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Foreword: Disability and Identity

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I. INTRODUCTION: DISABILITY AND (SUPREME COURT) IDENTITY

Speaking extra-judicially, Justice O'Connor remarked that the 2002 Supreme Court session would be "'remembered as the disabilities act term'"[1] due to the number of cases involving interpretation of the Americans with Disabilities Act (ADA).[2] Her statement reverberates with unintended irony. Although the Court handed down fourteen ADA-related decisions between 1998 and

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1. *See* Charles Lane, *O'Connor Criticizes Disabilities Law as Too Vague*, WASH. POST, Mar. 15, 2002, at A2 (quoting Justice O'Connor). This phrase was previously used by a commentator taking the Court to task for the unseemliness of its earlier decisions. *See* Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279 (2000) (focusing on the six disability cases decided by the Court during the 1998-99 term).

2. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12001-12213 (2000).

2002,[3] some dozen years after the statute's passage it is unclear which individuals are, or ought to be, covered by its provisions.[4]

Nor has the Court's recent interest, intense as it is following eight years of silence, afforded much guidance on this key issue.[5] Echoing the admonition in the *Gondoliers* by Don Alhambra Del Bolero that, "[w]hen everybody is somebod[y], [t]hen no one's anybody,"[6] the Court zealously has taken on a gatekeeping role, ensuring that only those individuals with disabilities "worthy" of the appellation[7] be afforded ADA protection.[8] Nonetheless, the Justices' ADA juris-

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3. Specifically, the Court has issued rulings in six cases directly raising employment claims (Chevron U.S.A., Inc. v. Echazabal, 122 S. Ct. 2045 (2002); US Airways, Inc. v. Barnett, 122 S. Ct. 1516 (2002); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); and Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999)); three which indirectly raise employment claims (EEOC v. Waffle House, Inc., 534 U.S. 279 (2002); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); and Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999)); and five others raising nonemployment issues (Barnes v. Gorman, 122 S. Ct. 2097 (2002); PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001); Olmstead v. Zimring, 527 U.S. 581 (1999); Bragdon v. Abbott, 524 U.S. 624 (1998); and Pa. Dep't of Corr. v. Yesky, 524 U.S. 206 (1998)).

4. Much ink has been, and will continue to be, spilled over this issue. *See, e.g.*, Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 93-94 (2000) (describing the drafting history of the ADA and proposing amendments to clarify the definition of disability); Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, 21 BERKELEY J. EMP. & LAB. L. 166, 173 (2000) (suggesting that courts should employ a sociopolitical definition of disability); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 370 (2000) (concluding that the Court's decisions regarding the definition of disability "seriously undermine the purposes and goals of the ADA"); Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 579-81 (2000) (arguing that the Court should defer to the EEOC's interpretations of the definition of disability).

5. Moreover, "the Court has not yet granted certiorari in any case where a reasonable accommodation has been upheld, thus making it difficult to discern what they would consider a reasonable accommodation." Michael Ashley Stein, *Disability, Employment Policy, and the Supreme Court*, 55 STAN. L. REV. 607, 629 (2002). For the nonce, *Barnett* holds that, absent a showing of special circumstances, a requested accommodation that conflicts with a seniority system is ordinarily unreasonable. 122 S. Ct. at 1519.

6. WILLIAM S. GILBERT & ARTHUR SULLIVAN, THE GONDOLIERS, ACT 2, song by Don Alhambra, with Marco and Giuseppe.

7. Anita Silvers and I argue elsewhere that determining disability in the context of accommodation requests necessarily requires courts to decide who is morally worthy of protection. *See* Anita Silvers & Michael Ashley Stein, "And Accommodations for All" (Feb. 2003) (unpublished manuscript, on file with authors).

8. They are not alone in this desire. *See* John W. Parry, *Supreme Court Narrows and Expands ADA Disability Definition*, 26 MENTAL & PHYSICAL DISABILITY L. REP. 15, 16 (2002)

prudence is less reminiscent of a Gilbert and Sullivan operetta than it is of a Jackie Mason comedy routine.[9]

According to the Court, to fit under the ADA, an individual has to be neither too little disabled nor too greatly disabled;[10] has to be disabled despite measures that mitigate her disability;[11] has to be credentialed as disabled if an employer perceived of her as disabled, but only if the employer admits that it did so;[12] and always needs to be able to perform essential job functions[13] while at the same time (absent accommodation) be functionally impaired from conducting not only the job at issue, but a range of other jobs as well.[14] In determining disability status, the Court need not defer to Equal Employment Opportunity Commission (EEOC) regulations,[15] but

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(noting that an individual must bring substantial evidence of an impairment beyond a medical diagnosis to sustain his claim).

