

Introduction

High Hope Followed by Public Backlash

Look, I'm not going to pick on an invalid.¹

—President Ronald Reagan, August 1988
(Response to a reporter's question about
presidential candidate Michael Dukakis)

The Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world.

—President George Herbert Walker Bush,
July 26, 1990 (ADA Signing Statement)

In 1988, the enactment of the Americans with Disabilities Act was virtually unthinkable. The president of the United States considered it appropriate to describe a presidential candidate as an “invalid.” Yet, in 1990, the president considered it important to support and sign the Americans with Disabilities Act. No longer could public figures appear to be against the rights of individuals with disabilities. As the *New York Times* aptly commented a year before the ADA's passage: “No politician can vote against this bill and survive.”² How did the idea of supporting disability rights move from a joking matter to a serious one that nearly all public figures supported? This book will critically examine the effectiveness of the ADA and ask why it may have fallen short of its high hopes and aspirations. This chapter will provide a general introduction to the ADA.

Chapter 2 will provide a basic overview of the history underlying the enactment of the ADA. We will see that Congress understood itself to be passing a broad-based disability statute. To the extent that there were compromises, they did not modify the basic commitment to broad civil rights protection. Businesses were given some extra time to comply and the restaurant industry received some of the protection it requested to permit it not to employ individuals with contagious diseases. Otherwise, as we shall see, the ADA reflected a boldly proplaintiff piece of legislation that Congress understood to protect unpopular groups such as individuals with HIV infection and former drug users.

Chapter 3 will use empirical tools to assess the effectiveness of ADA Title I. ADA Title I prohibits discrimination in the employment sector. Empirical data suggest that the courts have overwhelmingly interpreted Title I in favor of defendants. Chapter 3 will ask whether the data reflect a judicial backlash against the ADA or whether other factors might also explain these negative results.

Chapter 4 will explore two explanations for the strongly proplaintiff results under the ADA: (1) an inappropriately narrow definition of the term “disability,” and (2) misuse of the summary judgment standard to the disservice of plaintiffs. Case law concerning the definition of disability has had a profound impact on the effectiveness of the statute because plaintiffs cannot bring suit under the ADA unless they meet the definition of disability.³ Although Congress indicated in the findings section that it expected the statute to protect more than 43 million disabled Americans, the effect of these prodefendant rulings has been to limit statutory coverage to a relatively narrow band of plaintiffs. In particular, the “mitigating measures” rule has required plaintiffs to demonstrate that they are disabled *after* a court takes into account the ameliorative effects of mitigating measures. That rule has made it nearly impossible for plaintiffs to demonstrate that they are both “qualified” and “disabled” because the mitigating measure that they use to help them be qualified then renders them nondisabled.

Abuse of the summary judgment process has harmed those plaintiffs who may have managed to survive the courts’ stringent definition of disability. Despite Congress’s instructions that terms like “reasonable accommodation” and “direct threat” were to be determined in a fact-intensive setting, most amenable to a jury, trial court judges have routinely decided those issues adversely to plaintiffs without sending them to the

jury. This abuse of the jury process is inconsistent with the legal standard that is supposed to govern this area of the law.

Chapter 5 will examine ADA Title II. ADA Title II prohibits discrimination by state or local government. The constitutionality of the entirety of ADA Title II with respect to suits by private individuals against state actors remains in doubt following a recent but narrow Supreme Court decision that upheld the constitutionality of some of ADA Title II. This chapter will demonstrate how the Court's decisions under ADA Title II have followed a pendulum—the Court interprets the statute broadly, then restrictively, and then more broadly. Further, the lower courts have put pressure on the Court to relax its narrow interpretations of ADA Title II. Because of various narrow interpretations of ADA Title II, state law is an important backup protection for many individuals with disabilities. Chapter 5 will argue, however, that state law typically provides very inadequate legal recourse for individuals with disabilities when they face discrimination by the state.

Chapter 6 will examine ADA Title III. ADA Title III prohibits discrimination at private entities such as restaurants, motels, and places of amusement. Although ADA Title III provides for a broad scope of coverage, it has a very limited enforcement mechanism. Typically, aggrieved individuals can sue only for injunctive relief and may not seek monetary damages. That limited enforcement scheme has provided few incentives for private entities to comply with the law.

To be a more effective enforcement mechanism for individuals with disabilities, the ADA would benefit from some modest statutory amendments. The definition of disability should be amended to clarify that individuals should be considered disabled even if mitigating measures can ameliorate some of their disabilities. Further, the enforcement scheme under ADA Title III should be amended to include monetary relief. Nonetheless, seeking to amend the ADA would be a poor political strategy because it would open up the statute to amendments that might further limit its effectiveness. Amending the ADA also might not markedly improve its effectiveness. If the problem with the ADA is judicial hostility, rather than poor drafting, then the amendment process is unlikely to solve the problems discussed in this book.

