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Beyond Lane: Who is Protected By the Americans With Disabilities Act, Who Should Be?

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BEYOND *LANE*: WHO IS PROTECTED BY THE AMERICANS WITH DISABILITIES ACT, WHO SHOULD BE?

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I. INTRODUCTION

When the Americans with Disabilities Act[1] (the "Act" or the "ADA") was enacted in 1990, many disability rights advocates expected that it would usher in a new era of equal opportunity and acceptance for people with disabilities.[2] Written in the tradition of both the Rehabilitation Act of 1973[3] and the Civil Rights Act of 1964,[4] the ADA reflected the ideal of distributive justice in its mandate to both counter discrimination and provide accommodation;[5] however, the courts gradually narrowed its coverage.[6] Some empirical studies assert that the ADA actually caused a decline in the rate of employment among people with disabilities.[7] By early 2000, some scholars predicted that the ADA would fade into obscurity as an ill-conceived relic that failed to adequately anticipate social costs and the rational choices of employers and people with disabilities.[8]

However, the ADA received new vigor from the Supreme Court with the May 2004 opinion, *Tennessee v. Lane*.[9] In a 5-4 decision, the Court affirmed that Congress validly exercised its power when it subjected states to suits under the ADA, at least with regard to limitations on access to courts.[10] While the decision addresses Title II of the ADA,[11] it does have broader implications for the Act as a whole. *Lane* reflects a

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1. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).
2. Leslie Francis & Anita Silvers, *Introduction* to AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS xiii, xix (Leslie Pickering Francis & Anita Silvers eds. 2000) [hereinafter Francis & Silvers].
3. *See* 29 U.S.C. §§ 706, 794 (2000).
4. *See* 42 U.S.C. § 7000e (2004).
5. S. REP. NO. 101-16, at 2 (1989).
6. James Leonard, *Symposium: The American with Disabilities Act: A Ten-Year Retrospective: The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 91-92 (2000).
7. *See* discussion *infra* Part IV.
8. Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, Regulation, 2000, Vol. 23, No. 1 at 24.
9. 124 S. Ct. 1978 (2004).
10. *Lane*, 124 S. Ct. at 1994.
11. 42 U.S.C. §§ 12131-12165.

significant shift in the ethical paradigm used by the Court to decide ADA cases and creates the opportunity to re-open dialogue about the real policy goals of the ADA and broader questions of justice for those with disabilities. Analysis of the measurable impact of the ADA continues and results in sometimes conflicting assertions. But whatever conclusions are ultimately proven, the question of our policy goals and our conception of justice for people with disabilities must be distinguished from the judicial and legislative tools intended to achieve those goals.

The ADA's legislative history makes it clear that it was intended to address the social issues associated with discrimination as well as accessibility issues for those with physical impairments.[12] The Supreme Court's emphasis on impairment and the notion of a discrete and insular minority found in civil rights legislation has transformed the scope of the ADA found in its plain meaning. The result is that some claimants who fall within the intended and literal scope of the ADA do not receive the benefit of its protection.[13] Furthermore, states have largely been exempted from the requirements of the ADA,[14] *Lane* notwithstanding.

Under Title I (the ADA's employment provisions),[15] even those who can make a successful claim may be caught in the catch-22 of winning a case but being terminated because their impairment makes them unemployable.[16] Although those who care for the disabled are not expressly covered by any part of the ADA, it is arguable that they constitute a vulnerable class which should receive fair compensation and perhaps legal protections under the ADA (though admittedly this might be more appropriately addressed under a different legislative aegis).[17] For these reasons, this paper recommends a reconsideration of the ADA's goals and a review of its effectiveness. While such a project is broader than the scope of this paper, its ultimate conclusions may necessitate changes in disability policy and justify substantial amendments to the ADA which would better-serve the original legislative intent and the interests of the disabled.

Part II of this article comments on the scope of the ADA in its statutory language, its legislative history, the regulations intended to provide clarification and the history of major Supreme Court decisions interpreting it. Part III reflects on the philosophical paradigms that appear to be

12. Lowell P. Weicker, Jr., *Historical Background of the ADA*, 64 TEMP. L. REV. 387, 387-89 (1991) [hereinafter Weicker].

13. Claudia Center & Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL'Y REV. 321, 321-22 (2003) [hereinafter Center & Imparato].

14. Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001).

15. 42 U.S.C. §§ 12111-12117 (2004).

16. Ronald Turner, *The Americans with Disabilities Act and the Workplace: A Study of the Supreme Court's Disabling Choices and Decisions*, 60 N.Y.U. ANN. SURV. AM. L. 379, 409 (2004).

17. Mary Mahowald, *A Feminist Standpoint*, *in* DISABILITY, DEFERENCE, DISCRIMINATION, 209, 239-50 (Anita Silvers et. al. eds., 1998) [hereinafter Mahowald].

operative in the creation and interpretation of the ADA. The concerns raised by some of the major empirical studies and recommended new areas for research are addressed in Part IV. Part V comments on possible revision of the ADA to create effective and legally valid incentives that better achieve national justice goals.

II. SCOPE OF THE ADA

The scope of the ADA is not self-evident. The text of the statute and its legislative history created high expectations.[18] In general, the regulations implementing the ADA reinforced these expectations.[19] However, the case law, particularly at the Supreme Court level, has curtailed those expectations by narrowing the definition of disability and by according state governments a significant degree of immunity.[20]

A. The Statute

The ADA is divided into five separate titles, four of which provide rights of action.[21] Title I contains employment antidiscrimination provisions intended to protect the disabled.[22] Title II requires that state and local governments provide all public programs, activities and services without discriminating on the basis of disability.[23] Title III prevents private entities that provide public services from discriminating on the basis of disability.[24] Title IV requires telecommunications companies to provide equipment and services for the hearing and speech impaired.[25] Lastly, Title V contains miscellaneous interpretive provisions and dispute resolution clauses.[26]

The ADA describes a disability as "a physical or mental impairment that substantially limits one or more of the [individual's] major life activities."[27] In theory, the protection of the ADA also extends to those who are regarded as having a disability or who have a record of disability.[28] Although Title I protection should theoretically be extended in

18. Richard K. Scotch, *Making Change: The ADA as an Instrument of Social Reform, in* AMERICANS WITH DISABILITIES: EXPLORING THE IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 275, 276 (Leslie Pickering Francis & Anita Silvers eds. 2000) [hereinafter Scotch].

19. *See infra* notes 41 and 50.

20. *See* Center and Imparato, *supra* note 13, at 324-29.

21. Americans with Disabilities Act, §§ 42 U.S.C. 12101-12213.

22. 42 U.S.C. §§ 12111-12117 (2004).

23. 42 U.S.C. §§ 12131-12165 (2004).

24. 42 U.S.C. §§ 12181-12189 (2004).

25. 47 U.S.C. § 225 (2004).

26. 42 U.S.C. §§ 12201-12213 (2004).

27. The Americans with Disabilities Act, § 3(2)(A) (1990) [hereinafter ADA]. Quoting all of Section 3(2), "Disability—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." *Id.* at §3(2)(A)-(C).

28. *Id.* at § 3(2)(B) & (C). These sections clearly address the issue of discrimination as distinct from impairment. Those who have a record of disability would include disabled persons who no longer have a disability, but who still suffer from discrimination. For example, someone who

these cases according to the language of the statute, it has not been due to the narrow definition of disability used by the Supreme Court.[29] The legislative history of the ADA refers to 43 million as the hypothetical number of Americans living with disabilities in 1990.[30] In an effort to limit the scope of the ADA by including no more than that estimated 43 million people, the Court has required proof of severe physical or mental impairment, usually construed as a specific medical disorder, whether caused by genetics, injury or disease.[31]

B. Legislative History

Historically, the ADA is the logical extension of the protections of section 504 of the Rehabilitation Act.[32] Where the Rehabilitation Act only protected against discrimination by groups receiving federal funding,[33] Title I of the ADA applies in theory to nearly all private and state entities. Disability rights groups lobbied extensively for these protections in the 1988 presidential race.[34]

To fulfill expectations for new and more expansive disability antidiscrimination protection, a joint hearing was held before the Senate Subcommittee on Disability Policy and the House Subcommittee on Select Education in September 1988.[35] Many people with disabilities testified before the overflowing room about architectural and communication barriers and the pervasiveness of stereotyping and prejudice.[36] Senator Kennedy, Chair of the Labor and Human Resources Committee, Senator Harkin, Chair of the Subcommittee on Disability Policy, and Representative Owens of the House Subcommittee on Select Education committed themselves to passing a comprehensive disability civil rights bill.[37] Over the following two years, a significant body of testimony and statistics was presented to Congress and became a part of the legislative record of the ADA. While the legislative record strongly indicates Congressional

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suffered from a disabling disease that has been cured, may still suffer discrimination as a person who had a stigmatizing disease. Similarly, someone may suffer discrimination for being perceived as disabled even if she is not. Also, someone may be discriminated against because she is believed to suffer from a disabling disease, even if she does not.

29. *See* Center and Imparato, *supra* note 13, at 324-29.

30. 42 U.S.C. § 12101 (2004).

31. This is a reference to the so-called "medical model" of disability. *See* Elizabeth A. Pendo, *Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation*, 35 U.C. DAVIS L. REV. 1175, 1214 (2002) [hereinafter Pendo I]; *See generally* Joel Feinberg, *Disability and Illness*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 244 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000) (challenging the alleged objectivity of medical diagnoses as a basis for demonstrating disability discrimination) [hereinafter Feinberg].

32. *See* 29 U.S.C. §§ 701, 794.

33. 29 USC § 794(a) (2004).

