Judicial Backlash, the ADA, and the Civil Rights Model

By Matthew Diller†

Sometimes legislation enacted with little fanfare or comment proves profoundly important. Major changes in government programs can appear almost inadvertent. Presumably the converse can be true as well: legislation enacted with great expectations can effectuate little real change. Over time, events that once seemed momentous can be relegated to footnotes in history.

The Americans with Disabilities Act (ADA) was certainly enacted amid hopes that it would have a sweeping impact. The law itself contains a statement of purpose proclaiming the enormous breadth of its scope and goals. Congress intended the ADA to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]” To accomplish this purpose Congress stated it was “invok[ing] the sweep of congressional authority ... in order to address the major areas of discrimination faced day-to-day by people with disabilities.” Supporters hailed the ADA as an “emancipation proclamation” for people with disabilities. The bill was signed into law on July 26, 1990 at a White House ceremony attended by 2,000 supporters, including many people with disabilities. The event was an emotional watershed marked by tears and jubilation. Many present referred to it as a second independence day. Celebrations of the signing were held around the country.

Almost ten years later it is clear that the ADA will not become a mere footnote in the history of American disability policy. Although difficult to measure, its impact on the way that American institutions respond to issues relating to disability has been profound.

† Associate Professor of Law, Fordham University School of Law. I would like to thank Katherine Kennedy, Linda Krieger and Terry Smith for their comments on drafts of this paper. I am also grateful to Ian Goldrich, Stephanie Batchelder and Thaddeus Tracy for their outstanding assistance in research.

1. For example, the federalization of income support programs for poor people with disabilities was barely noticed when enacted in 1972. See Matthew Diller, Entitlement and Exclusion: The Role of Disability in the Social Welfare System, 44 UCLA L. Rev. 361, 434 (1996). Twenty-five years later, the SSI program created by the 1972 legislation had a $25 billion annual budget. Id. at 366, n.9.
7. See Jessamy Brown, Minnesotans Hail New U.S. Law to Protect Disabled from Bias, STAR-TRIB., Aug. 18, 1990, at 3B (describing the celebration of 1,000 people in Minneapolis); Patricia Capon, Disabled Hail Freedoms at Liberty Park Picnic, NEWARK STAR-LEGER, Aug. 11, 1990 (celebratory picnic attended by 500 people in New Jersey); Valerie Smith, Disabled Throw Party to Celebrate New Rights, ARK. DEMOCRAT-GAZETTE, Aug. 26, 1990 (describing the celebration in Little Rock).
8. See Paul Steven Miller, The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth
Still, there are reasons to fear that, at least in the area of employment, the ADA has not yet had the transformative impact that its supporters predicted. Indeed, almost a decade after its enactment, the judicial landscape dealing with claims of employment discrimination under the ADA looks far more bleak than one might expect, given the ambitious hopes placed on the ADA and the celebration that accompanied its enactment. The law reporters are littered with court decisions rejecting claims of employment discrimination on every ground imaginable and, in some instances, on grounds that seem inconceivable. A comprehensive study of 1,200 court decisions by the ABA’s Commission on Mental and Physical Disability Law has found that employers have prevailed in 92 percent of final judicial dispositions. Legions of ADA plaintiffs have been thwarted by a variety of barriers created by judicial interpretations of the statute. ADA advocates have looked on in horror as the case law has unfolded. In 1999, the Supreme Court ratified this trend in significant respects by ruling against plaintiffs in three crucial ADA employment cases.

This essay seeks to interpret this negative pattern in the cases. The generally

---

Circuit, 48 CASE W. RES. L. REV. 217, 219-21 (1998) (citing evidence that the number of people with disabilities in the work force has increased since the passage of the ADA).

9. Actually, the cases do not reflect a full ten years of experience because the employment discrimination provisions went into effect in phases two and four years after enactment. 42 U.S.C. § 12111. Thus, they did not become fully effective until July 1994.

10. See Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403 (1998) at 403 [hereinafter 1998 Study]. The authors found that these results were due largely to “the gap between what Congress claimed it was doing in enacting the ADA and what interpretation of the actual language of the Act allows.” Id. at 405. A follow-up study found that in 1998, employers actually increased their win rate to 94%. John W. Parry, Employment Decisions under ADA Title I B Survey Update, 23 MENTAL & PHYSICAL DISABILITY L. REP. 290, 294 (1999). See also Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 HARV. C.R.-C.L.L. REV. 99, 160 (1999) (describing empirical study of appellate employment discrimination decisions under the ADA and concluding that “defendants prevail at an astonishingly high rate on appeal” in ADA cases).

11. The authors of the ABA study concluded that:


12. Robert L. Burgdorf, Jr., one of the drafters of the ADA, has written the most comprehensive analysis of the decisions in ADA cases. See 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 (1997) [hereinafter Burgdorf, The Special Treatment Model]. Professor Burgdorf concludes that “legal analysis under [the ADA] has proceeded quite a long way down the wrong road...." Id. See also Arlene B. Mayerson, Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent, 42 VILL. L. REV. 587, 587, 612 (1997) (referring to the “disturbing trend” in the case law and criticizing the “hypertechnical, often illogical, interpretations of the ADA” in recent decisions).


This paper was written prior to these decisions. It focuses on patterns that have emerged in the lower court case law. Without changing this focus, the paper will take note of the actions of the Supreme Court where they bear directly on a point. In general, the Supreme Court’s decisions provide further support for the arguments that I present.
JUDICIAL BACKLASH

Dismal outcomes for plaintiffs could be viewed in a number of ways. First, many ADA claims may fail because they are inherently weak. Under this view, the ADA has generated a wave of meritless cases appropriately rejected by the courts. This interpretation would bear out the opponents of the ADA who predicted that the statute would invite legions of frivolous claims and that in the end, only lawyers would profit from its enactment. As gratifying as it may be to some, this account is unconvincing. As discussed below, many of the court decisions are based on crabbed interpretations of the Act that are at odds with its broad purposes. While it is impossible to determine what the success rate for ADA claims should be, it is clear that many plaintiffs who lose have claims that are far from frivolous.

A second explanation for the trend in the case law is that the ADA is simply poorly drafted in light of the congressional purposes. Under this view, the problem is not that plaintiffs are filing frivolous cases, but that the courts are constrained from enforcing the Act in a coherent and effective way by statutory language that fails to reflect the goals of the law. While the courts certainly have seized on statutory language to create major obstacles for plaintiffs, the key phrases in the ADA are ultimately vague. Vague language can be interpreted broadly, as well as narrowly. Despite judicial claims that the courts are simply applying the "plain meaning" of the statute, the courts are choosing narrow readings over broad ones, even in the face of expansive administrative interpretation and strong evidence that Congress intended the statute to be interpreted broadly. In light of the court decisions, it is easy to criticize the draftsmanship of the ADA. But the text itself does not mandate the narrow approach that the courts have taken.

A third explanation is possible. It may be that the case law merely reflects the confusion that frequently follows the enactment of major legislation. The ADA introduces a number of concepts that many judges have not dealt with in the past, such as the concepts of "reasonable accommodation," "undue burden" and a new definition of disability. Under this view, the judicial system will eventually right

15. See infra text accompanying notes 32-37.
19. See infra text accompanying notes 56-61.
20. These concepts are not wholly new. They were derived from the Rehabilitation Act and decisions interpreting that statute. 29 U.S.C. §§701, 794. However, the scope of the Rehabilitation Act is much narrower than the ADA, and, as a result, there has been much less litigation concerning it.
itself, as judges gain experience and expertise in dealing with ADA cases.

This third account may have some validity, as there are a number of areas in which the appellate courts have begun to reject clear misreadings of the statute that they had previously accepted. The Supreme Court's decision in *Bragdon v. Abbott*, holding that HIV infection is a disability under the Act, is one such example. Similarly, the Court's decision in *Cleveland v. Policy Management Systems Corp.*, holding that disability benefit recipients may not be estopped from maintaining ADA cases, should terminate a line of erroneous decisions. The Court's recent decisions in *Sutton*, *Murphy*, and *Kirkingburg*, however, adopt the kind of narrow approach to the statute that has proven lethal to the claims of most plaintiffs. These decisions suggest that ADA plaintiffs are not likely to face brighter prospects in the near future.

In any event, the theory that unfamiliarity with the ADA has led to judicial misinterpretation fails to explain why the decisions have so heavily favored employers. If we have simply been in a shakedown period which necessarily precedes consistent and well-reasoned interpretation of the ADA, why have the errors been so persistently one sided? Why do employers consistently emerge victorious?

A final account of the pattern in ADA decisions is the one suggested by the title of this symposium: that there is some kind of judicial backlash against the ADA. The term "backlash" suggests a hostility to the ADA and toward 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. In the absence of paranoia or a special fondness for conspiracy theories, it is difficult to accept the proposition that federal judges are deliberately sabotaging the ADA. But the idea of backlash need not be understood as a deliberate or intentional campaign. Resistance to the ADA may result from a failure to comprehend and therefore to accept the premises underpinning the statute. Such widespread misunderstanding might generate a pattern of erroneous decisions that on the surface appear unrelated. If backlash is used in this sense, the case for a judicial backlash against the ADA is strong.

---

25. 527 U.S. _, 119 S. Ct. 2133 (1999) (holding that employee with controlled high blood pressure does not satisfy the ADA's definition of having, or being regarded as having, a disability).
26. 527 U.S. _, 119 S. Ct. 2162 (1999) (finding that employer may use federal safety standard as justification for job requirement regardless of possibility of obtaining a waiver of the standard as part of an experimental program).
27. See Colker, supra note 10, at 160 (speculating that "conservative judges may simply be hostile to the ADA").
I will argue that the pattern of narrow and begrudging interpretations of the ADA derives from the fact that the courts do not fully grasp, let alone accept, the statute's reliance on a civil rights model for addressing problems that people with disabilities face in the workplace. Part I examines several areas of case law in which the courts have taken a restrictive approach to the ADA. In taking this approach, the courts have failed to interpret the ADA as a coherent civil rights policy. On the contrary, from a civil rights perspective, these decisions often appear perverse.

Part II looks at the implications of the decision to frame legislation intended to make social institutions accessible to people with disabilities as a civil rights measure. The civil rights model posits discrimination and resulting inequality as the central social issues that people with disabilities face. It establishes a framework of relationships in which employers and public institutions have a responsibility to facilitate the social integration of people with disabilities. Although there are many advantages to framing the issue as a matter of civil rights, in some ways the civil rights model is not an ideal fit with the problems posed by the issue of disability.

Part II further argues that the judicial resistance to the ADA is a manifestation of the more general skepticism that has confronted claims for equality in recent years. With the passage of Amendment 2 in Colorado and Proposition 209 in California, it is clear that claims for equality advanced by racial minorities, gays and lesbians, and women are frequently perceived by broad segments of the American public as attempts to gain “special treatment.” The ADA relies on notions of equality that have proven to be especially controversial. The ADA’s requirement of “reasonable accommodation” rests on the idea that in some circumstances people must be treated differently from others in order to be treated equally. This “different treatment” form of equality has long been contested and in the context of affirmative action has met with deep resistance from the courts.

