Has the Americans with Disabilities Act Reduced Employment for People with Disabilities

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REVIEW ESSAY

Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?


Samuel R. Bagenstos†

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A debate currently rages in the legal and economic literature concerning the effects of the Americans with Disabilities Act (ADA) on the employment of people with disabilities. The debate is fueled by a striking fact, which virtually no knowledgeable observer disputes: the ADA has failed significantly to improve the employment position of people with disabilities. Indeed, by virtually all reports the employment rate for disabled Americans has declined over the last fourteen years.\(^1\) A number of scholars have provocatively argued not only that the employment position of people with disabilities has deteriorated, but also that the ADA has in fact caused that deterioration.\(^2\) At least one of these scholars has broadly asserted, based on those arguments, that the statute is clearly counterproductive—"a striking example of the law of unintended consequences"—and should be repealed.\(^3\) Other scholars have rushed to defend the statute against that charge of perverse results and to offer alternative explanations for the post–ADA decline in the employment rate of people with disabilities.\(^4\)

The edited volume, *The Decline in Employment of People with Disabilities: A Policy Puzzle*,\(^5\) may be the most significant entry in this debate to date. Edited by two leading disability researchers, the book brings together key proponents of each of the competing explanations for why employment has fallen among people with disabilities. After an

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1. See infra Part I.
introduction, a chapter that provides a “user’s guide” to the array of disability employment statistics that are reported by public agencies, and a chapter examining how widespread is the problem of employment decline across the population of disabled Americans, each successive chapter analyzes the empirical evidence relating to one of the possible reasons for the employment decline (changes in the labor market, the health care system, or the severity of disabilities in the population; the enactment of the ADA; the use of inappropriate measures of disability employment; and the expansion of eligibility for Social Security Disability Insurance (SSDI)). The editors conclude with a chapter that offers a critical review of the evidence for each of the proffered explanations.

In this review essay, my agenda is twofold. First, I offer my own analysis of the evidence regarding the employment effects of the ADA. In Part I, I describe the overall decline in employment for people with disabilities throughout the 1990s. I then turn, in Part II, to examining whether the enactment and implementation of the ADA caused that decline. In brief, though I find it hard to disagree with the claim that the statute (at least initially) imposed some negative pressure on employers’ decisions to hire some people with disabilities, critics of the statute have argued well beyond their data in urging that the ADA be abandoned. To the contrary, the data suggest that much (though probably not all) of the employment decline for people with disabilities resulted from factors extrinsic to the statute. In particular, I find quite plausible the argument that the 1990-1991 recession pushed an unusually large number of people with disabilities out of the workforce and onto the SSDI rolls—an argument


8. See Andrew J. Houtenville & Mary C. Daly, Employment Declines among People with Disabilities: Population Movements, Isolated Experience, or Broad Policy Concern?, in DECLINE, supra note 5, at 87.

9. See David C. Stapleton et al., Have Changes in the Nature of Work or the Labor Market Reduced Employment Prospects of Workers with Disabilities?, in DECLINE, supra note 5, at 125.


12. See Thomas DeLeire, The Americans with Disabilities Act and the Employment of People with Disabilities, in DECLINE, supra note 5, at 259; Peter Blanck et al., Is It Time to Declare the ADA a Failed Law?, in DECLINE, supra note 5, at 301 [hereinafter DeLeire, The Americans with Disabilities Act].

13. See Douglas Kruse & Lisa Schur, Does the Definition Affect the Outcome?, in DECLINE, supra note 5, at 279.

pressed by the economists John Bound, Timothy Waidmann, David Autor, and Mark Duggan—though it is difficult empirically to disentangle that phenomenon from the effects of the ADA. Moreover, whatever the ADA’s short–term effects, it seems likely that the statute’s net long–term effects on employment for people with disabilities will be positive. Nonetheless, I find unpersuasive two key arguments offered by ADA defenders such as the legal scholar Peter Blanck and the economists Douglas Kruse and Lisa Schur: first, that the extant empirical studies are irrelevant because they employ the “wrong” definition of disability; and second, that the measured decline in employment reflects nothing more than compositional changes in the population that self-reports disability.

Second, I offer (in Part III) a brief commentary on the politics of this empirical dispute. Critics of the ADA have cited the statute as a prime example of the perverse results engendered by attempts to impose redistributive mandates on businesses. In so doing, as I have suggested, they have gone well past the data in sweepingly condemning the statute. But defenders of the ADA, recognizing the political power of the perverse results argument, have not stopped by noting that the critics draw conclusions that go beyond their data. Instead, those defenders have rushed to discredit the very data on which the critics have relied. But in doing so, they have been forced to endorse an understanding of disability and of the purposes of disability discrimination law that is at odds with bedrock principles widely endorsed by participants in the disability rights movement. For these ADA defenders, the goals of integration and empowerment for people with disabilities seem to have been displaced by a commitment to one specific means—the ADA—of achieving those goals. Although the ADA is exceptionally valuable, disability rights advocates will never come close to achieving their ultimate goals unless they honestly confront both the strengths and the limitations of the statute’s approach.15

I.

THE DECLINE IN EMPLOYMENT FOR PEOPLE WITH DISABILITIES FOLLOWING ENACTMENT OF THE ADA

In this Part, I review the basic employment data for people with disabilities since the enactment of the ADA. Simply describing the employment picture for people with disabilities is harder than it sounds. “Disability” can be defined in a variety of ways,16 and (as I show in Section

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15. I elaborate further on the limitations of the ADA’s antidiscrimination approach, and of the kinds of policy tools that will be necessary to achieve the goals articulated by disability rights advocates, in Samuel R. Bagenstos, The Future of Disability Law, 114 YALE L.J. 1 (2004).

A) the available data come from a number of different surveys that use
different definitions. But (as I show in Section B) the overall trend is clear.
People with disabilities are employed at vastly lower rates than are the
nondisabled, and a number of studies have shown that employment for
people with disabilities declined throughout the 1990s. In their “User’s
Guide” chapter, Professor Burkhauser and his colleagues report data
generated from a number of surveys that employ a variety of disability
definitions. Under all of these definitions, the basic pattern is one of
decline in the employment of people with disabilities. And as Andrew
Houtenville and Mary Daly explain in their chapter, that decline “was
broad-based, present in a wide range of demographic and educational
subgroups.”

A. The Different Definitions of Disability

The ADA defines disability as “a physical or mental impairment that
substantially limits one or more . . . major life activities,” “a record of such
an impairment,” or the status of “being regarded as having such an
impairment.” There are three major sources of comprehensive
government-compiled disability statistics: the Centers for Disease Control’s
National Health Interview Survey (NHIS); the Census Bureau and Bureau
of Labor Statistics’ joint Current Population Survey (CPS); and the Census
Bureau and Bureau of Labor Statistics’ joint Survey on Income and
Program Participation (SIPP). Unfortunately, these sources do not measure
disability according to the ADA’s definition. Instead, they use a number
of different definitions, none of which captures everyone who is covered by
the ADA’s disability definition, and some of which also capture individuals
who are not covered by that definition.

Thus, the NHIS uses at least two measures of disability: the
“impairment” measure, which asks only whether the subject has a
diagnosed impairment but does not ask whether that impairment causes

17. See, e.g., National Org. on Disability, 2000 N.O.D./Harris Survey of Americans with
Disabilities 27 (2000) (in 2000, only 32% of working age people with disabilities reported being
employed, in contrast to 81% of the comparable population without disabilities).
18. See, e.g., H. Stephen Kaye, Improved Employment Opportunities for People with
people with disabilities, and increasing employment gap between people with and without disabilities,
through 2000 using a variety of measures).
20. Houtenville & Daly, supra note 8, at 88.
22. See, e.g., Nat’l Council on Disability, Improving Federal Disability Data (2004);
functional or work–related limitations;²³ and the "work limitation" measure, which asks whether the subject has an impairment or health problem that keeps the subject from working at a job or business or that limits the kind or amount of work the subject can do.²⁴ When compared with the disability definition in the ADA, these measures are underinclusive in one significant respect: they fail to capture individuals who have no current substantially limiting impairment but who have a record of such an impairment or are regarded by others as having such an impairment. But the "impairment" measure probably also captures some people who do not satisfy the ADA's definition, because that measure includes anyone who has an impairment, whether or not it substantially limits any major life activity. The "work limitation" measure, by contrast, is clearly narrower than the ADA's disability definition, because it does not embrace those individuals whose impairments substantially limit major life activities outside, but not inside, the workplace.²⁵

The CPS uses two definitions that focus on the ability to work: the "work limitation" measure like that used by the NHIS;²⁶ and the "one–year limitation" measure, which identifies those individuals who have met the work limitation standard in two consecutive CPS interviews administered one year apart from one another.²⁷ Both of these measures are narrower than the ADA's disability definition, because they do not consider out–of–workplace major life activities, nor do they consider whether an individual has a record of a disability or is regarded as having one.

Finally, the SIPP uses at least three disability definitions: the "work limitation" measure as in the other surveys;²⁸ the "housework limitation" measure, which asks whether the subject has a health condition that limits the kind or amount of work the subject can do around the house;²⁹ and the "other limitation" measure, which asks whether the subject has a health condition that causes difficulty in any of a variety of activities of daily life.³⁰ Of these, only the "other limitations" measure comes close to considering the full range of "major life activities" that might be considered under the ADA's disability definition—though it fails to account for those who have merely a record of a disability or are regarded as having one. In another respect, however, the "other limitations" measure goes beyond the

²⁴. See id.
²⁵. See infra Part II–B–I for further discussion of the differences between the "work limitation" measure and the ADA's definition of "disability."
²⁷. See id. at 30.
²⁸. See id.
²⁹. See id.
³⁰. See id.
ADA’s definition by including people who experience limitations, though not “substantial” limitations, in those major life activities.

