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## Would the ADA Pass Today?: Disability Rights in an Age of Partisan Polarization

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## WOULD THE ADA PASS TODAY?: DISABILITY RIGHTS IN AN AGE OF PARTISAN POLARIZATION

LAURA ROTHSTEIN\*

### ABSTRACT

*The Americans with Disabilities Act of 1990 (ADA) was the most significant civil rights legislation enacted since the Civil Rights Act of 1964. It provided comprehensive protection against discrimination for individuals with disabilities in employment, public accommodations, and public services. It built on § 504 of the Rehabilitation Act that provided these protections only to programs receiving federal financial assistance. It afforded broad access to those individuals who had benefitted from the 1975 Individuals with Disabilities Education Act. This complex and far-reaching legislation was made possible by a confluence of timing and the right people at the right place at the right time in a political and social climate much different than today. It is extremely unlikely that such legislation would pass in the current political climate. Fortunately, the benefits of the ADA have become apparent as a result of almost three decades of impact. The combination of its success (although more is needed particularly in the area of health care access), the high percentage of the population affected by disability directly or indirectly, and the challenges of any major legislative change on any issue at present makes it unlikely to be repealed in any major way. There is, however, substantial concern over its diminished impact due to administrative agency actions in its reduced enforcement, prioritization, and other administrative attention.*

*This article recounts the story behind the passage of the ADA, referencing the detailed and insightful stories recounted in the 2015 book *Enabling Acts: The Hidden Story of How the Americans with Disabilities Act Gave the Largest US Minority Its Rights*, by Lennard Davis as the foundation. Added to those insights are the perspectives of the author of this Article who has been involved in disability rights advocacy and education since 1979.*

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## I. INTRODUCTION

The Americans with Disabilities Act (ADA)<sup>1</sup> was enacted in 1990 as a result of a long and challenging process of negotiation between the executive and legislative branches of government. The effort was a result of bipartisan effort within Congress in large part due to the fact that so many in both political parties had seen first-hand, through the lens of family and friends and their own situations, the need for a policy of nondiscrimination on the basis of disability. The support of constituents in their states only bolstered the willingness to enact a statute that would significantly broaden access to society and its rights and benefits.

The individuals who have written articles for this issue were speakers at a 2018 program at the Association of American Law Schools based on their presentations on the topic of whether the ADA could pass today. The consensus of the speakers was that the short answer is no, given the fractured and greatly polarized political climate. In addition to the politics, there are a number of factors that were critical to the 1990 passage that would not occur today, and there are additional barriers to such legislation.

Perhaps the more relevant question, however, is not whether the ADA would pass today, but whether it is being eroded, not by direct repeal, but by other actions. These actions include: amendments to the statute, administrative agency de-regulation and provision of administrative guidance, non-enforcement, and underfunding. The current Trump administration approach to deregulation impacts not just the ADA, but a range of other disability rights protections.<sup>2</sup>

This Article provides an overview of the history of the enactment of the ADA by reviewing the detailed and insightful book *Enabling Acts: The Hidden Story of How the Americans with Disabilities Act Gave the Largest US Minority Its Rights*<sup>3</sup> by Lennard Davis as historical guidance. Woven throughout that guidance is notation of the factors that led to the ADA that are not in place today. Finally, the Article briefly reviews the ways in which the statutory, regulatory, and enforcement mechanisms providing disability rights protections are being attacked. It notes areas where improvements to the ADA or clarification through regulations, statutory amendment, or other guidance would be helpful to carrying out the goals of the ADA.

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1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012).

2. The most significant example is the relationship of access to health care through the Affordable Care Act. See JESSICA SCHUBEL, CTR. ON BUDGET & POL'Y PRIORITIES, HOUSE ACA REPEAL BILL PUTS CHILDREN WITH DISABILITIES AND SPECIAL HEALTH CARE NEEDS AT SEVERE RISK 5 (2017), <https://www.cbpp.org/research/health/house-aca-repeal-bill-puts-children-with-disabilities-and-special-health-care-needs/>. This provides one example of the numerous stories explaining why that is the case, particularly for children with disabilities.

3. LENNARD J. DAVIS, *ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS* (2015).

## II. THE “ENABLING ACT”: PASSING THE AMERICANS WITH DISABILITIES ACT

### A. *The Rehabilitation Act of 1973: Framework for the ADA*

Any discussion of whether the ADA could pass today requires at least a brief background of what led up to the enactment of the ADA in the first place. The story begins in 1973.<sup>4</sup>

In 1973, the Vocational Rehabilitation Act, a statute passed primarily to support job training for World War I veterans with disabilities, was up for reauthorization.<sup>5</sup> The amendment to the reauthorization that had such significance did not come about because of a strong or organized advocacy effort, but because of Senate staffers, who thought that it made sense that programs receiving federal funding should not discriminate on the basis of disability.<sup>6</sup> Little legislative history exists to demonstrate that much thought had been given to what became the enormous implications of this idea. Instead, Congress enacted § 504 of the Rehabilitation Act with little discussion, just because it seemed to make sense to do so.<sup>7</sup>

The amendment provided the following: “No otherwise qualified individual with a handicap [now “disability”] shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....”<sup>8</sup>

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4. Interesting comparisons can be made between political and social events which occurred in 1973 and in more recent history. *Compare* DAVIS, *supra* note 3, at 12 (discussing the 1973 Watergate investigation and its repercussions on President Nixon), *with* Garrett M. Graff, *A Complete Guide to All 17 (Known) Trump and Russia Investigations*, WIRED (Dec. 17, 2018), <https://www.wired.com/story/mueller-investigation-trump-russia-complete-guide> (listing investigations into President Trump’s election campaign and alleged ties with foreign powers), *and* Billie Jean King, HISTORY, <https://www.history.com/topics/womens-history/billie-jean-king> (last updated Aug. 21, 2018) (in 1973 Billie Jean King played the famous “Battle of the Sexes” tennis match—a form of advocacy for equal pay of female and male tennis players amidst the women’s rights movement of the time—and beat Bobby Riggs, a male tennis player who believed women’s tennis was inferior), *with* Hansi Lo Wang, *Protesters Prepare for Women’s March After Trump’s Inauguration*, NPR (Jan. 20, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/20/510706246/protesters-prepare-for-womens-march-after-trumps-inauguration> (reporting on protesters’ desire to “remind the country” of the need to expand and protect the rights of women).

5. DAVIS, *supra* note 3, at 10.

6. *Id.*; The language used in prior versions of the Act referred to “individuals with handicaps,” which was later amended to “individuals with disabilities” shortly after the ADA was enacted. Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976) (current version at 29 U.S.C. § 794 (2012); *see* Rehabilitation Act of 1973, Pub. L. No. 102-569, 106 Stat. 4355–56 (codified as amended in 29 U.S.C. § 701 (2012)).

7. Rehabilitation Act of 1973, 29 U.S.C. § 794. Other sections of the amendments provided similar nondiscrimination mandates for federal government agencies, including § 501 of the Rehabilitation Act of 1973. *See id.* § 791; *id.* § 793.

8. *Id.* § 794; DAVIS, *supra* note 3, at 11 (describing § 504 as having “tweet-like length”).

The definition of who was protected, while it changed slightly over the years, basically protects<sup>9</sup> those with impairments that substantially limit one or more major life activities, those who have a record of such impairments, and those who are regarded as having such an impairment.<sup>10</sup> The term “major life activity” was not defined in the statute but was later defined in the regulations.<sup>11</sup>

Because very few employers or programs for the public receive federal funding, the statute did not apply to much of the private sector. The major exceptions were higher education and health care programs. These programs became the guinea pigs for the judicial interpretations of § 504. There was little fanfare and little public awareness of § 504.<sup>12</sup> The Department of Health, Education, and Welfare (HEW)<sup>13</sup> was tasked with promulgating model regulations, but that was initially taken on with little urgency by those at the top of the agency.<sup>14</sup>

As a result of the frustration with the slow development of regulations, a “groundswell activist movement ... launched a nationally oriented disability movement.”<sup>15</sup> Important to its success was the fact that the activist movements included a range of disabilities (including groups representing visual impairments and hearing impairments and the American Coalition of Citizens with Disabilities, the first major advocacy group not focused on a specific disability).<sup>16</sup> This cross-disability advocacy would be of critical value to the enactment of the ADA and the movement to focus attention on any legislative or regulatory action that is viewed as diminishing disability rights. Today, one cannot imagine being unable to reach groups with the click of a computer stroke, but the early disability rights advocacy was during a time before the internet or cellphones, so the coordination of the advocacy efforts is particularly remarkable. At the time these efforts occurred, the advocacy groups were

9. This definition has not changed, although its interpretation has been clarified. When the ADA was enacted and throughout its amendment stages, the definitions under both the Rehabilitation Act and the ADA are intended to be consistent. Americans with Disabilities Act of 1990, 42 U.S.C. § 12134 (2012).

10. *Id.* § 12102.

11. Equal Employment Opportunity Comm., 29 C.F.R. § 1630.2(i) (2018).

12. See NANCY LEE JONES, CONG. RESEARCH SERV., SECTION 504 OF THE REHABILITATION ACT OF 1973: PROHIBITING DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE 1 (2009). I was a second-year law student at Georgetown University Law Center in 1973, and there was, of course, no course on disability discrimination law.

13. HEW later became Department of Education and the Department of Health and Human Services (HHS). *HHS Historical Highlights*, U.S. DEPT. OF HEALTH & HUM. SERVS. (Feb. 10, 2017), <https://www.hhs.gov/about/historical-highlights/index.html>.

14. DAVIS, *supra* note 3, at 12–13.

15. *Id.* at 13.

16. *Id.*

focusing primarily on issues of K-12 education of students with disabilities and on the deinstitutionalization movement.<sup>17</sup>

Key to the effectiveness of any civil rights statute is inclusion of meaningful remedies and procedures. Under § 504, individuals claiming discrimination could either complain to the federal agency providing the funding or bring a private action in court. There was no requirement to exhaust administrative remedies.<sup>18</sup> Given the lack of knowledge and legal expertise as well as availability of legal counsel familiar with these protections, it took some time for litigation to be brought and to work its way through the judicial system. It was not until 1979 that the Supreme Court addressed any issue under § 504, and there were still only a handful of federally reported cases by then.<sup>19</sup>

The 1979 case, *Southeastern Community College v. Davis*,<sup>20</sup> not surprisingly involved both higher education and health care.<sup>21</sup> A student in a community college with a significant hearing impairment was denied admission to the advanced program for training nurses on the basis that she would be a risk to patients. The case was significant because it addressed a key issue of disability

17. *Id.*

18. JACQUE BRENNAN, SOUTHWEST ADA CTR., THE ADA NATIONAL NETWORK DISABILITY LAW HANDBOOK 52 (2013), <https://adata.org/publication/disability-law-handbook>.

19. I first became involved with disability rights in 1979, during a year that I was a visiting faculty member at the University of Pittsburgh School of Law. Because I was admitted to the Pennsylvania Bar, I was invited to work with the Developmental Disabilities Law Project, a law school clinical program where clients with disabilities and low income would be represented in a range of education, employment, community service, and other rights. When asked to do this, I responded that “I don’t know anything about this area of law.” The director of the program told me, “That’s OK, no else does either.” We had no reference books, regulatory guidance, or other framework to work from. There were only one or two federally reported cases at this point. *See, e.g.,* *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 397, 400 (1979). The lack of technical assistance was certainly one of many factors why attorneys did not take on the cases under § 504 (and the 1975 special education statute). There was no internet to turn to for ready access to regulations. This was the reason I wrote several of the first reference materials for law students, attorneys, and advocates. *See generally* LAURA F. ROTHSTEIN, RIGHTS OF PHYSICALLY HANDICAPPED PERSONS (Shepard’s & McGraw Hill 1984), for an example of one of my first contributions to the then-sparse disability law literature. It is now in its Fourth Edition and cumulatively supplemented every six months. My older daughter, Julia Irzyk, became my coauthor for all editions since 2004. LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW (Thomson Reuters 4th ed. 2015). In addition to the treatise that is a reference for attorneys, I co-authored SPECIAL EDUCATION LAW, which is now in its Fifth Edition. LAURA F. ROTHSTEIN & SCOTT F. JOHNSON, SPECIAL EDUCATION LAW (SAGE 5th ed. 2013). I also co-authored DISABILITY LAW: CASES, MATERIALS, PROBLEMS in 1995 (then published by Michie’s and now in its Sixth Edition). LAURA F. ROTHSTEIN & ANN C. MCGINLEY, DISABILITY LAW: CASES, MATERIALS, PROBLEMS (Carolina Academic Press 6th ed. 2017).

20. *Davis*, 442 U.S. at 397.