Chapter 7 examines the Supreme Court's treatment of the ADA in the larger context of its treatment of Congress in the past decade. It concludes that the Supreme Court has “dissed” Congress in interpreting the ADA

and other pieces of major legislation. The problem with the ADA's failed promises, therefore, largely lies with the Supreme Court rather than Congress's basic framework in enacting the ADA.

Before we can explore those assertions in depth, it is helpful to have a broad overview of the ADA. That overview follows.

I. From Insensitivity to Endorsement to Backlash

Congress first enacted modest disability rights legislation in the early 1970s, although active enforcement of those laws did not begin until at least 1978, when groups of individuals with disabilities began to stage sit-ins at federal buildings. Beginning in the 1980s, disability rights advocates sought to enact broad-based legislation that would accord civil rights to individuals with disabilities that would be comparable to those available to African Americans and women. For more than a decade, those efforts stalled because the disability rights community did not have sufficient support among the civil rights community or the political branches of government to attain such legislation. Many of its efforts were geared toward preventing the Reagan administration from dismantling the gains from the 1970s rather than moving forward with new legislation.

One jump-start for passage of broad-based disability rights legislation came from the insensitive remark by President Ronald Reagan, quoted at the beginning of this chapter. During the Bush-Dukakis presidential campaign in August 1988, rumors began to circulate from supporters of political extremist Lyndon H. LaRouche, Jr. that Governor Michael Dukakis had undergone psychiatric treatment during two stressful times in his life—when his brother died in 1973 after being hit by an automobile and when he lost the Democratic gubernatorial primary in 1978. In light of the negative public reaction to Senator Thomas Eagleton's (D-Mo.) disclosure that he had received treatment for mental illness soon after he was chosen as Senator George McGovern's (D-S.D.) running mate in the 1972 presidential campaign, these rumors were thought to be hurting the Dukakis presidential campaign. A reporter for a LaRouche-controlled publication, the *Executive Intelligence Review*, asked Reagan at a press conference what he thought about Dukakis's refusal up to that point to give the public access to his medical records concerning his alleged treatment for mental illness. Reagan responded: "Look, I'm not

going to pick on an invalid.”⁴ Reagan later said he had “attempted a joke” but “it didn’t work.”⁵ He never offered a full apology. Vice President (and presidential nominee) George H. W. Bush, at a visit to a defense plant in Annapolis, Maryland, said he was “not going to get drawn into this mini-controversy.”⁶ The media soon predicted that Reagan could hurt the presidential election campaign of Vice President Bush through such offhand and insensitive remarks.

After initially refusing to be drawn into the controversy, Vice President Bush responded on August 11, 1988, by urging Congress to enact the Americans with Disabilities Act.⁷ Although it is difficult to imagine that candidate Bush was aware of the fine details of the sweeping disability rights legislation then pending in Congress, he did make this campaign pledge. (Some people trace his support of disabilities rights legislation to the fact that his son Neil is dyslexic and his son Marvin had had a colostomy.)⁸ Following his inauguration as president, Bush instructed Attorney General Richard Thornburgh to work with Congress to pass major disability discrimination legislation. Reagan’s insensitive “invalid” comment, therefore, may have helped lead to George H. W. Bush’s support of the ADA.

For many reasons—both personal and political—Thornburgh took seriously his instructions from President Bush. Thornburgh’s son Peter had suffered a serious brain injury in a 1960 car accident, and Thornburgh and his wife, Ginny, thereafter became leading advocates for individuals with disabilities. As the parent of a child with a disability and the spouse of a partner who was very active in working on disability rights issues, Thornburgh was supportive of the president’s request. Moreover, the request permitted Thornburgh to increase his power base in the executive branch as he performed an important task at the request of the president.

Thornburgh worked with Congress and a group of dedicated disability activists to draft legislation that would be acceptable to both the disability and business communities. A year and a half later, Bush signed the Americans with Disabilities Act (ADA) into law on July 26, 1990.

The story of the passage of the ADA is a story of unprecedented bipartisan support for civil rights legislation, as well as one of very close scrutiny by Congress. On May 9, 1989, Senator Tom Harkin (D-Iowa),⁹ along with 33 of his colleagues, introduced the ADA in the Senate as S. 933. The House version of the ADA—H.R. 2273—was introduced on the same day. The Senate Committee on Labor and Human Resources held four hearings on the bill. It reported the bill out on August 2, 1989, by a

vote of 16 to 0. After two full days of debate, the Senate passed a version of the ADA on September 8, 1989, by a vote of 76 to 8.

