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Applying the civil rights model to people with disabilities, Congress instituted a system of judicial review that placed the courts at the center of the implementation process, establishing the judiciary as the final arbiter of rights and responsibilities under the ADA.¹ Although Congress also assigned enforcement authority to the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), advocates view litigation as “a primary tool” with which to secure disability rights (Switzer 2003, 131). Moreover, as Burris and Moss note (2000, 33–34), although only a proportion of potential ADA disputes are litigated to a final judicial resolution, litigation includes a range of behaviors, including conciliation and pretrial settlement. And because it is always an available option, disability rights advocates believe litigation sets the tone for compliance and enforcement of disability rights. Thus, despite the fact that litigation represents only a snapshot image of the implementation process, it occupies a central role in the struggle for disability rights.

Following the example of traditional civil rights groups, disability rights advocates turned to the federal courts to further their legislative victories, urging the judiciary to follow the well-established principle of statutory construction and effectuate the remedial purpose of the law.² They bolstered their claims by citing the legislative history and intent of the framers of the ADA, as expressed in floor debates and committee reports, as well as administrative regulations and interpretative guidelines.³

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Because disability rights advocates believe the legislative history and intent clearly favor their position, their litigation aims have been thwarted in large part by the high court's adoption of the "textualist" approach advocated by Justice Antonin Scalia, among others. Following the precepts of "textualism," the Court's interpretative methodology has been altered, and "the search for a more elusive statutory 'purpose' or 'intent' has given way to a new emphasis on text . . . [an emphasis] that has changed the rules of the game" (Gregory 2002, 453; see Eskridge 1990). In assigning this priority to the text of the statute, the Court has turned away from the teachings of Justices Oliver Wendell Holmes and Benjamin Cardozo, who were more inclined to adopt a broader view of the statutory purpose in interpreting a law (see Levi 1963; Popkin 1999).⁴ Noting that Scalia's desire to abandon consideration of the statute's legislative history, purpose, and intent has not caused the Court to eschew its traditional approach to statutory interpretation entirely, Eskridge (1990, 656) nevertheless concludes that the justice has had a significant impact on "the Court's practice" with respect to "the statutory text."

This method of analysis has led to constrained interpretations of rights and obligations in remedial laws, especially in the newly enacted civil rights statutes such as the ADA.⁵ Attempting to discern the "plain meaning" of the law, the Court seeks guidance from the statute as a whole, as well as interpretative aids such as grammar books and dictionaries, often slighting evidence of legislative intent and purpose (Parmet 2003, 134). Critical of this approach, Justice John Paul Stevens wrote in dissent in *Sutton v. United Air Lines* (1999, 504) that "it has long been a 'familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes'" (quoting *Tcherepnin v. Knight* 1967, 336). However, according to the majority, after determining that the text of the statute contradicted the plaintiffs' argument, there was "no reason to consider the ADA's legislative history" (*Sutton v. United Air Lines* 1999, 482). Justice Clarence Thomas's dissent in *Olmstead v. L.C.* (1999), in which he cited the *Random House Dictionary* and *Webster's Third New International Dictionary*, exemplifies how an appeal to the dictionary plays an instrumental role in rejecting a plaintiffs' claim of discrimination. In sum, in employing the methodology of textual analysis, the Court has disappointed the disability community—many of whom played a significant role in drafting the legislation—which had looked to the courts to advance the civil rights aims of the law.

Disability Rights Litigation

The genesis of disability rights litigation can be traced back to the 1950s and 1960s when African Americans and women, two historically oppressed groups in the United States, became increasingly insistent on their right to be fully included within the Constitution's civil rights guarantees. Although the exact nature of the rights and the venue in which the claims were advanced varied, their demands shared a common theme of equality (Watson 1993; Pfeiffer 1993). When their demands were transformed into legislation, such as the historic 1964 Civil Rights Act and the 1965 Voting Rights Act, the focus of attention of the civil rights community turned to the judicial and executive branches to implement the laws in conformity with the intent of Congress. Legislative intent becomes difficult to discern, however, when, as is frequently the case with civil rights statutes, the legislation reflects the compromises necessary to garner enough support to secure the bill's passage. As Bullock and Lamb's (1984) classic study of civil rights policies in such areas as equal employment opportunity, fair housing, and school desegregation demonstrates, implementation of civil rights policy depends in part on the nature of the policy and the available enforcement mechanisms (see also Stein 2000a).

During the late 1960s and 1970s, disability rights advocates added their voices to those in the civil rights community, demanding that government take a stand against discrimination on the basis of disability. And as with the earlier civil rights movement, with the legislative guarantees in place, the courts assumed a crucial role in disability policymaking by determining the parameters of disability rights (Berkowitz 1987). Indeed, as the earlier battles for equality of race and sex illustrate, the nature of a civil rights struggle places the courts in a central role by "enforcing [and articulating] the norms that are established" (Diller 2000, 35).

Percy's (1989) book on policy implementation, published before the enactment of the ADA, also cites the growing importance of the courts as an arena for implementing disability policy.⁶ Moreover, since passage of the ADA, the judiciary has assumed even greater significance in disability policymaking. In his recent analysis of ADA litigation, Burke (2002, 92) emphasizes the judiciary's role, stating that "implementation of the ADA is ultimately in the hands of the judges." Thus, although Congress and the executive branch are key actors in the disability policymaking process (see Percy 2000), the courts have the primary responsibility for implementing disability rights policies.

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Bishop and Jones (1993, 122) perceived the passage of the ADA as an opportunity to construct a model of prospective implementation, arguing that it is beneficial for public policy analysts to evaluate the implementation process at its onset, that is, before the law takes effect. Adapting Bullock and Lamb's (1984) model of civil rights policy implementation, they isolated five variables that would lead to successful implementation of the ADA: "(1) the organized support of beneficiaries, (2) clearly articulated compliance standards, (3) identification of implementing agencies, (4) specification of enforcement procedures, and (5) clarity of policy goals." After assessing the status of the five variables at the start of the implementation process, they concluded that the prospects for successful implementation of the ADA were good, assuming that government officials and advocates continued to advance the goals throughout the process. However, they cautioned, the implementation process would flounder if certain conditions arose: two related to problems within enforcement agencies and the third revolved around judicial interpretation of the law. Underscoring the importance of litigation in the implementation process, they warned that "if opponents of the ADA succeed in using the courts to cast doubt as to the proper interpretation of the law and regulations, confusion and delay may mute the enforcement of the act" (Bishop and Jones 1993, 127).

The Origins of Disability Rights Policies

Disability policymaking can be traced back to the post-World War I era with the passage of the Smith-Fess Act in 1920. For more than four decades, disability policies emphasized vocational rehabilitation rather than rights. The aim was to transform people with disabilities rather than to transform society by ending social and economic discrimination against them (O'Brien 2001). The empowerment of people with disabilities and the recognition of disability rights as civil rights did not come about until much later—in the late 1960s.

As with other civil rights activists, disability activists demanded an end to discrimination as a matter of right, arguing that disability should be viewed through a sociopolitical rather than a medical lens and that attempting to rehabilitate people with disabilities was equivalent to attempting to rehabilitate women or African Americans to end the discrimination against them. As Arlene Mayerson (2001), directing attorney at the Disability Rights Education and Defense Fund, Inc. (DREDF), explains, disability rights activists believe the focus should be on the interaction between society and the indi-

vidual, which is a social construct rather than a medical one. In rejecting the medical model, which regards the person with a disability as a patient, the new approach to disability studies “views the disabled person as the primary actor and the focus of the research,” encompassing a wide range of policy areas such as health, housing, transportation, and education, to name just a few (Pfeiffer 1993, 730; see Krieger 2000; Scotch 2001; Tucker 2001).⁷

The struggle of the individuals who formed the disability rights movement has been eloquently told by many (see, for example, Percy 1989; Shapiro 1994; see also Pfeiffer 1993). Influenced in part by the activism of women’s groups and racial minority groups, people with disabilities became aware that theirs must be the predominant voices in the public policy debates circulating within the new movement. They realized that one of the first steps was to wrest power from the old guard of disability advocates—frequently people without disabilities who often perceived people with disabilities as pitiable and objects of charity—and build a movement that cut across disabilities as well as race, class, and sex boundaries (see Shapiro 1994; Burke 2002). The passage of the 1968 Architectural Barriers Act—mandating that buildings and transportation facilities constructed, altered, or financed with federal funds after 1969 comply with federal accessibility standards for people with mobility, visual, and auditory disabilities—was the first legislative success of the nascent movement. It “signal[ed] a new awareness of mainstream society of the needs and frustration of disabled persons” (Percy 1989, 52; see Scotch 2001).

