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Disability, Employment Policy, and the Supreme Court

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BOOK REVIEW

Disability, Employment Policy, and the Supreme Court

Michael Ashley Stein*

CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE. By Ruth O'Brien. Chicago: The University of Chicago Press, 2001. 288 pp. + xiv.

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INTRODUCTION

After only twelve days in office, President George W. Bush announced the "New Freedom Initiative" (NFI),¹ a domestic policy program aimed at "tearing

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1. The full text can be accessed online through the White House's website: <http://www.whitehouse.gov/news/freedominitiative/freedominitiative.html> (last visited Oct. 13, 2002) [hereinafter NFI Online Text].

down the barriers to equality”² facing the nation’s fifty-four million citizens with disabilities.³ The press conference, convened at the White House, was imbued with indicia of the Chief Executive’s commitment to, and empathy with, disabled Americans. Mr. Bush issued his remarks while seated behind a low wooden dais, positioning himself at eye level with the audience, all of whom used wheelchairs.⁴ The President also made special reference to the slightly elevated ramped path leading to the East Room, remarking that the topography originated in the removal of stairs “so that Franklin Roosevelt”—whose wheelchair use was consciously concealed from the public during his terms of office,⁵ and later ignominiously disregarded by Congress when designating a memorial in his honor⁶—“could make it to his place of work.”⁷

Beyond the obvious significance of its timing relative to Mr. Bush’s tenure in office, the NFI could hardly have been proposed at a more opportune moment. The announcement came in the wake of criticism⁸ of the employment provisions of the Americans with Disabilities Act (ADA),⁹ a civil rights statute passed during George H.W. Bush’s term in office.¹⁰ Moreover, the President’s

2. *Id.*

3. *Id.* The Census Bureau classifies nearly 20% of Americans as having some kind of disability. Census Bureau, U.S. Dep’t of Commerce, Census Brief 97-5, *Disabilities Affect One-Fifth of All Americans*, available at <http://www.census.gov/prod/3/97pubs/cenbr975.pdf> (last visited Oct. 13, 2002). Demographic data for the disabled population can be found at the Current Population Survey’s website, <http://www.census.gov/hhes/www/disability.html> (last visited Oct. 13, 2002). The complex issues of who counts as “disabled,” and whether there ought even to be a univocal definition of that classification, goes well beyond the scope of this work.

4. See David E. Sanger, *With Conciliatory Gestures, Bush Reaches Out in Reprise of Successful Clinton Tactic*, N.Y. TIMES, Feb. 2, 2001, at A17. In doing so, the President was honoring a sensible, albeit frequently neglected, courtesy. See CITY OF SAN ANTONIO DISABILITY ACCESS OFFICE, DISABILITY ETIQUETTE HANDBOOK, available at http://www.sanantonio.gov/planning/disability_handbook/deh5.asp (last visited Nov. 2, 2002). A humorous take on disabled/nondisabled interaction is JOHN CALLAHAN, DON’T WORRY, HE WON’T GET FAR ON FOOT 190 (1989) (cataloging social taboos, including “acting like Leo Buscaglia”).

5. The decisive treatment is HUGH GREGORY GALLAGHER, *FDR’S SPLENDID DECEPTION: THE MOVING STORY OF ROOSEVELT’S MASSIVE DISABILITY AND THE INTENSE EFFORTS TO CONCEAL IT FROM THE PUBLIC* (3d ed. 1999).

6. This was done much to the consternation of various disability rights groups. See, e.g., David Stout, *Roosevelt Heirs Try to Calm Furor over Memorial*, N.Y. TIMES, Apr. 12, 1997, at A9. Ultimately, a life-sized statue of Roosevelt sitting in a wheelchair commissioned for the memorial and paid for by private donations was unveiled four years later. See Nelly Tucker, *A Wheelchair Gains a Place at FDR Memorial*, WASH. POST, Jan. 7, 2001, at C1.

7. See President George W. Bush, Remarks in Announcement of New Freedom Initiative (Feb. 1, 2001), at <http://usinfo.state.gov/usa/able/bush0201.htm>.

8. The criticism came mostly on the question of the ADA’s efficacy. See generally Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671 (2000) (reviewing and critiquing the conflicting studies).

9. 42 U.S.C.A. § 12,001 (West 2002).

10. See generally JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A

intention of stringently safeguarding his father's legacy was clearly pronounced: "Wherever a door is closed to anyone because of a disability, we must work to open it. Wherever any job or home, or means of transportation is unfairly denied because of a disability, we must work to change it."¹¹ In consequence, the NFI's scope is ambitious, encompassing goals that range from alternative means of public transportation to greater home ownership for people with disabilities.¹²

Yet, despite setting forth a promising agenda aimed at improving the relative economic and social position of Americans with disabilities (implementing some policy features that have been promoted by myself¹³ and others¹⁴ over the past decade), the dynamic underlying the NFI is troubling. For in seeking to incorporate people with disabilities into mainstream society, the initiative at times places the onus of integration squarely upon the disabled.

To illustrate, central to the section entitled "Integrating Americans with Disabilities into the Workplace"¹⁵ (and played up considerably at the press conference)¹⁶ is a proposal to increase "telework" (meaning long-distance computer-assisted commuting) for disabled workers by "guarantee[ing] low-income loans for people with disabilities to purchase equipment to telecommute from home."¹⁷ As a general proposition, it is difficult to overestimate the importance and centrality of employment¹⁸ both for workers with disabilities,¹⁹

NEW CIVIL RIGHTS MOVEMENT (1993); Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 EMORY L.J. 245 (1994) (reviewing SHAPIRO, *supra*). Also passed during the first Bush's presidency was the Civil Rights Act of 1991, 42 U.S.C.A. § 1981 (West 2002).

11. For the full text, see Bush, *supra* note 7. Unstated were some odd parallels. For instance, after signing the ADA into law, the elder Bush leaned over and kissed quadriplegic Evan Kemp on the head. See Stein, *supra* note 10, at 248. After proposing the NFI, Bush the younger kissed quadriplegic Jim Mullen on the cheek. See Sanger, *supra* note 4.

12. See NFI Online Text, *supra* note 1.

13. Initially as President of the National Disabled Bar Association. For recent (academic) treatments, see Michael Ashley Stein, *Disability and Post-ADA Employment Effects: Alternative Approaches to Traditional Economic Analysis*, in EMERGING WORKFORCE ISSUES: W.I.A., TICKET TO WORK, AND TRANSITION 95 (L. Robert McConnell ed., 2001); Stein, *supra* note 8.

14. Among the more notable analyses are Marjorie L. Baldwin, *Can the ADA Achieve Its Employment Goals?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (1997); Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 71 (1997).

15. See NFI Online Text, *supra* note 1.

16. See Sanger, *supra* note 4; Bush, *supra* note 7.

17. See NFI Online Text, *supra* note 1.

18. "In the modern world, a life with neither job nor money cannot be a life of dignity." Kwame Anthony Appiah, *Liberalism, Individuality, and Identity*, 27 CRITICAL INQUIRY 305, 331 (2001).

19. The paradigmatic argument is Gregory S. Kavka, *Disability and the Right to Work, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 174 (Leslie Pickering Francis & Anita Silvers eds., 2000). Interesting variations have lately arisen. See, e.g., Amy L. Wax, *A Reciprocal Welfare Program*, 8 VA.

and those without.²⁰ Certainly, increasing telecommuting and other employment options for disabled workers is a laudable²¹ and much needed²² policy goal. But the NFI's proposal, framed in terms of "integrating" disabled workers, may reify a key misperception that segregates these individuals from the general workforce population.²³ For in seeking to remedy disabled-labor market exclusion by diminishing technological equipment expenses (a dubious proposition in light of the disabled poverty level²⁴ and the complete absence of targeted job programs to assist them²⁵) the NFI implies that what keeps people with disabilities unemployed is their inherent impairments, rather than artificially exclusionary practices.²⁶ Thus, one logical implication of the NFI's statement of policy is that in order to participate in the mainstream societal function of work, people with disabilities must further adapt themselves to its established routines.

J. SOC. POL'Y. & L. 477 (2001) (arguing that not only should individuals capable of any gainful employment be required to work, but that society has a duty to so assist them).

20. Vicki Schultz makes these arguments with intelligence and insight in *Life's Work*, 100 COLUM. L. REV. 1881 (2000).

21. As a means of, among other advances, narrowing the digital divide. See generally Peter D. Blanck & Leonard A. Sandler, *ADA Title III and the Internet: Technology and Civil Rights*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 855 (2000); Mary L. Dispenza, *Overcoming a New Digital Divide: Technology Accommodations and the Undue Hardship Defense Under the Americans with Disabilities Act*, 52 SYRACUSE L. REV. 159 (2002).

22. The overall unemployment figures hover at about 50%. See Current Population Survey, available at <http://www.census.gov/hhes/www/disable/cps> (last visited Oct. 13, 2002).

23. I outline several in Michael Ashley Stein, *Labor Markets, Rationality, and Workers with Disabilities*, 21 BERKELEY J. EMP. & LAB. L. 314 (2000). For a broader perspective, see Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, 22 SOC. SCI. J. 87 (1985).

