
BOOK REVIEW
CAUSE LAWYERING FOR
PEOPLE WITH DISABILITIES

LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT. By Samuel R. Bagenstos. New Haven & London: Yale Univ. Press. 2009. Pp. xii, 228. \$48.00.

Reviewed by Michael Ashley Stein,
Michael E. Waterstone,** and David B. Wilkins****

I. INTRODUCTION

Passed with great flourish,¹ the Americans with Disabilities Act² (ADA) was heralded as an “emancipation proclamation” for Americans with disabilities.³ Nevertheless, twenty years after its enactment the overall socioeconomic status of persons with disabilities in the United States is tenuous.⁴ In particular, notwithstanding the express requirement that employers provide reasonable workplace accommodations for qualified individuals with disabilities, nearly all empirical analyses conclude that the relative employment rates of disabled persons has not improved significantly since the statute’s passage.⁵ Consequently, academics and policymakers alike continue to question the ADA’s abil-

* Executive Director, Harvard Law School Project on Disability; Cabell Professor, William & Mary Law School.

** Professor and Associate Dean of Academic Programs, Loyola Law School Los Angeles.

*** Lester Kessel Professor of Law, Vice Dean for Global Initiatives on the Legal Profession and Director of the Program on the Legal Profession, Harvard Law School. We thank William Alford, Rick Hasen, James Moliterno, and Doug NeJaime for their comments; and Cara Boekeloo, Laura Jacobson, and especially Jason Silverstein for research assistance. Professor Stein’s research was sponsored in part by a grant from Foundation Open Society (Zug).

¹ See, e.g., George H.W. Bush, Remarks on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1068 (July 26, 1990) (stating that the ADA “is the world’s first comprehensive declaration of equality for people with disabilities”).

² 42 U.S.C. §§ 12101–12213 (2006).

³ Two senators used this phrase. See 136 CONG. REC. 17,369 (1990) (statement of Sen. Harkin); 135 CONG. REC. 19,888 (1989) (statement of Sen. Kennedy).

⁴ For example, the 2005 employment rate among working-age people with disabilities was 38%, and the poverty rate among the same group was 25%. CORNELL UNIV. REHAB. RESEARCH AND TRAINING CTR. ON DISABILITY DEMOGRAPHICS AND STATISTICS, DISABILITY STATUS REPORTS (2005), available at http://www.ilr.cornell.edu/edi/disabilitystatistics/StatusReports/2005-html/2005-StatusReports_US.html.

⁵ See THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES (David C. Stapleton & Richard V. Burkhauser eds., 2003) (collecting empirical studies).

ity as a policy instrument to achieve true equality for Americans with disabilities.⁶

The results of claims brought under the statute appear to confirm this gloomy assessment. In 2008, lawsuits brought under Title I's employment provisions⁷ lost before federal trial courts approximately 98% of the time.⁸ By contrast, claims under Title II of the statute regarding access to state and local government services⁹ and under Title III's provisions regarding access to public accommodations¹⁰ have met with some success.¹¹ This thematic divide is reflected at the Supreme Court, where nearly every claimant alleging disability-based employment discrimination has lost, and nearly every other plaintiff seeking relief under the statute has won.

Given this track record, it is not surprising that, almost since its enactment, scholars have been critical of the ADA. These criticisms typically fall within one of three broad camps: that the statute is poorly written and structurally flawed;¹² that the ADA has been betrayed by judicial backlash;¹³ or that disability-based workplace accommodations are inefficient and create disincentives to employing disabled persons.¹⁴

In *Law and the Contradictions of the Disability Rights Movement*, Professor Samuel R. Bagenstos moves beyond these standard critiques to provide a more nuanced — and for disability rights advocates, an ultimately more unsettling — explanation of the ADA's failure to

⁶ See, e.g., *ADA Notification Act: Hearing on H.R. 3590 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 61 (2000).

⁷ 42 U.S.C. §§ 12111–12117.

⁸ AM. BAR ASS'N, 2008 EMPLOYMENT DECISIONS UNDER THE ADA TITLE I — SURVEY UPDATE (2009), available at <http://www.abanet.org/disability/docs/2009TitleISurvey.pdf>. The American Bar Association Commission on Mental and Physical Disability Law (on which two of the authors served as Commissioners) has provided annual tallies since 1997. The only lower recorded win-loss rate in federal court is for prisoner rights cases. Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 910–11 (2003).

⁹ 42 U.S.C. §§ 12131–12134.

¹⁰ *Id.* §§ 12181–12189.

¹¹ See Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1826–30 (2005) (noting that Title II and Title III claims have been more successful than Title I claims at the trial level).

¹² See, e.g., Charles Lane, *O'Connor Criticizes Disabilities Law as Too Vague*, WASH. POST, Mar. 15, 2002, at A2 (noting that the legislative sponsors were "so eager to get something passed that what passes hasn't been as carefully written as a group of law professors might put together") (quoting Justice O'Connor speaking extrajudicially).

¹³ See, e.g., Linda Hamilton Krieger, *Foreword — Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000), revised and reprinted in *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* (Linda Hamilton Krieger ed., 2003).

¹⁴ See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 480–94 (1992).

achieve its lofty goals. Bagenstos rejects the claim that Supreme Court jurisprudence in this area, including decisions with which he disagrees, is either the byproduct of judicial backlash or of inartfully crafted legislation. Instead, he argues that a central reason for the ADA's limited success is the inherent plurality of the disability rights movement itself.

This diversity of interests, Bagenstos claims, has created tensions within the movement's goals. In turn, when adjudicating the ADA, the Rehnquist Court¹⁵ (including, at times, Justices appointed by both parties) selected interpretations of the scope of disability rights from among a competing set of principles articulated by members of this "large and contentious" movement (p. x). For example, strands of disability rights thinking support that Court's narrow definition of disability and its restrictions on the accommodation requirement (pp. 5–6). Given these internal tensions, Bagenstos urges disability rights advocates to move beyond the antidiscrimination paradigm that has largely informed their approach to the ADA. Although he supports a number of traditional litigation-based reforms (such as reinstating plaintiffs' attorneys' fees to incentivize private enforcement), Bagenstos argues that an alternative for advancing the interests of people with disabilities lies in universalist mechanisms exogenous to the statute — notably, extending public and private health care coverage.

In highlighting the internal contradictions within the disability rights movement, Bagenstos has made a unique and important contribution to our understanding of what has happened to the ADA, particularly with respect to its fate in the Supreme Court. But by calling attention to these tensions, Bagenstos implicitly raises an even more fundamental question: given that internal divisions have undermined the movement's goals, why have disability rights advocates failed to develop strategies for bridging — or at the very least, camouflaging — their differences in order to present a more effective, united front?

As recent scholarship makes clear, the disability rights movement is far from unique in harboring significant internal contradictions within its ranks. Although prior struggles on behalf of other groups such as blacks or women are often portrayed as unproblematic expressions of the universal yearnings of oppressed people to be free, we now know that this hagiography often glosses over deep internal tensions that frequently threatened to derail these campaigns.¹⁶ Yet notwithstand-

¹⁵ The one ADA case the Roberts Court has had occasion to consider is *United States v. Georgia*, 546 U.S. 151 (2006). This unanimous decision did not break significant ground in terms of ADA jurisprudence, essentially reiterating — though declining to expand or narrow — the Rehnquist Court's decision two years earlier in *Tennessee v. Lane*, 541 U.S. 509 (2004). We therefore focus our discussion on the Rehnquist Court.

¹⁶ Compare, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975), and

ing these deep divisions, advocates for the rights of blacks, women, and, most recently, gays and lesbians have been able to achieve substantial victories in the Supreme Court. Disability rights advocates, as Bagenstos ably demonstrates, have not been able to achieve similar success.

In this Review, we suggest one possible explanation for this difference: the almost complete absence of disability rights “cause lawyers” in the ADA cases that have gone to the Supreme Court.¹⁷ By “cause lawyers” we mean attorneys who spend a significant amount of their professional time designing and bringing cases that seek to benefit various categories of people with disabilities and who have formal connections with disability rights organizations.¹⁸ Over the first two decades of the ADA, the Supreme Court heard eighteen related cases.¹⁹ None

GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983), with TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (forthcoming Nov. 2010), and Kenneth Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 *YALE L.J.* 256 (2005).

¹⁷ We note, as well, the absence of disability rights cause lawyers from the general cause lawyering literature. See *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* (Austin Sarat & Stuart Scheingold eds., 2001); *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter *POLITICAL COMMITMENTS*]; *CAUSE LAWYERS AND SOCIAL MOVEMENTS* (Austin Sarat & Stuart A. Scheingold eds., 2006); *STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* (2004); *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* (Austin Sarat & Stuart Scheingold eds., 2005) [hereinafter *STRUCTURE AND AGENCY*]; see also *THE CULTURAL LIVES OF CAUSE LAWYERS* (Austin Sarat & Stuart Scheingold eds., 2008). In this collection, there is only one contribution on cause lawyering for the disabled: Neta Ziv, *Cause Lawyers, Clients, and the State: Congress as a Forum for Cause Lawyering During the Enactment of the Americans with Disabilities Act*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA*, *supra* at 211. The one monograph on this topic deals with an earlier (pre-ADA) point in time. See SUSAN M. OLSON, *CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS* (1984).

¹⁸ Several definitions have been offered in the literature, with a key distinction being the dividing line between “cause lawyers” and “lawyers for causes.” See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT* 5 (2008); accord William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 *YALE L.J.* 1623, 1632 (1997); see also Scott Barclay & Anna-Maria Marshall, *Supporting a Cause, Developing a Movement, and Consolidating a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont*, in *STRUCTURE AND AGENCY*, *supra* note 17, at 171, 174 (“The definition of cause lawyering is broad, encompassing a variety of tactics and strategies and emphasizing the transformative goals and motivations of the attorneys engaged in the work.”).

¹⁹ See *United States v. Georgia*, 546 U.S. 151 (2006); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003); *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Olmstead v. L.C.*, 527 U.S. 581 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Cleveland v. Policy*

of the lawyers who filed these actions that have been litigated in the Supreme Court met this standard. Instead, these cases generally have been initiated by lawyers with limited civil rights experience, let alone experience with, and connection to, the broader disability rights movement. To the extent that cause lawyers for the disability rights community have been involved, they appear as amici or, more recently, as intervenors seeking creative ways to ensure that ADA cases that have already been filed by traditional tort lawyers are *not* decided by the Justices on the merits.

Given the prominent role that cause lawyers have played in prior civil rights movements, the fact that committed and engaged disability rights advocates have had almost no role in selecting or structuring the Supreme Court's ADA agenda is surprising. It has also, we submit, left the movement vulnerable to just the kind of exploitation of its internal contradictions that Bagenstos describes. By carefully — or, as some have argued, ruthlessly — pushing only those cases that advanced a particular interpretation of the movement's objectives, cause lawyers such as Charles Hamilton Houston and Thurgood Marshall played a key role in making sure that their respective movements presented a unified and cohesive face to courts and the general public. The absence of any similar disciplining force in the ADA arena has left the articulation of the movement's message to the choices of individual litigants and their lawyers — parties that often have little or no interest in presenting anything other than an interpretation of the statute and its reach that serves their own highly particularized interests. The result has been a series of Supreme Court cases attempting to stretch the ADA's coverage to novel, and often highly unusual and unpopular, circumstances. Not surprisingly, these claims rarely succeed.

The ADA Supreme Court cases contrast sharply with those that cause lawyers for persons with disabilities have been actively pursuing under the ADA. Rather than focusing on Court cases as their predecessors in other movements have done, these lawyers have focused their efforts on bringing suit with an eye toward settlement or district court victories on the relatively clear parts of the statute relating to access to areas of public accommodation. Their claims commonly represent a core set of ideas and commitments that members of the disability rights community broadly support. In bringing these kinds of cases, the movement's lawyers have sought to improve the daily lived experiences of their clients and also to stake out rights via settlements that extend to the larger American disability community.

Mgmt. Sys. Corp., 526 U.S. 795 (1999); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998).

As these successes demonstrate, with the aid of the kind of careful deliberation about means and ends that committed and informed cause lawyers bring to their work, the disability rights movement can make important progress on its traditional rights-based antidiscrimination agenda despite the many internal contradictions Bagenstos identifies. Yet these same lawyers have played no similar role in crafting the ADA cases that have ended up before the Court.

In the balance of this Review, we begin to explore why disability rights cause lawyers have largely chosen not to pursue the kind of Supreme Court litigation strategy followed by their predecessors — and even contemporaries — in other civil rights movements and why they should reconsider this strategy in light of Bagenstos’s important critique. Unlike other social movements, disability rights lawyers since 1990 have had something that other civil rights groups are still searching for: a federal statute that not only purports to protect disabled Americans from express discrimination, but also requires employers and others to provide “reasonable accommodations” to ensure this group’s full participation in society.²⁰ This circumstance reflects the historical context of disability cause lawyers. Operating in the aftermath of the civil rights movement, these advocates were able to lobby Congress successfully to pass a disability rights statute. At the same time, however, Congress promulgated imprecise statutory language that ultimately was susceptible to limiting judicial interpretation. It is not surprising, therefore, that these advocates have concentrated their efforts on enforcing these provisions in the lower federal courts. This is particularly true in light of the Justice Department’s general ambivalence, under both Republican and Democratic administrations, toward actively enforcing even the Act’s basic provisions during most of this period (p. 125) and a growing skepticism by many progressives about the Supreme Court’s ability to effect social change.²¹

These and other similar reasons provide strong justification for disability rights cause lawyers to pursue a different path than the one that Charles Hamilton Houston and other traditional cause lawyers opted for in the past. They do not, however, counsel in favor of abandoning Supreme Court litigation altogether as the cause lawyers in this area seem to have done, let alone creating a significant shift away from the entire antidiscrimination paradigm. Although many of the problems faced by Americans with disabilities would undoubtedly be improved by the passage of comprehensive social welfare programs such

²⁰ As Bagenstos discusses and others have recounted in more detail, cause lawyers were instrumental in getting the ADA passed. See Ziv, *supra* note 17.

²¹ For a treatment of the difference in public enforcement between 1960s civil rights statutes and the ADA, see Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 459–60 (2007).

as universal healthcare and comprehensive vocational training, the fact that these wholesale reforms have proven so politically daunting should caution disability rights advocates against directing all of their efforts toward achieving this important, but frustratingly elusive, goal. Instead, we urge these committed cause lawyers to pursue a multi-layered strategy that seeks to combine advocacy for broad-based programs of the kind Bagenstos proposes with a carefully tailored litigation strategy. This strategy should be designed to present the Supreme Court with an appropriate — and appropriately compelling — case to elaborate some of the key elements of the ADA that have still received relatively little judicial attention notwithstanding the array of cases that the Court has already decided. Although such a strategy cannot guarantee that the Court will take whatever case these cause lawyers decide to pursue — let alone decide it in their favor — it would help to create a dialogue about the goals and priorities of the disability rights movement that could allow it to move forward despite its internal contradictions.