The Rehabilitation Act of 1973

Throughout the 1970s, it became more commonplace to link disability rights with civil rights, as evidenced in the debate over the passage of the 1973 Rehabilitation Act.⁸ The heart of this measure was section 504, at the time a little-debated and little-noticed provision, modeled after Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, which prohibit discrimination in federally assisted programs on the basis of race and sex, respectively.

The genesis of section 504 lay in the actions of two members of Congress. The first was Representative Charles Vanik, Democrat of Ohio, who introduced legislation in December 1971 to amend Title VI of the 1964 Civil Rights Act to ban discrimination on the basis of disability in federally assisted programs. Vanik decried the treatment of people with disabilities as one of the nation’s “shameful oversights,” the product of indifference and lack of concern (quoted in Burgdorf 1997, 417). He also attempted to amend Title

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VII, the employment discrimination provision of the Civil Rights Act, to prohibit discrimination on the basis of disability. The second was Senator Hubert Humphrey, Democrat from Minnesota, who introduced a companion bill in the Senate in early 1972 urging Congress to guarantee “the civil rights of 40 million Americans” (quoted in Burgdorf 1997, 418).

Although the bills had numerous cosponsors, they died in committee before hearings were held, in part, according to O’Brien (2001, 114), because the traditional civil rights community did not want to tamper with the 1964 Civil Rights Act. Marca Bristo, chair of the National Council on Disability (NCD) in 1994, and currently the president of Access Living in Chicago, says that although she initially believed it more advisable to amend the 1964 Civil Rights Act to guarantee disability rights, she changed her views for a number of reasons. First, the traditional civil rights community was concerned about opening the 1964 act to new amendments; second, she came to realize that a disability rights law would not fit easily within the framework of traditional civil rights laws because of its unique requirement of a reasonable accommodations provision (Bristo 2002; Young 1997, 19).

In 1972, when the Vocational Rehabilitation Act came up for reauthorization, once again an antidiscrimination provision was introduced in the amended version of the bill, now called the Rehabilitation Act; the name change was intended to signify a new approach to disability. Most of Congress’s attention during debate over the law focused on the cost of the rehabilitation programs. Equating discrimination on the basis of disability with discrimination on the basis of sex or race, it proposed to bring a new type of civil rights guarantee into effect, including within its reach government entities such as public schools, hospitals, transportation systems, and private federal contractors. Despite support in Congress, however, the bill was twice vetoed by President Richard Nixon, who feared its constraints on federal authority and its impact on the budget.

In May 1973, another version of the Rehabilitation Act passed. Although primarily intended to fund vocational rehabilitational programs, the nucleus of the 1973 act was section 504, which stated that “no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁹ Despite the impact section 504 would have on disability rights, there was virtually no discussion of it in committee hearings. Inserted by congressional staffers who borrowed the language of Title VI,

“the rights provision, section 504, was an unanticipated consequence” of the disability policymaking process (O’Brien 2001, 5).

Bristo (2002) characterizes section 504 as “an anomaly of history,” enacted with little or no participation by the disability community; it was a “law [that] preceded the movement.” Burgdorf (1997, 419) describes the drafting of section 504 as “shrouded in mystery” and Young (1997, 20) calls it a “stealth measure [enacted] in the midst of a backlash against civil rights.” In discussing the origins of the ADA, a number of respondents expressed disappointment at the ineffectiveness of section 504, attributing it to lax enforcement.

The implications of section 504 were not debated during its passage, and no member of Congress even mentioned it during floor debate (Young 1997, 21). Indeed, as Scotch (2001, 4) points out, neither the Senate nor House committee reports contained cost estimates for section 504, indicating, in his view, that members of Congress likely believed it would not require an allocation of federal funds.

Other provisions of the 1973 act required federal agencies to develop affirmative action plans for hiring people with disabilities (section 501); created an Architectural and Transportation Barriers Compliance Board to develop guidelines and accessibility standards and monitor compliance with the Architectural Barriers Act (section 502);¹⁰ and mandated that federal contractors adopt affirmative action plans to employ people with disabilities (section 503). A year later, the Rehabilitation Act Amendments of 1974 broadened the definition of disability, defining a “handicapped individual” as a person with “(i) a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”¹¹ This language would be replicated in the ADA sixteen years later. Then in 1978 Congress added a new section, section 505, specifying that section 504 litigants were entitled to the “same remedies, procedures, and rights,” including attorneys’ fees for prevailing plaintiffs, as Title VI (of the 1964 Civil Rights Act) litigants.¹² In 1998 Congress again amended the 1973 act to add section 508, a provision requiring all federal agencies to comply with accessibility standards administered by the Architectural and Transportation Barriers Compliance Board to ensure that people with disabilities have access to electronic and information technology.¹³

Implementation of a law typically begins with the promulgation of administrative regulations. In this case, although the statute did not man-

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date it, the Department of Health, Education, and Welfare (HEW) prepared the implementing regulations.¹⁴ During the summer of 1975, HEW's Office of Civil Rights (OCR), under the direction of John Wodatch, completed its final draft of the section 504 regulations.¹⁵ The OCR, staffed by lawyers largely sympathetic to the goals of the disability rights activists, believed in committing federal authority to impose a high bar of accessibility on federal aid recipients. Their emerging ties to leaders of the disability community strengthened their resolve to produce strong regulations (Scotch 2001, 143-45). Under HEW procedure, the secretary was required to sign off on proposed regulations before they were sent to the Federal Register to initiate the public comment period. In part because HEW was concerned about the cost of compliance with section 504, the regulatory process was delayed, first by Caspar Weinberger, Gerald Ford's secretary at HEW, and later by his replacement, David Mathews, who refused to approve the regulations despite congressional urging and an eventual court order (Shapiro 1994, chap. 2; Scotch 2001, chap. 5).¹⁶

Disability rights activists were initially relieved when the Nixon-Ford administration was replaced by the Carter White House in 1977. But although Carter had criticized the Ford administration for refusing to promulgate the disability regulations during the presidential campaign (Scotch 2001, 104), his HEW secretary, Joseph Califano, also delayed implementation of the regulations, saying he needed additional time for review. Disability activists were especially concerned about Califano's failure to sign because it soon became clear that his delay was partially attributable to an attempt to rewrite the regulations to introduce cost as a defense for noncompliance (O'Brien 2001, 127).¹⁷ Finally, in April 1977, in response to his continued refusal to release the regulations, disability activists in Washington DC demonstrated at Califano's house and, two days later, conducted sit-ins in the DC HEW office and at the ten regional offices around the country. The demonstration attracting the most attention was in Washington DC, with Califano taking a hard line by refusing to allow anyone to enter or leave the building and preventing food from being brought in as well as cutting off telephone communication.

With the exception of the demonstrators at the San Francisco federal building, most of the protestors were soon routed. Led by Judy Heumann, deputy director of Berkeley's Center for Independent Living, and consisting of people with mental and physical disabilities, the sit-in persisted for almost a month in HEW's San Francisco office.¹⁸ Shapiro (1994, 68) asserts that "the San Francisco sit-in marked the political coming of age of the dis-

ability rights movement.” Fleischer and Zames (1998, 52) describe the San Francisco protest as “the first major political action by people with different disabilities themselves that had an impact on the consciousness and the lives of the general disability population as well as the wider society.”

With rising public support, the demonstrators demanded that Califano sign the regulations, equating inaccessible buildings with the segregated facilities that kept African Americans apart from white society. The parallels between the civil rights sit-ins of the early 1960s and the disability sit-ins of the late 1970s are obvious. Burke (2002, 69) compares the mobilization over section 504 to the Montgomery bus boycott that had energized the nascent African American civil rights struggle, translating barriers to societal integration as an act of discrimination. Finally, on April 28, 1977, Califano announced he would sign the rules, almost three years after the law was enacted. According to Chai Feldblum (2000b)—a Georgetown law professor who chaired the legal task force of the Consortium of Citizens with Disabilities from 1988 to 1989—1977 marked the onset of section 504 enforcement.

