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## BACKLASH, COURTS, AND DISABILITY RIGHTS

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### INTRODUCTION

This symposium celebrates fifty years since the passage of the Civil Rights Act of 1964. Federal statutes are often described in lofty terms like “sweeping,” “ambitious,” and “transformative.” Even if these accolades might overstate things in some contexts, surely they do not with the Civil Rights Act of 1964. At a theoretical level, this law helped cement a vision of equality that fundamentally broke from the past. More tangibly, the Civil Rights Act changed employment relationships forever, and forced a re-imagining of the role of privately owned places of public accommodation in public life. Of course, the Civil Rights Act of 1964 was not the beginning or the end of the struggle for racial (or gender) equality. But, by any account, it was a significant step.

Borrowing tactics used in the civil rights movement, twenty-six years later, people with disabilities passed their own federal civil rights law, the Americans with Disabilities Act (“ADA”).<sup>1</sup> Like the Civil Rights Act of 1964, the ADA was intended to express a national sentiment that people with disabilities were to be brought into full citizenship. It required employers and privately owned places of public accommodation to think about disability inclusiveness in different ways, and it asked them to make certain accommodations and changes, at their own expense, in the name of bringing people with disabilities into the fold. And, like the Civil Rights Act of 1964, the ADA has helped create a profound societal transformation.

We live in a more just and equal world because of both of these laws, and there is no serious political discussion for the repeal of either. At the same time, however, other contested social issues—affirmative action, abortion, marriage equality—that have found themselves resolved in the judicial forum, rather than the legislative, are more volatile. Supreme Court decisions have generated significant backlash, leading to doctrinal swings and intense social and political mobilization and counter-mobilization.<sup>2</sup> This, admittedly

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<sup>1</sup> 42 U.S.C. §§ 12101-12213 (2012) (“It is the purpose of this chapter . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . .”).

<sup>2</sup> See sources cited *infra* note 13 (addressing Supreme Court decisions in the areas of

oversimplified, is the view of some commentators (dubbed elsewhere as “court skeptics”),<sup>3</sup> who suggest that, when courts advance constitutional rights in socially and politically charged areas, opposition will actually coalesce in a manner harmful to the development of those rights.<sup>4</sup> Advocates would therefore be better off using the political process than advancing, and even winning, constitutional litigation.<sup>5</sup> Apart from not helping movements, these potentially counter-majoritarian court decisions are harmful to the social order, as they lead to “losers” leaving the political system.<sup>6</sup>

The court skeptic view has been challenged. Some commentators view the backlash to judicial decisions as just a different species of political backlash, asserting that we can understand key court decisions only as a result of the movement conflict that preceded them.<sup>7</sup> There are feedback loops between

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race, abortion, and marriage equality).

<sup>3</sup> See Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1769 (1993) (reviewing GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991), and GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992)) (“‘Court skeptics’ hold that court-directed reform, although not inevitably doomed to failure, is highly problematic.”).

<sup>4</sup> Two important names commonly associated with this view are Gerald Rosenberg and Michael Klarman. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 325 (2d ed. 2008) (“Court decisions also have indirect effects . . . through dramatizing issues and spurring actions.”); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 97 (1994) [hereinafter Klarman, Brown] (“Brown converted race into the decisive focus of southern politics, and massive resistance became its dominant theme.”); Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 GEO. L.J. 433, 448 (1994) [hereinafter Klarman, *Civil Rights Law*] (reviewing MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT* (1994)) (“Judicial intervention in the contexts of disfranchisement and segregation in housing, interstate transportation, and the public schools achieved very little until the national political branches mobilized in support of enforcement.”). Other scholars have taken an even more dim view of the role of traditional civil rights litigation and courts in social movements. See, e.g., LÓPEZ, *supra* note 3, at 67-68 (1992) (“[F]or every *Brown v. Board of Education* there must be unnoticed constellations of house meetings, sit-ins, teach-ins—strategies less formal than a lawsuit, but no less responsible for penetrating social life with long overdue change.”).

<sup>5</sup> See Klarman, *Civil Rights Law*, *supra* note 4, at 448 (arguing that the political branches played more important roles in desegregation than the courts).

<sup>6</sup> William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1293 (2005) (“Groups will disengage when they believe that participation in the system is pointless due to their permanent defeat on issues important to them or their perception that the process is stacked against them, or when the political process imposes fundamental burdens on them or threatens their group identity or cohesion.”).

<sup>7</sup> See Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1216-19 (2009) (exploring the connections between different forms of political backlash in the context of the gay rights

judges, social movements, and the public, occurring in and across levels of government.<sup>8</sup> Other scholars go even further and suggest that, normatively, intense contestation in the judicial arena is a good thing: constitutional law being responsive to politics is something to be celebrated, not feared.<sup>9</sup> Most recently referred to as “democratic constitutionalism,” adherents of this view argue that popular debate is a legitimate part of the cycle of how constitutional values are created and articulated.<sup>10</sup> Rather than forcing “losers” to leave the political system, even with Supreme Court intervention, citizens remain engaged through social movements that help to shape constitutional understandings.<sup>11</sup> This renders the entire constitutional order more democratic and even more redemptive.<sup>12</sup>

This Essay looks at the relationship between the Civil Rights Act of 1964, the ADA, and the disability rights movement’s social and political journey in pursuit of the ADA, with the goal of making a preliminary contribution to the debate about the role and utility of backlash. Disability rights occupy an unexamined and perhaps unique corner in this discussion. Like the civil rights movement, the disability rights movement sought to upend the existing social order, bringing a previously excluded group into the fold. But, whereas the Civil Rights Act of 1964 was the result of a politically salient and even painful national dialogue. By comparison, the ADA was not. And, while Supreme Court decisions in areas like affirmative action, abortion, and same sex marriage have been important movement moments, both reflecting and

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movement).

