Comparative Disadvantages?

Social Regulations and the Global Economy

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Chapter 6

On the Rights Track: The Americans with Disabilities Act

Thomas F. Burke

OPENING the legislative debate on the Americans with Disabilities Act of 1990, one of the bill's sponsors, Senator Tom Harkin, predicted that the act would "help strengthen our economy and enhance our international competitiveness" by bringing disabled people into the labor force.[1] In reality, the disabilities law has done nothing of the kind. What the law has enhanced instead is the volume of litigation in the workplace. How this came about is a saga that is best begun with the experience of one potential beneficiary.

In 1990 Lori Vande Zande began work as a program assistant for the Wisconsin state housing office. She was paralyzed from the waist down because of a tumor in her spinal cord. Her duties were mainly clerical, and she was able to perform them while in a wheelchair. The agency that employed her made several adjustments to help her carry out her work. It modified the bathrooms in her office. It bought special adjustable furniture. It paid for one-half the cost of a cot that she used for personal care and adjusted her schedule so that she could attend medical appointments.

But Vande Zande became convinced her employer had not done enough. When she commented that the kitchenette at her workplace was too high to use from her wheelchair, her supervisor told her to use the bathroom sink, a solution she found unsatisfactory. Later, when a bout of ulcers forced her to stay home, she asked for a desktop computer so that she could do her work from there. Her supervisor refused this request and offered her only fifteen to twenty

hours of work that she could do at home. The rest, her supervisor said, would have to be made up with sick leave or vacation time.

To Vande Zande, these incidents, along with some comments made by her supervisors, demonstrated insensitivity. She filed a complaint with the Equal Employment Opportunity Commission and eventually sued her employer in federal court. The state of Wisconsin, she claimed, had discriminated against her on the basis of her disability. To those unfamiliar with disability rights law, the claim might seem puzzling.[2] What, they might ask, makes the failure to provide a computer an act of discrimination? Yet Vande Zande's lawsuit, whatever its merits, was fully in keeping with the logic of disability rights law.

The ADA and Disability Rights

Although the concept of disability rights has lately begun to migrate to other nations, nowhere has it been implemented as fully as in the United States. Beginning with the passage of section 504 of the 1973 Rehabilitation Act, Congress and the states have created an array of disability rights laws, many of them giving those aggrieved the right to sue in court for discrimination. The Americans with Disabilities Act (ADA), the law under which Vande Zande sued, marks the culmination of this trend. Passed in 1990 by a wide margin in Congress and signed by an enthusiastic President Bush, the ADA prohibits barriers to disabled people in a wide range of activities. Title I of the act, the part under which Vande Zande sued, requires employers to provide "reasonable accommodations" to "otherwise qualified" disabled workers.[3] Title II applies nondiscrimination requirements to state and local governments and their agencies, and mandates that public transit systems be made accessible to disabled people. Title III requires that nearly all facilities and programs, from bars and bowling alleys to parks and zoos, be made as accessible as is "readily achievable" and that new facilities be designed to be accessible unless it is "structurally impracticable" to do so.[4]

Complainants under the ADA can bring their claims to the Equal Employment Opportunity Commission and various other federal agencies, but the ADA also gives disabled people the right to sue those who fail to live up to its provisions. Under Title I, employers found guilty of discrimination can be made to provide back pay, attorney's fees, and, in some cases, punitive and compensatory

damages.[5] Under Titles II and III, managers of facilities and programs can be sued to force them to make the facilities and programs accessible to disabled people. Title III lawsuits can also result in fines and "pain and suffering" damages against those judged guilty of discrimination.[6] Thus the ADA's sweeping mandates are to be enforced by lawsuits—and the threat of lawsuits—like Lori Vande Zande's.

This chapter examines the causes and consequences of the turn to litigation in disability policy. First, why has the United States taken a uniquely litigious, rights-oriented approach to the problem of disability? Second, what are the costs of this approach? Third, and perhaps most important, is there a better way? The final section of the chapter compares the U.S. approach with those taken by other economically advanced Western nations. Drawing on this comparison, it examines how implementation of the ADA might be improved and evaluates the political feasibility of an improvement.

The ADA's rights orientation and litigiousness are typical of U.S. public policy. They reflect what has been called "adversarial legalism," a style of dispute resolution that pervades much social regulation in the United States. This style involves formal adversarial procedures, punitive sanctions, costly forms of legal contestation, and complex legal rules that are subject to frequent controversy and change.[7] As the example of disability policy suggests, the tendency toward adversarial legalism in U.S. social policy creates unique costs that are not borne by other economically advanced nations, even those with more extensive regulatory and welfare programs.

The ADA was advertised not just as a civil rights measure, but as a way to take disabled people off welfare and get them onto the employment rolls.[8] It would be nice to believe that the specification and enforcement of rights leads directly to jobs and thus to greater productivity, as participants in the ADA debate seem to have assumed. But in fact rights-based policies turn out to be a problematic method of promoting employment, one that in the United States suffers from all the inefficiencies and inequities of court-based enforcement. The dependence on rights in disability policy reflects a strange American amalgam: a deep distrust of bureaucratic welfare-state approaches to social problems combined with a seemingly boundless faith in the capacity of courts and rights to change society for the better. Because no other nation shares this combination of values to the same extent, it is especially important for Americans to consider the costs of rights-based policies like the ADA.

Adversarial Legalism

The Americans with Disabilities Act illustrates several characteristics of adversarial legalism. The law itself is complex and subject to many interpretations, and the system of enforcement is mainly complaint driven, with easy access to courts. The ADA's provision for pain and suffering and punitive damages allows for high penalties for noncompliance. But most important, the ADA makes disability policy a matter of rights—duties that are owed to disabled people and so can be legally enforced—rather than of needs, problems that society chooses to pay for collectively.

The costs of a regime of adversarial legalism in disability policy are considerable.

—*Uncertainty*. One of the hallmarks of adversarial legalism is that the decisionmaking process is unpredictable, variable, and reversible. In Vande Zande's case, for example, no one could know in advance what a federal court would consider a "reasonable accommodation." Further, no one could be certain that an appeal to a higher court would result in the same decision. Even after the decision in *Vande Zande*, a plaintiff with a similar case might still prevail in another court.

—*Delay*. In an adversarial legal system a final decision may be delayed in seemingly endless ways. After filing her claim in federal district court, Vande Zande had to wait for two years to have her case decided.[9] She moved on to another job before her case was resolved.

—*High Transaction Costs*. Because of uncertainty, delay, and the expense of legal assistance, transaction costs in an adversarial legal system are high. Vande Zande and her employer undoubtedly invested many thousands of dollars to bring their dispute all the way to a federal appeals court. Transaction costs deter plaintiffs from challenging even blatantly illegal policies and drive defendants to settle claims they consider unwarranted.

—*High Penalties*. An adversarial legal system uses the threat of high penalties to achieve compliance. By contesting Vande Zande's claims, the employer risked a court award of pain and suffering damages and legal fees that would vastly outstrip the costs of the accommodations she had asked for. Of course many would argue that high penalties are appropriate for acts of discrimination, but the costs of such penalties generally get passed on to the public in the form of higher prices. The threat of such penalties also leads defendants to settle claims that may be legally dubious.

—*Defensiveness and Distrust.* The formality of adversarial legal processes can breed distrust and disagreement where other processes might reach accommodation. When an ADA lawsuit is filed, it is likely to put great strain on workplace relationships. Moreover, the threat of ADA litigation may lead employers to fear and distrust (or even refuse to hire) disabled workers.

—*Scattershot Enforcement.* A system of implementation by litigation depends on the ability of private parties to mount their own campaign to enforce the law. Those without the knowledge, resources, or motivation required to contest violations will simply try to live with the violations. At the same time, potential plaintiffs with resources can afford to make tenuous claims that stretch the law. Thus the pattern of litigation is bound to be at war with the purposes of the statute. Underenforcement *and* overenforcement are to be expected.

The Scope of the Law

These potential problems in ADA enforcement are important simply because the law itself touches so much of American life. According to one estimate, more than 600,000 businesses, 5 million places of public accommodation, and 80,000 units of state and local government are covered by the law.[10] The highest estimate of the number of disabled people in the United States approaches 50 million, though more conservative assessments put it somewhat lower: one figure suggested by an expert on the demographics of disability is 36 million.[11] According to even the low estimate, at least one of eight Americans is disabled, which means nearly everyone has a disabled relative or friend.

The magnitude of these estimates of the disabled population may seem surprising until one considers the range of people designated "disabled." The ADA defines disability as "(a) a physical or mental impairment that substantially limits one or more of the major life activities; b) a record of such an impairment; or c) being regarded as having such an impairment."[12]

What this definition actually entails depends, of course, on how courts interpret these phrases. Recent court decisions suggest that the range is much narrower than 50 million, but how much narrower is difficult to determine. In any case, the law clearly covers a broad spectrum of conditions, including some, such as drug addiction and emotional disorders, that fall outside popular conceptions of disability.

Not surprisingly, then, disability discrimination has already become one of the leading categories of claims at the EEOC. But job discrimination complaints like the one Vande Zande brought are just one aspect of the ADA. Because of ADA mandates, state and local governments, transit authorities, nonprofit agencies, and businesses face the prospect of spending billions of dollars to remake their physical environments. Beyond this, litigants have used the ADA to challenge a broad array of institutions and practices. ADA lawsuits have resulted in rulings that courts cannot bar blind people from serving on juries, bar associations cannot ask applicants about their history of treatment for mental illness, and insurers cannot limit benefits for people with AIDS.[13] The ADA's mandates and ADA lawsuits seek to literally reshape American society.

The ADA reflects a typically American approach to the problem of disability, one that emphasizes *rights* and litigation over *needs* and governmental assistance. Yet the turn to rights and litigation in disability policy has been relatively recent. Its causes can be best illustrated by a brief history of modern disability politics.

The Rise of Disability Rights

Until the 1960s disability policy centered on welfare, institutionalization, and rehabilitation programs. With the important exception of blind and deaf people, few raised discriminatory attitudes or architectural barriers as an issue, and the rhetoric of disability rights was mainly confined to academic treatises.[14] Disability politics was mostly animated by the nondisabled, especially physicians, rehabilitation therapists, and other service providers. The idea behind disability policy was charity: disability was an unfortunate condition, and society had an obligation to extend a helping hand to the afflicted.

The politics of disability was changed forever by the rise of a new generation of disabled people in the 1960s, the result of improvements in medical technology, the polio epidemic of the 1950s, and the Vietnam war. The new generation was larger, better educated, often less likely to be congenitally disabled, and perhaps as a result more determined than its predecessors.

Out of this generation grew the modern disability movement. Starting in centers of radical political activity, especially Berkeley, Boston, and New York, groups such as Disabled in Action, the United Handicapped Federation, SO FED UP (Students Organization for Every Disability United), MIGHT (Mobility Impaired Grappling Hurdles Together), and WARPATH (World Association to Remove Prejudice against the Handicapped) spread throughout the nation. These groups rejected charity and traditional rehabilitation therapy as hopelessly paternalistic. Advancing such slogans as "You've Given Us Your Dimes, Now Give Us Our Rights!" they demanded more power for people with disabilities to control their own lives.[15]

The Independent Living Movement

The first focus of the wave of disability activism was the creation of independent living centers. The concept of independent living centers was a reaction to the limitations of the vocational rehabilitation system, which disability activists had experienced firsthand. Vocational rehabilitation programs had aimed from their beginnings in the 1920s at getting their clients into the job market as efficiently as possible. Vocational rehabilitation directors justified their programs with cost-benefit statistics showing that they more than paid for themselves in increased tax revenues from gainfully employed disabled people. Thus the bureaucratic imperative within the program was to make people employable at the lowest cost. Because the rehabilitation programs generally had far more applicants than they could serve, they "creamed," taking the younger, the whiter, and the less disabled, and rejecting the rest.[16]

Vocational rehabilitation programs had little use for severely disabled people, who were deemed unemployable. Moreover, oriented as they were to job placement, the programs paid little attention to myriad other problems faced by disabled people. Surmounting architectural barriers, finding and paying for personal attendants, arranging accessible transportation, and dealing with the various welfare bureaucracies were all basic difficulties faced by people with disabilities, yet the rehabilitation programs were useless in these matters. Independent living centers were places where these needs could be met. As disabled people, attracted by the array of services provided, gathered at them, the centers became forums for discussion and headquarters for political activism.

Many in the first wave of the independent living movement embraced a radical critique of the ideology of rehabilitation. The critique grew out of personal experiences with rehabilitation professionals and exposure to various currents of thought in the 1960s and 1970s. In an influential analysis of its ideological origins, Gerben DeJong described the movement as a response to what he and other observers called the "medical model" of disability. In the medical model the physician is the expert who uses his knowledge to make decisions for the patient. The patient is expected to fulfill what Talcott Parsons called the "sick role." The patient is exempted from normal social activities and responsibilities and likewise from blame for his illness. In exchange, the patient is obligated to define his condition as undesirable and to follow the doctor's advice to get well. Disabled people, DeJong argued, often fall into a variant of the sick role, the "impaired role" as described by Siegler and Osmond, in which the patient gives up the hope of recovery and continues as a dependent, relieved of all normal responsibilities of life.[17]

Unlike medical rehabilitation, vocational rehabilitation attempted to restore some of those responsibilities, but it also tended to reinforce the belief that the problem of disability lay with the individual. According to the precepts of independent living, this belief in itself limited the lives of disabled people. The advocates of independent living redefined success for people with disabilities. Instead of advocating their fitting in by learning to overcome their disabilities, the independent living philosophy stressed that disabled people should control their own lives as much as possible. Independent living was premised on the belief that success for disabled people was a matter more of changing attitudes and removing barriers than of rising above one's physical condition.

Thus, as DeJong summarized, rehabilitation was part of the problem, not the solution.[18] Accordingly, independent living centers aimed above all to remain independent of disability professionals—physical therapists, occupational therapists, vocational rehabilitation counselors, even physicians. One of the leaders of the disability movement, Ed Roberts, was proud of the fact that he seldom went to a doctor.[19] Instead, services were to be controlled by disabled people themselves. Independent living centers strongly favored in-home personal attendants hired by disabled people themselves over services provided by nurses in institutional settings. Disabled people,

according to the independent living philosophy, should be treated as capable adults, not sick children.

Section 504

Ideas about disability rights had been floating around even before the changes in disability politics in the late 1960s and early 1970s. Academics such as Jacobus tenBroek, a professor of political science who was blind, had written articles exploring the application of rights concepts to people with disabilities, or comparing the situation of the "cripple" to that of blacks.[20] Moreover, litigation in matters of deinstitutionalization, patient rights, and education of people with disabilities had invoked rights concepts. Two important lower federal court decisions even entertained the possibility of considering disability a special "suspect" or "semisuspect" category under the equal protection clause of the U.S. Constitution, thus according people with disabilities the same constitutional rights extended to blacks and women.[21]

For many in the disability movement, however, disability rights was an abstraction compared with the basic existential issues raised by the independent living movement. While historical accounts generally treat the independent living movement as almost synonymous with the disability rights movement, some participants see the two as distinct. Independent living leaders had always been concerned about discrimination against people with disabilities, but in the early 1970s their efforts were focused on the practicalities of running the independent living centers. Only with the arrival of section 504 did rights come to the forefront of the disability movement.[22]

Section 504 was a "stealth" provision. It was written into the Rehabilitation Act of 1973 by congressional liberals and received little scrutiny, even when President Nixon twice vetoed the bill because of its other provisions.[23] When Congress overrode the second veto it became law. Section 504 was deceptively simple. It held that "no otherwise qualified individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance."[24] Was this merely an expression of an aspiration? A blueprint for governmentwide antidiscrimination rules? An invitation to disabled people to sue government-

funded agencies that discriminated against them? The regulations based on the bill leaned heavily toward making section 504 a disability rights law comparable to title VI of the Civil Rights Act of 1964. But in one significant respect the regulations went beyond traditional rights laws. As developed by the Office for Civil Rights of the Department of Health, Education and Welfare (HEW), the regulations included a requirement that employers provide "reasonable accommodation" to disabled workers.[25] To comply with the law, federally funded agencies would have to do more than simply prove they had not discriminated against disabled people. Where necessary, they might have to make arrangements to ensure that people with disabilities could perform the job. Thus physical barriers and unequal access to facilities were for the first time made a civil rights violation.