34. Francis & Silvers, *supra* note 2, at xix.

35. Weicker, *supra* note 12, at 391.

36. Francis & Silvers, *supra* note 2, at xix.

37. Weicker, *supra* note 12, at 391.

intent for broad protections,[38] the Supreme Court has largely ignored it.[39] Extensive references to the legislative history of the ADA in *Lane* indicate that such evidence of Congressional findings and intent are once again significant.[40]

C. Regulations

Within one year of the ADA's passage, Congress authorized the Equal Employment Opportunity Commission ("EEOC") to issue regulations implementing Title I.[41] The most important definitions proffered are "physical or mental impairment,"[42] "substantially limits,"[43] and "major life activity."[44] However, both *Sutton v. United Airlines*[45] and *Toyota Motor Manufacturing v. Williams*,[46] further described below, convincingly call into question the validity of these regulations.[47] Thus, while they may be instructive, the EEOC regulations are today accorded little deference.[48] As a result, the definition of "disability" is largely the product of judicial opinions, and the assertion that a plaintiff is not a "quali-

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38. 42 U.S.C. § 12101(b) (2004).

39. Sutton v. United Airlines, 527 U.S. 471, 482 (1999). "[The dissent] relies on the legislative history of the ADA for the contrary proposition that individuals should be examined in their uncorrected state. *See* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 10-18 (2000). Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history." *Id.*

40. *Lane*, 124 S. Ct. at 1984-92.

41. 42 U.S.C. § 12116 (2004).

42. Regulations To Implement The Equal Employment Provisions of the Americans With Disabilities Act, 29 C.F.R. § 1630.2(h) (2004).

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Id.

43. *Id.* at § 1630.2(j)(1) (2004).

> The term substantially limits means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Id.

44. *Id.* at § 1630.2(h)(2)(i) (2004). "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.*

45. *See generally* Sutton v. United Airlines, Inc., 527 U.S. 471, 482-83 (1999) (discussing that no agency has been delegated authority to interpret the term "disability").

46. *See generally* Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002) (substituting a more restrictive interpretation of "substantially limits" in place of the EEOC's definition of that element).

47. Lisa Eichhorn, *The* Chevron *Two-Step and the* Toyota *Sidestep: Dancing Around the EEOC's "Disability" Regulations under the ADA*, 39 WAKE FOREST L. REV. 177, 180 (2004) [hereinafter Eichhorn].

48. *Id.*

fied person with a disability" is the most common defense in ADA employment cases.[49]

The Department of Justice ("DOJ") issued regulations implementing Title II with the intention of harmonizing them with Title VII civil rights regulations.[50] These regulations provide detailed standards for state and local government compliance with the antidiscrimination provisions of Title II.[51] Notably, they provide specific guidelines for access to courtrooms, the very question posed by *Lane*[52] discussed below.[53]

Since the definition of disability in the ADA was based on the three-pronged definition in the Rehabilitation Act of 1973 (including impairment, a record of impairment and being regarded as having an impairment), courts have used regulations originally drafted by the Department of Health, Education and Welfare implementing the Rehabilitation Act to interpret terms in the ADA.[54] These regulations, now under the auspices of the Department of Health and Human Services ("DHHS"), are particularly important in defining "major life activities."

D. Supreme Court Jurisprudence

The ADA has been limited in several ways. Most significantly, the Supreme Court has narrowed the scope of ADA coverage by limiting the definition of a qualified person with a "disability."[55] Congress clearly intended to protect from discrimination those with epilepsy, diabetes, mental health conditions, amputees and others who are able to mitigate the effects of their impairment.[56] However, claims on the basis of these disabilities are "routinely dismissed as outside the protection of the statute."[57] Title I cases against states universally fail to overcome Eleventh Amendment immunity although *Tennessee v. Lane* has notably upheld Title II at least with regard to court access.[58] This is significant in that it represents a trend toward judicially limiting the scope and protections of the ADA.[59] Presuming that the current Supreme Court will not radically shift its position in favor of greater protection for the disabled, any real change must originate in Congress, must provide measurable results and

49. Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 303 (2000).
50. 28 C.F.R. § 35 (2004).
51. *Id.*
52. Tennessee v. Lane, 124 S. Ct. at 1979.
53. *See generally* 28 C.F.R. § 35.102, 35.104 (2004) (providing definitions for interpretation of the ADA, which apply to all services, programs, and activities provided or made available by public entities).
54. Eichhorn, *supra* note 47, at 182-83.
55. Center & Imparato, *supra* note 13, at 322.
56. *Id.* at 321.
57. *Id.* at 322.
58. *Lane*, 124 S. Ct. at 1980-82 (2004).
59. Scotch, *supra* note 18, at 279.

must be calculated to pass constitutional muster under the prevailing precedents.

1. The First Cases

Many of the earlier ADA cases provided clarification and tended to narrow the protections of the Act, creating a complex and often inconsistent set of rules.[60] One of the great challenges facing the Supreme Court in its ADA decisions has been reconciling the perceived need for clear rules with the tragic circumstances faced by many ADA claimants.

Some of the first Supreme Court cases interpreting the ADA seemed to uphold the scope of the Act indicated by its text and legislative history. *Bragdon v. Abbott*[61] asserted that an individual with HIV is considered a person with a disability even in the beginning stages of the disease.[62] While somewhat controversial at the time, this result was clearly intended by some in Congress.[63] *Cleveland v. Policy Management Systems Corporation*[64] declared that it is not a contradiction of terms when an individual claims to be "totally disabled" in order to collect Social Security Disability Insurance, and at the same time is able to perform the essential functions of a job under the ADA.[65] However, this rule has only been distinguished in reported federal cases, never followed.[66] *Pennsylvania Department of Corrections v. Yeskey*[67] declared that state prisons are state entities subject to the requirements of Title II of the ADA,[68] and that entities operating as extensions of state power are subject to Title II unless state immunity would apply.[69]

In 1999, there appeared to be a shift in Supreme Court decisions, significantly narrowing the protections of the ADA.[70] However, *Olmstead v. L.C.*[71] found that under Title II of the ADA it is appropriate to place people with mental disabilities in community-based settings when such placement is deemed appropriate by the state's treatment professionals.[72] The Court required that the State of Georgia provide these

60. Center & Imparato, *supra* note 13, at 325-26.
61. 524 U.S. 624 (1998).
62. *Id.* at 637.
63. 136 Cong. Rec. S. 9684 (1990).
64. 526 U.S. 795 (1999).
65. *Id.* at 798-99.
66. A Shepard's report was run using LEXIS on January 17, 2005.
67. *Yeskey*, 524 U.S. at 210.
68. *Id.* at 210.
69. Laurence Paradis, *Symposium: Development in Disability Rights: Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services and Activities Accessible to All*, 14 STAN. L. & POL'Y REV. 389, 395 (2003).
70. *See infra* notes 79, 80 and 81.
71. 527 U.S. 581 (1999).
72. *Id.* at 607.

alternatives to institutionalization so long as the costs remain reasonable.[73]

There have been a few very narrow decisions that have upheld ADA protection in highly disputed cases since 1999. *PGA Tour, Inc. v. Martin*[74] was decided after Sutton and its sibling cases, but it reflects a more expansive reading of the ADA. It required that the PGA allow Casey Martin to ride in a golf cart rather than walk the course during PGA tournaments.[75] The Court held that riding does not fundamentally alter the nature of the game and must be allowed to accommodate the disabled under Title III.[76] The ruling was so specific that it is unclear what sort of fact patterns would be governed by this precedent.[77]

Abbott, Policy Management Systems Corp., Yeskey, and *Martin* generally indicate a desire by the Supreme Court to protect those they perceive as being truly disadvantaged, a group that seems to be limited in these later cases to those without the ability to see, hear or walk.[78] However, the inconsistency in applying the original intent of Congress in enacting the ADA has created a patchwork of rules resulting in actual and perceived inequity in the judicial treatment of different groups of disabled people.

2. The *Sutton* Trio

Three related cases, *Sutton v. United Airlines*,[79] *Murphy v. U.P.S.*[80] and *Albertson's, Inc. v. Kirkingburg*[81](the "*Sutton* Trio"), decided on the same day in 1999, further limited the protections afforded by the ADA. *Sutton v. United Airlines* held that in order to determine if an individual is disabled within the meaning of the ADA, it is important to take into account any corrective measures the individual with the impairment employs.[82] Therefore, individuals who are able to correct their vision to 20/20 or better with eyeglasses are not to be considered disabled.[83] In a similar manner, *Murphy* relied on *Sutton* to conclude that the petitioner's high blood pressure could not be considered a disability when he was taking medication that effectively controlled it.[84] *Kirkinburg*, the third case of the *Sutton* Trio, concluded that cases questioning the existence of

73. *Id.* at 587.
74. 532 U.S. 661 (2001).
75. *Id.* at 661-62.
76. *Id.* at 690.
77. David A. Monaghan, *Title III of the ADA Allows a Qualified Disabled Entrant to Use a Motorized Cart on the Professional Golf Tour:* PGA Tour, Inc. v. Martin, 40 DUQ. L. REV. 403, 425 (2002).
78. *Toyota Motor Mfg.*, 534 U.S. at 195.
79. 527 U.S. 471 (1999).
80. 527 U.S. 516 (1999).
81. 527 U.S. 555 (1999).
82. *Sutton*, 527 U.S. at 482.
83. *Id.* at 481.
84. *Murphy*, 527 U.S. at 521.

a disability must be examined on a case-by-case basis regarding whether an individual is impaired in any major life activities.[85]

There are two significant problems with these three decisions. First, the Supreme Court has reinforced an "objective" medical standard for disability.[86] Second, "disabilities" that are correctable by device or medication do not qualify as protected disabilities under the ADA.[87] This rule was promulgated as a rejection of the claim that correctable vision constitutes a protected disability.[88] Although Justice Scalia rejected the inclusion of correctable vision problems as overly broad,[89] Justice Ginsburg took a more nuanced approach, noting that "[P]ersons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination."[90]

Thus the Supreme Court has interpreted the purpose of the ADA in the context of its goal to protect the "disabled" as an insular minority characterized by political and economic disadvantage.

