

The Costs of Easy Victory

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THE COSTS OF EASY VICTORY

MICHAEL E. WATERSTONE*

ABSTRACT

Studies of law and social change often focus on areas of intense conflict, including abortion, gun rights, and various issues around race, gender, and sexual orientation. Each of these has entered the culture wars, inspiring fierce resistance and organized counter-movements. A reasonable assumption might be that social change in less controversial areas might be easier. In this Article, I suggest that it is not that simple. Using the disability rights movement, I demonstrate how flying under the radar leads to unappreciated obstacles. The disability rights movement had a relatively easy path to the passage of the Americans with Disabilities Act (ADA), an omnibus federal civil rights law prohibiting discrimination on the basis of disability. Disability rights were not an issue of major public importance when the ADA was passed; the vast majority of people were completely unaware of the law's passage. Moving forward, to the extent awareness of the ADA exists, it has centered on public and judicial trepidation over granting what is perceived as some form of benefit, for which there has not been an extensive public dialogue, to a large and amorphous category of people, many of whom have no natural claim to any history of discrimination. Thus, a new way to understand the ADA's inability to make more progress on some of its

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more transformational goals is the limited socio-legal conflict around disability rights, combined with the expansive categories of people the ADA intended to cover. It is hard to transform society if society is not paying sufficient attention.

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INTRODUCTION

Studies of law and social change often focus on areas of intense conflict, including abortion, gun rights, and various issues around race, gender, and sexual orientation. Each of these has entered the culture wars, inspiring fierce resistance and organized countermovements. A reasonable assumption might be that social change in less controversial areas is easier. In this Article, I suggest that it is not that simple. Using the disability rights movement, I demonstrate how flying under the radar leads to unappreciated obstacles. This is especially the case when, as with disability, the category of people who are claiming rights is ambiguous and includes individuals with no apparent claim to a history of discrimination.

Seeking to transform the social and political order, various individual disability-specific communities unified in the 1970s to create the modern disability rights movement. This approach provided increased political power, making federal omnibus civil rights legislation possible. The most notable examples are the Americans with Disabilities Act (ADA),¹ and, when the judiciary responded with narrowing interpretations, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA).² In so doing, the movement consciously adopted the civil rights framework, patterning their efforts on social movements built up around race and gender. They envisioned their struggle as one for equality and rights. At the same time, consistent with the collective approach, advocates turned away from focused constitutional rights claiming, instead pursuing a broad range of federal legislative rights at once.

In previous work, I examined how the disability rights movement has avoided state and federal constitutional claims and suggested areas where constitutional claiming on behalf of discrete groups within the disability rights movement might provide meaningful doctrinal gains.³ In this Article, while moving away from discussing specific legal claims, I continue the inquiry into how the social

1. 42 U.S.C. § 12101 (2012).

2. Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101-12213).

3. See Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 529 (2014).

movement for people with disabilities has and continues to influence how rights are expressed and implemented. Somewhat unique amongst identity-based social movements, disability has stayed away from the culture wars. Being less divisive, and less threatening, disability rights do not inspire the same values conflicts as many other groups. Disability is also a more amorphous group identity than that found in other civil rights movements. The many different groups and categories of people with disabilities that joined together to help secure passage of the ADA, and are covered by its broad protections, are not necessarily natural allies, nor are there similar levels of public support and understanding for what these different constituencies might urge in the name of equality.⁴

Although low political salience can be a useful asset to get legislation passed, and broad identity might increase political strength, both of these features have influenced and continue to influence the disability rights project in previously unexamined and interrelated ways. To the extent that the disability rights movement saw the ADA as having the potential to create certain types of transformative change, such change may be unrealistic without engaging in more of an intergenerational, multidimensional, and intense socio-legal conflict than that which preceded the passage or even the implementation of the ADA. Especially in an area like disability that asks for resource redistributions, society cannot be transformed if it is not paying sufficient attention. To the extent people are engaged with the idea of disability rights at all, their attention is focused on the (perceived) dubious claims of individuals at the outer edges of what the ADA covers. But because the ADA links these disparate groups, this negative attention impacts the entire movement.

It is axiomatic that social and political debates influence law. A growing body of literature examines the interactions between social movements, the public, the legislature, and courts, to chart how different groups construct their constitutional cultures.⁵ Much of

4. See *infra* note 101 and accompanying text.

5. See, e.g., Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (discussing ways to move forward after “litigation loss” in marriage equality); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 377 (2007) (discussing abortion); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L.

this work focuses on groups and claims in areas of intense social conflict—including race, gender, sexual orientation, and even gun rights. This body of work demonstrates that, in addition to multi-level advocacy in pursuit of their goals, these movements experienced dedicated countermovements, appeals to actors outside each side’s core constituency, repeat players, and trips to the Supreme Court that further mobilized key players on either side. Often, these battles occurred in all branches of state and federal government.⁶ As part of a continuous feedback loop between social movements, legislatures (both state and federal), and courts, the judiciary reflects at least in part what is happening in these other spaces. Conflict guides and focuses these constitutional conversations. Although the disability rights movement patterned itself after several of these

REV. 1323, 1323 (2006) [hereinafter Siegel, *Constitutional Culture*] (discussing how “equal protection doctrine prohibiting sex discrimination was forged in the Equal Rights Amendment’s defeat”); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008) [hereinafter Siegel, *Dead or Alive*] (discussing the Supreme Court’s originalist interpretation of the Second Amendment); Reva B. Siegel, *The Supreme Court 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 74-75 (2013) [hereinafter Siegel, *Equality Divided*] (discussing a constitutional conception of race). For an example of a comprehensive treatment of several of these categories, see JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011). I use the term “constitutional culture” because the literature primarily studies claims for constitutional rights. But, in their discussions about rights claiming and conflict, scholars also address (although they do not always emphasize) legislative reform efforts. See Siegel, *Equality Divided*, *supra*, at 75 n.383; see also Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in *THE CONSTITUTION IN 2020*, at 79, 83, 86-87 (Jack M. Balkin & Reva B. Siegel eds., 2009).

6. This literature splits on the role and even utility of backlash to Court decisions articulating or rejecting claims for constitutional rights. One group of scholars posits that Court decisions in areas of intense social disagreement generate backlash that is harmful to the democratic order. See, e.g., William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312 (2005) (exploring the backlash caused by *Roe v. Wade*). Contested social change is therefore better left to the legislative branch. Others view the backlash to judicial decisions as just a different species of political pushback, explaining that we can understand key Court decisions only as a result of the movement conflict that preceded them. See Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1219 (2009) (applying this concept to marriage equality). Some scholars go further and stake out the ground that popular reaction to contested Court decisions is actually productive, making the entire constitutional process more democratic and even redemptive. See BALKIN, *supra* note 5, at 5-6. In a companion piece to this Article, I attempt to situate the disability rights movement in the context of that debate. See Michael Waterstone, *Backlash, Courts, and Disability Rights*, 95 B.U. L. REV. 833 (2015).

movements both in terms of tactics and strategy, it has not really been studied in this way.⁷

Here, in examining how the social movement of people with disabilities has influenced the evolution of rights, and continues to do so, I make two claims. The first is that the conflict around disability rights is less intense, and thus fundamentally different, than in several other identity-based civil rights movements. The ADA was an ambitious statute, seeking to transform attitudes around disability and the built environment and go deeply into the private sector to bring people with disabilities into full citizenship. By using a broad definition of disability, it potentially covered many different types of individuals, many of whom had no natural claim to any history of societal discrimination or stigma. Yet there was still relatively little opposition to the ADA's passage. There are many reasons for this, ranging from a lack of animus toward disability generally to the disability rights community's intentional effort to minimize public awareness of the new law in an effort to make passage easier.

Relatively speaking, the disability rights movement was then and remains today important to only a small group of people. There is no organized anti-disability movement, politicians do not regularly take public stands on matters important to the disability community, and views on disability issues are not a factor in judicial selection or confirmation. There are limited repeat players in disability cases. This lack of conflict reflects low public engagement on disability issues. Whereas the nation has the "conviction that an essential mission of the federal government is the prevention of racial and gender discrimination,"⁸ the ADA has been described as having low political salience.⁹ There has certainly been what is commonly

7. Neither this body of work, nor the larger project of progressive constitutional theorizing, address the disability rights movement or disability law. The anthology *The Constitution in 2020*, and its larger online project, *The Constitution in 2020*, <http://www.constitution2020.org>, do not include any specific discussion of disability. See *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009); *CONSTITUTION IN 2020*, <http://www.constitution2020.org/> [<http://perma.cc/8E52-9SZY>] (last visited Oct. 23, 2015).

8. See Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 23 (2003).

9. See *id.* (noting that "[i]n the years since *Boerne* the Court has used its new enforcement model of Section 5 power primarily to invalidate statutes of relatively low political salience" and citing a list which includes the Americans with Disabilities Act).

described as a “judicial backlash” to the ADA, with judges at all levels interpreting its provisions narrowly. But rather than demonstrating opposition to the equality claims of many individuals with what might be considered more serious disabilities, these cases typically center on judicial trepidation over the disability category getting too large.

My second claim is that the lower temperature conflict over disability issues, combined with public and judicial concern over the ambiguity of the category, shed new light on certain movement disappointments. In studying backlash, constitutional and social movement scholars have recently argued that intense conflict is a necessary condition for certain types of social change.¹⁰ If vigorous contestation helps us understand law, its absence should have an impact as well. In many ways, the ADA has been a phenomenally successful statute, creating a new world of opportunities for people with disabilities. Other groups who have faced stiffer resistance in their quest for rights certainly look longingly at the disability rights movement’s avoidance of energetic countermobilization. No movement gets everything it wants, as quickly as it believes it should, so any criticisms of the ADA should be taken with a grain of salt. But here I focus on two persistent and non-trivial critiques of the limits of the ADA. For each, I attempt to use the low political salience, combined with the large and artificial statutory group identity of disability, to help shed light on the limits of what the ADA has been able to accomplish.

At a specific level, one of the goals of the ADA was to restructure workplaces and, in so doing, increase the employment levels of

10. See Siegel, *Equality Divided*, *supra* note 5, at 81-82 (“[C]onflict is likely to be protracted, and change, if any, slow. Advocates can deliberate about the best directions in which to direct conflict of this kind, when opportunities permit choice; but it is hard to imagine change of this kind without profound and sustained conflict.”); see also Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 881-82 (2013) (reviewing BALKIN, *supra* note 5) (“Courts eventually validate meanings that have become reasonable through the course of continued debate and persuasion. The new constitutional meaning becomes authoritative not because a court decided so independently, but because social movements have persuaded political forces, opinion leaders, the public, and judges that a new position is reasonable and, in fact, correct.”) (internal citation omitted); Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J. F. 316 (2015), <http://www.yalelawjournal.org/forum/how-conflict-entrenched-the-right-to-privacy> [http://perma.cc/87DS-CNQE].

people with disabilities.¹¹ It is clear that this has not happened. I argue here that, in addition to the other explanations that have been offered in the literature, we must also consider that although advocates believed that the ADA created specific policy features capable of moving the employment rate, this was not a widely shared sentiment. This lack of engagement over some of these hard choices made it unlikely that the ADA could do its part in the transformative work of moving more people with disabilities into the workplace.

More generally, many hoped that the ADA would create a new way of thinking about disability; rather than a category to be pitied, people with disabilities were entitled to full rights commensurate with other civil rights groups.¹² Advocates aimed to ingrain the social model of disability—in which disability is considered a socially constructed category based on the interaction of personal impairments with environmental features—into American policy and notions of fairness. By calling physical and attitudinal barriers into question, and requiring employers, governments, and businesses to make choices to accommodate disability, the goal of the ADA, and supportive progressive academics, was nothing less than a redefining of the very nature of equality. Proponents hoped to use the ADA's broad coverage to do in one fell swoop what other movements had done in a piecemeal fashion.

But I suggest this conversation has not really happened, at least in part, because winning too easily has costs. Unguided by a public conflict over these transformational aspirations, awareness of disability rights—to the extent there is such awareness at all—remains rooted in a vision of special rights, not civil rights.¹³ ADA case law reflects this understanding. Without public pressure pushing judges in the direction disability advocates might hope, judges are free to follow whatever prior beliefs they might have about disability. And when the claim is on behalf of someone with what might be considered a marginal disability, and he or she asks for a redistribution of resources, limited judicial interpretations make sense. Both the

11. See *infra* note 118 and accompanying text.

12. See *infra* notes 121-28 and accompanying text.

13. See Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 606-07 (2004).

judiciary and the public resisted the idea that a large and amorphous category of people might be entitled to some form of statutory rights about which there had been limited public dialogue. The trajectory of pursuing multiple federal rights at once through an omnibus federal statute, on behalf of a large and amorphous category of people, without a history or parallel effort in state courts or legislatures, proved a poor vehicle to articulate a vision of equality that had the potential to capture the attention and imagination of those outside the movement, either in support or opposition.¹⁴

Using lower political salience and the broad definition of disability as a new framework for understanding some limits of the ADA can and should stimulate some additional, and perhaps difficult, conversations. If conflict, public awareness, and public engagement are linked, and disability remains something that incites passion in only a small group of people, then a more appropriate movement analogy, and area for future study, may be to groups like veterans or the poor, rather than other more traditional civil rights groups. Moreover, it suggests that the ADAAA—a legislative effort to lock judges into a broad definition of disability—may not usher in a new era of disability equality.¹⁵ Unconvinced as to why this (now larger) universe of people are entitled to an employer-funded accommodation (itself not precisely defined), there may well be space for continued narrow interpretations that leave plaintiffs on the losing end. This framework may also have implications for a prevailing trend in disability rights scholarship that proceeds from the unstated assumption that the day will come when people will “get” disability rights (and by implication, judges will grant them) in the way they do for other civil rights groups. In terms of the ADA-covered

14. To be clear, I am not making the claim that if the disability rights movement had encountered more resistance and had somehow become more politically salient to a broader range of people that the ADA would have necessarily been more effective at moving people into the workplace, or that there would have been deeper penetration of the social model of disability. Such a claim likely could not be proved. One possibility is that the ADA might never have passed in the first place. See Siegel, *Equality Divided*, *supra* note 5, at 75 (noting that “conflict can slow or even crush change”). Another claim is that if the business community had resisted more, a narrower definition of disability would have emerged. See Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 542 (2008).