The rest of this Review proceeds in four parts. Part II summarizes Bagenstos's argument about the tensions within the disability rights movement and describes his assessment of how these conflicts have played a key role in undermining the movement's effectiveness, particularly in the Supreme Court. Part III documents the surprising absence of disability rights cause lawyers from Supreme Court ADA cases. It then provides a portrait of these disability rights movement attorneys. Next, Part III examines the cases that disability rights cause lawyers have been bringing under the Act. These cases appear not to raise, or at least to elide, the contradictory shoals that Bagenstos argues have undermined the efforts of those interested in disability rights in the Court. Part IV then explains why these lawyers have pursued a strategy that places very little emphasis on the Court, noting that despite this strategy's broad success, it also has negatively impacted the ADA's antidiscrimination agenda. Part V suggests that recent events — including Bagenstos's appointment to head the Justice Department's efforts in this area — signal that the time has come for disability rights cause lawyers strategically to reengage Supreme Court litigation and provides some tentative suggestions for how these advocates might do so in a way that could help resolve the contradictions Bagenstos describes. Part VI concludes.

II. LAW AND CONTRADICTIONS

Analyzing Supreme Court ADA jurisprudence, *Law and Contradictions* maintains that the Court's decisions can be understood as aligning with one of a myriad of different advocacy positions advanced by the pluralistic disability rights movement. For example, Bagenstos argues that the "Court's definition-of-disability decisions are in many

ways quite consistent with the ‘independence’ frame many disability rights advocates employed in arguing for the ADA in the late 1980s” (p. 39). Likewise, he argues that those decisions are “also consistent with an understanding of disability as defining a discrete, stigmatized minority group. Indeed, it would be hard to come up with a pattern of decisions that fit that understanding better than the bottom lines the Court has actually reached” (p. 41).²²

Hence, the account by some advocates that judicial backlash against the ADA has impeded the statute’s efficacy is “vastly overstated” (p. 2). Similarly, Bagenstos suggests that contrary to the backlash account, the post-ADA lack of increase in relative employment of persons with disabilities is caused by “inherent limitations of anti-discrimination laws” (and especially the reasonable accommodation mandate) in eviscerating deeply entrenched social stigmas and their attendant barriers (p. 2). In consequence, maximizing the salutary impact of the ADA requires “confronting the tensions within disability rights thinking” and developing a coherent approach, rather than “simply criticizing” judicial opinions (p. 11). Bagenstos focuses on the strength and limits of the antidiscrimination agenda as one of the key issues on which clarity and consensus are crucial to fostering deeper legal and political engagement (p. 11). *Law and Contradictions* suggests that these tensions arise from the diverse constituents of the movement, disagreement over the breadth of ADA coverage, and conflict over what constitutes a reasonable accommodation.

It bears noting that in aligning Court holdings with strains of disability rights thinking, *Law and Contradictions* does not restrict itself to arguments posed by lawyers in these cases. Instead, Bagenstos compares the Court’s reasoning to pre-ADA advocacy, a time when groups of individuals with distinct disabilities pursued advocacy that forwarded the interests of only individuals with similar disabilities. More generally, *Law and Contradictions* derives themes and tensions of the disability rights movement from a broad array of sources and scholarship that range beyond the Court’s cases (pp. 12–33). And although the Court’s opinions can be squared with one strand of disability rights thinking or another, Bagenstos does not contend that those strands were developed by cause lawyers.

By way of background, *Law and Contradictions* describes the evolution of the concept of “disability” from individual disability-specific movements to a pan-disability movement, beginning in the 1970s. Prominent in this transformation were the rise of the Independent Living Movement (pp. 14–16), the ideologically harmonious deinstitutionalization movement of self-advocates (pp. 16–18), and parent-driven

²² A footnote has been omitted.

efforts toward inclusive education (p. 17). The 1980s saw the rise of AIDS activists and the merging of the culturally Deaf into the larger disability movement (pp. 17–18). Uniting these disparate advocacy strands together by providing a common focal point about which all can agree is the social model of disability. The social model views the socially constructed environment as causing disability. This model is in contrast to a medical model that deems disability an inherent and limiting characteristic. Since disabling conditions are artificial and remedial, disability rights advocates likened their circumstance to that of other historically excluded minority groups and advocated for similar civil rights-type remedies (pp. 18–20). Yet despite coherence among disparate disability rights groups over adoption of the social model as a general mantra, *Law and Contradictions* identifies three considerable tensions within the collective enterprise. The first philosophical tension is between those who see disability as universal and those who conceive of the disability category as a discrete minority (pp. 20–21). The second “unacknowledged” tension in worldview arises between disability rights advocates who feel disability professionals are paternalistic and oppressive and activists who rely upon the skills and assistance of those experts (pp. 21–22). The third and most significant tension revolves around independence (pp. 22–33). Although every segment of the collective disability rights movement aspires to independence (and related notions of autonomy and dignity), these segments conflict over the meaning and extent of that notion. While persons with disabilities wish to live on their own and on their own terms, they often find themselves reliant on public assistance for the means through which to achieve this agency. Thus, there exists a deep divide within the movement as to the desirability of welfare in the pursuit of social equality. Each of these tensions is addressed in turn.

Having identified the extent of the disability category to be protected under the ADA as controversial within the disability rights community, *Law and Contradictions* discusses pertinent Supreme Court opinions that limit the scope of statutory protection. These rulings have held that the scope of disability coverage is to be narrowly defined, confined to those conditions that seriously limit individuals’ ability to perform major life activities, prevent employees with disabilities from engaging in a range of related work activities, continue to present such barriers even in their mitigated (namely, post-medicated) states, or involve more than mere imputation of stereotypes (pp. 35–40). Contrary to prevailing wholesale criticisms of these opinions, *Law and Contradictions* maintains that they are consistent with key elements of disability rights advocacy that concentrate on individuals whose disabilities are beyond question and who want to enter the workplace to gain independence from public benefits or who experience stigma and subordination (pp. 41–44). Thus, the exclusion from

ADA coverage of already employed individuals with near-sightedness, high blood pressure, and carpal tunnel syndrome — economically empowered people whose disabilities exist at the fringe of the category — is on a level with beliefs deeply held by elements of the disability movement who embrace independence and minority models of disability. To achieve an opposite approach, that of universal coverage, requires a political solution (pp. 53–54).

The second inherent tension among disability rights advocates highlighted by *Law and Contradictions* involves divergent perspectives toward disability experts. Some movement members abhor these individuals for the historical paternalism and control they have imposed on the disability community, while others view experts as instrumentally valuable, if not allies, in achieving goals. Because much of disability discrimination, according to *Law and Contradictions*, arises from safety fears — say, the person with a disability is thought contagious, or in danger of falling in harm's way — courts rely upon the judgment of public health officials in assessing risk (pp. 76–82). The Court's ADA cases in which persons with disabilities were excluded from workplace opportunities based on professional assessments of the risks those plaintiffs allegedly posed exemplify to one part of the disability rights community the paternalistic politics underlying "neutral" evaluations (pp. 82–94). By contrast, another segment of the disability movement deems protection of fetuses and infants with disabilities and prohibitions on assisted suicide necessary safeguards against social mores that undervalue the quality of life and contributions of people with disabilities (pp. 95–111). Without taking sides in this matter, although it expresses sympathy for an alternative that favors autonomy (p. 114), *Law and Contradictions* notes tensions even within these drawn lines.

It is in discussing the third tension amongst disability rights advocates, concerning the meaning of independence and the vehicles necessary to achieve equality, that *Law and Contradictions* addresses the future of American disability law. At the heart of the matter is a philosophical gulf between disability rights advocates on their views of what constitutes independence and the role that antidiscrimination norms can play in achieving that goal. In the course of citing (pp. 116–19) and questioning (pp. 119–28) the bleak statistics on the relative post-ADA employment rate of people with disabilities, *Law and Contradictions* contends that the antidiscrimination agenda may even contribute to socioeconomic disparities because, despite its promise, it cannot by itself unseat deeply entrenched social stigmas (pp. 118–20). Instead, the future of disability law lies in a combination of increased governmental enforcement of existing rights (pp. 132–35), expansion of public health insurance in a manner that would allow more people with disabilities to work without losing access to health care (pp. 138–42), and greater consumer control of disability benefits (pp. 141–45).

Deciding how to balance these considerations as part of a unified political effort is an unresolved but crucial issue for the pluralistic disability rights movement.

III. THE NONTRADITIONAL ROLE OF DISABILITY CAUSE LAWYERS

Civil rights movements have always had lawyers bringing cases to challenge exclusionary social power structures.²³ Across these predecessor movements, cause lawyers have boldly pursued systemic litigation.²⁴ At times, the attorneys have even placed the movement's broader objectives ahead of their individual clients' particular interests in order to take opportune cases to the Supreme Court.²⁵ Below, we will demonstrate how the disability movement has what can and should be considered "disability cause lawyers," although they have operated in somewhat nontraditional ways. Contrary to predecessor movements, the most visible disability rights cases — those receiving Supreme Court adjudication — are notable for the absence of cause lawyers.

Before proceeding, it is important to distinguish the cause lawyers we are discussing from the "advocates" Bagenstos describes in *Law and Contradictions*. Part of Bagenstos's significant contribution to the disability rights literature is to explain the role of advocates and activists in the creation of a modern disability movement. The relationship between politicians, social advocates, and lawyers in developing social movements is a complex one that goes beyond the scope of this Review. Rather, we confine our focus to cause lawyers and exploring their place in the pluralism of the disability rights movement. Cause

²³ See Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in POLITICAL COMMITMENTS, *supra* note 17, at 3, 4 ("Cause lawyering . . . is frequently directed at altering some aspect of the social, economic, and political status quo."); Austin Sarat & Stuart Scheingold, *The Dynamics of Cause Lawyering: Constraints and Opportunities*, in STRUCTURE AND AGENCY, *supra* note 17, at 1, 9 ("[Cause lawyers] work with, and against, prevailing conceptions of how legal practices can and should be organized . . .").

²⁴ See generally STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004).

²⁵ See, e.g., Steven K. Berenson, *Government Lawyer as Cause Lawyer: A Study of Three High Profile Government Lawsuits*, 86 DENV. U. L. REV. 457, 489 (2009) ("With regard to the NAACP's legal campaign to end segregated schools, lawyers pursued a campaign of litigation . . . in the manner the lawyers thought best for the broader cause of desegregation . . . even where doing so may have been in tension with the individual interests of the clients being represented in a particular suit."); Rubenstein, *supra* note 18, at 1633–34 ("Marshall and the other covenant attorneys" when litigating the *Shelley* case saw the decision whether to pursue certiorari "as a legal tactical question about getting the 'right' case to the Court at the 'right' time. In their view, such questions would not be ceded to the clients, who were merely placeholders in their campaign, but would be decided by lawyers.")

lawyers, as we use the term, have a more specific role than shaping a movement, or at least a more specific set of tools at their disposal in doing so. They can craft litigation — or use the threat of litigation — on behalf of a cause and exert a measure of influence over how the work of courts can influence the internal and external perceptions of a movement. Our analysis also tracks that of *Law and Contradictions* by looking exclusively at ADA claims. Although other federal statutes protecting the rights of people with disabilities have been litigated both before and after 1990,²⁶ the ADA represents the most comprehensive domestic legal and policy statement on the rights of people with disabilities²⁷ and is therefore the focus of study.

Section III.A provides an empirical view into the identity and professional expertise of those lawyers who argued the eighteen Supreme Court ADA cases. It then evaluates the consequences of the unique circumstance that none of those attorneys was a cause lawyer on behalf of the group they were representing before the Court. Turning to the disability cause lawyers, section III.B describes those individuals and section III.C offers a snapshot of the types of cases they bring.

A. Supreme Court Litigation

The Supreme Court has thus far heard eighteen Americans with Disabilities Act cases.²⁸ Each case involved an individual plaintiff asserting an individual claim under the statute, and involved rights that are fundamental to the ADA's central mission of integrating people with disabilities into society. These assertions include claims for community-based treatment options,²⁹ freedom from workplace discrimi-

²⁶ The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2006) (addressing discrimination in education), the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3631 (2006) (addressing discrimination in housing), the Civil Rights of Institutionalized Persons Act, *id.* §§ 1997–1997j (protecting people in institutions), and the Medicaid Act, *id.* §§ 1396a(a)–1396v, are others.

²⁷ See Remarks on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1068 (July 26, 1990) (“This historic act is the world’s first comprehensive declaration of equality for people with disabilities [and] has made the United States the international leader on this human rights issue.”). A more international and holistic approach to disability rights is the United Nations Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007). For an assessment comparing this approach to United States federal law, see MICHAEL STEIN & MICHAEL WATERSTONE, NAT’L COUNCIL ON DISABILITY, FINDING THE GAPS: A COMPARATIVE ANALYSIS OF DISABILITY LAWS IN THE UNITED STATES TO THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) (2008), available at http://www.ncd.gov/newsroom/publications/2008/pdf/ncd_crpdp_analysis.pdf.

²⁸ See cases cited *supra* note 19.

²⁹ See, e.g., *Olmstead v. L.C.*, 527 U.S. 581 (1999).

nation,³⁰ equal access to dental care,³¹ and nondiscrimination in an athletic tournament,³² amongst others.

Yet none of these eighteen Supreme Court cases was initiated or argued by lawyers who spend a significant part of their professional time on disability rights cases or have a formal connection to a disability rights organization. The initiating attorneys ranged from general employment lawyers to solo practitioners handling a wide portfolio of cases (personal injury, trusts and wills, and so forth) but without significant civil rights experience, to large-firm practitioners who normally focus on transactional litigation. In one instance, *Bragdon v. Abbott*,³³ suit was initiated by the Boston office of Gay and Lesbian Advocates and Defenders,³⁴ which is a cause lawyering organization, but not one centered on disability advocacy. Table 1 demonstrates the practice experience of the lawyers involved at the district court level with each of the cases eventually heard by the Supreme Court during the period of the ADA's existence.

Academics have recently begun to explore the role of the elite and specialized appellate and Supreme Court bar.³⁵ As would be expected, as the eighteen cases eventually heard by the Court ascended through the federal system, some of the lawyers changed. In some instances, lawyers with experience in appellate and Supreme Court litigation entered the picture on the plaintiffs' side. Yet generally speaking, these lawyers at the Supreme Court stage still fell short of "elite" Supreme Court status — those attorneys who are brought in to argue significant cases.³⁶ In several instances, the lawyers who argued for the disability

³⁰ See, e.g., *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Toyota Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

³¹ See, e.g., *Bragdon v. Abbott*, 524 U.S. 624 (1998).