Like its predecessors, Titles VI and Title IX, litigation became the primary enforcement mechanism for section 504, with implementation largely in the hands of the federal courts because Congress had not committed enforcement authority to an executive branch agency like the EEOC. The problem with this solution, however, according to O’Brien (2001, 109), was that “the federal courts could not be described as strong proponents of promoting disability rights, particularly not in the workplace.”

The Education of All Handicapped Children Act

Shortly after the passage of the Rehabilitation Act in 1973, Congress enacted the Education of All Handicapped Children Act (EAHCA) in 1975; in 1990, during reauthorization, it was renamed the Individuals with Disabilities Education Act (IDEA). The House Education and Labor Committee report (1975, 3–4) accompanying the bill pointed to two lower federal court rulings decided in the early 1970s that had spurred Congress to action. These two cases, *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania* (1971) and *Mills v. Board of Education* (1972), played a pivotal role in the effort to equalize educational opportunities for children with disabilities, in part by mobilizing disability activists who, in turn, influenced Congress (Jeon and Haider-Markel 2001).

A class action suit, *PARC* was brought by plaintiffs on constitutional grounds, citing due process and equal protection violations. The case ended in a consent decree in which the state agreed to abandon its policy of exclud-

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ing “uneducable” and “untrainable” children with mental retardation (or children with a mental age less than five) from the public school system.¹⁹ The lengthy consent agreement concluded by stating that “every retarded person between the ages of six and twenty-one years shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible” (*PARC* 1971, 1266).

Mills, also a class action suit, was brought by plaintiffs who charged the District of Columbia public schools with failing to provide free education and training for mentally and physically disabled (that is, “exceptional”) children and with establishing disciplinary policies that violated due process by denying them hearings and timely reviews of their status. There were estimates that perhaps as many as 18,000 of the approximately 22,000 “exceptional” children in the district were not being properly educated. Following the school district’s failure to comply with the consent agreement it entered into as well as its failure to obey a court order to file a proposed plan of implementation, the court finally ruled. Citing violations of the equal protection and due process clauses, as well as District of Columbia law, the court ordered the district to provide “to each child of school age a free and suitable publicly-supported education regardless of the degree of the child’s mental, physical or emotional disability or impairment” (*Mills* 1972, 878).

In 1966, Congress amended the 1965 Elementary and Secondary Education Act (ESEA) by adding a new section, Title VI, which established a grant program to assist states in educating children with disabilities. In 1970, under pressure from interest groups, Congress repealed that program and substituted the Education of the Handicapped Act for Title VI. It authorized a higher level of funding, some earmarked for grant programs designed to encourage states to develop educational programs and train personnel (Salomone 1986, chap. 5).

The precursor to the EAHCA, the 1974 Education of the Handicapped Act Amendments, embodied a number of the principles of the *PARC* and *Mills* decisions. Advocates for children with disabilities lobbied for increasing federal aid as well as federal mandates on state and local governments to establish special education programs to serve children with disabilities, primarily mental disabilities (Percy 1989, chap. 3). According to estimates provided by HEW, there were at least eight million children needing special educational services (Hill 1986, 136).

Prior to passage of the EAHCA, the major unresolved issue was whether the states or the federal government should undertake primary responsibility for educating children with disabilities. In 1975, Congress settled the mat-

ter by mandating that public school systems provide a “free, appropriate education,” regardless of disability, “in the least restrictive environment.” Congress believed such a law was necessary because children with disabilities “were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to ‘drop out’” (U.S. House Education and Labor Committee 1975, 2).

In addition to allocating federal dollars to the states, the law imposed numerous mandates and restrictions on them. The heart of the bill was a grants-in-aid program requiring significant state expenditures for educating children with disabilities. States only had to comply with the provisions of the law if they wanted federal funding; they could avoid the requirements of the act by refusing the federal funds. Over the next decade, however, although the state’s responsibility for educating children with disabilities expanded, the federal contribution did not grow proportionately, greatly adding to the states’ burdens, especially in hard economic times (Salomone 1986, 146–47). Subsequent amendments to the EAHCA expanded the state’s responsibility to children from birth to twenty-one, guaranteed a wide range of educational and support services, and specified that all children were covered, whether they lived at home or in a foster care or institutional setting.

The ban on discrimination in section 504 and the EAHCA’s guarantee of free and appropriate education together provided a panoply of rights and remedies to children with disabilities.²⁰ They fit together well because the EAHCA is “narrow and specific,” while section 504 is “broad and general in coverage” (Guernsey 1989, 566). In large part, because of the specificity of its provisions, the EAHCA became the primary vehicle under which litigants sued for relief for violation of the rights guaranteed to children with disabilities (Wegner 1988, 387). Indeed, in *Smith v. Robinson* (1984), the Supreme Court held that Congress had intended the EAHCA to be the exclusive vehicle for children claiming a “free appropriate education” in a public school setting.

During the 1980s and 1990s, Congress continued to enact laws affecting the rights of people with disabilities, although none were as sweeping as the 1973 Rehabilitation Act and the EAHCA, and ultimately, the ADA. Among other things, the Civil Rights of Institutionalized Persons Act, enacted in 1980, authorizes the U.S. attorney general to file civil actions in cases where persons in state institutions such as prisons, residential mental health care facilities, or pretrial juvenile detention facilities are deprived of their constitutional or statutory rights.

Two other laws revolved around voting. The 1984 Voting Accessibility for

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the Elderly and Handicapped Act required federal polling places to be physically accessible and mandated that states make registration and voting aids available to elderly people and people with disabilities. The National Voter Registration Act of 1993 (the “Motor Voter” Act) mandated that states facilitate voting registration by persons with disabilities, among others, by providing enhanced voter registration services in drivers’ license and state-funded disability agencies. Section 255 of the Telecommunications Act of 1996 amended the Communications Act of 1934 to require manufacturers of telecommunications equipment and service providers to address the needs of persons with disabilities in designing and producing accessible equipment.

Perhaps the most comprehensive legislation predating the ADA was the Fair Housing Act Amendments (FHAA) of 1988, which amended the 1968 Fair Housing Act (FHA). The 1968 FHA prohibited discrimination in the sale and rental of public and private housing on the basis of race, religion, and national origin. The 1988 FHAA extended the law to include discrimination based on disability in selling, renting, financing, zoning, new construction design, and advertising. And in 1999, President Clinton signed the Ticket to Work and Work Incentives Improvement Act, which expanded the Medicaid and Medicare programs to allow people with disabilities to retain medical coverage after returning to work. These laws are evidence of the power of the disability rights movement to affect public policy through lobbying, media attention, litigation, and political mobilization (Jeon and Haider-Markel 2001).

Disability Rights in the Supreme Court

Supreme Court rulings in the decade following passage of section 504 and the EAHCA show that the Court’s interpretation of disability rights was constrained and, although there were exceptions, for the most part the Court narrowed the parameters of the nation’s disability rights laws.²¹

Surveying about ten years of the Supreme Court’s section 504 rulings, Percy (1989, 96) describes them as “generally conservative and restrictive.” Similarly, Wegner (1988, 388) contends that the “Supreme Court has significantly limited the substantive rights and remedies once believed to be available under the EAHCA.” More generally, Katzman (1986, 14), depicts the Court’s record on disability rights litigation as “an account of judicial contraction.”