21. *See id.* at 400. Not surprisingly because higher education and health care were two of the major programs that received federal financial assistance, these were the ‘laboratory’ programs for interpreting § 504.

discrimination law, the issue of what it means to be “otherwise qualified.”<sup>22</sup> To be protected from discrimination, it is not enough to have a disability (as yet not clearly defined). The individual had to be able to carry out the essential requirements of the program with or without reasonable accommodation in spite of the disability.<sup>23</sup> The Supreme Court held that because of her risk to patient safety, Francis Davis was not otherwise qualified but added a caveat that changes in technology required institutions of higher education to reconsider these issues in the future when technology might make some reasonable accommodations possible.<sup>24</sup> This highlights one of many dynamic aspects of § 504 (and later the ADA)—that decisions must be made in context and take into account the type of program involved, as well as the type and severity of a disability. Section 504 is certainly no “one size fits all” check-off list statute for programs to implement—nor is the ADA.

Over the next decade, the advocacy increased and so did the judicial decisions clarifying a range of substantive, procedural, and remedial issues in the context of § 504.<sup>25</sup> Noteworthy is the fact that, because most employers were not subject to the mandates, the courts focused primarily on *what* was required, not whether the individual met the definition of disability and was therefore entitled to protection. This changed in 1990 when disability discrimination protection expanded to most employers under the ADA.<sup>26</sup> Because § 504 and the ADA both require reasonable accommodations, employers became concerned about the cost of those accommodations and sought to limit coverage, as will be addressed in the next section.

By 1990, however, the courts began to clarify and interpret § 504, and the advocates had become more organized and focused on the benefits of broader application. The 1975 special education statute<sup>27</sup> also resulted in increasing numbers of students entering higher education, seeking employment opportunities, and accessing public services and public accommodations. Also by 1990, the § 504 Model Regulations were promulgated (1978).<sup>28</sup> The regulations expanded and clarified to some extent how the bare bones language of § 504 was to be applied in sectors of education, post-secondary education,

22. *Id.* at 402, 406.

23. *See id.* at 405, 407.

24. *Id.* at 411. For a detailed discussion of this decision, *see generally* Laura Rothstein, *The Story of Southeastern Community College v. Davis: The Prequel to the Television Series “ER”*, in *EDUCATIONAL LAW STORIES* 197, 197–219 (Michael Olivas et al., 2008).

25. *See generally* ROTHSTEIN & IRZYK, *supra* note 19.

26. 42 U.S.C. §§ 12111(2), 12112(a) (2012).

27. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 (c)(2), (d) (2012); *see generally* ROTHSTEIN & IRZYK, *supra* note 19.

28. DAVIS, *supra* note 3, at 13–14 (describing the need for protests by advocates before the 504 model regulations were finally promulgated under HEW Secretary Califano).

employment, and health care.<sup>29</sup> The strategies in advocating for the model regulations highlight the historical tension that continues between not just those who oppose disability rights entirely, but between advocates who support disability rights with differing political philosophies. The tension (not unlike the segments of the Democratic party today) is between those who believe that a careful, cautious approach to issues is necessary to maintain the balance to ensure long term success and sustainability and those who want action quickly.

The advocates began to build on the basic statutory language, the regulations, and judicial interpretations. Their work began comprehensive efforts to enact a broader statute that would provide the same protections available under § 504 to the private sector.<sup>30</sup>

### B. *The ADA*

Lennard Davis is the son of two parents with Deaf<sup>31</sup> parents, and like many members of Congress who had family members with disabilities in 1990, this experience shaped his perspective. He wrote *Enabling Acts: The Hidden Story of How the Americans with Disabilities Act Gave the Largest US Minority Its Rights*, in 2015, on the twenty-fifth anniversary of the ADA's enactment.<sup>32</sup> His rich and detailed historical accounting reads almost like a novel (with drama and intrigue) about the stories behind the individuals who worked to make this legislation possible.

Unlike § 504, there was strong advocacy (from many groups and individuals)<sup>33</sup> who worked publicly and privately in negotiating the much more detailed and nuanced statute that would broaden the protections of § 504 to the private sector and to state and local government entities beyond those receiving

29. *Id.*

30. Housing received separate attention in 1988 with the amendment of the Fair Housing Act. 42 U.S.C. § § 3601-06 (2012). The Act was a response to a 1985 Supreme Court decision. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 432 (1985). The Court applied the rational basis test to housing discrimination in a case involving group home zoning restrictions. Congress recognized that most housing does not involve state action, so the Constitution will not protect against most housing discrimination. The recognized limitation of the holding was the basis for amending the Fair Housing Act to include "handicap" as a protected category. That term is still used in the statute although all other federal legislation has changed terminology to use "disability."

31. The author notes in his introductory material why he uses "Deaf" rather than "deaf" in his work. DAVIS, *supra* note 3, at IX.

32. *See generally id.*

33. *Id.* at 14. Although I had been writing, teaching, and speaking on disability rights since 1979, my work has not generally involved advocacy for legislation. Many of the major actors in the story, however, are individuals I have known and worked with in various ways for many years. These include Chai Feldblum, Lex Frieden, Bobby Silverstein, and John Wodatch. I frame my own work as an 'advocate through education' to 'train' professionals, policymakers, and advocates and teach students who can themselves become advocates about the laws themselves, including areas in need of greater attention.



federal funding. Drawing on the judicial interpretations of § 504 and the many sets of regulations promulgated under § 504 before 1990, the ADA provides a much more detailed and specific set of requirements in its statutory language.<sup>34</sup>

The key provisions of the ADA prohibit discrimination on the basis of disability by employers with fifteen or more employees (Title I), state and local government programs (Title II), and twelve categories of private providers of public accommodations (Title III).<sup>35</sup> Additional provisions address insurance, federal wilderness areas, application to Congress, a number of definitional clarifications, and other clarifications about construction of the statute.<sup>36</sup> It “amends” the Rehabilitation Act indirectly by providing that in general, the Rehabilitation Act should be interpreted consistently with the provisions of the ADA.<sup>37</sup> The statutory language provides more detailed definitions and clarification of terms, such as: major life activities, discrimination, auxiliary aids and services, acceptable medical exams, application to religious entities, transportation services, concepts of integrated settings, application to private clubs, and examinations and courses provided for a range of purposes.<sup>38</sup> While many of these definitions and clarifications were already found in § 504 regulations and case law, having a statutory basis is a stronger assurance of continuity of protection than regulations that can be changed more easily than statutes and case law that can be overruled.<sup>39</sup>

*Enabling Acts* provides extraordinary insights into the story of what led to this critical statute.<sup>40</sup> The book describes in great detail the key factors in the enactment of the ADA, which was designed to “enable” individuals with disabilities. These factors include the leadership, skills, and connections of individuals in key roles, the media and other communications that facilitated

34. See generally *id.* at 7–18.

35. *A Guide to Disability Rights Law*, ADA, <https://www.ada.gov/cguide.htm> (last visited Apr. 24, 2019).

36. 42 U.S.C. §§ 12201(c), 12207, 12209, 12102, 12102(4) (2012).

37. *Id.* U.S.C. § 12201(a).

38. *Id.* §§ 12102(2), 12112, 12103(1), 12112(d), 12113(d), 12184, 12182(b)(1)(B), 12187, 12189 (2012).

39. See generally G. CALVIN MCKENZIE & ROBERT WEISBROT, *THE LIBERAL HOUR: WASHINGTON AND POLITICS OF CHANGE IN THE 1960S* (2009) (describing how during the period of 1963 to 1966, sweeping social legislation was enacted, much of which remains in place today).

40. The author gets a few details wrong. For example, Joseph Califano is referred to as James Califano. See, e.g., DAVIS, *supra* note 3, at 13. The author notes that Gallaudet University is one of only three federal institutions of higher education and mentions West Point and Annapolis, but does not reference the Air Force Academy and the Merchant Marine Academy. See, e.g., *id.* at 88. Punitive damages are referred to as the equivalent of fines. See, e.g., *id.* at 90, 138. Tom Harkin went to Catholic University for law school, not Iowa State. See, e.g., *id.* at 104. Section 198 should be Section 1981 of the Civil Rights Act. See, e.g., *id.* at 158. Reference to Senator Sherwood Boehlert should be to Representative, not Senator. See, e.g., *id.* at 186. These minor errors do not change the outstanding basic narrative of the story behind the statute.

collaboration and publicity about the movement, and the social/political structure in place in 1990. The key individuals include members of Congress, President George H.W. Bush<sup>41</sup> and federal administrative agency leaders, staff members in governmental roles, and advocates representing a broad array of interests. In Chapter One, the author states the ADA would not pass today, and he sets out the key factors that led to the enactment of the ADA and explains why those factors no longer make passage likely today.

The following are excerpts from that chapter with inserts comparing what is in place today. The book was written before the Trump administration and the Republican majority of Congress took control of the executive and legislative branches in 2016. The author's 2015 assessment of why the ADA would not pass is even more true today.

The first chapter of *Enabling Acts* states the following:

Certainly, an ADA could not pass Congress today. \*\*\*

The ADA is an excellent example of a bipartisanship no longer extant but made possible when a Republican president, George H.W. Bush, worked together with a Democratic House and Senate. The cooperation of Republicans [Robert] Dole and [Orin] Hatch together with Democrats [Ted] Kennedy and [Tom] Harkin in the Senate, along with Republican Steven Bartlett and Democrat Steny Hoyer in the House, was essential. All these political leaders believed that disability was an issue both parties could agree on. In fact, Justin Dart, a conservative Republican, said "The Americans with Disabilities Act is an authentic issue for conservatives." And that perennial conservative, bespectacled George Will, whose eldest son has Down syndrome, supportively called the ADA "that last great inclusion in American life." Today, it is almost impossible to imagine such crossing of party lines for the common good. And the day-to-day workings of the principals and their staffs in passing the ADA should be an object lesson to those presently in the halls of power.<sup>42</sup>

It is noteworthy that this was written in 2015. This is *before* the election of Donald Trump and before the Republican-controlled Congress of 2016 to 2018. Today the Republicans still control the Senate, and although Democrats took over the House through the 2018 midterm election, it is very clear that it is quite rare for there to be bipartisan cooperation within Congress, even where there are issues of agreement.

41. During the week of President Bush's memorial services in December 2018, I was reminded that I had met him at a tenth anniversary event celebrating the enactment of the ADA. This February, 2000, event was organized by Lex Frieden in Houston. I wrote a piece for the Courier Journal, published on December 9, 2018. Laura Rothstein, *President George H.W. Bush and His Legacy of the Americans with Disabilities Act*, U. LOUISVILLE, <https://louisville.edu/law/news/president-george-h-w-bush-and-his-legacy-of-the-americans-with-disabilities-act> (last visited Apr. 23, 2019).

42. DAVIS, *supra* note 3, at 8.

Chapter Two, “DC Outsiders Turn Washington Insiders,”<sup>43</sup> provides a rich background of stories behind the influx of disability activists who, beginning in 1980, arrived in Washington. Many were from Berkeley, known for its social justice activism. They came from different life experiences and with different perspectives. It was the year CNN began broadcasting. The key individuals had been involved previously in a range of counterculture and organization activities. Some were from wealthy backgrounds. Others had grown up poor. They came together to form a group known as DREDF (Disability Rights Education and Defense Fund) and recognized that efforts at a national level were needed if the effort was to have significant impact.

The initial core group recognized the value of inviting “significant movers and shakers in the civil rights” movement to join in the planning of this effort.<sup>44</sup> These “movers and shakers” came from the Women’s Legal Defense Fund, the NAACP, National Congress of American Indians, and an already existing Leadership Conference on Civil Rights (a coalition of all of the major civil rights groups).<sup>45</sup> Comparing the collaborative efforts from the 1980s with some of the political activism today, one can see the benefits of joint advocacy efforts and the downsides of when this outreach does not happen.<sup>46</sup> Many of these individuals had been part of the baby boomer generation that engaged in activism about the Vietnam war, race issues, and gender issues during the late 1960s and early 1970s. Young activists today have learned about political action in the context of access to health care, gun regulation issues, and immigration reform. The 2018 midterm elections highlighted that focused activism can have positive results. While the strategies are often different today, what disability rights advocates then and advocates today have in common is energy and commitment. What is yet to be determined is whether the collaboration that occurred to facilitate the enactment of the ADA will also carry over to fighting the new battles of retaining the rights under the ADA and related laws.

The coalition of advocates in the 1980s had an initial convening to strategize. This meeting lasted over several days in San Francisco:

The plan was clever because...it got the disability folks up to speed on civil rights and the civil rights people on disability. It also created strong ties between those two groups. [To be effective] legislation had to be focused on civil rights – a much more inclusive category that would open many more doors. Rehab programs might help some people, but if people had no access to places of public

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43. See generally, *id.* at 19–35.

44. *Id.* at 25.