³² See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

³³ 524 U.S. 624.

³⁴ See Gay & Lesbian Advocates & Defenders, *Our Work* — *Bragdon v. Abbott*, <http://www.glad.org/work/cases/bragdon-v-abbott> (last visited Mar. 27, 2010).

³⁵ See, e.g., Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008).

³⁶ Professor Lazarus suggests that a "measure of an expert Supreme Court advocate is someone who has . . . presented at least five oral arguments before the Court or works with a law firm or other organization with attorneys who in the aggregate have presented a total of at least ten arguments before the Court." *Id.* at 1490 n.17. By this standard, using the same data set as set forth below, *infra* note 37, only 27% of the lawyers who argued at the Supreme Court for the ADA claimant would be considered "expert counsel." When the government lawyers (who by nature of their job have significant experience before the Supreme Court) are removed from consideration, the number is only 8%. Of the nongovernmental Supreme Court advocates, almost two-thirds were making their first Supreme Court argument in their ADA case. For over half, their ADA Supreme Court case is their only Supreme Court case thus far in their respective careers.

TABLE 1. LAWYERS AT DISTRICT COURT LEVEL FOR EACH SUPREME COURT CASE — PRACTICE EXPERIENCE FROM 1990 TO CASE FILING³⁷

CASE	RELEVANT EXPERIENCE
United States v. Georgia	(none)
Spector v. Norwegian Cruise Line Ltd.	Torts/Negligence: 6.52% Civil Rights: 4.35%
Tennessee v. Lane	Torts/Negligence: 4.55% Civil Rights: 13.64%
Clackamas Gastroenterology Assocs., P.C. v. Wells	Torts/Negligence: 20.00% Civil Rights: 24.20%
Raytheon Co. v. Hernandez	Civil Rights: 50.00%
Chevron U.S.A. Inc. v. Echazabal	Torts/Negligence: 33.33%
US Airways, Inc. v. Barnett	Civil Rights: 40.00%
Toyota Motor Mfg., Ky., Inc. v. Williams	(none)
PGA Tour, Inc. v. Martin	Torts/Negligence: 22.22%
Bd. of Trs. of the Univ. of Ala. v. Garrett	Disability Discrimination: 14.10% Civil Rights: 29.50%
Olmstead v. L.C.	(none)
Albertson's, Inc. v. Kirkingburg	Torts/Negligence: 12.59% Civil Rights: 54.07%
Murphy v. United Parcel Serv., Inc.	Disability Discrimination: 8.33% Torts/Negligence: 8.33% Civil Rights: 33.33%

³⁷ Our methodology for Tables 1 and 2 was as follows: For each of the ADA Supreme Court cases, *see supra* note 19, at the district, appellate, certiorari, and Supreme Court stages, we recorded the case number, case title, filing date, court, and lawyers. For the district and appellate stages, the inclusion criterion for lawyers was appearance on the docket. Dockets were obtained through Westlaw and PACER. At the certiorari stage, lawyers were included if listed on the brief for the ADA claimant, whether petitioner or respondent. At the Supreme Court level, lawyers were included if listed within the decision's syllabus. We then collected two sets of data on each lawyer's litigation history through Westlaw Profiler's Litigation History Reports. The first set captured data between 1990 (the passage of the ADA) and the year prior to the case filing date. The second set captured data between 1990 and 2009. We captured data including, but not limited to: total cases, primary and secondary practice areas, civil rights, torts and negligence, disability discrimination, employment and labor, housing, public accommodation, and Supreme Court experience. Because the availability of Westlaw's Litigation History Reports depends on voluntary inclusion, there are certain lawyers for whom information was not available. Most notably, information was not available for Bennett Klein — who, from district to Supreme Court, argued *Bragdon* — or at the appellate stage for *Murphy*. Thus, our sample was drawn from a total of 26 out of 30 (86.7%) lawyers at the district court, 22 out of 24 (91.7%) lawyers at the appellate level, 37 out of 40 (92.5%) lawyers at the certiorari stage, and 33 out of 34 (97.1%) lawyers at the Supreme Court level. Overall, we were able to capture 118 out of 128 lawyers, or 92.2% of the population.

Sutton v. United Air Lines, Inc.	Torts/Negligence: 7.69% Civil Rights: 3.85%
Cleveland v. Policy Mgmt. Sys. Corp.	Torts/Negligence: 14.29%
Wright v. Universal Mar. Serv. Corp.	Civil Rights: 12.50%
Bragdon v. Abbott	Public Accommodation: 4.76% Housing: 4.76% Civil Rights: 33.33%
Pa. Dep't of Corr. v. Yeskey	Civil Rights: 16.67%

rights claimants were making their first appearance before the Court.³⁸ The Supreme Court lawyers were also not consistently what we would classify as disability cause lawyers. In two cases, the lawyers who argued before the Court had significant experience in disability law or civil rights cases and some connection to disability organizations.³⁹ But these instances were an exception to the rule, with most lawyers appearing before the Court lacking expertise and connection to the disability rights community. Table 2 demonstrates the civil rights experience of the lawyers involved at the Supreme Court level with each of the cases that went up to the Supreme Court over the course of the ADA's enactment.

The complete absence of disability cause lawyers from the list of those initiating ADA cases eventually heard by the Court, as well as their limited role at the appellate level, clearly diverges from predecessor social movements in which key cases traditionally have been initiated and litigated by cause lawyers. As indicated above, the litigation leading up to the Supreme Court's decision in *Brown v. Board of Education*⁴⁰ was almost exclusively controlled by cause lawyers.⁴¹ Even after the passage of the Civil Rights Act of 1964, cause lawyers have continued to play a significant role in the cases that have come

³⁸ This observation is empirical rather than editorial. For a discussion of first-time arguers before the Supreme Court, see Christine M. Macey, *Referral Is Not Required: How Inexperienced Supreme Court Advocates Can Fulfill Their Ethical Obligations*, 22 GEO. J. LEGAL ETHICS 979 (2009).

³⁹ Claudia Center, a lawyer with the Employment Law Center in San Francisco with extensive experience in disability cases, argued the plaintiff's case before the Supreme Court in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). Bagenstos, who had extensive civil rights experience but no formal connection to the disability rights movement, argued the plaintiff's case in *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Tennessee v. Lane*, 541 U.S. 509 (2004); and *United States v. Georgia*, 546 U.S. 151 (2006).

⁴⁰ 347 U.S. 483 (1954).

⁴¹ See, e.g., MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 127 (1994) (describing a lawyers' conference organized by Marshall to determine future litigation toward school desegregation and the resulting approaches adopted).

TABLE 2. PRACTICE EXPERIENCE OF LAWYERS AT
SUPREME COURT FROM 1990 TO CASE FILING

CASE	RELEVANT EXPERIENCE
United States v. Georgia	ADA Employment: 0.17% Disability Discrimination: 0.21% Civil Rights: 0.84%
Spector v. Norwegian Cruise Line Ltd.	Public Accommodation: 0.63% Housing: 0.99% ADA Employment: 0.36% Disability Discrimination: 0.36% Torts/Negligence: 45.43% Civil Rights: 4.66%
Tennessee v. Lane	ADA Employment: 1.47% Disability Discrimination: 5.88% Torts/Negligence: 1.47% Civil Rights: 4.41%
Clackamas Gastroenterology Assocs., P.C. v. Wells	Housing: 1.25% ADA Employment: 1.88% Disability Discrimination: 1.88% Torts/Negligence: 13.13% Civil Rights: 16.88%
Raytheon Co. v. Hernandez	Disability Discrimination: 15.63% Civil Rights: 9.38%
Chevron U.S.A. Inc. v. Echazabal	ADA Employment: 12.90% Disability Discrimination: 6.45% Torts/Negligence: 3.23% Civil Rights: 45.16%
US Airways, Inc. v. Barnett	Disability Discrimination: 33.33% Civil Rights: 25.00%
Toyota Motor Mfg., Ky., Inc. v. Williams	Disability Discrimination: 28.57% Civil Rights: 7.14%
PGA Tour, Inc. v. Martin	Public Accommodation: 1.92% Torts/Negligence: 17.31% Civil Rights: 17.31%
Bd. of Trs. of the Univ. of Ala. v. Garrett	Torts/Negligence: 16.70% Civil Rights: 11.10%
Olmstead v. L.C.	Disability Discrimination: 5.13% Torts/Negligence: 5.13% Civil Rights: 20.51%
Albertson's, Inc. v. Kirkingburg	ADA Employment: 1.72% Disability Discrimination: 6.90% Torts/Negligence: 13.79% Civil Rights: 13.79%

Murphy v. United Parcel Serv., Inc.	Disability Discrimination: 8.70% Civil Rights: 4.35%
Sutton v. United Air Lines, Inc.	Disability Discrimination: 3.57% Civil Rights: 7.14%
Cleveland v. Policy Mgmt. Sys. Corp.	Disability Discrimination: 8.33% Torts/Negligence: 16.67% Civil Rights: 12.50%
Wright v. Universal Mar. Serv. Corp.	Civil Rights: 20.00%
Pa. Dep't of Corr. v. Yeskey	Torts/Negligence: 1.56% Civil Rights: 20.31%

before the Court. The attorneys in *Griggs v. Duke Power Co.*,⁴² a fundamental Title VII case, were all established civil rights litigators with connections to the NAACP from the district court level upward.⁴³ Another seminal Title VII case, *International Union, UAW v. Johnson Controls, Inc.*,⁴⁴ featured an alliance of women's rights, labor rights, and workplace safety activists, all of whom were deeply involved in the case from the earliest stages.⁴⁵ *Bowers v. Hardwick*,⁴⁶ a prominent sexual orientation rights case, was brought after the American Civil Liberties Union (ACLU) offered to represent Michael Hardwick and use his circumstances to challenge the constitutionality of anti-sodomy

⁴² 401 U.S. 424 (1971) (holding that facially neutral practices, procedures, or tests that are discriminatory in effect cannot be used to preserve the status quo of employment discrimination).

⁴³ The earliest recorded opinion in the case shows J. LeVonne Chambers and Conrad O. Pearson as counsel for the plaintiff. See *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 244 (M.D.N.C. 1968). Chambers was a civil rights litigator (now law professor) who had previously worked for the NAACP. See JULIUS L. CHAMBERS PAPERS, 1902-1989 (Univ. of N.C. at Charlotte 1996), available at http://dlib.uncc.edu/special_collections/manuscripts/html/85.php. Pearson had been one of the lawyers in *Hocutt v. Wilson*, Civ. No. 1-188 (N.C. Super. Ct., Mar. 28, 1933), one of the first challenges to segregation in higher education. At the Fourth Circuit and the Supreme Court, Jack Greenberg, the director-counsel of the NAACP Legal Defense Fund who argued *Brown v. Board of Education*, was the lead lawyer for plaintiffs. See *Griggs*, 401 U.S. 424, 425 (1971); *Griggs*, 420 F.2d 1225, 1227 (4th Cir. 1970).

⁴⁴ 499 U.S. 187 (1991). *Johnson Controls* applied the "bona fide occupational qualification" defense to a company's policy of excluding fertile women, but not men, from the workplace. *Id.* at 200.

⁴⁵ See Caroline Bettinger-López & Susan Sturm, *International Union, U.A.W. v. Johnson Controls: The History of Litigation Alliances and Mobilization To Challenge Fetal Protection Policies*, in MYRIAM E. GILLES & RISA L. GOLUBOFF, *CIVIL RIGHTS STORIES* 211, 213 (2008) ("[*Johnson Controls*] illustrates the impact of relationships among repeat players in the legal advocacy community, particularly the strong relationships between labor attorneys in the UAW and feminist attorneys in national women's rights organizations."). The United Auto Workers filed the complaint in *Johnson Controls* with the plan that it would be a "test case, a policy case" that could eventually go to the Supreme Court. See *id.* at 228 (citing JULIANA S. GONEN, *LITIGATION AS LOBBYING* 58 (2003)) (internal quotation marks omitted).

⁴⁶ 478 U.S. 186 (1986).

laws.⁴⁷ Even in cases where those promoting the interests of minorities have been on the defendant's side, the lawyers involved have tended to possess significant civil rights experience. In the University of Michigan affirmative action cases,⁴⁸ for example, the university was represented by John Payton, a lawyer with substantial experience with and connection to the black civil rights movement. Mr. Payton is now the Director Counsel of the Legal Defense Fund.⁴⁹ It is clear that in other social movements, experienced lawyers with connections to civil rights organizations were involved in key cases from the beginning.⁵⁰

Nevertheless, it would be an exaggeration to state that cause lawyers have had no involvement in Supreme Court disability cases. Rather than initiating, directing, and arguing the cases, cause lawyers have two roles. The most visible example is that in nearly every Supreme Court case, disability rights organizations filed amicus briefs at the appellate and Supreme Court level. This role has grown over time. In *Bragdon*, the first ADA Supreme Court case, disability organizations coordinated on one main amicus brief.⁵¹ In *Goodman v. Georgia*,⁵² the most recent ADA Supreme Court case (and the only one heard so far by the Roberts Court), the five amicus briefs reflected a broader cross-section of the disability advocacy community and were more strategic in nature.⁵³ Cause lawyers have consistently used amicus briefs as a tool in Supreme Court cases in all other civil rights areas.⁵⁴

⁴⁷ See William H. Eskridge, Jr., *The Crime Against Nature on Trial: Bowers v. Hardwick, 1986*, in GILLES & GOLUBOFF, *supra* note 45, at 156.

⁴⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

⁴⁹ See Charles J. Ogletree, Jr., *From Brown to Tulsa: Defining Our Own Future*, 47 HOW. L.J. 499, 533-34 (2004).

⁵⁰ For a detailed description of the actions of a prime protagonist, see TUSHNET, *supra* note 41.

⁵¹ See Brief of the AIDS Action Council et al. as Amici Curiae Supporting Respondents, *Bragdon v. Abbott*, 524 U.S. 624 (1998) (No. 97-156), 1998 WL 47252.

⁵² 546 U.S. 151 (2006).

⁵³ See Brief of Amicus Curiae National Disability Rights Network in Support of Petitioners, *Goodman*, 546 U.S. 151 (Nos. 04-1203, 04-1236), 2005 WL 1811060; Brief for ADAPT et al. as Amici Curiae in Support of Petitioners, *Goodman*, 546 U.S. 151 (Nos. 04-1203, 04-1236), 2005 WL 1811061; Brief of the American Association on Mental Retardation et al. in Support of Petitioners, *Goodman*, 546 U.S. 151 (Nos. 04-1203, 04-1236), 2005 WL 1812485; Brief of the Honorable Dick Thornburgh and the National Organization on Disability as Amici Curiae in Support of Petitioners, *Goodman*, 546 U.S. 151 (Nos. 04-1203, 04-1236), 2005 WL 1826317. In *Goodman*, many of these briefs were written by cause lawyers. So, for example, the lawyers who wrote the *Goodman* amicus brief for Dick Thornburgh and the National Organization on Disability included Arlene Mayerson (Director, Disability Rights Education & Defense Fund), Eve Hill (then-Director, Disability Rights Legal Center), and academics Peter Blanck (Chairman, Burton Blatt Institute) and Michael Waterstone (chair, American Association of Law Schools's Section on Disability Law).