The Supreme Court’s first section 504 ruling, *Southeastern Community*

College v. Davis (1979), exemplified the Court's approach to disability rights claims. The plaintiff, Frances Davis, who had a severe hearing impairment, sought an associate nursing degree as a pathway to becoming a registered nurse. She filed suit after she was denied admission to the program, claiming that the school, a recipient of federal funds, violated section 504. The school argued that her hearing disability was an insurmountable obstacle to her participation in its clinical program as well as her ability to practice as a nurse.²²

The appellate court had ruled that she must be evaluated on her qualifications without regard to her disability and that section 504 imposed an obligation on the school to accommodate her disability without regard to cost (*Davis v. Southeastern Community College* 1978). The Supreme Court reversed the appellate court ruling in her favor, holding that neither the law nor the regulations forbade an educational institution from imposing reasonable physical requirements on an applicant. The Court ruled that to be "otherwise qualified," one must be able to perform a task "in spite" of a disability (*Southeastern Community College v. Davis* 1979, 406). The school did not have to accommodate her disability by waiving the course requirements and providing special attention from the nursing faculty because that would create a "fundamental alteration in the nature of the program," far exceeding what the regulations required (*Southeastern Community College v. Davis* 1979, 410). Acknowledging that the line between discrimination and a refusal to accommodate a disability is not always evident, the Court concluded by noting that the law was not intended to create "undue financial and administrative burdens" for a state (*Southeastern Community College v. Davis* 1979, 412).²³ *Davis* "dealt a severe blow" to disability rights advocates and their supporters, "for whom section 504 was a central part of their policy aspirations" (Katzman 1986, 166).²⁴ Mayerson (1993, 20) charged that *Davis* "revealed what was at best a lack of understanding and at worst a hostility toward even applying the concept of discrimination to exclusion based on disability."

Shortly after *Davis* was decided, the Court was asked to rule on whether the 1975 Developmental Disabilities Assistance and Bill of Rights Act (DDA) contained an implied cause of action that permitted plaintiffs to sue states for failing to provide "appropriate treatment" in the "least restrictive environment" to people with mental retardation (*Pennhurst State School and Hospital v. Halderman* 1981, 18). Enacted under pressure from the Consortium of Citizens with Disabilities (CCD), the DDA, like the EAHCA, was a federal grants-in-aid program to assist states in creating developmental disability councils for planning and advocacy.²⁵

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The lower courts ruled for the plaintiffs, but the Supreme Court reversed, holding that the statute was merely a funding statute and Congress had not explicitly conditioned the receipt of federal funds on the state's compliance with the law as it was required to do. Despite the language of the Bill of Rights provision stating that developmentally disabled individuals are entitled to "appropriate treatment" in "the setting that is least restrictive" (42 U.S.C. §6009(2)), the Court held that Congress had not "intended to require States to assume the high cost of providing 'appropriate treatment' in the 'least restrictive environment' to their mentally retarded citizens" (*Pennhurst* 1981, 18). The provision did not create any judicially enforceable substantive rights; rather, the Court said, it merely stated Congress's preference for certain policy goals.

In *Board of Education of the Henrik Hudson Central School District v. Rowley* (1982), the Supreme Court's first EAHCA case, it was asked to determine if the law required a child's school to provide her with a sign language interpreter. The case arose when the school denied Amy Rowley's parents' request for the services of an interpreter "because 'Amy was achieving educationally, academically, and socially without such assistance'" (*Rowley* 1982, 185). The district court found that although she was making excellent progress in school, she was not fulfilling her potential because of her hearing impairment. The court of appeals affirmed.

Although both lower courts had held that Congress had not provided adequate guidance for the meaning of the term, "free appropriate education," the high court disagreed, ruling that Congress had only intended to guarantee that children with disabilities "benefit" from the educational services provided; there was no indication that it meant that schools must "maximize the[ir] potential" (188–89). As long as a school provided the personalized instruction and support services that enabled a child to achieve passing marks and advance to a higher grade, it satisfied the requirements of the act.

The Court also cited *Pennhurst*, reiterating that legislation enacted under Congress's spending clause authority must unambiguously indicate the conditions for receiving federal funds. Therefore, even if Congress had intended to impose a higher standard of education services on the states as a condition of federal funding, it had not expressly stated its intention to do so. Finally, responding to the lower courts' understanding that the judiciary was supposed to define the meaning of "appropriate education," the Court indicated that the primary responsibility for determining suitable educational services resided with the school in cooperation with the parents.

Warning against judicial activism, the high court ordered the lower courts to refrain from engaging in educational policymaking and to limit themselves to ascertaining if the state was complying with the procedures of the act. If the procedural requirements were met, the courts' only task was to decide if the education provided was reasonably likely to allow the child to benefit from the services.

Scholars almost uniformly criticized *Rowley*, accusing the Court of undermining congressional intent by requiring only minimal benefits for children with disabilities. They charged that the Court's primary motivation was to avoid the ensuing litigation that would have followed a contrary ruling. As it turned out, most lower courts have either distinguished *Rowley* or simply have failed to apply the law as narrowly as the high court instructed (Weber 1990, 374–76).

Two years after *Rowley*, in *Irving Independent School District v. Tatro* (1984), the Court expanded the reach of the EAHCA by holding that “clean intermittent catheterization” (CIC), was a “related service” within the meaning of the act, and the school's refusal to provide it during school hours violated both the EAHCA and section 504. The Court found that CIC was a “supportive service,” without which the child could not benefit from her education, and did not fall into the category of a “medical service” that could only be provided by a licensed physician.²⁶

In *Smith v. Robinson* (1984), however, the Court dealt another blow to disability rights litigants when it ruled that attorneys' fees were not available in actions brought to vindicate rights under the EAHCA.²⁷ Congress reversed by passing the Handicapped Children's Protection Act in 1986 to amend the EAHCA to authorize attorneys' fees to parents who prevail in judicial or administrative hearings under the EAHCA and allow education suits under section 504 (Guernsey 1989, 567–69). Although not directly related to disability rights, the Supreme Court's decision in *Grove City College v. Bell* (1984) was a significant setback for members of the civil rights community, including disability rights groups. The Court held that Congress intended the “program or activity” language of Title IX of the Education Amendments to be narrowly interpreted; thus, the federal loans and grants to its students only bound the college's financial aid office to the nondiscrimination requirements of the act. A year later, *City of Cleburne v. Cleburne Living Center* (1985) established the boundaries of the equal protection guarantee of the Fourteenth Amendment for people with disabilities. Although the plaintiffs prevailed in their challenge to a zoning regulation, the Court ruled that mental retardation was not a suspect (or quasi-suspect) classification so that

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laws based on disability were not subject to the heightened scrutiny applied to classifications based on race and sex.

Grove City had been greeted with dismay by members of the civil rights community, who feared its effect on other civil rights statutes such as Title VI of the 1964 Civil Rights Act, section 504 of the 1973 Rehabilitation Act, and the 1975 Age Discrimination Act, all of which had the same “program” or “activity” language as Title IX. They believed that the Court’s insistence on erecting walls around individual programs within institutions threatened the major civil rights advances of the 1960s and 1970s. Their fears seemed justified when the Supreme Court held in *Department of Transportation v. Paralyzed Veterans of America* (1986) that federal aid to airports and the air traffic control system did not bring commercial airlines within the reach of the 1973 Rehabilitation Act because they were not direct recipients of federal funding. To counter the Court’s ruling in *Paralyzed Veterans*, Congress enacted the Air Carrier Access Act (ACAA) in 1986, prohibiting domestic and foreign airlines from discriminating against people with mental or physical disabilities.

In 1988, after repeated attempts to enact legislation to reverse *Grove City*, Congress succeeded in overriding Reagan’s veto and passed the Civil Rights Restoration Act, extending coverage of civil rights laws to the entire institution or system, not simply the unit receiving the federal aid. With this action, the Court’s narrow interpretation of the program-specific language of the nation’s federal civil rights laws was reversed and, according to its congressional sponsors, Congress had ensured that these laws would be interpreted according to their original intent.

Although the struggle to reverse *Grove City* lasted more than three years, it provided an opportunity for disability rights groups to work with traditional civil rights groups to secure a common goal. According to Arlene Mayerson and Ralph Neas, head of the Leadership Conference on Civil Rights (LCCR), the collaboration benefited both sides, developing trust and respect among all parties involved (Young 1997, 40).