<sup>8</sup> *Id.* at 1218-19 (recounting Colorado statutes that established sexual orientation as a protected class, and that later inspired backlash in the form of a Colorado constitutional amendment barring legal protections on the basis of sexual orientation).

<sup>9</sup> See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (“The premise of democratic constitutionalism . . . is sustained by traditions of popular engagement that authorize citizens to make claims about the Constitution’s meaning and to oppose their government . . . when they believe that it is not respecting the Constitution.”); Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1328 (2006) [hereinafter Siegel, *Constitutional Culture*] (“[P]opular deliberation about constitutional questions guides officials in enforcing the Constitution and promotes citizen attachment to the Constitution.”); Reva Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 5 (2013) [hereinafter Siegel, *Equality Divided*] (“[I]n fashioning the law of discriminatory purpose and strict scrutiny, the Supreme Court was responding to claims brought by members of different racial groups.”).

<sup>10</sup> See, e.g., Post & Siegel, *supra* note 9, at 374.

<sup>11</sup> See, e.g., Siegel, *Constitutional Culture*, *supra* note 9, at 1328.

<sup>12</sup> See JACK BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 9 (2011) (“[W]hat makes an imperfect constitutional system democratically legitimate is that people have the ability to persuade their fellow citizens about the right way to interpret the Constitution and to continue the constitutional project.”).

creating backlash, ADA Supreme Court decisions have not been as central in the movement's quest for equality.

My argument is that the disability rights movement—a successful legislative strategy, albeit with lower-grade conflict and political salience than the Civil Rights Act of 1964—has something to offer both sides of the backlash debate. The court skeptic view, in expressing support for social change occurring through the legislature, seems to assume that going through the more representative branches creates the level of contestation necessary to produce meaningful change. A transformative statute will only be passed when society is ready for it. Though undoubtedly correct for the Civil Rights Act of 1964, the same cannot necessarily be said about the ADA. And, if conflict and backlash are not entirely harmful but create positive movement and normative effects, their absence here provides a negative case study and supports one theory of the frustration of certain disability movement goals.

This Essay proceeds in two Parts. Part I will briefly compare the passage of the Civil Rights Act of 1964 and the ADA, highlighting differences in public awareness and engagement with the respective law's objectives. Part II will offer preliminary observations on how the disability rights movement maps onto, and enriches, existing scholarly accounts of backlash and the evolution of constitutional values.

## I

Issues like race, abortion, and most recently sexual orientation, are defined—or at least examined—through the lens of important Supreme Court decisions, usually making or failing to make pronouncements of constitutional rights.<sup>13</sup> Amongst others, Gerald Rosenberg and Mark Klarman have extensively deconstructed *Brown v. Board of Education*,<sup>14</sup> ultimately concluding that, given the benefit of history, it did less than conventionally assumed, and may even have been harmful, to the causes of school desegregation specifically and racial equality generally.<sup>15</sup> Similar scholarly

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<sup>13</sup> See, e.g., Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 989-98 (2011) (connecting gay rights litigation losses like *Bowers* to social progress); Post & Siegel, *supra* note 9, at 427-31 (examining the political backlash against the abortion-rights movement in the wake of the *Roe* and *Casey* decisions); Siegel, *Equality Divided*, *supra* note 9, at 59-73 (assessing the impact of the “race” cases from the 2012 Supreme Court term); see also Cary Franklin, *Discriminatory Animus*, in A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT (Samuel R. Bagenstos & Ellen D. Katz eds.) (forthcoming 2015) (discussing the impact of racial discrimination cases on the interpretation of Title VII). For an example of a comprehensive treatment of several of these categories, see BALKIN, *supra* note 12, at 65 (“[P]olitical parties and social movement contestation have shaped the development of constitutional norms concerning abortion. . . . We could tell similar stories about other social movements in American history.”).

<sup>14</sup> 347 U.S. 483 (1954).

<sup>15</sup> See Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 84-91 (1994) (asserting that “*Brown* had almost no immediate direct

accounts exist of *Roe v. Wade*,<sup>16</sup> with commentators splitting on whether it was helpful to the women's rights movement and the democratic order.<sup>17</sup> This debate is now playing out in real time with marriage equality, with different views on whether the time is right from social and political perspectives for the Supreme Court to intervene.<sup>18</sup> The backlash created by these Court decisions is alternatively viewed as an argument against the effectiveness and propriety of Court intervention, or evidence that Court decisions are capable of reflecting, and even leading, the way on evolving societal notions of equality.<sup>19</sup>

In this Part, I want to make two relatively modest claims about the modern disability rights movement in relationship to this line of scholarship. First, it has been significantly less Supreme Court-centric than these other movements. So whatever level of backlash is generated from contentious Court decisions that either alter or recognize (depending on one's viewpoint) norms of equality, Court decisions in disability cases have generally been only at the periphery. Second, even as a legislative effort, the ADA did not face similar resistance as other areas studied within this literature.<sup>20</sup> Disability never entered the culture wars, and the contestation to the ADA's passage was less intense. In the spirit of this conference, I will focus on comparing here

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impact on desegregation" and that "the political, economic, social, demographic, and ideological forces . . . laid the groundwork for the civil rights movement"); *see also* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 363 (2004) ("The 1964 Civil Rights Act, not *Brown*, was plainly the proximate cause of most school desegregation in the South."); ROSENBERG, *supra* note 4, at 52 ("[From] 1954-64, virtually *nothing happened*. Ten years after *Brown* only 1.2 percent of black schoolchildren in the South attended school with whites.").