45. *Id.*

46. See Anne Wafula Strike, *Disabled Women See #MeToo and Think: What About Us?*, GUARDIAN (Mar. 8, 2018), <https://www.theguardian.com/commentisfree/2018/mar/08/disabled-people-metoo-womens-movement-inclusion-diversity>.

accommodation, courtrooms, bathrooms, and buildings in general the rehabilitation wouldn't do very much.<sup>47</sup>

Key to the initial organization were the number of well-connected individuals with interest in the goals. One was Evan Kemp. He had a severe mobility disability and came from a family of Democrats.<sup>48</sup> He changed to Republican affiliation because he realized that he would have more impact. He also played bridge with a number of Washington "movers and shakers," including Republican C. Boyden Gray, chief White House counsel for Reagan and Bush.<sup>49</sup> This gave him direct access to the White House.<sup>50</sup> This example of connection highlights another reason why the ADA would not pass today. "Movers and shakers" today seem to have much less time for social interaction and building relationships. This is certainly true for current members of Congress who do not have time due to fundraising obligations and increased partisan identity.<sup>51</sup> In the early 1980s, the early years of the Reagan presidency, these social connections proved significant in getting the Department of Justice not to attack civil rights. Kemp's friendship with Bradford Reynolds (Attorney General) allowed Kemp to reinforce why disability rights legislation was important.<sup>52</sup> These key *alliances* meant that people of different perspectives actually *talked* to each other and also *listened*. Today, everyone has their own favorite cable news channel that reinforces what they already believe. There are very few alliances between those who disagree.<sup>53</sup>

Another key to shaping the language of the ADA was the judicial interpretation of § 504. The interpretation of the terms "reasonable accommodation," "undue hardship," "fundamental alteration," and "otherwise qualified" and to what extent retrofitting was required (especially for public transportation vehicles) was left to the courts.<sup>54</sup> Some narrow readings of the statute resulted in legislative amendments to § 504 and also provided guidance about language that should be in a statute itself so that regulations and judicial decisions would be less likely to limit the interpretation.<sup>55</sup> While some of the judicial and administrative agency interpretations during the 1970s and 1980s limited the benefits and reach of § 504, Congress responded in many instances

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47. DAVIS, *supra* note 3, at 25.

48. *Id.* at 26–27.

49. *Id.* at 29.

50. *Id.*

51. *Id.*

52. DAVIS, *supra* note 3, at 29–30.

53. McKay Coppins, *The Man Who Broke Politics*, ATLANTIC (Oct. 17, 2018), <https://www.theatlantic.com/magazine/archive/2018/11/newt-gingrich-says-youre-welcome/570832/>.

54. DAVIS, *supra* note 3, at 53, 56.

55. *Id.* at 56.

by amendment. For example, the *Grove City College v. Bell*<sup>56</sup> Supreme Court decision limited application of civil rights statutes based on receipt of federal financial assistance to the specific program that received the funding. Congress reacted by enacting the Civil Rights Restoration Act<sup>57</sup> that provided that when an entity receives funding in a program, all aspects of the program are subject to the mandates. This applied not only to disability discrimination law, but also to gender and race discrimination federal funding statutes.

### 1. Social Political Networks

Chapter Three is titled “The Texas Connection” and highlights how geography and social structures can connect people in ways that result in change.<sup>58</sup> The Texas connection included Lex Frieden,<sup>59</sup> who became quadriplegic during college as a result of a car crash. Immediately he learned about the lack of campus access. He eventually became part of the “melting pot of [disability rights] activists, legal experts, and legislative staff.”<sup>60</sup> Frieden, who became one of the most effective advocates, met Justin Dart Jr. in 1978 in Texas. Justin Dart (sometimes called the “father of the disability movement”)<sup>61</sup> came from a wealthy family. His father was a conservative businessman, and his mother was progressive and artistic. At age eighteen, he contracted polio, which resulted in lifelong use of a wheelchair and a first-hand view of the world from the perspective of both architectural and attitudinal barriers. An eclectic set of life experiences brought him to a philosophy of empowerment and seeking to develop systems of empowerment.<sup>62</sup> He found his way into developing his goals through the disability rights movement.<sup>63</sup> A meeting between Frieden and Dart in 1978 resulted in an alliance of Dart’s “political clout and connections” and forceful personality with Frieden’s commitment to having disability rights become legislatively enacted as a civil right.<sup>64</sup> Dart later became a key player in a previously ineffective federal agency committee (the National Council on Disability) through his appointment as Vice Chair.<sup>65</sup>

56. *Grove City Coll. v. Bell*, 465 U.S. 555, 573–74 (1984).

57. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

58. See generally DAVIS, *supra* note 3, at 36–51.

59. *Id.* at 36–37. While living in Houston from 1985 to 2000, I had numerous interactions with Lex and admired his commitment, persistence, and effectiveness in implementing disability rights. He remains an advocate today.

60. *Id.* at 39.

61. *Id.*

62. *Id.* at 41.

63. DAVIS, *supra* note 3, at 42.

64. *Id.* at 42–43.

65. *Id.* at 44–45.

Not expected by the Reagan administration was Dart's work to produce a "radical" report and strategic plan for disability policy.<sup>66</sup> A "confluence" of actions that kept this council from becoming ineffective and ignored included the participation of another Texan, Congressman Steve Bartlett, who was described as a "compassionate conservative," whose eye-opening experience was at a transportation committee hearing where he learned about the importance of an accessible bus system.<sup>67</sup> Bartlett knew how to use leadership on a small subcommittee for which he volunteered to "orchestrate" the creation of a presidentially-appointed independent agency to take a new look at disability policy and to put Frieden in the position of Executive Director of the newly created Council on Disability that would "become a powerful and effective voice within Congress and the White House and would write the first draft of the ADA."<sup>68</sup> Together, Dart and Frieden were able to convince Republicans to pass strong disability rights legislation. The other Texas connection would come later—President George H.W. Bush (who had been a Congressman from Texas) would be the president who signed the legislation in 1990.<sup>69</sup>

The judicial backlash that limited § 504 was also a result of limited legislative history, because the judges interpreting the statute had little guidance on what key terms meant.<sup>70</sup> One of the early decisions that did interpret § 504 broadly was *School Board of Nassau County v. Arline*.<sup>71</sup> The briefs before the Supreme Court used social science and economic arguments (known as a Brandeis Brief)<sup>72</sup> to argue the implications of not applying the definition to a school teacher who was fired because she tested positive for tuberculosis.<sup>73</sup> The reasoning was that she posed a risk because of potential contagion. The issue had broad implications because the 1987 decision was decided just as the issue of HIV/AIDS was gaining public attention, and the public fears about HIV were high. By arguing that fears and stereotypes should not be the basis for negative treatment, the advocates succeeded in having the Court recognize that individuals with contagious diseases who were regarded as being disabled should be protected.<sup>74</sup> An individualized determination could be made about whether an individual posed a risk to others, but it could not be based on myths

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66. *Id.* at 45.

67. *Id.* at 46.

68. DAVIS, *supra* note 3, at 49.

69. *Id.* at 220–21.

70. DAVIS, *supra* note 3, at 61.

71. *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 280–83 (1987); DAVIS, *supra* note 3, at 58–60.

72. For background on what the Brandeis Brief is and why it is significant, see *The Brandeis Brief—In Its Entirety*, U. LOUISVILLE BRANDEIS SCH. L., <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-brandeis-brief-in-its-entirety> (last visited Apr. 15, 2019).

73. DAVIS, *supra* note 3, at 61.

74. *Id.*

and stereotypes. The HIV/AIDS issue that had the potential of affecting the LGBT community through indirect discrimination was important as the advocacy to enact the ADA progressed. The alliance with a group that suffered from great stigma was significant.<sup>75</sup>

Another key factor that led to the passage of the ADA was how broad support was built throughout the country through the inclusion of a variety of people with a range of concerns related to disability issues and uniting those concerns into broad policy. Beginning in 1978, Justin Dart and Lex Frieden did listening tours through forty-eight states, collecting the stories and concerns of thousands of individuals in a variety of local disability rights organizations, building a communications network.<sup>76</sup> These stories were to shape the report of the National Council on Disability (NCD) that would provide “broad coverage” and “clear, consistent, and enforceable standards.”<sup>77</sup> The information gathered in the trenches was then shared with the NCD members, who through “a lot of arm-twisting,” took the “first steps toward [the idea of a law].”<sup>78</sup> But convincing this group, which included “major Republican donors and people of wealth and privilege,” allowed the advocates to anticipate and respond to the business and other concerns at an early stage.<sup>79</sup> This would prove valuable in the public relations aspect of moving the legislation to reality.

Thoughtful deliberation was given to whether to amend § 504, amend the Civil Rights Act, or enact a new law.<sup>80</sup> Once it was decided that an entirely new statute should be enacted, the next step required making sure that the White House was on board. Again, through personal relationships and connections, support was built from the Reagan administration, whereby his endorsement was included in the report.<sup>81</sup>

The next step was to “Bang the Drum Loudly,”<sup>82</sup> which meant “getting Congress educated and on the side of people with disabilities” and getting the disability community on board.<sup>83</sup> This required condensing the essence of a 300 page report into a “potent and digestible form that would reach key players and the larger disability community itself.”<sup>84</sup> Just as much attention was given to design and graphics as to the contents.<sup>85</sup> “The report was released with fanfare

75. *Id.* at 62.

76. *Id.* at 64, 67.

77. *Id.* at 67.

78. DAVIS, *supra* note 3, at 61.

79. *Id.* at 67.

80. *Id.* at 70.

81. *Id.* at 70–71 (describing the support of George Will who had a son with Down syndrome whose social interaction with President Reagan proved valuable in persuading Reagan to support the bill).

82. *See generally id.* at 63–75.

83. DAVIS, *supra* note 3, at 71.

84. *Id.*

85. *Id.* at 72.

on January 28, 1986.”<sup>86</sup> The groundwork was done by a group of committed, practical, and hardworking individuals with little Washington experience who had “stumbled around the corridors of power, cut their teeth on things they’d never tried before, and now were about to push through the largest civil rights legislation of the twentieth century.”<sup>87</sup> The Challenger explosion the same day that the report was released resulted in the cancellation of the meeting scheduled with President Reagan for the next day. Instead, Vice President Bush replaced him at that meeting. This twist of fate turned out to be fortuitous because Bush had a number of family experiences with disability, and he became a strong advocate of the legislation and eventually was the President to sign it into law.<sup>88</sup>

Jeremiah Milbank Jr., a member of the NCD and a prominent Republican, used his contact with Lou Harris (Harris Poll) and funded a poll to gauge public impact and public support, which proved critical to building the case to take to Congress.<sup>89</sup> While it is certainly true today that there are influential and wealthy individuals with connections to disability issues, it might be much more difficult to get a report like this on the radar of members of the public or Congress in light of the current overload of information and the skepticism of possible “fake news.”

## 2. Lack of Single Charismatic Figure Impedes Momentum

By 1986, there was a report with a fancy cover featuring a “bold silhouette of an eagle printed in brightly reflective silver ... gliding decisively, beak forward with its talons assertively flexed ... that you didn’t want to mess with.”<sup>90</sup> The National Council on Disability Report that had been thoughtfully developed had support from key players. What was needed next was to promote action by Congressional enactment. Chapter Six—Flat Earth, Deaf World—describes the events and factors that took the idea of the ADA, which had begun to languish, and made it a reality.<sup>91</sup> A historical perspective by Richard Scotch<sup>92</sup> noted the lack of any “single charismatic figure who serves to unify its various components and factions.”<sup>93</sup> While there were a number of hardworking and strong advocates, much attention was being given to fighting back the reduction of the rights under § 504 that were occurring both judicially and administratively. Areas of attention included the ambiguities of what was required for mass transit and whether disability rights extended to individuals

86. *Id.* at 73.

87. *Id.*

88. DAVIS, *supra* note 3, at 74.

89. *Id.* at 75.

90. *Id.* at 72.

91. *See generally id.* at 76–99.

92. *See generally* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (Temple Univ. Press 2d ed. 2001).

93. DAVIS, *supra* note 3, at 76.



with AIDS or HIV, to individuals addicted to drugs or alcohol, and to those in the LGBT community.<sup>94</sup> These battles had the potential of diminishing some of the coalition building from the civil rights communities.