15. See *infra* note 192 and accompanying text.

category of people with disabilities, this has not yet happened and may never occur.

This Article proceeds in two Parts. Part I briefly discusses the literature highlighting how feedback loops between judges, social movements, and the public, as well as the intensity of conflict, influence law. It then contrasts the modern disability rights movement, which I suggest is a history of political successes with relatively minimal political conflict. In light of this, Part II considers a focus on conflict and ambiguity in the group identity as a new framework to understand some areas in which advocates and scholars view the ADA as disappointing. It then concludes with some reflections on how the new way of understanding the disability rights movement can and should influence current and future debates on the movement's trajectory.

I. CONFLICT AND SOCIAL CHANGE

A. *The Role of Conflict in Pursuit of Rights*

In areas like race, gender, sexual orientation, and gun rights, among others, scholars have explored how rights and demands for equality are created through feedback loops between social movements, judges, legislatures, and even the public.¹⁶ These attempts to change the existing legal, social, and political order typically inspire fierce resistance, generating organized countermovements and fostering political debates.¹⁷ Law is forged through these conflicts. Even within the judiciary, law evolves not inevitably or even rationally, but as a result of deliberate and complex social forces

16. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 562 (2009); *supra* note 5; see also Cary Franklin, *Discriminatory Animus* 11 (Univ. of Tex. School of Law, Research Paper No. 554, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2401527 [<http://perma.cc/5YPB-5KGL>]; NeJaime, *supra* note 10, at 877.

17. See Post & Siegel, *supra* note 5, at 374 (noting a process whereby citizens make claims “about the Constitution’s meaning and ... oppose their government—through constitutional lawmaking, electoral politics, and the institutions of civil society—when they believe that it is not respecting the Constitution. Government officials, in turn, both resist and respond to these citizen claims. These complex patterns of exchange have historically shaped the meaning of our Constitution”).

exerting pressure on courts and judges.¹⁸ This is not a narrative of pro-civil rights forces always winning—even when there are victories, there is backlash and retrenchment. With both sides pushing hard, law rarely evolves to anyone's complete satisfaction. Rather, this literature suggests that conflict is a useful and perhaps necessary framework to understand the evolution of law, and that a certain level of intensity attends major social change.

Race and abortion are the classic examples of this phenomenon. The conflict surrounding *Brown v. Board of Education*¹⁹ and the Civil Rights Act of 1964, including protest, civil disobedience, and violence, has been well documented.²⁰ By the time the Civil Rights Act was passed, "it was supported by a powerful and well-publicized movement for social change, whose major tenets and aspirations had already garnered widespread socio-cultural support."²¹ Jumping forward, when the Supreme Court became involved on key issues of race, diverse groups paid attention and reacted: ninety-two amicus briefs were filed in *Fisher v. University of Texas at Austin*, involving a challenge to race-conscious admissions procedures.²²

This type of conflict is offered as one key to understanding law and its development.²³ So, for example, Professor Reva Siegel offers an account of the Supreme Court's recent decisions in *Fisher* and

18. See NeJaime, *supra* note 10, at 882 ("Important decisions become part of a narrative in which social movement actors, among others, use such decisions to explain legitimate social change, repudiate past injustices, and justify calls for further development.")

19. 347 U.S. 483 (1954).

20. See generally DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986); Michael J. Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 VA. L. REV. 7 (1994).

21. Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 489 (2000).

22. 133 S. Ct. 2411 (2013); see Mark Walsh, *It Was Another Big Term for Amicus Curiae Briefs at the High Court*, ABA J. (Sept. 1, 2013, 8:30 AM), http://www.abajournal.com/magazine/article/it_was_another_big_term_for_amicus_curiae_briefs_at_the_high_court/ [<http://perma.cc/37HU-WTEF>]. On the relationship between amicus briefs being filed and the political salience of Supreme Court decisions, see Vanessa A. Baird, *The Effect of Politically Salient Decisions on the U.S. Supreme Court's Agenda*, 66 J. POL. 755, 763-66 (2004).

23. See NeJaime, *supra* note 10, at 881-82 ("Courts eventually validate meanings that have become reasonable through the course of continued debate and persuasion.... The new constitutional meaning becomes authoritative not because a court decided so independently, but because social movements have persuaded political forces, opinion leaders, the public, and judges that a new position is reasonable and, in fact, correct.")

*Shelby County v. Holder*²⁴ as espousing a vision of the Equal Protection Clause that restricts judicial oversight of minorities while intensifying judicial oversight of majority claims.²⁵ Siegel's premise is that these decisions are not a result of doctrinal inevitability, but rather are occasioned by a profound transformation "by the conflict that enforcing equal protection provokes" and the "resistance the civil rights project aroused."²⁶ She traces a conflict that "divided the nation for decades,"²⁷ and was the result of vigorous contestation in public consciousness and the political process, expressed and reinforced by movement-counter-movement dynamics.²⁸ It is a history of citizen mobilization and presidents responding with obvious political commitments and selection of members of the federal judiciary.²⁹ In many instances, Supreme Court decisions, and the positions Justices staked out within them, provided rallying points around which the public and politicians could mobilize.³⁰ Justices on both sides then, in turn, reacted to these national conflicts and disagreements.³¹

Abortion followed a similar trajectory—law created as a result of movement-counter-movement dynamics and active contestation. Even if one starts the story with *Roe* (which is surely not where it begins), it is not an overstatement to say that the decision "inspired a political campaign to prohibit abortion that changed the shape of

24. 133 S. Ct. 2612 (2013).

25. See Siegel, *Equality Divided*, *supra* note 5, at 61-62.

26. *Id.* at 3.

27. *Id.* at 5.

28. *Id.* at 7 ("As this examination of equal protection history shows, equal protection law has been profoundly shaped by the conflicts it has engendered.")

29. *Id.* at 8 ("Changes in the interpretation of the Equal Protection Clause may reflect the workings of a democratic order in which citizens can mobilize for constitutional change, and Presidents—courting voters—can nominate as judges persons believed to have compatible views about the great constitutional controversies of their day."). Professor Siegel traces the evolution of these decisions to public positions taken by Presidents Nixon and Reagan, and in particular, the actions of the Department of Justice in the Reagan Administration, which sowed the seeds of their vision of equal protection jurisprudence. See *id.* at 11 (Nixon's speech against busing); *id.* at 16 n.72 (appointment of judges); *id.* at 25-29 (on the Reagan Justice Department's "connect[ing] debates over intent and effects to the debate over affirmative action and treat[ing] both questions as crucial matters of concern in judicial appointments").

30. *Id.* at 19 (on role of *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979)).

31. *Id.* at 23 (on Justice Powell "[i]nvo[ki]ng the national conflict over desegregation" in *Columbus Board of Education v. Penick*, 443 U.S. 449, 489 (1979)).

both constitutional politics and constitutional law.”³² This pushback, and subsequent debate, unfolded on multiple fronts: in popular culture, political parties and campaigns, judicial nominations, judicial proceedings, and the legislature.³³ Social movement forces have helped frame and solidify the constitutional values guaranteeing and protecting abortion rights.³⁴ And passions can even rise to the point of violence.³⁵

Similar accounts are offered for marriage equality, gender discrimination, and an individual right to bear arms under the Second Amendment. There were many points along the social and legal continuum of the LGBT movement and path to marriage equality: violence at Stonewall,³⁶ to *Bowers v. Hardwick*,³⁷ to *Baehr v. Lewin*,³⁸ to the Defense of Marriage Act (DOMA),³⁹ to *Lawrence v. Texas*,⁴⁰ to *United States v. Windsor*.⁴¹ Each was both the cause and result of movement-counter movement strategies and multilevel political, popular, and legal contestation. Further, each point represented an opportunity for the different sides to regroup, reorganize, and renew their effort to shape the hearts and minds of the public.⁴² Familiar adversaries continued to square off in

32. Post & Siegel, *supra* note 5, at 398.

33. *Id.* at 399 (“*Roe* has accordingly been tested by innumerable statutes that probe its reach and attack its normative underpinnings.”).

34. See Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875 (2010) (examining “understandings animating feminist abortion rights claims in the years before *Roe*”).

35. See *Planned Parenthood Se., Inc., v. Strange*, 33 F. Supp. 3d 1330, 1333 (M.D. Ala. 2014) (“[T]his court cannot overlook the backdrop to this case: a history of severe violence against abortion providers in Alabama and the surrounding region.”).

36. See Symposium, *Introduction: Stonewall at 25*, 29 HARV. C.R.-C.L.L. REV. 277, 277-82 (1994).

37. 478 U.S. 186 (1986).

38. 852 P.2d 44 (Haw.), *reconsideration and clarification granted in part*, 875 P.2d 225 (Haw. 1993).

39. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)), *invalidated by United States v. Windsor*, 133 S. Ct. 2675 (2013).

40. 539 U.S. 558 (2003).

41. 133 S. Ct. 2675 (2013).

42. See Steven A. Boutcher, *Making Lemonade: Turning Adverse Decisions into Opportunities for Mobilization*, 13 AMICI 8, 10-11 (2005); Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement’s Agenda*, 47 U.C. DAVIS L. REV. 1667, 1679-80 (2014) (noting how in the mid-1980s gay and lesbian political organizing had shifted dramatically in response to the challenge of the reinvigorated anti-gay religious right); NeJaime, *supra* note 5, at 985 (commenting on work of Steven Boutcher, and noting that “[h]

multiple fora.⁴³ Fueled by visible conflict, public awareness and public perception shifted and peaked.⁴⁴ By the time *Windsor* arrived at the Supreme Court, the issues had “divided the nation for decades.”⁴⁵ Again, Supreme Court action provided the impetus for reaction, which engaged the public and mobilized further legal development.⁴⁶ The Court was not ruling in a vacuum; rather, it was part of a conversation characterized by “ferocious reaction[s],”⁴⁷ which in turn “moved from the legislature, to the streets, to the courts, to popular referenda, and culminated in a trial, in which nationally renowned advocates presented arguments, honed through years of struggle, to a national audience.”⁴⁸ The Court’s recent decision in *Obergefell v. Hodges*, holding same-sex marriage to be a constitutionally protected interest, may have resolved that particular doctrinal question, although it explicitly recognized the multi-tiered advocacy in pursuit of that goal.⁴⁹ And all signals are that the same divergent interests will continue repeated and high-profile engagements on issues of individual rights against religious liberty,

shows that the *Bowers* defeat increased grassroots mobilization, fundraising, and organizational founding, all of which proved vital to a stronger LGBT-rights movement”); Schacter, *supra* note 6, at 1154.

43. See NeJaime, *supra* note 5, at 1003 (“Christian Right advocates have used the ballot-initiative process to turn back LGBT gains deriving from all branches of government. Indeed, LGBT-rights lawyers themselves understand backlash to judicial decisions as part of this broader movement-counter-movement phenomenon.”).

44. See Post & Siegel, *supra* note 5, at 400 (“Whereas in 1987, 55% of Americans thought that homosexuality between consenting adults should not be legal and 33% thought that it should be legal, by 2001 these numbers had virtually switched: 54% of Americans thought that homosexual relations should be legal and only 42% thought that they should be illegal.”); see also Siegel, *Equality Divided*, *supra* note 5, at 76 (“Evolving public opinion enabled this Term’s marriage decisions, but conflict over law importantly contributed to the public’s changing views.”); *id.* at 85 (“Yet the public’s evolving views about marriage were also importantly the fruit of conflict over, and through, law.”). The heavy involvement amongst interest groups and political elites can be demonstrated, at least in part, by the number of amicus briefs filed in *Hollingsworth v. Perry*—ninety-six, the most of the term. See Walsh, *supra* note 22.

45. Siegel, *Equality Divided*, *supra* note 5, at 5.

46. See, e.g., Leachman, *supra* note 42, at 1678-79 (noting the relationship between *Bowers*, a reinvigorated anti-gay religious right, and the subsequent response and unification of the gay rights community).