<sup>16</sup> 410 U.S. 113 (1973).

<sup>17</sup> Compare Eskridge, *supra* note 6, at 1282 (suggesting that "in its early abortion cases, the Court . . . prematurely removed a fundamental and hard-to-resolve issue from ordinary politics"), with Post & Siegel, *supra* note 9, at 428-29 ("Casey's goal was to draw those engaged in the abortion controversy into a common discussion about the meaning of the Constitution . . . [by] accord[ing] great respect to both sides of the abortion controversy.").

<sup>18</sup> See, e.g., Adam Liptak, *Justices to Decide Marriage Rights for Gay Couples*, N.Y. TIMES, Jan. 17, 2015, at A1 ("The pace of change on same-sex marriage, in both popular opinion and in the courts, has no parallel in the nation's history.").

<sup>19</sup> See *supra* notes 3-12 and accompanying text (contrasting the two theories of backlash).

<sup>20</sup> See Siegel, *Equality Divided*, *supra* note 9, at 75 n.383 ("[L]egislative action—such as the passage of civil rights legislation, or state ratification of the Equal Rights Amendment, or the enactment of health care legislation—can also provoke backlash."); *see also* Post & Siegel, *supra* note 9, at 393-94 ("Legislation that intervenes in entrenched status relations often generates countermobilization and hence serious controversy. The very word 'backlash' acquired political salience in the context of antagonism generated by the Civil Rights Act of 1964." (citing Clarence Y.H. Lo, *Countermovements and Conservative Movements in the Contemporary U.S.*, 8 ANN. REV. SOC. 107 (1982))).

compare the passage of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990.<sup>21</sup>

A. *Less Intense Political Contestation*

A predicate piece of Rosenberg's thesis is that the legislative forum can produce the type of disagreement and consensus necessary to achieve certain types of social change.<sup>22</sup> The political branches offer the forum for contested issues to play out within a spirited democratic process. One can offer the Civil Rights Act of 1964 as an example of this characterization.<sup>23</sup> Title II of the Civil Rights Act of 1964 prohibits discrimination on the basis of race (amongst other categories) in privately owned places of public accommodation,<sup>24</sup> and Title VII does the same for private employment.<sup>25</sup> Passage of this law was a key goal of the civil rights movement. Outside of the formal processes of law, there was protest, civil disobedience, and violence.<sup>26</sup> The political fissures and battles leading to the law's passage were monumental, inspiring the longest congressional filibuster in history.<sup>27</sup> By the time the Civil Rights Act was passed, "it was supported by a powerful and well-publicized movement for

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<sup>21</sup> For a longer treatment of some of the same themes, see Michael Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. (forthcoming 2015). The thesis of that article is that the relatively easy journey of the ADA through Congress, combined with the large category of people that it covered, may have made it harder for the ADA to accomplish some of its more transformative goals.

<sup>22</sup> See ROSENBERG, *supra* note 4, at 430 ("Until the mid-twentieth century, proponents of significant social reform mostly understood that change would only come through . . . social movements and subsequent legislative victories. However, . . . [l]iberals increasingly turned to litigation. . . . [T]his flirtation with litigation is fundamentally flawed.").

<sup>23</sup> Indeed, Rosenberg does so. See, e.g., *id.* at 117-27 (tracing the effectiveness of congressional efforts to spur social change like the Civil Rights Act of 1964).

<sup>24</sup> 42 U.S.C. § 2000a (2012) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the grounds of race, color, religion, or national origin.").

<sup>25</sup> *Id.* § 2000e (creating "equal employment opportunities").

<sup>26</sup> See Klarman, Brown, *supra* note 4, at 43-45 (discussing the effects of the race riots, civil rights demonstrations, mass incarcerations, and general violence that threatened to compromise the economy in the Jim Crow South); Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 488-89 (2000) (detailing protests and violence during the civil rights movement); see generally DAVID J. CARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1988) (describing prominent protests during the civil rights movement).