In the spring of 1975 the Office for Civil Rights completed a draft of the section 504 regulations, but the HEW secretary, David Matthews, stalled them. There the matter stood until 1977, when the Carter administration took over, and Joseph Califano became the new department secretary. When Califano also seemed to delay, disability activists held a wheelchair parade in front of his home and later sat in at his office overnight.[26] The center of protest, however, was California, where the West Coast wing of the disability movement conducted a sit-in at a San Francisco federal building. With more than a hundred disabled people camped, many in wheelchairs and some on a hunger strike, Califano relented.

It is an exaggeration to say that the controversy over the section 504 regulations created the disability rights movement, but as Richard Scotch has argued, the controversy did greatly strengthen the movement. As part of the effort to implement the regulations, many disability groups received government funding, some of which was used to train people with disabilities to assert their newfound rights.[27] But more important than the funding was the example of the San Francisco protest, which for the first time brought together people of different disabilities—deafness, blindness, cerebral palsy, spinal cord injury, mental retardation, mental illness, and others.[28] Until the 1970s, groups representing these disabilities, when active politically at all, had worked on their own, and the staggering differences among them seemed larger than their common interests.[29] In a fight over disability rights, however, they became united.[30] Thus the protests over section 504 attained for the disability movement the

same kind of significance that the Montgomery bus boycott had for the civil rights movement or the Stonewall riot had for the gay rights movement.

The Rights Model

In the aftermath of the section 504 controversy, a "rights model," or, as some called it, a "minority model," of the situation of disabled people emerged in the writings of disability activists and their academic sympathizers. These writings echoed the themes of the independent living movement but moved beyond its focus on the critique of traditional rehabilitation programs. The theorists of the rights model were influenced most by the civil rights movement. Some of the leaders of the disability movement had begun their activities in politics through their involvement in civil rights efforts; others had simply grown up watching the movement on television. The proponents of the rights model drew strong parallels between disabled people and racial minorities. The rights model would become the philosophical cornerstone of the ADA.

The essence of the rights model is the contention that disabled people are oppressed by society more than by their disabilities. "The general public does not associate the word 'discrimination' with the segregation and exclusion of disabled people," wrote Robert Funk, the first director of the Disability Rights Education and Defense Fund (DREDF). "Historically the inferior economic and social status of disabled people has been viewed as the inevitable consequence of the physical and mental differences imposed by disability."[31] According to the rights model, however, every building with narrow hallways, every sidewalk curb without a "cut," every subway without an elevator, and every elevator without Braille buttons is an act of discrimination against disabled people. Separate transportation, separate housing and separate educational programs are acts of segregation comparable to Jim Crow laws. Frank Bowe, the first executive director of the American Coalition of Citizens with Disabilities (ACCD), compared the historical oppression of blacks to the legacy of oppression of disabled people:

> The tragedy is that for two hundred years disabled people have not been asked about their needs and desires. Buildings went up before their inaccessibility was "discovered"—and then it was too late. During America's periods of greatest growth, when subways were constructed, television and motion pictures produced, telephone lines laid, school programs designed, and jobs manufactured, disabled people were hidden away in attics, "special" programs, and institutions, unseen and their voices unheard. Day by day, year by year, America became ever more oppressive to its hidden minority.[32]

Society allows physical and social barriers to exist because of pervasive prejudice against disabled people, just as Jim Crow laws were allowed to exist because of white racism. Of course, whereas racism is often overtly hostile to blacks, prejudice against disabled people is often more subtle. It usually takes the form of pity. But pity, according to the disability rights theorists, can be even more damaging than hatred. Many see disabled people as "childlike, helpless, hopeless, nonfunctioning and noncontributing members of society," who are not expected to lead normal lives.[33]

This attitude, according to the rights model, is reflected in the way government chooses to aid disabled people. Instead of spending money on services to help them become more independent, government devotes nearly all its disability budget to welfare payments: "It looks as though the federal government prefers to keep disabled people down [rather] than help them up."[34]

Paternalism toward disabled people is also reflected, according to the rights theory, in private charity efforts, particularly telethons. Thus proponents of the theory condemned an effort many thought the hallmark of goodwill, the Jerry Lewis Muscular Dystrophy Association Telethon. Evan Kemp Jr., a disability rights leader who himself had muscular dystrophy, argued that the telethon depicted disabled people as poor, suffering children whose lives were hopeless in the absence of a cure. In the effort to arouse pity, Kemp wrote, Lewis had reinforced "stereotypes that offend our self-respect, harm our efforts to live independent lives and segregate us from the mainstream of society." Kemp, whose own parents had helped to create the telethon, called on Lewis to "show disabled people working, raising families and generally sharing in community life."[35] Similar criticism moved the National Easter Seal Society and United Cerebral Palsy Associations telethons to drop the pity approach.[36]

If, as proponents of the rights model asserted, the fundamental problem for disabled people was discrimination caused by prejudice, the solution was for people with disabilities to claim their rights. The arrangement of society to suit only the nondisabled violated basic norms of freedom and equality. Thus people with disabilities should treat barrier removal and other modifications not as a privilege conceded to them, but as a right that had been denied, an injustice to be rectified. The act of demanding rights would also undermine the paternalistic view society took of a person with a disability: "How can we keep alive our vision of him as the helpless victim of a handicapping condition when he is putting together a political organization and agitating for change?"[37]

The rights model, then, entailed political action based on a radical reconceptualization of the disabled person's role in society. On its face it hardly seemed the stuff of Republican politics. Yet in the 1980s many elements of the rights model came to be accepted by Reagan and Bush administration officials. This acquiescence paved the way for the ADA.

How Conservatives Embraced the Rights Model

After the exhilaration of the victory on section 504, the disability movement faced a backlash in the late 1970s and early 1980s. The transportation industry, for example, fought section 504 rules that mandated full accessibility of buses and trains, winning a U.S. Court of Appeals decision that struck down the rules as beyond the scope of section 504 regulation.[38] The victory of Ronald Reagan, with his call for getting government off the backs of the American people, seemed to presage further setbacks. As part of his crusade against regulation, Reagan appointed Vice President George Bush to head a task force for regulatory relief. Two of the task force's early targets were section 504 and the Education for All Handicapped Children Act.[39]

The perceived threat posed by the task force mobilized the disability rights movement. In January 1982, DREDF expanded beyond its Berkeley base to create a Washington office staffed by Robert Funk and Pat Wright, who devoted their efforts to fighting the proposed revisions.[40] They were joined by Evan Kemp Jr., who was director of the Disability Rights Center backed by Ralph Nader. Their first move was to orchestrate a write-in campaign against revisions in the disability

laws. The administration was deluged with letters, demonstrating the muscle of the disability movement.[41]

The disability rights advocates also began meeting with C. Boyden Gray, Bush's legal counsel. Kemp had become friends with Gray years before, and he set to work to "educate" Gray, who had known little about disability policy before he came to the task force.[42] What Kemp, along with Wright and Funk, taught Gray was an understanding of the rights model of disability congenial to the worldview of a conservative Republican. Kemp told Gray that disabled people did not want the paternalistic, heavy hand of government doling out welfare to them. The disability regulations were not handouts, Kemp argued. They were accommodations made so that people with disabilities could become independent and support themselves with jobs. Kemp contended that the costs of the accommodations in section 504 were minimal compared with the heavy costs of welfare spending on disabled people. The disability rights advocates reinforced this message about paternalism and independence by inviting Gray and Bush to visit independent living centers and meet with disabled people.[43]

These efforts paid off. On March 21, 1983, Vice President Bush announced in a letter sent to leaders of disability groups that the administration would not try to change section 504.[44] The administration also dropped plans to alter the education regulations. Although these moves did not end the conflicts between the Reagan administration and disability advocates, the long-term effects of the episode turned out to be powerful. Disability rights leaders found in Gray "the strongest advocate we have ever had in any administration," as one commented.[45] Gray would demonstrate his newfound commitment to disability rights during the development of the ADA. Kemp, meanwhile, formed a relationship with Bush that continued long after the controversy over section 504. During the balance of the Reagan administration, the vice president asked Kemp for his help in drafting speeches on disability issues. In 1987 he recommended Kemp for a seat on the Equal Employment Opportunity Commission and in 1989 named him chairman. Perhaps most important, Bush and Gray came to accept key elements of the rights model. For Gray the fight over section 504 was a turning point in the Bush administration's support of ADA: "It all germinated back in that time."[46]

The National Council on the Handicapped

Meanwhile, in a far more obscure corner of the Reagan administration, another group of conservative Republicans also came to embrace the rights model. The National Council on the Handicapped, created during the Carter administration, had kept a very low profile during its first few years. But in 1984 the council was asked to produce a report "analyzing Federal programs and presenting legislative recommendations to enhance the productivity and quality of life of Americans with disabilities."[47] That report, created by a council dominated by conservative Reaganites, became a blueprint for the ADA.

Reagan had replaced nearly all of the Carter appointees on the council with his supporters, mainly conservative Republicans. Several were fundraisers in the 1980 Reagan presidential campaign. The leaders of the disability movement doubted anything valuable could come from such a cast, but they may have overlooked the unique qualities of some of its more forceful members. Among them was Justin Dart Jr. The son of a rich and very conservative businessman, Dart had been struck with polio at the age of eighteen. His work on disability policy in his home state of Texas convinced him that the disability movement needed to make civil rights its priority. Rehabilitation programs, education, and residential institutions had been substantially improved, Dart believed. Significant, though limited, civil rights laws had been enacted. But public knowledge of these changes, and full implementation of the laws, had lagged. Laws such as section 504 left vast gaps because it and the other provisions of the 1973 Rehabilitation Act covered only government agencies or businesses and institutions receiving federal funds. [48]

Perhaps more important, Dart thought, *attitudes* had not changed, even though disabled people had proved their capabilities time and again. "The basic assumption of inequality remained intact," Dart concluded. "The great majority of people with severe disabilities remained isolated, unemployed, impoverished and dependent."[49] The main problem for disabled people, Dart believed, was that "we were considered subhuman." [50]

Dart had been deeply impressed with the impact of the 1964 Civil Rights Act. He had attended college in the segregated South and had even started a college civil rights group—which attracted all of five members. "I would have bet every penny I had that I would never see

the day when integration was accepted."[51] Civil rights laws, he believed, were a powerful way to change American attitudes. "To Americans, total equality is a sacred concept of transcending power and majesty. 'We hold these truths . . .' and 'I have a dream . . .' are far easier to communicate than partial rights and particular services."[52] Thus Dart decided to devote his life to passing a comprehensive civil rights law for disabled people.

When Dart was appointed to the National Council on the Handicapped in 1981, he was able to put his views into action.[53] Realizing that he had to create a constituency for a comprehensive civil rights bill, he used his own money to travel from state to state, meeting disability leaders and building support for the civil rights approach. In these meetings he developed a statement on disability policy that stressed the need to promote independence and maximize productivity among disabled people. The statement included a recommendation that "Congress and the executive branch should act forthwith to include persons with disabilities in the Civil Rights Act of 1964, the Equal Opportunity Act of 1972 and other civil rights legislation and regulation." In 1983 Dart got the council to endorse and publish this statement as a "National Policy for Persons with Disabilities."[54]

Together with Sandra Parrino, the chairperson of the council, Dart worked to make a rights law a part of the council's agenda. They hired Lex Frieden, a leader in the independent living movement, and Robert Burgdorf Jr., a prominent disability rights lawyer, as staff for the council. When the council began to discuss civil rights, it soon became clear that the idea resonated even with the council's very conservative members. All of them had had close experience with disabled people and so could relate to cases in which a disabled person had been discriminated against unfairly. Moreover, Dart's message of independence for disabled people was one the Reaganites on the council appreciated. Burgdorf pointed out that most of the $60 billion spent annually on disabled people by the federal government was going to welfare programs; only about $3 billion was used to help disabled people become productive and independent. The council members, Burgdorf says, considered civil rights "simply a way to get from a society that takes care of people with disabilities to a society that tries to help people become productive and mainstream."[55] Civil rights ended up at the top of the council's agenda.

The council agreed with Dart that a comprehensive civil rights bill

for disabled people should be created, one that would go beyond section 504's narrow coverage of federal governmental institutions and groups receiving federal funds. Burgdorf recommended a stand-alone bill rather than an amendment to the 1964 Civil Rights Act, and this was accepted by the council.

In 1986 the council produced its report, *Toward Independence*. The tone of the report can best be summarized by its epigraph, a quotation from Theodore Roosevelt: "Our country calls not for the life of ease, but for the life of strenuous endeavor."[56] The report adopted many of the precepts of the rights model of disability, but refracted them through the prism of Reaganite conservatism. For instance, the report emphasized the costs to the government of federal disability welfare programs, which "are premised upon the dependency of the people who receive benefits."[57] The introduction to *Toward Independence* quoted approvingly a UN report that concluded, "More people are forced into limited lives and made to suffer by . . . man-made obstacles than by any specific physical or mental disability."[58] The report then warned that unless structural and attitudinal barriers to people with disabilities were reduced, the costs of services and care for disabled people would mushroom with the aging of the baby boom generation.[59] Thus concern about the personal costs of discrimination was mixed with a call for fiscal prudence.

Unlike the theorists who developed the rights model of disability, the writers of *Toward Independence* did not put the situation of disabled people into the context of earlier struggles of blacks and women. The historical precedent of the civil rights movement was never mentioned. Indeed, except in referring to the titles of particular laws, the report avoided the use of the term "civil rights" altogether. Instead it stressed "equality of opportunity," "dignity," and, most of all, "independence." ("Independence" was used twenty-one times in the first fourteen pages.) "Equality and independence," the report argued, "have been fundamental elements of the American form of government since its inception."[60] *Toward Independence* also quoted from a Ronald Reagan speech on disability policy: "By returning to our traditional values of self-reliance, human dignity, and independence, we can find the solution together. We can help replace chaos with order in Federal programs, and we can promote opportunity and offer the promise of sharing the joys and responsibilities of community life."[61]

The title of the report was taken from a speech in which Reagan declared that "we must encourage the provision of rehabilitation and other comprehensive services oriented *toward independence* within the context of family and community."[62] Thus the report embraced the rights theorists' belief that traditional disability policy induced dependency, but left behind their emphasis on society's oppression of disabled people.

Although its analysis of disability was conservative, the recommendations of *Toward Independence* were sweeping. Foremost was its endorsement of a comprehensive equal opportunity law for people with disabilities. The law's coverage would be even wider than that of traditional civil rights laws. Duties under the law, the report concluded, should include removal of architectural, transportation, and communication barriers. The law should be administratively enforced but should include a private right of action in federal court and fines for violators.[63]

To help build the case for an antidiscrimination law, the council had commissioned a survey of disabled people to document their living conditions and attitudes. Among the findings reported in *Toward Independence* was that only one-third held jobs, but two-thirds of all unemployed disabled people wanted to work. The study also concluded that disabled people were more socially isolated, less educated, and less happy with their lives than other Americans.[64] These conclusions would be cited constantly in the debate over the ADA.