The ADA Evolves

During the 1970s, there had been a good deal of support for ending discrimination against people with disabilities, in part fueled by the disability community’s association with the ideology and rhetoric of the civil rights movement, including their facility with protest activity and mobilization of public opinion (Jeon and Haider-Markel 2001, 215–31). Throughout the

1980s, the grass roots movement of disability rights groups expanded rapidly, epitomized by such organizations as Americans Disabled for Accessible Public Transportation (ADAPT). It consisted of both cross-disability and disability-specific groups, which were becoming increasingly adept at political organization, mobilization, and action (Young 1997, 43–46). The demand for equality for people with disabilities was consistent with the earlier struggle for civil rights as disability rights activists gave convincing accounts of discrimination against people with disabilities that were reminiscent of the experiences of African Americans whose battle for equal rights had led to the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act.

However, by 1980 the sentiment for people with disabilities among members of Congress “had begun to erode . . . and the blank check of civil rights entitlement had finally come up against serious political and financial constraints” (Scotch 2001, 136). Signs of the backlash against disability rights loomed large in the Reagan administration, epitomized by the government’s efforts to trim administrative regulations under the auspices of Vice President George Bush’s Task Force for Regulatory Relief (Milani 2000). One of this office’s first tasks was to put section 504, the EAHCA, and the Architectural and Transportation Barriers Compliance Board regulations under the microscope. Because of an immediate and forceful reaction to these measures, Bush agreed to meet with representatives of disability advocacy groups. This led to his introduction to Evan Kemp Jr., who was to play an important role in disability rights advocacy.²⁸

In early 1983, Bush announced that the section 504 and EAHCA regulations would remain intact. Despite their victory over the task force, however, the civil rights community remained concerned that civil rights enforcement, including disability rights, might still be subjected to “rollback” (Percy 1989, 104–5).

The task force’s decision to refrain from cutting back on section 504 regulations was greatly facilitated by conversations between Kemp and Bush in which Kemp appealed to the antiwelfare ideology of the Republican Party, stressing independence for people with disabilities rather than government support or welfare. Kemp, who was also a personal friend of Bush’s chief counsel, is widely regarded as the person who sparked the Bush administration’s support for the ADA and had the honor of introducing Bush at the ADA signing ceremony on July 26, 1990.²⁹

An unanticipated consequence of the Bush task force was the arrival of Patrisha Wright in Washington DC in 1980 to open a lobbying office for DREDF. Spurred by the possibility that section 504 would be eviscerated,

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Wright's initial work in DC involved lobbying the task force to keep it from weakening the section 504 regulations. Founded in 1979, DREDF was a successor to the Disability Law Resource Center, which arose out of the Berkeley Center for Independent Living.³⁰ The Disability Rights Education and Defense Fund was formed because there was a need for a national law and policy organization to advance civil rights for people with disabilities; it was modeled after the NAACP Legal Defense and Educational Fund, Inc. An important voice in the disability rights movement, DREDF arose out of a civil rights model. Its leadership worked to persuade leaders of the civil rights community to join with them, and Wright subsequently became a member of the national LCCR (Wright 2000; Breslin 2001).

During the decade of the 1980s, with section 504 and the 1964 Civil Rights Act providing the legal foundation for the ADA, members of the "disability community attained a new sophistication in legal expertise, developed a political presence in the White House and on Capitol Hill, and established credibility with the broader civil rights community" (Young 1997, 27). By the late 1980s, disability advocates had become convinced that section 504 was inadequate to achieve their goal of removing barriers to their full participation in society, in part, according to Mary Lou Breslin (2001), one of the co-founders of DREDF and now a senior policy advisor, because there was never a real commitment to enforce it and because it only applied to recipients of federal funds. Mayerson (2001) characterizes section 504 "as almost like a hidden law," saying "it never got the publicity, it was never part of the national agenda, the national debate."

The idea of a successor to section 504 was supported by Justin Dart Jr., vice chair of the National Council on the Handicapped (NCH) from 1982 to 1985.³¹ Dart (2001), who describes himself "as a voice in the wilderness in the early 1980s," headed the Task Force on the Rights and Empowerment of Americans with Disabilities from 1987 to 1989. In May 1988, the chair of the House Subcommittee on Select Education directed the task force to compile national data on discrimination against people with disabilities. Under Dart's direction, it conducted sixty-three open forums in all fifty states, gathering testimony from a broad range of people with disabilities about discrimination in a variety of settings (Dart 2001; see also Dart 1993). Evoking the rhetoric of the civil rights movement, members of the task force were repeatedly reminded that people with disabilities were entitled to equal rights as citizens (Dart 2001).³² Most members of the NCH were Reagan appointees who supported the idea of the civil rights model and disability

rights legislation in part because it would reduce dependency among people with disabilities as well as lower welfare costs (Burke 1997).

In 1986, the NCH—renamed the National Council on Disability (NCD) in 1988—was charged with advising the president and Congress on public policies related to people with disabilities. Its first report, *Toward Independence* (1986), was a pathbreaking document.³³ The council recommended that Congress enact “a comprehensive law requiring equal opportunity for individuals with disabilities . . . perhaps under such a title as ‘The Americans with Disabilities Act of 1986’” (NCH 1986, 18). The document, drafted by Robert L. Burgdorf Jr., included a broad array of entities subject to the nondiscrimination provisions of the envisioned act; it applied to the federal government, recipients of federal funds, federal contractors, employers, transportation and insurance industries, and state and local governments. It would have demanded full accessibility in two to five years for almost all entities (Young 1997, 59). Over the next two years, Burgdorf’s ideas were transformed into the law that would eventually become the 1990 ADA (Shapiro 1994, chap. 5). With Dart’s encouragement as well as the NCD’s, Burgdorf, who had long advocated a stand-alone civil rights law prohibiting discrimination on the basis of disabilities, produced the bill. In part because of his belief as well as Dart’s that section 504 lacked teeth and was limited in scope by the federal funding requirement, his disability rights law, termed an “equal opportunity law,” was modeled after the 1964 Civil Rights Act.³⁴

The NCD recruited Lowell Weicker and Tony Coelho to introduce the law in the 100th Congress. In 1988, on April 28 and 29, respectively, they introduced the ADA in the Senate and House. They did not anticipate that it would pass that year, but saw it as an opportunity to draw attention to the nation’s discrimination against people with disabilities.³⁵ Moreover, they planned to capitalize on the presidential election “to publicize the ADA and gain a foothold as a top priority for the next session of Congress” (Young 1997, 9). The bill received little attention at the time; many who were aware of it considered it too radical and believed it lacked any chance of passage (*Congressional Record* 1988, S5106–18; *Congressional Record* 1988, E1308–10). Although it passed the Senate, it died in the House.

Disability rights remained on the public agenda, with Bush’s endorsement at the Republican National Convention. His promise, “I’m going to do whatever it takes to make sure the disabled are included in the mainstream,” helped him secure votes from the disability community in the 1988 presidential election (Shapiro 1994, 124). Analyzing Bush’s percent margin of vic-

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tory over Dukakis, Pfeiffer (1993, 28) believes that from 1 to 3 percent of Bush's 7 percent lead was attributable to voters in the disability community.

At the outset of the Bush administration in 1989, according to Dart (1993), the disability community consulted with a wide range of groups in the business community, as well as members of Congress and the administration. Wright and her allies brilliantly forged a coalition of disability rights groups, including the CCD and the LCCR, cutting across class, race, and sex boundaries, and, most important, representing a broad range of mental and physical disabilities; almost two hundred national organizations threw their support behind the ADA (Shapiro 1994, 127). Ultimately, representatives from all the disability rights organizations in the country became involved in the movement (Switzer 2001, 629). Additionally, there was broad support from the traditional civil rights community; Ralph Neas, who made disability rights part of his group's agenda as early as 1980, played a leading role. He had been present at the meeting in San Francisco held under the auspices of DREDF in the fall of 1980, a meeting that was aimed at helping it to establish ties with members of traditional civil rights groups. His support for the ADA provided a critical link between disability rights advocates and traditional civil rights leaders (Young 1997, 34). Katy Beh Neas (2002), assistant vice president for government relations at Easter Seals, who was on Harkin's staff from 1987 to 1991, believes that disability rights were initially considered outside the arena of civil rights. Eventually, she notes, the civil rights community, persuaded in part by Wright and Ralph Neas, became convinced that disability rights were civil rights.