<sup>27</sup> See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 199 (1997) ("The filibuster against the Civil Rights Act of 1964 was unequalled in length and notoriety; it tied up the Senate for seventy-four days.").

social change, whose tenets and aspirations had already garnered widespread socio-cultural support.”<sup>28</sup>

Jim Crow itself was a reaction to Reconstruction, and the long struggle leading up to *Brown* a reaction to continued segregation. Within formal law, *Brown* articulated a vision of the Equal Protection Clause that looked to the effects of segregation,<sup>29</sup> and the Civil Rights Act of 1964 carried these principles into employment and public accommodation.<sup>30</sup> This created, or perhaps unleashed, a “massive backlash against racial change,”<sup>31</sup> which “in turn created a Northern backlash that contributed significantly to racial change.”<sup>32</sup> As noted by Michael Klarman, *Brown*

catalyz[ed] southern resistance to racial change. *Brown* propelled southern politics far to the right, as race was exalted over all other issues. In this political environment, men were elected to all levels of public office who were, both by personal predisposition and political calculation, prepared to use virtually any means of resisting racial change . . . .<sup>33</sup>

This in turn provoked violent confrontations that captured national attention, “leading Congress and the President to intervene with landmark civil rights legislation.”<sup>34</sup> In short, when the Civil Rights Act of 1964 was passed, it was

the product of a continuing passionate and informal national debate of at least a decade’s duration (beginning, vaguely with the Supreme Court’s decision in *Brown v. Board of Education* . . .) over the state of race relations in the United States. The debate took place every day and every night in millions of homes, schools, and workplaces. . . . Through a continuing national conversation about race, ordinary citizens (especially white citizens) came to see the subject of race anew.<sup>35</sup>

The ADA was simply different. Disability was not an issue of major political significance when Congress passed the ADA. Although it is probably

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<sup>28</sup> Krieger, *supra* note 26, at 489.

<sup>29</sup> See, e.g., Siegel, *Equality Divided*, *supra* note 9, at 11-12 (“Several other prominent Supreme Court decisions of the era suggested that the racial impact of a law was crucial in determining whether the Equal Protection Clause was violated.”).

<sup>30</sup> See 42 U.S.C. § 2000a (2012) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the grounds of race, color, religion, or national origin.”); *id.* § 2000e (creating the Equal Employment Opportunity Commission).

<sup>31</sup> Klarman, *Brown*, *supra* note 4, at 115 n.494.

<sup>32</sup> Klarman, *Civil Rights Law*, *supra* note 4, at 433 n.4.

<sup>33</sup> Klarman, *Brown*, *supra* note 4, at 85.

<sup>34</sup> *Id.*

<sup>35</sup> Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 975-76 (1997).

an overstatement to say the ADA passed easily, it had a significantly smoother path than the Civil Rights Act of 1964.<sup>36</sup>

Most people were not even aware of the law at the time of its passage.<sup>37</sup> A nationwide poll conducted in 1991 by Harris Associates demonstrated that only eighteen percent of those questioned were aware of the ADA's existence.<sup>38</sup> Although I have been unable to locate parallel polling contemporaneous with the passage of the Civil Rights Act of 1964, the existing polling from that time asks questions about evolving social attitudes on integration, demonstrating that at least in the minds of the polling agencies, this was something about which people were likely to have an opinion (and that attitudes were changing, yet with some concern that change was happening too fast).<sup>39</sup> The history of the passage of the ADA shows that this limited public awareness was at least in part an intentional effort by disability rights advocates to operate a "stealth campaign" to minimize political resistance.<sup>40</sup> Notice the key difference with the passage of the Civil Rights Act of 1964, "which had been graphically presented by media around the world. Images of lynchings, police dogs, and fire hoses became synonymous with the struggle for civil rights; few parallel images characterized the needs of disabled persons."<sup>41</sup>

Lots of explanations can and have been offered for this lower grade conflict. As the one minority group that anyone can join at any time, most disability

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<sup>36</sup> In the Senate, there were four hearings on the ADA, and the bill passed within five months by a 76-8 vote. *See* Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 190 (2007). In the House, there were more hearings, but the bill still went for a vote within nine months and it ultimately passed by a vote of 403-20. *See id.* at 190-91.

<sup>37</sup> *See* Krieger, *supra* note 26, at 491 ("Despite . . . efforts to educate the public . . . by the time the ADA was passed in the summer of 1990, few people understood what the law provided, why it was important, or what core values and ideals should guide its implementation.").

<sup>38</sup> LOUIS HARRIS & ASSOC., PUBLIC ATTITUDES TOWARDS PEOPLE WITH DISABILITIES 60 (1986).

<sup>39</sup> *See, e.g.*, George Gallup, *Southern Whites Shift on School Integration*, BOS. GLOBE, May 23, 1965, at 27; David Lawrence, *N.Y. Poll Results Surprising*, L.A. TIMES, Sept. 24, 1964, at A6.

<sup>40</sup> *See* JACQUELINE VAUGHN SWITZER, DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY 72 (2003) ("Avoiding the media and any attempt to try to explain the legislation to the press became a key element of the fight for passage of the ADA."); Joseph P. Shapiro, *Disability Rights as Civil Rights: The Struggle for Recognition*, in THE DISABLED, THE MEDIA AND THE INFORMATION AGE 59 (Jack A. Nelson ed., 1994) (mentioning a statement by Patrisha Wright, a leading lobbyist for the ADA, that "[w]e would have been forced to spend half our time trying to teach reporters what's wrong with their stereotypes of people with disabilities").

<sup>41</sup> *See* SWITZER, *supra* note 40, at 108.



discrimination is based on pity, paternalism, or cost concerns, not animus.<sup>42</sup> Neither major political party has completely laid claim to disability issues, which may explain the less intense political battles.<sup>43</sup> The disability rights movement's ability to get the ADA passed was aided greatly by champions on both sides of the political aisle; these supporters often had disabilities themselves (sometimes hidden) and/or had close relatives with disabilities.<sup>44</sup> Whatever the reason, the ADA's relatively easy journey through Congress, combined with a lack of public engagement, stands in marked contrast to the greater salience of the Civil Rights Act of 1964.