Frustrated with congressional inaction on their proposal, the council voted in 1987 to draft a disability rights bill based on the outline in *Toward Independence*. Council leaders shopped the bill around to sympathetic members of Congress, particularly Lowell Weicker in the Senate and Tony Coelho in the House, both key advocates of disability legislation. In January 1988 the council published its follow-up to *Toward Independence*, titled *On the Threshold of Independence*. The new report included the first version of the Americans with Disabilities Act.[65] Later that spring, after negotiations with disability groups, Weicker, followed by Coelho, introduced the first version of the ADA.[66]

The Enactment of the ADA

Weicker and Coelho submitted the bill mainly for symbolic reasons. There were hearings late in the fall, but no serious action was

ever contemplated. Yet the draft did have an important effect: during the 1988 presidential campaign, George Bush endorsed the bill in concept. In his presidential nomination acceptance speech at the Republican national convention, he pledged that he would "do whatever it takes to make sure the disabled are included in the mainstream." Since his experience with Reagan's Task Force for Regulatory Relief, Bush had become a disability rights believer. And he had been influenced by another group of Reagan appointees, the members of the Commission on the Human Immunodeficiency Virus Epidemic. He said he was "very much persuaded" by the commission's conclusion that discrimination against AIDS carriers should be made illegal and its endorsement of the ADA as a vehicle for this.[67] Bush's stance was reinforced after the 1988 election. A pollster for Louis Harris and Associates estimated in a letter to the president that up to half his 4 million vote margin in the election had come from disabled voters who had switched from the Democratic party to the Republican candidate.[68] This estimate was circulated in the White House and became a point of pride for C. Boyden Gray, who had urged that disability rights be a priority in the Bush administration.[69]

Bush's endorsement of the ADA before the election set the tone for the legislative struggle that ensued. When he took office, he was committed to passing the bill, and there was little or no public opposition within the White House. "Shut up and get on with it was the attitude," according to one top administration official.[70]

ADA in the Senate

Tom Harkin, the chair of the Subcommittee on the Handicapped (later renamed the Subcommittee on Disability Policy), and Ted Kennedy, the chairman of the Labor and Human Resources Committee, became the prime movers of the ADA in the Senate. They determined early on that the first version of the ADA, based largely on the proposal from the National Council on the Handicapped, would have to be extensively revised.[71] The Reagan-appointed conservatives on the council had approved a surprisingly radical measure. Dubbed by skeptics "the make the world flat bill," the first version of the ADA would have required all buildings to be made accessible within five years unless doing so would fundamentally alter the nature of a program or threaten a company's existence. This "bankruptcy" provision, among others, would have to be modified, the senators decided, if the bill was to stand a chance in Congress.[72]

In January 1989 a core group of disability activists and Senate staff members began revising the bill.[73] The group adopted a strategy that would become a primary emphasis in the debate over the ADA. The first version of the ADA had often used language from the regulations and case law that had been developed in section 504 enforcement. In employment cases, for example, employers were required to provide "reasonable accommodation," the same phrase used in section 504 employment cases. But in many respects, such as the infamous "bankruptcy" provision, the first draft deviated significantly from section 504. Robert Silverstein, chief counsel of the Senate Subcommittee on Disability Policy, argued that the ADA should as much as possible draw language and concepts from the enforcement of section 504.[74] As a result, the group changed the bankruptcy provision so that a company would only have to prove that a modification entailed an "undue hardship"—the same defense businesses used in section 504 cases. Instead of mandating what some called flat earth modifications to existing buildings, changes would be required only if "readily achievable," again language from case law from section 504 rulings. The use of this language was meant to reassure anxious members of Congress that the ADA was simply an extension of section 504, and that years of experience with the language of the act would guarantee smooth implementation of the ADA. As one participant said, "Every time we departed from 504, we had to have a damn good reason to do so, and also one that was politically viable."[75]

The strategy worked. Although business groups criticized aspects of the second draft, there was little outright opposition. Over some provisions, principally those affecting public transportation and food service, major controversies erupted.[76] But on the general subject of discrimination against those with disabilities, most business groups adopted the premises of the ADA and supported the bill from the beginning. The National Association of Manufacturers, the Chamber of Commerce, the Labor Policy Association, and the American Society of Personnel Administrators—the big business groups most involved in the ADA—worked to smooth the bill's edges rather than oppose it fundamentally. Among national general business groups, only the National Federation of Independent Business and National Small Business United, both representing small business owners, opposed

the ADA outright, and only the NFIB developed any kind of a critique of the rights model of disability.[77] As an NFIB official said, there was an "awfully meager alliance" of business groups against the ADA.[78]

One reason for business support of the ADA was that many larger corporations had learned to live with disability rights requirements because they were federal contractors and subject to section 504 provisions. Many companies were also probably concerned about the bad publicity that would result from opposing a bill to help disabled people. Finally, many business spokesmen seemed to accept the premise of the ADA that disabled people were a minority group deserving civil rights protections.[79]

The approach of the business community was also tactical. As the Senate was revising the ADA, the Bush administration let it be known that it was committed to passing the bill. Although the administration would work with business groups to address their concerns, it would not support direct attempts to block the ADA.[80] The administration's position meant that efforts to defeat the bill faced long odds. Consequently most groups labored to modify, rather than defeat, the legislation. In a memo to other business lobbyists, a Chamber of Commerce official concluded that bipartisan support for the ADA, together with President Bush's endorsement "adds up to almost certain passage in one form or another." The memo invited the lobbyists to join a working group "whose goal would be to help fashion the legislation so that it is acceptable to the business community while addressing the needs of the disabled."[81] This was the posture of most business groups throughout congressional consideration of the ADA.

The top priority for the business lobbyists was to limit the awards that ADA plaintiffs could win in court. Under the Civil Rights Act of 1964, plaintiffs in employment discrimination cases were eligible to win an injunction giving them back their jobs, back pay, and attorneys' fees. Racial minorities, however, were not limited to the remedies in the Civil Rights Act of 1964. They could also sue under the 1866 Civil Rights Act, often called section 1981, a law that had collected dust on the books until it was revitalized during the modern civil rights movement.[82] Section 1981 allowed injunctive relief, back pay, and reimbursement of legal fees, but it also gave plaintiffs the right to collect "pain and suffering" damages and punitive damages. These extra provisions created the possibility of very large verdicts—and made it

easier for prospective plaintiffs to find lawyers willing to represent them. Women and religious minorities, not covered under section 1981, were limited to the rewards of the Civil Rights Act of 1964.

The revised version of the bill gave disabled plaintiffs in employment cases the same remedies as those available in section 1981. In cases involving discrimination in public accommodations, the remedies were tied to the 1988 Fair Housing Amendments Act, which also made plaintiffs eligible for a full range of damages. For business groups this was anathema; they feared a litigation explosion. The business community was particularly apprehensive because under section 1981 juries could decide discrimination cases, and it was expected that disabled people would make extremely sympathetic plaintiffs in jury trials. The threat of punitive damages in such cases loomed large. Business lobbyists also complained that language in the legislation—"reasonable accommodation," "undue hardship," and "readily achievable"—was so vague as to make compliance with the law a guessing game and the jury trials a lottery.

The Bush administration took up the demands of the business interests in negotiations with Senate leaders. Attorney General Richard Thornburgh outlined the executive branch's view in testimony before the Senate Subcommittee on the Handicapped on June 22, 1989, a month after introduction of the revised bill. Thornburgh pledged the president's support for a comprehensive civil rights measure, but he urged that remedies and enforcement mechanisms in the ADA bill ought to parallel those in the 1964 Civil Rights Act. Because "we are a litigious society," Thornburgh said, the administration was "merely making a plea for the tried and true remedies." The changes Thornburgh advocated eliminated the use of juries and the possibility of punitive or pain and suffering damages in ADA lawsuits. In addition, Thornburgh urged that the language of the bill parallel section 504 as much as possible, and that compromises be made to protect small businesses and transit systems.[83]

Soon after Thornburgh's testimony, Harkin and Kennedy made a deal with the White House. The deal focused on remedies. The senators agreed to cut back the scope of the remedies in exchange for a broader range of coverage than in previous civil rights laws. Remedies and enforcement procedures for employment discrimination in the ADA were tied to those in the Civil Rights Act, as the administration wanted. The only remedy available to those bringing public ac-

commodations lawsuits was an injunction. This would make accommodations lawsuits less attractive to lawyers for plaintiffs, who would not be able to collect a contingency fee based on monetary damages. But the compromise did include a provision authorizing the attorney general to seek monetary damages on behalf of individuals harmed as a result of a "pattern or practice" of discrimination, and to mete out fines of $50,000 for a first violation and $100,000 for additional violations.[84]

In exchange the senators got broader coverage of businesses than under the Civil Rights Act. The 1964 act reached only restaurants, stores, gas stations, hotels, motels, theaters, and other places of entertainment. The revised bill covered a long list of businesses and institutions. Pharmacies, a major interest for disabled people, were included along with such venues as lawyers' offices, zoos, homeless shelters, and golf courses.[85]

Bolstered by the Bush administration's endorsement, the ADA reached the Senate floor three months later, on September 7, 1989. Harkin introduced the bill as a "landmark statement of basic human rights" that would also enhance "international competitiveness."[86] These two themes, of rights and of economic productivity, dominated the debate. Concerns about the cost to business were expressed by a few Democrats, but the only outspoken opposition to the bill came from a handful of conservative Republicans. The Americans with Disabilities Act swept the Senate on a vote of 76-8.

The Question of Remedies on the House Side

Steny Hoyer, a Maryland Democrat, was assigned by the House leadership to refine the details of the ADA with Steve Bartlett, a Texas Republican. Bartlett, an ADA supporter, attempted to find a way to rectify the many complaints of businesses. Their lobbyists were particularly critical of what they considered vague language in the bill. Bartlett was sympathetic to this concern but also frustrated by the inability of some business groups to offer acceptable alternatives.[87]

Some of the proposals offered by the National Federation of Independent Business were deemed politically infeasible. For instance, NFIB suggested that a "reasonable accommodation" in employment should cost no more than a certain percentage of an employee's wages. A ceiling on the cost of accommodations, however, was

opposed by Bartlett because it could become a floor—employers, he reckoned, would spend up to the ceiling to put their fears of litigation to rest. Anyway, House Democrats and disability groups saw ceilings as a copout.[88] Similarly, NFIB's suggestion that businesses with fewer than fifteen employees be exempted from the public accommodations section of the ADA was rejected out of hand.

After several months of negotiations, Bartlett and Hoyer produced a draft that made several concessions to businesses, including a longer phase-in for small employers, deference to employers' job descriptions in defining the "essential functions" of a job, and coordination of complaints filed under the ADA and section 504. The compromise also included language requiring courts to consider "site-specific factors" in determining whether an accommodation would create an "undue hardship" for an employer, or whether an accommodation was "readily achievable."[89] This meant that a court would decide whether an accommodation in a chain restaurant was an undue burden based on the financial condition of the particular location rather than the chain as a whole. Though slowed, the big bill seemed to be moving ahead.

Then an old issue resurfaced: remedies. In February of 1990 Senator Edward Kennedy and Representative Augustus Hawkins introduced a bill amending the Civil Rights Act of 1964. The Kennedy-Hawkins bill was supposed to reverse a string of adverse Supreme Court decisions, but it also included a provision expanding the remedies available to plaintiffs in civil rights cases. In addition, it enabled plaintiffs to demand jury trials.[90]

As part of their deal with the White House, Kennedy and Harkins had tied to the ADA the same remedies and procedures as in the Civil Rights Act. So if the Kennedy-Hawkins amendments were adopted, disabled plaintiffs would also be eligible for expanded remedies and jury trials. For the Bush administration, this arrangement would signify very different rules of the game. The limitations on remedies the administration thought it had negotiated earlier would be stripped away by the Kennedy-Hawkins measure. Accordingly, Thornburgh sought to delete from the ADA the reference to the Civil Rights Act of 1964, pleading that only limited remedies were in his original deal.[91]

Not surprisingly, those who had worked on the Senate side of the deal saw things differently. The point of the deal, according to them,

was that ADA plaintiffs should be governed by the same remedies accorded other minority groups. If Congress chose to grant expanded remedies to women, religious minorities, and racial minorities, logic dictated that disabled people should get them too.[92] Democrats in Congress, along with disability and civil rights groups, insisted on retaining the reference to the Civil Rights Act.

When the ADA reached the House floor, one of the last remaining issues was an amendment to restrict its remedies. In introducing the amendment, Wisconsin Republican F. James Sensenbrenner urged his colleagues to respect the spirit of the original compromise, arguing that because the ADA was a new type of legislation, it should be treated differently from the Civil Rights Act. Most businesses had little experience with disability discrimination laws, Sensenbrenner observed, so the possibility of compensatory and punitive damages awards and jury trials "raises the stakes much higher without any corresponding increasing benefit to the disabled." Moreover, expanded remedies should be provided only after a thorough examination of the effects; Congress had not considered expanded remedies during the bill's committee process and was not likely to give them much careful reflection during debate on the Kennedy-Hawkins bill.[93]

Democrats who opposed the Sensenbrenner amendment had a simple riposte: disabled people should be treated the same as other oppressed groups. California Democrat Don Edwards charged that the amendment "provides for a two-tier system, where women and minorities get a better break than persons with disabilities." Colorado Democrat Pat Schroeder summed up the logic of this view when she contended that "there are no rights without remedies," thus "you have lesser rights if you have lesser remedies."[94]

Kansas Democrat Dan Glickman, in contrast, deemphasized the importance of remedies, arguing that "rights and remedies are not the same thing," and that "a court of law should be the place of last resort, not first resort, to enforce civil rights." Glickman had added an amendment to the ADA urging that parties use arbitration instead of litigation to settle disability rights claims. Yet Glickman also argued that disabled people should not be locked into a lesser set of remedies. The argument over remedies, Glickman said, should be dealt with later, during consideration of Kennedy-Hawkins.[95]

Glickman's view prevailed; the Sensenbrenner amendment was defeated 192–227. The vote split mostly along party and ideological lines, with Republicans supporting the amendment 146–24 and Democrats opposing it 46–203. Conservative Southern Democrats provided 36 of the 46 Democratic votes in favor. Aside from these Southerners, the White House was unable to attract enough Democratic defectors to limit remedies.[96]

The final passage was not nearly so close; the ADA romped 403–20. With Evan Kemp and Justin Dart at his side, President Bush proudly signed the bill into law on July 26, 1990.[97]

Remedies and the Civil Rights Act of 1991

Enactment of the ADA still left the question of remedies unresolved. Democrats in Congress had beaten back attempts to detach disabled people from remedies available to other alleged victims of discrimination. The pending Kennedy-Hawkins scheme proposed to expand those remedies to allow plaintiffs in discrimination lawsuits to collect both pain and suffering and punitive damages. Remedies, however, became a secondary issue in the debate on that bill. Republicans, led by George Bush, focused on a provision that would have reversed a Supreme Court decision and reimposed a requirement that defendants in civil rights cases prove that employment practices resulting in "disparate impacts" were a "business necessity." Bush and the Republicans contended that businesses would sidestep this requirement by developing quotas so as to ward off discrimination suits. Calling Kennedy-Hawkins a "quota bill," Bush vetoed the 1990 Civil Rights Act. An effort to override the veto failed in the Senate by one vote.

The following year congressional Democrats reintroduced the bill. After complex negotiations and much softening in the GOP, Bush signed a compromise measure. The Civil Rights Act of 1991 for the first time allowed both pain and suffering and punitive damages, but capped them in proportion to the size of the business involved. For employers with 14 to 101 workers these damages could not exceed $50,000. The upper limit for employers with more than 500 employees was $300,000. A special provision in the bill barred damages in "reasonable accommodation" cases under the ADA or the 1973 Rehabilitation Act if the defendant demonstrated a good-faith effort to comply.[98]

Nonetheless, passage of the bill meant that plaintiffs in ADA employment cases were eligible for both a jury trial and an expanded

range of remedies, just what many business groups and supporters of the Sensenbrenner amendment had dreaded. The only major attempt to curb the litigious design of the ADA had largely failed.

Explaining the ADA

Why did so many disparate players, from President Bush to civil rights leaders, disability activists, and even some captains of industry, get behind the disabilities act? Why did a Republican administration sign on to a new source of litigation, even while resisting some changes in other civil rights laws on account of their litigation-creating potential? Why did U.S. business not unite to stop a burdensome new mandate?

One answer to these questions is that, paradoxically, disabled people are a uniquely powerful force—or at least a group uniquely difficult to challenge. Disabled people are diffused throughout society, among Democrats and Republicans, rich and poor. Every politician who worked on the ADA, from George Bush down, could point to a close friend or relative with a disability. Probably every person in America can make a similar claim. Moreover, while the paternalism and pity many feel toward disabled persons may be unwelcome, those sentiments also confer political advantages. The great majority of Americans believe that disabled people are blameless victims and deserve help, whether through public or private charity. This basic fact about disability politics helps explain why the ADA sailed through Congress drawing few vocal opponents. It is not good public relations to fight with disabled people. All those involved in the ADA debate, including the business representatives, had a strong incentive to keep their reservations to themselves.

But these unique aspects of disability politics do not suffice to explain the ADA's allure. If politicians want to be seen as doing good for the disabled, the question still remains: why did they do this particular good thing rather than another? Policymakers, for example, might have increased funding for rehabilitation or raised the monthly welfare payments that many handicapped persons receive.

Moreover, politicians have often said no to advocates for the disabled. Indeed, at the federal level many of the disability movement's demands—fuller funding for independent living centers, changes in social security benefit laws, medical insurance reform, even funding

for personal assistants—have gone largely unheeded. The greatest victories of advocates have come through rights-oriented measures, particularly the ADA, section 504, and the Education for All Handicapped Children Act but also the Fair Housing Amendments Act of 1988 and the Civil Rights Restoration Act of 1988. Thus it is the success of disability rights laws in particular, not the disability movement in general, that must be explained.