The evolution of an idea to a law, however, as is often the case, included a combination of the right personalities and some unplanned events that would affect the politics. Chapter Six provides a rich series of stories that include how Chai Feldblum (a key advocate) became involved in disability rights,<sup>95</sup> the decision to add sample legislation to the 1986 Report,<sup>96</sup> the early involvement of some key members of Congress,<sup>97</sup> the controversy over the presidency of Galludet University (creating valuable political attention to disability issues),<sup>98</sup> and the unexpected politics of the 1986 Presidential election in which Bush outshone both Bob Dole in the primary and Michael Dukakis in the general election.<sup>99</sup> Just as it is hard to second guess close votes in any presidential election, *Enabling Acts* suggests that the disability vote may have been a critical difference in the election of Bush.<sup>100</sup>

And, as was the case in turning the idea into a report, the next step required a great deal of grassroots effort and direct communication with people from a wide range of interests by many activists and advocates (the principal player continuing to be Justin Dart).<sup>101</sup> One of the issues of controversy from the sample legislation was whether the policy should be a “Flat Earth ADA” policy, where the disability community would get all of their rights immediately with no regard for the cost.<sup>102</sup> The political realists recognized that such a policy was unlikely to become law, but this early debate of whether and how much to compromise provided ‘practice’ for the ongoing debates on this issue.<sup>103</sup> Unlike most other civil rights laws that focus only on nondiscrimination, the reasonable accommodation and accessible environment principles required the expenditure of funds by the provider of the program.<sup>104</sup> How far should that go? And what private remedies should be included to ensure that rights would be a reality?

This time period was also important for beginning to lay the groundwork for broad support from the public and policymakers about the impact and value of

94. *Id.* at 76–77.

95. *Id.* at 80. Her work began as a clerk for Supreme Court Justice Harry Blackmun when the *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), case was being decided by the Supreme Court, a case that had direct impact on individuals with AIDS.

96. *Id.* at 83. This decision was controversial.

97. *Id.* at 83–85. These included Senators Harkin and Weicker and Congressman Tony Coelho (whose life experience with epilepsy gave him a unique perspective).

98. DAVIS, *supra* note 3, at 88–90.

99. *Id.* at 91, 99.

100. *Id.* at 99.

101. *Id.* at 91, 99.

102. *Id.* at 84.

103. DAVIS, *supra* note 3, at 84.

104. *Id.* at 95–96, 112–13.

this major policy proposal. Unlike § 504, there was greater commitment and understanding of the benefits to everyone because anyone can become disabled at any time. In addition to the one in five Americans with a disability, almost every American has a family member with a disability.<sup>105</sup>

During this time period, the key legislators to carry the bill took on the mantle. These were Democratic Senators Kennedy and Harkin,<sup>106</sup> Republican Senators Weicker and Humphrey,<sup>107</sup> and Democratic Representative Coelho.<sup>108</sup> Although the “flat earth” version did not pass initially, it proved to be valuable to laying the groundwork for the revised bill that would later be passed.<sup>109</sup>

Noteworthy throughout the process of bringing the proposal to reality is the value of bipartisan support and perhaps most critical—the amount of individual personal contact among stakeholders throughout the country, members of Congress and their staffs, members of the NCD and staff, and other advocacy groups. The goal was common. The strategies, however, were not agreed to. Importantly, the respect and communication was there, and people *listened* to each other and figured out how to compromise. The toxic political culture today does not readily lend itself to that. While there are still many hardworking, thoughtful advocates and activists, the ability to work through disagreements and the mistrust and lack of time to communicate and build personal relationships does not exist or at least not enough at a sustained level.

### 3. The Legislative Process

Once the first version of the ADA was introduced, the momentum shifted significantly when a joint House and Senate hearing was held in fall 1988.<sup>110</sup> This was the first opportunity for Americans with disabilities and their families (not just the policymakers) to be heard in a national public setting. Similar to the hearings that were held before the 1975 special education statute was enacted, these hearings provided for a broad range of stories and experiences to be shared.<sup>111</sup> Those with HIV/AIDS, spina bifida, cerebral palsy, intellectual disabilities, visual impairments, and other conditions spoke about their

105. Press Release, U.S. Census Bureau, Nearly 1 in 5 People Have a Disability in the U.S. (July 25, 2012), <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12134.html>.

106. QI WANG, U.S. DEP’T OF COMMERCE, DISABILITY AND AMERICAN FAMILIES: 2000 3 (2005), <https://www.census.gov/prod/2005pubs/censr-23.pdf>. His aide, Bobby Silverstein, was one of the most critical players throughout the legislative process and afterwards in disability rights issues. DAVIS, *supra* note 3, at 107.

107. DAVIS, *supra* note 3, at 80, 93.

108. *Id.* at 85–87, 94 (describing how Coelho, who had epilepsy, evolved into his role as perhaps the primary legislator).

109. *Id.* at 87–88.

110. *See generally id.* at 100–14.

111. *Id.* at 100.

experiences in settings such as college education and home health care.<sup>112</sup> The need for a federal policy to avoid the confusion of state-by-state approaches was highlighted.

Despite this initial first public hearing and the fact that the disability community had become aware of the new support from many elected officials for disability rights, the issue was not given much press or election coverage to bring it to the attention of the broader population. The fact that the bill was not being pushed for immediate action was also a factor in avoiding potential pushback from businesses or other communities during the rest of 1988.<sup>113</sup> Nonetheless, George H.W. Bush, who had proven to be a valuable early ally as Vice President, highlighted the issue in his first address to Congress in February 1989.<sup>114</sup> Senator Weicker had lost his bid for re-election, so the leadership on the Senate side went to Tom Harkin, whose life experience included having an older brother who was Deaf and faced discrimination in buying a car because of his deafness.<sup>115</sup> He also had a nephew who had become paraplegic at age nineteen.<sup>116</sup> Like many supporters of the ADA of both parties, Senator Harkin's personal experiences inspired his advocacy. He was able to apply his interest in disability issues by persuading Senator Ted Kennedy, who wanted him to be on the Health Committee, to chair the Subcommittee on Handicapped (later Disability).<sup>117</sup>

The appointment to chair this Subcommittee gave Harkin the platform to develop disability rights; bringing in Bobby Silverstein as a legislative aide provided the strategic support to make it a reality.<sup>118</sup> One of the key early

112. DAVIS, *supra* note 3, at 100–01.

113. *Id.* at 101.

114. George H.W. Bush, Former U.S. President, Address on Administration Goals Before a Joint Session of Congress (Feb. 9, 1989) (transcript available at <https://www.presidency.ucsb.edu/documents/address-administration-goals-before-joint-session-congress>). In this address, President Bush focuses his remarks on economics, not charity, saying, “To those 37 million Americans with some form of disability, you belong in the economic mainstream. We need your talents in America’s work force. Disabled Americans must become full partners in America’s opportunity society.” *Id.*

115. DAVIS, *supra* note 3, at 102–03.

116. *Id.* at 105.

117. *Id.* at 105–06.

118. *Id.* at 106. Bobby was my classmate at Georgetown University Law Center. Because Georgetown is so large, I did not know him in law school, but later, when my own work involved disability rights issues, we had several discussions about these issues. We share an approach to getting things done that incorporates both ‘touchy feely’ and practical negotiating skills. When my first book was published in 1984, one of my former professors, Joe Page, kindly reviewed it for *Trial* magazine, writing that my treatise took a “sensitive, but no nonsense” approach to the law. I have always liked that description of my work. Bobby has never stopped working as an advocate for disability issues, and he is currently doing so through a consultant organization. Robert “Bobby” Silverstein, POWERS L. (last visited Apr. 7, 2019), <https://www.powerslaw.com/professional/robert>

decisions was to determine how much to compromise at the outset, knowing the political realities of a bill that was going to have financial implications for the business community, but also knowing the importance of getting a strong rights bill from the beginning.<sup>119</sup> Silverstein also had the skills of a technician to draft a detailed piece of legislation that included technical aspects essential to making this a sustainable statute.<sup>120</sup> There are certainly people today with those same skill sets and his religious commitment<sup>121</sup> to the issue, but they are somewhat rare and do not always appear at the right place and the right time. There is probably no single individual (other than President Bush) who was critical to getting this bill enacted, but Silverstein probably is pretty close to that.

The consensus building that Silverstein is noted for was essential to the enactment of the ADA, and this is described in great detail in *Enabling Acts*.<sup>122</sup> His ethical reputation is also noteworthy, as highlighted in an interesting aside when certain advocates had to *not* tell Silverstein about certain meetings.<sup>123</sup>

Critical to the enactment of the ADA for Republican legislators (who at that time were concerned about the potential for the business community to oppose such legislation) was the early and strong support of President Bush.<sup>124</sup> While the personal friendship of Republican Orin Hatch with Democratic Senator Ted Kennedy and the personal connection to disability issues by Republican Senators Bob Dole and John McCain (both disabled as a result of war injuries) would provide some leadership from the Senate Republicans, the fact that the Republican President gave heartfelt, genuine, and committed support to the early concept of an ADA was critical.<sup>125</sup> Today, there are still many members of Congress in both houses and both parties who have disabilities<sup>126</sup> or support

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-bobby-silverstein/. He is correctly referred to as the “behinds-the-scenes architect” of the ADA and other disability policy through his understanding of the importance of consensus building. *Id.*

119. DAVIS, *supra* note 3, at 107.

120. *Id.* at 109.

121. *Id.* (describing Silverstein as guided by his Jewish value of “do[ing] justice and pursu[ing] acts of loving kindness”).

122. *Id.* at 150.

123. *Id.* at 155.

124. DAVIS, *supra* note 3, at 107–09.

125. *Id.* at 107–08.

126. There are currently only four members of Congress identified as having disabilities, two of which are Republican and two of which are in the Senate: Sen. Tammy Duckworth (D., Ill.); Rep. Jim Langevin (R., R.I.); Rep. Brian Mast (R., Fla.); Sen. Jon Tester (D., Mont.). *See About Tammy*, TAMMY DUCKWORTH, <https://www.duckworth.senate.gov/about-tammy/biography> (last visited Apr. 7, 2019); *Biography*, CONGRESSMAN JIM LANGEVIN, <https://langevin.house.gov/about-me/full-biography> (last visited Apr. 7, 2019); *Biography*, BRIAN MAST, <https://mast.house.gov/biography> (last visited Apr. 7, 2019); Ben Terris, *Jon Tester Could Teach Democrats A Lot About Rural America – If He Can Keep His Senate Seat*, WASH. POST (May 2, 2017), [https://www.washingtonpost.com/lifestyle/style/jon-tester-could-teach-democrats-a-lot-about-rural-america—if-he-can-keep-his-senate-seat/2017/05/01/198c03cc-251d-11e7-a1b3-faff0034e2de\\_story.html?noredirect=on&utm\\_term=.9cd84eec7825](https://www.washingtonpost.com/lifestyle/style/jon-tester-could-teach-democrats-a-lot-about-rural-america—if-he-can-keep-his-senate-seat/2017/05/01/198c03cc-251d-11e7-a1b3-faff0034e2de_story.html?noredirect=on&utm_term=.9cd84eec7825). There are almost certainly many from both

disability rights. President Trump, however, not only does not support disability rights in any way, but one of his earliest campaign appearances criticized McCain as being a coward for being caught<sup>127</sup> and mocked a reporter with a disability.<sup>128</sup> Indeed, President Trump would not only not support a disability law: he is at the forefront of encouraging his administration to dismantle the regulatory underpinnings that make disability policy as effective as it is.<sup>129</sup>

In crafting the legislation, Silverstein worked to anticipate the hundreds of questions that needed to be answered.<sup>130</sup> He drew on a wide range of committed individuals to address concerns about transportation issues, cognitive disabilities, the Deaf community, and others. Now that there was a message (the bill and the basis for it) and the messengers (the key members of Congress and the President), the strategy of turning the legislation into reality required a comprehensive and collaborative team to lobby and to engage in outreach.<sup>131</sup> This group continued to discuss the evolving legislation with key disability activists and organizations. Their purpose was to ensure that these key players felt involved and were not outsiders and to “gauge the level of agreement or disagreement with proposed legislation and changes.”<sup>132</sup> This was a labor-intensive process requiring weekly meetings that would include key strategists as well as various interest groups. Special concerns of specific disability groups, such as epilepsy, cognitive disabilities, HIV/AIDS, mental illness, and others were addressed, while the coordinators of the legislation had the task of ensuring that these interests were addressed while “at the same time look[ing] at the big picture.”<sup>133</sup> Two important early principles of the leaders of this effort were that

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parties and in both houses who have family members with disabilities. Sen. John McCain (R., Ariz.) died in 2018 before this article was completed. Linnea Crowther, *John McCain (1936-2018), War Hero Turned Maverick Politician*, LEGACY.COM, <http://www.legacy.com/news/celebrity-deaths/notable-deaths/article/john-mccain-1936-2018-war-hero-turned-maverick> (last visited Apr. 7, 2019). It is likely that at least some of the newly elected members of Congress have a disability, and their perspectives and experiences might well be factors in turning back efforts to repeal the ADA directly or indirectly.