B. The Consistently Negative Findings

Despite the variation in the definitions of disability used in various studies, there is no mistaking the overall trend. Strikingly, men with disabilities as measured under each of these different definitions experienced significant decreases in their employment rate following the enactment of the ADA. The broadest disability definitions illustrate the point. For men with disabilities as gauged by the NHIS’s broad “impairment” measure, the employment rate fell from 84.7% in 1990 to 77.3% in 1996, the last year for which data are available.\(^3\) For men with disabilities as gauged by the SIPP’s somewhat less broad “other limitation” measure, the employment rate fell from 53.5% in 1990 to 50.1% in 1996.\(^3\)

Similarly large declines can be seen when more narrow disability definitions are used. Consider the trend for men with disabilities as gauged by the narrower “work limitation” measure: The NHIS reported a drop in the employment rate for this population from 50.4% in 1990 to 44.4% in 1996;\(^3\) the CPS reported a drop from 42.1% in 1990 to 33.1% in 2000;\(^4\) and the SIPP found a drop from 53.3% in 1990 to 46.6% in 1996, the last year for which information is available.\(^5\) For men with disabilities, as gauged by the CPS’s even narrower “one–year limitation” measure, the employment rate fell from 23% in 1990 to 17.1% in 1999.\(^6\) And for men with disabilities as gauged by the SIPP’s “housework limitation” measure, the employment rate fell from 45.4% in 1990 to 39% in 1996.\(^7\)

The results for women are not as stark, but they are also generally negative. Using the broad “impairment” measure, the NHIS reported a (tiny) drop in the women’s employment rate from 63.9% in 1990 to 63.4% in 1996.\(^8\) Using the “work limitation” measure, the NHIS, CPS, and SIPP all reported somewhat larger drops in employment for women with disabilities: the NHIS reported a reduction from 40.7% in 1990 to 38.5% in 1996,\(^9\) the CPS a reduction from 34.9% in 1990 to 32.6% in 2000,\(^10\) and the
SIPP a reduction from 42.7% in 1990 to 41.4% in 1996. The trend for women identified under the CPS's "one-year limitation" measure is even more strongly negative (the employment rate in this population fell from 22.2% in 1990 to 17.3% in 1999), as is the trend for women identified under the SIPP's "housework limitation" measure (from 43% in 1990 to 39.3% in 1996). But the SIPP found that the employment rate actually increased among women with a disability as defined by the "other limitation" measure (from 49% in 1990 to 51.7% in 1996).

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These data are especially notable because two events occurred in the 1990s that could be expected to increase employment for people with disabilities significantly. First, the ADA was enacted in 1990; the statute became effective for employers with twenty-five or more employees in 1992 and for employers with fifteen or more employees in 1994. The ADA's backers urged with considerable force that the statute would improve the employment position of people with disabilities. Second, the economy in general expanded rapidly during the 1990s, and the overall employment rate improved concomitantly. But neither of these two phenomena succeeded in improving the employment rates for people with disabilities. As a result, Burkhauser and his colleagues observe, the relative employment rates of both women and men with disabilities vis-à-vis those without them "declined dramatically." And as Houtenville and Daly show in their chapter, the overall picture of employment decline is replicated in each of the major demographic subgroups of Americans with disabilities. Using the "work limitation" definition, employment declined among people with disabilities in all age groups, among whites and nonwhites, and at all levels of educational attainment.

It is these basic facts that create the "policy puzzle" to which the

41. See id.
42. See id.
43. See id.
44. See id.
48. Burkhauser et al., User's Guide, supra note 7, at 41; see also KAYE, supra note 18, at 10 (finding "statistically significant upward trends in the employment gap" between those with and without disabilities throughout the 1990s); Goodman & Waidmann, supra note 14, at 341 ("[F]or both men and women, the employment rate of people with disabilities was falling relative to that of people without disabilities during the economic expansion of the mid and late 1990s.").
49. See Houtenville & Daly, supra note 8, at 96-98.
50. See id. at 98.
51. See id. at 100.
subtitle of Decline refers. Why did employment rates for people with disabilities decline during the strongest overall employment boom in recent history? And why was the implementation of the ADA—which was, after all, intended to open up employment opportunities for people with disabilities—powerless to stop or reverse that decline? The balance of the Decline book considers possible answers to those questions.

II.
IS THE ADA THE CULPRIT?

In the legal and economic literature, a number of analysts argue that it is no accident that employment rates for people with disabilities declined following implementation of the ADA. Indeed, they contend, it is the ADA that has depressed employment for people with disabilities. This argument, pressed by Thomas DeLeire in his Decline chapter, has impressive theoretical and empirical support. But a number of other chapters give reasons for rejecting the conclusion that the ADA has caused the decline in employment among people with disabilities.

In this Part, I review these conflicting contentions and find serious problems with the arguments on both sides of the debate. Those who have elaborated the perverse-results critique of the ADA have been too quick to dismiss indications that factors extrinsic to the ADA are responsible for much of the employment decline and that the statute will in the long run have a favorable effect on employment among people with disabilities. In urging that the ADA be abandoned, they have drawn conclusions that are not supported by their data. But commentators who have rejected the perverse-results critique, too, often rest on an unpersuasive parsing of the data. Moreover, they have relied too heavily on a view of disability and of the goals of disability rights law that is in serious tension with principles widely held by disability rights advocates.

My discussion in this section proceeds as follows. In Section A, I describe the theoretical basis for the perverse-results critique of the ADA and review the empirical evidence that can be adduced in its support. I then examine the two principal challenges to that critique. In Section B, I discuss the claim that the statistics showing a decline in employment are irrelevant because they rely on the “wrong” definition of disability or mask compositional changes in the class of people who report themselves as having disabilities. Although ADA defenders make some important points here, I do not find their ultimate arguments convincing. In Section C, I

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52. See DeLeire, The Americans with Disabilities Act, supra note 12, at 263–73.
53. See Kruse & Schur, supra note 13, at 282–95; Blanck et al., supra note 12, at 314–28; Goodman & Waidmann, supra note 14, at 362–64.
discuss the claim that it was the expansion in eligibility for SSDI, and not the ADA, that caused the decline in employment for people with disabilities in the early 1990s. It seems clear that SSDI expansion did contribute to the employment decline, but that fact does not negate the inference that the ADA also contributed to that decline. Finally, in Section D, I undertake a more modest defense of the ADA. Even if the statute imposed some negative pressure on employment for people with disabilities in the short run, I contend that the long-term picture is likely to be more positive. But there remain real limits to the potential of an antidiscrimination law like the ADA to achieve the goals of empowerment and integration for people with disabilities.

A. The Perverse-Results Critique of the ADA

Professor DeLeire has been an important contributor to the perverse-results critique of the ADA, and his chapter powerfully marshals the theory and evidence in support of that critique. The argument rests on a straightforward, if perhaps counterintuitive, economic theory. By imposing liability for disability-based discrimination in hiring, the ADA does of course create an incentive to hire people with disabilities.54 But in at least two respects the statute creates a countervailing disincentive to hire people with disabilities. First, as with other employment discrimination statutes,55 the ADA increases the cost of discharging protected-class members; the higher firing costs, in turn, make hiring people with disabilities a less attractive prospect.56 Second, the Act’s requirement of accommodation imposes a cost that is, at least on the surface,57 different from the kinds of costs imposed by other employment discrimination statutes. By requiring employers to provide “reasonable accommodation” to people with disabilities—and by prohibiting employers from making accommodated employees bear the costs of accommodation through salary reductions and the like—the statute creates a disincentive to hire people with disabilities

54. See, e.g., Acemoglu & Angrist, supra note 2, at 924; DeLeire, Wage and Employment Effects, supra note 2, at 694.
56. See Acemoglu & Angrist, supra note 2, at 924; DeLeire, Wage and Employment Effects, supra note 2, at 694.
57. I have argued extensively that the reasonable accommodation requirement imposes similar costs as does an antidiscrimination requirement and that it carries a similar normative justification. See Samuel R. Bagenstos, “Rational Discrimination,” Accommodation, and the Politics of (Disability) Civil Rights, 89 VA. L. REV. 825 (2003); see also Christine Jolls, Antidiscrimination and Accommodation, 115 HARV. L. REV. 642 (2001) (arguing that the effects of accommodation mandates and antidiscrimination laws are likely to be similar).
who might need accommodations.58

Those incentives obviously work at cross-purposes: By making it
costlier to hire people with disabilities, the statute gives employers a reason
to discriminate against them in hiring; but by imposing liability on
employers who are caught engaging in hiring discrimination, the statute
gives employers a reason not to discriminate. The ADA’s ultimate
employment effects thus will turn on the relative strength of those
incentives in practice. The more effective is the statute’s prohibition of
hiring discrimination, the greater will be the incentive on an employer to
hire people with disabilities. The more costly are accommodations—and
the less able are employers to pass their costs on to the accommodated
individuals themselves—the greater is the incentive to discriminate at the
hiring stage.59

Unfortunately for ADA proponents, there are strong reasons to expect
that these costs will balance in a way that adds up to a net disincentive to
hire people with disabilities.60 For a variety of reasons, legal prohibitions
on wage discrimination against people with disabilities are likely to be
effectively enforced, so employers will not be able to force accommodated
individuals to bear the costs of their own accommodations.61 Legal
prohibitions on hiring discrimination against people with disabilities, by
contrast, are unlikely to be effectively enforced.62 As a general matter, the
overwhelming majority of employment discrimination cases these days are
brought by incumbent employees rather than disappointed applicants.63

58. This is the major focus of Jolls, supra note 2, at 273–76. For additional accounts, see
Acemoglu & Angrist, supra note 2, at 924; DeLeire, Wage and Employment Effects, supra note 2, at
694; Carolyn L. Weaver, Incentives versus Controls in Federal Disability Policy, in DISABILITY AND
59. For extensive discussion, see Jolls, supra note 2, at 242–61.
60. The most elaborate discussion of this point appears in id. at 273–76.
61. See id. at 274–75. ADA proponents emphasize that most accommodations are cheap. See,
e.g., Peter David Blanck, Empirical Study of Disability, Employment Policy, and the ADA, 23 MENTAL
& PHYSICAL DISABILITY L. REP. 275, 276–78 (1999); Peter David Blanck, The Economics of the
Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations, 46
DEPAUL L. REV. 877, 902–03 (1997); Michael Ashley Stein, Empirical Implications of Title I, 85 IOWA
(2000). But few are truly costless (especially when one considers indirect as well as direct costs), and
there is good reason to believe that the estimates cited by ADA proponents understate the true costs of
accommodation. See, e.g., Thomas N. Chirikos, Will the Costs of Accommodating Workers with
62. See Jolls, supra note 2, at 275.
63. See Donohue & Siegelman, supra note 55, at 1015–17. The skew in favor of cases brought by
incumbent employees is especially pronounced under the ADA. See Steven L. Willborn, The
Nonevolution of Enforcement under the ADA: Discharge Cases and the Hiring Problem, in
EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC
POLICY, AND RESEARCH 103, 103–04 (Peter David Blanck ed., 2000) (observing that “over the short
life of the ADA, the ratio of discharge to hiring cases has been about 10 to 1, a ratio that is substantially
Discrimination lawsuits by disappointed applicants face a number of barriers that are not present in the case of incumbent employees, and these barriers are ever so much greater in the disability context. The wide diversity among disabilities makes comparisons between an employer’s treatment of people with different disabilities largely meaningless—the fact that a manager has hired individuals with diabetes, for example, does not at all negate an inference that she intentionally discriminated against an individual with cerebral palsy or mental retardation. But the large number of different disabilities, and the concomitantly small number of people with any given disability who are likely to apply to a particular employer, make it virtually impossible to muster statistical proof of discrimination on a disability-by-disability basis. As a result, one would expect it to be even harder to prove intentional hiring discrimination in the disability context than in the race or gender contexts.