3. *Toyota Motor Manufacturing v. Williams*[91]

In *Toyota Motor Manufacturing v. Williams*, respondent Ella Williams claimed that her employer, Toyota, had violated Title I of the ADA by not providing a reasonable accommodation for her claimed disability, which included the inability to hold her arms at shoulder height for hours at a time.[92] Toyota successfully argued that the claimed disability only prevented Ms. Williams from performing the sort of manual labor required for her job and would not constitute a substantial disability with regard to a broad range of jobs.[93] Significantly, the Court issued a unanimous decision.[94]

The key question before the Court was whether the inability to perform manual tasks that are not necessarily encountered in daily living,

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85. *Kirkingburg*, 527 U.S. at 556.

86. *See* Pendo I, *supra* note 31, at 1214; David Wasserman, *Stigma Without Impairment: Demedicalizing Disability Discrimination*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 146, 149 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000) [hereinafter Wasserman].

87. *Sutton*, 527 U.S. at 488.

88. *Id.* at 487-88.

89. Wasserman, *supra* note 86, at 146.

> Justice Scalia removed his glasses and waved them in the air. He was making the point that if mitigation were ignored, he, along with millions of other Americans, would be swept into the category of "disabled," swelling its ranks far beyond the 43 million recognized by Congress when it adopted the statute . . . .

Id.

90. *Id.* at 147.

91. 534 U.S. 184 (2002).

92. *Id.* at 189.

93. *Id.* at 200.

94. *Id.* at 184.

but are required in some jobs, "substantially limits" a "major life activity."[95] If not, Ms. Williams could not be considered a "qualified individual with a disability" for the purposes of the ADA.[96] What is clear from the opinion is that the Court presumptively considers substantial impairments of the major life activities of walking, seeing and hearing as the clearest indications that a person is qualified to make a disability claim under Title I.[97] In quoting the DHHS regulations for the Rehabilitation Act defining "major life activities" which include such relevant categories as "performing manual tasks," the Court singles out "walking, seeing, [and] hearing."[98] The Court seems to be seeking a bright line test for eligibility, and blindness, deafness and the inability to walk provide a clear standard.

In stark contrast, the description of carpal tunnel syndrome from which the respondent suffered seems to trivialize the diagnosis without regard to her specific condition.[99] The Court reiterates its claim that Congress limited the ADA's scope to the 43 million it considered disabled.[100] If only those unable to see, hear or walk are presumptively disabled under the ADA and thus protected by Title I, then the number of those considered disabled in 1990 would only have been approximately 3.22 million.[101] Clearly, Congress intended to protect a broader class of people. Even so, *Sutton* and the other cases from the 1999 term had narrowed the scope of ADA coverage to the extent that no Justice dissented to the similar standard proposed in *Williams*.[102]

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95. *Id.* at 196.

96. *Id.* at 191.

97. *See id.* at 191-96.

98. *Id.* at 195.

99. *Id.* at 199.

> While cases of severe carpal tunnel syndrome are characterized by muscle atrophy and extreme sensory deficits, mild cases generally do not have either of these effects and create only intermittent symptoms of numbness and tingling. Studies have further shown that, even without surgical treatment, one quarter of carpal tunnel cases resolve in one month, but that in 22 percent of cases, symptoms last for eight years or longer . . . . Given these large potential differences in the severity and duration of the effects of carpal tunnel syndrome, an individual's carpal tunnel syndrome diagnosis, on its own, does not indicate whether the individual has a disability within the meaning of the ADA.

Id.

100. *Id.* at 197.

101. According to Chiang, Bassi & Javitt there were 1,103,600 legally blind Americans in 1990. *Prevalence of Vision Impairment: National Estimates*, *at* Lighthouse International: Statistics on Vision Impairment, *at* http://www.lighthouse.org/vision_impairment_prevalence_older.htm (last viewed Oct. 10, 2004). In 1990, 552,000 Americans were unable to hear or understand speech. *Prevalence and Characteristics of Persons with Hearing Trouble: United States, 1990-1991: Series 10: Data from the National Health Survey, No. 188*, at Table C, *available at* U.S. Department of Health and Human Services, http://www.cdc.gov/nchs/data/series/sr_10/sr10_188.pdf (Mar. 1994). There are 1,564,000 people in the United States using wheelchairs. *National Health Interview Survey on Disability (NHIS-D) for 1994*, at Table 1, *available at* National Center for Health Statistics, http://www.cdc.gov/nchs/about/major/nhis_dis/ad292tb1.htm (last viewed Oct. 10, 2004).

102. *Toyota*, 534 U.S. at 184.

4. *Chevron v. Echazabal*[103]

The second major ADA case of the October 2001 term is *Chevron v. Echazabal*. Like *Williams*, it was a unanimous decision and reinforced the narrowing of ADA protection.[104] However, instead of raising the standard for disability qualification, *Echazabal* gives employers greater latitude to fire or deny employment on paternalistic grounds.[105] That is, if the employer determines that employment poses a risk to the disabled employee, it has discretion to dismiss the employee.[106] Mr. Echazabal was diagnosed with a liver disease which could have been exacerbated by continued employment at a Chevron petrochemical refinery.[107] Upon the advice of his doctor, Mr. Echazabal determined that his potential health risk was minimal and decided to continue in his job.[108] Chevron fired Mr. Echazabal due to the potential risk to his health on the basis of EEOC regulations which were interpreted to allow a threat-to-self defense.[109]

Echazabal created a new catch-22 for people with disabilities. While it had been earlier decided that qualified persons with disabilities who require accommodations are not afforded ADA protection if such accommodations are not reasonable (i.e. demonstrating disability status provides grounds for dismissal or failure to hire),[110] employers may also terminate or fail to hire a person whose disability poses a potential risk to him or herself even if no accommodation is requested.[111] While the ADA was enacted to prevent employer paternalism in the form of discrimination, the Court reasoned that the threat-to-self defense reflected a different and acceptable form of paternalism.[112]

This decision is problematic to the extent that it is at odds with the goals of integration and self-determination, but it provides a bright line rule to protect employers who would assume known risks to employees, particularly when such personal injury risk might not be waivable. The unanimity of the Court implies that it is willing to allow paternalism in the name of judicial efficiency so long as it does not appear overly discriminatory.

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103. 536 U.S. 73 (2002).
104. *Echazabal*, 536 U.S. at 73.
105. D. Aaron Lacy, *Am I My Brother's Keeper: Disabilities, Paternalism, and Threats to Self*, 44 SANTA CLARA L. REV. 55, 84-85 (2003).
106. *Echazabal*, 536 U.S. at 74-75.
107. Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1065 (9th Cir. 2000).
108. *Echazabal*, 226 F.3d at 1065.
109. *Id.*
110. Sch. Bd. Of Nassau County v. Arline, 480 U.S. 273, 287 (1987) (finding that tuberculosis qualifies as a "handicap" under the Rehabilitation Act but that the threat of contagion could disqualify an individual from protection).
111. *Echazabal*, 536 U.S. at 86.
112. *Id.* at 85.

5. *U.S. Airways v. Barnett*[113]

U.S. Airways v. Barnett addresses the conflict between seniority hiring systems and requests for accommodation. Mr. Barnett was a baggage handler for U.S. Airways until he injured his back.[114] He was then transferred to a mail room position within the company for a period of time.[115] However, U.S. Airways decided to make the position available through its seniority system.[116] Barnett requested to stay in the position as a reasonable accommodation of his disability.[117] U.S. Airways argued that circumventing a seniority system negotiated with labor was not a reasonable accommodation and fired Barnett.[118] The Court agreed that this was a valid, though rebuttable, presumption.[119]

The most troubling fact in the case is that Barnett's position in U.S. Airways' mailroom was not a vacant position that the company needed to fill.[120] Barnett's only request for accommodation was to remain in the position to which he had been transferred.[121] However, the rule given by the Court does give employees with disabilities the opportunity to overcome the presumption by showing "special circumstances" that make disregarding a seniority system a reasonable accommodation.[122]

The dissents to key portions of the decision are quite different. Justice Scalia's dissent, in which Justice Thomas joins, rejects the Court's rule that allows a case-by-case analysis even though it creates a presumption in favor of employers.[123] Justice Souter's dissent is joined by Justice Ginsburg, and it rejects the notion that seniority rules ought to be insulated from the ADA requirement for reasonable accommodations.[124] Not surprisingly, these reactions seem to reflect the expected policy preferences of the Justices.[125] While *Barnett* does not fully resolve the competition between seniority systems and the ADA, it does not represent the kind of clear erosion of disability rights seen in *Sutton* or *Williams*.

113. U.S. Airways v. Barnett, 535 U.S. 391 (2002).
114. *Barnett*, 535 U.S. at 391.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 406.
120. *Id.* at 423.
121. *Id.* at 391, 423.
122. *Id.* at 405.
123. *Id.* at 419-20 (Scalia, J., dissenting).
124. *Id.* at 423-24 (Souter, J., dissenting).
125. *See generally* Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decisionmaking*, 29 J. LEGAL STUD. 721 (2000), and Frederick Schauer, *Lecture: Incentives, Reputation and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000).