9. For a self-provided overview, see http://www.jackiemason.com (last visited Jan. 28, 2003).

10. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002) (holding that an employee with carpal tunnel syndrome who was unable to perform repetitive job functions at a car manufacturing plant was not disabled enough to qualify for protection under the ADA because she was able to perform normal household chores); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565-66 (1999) (ruling that a monocular truck driver who was not rehired because he failed to meet the Department of Transportation's vision standards did not qualify for ADA protection as he was able to compensate for his impairment); Sutton v. United Air Lines, Inc., 527 U.S. 471, 488-89 (1999) (holding that severely myopic twins who were precluded from positions as global airline pilots were not considered disabled because their vision was correctable with glasses); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999) (ruling that a mechanic with high blood pressure did not qualify as disabled under the ADA because "when medicated, petitioner's high blood pressure [did] not substantially limit him in any major life activity").

11. *Kirkingburg*, 527 U.S. at 565-66 (concluding that a court must consider mitigating measures when determining if an individual is disabled); *Sutton*, 527 U.S. at 483 (finding that an impaired individual may not be substantially limited in a major life activity if such impairment is corrected by mitigating measures); *Murphy*, 527 U.S. at 521 (holding that the petitioner is not substantially limited in one or more life activities because of the availability of mitigating measures).

12. *Sutton*, 527 U.S. at 489 (holding that "it is necessary that a covered entity entertain misperceptions about the individual ... either that one has a substantially limiting impairment that one does not have or ... is not so limiting").

13. *See, e.g.*, US Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1520 (2002) (reinforcing the ADA's requirement that a qualified individual with a disability must be able to perform the essential functions of the position in question).

14. *See Toyota*, 534 U.S. at 200-01 (applying the *Sutton* rationale that courts should determine if an individual is unable to perform a range of jobs to be substantially limited in the major life activity of working).

15. *See Sutton*, 527 U.S. at 479 (noting that Congress did not delegate to any agency the

may reference[16] or apply[17] those regulations.[18] Moreover, the Court will pay no heed to established and previously utilized regulations interpreting disability under an identical definition,[19] but will adopt the retrogressive notion of disability[20] contained therein,[21] with approbation.[22]

Consequently, despite the Supreme Court's disproportionately high interest in adjudicating ADA-related claims, an interest presumably motivated by a desire to lend clarity to this statute's

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authority to define and interpret the term "disability").

16. *See id.* at 480 ("Although the parties dispute the persuasive force of these interpretive guidelines, we have no need in this case to decide what deference is due.").

17. Chevron U.S.A., Inc. v. Echazabal, 122 S. Ct. 2045, 2052-53 (2002) (finding that the EEOC's interpretation of the ADA's direct threat provision was reasonable and thus entitled to deference).

18. *See* White, *supra* note 4, at 579-81 (arguing that the Court should have deferred to agency interpretations in *Bragdon v. Abbott*, 524 U.S. 624 (1998) and *Sutton*, 527 U.S. 471).

19. I discuss this below in Part II.

20. *See* Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 94 (Fall 2001/Winter 2002) (arguing that the Court has carried over previous accreted socio-legal conventions in its ADA decisions).

21. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367-68 (2001) (citing with approval its previous decision in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985)). This is problematic for several reasons. *See* Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 122 (1987) (suggesting that the majority in *Cleburne* relied on the so-called "Abnormal Persons" approach to justify its decision and so "embrace[d] the conception that because difference based on mental competence are real, natural and immutable, governmental action based on this difference is not suspicious but instead legitimate"); Silvers & Stein, *supra* note 20, at 84 (arguing that the Court has adopted a retrogressive view of disabled individuals that assumes these individuals are incompetent).