⁵⁴ See Bettinger-López & Sturm, *supra* note 45; see also CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 163-67 (1959) (describing the NAACP's strategy of using amici curiae briefs in restrictive cove-

Another important but less noticed contribution by disability rights cause lawyers involves their efforts to prevent cases from being heard by the Court.⁵⁵ Many disability rights advocates feel that a conservative Rehnquist Court had weakened the ADA by handing down damaging precedents,⁵⁶ and especially so in cases with marginal fact patterns.⁵⁷ Consequently, some long-time disability cause lawyers have urged withdrawal or settlement of ADA cases granted certiorari,⁵⁸ with

nant cases before the U.S. Supreme Court); STEPHEN L. WASBY, RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY 219-35 (1995).

⁵⁵ This strategy is not unique to disability rights lawyers. See, e.g., HANS J. HACKER, THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION (2005) (discussing the amicus strategies of Christian Right cause lawyers). For a discussion of progressive groups generally trying to avoid the Supreme Court or to ensure narrow holdings, see Richard L. Hasen, *How Liberals Can Win by Losing at the Roberts Court*, SLATE, Sept. 14, 2009, <http://www.slate.com/id/2228257>. Of late, cause lawyers for the gay rights movement have used this strategy with some success. In *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part and vacated in part*, 447 F.3d 673 (9th Cir. 2006), a same-sex couple sought a marriage license from the county clerk's office. See *Smelt*, 374 F. Supp. 2d at 864. After suing in federal court to challenge their denial, defendants argued that plaintiffs did not have standing to challenge the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). On appeal, cause lawyers for the gay rights movement (Lambda Legal and the National Center for Lesbian Rights, representing Equality California), intervened, arguing that plaintiffs did not have standing and should abstain. The intervenors prevailed in the Ninth Circuit, thus evading potential Supreme Court review. See *Smelt*, 447 F.3d at 686.

⁵⁶ See Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 1287 (2003) [hereinafter Soifer, *Disabling the ADA*] ("The Court's recent deconstruction of the Americans with Disabilities Act (ADA) provides a series of striking illustrations. In the name of essences that the Justices alone can discern, the Court repeatedly ignores or overrules Congress. It also rejects interpretations painstakingly worked out by lower court judges. The Court has turned an important civil rights statute into an unseemly hash." (citations omitted)); see also Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 22 (2000); Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1299-1307 (2000) [hereinafter Soifer, *The Disability Term*] (discussing courts' restrictive interpretation of the "regarded as" definition).

⁵⁷ See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (upholding the accommodation right of a disabled professional golfer to use a golf cart rather than walk during a PGA tour); see also Soifer, *Disabling the ADA*, *supra* note 56, at 1301 ("The case [*PGA Tour, Inc. v. Martin*] may be hard to take entirely seriously. For one thing, it seems so easily confined to its facts: the very unusual circumstance of an extraordinarily talented, dedicated plaintiff who has a clear, rare disability, yet who still does exceptionally well competing in a commercial sports event that actually is open to anyone willing to pay a hefty entrance fee to enter the competition.").

⁵⁸ This was true for *Tennessee v. Lane*, 541 U.S. 509 (2004), ultimately a victory for disability rights plaintiffs, which held that Title II of the ADA validly abrogated state sovereign immunity insofar as it was intended to protect the fundamental right of access to courts. *Id.* Before *Lane*, this proposition was very much open, with advocates fearing that the Supreme Court would do with Title II what it had done to Title I in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), in which it held under sovereign immunity principles that the entirety of Title I was not valid section 5 legislation under the Fourteenth Amendment. The disability rights advocates who campaigned against having *Lane* heard did so despite a sympathetic fact pattern:

a pair of victories. One instance was *Hason v. Medical Board of California*,⁵⁹ where Dr. Hason's application for a medical license was denied on the grounds of his mental illness. The Supreme Court granted certiorari to decide whether or not under these circumstances Title II validly abrogated state sovereign immunity.⁶⁰ In light of an unsympathetic plaintiff and the Court's opinion in *Garrett*,⁶¹ California disability rights advocates followed a creative strategy to get the case off of the Court's docket before it could be heard. The advocates prevailed upon then-Governor of California, Gray Davis, to appoint a new member of the Medical Board who was supportive of disability rights. The Board then agreed to reconsider the case and reverse its decision. At that point, the case was moot and the writ of certiorari was dismissed.⁶²

B. Disability Cause Lawyers

Despite its absence from Supreme Court ADA cases, there is a vibrant professional advocacy community around these issues. Disability cause lawyers have actively been enforcing the statute in the lower federal courts. These lawyers spend significant amounts of time on disability rights cases, both at the private and public interest levels. They span the country, although they tend to be focused in the larger cities, with an emphasis in Washington, D.C. and northern California. Some of these organizations, such as the National Federation for the Blind, are primarily designed to serve individuals with a specific disability.⁶³ Others, like the Colorado Cross-Disability Coalition, serve the entire disabled population.⁶⁴ There also are organizations such as the Bazelon Center that were developed to serve one sector (for example, people with mental disabilities), yet over time have expanded their advocacy.⁶⁵ Still others have a more general civil rights orientation, but with significant experience in disability cases. The Employment Law

George Lane was compelled to appear in court on the second floor of an inaccessible courthouse and jailed when he declined to be carried up the stairs. See *Lane*, 541 U.S. at 513-14.

⁵⁹ 279 F.3d 1167 (9th Cir. 2002).

⁶⁰ *Id.*

⁶¹ See *Garrett*, 531 U.S. 356. *Hason* preceded *Lane*, so it is left to conjecture as to how these advocates would have responded if *Lane* had already been handed down.

⁶² *Hason*, 279 F.3d 1167, *cert. dismissed*, 538 U.S. 958 (2003). This narrative of events was based on an interview with Eve Hill, who at the time was the Executive Director of the Disability Rights Legal Center and was intimately involved in the advocates' efforts. Telephone Interview with Eve Hill, former Executive Dir., Disability Rights Legal Ctr. (Oct. 1, 2009). The second instance was *Klingler v. Director, Dep't of Revenue*, 366 F.3d 614 (8th Cir. 2004), *vacated*, 545 U.S. 1111 (2005).

⁶³ National Federation of the Blind, <http://www.nfb.org> (last visited Mar. 27, 2010).

⁶⁴ Colorado Cross-Disability Coalition, <http://www.ccdconline.org> (last visited Mar. 27, 2010).

⁶⁵ Judge David L. Bazelon Center for Mental Health Law, <http://www.bazelon.org/about/index.htm#history> (last visited Mar. 27, 2010).

Center is one such example.⁶⁶ In Table 3, we identify some of the more engaged public interest organizations and private law firms that bring a significant number of high-profile disability cases and give brief details on their geographic locations and targeted practice areas.⁶⁷

In addition to these public interest and private firms, the Protection and Advocacy System (P&A) could be viewed as a species of disability cause lawyer.⁶⁸ P&A is a federally mandated network of organizations that exists to protect and advance the interests of people with developmental disabilities and has at least one office in every state.⁶⁹ Some offices maintain active litigation agendas, while others do not.⁷⁰ The National Disability Rights Network is the nonprofit membership organization for the P&A.⁷¹

⁶⁶ The Legal Aid Society: Employment Law Center, <http://www.las-elc.org/index.html> (last visited Mar. 27, 2010).

⁶⁷ The descriptions of practice areas are taken from the organizations' respective websites.

⁶⁸ For a discussion of this view, see Gary P. Gross, *The Protection and Advocacy System and Collaboration with Legal Services Programs*, MGMT. INFO. EXCHANGE J., Summer 2001, at 1, available at <http://www.napas.org/aboutus/MIEarticleFinal301.htm>.

⁶⁹ 42 U.S.C. § 15041 (2006).

⁷⁰ For example, the California offices of Protection and Advocacy have litigated cases involving housing, MediCal (the California version of Medicaid), and services for people with mental disabilities. See Disability Rights California, Cases, <http://pai-ca.org/advocacy/cases.htm> (last visited Mar. 27, 2010).

⁷¹ The P&A network is collectively "the largest provider of legally based advocacy services to people with disabilities in the United States." National Disability Rights Network, About Us, <http://www.napas.org/aboutus/default.htm> (last visited Mar. 27, 2010). Of course, there are several federal agencies tasked with being the "public enforcers" of the ADA. Although the list is long, the primary agencies with enforcement authority are the Department of Justice and the Equal Employment Opportunity Commission. For a critique of the enforcement efforts, see Waterstone, *supra* note 21.

TABLE 3. ORGANIZATIONS AND PRACTICE AREAS

(A) PUBLIC INTEREST ORGANIZATIONS

ORGANIZATION	GEOGRAPHIC REGION	PRACTICE AREA
Disability Rights Advocates (DRA)	Berkeley, Cal.	A disability-specific non-profit law firm dedicated to securing the civil rights of people with disabilities. DRA advocates for disability rights through high-impact litigation, as well as research and education.
Disability Rights Education & Defense Fund	Berkeley, Cal.	A disability-specific organization whose mission "is to advance the civil and human rights of people with disabilities through legal advocacy, training, education, and public policy and legislative development."
Judge David L. Bazelon Center for Mental Health Law	Washington, D.C.	Mission "is to protect and advance the rights of adults and children who have mental disabilities. The Center envisions an America where people who have mental illnesses or developmental disabilities exercise their own life choices and have access to the resources that enable them to participate fully in their communities."
Disability Rights Legal Center	Los Angeles, Cal.	A disability-specific organization whose mission "is to promote the rights of people with disabilities and the public interest in and awareness of those rights by providing legal and related services." This is a cross-disability organization.
Colorado Cross-Disability Coalition	Denver, Colo.	A disability-specific organization that engages in advocacy to protect civil rights of all types of people with disabilities.

Employment Law Center (ELC)	San Francisco, Cal.	“[P]romotes the stability of low income and disadvantaged workers and their families by addressing issues that affect their ability to achieve self-sufficiency.” ELC has a disability-specific program that focuses on litigation.
The Impact Fund	Berkeley, Cal.	“[P]rovides strategic leadership and support for litigation to achieve economic and social justice,” including provision of “funds for impact litigation in the areas of civil rights, environmental justice, and poverty law.” The Impact Fund is lead counsel in several high-profile civil rights class action cases.
The Public Interest Law Center of Philadelphia	Philadelphia, Pa.	Uses “public education, continuing education of [its] clients and client organizations, research, negotiation and, when necessary, the courts to achieve systemic reforms that advance the central goals of self-advocacy, social justice and equal protection of the law for all members of society.”

(B) FOR-PROFIT LAW FIRMS AND PRIVATE ORGANIZATIONS

ORGANIZATION	GEOGRAPHIC REGION	PRACTICE AREA
Fox & Robertson, P.C.	Denver, Colo.	A civil rights practice with heavy emphasis on “promoting the rights of individuals with disabilities to full enjoyment and equal treatment in businesses, housing, government services, transportation and employment.”
Brown, Goldstein & Levy LLP	Baltimore, Md.	General trial lawyers who have a specialized practice in several high-profile disability cases and offer a Disability Rights Fellowship to a recent law graduate with a disability to litigate disability rights cases.

Goldstein, Demchak, Baller, Borgen & Dardarian	Oakland, Cal.	A plaintiff's public interest class action law firm.
Law Offices of Matthew W. Dietz	Miami, Fla.	A general civil rights firm with heavy emphasis on disability rights cases in employment, public services, and privately owned places of public accommodation.
Law Offices of David Ferleger	Jenkintown, Pa.	A general practitioner with a disability practice, specializing in developmental disabilities, retardation, mental health, physical disabilities, community services, and community placement.
Schneider Wallace Cottrell Brayton Konecky LLP	San Francisco, Cal.	Class action lawyers with emphasis on enforcing civil and consumer rights.

C. Cases by Disability Cause Lawyers

This section offers a representative snapshot of the work of the various disability cause lawyers and organizations identified above in section III.B.⁷² Strikingly apparent is how their work differs in structure

⁷² As a related matter, we note that in addition to the cause lawyers profiled above, there also exists a group of lawyers who could potentially be viewed as representing the disability rights cause. Often referred to as "serial litigators," these lawyers are somewhat controversial for bringing a high volume of cases under the ADA's public accommodations provisions or comparable state law. See Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 4-5 (2006). Typically, these lawyers bring access lawsuits against businesses, often filing multiple lawsuits at once, pursuing early settlements, representing the same clients as lead plaintiffs, and initiating their claims with a demand letter to the challenged business. Many of these lawyers practice in California, where under state law a plaintiff in access litigation is entitled to damages. See CAL. CIV. CODE §§ 52(a), 54.3 (West Supp. 2006). These lawyers have been derided by courts and commentators for extorting quick settlements without pushing for meaningful access improvements and abusing the court system. See, e.g., Walter Olson, *The ADA Shakedown Racket*, CITY J., Winter 2004, at 80, 82, 83. The Ninth Circuit has deemed at least one lawyer-client team as vexatious litigants. See *Molski v. Evergreen Dynasty*, 500 F.3d 1047 (9th Cir. 2007). Others assert that these lawyers are challenging legitimate violations of the ADA and state access laws and that their activities are an inevitable result of a statute with broad coverage, a limited remedial scheme, and weak public enforcement. See Bagenstos, *supra*, at 4-5. We agree with Bagenstos that these lawyers provide a valuable public service, but we have not included them in our initial analysis because their contributions to the broader movement are tangential to their primary focus of culling income through damage awards (while also serving the public), rather than advancing the tenets of or having connection to the larger disability rights community. In addition, the type of suits brought

and shape from those ADA cases before the Court. Namely, each suit brought by disability cause lawyers has had broader implications for systemic change on behalf of people with disabilities than do the cases before the Court. While some of the cause lawyer cases were brought pursuant to the class action device, all have had systemic effects beyond the individuals involved. This circumstance exists in only a minority of cases brought before the Court by non-cause lawyers. This phenomenon is especially so in the context of the employment discrimination claims in which non-cause lawyers request accommodations on behalf of individual clients.⁷³ This trend might also explain why so many of the lawyers who chose to practice in this area litigated cases at the district court level that eventually were heard by the Court.⁷⁴ These cases stand in sharp contrast to the ones that have been litigated in the Supreme Court.