B. *Less Supreme Court-Centric*

The disability constitutional law canon was essentially shut down by the Supreme Court's opinion in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*<sup>45</sup> There, the Court held that people with disabilities were only entitled to rational basis review, a holding that was reaffirmed in *University of Alabama v. Garrett*.<sup>46</sup> Since then, there have been no other Supreme Court cases directly advancing the status of disability under the Equal Protection or Due Process Clauses.<sup>47</sup> The modern disability rights movement is primarily a statutory one, inspiring laws like the ADA, the Fair Housing Amendments

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<sup>42</sup> See, e.g., HARRIS & ASSOC., *supra* note 38, at 13 (finding that seventy-four percent of Americans felt pity toward disabled individuals); see also Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 43-44 (1988) ("Probably the most common threat from disabled individuals is summed up in the concept of existential anxiety: the perceived threat that a disability could interfere with functional capacities deemed necessary to the pursuit of a satisfactory life.").

<sup>43</sup> See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1012-13 (2003) ("[N]ot all people with disabilities—even politically active people with disabilities—are liberal Democrats or supporters of civil rights generally. The focus on independence and self-reliance provided a way of appealing to the more conservative people with disabilities without alienating those who held more liberal orientations." (internal footnote omitted)).

<sup>44</sup> SWITZER, *supra* note 40, at 102 ("What brought many of the partisan forces together in support of the proposed law was 'a hidden army' of individuals who were disabled themselves or had a family member who was disabled."); *id.* at 102-03 (discussing the personal motivations to join the disability rights movement for a number of prominent politicians, including former chairman of the Equal Employment Opportunity Commission Evan Kemp, Senator Tom Harkin, Senator Edward Kennedy, Senator Bob Dole, Senator Orrin Hatch, Senator Dale Bumpers, and Congressman Tony Coehlo).

<sup>45</sup> 473 U.S. 432, 446 (1985) ("To withstand equal protection review, legislation that distinguished between the mentally retarded and others must be rationally related to a legitimate government purpose.").

<sup>46</sup> 531 U.S. 356, 366-68 (2001) (reiterating the rational basis review standard adopted in *Cleburne* for legislation applying to the disabled).

<sup>47</sup> See generally Michael Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 542-46 (2014) (detailing the court cases regarding the disabled beginning with *Cleburne*).

Act,<sup>48</sup> and the Individuals with Disabilities in Education Act,<sup>49</sup> amongst others. The movement has gathered political strength through unifying various disability-specific factions and utilizing powerful allies on both sides of the political aisle.<sup>50</sup>

Supreme Court cases involving disability, then, have not been key movement moments in announcing new rights or formulating visions of equality.<sup>51</sup> Rather, such cases have generally involved the interpretation of various parts of the ADA. The greatest concentration of those cases has involved the ADA's definition of disability, with the Court interpreting it in a consistently restrictive manner that limits the number of people who could be considered covered under the statute.<sup>52</sup> Frustrated with this development, advocates turned to the legislative arena and secured passage of the ADA Amendments Act ("ADAAA")<sup>53</sup> in 2008, legislatively overturning these decisions and explicitly instructing the Supreme Court to interpret the definition broadly.<sup>54</sup>

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<sup>48</sup> 42 U.S.C. §§ 3601-3631 (2012) ("[I]t shall be unlawful . . . to make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . handicap . . .").

<sup>49</sup> 20 U.S.C. §§ 1400-1482 (2012) ("The purposes of this chapter are . . . to ensure that the rights of children with disabilities and parents of such children are protected . . .").

<sup>50</sup> See, e.g., SAMUEL R. BAGENSTOS, *LAW & CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 18-20 (2009) (explaining the "social model" of disability advocated by the disability rights movement); SWITZER, *supra* note 40, at 72 ("Disability interest groups have played a key role in the policymaking process . . . and without their support American disability policy is unlikely to have moved forward during the last decade."); Richard K. Scotch, *Politics and Policy in the History of the Disability Rights Movement*, 67 *MILBANK Q.* 380, 382-84 (1989) (arguing that the ability of the disability rights movement to pass legislation is due largely to the result of a change to a rights issue orientation and participation in the larger disability rights movement, instead of individual silos). These supporters often had disabilities themselves (sometimes hidden) and/or had close relatives with disabilities. See SWITZER, *supra* note 40, at 102 ("What brought many of the partisan forces together in support of the proposed law was 'a hidden army' of individuals who were disabled themselves or had a family member who was disabled.").

<sup>51</sup> One exception, which I have discussed elsewhere, is the Court's decision in *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999) (finding that "the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions"). See Waterstone, *The Costs of Easy Victory*, *supra* note 21.

<sup>52</sup> See, e.g., *US Airways, Inc. v. Barnett*, 535 U.S. 391, 403 (2002) (holding that exception to seniority policy was not a reasonable accommodation); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566-67 (1999) (holding that an individual with amblyopia, an uncorrectable eye condition, was not per se covered by the ADA's definition of disability); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494 (1999) (holding that twin sisters with myopia were not covered by ADA's definition of disability).