22. This formal approval is evidenced, linguistically, in several opinions. *See Garrett*, 531 U.S. at 367-68 (agreeing that states "could quite hardheadedly—and perhaps hardheartedly —hold to job-qualification requirements which do not make allowance for the disabled" as long as they are rational). For an analysis of this retrogressive jurisprudence, see Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699, 715 (2002) (stating that Justice Kennedy's concurring opinion in *Garrett* reinforces these prejudicial views of the disabled when describing his own struggle between his baser "human instincts' (that make people who are different from us seem very unsettling) on the one hand, and 'the better angels of our nature' on the other") (footnote omitted).

application,[23] due to their Procrustean jurisprudence,[24] the central question of who is "disabled" remains unresolved.

II. DISABILITY AND (LEGISLATIVE) IDENTITY

Justice O'Connor raised a second criticism concerning the "'uncertainties as to what Congress had in mind'" regarding the scope of ADA coverage.[25] This was due mainly to the legislative sponsors being "'so eager to get something passed that,'" according to Justice O'Connor, "'what passes hasn't been as carefully written as a group of law professors might put together.'"[26]

Justice O'Connor is correct in her general assertion that Congress was indeed negligent when enacting the ADA (I discuss some reasons for this elsewhere),[27] but is incorrect as far as the reason she proffers.[28] Although the ADA's sponsors may have been

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23. Some commentators assert a more insidious impetus. Mark A. Rothstein et al., *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans With Disabilities Act*, 80 WASH. U. L.Q. 243, 244 (2002) (claiming that recent Supreme Court decisions contravene the statute's intent rather than clarify its application); *see also* Ann Marie Girot, *"Disability Status" for Asymptomatic HIV? Pondering the Implications, Unanswered Questions, and Early Application of* Bragdon v. Abbott, 1999 UTAH L. REV. 755, 796 (arguing that the Supreme Court's decision in *Sutton* compounded the confusion already established in *Bragdon* regarding ADA definitions).

24. According to the famous myth, Procrustes would offer traveling strangers a meal and a bed for the night when they passed by his home. The bed, he claimed was "magical," for it could fit the size of any person who laid upon it. Procrustes' "magic," however, was not the stuff of Disney movies or childhood bedtime stories. The bed itself did not transform. Rather, when the visitors retired for the evening, Procrustes would either stretch them out on a rack or cut off their legs to fit the bed. *See* BERGEN EVANS, DICTIONARY OF MYTHOLOGY: MAINLY CLASSICAL 211 (1970).

25. Lane, *supra* note 1 (quoting Justice O'Connor).

26. *Id.* (quoting Justice O'Connor).

27. *See* Silvers & Stein, *supra* note 7 (arguing that, absent consciousness-raising, the civil rights empowerment of disabled people is in jeopardy); Silvers & Stein, *supra* note 20, at 123 (demonstrating how Congress inadvertently imported social conventions into ADA jurisprudence); Michael Ashley Stein, *Disability and Employment: Alternative Approaches to Traditional Empirical Research*, *in* EMERGING WORKFORCE ISSUES: W.I.A., TICKET TO WORK, AND PARTNERSHIPS 95, 96 (L. Robert McConnell ed., 2001) (same); Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1685 (2000) (asserting that the ADA was passed without sufficient resources to account for environmental impediments); Stein, *supra* note 5, at 118-19 (noting that if Congress wanted to accord the disabled constitutionally protected status, it should have been more overt in stating so).

28. The legislative history that follows is drawn from Silvers & Stein, *supra* note 20, at 120-21, which also demonstrates the deeper effect of accreted societal biases that are

"eager"[29] to pass a civil rights statute on behalf of the forty-three million disempowered Americans with disabilities[30] subject to systemic societal prejudice,[31] not only was the definition well thought out, if poorly chosen,[32] it *was* in fact the considered product of law professors.[33]

In defining who would be protected as "disabled," Congress adopted without alteration the definition of disability from the Rehabilitation Act.[34] That designation encompassed a group of people who have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual[s],"[35] those who have a history of such impairment,[36] or those who are regarded as having an impairment.[37]

Importing this three-prong disability definition was a matter of political expediency. Regulations issued in 1977 by the Department of Health, Education, and Welfare (HEW) (now the Department of Health and Human Services (HHS)) extensively cataloged those who were considered "handicapped" under the Rehabilitation Act.[38] Both

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entwined in this definition. I am grateful to Professor Silvers for her courtesy.