One might argue that rights laws have a strong appeal simply because the analogy between the disability rights movement and the civil rights movement is compelling. Indeed, much of the discrimination faced by disabled people is easily analogized to that faced by African Americans, as congressional testimony vividly illustrated. A woman with cerebral palsy told of being refused entrance to a movie theater. A mother of a baby who had died of AIDS told of undertakers who refused to embalm the infant.[99] Tony Coelho, the congressman who first introduced the disabilities bill in the House, told of nearly being driven to suicide by the discrimination he faced after he was diagnosed with epilepsy.[100] These stories sounded very much like those that helped galvanize the civil rights movement. The force of the analogy to civil rights was clearly demonstrated in the debate over remedies. To restrict remedies, Bush officials and their business constituents had to argue that disabled individuals did not deserve the same protections afforded other minority groups. Yet in promoting the ADA, the administration had also embraced the rights model, with its implicit analogy between racial minorities and persons with disabilities. Before the key House vote the Democrats stressed emphatically that the two groups should be protected similarly, and when most of the Democrats stuck together they prevailed. Thus the rights model became the central rationale for expanded remedies.

But as the story of Lori Vande Zande suggests, the situation of disabled people is in many respects very different from that of racial minorities—and disability rights laws constitute a major departure from other kinds of civil rights legislation. With the exception of affirmative action programs, neutrality has been a presumed principle of civil rights laws: people should not treat members of one group differently from those of another. In the ADA, however, the requirement is often the opposite; as the Vande Zande case indicates, employers can be charged with discrimination when they do *not* take account of

differences. The concept of reasonable accommodation was lifted from civil rights law governing religious minorities, but in disability law it has been considerably broadened. Indeed while the ADA is called an antidiscrimination law, it is in many respects a prodiscrimination law. Employers and managers of public facilities must be prepared to spend money—sometimes a lot of money—to accommodate each disabled person based on his or her particular disability.

Further, because everyone agrees there are some rational bases for discriminating against disabled people, the ADA inevitably permits some kinds of discrimination.[101] Blind men cannot be cab drivers, mentally retarded people cannot be college professors, paraplegics cannot be football players. The standard of the ADA is whether, with a "reasonable accommodation," the disabled person can perform the "essential functions" of a job. If, as with Vande Zande's desktop computer, the accommodation demanded is deemed unreasonable, then the employer has the right to discriminate against anyone who cannot perform the essential functions of a job without it. Also, much to the displeasure of activists, the ADA leaves many physical barriers intact. Businesses need only remove structural barriers if removal is "readily achievable." Office buildings need not be accessible until they are renovated. And although subways are required to have at least one accessible car in each train, only "key stations" are required to be accessible. Thus the ADA is far from a blanket prohibition against discrimination and structural barriers. Instead, it draws a faint line between types of discrimination and barriers that are socially acceptable or too expensive to remedy and those that are not.[102] Those who drafted the ADA gave judges the job of brightening that line.

Thus the problem of disability is fundamentally different from the problem of race, and the solutions contained in the ADA are far from identical to those in traditional civil rights law. Yet few challenged the concept that the ADA was the analogue of civil rights law. What was it, then, about the rights analogy that so many policymakers found persuasive?

The Rights Model and American Values

Part of the answer lies in the distrust of public programs that is widespread among Americans. The appeal of the rhetoric of rights stems in part from its rejection of the welfare state, a maneuver that

fits the ideological preferences of both disability groups and conservatives. In the case of disability policy, a disadvantaged group did not seem to be requesting social assistance, only affirming a legal right to participate as equally as possible in the mainstream of society.

It is not too much to say that for the Bush administration the ADA became a kind of welfare reform. Its view was that on-budget "programs" reduce people to dependency. The disability activists agreed.[103] Their frustrating experiences with rehabilitation professionals and with disability bureaucracies led them to take a dim view of paternalistic agencies. In addition, the essence of the activists' campaign was to show that the disabled are not needy, pitiable creatures. Demonstrations of need are the typical way groups justify sharing governmental resources. For the activists, demonstrations of need were part of the problem, not the solution. That is why they despised the well-intentioned ministrations of Jerry Lewis, the muscular dystrophy telethon leader. The rights path enabled the disability lobby to reallocate resources without emphasizing neediness. It exploited the magical element of rights: a *need*, something one begs to have fulfilled, can be turned into a just *claim*, something that is owed. Expressing a need seems to infantilize the needer; claiming a right seems adult and dignified.

American activists have attempted, with some success, to export the rights agenda to other nations. But nowhere has the disability rights idea gone farther than in the United States. Maybe this is because most other industrialized societies have larger public sectors and deeper safety nets and attach less stigma to dependency. Perhaps where neediness is deemed less shameful, and self-help less essential (or virtuous), the politics of rights making loses energy. For better or worse, Americans may be exchanging a somewhat lower level of social spending for a higher pitch of rights activism. [104]

Litigation and the Decentralized State

The American emphasis on rights laws may also have something to do with aspects of the U.S. political structure. The appeal of such rights laws as the ADA is that they allow politicians to claim credit for helping disabled people while taking the costs off budget. Politicians, in other words, have a strong incentive to issue mandates such as the ADA, particularly at a time when alternatives are limited by fiscal

constraints. Activists, recognizing this, couch their demands in the form of rights. But why choose to mandate through the courts rather than by direct administration? Bureaucratic programs are subject to the changing priorities of each administration and Congress.[105] The judiciary is less susceptible to political and budgetary vicissitudes of the moment. Funding and staffing of the EEOC or the Justice Department can change, but regardless of what happens to such agencies in the future, disability activists can always have their day in court, so to speak. And in the decentralized, relatively nonhierarchical American court system, there is always a good chance of finding a judge sympathetic to their claims.

Courts also allow activists to force state and local governments to meet national standards. Even federal bureaucracies sympathetic to the goals of activists have no easy way to control independent local authorities, except perhaps by withdrawing federal grants. Litigation offers another method by which to enforce unfunded mandates against lower levels of government. And if the federal government chooses to look the other way when state and local governments fail to comply, the private advocates can force the public miscreants into court. Thus it should be no surprise that U.S. advocates for the disabled have not pressed for the creation of a special administrative body.[106] Incentives associated with the structure of American government have encouraged judicially based enforcement.

Costs of the System

Implementation through the courts entails considerable costs. The shortcomings of the ADA's adversarial legalism—uncertainty, delay, high transaction costs, high penalties, distrust, and scattershot enforcement—have become increasingly apparent in the seven years since the law's enactment.

Uncertainty

ADA enforcement is beset by uncertainty. Key terms in the legislation are vague. The authors of the act and the regulations written afterward tried to define terms such as "reasonable accommodation," "undue hardship," and "qualified individual with a disability." Indeed, the ADA is the most detailed civil rights statute ever written.

But because the drafters found themselves needing flexibility to deal with a wide range of unique cases, they chose to keep much of the language of the law open-ended.

For example, neither the law nor the regulations spell out exactly what conditions are to be considered a disability.[107] Thus this basic question turns out to be a matter of considerable controversy. Through 1995, in sixty lawsuits in which the definition of disability arose as an issue, courts found for the plaintiff in only twelve cases. Often reflecting the narrow constructions of Republican appointees, courts have ruled that people with carpal tunnel syndrome, chemical imbalance, sleep disorders, loss of a lung, cancer, and even multiple sclerosis are not disabled under the ADA.[108] As a result, plaintiffs in employment cases face a dilemma: on one hand, they must prove that they are impaired enough to be disabled, but on the other, they must show they are not so impaired as to be unqualified for a job. Thus verdicts for plaintiffs are relatively few and summary judgment rulings for employers frequent. Of course, what this means for employers is far from clear. Their win rate may reflect settlement practices: the defendants may be settling claims they think they cannot beat in court and contesting those, like the one involving Vande Zande, that they think can be beaten in summary judgment. In any event, in the hands of the judiciary the ADA so far appears to be something of a disappointment for its proponents.

At the same time, in a decentralized court system there are plenty of exceptions to the general pattern, and these cases add a big element of unpredictability. For example, although obesity has generally been determined not to be a disability, a store manager won more than $1 million under the ADA after being fired when he sought medical treatment for his weight problems.[109] The Rhode Island Federal District Court awarded an obese woman $100,000 in compensatory damages in a section 504 employment discrimination claim. The district court concluded that obesity was a disability if it was "caused by systemic or metabolic factors and constitutes an immutable condition," though the First Circuit Court which reviewed the case found that the claim would be valid even if the woman's obesity was deemed mutable.[110]

Uncertainty greatly complicates the decisions of managers and employers under the ADA. For example, there is the especially difficult matter of accommodating people with addictions or mental disor-

ders. A reasonable accommodation might include time off for treatment, flexible schedules, and a restructured job. But how to draw the line between illnesses that need to be accommodated—mood swings, phobias, problems dealing with others—and those that do not is anybody's guess. Uncertain, some employers capitulate to employee demands that others might deem unreasonable. The school superintendent of Hamden, Connecticut, was arrested and pleaded guilty to drunken driving, then disappeared for ten days. When the man was fired from his job, he filed a complaint alleging that the school had discriminated against him on the basis of a disability—alcoholism. In exchange for dropping the charges, the school board agreed to give the superintendent a partial salary and lifetime medical and life insurance benefits.[111] Better, the board reasoned, to pay this price than risk a lawsuit.

One selling point of the ADA was that some of its key concepts, "reasonable accommodation" and "undue hardship," were lifted from section 504 and had already been tested in the courts. This, it was argued, would make the ADA relatively easy to enforce, because many employers already had experience with the law. The assumption behind this argument was that over time legal concepts become more stable and less ambiguous as judges flesh them out. But the supposition is less solid than it seems in a system in which a decentralized, policymaking judiciary is often wrestling with challenges and revisions to legal language. Indeed, as the federal judiciary gradually changes hands, putting more Democrat-appointed judges on the bench, more expansive readings of the ADA are likely. It is not too far-fetched to imagine that the ADA will one day be invoked to bar discrimination against unattractive people or unusually short or tall people because it can be argued that they are "regarded as being impaired." In any case, stability in the law is improbable. The decentralization of American courts, the use of jurors as decisionmakers, and the endless reinterpretation of statutory language ensure that the ADA will remain a floating legal crapshoot for plaintiffs and defendants alike.

Delay

Actually, the ADA was not supposed to be enforced just by the courts. Under the law, aggrieved individuals can first file their complaints with appropriate federal agencies that are supposed to examine and possibly mediate disputes before they can be litigated. But, of course, having opened the flood gates for claims of employment discrimination, ADA mandates (along with other civil rights mandates) soon overloaded these bureaus. The volume of discrimination claims taken by the Equal Employment Opportunity Commission jumped from 62,000 in 1990 to 91,000 by 1994. The U.S. Department of Justice, which handles access discrimination cases, has also been swamped. As of mid-1995, the EEOC was staggering under a backlog of 100,000 civil rights cases of all kinds, including 18,000 unprocessed ADA claims, and was taking nearly a year to process what cases it could.[112] More than one-third of the 2,649 ADA public accommodations cases that had been filed with the Justice Department remained unopened as of mid-1994.[113]

Unable to keep up with, much less resolve, so much of the caseload, the EEOC and the Justice Department have all but encouraged complainants to take their troubles directly to the courts (the Justice Department has decided to concentrate chiefly on joining lawsuits it thinks will set major precedents).[114] But the federal courts are backlogged too. In 1995 the median time required to dispose of civil cases that went to trial in district courts was nineteen months.[115]

The upshot has been a method of redressing grievances that often satisfies no one. Many plaintiffs, like Lori Vande Zande, move on to other jobs before their cases finally get settled. Meanwhile, employers have to nurse ADA-induced legal headaches over many months or even years.

Transaction Costs

Disputes in an adversarial and legalistic system involve heavy transaction costs. Lawyering is required in such a system, and lawyers are expensive. The EEOC complaint process is supposed to provide a route to resolving discrimination claims that is less costly than litigation. Unfortunately, because the agency succeeds in mediating only a small number of nonfrivolous cases, the transaction costs still turn out to be steep when considered as a percentage of awards. By September 1996, 72,687 claims of disability discrimination had been submitted to the EEOC, with total awards reaching $117 million. But in only about 15 percent of the cases had the complainant re-

TABLE 6-1. *Employment Discrimination Cases Filed in Federal Court, 1989–95*[a]

Year	Cases	Year	Cases
1989	9,000	1993	12,221
1990	8,413	1994[c]	15,256
1991	8,144	1995	18,225
1992[b]	10,275		

Source: Administrative Office of U.S. Courts, table CIV 14.

a. Cases filed in twelve-month period ending June 30.

b. ADA regulations for employers of more than twenty-five people effective July 1992. Civil Rights Act of 1991, which expanded the range of remedies in discrimination litigation, effective November 1991.

c. ADA regulations for employers of between fifteen and twenty-four people effective July 1994.

ceived a benefit; the other 85 percent had either been closed for lack of reasonable cause or had become "administrative closures," an omnibus category that indicates that for one of several reasons the case was not fully processed.[116] Thus the vast majority of EEOC claims are either unresolved or are found to be baseless. Nonetheless, each claim that is investigated requires employers to conduct their own investigations, respond to EEOC questions, and prepare a defense based on the evidence.

The costs associated with an EEOC complaint look like a bargain next to the costs of fighting cases out in court, where some of the EEOC's "no reasonable cause" and "administrative closure" cases finally wind up.[117] It is unclear how many cases move from the EEOC into the courts because, incredibly, there are no reliable data on ADA filings. Overall employment discrimination filings under various federal laws have grown from around 8,000 in the years before the disabilities act went into effect to nearly 19,000 in 1995 (see table 6-1). How much of this increase is attributable to the ADA is unclear; a 1995 study by the Justice Department located a total of only 650 privately filed ADA cases.[118]

Cases that go to court doubtless run up many times the expense of an EEOC proceeding. Research on personal injury litigation has found that successful plaintiffs collect on average about half of the total outlay of litigation, with most of the rest going to the lawyers.[119]

Discrimination lawsuits may well involve even higher transaction costs, and ADA lawsuits higher still because of the ambiguous and unsettled nature of the law. When a California arbitrator awarded $1.1 million to one successful ADA plaintiff, his attorney got $800,000 of it.[120] Transaction costs like this can both discourage potential plaintiffs from pursing worthy cases *and* encourage defendants to settle unworthy ones.

Penalties

Opportunities for plaintiffs ballooned when Congress granted them the right to receive awards for pain and suffering and punitive damages. Although such damages in employment cases were capped at $300,000, the threat of even this limited sum transforms the rules of the game. Without such awards, lawyers working on a contingency fee basis would have little chance of collecting a sizable payoff, thus little incentive to take ADA cases. The threat of a large verdict is a hook for obtaining a lawyer and a device for inducing defendants to settle. The device, however, is not always benign; defendants may well settle questionable cases rather than gamble with a jury verdict.

Big wins by plaintiffs make more news than vindicated defendants and so get more attention than their numbers warrant. The first case brought under the ADA by the EEOC resulted in "a defense lawyer's nightmare," a more than $500,000 verdict against an employer who fired a man with brain cancer.[121] (The award was later reduced to $200,000 by a federal circuit court.) Another well-publicized case involved a Coca Cola executive who was fired while being treated for alcoholism. He hit pay dirt: a $7.1 million verdict, though likely to be much less in the end because of the caps.[122] A truck driver won a $5.5 million award when his company failed to transfer him to a new job after he suffered a seizure.[123] In most cases the amounts are not that large, but pain and suffering awards or punitive damages can be a large component of the total, sometimes dwarfing any other compensation.

If damages were awarded in a predictable pattern, their effects might be less unsettling. But given the uncertainties of ADA litigation, the vagaries of U.S. courts, and the use of juries in disability discrimination complaints, large verdicts are guaranteed to strike like lightning, hitting some defendants and missing others.

Distrust and Defensiveness

A vague and costly law can create counterproductive responses from those it seeks to regulate. Defensive employers spend their time and money trying to figure out how to avoid litigation rather than how to promote the ADA's goals. Firms may begin to fear disabled employees, who in turn may fear that if they raise issues of accommodation they will be branded troublemakers. The specter of litigation pits managers and workers against one another.