Professor DeLeire’s chapter reviews the two major empirical studies that purport to show that the ADA decreased employment among people with disabilities. In one of these studies, Daron Acemoglu and Joshua Angrist concluded that although there was no significant decline prior to the ADA’s effective date of 1992, people with disabilities experienced a significant drop in the number of weeks worked after the statute took effect. The drop was especially pronounced among those age twenty-one to thirty-nine, and it was particularly notable in the first two years of the statute’s implementation. Professor DeLeire himself conducted the second key study. He, too, concluded that the enactment of the ADA was associated with a significant decline in the relative employment rate of men with disabilities vis-à-vis men without them; in DeLeire’s study, the negative employment effects began in 1990 and continued through 1995, the last year he examined. Adding yet more texture to the argument, in a still-higher than for Title VII cases”).

64. See Richard V. Burkhauser & David C. Stapleton, A Review of the Evidence and Its Implications for Policy Change, in DECLINE, supra note 5, at 369, 396 (noting that it is hard for applicants to detect discrimination and to prove that they are capable of performing the job for which they applied, and also noting that disappointed applicants “probably [have] less incentive to pursue a lawsuit than the typical victim who is an existing employee, for a variety of reasons (less chance of success, a desire to focus their energy on searching for other jobs, fear of creating a negative reputation for themselves, lack of support from fellow employees or employee organizations, and perhaps others”)”.

65. See Bagenstos, Subordination, supra note 16, at 405 (“Common understandings of ‘disability’ embrace conditions ranging from deafness to quadriplegia, from epilepsy to cancer, from blindness to mental retardation, from mental illness to heart conditions. People may acquire these conditions at all different stages of life, and they may experience their conditions very differently as a result.”) (footnotes omitted).

66. See Jolls, supra note 2, at 275; Willbom, supra note 63, at 108.


68. See Acemoglu & Angrist, supra note 2, at 929–32.

69. See DeLeire, Wage and Employment Effects, supra note 2, at 700–08.
unpublished working paper (not discussed in Professor DeLeire's chapter) Christine Jolls and J.J. Prescott found that changes in the disability employment rate in the period immediately following enactment of the ADA varied by state in a way that strongly suggests that accommodation requirements depress employment. In states that had no laws requiring private actors to provide accommodation to people with disabilities prior to the ADA, the relative drop in the number of weeks worked by people with disabilities (vis-à-vis those without disabilities) was significant; in states that already imposed such a mandate, enactment of the ADA was associated with no significant employment effect.

Each of these studies measures disability according to the "work limitation" approach, which asks respondents whether they have a disability or health condition that limits the kind or amount of work they can do. Because each employs multiple regression analysis to control for the effect of other variables that might have contributed to the decline in disability employment, these studies seem to provide empirical support for the argument that the ADA has caused or contributed to the decline in employment among people with disabilities.

B. Challenging the Perverse-Results Critique I: Denying That Employment Has Decreased Among (the Relevant Group of) People with Disabilities

As might be expected, the conclusion that the ADA has perversely hindered the employment prospects of individuals with disabilities has proved controversial. Those who have challenged the perverse-effects argument have tended to take one of two tacks. One, exemplified by the Blanck/Schwochau/Song and Kruse/Schur chapters in Decline, urges that the data employed in the perverse-results studies cannot provide a firm basis for concluding that employment among a relevantly defined people with disabilities has declined at all—whether or not the ADA had anything to do with disability employment trends. The other, exemplified by the Goodman/Waidmann chapter in Decline, acknowledges that disability employment has decreased but urges that it was the relatively contemporaneous expansion of SSDI rolls, and not the enactment of the

71. See id.
72. See Acemoglu & Angrist, supra note 2, at 925 (relying on "work limitation" measure in the CPS); DeLeire, Wage and Employment Effects, supra note 2, at 697 (relying on "work limitation" measure in the SIPP); Jolls & Prescott, supra note 70, at 6-8 (relying on "work limitation" measure in the CPS).
73. See Kruse & Schur, supra note 13, passim; Blanck et al., supra note 12, passim.
ADA, that caused the decline.\footnote{74. See Goodman & Waidmann, supra note 14, passim.}

In this section, I consider the first set of arguments—the challenges to the usefulness of the data showing a decline in employment. In subsection 1, I explore the contention, made in \textit{Decline} by Professor Blanck and his colleagues as well as by Professors Kruse and Schur, that the studies showing a decline are invalid because they use a definition of “disability” that is not identical to the ADA’s own definition of its protected class. I argue that the data on which those studies rely are meaningful even if they measure employment trends among a group that does not precisely track the ADA’s coverage. Indeed, the Blanck/Schwochau/Song and Kruse/Schur chapters fail to acknowledge the degree to which more finely grained data actually give support to the theory that underlies the perverse-results critique of the ADA.

In subsection 2, I examine the contention, also made in the Blanck/Schwochau/Song and Kruse/Schur chapters, that the ADA may have destigmatized disability and therefore led large numbers of the long-term unemployed newly to identify themselves as disabled. According to that theory, any apparent decline in disability employment is simply an artifact of poor measurement; it does not indicate any real decline in employment for people with disabilities, when the population is held constant. Although there is not much good empirical evidence to prove or disprove this contention, for reasons I discuss below it seems unlikely to be true.

1. \textit{Do the Studies Use the “Wrong” Definition?}  

(a) \textit{The Challenge to the Perverse-Effects Argument}

One major challenge to the Acemoglu/Angrist, DeLeire, and Jolls/Prescott studies focuses on the mismatch between the definition of disability used to compile the data in those studies and the statutory definition of the class protected by the ADA. Because those studies measured employment trends among individuals who have self-identified as having disabilities that limit the kind or amount of work they can do—a class that is in some respects broader and in some respects narrower than the class of people who are “qualified individual[s] with a disability”\footnote{75. 42 U.S.C. § 12112(a) (1991).} for ADA purposes—critics believe those studies have “little relevance to the question of whether the ADA has been effective since it was enacted.”\footnote{76. Blanck, \textit{et al.}, supra note 4, at 275; see also Kruse & Schur, supra note 13, at 284–85; Blanck,}
Professor Blanck and his colleagues put it in their Decline chapter: “In light of the flaws identified, we submit that existing empirical research provides little basis on which policymakers can make informed decisions regarding whether the ADA is the cause of employment declines and should be thus be amended, repealed, or left untouched.” Indeed, Kruse and Schur argue, when we examine the ADA’s effects on classes that overlap more closely with the statute’s “qualified individual with a disability” definition, the statute appears to have had a positive effect on employment.

These are important points, and they suggest that the ADA’s employment effects have not been negative for all people with disabilities across the board. But they do not show that employment has increased among the protected class identified in the ADA—largely because that class is not nearly as fixed as the ADA defenders suggest. Nor do the Blanck/Schwochau/Song and Kruse/Schur chapters give any persuasive reason why policy analysts should disregard the evidence that the ADA has had a negative employment effect for a large and important group of people with disabilities.

The ADA gives a cause of action only to “qualified individual[s] with a disability.”79 As I have noted, the statute defines “disability” as “a physical or mental impairment that substantially limits one or more of the major life activities of [the plaintiff],” “a record of such an impairment,” or the status of “being regarded as having such an impairment.”80 An individual with a disability is “qualified” under the statute if he or she “can perform the essential functions of the employment position that [he or she] holds or desires,” even if only with reasonable accommodation.81 The “work limitation” measure of disability used in the Acemoglu/Angrist, DeLeire, and Jolls/Prescott studies, by contrast, identifies all individuals who have a disability or health condition that makes them unable to work or limits the kind or amount of work they can do.82

The Blanck/Schwochau/Song and Kruse/Schur chapters focus on a number of respects in which the “work limitation” measure of disability identifies a different class of people than does the “qualified individual with

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77. Blanck et al., supra note 12, at 326.
78. See Kruse & Schur, supra note 13, at 291–92; Blanck et al., supra note 4, at 277–78; see also Kaye, supra note 11, at 217 (“Among the segment of the disability population most likely to take advantage of job opportunities, there was a significant increase in employment levels during the 1990s.”).
82. See supra Part I–A.
a disability" language of the ADA. In one of those respects, the "work limitation" measure is underinclusive: It fails to capture those individuals whose conditions substantially limit major life activities other than working but do not limit the kind or amount of work they can do. (Neither the Blanck/Schwochau/Song nor the Kruse/Schur chapter notes yet another respect in which that measure is underinclusive—it fails to account for those who have no current impairment but simply have a record of or are regarded as having a disability.) But the "work limitation" measure is overinclusive in other respects. First, that measure identifies an individual as disabled whenever the individual’s impairment limits the kind or amount of work the individual can do. But the Supreme Court has made clear in a series of cases that a mere limitation on the kind or amount of work an individual can do is not sufficient to establish a "substantial[]" limitation in the "major life activity" of working; to be "substantially limit[ed]" in working, the plaintiff must be "unable to work in a broad class of jobs." Moreover, the "work limitation" measure includes everyone whose conditions limit the type or amount of work they can do, even if those limitations are extremely severe; some of these people will be unable to satisfy the ADA's "qualified individual" requirement.