29. *See generally* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 105-41 (1993) (recounting the history and passage of the ADA).

30. 42 U.S.C. § 12101(a)(1) (2000). The Census Bureau not estimates that approximately 52.6 million Americans were disabled in 1997. Press Release, Census Bureau, U.S. Dep't of Commerce, 11th Anniversary of Americans With Disabilities Act (July 11, 2001), *at* http://www.census.gov/Press-Release/www/2001/cb01ff10.html (last visited Jan. 28, 2003). This empirical fact did not seem to trouble the Supreme Court which, in *Sutton*, reasoned that myopics could not have been covered under the ADA after engaging in a bizarre reverse engineering exercise predicated on the earlier figure of forty-three million. Sutton v. United Air Lines, Inc., 527 U.S. 471, 484-86 (1999).

31. These are well documented in the ADA Findings, 42 U.S.C. § 12101(a)(2)-(9) (2000), and are discursively set out in Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 416-26 (1991).

32. *See* Anita Silvers & Michael Ashley Stein, *From* Plessy *(1896) and* Goesart *(1948) to* Cleburne *(1985) and* Garrett *(2001): A Chill Wind From the Past Blows Equal Protection Away*, *in* BACKLASH AGAINST THE AMERICANS WITH DISABILITIES ACT: REINTERPRETING DISABILITY RIGHTS 357-59 (Linda Hamilton Krieger ed., 2002) (arguing that disability discrimination jurisprudence should be reconceptualized to mirror race and gender-based discrimination jurisprudence); Silvers & Stein, *supra* note 20, at 119-20.

33. *See infra* text accompanying notes 51-57.

34. Rehabilitation Act of 1973, 29 U.S.C. § 705(9) (2000).

35. 42 U.S.C. § 12102(2)(A).

36. *Id.* § 12102(2)(B).

37. *Id.* § 12102(2)(C).

38. 45 C.F.R. § 84.3 (2001).

agencies and courts relied almost uniformly on these interpretive guidelines when enforcing the Rehabilitation Act.[39] Although legislators excluded several controversial conditions from ADA coverage,[40] Congress viewed the incorporation of Rehabilitation Act terms as a swift and unproblematic way of limning ADA coverage.[41]

Along with the wholesale importation of the definition of disability from the Rehabilitation Act into the ADA, Congress also introduced that statute's formulation of what comprises disability-based discrimination. This was neither an obvious nor an unopposed choice for Congress. Dissatisfied with the scope of pre-ADA civil rights statutes affecting the disabled,[42] academic commentators[43] and disability rights groups[44] had advocated amending the Civil Rights Act of 1964 through addition of the term "handicapped" since the mid-1980s. The result of this emendation would have been protections against discrimination paralleling that of other groups; for example, "on the basis of" having a disability was a formula utilized in some other disability-related antidiscrimination stat-

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39. Chai R. Feldblum, *The Americans with Disabilities Act Definition of Disability*, 7 LAB. LAW. 11, 12–13 (1991) (demonstrating the clarity that the 1977 HEW regulations lent to the ADA's definition of disability).

40. Homosexuals, transvestites, pedophiles, kleptomaniacs, and exhibitionists, among others, were excluded from statutory coverage. *See* 42 U.S.C. § 12211.

41. *See generally* Burgdorf, *supra* note 31, at 445-51 (noting that the 1974 definition of disability under the Rehabilitation Act came under much judicial and regulatory scrutiny, thereby creating a settled precedent for the ADA).

42. *See* Janet A. Flaccus, *Discrimination Legislation for the Handicapped: Much Ferment and the Erosion of Coverage*, 55 U. CIN. L. REV. 81, 81-82 (1986) (highlighting the relatively extensive protection from discrimination that Congress gave to certain groups while enacting only two limited statutes for protection of the disabled); Janet Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 ARK. L. REV. 261, 262-64 (1986) (demonstrating the limited protection that the Rehabilitation Act affords to individuals with disabilities).

43. *See, e.g.*, Robert L. Burgdorf, Jr. & Christopher G. Bell, *Eliminating Discrimination Against Physically and Mentally Handicapped Persons: A Statutory Blueprint*, 8 MENTAL & PHYSICAL DISABILITY L. REP. 64, 71 (1984) (arguing that "[d]iscrimination against handicapped persons should be prohibited in all the contexts where Congress has seen fit to outlaw other forms of discrimination").