With Weicker defeated in his 1988 reelection campaign and Coelho retired from the House in 1989, the baton was passed to Steny Hoyer, Ted Kennedy, and Tom Harkin. In the Senate, Kennedy chaired the Labor and Human Resources Committee, and Harkin, the Subcommittee on the Handicapped of the Labor and Human Resources Committee. Bobby Silverstein, Harkin's staff director and chief counsel of the Subcommittee on the Handicapped, who had drafted the second version of the ADA, tracked the section 504 regulations closely (Feldblum 2000a, 127). The final version of the ADA specifies that it should be interpreted according to the case law and regulations of the Rehabilitation Act.³⁶ The bill, introduced in modified form during the 101st Congress in May 1989, was presented as a civil rights measure, with members of Congress echoing the language heard in the debate over the 1964 Civil Rights Act.

Largely under Patrisha Wright's direction, a coalition of the disability community lobbied members of Congress on a bipartisan basis. According

to a coalition member, Becky Ogle, director of government affairs of the Spina Bifida Association, they would meet every Monday at one o'clock on Capitol Hill to get their "marching orders" for the day, and one of their chief tasks was "to put a face on discrimination" (Ogle 2001). One congressional staffer described the process as being "tutored" by Wright, Arlene Mayerson, and Chai Feldblum, who were taking a leading role in explaining substantive provisions of the law to Congress and staffers.

Congressional Action

Harkin's former staff member Katy Beh Neas (2002) reports that the disability community was united on the need for federal legislation to prohibit discrimination on the basis of disability and that Harkin wanted a bill that could become law. Convincing the business community to sign on to the bill was a more difficult task, she says.

Much of the congressional debate revolved around fears that compliance with the ADA would overwhelm the business community with excessive costs and added paperwork. The bulk of this opposition came from associations representing small business owners, such as the National Federation of Independent Businesses (NFIB). Groups such as the National Association of Manufacturers and the U.S. Chamber of Commerce also expressed concern, but were not as vehement in their opposition (Silverstein 2000). Testifying before Harkin's Subcommittee on the Handicapped, a representative of the Chamber stated that although his group favored the goal of the bill, "the costs of this action would be enormous and obviously could have a disastrous impact upon many small businesses struggling to survive." The bill supporters countered that surveys showed that most accommodations for employees with disabilities were either free or cost less than five hundred dollars (*Congressional Quarterly*, May 13, 1989, 1122-23).

In contrast to its fairly smooth passage in the Senate, the bill had been in the House for almost a year, in part because, instead of a single Senate committee, the bill had to proceed through four House committees (and six subcommittees): Education and Labor, Energy and Commerce, Public Works and Transportation, and Judiciary in addition to the Rules Committee. Each committee had at least one subcommittee hearing, during which amendments were introduced and debated.

The recollection of then-House member Larry Craig (1999), Republican from Idaho, provides an insight into the House debate over the ADA.³⁷ One of the most important issues, coverage of disabilities, aroused little serious

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opposition in the House. However, some members of Congress, reflecting the concerns of the business community, were troubled about the “large pool from which potential litigants might be drawn” (Craig 1999, 213) as well as the cost of the accommodations that would have to be provided for the vast numbers of workers with disabilities. They debated limiting the bill to categories of disabilities such as vision, hearing, or mobility impairments, but there was little support for this option. Most of the House discussion over coverage of disabilities was whether alcoholism, drug addiction, and homosexuality should be classified as disabilities—none were.

William Dannemeyer, Republican from California, proposed amendments barring coverage of homosexuals regarded as having AIDS or HIV, excluding communicable diseases from coverage, and specifying that the act did not create rights based on sexual orientation. He said this last amendment was intended to avoid having the ADA “turned into a homosexual bill of rights” (*Congressional Quarterly*, May 5, 1990, 1335). These amendments were defeated.

The principal cause of concern in the House during debate over the ADA was the costliness of the accommodations that would be required, especially to small businesses and communities as well as public transportation companies, and what would constitute an “undue burden.” This sentiment, often expressed as a fear that the law was too vague, was stated repeatedly by House members. The business community also expressed concern that ambiguities in the law would lead to uncertainty about the extent of their obligations. In response, Bill Richardson, Democrat from New Mexico, attempted to reassure them, noting that “whenever possible we have used terms of art from the 1964 Civil Rights Act and the Rehabilitation Act of 1973, phrases already interpreted in courts throughout this land so that business can know exactly what we mean” (*Congressional Record* 1990, H2427). Reaffirming this view, one of the primary sponsors of the bill, Major Owens, New York Democrat, explained, “there is a history of experience in implementing the concepts of this bill which will greatly facilitate the task of informing those with rights and responsibilities under this legislation as to what its provisions mean” (*Congressional Record* 1990, H2427–28).

A number of representatives proposed amendments setting limits on the dollar amount spent on compliance. Representative James Olin, Democrat from Virginia, offered an amendment to limit the employer’s obligation at accommodation to 10 percent of an employee’s salary (*Congressional Record* 1990, H2471). The majority, however, objected to this measure, saying it was

preferable if the courts determined the reasonableness of the accommodation (O'Brien 2001, 175–76).

Another proposal sought to create a rebuttable presumption that a small business was in compliance with the law if it spent \$1,500 on accommodations in the past three years; there were also several amendments to limit public transit costs. Tom Campbell, Republican from California, offered an amendment that would have delayed the effective date of the public accommodations section of the bill until eighteen months after the final regulations were issued, rather than eighteen months after the enactment of the bill; it was narrowly defeated (*Congressional Quarterly*, May 5, 1990, 1355). In the end, none of these limiting amendments obtained a majority of votes.

Perhaps the major controversy in Congress at the time, affecting not only the ADA, but other civil rights laws as well, revolved around the nature of available remedies. During the summer of 1989, the Bush administration and the ADA sponsors struck a deal in which the disability advocates acceded to omitting a provision that provided for compensatory and punitive damages to victims of employment discrimination and, instead, limited the employment discrimination remedies to those in the 1964 act: injunctive relief, back pay, and attorneys' fees. In return, the administration agreed to support broader coverage of the public accommodations section of the law than in the public accommodations section of the 1964 Civil Rights Act.³⁸

Months later, however, Congress considered the Kennedy-Hawkins bill, introduced in February 1990, that would have allowed compensatory and, in some cases, punitive damages for Title VII litigants. The administration contended that it was not fair for ADA remedies to be pegged to this proposed expanded version of Title VII and sought to tie the ADA remedies to the existing Title VII remedies of injunctive relief, back pay, and attorneys' fees. Proponents of the ADA argued that if Kennedy-Hawkins were enacted, disability plaintiffs would be at a disadvantage compared to other civil rights litigants. They claimed that the original agreement was based on the understanding that ADA remedies would be consonant with Title VII remedies, whatever they were at the time. Underscoring the vision of the ADA as a civil rights measure, a Senate staffer contended, "the notion was that you should treat people with disabilities the same as you treat minorities and women . . . the clear message was one of parallelism" (*Congressional Quarterly*, February 24, 1990, 600).

An administration-supported amendment offered by Representative James Sensenbrenner Jr., Republican from Wisconsin (*Congressional Record*

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1990, H2612–13), was narrowly defeated in the House Judiciary Subcommittee on Civil and Constitutional Rights in a 5–3 party-line vote (*Congressional Quarterly*, April 28, 1990, 1273). Objecting to the Sensenbrenner amendment, Representative Don Edwards, Democrat from California, called it “gross discrimination” if “women and minorities will get better treatment than persons with disabilities” (*Congressional Record* 1990, H2615). The amendment lost in the House in a 227 to 192 vote (*New York Times*, May 23, 1990).

Representative Tom DeLay, Republican from Texas, talked about the effect the law would have on small businesses, reminding his colleagues of the “incredible costs” that section 504 had imposed on the government and accused bill supporters of taking the same “deep pocket theory” evident in section 504 and applying it to private businesses (*Congressional Record* 1990, H2315). Craig (1999, 216–17), however, noted that although it may have appeared that all attempts to limit the reach of the bill were defeated, there were numerous provisions that protected business interests.