When measures of disability other than the "work limitation" measure are used, the ADA appears to have had a positive effect on employment. Kruse and Schur have done the most elaborate empirical analysis in this regard, an analysis they summarize in their chapter of Decline. As in the Acemoglu/Angrist, DeLeire, and Jolls/Prescott studies, Kruse and Schur found that the implementation of the ADA was associated with a significant decrease in the employment of people with disabilities identified according to the "work limitation" measure. But among individuals with disabilities identified according to measures that depended on functional or daily--

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83. See Blanck et al., supra note 12, at 316; Kruse & Schur, supra note 13, at 285.
84. For example, that measure would fail to capture Sydney Abbott, the successful plaintiff in Bragdon v. Abbott, 524 U.S. 624 (1998), whose asymptomatic HIV infection substantially limited her major life activity of reproduction but had no discernible effect on her ability to work. See also Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 201 (2002) (because substantial limitation in the major life activity of performing manual tasks is distinct from substantial limitation in major life activity of working, "occupation-specific tasks may have only limited relevance to the manual task inquiry").
85. Sutton v. United Air Lines, Inc., 527 U.S. 471, 491 (1999); see also id. at 492 ("If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs."). The Court has even gone so far as to suggest that working might not be a "major life activity" for purposes of the ADA's disability definition. See id. at 492; Toyota, 534 U.S. at 200. And the Court has emphasized that the terms in the disability definition "need to be interpreted strictly to create a demanding standard for qualifying as disabled." Toyota, 534 U.S. at 197. For discussion of the overinclusive nature of the "work limitation" definition in this respect, see Kruse & Schur, supra note 13, at 285.
86. See Blanck et al., supra note 12, at 317; Kruse & Schur, supra note 13, at 285.
87. See Kruse & Schur, supra note 4; see also Kruse & Schur, supra note 13.
88. See Kruse & Schur, supra note 4, at 49–53.
activity limitations outside of the work context, implementation of the ADA was associated with a significant increase in their employment. These findings are broadly consistent with other evidence that, although the overall employment rate for people with disabilities fell throughout the 1990s, employment for people with disabilities who were able and available to work increased. Unfortunately, both the proportion and the absolute number of people with disabilities who reported themselves as able to work fell substantially throughout the 1990s.

Both the Blanck/Schwochau/Song and the Kruse/Schur chapters assert that people who report a work limitation are unlikely to be “qualified” under the ADA’s definition. Because the ADA provides a cause of action only to those people with disabilities who are “qualified,” they argue that the best measure of the effects of the ADA is one that excludes people with work limitations. If that is so, they contend, the findings of the Kruse/Schur study suggest that the ADA has had an unambiguously positive effect on its target population—those who the authors of these chapters have elsewhere referred to as “ADA-qualified.”

(b) Problems with the Challenge

There are a number of major difficulties with these arguments, however. First, they too quickly assume that individuals who identify themselves as having work limitations are not “qualified individuals” under the ADA. They appear to treat “ADA-qualified” status as if it is a trait that runs with the person: A person either is or is not “ADA-qualified,” for all times and for all purposes. But under the ADA, one cannot coherently ask

89. See id. at 50–54.
90. See KAYE, supra note 18, at 11 (examining unemployment rates—the rate of non–work among people actually participating in the labor force—and finding that the rate for people with disabilities fell from 16.4% in 1994 to 9.4% in 2000, a 7.0 percentage–point decline, as opposed to a 2.5 percentage–point decline among nondisabled labor force participants over the same period); id. at 17–18 (finding increased employment—in absolute terms and perhaps also relative to nondisabled workers—after the early–1990s recession among people with disabilities who report that they are able to work); id. at 19 (finding significant increase in employment in the late 1990s among people with disabilities who identify themselves as able to work and state that they want a job—and also finding a significant narrowing of the employment gap between this population and the population of nondisabled workers). For similar findings, see JULIE L. HOTCHIKISS, THE LABOR MARKET EXPERIENCE OF WORKERS WITH DISABILITIES: THE ADA AND BEYOND 23–27 (2003).
91. See KAYE, supra note 18, at 22–23.
92. See Blanck et al., supra note 12, at 318; see also Kruse & Schur, supra note 13, at 289.
93. Blanck et al., supra note 4, at 278. The cited article was a joint project of Blanck, Kruse, Schur, Schochau, and Song.
94. See Blanck et al., supra note 12, at 315–16 (“The law divides individuals with impairments into three groups: individuals with impairments that do not substantially limit a major life activity; individuals with substantial limitations who are qualified; and individuals with substantial limitations who are not qualified. The law provides protection to those in the second group, but not to those in the
whether a person is a "qualified individual" in the abstract, without considering the "employment position that such individual holds or desires."

If the person "can perform the essential functions" of that position—even if only with reasonable accommodation—then the person is "qualified" for that position, even if he or she would not be qualified for other positions. People with disabilities measured by the "work limitation" approach—those whose impairments limit the kind or amount of work they can do—may well be un-"qualified" under the ADA's definition for some positions (those positions that require work of a kind, or in an amount, that they cannot do). But it does not follow that they are likely to be un-"qualified" for all positions. Indeed, the fact that many people with self-described "work limitations" are employed should itself refute the assertion that such limitations make a person universally unemployable.

There is thus no good reason to exclude people with "work limitations" from an analysis that examines the effects of the ADA.

Indeed, to assume that people with self-described work limitations can never be "qualified" is to disregard one of the key arguments of the disability rights movement. Disability rights activists have long argued that society tends to regard impairments as affecting a broader range of functional capacities than those impairments actually do; the ADA's requirement of individualized consideration whether the plaintiff is "qualified" for the specific job at issue represents a clear effort to combat this "spread effect." More generally, those activists have argued that the inability of people with disabilities to take advantage of employment opportunities is not the result of some kind of natural limitation inherent in


96. Id.

97. Indeed, for some (perhaps many) people with self-described "work limitations," there may not be any jobs for which their disability renders them un-"qualified" in the ADA sense. Because the surveys on which the "work limitation" data are based do not ask about the possibility of accommodation, respondents may say that they are limited in the kind or amount of work they can do even if any limitation could be removed with a reasonable accommodation. Respondents may assume that any disability question seeks information about their condition in an unaccommodated state, or they may assume that employers cannot be relied upon to provide accommodations. See DeLeire, The Americans with Disabilities Act, supra note 12, at 272 ("A person could report that 'their health condition prevents them from working' because they did not receive reasonable accommodations or because they face discrimination."); cf. Cleveland v. Policy Mgt. Sys. Corp., 526 U.S. 795, 803 (1999) (because SSDI disability determinations employ a work limitation approach that does not take account of the possibility of accommodation, "an ADA suit claiming that the plaintiff can perform her job with reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) without it").

98. The Blanck/Schwochau/Song chapter itself reports that over 40% of those who identified themselves as disabled under the "work limitation" definition were employed in 1991–1992. See Blanck et al., supra note 12, at 316.

the person with a disability; that inability results from the interaction between a person with a disability and an inaccessible society.  

For defenders of the ADA to embrace a naturalized model of disability—one that writes off a large proportion of people with disabilities as categorically not "qualified" for work—is ironic to say the least.

Second, even if we could confidently state that people who report work limitations are generally not "qualified," it is not fair to say that the ADA's drafters cared about the employment prospects of individuals with disabilities only if those individuals were "qualified." Throughout the period in which Congress considered the ADA, its supporters repeatedly stated that the statute would address the massive problem of non-employment among people with disabilities, full stop.  

The ADA's "qualified individual with a disability" language serves to limit the burden that any particular employer will be forced to bear to achieve the goal of increasing employment for people with disabilities, but that limitation does not make broader disability employment effects irrelevant to evaluating the statute. ADA backers never, to my knowledge, suggested that the statute would advance the employment prospects of people with some kinds of disabilities but that it would at the same time harm the employment prospects of people with other kinds of disabilities. If the statute has had such mixed effects, both the positive and the negative aspects of those effects must be considered in any fair analysis of the ADA. As Professor DeLeire argues in his contribution to Decline, to ignore negative effects "is not appropriate, either methodologically or from a policy perspective."

Finally, although neither Professor Blanck and his colleagues nor Professors Kruse and Schur acknowledge the point, the Kruse/Schur findings are in fact basically consistent with the theoretical account offered by those who say the ADA has limited employment opportunities for people with disabilities in the aggregate. If, as Professor Jolls has argued, the prospect of ADA-mandated accommodation costs encourages

100. See id. at 427–31.

101. See Bagenstos, ADA as Welfare Reform, supra note 46, at 953–75.

102. Professor Blanck and his colleagues suggest that because people identified under the "work limitation" measure are not protected by the ADA, any decrease in employment in this population cannot be attributed to the statute. See Blanck et al., supra note 4, at 275. As I have already explained, the premise of that argument is incorrect: People with self-described "work limitations" are not likely to be categorically un-"qualified" under the ADA's definition. To be sure, not everyone identified as disabled under the "work limitation" measure satisfies the "substantially limits" criterion of the ADA's disability definition, but the same is true of those identified as disabled under the alternate measures employed by Kruse and Schur. If they are right in attributing to the ADA the improvements in employment among people with disabilities identified according to some over-inclusively defined measures, then they cannot reject the attribution to the ADA of the decline in employment among people with disabilities identified according to other measures simply because those other measures are also over-inclusive.

103. DeLeire, supra note 12, at 274.
employers to discriminate against people with disabilities, then the negative employment effects of the statute are likely to be concentrated among those people with disabilities whom employers perceive as likely to need accommodations. But it is entirely plausible, applying the same economic analysis, that people with disabilities who do not need accommodations will on balance benefit from the ADA, because the prospect of liability for hiring discrimination will outweigh the (nonexistent) costs of providing accommodations to that subset of the disabled population. People who identify themselves as having impairments that limit the kind or amount of work they can do are probably far more likely to need accommodations (or be perceived by employers to need accommodations) than are people who identify themselves as having functional impairments that do not prevent or limit work. If that is right, then the Kruse/Schur results do not negate the inference that the ADA has had a negative effect on the employment prospects of workers with disabilities who need accommodations; instead, they merely suggest that the employment effects of the ADA differ among different classes of workers with disabilities.

The differences between the ADA’s definition of disability and the “work limitation” measure used in the studies showing negative employment consequences of the statute do counsel caution before reaching the broad conclusion that the ADA has had a uniformly harmful effect on the job prospects of people with disabilities. The analysis performed by Kruse and Schur suggests that the statute has, in fact, improved employment prospects for a significant subset of people with disabilities—though, as Burkhauser and Stapleton note in their concluding essay to Decline, it is a “decreasing share of [people with disabilities] who report being able to work at all.” At the same time, however, the statute may have harmed the employment prospects of another perhaps even larger subset of people with disabilities. Whether the statute has been, on balance, worthwhile is a question that cannot be resolved by simply asserting that the studies showing negative results used the “wrong” definition of disability.