More than twenty hearings were held on the ADA in the House. The Education and Labor Committee reported the bill out on November 14, 1989, by a vote of 35 to 0. The Energy and Commerce Committee reported the bill out on May 13, 1990, by a vote of 40 to 3. The Public Works Committee reported the bill out on April 3, 1990, by a vote of 45 to 5. The Judiciary Committee reported the bill out on May 2, 1990, by a vote of 32 to 3. The House passed this version of the ADA on May 22, 1990, by a vote of 403 to 20.

After two conferences convened to resolve differences between the Senate and House versions, the ADA passed Congress with overwhelming bipartisan support. The final vote in the House of Representatives was 377 to 28; in the Senate, 91 to 6. Unlike the Civil Rights Act of 1964, it faced neither serious opposition nor a threat of filibuster. Democratic Senator Edward M. Kennedy (Mass.)¹⁰ heralded the ADA as an “emancipation proclamation” for people with disabilities;¹¹ Republican Senator Orrin Hatch (Utah) called the act “the most sweeping piece of civil rights legislation possibly in the history of our country.”¹² As the chapter’s first epigraph suggests, President Bush signed the ADA into law with the hope that it would be a model for the world. The political climate within the executive branch had changed markedly concerning disability issues within a several-year period.

The United States has been a worldwide leader in enacting a broad bill of rights for individuals with disabilities. Other countries, such as Great Britain, Australia, and Canada, have also enacted nondiscrimination statutes but none of these protections are as comprehensive as those found in the ADA.¹³ The U.S. Congress applied the disability nondiscrimination standards that had existed for the public sector under Section 504 of the Rehabilitation Act to the private sector when it enacted the ADA. It also used the racial nondiscrimination standards found in Titles II and VII of the Civil Rights Act of 1964 as models in drafting many of the nondiscrimination provisions found in the ADA. The ADA benefitted from our experience in enforcing prior disability nondiscrimination statutes, as well as racial nondiscrimination statutes.

Despite the high hopes that surrounded the enactment of the ADA, its passage soon produced a public backlash. Following a few years of enforcement activity, columnist Ruth Shalit reported in the *New Republic* that the ADA has created a “lifelong buffet of perks, special breaks and

procedural protections” for people with questionable disabilities.¹⁴ A senior editor at *Reader’s Digest* asserted that plaintiffs “have used the ADA to trigger an avalanche of frivolous suits clogging federal courts.”¹⁵ Similarly, author Walter Olson complained that the ADA has the potential “to force the rethinking and watering down of every imaginable standard of competence, whether of mind, body, or character.”¹⁶

The media barrage against the ADA caused some people to think that the ADA was producing an inappropriate windfall for disability plaintiffs and their lawyers. As we will see in chapter 3, there is, in fact, no empirical support for such a conclusion. Hence, the U.S. Commission on Civil Rights has blamed “misleading and sometimes inaccurate news coverage” for the public’s negative perception and “gross misunderstanding” of the ADA.

The Supreme Court has interpreted the ADA narrowly, often disappointing the disability rights community. Narrow judicial interpretations of the term “individual with disability” have limited the applicability of the act. Decisions protecting states’ rights have exempted the public sector from coverage. These decisions have been contrary to Congress’s intentions in passing the ADA.

Rather than take responsibility for narrowing the reach of the statute beyond what was envisioned by Congress, Justice Sandra Day O’Connor has criticized the drafters of the ADA for writing an ambiguous statute. She said that the ADA is an example of what happens when a bill’s “sponsors are so eager to get something passed that what passes hasn’t been as carefully written as a group of law professors might put together.”¹⁷ Justice O’Connor made those remarks at Georgetown Law School. Georgetown’s Professor Chai Feldblum, who clerked for Supreme Court Justice Harry Blackmun during O’Connor’s tenure on the Court and who is often credited with being a leading architect of the ADA, disagreed with O’Connor’s assessment. Feldblum observed that “this law was the product of two years of careful research, drafting and negotiation between disability-rights lawyers and business community lawyers.” Feldblum is correct. The ADA was considered by four committees of the House of Representatives, with each committee authoring a lengthy report.¹⁸ It was then reported out by the House Rules Committee.¹⁹ After different versions of the ADA passed in the House and Senate, it was also the subject of two conference reports.²⁰ This voluminous record speaks for itself. The ADA received much more detailed consideration by Congress than any other prior civil rights legislation.