6. *Tennessee v. Lane*[126]

The most recent Supreme Court case addressing the ADA is *Tennessee v. Lane*. The respondents, George Lane and Beverly Jones, are both paraplegics who use wheelchairs.[127] Lane crawled up two flights of stairs to make an appearance to respond to criminal charges in a courthouse that had no elevator.[128] When he returned for a hearing, he refused either to crawl or be carried to the courtroom and was arrested and jailed for failure to appear.[129] Beverly Jones, a certified court reporter who relied on access to courtrooms for her livelihood and was unable to gain access to a number of county courthouses, joined in the action challenging the State of Tennessee pursuant to Title II of the ADA.[130]

Tennessee moved to dismiss the suit at the District Court level on the grounds of Eleventh Amendment immunity.[131] The District Court denied the motion, and Tennessee appealed the decision to the Sixth Circuit Court of Appeals.[132] The Sixth Circuit ultimately affirmed the denial of dismissal on due process grounds.[133] Since the Supreme Court had ruled in *Bd. of Tr. of the Univ. of Ala. v. Garrett*[134] that states were immune from Title I liability despite equal protection concerns, some commentators expected Eleventh Amendment immunity to be extended to all Title II suits.[135] However, in a 5-4 decision drafted by Justice Stevens, the Supreme Court ruled that the fundamental right to court access is a valid justification for Congress' enactment of Title II pursuant to its authority under section 5 of the Fourteenth Amendment.[136]

The Court applied the two-part test adopted in *Kimel v. Florida Bd. of Regents*[137] that requires Congress to unequivocally express its intent to

126. Tennessee v. Lane, 124 S. Ct. 1978 (2004).
127. *Lane*, 124 S. Ct. at 1982.
128. *Id.*
129. *Id.* at 1983.
130. Lane v. Tennessee, 315 F.3d 680, 683 (6th Cir. 2003) [hereinafter *Lane II*].
131. *Lane II*, 315 F.3d at 682.
132. *Id.*
133. *Id.* at 683. The Circuit Court of Appeals indicates the absence of a factual record in the District Court opinion. *Id.*
134. 527 U.S. 356, 364 (2001). *Garrett* raised the question of the constitutionality of Title I of the ADA to the extent that it regulates state governments. *Id.* This ruling relied on a strong interpretation of the 11th Amendment according to Ruth Colker & Adam Milani, Garrett, *Disability and Federalism: A Symposium on* Bd. of Tr. of the Univ. of Ala. v. Garrett: *The Post*-Garrett *World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075, 1077-81 (2002).
135. *See* Bazelon Center for Mental Health Press Release, *Supreme Court to Review Americans with Disabilities Act: Ruling Could Shield States from Anti-Discrimination Suits, at* http://www.bazelon.org/newsroom/11-12-03tenn_v_lane.htm (Jan. 15, 2004); *see* Memphis Center for Independent Living Journal, Tennessee v. Lane *Oral Arguments: Why Are the Civil Rights of People with Disabilities a "States Rights" Issue?* (stating comments made by disability rights advocates prior to oral arguments for *Lane*), *at* http://www.mcil.org/mcil/log/2004/011504sa.asp (Jan. 15, 2004) [hereinafter MCIL].
136. *Lane*, 124 S. Ct. at 1994. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. art. XIV, § 5.
137. 528 U.S. 62, 73 (2000).

abrogate state immunity and act pursuant to valid constitutional authority in rejecting the Eleventh Amendment challenge.[138] Title II itself constituted unequivocal intent to abrogate immunity,[139] but the question of valid authority implicated the test in *City of Boerne v. Flores*,[140] which sets out the standard for permissible remedial legislation in these cases. The rule allows remedial legislation so long as it is "congruen[t] and proportional[]" to the threatened injury.[141] Given the history and pattern of discrimination against the disabled and the compelling interest in a fundamental due process right, the Supreme Court upheld Title II with regard to states at least in cases involving access to courts.[142] It is not clear whether Title II is enforceable against states in other settings.[143]

Although *Lane* is primarily an Eleventh Amendment case, it does have broader implications for other categories of ADA litigation. It has sent a signal to the disability rights community that the ADA has not become a dead letter yet.[144] The majority in *Lane* includes those Justices who are typically considered the more liberal members of the Court (Justices Stevens, Souter, Ginsburg and Breyer), along with Justice O'Connor, and seems to represent a shift away from the trend toward narrowing the scope of the ADA, at least with respect to the due process right to court access.[145] However, it is not clear whether this rule will apply to Title II suits under any other circumstances.[146] Such a specific carve-out may not contribute to greater predictability and efficiency in ADA litigation, but it does represent a response to facts that demonstrated an extreme case of the sorts of indignity people with disabilities have been subjected to in this country—with limited or no legal recourse. As the clear deciding vote, Justice O'Connor's position is almost certainly a reaction to this extreme sort of indignity. While not a formalist in the sense of more conservative members of the Court, among her colleagues, Justice O'Connor is among the most consistent supporters of states' rights.[147] Thus, her decision to abrogate Eleventh Amendment immunity in this case indicates a competing, more important value.

Justices Thomas and Kennedy join Chief Justice Rehnquist in his dissent.[148] In it they dispute the majority's conclusions in applying the

138. *Id.*
139. *Lane*, 124 S. Ct. at 1983.
140. 521 U.S. 507 (1997).
141. *Id.* at 520.
142. *Lane*, 124 S. Ct. at 1993-94.
143. *Id.* at 1992-93.
144. *See* Bazelon Center for Mental Health Press Release, *Supreme Court Decides* Tennessee v. Lane *and* Jones, *Upholds Civil Rights Protections for People with Disabilities, at* http://www.bazelon.org/newsroom/5-17-04lanedecision.htm (May 17, 2004).
145. *See id.*
146. *Lane*, 124 S. Ct. at 1992-93.
147. *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 548-49 (1997) [hereinafter Klarman I].
148. *Lane*, 124 S. Ct. at 1997 (Rehnquist, J., dissenting).

Boerne test as reaffirmed in *Garrett*.[149] On the sole basis of formalism, the argument is likely more consistent with Eleventh Amendment jurisprudence than the majority position. Justice Scalia's dissent[150] objects to the "congruence and proportionality test" generally as a "flabby" test.[151] His concerns are characteristically both pragmatic and textual.

E. The Definition of Disability in the ADA

Disability, as with all categories of disadvantage, contains a wide variety of expressions. There is cause, time of onset, expected duration, the severity of impact, the type of impairment and recognizability/unrecognizability.[152] These are all valid categories that help to define with particularity the nature of a given disability. Presumably the spectrum of disadvantage ranges from the involuntary, permanent and severe to the voluntary, temporary and mild. Notably, time of onset and recognizability do not fit neatly within this gradient because they vary depending on the details of a person's experience and are thus more subjective.

Although there may be inconsistency in the way the ADA is applied to different groups, the statute itself does not inquire as to the cause or time of onset of the disability.[153] Severity and type of disability have been used as thresholds for recovery.[154] As mentioned earlier, those with correctable vision problems do not have a claim under the ADA.[155] Although recognizability would play a significant role in determining discrimination cases based on stigma, this factor tends merely to contribute to the threshold analysis in recent cases.[156]

1. Impairment versus Stigma, the Medical versus the Social Model

There are entire classes of people who are stigmatized but do not have a physical or mental impairment. The impairment classification is the product of statistics (a characteristic such as height or weight which is two standard deviations from the mean) or medical pathology.[157] Disabilities related to height and weight are raised in numerous articles critiquing the ADA.[158] For example, a boy who produces normal amounts of growth hormone and is very short, but not so short that he would be considered to have an impairment based on statistics, might suffer the same discrimination as a child with a hormonal deficiency, but it is not

149. *Id.* at 2005-06.
150. *Id.* at 2007 (Scalia, J., dissenting).
151. *Id.* at 2008.
152. *See* Wasserman, *supra* note 86, at 148-52.
153. *See id.* at 147.
154. *Id.* at 147-48.
155. *Sutton*, 527 U.S. at 482-83.
156. *See* Pendo I, *supra* note 31, at 1224-25.
157. Wasserman, *supra* note 86, at 149.
158. *See* Christopher J. Martin, *Protecting Overweight Workers Against Discrimination: Is Disability or Appearance the Real Issue?*, 20 EMPLOYEE REL. L.J. 133 (1994); *see also* Post, *supra* note 39, at 1.

likely that he would be protected under the ADA. This is an area of injustice which intuitively might seem to merit protection under the ADA but does not as it is currently interpreted. This is the situation for many groups who suffer systematic discrimination due to social stigma rather than as a direct cause of impairment.[159]

Although the discussion of stigma raises serious questions of justice, it seems to address the issue of discrimination generally, rather than disability as it is commonly understood. The ADA was never intended to protect all people from all forms of discrimination. Even so, its language and legislative history make it clear that Congress intended to address disability as a social construct—not simply as a medical phenomenon.[160]

2. A Different Standard for States: Eleventh Amendment Immunity

Title II of the ADA expressly prohibits discrimination by state and local governments on the basis of disability with regard to employment, public programs, activities, and services.[161] In *Garrett*, the Supreme Court struck down the provisions of Title I with regard to state governments as a violation of the Eleventh Amendment, a federalism provision granting states immunity to federal claims brought by private parties.[162] This case is consistent with a series of cases decided over the past twelve years that have breathed new life into the Tenth and Eleventh Amendments.[163] This reinvigorated federalism has reasserted the sovereignty of states and has limited previously accepted federal power over certain local issues.[164] It is unlikely that the ADA would have been found unconstitutional on these grounds at the time of its adoption. There is no significant debate that Congress intended for the rights of the disabled to improve access to employment and freedom from discrimination to have greater significance than state interests in discriminating.[165] However, the application of Eleventh Amendment immunity results in the denial of Title I protection for disabled employees of state governments, including instrumentalities of state governments.

A major factor underlying this result is that state discrimination on the basis of disability receives only rational basis review under the Equal

159. Wasserman, *supra* note 86, at 148-50.

160. THE ADA OF 1989 Cal. No. 216: COMM. ON LABOR AND HUMAN RES., S. REP. NO. 101-115, at 15-16 (1989).

161. 42 U.S.C. § 12202 (2004).

162. *Garrett*, 531 U.S. at 363 ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (quoting U.S. CONST. amend. XI)).

163. Note, *The Irrational Application of Rational Basis:* Kimel, Garrett, *and Congressional Power to Abrogate State Sovereign Immunity*, 114 HARV. L. REV. 2146, 2147 (2001).

164. William Claiborne, *Supreme Court Rulings Fuel Fervor of Federalists*, WASH. POST, June 28, 1999 at A2.

165. *See generally Lane*, 124 S. Ct. at 1978.