Part III argues that absent a strong commitment to the idea that the ADA promotes equality, the law appears to judges as a kind of subsidy conferred on a class of people singled out by Congress for special treatment. Judges view the ADA as a form of public benefit program for people with disabilities, rather than a mandate for equality. In deciding whether plaintiffs qualify for these supposed subsidies, courts inevitably focus on the worthiness and need of the plaintiffs. In contrast, under a civil rights framework, the focus of attention is on the question of whether the defendant has responded appropriately to the plaintiff’s disability. Judicial decisions in ADA cases, however, seldom reach this issue.

The article concludes by noting that although reliance on the civil rights


30. Robert Burgdorf has identified the tendency of courts to view ADA plaintiffs as individuals seeking special benefits, rather than equal rights. See Burgdorf, The Special Treatment Model, supra note 12, at 411.
model has brought many benefits for people with disabilities, it is not without limitations. People with disabilities have won civil rights protection at a time when such protections are under attack on many levels. The initial wave of judicial decisions interpreting the ADA, which will set the course for judicial enforcement in the future, is being handed down during a period when cramped readings of civil rights are the norm, rather than the exception.

I. NINETY-NINE WAYS TO LOSE A CASE

Any discussion of judicial backlash against the ADA must start from the premise that the courts are doing something wrong. For purposes of this discussion it is unnecessary to pick apart a large number of ADA decisions. Rather, I will outline a few areas in which substantial numbers of courts have relied on restrictive interpretations of the ADA that unnecessarily and unfairly work to the detriment of plaintiffs. In each of these areas, other articles have more fully examined the flaws in these decisions, and I will not reiterate their arguments. Before looking at specific issues, it is useful to examine the facts of a few cases which, taken together, give a good impression of a large number of ADA employment discrimination cases.

In Ellison v. Software Spectrum, Inc., the Fifth Circuit held that an ADA plaintiff with breast cancer who suffered side effects from chemotherapy was not a person with a disability because she managed to continue working despite her impairments. As a result of the ruling, Ms. Ellison had no right to reasonable accommodations and could be terminated for having cancer, regardless of whether she could perform her job.

In Redlich v. Albany Law School, a district court similarly found that a law professor who had suffered a stroke resulting in paralysis of the left hand, arm and leg did not have a disability because he continued to work at his job.

In McNemar v. Disney Store Inc., an employee with AIDS was fired for allegedly failing to replace $2.00 that he had taken from the cash register for a pack of cigarettes. The Third Circuit held that he could not maintain an ADA case challenging his dismissal because he had successfully applied for disability benefits.

31. See Burgdorf, The Special Treatment Model, supra note 12 (reviewing several areas in which the courts have misinterpreted the ADA); Mayerson, supra note 12 (examining how many courts have misconstrued the ADA's protection of people regarded as having disabilities); Steven S. Locke, The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act, 68 U. COLO. L. REV. 107 (1997) (critiquing decisions interpreting the ADA's definition of disability); Wendy Wilkinson, Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act, 38 S. TEX. L. REV. 907 (1997) (analyzing decisions rejecting ADA challenges on threshold issues).

32. 85 F.3d 187 (5th Cir. 1996); see also Gordon v. E.L. Hamm & Assocs., Inc., 100 F.3d 907 (11th Cir. 1996) (finding that cancer with side effects from chemotherapy is not a disability); Schwerfager v. City of Boynton Beach, 42 F. Supp. 2d 1347 (S.D. Fla. 1999) (same); Madjlessi v. Macy's West, Inc., 993 F. Supp. 736 (N.D. Cal.1997) (same).


34. 91 F.3d 610 (3d Cir. 1996), cert. denied, 117 S.Ct. 958 (1997).
and was therefore estopped from claiming that he was qualified for his past job. The court did not consider the fact that the defendant had never found the plaintiff to be unqualified for the job relevant to the court’s analysis.

In *Hileman v. City of Dallas*, the Fifth Circuit found that a plaintiff with a spastic colon aggravated by multiple sclerosis was not entitled to an accommodation that would permit her to arrive at her clerical job 20 minutes late, because her condition did not qualify as a disability. The court angrily chastised the plaintiff for seeking to misuse the ADA.

A list of cases like these could go on for pages. These cases make one thing clear: many of the plaintiffs who are losing ADA cases are not raising frivolous claims. Although it is possible to find decisions concerning far-fetched ADA claims, the “garden variety” case involves an employee with a significant medical condition that imposes a variety of work-related restrictions who has been concededly or allegedly terminated because of that condition. In short, many of the unsuccessful cases deal with the core of the ADA’s ban on employment discrimination, rather than its periphery.

The fact that so many of these cases fail is troubling in its own right. But the pattern is particularly disturbing because the cases tend to lose on threshold issues. The problem is not that the courts view all accommodations as “unreasonable” or “undue burdens” on employers, but that they rarely even get to the point of reaching such issues. Instead, they tend to find plaintiffs simply not covered by the ADA, or, prior to the Court’s recent decision in *Cleveland*, they barred plaintiffs from even asserting their claims. In sum, the decisions do not only narrow the scope of the ADA’s employment protection—they cut out its heart.

The courts have reached these results through a series of separate but related interpretations of the ADA. Two of the most significant lines of cases are described below: decisions constricting the definition of disability and therefore limiting the scope of the law, and decisions barring disability benefit recipients from bringing suit under the ADA.

### A. No One Has a Disability

The preamble to the ADA states that 43 million Americans have one or more

---

35. 115 F.3d 352 (5th Cir. 1997); see also *Sorensen v. University of Utah Hosp.*, 1 F. Supp. 2d 1306 (D. Utah 1998) (finding that plaintiff with multiple sclerosis did not have a disability).


37. In this sense, the facts of *Sutton*, the principal Supreme Court decision on the definition of disability, are particularly unfortunate. *Sutton* dealt with an ADA claim based on the plaintiffs’ fully corrected myopia. 527 U.S. —, 119 S. Ct. 2143 (1999). Review of the lower court decisions reveals that most ADA cases concern conditions that are far more significant.

physical or mental disabilities.\textsuperscript{39} Despite the enormity of this figure, the court decisions suggest that the people who choose to sue under the ADA are seldom among this group.\textsuperscript{40} In addition to the cases described above in which courts found that individuals with breast cancer, multiple sclerosis and stroke did not have disabilities, courts have also found individuals with lymphoma,\textsuperscript{41} brain tumors,\textsuperscript{42} heart disease,\textsuperscript{43} diabetes,\textsuperscript{44} hemophilia,\textsuperscript{45} epilepsy,\textsuperscript{46} ulcerative colitis,\textsuperscript{47} carpal tunnel syndrome,\textsuperscript{48} incontinence,\textsuperscript{49} depression,\textsuperscript{50} bi-polar disorder,\textsuperscript{51} and paranoia\textsuperscript{52} to be excluded from the definition of disability.\textsuperscript{53}

These decisions rest on statutory language defining a disability as an impairment resulting in a “substantial limitation” in the ability to perform a “major life activity.” Courts have construed this language narrowly, stressing that the ADA prohibits discrimination based on disabilities rather than medical impairments.\textsuperscript{54} Typically, the ADA defendant argues that the plaintiff’s impairments preclude him or her from performing the job at issue, but that the individual is not generally precluded from work, or any other “major life activity.” When fully accepted by a court, this line of argument results in a ruling that the plaintiff is not a person with a disability despite medical impairments that render him or her unqualified for the job. The import of these cases is that many people are precluded from performing

\textsuperscript{40} In \textit{Sutton}, the Supreme Court turned the broad preamble of the ADA on its head by claiming that the figure of 43 million indicated that Congress only intended the ADA to cover a narrow class of people. 119 S.Ct. at 2147-48.
\textsuperscript{42} See Cook v. Waters, 980 F. Supp. 1463 (M.D. Fla. 1997).
\textsuperscript{45} See Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1996).
\textsuperscript{46} See Deas v. River West L.P., 152 F.3d 471 (5th Cir. 1998).
\textsuperscript{47} See Ryan v. Grac & Rybickii, 135 F.3d 867 (2d Cir. 1998).
\textsuperscript{48} See Guttridge v. Clure, 153 F.3d 898 (8th Cir. 1998); McCoy v. Toyota Motor Mfg., 110 F.3d 369 (6th Cir. 1999).
\textsuperscript{49} See Swain v. Hillsborough County School Bd., 146 F.3d 855 (11th Cir. 1998).
\textsuperscript{50} See Miller v. City of Springfield, 146 F.3d 612 (8th Cir. 1998); Olson v. Dubuque Community School Dist., 137 F.3d 609 (8th Cir. 1998); Cody v. Cigna Healthcare of St. Louis, 139 F.3d 595 (8th Cir. 1998); Polderman v. Northwest Airlines, 40 F. Supp. 2d 456 (N.D. Ohio 1999); Powell v. Morris, 37 F. Supp.2d 1011 (S.D. Ohio 1998).
\textsuperscript{52} See Patterson v. Chicago Ass’n for Retarded Children, 150 F.3d 719 (7th Cir. 1998).
\textsuperscript{53} See Burgdorf, \textit{The Special Treatment Model}, supra note 12, at 539-41 & nn. 643-660 (listing conditions that courts have found not to constitute disabilities).
\textsuperscript{54} See Christian v. St. Anthony Med. Ctr., Inc., 117 F.3d 1051, 1053 (7th Cir. 1997) (offering a hypothetical explaining that if an ADA plaintiff is terminated because of an unsightly skin disease that the employer found “revolting,” but did not interfere with the plaintiff’s ability to do the job, the Act would not accord protection because the plaintiff is not limited in a major life activity, and because the employer did not perceive the individual to have a disability).
their past jobs by medical impairments, yet are not viewed as having disabilities.\(^{55}\)

By now, a number of commentators have pointed out the flaws in this approach to the definition of disability in the ADA.\(^{56}\) The language of the statute is ambiguous and does not compel this result. The legislative history makes clear that Congress did not intend a stringent medical threshold that would severely restrict the protections of the Act. Instead, Congress included the “substantial limitation” requirement as a means of preventing claims based on \textit{de minimis} impairments, like an infected finger.\(^{57}\) Indeed, the legislative history and preamble to the ADA demonstrate that Congress intended a comprehensive remedy for discrimination against people with disabilities, not a narrow measure that deals only with a limited piece of the problem.\(^{58}\) There is simply no evidence that Congress intended to permit the continuation of discrimination against a broad spectrum of people on the premise that they have medical conditions rather than disabilities. The case law, however, has given employers such license.\(^{59}\)

Administrative interpretation of the statute also supports a broad construction of the definition of disability. In interpreting the ADA’s “substantial limitation” requirement, the EEOC’s guidelines suggest that an impairment that prevents the performance of a job can be deemed “insubstantial” only if the individual cannot perform the job because of some unique requirement.\(^{60}\) In general, an impairment that prevents performance of one job is likely to prevent performance of at least some other jobs as well.\(^{61}\)

---

\(^{55}\) This reasoning was embraced by the Supreme Court in \textit{Sutton v. United Air Lines, Inc.} Justice O'Connor concluded that employers are “free to decide that some limiting, but not \textit{substantially} limiting, impairments make individuals less than ideally suited for a job.” \textit{Sutton}, 119 S.Ct. at 2150.