24. According to the Census Bureau, some 21.4% of those aged 25-64 subsist in poverty, compared to 8.3% of nondisabled people. See CENSUS BUREAU, *Americans with Disabilities: 1997 tbl.A*, in HOUSEHOLD ECONOMIC STUDIES, CURRENT POPULATION REPORTS 70 (2002), available at <http://www.census.gov/hhes/www/disable/sipp/disab97/asc97.html>.

25. See generally Stein, *supra* note 8. Bob Dole's attempt to pass a job training program aimed at bringing disabled workers into the labor force was a noble effort in this regard. See generally Bob Dole, *Are We Keeping America's Promises to People with Disabilities?*, 79 IOWA L. REV. 925 (1994). For ongoing research, see Peter D. Blanck, Leonard A. Sandler, James L. Schmeling & Helen A. Schatz, *The Emerging Workforce of Entrepreneurs with Disabilities: Preliminary Study of Entrepreneurship in Iowa*, 85 IOWA L. REV. 1583 (2000); Peter D. Blanck, Leonard A. Sandler, & James L. Schmeling, *A Business Case Study of Corporate Culture & Practices in Post-ADA Environment at a Major Technology Company* (2001) (slide presentation), at http://www.its.uiowa.edu/law/lhpdc/research/researchdocs/TechCo_present.ppt; Peter D. Blanck & Helen A. Schatz, *Emerging Workforce Issues: WIA, Ticket to Work and Transition* (2000) (report for the 22d Mary Switzer Memorial Seminar), available at <http://www.mswitzer.org/sem00/papers/blanck.html>; LAW, HEALTH POLICY & DISABILITY CTR., I.T. WORKS PROJECT, at http://www.its.uiowa.edu/law/lhpdc/research/projects/it_works.html.

26. The inverse assumption, which many disability rights advocates believe animates the ADA, is discussed *infra* notes 76-78 and accompanying text.

This notion, that individuals who have historically been categorized as “disabled” ought to fit seamlessly into the modern workplace (if they are to fit at all), is central to Ruth O’Brien’s recent and provocative book, *Crippled Justice: The History of Modern Disability Policy in the Workplace*. O’Brien contends that the “whole man”²⁷ concept of vocational rehabilitation developed during the 1950s and 1960s to “treat” the disabled instantiated the notion that it is people with disabilities, rather than society, that must change. It is to the intellectual, political, and juridical development of this schema that I now turn.

Part I examines the historical underpinnings of the whole man schema and the ways in which O’Brien asserts that it influences Supreme Court opposition to disability-related employment rights. Part II provides an overview of recent scholarship on the Court’s ADA jurisprudence and places *Crippled Justice* within the context of these studies. Finally, Part III critiques O’Brien’s averments about the Court’s jurisprudence and offers an alternative metric with which to understand these rulings.

I. THE “WHOLE MAN” SCHEMA

According to O’Brien, modern disability employment practices are influenced by vocational rehabilitation policies that only integrate disabled workers who have fully adapted themselves to the workplace. One consequence of this normative schema, which O’Brien avers influences judicial attitudes towards people with disabilities, is Supreme Court resistance to disability rights, especially the ADA’s employment provisions.

A. *An Epistemic Community of Rehabilitation*

In *Crippled Justice*, O’Brien traces the legislative history and implications of disability employment provisions from their World War II origins to the present.²⁸ Medical advances made during World War II, including the development of diagnostic tests and new techniques in neuro- and urogenital surgery,²⁹ resulted in higher survival rates for severely wounded soldiers.³⁰

27. Pp. 63-87. If using an obviously sexist term that excludes women is intended by O’Brien to demonstrate a point, it is a subtle (or at least not well-enunciated) one.

28. As background, there is also a small section on the period before World War II. Pp. 31-40.

29. Pp. 40-41; see also ROSEMARY STEVENS, *AMERICAN MEDICINE AND THE PUBLIC INTEREST* 179-80 (2d ed. 1998). A comparison of the impact of infectious diseases on the two world wars demonstrates that considerable improvement in disease management was made during the latter period. For troops separated from active combat due to disability, tuberculosis was the leading cause of death in World War I, the thirteenth in World War II. Similarly, some 46,640 World War I deaths were caused by influenza and related ailments (e.g., measles and bronchitis) in contrast to 1285 deaths in World War II. 2 *INTERNAL MEDICINE IN WORLD WAR II: INFECTIOUS DISEASES* xiii (John Boyd Coates, Jr. ed., 1963). The National Research Council cooperated greatly with the Army during World War II in

Influenced by the behavioral revolution in the social sciences lead by Franz Boas, the "parent" of modern anthropology,³¹ and the developments in psychoanalysis spearheaded by Karl and William Menninger, who shifted the focus of treatment from hospitals back to communities,³² the emergent field of rehabilitation medicine focused on treating the personalities of disabled people as a means of compensating for their impairments.³³

Pioneering doctors such as Howard Rusk³⁴ and Henry Kessler,³⁵ sought to develop the egos of disabled people to counterbalance the feelings of inferiority, hostility, and neurosis which Freud believed to accompany disability.³⁶ Moreover, those at the forefront of rehabilitation medicine

creating many of the medical innovations. 1 SURGERY IN WORLD WAR II: ACTIVITIES OF SURGICAL CONSULTANTS 23 (John Boyd Coates, Jr. ed., 1962). For a description of medical advances in neurosurgery, particularly in relation to treating spinal cord injuries, see SURGERY IN WORLD WAR II: NEUROSURGERY (John Boyd Coates, Jr., ed. 1959).

30. Pp. 31-36. This was especially true of paraplegics.

31. Pp. 37-40. Boas formed the principle that "the behavior of human beings everywhere, primitive or civilized, was determined . . . by their particular cultural tradition." A FRANZ BOAS READER: THE SHAPING OF AMERICAN ANTHROPOLOGY, 1883-1911, at 220-21 (George W. Stocking, Jr. ed., 1989). Several of his students expanded upon this initial notion of a nexus between psychology and culture. See RUTH BENEDICT, PATTERNS OF CULTURE 46 (1934) (suggesting that the interaction between one's behavior and one's environment finally emerges into a "consistent pattern of thought and action"); RALPH LINTON, THE CULTURAL BACKGROUND OF PERSONALITY 12 (1945) ("It is the individual's interaction with [society and culture] which is responsible for the formation of most of his behavior patterns, even his deep-seated emotional responses."); MARGARET MEAD, CONTINUITIES IN CULTURAL EVOLUTION 23 (1964) (stressing the important evolutionary contribution, rather than solely his biological addition, that an individual makes to his culture).

32. Pp. 47-48, 50-52. In treating the whole man, the Menninger brothers, along with other post-World War II psychiatrists, sought to change psychiatry's perspective by identifying "appropriate social and environmental changes that presumably could optimize mental as well as physical health." GERALD GROB, THE MAD AMONG US 195 (1994). In conjunction with this broad environmental approach, Karl Menninger focused on "the total economics of the personality rather than [viewing the disability] as something alien to the patient." ELIZABETH LUNBECK, THE PSYCHIATRIC PERSUASION 118 (1994). Recognizing that it was the doctor who must treat the dynamic interplay of the entire person, Franz Alexander hypothesized that "[t]he physiological changes accompanying the chronic emotions associated with unresolved conflict were the physiological changes that would give rise to alterations in structure and to disease." REUBEN FINE, THE HISTORY OF PSYCHOANALYSIS 224 (1979). Additionally, Flanders Dunbar supported the perspective in rehabilitation medicine that emotional illness, which causes a particular physical ailment, must be addressed and resolved prior to any resolution of the physical symptoms. See FLANDERS DUNBAR, MIND AND BODY: PSYCHOSOMATIC MEDICINE 26, 42 (1947).

33. Pp. 44-45.

34. See generally HOWARD A. RUSK, REHABILITATION MEDICINE (1964).

35. See generally HENRY H. KESSLER, THE PRINCIPLES & PRACTICES OF REHABILITATION (1950); HENRY H. KESSLER, REHABILITATION OF THE PHYSICALLY HANDICAPPED (1953).

36. Pp. 48-50. For illustrations of contemporary perceptions on the mental effects of disabling conditions, see, for example, Ruth J. Levy, *The Rorschach Pattern in Neurodermatitis*, 14 PSYCHOSOMATIC MED. 41, 48 (1952) (finding that "neurodermatitis

subscribed to many of the tenets of the Group for Advancement of Psychiatry, which emphasized the holistic relationship between the psychological well-being of individuals and general societal health.³⁷ As a result, rehabilitation medicine adopted the goal of restoring a disabled man to a "whole man," an improvement that would in turn enhance communal well-being.³⁸

Through the 1950s, Rusk and Mary Switzer, the director of the federal Office of Vocational Rehabilitation, formulated modern disability policy as the core of an "epistemic community,"³⁹ a term used by O'Brien to define a group of people sharing the same set of beliefs and working towards a common goal of fostering and promulgating their knowledge to others.⁴⁰ Referred to euphemistically as "Mr. and Miss Rehabilitation," Rusk and Switzer spearheaded the initiation and implementation of federal rehabilitation programs controlled by medical experts.⁴¹

One consequence of Rusk and Switzer's medically oriented perspective was that the epistemic community of rehabilitation applied a medical model of disability.⁴² Under this framework, disability was pathologized as a biological aberration.⁴³ Consequently, the appropriate treatment was to normalize or adapt these anomalous individuals to their surroundings.⁴⁴ To achieve this

patients tend to show marked signs of repressed hostility"); E. D. Wittkower, *Studies of the Personality of Patients Suffering from Urticaria*, 15 PSYCHOSOMATIC MED. 116, 123 (1953) (determining that urticaria "occurs in individuals who have been or have felt chronically deprived of affection").