Protection Clause of the Fourteenth Amendment;[166] therefore, discrimination is constitutional as long as it is rationally related to a legitimate government purpose.[167] Because such classifications are generally constitutional, and because Congressional action abrogating state immunity under section 5 of the Fourteenth Amendment must be congruent and proportional to a constitutional violation,[168] it is difficult (though as *Lane* demonstrates, not impossible) for Congress to bar state-sanctioned disability-based discrimination. While the ADA claims constitutional authority under the Commerce Clause of the Constitution and the Fifteenth Amendment, the Supreme Court has rejected this claim to the extent that legislation infringes on the legitimate authority of the states unless there has been a clear demonstration of discrimination by states themselves providing a specific due process justification.[169] The Supreme Court has ruled that this is not the case with Title I of the ADA.[170]

Garrett exempts states from suits brought under the employment provisions of Title I, but it does not address the question of liability under Title II. At least one federal circuit court has found that the rule in *Garrett* would apply to Title II claims.[171] While this is reasonable with regard to *Garrett*, a similar Supreme Court ruling applicable to Title II could have completely invalidated the title. Thus with one relatively narrow ruling on the basis of federalism, the Court paved the way for completely gutting Title II. Since the disabled rely heavily on programs, activities, and services largely administered by state governments, striking down Title II would have a profound impact on the disabled by removing the one direct cause of action against states they currently have based on discrimination.[172] Although *Lane* saved Title II from extinction, it only found a constitutional basis for Title II in the very narrow issue of access to courts.

3. The Catch-22 of Employment Cases

For those who are not employed by states or state entities, Title I claims may still be brought; however, these claims have been mostly unsuccessful when litigated.[173] Statistics on cases brought under the ADA are not necessarily indicative of the strength of the Act unless they include data on cases that are settled through administrative channels or

166. Michael H. Gottesman, *Disability, Federalism and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31, 106 (2001).

167. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314-15 (1976).

168. *See Flores*, 521 U.S. at 520.

169. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80-83 (2000).

170. *Kimel*, 528 U.S. at 80-83.

171. U.S. v. Morrison, 529 U.S. 598 (2000).

172. National Council on Disability, Policy Briefing Paper: Tennessee v. Lane: *The Legal Issues and the Implications for People with Disabilities*, September 4, 2003 *at* http://www.ncd.gov/newsroom/publications/2003/legalissues.htm (Sept. 4, 2003).

173. *See* SUSAN MEZEY, DISABLING INTERPRETATIONS: THE ADA IN FEDERAL COURTS (forthcoming U. of Pittsburgh Press 2005) [hereinafter MEZEY].

otherwise prior to litigation.[174] That said, Title II cases tend to be more successful than Title I cases when litigated.[175]

The problem that has arisen is that plaintiffs must show actual disability in the form of physical impairment even with correction by medication or device in order to make a claim under Title I, but once they have established that claim, employers are allowed to terminate employees because they do not have the requisite physical ability or qualification.[176] Thus, an employee is forced to "emphasiz[e] all the things he or she cannot do in order to claim ADA protection, and then, once through the courthouse door, [downplay] limitations in order to prove he or she is qualified for the job."[177]

As a practical matter, it would seem that employers will take advantage of this inconsistency whenever possible. Plaintiffs are effectively insulated from this rule only in cases where the claim is based on a clearly identifiable condition traditionally associated with physical, rather than developmental, disabilities such as blindness, hearing impairment, paraplegia, etc. Based on repeated references by the Court to these three categories,[178] it is likely that judges are likely to presume ADA protection for those who have paradigmatic disabilities such as blindness, deafness or paraplegia even if the discrimination suffered is no different than that suffered by those who do not have such impairments.

III. PHILOSOPHICAL PARADIGMS

ADA cases and their complex patchwork of rules are in some measure the result of conflicting philosophical paradigms.[179] Here, philosophy generally means ethics in the broad sense of identifying and making choices that promote "the good."[180] Though similar, it is distinct from morals, which are narrower, more personal, and less concerned with teleology.[181] Undoubtedly, the Court must give a nod to formalism by

174. *See id.*

175. *See id.*

176. *See* Anita Silvers, *The Unprotected: Constructing Disability in the Context of Antidiscrimination Law*, *in* THE AMERICANS WITH DISABILITIES ACT: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 126, 129 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000).

177. Arlene Mayerson & Matthew Diller, *The Supreme Court's Nearsighted View of the ADA*, *in* THE AMERICANS WITH DISABILITIES ACT: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 124, 124-25 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000).

178. *Lane*, 124 S. Ct. at 1978 (Scalia, J., dissenting); *Toyota Motor Mfg.*, 534 U.S. at 195; *Sutton*, 527 U.S. at 502.

179. *See generally* Laura F. Rothstein, *Reflections on Disability Discrimination Policy—25 Years*, 22 U. ARK. LITTLE ROCK L. REV. 147 (2000); *see generally* Elizabeth A. Pendo, *Substantially Limited Justice?: The Possibilities and Limits of a New Rawlsian Analysis of Disability-Based Discrimination*, 234 ST. JOHN'S L. REV. 225 (2004) [hereinafter Pendo II].

180. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1698 (Merriam-Webster Inc. 1993) (defining "philosophy" as "the study of the principles of human nature and conduct.").

181. *Id.* at 1468 (defining "morals" as "based on inner conviction.").

providing a precedential basis for its decisions. However, after *Bush v. Gore*[182] it is impossible to deny that Supreme Court decisions reflect the underlying values of the individual Justices.[183] While it is simple enough to categorize the basis for decisions as partisan, the ADA cases seem to indicate that competing ethical systems may motivate the decisions of individual Justices differently in different cases. We would expect these sorts of decisions to be more likely in cases on the margins, those with facts that are shocking or unusual. Clearly there is a tension between the judicial impulse to create coherent and consistent rules that are predictable and efficient and the impulse to provide just solutions within the framework of legal tradition.

A. The ADA as an Expression of Rawlsian Justice

The ADA was drafted in the shadow of Title VII and related civil rights legislation and addressed questions of distributive justice that may be understood within the context of the philosophy of John Rawls.[184] The philosophy of John Rawls is most thoroughly described in his *A Theory of Justice*.[185] Rawls posits that justice must fundamentally be fairness.[186] He proposes that rational persons not knowing the circumstances into which they were born would choose a system in which they would be in the best possible position if they were born into disadvantage.[187] That is, if we knew that we might be born into a marginalized group, whether discriminated against on the basis of class, race, ethnicity, gender, religion, orientation or disability, we would choose a system that would provide opportunities comparable to those who were not disadvantaged. The ADA attempts to move closer to such a system in its combination of antidiscrimination and accommodation provisions.

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182. 531 U.S. 98 (2000). For a more detailed discussion of the competing paradigms *see* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1441-1458 (2001).

183. *See generally* Michael J. Klarman, Bush v. Gore *through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001) [hereinafter Klarman II].

184. *See generally* Pendo II, *supra* note 179.

185. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press of Harvard University Press rev. 1999) [hereinafter Rawls I] (It is significant that the ADA received support as an expression of distributive justice in the classical liberal tradition. Rawls posited that fair legal rules can be developed as a social contract negotiated from the "initial position." *Id.* at 10-11. The initial position is a notion similar to the classical "state of nature;" however, it is an artificial position that requires ignoring the actual state of privilege and/or disadvantage into which one is born. *Id.* It assumes that one cannot make a fair decision regarding the distribution of social goods knowing a priori what advantages or disadvantages he or she will actually be born into. *Id.* So, in order to negotiate a fair social contract, we make distributive decisions pretending not to know. *Id.* This is called the "veil of ignorance." *Id.* at 118-23. As opposed to some other theories of social contract, Rawls' veil of ignorance is thick in that it denies knowledge of any details of life such as gender, race, ethnicity, intelligence, health, disability, orientation, etc. *Id.* Presuming human rationality and risk aversion, Rawls assumes that a person in the original position reasoning behind the veil of ignorance will choose to live in the best possible situation if born into disadvantage even if it means sacrificing economic or social privilege if born into advantage.). *Id.*

186. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT xvi (Erin Kelley ed., 2001) [hereinafter Rawls II].

187. *See generally* RAWLS I, *supra* note 185.

While this ethical system is reflected in the Act itself and its implementing regulations, justice as fairness has not been a clear ethical basis for Supreme Court decisions interpreting the ADA, except perhaps in *Abbott* and *Martin*. In both cases, the Court seems to be motivated to provide equal access for those considered disabled by combating irrational discrimination or by providing reasonable accommodations, respectively.[188]

The power of Rawls's theory of justice is most significant with regard to the ADA in creating a consensus regarding policy goals. To that extent, "justice as fairness" analysis ought to be used in any reconsideration of the goals of the ADA.[189] However, it is not as useful in developing rules that efficiently achieve those policy goals. While the ADA should be scrutinized to discover whether it has achieved the goals set out by Congress, failure to achieve those goals efficiently demands reconsidering the legal mechanisms of the ADA—not the goals of the ADA.

B. The Role of Standpoint Theory

Standpoint theory is largely a product of feminist theory, but it has been adapted by a number of marginalized groups, including people with disabilities.[190] The core ethical insights of this philosophy are that the disadvantaged are in the best position to observe and judge the relative justice or injustice of a system.[191] Concomitant to these ideas is the notion that the disadvantaged ought to have a privileged position in modifying systems in order to make them more just.[192] This position is not necessarily in conflict with a Rawlsian view, which requires that rational people at least consider what it would be like to be disadvantaged. The difference is that the Rawlsian social contract is the product of a thought experiment: "What would life be like if I were disabled, poor, etc.?" Within standpoint theory, notions of justice are actually defined by the disadvantaged themselves.