\(^{56}\) \textit{See} Burgdorf, \textit{The Special Treatment Model}, \textit{supra} note 12, at 539-46; Locke, \textit{supra} note 31 at 107; Mayerson, \textit{supra} note 12, at 591-609.


\(^{58}\) 42 U.S.C. \$ 12101(a) (1990).

\(^{59}\) The fact that Congress intended to place the focus on the employer’s conduct, rather than the plaintiff’s medical condition is reflected in the Act’s protection of individuals \textit{perceived} to have a disability as well as those who actually do. Many courts have effectively nullified the protection for perceived disabilities by concluding that the employer must be shown to have perceived the plaintiff to be unable to perform a broad spectrum of jobs. \textit{See} Nielsen v. Moroni Feed Co., 162 F.3d 604, 612 (10th Cir. 1998) (“[I]n order to establish a disability under the ‘regarded as’ prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes.”); Bridges v. City of Bossier, 92 F.3d 329 (5th Cir. 1996). The Supreme Court substantially adopted this reading of the statute in \textit{Sutton}. \textit{See} 119 S.Ct. at 2151-52.

The requirement that the plaintiff show that the employer perceived him as unable to perform a broad range of jobs is \textit{virtually} impossible to satisfy. Employers generally only focus on whether the individual can perform the job in question. Thus, under this view of the statute, they rarely “perceive” anyone to have a disability. For a critique of the judicial interpretations of the perception prong of the ADA, see Mayerson, \textit{supra} note 12, at 587.

\(^{60}\) 29 C.F.R. \$ 1630.2(j) (app.) (1991) (interpretative guidance). For example, a baseball pitcher with a sore arm would be considered to have an insubstantial limitation because the requirement of throwing a ball ninety miles an hour is truly unique to that job and the player’s ability to use his arm is reduced only from extraordinary to merely average.

\(^{61}\) The proposition that an impairment is not a disability if it precludes performance of only a “single job”
Courts have used the proposition that inability to perform a single job may be deemed insubstantial to impose onerous burdens of proof on many ADA plaintiffs.62 Thus, many courts have granted summary judgment to employers on the ground that plaintiffs failed to submit detailed evidence concerning the characteristics of jobs in the relevant region.63 These cases require plaintiffs to amass a wealth of demographic and economic data, potentially turning individual ADA cases into battles of labor market experts.64 There is no evidence that Congress desired or contemplated that ADA cases would turn into protracted battles over the ability of plaintiffs to perform jobs not at issue in the case.65

Examined more broadly, these decisions make no sense given the purposes of the ADA. Indeed, from a policy perspective, it is difficult to discern any coherent rationale behind these cases, let alone the policy Congress adopted in the ADA. If

---

62. In adopting the E.E. Black rule that disqualification from one job is not enough, many courts have disregarded the safeguards provided in that decision to ensure that this exception does not swallow up the statutory protections accorded to individuals. The Supreme Court has now also adopted this approach. In Sutton, the Court specifically declined to assume that other employers applied the same standard as the defendant. 119 S.Ct. at 2150 (“It is not enough to say that if the physical criteria of a single employer were imputed to all similar employers one would be regarded as substantially limited in the major life activity of working only as a result of this imputation.”).

63. See Skorup v. Modern Door Corp., 153 F.3d 512, 515 (7th Cir. 1998); Sherrod v. American Airlines, 132 F.3d 1112, 1120 (5th Cir. 1998); Bridges v. City of Bossier, 92 F.3d 329, 333 (5th Cir. 1996); Bolton v. Scrivner, Inc., 36 F.3d 939, 944 (10th Cir. 1994).

64. EEOC regulations provide that such considerations “may” be used in determining whether an individual is substantially limited in the major life activity of working; however, they do not establish a threshold requirement that the plaintiff present such evidence in every case. See 29 C.F.R. § 1630.2(j)(3)(i)(i)(1991).

65. To the contrary, the legislative history suggests that Congress viewed even the E.E. Black approach as too restrictive. See S. REP. No. 101-116, at 23 (1989) (“[If the person is severely restricted in the performance of the particular job, then coverage is triggered.”); H. REP. No. 101-485, pt.3, at 29 (1990) (“A person with an impairment who is discriminated against in employment is also limited in the major life activity of working. However, a person who is limited in his or ability to perform only a particular job because of circumstances unique to that job site or the materials used, may not be limited in the major life activity of working.”) (emphasis added); see also 136 CONG. REV. H4626 (1990) (statement of Rep.Waxman that the ADA relies on a “broad, flexible definition of disability”).
one considers these cases in terms of the regime of rights and responsibilities that they erect outside of the litigation context, their flaws become manifest.

As construed by the courts, the ADA principally prohibits employment discrimination against those individuals who can prove that their ability to perform many jobs is compromised by their impairments. The decisions leave employers free to discriminate when they deal with individuals whose medical impairments do not have such a broad impact. They authorize employers to deny accommodations that are "reasonable" and not burdensome if the impairment would not prevent the employer from performing many other jobs. There is no reason why the employer's responsibility and the employee's rights should depend on the extraneous and ultimately speculative question of how the impairment might affect the individual's ability to perform jobs that he or she does not hold and has not been offered.

The message implicit in this inquiry is that rather than demanding accommodations, the plaintiff should simply find a job where no alteration of the workplace would be necessary. This approach defeats the goal of establishing equal access to the job market, which requires that people with disabilities have as full a range of jobs available to them as is possible within the limits of the reasonable accommodation principle. The focus on other jobs transmutes the ADA from an equal access measure into a means of providing some threshold level of access to the job market. It suggests that accommodation is only required when it is necessary to enable the plaintiff to remain in the work force—an objective that is very different from that of equal opportunity.

This restrictive interpretation has a number of perverse effects. First, the likelihood that an individual will be found to satisfy the definition of disability as construed by the courts is inverse to the chances that he or she would be able to actually win on the merits. Plaintiffs with more serious medical impairments are less likely to be found qualified for jobs through the provision of accommodations. Those with less severe impairments would be able to show that they are qualified, but may well be found to have only a medical condition, rather than a disability. In screening out plaintiffs whose impairments are not incapacitating, the restrictive decisions exclude from the Act many of the individuals who would be most likely to benefit from its protections.

Second, under this restrictive approach, attempts by terminated employees to find other work could be construed as evidence of nondisability. Thus, even though the Act is intended to encourage and facilitate the inclusion of people with disabilities in the work force, courts may view efforts to work as removing an individual from the protections of the Act. A lawyer counseling a potential ADA

---

66. See supra notes 54-55 and accompanying text. An individual may establish protection by showing a substantial limitation of a life activity other than working. In the employment context, however, it is not surprising that the focus of many cases is on the life activity of working.

67. See, e.g., Szalay v. Yellow Freight Sys., 127 F.3d 1103 (6th Cir. 1997); Adair v. W.H. Braum's, Inc, 1999 WESTLAW 242696, 6 (N.D. Tex. 1999) ("The fact that [plaintiff] is presently employed is dispositive of her alleged substantial limitation on working.").
plaintiff may well advise him or her not to look for another job.\textsuperscript{68} This last point underscores how court decisions addressing the definition of disability stand at odds with the fundamental insight underlying the ADA: that disability and work are not mutually exclusive.

\section*{B. People with Disabilities Are "Not Qualified" for Jobs}

In addition to finding that ADA plaintiffs do not have disabilities, courts have been quick to find they simply are not qualified for the jobs that they seek. Courts have relied on statements made on applications for disability benefits as a basis for granting summary judgment to employers. After being terminated from jobs many people with disabilities apply for benefits either under the Social Security Act or long-term disability insurance policies. Many courts have found that assertions of inability to work made on benefit application forms either estop later ADA claims or provide a basis for summary judgment against ADA plaintiffs.\textsuperscript{69} The Supreme Court's May 1999 decision in \textit{Cleveland v. Policy Management Sys.}\textsuperscript{70} should put an end to the widespread practice of barring disability benefit recipients from bringing cases under Title I of the ADA. Nonetheless, the decisions of the lower courts remain illustrative of the obstacles that the courts have placed in the path of ADA plaintiffs. Because I have discussed this line of cases in detail elsewhere,\textsuperscript{71} I will only touch on them in this discussion.

As the Supreme Court recognized in \textit{Cleveland}, decisions barring benefits recipients from bringing ADA cases frequently overlook critical distinctions between the alternative definitions of disability used in these two different contexts.\textsuperscript{72} Specifically, in deciding claims for benefits under the Social Security Act, the Social Security Administration (SSA) does not factor in the possibility of reasonable accommodation.\textsuperscript{73} Statements made in connection with Social Security claims must be construed in light of this important difference. An individual may well be "unable" to work, absent provision of reasonable accommodations. General statements on disability benefit applications thus shed no light on the

\textsuperscript{68} On the other hand, by not looking for work the individual may be construed as failing to mitigate damages. See Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 53 (2d Cir. 1998).


\textsuperscript{70} 527 U.S. \textit{__,} 119 S.Ct. 1597 (1999).

\textsuperscript{71} See Diller, \textit{supra} note 69, at 1003.

\textsuperscript{72} 119 S.Ct. at 1602-03.

\textsuperscript{73} See Diller, \textit{supra} note 69, at 1040, n. 174.
ability of an individual to perform a job with the accommodations mandated by the ADA.

Although many courts have recognized the distinction between the ADA's definition of disability and that contained in the Social Security Act, they have often failed to grasp its full implications. After acknowledging the differences in the statutes, they have nonetheless treated general statements of inability to work on benefits applications as dispositive of ADA claims. Alternatively, they have viewed the instances of overlap between the ADA and the disability benefits programs as only a rare and theoretical possibility. This later view is based on an assumption that the availability of accommodations—the cornerstone of the ADA—will seldom really make a difference.

The Fifth Circuit's decision in Cleveland, which was subsequently overturned by the Supreme Court, exemplified this approach. After suffering a stroke, Ms. Cleveland applied for Social Security Disability Insurance benefits, claiming inability to work. As her condition improved, she returned to her job, despite the fact that her employer denied her request for accommodations. After a number of months, the employer terminated Ms. Cleveland on the ground that she could not perform her job. Following the termination, Ms. Cleveland was awarded disability benefits. Although recognizing the theoretical possibility that a disability benefits recipient could be "qualified" for a job under the ADA because the Social Security Administration does not take the possibility of accommodation into account, the Court nonetheless held Ms. Cleveland estopped because her assertion of disability was not specifically limited to the Social Security context.

In reversing the Fifth Circuit, the Supreme Court correctly noted that "there are too many situations in which a [disability benefit] claim and an ADA claim can comfortably exist side by side" to warrant the assumption that benefit recipients will only rarely be qualified for the jobs they seek.

