notes 81–82 (discussing the ADA's sponsors).

206 *See* Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 Nw. U. L. Rev. 1207, 1209 (2007); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. Pa. L. Rev. 1417, 1422 (2003) [hereinafter Rodriguez & Weingast, *Positive Political Theory*].

207 *See* Rodriguez & Weingast, *Positive Political Theory*, *supra* note 206, at 1426.

208 For example, President Johnson brought substantial pressure to bear on a number of critical Southern legislators. *See* Nick Kotz, Judgment Days: Lyndon Baines Johnson, Martin Luther King Jr., and the Laws That Changed America 90–91, 97, 145 (2005). It is not always clear, however, that the support of what Rodriguez and Weingast label "pivotal legislators" turned on particular interpretations of the Act, as often the President offered support on other projects in return for support of the civil rights legislation. *See id.* at 97–102.

209 *See supra* note 3.

210 At one time, the Supreme Court adopted a similar view and often interpreted civil rights legislation consistent with its remedial purpose. *See, e.g.*, Zipes v. Trans World Airlines,

Although the primary methods of statutory interpretation would fail to provide any conclusive answers, it might be argued that the Court's decisions are consistent with interpretive theories that emphasize the role of social norms or public values. William Eskridge has, for example, highlighted the importance of public values in giving meaning to ambiguous statutory language, though he has also sounded a cautionary note about the limits of such an approach.[211] In Professor Eskridge's model, it is inappropriate for courts to "use[ ] public values analysis to displace an apparent legislative decision that has not been overtaken by changed circumstances."[212] At the time he was writing, Professor Eskridge seemed to assume that incorporating public values into statutory analysis would likely broaden remedial statutes, and the cases he championed as models of public value reasoning were those in which civil rights, or other important liberal values, were ultimately upheld.[213] The Court's decisions on the ADA, and its statutory approach, would be difficult to reconcile with Eskridge's theory; in fact, he specifically condemned judicial efforts to rewrite statutes while ignoring clear language or other legislative materials.[214]

The Court's implicit emphasis on social norms might also be seen as consistent with a textualist approach to interpretation. A central precept of the textualist method is that a court ought to define statutory terms based on common understandings.[215] Given that the Su-

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Inc., 455 U.S. 385, 398 (1982) (emphasizing the importance of the remedial purpose of Title VII in interpreting filing deadlines); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (defining back pay as central to the remedial purposes of Title VII).

211 *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1009–10 (1989) [hereinafter Eskridge, *Public Values*]; *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 148–51 (1994) (discussing the role of public values in theories of interpretation).

212 Eskridge, *Public Values*, *supra* note 211, at 1010.

213 For example, the case Eskridge cites as paradigmatic of the best use of public values is *Bob Jones University v. United States*, 461 U.S. 574, 605 (1983), where the Supreme Court upheld the government's denial of tax exempt status because of Bob Jones's racial policies. *See* Eskridge, *Public Values*, *supra* note 211, at 1035–36. In contrast, Eskridge was critical of several Supreme Court decisions that were inconsistent with liberal outcomes. *See id.* at 1066 (criticizing, for example, NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979)).

214 Eskridge writes, "The most controversial public values decisions are those where the result 'rewrites' the statute *and* negates clearly expressed legislative expectations that have not been undone by substantially changed circumstances." Eskridge, *Public Values*, *supra* note 211, at 1066.

215 As Professor John Manning, the most prominent academic textualist, noted, "[M]odern textualists acknowledge that language has meaning only in context. . . . [T]hey believe that statutory language, like all language, conveys meaning only because a linguistic community attaches common understandings to words and phrases, and relies on shared conventions for deci-

preme Court has largely defined disability consistent with existing social norms, it might appear that the Court's method is, in fact, a principled textualist approach. This argument, however, neglects the specific statutory text—"substantially limits one or more of the major life activities"[216]—and allows the Supreme Court to substitute a commonsense definition for the statutory definition. This might be a reasonable approach for the Court to take, but it is a difficult one to reconcile with an emphasis on the actual written text. In other words, the Court's approach might be defined as textualist if the statute sought to "protect the disabled,"[217] leaving those terms to be defined through litigation. But the statute, particularly as illuminated by the legislative history, offered a far different textual definition.