Justice O'Connor's comments reflect the ahistorical lens that a majority of the Court insists on using in interpreting the ADA. As Professor Cynthia Estlund has observed: "[T]he commitment to textualism among at least a majority of the current Court tends to preclude both a resort to the ADA's rich legislative history and deference to the administrative agency, and to foster an almost obsessive focus on the complicated and open-textured text itself."²¹ The ahistorical approach requires the words of the ADA to resolve all conceivable disputes under the statute. Members of Congress, however, throughout the debate over passage of the ADA, made reference to the extensive committee reports that accompanied passage of the bill. They expected that the judiciary and the various agencies charged with enforcing the ADA would rely on these reports to resolve the fine details of the bill.

Although the agencies have followed this history closely in drafting regulations, the Supreme Court has not. When the ADA's statutory language has necessarily embodied some ambiguity, a majority of the Court has refused to fill the gaps by inquiring into evidence of Congress's intentions as expressed in these reports and the congressional legislative record. Instead, the Court has used the latitude created by that ambiguity to interpret the statute as narrowly as possible. Chapter 2 will recount the story of the ADA's journey through Congress so that the reader can see the scope and clarity of Congress's vision when it enacted the ADA. It may be true that the literal language of the ADA "did leave uncertainties as to what Congress had in mind," as suggested by Justice O'Connor, but it is also true that an inquiry into the history and context of the statute can easily resolve many of these uncertainties. It is disappointing that the Court has taken such an ahistorical approach in interpreting this landmark legislation. "The Court is narrowing the scope of the ADA one provision at a time and constructing a statute that does less for disabled individuals and puts less of a burden on employers than the ADA's congressional proponents appear to have envisioned."²²

Despite the backlash against the ADA, the ADA has helped transform many aspects of American life. Cities have installed thousands of curb ramps, buses have routinely become equipped with lifts, and hotels often provide accessible rooms for their guests. Although many of these changes may have been required by state law that preceded enactment of the ADA, it took national attention to a new civil rights statute to provide the impetus for these important changes.

Before assessing the effectiveness of the ADA, one must have a good working knowledge of the act's basic structure, as well as a basic understanding of the statute's history. The next section of this chapter will provide some background information about the historical antecedents to the ADA, as well as a general description of the ADA itself. Chapter 2 will provide a detailed discussion of the passage of the ADA.

II. Statutory Background

A. The ADA's Legislative Models

The modern story of the protection of disability rights began in 1970 when Congress passed its first landmark disability legislation in the education area.²³ It would take two more decades before that model could be broadly extended to most aspects of civic life through passage of the ADA. These historical precedents set the ultimate framework for the ADA while also providing evidence of the judicial hostility and ambivalence that accompanied passage of these laws. We will see these same strains of judicial hostility in reaction to passage of the ADA in subsequent chapters.

I. EDUCATION FOR THE HANDICAPPED ACT

The first landmark disability statute enacted by Congress was the Education for the Handicapped Act, in 1970.²⁴ It mandated, for the first time, that children with disabilities receive a free and appropriate public education. (Today's version of this law is entitled Individuals with Disabilities Education Act and goes by the acronym IDEA. I will use that acronym to describe the statute even before its name formally changed.) Gone were the days when children could be absolutely excluded from school because of their disability. Over the next thirty years, Congress has amended the statute many times to give content to what is considered a "free and appropriate public education" for children with disabilities and to mandate that they receive this education in the most integrated setting possible. It has also extended the statute's reach, often covering children from ages 3 to 21. (At the same time, Congress has also increased the latitude of the states to discipline children with disabilities who are disruptive in the classroom.) This law, however, typically affects only children educated in the public school system.

The theory underlying the IDEA is that children with disabilities face unique problems in the educational context and therefore need a specialized statutory response to those problems. The IDEA affects only a subset of children with disabilities—those whose disabilities mean that they require “special education” services. The IDEA is not applicable to many situations that might involve children with disabilities who face discrimination in the educational context. For example, if a school district tried to exclude a child from a school program because he was HIV-positive, that would not be an IDEA problem. Assuming the child was healthy enough to attend school during the regular school day, that child would not have had need of special education services and therefore would not have qualified for an “individualized education plan” under the IDEA. Similarly, the parent of a child who attends public school might use a wheelchair and find the building inaccessible. Hence, the parent may not be able to attend parent-teacher conferences or school programs. That would also not be an IDEA problem because the child is not in need of special education services due to the parent’s disability.

2. MOVING BEYOND THE IDEA: SECTION 504 OF THE REHABILITATION ACT

Beginning in the 1970s, Congress was also interested in creating a legislative response to problems not addressed by the IDEA. It wanted to extend the reach of federal antidiscrimination law beyond the area of education and to provide more comprehensive protection in the education area for individuals with disabilities. Two approaches were available to Congress. It could follow the IDEA model and create additional, special legislation that addressed only disability discrimination issues. Alternatively, it could amend existing race-based civil rights laws to prohibit disability-based discrimination.