Congress inserted cost considerations into each section of the law: in the “reasonable accommodation” and “undue hardship” language in Title I, the “undue burden” defense in Title II, and the “reasonable modifications” and “readily achievable” standards in Title III. Additionally, only new or altered construction was subject to immediate accessibility requirements and there was a phase-in period for small businesses. Similarly, Hawkins pointed out that the “Senate receded on almost every point of difference [between the Senate and House versions], particularly those which amended the Senate-passed bill with provisions deemed important to business or other private interests” (*Congressional Record* 1990, H4615).

Reflecting the concern for conciliating business interests, Bush also attempted to assure the business community that their “fears that the ADA is too vague or too costly and will lead to an explosion of litigation are misplaced.” By incorporating the standards of section 504; by allowing flexibility in meeting the requirements of the act, including the phase-in provisions; and by allowing cost to be a factor in determining whether an accommodation is reasonable or an alteration is readily achievable, he said, a “careful balance [has been] struck between the rights of individuals with disabilities and the legitimate interests of business” (Bush 1990b).

One of the most hotly contested issues in the House was an amendment proposed by Representative Jim Chapman, Democrat from Texas, and supported by the National Restaurant Association and the NFIB, which termed

the vote on the matter a “key small business vote” (NCD, n.d.). The amendment would have permitted a food service facility “to refuse to assign an employee with an infectious or communicable disease of public health significance to a job involving food handling” in the absence of a direct threat to health or safety (*Congressional Record* 1990, S7437). After much debate, on May 22, 1990, the amendment narrowly passed the House in a vote of 199 to 187 (*New York Times*, May 23, 1990).³⁹ The House approved the final bill in a 403 to 20 vote.

On May 24, the House requested a conference, and the Speaker appointed twenty-two conferees to represent the House side. When the Senate met on June 6, Senator Jesse Helms, Republican from North Carolina, sought to have the Senate conferees include the language of the Chapman amendment in the final version of the bill, replacing a Senate version that offered broader protection to food service workers with AIDS or HIV. Admitting that there was no evidence that AIDS or HIV was transmittable through food or casual contact, Helms nevertheless termed this a key vote in support of small businesses because of the consequences of the public’s perception of the health risk of such workers. “You can call it hysteria all you want to,” Helms said, “but you better believe that the vast majority of people who eat in restaurants do not want to have their food prepared or handled by people who have AIDS or who are HIV positive” (*Congressional Record* 1990, S7437).

Arguing against the motion to instruct, Harkin (*Congressional Record* 1990, S7437) pointed out that the Senate-passed measure already removed “an individual with a currently contagious disease” who “poses a direct threat to the health or safety of other individuals” from the protection of the act. The Chapman amendment proposed to strike “the words ‘poses a direct threat to others’” from the act, allowing a worker with a communicable disease that was not transmittable through food or other casual contact, such as AIDS, to be excluded from the protection of the law. Harkin cited medical evidence indicating “that there is not one case of AIDS or HIV ever coming from food handling or from airborne substances.” Accepting this amendment, he warned, would undermine the integrity of the law because it would “codify unfounded fears and ignorance,” allowing employers to act “not based on medical evidence that that individual poses a direct threat to other people but based on ignorance, based upon fear, based upon mythology” (*Congressional Record* 1990, S7437–38). In remarks made to the business leadership on March 29, 1990, Bush also spoke out against the amendment (*Congressional Record* 1990, S7442), saying “our goal is to turn irrational fear

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into rational acts.” Amid procedural wrangling, the Senate adopted Helms’s motion to instruct in a voice vote.

There were countervailing pressures at work during the conference. Although a majority of both houses favored the Chapman amendment, representatives of the disability community announced that they would withdraw their support for the law if it included the amendment. According to Dart (1993, xxiii), the disability community was willing to be “flexible in terms of time limits, remedies, and cases of undue hardship, [but] would publicly oppose an ADA that included any significant permanent exemptions of coverage.” Ultimately, faced with the prospect of dooming the entire legislation, the majority of conferees of each house voted against including the amendment.⁴⁰

In addition to the Chapman amendment, another contentious issue in conference was whether the mandate against discrimination should be enforced against Congress through internal mechanisms only or through the courts. Ultimately, the conferees reached a compromise that complaints against House policies or practices would be governed by the Office of Fair Employment Practices and, based on an amendment by Charles Grassley, Republican from Iowa, complaints against Senate procedures would initially go through an internal grievance process that could be followed by suit in federal court. Orrin Hatch, Utah Republican, supported Grassley’s attempt to permit judicial review of ADA claims in the Senate, saying, “We shouldn’t saddle the private sector with something we’re not willing to saddle ourselves with” (*Congressional Quarterly*, June 30, 1990, 2071).

Despite this agreement, Senator Wendell Ford, Democrat from Kentucky, and several others successfully argued that judicial review of congressional actions would constitute a separation of powers violation. The bill was returned to conference on a voice vote, with a majority of the Senate indicating it supported Ford’s amendment, which merely granted civil rights protection to Senate employees, over the Grassley version. The bill’s second trip to conference allowed Helms to attempt to have conferees accept the Chapman amendment. He again failed, largely because of opposition from Hatch and Bob Dole, Republican from Kansas, who were now willing to enact the law without the Chapman amendment. Hatch proposed that the Secretary of Health and Human Services (HHS) compile an annual list of communicable and infectious diseases that could be transmitted through food handling. Restaurant operators would be able to remove people with these illnesses from food handling positions. This was accepted first in the Senate and later in conference. Dannemeyer’s subsequent motion to recommit the

bill to conference for a third time to restore the Chapman amendment language also failed to secure a majority (*Congressional Quarterly*, July 14, 1990, 2227–28; see NCD, n.d.).

With strong lobbying by business interests as well as members of the disability community, the conference report was approved in the House on July 12 with a 377 to 28 vote and in the Senate on July 13 in a 91 to 6 vote.⁴¹ Thirteen days later, on July 26, 1990, in a ceremony before thousands gathered on the White House South Lawn, Bush signed the ADA. In his remarks on signing the act, he exclaimed, “Let the shameful wall of exclusion finally come tumbling down” (Bush 1990a). Standing close to the president, Justin Dart, considered the “father of the ADA,” was handed the first pen used to sign the bill (*St. Louis Post-Dispatch*, July 28, 2002).⁴² Speaking at the signing ceremony, Neas (1990, 7) proclaimed that “the civil rights community, the Congress and the public are finally beginning to understand that disability rights are civil rights—and that when one of us suffers discrimination, the rights of all of us are diminished.”

The ADA became law in the midst of controversy surrounding Kennedy-Hawkins—enacted as the 1991 Civil Rights Act—over Bush’s veto in 1990. Kennedy-Hawkins allowed victims of employment discrimination on the basis of race, sex, age, religion, *and* disability to demand jury trials and collect money damages in cases of unlawful intentional discrimination.⁴³

Provisions of the Law

In justifying the law at the outset, Congress proclaimed that “some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older” (42 U.S.C. §12101(a)(1)). Explicitly depicted as a civil rights act, the ADA described discrimination against people with disabilities as “a serious and pervasive social problem.” Analogizing people with disabilities to other groups subjected to historical discrimination, the law invoked the powerful language of footnote 4 in *United States v. Carolene Products* (1938) by characterizing “individuals with disabilities [as] a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions” (42 U.S.C. §12101(a)(7)).

Discussing the “double standard” of judicial review arising out of foot-

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note 4, Abraham and Perry (2003, 23; see also Ely 1980) describe the “special judicial protection” the courts have afforded to “unpopular racial, religious, and political minorities and other often helpless and small groups.” By incorporating the language of footnote 4 into the act, Congress clearly intended to signal the courts to accord people with disabilities the preferred status granted other “discrete and insular minorities.”

The civil rights theme continued with Congress declaring that “it is the purpose of this Act . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; to provide clear, strong, consistent, enforceable standards addressing discrimination against people with disabilities; [and] to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities” (42 U.S.C. §12102(2)(A)(B)(C)).