44. Most prominent was the National Council on the Handicapped's strong opposition to the Rehabilitation Act model: "Proof of class membership is not required under other types of nondiscrimination laws, and statutes guaranteeing equal opportunity for persons with disabilities need not have such a requirement either." NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE A-25 (1988).

utes.[45] This formulation would also have mirrored the one applied to people covered by the Civil Rights Act of 1964 (Title VII).[46]

By contrast, the Rehabilitation Act (as well as a handful of statutes modeled after it)[47] requires that those individuals defined as having a disability must also satisfy a second requirement, that they be "qualified" individuals with disabilities;[48] a term which the Act defined as those individuals who can perform the essential functions of a given job either with or without reasonable accommodation.[49] The Rehabilitation Act's formulation requiring disabled plaintiffs to prove their qualifications was incorporated into the ADA's Title I.[50]

Although this heavy adaptation of definitional terms and administrative agency regulations may have been unfortunate in some respects,[51] it was not the result of the type of slipshod drafting reproved by Justice O'Connor.[52] At least three of the people who helped draft and negotiate the ADA's provisions were, in fact, law professors. Moreover, Chai Feldblum,[53] Robert Burgdorf,[54] and

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45. Examples include the prohibition of discrimination on the basis of disability for the purposes of Foreign Service employment, 22 U.S.C. § 3905(b)(1) (2000); participation in any pursuit funded under the Full Employment and Balanced Growth Act of 1978, 15 U.S.C. § 3151(a) (2000); activities of labor organizations, 5 U.S.C. § 7116(b)(4) (2000); and the sale or rental of housing, 42 U.S.C. § 3604(f)(1)-(2).

46. 42 U.S.C. §§ 2000e-2000e-17.

47. *See, e.g.*, 49 U.S.C. § 1374(1) (1988) (prohibiting air carriers from discriminating against qualified individuals with handicaps).

48. *Id.* A clear demonstration of this standard, as well as the circularity of its reasoning, can be seen in *Southeastern Community College v. Davis*, 442 U.S. 397, 397 (1979), where the Court held that because a student with a profound hearing disorder could not be reasonably accommodated in a clinical nurse training program, adverse actions taken against her could not be construed as disability discrimination because she was not an "otherwise qualified handicapped individual" under the terms of the statute. *Id.*

49. Rehabilitation Act of 1973, 29 U.S.C. § 791 (2000).

50. 42 U.S.C. §§ 12111(8), 12112(a).

51. *See supra* note 27 and accompanying text.

52. Lane, *supra* note 1.

53. *See* Feldblum, *supra* note 4, at 92 (suggesting that changing definitions under the ADA would cause confusion unnecessarily); Feldblum, *supra* note 39, at 12-13 (stating that the ADA's definition of disability is almost identical to that of the Rehabilitation Act).

54. *See* Robert L. Burgdorf, Jr., *"Substantially Limited" Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 438-39 (arguing that most regulations and judicial decisions have supported both acts' definitions and principles). *See generally* Burgdorf, *supra* note 31, at 444-45 (drawing parallels between section 504 of the Rehabilitation Act and the ADA).

Arlene Mayerson,[55] each believed that extending the Rehabilitation Act's extant and well-received system to the ADA would provide a clear standard for determining which individuals were included under the ADA's auspices.[56] As Feldblum has stated: "Congress felt comfortable relying on a definition that had fifteen years of experience behind it, and disability rights advocates felt comfortable that the same individuals with the wide range of impairment who had been covered under existing disability antidiscrimination law would be covered under the ADA."[57] Again, the drafters' deliberate and conscious choice of including the Rehabilitation Act's language in the ADA was based on their assumption that the ADA would be viewed as a slight change from its predecessor and, therefore, interpreted similarly.

Thus, despite Justice O'Connor's admonition, it was law professors who very consciously promulgated the ADA's definition of disability as it presently exists. Although their decision turned out to be an unfortunate one, it certainly was not lightly considered.