2. Changes in the Population That Self–Reports Work Limitations

Both the Blanck/Schwochau/Song and Kruse/Schur chapters raise a

104. See Jolls, supra note 2, passim; see also JOLLS & PRESCOTT, supra note 70 (concluding that accommodation costs, rather than firing costs, are the principal reason the ADA created a disincentive to hire workers with disabilities).
105. See Weaver, supra note 58, at 11–12.
107. Burkhauser & Stapleton, supra note 64, at 394.
separate point—though one that also focuses on the “work limitation” measure used in the studies that identify negative employment effects of the ADA. People with self-identified work limitations represented an increasing proportion of the population of people with disabilities throughout the 1990 to 1994 period.\footnote{See Kruse & Schur, supra note 4, at 45 (proportion of overall working-age population reporting a disability under the “work limitation” measure increased from 10.1% in 1990 to 12.1% in 1994; while proportion of overall working-age population reporting a disability under the “functional limitations” measure but reporting no work limitations declined from 5.8% in 1990 to 4.4% in 1994).} And the proportion of people with disabilities reporting an absolute inability to work increased throughout the 1990s.\footnote{See KAYE, supra note 18, at 21–23 (reporting NHIS data showing that the proportion of working-age adults with disabilities who reported an inability to work increased from 40.4% in 1990 to 44.5% in 1996, and CPS data showing that the proportion of working-age adults with disabilities who reported an inability to work rose from 41.5% in 1994 to 47.8% in 2000).} These facts, combined with the substantial increase around the time of the ADA’s enactment in the number of people who identified themselves as having disabilities at all,\footnote{See id. at 21 (“According to data from the NHIS, the number of people with activity limitations rose from 19.4 million in 1990 to 22.7 million in 1993, an increase of 17.2 percent in only three years. (In contrast, the non-disabled population grew by only 0.4 percent during that period.”)); id. at 21–22 (discussing NHIS and CPS data showing that the size of the overall population of those reporting disabilities remained steady after 1993).} suggest that the ADA’s enactment may have led to a change in the composition of the population that identifies itself as having a health condition or disability that prevents or limits work.\footnote{Kaye’s chapter argues that a change in the composition of the disabled population occurred wholly independently of the ADA. Kaye contends that disability rates and severity objectively increased, and that those increases account for the decline in employment. See Kaye, supra note 11, at 253. There are a number of problems with Kaye’s analysis on this point, however, including that employment for people with disabilities continued to decline even after impairment severity seems to have stopped increasing in the late 1990s. See Burkhauser & Stapleton, supra note 64, at 382–86.} 

The Kruse/Schur chapter hypothesizes that—wholly independent of any increase in hiring discrimination caused by the statute—the ADA altered society’s and individuals’ views of disability in two respects that caused such a compositional change in the self-identified “work limitation” disability population. First, the ADA may have destigmatized the “disability” label; as a result, the statute’s passage may have induced people with impairments to “come out of the closet” and for the first time acknowledge that they have disabilities.\footnote{See Blanck et al., supra note 4, at 278; see also Kruse & Schur, supra note 4, at 36 (“Passage of the ADA may have led more to be willing to identify themselves as having a disability either because it became more socially acceptable to have a disability in general or because the general emphasis on employment of people with disabilities led people with serious impairments to be more likely to say that [they] are limited in the kind or amount of work they can do (whereas prior to the ADA they may not have considered employment as an option.”).} If this effect is particularly pronounced “among those with the most stigmatized disabilities, such as mental impairments, that are associated with the lowest employment rates,”
then many more people who are unable to find work will report that they have disabilities. As a result, the reported employment rates for people with disabilities will fall, even if the same number of people with the same impairments are working as before.

There is some empirical support for this explanation. Julie Hotchkiss reviewed trends in workforce participation from 1990 to 2000 among those who did and did not report disabilities. She concluded that people who were already out of the labor force but newly identified themselves as disabled accounted for at least 80% of the increase in the percentage of individuals with self-reported “work limitation” disabilities who were out of the workforce over that period.

Second, an individual’s likelihood of reporting a disability depends heavily on that individual’s employment status. There is evidence that, even among those with the same objective medical condition, people who are employed are less likely to report that they have serious health conditions than are people who are not employed. In line with that evidence, Kruse and Schur argue that newly employed people with disabilities might well choose to shed the disability label—particularly when measured under the “work limitation” approach, an approach that, after all, directly keys on an impairment’s effect on work opportunities. As a result, they contend that a decline in employment among those who

113. See Blanck et al., supra note 4, at 278; see also Kruse & Schur, supra note 13, at 285 ("Perceptions of increased social acceptability and rights may have encouraged more people to identify themselves as having a disability following the ADA. It is plausible that this effect was greatest among those who were suffering the greatest stigma owing to a lack of employment, and thus increased reports of work limitation would lower the associated employment rate.").

114. See HOTCHKISS, supra note 90, at 28-29. In particular, Professor Hotchkiss concluded that the number of nondisabled people in the labor force increased by .15 percentage points per year from 1990–2000; the number of nondisabled people out of the labor force decreased by .23 percentage points per year over that period; the number of disabled individuals in the labor force decreased by .02 percentage points per year over that period; and the number of disabled individuals out of the labor force increased by .10 percentage points per year over that period. See id. (All of these results use the self-reported “work limitation” measure of disability.) Even if all of the decline in the number of people with disabilities in the labor force consists of people who continued to report that they had disabilities but had newly left the labor force, that could account for only .02 percentage points out of the .10 percentage-point annual increase in the number of people with disabilities not in the labor force. The remainder, Professor Hotchkiss argues, most likely came from people who had never been in the labor force but newly identified themselves as disabled. See id. at 29.

115. See Blanck et al., supra note 4, at 279; see also Kruse & Schur, supra note 13, at 285-86 ("Among people with the same medical conditions, functional limitations, and other characteristics, those who are not employed may be more likely to say they have a work limitation as a way of justifying their lack of employment (referred to as the ‘justification hypothesis’). Those who obtain jobs may become less likely to cite a work limitation even if they have the same impairments and medical conditions as before . . . .") (citation omitted).


117. See Blanck et al., supra note 4, at 279.
self-report disabilities under the "work limitation" approach is perfectly consistent with the conclusion that the ADA actually improved employment prospects for people with disabilities: "This could have occurred if those who obtained jobs became less likely to report a work disability, while those who stayed nonemployed became more likely to report a work disability to justify their lack of employment in a strong market."\footnote{118}

These are interesting hypotheses, and they helpfully highlight the effect that a law like the ADA can have in altering individuals' sense of their own identity.\footnote{119} But they are not obviously right.\footnote{120} Indeed, they are in some tension with each other. Precisely because people with impairments who are already in the workforce are likely not to identify themselves as having disabilities, it is quite plausible that the destigmatization of the disability label will artificially drive up reported employment rates for people with disabilities. That, of course, would be exactly the opposite of the effect that Blanck, Schwochau, Song, Kruse, and Schur hypothesize. When there is a stigma attached to identifying oneself as having a disability, it seems likely that an individual would embrace that label only as a last resort—such as when that individual has found it impossible to find work and thus must rely on disability benefits for income. People who are in or even on the margins of the workforce might well be inclined to "tough it out" and refuse to embrace such a stigmatized identity. That may well be the reason why employed people with

\footnote{118. Id. To similar effect, see Kruse & Schur, supra note 4, at 35–37; Kruse & Schur, supra note 13, at 284; Corinne Kirchner, Looking Under the Street Lamp: Inappropriate Use of Measures Just Because They Are There, 7 J. DISABILITY POL’Y STUD. 77 (1996).


120. The Acemoglu/Angrist study purports to control for possible composition bias. See Acemoglu & Angrist, supra note 2, at 935 (stating that restricting the analysis to a matched sample of those who reported the same disability status in both 1992 and 1993—straddling the effective date of the ADA—"had little effect on the results for men aged 40–58 and women aged 21–39," the two groups in which disability rates increased the most from 1988 to 1996). But Kruse and Schur raise a serious challenge to their methodology. See Kruse & Schur, supra note 4, at 37 (noting that "the average weeks worked in the previous year falls for every matched sample over the 1981–1999 period, with magnitudes similar to the 1992–1993 drop," which suggests that the ADA was not the reason for the drop in the matched sample measured from 1992 to 1993). The Jolls/Prescott study, too, purports to control for possible composition bias. See JOLLS & PRESCOTT, supra note 70, at 24–27. But Jolls and Prescott make no attempt to examine empirically the possibility that the innovation of the ADA led an increasing number of basically unemployable individuals to self-identify as disabled as Professor Blanck and others have suggested. Instead, they simply deem it unlikely that the social changes effected by the ADA would lead to a disproportionate number of individuals with poor employment prospects to identify as disabled; "if anything," they say, "one would think it would be those closest to the line between disability and nondisability, and thus those with relatively good employment prospects, who might switch from identifying as nondisabled to identifying as disabled in a state in which the ADA was a significant innovation." Id. at 25. Although I share Jolls and Prescott's skepticism about the claim that the destigmatization of disability has disproportionately encouraged individuals with relatively poor employment prospects to self-identify as having disabilities, such skepticism is not an empirical test.}
Impairments are less likely to identify themselves as having disabilities. In other words, perhaps "the most stigmatized disabilities, such as mental impairments... are associated with the lowest employment rates"121 because the stigma is so great that employed people with those disabilities refuse to identify themselves as disabled. If so, and the ADA has led to a destigmatization of disability,122 those who newly embrace the disability label are likely to be people who are already working, not people who are unemployable.