The ADA has spawned a cottage industry of consultants who advise organizations on how to avoid lawsuits. One article proposes an elaborate formula in which the value of each "essential function" of a job and the importance of various qualifications for the job are rated by evaluators, then used to determine the relative cost of an accommodation. The article suggests capping accommodation costs at somewhere between 10 percent and 15 percent of an employee's annual salary. The percentage is necessarily arbitrary because Congress refused to create a ceiling on ADA accommodation costs. But management is promised that the result "will be an empirically derived, defensible and fair" policy.[124]

The ultimate defensive play among employers is to avoid hiring disabled job applicants. Discrimination in hiring is difficult to prove, so the risk of being sued is low. Perversely, when employers act in the spirit of the ADA and hire disabled people, the threat of litigation rises sharply. Only 10 percent of ADA complaints with the EEOC involve hiring; the rest were brought by current or terminated employees (table 6-2).

Laying off a disabled person who has not performed well can be expensive and treacherous. More than half of all ADA Title I (employment) lawsuits involve terminations, and this is where some of the most outrageous plaintiff claims can be found. The *Wall Street Journal* gathered in one article the stories of a government clerk who claimed she was manic depressive and was fired for repeatedly making rude outbursts; a bus driver with severe diabetes who contested his dismissal even though he was at serious risk of losing consciousness; and a philosophy professor who claimed a mental handicap after he was fired for sexual assault.[125] Plaintiffs in such ludicrous lawsuits almost invariably lose. Often employers obtain summary judgments. But defending against even a ridiculous lawsuit can be time consuming and costly.

TABLE 6-2. *ADA Employment Claims, by Type of Violation Most Often Cited, July 1992–September 1996*

Violation	*Number*	*Percent*
Discharge	37,760	51.9
No reasonable accommodation	20,447	28.1
Harassment	8,718	12.0
Hiring	7,095	9.8
Discipline	5,676	7.8
Layoff	3,407	4.7
Promotion	2,827	3.9
Benefits	2,807	3.9
Wages	2,501	3.4
Rehire	2,457	3.4
Suspension	1,608	2.2

Source: Equal Employment Opportunity Commission, cumulative ADA charge data for July 26, 1992 to September 30, 1996.

Mistargeted Enforcement

A prerequisite for any complaint-based system of enforcement is that citizens know something about the law. From 1990 to 1994 the federal government spent $44 million trying to educate employers, disabled workers, and the public about the ADA.[126] Yet a 1994 survey found only 40 percent of people with disabilities were even aware of the law's existence.[127] Among clients of vocational rehabilitation programs surveyed in 1994, 58 percent were aware of the ADA, but only 8 percent said they knew how to file a complaint.[128] Needless to say, even among those familiar with the law, many lack the resources or ability to put it to use.[129]

A complaint-based system of enforcement favors the claims of the better off. As it happens, 90 percent of those who use the ADA *are already employed*. And the modal ADA case does not involve wheelchair users like Vande Zande but instead people citing bad backs, perhaps, or mental disorders (table 6-3). The law's principal clients, in other words, are people with the common afflictions of middle-aged workers. If the point of the ADA was to bring people with graver impairments like blindness, deafness, or partial paralysis into the work force, the pattern of enforcement seems hardly to comport with that goal.

TABLE 6-3. *ADA Employment Claims, by Type of Impairment Most Often Cited, July 1992–September 1996*

Impairment	*Number*	*Percent*
Back impairment	13,243	18.2
Emotional-psychiatric	9,216	12.7
Neurological impairment	8,201	11.3
Extremities	6,562	9.0
Heart impairment	3,003	4.1
Diabetes	2,605	3.6
Substance abuse	2,437	3.3
Hearing impairment	2,094	2.8
Vision impairment	1,911	2.6
Blood disorders	1,883	2.6
HIV (subcategory)	1,276	1.8
Cancer	1,706	2.3
Asthma	1,266	1.7

Source: See table 6-2. List is incomplete; percentages do not add to 100.

Rights Do Not Create Jobs

The ADA was written on the premise that disabled people were oppressed more by society than by their disabilities. During debate over the ADA, proponents found plenty of evidence, anecdotal and statistical, of prejudice against disabled people. Advocates also were able to document higher levels of poverty, unemployment, and social isolation among the disabled. Missing from the debate, however, was any careful study of the actual determinants of employment among disabled people. ADA proponents too easily assumed that discrimination was the main cause of joblessness among disabled individuals.

If prejudice and structural barriers were in fact the main cause of unemployment among the disabled, the ADA might operate as advertised by its enthusiasts. The weight of the evidence, however, suggests that discrimination, while a factor, is only one source of the employment problem, and the effects of antidiscrimination rules are easily swamped by larger forces, such as changes in the structure of labor markets. Moreover, the problems faced by disabled persons who seek employment are diverse. The vast majority of working-age people with a disability are older adults who have acquired medical conditions such as arthritis, coronary disease, or backaches. Prejudicial discrimination, the evil on which the backers of the ADA concentrated, does not appear to be much of an issue for this group, which constitutes about 80 percent of the working-age disabled population, though antidiscrimination laws can perhaps encourage employers to retain and accommodate these workers as their health deteriorates.[130]

In studies comparing disabled and nondisabled workers, researchers have found that after controlling for health, education, and experience, a wage differential of between 15 percent and 35 percent—which they impute to discrimination—remains. It is not clear, however, what role rights laws would have in narrowing this gap. When Marjorie Baldwin and William Johnson compared salaries in 1972, before federal and state disability laws were enacted, with salaries in 1984, they found the wage gap at best unchanged.[131]

Discrimination is but one difficulty facing seriously disabled people seeking to join the labor force. For example, the loss of public welfare and health benefits is a strong disincentive to employment. Because disabled people tend to have more health problems than the nondisabled, they are often unable to take jobs that offer inadequate health care packages. Moreover, as economist Walter Oi puts it, "Disability steals time." Disabled people on average need more sick days, more time for sleep, more time for getting around, and more time for obtaining medical care. Because of this, many severely disabled persons prefer part-time or flexible jobs, or no job at all, leaving them with lower incomes.[132]

A 1994 Harris survey reflected these concerns. When asked why they were not working, or not working full time, 80 percent of working-age disabled cited low-paying jobs, 58 percent cited the need for medical treatment or therapy, 35 percent cited a lack of work in the field, and 31 percent cited the danger of losing benefits, all matters the ADA does not address. Of the kinds of concerns the ADA does attempt to address, employer attitudes were cited by 40 percent, lack of access to transportation by 24 percent, and accommodations by 16 percent.[133] Thirty percent also reported encountering job discrimination, but clearly this was just one among many obstacles.[134]

Add these facts to the inherent limitations of a court-based enforcement process, and it is not surprising that research generally fails to demonstrate any clear employment bonus from antidiscrimination laws.[135] In a survey of very highly educated disabled people (a population presumably most likely to benefit from the ADA), 39

percent said the law had made no difference *or made it harder* to obtain a job; only 28 percent said it had improved employment prospects, although the respondents did report improvements in other aspects of employment such as accommodation and barrier removal.[136] Meanwhile the ADA does not appear to have brought disabled people from welfare to work, as its proponents had envisioned. Enrollment in the two major disability welfare programs, SSI and SSDI, ballooned in the first several years after passage of the act.[137]

Of course the ADA is still a fairly new law, and it may yet prove beneficial to some groups of disabled people in the labor market, especially those already employed. Experts think the law, supplemented by other changes in disability policy, could help encourage employers to accommodate newly disabled workers. These experts doubt, however, that the law will help those on welfare find employment.[138] Thus it seems very unlikely now, five years after the employment provisions of the ADA went into operation, that the law will have the broad effects optimists had proclaimed. The effects of civil rights laws on the employment of African Americans has also been much debated, but studies demonstrate that the gap between black and white incomes narrowed in the early years of statutes, and even critics have had to acknowledge large employment gains during these years.[139] Nothing comparable can be seen so far in the case of the Americans with Disabilities Act.

One likely indication of the effect of ADA on employment of disabled people is the experience with earlier state and federal disability laws. The regulations for section 504, which governs disability discrimination in federally funded programs and in federal employment, went into effect in 1973. Between 1970 and 1982, when the government work force as a whole grew by a third, the proportion of disabled government workers rose from 9.9 percent to 10.2 percent. But from 1982 to 1987—years in which section 504 was in force—the proportion of government workers with disabilities decreased from 10.2 percent to 9.4 percent, and the absolute number of workers with disabilities dropped by 18 percent. Thus section 504 did not prevent workers with disabilities from bearing more than their share of government downsizing, although people with disabilities in government did fare better than those in other economic sectors undergoing retrenchment.[140]

State disability rights laws proliferated in the wake of section 504. By the time the ADA was enacted, forty-six states had similar laws, many

of them granting extensive antidiscrimination rights and remedies comparable to the ADA.[141] Was this period of rights activism at the state level also a period of employment growth? The answer depends in part on whether one focuses on the whole disabled population or on just those looking for work. Baldwin and Johnson found big gains in employment for disabled men in the labor force between 1972 and 1984. But Edward Yelin found that between 1970 and 1992 the labor force participation rate for disabled people declined 2 percent; for the population as a whole during this same period it increased 12 percent.[142]

Yelin's research concludes that people with disabilities are a contingent labor force, laid off first when industries are in decline but also likely to benefit disproportionately when the economy improves, as they did during the expansionary 1980s. Yelin along with Baldwin and Johnson argue that ADA enforcement needs to be more carefully targeted if it is to have an effect on employment. They urge more careful research on employment levels in various industries and on costs and benefits of accommodations across disabilities and occupations.[143]

Costs of Accommodation

To some, the fact that disability rights laws may not gain employment for more disabled people is irrelevant. The rights of disabled people should not be abridged, whether or not nondiscrimination laws lead "toward independence," as the report by the National Council on the Handicapped prophesied. The argument is powerful if applied to simple prejudice, the kind that stopped Tony Coelho from getting a job simply because he had epilepsy or that prevented Lisa Carl from attending a movie because of her cerebral palsy. But can the argument be stretched to include "structural discrimination" (like the idea that stairs and other physical obstacles or even forty-hour work weeks discriminate against disabled people)? Some disability activists may believe that stairs and other obstacles to people with disabilities are objects of prejudice comparable to Jim Crow signs, but few in Congress who voted for the ADA would agree. The drafters of the ADA recognized as much when they subjected rights of accommodation to rudimentary cost-benefit standards, namely "reasonable accommodation" and "undue hardship."

In the absence of any law, disabled people themselves bear the burden of special accommodations. Given the fact that disabled

people are on average poorer than the rest of society, this is an injustice. But it is not at all clear that shifting the cost of accommodation to another party is necessarily more just.[144] Of course, if one accepts the rights model's thesis that lack of accommodation is a kind of discrimination, the cost of rectifying structural barriers should fall on whoever has discriminated. But if accommodation is a good thing for society—a positive externality—then society as a whole should pay for it explicitly. The rights rhetoric that suffuses the ADA has served as a convenient way of disguising what is, at bottom, a selective off-budget mandate.[145]

Current law provides only a minimal subsidy for accommodation expenses. Small businesses get a 50 percent tax credit of up to $5,000 to defray ADA compliance costs. Businesses of any size can deduct up to $15,000 each year for some types of ADA costs.[146] These provisions would be sufficient if the cost of accommodations were minimal. Studies suggest that the costs of simple physical accommodation under title I, the employment section of the law, *average* $500 or less.[147] The estimated costs of accommodations, however, need to take account of much more than removing physical barriers. Changing working hours, eliminating nonessential functions from a job, allowing employees long absences during illness, and so on, ought to be factored in too. Broadly construed, the economic cost of accommodation is not likely to be trivial.

The costs of title III, the section governing public accommodations, will undoubtedly soar. The immediate mandate of title III is that public facilities be made accessible wherever "readily achievable."[148] As with "reasonable accommodation," this phrase will receive a variety of exegeses from the courts, but in the short term the judiciary is not likely to take an expansive interpretation. Much more expensive will be title III mandates for full accessibility in new construction and alteration of existing facilities. All workplaces will be required to meet these standards unless they are deemed "structurally impracticable," a very high hurdle.[149] One business consultant has estimated the total cost of accessibility standards for office buildings alone at $45 billion. The American Hospital Association estimates its costs at $20 billion.[150] No research has been performed on the aggregate costs of the ADA accessibility requirements, but as these figures indicate, they are potentially huge. Moreover, the costs will fall unevenly and will be largely unfunded. In some cases, they

may well deter businesses and nonprofit agencies from renovating or building new facilities.

Title II of the ADA also hits state and local governments with a big bill. In the medium-sized city of Aurora, Colorado, just installing curb cuts will cost $30 million. The U.S. Conference of Mayors estimates that cities will spend $2.2 billion to comply with the ADA from 1994 to 1998; the National Association of Counties has estimated that county governments will spend $2.8 billion over the same period.[151] Costs to states are probably larger.[152] The Federal Transit Administration estimates that in the 1990s transit agencies will spend $65 million annually to make buses and rail cars accessible, $130 million to make stations accessible, and $700 million to provide additional paratransit services.[153]

If government agencies balk at these costs, they will be hauled into court, where judges will decide what exactly is an "undue burden." That task in itself will pose difficulties. But at least the costs of title II accommodations will be widely shared and not pushed onto individual businesses, unlike those under titles I and III.

Rights Can Be Messy

Under the rights model, costs and benefits are not to be weighed; discrimination is simply considered immoral and intolerable, whatever the price. That was the logic behind the first draft of the ADA, the "flat earth" version. But if one does not accept the rights model, costs and benefits matter a lot, and laws that mandate great infrastructure costs for a minimal social return are troubling. The ADA departs significantly from a pure rights model by providing defenses such as "undue burden," implying that costs are an issue. Thus the law looks like certain environmental statutes, which combine strong regulatory standards with various statutory hedges. Enforcement of the ADA may well end up looking like enforcement of the Clean Air Act: courts that are sympathetic to the regulations will focus on the standards, while courts that are sympathetic to the regulated will focus on how to hedge. Thus a kind of ad hoc, piecemeal, cost-benefit calculus will be conducted by the federal judiciary.[154]

This poses at least two basic problems. First, because the courts never speak with one voice, the law will receive multiple interpretations. Second, judicial deliberation about costs and benefits will

sometimes become bizarre because courts lack the capacity for systematic policy evaluation.

Alternative Policies

The ultimate goal of the framers of the ADA was to bring disabled people into the mainstream of American life. To advance this public purpose, however, the act emphasizes various rights to be enforced through costly and unpredictable litigation. Is there an alternative to this litigious scheme? A brief comparison with the disability policies of some other Western nations is useful here.

Some Foreign Contrasts

The U.S. approach to disability policy has remained unusual. Many nations have embraced the U.S. disability movement's goal of freedom and independence for disabled people, but few have sought to reach that objective through antidiscrimination laws, and none has provided the ADA's extensive right to litigate claims. The dominant approach in western Europe has been the use of quotas (table 6-4). Employers are required to hire a certain percentage of disabled workers, usually drawn from a registry. The quotas are often underenforced and the targets rarely achieved, yet disability groups abroad typically favor retaining them.[155]

The German quota program is generally viewed as the most successful. Begun after the First World War, it currently sets a 6 percent target for employers with sixteen or more employees to employ severely handicapped people who are able to work only 50 percent of the time or less. Those employers who fail to reach the target must pay a special "compensation contribution" of DM 200 each month for every unfilled place in the quota, a levy that is used, in turn, to promote the employment of disabled people. Most employers pay the levy rather than fulfill the quota, but the larger employers often meet it. In 1982 employment of the handicapped reached 5.9 percent, but by 1992 it had slipped to 4.3 percent.[156] Research suggests that the German system is effective in retaining workers who have become disabled during their working lives, but less effective in recruiting disabled persons not already in the labor market.[157]

A second approach, increasingly common in western Europe, is to subsidize employers for hiring disabled people or to subsidize the disabled self-employed people themselves. In some nations this subsidy comes in a lump sum or is time limited; in others it is based on an assessment of lost productivity and continues indefinitely. Many nations also give grants for changes in the work environment, some of them far more extensive than the U.S. tax credits. Denmark's program, which reimburses employers for the costs of personal assistants, such as sign language interpreters, is especially generous.[158]

TABLE 6-4. *Disability Employment Policies in Sixteen Nations, 1993*

Country	*Quotas*	*Permanent employer subsidies*	*Antidiscrimination laws*	*Accommodation subsidies*
Australia	. . .	. . .	X	X
Belgium	[a]	X	. . .	X
Britain	. . .		X	
Canada	[b]	. . .	X	X
Denmark	. . .	X	. . .	X
France	X	X	[c]	X
Germany	X	X	. . .	X
Greece	X	. . .	. . .	X
Ireland	X[d]	X	. . .	X
Italy	X	X[e]	. . .	X[e]
Luxembourg	X	X	. . .	X
Netherlands	X	. . .	. . .	. . .
Portugal	. . .	. . .	. . .	X
Spain	X	. . .	. . .	X
Sweden	. . .	X	. . .	X
United States	. . .	. . .	X	X

Source: Neil Lunt and Patricia Thornton, *Employment Policies for Disabled People* (British Employment Department, 1993).

a. Quota law on books is not enforced.

b. Employers of more than one hundred people are required to file an annual report detailing representation of four groups, including disabled people, and may be investigated if they are below employment targets.

c. Criminal penalties for discrimination on the basis of disability; civil action for quota violations.

d. Quotes in government employment only.

e. Some regions provide subsidies; no national program.