To the extent that the ADA was influenced by the contributions of people with disabilities (such as Senator Robert Dole), it may be considered a product of standpoint theory. Since none of the sitting Justices would likely consider themselves to be disabled, their decisions are unlikely to be the product of standpoint theory from the point of view of the disabled. However, some of the Justices admit a high regard for the view of the disadvantaged even if they are not members of that particular class. This group would likely include Justices Breyer, Ginsburg, Souter,

188. *See Abbott*, 524 U.S. at 637; *Martin*, 532 U.S. at 661-62 (2001).
189. *See infra* Part V for a detailed discussion.
190. Mahowald, *supra* note 17 at 211.
191. *Id.* at 209.
192. *Id.* at 209-10.

and Stevens.[193] Some commentators would also characterize Justice O'Connor as a feminist.[194]

Standpoint theory should be considered in any evaluation or revision of the ADA. Views of the disabled must be considered in the analysis of raw employment data. Empirical studies should be designed to compare experiences of discrimination and well-being since the enactment of the ADA and similar state provisions. Also, in refining our policy approach to the antidiscrimination and participation goals of the ADA, the voices of people with disabilities must be seriously considered. This is also true in a Rawlsian analysis of the ADA.

C. Pragmatism in Narrowing Coverage

All nine members of the Court are driven by pragmatic concerns for judicial consistency and clarity to varying degrees.[195] The fact that important cases limiting ADA protection such as *Williams* were decided unanimously[196] seems to indicate a concern for efficiency over fairness in individual circumstances. From *Sutton* onward, the Court has denied protection to people who might otherwise be considered disabled because it views the class of qualified persons with disabilities as necessarily limited—first, because Congress itself numbered the disabled in the United States at 43 million[197] and second, because the costs would be excessive if ADA protection were given to everyone who wears glasses[198] or has carpal tunnel syndrome.[199] This is a position defended by Justice Scalia as evidenced by his dissent in *Lane* and his position on many other ADA cases.[200]

Of course, the Court must distinguish between disabilities that create major impairments requiring accommodations and those that do not in order to allocate limited economic resources. However, broad application of the antidiscrimination provisions of the ADA does not necessarily

193. These Justices tend to be considered sympathetic to feminist perspectives at least in part because of their ruling on abortion rights cases. *See, e.g.*, Patricia Dreher & Mindy Davis, *After 30 Years of* Roe v. Wade*: We Won't Go Back!*, *at* http://www.now.org/nnt/fall-2002/roe.html (Jan. 22, 2003). "Four justices who can be counted on to vote for reproductive freedom and against most restrictions on abortion: Stephen Breyer, Ruth Bader Ginsberg, David Souter and John Paul Stevens." *Id.*

194. Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 895 (1995).

195. Klarman II, *supra* note 183, at 1723.

196. Toyota Motor Mfg. v. Williams, 534 U.S. 184, 187 (2002).

197. Sutton v. United Airlines, 527 U.S. 471, 484 (1999).

198. *Sutton*, 527 U.S. at 487.

199. *Toyota* 534 U.S. at 199.

200. *See e.g.*, PGA Tour v. Martin, 532 U.S. 6661 (2001); *Lane*, 123 S. Ct. at 3; Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998); Pa. Dep't of Corr. v. Veskey, 524 U.S. 206 (1998); Barnes v. Gorman, 536 U.S. 181 (2002); US Airways, Inc. v. Barnett, 535 U.S. 391 (2002); U.S. v. Morrison, 529 U.S. 598 (2000).

impose additional costs on employers.[201] Pragmatism, including but not limited to neoclassical economics, offers powerful analytical tools for achieving particular goods. However, it is not as helpful in identifying the justice goals of our society.[202]

D. Formalism and States' Rights

Formalism is an awkward basis for judicial decision making. On the one hand, it is the dominant view of the Langdellian revolution in legal education which still dominates American law schools and influences many judges.[203] On the other hand, legal scholars and average citizens find it patently obvious that judges make decisions based on their personal preferences and cloak those decisions with an aura of formalism—particularly on the margins and in difficult cases.[204] That said, those judges typically considered conservative seem to rely more heavily on formalism, as in Rehnquist's dissent in *Lane*.[205] Critical scholars might point out that conservative jurists are more likely to rely on formalism because it reinforces the status quo, even though that status quo may be rife with unfairness.[206]

One result of formalist decisions in ADA cases is the upholding of Eleventh Amendment state immunity. This is particularly noticeable in *Garrett*, but it is also evident in most Title II cases with the notable exception of *Lane*. Although the Court has made it fairly clear that equal protection claims will not abrogate state immunity,[207] perhaps *Lane* will open the door to state liability under Title II for due process claims other than the denial of access to the courts.

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201. While there are persuasive intuitive arguments that the threat of litigation increases firing costs, there is empirical evidence indicating that hiring disabled employees can provide businesses with competitive advantages. Furthermore, accommodations are usually unnecessary and tend to be inexpensive when they are necessary. *See* Peter D. Blanck, *Studying Disability, Employment Policy and the ADA*, *in* THE AMERICANS WITH DISABILITIES ACT: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 209, 212 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000).

202. Pendo I, *supra* note 31, at 1205-08.

203. *See* Michael Ariens, *Modern Legal Times: Making Professional Legal Culture*, 15 J. OF AM. CULTURE 25, 25-26 (1992).

204. Klarman II, *supra* note 183, at 1734-35.

205. *Lane*, 124 S. Ct. at 1999 (Rehnquist, C.J., dissenting) (arguing that Congress's failure to document state due process violations in the legislative record was a formal reason that the majority opinion in *Lane* was an invalid exercise of Fourteenth Amendment power).

206. Michael Ashley Stein, *Market Failure and ADA Title I*, *in* THE AMERICANS WITH DISABILITIES ACT: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 193, 196 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000) (noting that the status quo is "designed by an empowered majority that has already absorbed existing prejudices and made them endogenous to future decision making").

207. *Lane*, 124 S. Ct. at 1983; *id.* at 1997 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist clarifies that Title II claims based on equal protection grounds would be subject to the same rational base standard applied to Title I claims in Garrett. *Id.* at 2004 (Rehnquist, C.J., dissenting).

E. Virtue Ethics in Reaction to Extremes

Virtue ethics[208] has grown in influence as a reaction to both Kantian deontology and postmodern fragmentation.[209] It is teleological in that it looks toward an ultimate good, which in the case of a legal system would be justice.[210] Virtues[211] can be imitated by individuals and are ultimately reflected within the community.[212] Just individuals contribute to the creation of a just society. While emulable virtues may come from a variety of sources, many virtue ethicists rely heavily on the Nicomachean Ethics of Aristotle, even today.[213] A virtue ethics analysis of disability law is likely to address the facts of legal dispute rather than the rules. If a result does not seem just, however defined, it is not likely to be just. This is a possible explanation for Justice O'Connor's decision in *Lane,* among other controversial decisions. Forcing a man who cannot walk to crawl up two flights of stairs for a court appearance has an air of moral unconscionability. It is the kind of thing that does not occur in a just society, and no amount of formalistic gymnastics can make it just.

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208. Virtue ethics concerns "the virtues themselves, motives and moral character, moral education, moral wisdom or discernment, friendship and family relationships, a deep concept of happiness, the role of the emotions in our moral life and the fundamentally important questions of what sort of person I should be and how we should live." Rosalind Hursthouse, *Virtue Ethics, in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *at* http://plato.stanford.edu/archives/fall2003/entries/ethics-virtue/#1 (last mod. Jul. 18, 2003) [hereinafter *Virtue Ethics*].

209. Kyron Huigens, *Homicide in Aretaic Terms*, 6 BUFF. CRIM. L. REV. 97, 97-99 (2002) [hereinafter Huigens].

> There is a third major tradition in philosophical ethics, rooted in the writings of Aristotle and revived recently under the name of virtue ethics. The philosophical tradition of virtue has nothing to do with the rigid adherence to moral duty advocated by conservatives in our ongoing culture wars. In its proper, technical sense, the word virtue refers to a capacity for sound practical judgment, both on the occasion of action and in the assembly and maintenance of one's system of ends and standing motivations. Virtue ethics as a philosophical enterprise focuses its inquiry on normative governance at the level of motivation—as opposed to duty as dictated by reason, or prescriptions for optimal social welfare.

Id.

210. . ALASDAIR MACINTYRE, AFTER VIRTUE 244, 244-55 (U. of Notre Dame Press, 2d ed. 1984) [hereinafter MACINTYRE I] (discussing how virtues seek to define an "ultimate good," although asserting that individualism can create competing views).

211. *Virtue Ethics*, *supra* note 208.

> A virtue such as honesty or generosity is not just a tendency to do what is honest or generous, nor is it to be helpfully specified as a 'desirable' or 'morally valuable' character trait. It is, indeed a character trait—that is, a disposition which is well entrenched in its possessor, something that, as we say 'goes all the way down', unlike a habit such as being a tea-drinker—but the disposition in question, far from being a single track disposition to do honest actions, or even honest actions for certain reasons, is multi-track. It is concerned with many other actions as well, with emotions and emotional reactions, choices, values, desires, perceptions, attitudes, interests, expectations and sensibilities. To possess a virtue is to be a certain sort of person with a certain complex mindset.

Id.

212. MACINTYRE I, *supra* note 210, at 191-193.

213. *Virtue Ethics*, *supra* note 208. "[A]lmost any modern version [of virtue ethics] still shows that its roots are in ancient Greek philosophy." *Id.*

Alasdair MacIntyre proposes that virtue ethics can define a standard of care for people with disabilities to which we should aspire.[214] He argues that this standard ought to inform our legal rules, including the ADA.[215] Since we all depend upon the care of others, in childhood and old age at the very least, we ought to be able to discern our obligation to care for others.[216] This, MacIntyre understands in the context of human interdependence rather than benevolence owed to the unfortunate by the fortunate.[217] Though the goals may be different, the process of rooting a standard of care in Aristotelian virtues in this case may resemble Rawlsian analysis to the extent that it requires one to be other-directed. Of course, for Rawls this is an act of rational self-interest.