II.
ADOP~rION OF THE CIvL RIGHTS MODEL

The ADA explicitly adopts a civil rights approach to the problems that people with disabilities encounter in the workplace. It characterizes adverse employment decisions based on disabilities to be a form of "discrimination," and, going further,

74. See Kennedy v. Applause, Inc., 90 F.3d 1477, 1481-82 (9th Cir. 1996) (granting summary judgment to employer based on plaintiff's statements on benefits application).
75. See, e.g., Pena v. Houston Lighting & Power Co., 154 F.3d 267, (5th Cir. 1998) (applying rebuttable presumption of estoppel); McConathy v. Dr. PepperSeven Up Corp., 131 F.3d 558, 562-63 (5th Cir.1998) (same); Downs v. Hawkeye Health Serv., Inc., 148 F.3d 948 (8th Cir. 1998) (requiring disability benefit recipient to meet a heightened burden in ADA case); Moore v. Payless Shoe Source, Inc., 139 F.3d 1210 (8th Cir. 1998) (same); Dush v. Appleton Elec., 124 F.3d 957 (8th Cir. 1997) (same).
76. Diller, supra note 69.
77. 120 F.3d 513 (5th Cir. 1997), rev'd, 119 S.Ct. 1597 (1999).
78. Id.
79. Cleveland, 119 S.Ct. at 1602.
identifies the denial of accommodations in the workplace as a form of discrimination as well.\textsuperscript{40} The legislative findings that form the preamble to the Act draw on the concepts and rhetoric identified with legal remedies for violations of civil rights. These findings identify people with disabilities as “a discrete and insular minority,” historically subjected to isolation, segregation, and “purposeful unequal treatment” that relegates them to a position of “political powerlessness in our society.”\textsuperscript{3} The ADA also draws upon the remedial and administrative scheme of the Civil Rights Act of 1964.\textsuperscript{82}

Both the rhetoric and structure of the ADA are therefore based on an implicit analogy between the problems facing people with disabilities and those faced by women and racial minorities.\textsuperscript{3} The analogy rests on the idea that the problems confronting people with disabilities are first and foremost issues of equality. It is grounded on the premise that people with disabilities are denied the opportunities accorded to others because of irrational stereotypes and outmoded social and institutional structures and arrangements.\textsuperscript{84} Accordingly, the protections of the ADA are a means of enabling people with disabilities to compete in the job market on a level playing field.\textsuperscript{85}

The ADA’s embrace of the civil rights model represents a break with the tradition of viewing the problems faced by people with disabilities as principally medical in nature.\textsuperscript{86} Under the medical approach, the physical or mental effects of the disability on the individual are seen as the paramount problem. The medical model lends itself to a focus on medical treatment and rehabilitation—attempts to reform the individual, rather than to restructure society. In contrast, the ADA focuses on the societal response to disability. It seeks to reform social institutions to provide people with disabilities with equal access to the labor market, public accommodations and government programs.

The idea of social reform, however, is not exclusively an attribute of the civil rights model. Attempts to restructure society to be more inclusive of people with disabilities can be justified under the medical model as well. First, efforts to increase employment for people with disabilities can be viewed as a means of

\textsuperscript{80.} 42 U.S.C. § 12112 (1994).
\textsuperscript{84.} 42 U.S.C. § 12101(a) (1994) (Congressional findings detailing history of discrimination).
\textsuperscript{85.} 42 U.S.C. at § 12101(a) (1994) ("[T]he Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living and economic self sufficiency for such individuals.").
improving the quality of life for such individuals. Greater access to the job market can be seen as a means both of increasing the income of people with disabilities and enabling them to have richly rewarding life experiences. This claim can be seen either as an unadorned appeal to altruism or as part of a social vision in which society as a whole has an obligation to ameliorate adversity among its members. Arguments of this nature have underpinned the growth of the welfare state over the course of much of the twentieth century.

Second, an economic argument can be made that expenditures that enable people with disabilities to work will reduce sums spent on income maintenance and will add needed skills and talents to the job market. The idea of promoting the employment of people with disabilities as an investment has traditionally been offered in support of funding for physical and vocational rehabilitation. The power of this idea can be discerned in the fact that federal funding for vocational rehabilitation was established in 1920, prior to the onset of the New Deal.

These arguments make clear that the civil rights model is not the only conceptual tool for using the power of government as a means of increasing employment and related opportunities for people with disabilities. Support for government intervention in the workplace on behalf of people with disabilities need not rest on the principles of equality that form the core of the civil rights model.

Although these arguments can be used to advance goals shared by a civil rights approach, they suggest very different means of government intervention. Because they focus on overall societal objectives, they lend themselves to the creation of government programs that fund, through direct spending or tax subsidies, the desired changes in the workplace. In contrast, the civil rights approach places the responsibility for the necessary changes on individual employers. The premise of civil rights law is that the provision of equal opportunity and equal access is a basic responsibility of every employer, government program and public accommodation. The idea of socializing the cost through public funding of compliance by private entities cuts against the grain—it suggests that the responsibility for effectuating equality is collective rather than individual.

89. In fact, ADA proponents used all of these arguments in order to build a consensus in support of the legislation. See, e.g., 136 Cong. Rec. S9530 (1990) (statement of Senator Durenberger that passage of the ADA is critical to the economic future of the United States). See generally O'Day, supra note 86, at 293-294 (discussing how proponents of the ADA relied on both economic and civil rights arguments).
90. Many critics of the ADA oppose the statute's focus on individual rights and responsibilities and argue instead for socializing the costs of providing people with disabilities access to the societal mainstream. See Richard Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 480-94 (1992) (arguing for federal grant program, rather than civil rights protection); Carolyn Weaver, Incentives Versus Controls in Federal Disability Policy, in Disability and Work: Incentives, Rights and Opportunities 3-17 (Carolyn Weaver ed., 1991) (arguing for incentives rather than rights-based policies toward disability); Christopher Willis, Comment, Title I
This discussion highlights the fact that advocates for and among people with disabilities have made a strategic decision to cast the claim for government protection as an issue of civil rights, rather than simply as an appeal for a social welfare program, or an investment in the labor force. This strategic decision was not made at a specific point in time or by a select group of individuals. Rather, the momentum for a civil rights-based strategy grew over a twenty year period during which it gathered increasing support both among people with disabilities and among political leaders, culminating in the passage of the ADA in 1990. The decision to adopt a civil rights framework to address the problems of people with disabilities has had enormous consequences, a number of which can help us understand the trend now emerging in court decisions construing the ADA.

A. Advantages of the Civil Rights Model

The struggle of African Americans for equality serves in many ways as the prototype of a successful movement combining political mobilization and activism with litigation and legislation to bring about major social changes. Although the struggle of African Americans is certainly incomplete and in recent years has suffered a number of political and legal setbacks, during the 1970s, when the civil rights approach to disability was developing and growing in strength, the cause of racial equality had appeared to move from success to success. It is not surprising that other groups sought to adapt the civil rights model for advocacy, legislation and litigation to their own struggles for equality. Advocates for women's rights have perhaps been most successful in this effort, while advocates for welfare rights have been largely unsuccessful.

The use of concepts and legal frameworks provided by the civil rights movement to address the barriers confronting people with disabilities has brought enormous benefits. Principally, it has furnished a vocabulary and a frame of reference through which people with disabilities can articulate—and others can...
understand—the difficulties that they face in seeking to participate fully in society. The benefits of reliance on the civil rights model can be seen on many levels: it has helped to mobilize people with disabilities and forge them into a distinct and vocal political constituency. It has provided a framework through which the larger public can gain some understanding of the problems facing people with disabilities. It has supplied a structure to legislation intended to benefit people with disabilities. It has helped build alliances with other interest groups. Finally, it has enabled arguments on behalf of people with disabilities to be cast as claims of right in a way that reinforces rather than threatens fundamental values of our society.

The vocabulary and framework of civil rights provides a means through which people with disabilities can understand their experience and communicate that experience to others. The focus of civil rights discourse on lack of equal opportunity and treatment stemming from stereotypes, irrational fear, and hostility resonates deeply with many people with disabilities and reflects the reality that they have experienced. It also enables people with disabilities to communicate this reality in a way that is familiar and understandable to the nondisabled majority. The civil rights framework thus gives the nondisabled majority a means of comprehending many of the problems faced by people with disabilities.

Further, the civil rights framework establishes a set of legal relationships between those who act on biases and those who are treated adversely as a result. The key concept is the idea of discrimination—the principle that it is improper for employers or public accommodations to act on biases, hostility or stereotypes relating to the group in question. Under the civil rights rubric, the discriminator is a wrongdoer who has violated legal and social norms, while the person discriminated against is a victim entitled to redress. Thus the civil rights framework suggests the legal prohibition on discrimination as a principal solution to inequality.

The civil rights framework also incorporates a means of achieving this solution—the use of the coercive power of the state to compel compliance with the law and to remedy violations of non-discrimination norms. Indeed, the civil rights model is a distinctively judicial model for dealing with social problems. The courts are expected to take an active role in enforcing the norms that are established. During the civil rights struggles of the 1950s and 60s, the federal judiciary played a critical role in articulating norms, such as the renunciation of “separate but equal,” the protection of civil rights activists, and the imposition of sweeping remedies to


98. The leap between the proposition that government has an obligation to treat people equally and the idea that private parties have a similar obligation was not an easy one for the civil rights movement. See, e.g., Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (finding that the Equal Protection clause of the Fourteenth Amendment applies to restaurant that is tenant in a municipal parking lot); Shelley v. Kraemer, 334 U.S. 1 (1948) (finding that the Equal Protection clause prohibits enforcement of racially restrictive covenants in deeds). The Civil Rights Act of 1964 crossed this bridge as part of a sea change in public attitudes toward discrimination. 42 U.S.C. § 2000 a-a-6 (1994).

correct past illegalities. The legal structure provided by the civil rights model is also powerful because it casts the claims of people with disabilities in the form of asserted rights. In this way, the claims raised by people with disabilities can be presented as imperatives rather than mere policy preferences. Moreover, the civil rights approach enabled advocates to frame the issue as one of equal opportunity rather than economic redistribution. Over the long run, arguments framed as appeals for equal opportunity have proven far more resilient both in the political process and in the courts than attempts to secure redistribution of resources. Indeed, advocates for the poor and other marginalized groups have long sought to avoid unadorned claims for the redistribution of resources by clothing their arguments in the garb of traditional rights and entitlements. Instead of seeking redistribution and subsidization, the use of a civil rights model enables advocates for people with disabilities to present their claims as congruent with traditional and broadly accepted values such as equality, fair play and meritocracy. Because it was anticipated that civil rights protection would enable people to leave the disability benefits rolls, the ADA was even promoted as a means of decreasing the extent of redistribution in our society.

Further, by framing the issue as one of civil rights, advocates could argue that legal protections for people with disabilities would not be overly disruptive. The Civil Rights Act of 1964 had already established the basic principles and statutory protections that were sought—all that needed to be done was to add discrimination

---


In contrast, the federal administrative structure for enforcing civil rights laws is relatively weak. See Michael Selmi, The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law, 57 OHIO ST. L. J. 1 (1996). The EEOC only deals with employment issues. Even in the employment area, it has no power to issue determinations on discrimination claims or to impose remedies. Unlike Title VII, however, the ADA does grant the EEOC authority to issue binding regulations implementing Title I of Act. 42 U.S.C. § 12116 (1994); see also Rebecca Hanner White, The EEOC, The Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation, 1995 UTAH L. REV. 51, 89-93 (1995).

In Sutton, however, the Court gave only limited deference to the EEOC's regulations amplifying the definition of disability. Sutton v. United Airlines, Inc., 527 U.S. 449 (1999). The Court noted that the definitional section of the ADA is not part of Title I. Id. It rejected the argument that deference is appropriate because construction of the Act's definitions is essential to the EEOC's role in interpreting and enforcing Title I. Id.