Besides quotas and direct subsidies, most economically advanced nations still rely predominantly on rehabilitation programs and welfare payments to improve the lives of the disabled. Disability discrimination laws have found a place mainly in Anglo-Saxon nations: Australia, Canada, New Zealand, Great Britain, and, most aggressively, the United States. Australia and Canada have national and provincial disability laws that resemble the Americans with Disabilities Act. Their laws require employers and managers of facilities and programs to provide "reasonable accommodation," although this appears to be a much more limited requirement than it is in the United States.[159]

But the Australian and Canadian laws differ from the ADA in a key respect: they are enforced by investigative boards and tribunals rather than courts.[160] In Ontario, for example, a commission investigates and attempts to settle complaints. If conciliation is unsuccessful, a board of inquiry is instated. The board hears the complaint in an informal proceeding and has broad power to issue injunctions to force compliance with the law. In addition, the board may issue monetary awards, including lost wages and benefits. However, "general damages" for mental anguish are capped at $10,000. The board's decision may be appealed to the courts, but for the most part grievances are redressed without litigation.[161]

The latest to adopt a disability rights law is Britain. The Disability Discrimination Act outlaws discrimination in employment and access to facilities. The British law does not appear to sweep as broadly as the ADA. The law allows complainants in employment cases to bring their claims to an industrial tribunal; public accessibility cases can be brought to court. Pain and suffering damages are allowed.[162] The struggle over disability rights in Britain offers a fascinating contrast to that in the United States. British disability activists were dissatisfied with the Disability Discrimination Act because it lacked a bureaucratic agency with the power and resources to enforce the law. Some British business interests also argued for a "one-stop shop," a disability commission that would coordinate implementation.[163] In the United States, neither disability activists nor business groups considered the creation of such an agency. The British story suggests that even where disability rights laws have come closest to the U.S. model, activists have preferred administrative remedies to legal wrangling.

The Agency Alternative

For better or worse, it is highly unlikely that the United States would adopt either the quotas or the more extensive subsidy schemes of western Europe, whatever their merits.[164] These programs are part of a form of government intervention in the labor market resisted in the United States. Nor is the United States likely to abandon the basic commitment to accommodating disabled people through the ADA and other disability rights laws. Nonetheless, international comparisons may suggest ways the United States might better implement the laws it has. Compared with other nations, even those with rights laws, the U.S. policy appears to be less flexible in accommodating mandates, less willing to distribute transparently the costs of such mandates, and, above all, much more willing to take quarrels to court. Reducing adversarial legalism in disability policy requires stepping away from judicial enforcement and toward administrative implementation.

The elements of such a shift might include:

1. *Creation of a New Disability Agency.* The agency would administer all the national disability rights laws, thus bringing together the scattered enforcement programs of various federal agencies. This consolidation would reflect the fact that disability discrimination laws pose a unique set of issues and hence should not be treated as just another brand of civil rights law.

2. *Elimination of Private Rights of Action.* The agency should be in charge of all enforcement; no private litigation would be allowed. Nor would the agency be obligated to act on any complaint whatsoever. The large volume of frivolous or opportunistic cases would be screened out. To do this, the agency ought to be funded more generously than the operations it would replace. The goal of the agency in enforcing disability laws should be to achieve integration flexibly and at the lowest cost to society. The agency, for example, would be explicitly charged with conducting research to target particular industries or types of facilities where discrimination is particularly egregious or where employment and accessibility gains can be achieved at least cost.[165]

3. *Strict Limits on Judicial Review of Agency Decisions.* The agency should be permitted to develop industry-specific regulations fleshing out phrases such as "reasonable accommodation" and "undue

burden" in close consultation with disability groups and businesses. Again, in developing regulations the objective should be to provide accessibility at least cost. Judicial review of agency rule making and enforcement priorities should be limited so that only actions that clearly exceed the bounds of the agency's statutory authority could be overturned.

4. *On-Budget Subsidies for Mandated Accommodations.* A partial or full tax credit for the costs of all mandated accommodations could prove extremely expensive, especially if the credit is extended to construction and renovation expenses under title III. But budgeting such costs explicitly might improve compliance and make the mandates more equitable, or at least force taxpayers to decide how much disability remediation is worth buying.

Politically, to be sure, these proposals seem farfetched, since they would undoubtedly antagonize not only disability activists and conservative supporters of the ADA, but also the law's harshest critics. All of these groups have reasons to oppose a bureaucracy of such scope. In fact, the reasons Americans are so attracted to court-based enforcement, and thus so prone to adversarial legalism, are all the more clear once this administrative option is imagined. Conservatives supported the ADA in part because they wanted to avoid creating a new bureaucracy or new budgetary commitments. Their argument was that the ADA would not enlarge the welfare state; if anything, the law would move people *off* welfare. It seems implausible that these visionaries would now favor the creation of a powerful, centralized regulatory bureaucracy or the added expenditure of subsidizing accommodations.

Nor would advocates for the disabled be charmed by the idea of an agency. Their bad experiences with administrative enforcement of section 504, together with their commitment to independence from bureaucrats and various paternalistic helpers, would incline them to be skeptical. Moreover, unlike their counterparts in the British disability movement, U.S. activists might conclude that an enforcement agency would be easily intimidated and vulnerable to budget cuts. Indeed, the underfunding of the EEOC and the other agencies charged with enforcing the ADA seems to vindicate this view. Better, it would seem, to put enforcement in the hands of hundreds of courts and thousands of litigants, safe from the clutches of unsympathetic and budget-conscious politicians.

Finally, many of the ADA's critics are not likely to be impressed with the agency alternative either. If one objects to the large infrastructure expenses and accommodation rights imposed by the ADA on the grounds of pure economic efficiency, a scheme that simply shifts enforcement from courts to a new bureaucracy and costs from business to the government solves nothing.

Despite all the complaints about adversarial legalism in American public policy, and despite all the costs it imposes, there is not much of a constituency for limiting the phenomenon. As familiar as all sides are with the dangers and difficulties of litigation, Americans are even more concerned about the dangers of big-time bureaucratic regulation.

Conclusion

Disability activists seek to enable disabled people to participate fully and equally in all aspects of day-to-day life. In the United States the disability movement has adopted rights and litigation, what I have called the tools of adversarial legalism, as the primary means to this end. This choice has been influenced by the individualistic and antistatist cast of American political culture and by the fragmented structure of U.S. government, both of which have led U.S. reformers of every kind to look to the courts for intervention.

But litigation is a clumsy and expensive tool, often abused. Thus rights-based disability policies like the ADA are frequently unfair, intrusive, uncertain, and inefficient. The cost of adversarial legalism can be seen in many areas of U.S. public policy. Environmental policy is notoriously beset by it, as regulators and regulatees get buffeted by litigation.[166] Pitched court battles between industry and government engulf occupational health and safety rules.[167] Personal injury litigation delivers uneven, unpredictable compensation to victims at often inordinate cost. It is hard to put a price tag on these problems, unlike the more obvious costs of the manifold welfare and labor regulations of western Europe. All the same, America's adversarialism limits the effectiveness of some U.S. domestic social policies.

The Americans with Disabilities Act exemplifies the limitation. This ambitious social experiment was trumpeted as a means of bolstering the competitiveness of the U.S. economy by facilitating job opportunities and accommodations for handicapped citizens. The principal economic consequence of this project, however, has been to

stimulate additional lawsuits in an already litigious U.S. labor market, while adding few disabled employees to the work force. The ADA's message of freedom and independence for people with disabilities is morally uplifting.[168] In the end, this may be all that matters. But for now, as a substantive solution to the needs of disabled people, much less to the exigencies of many U.S. businesses, the law disappoints.

Notes

1. *Congressional Record*, daily ed, September 7, 1989, p. S10714.

2. Cary Segall, "Disabled Woman Suing State," *Wisconsin State Journal* (March 9, 1993), p. 1D; and Elizabeth Brixey, "Access Always on Some Minds," *Wisconsin State Journal* (December 10, 1994), p. 1C. To Judge Richard Posner, who wrote an opinion in the case for the Seventh Circuit Court of Appeals, Vande Zande's claim was, if not puzzling, at least unwarranted. In upholding a district court decision, Posner concluded that the accommodations she had asked for were unreasonable and granted the defendant summary judgment in *Vande Zande* v. *Wisconsin*, U.S. Court of Appeals, Seventh Circuit, January 5, 1995; see *National Disability Law Reporter*, vol. 6 (February 16, 1995), pp. 87–91. Thus the case never reached trial. Vande Zande quit the job and has since been appointed by President Clinton to the Architectural Barriers and Transportation Compliance Board, a federal agency that creates disability accessibility standards.

3. 42 US.C. 12112.

4. 42 US.C. 12131, 12148, 12181, 12182, 12183. In addition, title IV of the ADA mandates that phone companies provide teletype translators so that deaf people can communicate with the hearing.

5. Damages available under Title I are tied to the remedies available to plaintiffs under the *Civil Rights Act of 1964*. 42 U.S.C. 12117.

6. 42 U.S.C. 12131, 12181, 12182, 12183, 12188.

7. Robert A Kagan, "Do Lawyers Cause Adversarial Legalism?" *Law and Social Inquiry*, vol. 19 (Winter 1994), p. 3.

8. *Congressional Record*, daily ed., September 7, 1989, p. S10714.

9. Indeed, in this case the outcome came relatively quickly, since Vande Zande's case never reached trial. If she had won the motion for summary judgment, the case might have dragged on for several more years, with pretrial motions, a jury trial, and possibly an appeal. Segall, "Disabled Woman Suing State," p. 1D.

10. Jane West, *Federal Implementation of the Americans with Disabilities Act, 1991–94* (New York: Milbank Memorial Fund, 1994), p. 11.

11. The figure of 49 million is taken from the 1991–92 Census Bureau Survey of Income and Program Participation cited in Peter David Blanck, "Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990–93," *Iowa Law Review*, vol. 79 (1994), p. 855, n. 8. A more appropriate measure of disability, according to some researchers, is the number of people who are limited in their abilities to perform everyday activities. This approach generates an estimate of 36 million, including 2 million people in institutionalized settings. See Mitchell P. LaPlante, "The Demographics of Disability," *Milbank Quarterly*, vol. 69, supplement 1/2 (1991), p. 65.

The number of Americans between the ages of sixteen and sixty-four with a "work disability" is estimated (based on 1995 census data) to be 16.9 million, or 10.1 percent of the working-age population. Mitchell P. Laplante and others, "Disability and Employment," *Disability Statistics Abstract*, vol. 11 (1996), p. 1.

12. 42 U.S.C. 12102.

13. For disallowance of history of treatment for mental illness see testimony of John L. Wodatch, Justice Department, U.S. Senate Subcommittee on Disability Policy, July 26, 1995. On insurers and AIDS benefits see "Ruling May Stop Insurers from Limiting AIDS Benefits," *San Francisco Chronicle*, October 19, 1994, p. E3. On blind people and juries see 816 F. Supp. 12 (D.D.C. 1993).

14. Congress banned discrimination against the handicapped in civil service in 1964. Five states adopted similar bans; a few even had nondiscrimination laws in certain job categories, particularly teaching. See Jacobus tenBroek, "The Right to Live in the World: The Disabled in the Law of Torts," *California Law Review*, vol. 54 (1966), p. 846.

Access for mobility-impaired people was raised as an issue in the 1950s by paralyzed veterans who fought for accessible facilities at Veterans Administration hospitals. In 1959 several disability groups met with the American Standards Association to agree on standards for architectural accessibility. These were adopted by many states in the mid-1960s as part of building accessibility laws and eventually by the federal government for its buildings. See Rita Varela, "Changing Social Attitudes and Legislation Regarding Disability," in Nancy M. Crewe, Irving Kenneth Zola and Associates, eds., *Independent Living for Physically Disabled People* (San Francisco: Jossey-Bass, 1983), pp. 28–48.

These early laws were generally enforced by administrative mechanisms. An exception was Wisconsin's accessibility law, which created a private right of action. See tenBroek, "Right to Live in the World," p. 863.

15. Richard K. Scotch, *From Good Will to Civil Rights:Transforming Federal Disability Policy* (Temple University Press, 1984), p. 36.

16. Edward D. Berkowitz, "The American Disability System in Historical Perspective," in Edward D. Berkowitz, ed., *Disability Policies and Government Programs* (Praeger, 1979), pp. 44–45.

17. Gerben DeJong, "The Movement for Independent Living: Origins, Ideology and Implications for Disability Research," Medical Rehabilitation Institute, Tufts–New England Medical Center, March 1979, pp. 32–37.

18. DeJong, "Movement for Independent Living," p. 60.

19. Edward D. Berkowitz, *Disabled Policy: America's Programs for the Handicapped* (Cambridge University Press, 1987), p. 203.

20. Jacobus tenBroek, "The Disabled in the Law of Welfare," *California Law Review*, vol. 54 (1966), p. 809; tenBroek,"The Right to Live in the World," p. 841; and Leonard Kriegel, "Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro," *American Scholar*, vol. 38 (1969), pp. 412–30.

21. In *The Pennsylvania Association for Retarded Children et al* v. *Commonwealth of Pennsylvania et al.*, 343 F. Supp. 279 (1972), a federal court concluded that the plaintiffs had a "colorable" claim under both the equal protection clause and the due process clause in approving a settlement reached between

the parties, but the decision did not reach the issue of suspect or semisuspect status. In *Mills et al.* v. *Board of Education of the District of Columbia et al.*, 348 F. Supp. 866 (1972), the court found a violation of the due process clause because the District was excluding mentally retarded children from schooling, but the decision also rested on local statutes. These cases paved the way for the 1975 passage of the Education of All Handicapped Children Act, which guarantees all children with disabilities a "free, appropriate education."

The clearest discussion of the place of disabled people in constitutional law came much later in *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1984). Here the Supreme Court ruled that the mentally retarded were not a suspect class deserving of special protection under the Fourteenth Amendment.

22. Interviews with Evan Kemp Jr. and Bob Funk, December 16, 1993, Washington D.C., and Lex Frieden, April 21, 1994, Washington, D.C. Funk contends that the civil rights model might not have come to prominence if not for section 504 because the proponents of independent living were interested mainly in creating a more effective model of service delivery. But David Pfeiffer, a Massachusetts-based disability activist, contends disability rights was an important focus of the disability movement even before section 504 (personal communication, May 6, 1996).

Frieden notes that in Berkeley one could easily see the distinction between the two parts of the disability movement: "CIL (the Center for Independent Living) was on one side of Telegraph Avenue and DREDF (the Disability Rights and Education Defense Fund) was on the other side of the street. And a lot of times that street was pretty wide. There were differences of opinion even on Telegraph Avenue on where the movement should go, and there still are." In contrast, Arlene Mayerson, a top DREDF attorney, sees little distinction between the independent living movement and the civil rights movement. Interview with Mayerson, June 2, 1994, Berkeley, California.

23. Robert A. Katzmann, *Institutional Disability: The Saga of Transportation Policy for the Disabled* (Brookings, 1986).

24. 87 Stat. 355.

25. Katzmann, *Institutional Disability*, pp. 50–54; and Robert L. Burgdorf Jr., *Disability Discrimination in Employment Law* (District of Columbia School of Law, 1995), p. 275.

26. Katzmann, *Institutional Disability*, pp. 56–57.

27. Scotch, *From Good Will to Civil Rights*, pp. 150–51.

28. Edward V. Roberts, "Into the Mainstream: The Civil Rights of People with Disabilities," *Civil Rights Digest*, vol. 11 (Winter 1979), pp. 23–24.

29. Susan Olson has noted that for blind and deaf people there are inherent communication problems for working together. "Perhaps because of this and because they organized earliest and separately, deaf and blind persons have been among the slowest to acknowledge a need for cross-disability cooperation." She commented that the bylaws of the National Federation of the Blind went so far as to prohibit coalitions with other disability groups. Susan M. Olson, *Clients and Lawyers: Securing the Rights of Disabled Persons* (Westport, Conn.: Greenwood Press, 1984), p. 48.