47. See Siegel, *Equality Divided*, *supra* note 5, at 80.

48. *Id.* at 85.

49. See 135 S. Ct. 2584, 2597-98 (2015).

with those on the religious right adopting the tactics of their adversaries.⁵⁰

The constitutional jurisprudence of gender discrimination can also be understood only through the lens of multilevel conflict. In the 1970s, an initial groundswell of support for the Equal Rights Amendment (ERA) met “energized countermobilization,” which eventually doomed its passage.⁵¹ Politicians at all levels of government weighed in, and organized groups like STOPERA, with burgeoning national figures like Phyllis Schlafly, were born and thrived.⁵² This in turn drove the women’s rights movement to new levels of messaging and organization.⁵³ These debates, though ultimately unsuccessful in creating a constitutional amendment, impacted how courts interpreted the Fourteenth Amendment, such that scholars began to consider the resulting body of equal protection jurisprudence as a de facto ERA.⁵⁴ Cases like *Reed v. Reed* and *Frontiero v. Richardson* developed a theory of gender discrimination that could directly trace its lineage to arguments and advocacy developed in the battles over the ERA.⁵⁵

The same principle explains decisions in other areas as well. Scholars offer an account of the Supreme Court’s decision in *District of Columbia v. Heller*, protecting an individual’s right to bear arms

50. See Adam B. Lerner, *Conservatives Regroup After Gay Marriage Defeat*, POLITICO (July 12, 2015, 7:53 AM), <http://www.politico.com/story/2015/07/conservatives-regroup-after-gay-marriage-defeat-119984.html> [<http://perma.cc/8A6D-ZXVZ>] (noting that conservatives are adopting the framework of discrimination pursued by advocates for marriage equality).

51. See Siegel, *Constitutional Culture*, *supra* note 5, at 1378-79 (“[W]ithin a few years, the groundswell of support for the ERA had provoked energetic countermobilization. Opposition began with impassioned debate over the ERA’s meaning that transpired before Congress was willing to enact it—and grew more heated as the decade wore on.”).

52. See, e.g., CAROL FELSENTHAL, *THE SWEETHEART OF THE SILENT MAJORITY: THE BIOGRAPHY OF PHYLLIS SCHLAFLY* 244 (1981) (“In Illinois, for example, she could rally a thousand women for a routine demonstration And that was nothing because, all told, she had twenty thousand people working for her in the state.”); Symposium, *Men, Women, and the Constitution: The Equal Rights Amendment*, 10 COLUM. J.L. & SOC. PROBS. 77, 110 (1973) (observing that Schlafly was “very well funded, and she ha[d] coordinated some ‘grass roots’ groups all over the country that started emerging They [were] active with pickets and placards at legislative sessions, sometimes slowing the progress of the amendment”).

53. See Symposium, *supra* note 52, at 110 (“Luckily, a good counterattack is being mounted by groups like B.P.W. and Common Cause.”).

54. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476-77 (2001).

55. See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

against federal gun control regulation, as reflecting the work of social movement actors to change American minds about the meaning of the Second Amendment.⁵⁶ Challenging a view of *Heller* as a “triumph of originalism,”⁵⁷ Professor Siegel argues that the decision “enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism.”⁵⁸ She traces *Heller*’s holding to express social movement strategy, advocacy, and contestation, thus situating it as one of many decisions where “in American constitutional culture, social movement conflict can motivate as well as discipline new claims about the Constitution’s meaning, and how responsive interpretation by public officials can transmute constitutional politics into new forms of constitutional law.”⁵⁹

Although there is some disagreement about the proper role of the courts in mediating these disputes, as opposed to that of the legislatures,⁶⁰ the diverse literature supports an understanding of law both through the prism of social movement conflict and through an intense disagreement and debate over claims for rights that accompany swings of law.

B. Disability is Different

On one account—perhaps the dominant view in disability law scholarship—the trajectory of disability law can map onto this conflict and backlash narrative. Advocates lobbied fiercely for passage of the Americans with Disabilities Act. Businesses fought back and helped create limited interpretations of the law, particularly on its

56. 554 U.S. 570, 636 (2008); see Jack Balkin, “*This Decision Will Cost American Lives*”: A Note on *Heller* and the Living Constitution, BALKINIZATION (June 27, 2008), <http://balkin.blogspot.com/2008/06/this-decision-will-cost-american-lives.html> [<http://perma.cc/4BRD-3BHQ>] (“[T]he result in *Heller* would have been impossible without ... social movement actors who, over a period of about 35 years, succeeded in changing Americans’ minds about the meaning of the Second Amendment.”).

57. See Lawrence Solum, *Analysis of Heller*, LEGAL THEORY BLOG (June 26, 2008), <http://lsolum.typepad.com/legaltheory/2008/06/analysis-of-hel.html> [<http://perma.cc/Z75R-6MMF>] (“It is difficult to imagine a clearer or more thoroughgoing endorsement of original public meaning originalism.”).

58. See Siegel, *Dead or Alive*, *supra* note 5, at 192.

59. *Id.* at 201.

60. See *supra* note 5.

threshold definition of disability.⁶¹ Indeed, there is an active backlash literature attempting to explicate the extent to which the judiciary undermined the law's original intent.⁶² This work recognizes assertions that the pushback or backlash to disability rights was akin to that faced by other civil rights groups.⁶³

In contrast to these conventional accounts, my argument highlights a significant difference in kind between the conflict created by the ADA's passage and the ways in which certain other groups, several of which the disability rights movement consciously patterned itself after, have constructed their constitutional cultures. Furthermore, the diffuse and ambiguous nature of group identity has complicated public and judicial understandings of disability equality. Below, I will explore how these features offer a new frame-

61. See, e.g., *US Airways, Inc. v. Barnett*, 535 U.S. 391, 403 (2002) (holding that an exception to seniority policy was not a reasonable accommodation); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566-67 (1999) (holding that an individual with amblyopia, an uncorrectable eye condition, was not covered by the ADA's definition of disability); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494 (1999) (holding that twin sisters with myopia were not covered by the ADA's definition of disability).

62. The seminal work in this literature was a dedicated issue of the *Berkeley Journal of Employment and Labor Law*, which was the result of a 1999 gathering of scholars from the fields of law, sociology, psychology, political science, economics, history, and English literature investigating the idea of ADA backlash. See Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 *BERKELEY J. EMP. & LAB. L.* 19, 22 (2000) ("A final account of the pattern in ADA decisions is the one suggested by the title of this symposium: that there is some kind of judicial backlash against the ADA. The term 'backlash' suggests a hostility to the ADA The backlash thesis suggests that judges are not simply confused by the ADA; rather, they are resistant to it. It suggests that the courts are systematically nullifying rights that Congress conferred on people with disabilities."); Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 *BERKELEY J. EMP. & LAB. L.* 1, 12 (2000). See generally *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* (Linda Hamilton Krieger ed., 2003) (collecting and expanding upon articles presented at the symposium).

63. See Diller, *supra* note 62, at 44 ("[P]eople with disabilities find themselves on the front lines of a legal and cultural war."); see also Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 *BERKELEY J. EMP. & LAB. L.* 335, 335 (2000) ("[J]ust as the Civil Rights Act of 1964 produced a backlash by those who feared that minorities and women would take jobs away from them, the ADA has been subject to recent backlash by the public, our elected officials, and the courts.").

work for understanding some of the ADA's jurisprudence.⁶⁴ But first, I demonstrate that a meaningful difference does exist.

In terms of the category composition, although no movement is monolithic, and all of the groups discussed have internal divisions,⁶⁵ the disability community is perhaps exceptional in its diffuseness. For the most part, the "movement" is made up of individual communities of people built around shared life experiences with specific impairments. Historically, these different groups have not had much in common and have not worked together (or even gotten along) as a social or political matter.⁶⁶ Starting in the 1970s, though, distinct

64. There has been scholarly work looking at what happens to a movement *after* it secures either a judicial or legislative victory. *See, e.g.*, JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 33-41 (1978); MICHAEL W. McCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 1-2 (1994); Jennifer Gordon, *A Movement in the Wake of a New Law: The United Farm Workers and the California Agricultural Labor Relations Act*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 277, 291-97 (Austin Sarat & Stuart A. Scheingold eds., 2006). In exploring why these changes (usually judicial, but sometimes legislative) are not as successful as advocates have hoped, the typical challenges identified are "bureaucratic resistance to implementing new rules and procedures, the dominance of opponents in determining the regulations that will govern the new right, and the technicalization and lawyerization of the movement's fight." Gordon, *supra*, at 292. Some work has looked at these factors in the context of the disability rights movement. *See, e.g.*, Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1 (2006) (private enforcement); Lisa Eichhorn, *The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC's "Disability" Regulations Under the ADA*, 39 WAKE FOREST L. REV. 177, 209 (2004) (role of administrative agencies); Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 444-55 (2007) (public enforcement). The focus here, however, is somewhat different and pushes that literature in an additional direction—exploring a lower-grade conflict at the law's founding and thereafter, combined with category ambiguity, to explain frustration with movement goals.

65. To the extent that movements give the appearance of unified voices, it is most likely a result of some voices being quashed and others being privileged. *See* TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 1-2 (2011); *see also* Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 289-90 (2005).

66. *See, e.g.*, GARY L. ALBRECHT, THE DISABILITY BUSINESS: REHABILITATION IN AMERICA 281 (1992) ("These diverse groups, while sharing common interests, do not constitute a united lobby. Rather they seek their own objectives, often competing with one another for resources."); SHARON BARNARTT & RICHARD SCOTCH, DISABILITY PROTESTS: CONTENTIOUS POLITICS 1970-1999, at 109-38 (2001) (discussing unity and disunity within the disability rights movement and noting differences between lived experiences and political goals); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 126 (1993) ("There are hundreds of different disabilities, and each group tended to see its issues in relation to its specific disability. There were groups for people with head injuries, different groups for blind people, and still others for cancer survivors or those with diabetes, arthritis,

undertakings—such as the independent living movement, the deinstitutionalization movement, parent efforts toward inclusive education, the rise of AIDS activists, and the merging of the culturally deaf into the larger disability movement—began slow and tentative steps toward a pan-disability model.⁶⁷ This “big tent” iteration of the disability rights movement is directly tied to the expansive definition of disability adopted in the ADA and recommitted to in the ADAAA. But it is important that this unification not be overstated: there were and remain significant divisions across and even within groups.⁶⁸

Two important efforts unified these disparate groups, one involving tactics and the other, ideology. The disability rights movement consciously sought to come together as a *civil rights* movement, using the imagery and unifying framework of civil rights.⁶⁹ Like race and gender before them, people with disabilities sought to cast themselves as a minority seeking to be free of persecution and discrimination to live free lives.⁷⁰ People with disabilities would be active holders of rights as opposed to passive recipients of medical

learning disabilities, and mental illness, all fighting for specific programs, funding, and laws to address the needs of members of their own group.”); JACQUELINE VAUGHN SWITZER, *DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY* 71 (2003) (noting views of Richard Scotch “that until the mid-1970s the disability rights movement was a loosely structured grassroots movement.”).

67. See SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 14-18 (2009); see also Michael Ashley Stein et al., *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1667 (2010) (reviewing BAGENSTOS, *supra*).

68. See SWITZER, *supra* note 66, at 77 (noting differences between the National Federation for the Blind, which did not support the ADA, and the American Council of the Blind, which did). In *American Council of the Blind v. Paulson*, 463 F. Supp. 2d 51, 63 (D.D.C. 2006), the American Council of the Blind challenged paper currency as being inaccessible and thus violating section 504 of the Rehabilitation Act. The National Federation for the Blind filed an amicus brief opposing the American Council of the Blind’s position. See Brief for National Federation of the Blind as Amicus Curiae in Support of Appellant at 1-3, *Am. Council of the Blind v. Paulson*, 525 F.3d 1256 (D.C. Cir. 2008) (No. 07-5063).

69. See SWITZER, *supra* note 66, at 68-69 (describing protest at Gallaudet University over the appointment of a hearing president as a defining civil rights event); see also 135 CONG. REC. 19,807 (1989) (statement of Sen. Kennedy) (“The Americans with Disabilities Act ... has the potential to become one of the great civil rights laws of our generation.”).

70. See SWITZER, *supra* note 66, at 76 (“One of the slogans often associated with disability activism is ‘Nothing About Us Without Us’—a phrase that has parallel significance with ‘Power to the People’ in the civil rights movement and, for many in the women’s liberation movement, ‘Our Bodies, Ourselves.’”).

expertise and/or charity.⁷¹ In addition to empowering people with disabilities, this framework brought with it political power, especially when it included more groups into the fold.⁷² Ideologically, people with disparate disabilities could collectively get behind the social model of disability: the idea that disability is an interaction between an individual's impairment and society's response to that impairment.⁷³ The policy payoff was that this framework opened up a whole range of social choices as themselves contributing to disability.⁷⁴

These tactics and ideology served as forces to unify the movement internally, which proved important to gather political power to pursue an omnibus federal civil rights law. The goal, as with other civil rights groups, was to "recognize the equal 'status and dignity' of persons who live in entrenched relations of inequality."⁷⁵ Given the expansive nature of the category, and the large number of rights sought, perhaps more resistance would have been expected. Yet none of the hallmarks of the type of backlash discussed above occurred—no violence, countermobilization, entrenchment, maneuvering for public awareness, or repeated engagement. In contrast, the modern disability rights movement is a case study of political success with relatively minimal political conflict.