<sup>53</sup> Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12101 (2012)).

<sup>54</sup> 42 U.S.C. § 2(b)(1) (2012) ("The purposes of this Act are . . . to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, and its companion

The concept of not looking to the Supreme Court to articulate key movement goals, and, when possible, to try to stay out of the Supreme Court altogether, has been a conscious decision of many disability cause lawyers.<sup>55</sup> The primary motivation for this has been a fear of harmful decisions from a Court perceived as inhospitable to civil rights generally and disability rights specifically.<sup>56</sup> But one consequence is that the opportunity for backlash against judicial decisions, pushing the frontiers of disability rights beyond where the public is willing to take them, has been minimized.<sup>57</sup> Thus, the modern disability rights movement seems to have heeded Rosenberg's warnings and attempted to secure social change through the more democratic branch.

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cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures . . .”).

<sup>55</sup> See Michael E. Waterstone, Michael Ashley Stein & David B. Wilkins, *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287, 1317-18 (2012) (“A poll [of disability lawyers] showed a near-uniform consensus among [them] that constitutional litigation was not a priority or even a significant item on the litigation agenda.”); see also Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1676 (2010) (reviewing BAGENSTOS, *supra* note 50) (“One instance was *Hason v. Medical Board of California*, 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. In light of an unsympathetic plaintiff and the Court’s opinion in *Garrett*, 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.” (internal footnotes omitted)).

Most recently, the disability rights community has publicly urged the City of San Francisco to settle the case of *City and County of San Francisco, California v. Sheehan*, 135 S. Ct. 702 (2014), involving the applicability of Title II of the ADA to police arrest proceedings, in order to remove the case from the Supreme Court’s docket. See Susan Mizner, *There Is No Police Exception to the Americans with Disabilities Act*, ACLU: BLOG OF RIGHTS (Jan. 8, 2015, 4:47PM), <https://www.aclu.org/blog/speakeasy/there-no-police-exception-americans-disabilities-act>, archived at <https://perma.cc/U7Z5-SAS7>.

<sup>56</sup> Waterstone, Stein & Wilkins, *supra* note 55, at 1318 (recounting the views of one lawyer that “I live in an age when Federal courts are not going to interpret the Federal Constitution in ways that are going to assist me, and so unless I have a case that absolutely screams out for it, I’m not going to be looking for novel constitutional theories because all I’m likely to accomplish in doing that is to create a precedent that will foreclose those who come after me in what I hope will be a warmer judicial climate. . . . I’m a craftsman, and I use whatever tools look appropriate to the task.”).

<sup>57</sup> See ROSENBERG, *supra* note 4, at 16 (assessing the institutional limitations of the courts as fora for social change).

## II

Comparatively speaking, then, the ADA is an example of federal legislation, passed relatively easily, with minimal significant judicial involvement beyond some limiting statutory interpretation. This unique combination of political power and low political salience presents an intriguing case study in the debate over the effect of backlash. This Part offers some preliminary observations on what insights the disability rights movement can offer.

The passage of the ADA can certainly be explained as a triumph of the democratic process, with Congress rather than the courts leading the way on social reform. Disability advocates squared off with the Chamber of Commerce and other business groups, and the resulting law reflected compromises worked out by opposing parties.<sup>58</sup> Flying underneath the radar had benefits, and the ADA, combined with other disability civil rights laws, has created a more accessible society and improved people's lives immeasurably. The ability of the disability rights movement to gather enough political power to pass federal civil rights laws, yet elide bitter conflicts that result from courts pushing rights beyond where the public is ready to go, reads as a Rosenberg success story.

Yet, as I argue more extensively elsewhere,<sup>59</sup> this account may be too simplistic. Although successful in some areas, the ADA has fallen well short of its goals in others.<sup>60</sup> Academics and advocates have linked many of the ADA's shortcomings to the narrow ways courts have interpreted the law, and have suggested that the lower courts and Supreme Court have not been partners in creating the social change envisioned by the ADA.<sup>61</sup> Indeed, court

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<sup>58</sup> See Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 BERKELEY J. EMP. & LAB. L. 335, 335 (2000) (“[T]he National Association of Manufacturers, the American Banking Association, and the National Federation of Businesses all publically voiced opposition to the ADA.”).

<sup>59</sup> See Waterstone, *The Costs of Easy Victory*, *supra* note 21.

<sup>60</sup> For example, the employment rate of people with disabilities has not improved since the ADA was passed. See, e.g., U.S. SENATE COMM. ON HEALTH, EDUCATION, LABOR & PENSIONS, FULFILLING THE PROMISE: OVERCOMING PERSISTENT BARRIERS TO ECONOMIC SELF-SUFFICIENCY FOR PEOPLE WITH DISABILITIES 3 (2014) (“Of the over 20 million Americans with disabilities who are of working age, less than 30 percent work, compared to over 78 percent of non-disabled Americans.”), available at <http://www.help.senate.gov/imo/media/doc/HELP%20Committee%20Disability%20and%20Poverty%20Report.pdf>; H. STEPHEN KAYE, IMPROVED EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH DISABILITIES 9 & fig.1 (2003) (showing the employment rate for working-age people with disabilities as 49% in 1996, according to the federal government's National Health Information Survey).