The ADA defines a disability with a broad stroke, classifying “an individual with a disability” as a person with “a physical or mental impairment that substantially limits one or more of the major life activities” of an individual. The second part of the definition, “has a record of such an impairment,” refers to an individual “who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” The third, “regarded as,” prong applies to individuals who have no substantially limiting impairments but are treated as if they do, or their substantially limiting impairments result from the attitudes of others (42 U.S.C. §12102).⁴⁴ The purpose of the last part of the definition was to prevent discrimination based on stereotypical fears, biases, and perceptions about people with illnesses such as cancer, mental disorders, or asymptomatic HIV (Blanck 2000a, 204).⁴⁵ Equal Employment Opportunity Commission regulations define “major life activities” as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working” (29 C.F.R. Part 1630.2(I)).

The attempts to eliminate the “regarded as” prong in Congress were defeated with the explanation that it was necessary to protect people without disabilities, such as cancer survivors or burn victims, who might suffer discrimination because of stereotypes based on ignorance or fear (Burgdorf 1997). Because of the uncertainty of the number of persons within the “regarded as” prong, it was clear that Congress’s finding of 43 million people with disabilities was very imprecise and intended as a floor rather than a ceiling (Bristo 2002).⁴⁶

Seen by many as “the most important piece of disability policy in the 20th century” (Pfeiffer 1996a, 272), the ADA is wide-ranging, banning discrimination on the basis of disabilities in employment (Title I), in the delivery of state and local government services, including public transportation (Title II), in public accommodations (Title III), and in telecommunications (Title IV). Title V consists of miscellaneous provisions, including attorneys’ fees, alternative dispute resolution, retaliation, consistency with state laws, and insurance underwriting. To ensure continuity between the legislative acts, Congress directed the courts and executive branch agencies to follow the legal interpretations and regulations of section 504 when implementing the ADA.

Within less than a year after its passage, the EEOC and the DOJ, the two primary agencies responsible for promulgating regulations, along with the Department of Transportation (DOT), had received almost four thousand comments and heard testimony from almost three thousand people. And on the one-year anniversary, they issued final rules: the EEOC in employment (Title I) and the DOJ in public services and programs in state and local governments (Title II) and public accommodations (Title III). Soon the DOT, the Architectural and Transportation Barriers Compliance Board, and the Federal Communications Commission also issued final rules. A wide range of agencies, such as HHS, Commerce, and the Small Business Administration, to name a few, were also implicated in implementing the ADA (Craig 1999, 219).

The ADA as a Civil Rights Law

Most members of the disability community reacted very positively to the ADA. Bristo (2002) says it “reflect[ed] a paradigm shift of disabled people redefining and reclaiming disability,” replacing the medical model with a social and civil rights model. Although Dart (2001) qualifies his comment by saying “an advocate is never satisfied,” he believes that, “relative to the rights mandates in the past,” the ADA was a “profound success.”

One activist cited a “different spirit” between section 504 and the ADA, proclaiming that the ADA renewed a spirit of ending second-class citizenship. Sheila Thomas-Akhtar (2001), formerly the civil rights information and technical assistance coordinator at Access Living in Chicago and now a paralegal in the Civil Rights and Disability Rights Bureaus of the Illinois attorney general’s office, simply states that the law “changed her life.” And

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according to Wright (2000), “the face of America changed dramatically because of the ADA.” One respondent reported that, as a result of the ADA, more people with disabilities are “out and about.” And Ogle (2001) says that, because of the ADA, people with disabilities “have the right to pursue the American dream.” Feldblum (2000b) claims the ADA “changed awareness of people with disabilities, that they have a right to opportunity, rather than pity.” Moreover, she states, society is more aware of physical accessibility for which the ADA is responsible, and it has made people with disabilities aware that they have rights in employment settings and can ask for accommodations. David Hanson, commissioner of the Mayor’s Office for People with Disabilities in Chicago, characterizes the ADA’s achievements as “monumental” (Hanson 2001). Katy Beh Neas (2002) proclaims the ADA the “Emancipation Proclamation for people with disabilities.”

Although the new law was full of promises, it was also “vague and contradictory” (Switzer 2001, 629). Litigants soon learned that “the Act was not being interpreted as its drafters and supporters within the disability community had planned” (Krieger 2000, 7). Indeed, Diller (2000, 20) reports that “ADA advocates have looked on in horror as the case law has unfolded.” Burris and Moss (2000, 31) suggest that a possible reason for the disparity between hope and reality was that although Congress identified the nation’s aims as “assuring equality of opportunity, full participation, independent living, and economic self-sufficiency” for people with disabilities, the law was only directed at ending discrimination, a much narrower aim that, by itself, was unlikely to achieve the lofty goals of the disability community.

The framers of the ADA had expected the courts to base their interpretations on their experience with earlier antidiscrimination laws such as Title VII and the Age Discrimination in Employment Act (ADEA) of 1967, as well as the legislative intent, case law, and agency regulations of the 1973 Rehabilitation Act (Befort and Thomas 1999). Although some traced the problems of enforcement to the law’s vague and somewhat ill-defined terms (see Pfeiffer 1996a), the activists who framed the ADA and championed it in court defended its vagueness as necessary. They believed it was their best chance to achieve a disability rights law and believed that Congress’s intention of securing equal treatment for people with disabilities was clearly manifested.

Curtis Decker (2000), executive director of the National Association of Protection and Advocacy Systems (NAPAS), also believes that vagueness is not a problem; in his view, the flexibility within the law is advantageous.

Others agreed, expressing concern that absolute terms, such as dollar amounts or percentages, would have been subject to misinterpretation by the courts. Such laws are intentionally vague, one said. The problem, according to James Dickson, formerly at the National Organization on Disability (NOD) and currently at the American Association of People with Disabilities (AAPD), was not that the law was poorly drafted, but that there was a lack of political will to enforce it. “The terms are clear and the *Congressional Record* spoke to Congress’s intent,” he says (Dickson 2001).

When asked whether they view the ADA as a civil rights law, the disability rights advocates unhesitatingly proclaimed it a civil rights law. Wallace Winter, director of the Disability Law Project at the Legal Assistance Foundation of Chicago, observes that “many disability rights advocates pushing for the ADA derived their ideas and strategies from the civil rights leaders of the 1960s and ’70s” (Winter 2002). “Certainly it is a civil rights bill,” says Carolyn Osolinik (2001), a Ted Kennedy senior staffer for civil rights issues from 1981 until 1992, “we used other civil rights laws as models and analogies.” Susan Henderson (2001), managing director of DREDF, analogizes the ADA to other civil rights bills in its effort to “break down barriers and attitudes.” Frank Laski (2002), executive director of the Massachusetts Mental Health Legal Advisors Committee, emphasizes that “its origin and genesis is civil rights.” But, he says, there are differences. The principle behind a traditional civil rights bill is “equality and a level playing field.” The principle behind the ADA is “accommodations and affirmative steps.” Thus, he states, you “can’t simply end discrimination by treating a disabled person like everybody else.” He observes that Title VII theory is not as useful in disability discrimination cases—largely because of accommodation issues—and that there has been more negative reaction to ADA litigation from employers and courts than to race and sex discrimination cases.

Others also differentiated the ADA from traditional laws guaranteeing equality. Stan Eichner, director of litigation of the Disability Law Center in Massachusetts, distinguishes it from other civil rights law, saying “since the ADA, in certain instances, imposes an affirmative obligation to provide reasonable accommodations, it is the only civil rights law where an organization might face liability for treating everyone exactly the same.” He also notes that, “it is the only civil rights law in which rights are balanced against costs” (Eichner 2002). Breslin (2001) agrees that the ADA is a civil rights law, but says it is structurally different from other civil rights laws: first, because it specifies that discrimination can take physical forms (as in architectural barriers); and second, because equal employment and other opportunities may

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require accommodations. As a civil rights law, its impact, which is significant, will be limited because it only deals with the issue of discrimination, not the barriers that arise from economic structures. The ADA does not, nor is it intended to, deal with the problem of poverty among people with disabilities (except insofar as discrimination limits opportunities).

After pointing out that the ADA had followed the path of the traditional civil rights laws with civil disobedience and grass roots organizing, Robert Herman (2002), senior advocacy attorney for the Paralyzed Veterans of America, focuses on the differences between the ADA and those laws. The ADA, he says, requires society to ignore disabilities and, at the same time, to pay attention to them. The 1964 Civil Rights Act did not require positive action; but with the ADA, it is not sufficient to say to people with disabilities, “you can come into my restaurant, you have to build a ramp [for them].”