127. Felicia Sonmez, *Donald Trump on John McCain in 1999: ‘Does Being Captured Make You a Hero?’*, WASH. POST (Aug. 7, 2018), [https://www.washingtonpost.com/politics/donald-trump-on-john-mccain-in-1999-does-being-captured-make-you-a-hero/2018/08/07/a2849b1c-9a56-11e8-8d5e-c6c594024954\\_story.html?utm\\_term=.ee0e263200f7](https://www.washingtonpost.com/politics/donald-trump-on-john-mccain-in-1999-does-being-captured-make-you-a-hero/2018/08/07/a2849b1c-9a56-11e8-8d5e-c6c594024954_story.html?utm_term=.ee0e263200f7).

128. Irin Carmon, *Donald Trump’s Worst Offense? Mocking Disabled Reporter, Poll Finds*, NBC NEWS (Aug. 11, 2016), <https://www.nbcnews.com/politics/2016-election/trump-s-worst-of-fense-mocking-disabled-reporter-poll-finds-n627736>.

129. See Press Release, Jeff Sessions, Attorney Gen., Rescinds 25 Guidance Documents (Dec. 21, 2017) (on file with Dep’t of Justice). This issue is addressed later in the article.

130. DAVIS, *supra* note 3, at 109–10.

131. *Id.* at 110.

132. *Id.*

133. *Id.* at 113.

“all groups had to be included and that none could be carved out” and that, while timelines could be negotiated, principals could not.<sup>134</sup>

After about three months of this fine tuning of the legislation, a draft bill was circulated to the White House, legislators, and the disability community.<sup>135</sup> One of the key members of Congress whose support was critical was Representative Steve Bartlett, a Republican from Texas.<sup>136</sup> The 1989 version included key areas of concern. These included the broad application to the employment sector and the broad application to places of public accommodation.<sup>137</sup> Giving people a right to sue was of concern.<sup>138</sup> Limiting protection only to individuals whose impairments were *substantially limiting* was a key issue to garnering support.<sup>139</sup> Television captioning goals had to be accomplished by separate legislation, because the political reality of mandating all program captioning would have killed the bill.<sup>140</sup> Carve-outs for private clubs and not including the insurance industry (for the most part) were also critical to passage. Setting the level at which an accommodation need not be provided was one of the biggest challenges.<sup>141</sup> The term “undue hardship” in the revised bill was more favorable to the business community because it did not require a demonstration that a business would go out of business before excusing it from providing a requested accommodation.<sup>142</sup> The application to transportation was also less burdensome than the earlier proposed legislation. The relationship to

134. *Id.* at 114.

135. DAVIS, *supra* note 3, at 115.

136. *Id.*

137. The present-day debate about the application to websites and to whether only “physical structures” were covered (an issue that arises with respect to insurance providers) reflects the tensions on broad inclusion. CONG. RESEARCH SERV., THE AMERICAN WITH DISABILITIES ACT (ADA): APPLICATION TO THE INTERNET 7 (2012), [https://www.everycrsreport.com/files/20120328\\_R40462\\_4cd1aa8279b147dd8eab287fbd16128d6086497a.pdf](https://www.everycrsreport.com/files/20120328_R40462_4cd1aa8279b147dd8eab287fbd16128d6086497a.pdf).

138. Not surprisingly, that is one of the major efforts of repeal. *See* Laura Rothstein, *Preserving Access for People with Disabilities*, 378 NEW ENG. J. MED. 2065, 2065 (2018).

139. This would become an issue in the Supreme Court *Sutton* trilogy decisions in 1999, which narrowed coverage from what the ADA drafters had intended. This interpretation required almost a decade of advocacy to override and return the definition to the intended broad coverage (but not covering all conditions no matter how small) that resulted in the ADA Amendments Act of 2008. That amendment effort also involved many of the same tactics and connections that the 1990 statute had included and probably represented the last time that the key factors were in place to make such a significant civil right a reality. *See* *Sutton v. United Airlines, Inc.*, 527 U.S. 2143, 2144 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 2165, 2167 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 2133, 2136 (1999).

140. DEPT. JUST., NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS MOVIE THEATERS; MOVIE CAPTIONING AND AUDIO DESCRIPTION 1 (2016), [https://www.ada.gov/regs2016/movie\\_rule.htm](https://www.ada.gov/regs2016/movie_rule.htm).

141. *See* DAVIS, *supra* note 3, at 116.

142. *Id.*

§ 504 was clarified so that it was clear that this did not override § 504, but it expanded coverage beyond those receiving federal financial assistance.<sup>143</sup>

While all of these compromises were designed to ensure that the bill was politically realistic and reasonably responded to the interests of a range of disability communities, the support of members of Congress who were philosophically supportive, but concerned about opposition from the business community, remained.<sup>144</sup> The same was true for the White House. Being in support of Mom and Apple Pie is easy in the abstract. The specifics of what that means to the business community becomes much more challenging. Those same debates certainly exist today, but in a much more contentious and toxic political climate.

It is almost always better to set the agenda of what is to be in a bill by drafting the first version and having others respond to it. In the case of the ADA, the White House was put in the position of responding to the Congressional draft.<sup>145</sup> Once the reality of backing what could be viewed as a liberal civil rights policy that would cost businesses, the brand new Bush administration had to decide how to respond. While a disability rights law was one of the Bush priorities,<sup>146</sup> the various White House and executive branch players<sup>147</sup> engaged in the negotiation, slow walking, and political wrangling that is often the case with a major policy such as this. Noteworthy, however, is that while there were significant concerns about the specific provisions, there was not widespread Executive branch and White House *opposition* to the concept (although Boyden Gray managed to walk a middle road in the negotiations carrying water for business interests).<sup>148</sup>

Chapter 8—A New Day, A New ADA—describes the drama and political strategizing within the White House and executive branch, which included personal dislike and distrust by some players for others.<sup>149</sup> That same in-house drama occurs to some degree in every administration, but the degree varies from president to president. What is unique with the Trump administration, however, is the high turnover of personnel that substantially reduces the value of building internal political alliances and the legal and political attention to the internal

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143. *Id.* at 117.

144. *Id.*

145. Notably it was the Congressional Democratic version that was presented because of the detailed and strategic early work by Silverstein and others. *Id.* at 120.

146. DAVIS, *supra* note 3, at 122.

147. These included Chief of Staff John Sununu (viewed as the ‘bad’ cop on some issues), White House counsel Boydon Gray (concerned about the cost to business), Budget Director Secretary of Transportation Sam Skinner, Attorney General Richard Thornburgh, and agency representatives for the Department of Labor and the Office of Management and Budget Dick Darman. *See id.*

148. *See id.* at 124.

149. *See generally id.* at 115–31.

workings of the administration. Most challenging, however, is the reality that President Trump not only does not seem to care a great deal about input from others on either the policy or the political implications of proposed policy, but he cannot be counted on to retain a particular position for any length of time. As Congress learned during the late 2017 immigration debates and tax cut discussions, even Republicans who thought they had buy-in or agreement from President Trump would often be undercut by a later tweet.<sup>150</sup> This means that, even if the members of Congress can agree (quite a challenge in the current political climate), unless there is a veto-proof majority, it is not certain that a policy can be enacted.

Even where there is general White House support for a specific policy, the ability to become a bill can “go off the rails,” which the ADA had the potential to do because the bill introduced did not yet have the full weight of support of President Bush.<sup>151</sup> That became a factor in whether some key legislators (particularly Republican Texas Representative Bartlett) would back the stronger bill. What seemed to bring Bartlett around was the persuasive testimony at hearings held in Texas of Bob Lanier (a successful businessman who chaired the Texas Highway Commission and METRO, Houston’s mass transit system).<sup>152</sup> His testimony included a moving poem about how those left behind may be hidden gems. This practical and economically conservative and successful business leader provided an emotional context to put Bartlett behind the bill, and Bartlett was key because he was a member of the House Committee on Labor and Education, which hosted the hearings in Houston.<sup>153</sup>

While Bush was ‘on board’ in terms of wanting this to be a priority, the ADA was *his* priority, not that of his staff, and they looked to him for guidance about direction and details.<sup>154</sup> Neither Bush nor his appointees spoke “in a single voice.”<sup>155</sup> The White House was hampered in focusing both by being new to the leadership, but also because of unplanned challenges that often come up in unexpected ways. These included Tiananmen Square protests and the invasion of Panama.<sup>156</sup> The risk in not providing stronger direction was that the Senate agenda for the bill would take over. While the Senate leadership had given Bush

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150. James Hohmann, *The Daily 202: Trump’s DACA ‘Deal’ is Another Humiliation for Jeff Sessions*, WASH. POST (Sept. 15, 2017), [https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/09/15/daily-202-trump-s-daca-deal-is-another-humiliation-for-jeff-sessions/59bb011f30fb045176650cd1/?utm\\_term=.3ad48fc1377b](https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/09/15/daily-202-trump-s-daca-deal-is-another-humiliation-for-jeff-sessions/59bb011f30fb045176650cd1/?utm_term=.3ad48fc1377b).

151. DAVIS, *supra* note 3, at 132.

152. He would later become Mayor of Houston from 1992 to 1998. *Id.* at 130.

153. *Id.* at 130–31.

154. *See generally id.* at 132–42.

155. *Id.* at 132.

156. DAVIS, *supra* note 3, at 132. Because his background was in the CIA and international issues, these issues fit his skill sets more readily than domestic issues, even though his values supported the ADA goals. *Id.*



some time to respond to their proposed language, they were not going to wait forever. The issues to be resolved focused on the impact on small business, the remedies and procedures to be provided, and who should be covered (illegal drug users was a big issue).<sup>157</sup>

The key to sorting this out came about by accident through the involvement of Attorney General Richard Thornburgh, who had just the right balance of Republican fiscal business concern and compassion because of his own personal experience with a son who had severe disabilities from an auto accident.<sup>158</sup> Thornburgh was the ultimate ‘compassionate conservative.’<sup>159</sup> A range of interest groups within the administration scrutinized and worried about Thornburgh’s draft testimony before the Senate Committee, but ultimately he prevailed by offering a position that highlighted getting the public attention. He also highlighted the value of yet another “civil right” and faced head on and responded to the concerns of the business community, particularly small businesses.<sup>160</sup> Strategically, a high profile *New York Times* article on the day of Thornburgh’s testimony spoke to the benefits of employing individuals with disabilities, moving them from welfare to work.<sup>161</sup>

In today’s reality, it is certainly possible that there would be some key support and advocacy from members of Congress. It is also quite likely that strategic use of media could provide additional support. It is much more difficult to identify who within the Trump administration would take the role of Thornburgh. And one can imagine that press stories that did not follow the Trump philosophy would be labeled as ‘fake news.’

#### 4. Secret Strategies in an Era of Cellphones and Alexa

Once the White House and administration were collectively on board to push for the ADA, the internal wrangling within the executive branch and negotiations with the Senate proceeded. Some ground rules were agreed on (but not always honored).<sup>162</sup> The personalities, skill sets, connections, and status of various agency representatives played into who was at the table for what became weekly negotiations.<sup>163</sup> There was agreement that no one would talk to the

157. *Id.* at 138–39, 141.

158. *Id.* at 139–41.

159. *Id.* at 139.

160. DAVIS, *supra* note 3, at 141.

161. *Id.* at 142 (citing Kathleen Teltsch, *As The Labor Pool Dwindles, Doors Open for the Disabled*, N.Y. TIMES (June 22, 1989), <https://www.nytimes.com/1989/06/22/us/as-the-labor-pool-dwindles-doors-open-for-the-disabled.html>).

162. *Id.* at 143. One example is that an agreement that a “complete” bill had to be presented and that it would not allow for amendments. *Id.*

163. *See id.* at 144–50. Initially there was thought of excluding John Wodatch (a staff member from Department of Justice) because he was not from the White House, but once his skill and

press.<sup>164</sup> While it made sense to have the disability groups represented at the negotiating table, these advocates were not included because of concern that their demands would be too radical.<sup>165</sup> Instead, their views were indirectly negotiated by individuals at secret bagel breakfasts.<sup>166</sup> Silverstein took meticulous notes,<sup>167</sup> so he was not told about most of the meetings because of concerns that this might chill open discussion.<sup>168</sup> Thus, the 1989 negotiations progressed like most “sausage-making” throughout the summer.<sup>169</sup>

As was the case with earlier discussions, the major concerns centered around mass transit (cost of retrofitting busses), concerns about remedies, application to small businesses, and what specific types of public accommodations would be covered.<sup>170</sup> These issues were somewhat resolved when President Bush had his attention pulled again to an international crisis in Lebanon, which had the consequence of having everyone agree to the deal that had been reached at that point rather than risk the momentum being sidetracked.<sup>171</sup> And so, on August 2, 1989, the press release proclaimed that “The Administration has reached a consensus with key Senators from both parties on legislation that would expand the reach of this country’s civil rights laws to include disabled Americans.”<sup>172</sup> While the press coverage was positive, the public announcement now meant that the legislation was open to attack by the business community.