104. For example, in supporting enactment of the ADA, Representative Hammerschmidt stated that "The disabled do not want charity or a government handout; they want to work." 136 CONG. REC. H4627 (1990).
on the basis of disability to the list of prohibited conduct. The Rehabilitation Act of 1973 established this core principle with respect to federal agencies and entities that receive federal funding. By the late 1980s advocates for the ADA could point to the experience with the Rehabilitation Act as evidence that protection of people with disabilities was feasible, and could cite the regulations and case law based on the Rehabilitation Act as a workable blueprint for extending the protection more generally. Lastly, a civil rights protection would place the cost of societal changes on employers, public accommodations, and state and local governments, rather than on the federal government—a vital point during a period when budget deficits were a major political issue.

For all of these reasons, the civil rights focus of the ADA was critically important to the establishment of a major federal commitment to the mission of employing people with disabilities and providing them with vastly expanded access to public programs and accommodations. Although a number of amendments were introduced in attempts to water down the legislation, by the time it was enacted, the ADA garnered broad bipartisan support. A vote for the ADA was a vote for traditional American values, such as fairness, tolerance, self-sufficiency and the work ethic.

B. Limitations of the Civil Rights Model

Although reliance on the civil rights model made it possible to enact the ADA during a conservative period in which a Republican Administration held power, the civil rights model has contributed to the problems plaintiffs have faced in enforcing the statute in at least two ways. First, in some respects, the barriers faced by people with disabilities differ from those experienced by other groups protected by civil rights laws. The ADA adapts the basic civil rights model to address these barriers in a way that raises a number of difficult issues and questions. Second, public


106. See H.R. REP. No. 101-485, pt. 3 (noting that the ADA defines disability in terms similar to the Rehabilitation Act because that statute has “worked well”); see also Bragdon v. Abbott, 524 U.S. 624 (1998) (drawing on Rehabilitation Act regulations and policy statements for guidance in interpreting the ADA); Pritchard v. Southern Co. Serv., 92 F.3d 1130, 1132 n.2 (11th Cir. 1996) (“Congress intended for courts to rely on Rehabilitation Act cases when interpreting similar language in the ADA”); 42 U.S.C. §12117(b) (requiring agencies with enforcement authority to ensure that the requirements of the ADA and the Rehabilitation Act are handled consistently).


108. The vote in the House of Representatives was 377 to 28. 136 CONG. REC. H4629 (1990). In the Senate, the vote was 91 to 6. Id. at S9695.

109. This is not to suggest that enactment of the ADA was a simple matter. Since the mid-1970s virtually every aspect of implementation and expansion of civil rights protections for people with disabilities has been hotly contested. For example, it took four years for the Department of Health, Education and Welfare to finalize regulations implementing the Rehabilitation Act. The regulations were the focus of heated opposition and were only issued after a wave of protests by people with disabilities. See SHAPIRO, supra note 97, at 64-70. Numerous unsuccessful attempts were made to add disability to the Civil Rights Act of 1964. See Burgdorf, supra note 83, at 429-34.
attitudes toward the civil rights model itself have shifted. Apart from some core areas, the civil rights model itself has become highly controversial and the judiciary has become much less sympathetic to civil rights claims in general. Thus, the questions raised by the ADA are being answered by a judiciary that takes a restrictive view towards civil rights. Not surprisingly, the courts are responding in ways that narrow the coverage and limit the efficacy of the statute. Ironically, people with disabilities have gained civil rights protection at a point when civil rights are under attack.

1. Defining Protected Classes

The civil rights model has traditionally been applied in situations in which the protected group is relatively easy to define. Unlike race and gender, however, there is no social consensus around a definition of disability. Thus, the question of whom exactly Congress sought to protect in enacting the ADA is a legitimate ground for disagreement and litigation. In deciding these questions, the courts have tended to draw on stereotyped images of what it means to be “disabled.” Although the person who uses a wheelchair would clearly seem to fit this stereotype, its application to an individual with a lifting, bending or manipulative restriction is much less clear. Indeed, according to stereotypes, people with disabilities cannot work. Thus, an individual who can work is seen as “not disabled.” The stereotype therefore suggests exclusion of those most able to work from the class protected by the statute. There is more than a bit of irony in the fact that the interpretation of a statute whose purpose is to break down stereotypes has become ensnared by their application.

In addition, aspects of the civil rights model reinforce this inclination toward a restrictive definition. The civil rights model rests on the premise that a powerless minority group is systematically subordinated by the majority. Pursuant to this model, the preamble to the ADA defines people with disabilities as a “discrete and insular minority,” a phrase filled with connotations in civil rights law. The idea

110. See Diller, supra note 1, at 361 (discussing the variability in definitions of disability used in government benefit programs).

111. Robert Burgdorf points out that other civil rights statutes have not sought to define precise classes, but have prohibited forms of conduct based on the grounds that define membership in a class. Burgdorf, The Americans With Disabilities Act, supra note 83, at 441. Thus, Title VII prohibits discrimination based on race, without requiring a threshold showing that the plaintiff is a member of a racial minority. Although aspects of antidiscrimination law such as disparate impact liability and affirmative action do call for racial classifications, classification issues are a much less prominent feature of race discrimination law. For a discussion of the difficulties in establishing racial categories, see Christopher A. Ford, Administering Identity: The Determination of “Race” in Race Conscious Law, 82 CAL. L. REV. 1231 (1994).

Although the ADA could have simply prohibited discrimination based on disability without defining a protected class, the term “disability” would still have raised difficult definitional issues and the current problems would not have been avoided.

112. Wendy Parmet has explored the ways in which traditional stereotypes about disability have influenced the judicial interpretation of the ADA. See Parmet, supra note 18.

of the discrete and insular minority suggests protection for a narrow and clearly defined group that has been subjected to a particular history of discrimination. It encourages people to think about the disabled as a group that is distinct and separate from the nondisabled. In sum, it invites judges to view the problem of disability narrowly, rather than broadly. In reality, the problems addressed by the ADA are experienced by a wide-ranging and amorphous spectrum of people. In this sense, the minority group model provides an uneasy fit with the problem of access to the workplace that the ADA addresses.

2. Contested Visions of Equality: The ADA and the Landscape of Civil Rights Law

The fact that disability does not easily fit into the “discrete and insular” minority model, however, is not necessarily a stumbling block. The civil rights model has been successfully adapted to address gender and age issues, even though neither women nor the elderly could be characterized as discrete and insular minorities. The issues that surface in adapting the civil rights model to the context of disability have become major problems because of the larger judicial landscape in which the ADA is being implemented. Courts are resolving critical issues concerning the ADA’s scope at a time when they are decidedly inhospitable to expansive interpretations of civil rights protections in general. In contrast, the initial decisions construing the Civil Rights Act of 1964 were issued during a period when the federal judiciary was substantially more willing to play an active role in the articulation and enforcement of civil rights statutes. The civil rights model’s reliance on the judiciary has proven to be a major obstacle to effective enforcement of the ADA.

114. The phrase comes from Justice Stone’s famous footnote in United States v. Carolene Products Co., 304 U.S. 144 n.4 (1938) (defining the bases for heightened judicial scrutiny of legislative enactments). See generally Bruce Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713 (1985) (questioning the assumption that discreteness and insularity can be equated with political powerlessness).


116. See Paul Steven Miller, Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender and Age, 1 U. PA. J. OF LAB. & EMP. L. 511, 521 (1998) (noting that the ADA is unusual among civil rights laws in that the members of the protected group are not perceived and do not perceive themselves as sharing common characteristics).

117. See Samuel Issacharoff & Erica Harris Worth, Is Age Discrimination Really Age Discrimination?: The ADEA’s Unnatural Solution, 72 N.Y.U. L. REV. 780 (1997) (critiquing use of antidiscrimination paradigm to deal with the employment issues raised by the process of aging).

118. See infra text accompanying notes 142-60. There are some exceptions to this trend, such as the recent decisions concerning sexual harassment. See, e.g., Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries v. Ellerth, 524 U.S. 742 (1998); Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998); Harris v. Forklift Sys., 510 U.S. 17 (1993).

119. For example, a stronger administrative scheme could have placed more authority in the hands of the EEOC, which has been far more sympathetic to ADA plaintiffs than the courts. Congress could have empowered the agency to adjudicate claims of employment discrimination and limited the role of the courts to performing judicial review under
Many of the problems emerging from judicial decisions concerning the ADA stem from the ADA's reliance on a vision of equality that is particularly controversial—the principle that differential treatment, rather than the same treatment, is necessary to create equality. Although the proposition that members of protected minorities should be treated the same as others enjoys broad consensus,120 notions of equality that call for protected groups to be treated differently as a means of establishing equal opportunity in the labor market or providing equal access to programs and institutions are hotly disputed. As explained below, the justifications for requiring reasonable accommodation as a means of promoting equality are similar to the arguments presented in support of affirmative action programs. The courts have been increasingly unreceptive to these arguments in the context of affirmative action and it should not be surprising that they are resistant to the same arguments in the ADA context.

The ADA relies on a different treatment vision of equality to address the reality that disabilities frequently do have an impact on an individual's ability to perform a job.121 Thus, unlike race, disability is frequently a legitimate consideration in employment decisions.122 For this reason, the ADA relies on the requirement of reasonable accommodation to require employers to alter job requirements in response to an individual's disability.123 Under the reasonable accommodation principle, the employer is not simply required to treat a person with a disability like a nondisabled person. Rather, the statute requires the employer to take the disability into consideration and change its workplace accordingly. Moreover, because every disability is unique, the ADA relies on a highly individualized and contextualized vision of equality. The reasonable accommodation requirement does not simply mandate that a group be treated differently; it requires that each person within a group be treated differently.124 The reasonable accommodation requirement therefore is based upon a more complex and richer conception of equality than a simple requirement that the disabled and nondisabled be treated the same.125

---

120. Opposition to civil rights protections based on sexual orientation is a notable exception to this acceptance. See Romer v. Evans, 116 S.Ct. 1620 (1996); see also infra text accompanying notes 161-64 (discussing the ways in which law requiring the "same" treatment can be perceived as "special" treatment).

121. See Miller, supra note 116 at 514 (noting that "the traditional civil rights model of treating people 'exactly the same' does not apply to disability discrimination.").

122. The ADA does not rely solely on this different treatment conception of equality. In situations in which a disability does not impact an individual's ability to perform the job in question, the ADA's prohibition on discrimination requires that people with disabilities be treated the same as others.

123. See 42 U.S.C. §12112(b)(5)(A) (1994) (defining discrimination to include the failure to make reasonable accommodations).

124. See Miller, supra note 116, at 521 (noting that the "individualized, person-by-person approach of the ADA is a departure from the traditional civil rights approach embodied in Title VII, which lays down broad and general rules that apply to all employees and employers across the board.").