2. Positive Political Theory

If the particular normative theories of statutory interpretation prove unhelpful, another theory steeped in positive political theory ("PPT") might provide some insight into the Court's decisions. Although there are variations of the PPT approach, all models identify the Supreme Court as a strategic actor that is intent on implementing its own policy preferences.[218] Those preferences are most commonly defined as political in nature, but there is no particular reason those preferences need to be limited to policy issues.[219] Institutional preferences have likely had a greater influence on the Court's approach to the ADA than particular policy preferences.

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phering those words and phrases in particular contexts." John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108–09 (2001) (citations omitted).

216 42 U.S.C. § 12102(2) (2000).

217 A common example of this methodology is found in the antitrust field, where courts have applied common-law reasoning to give meaning to the broad statutory language.

218 A good summary of the theory is found in McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1636 (1995), where the authors write, "The core assumption of the argument in this Article is that all of the relevant actors—elected politicians and judges—act rationally to bring policy as close as possible to their own preferred outcome." *See also* John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263, 263 (1992) (commenting that judicial interpretations reflect "the strategic setting in which they are announced"); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 28 (1997) (noting the assumption that judges "are interested in imposing their policy preferences on society").

219 *See, e.g.*, Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 546–47 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, THE CHOICE JUSTICES MAKE (1998)) ("Nothing in the concept of judicial strategy requires the assumption that Justices are exclusive maximizers of their policy preferences . . . . Far more plausible is the position that judges are concerned with a variety of ends, including ideological policy.").

The idea behind PPT is that the Supreme Court is engaged in a strategic game with Congress, and to a lesser extent the President, to impose its preferences without later having those preferences overturned or modified.[220] To keep from being overruled, the Court must stay within a policy range that will be respected by the existing Congress or the gatekeeping congressional committee, or which will be of sufficient importance to the President to justify a veto.[221] An important aspect of this theory is that, in making its strategic decisions, the Court looks to the preferences of the existing Congress as opposed to those of the enacting Congress.[222] Within the law, Professor Eskridge has developed the model most extensively with a particular focus on the civil rights decisions that prompted the Civil Rights Act of 1991, as an indication, in part, how the Supreme Court played the game poorly given that its decisions were subsequently, and quickly, overruled.[223] The assumptions that fuel Eskridge's model, and those developed by others, are many and the analytical results often limited.[224] Nevertheless, the model has been influential within legal scholarship and is a variant of other models developed within political science that are gaining increased attention.[225] On at least a surface level, the PPT model offers considerable appeal for understanding the Court's ADA methodology.

The Supreme Court's decisions have typically narrowed the scope of the ADA by redefining the core concept of disability, and the Court has done so in a way that is clearly contrary to the more expansive approach adopted by the enacting Congress. And, in terms of a game, the Supreme Court has guessed right: Congress has not sought to overturn its decisions, so the Court's policy preferences have, for the time being, been solidified.

Yet there are at least two primary difficulties in relying on this strategic theory to explain the Court's ADA decisions. First, many of

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220 *See* Eskridge, *supra* note 75, at 646–47.

221 *See id.* at 643–47.

222 *See* Ferejohn & Weingast, *supra* note 218, at 270 (noting that under a positive theory "the preference configuration of the current legislature is far more important for the results of statutory interpretation than is that of the enacting legislation").

223 *See* Eskridge, *supra* note 75, at 615–17. Although the referenced article most directly relates to a discussion of the ADA, Professor Eskridge developed his argument through a series of articles that he later incorporated into a book. *See* ESKRIDGE, *supra* note 211.

224 For a balanced but skeptical review, see Segal, *supra* note 218, at 31–33.

225 For a comprehensive overview of the political science literature, see generally POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS (Kenneth A. Shepsle & Barry R. Weingast eds., 1995) (tracing the evolution of positive legislative theory and exploring theoretical models within the rational choice camp).

the controversial judicial decisions have been unanimous, and given the ideological diversity of the Court, it seems unlikely that the Justices would be unanimous in their political preferences. They might, however, be unanimous in their institutional preferences, in particular in their desire not to displace workers' compensation remedies, not to transform the federal courts into workers' compensation forums, or not to increase substantially the disability caseload. The Justices might also be in substantial agreement that those who suffer from high blood pressure or other relatively minor conditions and those who wear glasses should not be defined as disabled. But that only suggests that the Court would desire to rewrite the statute and would not necessarily explain any particular strategic considerations, unless there was reason to believe Congress intended those conditions to be covered.