It is quite likely that the legislation progressed that far, however, because of the secrecy and discretion in negotiations, which placed it in the position of having to be reacted to.<sup>173</sup> It is unlikely that the secrecy possible in 1989 would be the same today. With cell phones recording so much of what is said in every setting, it would not be Silverstein’s meticulous notes that might impede open discussion. It is the reality that nothing anyone says can be assured of such secrecy.<sup>174</sup> In addition, the leaks within the White House under the Trump

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understanding of the details (because of his past work on the § 504 regulations), it was agreed that he was critical to those stage of the process. DAVIS, *supra* note 3, at 147.

164. *Id.* at 145.

165. *Id.* at 153.

166. *Id.*

167. *Id.* at 155. In 2018, the understanding of the FBI practice of taking meticulous notes reflects the value of such records. Rebecca R. Ruiz, *Comey’s Memos Were a Product of a Culture of Note-Keeping*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/politics/james-comey-memos-fbi-culture.html>.

168. DAVIS, *supra* note 3, at 155.

169. *Id.* at 154.

170. *Id.* at 156.

171. *Id.* at 159.

172. *Id.* at 159–60.

173. DAVIS, *supra* note 3, at 155.

174. The various investigations of Trump’s conduct have highlighted the fact that it is difficult to know when one is being recorded. *See, e.g.*, Chrystal Hays, *Michael Cohen Trump Tapes: What We Know*, USA TODAY (July 28, 2018), <https://www.usatoday.com/story/news/politics/2018/07/>

administration make secret negotiations even less likely.<sup>175</sup> While such leaks have always occurred, the degree in 2018 is dramatically greater.<sup>176</sup>

### 5. Best Laid Plans Can Fall Apart

Although there were extensive negotiations about the shape of the legislation before it was brought to the floor for debate in the fall of 1989, the reality of a more public draft policy was that new attacks began. In the chapter “This Means War,” the tensions that had already been there before became even greater.<sup>177</sup> The disability community thought too much was being given up. The business community raised the specter of explosive costs. Members of the House were mad because the draft legislation was primarily a product of negotiations between the White House and Senate leaders, and the House had not been sufficiently included (although there were co-sponsors from the House).

In anticipation of business pushback, the August 4 letter from the fifty-seven co-sponsors from both parties and both houses emphasized that this was a bill that would save the government and society billions of dollars by getting people off benefits and into the workforce and public places.<sup>178</sup> Nevertheless, there were some special concerns from certain sectors, including Greyhound Lines bus service and employers worried about drug users in the workplace.<sup>179</sup> Because it was the late 1980s when the HIV/AIDS issue was becoming a public issue with much unknown about how it was spread and how to treat it, there were concerns about how the LGBT community should be protected in the legislation.<sup>180</sup> This lack of understanding made fear a big factor for some in whether they should be included. Sadly, fear is still a political factor, very much on display during 2018 for supporting or opposing legislation and throughout the midterm election process.<sup>181</sup>

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28/michael-cohen-trump-tapes-what-we-know/852141002/; Chris Cilliza, *Just How Many Tapes Does Omarosa Actually Have?*, CNN (Aug. 16, 2016), <https://www.cnn.com/2018/08/16/politics/donald-trump-omarosa-tapes/index.html>.

175. See, e.g., Katherine Faulders, *Leaks Plague White House Despite Crackdown*, ABC NEWS (May 14, 2018), <https://abcnews.go.com/Politics/leaks-plague-white-house-crackdown/story?id=55164711>.

176. See, e.g., David A. Graham, *How Bill Clinton Stopped White House Leaks*, ATLANTIC (May 15, 2018), <https://www.theatlantic.com/politics/archive/2018/05/bill-clinton-trump-white-house-leaks/560414/>.

177. See generally DAVIS, *supra* note 3, at 161–73.

178. *Id.* at 162.

179. *Id.* at 164–67.

180. *Id.* at 166.

181. See, e.g., Sean Sullivan & John Wagner, *Midterm Fear Factor: Republicans, Democrats Stoke Anxiety Over Health Care, Rule of Law*, WASH. POST (Oct. 10, 2018), [https://www.washingtonpost.com/powerpost/midterm-fear-factor-republicans-democrats-stoke-anxiety-over-healthcare-rule-of-law/2018/10/10/d2a24352-ccac-11e8-a360-85875bac0b1f\\_story.html?utm\\_term=.f8f75ec7cb7d](https://www.washingtonpost.com/powerpost/midterm-fear-factor-republicans-democrats-stoke-anxiety-over-healthcare-rule-of-law/2018/10/10/d2a24352-ccac-11e8-a360-85875bac0b1f_story.html?utm_term=.f8f75ec7cb7d).

An interesting twist on how public relations can be a major factor in policy support is the fact that while the ADA was getting greater attention by policymakers and disability rights groups, the general public was not aware to a great extent of this major civil rights proposal.<sup>182</sup> Although the *New York Times* came out opposing the ADA, there was not a lot of major media attention to the issue.<sup>183</sup> It was noted by one of the major advocates that “the law never would have been enacted [if there had been a great deal of publicity].”<sup>184</sup> In contrast, it is the high publicity and public awareness that has largely been a critical factor in keeping the ADA from being repealed, even by piecemeal efforts. There was extensive communication, however, within the disability advocacy groups, and this communication proved valuable in the intense grassroots lobbying efforts.<sup>185</sup> That type of effort is still in place today.<sup>186</sup> It is almost certain that today, in spite of information-overload, that if there was an effort to pass a major legislative policy, the publicity spotlight would be high. This was the case with the tax reform of 2017 and any recent efforts to enact major immigration reform.

One of the major debates was about tax credits for small businesses to make architectural changes.<sup>187</sup> Although the tax credit provisions were not specifically incorporated into the ADA, the tax code does allow for it.<sup>188</sup> Perhaps the most outrageous amendments that were specifically added to the bill are what are known as the Jesse Helms’ amendments.<sup>189</sup> Senator Helms held stereotypic attitudes and prejudices, in spite of the fact that in many cases certain conditions would not be considered to be disabilities, or if they were, the individuals with those conditions would not be qualified because of a threat.<sup>190</sup> He prevailed in having the ADA specify that the following conditions would not be considered to be disabilities: transvestism, pedophilia, transsexualism, exhibitionism, voyeurism, compulsive gambling, kleptomania, pyromania, gender-identity disorders, current psychoactive substance use disorders, and current psychoactive substances-induced organic mental disorders.<sup>191</sup> Another concern was about potential floodgates of litigation by employees, which was resolved by requiring that the Equal Employment Opportunity Commission (EEOC)

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182. DAVIS, *supra* note 3, at 162.

183. *Id.* at 167.

184. *Id.*

185. *Id.* at 168.

186. The public awareness is evident in the 2018 activism responding to proposed repeals of the Affordable Care Act. *See, e.g.,* Dan Mangan, *Obamacare Rule Repeal: Public Strongly Objects to Changing ACA with Tax Bill, as Ads Target House Members*, CNBC (Dec. 7, 2017), <https://www.cnbc.com/2017/12/07/public-strongly-objects-to-changing-obamacare-with-tax-bill.html>.

187. DAVIS, *supra* note 3, at 162.

188. *Id.* at 170.

189. *Id.* at 170–73.

190. *Id.* at 171–72.

191. *Id.* at 172.

would be the agency to initially handle such complaints, rather than allowing individuals go directly to court.<sup>192</sup> The sausage-making at this point resulted in a seventy-six to eight (with sixteen “not present”) Senate vote of support.<sup>193</sup>

One of the greatest challenges in making the ADA a reality was the gauntlet that would have to be run within the House of Representatives. This required involvement of “four committees, seven subcommittees, and eleven hearings.”<sup>194</sup> Like the previous negotiations, the successful outcome was a result of strong commitments, key alliances (including some that would have seemed to be from polar opposite viewpoints), some backroom deals, and nine long months of slogging through and making compromises.<sup>195</sup> It is noteworthy that the negotiations were reported as “civil” and that everyone wanted to “get to yes.”<sup>196</sup> It also meant “going back” on the White House promise not to allow amendments.<sup>197</sup> Noteworthy, however, was that the amendments were very limited and only for high priority issues. The effort was “time-consuming and herculean” and sometimes “lonely” for the advocates doing the nuts-and-bolts work of fine tuning the specific language.<sup>198</sup>

The *Enabling Act* discussion of the House work includes details of many critical factors, including that three of the key committees were chaired by Representatives who were ethnic minorities, who appreciated the value of civil rights legislation.<sup>199</sup> Also noted in the chapter focusing on the House of Representatives negotiations are the references to the number of House members who had family members with disabilities.<sup>200</sup> It is almost certain that the same would be true today. What is less predictable is how the issue of drug addiction and drug use would be viewed if there was an attempt to enact the ADA today. In 1989, this issue was one of the major sticking points.<sup>201</sup> Drug users being allowed in the workplace was a great concern. It is probable that given these concerns, few of the key legislators had any direct experience with people with drug addiction. Today, the opioid crisis that affects virtually every part of the country and every congressional district would certainly give this a different kind of attention.<sup>202</sup> Although the focus today is primarily on the health aspects

192. DAVIS, *supra* note 3, at 172.

193. *Id.* at 173.

194. *Id.* at 174.

195. *Id.* at 175–77.

196. *Id.* at 178. This can be contrasted with examples of negotiations between the White House and Congress regarding the border wall.

197. DAVIS, *supra* note 3, at 178.

198. *Id.*

199. *See generally id.* at 174–90.

200. *Id.* at 178.

201. *Id.* at 181–82.

202. *See generally* David Shadovitz, *The Truth About the Opioid Crisis at Work*, HUM. RESOURCE EXECUTIVE (June 21, 2018), <http://hrexecutive.com/truth-about-the-opioid-crisis-at-work/>

of this crisis, workplace issues would likely be of concern if the ADA were proposed today.

One strategy that was attempted by some members of the House was to pit the “poor against the disabled.”<sup>203</sup> This strategy was unsuccessful.<sup>204</sup> Those with disabilities are disproportionately also low income. The strategy of pitting interest groups against each other whenever social justice legislation is considered today, however, is probably even more present, although primarily coming from the White House.<sup>205</sup>

Both in 1989 and today, financial and sexual improprieties have brought down key legislators at important points in moving a proposed policy to reality. Examples of these are provided in *Enabling Acts*,<sup>206</sup> and they are not always easy to predict, although the sunlight of the press today makes legislators less likely to escape the spotlight. Another interesting parallel is how other matters can distract from progress on legislation. In 1989, there was focus on the end of the Cold War announced by President Bush and Mikhail Gorbachev.<sup>207</sup> Ironically, Russia is still the distraction, although certainly for different reasons.

#### 6. The Lesser Known Stories Behind the Scenes

The story of how the ADA got enacted includes some little-known episodes of how ‘history becomes history’ only later. One episode resulted in an image that is often highlighted as the iconic symbol of how a major protest with striking visuals is often thought to have played a significant role in persuading members of Congress to pass the ADA.<sup>208</sup> One iconic story is the Capitol Crawl, where wheelchair users crawled up the Capitol steps on March 12, 1990, in protest of the slow effort to enact the ADA.<sup>209</sup> The story made it seem that that protest

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work/ (noting that the opioid crisis affects more than seventy percent of employers and costs employers forty-two billion dollars annually in lost productivity).

203. DAVIS, *supra* note 3, at 185, 189.

204. *Id.* at 185.

205. This has been done by pitting minorities against women, rural America against urban America, and other groups. *See, e.g., Trump Says He Is Not Pitting Americans Against Each Other*, CNBC (Nov. 7, 2018), <https://www.cnbc.com/video/2018/11/07/trump-says-he-is-not-pitting-americans-against-each-other.html>; Press Release, Cong. Black Caucus, CBC Chairman to Trump: Stop Pitting Black and Brown Immigrants Against Each Other (Feb. 12, 2018), <https://cbc.house.gov/news/documentsingle.aspx?DocumentID=841>; Harry G. Broadman, *We All Should Worry About Trump’s ‘Divide and Conquer’ Trade Policy*, FORBES (June 29, 2018), <https://www.forbes.com/sites/harrybroadman/2018/06/29/we-all-should-worry-about-trumps-divide-and-conquer-trade-policy/#18b8c8b35346>.

206. *See* DAVIS, *supra* note 3, at 187 (noting one House Representative’s conviction for soliciting the sexual favors of a sixteen-year-old girl).

207. *Id.* at 189–90.

208. *Id.* at 192–93.

209. *See generally id.* at 191–216.