Though the passage of the ADA certainly resulted from a concerted political effort, it was not borne out of any high public awareness of, or values clash over, the inclusion, or lack thereof, of

71. See Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 343 (2001) ("The ADA's proponents were—and are—careful to highlight not only the differences between the 'civil rights' and 'medical' approaches to dealing with the problem of disability, but the differences between the 'civil rights' and 'charitable' approaches."); see also Diller, *supra* note 62, at 31-32 ("The ADA explicitly adopts a civil rights approach to the problems that people with disabilities encounter in the workplace.... The legislative findings that form the preamble to the Act draw on the concepts and rhetoric identified with legal remedies for violations of civil rights.").

72. See, e.g., Richard K. Scotch, *Politics and Policy in the History of the Disability Rights Movement*, 67 MILBANK Q. 380, 384 (1989) (arguing that the ability of the disability rights movement to pass legislation is largely due to a change in a "rights issue orientation" and participation in the larger disability rights movement instead of individual silos); see also SWITZER, *supra* note 66, at 71-74.

73. See BAGENSTOS, *supra* note 67, at 18-20 (noting the unifying effects of the social model and civil rights framework).

74. *Id.* at 20.

75. See Siegel, *Equality Divided*, *supra* note 5, at 74.

people with disabilities in society.⁷⁶ At the time advocates were gearing up to make the push for omnibus civil rights protections, disability rights were not “on the public’s radar screen or anyone’s political agenda.”⁷⁷ The “policy window” was not opened primarily by a public recognition of the need for legislative civil rights action for people with disabilities, but instead as part of a reaction to the regulatory reform movement that had reached new heights under President Reagan.⁷⁸ Thus, the initial legislative mobilizing force was at least as much a defensive maneuver to safeguard regulations under section 504 of the Rehabilitation Act from the threat of deregulation, as it was a value-driven push for transformative change.⁷⁹

The debates in Congress about the ADA were, for the most part, not about any disability animosity or objections to the theoretical benefits of integrating people with disabilities into society. They were about cost.⁸⁰ There were concerns about creating a bonanza for plaintiff’s lawyers who would bring suits against defendants who could not afford to litigate them.⁸¹ Some members of Congress

76. For more comprehensive treatments of movement politics, see SWITZER, *supra* note 66, at 68-89; Arlene Mayerson, *The History of the ADA: A Movement Perspective*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 17, 17-24 (Lawrence O. Gostin & Henry A. Beyer eds., 1993); Sara D. Watson, *A Study in Legislative Strategy: The Passage of the ADA*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT, *supra*, at 25, 25-34.

77. See SWITZER, *supra* note 66, at 96; see also Krieger, *supra* note 21, at 489 (“[T]he Americans with Disabilities Act was [not] supported by a broad-based popular understanding of the injustices faced by people with disabilities, the nature of their continuing struggle for inclusion and equality, or the particular theory of equality that informed the statutes’ many ambiguous provisions.”); Watson, *supra* note 76, at 26 (“No public opinion poll had highlighted disability discrimination as a major issue; no new publication had captured the public’s attention; no crisis had emerged to spur legislators to action; no data had suddenly emerged to indicate a dramatic increase in problematic behavior; and no media exposé had taken place.”).

78. See SWITZER, *supra* note 66, at 96.

79. See Mayerson, *supra* note 76, at 19.

80. See SWITZER, *supra* note 66, at 106. For example, Senator Orrin Hatch offered a floor amendment, which was ultimately defeated, seeking to have a refundable tax credit of up to \$5000 to help small businesses comply with the public accommodations provision. See 135 CONG. REC. 19,836 (1989) (statement of Sen. Hatch) (“[W]e have to recognize that Federal requirements cost money and some of these people cannot afford to come up with that money.”). Similarly, the National Federation of Independent Business voiced objections that the ADA would be difficult for small businesses to comply with. See SWITZER, *supra* note 66, at 109 (describing the role of the National Federation of Independent Business). Trade associations for hotels and mass retail offered similar testimony. *Id.* at 109-10.

81. See James Bovard, *The Lame Game*, AM. SPECTATOR, July 1995, at 30, 32-33; see also

feared that those who used illegal drugs, as well as homosexuals, might be covered by the ADA.⁸² Looking through the legislative record confirms that even libertarian opposition to the ADA tended to be more of the utilitarian critique centering on “cost and (in)efficiency,” not a deontological libertarian critique based on freedom of association.⁸³ Stated differently, these concerns expressed themselves in economic terms (“Who is going to pay for this?”) rather than value judgments or animus (“I do not want to associate with these people.”).⁸⁴

These statements reflect the nature of socio-political resistance to disability. Disability stands at an interesting precipice, as it does not inspire the same values conflicts as many other social movements and minority categories.⁸⁵ Although varying by the type of disability, research demonstrates that people experience disability with pity, fear, and paternalism, but not necessarily animus.⁸⁶

Editorial, *The Lawyers Employment Act*, WALL ST. J., Sept. 11, 1989, at A18 (arguing that the law would “mostly benefit lawyers who will cash in on the litigation that will force judges to, in effect, write the real law”).

82. See Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 33, 33, 38-39 (2004); see also 135 CONG. REC. 22,734 (1989) (statement of Rep. Burton) (“The ADA is the last ditch attempt of the remorseless sodomy lobby to achieve its national agenda before the impending decimation of AIDS destroys its political clout. Their Bill simply must be stopped. There will be no second chance for normal America if the ADA is passed.”).

83. On the distinction, see Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 UCLA L. REV. 599, 602 n.21 (2000).

84. See *id.*; see also RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 486-87 (1992); Edward L. Hudgins, *Handicapping Freedom: The Americans with Disabilities Act*, REGULATION, Spring 1995, at 67, 67, 75-76, <http://object.cato.org/sites/cato.org/files/serials/files/regulation/1995/4/v18n2-7.pdf> [<http://perma.cc/ZGQ5-L8GC>].

85. Lots of reasons can be, and have been, offered for this, including, but not limited to: the possibility that the disability classification is the one minority group that anyone can join at any time; the overlap of disability and age; and the “hidden army” of disability rights, meaning that most people have some personal experience with disability themselves or with family members or friends, which led to important supporters of disability rights on both sides of the political aisle. See Selmi, *supra* note 14, at 538-39 (noting how members of Congress with personal life experience with disability “would play critical roles in ensuring the passage of the ADA, and perhaps because of the personal connections to issues of disability, there was virtually no opposition to the ADA in either the House or the Senate”). In this Article, I do not try to deconstruct this phenomenon; rather, I largely take it as a given, examining its effects on the way the movement’s rights are constructed.

86. See LOUIS HARRIS & ASSOCS., PUBLIC ATTITUDES TOWARD PEOPLE WITH DISABILITIES 13 (1991) (74 percent of Americans felt pity toward disabled individuals); see also ALAN

The fact that both political parties can lay some measure of claim to disability rights certainly can be viewed as a contributing factor to the low political salience.⁸⁷ To secure passage of the ADA, advocates succeeded by staying away from the culture wars.⁸⁸ Commentators have suggested that the relatively easy route of disability rights, as embodied in the ADA, reflects that the efforts to recognize rights for people with disabilities were not perceived as threatening the interests of the majority (particularly white males) in the same way that parallel efforts to integrate women and minorities were.⁸⁹ As explained by Sara Watson, “[t]he concept of providing civil rights protections for people with disabilities had advanced far enough to make itself palatable but not so far that it had become unpopular or even objectionable.”⁹⁰ This meant that despite the obvious political power of the big tent version of the disability rights movement, there was simply not the same values clashes as with earlier civil rights struggles.

As a cause, or perhaps effect, of the lack of a values clash, public awareness of the law was low. Although the disability rights community certainly viewed the law as transformative and reflective of a vision of a mandate to extend full citizenship in every form to people with disabilities, most people did not see the law that way, to the

GARTNER & TOM JOE, *IMAGES OF THE DISABLED, DISABLING IMAGES* 2-3 (1987) (demonstrating how the disabled are characterized as feeble or incapable, and are often objectified); NAT'L INST. ON MENTAL HEALTH, *MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL* 6-8 (1999) (noting that although for people with physical disabilities the most common form of discrimination is paternalism, in the case of mental disability, discrimination is manifested as bias, distrust, stereotyping, fear, embarrassment, anger, or avoidance); 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) (“[T]he public’s need to define a person who uses a wheelchair as ‘disabled’ ... derives from the idea that disabled people lack value and are to be pitied.”); Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 *J. SOC. ISSUES* 39, 43-44 (1988) (“Probably the most common threat from disabled individuals is summed up in the concept of existential anxiety: the perceived threat that a disability could interfere with functional capacities deemed necessary to the pursuit of a satisfactory life.”).

87. See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 *WM. & MARY L. REV.* 921, 1012-13 (2003); see also Schacter, *supra* note 6, at 1205-06 (arguing that the salience of same-sex marriage was driven by the Republican Party aggressively pressing the issue).

88. See SWITZER, *supra* note 66, at 109.

89. See *id.* (“[T]he disability rights movement had not evolved to the point that disabled people were considered a threat to the nondisabled majority.”).

90. See Watson, *supra* note 76, at 28.

extent they were aware of it all.⁹¹ A nationwide poll conducted in 1991 by Harris Associates demonstrated that only 18 percent of those questioned were aware of the ADA's existence.⁹² The history of the passage of the ADA shows that this was at least in part an intentional effort by disability rights advocates to operate a stealth campaign to minimize political resistance. As one researcher explained, "[a]voiding the media and any attempt to try to explain the legislation to the press became a key element of the fight for passage of the ADA."⁹³ Notice the key difference with the passage of Title II of the Civil Rights Act of 1964, "which had been graphically presented by media around the world. Images of lynchings, police dogs, and fire hoses became synonymous with the struggle for civil rights; few parallel images characterized the needs of disabled persons."⁹⁴

As a goal, the ADA was thus relatively easily realized.⁹⁵ In other civil rights movements, by the time advocates sought constitutional recognition of the specific right they were claiming (either through the courts or statutory law), there existed a state-level precedent to which they could point. By the time *Obergefell* was decided, almost half of the states had laws or court decisions that legalized same sex marriage.⁹⁶ When *Roe* was decided, four states had outright repealed their abortion bans, and several others had reformed their

91. See SHAPIRO, *supra* note 66, at 141 ("[I]t was an odd victory; as radical as the ADA's passage would be for disabled people, nondisabled Americans still had little understanding that this group now demanded rights, not pity.").

92. See LOUIS HARRIS & ASSOCS., *supra* note 86, at 60; see also Krieger, *supra* note 21, at 491.

93. See SWITZER, *supra* note 66, at 107; see also Selmi, *supra* note 14, at 542 ("The lobbying community also made an important strategic decision that may have further limited the possibility of an expansive judicial approach to the statute. Early on, the lobbying community decided not to mount a large publicity campaign for the ADA or to rally broad public support but instead opted to work solely within Congress."); Joseph P. Shapiro, *Disability Rights as Civil Rights: The Struggle for Recognition*, in *THE DISABLED, THE MEDIA, AND THE INFORMATION AGE* 59, 59 (Jack A. Nelson ed., 1994) (noting the statement of Patricia Wright, lead lobbyist on the ADA, that "[w]e would have been forced to spend half our time trying to teach reporters what's wrong with their stereotypes of people with disabilities").

94. See SWITZER, *supra* note 66, at 108.

95. In the Senate, there were four hearings on the ADA, and the bill passed within five months by a 76-8 vote. 135 CONG. REC. 19,903 (1989). In the House, there were more hearings, but the bill still went for a vote within nine months and ultimately passed by a vote of 403-20. 136 CONG. REC. 11,466 (1990).

96. See *Obergefell v. Hodges*, 135 S. Ct. 2584, App. B (2015).

laws.⁹⁷ Before passage of the Civil Rights Act of 1964, twenty-five states prohibited discrimination on the basis of race in employment,⁹⁸ and thirty, in privately owned places of public accommodation.⁹⁹ The specific judicial or federal statutory intervention sought was thus one point on the continuum of contestation. The ADA was not drawn on a completely blank slate—most states did have some form of antidiscrimination laws. But by combining a broad definition of disability (including physical and mental impairments), a reasonable accommodation provision in private employment, accessibility and accommodation requirements for privately owned places of public accommodation, and a private right of enforcement for the employment and public accommodations provisions and damages remedy for employment, the ADA went significantly further than almost any state.¹⁰⁰

A lack of public awareness and participation has continued.¹⁰¹ Unlike other claims by identity-based social movements, disability is rarely (if ever) an issue in political campaigns or judicial confirmations. On lists of important issues in presidential campaigns, abortion, gay marriage, and criminal justice appear as contested social issues; disability does not.¹⁰² Both at the ADA passage stage

97. See Sarah Kliff, *Thirteen Charts That Explain How Roe v. Wade Changed Abortion Rights*, WASH. POST (Jan. 22, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/22/thirteen-charts-that-explain-how-roe-v-wade-changed-abortion-rights/> [<http://perma.cc/U7XA-FQ4Z>].