125. See Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 DUKE L.J. 1, 10-11 (1996) (discussing how the "difference model" of discrimination differs from the "sameness model" in that it requires employers to treat some disabled persons differently than other individuals); see also Miller,
The case for reasonable accommodation as a means of establishing equality can be made in a number of different ways. First, the reasonable accommodation mandate can be seen as a means of enforcing the more traditional civil rights requirement that employers refrain from acting based on stereotype or bias. Since employers are often not consciously aware of their own biases with respect to disability, an edict simply prohibiting discrimination would likely have little effect on their conduct.\textsuperscript{126} The reasonable accommodation requirement can be seen as a means of dealing with this problem of subliminal discrimination. It makes the employer focus on the question of whether an employee with a disability can indeed perform the essential elements of the job. The process of considering whether an individual can be accommodated may well lead the employer to realize that the person would in fact be able to perform the job after certain adjustments are made. If, however, an employer is unwilling to make reasonable adjustments to accommodate a disability, then there is a good chance the employer is indeed biased against the plaintiff and it is appropriate to treat the employer as biased.\textsuperscript{127}

Second, and more importantly, the reasonable accommodation requirement can be viewed as a reflection of the fact that social institutions are not structured neutrally—they are shaped by and for a nondisabled majority.\textsuperscript{128} Social institutions that do not provide any accommodation to the needs of people with disabilities give a competitive edge to individuals who do not have disabilities and place those who do have disabilities in an inferior position. Thus, the establishment of equal opportunity requires alterations in existing norms. Seen in this light, the reasonable accommodation requirement is not a means of giving people with disabilities a special benefit or advantage; rather, it is a means of equalizing the playing field so that people with disabilities are not disadvantaged by the fact that the workplace ignores their needs.\textsuperscript{129}

The limitation permitting employers to withhold accommodations that impose an “undue burden” cabins this concept. The statute’s requirement of a level playing field is thus not absolute, in recognition of the fact that with respect to disability, the provision of equality does impose costs.\textsuperscript{130}

\textsuperscript{126} See Alexander v. Choate, 469 U.S. 287, 295 (1985) (noting that discrimination against the handicapped is “most often the product, not of invidious animus, but rather thoughtlessness and indifference.”).

\textsuperscript{127} See David Benjamin Oppenheimer, \textit{Negligent Discrimination}, 141 U. PA. L. REV. 899, 943-44 (1993) (viewing the reasonable accommodation requirement as a prohibition on discrimination through negligence). The ADA does, however, require the provision of reasonable accommodations even when the employer has a legitimate business reason for not wanting to do so, as long as they do not impose an undue burden on the employer.

\textsuperscript{128} See Chai Feldblum, \textit{Antidiscrimination Requirements of the ADA, in Implementing the Americans with Disabilities Act: Rights and Responsibilities of All Americans} 35, 36-37 (Lawrence O. Gostin & Henry A. Beyer eds., 1993); see also Burgdorf, \textit{The Special Treatment Model}, supra note 12, at 533 (describing the reasonable accommodation requirement as “a method for eliminating discrimination that inheres in the planning and organization of societal opportunities based on expectations of certain physical and mental characteristics”).


\textsuperscript{130} See id. at 152-53 (asserting that the undue burden limitation vitiates the ADA’s commitment to equality).
In the area of race and especially in the debate over affirmative action, conceptions of equality that require differential treatment have been hotly contested. Supporters of affirmative action maintain that American society continues to suffer from pervasive and often unconscious racism that cannot be eliminated by a simple statutory requirement of color-blind treatment. The problem is simply too ingrained in American society to be rooted out by a simple statutory mandate that everyone must cease to act in a racist manner. As Christopher Edley has argued "within a broader conception of discrimination, our attention to racial progress must not be diverted by scattered investigations of isolated cases of provable bigotry. We care, too, about the big picture, the larger forces sustaining racial inequality." Accordingly, the achievement of equality requires "active efforts attacking and preventing discrimination, not merely opposing it whenever one happens on it."

Affirmative measures to promote the employment of racial minorities are generally justified by reference to a past history of discrimination that has a continuing impact. Because social and economic institutions have been shaped by explicitly or implicitly biased practices, a requirement that blacks and whites be treated identically does not establish equality. The history and lingering effects of racism create structural conditions that disadvantage racial and ethnic minorities. Under this argument, equal opportunity requires affirmative efforts to overcome these disadvantages. As Charles Lawrence and Mari Matsuda have recently explained: "Social systems three centuries in the making can be dismantled only through affirmative action; it requires affirmative efforts to tear down the walls that white supremacy took centuries to build."

---


132. CHRISTOPHER EDLEY, NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE AND AMERICAN VALUES 112 (1996) (explaining that affirmative action is a prophylactic measure).

133. Id. at 113 ("By engaging in appropriate affirmative action an employer, for example, can help dismantle subtle forms of discrimination that occur in ill-conceived recruitment, hiring and promotion practice—discrimination that might otherwise go undetected or be detected but left unchallenged because of the transaction costs and imperfections in the enforcement system."). See also Linda Krieger, Civil Rights Perestroika: Intergroup Relations after Affirmative Action, 86 CAL. L. REV. 1251, 1258 (1998) ("Antidiscrimination policy grounded in an individualized search for discriminatory intent cannot be expected to succeed either in identifying and preventing intergroup bias or in managing social tendencies toward intergroup conflict.").

134. LAWRENCE & MATSUDA, supra note 131, at 26. Lawrence and Matsuda elaborate:

[T]he only remedy for racial subordination based on systematic establishment of structures, institutions, and ideologies is the systemic disestablishment of those structures, institutions, and ideologies. Radical affirmative action goes beyond the remedy of simply declaring that discrimination is illegal and pretending that our culture is color blind. It is not enough for the discriminator to remove his boot from the victim's throat and call it equal opportunity.

Id. at 27. See also MARTHA MINOW, NOT ONLY FOR MYSELF 153-54 (1997) ("In a society that has made race matter so pervasively, colorblindness simply leaves in place racialized thinking that benefits whites."); Susan Sturm & Lani Guinier, The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 CAL. L. REV. 953 (1996) (arguing that affirmative action is necessary because so-called meritocratic systems are in fact arbitrary and exclusionary).
There has been some confusion about whether the reasonable accommodation requirement of the ADA should be viewed as an "affirmative action" provision. In *Southeastern Community College v. Davis*, the Supreme Court referred to the modification of basic program requirements to accommodate a person with a disability as a form of "affirmative action." In *Alexander v.Choate*, however, Justice Marshall responded to criticism of this proposition by explaining that substantial or fundamental alterations of a program could be considered "affirmative action," but that the Court had not intended to classify reasonable accommodation as affirmative action. Commentators have also offered differing views on the issue.

Although there are clearly significant differences between policies that provide for racial preferences as a means of countering historic discrimination and the ADA's mandate of reasonable accommodation, both concepts rely on visions of equality that call for differential treatment of the subordinated individual or group. In fact, there are obvious parallels between the arguments for the two policies.

---

135. 442 U.S. 397 (1979) (finding that under some circumstances, a refusal to modify an existing program might become unreasonable and discriminatory).

136. *Id.* at 411. The Court suggested that in some instances modification of requirements would be unreasonable and discriminatory, while in other cases to insist on modification would be to require affirmative action that is not contemplated by the Rehabilitation Act. *Id.*


138. *Id.* at 300 n. 20; *see also* Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982) ("Use of the phrase 'affirmative action' in this context is unfortunate, making it difficult to talk about any kind of affirmative efforts without importing the special legal and social connotations of that term."). Under the Rehabilitation Act the distinction is of some importance as federal contractors are required to engage in affirmative action, while recipients of federal funds are not. *See* 41 C.F.R. § 60-741.21 (1978) (contractors); 45 C.F.R. § 84.12 (1977) (grantees). *Compare* 29 U.S.C. § 793 (1973) with 29 U.S.C. § 794 (1973). Applicable regulations, however, make both groups subject to the obligation to provide reasonable accommodations.


140. In this sense, one can agree both with Mark Weber and with Pamela Karlen and George Rutherglen. Professors Karlen and Rutherglen further argue that reasonable accommodation is more potent than affirmative action because it can actually require employers to alter job definitions and expectations about how jobs will be performed. *See* Karlen & Rutherglen, *supra* note 125, at 38-39. In contrast, affirmative action usually centers on hiring and promotion, but leaves the job itself unchanged. *Id.*

141. The arguments for reasonable accommodation as an aspect of equality also bear similarities to arguments in support of a disparate impact approach to achieving a level playing field. The Supreme Court has construed Title VII to prohibit the use of employment policies that have a disparate impact on the hiring and promotion of minorities that cannot be justified by business necessity. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). Congress codified this interpretation in the Civil Rights Restoration Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1074. Like the reasonable accommodation requirement, the disparate impact test can invalidate facially neutral policies
The concept that equality requires differential treatment, however, has long been contested in American society, as many have argued that different treatment is inherently unequal. Since its inception in the late 1960s, affirmative action has been controversial at every turn. Thus, the strategy of linking the goals of people with disabilities to a civil rights model does not simply place questions concerning the treatment of people with disabilities in an area of broad social consensus around civil rights. Instead, it situates the issue of access to employment for people with disabilities in the midst of a hotly contested and long-running battle. In short, with the passage of the ADA and the adoption of the civil rights model, people with disabilities find themselves on the front lines of a legal and cultural war.

For our purposes, the key point is that this war has not been going well in recent years for those asserting that equality requires differential treatment of socially subordinated groups. The passage of proposition 209 in California banning the use of racial preferences in higher education shows a renewed hostility to this proposition. More importantly, the federal courts, led by the Supreme Court, have grown increasingly wary of policies based on this richer notion of equality.

In the Bakke case decided in 1978, the Court splintered so thoroughly on the use of affirmative action by the University of California that it could not produce a majority view. In Richmond v. J.A. Croson Co., the Court struck down a minority set aside in municipal contracting, holding that all governmental classifications by race are subject to strict scrutiny. The Court rejected the argument that classifications which benefit groups that have historically been subjected to discrimination should be evaluated under a different standard than classifications that disfavor such groups. Although the Court initially held in Metro...
Broadcasting Inc. v. FCC\textsuperscript{147} that racial classifications used by the federal government to benefit minority groups were subject to only intermediate scrutiny, the Court reversed itself in Adarand Constructors, Inc. v. Pena,\textsuperscript{148} and held strict scrutiny to be applicable in this context as well.