This leads to the second concern with relying on PPT to explain the Court's decisions. As noted previously, Congress sharply rebuked the Supreme Court with the 1991 Civil Rights Act, which was passed at about the same time as the ADA.[226] Under a PPT approach, one would expect the Supreme Court to react to that statute by curtailing its preference impositions in light of an expected congressional rebuke. In fact, this is what has largely occurred with Title VII, where over the last decade a chastened Supreme Court has issued a series of decisions advancing the interests of plaintiffs, and which are clearly contrary in spirit to the rulings that prompted the 1991 Act.[227] But

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226 *See supra* note 88 and accompanying text.

227 In retrospect, there have been a surprising number of such decisions, many of which were unanimous reversals of lower courts on rather straightforward issues. *See, e.g.*, Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006) (unanimously finding that the number of employees is not a matter of subject matter jurisdiction under Title VII); Ash v. Tyson Foods, Inc., 546 U.S. 454, 456–58 (2006) (unanimously and summarily reversing Eleventh Circuit's standard on pretext and test for direct evidence); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (unanimously rejecting heightened pleading standard for employment discrimination cases); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146–48 (2000) (unanimously rejecting pretext-plus theory); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (unanimously approving that same-sex sexual harassment is actionable under Title VII); Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (unanimously holding the term "employees" includes former employees).

The Supreme Court's series of sovereign immunity decisions might be seen as inconsistent with a positive portrayal, but upon reflection, those cases fit within the Court's scheme. Although the Supreme Court held that the Eleventh Amendment barred enforcement of the ADA and the age discrimination statute against state entities, both of those statutes are subjected to rational basis review under the Constitution. In contrast, when the Court moved to the Family and Medical Leave Act, which it treated as a gender-based statute and thus subject to an intermediate level of scrutiny, the Court held that application to the states was consistent with the Eleventh Amendment. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 725 (2003) (up-

simultaneous with its restrained interpretations of Title VII, the Court began to emasculate the ADA, and just to make sure Congress noticed, it took three cases in one Term and slashed them all.[228] From this perspective it is difficult to explain why the Supreme Court would act in a restrained fashion with Title VII while interpreting the ADA narrowly and contrary to congressional intent.

Staying within Eskridge's model, one might conclude that the Court made a judgment that Congress was unlikely to care about the ADA, whereas Congress had clearly demonstrated its commitment to the interests of Title VII. Though plausible, this seems highly unlikely as a strategic matter, though, again, it has turned out largely to be true. The ADA passed with overwhelming support, typically a sign of strong congressional interest rather than disinterest, and the statute was purposefully broad in its scope.[229] It is also unlikely that the Supreme Court would have such a strong contrary policy preference with respect to disabilities so as to risk congressional rebuke in the same manner that had occurred with Title VII.[230]

Within the PPT model, the focus would be on the Congress in place when the decisions were issued, which was decidedly more conservative than the enacting Congress: thus, in narrowing the scope of the statute, the Court has moved closer to the position originally staked out by a small group of conservative members of Congress.[231] Shifting the focus to the contemporaneous Congress, however, does not solve the puzzle of the differing approach to Title VII. Presumably, a more conservative Congress would welcome narrower interpre-

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holding application of the Family and Medical Leave Act to the states); Bd. of Trs. v. Garrett, 531 U.S. 356, 360 (2001) (holding that Congress exceeds its authority in applying ADA to the states); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (same with respect to the Age Discrimination in Employment Act). Most recently, the Court held that Title II of the ADA could be applied against the states. *See* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

228 *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), *Murphy v. United Parcel Services, Inc.*, 527 U.S. 516 (1999), and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), were all decided on the same day.

229 *See supra* Part I.C.

230 Focusing on institutional concerns might explain a contrary preference if the Court was primarily concerned about a rising caseload devoted to disabilities claims. Yet during this same time period, Title VII claims tripled, and this sharp increase in cases did not prompt restrictive interpretations. *See* Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. Rev. 1401, 1427 (1998) (discussing increase in employment caseload).