98. See 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey).

99. See 110 CONG. REC. 6537-39 (1964) (statement of Sen. Magnuson and Sen. Hruska).

100. See H.R. COMM. ON EDUC. & LABOR, THE AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 101-485(II), at 47-48 (1990) (“State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing [T]he fifty State Governor’s Committees ... report that existing state laws do not adequately counter acts of discrimination against people with disabilities.”); see also Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075, 1075-76 (2002); Don F. Nicolai & William J. Ricci, *Access to Buildings and Equal Employment Opportunity for the Disabled: Survey of State Statutes*, 50 TEMP. L.Q. 1067, 1085 (1977) (describing the shortcomings of state public accommodation provisions); Christine Jolls & J.J. Prescott, *Disaggregating Employment Protection: The Case of Disability Discrimination 2-4*, (Nat’l Bureau of Econ. Research, Working Paper No. 10,740, 2004), <http://www.nber.org/papers/w10740.pdf> [<http://perma.cc/L5V5-AZL7>].

101. See SWITZER, *supra* note 66, at 92 (noting “a ‘hidden army for civil rights’ that coalesced sufficiently to capture political interest just long enough” to get the law passed).

102. See, e.g., Katharine Q. Seelye et al., *Election 2008: Social Issues*, N.Y. TIMES, <http://elections.nytimes.com/2008/president/issues/abortion.html> [<http://perma.cc/NG2Z-APZZ>] (last visited Oct. 23, 2015).

and following its enactment, there was simply no comparable express, organized, and mobilized resistance to the disability rights movement.¹⁰³ The Chamber of Commerce, who would be the most natural entity in opposition (due to the costs, both real and perceived, that the ADA would impose on its members), certainly had lobbyists who expressed concerns about the bill.¹⁰⁴ But early on, the business community made the decision to work for a bill they could live with, rather than oppose it entirely.¹⁰⁵ The extent to which they were willing to cooperate with disability advocates is revealed in the passage of the ADAAA. At the request of key legislators, representatives for the business community—made up of the Chamber of Commerce, the HR Policy Association, the Society of Human Resource Management, and the National Association of Manufacturers—met in 2008 with representatives from the disability community in a series of negotiations over thirteen weeks to come up with a compromise agreement, which formed the complete basis for the ADAAA.¹⁰⁶

Litigation under the ADA has also not been an occasion for expression of values struggles between common adversaries, as it has been with other movements. Unlike judicial proceedings with abortion, gay marriage, or even gun rights, in which familiar opponents repeatedly mobilized and squared off against each other, the disability cases that have gone to the Supreme Court (of which there are a significant number) have almost uniformly not been brought or directed in significant extent by lawyers with formal connections to the disability rights movement,¹⁰⁷ and the defendants are state or local governments or private businesses, who have not been repeat

103. See Waterstone, *supra* note 3, at 554.

104. See, e.g., Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 229-30 n.166 (2008).

105. See Paula Yost, *Business Not Fighting Bill for Disabled*, WASH. POST, Aug. 19, 1989, at A12 (explaining that business lobbyists decided to work towards a more palatable bill rather than oppose it outright).

106. See Feldblum et al., *supra* note 104, at 229-30. With both groups signing off, the law passed in the House of Representatives with a vote of 402-17 and unanimously in the Senate, and was signed into law in September of 2008. *Id.*

107. See Stein et al., *supra* note 67, at 1661-62 (“Over the first two decades of the ADA, the Supreme Court heard eighteen related cases. None of the lawyers who filed these actions that have been litigated in the Supreme Court [were disability cause lawyers]. Instead, these cases generally have been initiated by lawyers with limited civil rights experience, let alone experience with, and connection to, the broader disability rights movement.”).

players. The amicus participation reflects this general lack of movement-counter movement dynamic and public engagement.¹⁰⁸

Cases interpreting the ADA's definition of disability dominated litigation in the first two decades after the law's passage. Both lower courts and the Supreme Court generally interpreted the definition narrowly, limiting the universe of people who were considered covered under this threshold inquiry.¹⁰⁹ These interpretations led to the idea of a judicial backlash against the ADA.¹¹⁰ Commentators have generally expressed incredulity that judges interpreted the law so narrowly—particularly, in employment cases—and with objectionable outcomes that seemed inconsistent with the law's text.¹¹¹ One diagnosis observed that an increasingly conservative judiciary simply did not like the ADA.¹¹² From a tactical perspective, several of the first round of cases to go to the Supreme Court had less than desirable fact patterns.¹¹³ They were also brought by individuals with disabilities that could be considered more marginal and further removed from any history of discrimination.¹¹⁴ With this in mind, judicial resistance in disability cases is different than the charged, broad-based counter movement structure exhibited in other areas. Rather, it can be understood as the judiciary—tracking public understanding¹¹⁵—resisting the idea that a large and amorphous

108. For example, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), one of the first ADA cases to make it to the Supreme Court, there were eleven amicus briefs filed with the Court.

109. See Stein et al., *supra* note 67, at 1659.

110. See *id.*

111. See Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 55 (2000) (linking the narrow interpretation of the ADA's definition of disability to a textualist methodology of statutory interpretation); see also 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, 439 (1997); Diller, *supra* note 62, at 24 (outlining "a few areas in which substantial numbers of courts have relied on restrictive interpretations of the ADA that unnecessarily and unfairly work to the detriment of plaintiffs").

112. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 160 (1999) ("[C]onservative judges may simply be hostile to the ADA.").

113. The early Supreme Court cases involved sisters with myopia attempting to be airline pilots, see *Sutton*, 527 U.S. at 475-76, and someone with a visual impairment trying to secure certification as a truck driver, see *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 558-60 (1999).

114. See BAGENSTOS, *supra* note 67, at 41.

115. See, e.g., Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung, and Juggler's Despair*:

category of people might be entitled to some form of statutory rights about which there had been limited public dialogue.

In sum, in contrast with accounts of other movements that demonstrate the interaction of social movements and law across branches and levels of conflict, disability looks rather one-dimensional. A big tent model of disability helped to get the ADA passed, and when judges did not interpret the law in the way the community hoped, there was a move back to Congress. The fight for disability rights lacked a broad-based social movement working in harmony with the large category of people with disabilities covered by the statute.¹¹⁶ And, in response, no mobilized opposition materialized, beyond judicial and public trepidation about the limits of how many people the ADA might actually cover.

II. LIMITED CONFLICT AND CATEGORY AMBIGUITY AS A NEW FRAME FOR UNDERSTANDING DISABILITY RIGHTS LAW

The above discussion has demonstrated that several identity-based groups—some of whom the disability rights movement patterned themselves after—have faced more charged conflict in their claims for rights than the disability rights movement. Resistance to the disability rights project has been less value-driven, has not featured parallel public debate or political contestation, and has not encountered a similar organized countermovement structure. The ambiguity over the large category of people potentially covered by the ADA dominated public and judicial conversation about the law. This Part offers the limited conflict and category ambiguity frames as a new way to understand the limited ability of the disability rights movement to make progress on some of its harder and more transformative goals.

With the ADA, the newly constituted and broadly defined disability rights movement flexed its political power. Buoyed by their ability to get omnibus civil rights legislation passed when others

The Portrayal of the Americans with Disabilities Act on Television and Radio, 21 BERKELEY J. EMP. & LAB. L. 223, 223-34 (2000); see also Krieger, *supra* note 62, at 10-11 (describing *The Simpsons* and *King of the Hill* episodes portraying, in humorous ways, characters attempting to take advantage of disability laws).

116. See Stein, *supra* note 13, at 626-27.

had failed,¹¹⁷ one of the most important and specific goals of the ADA was to open up workplaces and increase the employment rate of people with disabilities.¹¹⁸ Despite other areas of progress, it is clear that this goal has not been realized. ADA Title I cases have the lowest success rate of any private litigant group other than prisoners.¹¹⁹ Although they offer different explanations, commentators and policymakers are in agreement that the ADA has not increased the employment levels of people with disabilities.¹²⁰

Operating at a higher level of generality, another goal of the ADA was to turn disability into a civil rights issue.¹²¹ This was not just a semantic distinction. Pre-ADA American disability policy, and

117. See Krieger, *supra* note 62, at 2 (noting that President Bush vetoed a raise in the minimum wage and the Family Medical Leave Act contemporaneously with signing the ADA).

118. See U.S. COMM'N ON CIVIL RIGHTS, SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL? 19-38 (2000), <http://files.eric.ed.gov/fulltext/ED457626.pdf> [<http://perma.cc/CSF4-3M42>] (“In passing the ADA, Congress intended to eliminate discrimination in the workplace and create more employment opportunities for individuals with disabilities.”); see also 42 U.S.C. § 12101(a)(8) (2012) (“[T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.”).

119. See, e.g., Am. Bar Ass’n Comm’n on Mental & Physical Disability, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (1998) (demonstrating that plaintiffs lost 92 percent of the time in published ADA Title I cases that had gone to judgment or trial between 1992 and 1997); see also Colker, *supra* note 112, at 107 (noting that, of cases appealed to the courts of appeals, plaintiffs lost 94 percent of the time in the trial court).

120. See, e.g., S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, FULFILLING THE PROMISE: OVERCOMING PERSISTENT BARRIERS TO ECONOMIC SELF-SUFFICIENCY FOR PEOPLE WITH DISABILITIES 3 (2014), <http://www.help.senate.gov/imo/media/doc/HELP%20Committee%20Disability%20and%20Poverty%20Report.pdf> [<http://perma.cc/54JZ-DVKV>] (“Of the over 20 million Americans with disabilities who are of working age, less than 30 percent work, compared to over 78 percent of non-disabled Americans.”); Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 19-20 (2004); 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, 271-74 (2000) (noting that, although employment rates have not gone up, and may have gone down since the ADA was passed, those trends are not necessarily attributable to the ADA).

121. See *supra* note 71; see also S. COMM. ON LABOR & HUMAN RES., AMERICANS WITH DISABILITIES ACT OF 1989, S. REP. NO. 101-116, at 118 (1989) (noting testimony of Tony Coelho that “[w]hile the charity model once represented a step forward in the treatment of persons with handicaps, in today’s society it is irrelevant ... [o]ur model must change”); 136 CONG. REC. 17,289 (1990) (statement of Rep. Owens) (“The Americans with Disabilities Act of 1990 will at long last provide parallel civil rights protections to our citizens with disabilities as are afforded other minority groups in our society.”).

popular conceptions of disability, were based on a “medical model” of disability, in which disability was an empirically diagnosable condition attributable to some biological or physiological difference from the norm.¹²² Shifting toward rights, away from paternalism and charity, marked a move toward the “social model” of disability, which envisions disability as a construct that is the interaction of a person’s impairment and societal responses to that impairment.¹²³ The actual impairment someone has becomes less legally important; instead, the framework shifts to environmental choices that accommodate the largest possible universe of abilities.¹²⁴ The disability rights movement believed that it would not only be transformative for the rights of people with disabilities to enter the citizenry on equal terms, but that it would also represent a paradigm shift within equality law generally. Advocates hoped the ADA could tackle deep-seated social problems that had thus far proved unreachable by moving past formal equality (equality based on treatment of similarly situated individuals) and encompassing a structural theory of equality (also referred to as a “second-generation” civil rights statute),¹²⁵ which acknowledged difference and the need for reasonable accommodation.¹²⁶ The general civil rights community shared in these hopes,¹²⁷ and academics bought in to the goal.¹²⁸

122. See, e.g., PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY* 3 (3d ed. 2014).

123. *Id.* at 5-7.

124. This was explicitly recognized in the ADA through the “regarded as” prong of the definition of disability, in which someone is considered to have a disability under the statute if someone regards them as having one, regardless of whether they actually do or not. See 42 U.S.C. § 12102(1)(C) (2012).

125. See 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, 414-15 (1991).

126. See Krieger, *supra* note 62, at 6 (“The ADA promised to revive the concept of stigma as a powerful hermeneutic for the elaboration and judicial application of American civil rights law. Supporters and detractors alike predicted that the structural approach to equality advanced by the ADA might eventually diffuse into other areas of law, eroding the entrenched understanding that equality always—and only—requires equal treatment under rules and practices assumed to be neutral.”).

127. *Id.* at 3 (“[T]here was ... hope ... that the ADA would transform the lives of disabled Americans, but also that the theoretical breakthrough represented by reasonable accommodation theory would eventually play a role in solving other equality problems.”).