37. Pp. 54-57; see also SOLOMON W. GINSBURG, A PSYCHIATRIST'S VIEWS ON SOCIAL ISSUES (1963); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, THE SOCIAL RESPONSIBILITY OF PSYCHIATRY, A STATEMENT OF ORIENTATION (1950).

38. Pp. 27-30, 45-48, 60. At the 29th annual meeting of the American College of Physicians, Karl Menninger espoused a change in medical treatment by viewing disease "in terms of the total economics of the personality." *Self-Diagnosis*, TIME, May 3, 1948, at 68. The whole man schema was later applied even more broadly to the poor. P. 101.

39. See generally CHAVA WILLIG LEVY, A PEOPLE'S HISTORY OF THE INDEPENDENT LIVING MOVEMENT (1988); MARTHA LENTZ WALKER, BEYOND BUREAUCRACY: MARY ELIZABETH SWITZER AND REHABILITATION (1985).

40. Pp. 18-20, 71-83. See generally PETER A. HALL, GOVERNING THE ECONOMY: THE POLITICS OF STATE INTERVENTION IN BRITAIN & FRANCE 276-80 (1986) ("[T]he social power of any set of ideas is magnified when those ideas are taken up by a powerful political organization, integrated with other ideological appeals, and widely disseminated."); IDEAS AND FOREIGN POLICY (Judith Goldstein & Robert O. Keohane eds., 1993).

41. Pp. 22, 27, 71.

42. Although it would be several decades before the framework was referred to as such. See RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS (2d ed. 2001).

43. And it still is. 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 (2002) (describing the continuing influence of outmoded notions).

44. By contrast, Harlan Hahn, a political scientist from University of Southern California and one of the founders of the Disability Studies movement, advocated adapting the surrounding environment to meet the needs of the people with disabilities. Hahn recognized that "the primary problems confronting citizens with disabilities are bias,

goal, teams of professionals and doctors treated the "whole" patient, psychologically and physically, in hospital-like rehabilitation centers.⁴⁵ A second consequence of the rehabilitation community's categorical support of the whole man theory was its resistance to rights-based legislation, notably attempts by activist Paul Strachan to procure an act prohibiting discrimination in employment. This disinclination was motivated by dual concerns. First, that such entitlements would challenge the epistemic community's goal of channeling people with disabilities into the workforce by rehabilitating their defects (rather than by forcing employers to hire misfits). Second, that rights-based legislation would imperil federal funding for vocational rehabilitation programs by drawing attention to the practice of focusing their efforts on those most likely to succeed.⁴⁶

The crowning glory of Rusk and Switzer's combined efforts was adoption of the Vocational Rehabilitation Act of 1954 (VRA),⁴⁷ a key feature of President Eisenhower's larger Cold War agenda of developing "nonsocialistic" domestic social programs.⁴⁸ Passage of the VRA resulted in more funds and grants for research, construction of rehabilitation centers, training of vocational rehabilitation professionals, and the establishment of the National Advisory Council on Vocational Rehabilitation.⁴⁹

The preference for a rehabilitative (rather than a rights) theory for improving the lives of disabled Americans reached a golden age during President Johnson's administration, when the VRA was renewed,⁵⁰ even more rehabilitation centers were built, the total federal rehabilitation program budget was doubled, and new advisory boards were implemented.⁵¹ The building of this "rehabilitation empire" peaked in 1967 with the creation of the Social

prejudice, segregation, and discrimination that can be eradicated through policies designed to guarantee them equal rights." Harlan Hahn, *Civil Rights for Disabled Americans*, in *IMAGES OF THE DISABLED, DISABLING IMAGES* 181, 182 (Alan Gartner & Tom Joe eds., 1987).

45. The best known of these centers are named, respectively, after Rusk and Kessler.

46. Pp. 76-78.

47. Vocational Rehabilitation Amendments of 1954, Pub. L. No. 83-565, 68 Stat. 652 (1954); see Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1367-71 (1993) (discussing the importance of the amendments to expansion of the rehabilitation movement).

48. P. 81.

49. Pp. 81-82, 85. In practical terms, by 1955 there were some 1000 vocational rehabilitation trainees at universities nationwide, and by 1960, about 40 universities offered related graduate programs. The number of programs would grow to about 100 in 1980. See EDWARD D. BERKOWITZ, *DISABLED POLICY: AMERICA'S PROGRAMS FOR THE HANDICAPPED* 171-72 (1987).

50. Vocational Rehabilitation Act Amendments of 1965, Pub. L. No. 89-333, 79 Stat. 1282 (1965).

51. P. 93.

Rehabilitation Service, which consolidated all rehabilitation services under one roof, with Switzer appointed as its head until she retired in 1970.⁵²

B. *The Rehabilitation Act and the Americans with Disabilities Act*

Despite the prevailing penchant for rehabilitation in lieu of rights, O'Brien relates how rights were legislated in the end as "an accident of history."⁵³ The philosophy of self-determination, developed within the disability context by Ed Roberts of the Center for Independent Living in Berkeley, California,⁵⁴ inspired disability rights advocates to protest the exclusion of people with disabilities from society at large and their concurrent warehousing under "inhumane conditions."⁵⁵ Part of this civil rights scheme was resistance to what advocates deemed the paternalistic posture of rehabilitation medicine, one they claimed viewed people with disabilities as child-like and unable to care or make decisions for themselves.⁵⁶

In contrast to the paternalism of the Rehabilitation Movement, the Independent Living Movement, as well as other disability rights groups, advocated the independence of disabled people as full and active members of society.⁵⁷ Over time, the progress of this disability rights-based agenda faced resistance from an oddly matched political coalition that included the Nixon, Ford, and Carter administrations, as well as several civil rights leaders.⁵⁸ This opposition was united by the concern that extending established antidiscrimination provisions to the disabled would weaken protections for other constituencies.⁵⁹ President Carter's decision to preclude passage of the Equal Employment Opportunity for the Handicapped Act was motivated by similar concerns.⁶⁰

The Rehabilitation Act was nonetheless enacted, ironically as a direct result of the civil rights movement,⁶¹ with antidiscrimination principles

52. Pp. 98, 100-01.

53. P. 5.

54. P. 110. See generally LEVY, *supra* note 39; SHAPIRO, *supra* note 10.

55. P. 110 (quoting *Wyatt v. Stickey*, 325 F. Supp. 781 (M.D. Ala. 1971)). One result of this advocacy was the holding in *Youngberg v. Romeo*, 457 U.S. 307 (1982). There, the Court ruled that the State, in protecting an involuntarily committed individual's liberty interests in safety and freedom of movement, could restrict those interests only for reasonable and legitimate reasons based upon professional judgment. *Id.* at 324.

56. Pp. 109-10.

57. Pp. 109-10.

58. Pp. 113, 115-16.

59. Pp. 115-16, 121-23.

60. Carter also perceived a distinction between race- and sex-based prohibitions and those extended to the disabled, whom he evaluated as "impaired in some abilities and function." P. 114.

61. Pp. 109-17.

intact.⁶² Introduced by Senator Cranston in large part as an effort to eliminate “creaming”—a practice in which employers hire either workers with minimal disabilities or only those individuals with disabilities who require the least expensive accommodations⁶³—the Rehabilitation Act had a two-prong focus on both affirmative action and antidiscrimination.⁶⁴ Section 501 was directed at affirmative action hiring practice for federal agencies,⁶⁵ section 503 at businesses that received governmental contracts.⁶⁶ Section 504, inserted as a gesture of goodwill without full consideration of its import, prohibited discrimination by any recipient of federal funds, or any federal agency, against “qualified” individuals with disabilities.⁶⁷ This accidental addition to the Rehabilitation Act would prove momentous in shaping its progeny, the ADA.

Crucial to rights advocates, the Department of Health, Education and Welfare (HEW, now called Health and Human Services) promulgated guidelines interpreting the Rehabilitation Act that defined the central (and vague) term “disability” under the Act.⁶⁸ The issuance of these HEW regulations, however, was greatly resisted by both the Ford and Carter administrations. To precipitate their release, disability rights advocates engaged in a number of highly publicized protests. Especially visible were the April 1977 sit-ins at the ten regional HEW offices to protest then-Secretary Joseph Califano’s recalcitrant refusal to authorize his own agency’s regulations.⁶⁹ The most significant demonstration occurred in San Francisco, where protestors remained in the HEW office building without food, attendant service, or medical care until Califano, who had authorized the siege-like conditions,⁷⁰ yielded to public pressure and agreed to publish the HEW

62. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C.A. §§ 701-96 (West 2002)).