Moreover, the Court has explained that strict scrutiny in this context can only be satisfied by a strong showing that there has been specific discrimination in the past and that the remedial plan is narrowly tailored to redress this history.\textsuperscript{149} Absent such a showing, the Court has concluded, affirmative action may “in fact promote notions of racial inferiority and lead to a politics of racial hostility.”\textsuperscript{150} Although the Court has applied a less restrictive standard in reviewing affirmative action programs by private actors,\textsuperscript{151} the distinction may merely result from the fact that the Supreme Court has not heard a case involving a Title VII challenge to an affirmative action program in twelve years.\textsuperscript{152}

In another line of cases, the Court has rejected the use of race as a criteria in establishing voting districts, rejecting the argument that the use of race is appropriate to ensure that African Americans can participate effectively in the political process. In Shaw v. Reno,\textsuperscript{153} the Court announced that it would apply strict scrutiny to congressional districting decisions made on racial lines.\textsuperscript{154} In a series of cases, the Court has rejected various arguments that particular districting schemes can be justified as narrowly tailored to serve a compelling government interest.\textsuperscript{155}

The Supreme Court's lead has been followed by many lower courts. Following Croson, Shaw and Adarand, lower courts have struck down plan after plan for affirmative action to redress past and present effects of racial discrimination. In Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of

\begin{itemize}
\item \textsuperscript{147} 497 U.S. 547 (1990).
\item \textsuperscript{148} 515 U.S. 200 (1995).
\item \textsuperscript{149} Richmond v. Croson, 488 U.S. at 500-506 (1989). After Croson, lower courts have split over whether the specific entity engaging in affirmative action must have discriminated in the past or whether government entities can use affirmative action to remedy discrimination by private actors. See Ian Ayres & Frederick Vars, When Does Private Discrimination Justify Public Affirmative Action, 98 COLUM. L. REV. 1577 (1998).
\item \textsuperscript{150} Croson, 488 U.S. at 493.
\item \textsuperscript{152} In fact, civil rights advocates have taken steps to avoid such cases being heard by the court. One such case was settled at the Supreme Court level at the urging of civil rights advocates in order to keep the matter off the court's docket. Piscataway Township Board of Educ. v. Taxman, 118 S.Ct. 595 (1997) (dismissing writ of certiorari). In the Piscataway case, the Third Circuit held that an affirmative action plan violates Title VII if its purpose is to promote diversity, rather than remedy past discrimination. Taxman v. Board of Educ. of Township of Piscataway, 91 F.3d 1547 (3rd Cir. 1996) (en banc), cert. granted, 117 S.Ct. 2506 (1997). See Joan Biskupic, On Race, a Court Transformed; Affirmative Action Defenders Now Avoid Justices, WASH. POST, Dec. 15, 1997, at A1 (discussing efforts of civil rights advocates to avoid the Supreme Court). Recently, advocates persuaded another defendant not to seek certiorari following a decision striking down an affirmative action plan. See Tony Mauro, Civil Rights Groups Avoiding High Court, USA TODAY, Feb. 8, 1999, at 2.
\item \textsuperscript{153} 509 U.S. 630 (1993).
\item \textsuperscript{154} Id. at 644.
\end{itemize}
Philadelphia, the Third Circuit struck down Philadelphia's system of setting aside a portion of construction contracts for minority contractors. The court found it unnecessary to determine if the City had a past history of discrimination because the program was not narrowly tailored to remedy such discrimination. In Middleton v. City of Flint, the Sixth Circuit sustained a challenge to an affirmative action plan providing for quotas in promotions in a police department. As in the Philadelphia case, the court found the plan to be insufficiently tied to a demonstrable history of discrimination and insufficiently tailored to remedy the harms identified. Similar challenges to affirmative action programs have been successful in federal courts around the country.

The clear trend in decisions regarding affirmative action shows an increasing judicial skepticism toward the proposition that differential treatment of minority groups may be necessary to establish equal opportunity and equal access. As one commentator has stated, the judiciary has shown "growing discomfort with the slightest hint of special rights or preferences." This skepticism is reflected in the trend toward ratcheting up the showing needed to support affirmative action programs. The courts have firmly rejected claims that some kind of generalized mistreatment of minority groups in the past will justify differential treatment by government entities.

This same skepticism of claims that equal opportunity requires that protected groups be treated differently underpins many of the negative trends in the case law dealing with the ADA. Although the legal context of these cases is extremely different from the cases dealing with affirmative action—courts are called upon to enforce a statutory mandate requiring differential treatment, rather than to pass judgment on the legality of differential treatment—the underlying issues concerning equality are similar. Simply put, many judges are not strongly imbued with the notion that basic civil rights are at stake in ADA cases. Many do not harbor a sense that the employer who refuses to provide an accommodation has in fact violated someone's basic civil rights. Thus, the civil rights model has, to date, been only a limited success—judges are reluctant to label employers who fail to provide accommodations as wrongdoers for carrying on their business as usual.

In addition, the ADA impinges on the long held doctrine of at-will employment, under which employers are free to make arbitrary, absurd or

---

156. 91 F.3d 586 (3d Cir. 1996)
157. Id. at 605.
158. 92 F.3d 396 (6th Cir. 1996).
159. Id.
160. See Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) (public school admissions policy); Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998) (FCC rules requiring broadcasters to seek minority applicants for jobs); Engineering Contractors Ass'n v. Metropolitan Dade Cty., 122 F.3d 895 (11th Cir. 1997) (county construction contracts); Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996) (law school admissions). But see Boston Police Superior Officers Federation v. City of Boston, 147 F.3d 13 (1st Cir. 1998) (sustaining use of racial preference in police promotion as based on compelling interest).
161. See Adams, supra note 143, at 1463.
seemingly ridiculous demands on their employees. Although at one level the requirement of “reasonable” accommodation appears difficult to dispute—who can object to a requirement that people act “reasonably”?—on another level, American employers have long been free to be unreasonable and have zealously guarded this prerogative. If one proceeds from the premise that employers are at liberty to be “unreasonable,” then the refusal to provide an accommodation, however reasonable, may not appear to be a heinous act. Indeed, for this reason, even requirements that people be treated the same may be labeled “special” rights. In a context in which employers have complete control, the protection from discharge due to race, gender, disability or sexual orientation can be seen as exceptional. Hence, even civil rights protections without affirmative requirements have provoked ire.

Finally, the conception of equality reflected in the reasonable accommodation requirement of the ADA is not only controversial, it is threatening. Acceptance of the ADA’s vision of equality can have consequences beyond the disability context. If differential and individualized treatment is necessary for the establishment of equal opportunity for people with disabilities, it may also be necessary for other groups, including women and minorities. In fact, several commentators have made just this point, arguing that the ADA’s insights concerning equality should be made applicable in other areas. Thus, the ADA introduces concepts that, once accepted, are difficult to contain.

III. CONSTRUING THE ADA AS A PUBLIC BENEFITS LAW

The failure of many judges to fully embrace the concept of equality reflected


163. See Estlund, supra note 162, at 1679 (“In the world of at-will employment, simple negligence, lack of notice or of warnings, personal favoritism, pique, or sloppiness in evaluation or investigation gives no basis for relief.”).

164. See id. at 1681 (“Employees who are not ‘protected’ [by antidiscrimination] laws may perceive fairness itself as a special privilege from which they are excluded.”).

165. See Peter Rubin, Equal Rights, Special Rights and the Nature of Antidiscrimination Law, 97 MICH. L. REV. 564 (1998) (discussing how requirements that people be treated the “same” can be viewed as “special” treatment).

166. For example, Pamela Karlen and George Rutherglen have observed that:

The insights gained from fleshing out the meaning of reasonable accommodation in disability cases present an opportunity to rethink employment discrimination law more generally. . . . A revised model of affirmative action can be developed from this understanding of jobs as contingent assemblies of tasks and responsibilities that can be changed to accommodate the needs of individual employees.

. . . If the ‘heart’ of equal treatment is the simple command to treat persons as individuals, not as simply components of a racial, religious, sexual or national class, then antidiscrimination law should allow employers to respond to the particularized needs of individual women and racial minorities for adjustments to job requirements that incumbent male or white workers have satisfied.

Karlen & Rutherglen, supra note 125, at 39-48; see also Miller, supra note 116, at 526 (“The disability civil rights paradigm can provide the model for an individualized, flexible and contextual approach to civil rights enforcement.”).
in the ADA has led courts to construe the statute in ways that make no sense as a matter of civil rights policy. If judges do not view the ADA as a mandate for equality, the question remaining is how do they view the statute? Is there any coherent set of principles that guides their interpretation of the ADA? The answer is that in the absence of a grounding in principles of equality, the ADA can only be read as a means of dispensing subsidies to a targeted group of people.167 Seen from this vantage point, the case law has a certain coherence, although not the coherence intended by the framers of the law.

Viewed from the perspective of public benefits law, ADA plaintiffs do not appear to judges as potential victims. Rather, they appear as supplicants. In dispensing benefits, the moral worth and need of the applicant are traditionally viewed as paramount.168 ADA decisions tend to focus on threshold issues because judges tend to be concerned with the character of the plaintiff, rather than the conduct of the defendant. Thus, the animating force behind the judicial estoppel cases is, in part, a belief that disability benefits recipients are already being “taken care of” by the social welfare system. The attempt to maintain an ADA case is seen as a form of double dipping. Similarly, the cases imposing strict definitions of disability can be seen as evaluating the extent to which the plaintiff needs the job in question. If the plaintiff is able to perform many other jobs, then the “benefit” of accommodation may appear unnecessary because the plaintiff can simply work somewhere else.

Reflecting this view, both the Fifth and the Tenth circuits have reproached plaintiffs who failed to show that their impairments had a broad negative effect on employability: “We refuse to construe the . . . Act as a handout to those who are in fact capable of working in substantially similar jobs.” Presumably, the “handout” to which the courts refer is the accommodation that is requested. The courts’ anger stems from the belief that the plaintiff is making demands on his or her employer.

167. Academic critics of the ADA have made this point explicitly. Carolyn Weaver has argued that the reasonable accommodation requirement “distorts a civil rights measure into what is essentially a mandated benefits program for the disabled.” Weaver, supra note 103, at 3, 5. Walter Oi has argued that reliance on the reasonable accommodation requirement of the ADA is another form of dependence on government entitlements. Walter Oi, Disability and a Workfare-Welfare Dilemma, in DISABILITY AND WORK, supra note 90, at 31, 43-45.

John M. Vande Walle also views the ADA from this perspective. See John M. Vande Walle, In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA’s Employment Protection for Persons Regarded as Disabled, 73 CHI.-KENT L. REV. 897 (1998). Vande Walle argues that the ADA “primarily services the purposes of distributive justice in that it establishes criteria that identify a group that needs or merits a greater distribution of societal goods” and that it requires redistribution “because of the employee’s status, not because the employer has committed a moral wrong.” Id. at 925.

168. See JOEL HANDLER & YESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY (1991); DEBORAH STONE, THE DISABLED STATE (1984). Government benefit programs have long sought to enforce strict definitions of disability as a means of distinguishing the “worthy” poor. See also Vande Walle, supra note 167, at 925 (describing the view that the central inquiry under the ADA should focus on whether the plaintiff is deserving of protection).

169. See, e.g., Vande Walle, supra note 167, at 936-37 (arguing that prohibition on discrimination against people perceived as disabled should be construed to protect people who need the job in question, but not those who can find other work).

170. Sutton v. United Airlines, 130 F.3d 893 (10th Cir. 1997), aff’d, 527 U.S. ___, 119 S.Ct. 2139 (1999); Hileman v. City of Dallas, 115 F.3d 352 (5th Cir. 1997).
when he could be simply looking for another job. Clearly, it is the courts that are construing the ADA as a "handout," not the plaintiffs in these cases. Thus, the emphasis that courts have placed on the definition of disability is much more akin to determinations concerning categorical eligibility for benefits programs then it is to the elements of a civil rights claim.\(^7\)

When viewed from a civil rights perspective, however, it is apparent that the definitional test ought not to be a stringent one. After all, a finding that a person is protected by the ADA only leads to the central question of whether the employer has improperly discriminated against the individual. In other words, it leads to an individualized inquiry into whether the particular employer has treated a particular individual in ways that reflect the biases that the ADA addresses. Moreover, the goal of providing equal access to the job market suggests that to the extent possible under the reasonable accommodation principle, the individual should have access to the entire range of jobs, not simply a means of obtaining some minimal foothold in the labor market. Thus, if an individual needs accommodation to perform a class of jobs, it should not matter whether there are other jobs that he or she could do.\(^7\)

The goal of equal opportunity suggests that the accommodation should be available to provide access to those jobs.