<sup>61</sup> See generally LINDA HAMILTON KRIEGER, BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (2006); see also Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 12 (2000) (“Indeed, by 1996 many in the disability community were speaking of an emerging judicial backlash against the ADA.

interpretations have been so restrictive that advocates returned to Congress to pass the Americans with Disabilities Amendments Act of 2008, legislatively overturning several Supreme Court decisions.

Although Rosenberg does not study the disability rights movement specifically, the framework he offers would not necessarily envision this level of judicial hostility.<sup>62</sup> Rosenberg offers several conditions under which courts “can be effective producers of significant social reform.”<sup>63</sup> At first blush, it could look as if these conditions are met in the context of the disability rights movement and the ADA. Condition 1 is “ample legal precedent for change,” which the ADA certainly provides.<sup>64</sup> Condition 2 is “support for change from substantial numbers of Congress and from the executive.”<sup>65</sup> As discussed above, the ADA and ADAAA passed by wide margins in Congress,<sup>66</sup> and the ADA was signed by a Republican president who was a vocal political champion of disability rights.<sup>67</sup> Condition 3 is “support from some citizens or at least low levels of opposition from all citizens,” and (amongst other things) costs imposed to induce compliance.<sup>68</sup> The low political salience of

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Law review articles written by many of the statute’s drafters described a powerful narrowing trend in the federal judiciary, especially on the foundational question of who was a “person with a disability” entitled to protection under the Act.”); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 22 (2000) (“The backlash thesis suggests that judges are not simply confused by the ADA; rather, they are resistant to it. It suggests that the courts are systematically nullifying rights that Congress conferred on people with disabilities.”).

<sup>62</sup> A back and forth between courts and Congress is not unique to the disability rights movement. The Pregnancy Discrimination Act and 1991 Amendments to Title VII are both examples of Congress taking a different, and more expansive, view of civil rights protections than the Supreme Court. I would contend, however, that the ADAAA stands out as demonstrating congressional belief that courts, and the Supreme Court in particular, had not just issued rulings that Congress disagreed with, but dramatically misunderstood the whole disability rights project.

<sup>63</sup> ROSENBERG, *supra* note 4, at 36.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See *supra* notes 36 and 54 and accompanying text (discussing the geneses of the ADA and the ADAAA). On it being a good strategy politically to support disability rights, see JOSEPH SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 25 (1993) (stating views of political pollster Louis Genevie that “a candidate ignores the issues of disabled people at his own peril”); see also Testimony of Senator David Pryor, CONG. REC. 19480 (Sept. 7, 1989) (“It is very difficult, all of us know, to be perceived as possibly questioning any type of legislation that would be of assistance to the blind, the handicapped, the disabled, the elderly, the physically and the mentally impaired.”).

<sup>67</sup> As chronicled by Joseph Shapiro, the highest-ranking champion was President George H. Bush himself, who had lost a 3-year old daughter to leukemia, had a son with a learning disability, and had an uncle with polio. See SHAPIRO, *supra* note 66, at 119.

<sup>68</sup> ROSENBERG, *supra* note 4, at 36.

disability,<sup>69</sup> combined with legal penalties for non-compliance with various provisions of the ADA,<sup>70</sup> suggest this condition is met as well.

In endorsing a move to the legislature, and in detailing the conditions under which courts can play a meaningful role in social reform, there is an assumption that the legislative process provides a vehicle for divergent groups to resolve their differences in a politically sufficient manner.<sup>71</sup> The disability rights movement and ADA examples challenge that assumption. For civil rights legislation intended to transform both the political and social environments, in some cases dramatically, there was remarkably little opposition. The lack of opposition led to a limited public understanding of what disability rights advocates hoped the law would accomplish. As noted by Professor Linda Krieger, “few people understood what the law provided, why it was important, or what core values and ideals should guide its implementation.”<sup>72</sup> This made implementation and enforcement of the statute harder, and no doubt contributed to cramped judicial understandings of the ADA.<sup>73</sup>

Any law or movement has to contend with a disconnect between law and reality. And enforcing a statute requires guidance by social movements, political strength, and litigation gains and losses. But the ADA example demonstrates that equating the legislative process with a resolution of deep values conflicts may assume too much. The legislative forum can also mute backlash, potentially in a way that can be detrimental to some movement goals. This suggests that further work should focus on refining the court skeptic thesis, and gauging the actual political contestation necessary for legislation to lead the way for courts to be partners in creating social change.

And this relates to the other side of the backlash debate, which suggests judicial backlash is not necessarily harmful because it has the ability to, over

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<sup>69</sup> See Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 23 (2003) (recognizing that “in the years since *Boerne* the Court has used its new enforcement model of Section 5 power primarily to invalidate statutes of relatively low political salience,” a list which includes the ADA).

<sup>70</sup> Damages are available for violations of Title I (employment), and under some circumstances under Title II (state and local government programs, services and activities), but not under Title III (privately owned places of public accommodation). See Waterstone, Stein & Wilkins, *Disability Cause Lawyers*, *supra* note 55, at 1344 (“Damages are not typically available under the ADA . . .”). In all instances, however, prevailing parties are entitled to attorney’s fees. 42 U.S.C. § 12205 (2012) (“In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee, including litigation expenses, and costs . . .”).