‘caused’ the movement.<sup>210</sup> In actuality, the ADA was already being voted on that day and already had key support from significant members of Congress.<sup>211</sup> It is also interesting to note that this image and protest were not uniformly viewed by members of the disability community as being the best strategy for persuasion.<sup>212</sup> The “militant” segment of the advocacy movement was often at odds with those who supported the goal of that group, but who believed that this was not the best means of getting to yes.<sup>213</sup> The protests within Congress during 2018 again highlight the high profile ‘civil disobedience’ model of staging mass presence in the halls of Congress when threats of repeal of the Affordable Care Act (with huge impact on individuals with disabilities) was taking place<sup>214</sup> and the protest of women’s groups during the Supreme Court hearings.<sup>215</sup> Not unlike other civil rights movements where there may be agreement on goals, there is often disagreement on tactics and whether and how much to compromise.

Also significant is how a cultural force and lack of understanding and knowledge can affect attitudes. This is demonstrated by the concerns in the late 1980s about HIV/AIDS issues and the newness and lack of understanding of this issue. Good information on transmission was not yet in the public understanding, and the fact that HIV/AIDS was a virtual death sentence at that time fostered enormous fear within the public. For the ADA, this played out as a particular concern of the restaurant and food service industry.<sup>216</sup> Restaurant owners (many of whom were small business owners) were concerned that if the public knew that an individual with HIV/AIDS was employed at the restaurant, the public would refuse to come, and it would go out of business. The proposed amendment from Congressman Chapman (a southern Democrat from Texas) provided that rather than striking people with HIV/AIDS from protection (which was viewed as giving in to “customer” preference that was often the basis for refusing service

210. *See id.* at 197. The demonstrators’ unawareness that the ADA in fact already had congressional support is indicative of the public’s perception at the time that congressional support of the ADA would require political activism. This is similar to the issue of whether the women who confronted Senator Flake during the Kavanaugh controversy caused him to take the action he took or whether he was already planning to do so. *See generally* Michael D. Shear et al., *A Tumultuous 24 Hours: How Jeff Flake Delayed a Vote on Kavanaugh*, N.Y. TIMES (Sept. 28, 2018), <https://www.nytimes.com/2018/09/28/us/politics/jeff-flake-kavanaugh-confirmation.html>.

211. DAVIS, *supra* note 3, at 197.

212. For example, Senator Bob Dole was reported as opposing this type of action as being counterproductive. *Id.*

213. *Id.*

214. Abigail Abrams, ‘Our Lives Are at Stake.’ *How Donald Trump Inadvertently Sparked a New Disability Rights Movement*, TIME (Feb. 26, 2018), <http://time.com/5168472/disability-activism-trump/>.

215. Joe Heim et al., ‘A Women’s Wave Is Coming’: *Demonstrators at Capitol Protest Kavanaugh Confirmation*, CHI. TRIB. (Oct. 6, 2018), <https://www.chicagotribune.com/news/nationworld/politics/ct-kavanaugh-confirmation-protest-20181006-story.html>.

216. DAVIS, *supra* note 3, at 204–07.

to African Americans), the amendment allowed the industry to determine that any employee with an infection or communicable disease of *public health significance* to a job involving food handling could be moved to another position.<sup>217</sup> Notably, this requires the employer to make the case that a condition does have public health significance, and over time, the evidence (rather than the myths and fears) proved that individuals with HIV/AIDS did not present a public health risk.<sup>218</sup> When the Chapman amendment became a potential deal breaker for the entire bill, Senator Hatch found a way to navigate this by instead amending the bill to require the Secretary of Health and Human Services to evaluate what communicable diseases were a risk for food handlers and posed a direct threat (and to update the list every year) and apply the employee reassignment only to those.<sup>219</sup> It meant that the reassignment would be based on research, not on fear.<sup>220</sup> In the three decades since HIV/AIDS issues arose, there has been both greater scientific understanding of its transmission, public awareness of this information, and medical breakthroughs that mean that HIV status is no longer a death sentence.

An interesting parallel to the ADA threat of public shaming of those who supported Representative Chapman's amendment<sup>221</sup> was the activism during the summer of 2018, when several high-profile Republicans faced public "shaming" at restaurants.<sup>222</sup> The significant changes in public opinion with respect to LGBT rights<sup>223</sup> would also make any attempt today to make public policy exclusions based on LGBT status (directly or indirectly) politically difficult. The greater

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217. *Id.* at 206–10, 212.

218. See generally Laura Rothstein, *Children with AIDS: A Need for a Clear Policy and Procedure for Public Education*, 12 NOVA L. REV. 1259 (1988). Notably this same kind of hysteria was also at play with public school policies in the late 1980s and early 1990s. *Id.*

219. The advocates stood firm on the commitment not to enact a bill that would have the effect of excluding those with HIV (and indirectly members of the LGBT community) from protection. DAVIS, *supra* note 3, at 211. The advocates stood firm on the commitment not to enact a bill that would have the effect of excluding those with HIV (and indirectly members of the LGBT community) from protection.

220. *Id.* at 212.

221. Chapman himself paid for his attitude and advocacy, when he was passed over by Governor Ann Richards to appoint the replacement for Senator Bentsen who resigned to take a Cabinet position in the Clinton administration. *Id.* at 214. Members of the disability community threatened that those members of Congress who voted for the Chapman amendment would be refused service at restaurants (in recognition that many in the restaurant service industry are gay). *Id.* at 210.

222. Mary Jordan, *The Latest Sign of Political Divide: Shaming and Shunning Public Officials*, WASH. POST (June 24, 2018), <https://www.chicagotribune.com/news/nationworld/politics/ct-shaming-public-officials-20180624-story.html> (describing how several supporters of the Trump administration were publicly embarrassed at restaurants during summer 2018).

223. See, e.g., *Changing Attitudes of Gay Marriage*, PEW RES. CTR. (June 26, 2017), <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.



openness in society and the realization by more people that many of their family and friends are LGBT has changed attitudes significantly (although not entirely).

#### 7. Making the ADA a Reality – The Statute is Only the First Step

Enacting a statute is only the first step to accomplishing the goals of the ADA. *Enabling Acts* addresses that issue in the book's final chapter, titled "Enabling the ADA."<sup>224</sup> The focus of the chapter relates not only to whether the ADA could be passed today, but whether the other factors that ensure effectiveness would also be in place today.

Implementing the ADA required promulgating extensive and detailed regulations by several federal agencies affecting a wide range of American programs—transportation, health care, education, employment, public places, and government programs.<sup>225</sup> Fortunately, John Wodatch, who had performed critical service in drafting regulations under § 504 of the Rehabilitation Act, was up to the task.<sup>226</sup> In fact, the statute itself called for a short turnaround for regulations as a way to prevent the slow process that had occurred in promulgating § 504 regulations. While the deadline for the basic regulations was met (within a year) and these were a starting place, much more detailed regulations were added between 2004 and 2010 that address issues ranging from swimming pools to service animal accommodations.<sup>227</sup> These continue to be refined.<sup>228</sup>

Perhaps of greatest value were the clarifications about some of the transit issues that responded to the confusion over requirements relating to a range of issues, such as retrofitting existing vehicles, paratransit, and light rail-type issues.<sup>229</sup> Current uncertainty relating to Lyft <sup>TM</sup> and Uber <sup>TM</sup>-type vehicles, AirBnB-type housing, and websites reflect the fact that not all issues are clearly addressed even in the numerous sets of regulations. Before Trump was elected, there were ongoing activities within the Department of Justice relating to some

224. See generally DAVIS, *supra* note 3, at 225–51.

225. *Id.* at 225.

226. *Id.*

227. *Id.* at 226. These regulations involved issues including swimming pools, Segway <sup>TM</sup> type vehicles, miniature golf courses, playgrounds, shooting ranges. *Id.* I recall reviewing a draft of one set in 2009 focusing on animal accommodations.

228. Some of the important regulations after 2010 include clarification of the definition of disability, Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008, 81 Fed. Reg. 53,204 (Aug. 11, 2016), and final rules regarding movie theater obligations under Title III, Nondiscrimination on the Basis of Disability by Public Accommodations—Movie Theaters; Movie Captioning and Audio Description, 81 Fed. Reg. 87,348 (Dec. 2, 2016).

229. Transportation for Individuals with Disabilities, 61 Fed. Reg. 25,409 (May 21, 1996).

of these issues, but that has largely been halted under the current anti-regulation policies of the Trump administration.<sup>230</sup>

The ADA regulations were also an opportunity to clarify and refine terms from § 504 statutes, regulations, and judicial interpretations. Terms such as “reasonable accommodation,” “undue hardship,” and “otherwise qualified” could be clarified within regulations as they applied to specific settings.<sup>231</sup>

The compromise about enforcement in enacting the ADA was initially most significant with respect to employment.<sup>232</sup> First, the application to employers was phased in over four years, applying to different sized employers on a staggered basis.<sup>233</sup> Second, the primary enforcement process required exhaustion of EEOC administrative remedies.<sup>234</sup> As a consequence, it took several years before the impact on employers began to see major backlash.

#### 8. Backlash Consequences in the Courts

As EEOC complaints reached litigation stages, an employment sector backlash occurred. Some employers took a proactive approach and began to ensure that their Human Resources departments responded to requests for accommodations and other ADA issues in a positive way. Others, however, were more resistant and often used the technique of getting the case dismissed on the basis that the individual was not disabled and therefore did not have standing.<sup>235</sup> This was done to avoid dealing with the substantive issue of whether the individual was otherwise qualified or whether the requested accommodation would be unduly burdensome. One of the primary avoidance techniques was to claim that individuals whose impairments could be mitigated were not “disabled” under the statute.<sup>236</sup> As a result, many individuals (such as those with depression, seizure disorders, HIV-positive status, cancer, and other health impairments) were finding themselves not even able to get to the next stage of the claim. The Supreme Court, in 1999, held that taking medication that alleviated a condition or otherwise mitigating a condition meant that the individual was stopped at the courthouse door.<sup>237</sup> Those same individuals who did not take the medication needed for seizures or depression would probably be

230. The only area where there seems to be an agency interest in new regulations related to disabilities is regarding animal accommodations on airplanes. The Department of Transportation provided proposals under the Air Carrier Access Act regarding animal accommodations on airlines. *Traveling by Air with Service Animals*, 83 Fed. Reg. 23,832 (May 23, 2018) (regulations had not been finalized at the time of this writing).

231. DAVIS, *supra* note 3, at 229.

232. *Id.* at 227.

233. *Id.* at 227, 229.

234. *Id.* at 230.

235. *Id.* at 231.

236. *See, e.g.*, DAVIS, *supra* note 3, at 231.

237. *Id.* at 230–31.

found not to be otherwise qualified. Similar confusion occurred about some learning disabilities.<sup>238</sup>

The narrow interpretation of the definition of disability was immediately recognized not to be the intent and spirit of the original statute, but it took until 2008 for Congress to pass the amendments that corrected that error.<sup>239</sup> While not as politically challenging to pass as the original 1990 statutes, a great deal of effort by advocates and a lot of grassroots activity was necessary to get this critical clarification through passage of the Americans with Disabilities Amendments Act (ADAAA).<sup>240</sup> What is particularly remarkable about its enactment is that it was passed in September 2008, at the same time of the financial meltdown that required intense political focus by members of Congress.<sup>241</sup>

Remedies achieved through litigation are essential to the effectiveness of the ADA, and the challenges continue to play out in a range of areas. While some have argued that the ADA is not effective for employees because so few plaintiffs ultimately win their cases, the specter of litigation has almost certainly changed employer practice so that there is less discrimination in the first place.<sup>242</sup> The example from the enactment of the special education statute in 1975 is useful.<sup>243</sup> Without the elaborate procedural safeguards and remedies available to children with disabilities, the effectiveness of the Individuals with Disabilities Education Act (IDEA) would almost certainly be quite low.

The Supreme Court has given attention to a range of ADA issues. These include access to the judicial and criminal justice systems,<sup>244</sup> living in least

238. See generally *Bartlett v. New York State Bd. of Law Examiners*, No. 93 CIV. 4986 (SS), 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001). In 2002, the Supreme Court raised issue about what activities were “major life activities,” casting an additional question about who was protected under the ADA. See DAVIS, *supra* note 3, at 232.

239. *Id.* at 237, 239.

240. *Id.* at 239; see also ADA Amendments Act of 2008, PUB. L. No. 110-325, § 112 Stat. 800 (2008).

241. I was quite surprised because I thought it would not be voted on until the November elections, but apparently enough groundwork had been laid (or perhaps some legislators were just not focused on what was being passed) and the clarifying amendments are now law.

242. Sharon Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 308, 337, 343 (2008).

243. See, e.g., Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 (2012) (originally titled Education for All Handicapped Children Act). For discussions of this statute, see generally ROTHSTEIN & IRZYK, *supra* note 19.