231 The House shifted from Democratic to Republican control with the 1994 elections, and many of the new members were quite conservative. For one of the many books chronicling the changeover, see Nicol C. Rae, Conservative Reformers: The Republican Freshmen and the Lessons of the 104th Congress 27–61 (1998).

tations of civil rights statutes across the board, and there is no reason to think it would desire narrow interpretations of the ADA but broader interpretations of Title VII.[232] One possible explanation would emphasize the different stages of statutory evolution—the Court's interpretations of the ADA are at an earlier stage and concentrate on core issues, whereas Title VII is at a more mature stage of development with more tangential issues to be resolved. This theory might explain some of the Court's more limited interpretations under Title VII, but it would not explain most of its recent, expansive decisions, including the decision two years ago to adopt a broad interpretation of retaliation even in a case where a broad interpretation was unnecessary to the outcome of the case.[233]

Changing the focus of the strategic interaction to the Court's institutional interests, combined with the lack of a prominent social movement regarding disability, may help explain what the Court has accomplished and why it has done so. As noted earlier, there is simply no way to identify the Court's decisions as consistent with any principled method of interpretation. The Court adopts EEOC interpretations when they support the decision and ignores them when they do not, and these are interpretations from the very same agency operating under the very same congressional authorization. The Court emphasizes statutory language and sentence structure in some cases but turns its eye on clear language in others. And yet all of the decisions appear to be consistent with broad social norms and institutional concerns. Although there is very little helpful empirical data on the specific questions, it seems fair to suggest that most people would not define those who wear glasses or who have high blood pressure as disabled, at least in any broad sense, just as it is likely true that most individuals would agree that those who are HIV-positive should be defined as disabled.

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232 Similarly, if the Supreme Court weighed the preferences of the current Congress when it issued its decisions, it might have taken the opportunity to render restrictive interpretations of Title VII so as to preserve its decisions that were overturned in the Civil Rights Act of 1991.

233 *See* Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414 (2006) (adopting a broad definition of retaliation even though plaintiff had prevailed in lower court on more restrictive definition). Several years earlier, in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101–02 (2003), the Supreme Court unanimously held that the mixed motives theory, under which a plaintiff can prevail by establishing that an illegitimate motive was a substantial motivating factor in an employment decision, was not limited to cases of direct evidence. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Justice O'Connor had written an influential concurring opinion stating that the theory should only be available in cases that involved direct evidence. *See id.* at 276 (O'Connor, J., concurring).

Institutionally, the Court has a strong interest in not opening the federal litigation doors to workers' compensation claims, which are otherwise confined to lowly administrative courts, and at least some members of the Court likely have a political policy preference to limit the number of claims employers are likely to face. But it is important to emphasize that the Supreme Court decisions are not simply the product of a conservative Court seeking to trump legislative preferences with its own policy preferences. Rather, the Court has reconstructed the statute consistent with broad norms of protections society would provide; it is perhaps the statute Congress should have written—and would have written if there had been pressure to do so.

B. The Importance and Absence of a Social Movement

Although the Court's interpretations may bring the statute closer to the policy preferences of the current Congress,[234] the real freedom to rewrite the statute did not come from congressional preferences, or the lack thereof, but the absence of any social movement demanding legislative changes. Without significant pressure from interest groups, Congress is not likely to move to overturn judicial decisions. This is particularly true with the ADA, given that the Court's decisions have generally favored the business community, which may have lost out in the original statutory play but which remains a strong legislative force. In the context of the ADA, there is simply no substantial lobbying force to push statutory reform, and that will remain true so long as the Court does not carve out traditional disabilities from the statute's scope, where there is a sympathetic lobbying force.

This leads to one final lesson to be drawn from this case study regarding the importance of social movements. The last few years have seen a surge of interest within legal scholarship regarding the

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234 Whether the Court has, in fact, moved closer to the preferences of the current Congress is difficult to know without some tangible evidence of those preferences, especially in light of the strong support among Republicans the original legislation received. It is perhaps more accurate to suggest that the Court has moved closest to the preferences of those minority members of Congress who opposed the ADA; but that too is a difficult estimation to make. Professor Einer Elhauge has recently advocated an approach to statutory interpretation that emphasizes tracking current legislative preferences over those of the enacting legislature. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2032 (2002). Like Bill Eskridge's dynamic theory discussed earlier, *see supra* Part III.A.2, Elhauge's theory seems best suited for updating older statutes rather than interpreting contemporary ones. Indeed, Elhauge's theory would be difficult to implement any time voters alter Congress's political balance, as they can easily do every two years. For a perceptive critique of Elhauge's theory, see Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. REV. 1389, 1392–93 (2005).