63. See Thomas N. Chirakos, *Will the Costs of Accommodating Workers with Disabilities Remain Low?*, 17 BEHAV. SCI. & L. 93 (1999) (arguing that the likelihood of accommodation for disabled workers by employers depends in part on costs).

64. Although not mutually exclusive, these are far from the same thing. See Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination* (2002) (unpublished manuscript on file with author).

65. Rehabilitation Act of 1973, § 501, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C.A. § 791 (West 2002)) (establishing an affirmative action program in hiring, placement, and advancement of people with disabilities throughout the federal government and an annual reporting scheme to Congress on the program’s status).

66. *Id.* § 503 (codified at 29 U.S.C.A. § 793 (West 2002)) (creating an affirmative action program for federal government contractors with contracts in excess of \$10,000.00 to employ people with disabilities).

67. *Id.* § 504 (codified at 29 U.S.C.A. § 794 (West 2002)) (prohibiting discrimination against otherwise qualified individuals with a disability).

68. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. § 84 (1977); see also pp. 125, 128-30.

69. Pp. 126-28.

70. See Stein, *supra* note 10.

guidelines.⁷¹ Although Califano's capitulation was an important first step in the fight against disability-based discrimination,⁷² rights advocates were disappointed in the Rehabilitation Act's (non)effect upon disabled workers' employment. This ineffectiveness was due in large measure to the Supreme Court's narrow construction of the legislation, discussed below,⁷³ that reified the epistemic rehabilitation community's ideas on normalizing the "whole" disabled man.⁷⁴

Remonstrating against these detrimental judicial interpretations, activists lobbied to pass a new statute that would expand protections for workers with disabilities beyond the pale of the public sector, and be grounded in the type of rights framework that had been developed by the disability rights community.⁷⁵ Under this "social model" of disability, disabled workers are no longer required to adapt perfectly to the job as a means of fitting in.⁷⁶ Instead, the workplace environment and its seemingly "neutral" policies⁷⁷ are obliged to accommodate workers with disabilities as a means of vitiating artificial exclusions that have prevailed due to pervasive social attitudes.⁷⁸

Enacted by Congress in 1990, the ADA achieved the disability rights activists' stated goals.⁷⁹ Modeled after existing civil rights statutes, the statute was "heralded as the most significant law since the Civil Rights Act of 1964"

71. Pp. 127-28; *see also* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS 113-15 (1st ed. 1984) (providing detailed primary-source accounts of the demonstration).

72. Other steps included a bill from Representative John Brademas and Senator Alan Cranston that expanded the current vocational rehabilitation program to the severely disabled, and other legislation, such as the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C.A. §§ 1401-1420 (West 2002)), that was also enacted. Pp. 118-20.

73. *See infra* Part I.C.

74. Pp. 137-39.

75. Pp. 165-68.

76. This altered dynamic is also referred to as the "new paradigm" of disability, one that "focuses on taking effective and meaningful actions to 'fix' or modify the natural, constructed, cultural, and social environment." Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691, 1695 (2000).

77. For "even if individuals now are chosen for jobs strictly on the basis of their likely productivity," this assessment "may reflect past discriminatory practices." Richard J. Arneson, *Disability, Discrimination and Priority*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS, *supra* note 19, at 18; *see also* Stein, *supra* note 23, at 329-30 (highlighting the nonneutrality of the neoclassical labor market model status quo baseline as applied to disabled workers).

78. Pp. 166-67. The philosophical underpinnings of this theory are well stated by Anita Silvers, *Formal Justice*, in DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13 (1998).

79. The ADA also achieved other goals since the scope of protection extended to state and local government, as well as to public accommodation. *See generally* 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 (1991) (providing an overview of the statute, including the motivation behind its passage).

(i.e., Title VII).⁸⁰ The ADA's employment provisions, contained in Title I, were drawn directly from the Rehabilitation Act in "an attempt to provide greater relief for people with disabilities" than existed at the time.⁸¹ Moreover, the drafters anticipated that using the same language in the ADA would avoid definitional difficulties for courts that, presumably, were already familiar with their application through Rehabilitation Act claims.⁸² Accordingly, Title I defines a person with a disability as an individual who has either "a physical or mental impairment that substantially limits one or more of the major life activities,"⁸³ has had a history of such an impairment,⁸⁴ or is currently regarded as having one.⁸⁵ Similarly tracking its predecessor, the ADA adopted as a condition precedent to statutory protection that a disabled worker be "qualified," meaning that she could perform the essential functions of a given job, either with or without provision of a required reasonable accommodation.⁸⁶

Despite the open-ended nature of these provisions and the optimism with which they were greeted, O'Brien avers that the ADA's impact on disability-related employment has been "profoundly disappointing."⁸⁷ At the heart of the ADA's inefficacy, she claims, is an interpretation by the federal trial courts of "disability" that places claimants in a Catch-22: "[E]ither they have such a severe disability that they are not qualified to work, or their disability is not serious enough to warrant statutory protection."⁸⁸ This was an issue, according to O'Brien, that neither ADA activists nor the business community "could have anticipated" as federal courts "switched" their gate-keeping emphasis from qualification to coverage by substituting their own judgment for those of medical experts.⁸⁹ As a result, some eighty percent of Title I claims are "thrown out on summary judgment."⁹⁰

Nonetheless, as egregious as is this treatment of disabled plaintiffs by the lower federal courts, "the Supreme Court went even further," according to O'Brien, in limiting their rights in the workplace.⁹¹

80. P. 162.

81. P. 174.

82. P. 164.

83. 42 U.S.C. § 12,102(2)(A) (West 2002).

84. *Id.* § 12,102(2)(B).

85. *Id.* § 12,102(2)(C).

86. *Id.*

87. P. 163.

88. P. 163.

89. P. 164.

90. P. 163.

91. P. 163.

C. *The Supreme Court and Disability Employment Policy*

According to O'Brien, one consequence of the whole man schema of rehabilitation is the Supreme Court's resistance to recognizing and enforcing disability rights. This is particularly so with respect to the ADA's employment provisions.

As a preface to discussing the Court's ADA jurisprudence, O'Brien describes how the Justices "constrained" disability-related rights prior to the ADA's enactment. O'Brien contends that the Court's failure to extend suspect or quasi-suspect constitutional protection to the egregiously mistreated individuals with mental disabilities⁹² in either *Pennhurst State School & Hospital v. Halderman*⁹³ (brought under the Developmental Disabilities Act),⁹⁴ or *City of Cleburne v. Cleburne Living Center, Inc.*⁹⁵ (asserting Fourteenth Amendment protection),⁹⁶ was one of the most significant of these setbacks. Moreover, in *Youngberg v. Romeo*,⁹⁷ the Court held that since legislative bodies should balance the needs of individuals with disabilities against the "demands of organized society,"⁹⁸ they are only entitled as a matter of constitutional right to minimal care.⁹⁹ Hence, the Court determined "that disabled people did not deserve equal protection under the Fourteenth

92. Previously, drawing upon the Supreme Court's enumeration of class characteristics that triggered strict scrutiny in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 19-20 (1973), and in *Frontiero v. Richardson*, 411 U.S. 677, 682-88 (1973), two commentators argued that people with disabilities likewise qualified as a suspect class since they were also politically powerless, historically and unfairly discriminated against, and (frequently) possessed immutable characteristics. See Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 902-08 (1975).

93. 451 U.S. 1 (1981) (reasoning that a funding statute did not guarantee constitutional rights to people with disabilities).

94. Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 88-164, 77 Stat. 282, as added Pub. L. No. 94-103, § 6010, 89 Stat. 486, 502 (1976), amended by Pub. L. No. 95-602, § 6010, 92 Stat. 2955, 3007 (Supp. IV 1980).

95. 473 U.S. 432 (1985).

96. *Id.* at 455 (holding that the Cleburne Living Center was wrongly denied a special use permit under rational-basis review, but that the mentally retarded are not entitled to heightened judicial scrutiny as a suspect or quasi-suspect class); see also pp. 141-44; Silvers & Stein, *supra* note 43 (comparing sex discrimination and disability jurisprudence, as well as the nuances and implications of the *Cleburne* decision).

97. 457 U.S. 307 (1982).

98. *Id.* at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). Thus, O'Brien avers that to the Justices "[o]rder, unity, normality, and objectivity—the state's interests—were more important than the individual's interests" of freedom and security in an institutional setting. Pp. 144-46.

99. Under the Due Process Clause of the Fourteenth Amendment, an involuntarily committed individual has constitutional liberty interests in "conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by those interests." *Romeo*, 457 U.S. at 324; see also p. 145.