1. *Accessing the Internet: National Federation of the Blind v. Target.* — A coalition of disability rights advocates brought a class action suit against Target on behalf of the National Federation of the Blind and individual plaintiffs. They included a Berkeley-based nonprofit law firm that specializes in high-impact cases on behalf of people with disabilities; Brown, Goldstein & Levy, a leading civil rights law firm in Baltimore that often litigates disability access cases; Schneider & Wallace, a national plaintiffs' class action and civil rights law firm based in San Francisco; and Peter Blanck, chairman of the Burton Blatt Institute and University Professor at Syracuse University.⁷⁵ Under the settlement reached, Target agreed to make its website fully accessible and to pay substantial damages.⁷⁶

2. *Alternative Forms of Communication in Federal Government Services: American Council of the Blind v. Astrue.* — Represented by the Disability Rights Education and Defense Fund (DREDF) in Berkeley, California, the American Council of the Blind and ten individual plaintiffs brought a class action case to compel the Social Security Administration to provide information in alternative formats like Braille, audio, large font, and electronic text to ensure that persons

by these attorneys is highly unlikely to merit review at the Supreme Court, even as they garner negative attention through the media.

⁷³ See Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861 (2006).

⁷⁴ See Table 1, *supra* pp. 1671-72.

⁷⁵ See Nat'l Fed'n of the Blind v. Target Corp., 582 F. Supp. 2d 1185 (N.D. Cal. 2007); Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006).

⁷⁶ Class Settlement Agreement and Release at 3, 5, *Nat'l Fed'n of the Blind*, 582 F. Supp. 2d 1185 (No. C 06-01802 MHP), available at <http://www.dralegal.org/downloads/cases/target/Final-Agreement.pdf>.

with visual disabilities can obtain benefits.⁷⁷ This case proceeded to a bench trial, and on October 20, 2009, the court issued a judgment in favor of the plaintiff classes.⁷⁸ This case is one of several in which DREDF has sued federal government agencies and is not the first against the Social Security Administration.⁷⁹

3. *Physical Accessibility in Fast Food Restaurants: Moeller v. Taco Bell.* — Plaintiffs with mobility impairments filed suit against Taco Bell, challenging physical accessibility barriers at California Taco Bell stores.⁸⁰ Fox & Robertson, a private two-lawyer civil rights law firm in Denver with a specialization in disability law, brought this class action along with the Impact Fund, a general public interest firm with an emphasis in high-profile class actions.⁸¹ Fox & Robertson is bringing other cases challenging physical accessibility in the fast food industry⁸² and other sectors.⁸³

4. *Alternative Communication in Banking: Talking ATM Cases.* — Over the last several years, Goldstein, Demchak, Baller, Borgen & Dardarian, a civil rights firm in Oakland, California, has, together with solo practitioner Lainey Feingold, engaged in “structured negotiations” with a number of major banks on the part of the California Council for the Blind, as well as individuals and several other affiliates of the American Council of the Blind.⁸⁴ Collectively, these cause lawyers have negotiated agreements with Bank of America, Bank One/Chase, and Wells Fargo, among others, “to guarantee that persons with visual impairments have access to basic banking services that the sighted world takes for granted,” including “talking ATMs” offering audible instructions to aid customers in their banking transactions.⁸⁵

⁷⁷ See *Am. Council of the Blind v. Astrue*, No. C 05-04696 WHA (N.D. Cal. Sept. 11, 2008), available at http://www.dredf.org/cases/SSA_Class_Cert_Order_9-12-08.pdf (order certifying class).

⁷⁸ See *Am. Council of the Blind v. Astrue*, No. c 05-04696 (N.D. Cal. Oct. 20, 2009) (judgment). The plaintiff class won the right to receive communications in a format that is accessible to them.

⁷⁹ See Disability Rights Educ. & Def. Fund, State and Federal Programs, http://www.dredf.org/programs/State_and_Federal.shtml (last visited Mar. 27, 2010).

⁸⁰ See *Moeller v. Taco Bell Corp.*, No. C02-05849 MJJ, 2007 WL 2301778, at *1-2 (N.D. Cal. Aug. 8, 2007).

⁸¹ *Id.* at *1.

⁸² See *Castaneda v. Burger King Corp.*, 597 F. Supp. 2d 1035 (N.D. Cal. 2009).

⁸³ See Pleadings: Fox & Robertson, P.C., <http://www.foxrob.com/pleadings.asp> (last visited Mar. 27, 2010).

⁸⁴ See Goldstein Demchak Baller Borgen & Dardarian, Bank One/Chase Talking ATMs, Web Access & Alternative Formats, http://www.gdblegal.com/cases/current_cases/Disability_Rights/BANK_ONE_CHASE.aspx (last visited Mar. 27, 2010).

⁸⁵ *Id.*

Because of their industry-wide approach, these agreements have reached tens of thousands of banking locations across the country.⁸⁶

5. *Discrimination in Voting: American Ass'n of People with Disabilities v. Shelley.* — The Disability Rights Education and Defense Fund, based in Berkeley, California, and the Disability Rights Legal Center, based in Los Angeles, California, represented registered voters with either visual or manual impairments in opposing the withdrawal of direct recording electronic voting machines enabling the voters to vote secretly and independently without assistance.⁸⁷ Although the court denied the motion for preliminary injunction,⁸⁸ the suit had implications for thousands of voters.

6. *Right To Live in the Community: DAI v. Paterson.* — Disability Advocates Inc., a P&A, brought this action on behalf of individuals with mental illness in New York City seeking to live in community-based supported housing.⁸⁹ The Bazelon Center, New York Lawyers for the Public Interest, MFY Legal Services, Urban Justice Center, and the law firm Paul, Weiss, Rifkind, Wharton & Garrison joined them.⁹⁰ The trial court held that these 4300 individuals were entitled to live in the most integrated settings appropriate to their needs.⁹¹

7. *Accessibility of City Sidewalks: Barden v. City of Sacramento.* — Plaintiffs, a group of individuals with mobility and vision impairments, filed a lawsuit against the City of Sacramento, alleging that the City violated the ADA by failing to install curb ramps in newly constructed or altered sidewalks and by failing to maintain existing sidewalks to ensure accessibility by persons with disabilities. The lawyers for plaintiffs were Disability Rights Advocates.⁹² At the district court, the City prevailed on its motion to dismiss the lawsuit on the argument that sidewalks were not a public program, service, or activity and therefore were not covered under Title II of the ADA. Plaintiffs appealed to the Ninth Circuit, which reversed the district court.⁹³ The case then settled, setting a nationwide precedent requiring cities and other public entities to make all public sidewalks accessible. The settlement provided that for up to thirty years, the City of Sacramento

⁸⁶ See Goldstein Demchak Baller Borgen & Dardarian, *Disability Rights*, http://www.gdblegal.com/Practice_Areas/Disability_Rights.aspx (last visited Mar. 27, 2010).

⁸⁷ *Am. Ass'n of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120, 1124–25 (C.D. Cal. 2004).

⁸⁸ *Id.* at 1131–32.

⁸⁹ See *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184 (E.D.N.Y. 2009).

⁹⁰ See Judge David L. Bazelon Ctr. for Mental Health Law, *Disability Advocates, Inc. v. Paterson*, <http://www.bazelon.org/incourt/docket/dai.html> (last visited Mar. 27, 2010).

⁹¹ *Paterson*, 653 F. Supp. 2d at 314.

⁹² See *Disability Rights Advocates, Barden v. Sacramento*, http://www.drlegal.org/cases/public_entities/barden_v_sacramento.php (last visited Mar. 27, 2010).

⁹³ See *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002).

would allocate twenty percent of its annual transportation fund to make the city's pedestrian rights-of-way accessible to individuals with vision or mobility disabilities. This agreement included installation of compliant curb ramps at intersections, removal of barriers that obstruct sidewalks (including narrow pathways, abrupt changes in level, excessive cross slopes, and overhanging obstructions), and improvements in crosswalk access.⁹⁴

Although the above represent only a sample of cases brought by disability cause lawyers, they are consistent with the overall trend of movement attorneys primarily advancing claims that have implications beyond the individual clients whose interests they are duty-bound to represent.⁹⁵ Moreover, to the extent that these cases arise from representing only particular types of disabilities, they are not objectionable to individuals with other forms of disabilities and do not raise the sort of tensions described throughout *Law and Contradictions*. These differences arise because disability cause lawyers have gone to some lengths to craft remedies with the broadest possible implications, rather than ones that only serve their clients. And to the extent that those remedies are disability-specific, the rulings also serve to establish precedent and lay the groundwork for future claims.

IV. CAUSE LAWYERING WITHOUT THE SUPREME COURT

Part III demonstrated the absence of movement advocates from the design and argument of ADA cases eventually heard by the Supreme Court, a phenomenon unique to disability rights cause lawyering. This circumstance yields fertile ground from which to further engage *Law and Contradictions* and to consider the future direction of disability cause lawyering. The complete absence of Supreme Court cases brought by disability cause lawyers has created even more of a vacuum for the tensions identified by Bagenstos to flourish. Given the multiple goals embraced by the ADA, the various agendas put forward in its passage, and the fragmented nature of the disability communi-

⁹⁴ See Disability Rights Advocates, *supra* note 92.

⁹⁵ This work continues in "real time." Stephanie Enyart, a law student sitting for the bar, was recently represented by Disability Rights Advocates in Berkeley in a successful lawsuit for the reasonable accommodation of a computer-assisted reading device on the bar exam. See Bob Egelko, *Bar Exam Company Fights Computer Aid for Blind Student*, S.F. CHRON., Feb. 11, 2010, at C2. The American Council for the Blind, in connection with Goldstein, Demchak, Baller, Borgen & Dardarian and the Law Office of Lainey Feingold, recently entered into a structured negotiation with Major League Baseball whereby Major League Baseball agreed to make its website and the websites of all thirty major league teams accessible for people who are blind or visually impaired. See Law Office of Lainey Feingold, *MLB Accessible Website Press Release*, <http://llegal.com/2010/02/mlb-press> (last visited Mar. 27, 2010).

ty,⁹⁶ these tensions may be inevitable. But the lack of a centralized movement agenda has removed Court decisions as an overt rallying point around which society could debate key disability rights principles, at least in a way that disability cause lawyers might desire.⁹⁷ While highlighting tensions within the disability rights community, Bagenstos does offer the social movement of disability as the closest proxy to a unifying vision of the disability rights community and explains how this value is broadly expressed in the ADA (p. 18–20). We suspect that Bagenstos would agree that this fragile unity does not operate as a substitute for tactical decisions about how best to frame litigation efforts to the movement's advantage, a key role of cause lawyers.

In the absence of such efforts, the numerous and uncoordinated strategies voiced by lawyers unconnected to the disability rights movement have proliferated the tensions and contradictions presented before the Supreme Court. While we agree with Bagenstos that the ADA is underenforced, cause lawyers have been at the forefront of enforcing the ADA's nonemployment provisions and serve as an example for what more robust public enforcement can aspire to achieve. We ultimately suggest that disability cause lawyers reengage key portions of the statute, in particular picking up some of the employment-driven issues that have been dominated by non-cause lawyers up to this point. As in past efforts, cause lawyers can and should continue their successes in seeking systemic reform at the district court level, using settlements to change the behavior of recalcitrant defendants. But we also suggest that in discrete instances, they should be more active in seeking Supreme Court adjudication.

A. Cause Lawyering in the Lower Federal Courts

The absence of Supreme Court cases brought by disability cause lawyers is not accidental. Nor is it readily attributable to the vagaries and unpredictability of the certiorari-granting process, or even a desire on the part of the Court to avoid cause lawyer cases. During its October 1999 Term, for example, the Court granted certiorari in two ADA cases: *Sutton v. United Air Lines, Inc.*⁹⁸ and *Albertson's, Inc. v. Kir-*

⁹⁶ See JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 41–73, 105–41 (1993); Paul K. Longmore, *Disability Rights Movement*, in ENCYCLOPEDIA OF AMERICAN DISABILITY HISTORY 280, 285 (Susan Burch ed., 2009).

⁹⁷ We acknowledge that it would be inaccurate to portray cause lawyering efforts on behalf of any single movement as univocal. See generally RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); KENNETH W. MACK, RETHINKING CIVIL RIGHTS LAWYERING AND POLITICS IN THE ERA BEFORE BROWN 19 (2005); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1455–66 (2005).

⁹⁸ 525 U.S. 1063 (1999) (mem.).

kingburg.⁹⁹ As discussed above, the lawyers for plaintiffs in these cases were not disability cause lawyers.¹⁰⁰ In the same Term, the Court considered and denied petitions for certiorari in six other ADA cases.¹⁰¹ In these six cases, none of the lawyers who represented the plaintiffs at the court of appeals or certiorari petition stage were disability cause lawyers.¹⁰² Instead, the absence of disability cause lawyers is a function of the unique situation in which they find themselves under the ADA. Although more work is needed to verify a complete lack of cause lawyer cases in the ADA certiorari pool, the dearth is not surprising. Using the sample of cause lawyer cases discussed above in section III.C,¹⁰³ the cases at the Supreme Court (and those that would have the best chance of getting there) were different in form and character from the non-cause lawyer cases. Almost all of the cases ultimately heard by the Court involved discrete questions of statutory in-

⁹⁹ 525 U.S. 1064 (1999) (mem.).

¹⁰⁰ The lawyers who filed the petition for certiorari in *Sutton* were Van Aaron Hughes and Tucker K. Trautman. See Petition for Writ of Certiorari, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (No. 97-1943). Hughes is of counsel in the Denver office of Dorsey & Whitney. His areas of emphasis (as described on his firm's website) are commercial litigation, including appellate advocacy, contract disputes, securities fraud litigation, antitrust, and intellectual property litigation. See Dorsey & Whitney LLP, Van Aaron Hughes Attorney Profile, http://www.dorsey.com/hughes_aaron (last visited Mar. 27, 2010). Trautman practices in the areas of intellectual property litigation, complex commercial litigation, antitrust, securities fraud, and regulatory law. See Dorsey & Whitney LLP, Tucker K. Trautman Attorney Profile, http://www.dorsey.com/trautman_tucker/ (last visited Mar. 27, 2010). The lawyer for the *Sutton* plaintiffs at the Tenth Circuit was Shawn D. Mitchell, a Colorado State legislator who keeps up a part-time law practice. See Colorado General Assembly, Shawn Mitchell, http://www.state.co.us/gov_dir/leg_dir/senate/members/sen23.htm (last visited Mar. 27, 2010). The lawyers for the *Sutton* plaintiffs at the District Court were Trautman and Mitchell. The lawyer for the plaintiff in *Albertson's* at the Ninth Circuit (and Supreme Court) was Scott Hunt, a partner in the three-lawyer firm of Busse & Hunt in Portland, Oregon. His practice is focused heavily on employment, and subsequent to *Albertson's*, has come to include a significant portion of disability law. See Busse & Hunt, Scott N. Hunt, <http://www.busseandhunt.com/Firm%20Info/Lawyers/1504340.aspx> (last visited Mar. 27, 2010).