III. DISABILITY AND (CONCEPTIONS OF) IDENTITY

We have come full circle to the question initially raised: Who should be considered "disabled" under the ADA? On October 27, 2001, more than a dozen scholars met to discuss this issue at a symposium convened at the College of William and Mary School of Law.[58] Their research, which is published in this issue, offers rare insight.[59]

During the course of the convivium, several major themes emerged regarding the intersection between disability, identity, and

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55. *See* Arlene Mayerson, *Title I—Employment Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 499 (1991) (noting the overwhelming contributions that the Rehabilitation Act made to the ADA).

56. As did other commentators. *See* 136 CONG. REC. E1913, E1914 (1990) (statement of Rep. Hoyer) (arguing that the ADA's definition of "regarded as" should mirror the same language in the Rehabilitation Act).

57. Feldblum, *supra* note 4, at 92.

58. Participating, but not contributing (in writing) to this issue, were the aforementioned Davison Douglas and Anita Silvers, as well as the Honorable Robert M. Bell, Chief Judge of the State of Maryland.

59. As well as rare ideological balance by including some theories that will not be to the taste of some of the disability rights community.

the law. The articles that follow focus on perceptions of disability—within the disability "community," among the Justices on the Supreme Court, and in society more generally—and the effectiveness (or lack thereof) of the ADA.

Continuing a historical and empirical research agenda,[60] Peter Blanck and Chen Song, in *"Never Forget What They Did Here": Civil War Pensions for Gettysburg Union Army Veterans and Disability in Nineteenth-Century America*,[61] demonstrate how access to the pension system was driven, at least in part, by public perceptions of disability.[62] They consider the extent to which a veteran was considered more or less "worthy" of benefits depending upon the nature of his disability and his role in the war. They suggest as one implication of their study the need for further investigation on the impact that extra-legal factors have on present day disability jurisprudence.[63]

Turning to the present, in *Disabling the ADA: Essences, Better Angels, and the Unprincipled Neutrality Claims*,[64] Aviam Soifer assesses the Supreme Court's ADA jurisprudence.[65] He asserts that the Justices have erected an unempathetic emotional barrier between themselves and the disabled.[66] All the while, a majority of the Court remains firmly unconvinced that the disabled require (or even deserve) legal protection.[67] The Justices' general denial of the need for legal protection is even more egregious for those with mental disabilities.[68] Samuel Bagenstos, in contrast, attempts to explain the Court's recent decisions in *The Americans with*

60. *See* Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109 (2001); Peter David Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1 (2000); Peter Blanck & Chen Song, *Civil War Pension Attorneys and Disability Politics*, 35 U. MICH. J.L. REFORM 137 (Fall 2001/Winter 2002); Peter Blanck & Chen Song, *"With Malice Toward None; With Charity Toward All": Civil War Pensions for Native and Foreign-Born Union Army Veterans*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 1 (2001).

61. 44 WM. & MARY L. REV. 1109 (2003).

62. *Id.* at 1112.

63. *Id.* at 1164.

64. 44 WM. & MARY L. REV. 1285 (2003).

65. *Id.*

66. *Id.* at 1288.

67. *Id.* at 1290.

68. *Id.* at 1292-94.

Disabilities Act as Welfare Reform[69] by suggesting that the outcomes of these cases are consistent with at least some of the underlying justifications for the ADA. Specifically, he examines the arguments put forth by disability rights advocates and their congressional supporters regarding moving people with disabilities from welfare to work.[70] Bagenstos concludes that the larger disability rights movement ignores the impact of the welfare reform argument at its peril.

Moving beyond social and judicial notions of disability, Susan Stefan tackles the issue of identification within the disability community itself. In *"Discredited" and "Discreditable": The Search for Political Identity by People with Psychiatric Diagnoses*,[71] she describes two separate categories of people with psychiatric disabilities: the "discredited" and the "discreditable."[72] Although these groups differ in the way that society labels them and in the manner in which they view the medical profession, both suffer from social stigma and disbelief.[73] Stefan argues that both groups must recognize and accept the other's self-definition in order to promote their common interests.[74]

Whereas some of the authors address the coverage of the ADA, in other words, how to define disability, others address the economic underpinnings of the law, and query the extent to which it could be more effective. Amy Wax, for example, argues that the ADA can improve social welfare overall so long as people with disabilities in the workplace are somewhat productive.[75] Nonetheless, she asserts that because of minimum wage and equal pay legislation, employers may not be willing to hire workers with disabilities even when it is economically beneficial to society as a whole.[76]