Amendment.”¹⁰⁰ This view by the Court, which O’Brien characterizes as one in which the disabled “have no constitutionally guaranteed rights,” was an outgrowth of the epistemic rehabilitation movement, and Switzer’s influence in particular.¹⁰¹

O’Brien further argues that although the Court did eventually differentiate between equality of opportunity, affirmative action, and the reasonable accommodation mandates of the Rehabilitation Act, it failed to do so appropriately.¹⁰² For, although the latter two theories underscored civil rights, the Rehabilitation Act provided for more limited remedies.¹⁰³ As a result, people with disabilities had some opportunities, but not necessarily ones equal to those of the able-bodied.¹⁰⁴ Accordingly, in *Alexander v. Choate*,¹⁰⁵ the Court found that reasonable accommodations afforded less relief than affirmative action,¹⁰⁶ while in *Board of Education v. Rowley*,¹⁰⁷ the Court held that disabled children were entitled to free, available, and appropriate education, but not to education that maximized each child’s potential.¹⁰⁸

With this restricted view of the rights of the disabled to coexist in society firmly in mind, the Court adopted a limited view of reasonable accommodation when challenges arose under the Rehabilitation Act.¹⁰⁹ Thus, in *Southeastern Community College v. Davis*,¹¹⁰ which went on to become one of the leading section 504 decisions,¹¹¹ the Court held that an accommodation was only applicable if it did not fundamentally alter or substantially modify the underlying program, for to hold otherwise would “constitute an unauthorized extension of the obligations imposed by that statute.”¹¹² Moreover, in

100. P. 139.

101. P. 145.

102. Pp. 150-52.

103. Pp. 150-52.

104. P. 151.

105. 469 U.S. 287 (1985).

106. P. 150.

107. 458 U.S. 176 (1982).

108. Pp. 150-51.

109. P. 147 (analogizing reasonable accommodations to affirmative action, the Supreme Court found that reasonable accommodations “imposed less of a burden on an institution than programs that had to be changed because they had initially denied [someone] equality of opportunity”).

110. 442 U.S. 397 (1979) (affirming a State college’s decision to deny admission to a deaf nursing student on the ground that it was unsafe for her to practice or even complete the current clinical training program); *see also* p. 149.

111. Sometimes infamous due to the circularity of its reasoning. *See, e.g.*, Judith Welch Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 452-59 (1984) (assessing the Supreme Court’s decision in *Southeastern Community College v. Davis*, its analytical framework for “exclusionary refusal to accommodate” cases, and its impact upon section 504’s antidiscrimination mandate).

112. *Davis*, 442 U.S. at 410; *see also* pp. 147-48.

emphasizing whether an individual is 'otherwise qualified' under the Rehabilitation Act, the Court "encouraged employers to either make light of employees' or applicants' disabilities or emphasize their incompetence."¹¹³

Worse still, "[t]he Supreme Court widely viewed people with disabilities as inferior to those without them, and expressed this view by having them shoulder the initial burden of proof in disability law" by requiring claimants to demonstrate that they belong to the protected class.¹¹⁴ This was especially apparent in the Court's first, and some would argue paradigmatic,¹¹⁵ attempt to grapple with the Rehabilitation Act's definition of disability in *School Board v. Arline*.¹¹⁶ Affirming a lower court's ruling that a school teacher with currently asymptomatic tuberculosis is a "handicapped individual," Justice Brennan wrote that although "[s]uch an impairment might not diminish a person's physical or mental capabilities," it could still limit substantially the teacher's working ability "as a result of the negative reactions of others to the impairment."¹¹⁷ O'Brien avers that, in so ruling, the Court bolstered society's resentment towards people with disabilities by both acknowledging and highlighting their differences from the able-bodied mainstream.¹¹⁸

In discussing the Court's ADA jurisprudence, O'Brien focuses on the Justices' "constraining" interpretation of the definition of disability, one that has created "legal dams" against further Title I claims. In making these assertions, O'Brien analyzes four of the six ADA decisions handed down at the time of publication,¹¹⁹ and how each treats the definition of disability: *Bragdon v. Abbott*,¹²⁰ and the troika of *Sutton v. United Air Lines*,¹²¹ *Murphy v. UPS*,¹²² and *Albertson's, Inc. v. Kirkingburg*.¹²³ In *Bragdon*, the Court ruled that an HIV-asymptomatic woman was disabled on the ground that the risk of transmitting her condition to a partner or child limited the major life activity of reproduction.¹²⁴ Although a Title III public-accommodation case unrelated to employment, the decision signaled the case-by-case methodology that the Court

113. P. 147.

114. P. 139.

115. See, e.g., Anna Phipps Engh, *The Rehabilitation Act of 1973: Focusing the Definition of a Handicapped Individual*, 30 WM. & MARY L. REV. 149, 168 (1988).

116. 480 U.S. 273 (1987).

117. P. 158 (quoting *Arline*, 480 U.S. at 283).

118. P. 157.

119. She does not, however, address two others decided over the same period: *Pennsylvania Department of Correction v. Yesky*, 524 U.S. 206 (1998) (holding that Title II of the ADA applies to state prisons), and *Cleveland v. Policy Management System Corp.*, 526 U.S. 795 (1999) (ruling that claims for Social Security Disability Insurance and ADA damages need not preclude each other).

120. 524 U.S. 624 (1998).

121. 527 U.S. 471 (1999).

122. 527 U.S. 516 (1999).

123. 527 U.S. 555 (1999).

124. 524 U.S. at 626-28.

would adopt when approaching the definition of disability in later cases.¹²⁵ The Court in *Sutton* decided that severely myopic twins who aspired to pilot airplanes were not disabled due to the corrective lenses they used to prevent substantial limitation of the major life activity of seeing.¹²⁶ The opinion "gave employers the right to discriminate" against those "with limiting impairments."¹²⁷ Expanding the ruling in *Sutton*, the *Murphy* Court held that a driver with high blood pressure was not disabled since medication mitigated his impairment.¹²⁸ Thus, Vaughan Murphy was placed in an untenable bind wherein he "functioned too well to be thought of as having a disability" while also being considered "too sick to perform the job."¹²⁹ Also relying upon *Sutton*, *Kirkingburg* held that a truck driver with monocular vision was not per se disabled because of mitigating factors.¹³⁰ Consequently, the fact that Hallie Kirkingburg's body compensated for its own limitation stripped him of ADA protection.¹³¹

According to O'Brien, the rulings in each of these cases demonstrate the influence of the whole man schema of rehabilitation over the individual Justices. She therefore relates the Court's analytical approach to the principles underlying the vocational rehabilitation movement by drawing parallels between the perspectives of the judiciary and those of the epistemic rehabilitation community.¹³² Just as rehabilitation experts possessed a functionalist view of people with disabilities, "judges do not recognize that persons have a disability because they have a specific impairment, but [only] if this condition *substantially interferes* with [or limits] a significant aspect of their lives."¹³³ In considering how people with disabilities mitigate their impairments, the Justices compared the disabled to able-bodied persons, thereby invoking the normalizing goal of the rehabilitation movement.¹³⁴ Additionally, the Court afforded ADA protection only to those people with disabilities whose impairments substantially limited a major life activity.¹³⁵ For O'Brien, the consequence of this standard is that people with disabilities who have mitigated the impact of their impairments are considered "whole." ADA protection is therefore, in the Court's view, unnecessary as well as over-compensatory for those types of individuals.¹³⁶ By contrast, those who have

125. P. 189.

126. 527 U.S. at 477.

127. Pp. 192-98.

128. *Murphy v. UPS*, 527 U.S. 516, 520 (1999).

129. P. 200.

130. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 557 (1999).

131. Pp. 199-200.

132. The analysis that follows amalgamates arguments that appear, but are not well organized, in the text of the book.

133. P. 208 (emphasis added).

134. P. 210.

135. P. 164.

136. P. 199.

not reached "whole" status are taken under the paternalistic wing of the state since they cannot fully be citizens without legal intervention.¹³⁷

II. (RE)ASSESSING SUPREME COURT JURISPRUDENCE

Over the last few years the Supreme Court has handed down an increasing number of ADA rulings,¹³⁸ the majority of which raise, directly or indirectly, employment-related issues.¹³⁹ Consequently, a number of legal commentators have analyzed these decisions, positing different explanations for understanding the Court's growing jurisprudence.¹⁴⁰ This literature can be organized into three broad categories, each of which analyzes the Court's decisions from a greater degree of theoretical abstraction.¹⁴¹ Taken as a whole, they examine the (a) lack of harmony between the ADA's stated goals and its practical effects;¹⁴² (b) discomfort the Justices have in understanding the group of people called "disabled" by Title I and the attendant effect upon application of the statute;¹⁴³ and (c) underlying principles the Justices seem to be striving for as well as those goals the ADA ought to effectuate.¹⁴⁴

Entering this debate from the perspective of a political scientist, O'Brien's thesis is provocative and ambitious. She provides a welcome addition to this literature by proffering an even more theoretical level: one that examines the effect of a specific intellectual milieu (here, the epistemic rehabilitation

137. P. 211.

138. Leading Justice O'Connor to remark that the 2002 Court session would be "remembered as the disabilities act term." See Charles Lane, *O'Connor Criticizes Disabilities Law as Too Vague*, WASH. POST, Mar. 15, 2002, at A2.

139. Specifically, the Court has issued rulings in six cases directly raising Title I claims. See *Chevron U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045 (2002); *U.S. 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, 557 (1999); *Murphy v. UPS*, 527 U.S. 516, 520 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). Three indirectly raise Title I claims. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999). Five others raise non-employment issues. See *Barnes v. Gorman*, 122 S. Ct. 2097 (2002); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206 (1998).