244. See, e.g., *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 207 (1998); *Atkins v. Virginia*, 536 U.S. 304, 305 (2002); *Tennessee v. Lane*, 541 U.S. 509, 512–15 (2004); *United States v. Georgia*, 546 U.S. 151, 151 (2006); ROTHSTEIN & IRZYK, *supra* note 19, at 659–66.

restrictive settings,<sup>245</sup> and a range of health care issues.<sup>246</sup> Without a private right of action, it is almost certain that access in these areas would be substantially less than it is today. The Supreme Court has even addressed accommodations on cruise ships<sup>247</sup> and at professional golf tournaments,<sup>248</sup> because complainants did not have to use an agency process but instead were able to proceed through a private right of action directly in court. Some have argued and currently argue that these private actions are resulting in burdensome litigation (particularly with respect to architectural barrier issues in places of public accommodation).<sup>249</sup> It is almost certain, however, that public spaces have been made more accessible, not only to wheelchair users, but to those pulling roller luggage, those with strollers for children, and those with delivery carts, only because of the private right of action. While there is certainly room for some adjustments to the rights and remedies, the ADA is a classic example of rights without remedies being hollow. Those who have found the challenges of the ADA to be burdensome, if they had the benefit of hindsight, would be likely to vigorously oppose the ADA should it be proposed today. Unfortunately, that attitude does not recognize the extraordinary societal benefits that have resulted from the ADA that provide the basis for the employee with a disability not only being accommodated in the workplace, but also being able to get to and from work (as a result of transportation rights), to attend conferences, and to participate in the social aspects of employment by being able to get into the restaurant.

### III. "REPEALING" THE ADA

The important question is not so much whether the ADA would pass today. The factors described in how it was passed in 1990 (and amended in 2008) support the position that it would be extremely unlikely to pass today. There is almost no bipartisan cooperation within Congress. The conflict of the White House with its own Republican members of Congress and the erratic conduct of President Trump<sup>250</sup> make that unlikely. Social media and iPhones make it

245. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 1, 17 (1981); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 92 (1984); *City of Cleburne Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 442–46 (1985); *Heller v. Doe by Doe*, 509 U.S. 312, 318 (1993); *City of Edmonds v. Oxford House*, 514 U.S. 725, 730 (1995); *Olmstead v. L.C.*, 527 U.S. 581, 599 (1999); ROTHSTEIN & IRZYK, *supra* note 19, at 580–81.

246. See, e.g., *Alexander v. Choate*, 469 U.S. 287, 299 (1985); ROTHSTEIN & IRZYK, *supra* note 19, at 675–82.

247. See *Spector v. Norwegian Cruise Line*, 545 U.S. 119, 123 (2005); ROTHSTEIN & IRZYK, *supra* note 19, at 488.

248. See *PGA Tour Inc. v. Martin*, 532 U.S. 661, 664 (2001).

249. For a discussion of the concerns about this style of litigation and the dangers of overreacting by changing the current remedies and procedures. See Rothstein, *supra* note 138, at 2065.

250. The tax and immigration reform attempts highlight how Trump's volatile and mercurial approach made it difficult from one day to the next (and even within the same day) to know what

extremely unlikely that the secrecy that was essential to getting the behind the scenes work done on the ADA would be possible today. The outstanding and unusual combined skill sets of the steady and able-to-compromise individuals,<sup>251</sup> who hammered out the details of the statute and the regulations and the political strategies, while rare, still exist within others committed to social justice. But using those skills in a toxic political environment is quite challenging. There are strong advocates, and they are more well organized than ever. As other movements (such as #MeToo, Black Lives Matter, gun safety issues, immigration) have demonstrated, organized advocacy and the 24/7 news cycle and social media can get attention for major issues quickly. The challenge of passing major social justice legislation today, however, is competing with other social justice advocacy efforts to garner the critical level of support. Many of those who would support an ADA today are kept busy by fighting for related causes, and the energies of these advocates can be dissipated by the necessity of fighting battles on so many fronts.

The issue today is more about whether the ADA will be repealed. The shift in power since the 2016 election has already created direct and indirect challenges in carrying out the goals and spirit of ensuring full participation of individuals with disabilities in American society—where these individuals work, live, and play. The goals of the ADA can be frustrated not only by attacks on the ADA itself, but through attacks on related legislation, such as the Affordable Care Act. It is too soon to know what impact the Democratic control of the House of Representatives since the 2018 midterm elections will have. The following sections highlight briefly the efforts to thwart the goals of the ADA.

#### A. *Statutory Amendments*

As the previous discussion highlighted, it is unlikely that the ADA could be passed today, but it is equally unlikely that it would be completely repealed. The optics of a general total effort to take away the rights of individuals with disabilities are politically unwise.<sup>252</sup>

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he would support. See Hohmann, *supra* note 149; Tara Golshan & Dana Lind, *How a Day That Started with a Bipartisan Immigration Deal Ended with a "Shithole,"* VOX (Jan. 11, 2018), <https://www.vox.com/2018/1/11/16880360/immigration-congress-bill-daca-trump>; David Leonhardt, *The People vs. Donald Trump*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/01/05/opinion/sunday/trump-impeachment.html>.

251. These individuals include Bobby Silverstein, John Wodatch, Lex Frieden, and Chai Feldblum. See generally *Equality of Opportunity: The Making of the Americans with Disabilities Act*, NAT'L COUNS. OF DISABILITY (July 26, 2010), [https://ncd.gov/publications/2010/equality\\_of\\_Opportunity\\_The\\_Making\\_of\\_the\\_Americans\\_with\\_Disabilities\\_Act](https://ncd.gov/publications/2010/equality_of_Opportunity_The_Making_of_the_Americans_with_Disabilities_Act).

252. Other factors that make outright repeal include the greater presence of individuals with disabilities in daily life, including popular culture. The number of individuals with disabilities and their family members who are affected and the organizations of advocates have demonstrated the ability to marshal high profile efforts quickly. Even those who would advocate improving the ADA for the benefit of those with disabilities recognize that even making a small amendment would open

The only significant statutory repeal effort to date is the ADA Education and Reform Act.<sup>253</sup> One of the legitimate concerns about Title III of the ADA is the number of cases brought by litigants who are not really seeking to remedy an inaccessible setting for everyone, but to pressure a provider into paying for the litigant to “go away.”<sup>254</sup> This is sometimes referred to vexatious litigation. It is a strategy used by only a few, but it has gained publicity and adverse attitudes towards the ADA. In response to these lawsuits, the House of Representatives passed the ADA Education and Reform Act in February of 2018.<sup>255</sup> The goal of the bill was to promote compliance with Title III “through education, to clarify the requirement for demand letters”—warnings of a potential lawsuit—and “to provide for a notice and cure period” before a lawsuit is actually filed.<sup>256</sup> To date, the Act has not been passed in the Senate, and the November 2018 elections will certainly have an impact on any continued efforts on this.<sup>257</sup> The interest in this issue highlights the problems that a handful of individuals can have on undermining support for a public policy.

### B. Regulatory Changes

Even without any Congressional action to amend or repeal, a president can have significant impact on the effectiveness of statutes through its administrative agency actions. These include regulations, agency guidance (providing Frequently Asked Questions; Dear Colleague letters; and other Office for Civil Rights letters).<sup>258</sup> One example of the danger of such action is the December 2017 rescission of guidance documents.<sup>259</sup> This kind of action signals how seriously a presidential administration takes enforcement of statutes. While this

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a can of worms, so it is unlikely that any DIRECT amendment will occur. See Samuel R. Bagenstos, *How Congress is Hacking Away at Disability Rights*, THOMSON REUTERS (Sept. 25, 2017), <https://www.reuters.com/article/us-bagenstos-disability-commentary/commentary-how-congress-is-hacking-away-at-disability-rights-idUSKCN1C022V>.

253. H.R. 620, 115th Cong. (2017).

254. Mark Pulliam, *The ADA Litigation Monster*, CITY J. (2017), <https://www.city-journal.org/html/ada-litigation-monster-15128.html>.

255. H.R. Rep. No. 115-539, 115th Cong. (2018); see *H.R. 620 (115<sup>th</sup>): ADA Education and Reform Act of 2017*, GOVTRACK (Feb. 20, 2018), <https://www.govtrack.us/congress/votes/115-2018/h80>.

256. H.R. Rep. No. 115-539.

257. For a discussion of the concerns about this style of litigation and the dangers of overreacting by changing the current remedies and procedures, see Rothstein, *supra* note 137, at 2065; *Congress Just Voted – Now It’s OUR TURN to Vote!* AAPD (Feb. 15, 2018), <https://www.aapd.com/congress-just-voted-now-its-our-turn-to-vote/>.

258. See generally Daniel Lyons, *The Administrative Law of Deregulation: The Long Road for the Trump Administration to Undo Obama-Era Regulations*, 61 BOS. B. J. 18 (2017); Marc E. Williams & Anna C. Majestro, *Regulation Through Deregulation: Trump’s First Year in Office*, 13 IN-HOUSE DEF. Q. 36 (2018).

259. Press Release, *supra* note 129.

may have less impact in some ways because there are private rights of action, these signals nonetheless may guide courts in how statutes should be interpreted.

### C. *Funding and Appropriations*

Another means of indirectly affecting the impact of a major statute is how funding (within an agency's budget) and Congressional appropriations for research and enforcement and other activities that ensure the effectiveness of a law. When leadership within federal agencies does not prioritize enforcement, even adequate funding cannot ensure that a law is effective.

### D. *Judicial Erosion on the Horizon*

The Trump administration (supported by the Republican Senate) has been extraordinarily effective in changing the judiciary.<sup>260</sup> Although it can take some time for cases to work their way through the courts, it is likely that a more conservative judiciary may reach decisions that interpret the ADA and related statutes more narrowly.

### E. *Related Statutory Issues*

While the ADA has the greatest federal statutory impact on rights of individuals with disabilities, there are several other statutes protecting individuals with disabilities that should be watched. These include the special education statutes (originated in 1975),<sup>261</sup> the Rehabilitation Act (1973), and the Fair Housing Act Amendments (1988).<sup>262</sup> Changes to the Affordable Care Act have the potential to have enormous impact on individuals with disabilities, particularly anything that changes the pre-existing conditions status.

## IV. CONCLUSION

There are some aspects of the ADA that merit constructive consideration. One example is the rights and remedies related to architectural barriers design issues and the aggressive and sometimes 'vexatious' litigation that may be counterproductive. Other areas include attention to clarity on web page accessibility (particularly design standards), animal accommodations on planes,

260. John Gramlich, *With Another Supreme Court Pick, Trump Is Leaving His Mark on Higher Federal Courts*, PEW RES. CTR. (July 16, 2018), <http://www.pewresearch.org/fact-tank/2018/07/16/with-another-supreme-court-pick-trump-is-leaving-his-mark-on-higher-federal-courts/>.

261. See e.g., Casey Bayer, *DeVos Rescinds Guidance Documents for Disabled Students: What Does It Mean?*, HARV. GRADUATE SCH. OF EDUC. (Oct. 24, 2017), <https://www.gse.harvard.edu/news/17/10/devos-rescinds-guidance-documents-disabled-students-what-does-it-mean>.

262. See e.g., Kriston Capps, *Is the Fight for Fair Housing Over?*, CITYLAB (Aug. 22, 2018), <https://www.citylab.com/equity/2018/08/is-the-fight-for-fair-housing-over/568090/>; Robyn Powell, *The Trump Administration Has Made It Even Harder for People with Disabilities to Access Health Care*, REWIRE (May 2, 2018), <https://rewire.news/article/2018/05/02/trump-administration-may-made-even-harder-people-disabilities-access-health-care/>.

danger to ‘self’ in higher education, and the application of ADA to ride share services (such as Uber and Lyft) and Airbnb. Clarification of how some regulations apply to higher education settings (which include a wide array of activities) would be valuable. There is a drumbeat of not allowing guns in the hands of those with mental illness that occurs whenever there is a mass shooting. It will be important that policy responding to that concern does not have the unintended consequence of requiring mental health professionals to report all mental health treatment to government agencies. This could be a deterrent to treatment.

Essential, however, is that any constructive amendment or fine tuning does not open the door to wholesale repeal. The solution to ensuring that the basic principles remain in place is the same key to maintaining virtually all of the progressive laws that are under attack. There must be a realistic and thoughtful assessment of some of the areas that do need improvement (‘mend it, don’t end it’) and coordinated and constructive communication about how policy changes will impact everyone (particularly middle-income Americans). Building alliances across interest groups is essential.

Thoughtful attention is needed before political activity from special interest groups not supporting the goals of the ADA overtakes constructive reconsideration. The ADA is a valuable and critical protection to include approximately one fifth of Americans in the mainstream of society. The vigilance of organized and thoughtful advocates to retain its protections will be essential because if it is repealed, it is hard to imagine how it could be passed again today.