128. See Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-*

Measuring the success of this goal is harder than the employment rate. Certainly the ADA has made some significant progress in making federal disability policy a tool to restructure environments and programs in a way that is more inclusive toward disability. Title III of the ADA, for example, concretely requires certain standards in new or renovated buildings.¹²⁹ But ADA cases, at both the lower and Supreme Court levels, still generally reflect the older, medical way of thinking about disability that the ADA hoped to replace.¹³⁰ In *Chevron U.S.A., Inc. v. Echazabal*, which held that the ADA allowed an employer to protect an oil refinery worker from harm to himself—despite medical evidence from his doctor that any harm was limited, and despite the plaintiff’s desire to stay in the job and face whatever risks there were¹³¹—the Court evinced traditional paternalistic views toward the disability category.¹³² Similarly, Justice Kennedy opined in a concurrence in *Board of Trustees of the University of Alabama v. Garrett* that disability prejudice is natural

First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age, 1 U. PA. J. LAB. & EMP. L. 511, 526 (1998) (“The disability civil rights paradigm can provide the model for an individualized, flexible and contextual approach to civil rights enforcement.”); see also Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 38 (1996) (“The insights gained from fleshing out the meaning of reasonable accommodation in disability cases present an opportunity to rethink employment discrimination law more generally.”).

129. See 42 U.S.C. § 12182(b)(2)(a)(iv); see also S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, *supra* note 120, at 2 (“The ADA’s enactment radically changed the landscape of the country and enfranchised persons with disabilities in ways that were previously unimaginable. Those with disabilities can now move about towns and cities because of curb cuts. They can cross at intersections because of traffic lights that talk and tell a person when it is safe to cross the street.... These and thousands of other changes make it possible for those with disabilities to be active participants in their communities and to take part in society as equals.”).

130. See, e.g., Diller, *supra* note 62, at 24-25 (examining ADA case law and arguing that courts were not using civil rights constructions in evaluating whether or not plaintiffs met the ADA’s definition of disability); see also Burgdorf Jr., *supra* note 111, at 482-47 (same).

131. 536 U.S. 73, 85-87 (2002).

132. Anita Silvers et al., *Disability and Employment Discrimination at the Rehnquist Court*, 75 MISS. L.J. 945, 970-71 (2006) (demonstrating the Supreme Court’s paternalist view of disability in *Chevron*). The one Supreme Court case that grappled with deeper issues of disability equality was *Olmstead v. Zimring*, 527 U.S. 581, 593 (1999), holding that institutionalized placements in certain circumstances violated the ADA’s integration mandate. In future work, I hope to explore how *Olmstead*’s exceptionalism was at least in part a result of a long-running and multidimensional deinstitutionalization movement on behalf of a relatively well-defined and understandably discriminated-against population. See *infra* notes 199-203.

unless we are guided by the “better angels of our nature.”¹³³ Rather than focusing on what it means to accommodate and notions of equality, ADA cases focused on who falls inside the definition of disability, a form of legal reasoning itself reflecting a check-the-box, medical approach to thinking about disability.¹³⁴ Despite the goal to have disability be identified as a civil rights issue, it routinely is not.¹³⁵

Improving employment levels and changing conventional thinking about disability are admittedly hard pursuits. Yet they were among the ambitions present at the ADA’s founding, and various explanations have been offered for the limits of the ADA in both of these areas. Regarding the employment rate, there is economic-based literature about whether the ADA creates helpful incentives for employers to hire employees with disabilities.¹³⁶ Others have noted the limits of an antidiscrimination approach generally,¹³⁷ or,

133. 531 U.S. 356, 375 (2001) (Kennedy, J., concurring).

134. See Michael E. Waterstone et al., *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287, 1318 n.151 (2012) (noting views of disability constitutional lawyers: “I don’t see how you can do constitutional litigation in the disability area until you have judges whose perception[s] of disability move[] away from the sympathy narrative to the rights narrative” and “people don’t think about disability rights on the same level as racial discrimination or race-based civil rights”). Most earlier social programs for people with disabilities were and remain expressly based on medical determinations of inability to work, a mindset that has worked its way into ADA cases. See Diller, *supra* note 62, at 31 (“Although many courts have recognized the distinction between the ADA’s definition of disability and that contained in the Social Security Act, they have often failed to grasp its full implications. After acknowledging the differences in the statutes, they have nonetheless treated general statements of inability to work on benefits applications as dispositive of ADA claims.”).

135. For a discussion of disability not being thought of by academics, policymakers, and the public as a civil rights issue, see Doris Zames Fleischer, *Disability Rights: The Overlooked Civil Rights Issue*, 25 DISABILITY STUD. Q. 8 (2005). See generally ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* (1996).

136. See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 240-42 (2000); see also Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 916 (2001); Peter Blanck et al., *Calibrating the Impact of the ADA’s Employment Provisions*, 14 STAN. L. & POL’Y REV. 267, 274 (2003); Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177, 180 (1989) (discussing the costs of mandated benefits to the wages and hiring of people with disabilities).

137. See generally Bagenstos, *supra* note 120; see also Sherwin Rosen, *Disability Accommodation and the Labor Market*, in DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES 18, 28-30 (Carolyn L. Weaver ed., 1991) (arguing for government spending on education and work training, instead of accommodations); Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*,

as discussed above, have been critical of a perceived conservative judiciary.¹³⁸ Regarding the lack of a fundamental shift in attitudes, scholars note the stickiness of prevailing thinking about disability.¹³⁹

Without necessarily disputing these existing narratives, I want to offer a different understanding. When reviewed in reference to other movements discussed above, the level of conflict and controversy around the ADA as a key tool to accomplish these goals was relatively low. The disability rights community (and some academics) had a vision of the statute as having transformative potential in these areas.¹⁴⁰ But no one else did, leaving, I suggest, the public and judiciary unprepared to think about the law in these terms.¹⁴¹ As discussed above, the unification of various disability-specific groups achieved maximum political power but required a broad definition operating at a high level of generality.¹⁴² The literature on constitutional claiming offers examples suggesting that group composition is important to the type of conflict that rights claiming generates.¹⁴³ For disability, the answer was a large, socially-constructed, amorphous group, which shifted the conversation away from groups that might have had more traction in popular discourse and into areas

46 BUFF. L. REV. 123, 124 (1998) (“Existing legal remedies embodied in the Americans with Disabilities Act and other laws, though beneficial, do not eliminate the problem [of discrimination against those with disabilities].”).

138. See *supra* notes 111-12.

139. One prominent scholar suggests that narrow judicial interpretations were a result of judicial confusion between notions of impairment and disability, judicial refusal to adopt a socio-political conception of disability, and rejecting the analogy between disability and the minority model and civil rights. See Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, 21 BERKELEY J. EMP. & LAB. L. 166, 166-67 (2000).

140. See *supra* notes 121-28 and accompanying text.

141. See SHAPIRO, *supra* note 66, at 140-41; see also *supra* notes 92-94 and accompanying text.

142. See *supra* notes 67-75 and accompanying text.

143. The literature that discusses *Heller* and a Second Amendment private right to bear arms sheds light on the importance of group composition in forming claims. In the wake of the bombing of a federal building in Oklahoma City, there was a conscious effort by the NRA's leadership to distance itself from the militia and paramilitary movement, which until then it had loosely courted. See Siegel, *Dead or Alive*, *supra* note 5, at 229-31. When the *Heller* Court considered the Second Amendment, it was guided by the NRA's “family-friendly public image,” to the exclusion of paramilitary activity. *Id.* at 231.

that were not intuitively compatible with the social model conception of equality disability under which advocates sought to unite.¹⁴⁴

The law needed the support of the public and judges to be implemented and enforced.¹⁴⁵ Even if there were shared understandings of what the law meant (which there were not), the ADA could not stand on its own to create these changes.¹⁴⁶ In our system of private rights enforcement, individuals would need to engage courts to help protect their statutory rights, either because businesses ignored statutory requirements or because there was disagreement as to what the statute required.¹⁴⁷ Rather than providing exact guidance, the ADA left several core concepts, apart from the definition of disability, undefined—including the notion of reasonable accommodation, undue burden and hardship, and direct threat, just to name a few—either furnishing illustrative examples that required future elaboration by administrative agencies, or otherwise punting to the courts to help provide meaning.¹⁴⁸

Regarding employment, it is undoubtedly correct that the ADA stood very little chance of success in moving the employment rate on its own.¹⁴⁹ But it is also true that a robust interpretation of the ADA, and in particular its reasonable accommodation provision requiring employers to make accommodations that were not an undue hardship at their own expense, needs to work in tandem with other policy measures to meet any disability-related employment goals.¹⁵⁰ One great hope for the ADA was that it could actively work to restructure workplaces, challenging assumptions about what was truly necessary and suggesting that a broader range of individuals could flourish in employment settings.¹⁵¹ But by and large, this has

144. See *supra* notes 110-16 and accompanying text.

145. See *supra* notes 13-14 and accompanying text.

146. See *infra* notes 166-79 and accompanying text.

147. See *infra* notes 166-79 and accompanying text.

148. See Krieger, *supra* note 21, at 520 (“The ADA is an extremely complex statute, incorporating many vague standards requiring the case-by-case balancing of under-specified factors.”).

149. See *supra* notes 136-37 and accompanying text.

150. See Bagenstos, *supra* note 120, at 23. In public speeches, EEOC Commissioner (and ADA architect) Chai Feldblum says this best, remarking that “the ADA is a necessary but not sufficient condition.” Chai Feldblum, Comm’r, EEOC, Remarks at the Business Meeting and Closing Plenary Session of the Association of University Centers on Disabilities (Nov. 20, 2013) (transcript available at <http://perma.cc/A3FQ-9UE2>).

151. See *supra* note 128.

not happened.¹⁵² Even setting aside the vast majority of ADA employment cases that are decided against plaintiffs at the summary judgment stage, the existing cases take a cramped view of what the law requires regarding reasonable accommodation and workplace restructuring.¹⁵³ For example, in today's evolving workplace, it is more common for many workers to face issues with commuting and virtual workplaces.¹⁵⁴ Rather than the ADA creating space for these types of modifications generally, judges regularly deny them as requests for reasonable accommodation.¹⁵⁵ Although not as uniform, there are similar results involving requests for reassignment.¹⁵⁶

152. See *supra* notes 117-20 and accompanying text.

153. See *supra* notes 130-35 and accompanying text.

154. See, e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 20-24 (2000) (discussing traditional families and working roles); Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 364-67 (2003); Michelle A. Travis, *Telecommuting: The Escher Stairway of Work/Family Conflict*, 55 ME. L. REV. 261, 282-86 (2002).

155. See, e.g., *Regan v. Faurecia Auto. Seating, Inc.*, 679 F.3d 475, 480 (6th Cir. 2012) ("We find ... that the Americans with Disabilities Act does not require Faurecia to accommodate Regan's request for a commute during more convenient hours."); *Robinson v. Bodman*, 333 F. App'x 205, 208 (9th Cir. 2009) ("The [employer] was not required to accommodate [the plaintiff's] inability to drive to work or use public transportation. Although an employer is required to make reasonable accommodations to eliminate barriers for a disabled employee in the workplace, the employer is not required to eliminate barriers outside the workplace that make it more difficult for the employee to get to and from work."); *Kvorjak v. Maine*, 259 F.3d 48, 50-51 (1st Cir. 2001) (denial of request to work from home); *LaResca v. AT&T*, 161 F. Supp. 2d 323, 333 (D.N.J. 2001) ("[T]he change to day shift sought by Plaintiff is not an 'accommodation,' that it is legally obligated to provide, but is simply a request for an easier, more convenient commute."); *Salmon v. Dade Cty. Sch. Bd.*, 4 F. Supp. 2d 1157, 1163 (S.D. Fla. 1998) (rejecting plaintiff's claims that the employer "failed to accommodate her disability by transferring her to a school which afforded her a shorter commute [because] plaintiff's commute to and from work is an activity that is unrelated to and outside of her job"); *Schneider v. Cont'l Cas. Co.*, No. 95 C 1820, 1996 WL 944721, at *9 (N.D. Ill. Dec. 16, 1996) (finding that an employer is not required to eliminate an employee's commute to accommodate the employee's back injury); *Chandler v. Underwriters Labs., Inc.*, 850 F. Supp. 728, 738 (N.D. Ill. 1994) (employee's inability to undertake a long commute because of back injury was not a disability for purposes of the employer's benefit plan but instead a limitation within the employee's control).

156. See, e.g., *US Airways, Inc. v. Barnett*, 535 U.S. 391, 393-94 (2002) (holding that seniority system prevails over reassignment request in run of cases); *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 481 (8th Cir. 2007) (upholding a policy to hire the most qualified candidate); *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000) (discussing the reassignment provision and finding that the Americans with Disabilities Act is not an affirmative action statute), *overruled by EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012). *But see Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (requiring reassignment as a reasonable accommodation).

Even when employers make accommodations that conceivably go beyond the bare minimum of what the law requires, courts have been reluctant to allow plaintiffs to keep those accommodations when a new supervisor comes in and looks to take them away.¹⁵⁷ More significant interventions that stretch even further beyond the bounds of the traditional workplace, like having employers provide assistance for home healthcare workers or modify insurance provisions to benefit people with disabilities, have consistently been off the table—even if their expense would not have been great.¹⁵⁸ The ADA has simply not yet served a significant role in creating a re-envisioned workplace, one that is more accessible to individuals with or without disabilities.¹⁵⁹

The different conflict and category frameworks make these results unsurprising. Given low public engagement and awareness of the law at the time of its passage, there was no mandate for this more radical intrusion into the workplace.¹⁶⁰ Nor could advocates point to state laws being interpreted or implemented in this way.¹⁶¹ In the absence of being forcibly directed by the disability rights movement and even the public, judges would not arrive at such a conclusion on their own.¹⁶² Although the ADA's legislative record

157. See, e.g., *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995) ("And if the employer, because it is a government agency and therefore is not under intense competitive pressure to minimize its labor costs or maximize the value of its output, or for some other reason, bends over backwards to accommodate a disabled worker—goes further than the law requires—by allowing the worker to work at home, it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation."). But see *Isbell v. John Crane, Inc.*, 30 F. Supp. 3d 725, 734-35 (N.D. Ill. 2014).