Each model had advantages and disadvantages. The creation of “special” legislation for the disability community might send the signal that individuals with disabilities are somehow inferior to other groups qualifying for antidiscrimination protection. Moreover, it would take a great deal of work to draft and enact freestanding legislation for individuals with disabilities. Amending existing laws might be simpler and faster. Amending existing laws, however, posed its own set of problems. Those laws were typically written from a race-discrimination perspective and might not work effectively in the disability context. Concepts like rea-

sonable accommodation and accessibility do not have good analogs in the law of race discrimination but are crucial to the law of disability discrimination. Moreover, the civil rights community might be reluctant to open up existing law to amendment out of fear that additional amendments might be offered that would undermine those laws. Because of the need to work in coalition to get laws passed in Congress, it was important for the disability rights community to be sensitive to the needs and interests of other civil rights communities if it were to attain successful passage of disability discrimination measures.

Congress attempted to strengthen the rights for the disability community through both models. In the 1970s, Senators Hubert Humphrey (D-Minn.) and Charles Percy (R-Ill.), along with Representative Charles Vanik (D-Ohio), made unsuccessful efforts to amend Title VI of the Civil Rights Act of 1964 to include “handicapped” as a protected category. Title VI prohibits discrimination on the basis of race at entities that receive federal financial assistance. Such an amendment would have had a broad-ranging impact on state government, hospitals, and public schools (including higher education) because they receive federal financial assistance.

Instead of amending Title VI, Congress agreed to pass a provision devoted entirely to the problem of disability discrimination by entities that receive federal financial assistance. The language of this new provision within the Rehabilitation Act of 1973 was modeled closely on Title VI. This new provision contained the following, relatively simple paragraph:

No otherwise qualified handicapped individual in the United States, as defined in section 7 (6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 7(6) defined the term “handicapped individual” to mean

any individual who (a) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (b) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to title I and III of this act.²⁵

The scope of this Rehabilitation Act provision was fairly narrow. It applied only to entities that were providing vocational rehabilitation services and covered only individuals whose disability affected their employability. A year later, the definition of “handicapped” was expanded to include the three-prong definition that has been the foundation of disability discrimination law for the past three decades. The 1974 statute defined “handicapped” as meaning

any person who (a) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment. (Rehabilitation Act of 1974, Pub. L. No. 93-516 § 11(11), 88 Stat. 1617, 1619 (1974))

When the bill passed Congress, Senator Humphrey and Representative Vanik stated that this provision—often called “Section 504”—carried over the intent of their prior bills to make Title VI applicable to individuals with disabilities.

There was little public discussion or debate of the provision. It was part of a large funding statute that received considerable attention and, in fact, was vetoed twice by President Richard Nixon for reasons unrelated to the nondiscrimination provision. It was signed into law on September 26, 1973.²⁶ The president’s objections to the two previous versions of this bill were monetary. At no time was there any dispute between the administration and Congress over the wisdom of the nondiscrimination provision that was eventually codified as Section 504. Although it was not part of the first House resolution for the Rehabilitation Act, the Senate version, which contained the nondiscrimination provision, was accepted in conference with no more than the notation “The House recedes.”²⁷

For the first decade following the act’s passage, Section 504 was the basis of little litigation. Beginning in the 1980s, however, the disability community began to take advantage of the law so that the courts had to begin to define what it meant for an individual to be a victim of disability-based discrimination. Meanwhile, the Education for the Handicapped Act continued to evolve to become the modern IDEA, with Congress amending the statute repeatedly to enhance educational opportunities for children with disabilities.

As these statutory standards evolved, one can see early signs of judicial ambivalence or even resistance. In 1979, the Supreme Court held in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) that it was lawful under Section 504 for a nursing program to deny admission to Frances B. Davis because of her hearing impairment. Although Davis had been previously trained and certified as a licensed practical nurse, the nursing school was entitled to fail to admit her because of her purported inability to perform certain functions in which she would not be able to read lips. In a unanimous opinion, the Court held that it was inappropriate to interpret Section 504 to impose “an affirmative-action obligation on all recipients of federal funds.” Because the Court found that the nursing school would have to make “major adjustments” to its curriculum in order for Davis to be able to complete the program successfully, it could lawfully deny her admission. While recognizing that the “line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons” will not always be clear, the Court held that the conduct in this case was lawful. This tension between affirmative action and reasonable accommodation continues today under the ADA. (For example, Judge Richard Posner has characterized a reasonable accommodation that he concluded was not required under the ADA as “affirmative action with a vengeance.”)²⁸

Similarly, a few years later, in *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court held that the Education of the Handicapped Act did not require a school district to pay for a sign language interpreter for Amy Rowley, a deaf student, who was attending first grade at the time of the lawsuit. An interpreter was not needed, according to the Court because Rowley was an “excellent lipreader” and an above-average student. Hence, the Court concluded that she was receiving an appropriate public education without the provision of a sign language interpreter. Although the Court recognized that she was not receiving as much education as a child who can hear, the education she was receiving was adequate for the purpose of federal law. The dissenting justices (Justices White, Brennan, and Marshall) focused on the statute’s intent to provide children with disabilities an *equal* education. The majority, however, was satisfied with the provision of an *adequate*, rather than *equal* education.