140. These are discussed *infra* Part II.A-C. I have not included Mark Kelman's work (which I very much admire, but with which I do not always agree) in the textual discussion for the reason that it focuses exclusively on *Bragdon*, at least so far as Supreme Court decisions are concerned. See, e.g., Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833 (2001) (citing *Bragdon*, 524 U.S. 624 (1998), to demonstrate the Supreme Court's confusion in determining which individuals are protected by the ADA).

141. Of course, there are many different ways to approach this literature, but I will utilize this scheme to facilitate the essay portion that follows.

142. See *infra* Part II.A.

143. See *infra* Part II.B.

144. See *infra* Part II.C.

community) upon the federal judiciary and, in particular, the Justices of the Supreme Court. In order to evaluate O'Brien's critique of modern disability jurisprudence, it is necessary to place her arguments in the context of other scholarly modes of assessment, each of which will now be examined.

A. *The ADA as a Disharmonious Statute*

In a jointly written article, Samuel Issacharoff and Justin Nelson attempt to reconcile the Court's jurisprudence with the ADA's statutory scheme.¹⁴⁵ They argue that the Court's decisions in *Sutton*, *Murphy*, and *Kirklingburg* reflect the Justices' inability to harmonize the ADA's antidiscrimination mandates with its redistributive effects.¹⁴⁶ First, this is because, unlike Title VII, the ADA is primarily redistributive rather than prohibitive of discrimination.¹⁴⁷ Second, the ADA does not fund or create risk distribution among employers or taxpayers for its associated costs.¹⁴⁸

It can also be argued that Congress was negligent in drafting the ADA when it adopted wholesale (in part as the result of a political compromise among cross-disability rights groups and groups who represented people with specific disabilities¹⁴⁹) the definition of disability from the Rehabilitation Act.¹⁵⁰ For although the definition itself was meant to be neutral, the socio-legal-cultural accretion of established welfarist classifications continued to influence post-ADA Supreme Court decisions.¹⁵¹ In other words, because the ADA followed so closely on the Rehabilitation Act, the Justices continued to assume that the targeted population should equally be characterized as incompetent.¹⁵² The Court therefore extended the Rehabilitation Act's inference that the disabled needed rehabilitation to fit into society to those individuals who asserted ADA claims.¹⁵³

145. See Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307 (2001).

146. *Id.* at 338-39.

147. *Id.* I strenuously disagree with this assertion in Stein, *supra* note 64.

148. Issacharoff & Nelson, *supra* note 145, at 340-41.

149. See generally Burgdorf, *supra* note 79; Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP. L. REV. 471 (1991).

150. This argument is drawn from Silvers & Stein, *supra* note 43, and 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 (Linda Hamilton Krieger ed., forthcoming 2002).

151. See sources cited *supra* note 150.

152. See sources cited *supra* note 150.

153. See sources cited *supra* note 150.

B. *The Justices and the Disabled: Discomfort*

Aviam Soifer has contributed two accounts of how the current Justices do not relate to the group of individuals with disabilities targeted by the ADA. First, he has argued that the Court's ADA interpretations reflect a lack of concern for the personal dignity of people with disabilities.¹⁵⁴ As such, he criticizes the Justices for hypocritically proclaiming the need to make individualized assessments of those seeking ADA protection, while at the same time not considering as individual people the disabled plaintiffs themselves.¹⁵⁵ Soifer also asserts that the Court's rulings reveal a "stealth strategy" in which only narrow, easily restricted instances of ADA coverage that grab public attention are upheld.¹⁵⁶ Meantime, a majority of the Justices remain firmly unconvinced that the disabled require (or even deserve) legal protection.¹⁵⁷

An alternative but complementary explanation is that the Justices are generally unfamiliar with disabled Americans due, in part, to their unique civil rights chronology.¹⁵⁸ Unlike other marginalized groups, people with disabilities were empowered by legislation before a general elevation of social consciousness about their circumstances and capabilities.¹⁵⁹ Thus it is not entirely surprising that the Court's view of the disabled, much like the view of society at large, does not conform to the spirit of the statute's legislative findings or to the letter of assertions made by disability rights advocates.¹⁶⁰

C. *The Justices and the ADA: Underlying Principles*

Samuel Bagenstos offers three distinct attempts at gleaning the principles that either underlie or ought to motivate the Court's ADA jurisprudence. First, he argues that the Court's definition of disability could be seen as by and large extending ADA protection only to those individuals subject to disability-related stigma that subjects them to systematic disadvantage.¹⁶¹ This "antibordi-

154. See Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279 (2000).

155. *Id.*

156. Aviam Soifer, *Essences, Better Angels, and the ADA: Accommodating the Public Interest*, 44 WM. & MARY L. REV. (forthcoming 2003).

157. *Id.* Susan Stefan extends this assertion, arguing that society in general has a similar perception of individuals with mental disabilities that are not apparently visible. See Susan Stefan, *The Two Worlds of Psychiatric Disability: "Discredited," "Discreditable," and the Identities of Disabled People*, 44 WM. & MARY L. REV. (forthcoming 2003).

158. See SHAPIRO, *supra* note 10; Stein, *supra* note 10.

159. See Drimmer, *supra* note 47; Richard K. Scotch, *Politics and Policy in the History of the Disability Rights Movement*, 67 MILBANK Q. 380 (1989).

160. Perhaps, then, the Title I win/loss statistics cited by O'Brien might be a partial answer to the rhetorical question posed almost a decade ago: "What happens when Congress grants a new group minority rights, but society has little understanding that those rights have been awarded or why they are needed?" SHAPIRO, *supra* note 10, at 323.

161. See Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L.

nationist" approach conforms to accepted constitutional theory, and is also coherent with other civil rights legislation.¹⁶² Alternatively, the Court's decisions can be viewed through the lens of risk regulation.¹⁶³ When balancing the relative costs and benefits to the parties, the Justices defer to technocratic scientific risk regulation.¹⁶⁴ Most recently, Bagenstos argues that the Court is more inclined to apply the ADA to those individuals with functional impairments who are likely to become dependent on public assistance in the absence of protection.¹⁶⁵ Such an interpretation renders the Court's rulings consistent with the stated goals of the ADA when it was "sold" to Congress, and especially for the business interests represented therein.¹⁶⁶

III. THE JUSTICES AND THE WHOLE MAN

Although valuable for raising a novel notion regarding the Supreme Court's treatment of people with disabilities, *Crippled Justice* suffers from three main flaws: The book neglects to properly develop the notions it presents; it tends towards carelessness in describing certain topics; and, most significantly, it is ultimately unconvincing.

O'Brien proffers very provocative and interesting theories, but then fails to discuss these premises or their implications adequately.¹⁶⁷ Examples of this faulty methodology include her assertions that the Court refused to grant wider disability rights through the provision of reasonable accommodations because of their cost,¹⁶⁸ that the ADA satisfactorily "pieced together an amalgam of phrases to denote the qualifications for a constitutionally suspect classification,"¹⁶⁹ and that the lower federal courts have ignored the guidance of both administrative agencies and Congress when interpreting disability-related rights statutes.¹⁷⁰ Each of these arguments contains valid, interesting points. Support for these assertions might have included, respectively, a discussion of how the ADA compares with other civil rights statutes,

REV. 397 (2000). I qualify this statement because neither the holding in *Murphy* nor the dicta in *Sutton* fits this model.

162. *Id.* Bagenstos coins this term to mean "[a]n understanding of disability as subordination." *Id.* at 401.

163. See Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479 (2001).

164. *Id.*

165. See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. (forthcoming 2003).

166. *Id.*

167. A tendency that is also exhibited in an earlier publication. See RUTH O'BRIEN, *WORKER'S PARADOX: THE REPUBLICAN ORIGINS OF NEW DEAL LABOR POLICY, 1886-1935* (1998).

168. P. 149.

169. P. 173.

170. P. 176.

particularly as accommodation costs are concerned;¹⁷¹ the effect on ADA litigation that a clearer congressional endorsement of heightened constitutional classification¹⁷² would have had;¹⁷³ and what disability jurisprudence would look like if the Court deferred either to congressional findings¹⁷⁴ and/or to administrative regulations, especially in relation to the EEOC's interpretive guidelines.¹⁷⁵

An attendant difficulty presented by the book is that O'Brien's arguments suffer from imprecision.¹⁷⁶ For example, in discussing *Cleburne*, O'Brien mistakenly characterizes Justice White's majority opinion as holding that the Court did not provide rational basis scrutiny for the law in question.¹⁷⁷ Later on she states that the "zoning law failed to meet what White described as the minimal requirement of rationality required of any law."¹⁷⁸ Likewise, Justice Brennan's opinion in *Arline* is castigated on the ground that in applying the "regarded as" prong of the Rehabilitation Act, he condoned social stereotypes,¹⁷⁹ while Justice O'Connor is taken to task for not applying the ADA's identical "regarded as" provision in *Sutton*, thereby giving employers

171. See Stein, *supra* note 64 (demonstrating the empirical inaccuracy of this postulate and the manner in which it has become received wisdom among many legal academics).