30. Robert Katzmann concludes that "it is questionable whether the [American Coalition for Citizens with Disabilities] could have been born without the rights premise. If government defined federal policy toward the disabled as a matter of claims involving the allocation of finite resources, then presumably each of the many groups within the ACCD would have competed with the others to secure funds for its own constituency." Katzmann, *Institutional Disability*, p. 111.

31. Robert Funk, "Disability Rights: From Caste to Class in the Context of Civil Rights," in Alan Gartner and Tom Joe, eds., *Images of the Disabled, Disabling Images* (Praeger, 1987), p. 7.

32. Frank Bowe, *Handicapping America: Barriers to Disabled People* (Harper and Row, 1978), p. 224. See also Harlan Hahn, "Introduction: Disability Policy and the Problem of Discrimination," *American Behavioral Scientist*, vol. 28 (January-February 1985), pp. 293–318.

33. Evan Kemp Jr., "Aiding the Disabled: No Pity, Please," *New York Times*, September 3, 1981, p. A19. Harlan Hahn, an academic who has written extensively on disability issues, sees a sinister side to paternalism because it "enables the dominant elements of a society to express profound and sincere sympathy for the members of a minority group while, at the same time, keeping them in a position of social and economic subordination." See "Disability and Rehabilitation Policy: Is Paternalistic Neglect Really Benign?" *Public Administration Review*, vol. 42 (July-August 1982), pp. 385–89.

34. Frank Bowe, *Rehabilitating America: Toward Independence for Disabled and Elderly People* (Harper and Row, 1980), p. xi; and Bowe, *Handicapping America*, p. 171.

35. Kemp, "Aiding the Disabled," p. A19.

36. Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (Times Books, 1993), pp. 23–24.

37. John Gliedman and William Roth, *The Unexpected Minority: Handicapped Children in America* (Harcourt Brace Jovanovich, 1980), p. 34. Renee Anspach sees in disability activism a kind of identity politics; "From Stigma to Identity Politics: Political Activism among the Physically Disabled and Former Mental Patients," *Social Science and Medicine*, vol. 13A (1979), pp. 765–73.

38. *APTA* v. *Lewis*, 655 F.2d 1272 (D.C. Cir. 1981).

39. Shapiro, *No Pity*.

40. Felicity Barringer, "How Handicapped Won Access Rule Fight," *Washington Post*, April 12, 1983, p. A10.

41. Interview with C. Boyden Gray, December 13, 1993, Washington, D.C.; and Shapiro, *No Pity*, p. 120.

42. Interview with Bob Funk and Evan Kemp Jr., December 16, 1993, Washington, D.C.

43. Interviews with Funk, Gray, and Kemp.

44. Katzmann, *Institutional Disability*, p. 125. David Pfeiffer, a disability activist and historian of the disability movement, argues that the Reagan administration's turn on section 504 arose from its interest in the two "Baby

Doe" cases, which involved controversy over whether to provide lifesaving medical treatments to disabled babies. The administration found section 504 useful in arguing that treatment should be provided (personal communication, May 6, 1996).

45. Interview with Pat Wright, executive director, DREDF, February 3, 1994, Washington, D.C.

46. Interviews with Funk, Gray, and Kemp.

47. National Council on the Handicapped, *Toward Independence* (February 1986), p. iv.

48. Shapiro, *No Pity*, p. 108.

49. Justin W. Dart Jr., "The ADA: A Promise to Be Kept," in Lawrence O. Gostin and Henry A. Beyer, *Americans with Disabilities Act: Rights and Responsibilities of All Americans* (Baltimore: Paul H. Brookes, 1993), p. xxi.

50. Interview with Justin Dart Jr., June 18, 1994, Washington, D.C.

51. Ibid.

52. Dart, "The ADA: A Promise to Be Kept," p. xxii.

53. Interview with Dart.

54. National Council on the Handicapped, *National Policy for Persons with Disabilities* (1983), p. 7.

55. Interview with Robert Burgdorf Jr., February 23, 1994, Washington, D.C.

56. *Toward Independence*, p. 1.

57. Ibid., p. 12.

58. Ibid., p. 1.

59. Ibid., p. 2. In her transmittal letter to President Reagan, Parrino argued that if the recommendations of the council were implemented, "current Federal expenditures for disability can be significantly redirected from dependency-related approaches to programs that enhance independence and productivity of people with disabilities, thereby engendering future efficiencies in Federal spending." Ibid., p. ii.

60. Ibid., p. 8.

61. Ibid., p. 8.

62. Ibid., p. 8.

63. Ibid., pp. 20–21.

64. Louis Harris and Associates, *The International Center for the Disabled Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (March 1986), pp. 23–51.

65. National Council on the Handicapped, *On the Threshold of Independence: Progress on Legislative Recommendations from* Toward Independence (January 1988), pp. 25–39.

66. S2345, *Congressional Record*, April 28, 1988, p. S5089; and HR4498, *Congressional Record*, April 29, 1988, p. H2757.

67. Julie Kosterlitz, "Joining Forces," *National Journal* (January 28, 1989), p. 194; and United States Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988), p. 123, reproduced in House Committee on Education and Labor, *Legislative History of The Americans with Disabilities Act*, vol. 2 (December 1990), p. 981.

68. Shapiro, *No Pity*, p. 125.

69. Phil McCombs, "The Distant Drum of C. Boyden Gray," *Washington Post*, March 31, 1989, pp. D1, D8; and interview with Gray, December 13, 1993.

70. Interview with Bill Roper, former deputy assistant to the president for domestic policy, June 9, 1994, Atlanta, Georgia. Roger Clegg, a deputy assistant attorney general in the civil rights division, remembers that he "expressed fundamental misgivings" but recalls only limited public discussion in the White House over the merits of the ADA. "The point was made early on that the president had made a promise during the campaign that he supported the ADA, and so once you know that . . . there's not much point in continuing to oppose it." Interview with Roger Clegg, May 17, 1994, Washington, D.C.

71. Interview with Robert Silverstein, chief counsel, Subcommittee on Disability Policy, December 16, 1993.

72. Paula Yost, "Tedious Meetings, Testy Exchanges Produced Disability Rights Bill," *Washington Post*, August 7, 1989, p. A4.

73. Interview with Chai Feldblum, March 21, 1994, Washington, D.C.; and interview with Pat Wright, February 3, 1994.

74. Sara D. Watson, "A Study in Legislative Strategy: The Passage of the ADA," in Jane West, ed., *The Americans with Disabilities Act: From Policy to Practice*, p. 29.

75. Interview with Arlene Mayerson, Disability Rights Education and Defense Fund, June 2, 1994, Berkeley, California.

76. Lobbying on the ADA's transportation section was intense. Controversy over the transportation sections represented yet another round in a long debate among mass transit system officials, bus and train companies, and disability activists over how disabled people should be accommodated. Robert Katzmann traces this debate in his book *Institutional Disability* (Brookings, 1986) and updates it through to the Americans with Disabilities Act in Katzmann, "Transportation Policy," *Milbank Quarterly*, vol. 69, supplement 1/2 (1991), pp. 214–37.

77. NFIB never disagreed that disabled people should have "the same protections currently contained in other federal civil rights laws prohibiting discrimination on the basis of race, sex, national origin, and religion," as one representative put it. But NFIB argued that the ADA was in fundamental respects different from other civil rights laws because it covered a broader scope of private businesses, required affirmative and possibly costly actions on the part of business, had stiffer remedies, and was more adversarial and legalistic in tone. Thus, far more compromise was necessary, NFIB argued, to make the bill workable and fair. See statement of Sally Douglas, National Federation of Independent Business, Senate Subcommittee on the Handicapped, Hearings on the Americans with Disabilities Act of 1989, May 10, 1989.

78. Interview with John Motley, director of federal government relations, National Federation of Independent Business, June 9, 1994, Washington, D.C.

79. Sara D. Watson makes this point in "Study in Legislative Strategy," pp. 25–34.

80. Interviews with John Tysse, lobbyist, Labor Policy Association, May 27, 1994, Washington, D.C.; Wendy Lechner, legislative representative, National Federation of Independent Business, July 29, 1994; Lawrence Lorber, lobbyist, National Association of Manufacturers and ASPA, May 19 and May 26, 1994, Washington, D.C.; and Bill Roper, June 9, 1994.

81. Quoted by Senator Tom Harkin in *Americans with Disabilities Act of 1989*, Hearings before the Senate Subcommittee on the Handicapped and Committee on Labor and Human Resources, 101 Cong 1 sess. (Government Printing Office, 1989), p. 23.

82. Information on section 1981 is from "Compromise Civil Rights Bill Passed," *1991 Congressional Quarterly Almanac* (Congressional Quarterly, 1991), pp. 251–52, and "1991 Civil Rights Law Provisions," *1991 Congressional Quarterly Almanac*, pp. 258–61.

83. Testimony of Richard L. Thornburgh, attorney general of the United States, before the Senate Subcommittee on the Handicapped, Committee on Labor and Human Resources, *Americans With Disabilities Act of 1989*, June 22, 1989.

84. 42 U.S.C. 12188.

85. Letter from Attorney General Richard Thornburgh, March 12, 1990, quoted in *Congressional Record*, daily ed., May 29, 1990, p. H2613.

86. *Congressional Record*, daily ed., September 7, 1989, p. S10714.

87. At a hearing in which one NFIB member attacked several provisions in the bill, Bartlett was critical: "It becomes at this point extremely essential, extremely helpful and necessary for the NFIB or your business or others who have objections to give us your objections in the form of objections. That is to say, 'Here is what the Senate-passed bill says, here is why we don't like these words, and here is a suggestion to alter those words.' I am not suggesting you didn't give us good testimony, you did, but your testimony doesn't lead us anywhere." House Subcommittees on Employment Opportunities and Select Education, Committee on Education and Labor, *Americans with Disabilities Act of 1989*, September 13, 1989.

88. *Congressional Record*, daily ed., May 17, 1990, p. H2472. A ceiling on reasonable accommodations amounting to 10 percent of an employee's annual wages was defeated on the House floor (p. H2475).

89. *The Americans with Disabilities Act: A Practical and Legal Guide to Impact, Enforcement, and Compliance* (Washington: Bureau of National Affairs, 1990), p. 44; and "Landmark Disability Bill Closer to Enactment," *1989 CQ Almanac* (Congressional Quarterly, 1989), p. 252.

90. "Bush Vetoes Job Bias Bill; Override Fails," *1990 CQ Almanac*, pp. 462–73.

91. Letter from Thornburgh in *Congressional Record*, daily ed., May 22, 1990, p. H2613.

92. Interviews with Feldblum and Silverstein.

93. *Congressional Record*, daily ed., May 22, 1990, pp. H2612, H2613.

94. Ibid., p. H2615.

95. Ibid., p. H2616.

96. "House Votes," *Congressional Quarterly Daily Edition*, May 26, 1990, p. 1688.

97. "Remarks on Signing the Americans with Disabilities Act of 1990," *Personal Papers of the Presidents*, vol. 7, July 26, 1990, pp. 1067–68.

98. "1991 Civil Rights Law Provisions," p. 258.

99. Testimony of Lisa Carl, Betty Corey, and Emory Corey, *Americans with Disabilities Act of 1989*, Hearings, pp. 101–05.

100. Testimony of Tony Coelho, Senate Subcommittee on the Handicapped and House Subcommittee on Select Education, *Americans with Disabilities Act of 1988*, September 27, 1988.

101. In the Harris survey commissioned by the National Council on the Handicapped, disabled people were asked which was the greater obstacle to getting a better job, employer reactions to their disability or the disability itself. Seventy-one percent said that the disability was the greater barrier; only 18 percent thought employer reactions were more important. Thus the respondents disagreed with a central tenet of the rights model, that socially imposed barriers limit disabled people more than their physical impairments. Louis Harris and Associates, *ICD Survey of Disabled Americans*, March 1986, p. 79.

102. Some of these divergences are discussed in Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, Clearing House publication 81 (September 1983), pp. 141–58; and West, "Evolution of Disability Rights," pp. 3–15.

103. Interview with C. Boyden Gray; and Dart, "ADA," p. xxv.

104. Arnold Heidenheimer and colleagues, summarizing the literature on comparative public policy among developed nations, suggest that the feudal legacies of continental Europe and Japan have made these nations more statist than the United States and Britain, where "national bureaucracies . . . were forced to accommodate themselves to preexisting forms of popular political participation." Arnold J. Heidenheimer, Hugh Heclo, and Carolyn Teich Adams, *Comparative Public Policy: The Politics of Social Choice in America, Europe and Japan*, 3d ed. (St. Martin's Press, 1990), p. 22. The welfare state in the United States is both smaller and different in kind from those in most other economically advanced nations because it relies more on individually earned benefits and on means-tested benefits that stigmatize the receiver. Gosta Esping-Anderson groups the United States with Britain as a "social-assistance" welfare state whose practices "strengthen the market since all but those who fail in the market will be encouraged to contract private-sector welfare." *The Three Worlds of Welfare Capitalism* (Princeton University Press, 1992), p. 22. See also Heidenheimer, Heclo, and Adams, *Comparative Public Policy*, p. 249. From 1960 to 1986 the United States spent less on social security as a percentage of GNP than Austria, Norway, Sweden, Belgium, Britain, Denmark, France, Italy, the Netherlands, Switzerland, or West Germany, and roughly equaled only Canada and Japan. Heidenheimer, Heclo, and Adams, *Comparative Public Policy*, p. 226. A 1974 survey found Americans less likely than citizens of Britain, the Netherlands, or West Germany to believe the government was responsible for education, health care, housing, old age security, and unemployment. Heidenheimer, Heclo,

and Adams, *Comparative Public Policy*, p. 354. Sven Steinmo argues that the institutional fragmentation of political authority in the United States explains the "meager social welfare policies" because fragmantation has led to more limited taxation. Tax revenue as a percentage of GNP in the United States is significantly lower than in Europe or Japan. See "Why Is Government So Small in America?" *Governance: An International Journal of Policy and Administration*, vol. 8 (July 1995), pp. 303, 306, 327.

105. Robert A. Kagan, "Adversarial Legalism and American Government," *Journal of Policy Analysis and Management*, vol. 10, no. 3 (1991), pp. 369–406.

106. When asked why no one considered a purely bureaucratic mechanism for enforcing the ADA, participants in the bill's creation did not offer a clear answer. Several of the disability activists mentioned the deficiencies of previous administrative mechanisms in disability policy. The Architectural Barriers and Transportation Compliance Board, for example, was widely criticized by disability advocates as underfunded and ineffective. Bureaucratic enforcement of section 504 was similarly considered, as one review put it, "at best lethargic and at worst ineffectual." Bonnie P. Tucker, "Section 504 of the Rehabilitation Act after Ten Years of Enforcement: The Past and the Future," *University of Illinois Law Review*, no. 4 (1989), p. 877.

It is hard to tell whether these experiences with bureaucratic regulation shaped the creation of the ADA, in large part because the debate over the ADA never included any discussion of the merits of bureaucratic versus judicial enforcement. This issue simply did not seem to be on the minds of disability activists.

107. The Justice Department's regulations provide a list of examples of what it considers to be an impairment. The phrase "physical or mental impairment" includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

This is as close to a list as the definition of disability gets. Simply having an impairment, however, does not mean a plaintiff is disabled under the law; a court must also find that the impairment "substantially limits major life activities." The regulations provide a suggestive but not definitive list of "major life activities." Thus those covered by the ADA confront a series of ambiguities in the law. 28 C.F.R. 36 (1991), p. 35548.

108. Testimony of Melinda Maloney, LRP Publications, before the Senate Subcommittee on Disability Policy, July 26, 1995.

109. This case was, however, tried under the California state disability rights law, which allows larger damage verdicts. Barbara Steuart, "Vague and Vaguer," *Recorder* (October 9, 1995), p. 3.

110. Robert L. Burgdorf Jr., *Disability Discrimination in Employment Law* (Washington: Bureau of National Affairs, 1995), pp. 132–33.

111. Lucinda Harper, "Head Games: Mental Health Law Protects Many People But Vexes Employers," *Wall Street Journal*, July 19, 1994, p. A1.

112. Statement of Gilbert Casellas, EEOC chairman, before the Senate Labor and Human Resources Committee, May 23, 1995; and West, *Federal Implementation*, p. 19.