¹⁰¹ See *Ferguson v. City of Phoenix*, 526 U.S. 1159 (1999), *denying cert. to* 157 F.3d 668 (9th Cir. 1998); *Wal-Mart Stores, Inc. v. Griffith*, 526 U.S. 1144 (1999), *denying cert. to* Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376 (6th Cir. 1998); *Seaborn v. Fla. Dep't of Corr.*, 525 U.S. 1144 (1999), *denying cert. to* 143 F.3d 1405 (11th Cir. 1998); *Palm Beach Soil & Water Conservation Dist. v. Bledsoe*, 525 U.S. 826 (1998), *denying cert. to* Bledsoe v. Palm Beach Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998); *Christopher v. Adam's Mark Hotels*, 525 U.S. 821 (1998), *denying cert. to* 137 F.3d 1069 (8th Cir. 1998); *Coolbaugh v. Louisiana*, 525 U.S. 819 (1998), *denying cert. to* 136 F.3d 430 (5th Cir. 1998).

¹⁰² The lawyers who argued at the courts of appeals for these cases were as follows: John Emry (*Coolbaugh*, 136 F.3d at 431), David William White (*Christopher*, 137 F.3d 1069); Isidro M. Garcia (*Bledsoe*, 133 F.3d at 817); Marie A. Mattox (*Seaborn*, 143 F.3d at 1406); Lee Hornberger (*Griffith*, 135 F.3d at 377); and Suzanne Dohrer (*Ferguson*, 157 F.3d at 669). Although some of these lawyers have employment and civil rights experience, none satisfy the definition of disability cause lawyers as set out in this Review.

¹⁰³ See *supra* pp. 1681-85.

interpretation.¹⁰⁴ In many ways, these were defensive cases: the plaintiffs tried to vindicate a statutory right (to be granted a reasonable accommodation, to be treated equally in a privately owned place of public accommodation, and so forth), and the defendant raised an issue of statutory interpretation as a defense. The fact that plaintiffs were individuals with “marginal” disabilities allowed the defendants to maneuver at least on the definition of disability.¹⁰⁵ Of course, it is the reality of litigation under a statute that anyone can (and should be able to) litigate a case all the way to the Supreme Court to vindicate an individual right. But the distinction that *Law and Contradictions* does not engage is that this reality is a far cry from cause lawyers using litigation to express a key movement principle.¹⁰⁶

Consider that in bringing nonemployment enforcement actions, cause lawyers are attempting to achieve systemic justice at a level of generality with which most disability advocates would agree.¹⁰⁷ They are not trying to create new law, but rather to secure existing statutory rights for the largest population possible. Many cause lawyer cases involve claims with individuals whose coverage under the ADA’s definition of disability is beyond dispute.¹⁰⁸ One of the cases discussed above settled,¹⁰⁹ and the only case in which a party even sought a writ

¹⁰⁴ In *Echazabal*, for example, the question presented in the certiorari petition was “[w]hether a person who is unable to carry out the essential functions of a job without incurring significant risks to the person’s own health or life is a ‘qualified individual’ who satisfies ‘qualification standards’ for that job within the meaning of the Americans with Disabilities Act.” Petition for Writ of Certiorari at i, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002) (No. 00-1406). In *Sutton*, the questions presented in the certiorari petition were: “(1) Where an airline pilot’s uncorrected vision is so poor that it constitutes a physical impairment under the Americans with Disabilities Act, is the pilot nevertheless excluded from protection under the Act if her vision can be corrected? (2) Should courts defer to the Equal Employment Opportunity Commission (EEOC) Interpretive Guidance that disabilities should be analyzed in their uncorrected state? (3) Is a commercial pilot regarded as disabled by a major airline that refuses to employ her as a pilot for that airline due to her poor vision?” Petition for Writ of Certiorari at i, *Sutton*, 527 U.S. 471 (No. 97-1943).

¹⁰⁵ See CAL. CHAMBER OF COMMERCE, 2007 CALIFORNIA LABOR LAW DIGEST 810-11 (2007) (noting that in ADA cases, an employee will not be considered disabled in circumstances analogous to *Sutton*, *Albertson’s*, and *Murphy*).

¹⁰⁶ “Cause lawyers, in short, are not simply carriers of a cause but are at the same time its producers: those who shape it, name it, and voice it.” Ronen Shamir & Sara Chinski, *Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in Israeli Courts*, in POLITICAL COMMITMENTS, *supra* note 17, at 227, 231.

¹⁰⁷ Even in the employment accommodation area, one may identify many issues that unite disparate groups of people with different disabilities. The active participation of cause lawyers would greatly facilitate this dynamic. See generally Stein & Waterstone, *supra* note 73.

¹⁰⁸ In none of the cases discussed above in section III.C, *supra* pp. 1681-85, was there a litigated issue as to whether the plaintiffs in fact met the ADA definition of disability.

¹⁰⁹ In the talking ATM cases, the plaintiffs’ attorneys do not routinely file lawsuits, but instead proceed under a theory of “structured negotiations.” Interview by Paul Halpern with Linda M. Dardarian, Partner, Goldstein, Demchak, Baller, Borgen & Dardarian (Apr. 12, 2008), <http://www.lawyersandsettlements.com/articles/dardarian-structured-negotiation.html>. *National Feder-*

of certiorari was *Barden v. City of Sacramento*,¹¹⁰ in which the petitioners (unsuccessfully) sought Court adjudication. These lawsuits are essentially enforcement actions, with an eye toward changing behavior in a systemic fashion to impact the largest number of people. This practice is in sharp contrast to the more atomistic nature of most of the Supreme Court ADA cases.

In one sense, by bringing cases with broad reach, the disability cause lawyers are following the institutional litigation traditions of their civil rights predecessors.¹¹¹ As a statute with ambitious goals but a modest remedial scheme,¹¹² the ADA is even more dependent than predecessor civil rights statutes on professional cause lawyers. Given developments in the private attorney payment scheme,¹¹³ attorneys whose work is not externally financed may have trouble sustaining themselves,¹¹⁴ and federal enforcement officials traditionally have not made structural litigation a priority.¹¹⁵ Rather than bringing high-profile cases before the Supreme Court to change existing legal interpretations and social perceptions (the traditional top-down tenet of movement lawyers), disability cause lawyers have engaged in the type of activity usually seen as the province of public enforcement agencies like the Department of Justice.

That disability cause lawyers have utilized nontraditional cause lawyering tactics by foregoing the Supreme Court reflects their history. Whereas the NAACP-era cause lawyers had first to litigate to remove Jim Crow-era state laws,¹¹⁶ women's rights groups dismantled socially

ation of the Blind ultimately settled. *Astrue and Disability Advocates v. Paterson*, 653 F. Supp. 2d 184 (E.D.N.Y. 2009), are still ongoing.

¹¹⁰ 292 F.3d 1073 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003).

¹¹¹ See Waterstone, *supra* note 21, at 455–57.

¹¹² See generally Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000); Waterstone, *supra* note 11.

¹¹³ See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) (holding that plaintiffs must achieve a material alteration of the legal relationship of the parties — such as a favorable judgment on the merits or a consent decree — to receive attorneys' fees); see also Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007) (discussing *Buckhannon's* negative effects on private organizations that bring civil rights cases).

¹¹⁴ In one sense, the existence of private lawyers in Table 3, *supra* pp. 1679–81, argues against this idea. But virtually none of these organizations does exclusively disability rights advocacy. The high-volume lawyers, who may focus more attention in that area, traditionally bring cases in states like California, whose laws contain a remedial scheme more robust than the ADA's.

¹¹⁵ See Waterstone, *supra* note 21, at 457.

¹¹⁶ See ROY L. BROOKS ET AL., *CIVIL RIGHTS LITIGATION* 47, 48 (3d ed. 2005) (“Margold’s [(Nathan Margold, the drafter of the NAACP’s master plan)] plan was to move the Supreme Court toward the ultimate goal in small steps. . . . The first prong was directed at eliminating segregation laws that did not require equality along with separation. The second prong was directed at eliminating segregation in states where the inequality was endemic and therefore discriminato-

constructed rules that restricted workplace opportunities and sexual and reproductive freedoms,¹¹⁷ and the gay rights movement has put significant emphasis on changing prevailing interpretations of state and federal constitutions,¹¹⁸ disability cause lawyers have faced a different social reality. Even before the ADA, several states had progressive laws prohibiting discrimination on the basis of disability in employment, public services, and private accommodations.¹¹⁹ As Bagenstos demonstrates, and as others have recounted in more detail, disability cause lawyers built on this foundation and played a monumental role in achieving passage of the ADA,¹²⁰ which arguably remains the world's most progressive disability antidiscrimination legislation.¹²¹ Those efforts, as well as earlier ones,¹²² invested these lawyers in movement goals and endowed them with credibility. This legitimacy is not exclusive to cause lawyers. However, people with such dedication to this area (made up in part, we suspect, from their own experiences as people with disabilities or having family members

ry."); see also 2 GUNNAR MYRDAL, AN AMERICAN DILEMMA 830 (1964) (discussing the NAACP's shift "from legal defense to legal offense").

¹¹⁷ See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (holding that overly restrictive regulation on maternity leave in public schools violates the Due Process Clauses of the Fifth and Fourteenth Amendments); *Reed v. Reed*, 404 U.S. 71 (1971) (holding that the Equal Protection Clause mandates that administrators of estates be named in a way that does not discriminate between sexes); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a Connecticut law prohibiting the use of contraceptives violated the right to marital privacy).

¹¹⁸ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (unsuccessful constitutional challenge to Georgia sodomy statute); *Lawrence v. Texas*, 539 U.S. 558 (2003) (successful constitutional challenge to Texas sodomy statute); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (holding that same-sex couples have an equal right to marry under California's Equal Protection Clause, *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California.")).

¹¹⁹ See PETER BLANCK ET AL., DISABILITY CIVIL RIGHTS LAW AND POLICY 734-37 (2d ed. 2009).

¹²⁰ See Ziv, *supra* note 17.

¹²¹ See 137 CONG. REC. 19,530 (1991) (statement of Sen. Simon) ("[T]he United States had, by virtue of enacting the ADA, become the world leader in establishing rights and opportunities for persons with disabilities. . . . [O]ther countries are looking to us for leadership."); President George H.W. Bush, Remarks on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1067, 1068 (July 26, 1990) (stating that the ADA "is the world's first comprehensive declaration of equality for people with disabilities" and "has made the United States the international leader on this human rights issue").

¹²² Perhaps the seminal litigation campaign for the rights of people with disabilities was a sustained challenge to the deplorable conditions in Bryce Hospital, a state institution in Alabama, in *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971). See *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). On the role of cause lawyers in the *Wyatt* campaign, see L. RALPH JONES & RICHARD R. PARLOUR, *WYATT V. STICKNEY: RETROSPECT AND PROSPECT* (1981). On pre-ADA disability cause lawyering, see SUSAN M. OLSON, *CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS* (1984).

with disabilities) have especial insight into the lived experiences of people with disabilities that may not extend beyond that community.¹²³

Instead of charging constitutional windmills — a dubious prospect after the 1985 Supreme Court decision in *City of Cleburne v. Cleburne Living Center, Inc.*¹²⁴ declared rational basis as the Equal Protection Clause standard of review for disability discrimination¹²⁵ — cause lawyers have naturally tended to focus on enforcing existing statutory rights. In trying to achieve the greatest good for the largest number of people, it is understandable that disability cause lawyers have tended to focus their efforts on cases outside the employment realm, where they stand the greatest chance of success at the district court level and can avoid federal court skittishness at aggregating plaintiff interests within the employment relationship.¹²⁶ Disability cause lawyers primarily exist in a post-“Hollow Hope”¹²⁷ world, where there is healthy skepticism about using the Supreme Court as a tool to change the lived experiences of a targeted group. These movement lawyers also have been savvy enough to engage a legal mobilization framework,¹²⁸ where litigation functions as a bargaining chip in negotiations, rather than as an end to be achieved. By directly controlling settlement terms, these advocates have avoided relying on the judiciary for enforcement that courts are institutionally ill-equipped and indisposed to handle. This situation is compounded by disability cause lawyers’ being in the unique civil rights position of needing to enforce an existing statute rather than the more historical one of needing the Court to break down existing barriers using constitutional means. This vision of the disability rights movement — to enforce existing nonemployment rights through district court litigation by settling most cases along the way — is an omission from *Law and Contradictions*’s exceptionally thoughtful account of the interaction between the disability rights movement and the legal landscape. Neglecting the cause lawyers also elides the harder question of how the Court’s ADA jurisprudence might have evolved in response to the type of unified disability rights movement for which Bagenstos wisely advocates.

¹²³ See generally JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT (1998).

¹²⁴ 473 U.S. 432 (1985).

¹²⁵ *Id.* at 441–42.

¹²⁶ See Waterstone, *supra* note 11 (noting greater litigation successes in Title II and Title III cases); see also Stein & Waterstone, *supra* note 73, at 903–04 (discussing failures of Title I cases but successes in Title II and Title III in pursuing collective remedies).

¹²⁷ See GERALD N. ROSENBERG, THE HOLLOW HOPE (1st ed. 1991).

¹²⁸ For a general discussion of legal mobilization, see MICHAEL W. MCCANN, RIGHTS AT WORK (1994).

*B. Impact of Absence of Cause Lawyer Cases
from the Supreme Court*

Amicus briefs and the kind of defensive maneuvering used in *Hason*¹²⁹ are at the margins. Real control over a case resides in the lawyers who decide to bring it in the first place and who ultimately control whether and how the case will proceed. Disability rights cause lawyers have largely been absent from these key decisions. This absence has had important consequences for both the cases that have been brought and the manner in which they have been portrayed.

Consider, for example, the nature of the claimant's disability. One aspect of Supreme Court ADA litigation that has undercut the goals of the disability rights movement — and differentiated it from prior cause-oriented movements and their attorneys¹³⁰ — is the unsympathetic nature of the clients and fact patterns that appeared before the Court.¹³¹ Given the lack of involvement by disability rights cause lawyers in Court cases — beginning with the district court trials — it is perhaps unsurprising that many of these cases did not involve individuals and circumstances that advocates would have hoped for in the first round of ADA litigation.¹³²

This was especially salient in the employment cases in which the plaintiffs' alleged disabilities combined with their allegations of discrimination created discomfort for judges and provided ready fodder for lampoon and scorn in the popular media.¹³³ For example, *Sutton*

¹²⁹ See *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167 (9th Cir. 2002); see also *supra* pp. 1676–77.