The challenge of legal decisions influenced by virtue ethics is that they could lead to inconsistent or unintelligible doctrines when applied only in cases with outrageous facts. This is a plausible explanation for the patchwork of rules around the ADA, but it might not be the case if virtue ethics were better integrated into judicial decision making. Perhaps the most significant problem with relying on virtue ethics in a pluralistic culture such as the United States is that there is little broad consensus regarding what such virtues as justice actually require.

IV. IDENTIFYING VERSUS ACHIEVING THE GOOD

With the increased use of empirical studies by legal scholars and the growing influence of law and economics on both scholarship and policy, it is not surprising that a number of studies have been conducted to objectively measure the impact of the ADA in the lives of the disabled.[218] Unfortunately, there is serious disagreement about the methodology, usefulness, and conclusions of these studies.[219] It is conceivable that the ADA has created more problems than it has solved; however, even if there is ultimately a consensus that the ADA has failed, an unlikely and highly disputed possibility, the failure of particular policy mechanisms must be distinguished from the goal of achieving social goods (the lowering of irrational discrimination and providing greater opportunities for the disabled).

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214. Alasdair MacIntyre, *The Need for a Standard of Care, in* THE AMERICANS WITH DISABILITIES ACT: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 81, 81 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000) [hereinafter MacIntyre II].

215. *Id.* at 82.

216. *Id.* at 83.

217. *Id.* at 84.

218. *See generally infra* notes 220, 221, 226, 227 and 228.

219. Peter Blanck, Lisa Schur, Douglas Kruse, Susan Schwochau & Chen Song, *Calibrating the Impact of the ADA's Employment Provisions*, 14 STAN. L. & POL'Y REV. 267, 289 (2003) [hereinafter Blanck, et. al I].

A. Empirical Analysis

There are now a number of major empirical studies of the ADA's impact on employment. Despite the initial optimism following the passing of the ADA, studies conducted by Thomas DeLier[220] and Daron Acemoglu and Joshua D. Angrist[221] seem to indicate that the ADA actually resulted in a decline of disabled employment. DeLeir used Survey of Income and Program Participation ("SIPP") data for men aged eighteen to sixty-four,[222] and Acemoglu and Angrist used Current Population Survey ("CPS") data for men and women between twenty-one and fifty-eight years of age.[223] DeLeire concludes that the ADA led to a 7.2% decrease in the probability that a disabled man would be employed starting in 1990, with no corresponding increase in wages.[224] Acemoglu and Angrist found similar drops in employment probability, but not until 1992.[225] The discrepancy in findings raises questions regarding both methodology and reliability.

Contrary results were reached by John Bound and Timothy Waidmann[226] and by Douglas Kruse and Lisa Schur.[227] Looking at the same SIPP and CPS data, these scholars attribute the decline in employment probability to changes in federal disability benefits and health status.[228] Christine Jolls argues that the decline may be accounted for by demonstrated increases in the rate of disabled adults seeking education and employment training, presumably with the intention of obtaining new or better employment.[229] Thus, the drop in the early 1990's was actually a positive response to the ADA to the extent that those with disabilities suddenly expected a greater return on investment in human capital.[230]

There are still a number of problems with these studies. The most important methodological issue is that the data relied on does not use the narrow definition for "disabled" from ADA jurisprudence.[231] Further-

220. Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693, 694 (2000) [hereinafter DeLeire].

221. Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON 915, 917 (2001) [hereinafter Acemoglu & Angrist].

222. DeLeire, *supra* note 220, at 698.

223. Acemoglu & Angrist, *supra* note 221, at 917.

224. Deleire, *supra* note 220, at 705.

225. Acemoglu & Angrist, *supra* note 221, at 929.

226. JOHN BOUND & TIMOTHY WAIDMANN, ACCOUNTING FOR RECENT DECLINES IN EMPLOYMENT RATES AMONG THE WORKING-AGED DISABLED (Nat'l Bureau of Econ. Research, Working Paper No. 7975, 2000).

227. Douglas Kruse & Lisa Schur, *Employment of People with Disabilities Following the ADA*, 42 INDUS. REL. 31-66 (2003) [hereinafter Kruse & Schur].

228. CHRISTINE JOLLS, IDENTIFYING THE EFFECTS OF THE AMERICANS WITH DISABILITIES ACT USING STATE-LAW VARIATION: PRELIMINARY EVIDENCE ON EDUCATIONAL PARTICIPATION EFFECTS 1 (Am. Law and Econ. Assoc. Ann. Meeting, Working Paper 62, 2004), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1078&context=alea [hereinafter JOLLS I].

229. *Id.*

230. *Id.* at 9.

231. Kruse & Schur, *supra* note 227, at 40-45.

more, even discounting other external factors, the ADA would have relatively little impact on employment levels in states that had comparable protections in place before the passage of the ADA.[232]

As a partial response to this problem, this paper proposes a new empirical project to obtain data from those who would clearly qualify as disabled under the ADA, particularly in states which had no comparable state antidiscrimination statute before 1990. Ideally the target group would consist of people who are unable to see, hear or walk, with a likely presumption of disability under the ADA, from Arkansas, Mississippi and Alabama (the states without prior protections),[233] and between the ages of thirty-four and sixty (those who would have been of working age at least two years prior to the passage of the ADA).

B. Discrimination and Accommodation

The employment provisions of the ADA serve both as antidiscrimination and accommodation measures.[234] Civil rights legislation designed to combat the effects of irrational discrimination also provided a cause of action for discriminatory hiring and firing practices as well as granting hiring preferences.[235] Given perfect markets, it is true that irrational discrimination ought to disappear because it is not efficient.[236] However, there remains clear evidence of irrational discrimination against people with disabilities in the labor market.[237] So, the ADA and related legislation effectively provides incentives for employers to overcome discrimination. These are primarily negative incentives in the form of mandatory regulatory compliance and the threat of litigation. Accommodation, however, is a cost borne at least initially by employers, intended to enable people with disabilities to compete in terms of worker efficiency. Ideally, with reasonable accommodations, qualified people with disabilities can compete with non-disabled employees, dispelling assumptions that might perpetuate irrational discrimination. However, placing the cost burden on employers could have the unwanted consequence of encouraging discrimination.

Christine Jolls argues that antidiscrimination and accommodation measures in the ADA actually serve overlapping and complementary roles.[238] Legislation intended to lower taste-based discrimination[239] and

232. JOLLS I, *supra* note 228, at 2.

233. *Id.* at 11.

234. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L.REV. 642, 645 (2001) [hereinafter Jolls II].

235. *Id.* at 697-98.

236. Gary Becker, THE ECONOMICS OF DISCRIMINATION 39-40 (Univ. Chicago Press, 2d ed. 1971) [hereinafter Becker].

237. Marjorie Baldwin & William Johnson, *Labor Market Discrimination against Men with Disabilities*, 29 J. HUM. RESOURCES 1, 1-19 (1994).

238. Jolls II, *supra* note 234, at 698.

> [C]ertain aspects of antidiscrimination law—in particular its disparate impact branch—are in fact accommodation requirements. In such instances it is hard to resist the conclu-

to provide fair opportunities to a historically disadvantaged class must address the deeper causes of selective unemployment such as the lack of education and job training.[240] Ultimately, reasonable accommodation has been required because it is essential if we are to achieve the goal of equal participation in society by people with disabilities, in the tradition of the Rawlsian ideal. Although the cost of reasonable accommodations may limit the number of people who might otherwise benefit from the antidiscrimination protection of Title I, accommodations are an essential element in overcoming irrational discrimination.[241]

C. Incentives

Historically, the greatest negative incentives in the employment of the disabled are discrimination and the lack of reasonable accommodations. There is insufficient incentive to invest in human capital through education or vocational training if there is no hope for a reasonable return, particularly if accepting employment requires sacrificing disability assistance.[242] In response, the ADA creates an accommodation requirement and a cause of action against discriminating employers as negative incentives to discourage discrimination.[243] Although the antidiscrimination portion of this policy may be helpful, the accommodation provision diverts employer resources that could be used to hire qualified people with disabilities who require little or no accommodation.[244] Employer costs increase, and the ADA is to blame.

Thus, it is imperative that positive incentives remove some of the cost burden from employers. The clearest incentives are tax deductions for the cost of accommodations.[245] To the extent that these are one-time sunk costs, employers who have made accommodations would have access to a broader labor market, including people with disabilities for which they have already accommodated, making these employers more competitive. Technological improvements make it more likely that ac-

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sion that antidiscrimination and accommodation are overlapping rather than fundamentally distinct categories, despite the frequent claims of commentators to the contrary. The overlap between the two categories, I suggest, also sheds light on the question of Congress's power under Section 5 of the Fourteenth Amendment to enact laws (such as the FMLA) that expressly mandate the provision of particular employment benefits directed toward specific groups of employees.

Id.

239. The economic dynamic of irrational discrimination, a "taste for discrimination," was described by Gary Becker in *The Economics of Discrimination*. Becker, *supra* note 236, at 39-40.

240. *See* JOLLS I, *supra* note 228, at 1.

241. Jolls II, *supra* note 234, at 698.

242. Peter Blanck, et al., *The Emerging Workforce of Entrepreneurs with Disabilities: Preliminary Study of Entrepreneurship in Iowa*, 85 IOWA L. REV. 1583, 1639-40 (2000) [hereinafter Blanck, et al. II].

243. 42 U.S.C. § 12101(b) (2004).

244. Acemoglu & Angrist, *supra* note 221, at 920-23.

245. 26 U.S.C.A. § 190 (2004).

commodations will be scalable within a business.[246] On the employee side, positive incentives, including access to education and job training, are crucial, especially for those who did not invest in human capital before the ADA.[247]

D. The Need for Meaningful Data

Congress has made the goal of combating discrimination and providing meaningful opportunities for the disabled to participate in the labor market and society a national goal.[248] This is an acknowledged good that legislation such as the ADA is intended to achieve. However, there is no point in enforcing rules that do not further this goal. Detailed studies on the impact of legal incentives on the employment opportunities of people with disabilities are critical for modifying current legal rules or proposing new ones. It is encouraging that a body of literature has developed in the last four years that takes these issues seriously. However, if antidiscrimination and inclusion are still national goals, we must consider broadening the protections of the ADA to the extent originally expressed by Congress. Further studies will help provide a more rational basis for changes in disability law.