172. In a nutshell, Congress specifically mentioned in its ADA findings that people with disabilities were "a discrete and insular minority" facing the "serious and pervasive social problem" of discrimination. It also noted that people with disabilities often have "no legal recourse to redress such discrimination" and are "relegated to a position of powerlessness in our society." 42 U.S.C.A. § 12,101(a) (West 2002). This language clearly demonstrates Congressional intent to raise judicial scrutiny of laws concerning people with disabilities by drawing linguistic parallels to Justice Stone's footnote from *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Unfortunately, if that was Congress's intention, it was neither sufficiently explicit nor artful in its articulation. See Silvers & Stein, *supra* note 43 (arguing that in promulgating the ADA, Congress was attempting to rebut the framework established by the Supreme Court in *Cleburne*).

173. Decided well after publication of *Crippled Justice*, the question is resounding in *University of Alabama v. Garrett*, 535 U.S. 356 (2001) (holding that Congress's application of the ADA to states as employers was unconstitutional under the Fourteenth Amendment for reasons of state sovereign immunity).

174. See generally Ruth Colker & James Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).

175. Lack of deference to those regulations has raised a hue and cry among some disability rights advocates, including O'Brien. More perplexing is the Court's selective use of administrative regulations, as described by Soifer, *supra* note 156.

176. As do her footnotes. See, e.g., p. 108 n.235 (citing Rubin Klein, *A History of Psychoanalysis* in lieu of Reuben Fine, *The History of Psychoanalysis*, *supra* note 32); p. 254 n.12 (attributing, incorrectly, usage of the word "inhumane" to *Wyatt v. Stickey*, 325 F. Supp. 781 (M.D. Ala. 1971)). More problematic are examples, such as the one in footnote 74 on page 233, where it is unclear whether the arguments originate with O'Brien or the scholar she previously cited.

177. P. 140.

178. Pp. 142-43.

179. P. 150.

free rein to discriminate on the basis of irrelevant characteristics.¹⁸⁰ At times O'Brien switches back and forth between the Supreme Court and other courts, leaving readers (or at any rate, this one) confused as to which court held what.¹⁸¹ Similarly, O'Brien states both that the lower federal courts utilized the whole man schema in interpreting the Rehabilitation Act,¹⁸² and also that their focus on qualification under the ADA was novel.¹⁸³ Most egregious is O'Brien's basic misunderstanding of the applicable law. For instance, she is put off by the Court's willingness to extend ADA protection only to those individuals with substantial limitations, and takes umbrage at the Court's screening of disabled claimants based on their "qualified" status.¹⁸⁴ These standards, however, are drawn directly from the ADA's definition of disability. The adoption of this definition (and thus these standards) whole cloth from the Rehabilitation Act may have been an unfortunate choice for the reasons described above,¹⁸⁵ as well as for the procrustean manner in which they are applied.¹⁸⁶ Nevertheless, in light of this definition's adaptation, these are categorically the appropriate standards to use.

The central failing of *Crippled Justice*, however, is that O'Brien's thesis of the whole man schema is unconvincing. This is so for three main reasons. First, some of the cases cited are incongruent to her theory. Second, O'Brien's thesis is overly broad and therefore cannot be sustained. Third, the book does not specifically connect the normative whole man schema (as opposed to that of general bias) to the Court's actions.

To begin with, several of the cases she cites as illustrative of application of the schema in fact do not conform to her thesis. Adherents to the epistemic rehabilitation community's trope, for example, would likely favor plaintiffs

180. P. 194. Both the Rehabilitation Act and the ADA define being disabled as having "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (b) a record of such an impairment; or (c) being regarded as having such an impairment." See 29 U.S.C.A. § 794 (West 2002); 42 U.S.C.A. § 12,102(2)(A)-(C) (West 2002). Congress extended the definition of disability to this group of functionally nondisabled individuals in order to combat erroneous but widespread cultural assumptions about people with "disabilities"—what the Supreme Court in *School Board v. Arline*, 480 U.S. 273, 283-84 (1987), a Rehabilitation Act decision, eloquently termed the "perception of disability based on myth, fear, or stereotype." See Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901 (2000); Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes,"* 55 VAND. L. REV. 481 (2002).

181. Pp. 154-57.

182. P. 150.

183. Pp. 164-65.

184. Pp. 177-92.

185. See *supra* text accompanying notes 149-53.

186. See Michael Ashley Stein, *Foreword: Disability and Identity*, 44 WM. & MARY L. REV. (forthcoming 2003) (criticizing the Justices' ADA jurisprudence as resembling "a Jackie Mason comedy routine" for the way that it lurches to and fro in its determination of which claimants are "disabled" under the ADA).

with impairments who nonetheless managed to perform their jobs, especially when they did so without requesting special accommodation. Hallie Kirkingburg, who drove a truck using monocular vision,¹⁸⁷ and Vaughan Murphy, who conveyed parcels despite his high blood pressure,¹⁸⁸ are each primary examples of the type of disabled success stories that Rusk and Switzer advocated. Placed on a hypothetical Supreme Court bench, an epistemic rehabilitation community Justice would have ruled in each of these plaintiffs' favor. As it turns out, the Supreme Court went the other way. Thus, the whole man schema is not convincing as a determinate guide to resolving Supreme Court ADA decisions.

Additionally, the logical extension of O'Brien's whole man thesis, wherein the only acceptable disabled workers are those who perform their duties without altering the workplace, is that no accommodation will be palatable to the Court. Although some disability rights advocates might agree with this assertion,¹⁸⁹ I do not. While I am also aggrieved by much of the Court's ADA jurisprudence,¹⁹⁰ O'Brien's core proposition, as stated, is simply too extreme. True, 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.¹⁹¹ Yet ADA cases subsequent to *Crippled Justice's* publication indicate that the Court would consider some accommodations reasonable, even if the Justices are currently unwilling to elaborate upon the actual standard in either their rulings or dicta. For instance, in *U.S. Airways, Inc. v. Barnett*,¹⁹² the Court held that a requested accommodation that conflicts with a seniority system is ordinarily unreasonable.¹⁹³ Nevertheless, the Court ruled that an employee can show special circumstances where it is reasonable to make an exception to the seniority system, thus compelling the employer to grant an accommodation (here, reassignment).¹⁹⁴ In so doing, the Court rejected U.S. Airways' argument that any change to a "neutral" workplace rule is per se

187. See *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 557 (1999).

188. See *Murphy v. UPS*, 527 U.S. 516, 520 (1999).

189. Perhaps therein lies the difficulty, for O'Brien seems to rely exclusively on assertions made by members of the disability rights movement, and in particular, some of the most political ones. While she is certainly entitled to do this, the resulting polemic often detracts from the force of her arguments.

190. See generally Silvers & Stein, *supra* note 43; Silvers & Stein, *supra* note 150; Anita Silvers & Michael Ashley Stein, *Essentially Empirical: The Roles of Biological and Legal Classification in Effectively Prohibiting Genetic Discrimination*, in *SCIENCE AND OTHER CULTURES: ISSUES IN PHILOSOPHIES OF SCIENCE AND TECHNOLOGY* (Robert Figueroa & Sandra Harding eds., forthcoming 2002); Anita Silvers & Michael Ashley Stein, *Disability and Paternalism at the Supreme Court* (unpublished manuscript, on file with authors) [hereinafter Silvers & Stein, *Disability and Paternalism*]; Stein, *supra* note 64.

191. This point, a corollary to his "outlier" theory, is raised by Soifer, *supra* note 156.

192. 122 S. Ct. 1516 (2002).

193. *Id.* at 1524.

194. *Id.* at 1525.

unreasonable.¹⁹⁵ And, although Justice Scalia's dissent determinedly argued for such an interpretation, the majority opinion unequivocally rejected it.¹⁹⁶ Thus, contrary to the whole man schema, circumstances do exist in which the Court seems at least receptive to the possibility of accommodating a worker with a disability.¹⁹⁷

Most detrimental to O'Brien's thesis is that she fails adequately to demonstrate why the normative whole man schema influenced the Court's interpretation of disability-related employment issues. This is primarily due to the overly ambitious scope of her thesis. At times O'Brien infers that the epistemic rehabilitation community's vision of disability held a hegemonic precedence in Cold War-era American culture.¹⁹⁸ Certainly, her assertion that this period was also the heyday of psychoanalysis in that society is well taken.¹⁹⁹ However, to be persuasive O'Brien would need to show that the Justices who lived through that period were acculturated by the intellectual milieu of psychoanalytic thinking; further, that as a result of this indoctrination they in turn absorbed the epistemic rehabilitation community's vision of disability.

So global a view of the Justices' motivation is essential to O'Brien's thesis. It would not be sufficient, for example, to assert that the current Supreme Court's constricting view of disability-related rights is merely a corollary of their general aversion to expansive readings of civil rights laws.²⁰⁰ For although a very strong case has been (convincingly) made that the current conservative majority is hostile to antidiscrimination provisions and is engaged in an agenda to roll back civil rights,²⁰¹ such a straightforward, politically

195. Asserted by their counsel, Walter E. Dellinger, III, in briefing and at oral argument. Brief for Petitioner at 19, *Barnett* (No. 00-1250); Respondent's Oral Argument at 47, *Barnett* (No. 00-1250).

196. *Barnett*, 122 S. Ct. at 1520-22.