¹³⁰ See, e.g., Steven K. Berenson, *Government Lawyer as Cause Lawyer: A Study of Three High Profile Government Lawsuits*, 86 DENV. U. L. REV. 457, 489 (2009) (“The NAACP lawyers recruited plaintiffs for their cases based on the parties’ ability best to represent the legal claims the lawyers sought to advance.”); see also Barclay & Marshall, *supra* note 18, at 194 (describing plaintiffs in Vermont gay marriage litigation, who were in “committed relationships, [] were financially secure, [and] were respected members of their communities ‘living quiet lives’” (citations omitted)); Douglas NeJaime, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511, 519 (2003) (“For instance, if the judiciary proves sympathetic to a particular gay identity — e.g., homosexual as respectable family member — advocates will use such identity to obtain desirable results and to meet client needs.”). But see BROOKS ET AL., *supra* note 116, at 48 (describing the NAACP’s early case of *Hocutt v. Wilson*, Civ. No. 1-188 (N.C. Super. Ct. Mar. 28, 1933), where NAACP lawyers discovered on cross-examination that their client was not qualified for admission into pharmacy school).

¹³¹ See, e.g., Michael D. Reisman, *Traveling “To the Farthest Reaches of the ADA,” or Taking Aim at Employment Discrimination on the Basis of Perceived Disability?*, 26 CARDOZO L. REV. 2121, 2143–44 (2005) (discussing the nearsighted pilot plaintiffs in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), as unsympathetic).

¹³² Cf. Soifer, *Disabling the ADA*, *supra* note 56, at 1289–90 (criticizing swing voters on the Court for employing a “stealth strategy,” *id.* at 1290, when selecting ADA cases).

¹³³ See generally Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler’s Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223 (2000).

*v. United Air Lines, Inc.*¹³⁴ involved twin plaintiffs with severe myopia who sought accommodations as airline pilots.¹³⁵ This situation created problems from the outset. In addition to the general question of weighing disability rights against public safety,¹³⁶ the question of whether everyone with corrective lenses should benefit from civil rights protection initiated fears that litigation floodgates would open and drown federal dockets.¹³⁷ Similarly, *Toyota Motor Manufacturing v. Williams*¹³⁸ and *Murphy v. United Parcel Service, Inc.*¹³⁹ involved claims by individuals with what some might consider marginal disabilities (carpal tunnel syndrome and high blood pressure, respectively), which fed into fears that the ADA could become a runaway statute if not vigorously policed.¹⁴⁰ At a very early stage, these concerns placed the definition of disability at the center of attention, and the resulting narrowing interpretations — although drawn from outlier fact patterns — set the stage for the next decade of ADA litigation.¹⁴¹

The absence of Supreme Court cases brought by disability cause lawyers has created an odd vacuum. Although a full appraisal of the ADA requires in-depth examination of more than Supreme Court decisions, these cases cast a long shadow in terms of doctrinal impact, influence on public opinion, and symbolism.¹⁴² For better or worse, Su-

¹³⁴ 527 U.S. 471.

¹³⁵ *Id.* at 475.

¹³⁶ See, e.g., Walter Olson, *Disabling America*, NAT'L REV., May 5, 1997, at 40 (noting that ADA lawsuits are on a collision course with public safety).

¹³⁷ At the oral argument in *Sutton*, Justice Scalia waved his glasses in the air, noting that under the plaintiffs' preferred definition of the statute, seven out of nine Supreme Court Justices could count as protected class members, as could a majority of Americans. See Walter Olson, *Under the ADA, We May All Be Disabled*, WALL ST. J., May 17, 1999, at A27. The issue of eyeglasses and disability was resolved by a specific provision in the ADA Amendments Act expressly excluding this population. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3553, 3556 (codified at 42 U.S.C. § 12102 (2006 & Supp. II 2008); 42 U.S.C. § 12103 (Supp. II 2008)).

¹³⁸ 534 U.S. 184 (2002).

¹³⁹ 527 U.S. 516 (1999).

¹⁴⁰ See generally Ruth E. Sternglantz, *Raining on the Parade of Horribles: Of Slippery Slopes, Faux Slopes, and Justice Scalia's Dissent in Lawrence v. Texas*, 153 U. PA. L. REV. 1097, 1100 (2005) (describing and critiquing the "slippery slope" argument in which judges "highlight[] the dire effects of proximately potential future decisions that are likely to result from the present case").

¹⁴¹ See, e.g., Robert L. Burgdorf Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 539 (1997) ("The restrictions on the term 'disability,' imposed in the name of reserving the protection of the statute for 'the truly disabled,' have caught many plaintiffs with serious, highly disabling conditions in their webs.>").

¹⁴² For treatments of the civil rights movement expressed through the lens of important Supreme Court cases, see, for example, GILLES & GOLUBOFF, *supra* note 45; JOHN R. HOWARD, *THE SHIFTING WIND: THE SUPREME COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO BROWN* (1999); MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* (2007); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004); and TUSHNET, *supra* note 41.

preme Court cases also drive academic discussion. There is a tendency in academic circles to “romance the Court”¹⁴³ and to describe law and social movements through the prism of Supreme Court adjudication. This situation has played out in the context of the ADA, where much ink has been spilled over the Court’s definition-of-disability decisions.¹⁴⁴ The thrust of the ADA Amendments Act of 2008 was to “correct” these decisions.¹⁴⁵ To his credit, Bagenstos takes a broader approach and derives the themes and tensions of disability rights thought from a broad range of sources and scholarship (pp. 12–33). But many of the important conflicts identified by *Law and Contradictions* as inherent to the disability rights movement have been exacerbated by the lack of a unifying agenda provided by cause lawyers at the Supreme Court. Put another way, the hodgepodge of advocacy advanced by non-cause lawyers on behalf of their individual clients seeking individual remedies has highlighted prior tensions and contradictions.

Before the disability rights movement centered around the ADA, Supreme Court litigation was a focal point to articulate key values of other civil rights movements. In the desegregation campaign, cause lawyers intentionally maneuvered the claim of “separate but equal” as inherently unequal before the Court. Women’s cause lawyers developed protection for sexual and reproductive freedom through constitutional privacy protection by arguing landmark cases such as *Griswold v. Connecticut*¹⁴⁶ and *Roe v. Wade*.¹⁴⁷ In the gay rights movement, although advocates have resisted the temptation to put the issue of marriage equality before the United States Supreme Court (while doing so in numerous state supreme courts),¹⁴⁸ there has been confluence and coordination on the right to privacy and liberty in sexual relations resulting in its decriminalization by the Court in *Lawrence*.¹⁴⁹ The con-

¹⁴³ See Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 564 (2009) (“If scholars want to understand the capacity of the Justices to influence democratic deliberation, they need to focus on that deliberation and on social movements, not on the Court. Focusing only on the Court will inevitably overstate its role. . . . [W]hy, in the face of decades of social science research, [do] legal academics continue their endless quest to find judicial influence, to romance the Court[?]”). For an example of scholarship moving beyond a Court-centered approach to address social change, see MCCANN, *supra* note 128.

¹⁴⁴ See, e.g., Burgdorf, *supra* note 141; Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2000); Arlene B. Mayerson, *Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587 (1997); Soifer, *Disabling the ADA*, *supra* note 56; Soifer, *The Disability Term*, *supra* note 56.

¹⁴⁵ See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.).

¹⁴⁶ 381 U.S. 479 (1965).

¹⁴⁷ 410 U.S. 113 (1973).

¹⁴⁸ See Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1501–04 (2006).

¹⁴⁹ See Rubenstein, *supra* note 18, at 1639–40.

clusion is subtle: Contemporary cause lawyers need not control their respective movements as they did in previous waves of civil rights litigation. However, their involvement in bringing and litigating cases up to the Supreme Court has been a unifying force for prior movements in identifying core values, and such a contribution remains a necessary and missing ingredient for disability rights advocacy. Indeed, this harmonizing dynamic is exactly what Bagenstos identifies as the missing feature necessary for the future success of the American disability rights movement.

To be sure, even without the direct involvement of cause lawyers, a minority of the Supreme Court's ADA cases have raised key movement values. *Chevron U.S.A. Inc. v. Echazabal*,¹⁵⁰ for example, should appropriately be viewed as the struggle of the disability rights community to be free from paternalistic views of what is deemed best for their welfare.¹⁵¹ Similarly, the right to live in the community instead of in an institution, at issue in *Olmstead v. L.C.*,¹⁵² is a fundamental and longstanding principle of the disability movement¹⁵³ about which the movement's cause lawyers sought Court hearings.¹⁵⁴ But other cases are notable for the extent to which they only peripherally address important movement values. For example, both the underlying claims in *Spector v. Norwegian Cruise Line Ltd.*¹⁵⁵ (lack of physical access on cruise ships and disability-related surcharges¹⁵⁶) and the legal issue before the Supreme Court (extraterritorial reach of the ADA) are oblique to the lived experiences and concerns of most Americans with disabilities. Three of the more prominent Supreme Court ADA cases —

¹⁵⁰ 536 U.S. 73 (2002).

¹⁵¹ This argument is raised and analogized to the parallel struggle of women to be free of paternalistic assumptions as expressed in *Johnson Controls*. See Anita Silvers et al., *Disability and Employment Discrimination at the Rehnquist Court*, 75 MISS. L.J. 945 (2006). What is deeply ironic and disturbing in *Echazabal* is the insistence by the Court that the clearly paternalistic ruling is not the type of paternalism the ADA seeks to combat. See *Echazabal*, 536 U.S. at 85–86, 85 n.5.

¹⁵² 527 U.S. 581 (1999).

¹⁵³ See generally INDEPENDENT LIVING FOR PHYSICALLY DISABLED PEOPLE (Nancy M. Crewe & Irving Kenneth Zola eds., 1983); DUANE F. STROMAN, THE DISABILITY RIGHTS MOVEMENT (2003); University of California, Berkeley, The Disability Rights and Independent Living Movement, <http://bancroft.berkeley.edu/collections/drilm> (last visited Mar. 27, 2010).

¹⁵⁴ See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (holding as constitutionally invalid a local zoning ordinance that had the effect of prohibiting mentally retarded individuals from living in the community). Other Court cases also went to the issue of conditions within institutions. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). Cause lawyer David Ferleger was involved in several of these cases. See David Ferleger: Attorney, <http://www.ferleger.com> (last visited Mar. 27, 2010).

¹⁵⁵ 545 U.S. 119 (2005).

¹⁵⁶ Among other claims, plaintiffs alleged that because only four cabins in each ship were ADA accessible, potential passengers with disabilities were not allowed to participate in advance purchase discount programs and were thereby assessed surcharges. Complaint, *Spector v. Norwegian Cruise Line Ltd.*, No. H-00-2649 (S.D. Tex. Aug. 1, 2000).

Board of Trustees of the University of Alabama v. Garrett,¹⁵⁷ *Tennessee v. Lane*,¹⁵⁸ and *United States v. Georgia*¹⁵⁹ — had at their core legal issues that were part of a larger federalism project undertaken by the Rehnquist Court.¹⁶⁰ These cases clearly involved important disability rights issues: the right to be treated equally by the state in publicly run programs, services, and activities. The advocates who argued these cases, particularly at the courts of appeals and the Supreme Court, were talented and had significant civil rights experience.¹⁶¹ They were aware that larger disability rights issues existed in these cases, and they made use of these issues in their arguments.¹⁶² But that is a different project than having cause lawyers engineer cases from the ground up to establish and extend the scope of ADA coverage.

Further, when *Law and Contradictions* highlights conflicts within positions held by various members of the disability rights movement that are reflected in the menagerie of Supreme Court ADA cases, it does so with the benefit of hindsight. For although Bagenstos adroitly aligns precepts within the Court's decisions with disability rights movement tensions — and wisely counsels for reconciliation of those disagreements — without cause lawyers and in the absence of different strands of disability rights presented before the Court, the occasional presence of core precepts must be viewed as serendipitous, rather than as reflecting an active choice from among conflicting values. This is not to say that opposing themes would not exist without being fully vetted by cause lawyers at the Supreme Court. Bagenstos demonstrates to the contrary in *Law and Contradictions* and has himself orchestrated and argued two core cases: *Lane*, which raised the issue of courthouse access by two wheelchair users,¹⁶³ and *Echazabal*, which challenged a paternalistic exclusion from work of an individual with a liver condition.¹⁶⁴ But one is left to wonder how different the Rehnquist Court's ADA jurisprudence would have been had cause lawyers led a unified movement in bringing cases before the Supreme Court. Such an effort would have required exactly the type of reconciliation and strategic thinking shrewdly advocated by *Law and Contradictions*.

¹⁵⁷ 531 U.S. 356 (2001).

¹⁵⁸ 541 U.S. 509 (2004).

¹⁵⁹ 546 U.S. 151 (2006).

¹⁶⁰ See Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).

¹⁶¹ Among these advocates were Professors Bagenstos, Pamela Karlan, and Michael Gottesman.

¹⁶² See generally Michael H. Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31 (2001); Brief for the Private Respondents at 7, *Lane*, 541 U.S. 509 (No. 02-1667), 2003 WL 22428029 at *7 (“Title II operate[s] broadly to protect individuals with disabilities against being effectively shut out of opportunities to have access to and influence on their state governments.”).

¹⁶³ *Lane*, 541 U.S. at 513.

¹⁶⁴ *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 76 (2002).

V. LOOKING AHEAD

We have demonstrated how the nontraditional role of cause lawyers, while effective in helping enforce the nonemployment provisions of the ADA, has created space for the tensions identified in *Law and Contradictions* to flourish. Although our project of examining and critiquing disability cause lawyers is ongoing, the interaction of cause lawyers' efforts to date with Bagenstos's thesis provides some initial insights into what cause lawyers might consider when moving forward.

Happily, we may be on the threshold of an exciting time in disability cause lawyering, and Bagenstos may be in a position to help usher in this new era. With the Obama Administration, we now have a President and an Attorney General who view civil rights as a top priority.¹⁶⁵ As part of this agenda, the President has appointed a number of well-informed activists to high-level Justice Department positions, including Bagenstos. Many of the Administration's appointees to key federal enforcement positions have a track record of disability advocacy and are on (at least the academic) record as arguing for more vigorous enforcement.¹⁶⁶ Building on the successes cause lawyers have had in enforcing the nonemployment provisions of the ADA, the Equal Employment Opportunity Commission (EEOC) and Justice Department are already showing more leadership on these issues.¹⁶⁷

In addition to partnering with public enforcement officials, cause lawyers should reclaim parts of Title I of the ADA by exerting more control over litigation and its messaging. We believe that disability cause lawyers, by building on their initial successes, can reinvigorate the ADA's antidiscrimination agenda, which is at least as important as moving toward universalist extrastatutory measures. Given the ADA's reliance on private enforcement, it is extremely unlikely that cause lawyers can control the Court's docket. No group in any movement can.¹⁶⁸

¹⁶⁵ Charlie Savage, *Justice Department To Recharge Civil Rights Enforcement*, N.Y. TIMES, Aug. 31, 2009, at A1 (quoting Attorney General Holder's statement that the civil rights division will be "getting back to doing what it has traditionally done").