This is not to say that the Blanck/Schwochau/Song and Kruse/Schur chapters are wrong in their hypothesis (which I have no more attempted to disprove than they attempted to prove). It is to say only that one can acknowledge a possible change in the composition of the population that self-reports a disability without rejecting the conclusion that the ADA has limited employment opportunities for people with disabilities. It is possible that the ADA led to attitudinal changes that altered self-reports of disability in a way that masked an actual improvement in employment opportunities for people who "really" had disabilities in 1990, however we might define that population. But it is at least as possible that the ADA or some other factor (such as the expansion of federal disability benefits eligibility discussed in the next section) induced an actual reduction in employment for that population. To resolve this question would require extensive research on a question about which the existing literature has only scratched the surface: In what ways do employment status and broader social attitudes affect the decision to report (or not to report) that one has a disability under the various measures used in government surveys?123

C. Challenging the Perverse Results Critique II: Blaming the Expansion of SSDI Eligibility and the 1990-1991 Recession

In addition to challenging the measure of disability employed in the studies that found a drop in employment among people with disabilities, ADA defenders have argued that the employment drop is best explained by the expansion of eligibility for SSDI and SSI benefits, rather than by the ADA. In particular, the 1990-1991 recession may have led a large number of people with disabilities to leave the workforce and take advantage of

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121. Blanck et al., supra note 4, at 278.
122. There is also good reason to doubt that the ADA led so quickly (i.e., by 1994, the date at which the relevant studies identify employment declines) to a destigmatization of "the most stigmatized disabilities." Blanck et al., supra note 4, at 278. It is a staple of the "ADA Backlash" literature that courts and society have resisted the ADA precisely because the stigma associated with disability was too powerful for the mere enactment of a statute to overcome. For the most extensive treatment of this issue, see Linda Hamilton Krieger, Socio-Legal Backlash, 21 BERKELEY J. EMP. & LAB. L. 476 (2000).
123. For suggestions toward a proposed research agenda in this direction, see Kruse & Schur, supra note 13, at 296.
changes that had broadened eligibility for the major federal disability benefits programs since 1984. This argument, well summarized in the Goodman/Waidmann chapter of Decline, is an important one, and it rests on a powerful factual basis. Receipt of SSDI and SSI benefits did increase substantially in the 1990–1991 recession, and that increase does seem to account for the observed drop in employment among people with disabilities during the 1990s. Ultimately, it is difficult to deny that the expansion of eligibility for SSDI and SSI benefits contributed to the employment drop of the 1990s. But for a number of reasons that conclusion does not negate the conclusion that the ADA also contributed.

At the same time that the employment rate for people with disabilities fell throughout the 1990s, the percentage of working–age individuals who received SSDI rose substantially. Between 1990 and 2000, the “SSDI rolls grew 67 percent,” a rate “over five times faster than the working-aged population as a whole.” There is an obvious intuitive relationship between the growth in the SSDI rolls and the drop in employment among people with disabilities. To be eligible for SSDI benefits, an individual must be determined to have an impairment that renders the individual unable “to engage in any substantial gainful activity.” More specifically, an applicant must show “that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.” To be sure, the administrative regulations that implement these requirements rely on a number of categorical presumptions under which many applicants are deemed eligible for benefits even if they in fact can work. But benefit recipients who do more than a nominal amount of work for more than nine months lose eligibility for cash benefits. As a result, those who enter the SSDI benefit

124. It should be expected that people with disabilities would be disproportionately affected by the 1990–1991 recession. There is good evidence that “[w]ith respect to either cyclical or structural changes in the economy, individuals with disabilities seem to be the leading edge out of the labor market, and they lag behind other workers in returning to work.” Jerry L. Mashaw & Virginia P. Reno, Overview, in DISABILITY, WORK AND CASH BENEFITS 1, 10 (Jerry L. Mashaw et al. eds., 1996).

125. See Goodman & Waidmann, supra note 14.

126. Id. at 339; see also KAYE, supra note 18, at 25 (“The Social Security Administration’s disability benefit rolls—including those receiving SSI, SSDI, or both—expanded from 5.4 million in 1990 to 8.3 million in 1999, or from 3.9 percent to 4.9 percent of the working–age population.”).


130. See 42 U.S.C. § 422(c) (2000). After the nine-month trial work period, recipients enter a 36-month “extended period of eligibility” during which they can be reinstated to the rolls for any month in
rolls are “essentially precluded from working as a precondition of benefits.”

A large increase in the percentage of individuals receiving SSDI benefits, then, was likely to be associated with precisely the kind of employment drop that people with disabilities experienced in the 1990s. And there is good reason to believe that new entrants to the SSDI rolls account for essentially the entire reported decline in employment among people with disabilities. John Bound and Timothy Waidmann found that at least for working-aged men nationwide there was “an almost one to one correspondence between the numbers moving onto SSDI and the numbers showing up in the work limited and not employed category.” And analyzing state-by-state data, they concluded “that the increase in the fraction of the working-aged population receiving SSDI benefits can account for the entire rise in the fraction of the population that reports a work limitation and is not employed.”

Even if new SSDI beneficiaries can account for all of the people with disabilities who stopped working in the 1990s, of course, that fact cannot itself negate the inference that the ADA was the basic cause of the employment drop. The ADA could be encouraging employers to discriminate against people with disabilities, who are then forced to apply for SSDI when they cannot find work. But there is in fact good reason to believe that the SSDI program has played an independent role in the employment decline. Beginning with the Disability Benefits Reform Act of 1984, eligibility requirements for SSDI were significantly relaxed.


131. Goodman & Waidmann, supra note 14, at 339. The work–incentive provisions of the Social Security Act complicate this picture somewhat, but extremely few SSDI recipients take advantage of them. For all intents and purposes, SSDI recipiency is a ticket out of the workforce. On these points, see Bagenstos, supra note 15.

132. Goodman & Waidmann, supra note 14, at 352 (reporting results of Bound & Waidmann, supra note 4, at 240).

133. Id. at 357 (reporting results of Bound & Waidmann, supra note 4, at 240).

134. See Acemoglu & Angrist, supra note 2, at 936 (“An investigation of the SSI/disability insurance issue is complicated by the fact that receipt of social security income is both a cause and a consequence of employment status.”).

135. Pub. L. No. 98–460, 98 Stat. 1794 (1984). That statute expanded eligibility for SSDI in a number of significant ways, including: requiring consideration of the aggregate disabling effect of an applicant’s multiple impairments, even if no single impairment would by itself satisfy the statutory disability definition, id. § 4; requiring the Secretary of Health and Human Services to revise the criteria by which mental impairments are deemed to be disabling, id. § 5; and giving more weight to evidence provided by the applicant’s own physician in the disability determination process, id. § 9. The statute
because SSDI benefits are indexed to the mean wage in the economy, and the wage gap between high and low paying jobs increased in the 1980s, SSDI became increasingly attractive to low-wage workers throughout that period.136

Professors David Autor and Mark Duggan hypothesize that these two factors operated during the 1980s to create a large pool of "conditional" applicants for disability benefits—many of whom found it attractive to apply for benefits when they lost their jobs in the 1990-1991 recession.137 And the evidence suggests that it was just such conditional applicants who fueled the exodus from the employment rolls among people with disabilities in the 1990s. Not only did the "steepest increases" in disability benefits receipt "occur[] during the two years following the 1991 recession,"138 but people with mental impairments and musculoskeletal impairments represented an increasing proportion both of SSDI recipients and of people with work limitations who reported an inability to work during that time.139 These two types of impairments were the most likely to be affected by the post-1984 relaxation of SSDI eligibility criteria.140 By contrast, although employers are likely to be wary of the costs of accommodating such impairments, it seems unlikely (though hardly impossible)141 that they will be more wary of those costs than of the costs of accommodating any other types of impairments. On the face of it, then, the SSDI explanation for the employment decline in this population seems more plausible than the ADA explanation.

But the SSDI explanation cannot fully exonerate the ADA as a

also added new language discussing the circumstances in which chronic pain could be disabling, see *id.* § 3, but it is hard to regard that language as more expansive or more restrictive than the prior law. See Ellen Smith Pryor, *Compensation and the Ineradicable Problems of Pain*, 59 Geo. Wash. L. Rev. 239, 258–74 (1991). In 1985, the legislatively mandated "revision of the Listings of mental disorders further loosened the standards of mental disability, thus hastening the enrollment of large numbers of individuals with mental retardation and mental illness." Jennifer L. Erkulwater, *The Judicial Transformation of Social Security Disability: The Case of Mental Disorders and Childhood Disability*, 8 Conn. Ins. L.J. 401, 419 (2001–2002). A series of court decisions throughout the 1980s reinforced the eligibility expansions established by the Reform Act, especially the deference to treating physicians. See *Social Security Advisory Bd., Disability Decision Making: Data and Materials* 116–17 (2001)

136. See Autor & Duggan, *supra* note 4, at 162–64.
140. See *supra* note 135.
141. The public outcry that met the EEOC’s release of its guidance on psychiatric disabilities, see *EEOC, Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (1997), does suggest that the stigma attached to mental impairments might promote particular resistance to providing accommodations for people with such impairments, but that stigma quite likely caused significant resistance to hiring people with mental impairments even before the ADA.
potential cause of the decline in employment among people with disabilities.\textsuperscript{142} Even if the expansion in SSDI eligibility has had some significant effect in pulling people with disabilities out of the workforce—and there is little reason to doubt that it has—the ADA may have been operating to push them out at the same time.\textsuperscript{143} If the ADA limited employment prospects for people with disabilities, then paid employment may have become relatively less attractive and SSDI benefits relatively more attractive—particularly for workers with disabilities affected by the post-1984 eligibility expansion and low-wage workers who benefited from the SSDI indexing formula. Although “[w]e do not have satisfactory answers” to the question of the relative contribution of the ADA and SSDI to the drop in employment for people with disabilities in the 1990s,\textsuperscript{144} it

\textsuperscript{142} Both the Acemoglu/Angrist study and the Jolls/Prescott study employ regressions that control for the receipt of SSDI or SSI benefits. See Acemoglu & Angrist, \textit{supra} note 2, at 937–39; Jolls & Prescott, \textit{supra} note 70, at 21–23. Acemoglu and Angrist found that employing a control for disability benefits receipt (whether by omitting benefits recipients from the analysis or by including a dummy variable for benefits receipt in the regression) generally mutes but does not otherwise change the basic conclusion that the ADA has led to a reduction in weeks worked by people with disabilities age twenty-one to thirty-nine. See Acemoglu & Angrist, \textit{supra} note 2, at 937–39. Jolls and Prescott, as well, found an ADA disemployment effect even after they controlled for disability benefits receipt. See Jolls & Prescott, \textit{supra} note 70, at 21–23. But the fact that these studies employed regressions that controlled for benefits receipt is not a fatal blow to the SSDI explanation for the decline in employment among people with disabilities. (Nor does the fact that the Jolls/Prescott study employed a difference-in-difference-in-difference analysis that “looks at disabled employment levels in one group of states relative to disabled employment levels in other state groups”; as Jolls and Prescott note, the attractiveness of SSDI benefits to workers might differ systematically across their three state groups. \textit{Id.} at 22.) The SSDI program requires applicants to wait five months after their last job before applying for benefits, and the eligibility determination process can last for many months and sometimes years after that. During that entire period, SSDI applicants must refrain from working (lest they jeopardize their pending applications). As a result, the existence of and desire for SSDI benefits is likely to have an effect on employment participation even among those who have applied for (or intend to apply for) those benefits but have not yet received (and may never receive) them. But the measures used to control for the effects of SSDI in the Acemoglu/Angrist and Jolls/Prescott studies were—with the exception of one of the dummy variables used by Jolls and Prescott—measures of actual benefits recipiency. Accordingly, they could not detect the important employment effects SSDI has even before an individual is awarded benefits. See Burkhauser & Stapleton, \textit{supra} note 64, at 403–04 n.4 (criticizing the Acemoglu/Angrist study on these grounds). In any event, Bound and Waidmann found that “[o]nce the rise in the fraction of individuals receiving DI benefits has been accounted for . . . there is little evidence of any effect of the ADA.” Bound & Waidmann, \textit{supra} note 4, at 244–45. Because the posited ADA effect and the posited SSDI effect seem to be so closely intertwined, this does not seem to be a dispute that can be resolved by employing regressions that control for one factor or the other.