158. See Bagenstos, *supra* note 120, at 34-54 (arguing that this has been an expected, though logically indeterminate, interpretation of the ADA).

159. See Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 5-6 (2005).

160. See *supra* notes 76-79 and accompanying text.

161. See Balkin, *supra* note 16, at 563-64 (noting that when the Court decided *Brown*, most states had already ended de jure racial segregation in public schools, and *Lawrence* was decided only after a vast majority of states had decriminalized sodomy).

162. The business community predictably did not embrace a move away from structural equality, viewing it as more akin to unpopular affirmative action, and in any event, an unwelcome move away from concepts of employment at will and limited employer responsibility to provide living wages or health insurance. See Russell, *supra* note 63, at 335-36 (characterizing resistance to ADA and other employment discrimination laws as being an outgrowth of the lack of a living wage and access to healthcare); see also Diller, *supra* note 62, at 46-47 (examining skepticism of the ADA, noting that "the ADA impinges on the long-

reflects concerns by the business community about the cost of accommodations in the workplace, the more ambitious and costly project of breaking down power structures in workplaces was not made a part of a contested political process.¹⁶³ To be fair, transforming the workplace has been and remains an unrealized aspiration of progressive forces in employment law generally.¹⁶⁴ But just as scholars have posited that constitutional claims do not succeed without the work of social movements and political parties “making claims, taking positions, and trying to persuade others,”¹⁶⁵ the same theory applies to statutes. The ADA is unlikely to lead the way on this type of transformative change; rather, it will await a day and coalition with a higher level of public buy-in.

In terms of positioning disability as a civil rights issue, here too, for all of its benefits, the ADA had unappreciated limitations. There are very few express positions taken denying the rights of people with disabilities to “live in the world.”¹⁶⁶ Rather, there seems to be superficial agreement that people with disabilities are deserving of equal rights, although there is widespread misunderstanding and apathy as to what that might mean.¹⁶⁷ This veneer of agreement masking a lack of meaningful debate and discussion has stilted progress.¹⁶⁸ Therefore, as Harlan Hahn suggests, it is not surprising that judicial outcomes reflect common notions of paternalism and pity, not the transformative civil rights potential that disability

held doctrine of at-will employment, under which employers are free to make arbitrary, absurd or seemingly ridiculous demands on their employees”).

163. See S. REP. NO. 101-116, at 109 (1989) (noting that several witnesses explained how Title I is based on “regulations implementing the Rehabilitation Act of 1973,” and compliance is “no big deal”); *id.* (noting testimony of Harold Russell, chairperson of the President’s Committee on Employment of People with Disabilities, that for a majority of employees, no accommodation is required; for others, the costs can be less than \$50; even for more expensive accommodations, costs are “frequently exaggerated”).

164. See *supra* note 118.

165. See Balkin, *supra* note 16, at 593-94.

166. See Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 848 (1966).

167. See Hahn, *supra* note 139, at 166 (“Only a few have expressed open criticism or opposition to the principle of equal rights for Americans with disabilities. Nonetheless, many activists in the disability rights movement may react with a knowing glance, a meaningful smile, a slight shake of the head, and a muttered aside: ‘They just don’t get it, do they?’”).

168. *Id.* at 167 (“The superficial discussion of issues that appear to evoke agreement, but are actually the source of deep-seated conflict, has masked an accurate appreciation of public, judicial, and other reactions to the ADA.”).

rights advocates view as so ingrained in the fabric of the ADA.¹⁶⁹ In explaining Supreme Court disability cases, Professor Sam Bagenstos has argued that, contrary to those who assert the cases have no basis in fact or reason, they are explainable through divergent strands in the disability community itself.¹⁷⁰ My point is similar, but also different: judges were not put in a position where they could be guided by public and political debates, as disability rights advocates would have hoped, because these debates were not happening.¹⁷¹

To the extent there was any public discussion of the ADA, it did not include vetting the hard and contentious choices that would need to be made to impact employment, or a transformative vision of equality.¹⁷² The claims that initially developed through the courts did not necessarily lend themselves to the law's transformative potential in the employment context or in promoting the evolution of disability theory.¹⁷³ The Supreme Court too easily viewed cases like *Sutton v. United Air Lines, Inc.* (sisters with myopia seeking accommodation to be airline pilots)¹⁷⁴ and *Albertson's, Inc. v. Kirkingburg* (truck driver with visual impairment seeking certification)¹⁷⁵ in a different way from how the disability rights movement viewed them, or even from how other civil rights claims were perceived.¹⁷⁶ Other groups could make the claim that they just wanted to be treated "equally" under law, and that state laws expressly, needlessly, and as a result of historical prejudice, stood in the way of this equality. There are disability claims—many within

169. *Id.* at 172 ("[T]he characteristics of the plaintiffs [in ADA cases] may have been a less important determinant of the litigation than the social, political, and legal values of non-disabled employers, attorneys, and judges who have scant personal awareness or education concerning the prejudice and discrimination encountered by disabled Americans.")

170. See BAGENSTOS, *supra* note 67, at 34-55.

171. See *supra* notes 166-68 and accompanying text.

172. See *supra* notes 91-93 and accompanying text.

173. This was certainly compounded by the lack of participation of disability cause lawyers in ADA cases that made it to the Supreme Court. For an extensive account of this phenomenon, and the extent to which—in contrast to other groups—the narrative of ADA Supreme Court cases was dominated by lawyers without connections to the disability rights movement, see Stein et al., *supra* note 67, at 1658-64.

174. 527 U.S. 471 (1999).

175. 527 U.S. 555 (1999).

176. See Stein, *supra* note 13, at 606.

the ADA's broad coverage—that fit this mold,¹⁷⁷ but in terms of public and judicial conceptions of the ADA's meaning, these claims were quickly drowned out by perceived claims for special rights and preferential treatment, oftentimes by people with disabilities that were considered marginal or easily mitigated.¹⁷⁸ The disability experience teaches that the type of constitutional claiming and the construction of the group bringing the claim matters in the constant dialogue between social movements, the public, and judges.¹⁷⁹

Relatedly, given the omnibus nature of the ADA, there was also ambiguity as to which rights were being claimed.¹⁸⁰ In some other movements, although they changed over time and shifted levels of government, the stakes of rights claiming and conflict were clearer.¹⁸¹ Should gays and lesbians be allowed to marry consistent with opposite sex couples? Does the Second Amendment provide an individual right to bear arms? Under what circumstances does the Equal Protection Clause require that state classifications and employers treat men and women equally? Can privately owned places of public accommodation create separate facilities for people of different races? In contrast, are claims for disability equality about an individual with back pain who wants to maneuver around an established seniority system to transfer to a different part of a company,¹⁸² or are they about the ability of someone who uses a wheelchair to access their court hearing?¹⁸³ Although both may be important from the perspective of disability advocates, the former has dominated the ADA narrative.¹⁸⁴ This focus has obscured the disability rights movement's core vision of equality drawn from the social model of disability—that choices about the physical and

177. See Waterstone, *supra* note 3, at 548-55 (discussing areas within family law, voting, and benefits where state laws expressly differentiate based on disability classifications).

178. See Krieger, *supra* note 21, at 520 (“[T]he ADA is an extremely complex statute, incorporating many vague standards requiring the case-by-case balancing of under-specified factors. This complexity and under-specification, I suggest, has created a legal field characterized by intense normative ambiguity, which has in turn engendered hostility directed at the Act, its enforcers, and its beneficiaries.”).

179. *Id.* at 519 (noting the importance of clarity in claiming a category, and offering the ambiguities in the ADA as a partial explanation for backlash against it).

180. See *supra* note 148 and accompanying text.

181. See *supra* note 18 and accompanying text.

182. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394-95 (2002).

183. See *Tennessee v. Lane*, 541 U.S. 509, 513-14 (2004).

184. See *supra* notes 151-56 and accompanying text.

attitudinal environment are themselves not inevitable and contribute to what it means to experience disability.¹⁸⁵

Although the disability rights movement used the social movement framework to unify diverse constituencies, the relatively easy passage of the ADA meant that the broadly defined group did not seek the support of social and political actors outside their core community.¹⁸⁶ Other groups, more squarely tested with conflict, went outside their base, and commentators have explained how this broadened network served a productive function in court battles.¹⁸⁷ Whereas *Roe* “provoked opponents to enter the political arena” and “inspired a political campaign to prohibit abortion that changed the shape of both constitutional politics and constitutional law,”¹⁸⁸ and *Bowers* energized and transformed the direction of the gay rights movement,¹⁸⁹ the Supreme Court ADA cases have not provoked any similar broad-based political or constitutional movements.

And the recent playbook looks familiar to the past one. The ADAAA was a return trip to Congress to legislatively “fix” how courts had narrowed the definition of disability. Congress also removed a finding in the original ADA that “individuals with disabilities are ... a discrete and insular minority,” a move that is best seen as reflecting that this language was a poor fit with the ADAAA’s goals of broadening the definition of disability.¹⁹⁰ The ADAAA then doubled down on the political strategy of providing civil rights protections for the largest possible population of people with disabilities. It does, in a sense, force judges to move past the issue of whether someone is disabled, and instead focus on whether entities complied with their substantive obligations. Initial research demonstrates that judges are indeed deciding fewer cases against

185. See *supra* notes 73-74 and accompanying text.

186. See *supra* notes 8-9 and accompanying text.

187. See Post & Siegel, *supra* note 5, at 390 (“Citizens who oppose court decisions are politically active. They enact their commitment to the importance of constitutional meaning. They seek to persuade other [movements] ... to embrace their constitutional understandings.”).

188. *Id.* at 398.

189. See NeJaime, *supra* note 5, at 985.

190. See NAT’L COUNCIL ON DISABILITY, RIGHTING THE ADA 107-08 (2004), <http://www.ncd.gov/publications/2004/Dec12004> [<http://perma.cc/R4GW-RCDG>] (“The ‘discrete and insular minority’ language was not intended to be applied to the full scope of persons to whom the ADA provides protection from discrimination.”).

plaintiffs on summary judgment at the definition of disability stage.¹⁹¹ But if the lack of conflict over the ADA's underlying equality principles and the broad and uncertain statutory coverage have in some way contributed to the statute's limits, then the ADAAA may prove to be a hollow victory, and indeed perhaps even counter-productive. Although there may be a small universe of easy cases, in others, unconvinced as to why this (now larger) universe of people are entitled to an employer-funded accommodation (itself not precisely defined), there may well be space for continued narrow interpretations that leave plaintiffs on the losing end. This view cuts against the prevailing scholarly trend to celebrate the ADAAA and express hope that it will usher in a new era of ADA effectiveness.¹⁹² Indeed, locking in an expanded definition of disability may exacerbate the difficulty of having the discussion that disability rights advocates hope to have about altering notions of equality.

If accurate, this account challenges the thrust of a significant body of disability law scholarship. Assuming the next twenty-five years are remotely similar to the last twenty-five, disability rights may remain something that incites passion only in a small group of people. The nation has the "conviction that an essential mission of the federal government is the prevention of racial and gender discrimination."¹⁹³ Even with the work of dedicated lawyers seeking to enforce it at every turn, it is unlikely that the ADA will magically reach this status and move beyond its current low political salience.¹⁹⁴ The disability law scholarship contains many accounts of how judges should interpret the ADA differently¹⁹⁵ or how new

191. See Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2057-58 (2013).

192. *Id.* at 2070; see also Feldblum et al., *supra* note 104, at 240 ("And now we can get down to the business of truly opening the doors of opportunity to *all* people with disabilities."); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 229 (2008).

193. See Post, *supra* note 8, at 23.

194. *Id.* (characterizing the ADA as a statute of "relatively low political salience"); see also Sarah Blahovec, *Politicians Ignore Disability, and It's a Big Problem*, HUFFINGTON POST (July 13, 2015, 6:59 PM), <http://m.huffpost.com/us/entry/7784824> [<http://perma.cc/N2LS-9SHX>] ("Disability, yet again, is not recognized as a significant demographic in the political sphere.")

195. See, e.g., MARK WEBER, *DISABILITY HARASSMENT* (2007) (arguing that the ADA should be interpreted to allow claims for disability harassment); Diller, *supra* note 62, at 51 (criticizing ADA definition of disability decisions); Tucker, *supra* note 71, at 362 (same).

theoretical insights would make a difference.¹⁹⁶ My own work has often fit into this mold.¹⁹⁷ Though relevant and useful, this literature usually has an unstated premise that the civil rights framework is correct—that there will come a day that disability rights advocates hope for when people (and judges) somehow “get” disability rights in this way. At least under the ADA-covered definition of disability, this may be unrealistic. The more appropriate movement analogy, and area for future study, might involve a group like veterans, who have some measure of political power and still struggle for societal acceptance and commitment to meet their needs.