In contrast, the courts have seized upon the statutory definition of disability to erect a formidable categorical barrier that often has the effect of shielding the employer's conduct from scrutiny. In the view of many courts, if the plaintiffs' impairments do not appear serious enough, then there is no basis for distinguishing

---

171. The view of the ADA as simply a public benefits program is also apparent in a number of decisions addressing the question of whether the ADA is a valid exercise of Congress' power under Section Five of the Fourteenth Amendment. Cf. City of Boerne v. Flores, 117 S.Ct. 2157 (1997) (holding that the Religious Freedom Restoration Act is not a valid exercise of Congress' power under the Fourteenth Amendment). The Fourth Circuit concluded that in prohibiting states from charging fees for the provision of handicapped parking stickers, the ADA simply creates "a positive entitlement to a free handicapped parking space," rather than a guarantee of equal access. Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999). Similarly, Judge Cox of the Eleventh Circuit perused the legislative history of the ADA and concluded that despite Congress' protestations, the true basis of the statute is simply to help people with disabilities and to get them off of the public benefit rolls: "Altruistic and economic concerns motivated this Act—not defense of the Constitution." Kimel v. Florida Board of Regents, 139 F.3d 1426, 1449 (11th Cir. 1998) (Cox, J., concurring in part and dissenting in part), cert. granted on other gds, 67 USLW 3348 (Jan. 25, 1999); see also Vande Walle, supra note 167, at 928 (arguing that the ADA grows out of efforts to aid the handicapped, rather than the civil rights movement).

172. Courts have inappropriately focused on how many jobs in the economy the plaintiff can perform, despite his or her impairment, rather than the question framed by EEOC regulations—whether the plaintiff is precluded from performing a class of jobs. See, e.g., Tardie v. Rehabilitation Hospital, 168 F.3d 538, 542 (1st Cir. 1999) (finding no disability where "there are vast employment opportunities" still available to the plaintiff). Cf. 29 C.F.R. § 1630.2(j)(3) (2000). Under the EEOC's approach, an individual whose impairment restricts the ability to perform a class of jobs is "substantially" limited in a major life activity, even if there are other jobs that the person can do without restrictions. Thus, that individual could draw upon the reasonable accommodation requirement of the ADA to provide access to the full spectrum of jobs. Many courts, however, focus on the residuum of jobs available to the plaintiff, an approach that is similar to the inquiry undertaken by the Social Security Administration in awarding income support payments. 20 C.F.R. § 404.1520 (2000) (process for considering whether there are significant numbers of jobs that the claimant can perform). The majority opinion in Sutton, unfortunately, makes the same mistake that many of the lower courts have made. Sutton, 119 S.Ct. at 2151 ("If jobs utilizing the individual's skills (but not perhaps his or her unique talents) are available, [that individual] is not precluded from a substantial class of jobs.").
them from the general mass of workers who are subject to the vicissitudes of at-will employment and that there is no reason to grant them the "benefit" of accommodation and protection from discharge.

When plaintiffs are not seen as members of this category deemed worthy of the "special benefits" conferred by the ADA, they appear to judges merely as a bunch of whiners making excuses for poor performance. The request for accommodations is seen as an attempt to capitalize on the individual's medical condition. This perception is ironic in view of the fact that on another level, ADA plaintiffs can be seen as individuals who are struggling to do exactly what in other contexts society demands—they seek to work, rather than rely on public benefits. Moreover, absent a clear understanding that issues of equality are at stake, ADA cases appear as a tangle of petty disputes that clutter up the dockets of federal courts. Federal judges are generally imbued with a strong sense that their role is to resolve "important" cases, rather than run of the mill disputes that are more appropriately heard in state courts. In recent years, federal judges have complained openly about statutes that create new federal causes of action without, in their view, sufficient justification. Although specific statutes are rarely identified, I suspect that many federal judges would count the ADA as among the culprits. In sum, rather than viewing ADA cases as disputes about fundamental civil rights, many judges treat them as requests for special benefits made by employees who are performing poorly. They are both unsympathetic to these

173. See e.g., Hileman v. City of Dallas, 115 F.3d 352 (5th Cir. 1997); Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1997).

174. The judicial estoppel cases most clearly reflect the view that ADA plaintiffs are unscrupulous people seeking to manipulate the system to their own advantage. See, e.g., McNemar v. The Disney Stores, 91 F.3d 610, 617-18 (3d Cir. 1996), cert. denied, 117 S.Ct. 958 (1997) (accusing plaintiff of "playing fast and loose with the courts"); Hindman v. Greenville Hosp. Sys., 947 F. Supp. 215, 223 (D.S.C. 1996), aff'd F.3d (4th Cir. 1997) ("This court . . . will not allow [the plaintiff] to treat her disability as a garment that she can don and remove as the mood strikes her.").

175. See Miller, supra note 8, at 225 (the ADA protects "those who want to work, not those who want to be malingerers").


177. See Stephen Reinhardt, Whose Federal Judiciary Is It Anyway?, 27 LOYOLA L.A. L. REV. 1, 3 (1993) (describing and critiquing the view that "federal judges are too important for routine matters that only affect ordinary persons").

178. The Judicial Conference has recommended that "Congress should be encouraged to exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justifies federal interest." UNITED STATES JUDICIAL CONFERENCE, LONG RANGE PLAN FOR THE FEDERAL COURTS 28 (1995) (recommendation 6). Although the commentary to the recommendation cites the vital role "of the federal courts in promoting civil rights," and notes that this role should continue, it also urges that Congress should rely on state courts to a greater extent than it has to enforce federal rights. Id.

179. Judge Reinhardt has referred to Justice Scalia's view that federal courts should be reserved for "important" cases, rather than "mundane matters" such as employment discrimination. See Reinhardt, supra note 177, at 2. Judge Tjoflat of the Eleventh Circuit has proposed that employment discrimination cases be resolved by specialized courts in order to reduce the workload of the judiciary. Gerald Tjoflat, Testimony Before the Commission on Structural Alternatives for the Federal Courts of Appeals, 32 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD: A FIVE YEAR RETROSPECTIVE 5 (1998) <http://www.uscourts.gov/hearings/atlanta/realign.htm>. He notes, however, that such cases are not "any less deserving of deliberate judicial attention" than other matters, but that the law is "well-settled" in the area and that these cases have accounted for much of the growth in the case load. Id.
requests and, at some level, annoyed that Congress has compelled the federal judiciary to hear them. The result has been a body of case law that is disastrous for ADA plaintiffs.

IV.

CONCLUSION

The enactment of the ADA shows the great power of analogy. By analogizing the issues facing people with disabilities to the problems faced by racial minorities, advocates were able to harness some portion of the persuasive power of the civil rights movement. The analogy provided a powerful new way of thinking and talking about the problems faced by people with disabilities and suggested a series of concrete and achievable legislative goals.

The case law interpreting the ADA, however, has made clear that the analogy has certain limitations and disadvantages. The risk involved in a strategy that calls for convincing mainstream America that people with disabilities are comparable to racial minorities seems obvious: White America has only sporadically and superficially been interested in addressing racial inequalities in society. Putting people with disabilities on the same footing as racial minorities places them in an unenviable situation.

This reality may have been obscured at the time the civil rights strategy for people with disabilities was formed. The cause of racial equality seemed a clear model for success. The real story, however, was far more complex. The sweeping language of the Supreme Court in civil rights decisions often has not led to comparable changes in society. Moreover, over time a backlash has set in and the series of broad victories in the courts has given way to a wave of losses. In actuality, as civil rights leaders have long known, the achievement of racial equality is a long term goal that society moves toward only tentatively, with many barriers along the way.

The same is true with respect to civil rights for people with disabilities. The case law makes clear something that should have been apparent when the statute was enacted—the signing of the Act was not the end of the struggle for civil rights for people with disabilities. Rather, it was an interim victory that shifted and redefined the terms of the battle. The drafters of the ADA were aware of this

180. For discussions questioning whether the integration strategy of the civil rights movement has promoted equality, see Derrick Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L. J. 470 (1976); Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978); see also Cheryl Harris, Whiteness at Property, 106 HARV. L. REV. 1707, 1757 (1993) (describing Brown’s legacy as “mixed” because it did not address government’s responsibility to eradicate inequalities in resource allocation that support white domination); Kimberle Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimization in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1377-79 (1988) (arguing that the civil rights movement removed most of the formal barriers and symbolic manifestations of racial subordination, but left much of the reality of white domination intact).

181. See Derrick Bell, And We Are Not Saved: The Elusive Quest For Racial Justice 59-74 (1987) (discussing disappointment of civil rights activists with reliance on the judiciary).

182. See supra text accompanying notes 143-60.
reality. They recognized the critical importance of judicial interpretation and the inhospitable orientation of the Supreme Court.183 To guard against crabbed judicial interpretations, they drafted the ADA and the accompanying committee reports with painstaking care and attention to detail.184

In the end, however, laws are subject to interpretation. Judges engaged in interpretation are inevitably affected by the broader social and political environment, even as they disclaim such influences. Only a broad-based social consensus in support of the principles asserted in the ADA will make the promise of the statute a reality.185 Although enactment of the law and efforts to enforce it can play an important role in helping to create such a consensus, neither ringing statutory language, nor seemingly tough provisions for judicial enforcement are sufficient. The ultimate question of whether the ADA has the transformative effect that its supporters predicted will not be resolved in the courtroom.

Lastly, we should not forget that the ADA and the civil rights model are strategic tools for achieving change, rather than ends in themselves. The search for new tools and analogies should continue.186 For example, it may be that the goal of protecting people with disabilities from discrimination in the workplace is itself connected to larger issues about workers' rights. Strategies that emphasize the universal aspects of the problems faced by people with disabilities, rather than their uniqueness, may complement the approach taken by the ADA.187

In sum, there is plenty of work to be done, both to make the vision of the ADA a reality and to devise new strategies to provide people with disabilities with the fullest range of employment opportunities is possible.

---

183. At the time that Congress enacted the ADA, the Supreme Court had already revealed its tendency toward narrow interpretation of civil rights laws. See, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). In fact, at the same time that Congress enacted the ADA, it was also considering the bill that ultimately became the Civil Rights Restoration Act of 1991, a measure designed to overturn narrow interpretations of Title VII. See Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

184. See Burgdorf, The Americans With Disabilities Act, supra note 83 (contrasting the detail of the ADA with the broad language of other civil rights statutes).

185. See Shapiro, supra note 97, at 134 (noting that enactment of the ADA was not preceded by the same kind of social upheaval that led to the enactment of the Civil Rights Act of 1964).

186. See Weber, supra note 139, at 123.

187. For example, the Family and Medical Leave Act, Pub. L. No. 103-3, 29 U.S.C. § 2601, is built on the idea that all workers, instead of a narrowly defined group, should be permitted to take leave when various exigencies arise; see also Estlund, supra note 162, at 1678-82 (arguing for protections for all employees against wrongful discharge, in part to alleviate resentments caused by targeted antidiscrimination laws).