V. BROADENING THE SCOPE OF THE ADA

The enactment of the ADA represented an ethical decision on the part of Congress to provide greater access, opportunity, and protection to people with disabilities. The language of the ADA itself makes the elimination of discrimination a clear national mandate.[249] To the extent that courts, including the Supreme Court, have limited the application of the ADA and frustrated this goal, Congress ought to amend the ADA to create clearer and more efficient rules for countering discrimination against the disabled. Since discrimination as defined by the Act is rooted in the social response to the disabled rather than the physical impairment itself, ADA rules ought to more clearly address the stigma associated with disability in attempting to reduce irrational discrimination. Any proposed changes ought to address distributive justice concerns, the

246. Heidi M. Berven and Peter David Blanck, *The Economics of the ADA Part II- Patents and Innovations in Assistive Technology*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 85-89, 96 (1998).

247. Blanck, et al. II, *supra* note 242, at 286.

248. Tennessee v. Lane, 124 S. Ct. 1978, 1984 (2004).

249. 42 U.S.C. § 12101(b) (2004).

> It is the purpose of this chapter—(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id.

ramifications of increased litigation, state immunity problems and the catch-22 created by *Sutton*.

A. Legislation Defining Disability as Stigma

In order to be relevant and effective, the ADA requires significant changes, drafted within the context of disability law, but which would unequivocally apply to anyone discriminated against on the basis of social stigma associated with disability. Such legislation should require courts to consider the social model originally intended by Congress.[250] Philosophically, this position emphasizes broader protections from discrimination based on differences that are consistent with a Rawlsian point of view.

Congress needs to make it clearer that those covered by sections 3(2)(B) and (C) of the current ADA, people with a history of a disability or perceived as having a disability,[251] are intended beneficiaries of this legislation. There should be clear examples of the kinds of people who should be protected from discrimination listed in the Congressional Record—even if their conditions do not constitute a physical impairment according to the medical model or if their conditions are managed with drugs such as for epileptics or diabetics. To be absolutely clear, the proposed changes would create a new category consisting of those who are discriminated against due to the stigma of actual, historic, or perceived disability. It is unfortunate that judicial activism has circumvented legislative intent to the extent that the plain meaning of a statute is simply reconstrued,[252] but it requires that Congress express its intentions with greater precision. Since any piece of legislation consists of a bundle of compromises, this kind of clarity can be difficult to achieve, but the alternative is to cede legislative authority to the courts, which seems to have happened in ADA cases.

B. Distributive Implications

Broadening the protections of the ADA, or disability legislation in general, might adversely impact the severely disabled who are among the powerless described by Justice Ginsburg. With regard to accommodation, the ADA is an unfunded mandate (with the exception of subsidies in the form of tax credits) and institutions need only make reasonable accommodations. Thus, if more employees of a company could make claims for accommodation, the pool available for the severely disabled as currently understood would be reduced. It might be argued that that distribution could be prioritized. However, such an arrangement would require a bright line test, could default to the current standard of impair-

250. This is true at the very least in the case of 42 U.S.C.A. § 12102(2)(C) of the ADA which does not require actual impairment.

251. 42 U.S.C.A. § 12102(2)(B) (2004).

252. Center & Imparato, *supra* note 13, at 322.

ment, and would leave few, if any, resources for the newly covered. The argument that there are limited resources is reinforced by the fact that even now most challenged claims are denied.[253]

While these objections have validity with regard to the provisions that require access to special services or require employers to make expensive accommodations, it would be possible and appropriate to limit the scope of the ADA to preventing discrimination for those who make claims based on stigma alone rather than actual impairment. After all, if there is no actual impairment, there should be no need for accommodation. All of the arguments raised rely on the assumption that those protected by antidiscrimination provisions require accommodations. If we do not grant accommodation to those claiming discrimination due to stigma alone, there will be no accommodation costs. As with the Civil Rights Act, aggressive distributive justice measures like affirmative action and accommodations can be handled separately from the core antidiscrimination provisions even though they serve overlapping functions.

C. Litigation

Drafting statutes requires line-drawing, and it is commonly understood by legislators that bright line standards are most efficient. They are admittedly arbitrary, but they establish that certain categories of people are not intended to be covered. The medical standard typically used in ADA litigation may appear to be more objective, but it is subjective in that it requires a physician's opinion. There is significant evidence to indicate that medical diagnosis fails as a truly objective standard in litigation.[254] Ultimately, proving stigma may be no more subjective than proving impairment.

It may be argued that a standard of individual impact due to stigma would open the courthouse doors to mountains of potential claims by "short, fat, homely people,"[255] and that without clear standards, litigation would become more time consuming and more expensive. There is probably some truth to this claim. If we expand the protection of the ADA, there will likely be more litigation. However, it must be noted that Congress intended to cover those who are perceived to be disabled in the original ADA, so technically such claims were litigable before. Furthermore, if preventing injurious, unjustified discrimination is a goal of our justice system, then litigation is an inevitable consequence of legislation that would further that goal as in the Civil Rights Act.

253. MEZEY, *supra* note 173.
254. SUSAN WENDELL, THE REJECTED BODY 117-138 (NY: Routledge 1996).
255. Wasserman, *supra* note 86, at 154.

D. How to Overcome the Federalism Problem

The issue of federalism is the most problematic for the ADA, as the response to *Lane* in both the majority and the dissents may indicate.[256] If the Supreme Court has determined that Congress has no legal authority to enact such legislation, then amendments will inevitably fail.

First, the legislative history and preamble to any new legislation should more clearly document historical patterns of discrimination against the disabled in both the private and public sectors. If a clear pattern of discrimination is shown, the Court might be more willing to uphold restrictions on states as employers under equal protection and due process rights other than access to courts.

Second, Congress could define qualified disabled persons as members of a class requiring stronger protection under the Fourteenth Amendment. As long as states can discriminate based on any "rational basis," the current standard, there will be relatively little protection for the disabled. While Congress may not have the power to designate a suspect class for purposes of constitutional jurisprudence, the Court is beginning to analyze discrimination cases on a more individualized basis, recommending proportional responses.[257] This is particularly true in light of *Lawrence v. Texas*.[258] If Congress were to clearly identify patterns of discrimination that justify a stronger federal response, the courts would be under more pressure to enforce the legislation as written, even if a new suspect class were not created for Fourteenth Amendment purposes.

E. Solving the Catch-22

Here, distinguishing between stigma, with or without actual impairment, and impairment alone is significant. With regard to discrimination, the key issue is stigma. The Supreme Court may have been reasonable in concluding that those who have relatively minor correctable vision problems are not "disabled" in the sense intended by the ADA. Actual impairment still raises valid issues of accommodation and access,

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256. MCIL, *supra* note 135.

> This case is important not just because it threatens to gut the ADA, preventing millions of people with disabilities from enforcing their rights, but also because it is the latest attack in an aggressive campaign by extremist conservatives in recent years to weaken federal civil rights protections for all Americans, under the notion of states' rights," said Nancy Zirkin, deputy director and director of public policy at the Leadership Conference on Civil Rights, a leading national civil rights coalition.

Id.

257. *See generally* Lawrence v. Texas, 539 U.S. 558, 560 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

258. Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny*, 6 U. PA. J. CONST. L. 945, 996 (2004). The Court in *Lawrence* overturned the state power to criminalize sodomy established in *Bowers v. Hardwick*, 478 U.S. 186 (1986) on due process grounds. While the standard used by the Court does not resemble intermediate or strict scrutiny, neither does it appear to be a simple rational basis standard. *See* Lawrence v. Texas, 539 U.S. 558, 571-579 (2003).

and those cases could be litigated under different auspices than pure discrimination claims. If someone with hypertension or diabetes is stigmatized in some way, then they should receive protection from discrimination based on that stigma whether the condition is corrected by medication or not. If an employer makes irrational decisions based on prejudices regarding a person's health and perceived disability, there should be a remedy under the ADA as originally drafted. The fact that a condition is correctable by prosthesis, device or medication does nothing to eliminate the irrational bias and discrimination. Separating distributive justice measures linked with impairment and antidiscrimination concerns associated with stigma would eliminate the catch-22 in those cases in which it seems most illogical.

VI. CONCLUSION

Our comprehensive approach to disability must distinguish between cases that address functional issues of access based on impairment and discrimination issues based on stigma. This would return us to the social model apparently intended by Congress, at least with regard to discrimination cases, and would mitigate the catch-22 problem.[259]

New legislation must be clearly drafted to unequivocally and strategically define the categories of those who should be protected under the ADA as well as demonstrate a clear history of discrimination against the disabled. Legislation must aggressively address the challenges to Congressional authority posed by recent Supreme Court cases within the framework of those decisions in the context of federalism.

The ADA was intended to promote justice for the disabled. It has become a model for many nations.[260] Unfortunately, the reach of the ADA has been gradually eroded by court decisions. Perhaps without even intending it, the Supreme Court has created a legal framework that is filled with contradictions and denies justice to the intended beneficiaries of the legislation. If the ADA is not amended, its effectiveness as an antidiscrimination law will likely continue to diminish, even if cases such as *Lane* occasionally enforce its provisions in narrow circumstances.

259. Pendo I, *supra* note 31 at 1226.

260. Jerome E. Bickenbach, *The ADA v. the Canadian Charter of Rights: Disability Rights and the Social Model of Disability*, *in* THE AMERICANS WITH DISABILITIES ACT: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 354 (Notes) (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000). A number of nations have enacted legislation modeled on the ADA, including Australia (Disability Discrimination Act, 1992), the United Kingdom (Disability Discrimination Act, 1995, c 50), New Zealand (Human Rights Act, 1993, No. 82), India (Disabled Persons Act), and Israel (Disabled Persons Act, 1998). *Id.*