The *Rowley* case foreshadows a tension that later emerges under the ADA. How much equality is really required by federal nondiscrimination

legislation in the disability area? Are there monetary limits on equality? Again, one sees hints of the affirmative action quandary. Would the provision of a sign language interpreter to Rowley be considered affirmative action by the other students? Is it special treatment or equal treatment?

The *Rowley* case also reflects the limited perspective that courts bring to disability discrimination cases. The courts saw the problem in the *Rowley* case as one of Rowley's not being able to understand what was being said in the classroom. But the failure to provide a sign language interpreter to her presents other problems as well. Depending on Rowley's oral speaking skills, the failure to provide an interpreter may inhibit her ability to communicate her ideas to others in the classroom. Professor Martha Minow suggests that the Court should have understood that the entire learning community was harmed when Rowley's classmates could not communicate with her.²⁹ Further, a failure to help Rowley attain her education potential will hurt society as a whole if she is then unable to contribute to society through her vocational skills. Children who are born deaf typically do not advance beyond a fourth- or fifth-grade reading level. As a deaf child, Rowley was at severe risk of facing educational challenges, yet the Court permitted the school district to do little to combat that risk because she apparently entered grade school with above-average reading skills. The Court's decision put the burden of education on her parents rather than the school district. Similarly, the failure to enroll Davis in the nursing program precluded the nursing profession from receiving the skills of another trained nurse, while also limiting the economic earning capacity of Davis.

Despite the setbacks in the *Rowley* and *Davis* litigation, the disability community had some basis to believe that the courts might be receptive to claims of disability discrimination. In 1985, the Supreme Court held in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), that it was a violation of the Constitution's guarantee of equal protection for a city to act on the basis of prejudice to deny a special-use permit for the operation of a group home for the mentally retarded. This holding helped create some momentum to amend the Fair Housing Act to prohibit disability discrimination in housing. Nonetheless, even this positive legal result foreshadowed some judicial resistance to protecting individuals with disabilities. While recognizing that the plaintiffs had a meritorious claim in that case, the Court also declined to conclude that individuals with disabilities are a "suspect class" entitled to "heightened scrutiny" by the courts. As we will see in chapter 5, this failure to conclude that individu-

als with disabilities are a suspect class laid the foundation for later limiting Congress's power to protect individuals with disabilities. Thus, the seeds of judicial ambivalence can be found even in one of the landmark victories for the disability community.

3. FAIR HOUSING ACT AMENDMENTS

Despite these signs of judicial ambivalence with the existing disability discrimination laws, the disability community began to push more vigorously for new antidiscrimination laws that would extend Section 504's rules to the private sector. As with the passage of Section 504, two approaches were available: Congress could pass freestanding legislation for individuals with disabilities, or it could seek to amend existing race-based civil rights laws to cover individuals with disabilities. The disability community had a trial run at a middle-ground approach in 1988. It drafted an amendment to the Fair Housing Act that would extend that statute's protections to disability discrimination.³⁰ This approach involved the amendment of an existing civil rights law. But the amendment did not merely add the word "disability" to the list of covered grounds of discrimination. Instead, it created a new rule of nondiscrimination that specifically prohibited disability discrimination in housing. These rules recognized a reasonable accommodation obligation and also mandated that new construction be handicapped accessible under the national, "ANSI" guidelines of the American National Standards Institute.

The disability community's success in working with other civil rights organizations to amend the Fair Housing Act emboldened it to believe that it could work in coalition with others to enact sweeping disability-discrimination legislation. It properly sensed that Congress was willing to take this giant step forward.

III. Enactment of the ADA

A. The ADA's Statutory Models

Chapter 2 will tell the legislative story of how Congress enacted the ADA. The general framework that underlies the ADA, however, can be found in its historical precedents: Section 504 of the Rehabilitation Act and the Civil Rights Act of 1964.