\textsuperscript{143} One significant indication that the ADA had an independent effect in pushing some people with disabilities out of the workforce comes from the Acemoglu/Angrist study’s finding that employment prospects for people with disabilities fell more sharply in medium-sized firms than in small or large firms in the post–ADA period. See Acemoglu & Angrist, \textit{supra} note 2, at 941–44; see also Hotchkiss, \textit{supra} note 90, at 41–42 (reporting similar results). As Burkhauser and Stapleton note, “[t]here is no apparent reason to think that SSDI and SSI expansions would reduce employment of people with disabilities at medium-sized firms relative to others,” but there is good reason to think that medium-sized firms are the ones most affected by the cost of accommodations. Burkhauser & Stapleton, \textit{supra} note 64, at 391.

\textsuperscript{144} Burkhauser & Stapleton, \textit{supra} note 64, at 392.
remains entirely plausible that both played a role.\textsuperscript{145}  

D. A Rosier Long-Term Picture?  

From the foregoing analysis, it should be clear that great uncertainty remains regarding the precise employment effects of the ADA. There are good theoretical reasons to expect that mandated accommodations would have a negative impact on employment for the large subset of people with disabilities who need workplace accommodations. And the empirical evidence is broadly consistent with that theory: People whose disabilities limit the kind or amount of work they can do seem to have lost ground following the enactment of the ADA, while job opportunities for people whose disabilities do not impose such work limitations seem to have expanded. Although it is possible that the composition of the population that self-reports work limitations changed during the 1990s in ways that masked more widespread positive employment effects of the statute, there are good reasons to doubt that it did so to any large extent. The expansion in SSDI benefits eligibility does seem to provide a good alternative explanation for the 1990s' employment drop among people with disabilities. But the effects of benefits expansion are likely to have been sufficiently intertwined with any disemployment effects of the ADA to make it impossible to reject the conclusion that both played a role in the employment drop.

Although the proposition that the ADA contributed to the decline in employment among people with disabilities cannot by any means be rejected, the lingering doubts about the scope of the statute’s disemployment effect as well as the role of disability benefits expansion should lead sensible policy analysts to hesitate before recommending such radical changes as repeal of all or part of the statute’s employment title.\textsuperscript{146} There are at least two additional reasons for analysts to be cautious in this

\textsuperscript{145} Similarly, the Hill/Livermore/Houtenville chapter provides strong evidence that the increase in health care costs in the United States contributed to the decline in employment for people with disabilities (by, among other things, making it harder for them to obtain private insurance and therefore forcing them to join the SSDI/SSI rolls to become eligible for Medicare or Medicaid). See Hill et al., \textit{supra} note 10, at 181–82. But this factor accounts for only a small fraction of the employment decline, see \textit{id.} at 206, so there remains strong reason to believe that the ADA played a role as well. And although changes in the nature of work (particularly increasing education and skill requirements and diminishing job security) probably adversely affect people with disabilities, those changes predate the sharp drop in disability employment in the early 1990s and cannot explain it. See Stapleton et al., \textit{supra} note 9, at 160–61.

\textsuperscript{146} See, e.g., Richard A. Epstein, \textit{Forbidden Grounds: The Case Against Employment Discrimination Laws} 493–94 (1992) (arguing that the ADA should be replaced by grants to firms that make their facilities accessible); Jerry L. Mashaw, \textit{Against First Principles}, 31 San Diego L. Rev. 211, 232–37 (1994) (suggesting that the ADA should be replaced by a system of tradable employment quotas for workers with disabilities); DeLeire, \textit{Unintended Consequences, supra} note 3, at 21, 24 (suggesting that the ADA’s accommodation mandate should be replaced by a disabled worker tax credit).
regard: (1) the real prospect that any disemployment effect of the ADA is a short-term phenomenon,147 and (2) the possibility of countering any disemployment effects of the statute by strengthening enforcement of the antidiscrimination and accommodation requirements at the hiring stage.

If the fear of accommodation costs has, after enactment of the ADA, led employers increasingly to discriminate against people with disabilities in hiring, then any reduction in the costs of accommodations should reduce the statute’s disemployment effects. And the costs of accommodations do seem likely to fall (though not to zero) over time. Many accommodations (such as the installation of a ramp) involve one-time expenditures that will be useful to an entire class of people with disabilities who might work for the employer at any point in the future.148 Once employers have made such an accommodation (whether in response to the request of a specific prospective employee or in response to the provisions of the ADA’s public accommodations title, which imposes various accessibility requirements on commercial facilities), the marginal cost of providing it to any future employee drops dramatically.149 Even where accommodations involve ongoing expenditures, their costs should fall over time as employers and others develop, disseminate, and refine techniques of accommodating people with a range of disabilities in a range of contexts and as courts develop a body of case law that reduces uncertainties in the ADA’s application.150 And full implementation of the public services and public accommodations titles of the ADA should expand educational opportunities for individuals with disabilities and thus make those individuals more attractive to employers.151

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147. I previously raised this point in Bagenstos, ADA as Welfare Reform, supra note 46, at 1018–19.

148. See Sue A. Krenek, Note, Beyond Reasonable Accommodation, 72 Tex. L. Rev. 1969, 2010 (1994) (“Renovation is a one–time expenditure that, once made, allows the company to hire from a larger labor pool (both workers with disabilities and those with no disabilities); enlarging the pool of available employees may allow the company to pay lower wages. Over the long term, it is thus likely that the benefit of renovating for physical accessibility outweighs its cost.”).

149. See Acemoglu & Angrist, supra note 2, at 940.

150. See Bagenstos, ADA as Welfare Reform, supra note 46, at 1018; Jolls & Prescott, supra note 70, at 19 (noting that accommodation costs might decline over time “in response to technological changes and judicial refinements of the ADA’s requirements”).

151. See Bagenstos, ADA as Welfare Reform, supra note 46, at 1018–19; Jolls & Prescott, supra note 70, at 19. Tolin and Patwell argue that the ADA’s expansion of educational opportunities may itself be a cause of the employment drop among people with disabilities. Because a greater percentage of people with disabilities attended college during the 1990s than did previously, one would expect to see a decline in employment among younger people with disabilities during that time as they took advantage of newly available educational opportunities. See Tolin & Patwell, supra note 4, at 135; see also Jolls, Accommodation Mandates, supra note 2, at 280 (hypothesizing that such an effect might have occurred). This is an important point, but it seems unlikely that increasing college attendance among people with disabilities can fully explain why so many more individuals with disabilities at virtually all age ranges reported in the 1990s that they were unable to work at all. See Kaye, supra note 18, at 23 (observing that reported inability to work increased between 1990 and 1996 for individuals with
Even if the ADA initially gave employers a net disincentive to hire people with disabilities, then, that disincentive may dampen or reverse with time. And indeed, there is some empirical evidence to support that prediction. Acemoglu and Angrist "note that the negative effects of the ADA seem to peak in 1994 or 1995." And Jolls and Prescott concluded that "[t]he innovation-related employment declines identified by state-law variation . . . were concentrated in the initial years after the ADA’s enactment." After 1993–1994, they found no link between the ADA and the decline in employment for people with disabilities. Even if the ADA did have an initial disemployment effect, Jolls and Prescott are surely correct to conclude that "the law may well have had no causal link to the declines in disabled employment through much of the 1990s."

It also bears emphasis that, on the now-standard economic analysis, the ADA will have a negative employment effect only if expected accommodations costs exceed the liability costs employers can expect to face if they discriminate against individuals with disabilities in hiring. Stepped-up efforts at enforcing the statute’s requirements at the hiring stage could increase those expected liability costs and, again, dampen or reverse any disemployment effect that now exists. Until such stepped-up efforts are attempted, it is surely too soon to write off the ADA as a potentially positive force in promoting employment among people with disabilities.

Yet disability rights advocates and defenders of the ADA have reason to be cautious as well. For the fact remains that the ADA simply has done very little, if it has done anything at all, to move significant numbers of people with disabilities into the workforce. There are serious limitations to what the ADA can do in that respect. For very large numbers of people with disabilities in all working-age ranges, especially the 30–39, 40–49, 50–59, and 60–64 year-old cohorts). For what it’s worth, Professor Jolls found that the enactment of the ADA was associated with increased educational participation for people with disabilities in only the three states that had no prohibition of disability-based discrimination (whether or not it included an accommodation requirement) prior to the ADA. See Christine Jolls, *Identifying the Effects of the Americans with Disabilities Act Using State-Law Variation: Preliminary Evidence on Educational Participation Effects*, 94 AM. ECON. REV. 447 (2004).

152. Acemoglu & Angrist, supra note 2, at 940.

153. Jolls, supra note 151 at 448; see also Bound & Waidmann, supra note 4, at 245 ("Were [the ADA] to have a significant independent effect on the employment of the disabled, we would expect to see a continued worsening of their employment prospects as the effects of the ADA accumulated over time. Instead, what we see is that, regardless of specification, year effects tend to peak in 1994 and drop subsequently.").

154. See JOLLS & PRESCOTT, supra note 70, at 17–18.

155. Id. at 28.

156. See, e.g., Jolls, *Accommodation Mandates*, supra note 2, at 281 (suggesting lifting, in hiring cases, the ADA’s damages caps).