197. Parenthetically, the Court was also willing to be convinced in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), that individuals with disabilities currently receiving public-assistance benefits after representing under oath that they were unable to perform any work could still make the case that they had been denied gainful employment.

198. Pp. 28-29, 56, 87.

199. P. 30.

200. See Brent E. Simmons, *The Invincibility of Constitutional Error: The Rehnquist Court's States' Rights Assault on Fourteenth Amendment Protections of Individual Rights*, 11 SETON HALL CONST. L.J. 259 (2001). For commentaries on the Supreme Court's growing curtailment of disability rights, see Peter David Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1, 2 (2000) (noting that the Supreme Court has "stubbornly resisted the conceptions of civil rights and anti-discrimination that are at the core of the ADA").

201. See Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1028-29 (2002) (arguing that "overall the Court continues to be more conservative than Congress on civil rights, and applies statutory construction as a tool for combating Congress's civil rights agenda"); Colker & Brudney, *supra* note 174, at 123; Charles J. Ogletree, Jr., *From Pretoria to Philadelphia: Judge Higginbotham's Racial Justice Jurisprudence on South Africa and the United States*, 20

partisan claim does not explain why traditionally liberal Justices have frequently joined their counterparts.²⁰² Consequently, to adequately prove the influence of the whole man schema of rehabilitation posited in her book, O'Brien needed to demonstrate the actual influence of this precept upon the Court's members. Had she done so, *Crippled Justice* would have presented a fascinating view of post-World War II American society, one seen through the lens of disability and employment.

To be fair, successful treatments of the effect of larger intellectual milieus upon specific judges acting in particular circumstances are Herculean tasks, and thus justifiably rare.²⁰³ Two seminal examples of this type of jurisprudence, drawn from earlier periods of American legal history,²⁰⁴ are Robert Cover's analysis of why the Justices upheld the rights of slave owners as opposed to the human rights of slaves,²⁰⁵ and Morton Horwitz's explanation of the motivations of state court judges in stunting the growth of negligence liability during America's Industrial Revolution.²⁰⁶ Perhaps, then, *Crippled Justice* ought not to be judged by so lofty a standard. Nonetheless, while it is clear from the book why policymakers and government agency staffers might be influenced by the epistemic rehabilitation community's vision of disability, O'Brien does not explain why this would be true for any of the Justices.

A more ecumenical assertion might be plausible. It could be argued, for instance, that the Court's perceptions are motivated by general social bias against people with disabilities. Such an explication could draw upon several different asseverations made by Disability Studies scholars.²⁰⁷ Harlan Hahn, to

YALE L. & POL'Y REV. 383, 389 (2002) (highlighting that the conservative Supreme Court has eroded "civil rights recognized by the Warren Court").

202. See *Chevron U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045 (2002) (Souter, J., for a unanimous Court); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (O'Connor, J., for a unanimous Court); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (Souter, J., for a unanimous Court); *Murphy v. UPS*, 527 U.S. 516 (1999) (O'Connor, J., for the majority, including Souter & Ginsburg, JJ.); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494 (1999) (Ginsburg, J., concurring); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999) (Breyer, J., for a unanimous Court).

203. For an overview of this type of academic endeavor, see William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997).

204. See also P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979) (providing in-depth analysis of the intellectual, political, and economic milieu affecting contract law in nineteenth century England, and being, in my opinion, equally laudable).

205. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

206. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* (1992).

207. See, e.g., Bagenstos, *supra* note 161, at 436 (summarizing the ADA's statutory findings that a disabled person's "obstacles result from society's prejudices, stereotyping, and neglect"); 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, 165 (2000) (asserting that the general public's view is that "disabled people lack value

name just one, asserts that able-bodied society feels “existential anxiety” towards the disabled.²⁰⁸ The combination of repugnance to disabled bodily difference and fear of also attaining such variation in the future, according to Hahn, result in a sociological desire to segregate people with disabilities from the mainstream.²⁰⁹ It also results in the Supreme Court’s aversion to upholding disability-related rights.²¹⁰

In addition, a larger story can be told regarding the threat that disability accommodations pose to workplace hierarchies, and how they are viewed as a means of eroding employer control. This is a theme O’Brien hints at throughout the book, and even includes in her conclusion, but she does not examine it in any depth.²¹¹ It can be argued, for example, that current disability law resembles the abandoned, chauvinistic framework for determining sex equality.²¹² Consequently judges presume, based on unfounded stereotypes, that people with disabilities have a diminished capability to perform social functions (such as work) without grounding those assumptions in fact.²¹³ Likewise, when confronted with disability discrimination claims, judges do not even perceive those assertions as having merit, much as they did not acknowledge parallel claims of sexual discrimination.²¹⁴ Accordingly, the Justices will examine in depth the bases on which employers justify the exclusion of women from workplace opportunities (as they did in *UAW v. Johnson Controls, Inc.*,²¹⁵ discussed below), but routinely accede to employers’ stipulations on occupational necessity for denying disabled workers’ labor market participation.

Nor does the ruling in *PGA Tour, Inc. v. Martin*,²¹⁶ wherein the Court ruled that the fundamental nature of a professional golf tournament was not altered by allowing a disabled participant to use a golf cart,²¹⁷ detract from this argument. The *Martin* decision went to the issue of public accommodation under Title III of the ADA, rather than to an employer’s duty under Title I.²¹⁸

and are to be pitied”); Anita Silvers, *The Unprotected: Constructing Disability in the Context of Antidiscrimination Law*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS*, *supra* note 19, at 133-34 (noting a history of bias against the disabled due to the “consequent burdens and dangers their presence in public posed both for them and for the common good”).

208. See Hahn, *supra* note 23; Hahn, *supra* note 44.

209. See Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 BEHAV. SCI. & L. 41 (1996).

210. See Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, 21 BERKELEY J. EMP. & LAB. L. 166, 182-91 (2000).

211. See, e.g., pp. 201-02.

212. See Silvers & Stein, *supra* note 43.

213. *Id.* at 690.

214. *Id.* at 676.

215. 499 U.S. 187 (1991).

216. 532 U.S. 661 (2001).

217. *Id.*

218. *Id.*

More significantly, it highlights that the Court is very selective about which activities it is willing to investigate the fundamental natures of.²¹⁹ In the context of investigating the fundamental nature of job requirements, there is a clear divergence between the methodology applied to investigating exclusions based on sex from that utilized for disability.²²⁰

The most recently decided Title I case, *Chevron U.S.A. Inc. v. Echazabal*,²²¹ holding that employers may exclude not only workers who pose dangers to others but also those who endanger themselves, nicely illustrates this contrast between the Court's treatment of sex and disability.²²² The *Echazabal* Court explicated the harms that the plaintiff might cause only in terms of the potential costs (such as tort liability) that would be borne by the employer, rather than as those which might harm his own health.²²³ In stark contrast, the Court in *Johnson Controls* went to great length to explain that an employer's potential liability was not a valid consideration for precluding workplace opportunity for women.²²⁴ That Court, moreover, explicitly required an employer to demonstrate that "sex or pregnancy actually interferes with the employee's ability to perform the job" in order to justify its exclusionary policy.²²⁵ By comparison, the Justices in *Echazabal* left the standard of proof unstated.²²⁶ Finally, the *Echazabal* Court noted that excluding disabled workers who were willing to hazard their own health avoided unfounded stereotypical judgments based on broad categories of the type utilized by the defendant in *Johnson Controls*.²²⁷ Accordingly, while the Court was willing to parse out the underlying motivation and justification for excluding women in *Johnson Controls*, it left those considerations untouched in *Echazabal*.

CONCLUSION

Crippled Justice's thesis is provocative and interesting. O'Brien proffers a novel theory in claiming that a whole man schema, originated by an epistemic rehabilitation community in Cold War America, continues to have a determinative effect upon the Supreme Court's ADA jurisprudence. Yet despite the freshness of this approach, O'Brien's thesis is ultimately

219. For a parallel argument that the Court frequently lacks knowledge for making decisions and is therefore driven by political considerations in choosing some areas for judgment, see Frederick Schauer, *The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin*, 2001 SUP. CT. REV. 267.

220. See Silvers & Stein, *Disability and Paternalism*, *supra* note 190. The following discussion is drawn from this source.

221. 122 S. Ct. 2045 (2002).

222. *Id.*; see also Silvers & Stein, *Disability and Paternalism*, *supra* note 190.

223. *Echazabal*, 122 S. Ct. at 2052.

224. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 208 (1991).

225. *Id.* at 204.

226. *Echazabal*, 122 S. Ct. at 2047 n.1.

227. *Id.* at 2054 n.5

unconvincing. This is primarily due to her inability to demonstrate that the Justices who lived through the 1950s and 1960s were so indoctrinated by the intellectual milieu of psychoanalytic thinking that they continue to be influenced by that epistemic community's vision of disability. Nevertheless, the book provides a valuable service by raising a key question: Why is the Supreme Court (as well as the lower federal courts) averse to disability-related employment claims? Many answers can, and hopefully will, be forthcoming.²²⁸

228. See *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 403 (1998) (reporting that a study by the ABA found over 92% of Title I cases were won by employers over the period 1992-1997); see also Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants?*, 34 HARV. C.R.-C.L. L. REV. 99 (1999); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001).