¹⁶⁶ Bagenstos is one of these officials. See Samuel Bagenstos, *Mandatory Pro Bono and the Enforcement of Civil Rights*, 101 NW. U. L. REV. 1459, 1460-62 (2007) (noting shortcomings of the private attorney general model of enforcing civil rights). Chai Feldblum, one of the architects of the ADA, has been nominated as an EEOC Commissioner. Feldblum has been a consistent advocate of meaningful enforcement of that statute. See, e.g., Feldblum, *supra* note 144.

¹⁶⁷ The EEOC recently announced that it had settled a class action case against Sears, Roebuck and Co. for \$6.2 million. This is the EEOC's largest ADA settlement to date. See Press Release, U.S. Equal Employment Opportunity Comm'n, *Sears, Roebuck To Pay \$6.2 Million for Disability Bias* (Sept. 29, 2009), available at <http://archive.eeoc.gov/press/9-29-09.html>.

¹⁶⁸ See, e.g., *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (challenging the constitutionality of California's Proposition 8). This case has garnered attention for its high-profile legal

Moreover, the type of control over litigation strategy exerted by cause lawyers in other movements has its own problems and is controversial. Contrary to the image often portrayed in early accounts of the years leading up to *Brown v. Board of Education*, there was substantial dissent within the black community as to what the objectives of any campaign to overthrow American apartheid ought to be and how best to achieve them.¹⁶⁹ There were also blacks who benefited from certain aspects of segregation or who opposed racial mixing. By exerting control (sometimes brutally) over the cases that would be brought to challenge “separate but equal,” over the arguments advanced in those cases, and over how the overall struggle was presented to and understood by both the black community and the public at large, Charles Hamilton Houston, Thurgood Marshall, and the other lawyers affiliated with the NAACP were able to manage these internal tensions (albeit often with great difficulty) to present a coherent litigation strategy in the period leading up to and for many years after *Brown*.¹⁷⁰ Although many scholars now legitimately question some of the implications of allowing one group to so dominate the debate over racial equality, few argue that the black equality movement would have been better off without the work of this dedicated band of cause lawyers¹⁷¹ or that the overarching litigation mission was not successful.¹⁷² These black cause lawyers were able successfully to establish a coherent step-by-step litigation strategy that papered over and ultimately transcended these differences by persuading the overwhelming majority of blacks — and a large enough number of whites — to support their basic antidiscrimination and integrationist agenda.¹⁷³

As we discussed above, given political realities, the decisions of cause lawyers not to focus on a Supreme Court litigation strategy are defensible, and their success should be applauded. But there are still areas of the statute where the right case or cases brought with an eye

team of Theodore Olson and David Boies, two politically opposed lawyers who joined forces in support of gay marriage expressly for the purpose of placing the issue before the United States Supreme Court. See Jesse McKinley, *Bush v. Gore Foes Join To Fight Gay Marriage Ban*, N.Y. TIMES, May 28, 2009, at A1. Neither of these lawyers has a history with the gay rights movement that would suggest they are viewed as cause lawyers for that group’s civil rights.

¹⁶⁹ See MARK V. TUSHNET, *BROWN V. BOARD OF EDUCATION* (1995); see also MACK, *supra* note 97.

¹⁷⁰ See generally TUSHNET, *supra* note 41.

¹⁷¹ For a selection of scholarship critical of the NAACP, see DERRICK A. BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); GOLUBOFF, *supra* note 97; and Brown-Nagin, *supra* note 97. Of these three critics, Professor Bell is arguably the only one to claim that black Americans would have been better off without *Brown*. See Derrick A. Bell, *Dissenting, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 185 (Jack M. Balkin ed., 2001).

¹⁷² See CAROL ANDERSON, *EYES OFF THE PRIZE* (2003).

¹⁷³ See JUAN WILLIAMS, *EYES ON THE PRIZE* (1987).

toward the Supreme Court could be useful. Even if the Supreme Court would not readily do much to help the disability movement, it can continue to harm it doctrinally as well as contribute to an increasingly negative popular vision of disability rights. We suggest that disability cause lawyers have a role in reinvigorating the ADA's antidiiscrimination potential — specifically, by reframing the existing and atomistic vision of what comprises reasonable accommodation, and focusing on employment failure-to-hire cases. This agenda might ultimately involve engaging the Court and nudging it slowly toward a different vision of disability rights under the ADA.¹⁷⁴

As discussed above, most “harmful” ADA precedents — and those to which Bagenstos has devoted most discussion in *Law and Contradictions* — center on the ADA's employment provisions.¹⁷⁵ Understanding the central role that reasonable workplace accommodations play in fostering independence, social integration, and agency, disability cause lawyers might have sculpted a reasonable accommodation case into one with systemic impact for the entire movement. In *Law and Contradictions*, Bagenstos offers a deeply nuanced view of the theoretical underpinnings and normative defensiveness of the concept of reasonable accommodation (pp. 10–12). But cause lawyers are faced with a more immediate and tangible issue: what does “reasonable accommodation” mean under the terms of the statute? The terrain here is relatively open: despite efforts made during the ADA's passage,¹⁷⁶ Title I of the ADA itself contains no precise definition of “reasonable accommodation,” but instead gives general principles and illustrative examples.¹⁷⁷ The one Supreme Court case touching on this issue in the employment context, *US Airways, Inc. v. Barnett*,¹⁷⁸ had several disadvantages from the outset. It dealt with a request for a variance from an established seniority policy — a tough hurdle for the Court to overcome — and had a plaintiff with a back injury, no

¹⁷⁴ On whether the Supreme Court's ADA docket was “inevitable,” see Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 575 (2008).

¹⁷⁵ Bagenstos is not alone here in focusing on Title I. It has driven the ADA academic discussion. See Waterstone, *supra* note 11, at 1811–12.

¹⁷⁶ See BLANCK ET AL., *supra* note 119, at 60–63 (discussing objections to the ADA, including problems with the “open-ended nature of the ADA's central terms,” *id.* at 62).

¹⁷⁷ The statutory definition is: “The term ‘reasonable accommodation’ may include — (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.” 42 U.S.C. § 12111(9) (2006 & Supp. II 2008).

¹⁷⁸ 535 U.S. 391 (2002).

doubt viewed by many as a common injury and at most a marginal disability.¹⁷⁹

Several cases raising this issue (not brought by cause lawyers) were denied certiorari. In *McAlindin v. County of San Diego*,¹⁸⁰ the plaintiff, an individual with anxiety disorders (including panic disorder and somatoform disorders), requested the reasonable accommodation of a job transfer. He asserted he would benefit from and was entitled to this transfer,¹⁸¹ and indeed similarly situated employees without disabilities had been given transfers of this nature.¹⁸² The defendant declined. Similarly, in *Sheren v. Dayton Hudson Corp.*,¹⁸³ the plaintiff, a sales associate hired in a furniture department, had a degenerative eye condition that led to declining vision. She requested that, as a reasonable accommodation, her employer install a stationary high-powered magnifying machine that would allow her to continue her work. While conceding that the plaintiff's performance had been at least average, the defendant declined to make the accommodation.

Given the idiosyncratic nature of ADA jurisprudence, leadership by cause lawyers on this issue might still be possible. Almost two decades after the passage of the ADA, most of its jurisprudence (certainly in the employment area) has been dominated by cases interpreting its definition of disability. Apart from *Barnett*, there are no employment cases defining the contours of reasonable accommodation despite the lack of clear statutory guidance. With the ADA Amendments Act of 2008, Congress has sent a clear signal to the courts that it is time to move past this narrow issue.¹⁸⁴ The moment is ripe for disability cause lawyers to identify a plaintiff with an unquestionable disability (say a blind individual) who sought a fairly uncontroversial accommodation (say, a screen magnifier) whose cost would not satisfy the criteria for an undue hardship defense under the ADA. Placing this type of plaintiff before the Court would force the Court to define the scope and content of a reasonable accommodation.¹⁸⁵ Such jurisprudence would also have great reach, as international law has increasingly

¹⁷⁹ See generally Samuel R. Bagenstos, *US Airways v. Barnett and the Limits of Disability Accommodation*, in GILLES & GOLUBOFF, *supra* note 45, at 323.

¹⁸⁰ 192 F.3d 1226 (9th Cir. 1999).

¹⁸¹ *Id.* at 1230–31.

¹⁸² *Id.* at 1236–38.

¹⁸³ No. 98-3166, 1999 WL 98046 (7th Cir. Feb. 18, 1999).

¹⁸⁴ See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553, 3553 (“The purposes of this Act are . . . to convey congressional intent that . . . the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.”).

¹⁸⁵ For an exhaustive account, see Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003).

adopted the reasonable accommodation mandate, but has yet to interpret it.¹⁸⁶

Another project might involve failure-to-hire cases — the hardest employment cases to bring and to prosecute, in large part because bias and discrimination at the hiring stage are more difficult to establish.¹⁸⁷ Employment testing can be useful here, as it has been in other areas, to ferret out difficult-to-detect discrimination.¹⁸⁸ But because the damages in failure-to-hire cases are lower, and because testing is expensive, private lawyers have not typically utilized testing. Bagenstos suggests that public enforcement officials should do so (p. 135). This change would be a welcome development, and one for which one of the authors here has previously advocated.¹⁸⁹

But using testing in failure-to-hire cases should not be so easily left to public officials. As detailed herein, disability cause lawyers have shown themselves to be resourceful and tenacious in enforcing the nonemployment provisions of the ADA. If they were to dedicate some of their efforts to bringing testing cases, it could yield benefits in changing the tone of ADA employment litigation, which has been dominated by individualized requests for reasonable accommodation and thoroughly sidetracked by definitional issues. Although these cases might not contain legal issues that would warrant Supreme Court attention, they could publicly document what knowledgeable observers suspect is sadly prevalent: driven by bias and stigma, employers — either consciously or unconsciously — are less likely to hire workers with disabilities.¹⁹⁰ Disability cause lawyer leadership on this issue

¹⁸⁶ See, e.g., G.A. Res. 61/106, *supra* note 27; Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16 (EC). See generally Janet E. Lord & Michael Ashley Stein, *Assessing Economic, Social and Cultural Rights: The Convention on the Rights of Persons with Disabilities*, in EQUALITY AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Malcolm Langford & Eibe Reidel eds., 2010).

¹⁸⁷ This is true across civil rights statutes, but is even more amplified under the ADA. See Steven L. Willborn, *The Nonevolution of Enforcement Under the ADA: Discharge Cases and the Hiring Problem*, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT 103, 103–04 (Peter David Blanck ed., 2000) (“[O]ver the short life of the ADA, the ratio of discharge to hiring cases has been about 10 to 1, a ratio that is substantially higher than for Title VII cases . . .”).

¹⁸⁸ See Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1426 (1998) (“[T]esting has proved to be an effective means of documenting discrimination.”); see also Michael J. Yelnowsky, *Filling an Enforcement Void: Using Testers To Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 413 (1993) (“Testing can help root out discriminatory practices where the disincentives to bring a private suit result in underenforcement.”).

¹⁸⁹ See Waterstone, *supra* note 21, at 471–74.

¹⁹⁰ The 2004 National Organization on Disability/Harris Survey of Americans with Disabilities found, as in previous years, that the most prevalent form of discrimination against people with disabilities in employment is not being offered a job for which one is qualified. The second most common is being refused a job interview on the basis of disability. See NAT’L ORG. ON DISABILITY, 2004 N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES 7 (2004). This

could offer an example to similar struggles of other minority groups, who continue to be subject to stigma and bias at the hiring stage.¹⁹¹ It could also offer a very powerful display of a type of discrimination some forces believe no longer exists.

These are steps cause lawyers can and should take to work within the antidiscrimination framework the ADA sets forth. In doing so, it is our hope that cause lawyers can reclaim the capacity of law to create social change,¹⁹² a goal that we share with Bagenstos. While we also find ourselves agreeing with many of the extrastatutory reforms Bagenstos proposes, including public health insurance, we are wary of the disability community placing too many eggs in the universalist basket. As evidenced by the problems many people with disabilities face under the current iteration of “general” social programs,¹⁹³ it is unlikely that any project, like health care programs, would be tailored to completely address the unique needs of people with disabilities. As Bagenstos acknowledges, there is much still to be gained through a reinvigorated enforcement and even expansion of existing antidiscrimination principles embodied in the ADA.

VI. CONCLUSION

Law and Contradictions is a deeply thoughtful contribution to disability law and policy jurisprudence, as befits the work of one of its leading scholars. The diagnoses and prescriptions offered by Bagenstos, untethered to any disability rights party line or trope, are insightful and convincing. This Review, while agreeing with most of the assertions in *Law and Contradictions*, also engages an area almost

statistic is not limited to service sector jobs: the State Bar of California’s Committee on Legal Professionals with Disabilities reported that nearly half of the respondents it surveyed believed that they were denied employment opportunities because of their disabilities. AM. BAR ASS’N COMM’N ON MENTAL & PHYSICAL DISABILITY LAW, THE NATIONAL CONFERENCE ON THE EMPLOYMENT OF LAWYERS WITH DISABILITIES 10–11 (2006), available at http://www.abanet.org/disability/docs/conf_report_final.pdf.

¹⁹¹ See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004), available at <http://www.nber.org/papers/w9873> (finding that simply having an African American-sounding name significantly decreased one’s opportunity to receive a job interview, regardless of occupation or industry).

¹⁹² See Christopher W. Schmidt, “Freedom Comes Only from the Law”: *The Debate over Law’s Capacity and the Making of Brown v. Board of Education*, 2008 UTAH L. REV. 1493 (arguing that legal reform helped make possible the change in prejudicial attitudes and customs during the civil rights era). On the need for a contextualized strategy to create social change, utilizing both legal and extralegal measures, see Orly Lobel, *The Paradox of Extralegal Activism*, 120 HARV. L. REV. 937, 987 (2007).

¹⁹³ See Michael E. Waterstone, *Returning Veterans and Disability Policy*, 85 NOTRE DAME L. REV. 1081 (2010) (discussing work disincentives for people with disabilities under existing federal programs); see also Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 26 (2004).

wholly absent from the book as well as the general literature: the role of disability cause lawyers. These lawyers exist, and their unacknowledged efforts may provide an opportunity for these advocates, the disability rights movement, and the wider civil rights and cause lawyering communities to contribute to one another.