importance of social movements in the pursuit of equality. Traditionally, the social movement literature has identified legal action as in tension with social change, with the law frequently seen as disruptive to more meaningful political action.[235] More recently, legal scholars have emphasized the interrelation between effective social movements and legal action.[236] Professor Bill Eskridge has explored the relationship as it applies to constitutional law, with a particular focus on gender and race movements, as well as the development of social change in the area of sexual orientation.[237] In his classic work on the pay equity movement, Michael McCann demonstrated how legal actions can energize social movements and result in significant political progress even when those legal actions ultimately fail, as they typically did in the context of the comparable worth movement he studied.[238] Within antidiscrimination law, three areas where substantial progress has been made over the last few decades—sexual orientation, sexual harassment, and affirmative action—all had parallel social movements that supported the development of effective legal strategies.[239] Social

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235 Much of the social movement literature focuses on how social movements arise and are sustained. I am interested in the slightly different question of the interrelation between social movements and legal action in promoting social change. For an overview of the social movement literature and its relevance to legal change, see Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001) (discussing the current, and unfortunate, gap between social movement literature and legal scholarship). *See generally* NICK CROSSLEY, MAKING SENSE OF SOCIAL MOVEMENTS (2002) (exploring sociological theories on creating and sustaining social movements, including the disabilities movements).

236 *See* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1489 (2005) ("Nineteenth- and twentieth-century social movement history . . . counsel that law and social movements are fundamentally in tension. They teach that social movements attain leverage in the political and legal processes by engaging in disruptive protest action taken outside of institutionalized political structures; that legal and political change are codependent, but that influence runs from politics to law; and that law can both harm and help social movements in unintended ways.").

237 *See* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 420–23 (2001) (arguing that "[t]he phenomenon by which social groups have presented their goals in constitutional terms has had a *channeling* effect on both the [identity-based social movements] and their inevitable countermovements"); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2405–06 (2002) [hereinafter Eskridge, *Effects of Identity-Based Social Movements*].

238 *See* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 48–91 (1994).

239 I am obviously painting with a wide brush, and will leave this thought undeveloped while providing an illustration. Within the context of sexual harassment law, the country experienced an important public discussion during the Clarence Thomas hearings. *See supra* note 102. The hearings and the public discussion led to important legislative changes—the damage provisions added to Title VII were a direct result of the lack of remedies for many sexual harassment

change, Eskridge and others have concluded, requires both legal action and a coherent social movement.[240]

The experience with the ADA supports this claim, as the lack of an effective social movement influenced both the development of the original legislation and its subsequent interpretation. With greater social pressure or attention, Congress may have drafted more specific legislation, or at least addressed some of the imminent issues more clearly, such as the question of mitigating measures or the potential conflict with workers' compensation laws.[241] It is also possible that a coherent movement would have arrived at a more specific definition of disability, rather than one that could accommodate any or all conditions. A social movement devoted to increasing public awareness about disabilities and the many ways in which our society is constructed based on a limited norm of ability might also have affected the normative vision the Supreme Court brings to its interpretive task. In contrast, it was unrealistic to expect simple legislative action to alter the very definition of disability, just as it was unrealistic to expect the Supreme Court to allow the Suttons to proceed with their claim as a way of protecting other more deserving claims. Instead, as this case study demonstrates, the Supreme Court remains steeped in an outdated notion of disability, one that emphasizes limitations rather than abilities and sees the disabled as deserving of protection rather than independence.

Too frequently, we think of the Supreme Court as apart from, or above, broader social norms or movements, even though we are repeatedly reminded that the Court most commonly mimics rather than transforms social norms. As Robert Post has recently written regarding constitutional decisions, courts work "within the web of cultural understandings that it shares with the society that it serves."[242] This is not to say that courts cannot influence society or prevailing social norms, but rather the influence typically works in both directions, as

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claims under the equitable remedies model. *See supra* note 102. Sexual harassment claims thereafter increased dramatically, as did business concern and judicial attention. As a result, many scholars who argued for an expanded sexual harassment model, like Yale Professor Vicki Schultz, now claim that sexual harassment law has gone too far in ridding sexuality from the workplace. *See generally* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003) (arguing that the sexual model is too broad, in that companies have begun to prohibit harmless, nondiscriminatory conduct).