Certainly, there is no magic “conflict” button upon which, if advocates only remembered to flip the switch, transformation would have occurred. Other groups in more contested space still struggle in multiple places to change ingrained, structural, societal inequalities.¹⁹⁸ Advocates use what tools they have, and political power with low political salience presents many opportunities. But the above discussion has demonstrated that eluding values conflicts and maximizing statutory coverage, while positive in many respects, sheds light on some disappointments. Claims for civil rights, intended to transform some form of existing social order, at least with disability, proved a poor fit when pursued on behalf of a large and amorphous group.

But when we move away from the “big tent” conception of the disability rights movement, things may look different. Certain conversations may be easier to have (even if not resolved) on behalf of discrete communities of people with disabilities seeking to establish or enforce specific rights. Although unification has its utility, the

196. See, e.g., Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 921 (2008) (arguing that third party benefits should be considered in accommodation requests); Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 522 (2008) (proposing a vulnerability construct for ADA).

197. See Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 864 (2006) (arguing that courts should interpret the ADA to allow for class actions in employment cases).

198. For example, as evidenced most recently in the events in Ferguson, Missouri, the criminal justice system in particular has been a locale where the public and scholars debate and contest claims of racial inequality. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6-7 (rev. ed. 2012); Angela P. Harris, *Comments on SpearIt, “Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment,”* 82 MISS. L.J. 45, 56 (2013) (“According to the backlash/frontlash account, criminal punishment is all too rational—a strategy adopted to preserve white supremacy.”).

conflict and category framework helps show that disability-specific advocacy has its place.

One example of this, which I hope to explore in future work, involves deinstitutionalization and the Supreme Court's decision in *Olmstead v. L.C.*¹⁹⁹ If limited conflict and ambiguous group identity shed light on certain limits, we can alter these variables by examining the deinstitutionalization movement, a subset of the larger disability rights project. The deinstitutionalization movement had deep roots that significantly predated the ADA. As part of a multidimensional campaign dating back to the 1970s, those that sought care for people with intellectual and developmental disabilities in community-based settings instead of state institutions had brought claims in federal court under both constitutional and statutory theories, with some successes and some failures.²⁰⁰ They sought to delegitimize a clear (though complicated) set of state practices, on behalf of a discrete and understandable population, although one with significantly less political power than the big tent version of the disability rights community.

As they faced powerful and organized opponents, advocates were forced to gather allies outside the movement, and have their claims enter contested and publicized local political environments.²⁰¹ As part of this, they were forced to continually articulate visions of equality that supported their arguments, although the constitutional and statutory bases for these theories evolved over time. The Supreme Court's decision in *Olmstead*,²⁰² holding that Title II of the ADA contained a (qualified) integration presumption toward community-based treatment options over segregated and institutionalized settings, reflected this long and contentious advocacy. The decision is unique in ADA Supreme Court cases in that it meaningfully confronted and considered the disability community's vision of equality. Admittedly, many reasons can be offered for the trajectory

199. 527 U.S. 581, 593 (1999).

200. For general history of the deinstitutionalization movement, see, for example, ANN BRADEN JOHNSON, *OUT OF BEDLAM: THE TRUTH ABOUT DEINSTITUTIONALIZATION* (1990); PAUL LERMAN, *DEINSTITUTIONALIZATION AND THE WELFARE STATE* (1982); MICHAEL L. PERLIN, *LAW AND MENTAL DISABILITY* 166-90 (1994).

201. See Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 *CARDOZO L. REV.* 1, 7-8 (2012).

202. 527 U.S. 581, 607 (1999).

of the deinstitutionalization movement, and I would not offer the more intense local conflict or clear nature of the category as the definitive causal account of this success. But it does illuminate how both of these features can have positive effects within the universe of disability rights. And to the extent that this demonstrates fragmentation and disability-specific advocacy has its place, this may be an important contribution to real time debates on this topic.²⁰³

CONCLUSION

Before *Windsor* and *Obergefell*, there was *Bowers v. Hardwick*. And Hawaii.²⁰⁴ Before the Civil Rights Act of 1964, there was *Brown v. Board of Education*. And Birmingham.²⁰⁵ Before *Reed* and *Frontiero* (or at least concurrently), there was the failed ERA. Before the Americans with Disabilities Act, there was no parallel publicly salient contestation to spur evolving notions of shifting societal norms. Unlike these other movements, there was limited conflict to help focus the terms of the debate, highlighting differences between the existing social order and a disability-based vision of equality that advocates saw embedded in the ADA. Throughout, rather than capturing public attention and imagination, disability rights remained something that, relatively speaking, were important to a small group of activists. Public and judicial attention was focused, if at all,

203. In 2013, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced its Final Rule for compliance with Section 503 of the Rehabilitation Act. 78 Fed. Reg. 58,682, 58,683 (Sept. 24, 2013) (to be codified at 41 C.F.R. pt. 60-741). This new rule revised the affirmative action regulations that federal contractors have for individuals with disabilities. *Id.* Specifically, this regulation established a nationwide 7 percent utilization goal for qualified individuals with disabilities, using the same definition as the Americans with Disabilities Act Amendments Act. *Id.* This could therefore give federal contractors an incentive to urge their employees with the most marginal disabilities to self-identify, to exclude hiring and recruiting of workers with more serious disabilities.

204. See Jeffrey J. Swart, Comment, *The Wedding Luau—Who is Invited?: Hawaii, Same-Sex Marriage, and Emerging Realities*, 43 EMORY L.J. 1577, 1578 (1994) ("In May 1993, the Hawaii Supreme Court became the first court in the history of the United States to hold that the denial of marriage licenses to same-sex applicants may violate the state's constitutional guarantee of equal protection.").

205. See Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1000 (1989) ("Protest campaigns in Birmingham and Selma constituted crucial links in the chain of events that culminated in the Civil Rights Act of 1964.").

on the potentially large number of people who could be covered under this new and possibly far-reaching statute.

The big tent version of the disability rights movement has political power, as evidenced by its ability to get federal legislation passed in an era in which it was difficult to do so. The disability rights movement's lower political salience relative to other groups enabled it to avoid entering the culture wars and positively contributed to the movement's ability to get things done at the federal political level. This had its upsides: for example, the disability rights movement was able to form strategic alliances in places where movement goals overlapped with more pressing national interests.²⁰⁶ But the literature on social movements and constitutional rights claiming, focusing on the role of conflict and contestation in creating different understandings of law, reveals an unexplored downside. Without a fought-for vision of equality, there is a natural ceiling on what an ambitious law like the ADA can reasonably hope to accomplish.

In 1997, the *New York University Law Review* published an essay written by the recently deceased Thomas Stoddard, Executive Director of Lambda Legal Defense Fund and adjunct professor at New York University School of Law. Entitled *Bleeding Heart: Reflections on Using the Law to Make Social Change*, Stoddard wrote about a recent trip to New Zealand, a country he was excited to visit in part because of its strong laws providing protection from discrimination on the basis of sexual orientation, a state of affairs that was far different from what existed in the United States at that time.²⁰⁷ To his surprise, "[o]n paper, the country is among the most advanced nations in the world in according rights and respect to gay people. In the everyday life of the lesbians and gay men of New Zealand, however, the country is not particularly advanced."²⁰⁸

206. One recent example includes *Authors Guild, Inc. v. Hathitrust*, in which several universities were sued by copyright owners over their attempts to digitize copyrighted works in their libraries. 755 F.3d 87 (2d Cir. 2014). The National Federation of the Blind intervened in the case on the side of the libraries, arguing that electronic access was important for blind students and scholars. This helped support the ultimate fair use holding. *See id.*

207. *See* Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 968 (1997).

208. *Id.* at 971.

In thinking through why this was the case, Stoddard concluded that conflict—and the awareness it brings—was the key to true change:

Let me also suggest this: the Civil Rights Act of 1964 has had such a powerful cultural impact not just because of what it said, but also because of how it came into being. The Act was the product of a continuing passionate and informal national debate of at least a decade's duration (beginning, vaguely with the Supreme Court's decision in *Brown v. Board of Education* ...) over the state of race relations in the United States. The debate took place every day and every night in millions of homes, schools, and workplaces.... Through a continuing national conversation about race, ordinary citizens (especially white citizens) came to see the subject of race anew.²⁰⁹

Similarly, “[o]rdinary citizens must know that a shift has taken place for that shift to have cultural resonance.”²¹⁰ Disability rights, at least in the form presented in the Americans with Disabilities Act, are different.

In this Article I have not attempted to fully operationalize this principle in terms of what it might mean for the disability rights movement. That will need to occur in future work, hopefully by diverse scholars and members of the disability rights movement. It may be that the ADA-defined conception of disability encompasses too many groups around which to coalesce a vision of social change. This omnibus view of disability will likely never be salient in the same way as race, gender, or other identity groups. If so, and if fragmentation is useful, advocates may do well to study the deinstitutionalization movement and look to areas (at least initially) in which there is potential cultural resonance.

Family law is also an area in which states often expressly discriminate against people with disabilities, in a way that should be an affront to a faithful vision of the Equal Protection Clause that acknowledges that social judgments about people with disabilities are not inevitable.²¹¹ As recent media accounts suggest, the ability

209. *Id.* at 975-76.

210. *Id.* at 980.

211. Some state laws expressly require consideration of mental disability in determinations of parental fitness or otherwise link mental disability to a termination of parental

to be near loved ones, and to create family units, has cultural resonance.²¹² The recent trajectory of the quest for marriage equality belies the argument that it is an impossible goal to secure civil rights gains from a conservative judiciary, and serves as a reminder that “law that intervenes in status relationships can help unsettle beliefs long thought reasonable.”²¹³ An aging population, which correlates highly with disability, and the fluid nature of the category itself—it is the one minority group anyone can join at any time—should mean over the long term that there is the possibility for a more accepted vision of equality to take hold.²¹⁴

This strategy would not accomplish all of the goals set out in the ADA for the entire universe of people it covers. But history teaches that advocates must exercise patience, keep their eyes on the end game, and, at times, have a high pain threshold. Such is the nature

rights, or deny parents with mental disabilities reunification services that other parents receive. *See, e.g.*, CAL. FAM. CODE § 9100 (West 2015); *see also* CAL. WELF. & INST. CODE § 361.5(a), (b)(2) (West 2015); GA. CODE ANN. § 15-11-26(b) (West 2015). Other state laws severely restrict the rights of people with mental disabilities to get married. *See, e.g.*, KY. REV. STAT. ANN. § 402.990(2) (West 2015); TENN. CODE ANN. § 36-3-109 (West 2015). In part based on laws such as these, parents with physical and mental disabilities all too often face proceedings to remove children from their care. *See* NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 14 (2012), <http://www.ncd.gov/publications/2012/Sep272012/> [<http://perma.cc/4MWM-2Y9T>] (“Clearly, the legal system is not protecting the rights of parents with disabilities and their children.”).

212. For a current—and sympathetic—account of people with disabilities being institutionalized and having to fight for their ability to get married, see Dan Barry, *A Couple Gaining Independence, and Finding a Bond*, N.Y. TIMES (Oct. 4, 2014), <http://www.nytimes.com/2014/10/05/us/a-couple-gaining-independence-and-finding-a-bond.html> [<http://perma.cc/LR8N-3G4H>].

213. *See* Siegel, *Equality Divided*, *supra* note 5, at 91.

214. A recent poll commissioned by RespectAbility, a disability rights organization, and conducted by Democratic and Republican polling firms in Senate battleground states, demonstrates the potential for generating increased political awareness, and contestation, of disability issues. *See* DISABILITY ISSUES FOR VOTERS IN THE SENATE BATTLEGROUND, RESPECTABILITY (2014), <http://respectabilityusa.com/Resources/Disability%20Issues%20for%20Voters%20in%20the%20Senate%20Battleground.pdf> [<http://perma.cc/VLN5-HEU2>]. This poll finds that 56 percent of voters report having a family member or close friend with a disability, while 43 percent do not. A majority of Americans (54 percent) think that the state government is “not doing enough/not doing anywhere near enough” to “help people with disabilities get jobs and become independent,” while 28 percent think the state is “doing more than enough/enough.” Overall, more than half of likely voters believe the federal government is “not doing enough/not doing anywhere near enough” to “help people with disabilities get jobs and become independent,” while 35 percent believe it is “doing more than enough/enough.” *Id.*

of civil rights struggles that “stir[] the imagination of the young, and the imagination of the free.”²¹⁵ One cadre of activists and lawyers does its part and then passes the torch on to the next generation. Setbacks, whether in the form of Supreme Court losses or legislative failures, mobilize constituencies and create opportunities for new coalitions, public education, and supportive media coverage. Keeping in mind that change is intergenerational, such setbacks also provide the opportunity for “winning through losing.”²¹⁶

215. See Siegel, *Equality Divided*, *supra* note 5, at 76.

216. See NeJaime, *supra* note 5, at 945-48.