157. For fuller development of the points in this paragraph, see Bagenstos, supra note 15.
with disabilities, the principal barriers to employment are structural. They 
inhere in the design of our health care system and in the failure of the 
government to provide services that would enhance independence. These 
barriers operate well before an employer even has an opportunity to 
discriminate. An antidiscrimination law like the ADA simply cannot 
eliminate them—and even the ADA's accommodation mandate is much 
more like a traditional antidiscrimination requirement than is ordinarily 
assumed.

Although ADA advocates are right to insist that the perverse-results 
critique of the statute has not been established, it remains essential that they 
face up to the real limitations of the antidiscrimination and accommodation 
approach. It is only by recognizing both the important contributions of the 
ADA and the need for more extensive social welfare interventions that 
disability rights advocates can make significant progress toward their 
ultimate goals of empowerment and integration for people with 
disabilities.158

III.
REFLECTIONS ON THE POLITICS OF THIS EMPIRICAL DISPUTE

To review, the evidence that the ADA has caused a decline in 
employment for people with disabilities cannot be ignored, but it is a long 
way from showing that the statute's ultimate effects will be perverse. Yet 
that has not stopped researchers like Professor DeLeire from broadly 
asserting that the ADA is clearly counterproductive and should be 
repealed.159 ADA defenders, for their part, have not stopped by pointing out 
the prematurity of the conclusion that the statute is counterproductive. 
They have sought as well to discredit the empirical findings that 
employment fell in the years immediately following the ADA's enactment 
and that other factors are unlikely explanations for that drop. In their efforts 
to discredit those findings, however, ADA defenders have been forced to 
rely on premises at odds with core principles of the disability rights 
movement. In particular, their arguments assume that people whose 
disabilities impose any work limitations should not ever be considered 
"qualified" for ADA purposes—a position that cannot be sustained as a 
proper interpretation of the statutory text—and that, as a result, analysts 
evaluating the ADA's effects simply should not care whether employment 
has increased or decreased among people who have work-limiting 
disabilities.

Why do proponents of the perverse-results challenge make arguments

158. See generally id.
159. See DeLeire, Unintended Consequences, supra note 3, at 21, 24.
that go so far beyond their data? And why are ADA defenders not content to stop at pointing out that the challenge is overblown? The answer for proponents of the perverse-results argument seems straightforward enough. As Albert Hirschman masterfully showed, the perversity thesis is a staple of reactionary rhetoric. In modern times, perverse-results arguments have quite frequently been deployed against civil rights laws and other regulatory interventions in the economy. For those who oppose such policies, the utility of the perversity thesis is clear: It allows the critic to accept, even embrace, the ultimate goals of reformers—goals that, like equality, empowerment, and public health, may be extremely popular. It permits the critic to pitch his or her challenge at the technocratic level of means—a level that may place the critic on far firmer political and rhetorical ground.

That the perverse-results argument readily serves an agenda should surely lead us to be “on guard,” as Hirschman says. But perverse-results arguments cannot simply be rejected out of hand. As Richard Pildes argues, “careful attention to actual consequences is required to sort out when these critical themes have force and when they do not.” Unfortunately, for too many ADA supporters the guiding principle in response to the perversity claim seems to have been not “careful attention to actual consequences” but a full-court-press defense. To be sure, Kruse and Schur have provided a careful analysis of the statute’s actual effects on various subclasses of people with disabilities. Their study provides

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160. See Albert O. Hirschman, The Rhetoric of Reaction: Perversity, Futility, Jeopardy 11–42 (1991); see also id. at 140 (“[T]he perversity claim would probably be pronounced the ‘winner’ as the single most popular and effective weapon in the annals of reactionary rhetoric.”).


162. See Hirschman, supra note 160, at 11.

163. As Hirschman notes, there is also more than a bit of a self-satisfied quality to perverse-effects arguments:

But the very douceur and self-flattery of this situation should put the analysts of the perverse effect, as well as the rest of us, on guard: could they be embracing the perverse effect for the express purpose of feeling good about themselves? Are they not being unduly arrogant when they are portraying ordinary humans as groping in the dark, while in contrast they themselves are made to look so remarkably perspicacious?

id., at 36. The perverse-effects argument thus might hold appeal even for those who have no preexisting hostility to a particular regulation.

164. Id.

165. Pildes, supra note 161, at 1360.
information that policymakers must consider in addressing the continuing employment problems of people with disabilities. But their study does not by any stretch demonstrate that the findings of Acemoglu, Angrist, and DeLeire have “little relevance” to ongoing policy deliberations.\textsuperscript{166} The authors of the Kruse/Schur and Blanck/Schwochau/Song chapters overreach when they make such a claim.

In part, that overreaching is an understandable reaction to the political power of the perverse-results argument—particularly when it is leveled against a statute as vulnerable as the ADA. Evidence of a judicial, political, and even social backlash against the ADA is abundant.\textsuperscript{167} The statute’s forthright intervention into the assignment of job tasks, and its requirement that (some) people with disabilities be excused from (some) work rules that their coworkers must follow, may seem to threaten core managerial prerogatives as well as basic principles of equal treatment.\textsuperscript{168} Perhaps resisting the changes the statute threatens, courts have read the ADA narrowly.\textsuperscript{169} Disability rights activists thus understandably feel that they are under siege. And one of the most effective weapons those activists have is the broad public support for improving the conditions in which people with disabilities live. But if the ADA is \textit{not} improving those conditions—if it is making them worse—that weapon is lost. If the perverse-results challenge is accepted, then, it could have devastating effects on public support for the ADA. It should come as no surprise that disability rights advocates feel impelled not just to show that the perverse-results exponents have argued beyond their data but instead to discredit their studies utterly and completely.

The disability rights movement must have a positive as well as a negative agenda, however. It seems likely that in the long run the benefits of the ADA for people with disabilities will clearly outweigh the costs. I have no doubt that historians will look back on the statute’s passage as marking an important turning point in American disability policy, in which people with disabilities were finally recognized as full citizens, with full rights to participate in political, economic, and civic life. But those who advocate the empowerment and integration of people with disabilities must recognize that the ADA has achieved only limited gains. Overall employment rates for people with disabilities have been stagnant or in decline, and the employment gap between people with and without

\textsuperscript{166} Blanck, \textit{et al.}, \textit{supra} note 4, at 275.

\textsuperscript{167} See, e.g., \textit{Backlash Against the ADA: Reinterpreting Disability Rights} (Linda Hamilton Krieger ed., 2003); \textit{Mary Johnson, Make Them Go Away: Clint Eastwood, Christopher Reeve \& the Case Against Disability Rights} (2003).

\textsuperscript{168} See Krieger, \textit{supra} note 122, at 509.

\textsuperscript{169} See \textit{id.} at 520. For a suggestion that backlash is not the only explanation for courts’ narrow readings of the statute, see Bagenstos, \textit{ADA as Welfare Reform, supra} note 46, at 976–85.
The decline in employment of people with disabilities has grown. The ADA has clearly helped some people with disabilities get jobs—particularly those people with disabilities who do not need workplace accommodations. But it has just as clearly helped some people with disabilities more than others, and those who need accommodations may have been harmed, at least in the short run.

Any meaningful effort to achieve empowerment and integration must both build on the ADA's successes where the statute has been successful and find alternative policy tools where the statute has not been successful. At a minimum, the data suggest that additional public subsidies for workplace accommodation—which would blunt employers’ incentive to discriminate against those who need accommodations—should be high on the policy agenda of disability rights advocates. A great deal of work would be required to decide how a subsidy scheme would be best crafted, implemented, and shepherded through Congress. In particular, any subsidy proposal must meet the objection that public funding of accommodations “both detracts from the notion of people with disabilities being entitled, as equally valued human beings, to civil rights, and/or renders those subsidies vulnerable in the future to the political process.”

It must also address the poor record of success left behind by previous efforts at subsidizing employment for disempowered people. But honest analysis of the data suggests that subsidies may be required to assure that employers actually provide accommodations to all who are “entitled” to them under the terms of the law. The effort to discredit studies that show harmful effects of the ADA will only draw time and attention away from the important work of deciding whether and what subsidies are appropriate in this context.

170. See supra Part I.
171. See supra Part II–B–1.
172. The tax code currently contains provisions that defray some of the costs employers incur when they provide accommodations to employees with disabilities, but those provisions are neither widely known nor widely used. See GEN. ACCOUNTING OFF., BUSINESS TAX INCENTIVES: INCENTIVES TO EMPLOY WORKERS WITH DISABILITIES RECEIVE LIMITED USE AND HAVE AN UNCERTAIN IMPACT (2002).
175. See Alstott, supra note 174, at 1018–47.
176. Subsidy policy raises the deeper question whether work or a broader conception of well–being
More generally, to achieve their goals disability rights advocates must honestly confront the ADA’s record in all of its complexities. The record has been a mixed one, and the disability rights movement will do itself no favors if it ignores the negative, as well as the positive, aspects of that record. I fear, however, that in almost reflexively defending the ADA against a powerful political attack, advocates may be tempted to do just that. Although the ADA is an incredibly important statute, both symbolically and practically, in the end it is just a means to an end: full and equal citizenship for people with disabilities. The statute cannot by itself achieve that end, for it is ill-suited to eliminating the deep-rooted structural barriers that keep many people with disabilities from even being in a position to apply for jobs.\(^1\) To achieve that end will require social welfare interventions as well as the antidiscrimination and accommodation approach of the ADA.\(^7\) But we will have a far better understanding of the proper balance between antidiscrimination and social welfare approaches if we fully account for both the benefits and the costs of the current regime.

IV. CONCLUSION

My argument will likely leave none of the partisans in this debate happy. For those who believe, with Professor DeLeire, that the “ADA is a striking example of the law of unintended consequences,”\(^179\) my contention that the net long-term effects of the statute will likely be positive will not sit well. For those who believe, with Professors Blanck, Kruse, Schur, and their coauthors, that the existing data have “little relevance to the question of whether the ADA has been effective since it was enacted,”\(^180\) my contention that the data do show something meaningful will not be welcome. As one who believes in the principles of integration and empowerment for people with disabilities, however, I do not think that those principles can be advanced without paying careful attention to all of the relevant evidence of the effectiveness of various policy tools. And the ADA—which is of historic importance both symbolically and practically—is at bottom a policy tool. Advocates of the statute (and I count myself as

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\(^1\) See Bagenstos, supra note 15, at Part II.

\(^7\) See id. at Part III.

\(^179\) DeLeire, Unintended Consequences, supra note 3, at 23.

\(^180\) Blanck, et al., supra note 4, at 275.
one) should keep that point in mind as we evaluate studies of the ADA's effects.