240 Eskridge, *Effects of Identity-Based Social Movements*, *supra* note 237, at 2406–07.

241 *See supra* Parts II.A, II.B.1 (discussing *Sutton* and *Toyota*, respectively).

242 Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 77 (2003) (footnote omitted).

was particularly apparent in the recent battle over affirmative action. In the University of Michigan cases,[243] there seems little question that the amicus briefs filed by elite universities and powerful figures had a profound effect on the Court's ultimate determination,[244] just as the Court's approval of affirmative action in *Regents of the University of California v. Bakke*[245] influenced elite public opinion. But when the work of social change is left exclusively to the courts, advocates are almost certain to be disappointed in the ultimate results.

This is not to discount the important disability rights movement that has, in fact, had a significant social impact. In the early 1970s, the independent living movement proved extremely successful in deinstitutionalizing many of those who lived with disabilities and were capable of living outside of an institutional setting.[246] The next decade saw the emergence of the organization Americans Disabled for Accessible Public Transportation ("ADAPT"), which focused on the inaccessibility of public transportation and engaged in various protests around the country designed to highlight that inaccessibility.[247] The protests centered at Gallaudet University succeeded in producing a deaf university president for the first time in the school's history, and last fall student protests again prompted the board to alter its presidential choice.[248] All of these movements, however, were limited in their focus and none sought to expand the definition or concept of disability; in fact, all were centered around traditional disabilities. Equally important to the future of the ADA, none of the movements sought to integrate workplace issues into the protests and none spawned a broader or sustainable group that could carry on the work beyond the targeted issues.

In the end, without a broader social movement pushing to alter the public consciousness of disability, there was simply no reason to expect that the Supreme Court would interpret the statute expansively—and many reasons to expect that they would do so narrowly.

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243 Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

244 *See* Brown-Nagin, *supra* note 236, at 1516, 1526.

245 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

246 *See* Bagenstos, *supra* note 56, at 985–1022 (tracing history of independent living movement).

247 *See, e.g.*, Irving Kenneth Zola, *In the Active Voice: A Reflective Review Essay on Three Books*, 21 POL'Y STUD. J. 802, 804 (1993) (reviewing GARY L. ALBRECHT, THE DISABILITY BUSINESS: REHABILITATION IN AMERICA (1992); SHAPIRO, *supra* note 37; RICHARD BRYANT TREANOR, WE OVERCAME: THE STORY OF CIVIL RIGHTS FOR DISABLED PEOPLE (1993) (discussing role of ADAPT)); SHAPIRO, *supra* note 37, at 127–29 (highlighting importance of ADAPT protests).

248 *See supra* note 110.

Many of the difficult interpretive issues surrounding what constitutes a disability involve contested social meanings, and, as noted previously, the Supreme Court seems to have tracked public opinion in defining the scope of the ADA. To transform our definition of disability, it is necessary first—or at least simultaneously—to alter the public imagination. Courts can assist in that effort, but they cannot do all the work.

Conclusion

The first decade of experience under the ADA provides important lessons for the way we think about the power and limits of courts. The Supreme Court has interpreted the ADA narrowly, but as discussed extensively above, those interpretations were both predictable and consistent with the reigning public definition of disability. The statute's effort to transform that definition, and to transform our imagination, has largely failed, even though we have made significant progress on numerous disability issues. Many might be critical of the legislative nature of the Court's actions—but those actions were likewise inevitable, particularly when confronted with a poorly drafted statute and a disinterested Congress. Whether the Court has been engaged in a strategic game with Congress to enforce its own preferences is a difficult conclusion to draw. It is, however, relatively easy to conclude that the Court's decisions are not the product of any particular theory of interpretation. It is also likely that what the Supreme Court has done has been fully consistent with congressional expectations, assuming those expectations were to provide protections for those traditionally defined as disabled without significantly transforming that definition. This is obviously substantially less than what disability advocates had envisioned, or what they might argue Congress enacted, but without a broader social movement, without broader public involvement in the legislative process, the statute the Court has reconstructed may be the best we can expect.