By the late 1990s, when the ADA was being drafted, Section 504 had an extensive array of regulations and nearly three decades of case law interpreting its provisions. Drawing from Section 504 in enacting the ADA made sense to both the disability community and the business community. For both groups, this foundation meant that the ADA would be built on settled precedent so that there would be some legal certainty about the meaning of some of its central terms like “disability,” “reasonable accommodation,” and “undue hardship.” The protections offered by Section 504 were supposed to be the floor, not the ceiling. Hence, Congress specifically provided in the ADA that “nothing in this chapter shall be construed to apply a lesser standard than the standards applied under [Section 504].”³¹ This simply interpretive rule, however, has been ignored by the courts as they have construed the definition of disability much more narrowly under the ADA than it had been interpreted under Section 504. For example, lower courts interpreting Section 504 routinely found that individuals with conditions often controllable with medication, such as epilepsy or diabetes, were “disabled.”³² In fact, that proposition was entirely uncontroversial under the Section 504 case law. The original House sponsor of the ADA—Tony Coelho (D-Calif.)—had epilepsy and clearly understood himself to be covered by the ADA’s definition of disability. Nonetheless, lower courts have found that individuals with epilepsy are not disabled for the purpose of the ADA, when medication is effective in permitting them to engage in daily activities such as working (despite also recognizing that Congress thought individuals with epilepsy were covered when they enacted the statute).³³

Similarly, the lower courts interpreting Section 504 unanimously concluded that HIV infection was a covered disability under the act.³⁴ Yet, courts interpreting the ADA have repeatedly concluded that certain individuals with HIV infection do not meet the statute’s definition of disability.³⁵ When the Supreme Court ruled in *Bragdon v. Abbott*, 524 U.S. 624 (1998), that Abbott, who was infected with HIV, met the definition of “disability” under the ADA, it did not actually go as far in its holding as the history of the ADA would have required. Rather than conclude that individuals with HIV infection are *per se* disabled (as prior courts had concluded under Section 504 and as Congress had in its consideration of the ADA), it concluded that Abbott was disabled pursuant to an individualized inquiry. Although an individualized inquiry was basic to court decisions under Section 504, the Court took that inquiry to new heights

under ADA in requiring such an inquiry for serious medical conditions like HIV infection.

Section 504, however, was not the only model for the ADA. Congress also borrowed extensively from Titles II and VII of the Civil Rights Act of 1964. Title II of the Civil Rights Act of 1964 primarily bans discrimination on the basis of race at hotels and restaurants. Congress modeled its public accommodation rules in ADA Title III on this foundation. Title VII of the Civil Rights Act of 1964 bans discrimination on the basis of race or gender at places of employment. Congress modeled its employment discrimination rules in ADA Title I on this foundation.

The ADA therefore had a very firm foundation in Section 504 as well as in Titles II and VII of the Civil Rights Act of 1964. That foundation should have made its meaning readily understandable in the early years of its history. As we will see, especially in chapter 2, the courts have not interpreted the ADA consistently with prior interpretations of Section 504.

B. The ADA's Language

The ADA comprises five main titles. Preceding these titles is a section entitled “General Provisions” that lists findings and definitions that cover the entire act. The finding that has played the largest role in litigation under the ADA has been the first finding, in which the act states that “some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.” 42 U.S.C. § 12101(a)(1).

Although Congress recited the 43 million figure as a *minimum* figure to suggest that a substantial portion of the American population is disabled and would benefit from the protections of the ADA, the courts have used the figure as a justification to *limit* the scope of statutory coverage. They have ignored that Congress recited that this figure was *growing*, and that a purpose of the ADA is to “provide a clear and *comprehensive* national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1) (emphasis added).

The general provisions section contains the definition of disability that is used throughout the act. Through a three-prong definition, it states that the term “disability” means, with respect to an individual:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

- (B) a record of such an impairment; or
 - (C) being regarded as having such an impairment.
- 42 U.S.C. § 12102(2).

This is an important and broad-ranging definition of disability. The first prong of the definition is not limited to physical impairments; it also covers individuals with cognitive or psychological impairments. Even if one is not actually disabled at the time of discrimination, the statute provides that a suit can be brought if the individual has a record of a disability under the second prong or is falsely being regarded as disabled under the third prong.

The ADA, however, is unlike most other civil rights statutes in that it requires an individual to demonstrate that he or she is a member of a protected class in order for a lawsuit to go forward. Under Title VII of the Civil Rights Act of 1964, an individual can bring a gender-discrimination lawsuit irrespective of whether the individual is a man or a woman. Similarly, one can bring a race-discrimination lawsuit under Title VII irrespective of whether one is black or white. The primary legal question under Title VII is typically whether the employer considered an impermissible factor—race or gender—not whether the individual is the member of a protected class.³⁶

By contrast, under the ADA, one can bring suit only if one establishes that he or she is a member of the protected class as an individual with a disability. Although Congress did not intend that requirement to be a substantial hurdle, in fact, it has become one. A plaintiff frequently loses at the summary judgment stage at trial because the employer successfully argues that the employee is not an individual with a disability. In that instance, the court determines that the individual is not disabled and therefore never even sends to the jury the question of whether the plaintiff faced unlawful discrimination on the basis of disability. Chapter 3 will examine those narrow interpretations of the definition of disability and the misuse of the summary judgment standard.