113. West, *Federal Implementation*, pp. 20–21.

114. Ibid., p. 21.

115. Administrative Office of the United States Courts, *Statistical Tables for the Federal Judiciary* (June 30, 1995), table C5.

116. Equal Employment Opportunity Commission, *Americans with Disabilities Act of 1990—Statistics, FY 1992–FY 1996* (chart).

117. Under EEOC rules, complainants can demand a "right to sue" letter 180 days after filing. Kristi Bleyer, "The Americans with Disabilities Act: Enforcement Mechanisms," *Mental and Physical Disability Law Reporter* (May-June 1992), pp. 347–48.

118. Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts* (1996), table C2A; "U.S. District Courts Civil Cases Commenced by Nature of Suit," table CIV 14; and Janet Reno and Richard Thornburgh, "ADA—Not a Disabling Mandate," *Wall Street Journal*, July 26, 1995, p. A12.

119. Institute for Civil Justice, *1992–93 Annual Report* (Santa Monica, Calif.: RAND, 1993), p. 22.

120. Steuart, "Vague and Vaguer," p. 3.

121. Lisa J. Stansky, "Opening Doors," *ABA Journal* (March 1996), pp. 66–67.

122. Robert Frank and Alex Markels, "Coca-Cola Loses ADA Alcoholism Case," *Wall Street Journal*, July 3, 1995, p. B3.

123. "Federal Jury Hands Victory to the EEOC in Disabilities Case," *Wall Street Journal*, January 7, 1997, p. B11.

124. John Hollwitz, Deborah F. Goodman, and Dean Bolte, "Complying with the Americans with Disabilities Act: Assessing the Costs of Reasonable Accommodation," *Public Personnel Management*, vol. 24 (Summer 1995).

125. James Bovard, "The Disabilities Act's Parade of Absurdities," *Wall Street Journal*, June 27, 1995, p. A18.

126. West, *Federal Implementation*, p. 8.

127. *National Organization on Disability/Harris Survey of Americans with Disabilities* (New York: Louis Harris and Associates, 1994), p. 124.

128. The study also surveyed those on a mailing list of the World Institute on Disability and found 98 percent of respondents knew of the ADA, but this sample was highly educated and far more likely to be knowledgeable of disability policy than the total population of disabled people. In the sample, 74.9 percent reported having a college degree or more education, whereas only 14 percent of respondents had a college degree in the Harris Poll's 1994 survey of disabled people. See Martha J. McGaughey, Susan M. Foley, and Catherine F. Ard, "Implementation of the Americans with Disabilities Act: Perceptions and Experiences of Individuals with Disabilities," Starr Center on Mental Retardation, Brandeis University, March 1996, pp. 8, 14, 18.

129. Sociolegal research suggests that victims of discrimination tend to swallow their grievances more readily than, for example, persons who have been injured in an accident. See, for instance, Richard E. Miller and Austin Sarat, "Grievances, Claims and Disputes: Assessing the Adversary Culture," in Sheldon Goldman and Austin Sarat, eds., *American Court Systems: Readings in Judicial Process and Behavior*, 2d ed. (Longman, 1989), p. 57; and Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Johns Hopkins University Press, 1988), p. 109. Then, too, disability rights organizations, which help arrange legal counsel for complainants, are swamped and underfunded and thus unable to help all potential litigants. See Lisa J. Stansky, "Opening Doors," *ABA Journal* (March 1996), p. 67.

130. Marjorie Baldwin and William G. Johnson, "Labor Market Discrimination against Men with Disabilities," *Journal of Human Resources*, vol. 29 (Winter 1994), pp. 1–19.

131. Ibid., p. 12; see also Marjorie L. Baldwin, "Can the ADA Achieve Its Employment Goals?" *Annals of the American Academy of Political and Social Sciences*, vol. 596 (1997), p. 43, citing Baldwin and Johnson, "Labor Market Discrimination against Men with Disabilities in the Year of the ADA"; and William G. Johnson and James Lambrinos, "Wage Discrimination against Handicapped Men and Women," *Journal of Human Resources*, vol. 20 (Spring 1985), pp. 264–77.

132. Walter Y. Oi, "Work for Americans with Disabilities," in Richard D. Lambert and Alan W. Heston, eds., *Annals of the American Academy of Political and Social Science*, vol. 523 (London: Sage Publications, 1992), pp. 159–74.

133. *National Organization on Disability/Harris Survey of Americans with Disabilities*, pp. 60, 68.

134. Ibid., p. 72. In her survey of vocational rehabilitation clients, McGaughey found 33 percent reported job discrimination after the ADA had been passed. A survey of those on the mailing list of the World Institute on Disability found 28 percent reporting discrimination. In addition, 10 percent of the vocational rehabilitation clients and 54 percent of the WID mailing list sample reported discrimination in receiving public accommodations. McGaughey, Foley, and Ard, "Implementation of the Americans with Disabilities Act," p. 14.

135. The gap in participation in the labor force between disabled people and the nondisabled does not appear to be shrinking; see Laura Trupin and others, "Trends in Labor Force Participation among Persons with Disabilities, 1983–1994" (forthcoming), table I; and Edward Yelin, "The Labor Market and Persons with and without Disabilities," report to NIDRR and the Social Security Administration Office of Disability, table 3. But see also Census Bureau, "Employment Rate of Persons with Disabilities," table 1, which shows a small narrowing in the employment rate for some definitions of disability. Peter David Blanck's small-scale study of mentally retarded adults in Oklahoma found significant increases in employment and income during a period that coincided with the passage and implementation of the ADA. See "Empirical Study of the Americans with Disability Act: Employment Issues from 1990 to 1994," *Behavioral Sciences and the Law*, vol. 14 (1996), pp. 5–27.

In one survey the percentage of disabled people working actually fell from 33 percent in 1986 before the ADA was enacted to 31 percent in 1994. The survey also measured changes in the social and recreational activities of disabled, finding no significant changes in levels of socializing with friends, patronizing supermarkets and restaurants, or attending religious services, music performances, movies, and sports events. These findings, however, may have been affected by the fact that the 1994 sample was slightly more severely disabled than the 1986 sample. See *The National Organization on Disability/Harris Survey of Americans with Disabilities*, pp. 37, 26, 101–04.

136. McGaughey, Foley, and Ard, "Implementation of the Americans with Disabilities Act," pp. 7, 20. A plurality, however, said that the ADA had improved interview and test accommodations and that it had aided in job accommodations and barrier removal.

137. Between 1990 and 1994 there was a 44 percent increase in the ratio of disability welfare recipients to workers. Richard V. Burkhauser, "Post-ADA: Are People with Disabilities Expected to Work?" *Annals of the American Academy of Political and Social Science*, vol. 549 (1997), table 1. Both SSDI and SSI expanded at "disturbing rates," according to Edward Berkowitz, who concludes that "nothing in the performance SSDI or SSI suggested that ADA had begun to change the nation's approach to disability." See "Implications for Income Maintenance Policy," in Jane West, ed., *Implementing the Americans with Disabilities Act* (Blackwell, 1996), p. 201.

138. Richard Burkhauser concludes that "it is unlikely that any of the 3.97 million workers receiving SSDI benefits or the 3.29 million blind or disabled adults under the age of 65 who were receiving SSI benefits in December 1994 will return to work." See "Are People with Disabilities Expected to Work?" p. 79. See also Baldwin, "Can the ADA Achieve Its Employment Goals?"; Berkowitz, "Implications for Income Maintenance Policy"; and William G. Johnson, "The Future of Disability Policy: Benefit Payments or Civil Rights?" *Annals of the American Academy of Political and Social Sciences*, vol. 596 (1997), pp. 160–72.

139. Paul Burstein and Mark Evan Edwards have written that "black men's earnings rose significantly compared to white men's during the late 1960s and early 1970s, and even those who say EEO legislation has had little long-term impact attribute gains during this period to federal EEO efforts." See "The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues," *Law and Society Review*, vol. 28, no. 1 (1994), p. 88. See also Richard B. Freeman, "Black Economic Progress after 1964: Who Has Gained and Why?" in Sherwin Rosen, ed., *Studies in Labor Markets* (University of Chicago Press, 1981), pp. 247–94.

140. Edward H. Yelin, "The Recent History and Immediate Future of Employment among Persons with Disabilities," *Milbank Quarterly*, vol. 69, supplements 1/2 (1991), pp. 136–37.

141. Stephen L. Percy, "ADA, Disability Rights, and Evolving Regulatory Federalism," *Publius*, vol. 23 (Fall 1993), p. 96.

142. Baldwin and Johnson, "Labor Market Discrimination"; and Edward

H. Yelin, "The Employment of People with and without Disabilities in an Age of Insecurity," *Annals of the American Academy of Political and Social Science*, vol. 597 (1997), tables 1 and 2.

143. Edward H. Yelin and Patricia P. Katz, "Making Work More Central to Disability Policy," *Milbank Quarterly*, vol. 72 (Winter 1994), p. 615; and Baldwin and Johnson, "Labor Market Discrimination," p. 14.

144. Some businesses will be in a position to pass on their costs to customers, but this will vary from industry to industry and company to company. Furthermore, the ADA also covers nonprofit organizations, many of whom will be in a poor position to pass costs on.

145. As Richard Burkhauser has said, the ADA represents "morality on the cheap" because it employs the rhetoric of rights to mandate structural changes without paying for them. "Morality on the Cheap: The Americans with Disability Act," *Regulation*, vol. 13 (Summer 1990), pp. 47–56.

146. Robert L. Burgdorf Jr., *Disability Discrimination in Employment Law* (Bureau of National Affairs, 1995), pp. 326, 327.

147. Peter David Blanck, *Communicating the Americans with Disability Act: Transcending Compliance: A Case Report on Sears, Roebuck and Co.*, report to the Annenberg Washington Program, Northwestern University, 1994, p. 12; *National Organization on Disability/Harris Survey on Employment of People with Disabilities*, p. 34; and Job Accommodation Network survey, cited in West, *Federal Implementation*, p. 30.

148. 42 US.C. 12181.

149. 42 US.C. 12183.

150. Robert Genetski, "The True Cost of Government," *Wall Street Journal*, February 19, 1992, p. A14.

151. André Henderson, "The Looming Disabilities Deadline," *Governing*, December 1994, pp. 22–23.

152. There has been no nationwide survey of state costs, but estimates made by some states are revealing. Illinois, for example, has said it will spend $100 million to comply with the ADA, while Missouri has estimated $38 million. Fred W. Lindecke, "Leading the Way: Cooperation Can Open Doors for Americans with Disabilities Act," *St. Louis Post-Dispatch*, March 27, 1995, p. 1A.

153. General Accounting Office, *Americans with Disabilities Act: Challenges Faced by Transit Agencies in Complying with the Act's Requirements*, GAO/RCED-94-58 (1994), pp. 7, 13.

154. In the case of the Clean Air Act the main source of this dualism was that enforcement cases went to one set of courts while rule-making cases went to another. See generally R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Brookings, 1983).

155. In Great Britain a 3 percent quota in hiring was not achieved after 1961, and by 1993 the actual rate of hiring was 0.07 percent. Brian Doyle, *Disability, Discrimination and Equal Opportunities: A Comparative Study of the Employment Rights of Disabled Persons* (London: Mansell, 1995), p. 260.

156. Lisa Waddington, *Disability, Employment and the European Community* (Antwerp: Metro, 1995), pp. 230–32.

157. Neil Lunt and Patricia Thornton, *Employment Policies for Disabled People: A Review of Legislation and Services in Fifteen Countries*, Research Series 16 (York, U.K.: Employment Department Group, 1993), p. 160.

158. Lunt and Thornton, *Employment Policies*, p. 41.

159. Doyle, *Disability, Discrimination and Equal Opportunities*, pp. 228–32.

160. Canada does have a constitutional provision in the 1982 Charter of Rights and Freedoms specifically outlawing discrimination based on "mental or physical disability." This provision, however, only applies to actions taken by the federal and provincial governments. A few cases have been brought under this provision, including one that struck down municipal regulations restricting group care homes for disabled people. Cliona Kimber, "Disability Discrimination Law in Canada," in Gerard Quinn, Maeve McDonagh, and Cliona Kimber, *Disability Discrimination Law in the United States, Australia and Canada* (Dublin: Oak Tree Press, 1993), p. 192.

161. Judith Keene, *Human Rights in Ontario*, 2d ed. (Scarborough, Ontario: Carswell, 1992), pp. 263, 335, 372–75.

162. For an analysis of the British law, see Brian J. Doyle, *Disability Discrimination: The New Law* (Bristol: Jordans, 1996).

163. The Tory government had turned back a stronger disability rights law because it opposed the creation of a "centralized, bureaucratic, monitoring and policing body." Mark Suzman, "Financial Times Guide to the UK's Disability Discrimination Act," *Financial Times*, November 6, 1995, p. 12.

164. The United States does have two small employer-subsidy programs, the Job Training Partnership Act (JTPA) and the Targeted Jobs Tax Credit (TJTC). The JTPA contributes 50 percent of the first six months of wages for those considered economically disadvantaged, which can include people with disabilities. In 1989 about 37,000 adults with disabilities and 43,000 youths between the ages of sixteen and twenty-one with disabilities were enrolled in the program. The TJTC pays 40 percent of the wage costs of a new employee for one year, with a maximum credit of $6,000. Disabled people who register with a vocational rehabilitation office are one of ten groups eligible for the credit; in 1987 about 40,000 were certified. Lunt and Thornton, *Employment Policies*, pp. 166, 171.

165. Edward Yelin argues that "the passive strategy of waiting for aggrieved individuals to file claims will not suffice," and urges a program of statistical research to highlight problem industries. "Recent History," p. 146.

166. Melnick, *Regulation and the Courts*. For a particularly poignant example, see Robert A. Kagan, "Adversarial Legalism and American Government," *Journal of Policy Analysis and Management*, vol. 10, no. 3 (1991), pp. 369–406.

167. See for example Joseph L. Badaracco Jr., *Loading the Dice: A Five-Country Study of Vinyl Chloride Regulation* (Harvard Business School Press, 1985).

168. David M. Engel and Frank W. Munger make this point in "Rights, Remembrance and the Reconciliation of Difference," *Law and Society Review*, vol. 30, no. 1 (1996), pp. 7–53.

169. J. A. Garraty, *Unemployment in History: Economic Thought and Public Policy* (Harper and Row, 1978), pp. 46–47.

170. Walter Y. Oi, "Employment and Benefits for People with Diverse Disabilities," in Jerry Mashaw and others, eds., *Disability, Work, and Cash Benefits* (Kalamazoo: W. E. Upjohn Institute for Employment Research, 1996), p. 107.

171. Jane West, "The Social and Policy Context of the Act," in *The Americans with Disabilities Act: From Policy to Practice* (New York: Milbank Memorial Fund, 1991), pp. 3–24.

172. Oi, "Employment and Benefits," pp. 103–27.

173. Kerwin Charles, "An Inquiry into the Labor Market Consequences of Disabling Illness," Ph.D. dissertation, Cornell University, 1996.

174. National Council on the Handicapped, *Toward Independence*, p. 1.

175. Nancy Lee Jones, "Essential Requirements of the Act: A Short History and Overview," in *Americans with Disabilities Act*, pp. 25–54.

176. Oi, "Employment and Benefits," p. 105.

177. Burkhauser, "Morality on the Cheap," pp. 47–56.

Chapter 7

Internationalizing Regulatory Reform

Roger G. Noll

AN UNUSUAL FEATURE of this book is its focus on international aspects of regulatory policy. While U.S. regulatory policy has been politically controversial since its inception, until the late 1970s the debate focused on whether government legitimately could control various aspects of private production and transactions and whether specific regulations and the net effect of all regulation generated positive social benefits. As the United States and its major trading partners eased into the current regime of relatively free trade, the regulatory policy debate was internationalized in three important ways. First, opponents of regulation—especially companies that opposed environmental, health, and safety regulation—argued that excessive regulation eroded the "competitiveness" of U.S. industry and contributed to persistent trade deficits. Second, everyone concerned with regulation began to look abroad for new ideas about how to reduce the burdens of regulation. Third, as direct trade barriers fell, and in many cases became negligible, countries began to incorporate regulatory policy into trade negotiations as a means of reducing indirect trade barriers.

The chapters of this book explore all of these issues and in so doing contribute new information to the ongoing debate about regulatory reform. The purpose of this chapter is to provide a general overview of the regulatory reform debate, its international ramifications, and

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