Accepting Wax's premise that disabled workers may be less productive than those without disabilities, Stewart Schwab and

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69. 44 WM. & MARY L. REV. 921 (2003).
70. *Id.* at 961-71.
71. 44 WM. & MARY L. REV. 1341 (2003).
72. *Id.* at 1349.
73. *Id.* at 1350.
74. *Id.*
75. Amy L. Wax, *Disability, Reciprocity, and "Real Efficiency": A Unified Approach*, 44 WM. & MARY L. REV. 1421 (2003).
76. *Id.* at 1424.

Steven Willborn investigate some economic aspects of hiring disabled workers. In *Reasonable Accommodation of Workplace Disabilities*,[77] they highlight distinctions between the "soft" anti-discrimination preference under Title VII and the "hard" accommodation preference under the ADA.[78] Because the latter favors cost accommodations over productivity accommodations, Schwab and Willborn argue that disabled workers should be allowed to subsidize their accommodations when "extra-reasonable,"[79] and ultimately predict that Title VII and similar civil rights laws will evolve to incorporate elements of the ADA model.[80] J.H. Verkerke likewise tackles the antidiscrimination/accommodation debate.[81] Responding to one scholar's recent claim that antidiscrimination and accommodation can, at times, overlap,[82] he suggests that civil rights mandates fall along a continuum, with antidiscrimination and accommodation serving as anchors on each end. Here he concludes that although the distinction between antidiscrimination and accommodation sometimes blur, the categories nevertheless draw a "meaningful distinction" in defining and remedying employment discrimination.[83]

Following on these three economic examinations are a pair of empirical investigations into the economics of ADA employment. In *Labor Force Participation and Income of Individuals with Disabilities in Sheltered and Competitive Employment: Cross-Sectional and Longitudinal Analyses of Seven States During the 1980s and 1990s*,[84] Peter Blanck, Helen Schartz, and Kevin Schartz examine the labor force participation and wages of individuals who have transitioned from facility-based work to employment in integrated settings.[85] Notable among their findings is that those individuals who transitioned from sheltered workshops to inte-

77. 44 WM. & MARY L. REV. 1197 (2003).

78. *Id.* at 1209.

79. *Id.* at 1279.

80. *Id.* at 1204.

81. J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385 (2003).

82. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

83. Verkerke, *supra* note 81, at 1387.

84. 44 WM. & MARY L. REV. 1029 (2003).

85. *Id.*

grated employment settings improved both their earned income and their levels of daily living skills.[86] Susanne Bruyère's study, outlined in *Identity and Disability in the Workplace*,[87] also examines labor force participation, but focuses specifically on the barriers to employment faced by people with disabilities. She finds that despite the passage of the ADA, discrimination and stereotypes continue to create a disparity in employment opportunities for the disabled.[88]

CONCLUSION

This Symposium has contributed to the disability-related legal literature by lending insight to the ongoing and unanswered question of who should be covered under the ADA. Much more thought and work needs to be done in this regard. Beyond learning the boundaries of who ought to be covered under the statute's auspices, and how such determinations can be made predictably, are larger issues relating to identity. For example, do the disabled have a unifying group identity in the same way that other statutorily protected groups—say women, or people of color—are perceived to have?[89] Likewise, can other aspects of the anti-discrimination canon—for instance, hostile work environment—be applied to the disabled?[90] What significance do exogenous factors, like Department of Justice enforcement, have upon the ADA's efficacy? And, if the ADA is not effective, how might its efficacy be

86. *Id.* at 1030.

87. 44 WM. & MARY L. REV. 1173 (2003).

88. *Id.* at 1173.

89. For a discussion of this issue, see Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391 (2001); Silvers & Stein, *supra* note 20.

90. For analyses of disability-based harassment in the workplace, see Lisa Eichorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575 (2001); Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475 (1994); Holland M. Tahvonen, Note, *Disability-Based Harassment: Standing and Standards for a "New" Cause of Action*, 44 WM. & MARY L. REV. 1485 (2003).

improved?[91] My hope is that this Symposium will stimulate further dialogue about these quandaries.

91. *See generally* Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. & LAB. L. 271 (2000); Stein, *supra* note 27.