ADA Title I

Assuming a plaintiff can get past the hurdle of demonstrating that he or she is an individual with a disability, then the case may proceed under one

of the ADA's main titles. ADA Title I is the employment title. It generally provides:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.

ADA Title I is of crucial importance to individuals with disabilities. It requires that employers not discriminate against individuals who, with reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires. Although the media frequently criticize the reasonable accommodation requirement, the available empirical data suggest that that requirement has not been particularly costly. The literature suggests that more than two-thirds of reasonable accommodations cost less than \$500 and that the average cost is probably around \$200.³⁷ Each of these accommodations is estimated to save employers around \$5,000, on average, in lower job training costs and insurance claims, increased worked productivity, and reduced rehabilitation costs after injury on the job.

Enactment of ADA Title I caused some people to hope that the unemployment rate for individuals with disabilities would decline as a result of increased statutory protection. It is estimated that only one-third of people with disabilities who are qualified to work can find jobs. The employment rate for persons without disabilities is 80.5 percent, but the rate is 27.6 percent for persons with severe functional limitations and 20.6 percent for persons who require personal assistance to perform a life activity. Those people with disabilities who do find jobs are often kept at low-level jobs and prohibited from advancing at the workplace. The available empirical data suggest that the unemployment rate for individuals with disabilities has remained relatively unchanged (or has worsened) since the enactment of ADA Title I. This fact has caused some researchers to assert that the ADA has been ineffective. The assertions will be discussed in chapter 4. I will argue that it is too early to know if the ADA has been ineffective in changing the unemployment rate for individuals with disabilities. Possibly, it is unrealistic to expect that the enactment of the ADA's civil rights model would improve the employment

rate of individuals with disabilities. Other countries, like Australia, have tried more of a social service model to increase employment for individuals with disabilities.³⁸ Congress's goal of improving the employability of individuals with disabilities through enactment of the ADA may have been naive or misguided.

ADA Title II

Although ADA Title I is certainly important, ADA Titles II and III are equally important because, as noted above, many members of the disability community are unemployed, and possibly unemployable, and therefore cannot take advantage of ADA Title I. ADA Title II provides:

No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

ADA Title II covers nearly any program or activity conducted by a public entity ranging from higher education to prisons to public health care. ADA Title II broadens the coverage already existing under Section 504 of the Rehabilitation Act of 1973. Section 504 prohibits entities that receive federal financial assistance from discriminating on the basis of disability. Because most branches of state or local government receive federal financial assistance, ADA Title II and Section 504 are often coextensive. The only activity funded by state or local government that ADA Title II and Section 504 do not extensively regulate are primary and secondary education because that area is primarily regulated by the Individuals with Disabilities Act (IDEA). Discussion of the IDEA is beyond the scope of this book; it deserves its own, full-length attention.

ADA Title III

Title III of the Americans with Disabilities Act protects individuals with disabilities from discrimination at places of public accommodation. It provides:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

Unlawful discrimination under ADA Title III takes the form of outright exclusion, discriminatory policies and eligibility criteria, as well as physical barriers that impede accessibility. ADA Title III provides broad coverage, requiring accessibility and nondiscrimination at entities that individuals visit on a frequent basis in order to obtain the basic essentials like food, lodging, and health care, as well as at entities that individuals visit on a frequent basis to enhance the quality of their lives, such as restaurants, hotels, and places of amusement and recreation. ADA Title III plays an enormously important role in the integration of individuals with disabilities into society. The most well known ADA Title III case has been *Casey Martin v. PGA*, 531 U.S. 1049 (2001), in which the Supreme Court held that ADA Title III requires the PGA to permit Martin to use a golf cart while playing professional golf. The *Martin* decision is not reflective of the overall trend of the ADA to favor defendants.

As a package, the ADA contains marvelous language. It provides comprehensive protection from the moment one is born or becomes a person with a disability and might need access to public services to the time when one might enter the workforce or seek to use a forum for public entertainment. Countries such as Canada, Australia, and Great Britain admired the willingness of the United States to enact the ADA and enacted their own disability discrimination statutes modeled after the ADA's extensive array of protections.³⁹ Although the disability discrimination laws of other countries have been interpreted liberally, the ADA has been interpreted narrowly by the appellate judiciary in the United States, resulting in overwhelmingly prodefendant appellate outcomes, particularly under ADA Title I. This book will explore why and how the ADA has been interpreted so narrowly even while it is also having a transformative effect on American life.