<sup>71</sup> See *supra* note 4 and accompanying text (describing the court skeptic view).

<sup>72</sup> Krieger, *supra* note 26, at 491.

<sup>73</sup> See *id.* at 491 (“Most people . . . simply did not understand the theoretical constructs, social meaning systems, and core principles on which the disability rights movement . . . and the ADA were based.”).

time, create positive movement and normative effects.<sup>74</sup> Here too, the disability experience has the potential to extend and enrich this discussion. On one account, and perhaps the prevailing one, backlash to restrictive Supreme Court decisions helped mobilize political resistance, which culminated in the passage of the Americans with Disabilities Amendments Act of 2008.<sup>75</sup> This supports the thesis that judicial backlash has been and can be channeled into other directions which work their way back into the political system in a productive manner.

Another account, however, could focus on the relative lack of resistance to the passage of the ADA. Whereas a link could be drawn between a major Supreme Court decision (*Brown*) and the passage of the Civil Rights Act of 1964,<sup>76</sup> no such link between the judiciary and the legislature exists for disability rights.<sup>77</sup> The judiciary has continued to play a limited role in the progression of the disability rights movement, with most ADA Supreme Court cases not being directed by disability cause lawyers.<sup>78</sup> As noted by commentators, in contrast to other civil rights movements, there is no broad-based social movement pushing people—or judges—to change attitudes on disability issues.<sup>79</sup> To the extent one is willing to entertain the assumption that,

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<sup>74</sup> See *supra* notes 10-12 and accompanying text (describing the theory of democratic constitutionalism).

<sup>75</sup> See Feldblum, *supra* note 36, at 192-94 (recounting the public response to the Supreme Court's decision in the *Sutton* trilogy and the *Williams v. Toyota* case).

<sup>76</sup> See Klarman, Brown, *supra* note 4, at 85 (“[M]y central thesis is that *Brown* was indirectly responsible for the landmark civil rights legislation of the mid-1960s by catalyzing southern resistance to racial change.”); see also J. HARVIE WILKINSON III, FROM *BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978*, at 49 (1979) (“*Brown* was the catalyst that shook up Congress and culminated in the two major Civil Rights acts of the century . . .”).

<sup>77</sup> None of the key historical accounts of the disability rights movement history attribute the efforts leading to the passage of the ADA to *Cleburne*. Congress included language in the original ADA suggesting that it believed, contrary to *Cleburne*, that people with disabilities should be entitled to some type of higher-level scrutiny under the Equal Protection Clause. See 42 U.S.C. § 12101(a)(7) (2006) (“[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society. . . .”). But this provision was removed by the ADAAA, based on the reasoning that it was a poor fit with the ADA's goals of broadening the definition of disability. See Waterstone, *supra* note 47, at 545-46.

<sup>78</sup> See Stein, Waterstone & Wilkins, *Cause Lawyering for People with Disabilities*, *supra* note 55, at 1668 (“Contrary to predecessor movements, the most visible disability rights cases—those receiving Supreme Court adjudication—are notable for the absence of cause lawyers.”).

<sup>79</sup> See Michael Ashley Stein, *Same Struggle, Different Difference: ADA*

despite some real successes, certain projects within what advocates hoped the ADA might accomplish have not gone as well as hoped (an assertion commonly made in disability law scholarship),<sup>80</sup> the failure of courts to be co-equal partners in marshaling in a new era of disability equality can be thought of as a result of the lack of meaningful pressure on judges in disability cases. Without a guided and focused social movement, judges can comfortably remain within their priors on disability issues.

Democratic constitutionalists discuss certain types of social change as being the result of long conflict, involving the judiciary, and being impossible without such intense contestation.<sup>81</sup> Given lower political salience, judicial disengagement, and the intentional efforts to get legislation passed without a major fight, conflict of this type has generally been avoided by the disability rights movement. Its absence certainly has enabled some important successes, and no doubt other movements look longingly at the disability rights movement's ability to stay out of the culture wars. But, to the extent the judiciary has been unresponsive to the higher aspirations of the ADA, which include not just altering environments but attitudes,<sup>82</sup> the lack of the level of contestation generated by the Civil Rights Act of 1964 can also provide a negative counterexample supporting the positive claim that backlash has productive functions.

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*Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 629 (2000) ("Since people with disabilities were empowered with civil rights absent the necessary political tools and organization for inducing a general elevation in social consciousness, it is not entirely surprising that popular opinion about people with disabilities . . . has yet to conform to the goals underlying passage of the ADA.").

<sup>80</sup> See generally LINDA HAMILTON KRIEGER, *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* (2006) (discussing judicial decisions that narrowed the ADA's definition of disability); see also Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. REV. 99, 100 (1999) ("[D]efendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, defendants prevail in eighty-four percent of reported cases."); Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1 (2006) (identifying limits on the effectiveness of ADA provisions dealing with accessibility to privately owned places of public accommodation).

<sup>81</sup> See Siegel, *Equality Divided*, *supra* note 9, at 82 ("[C]onflict is likely to be protracted, and change, if any, slow. Advocates can deliberate about the best directions in which to direct conflict of this kind, when opportunities permit choice; but it is hard to imagine change of this kind without profound and sustained conflict.").

<sup>82</sup> See Thomas Burke & Jeb Barnes, *The Civil Rights Template and the Americans with Disabilities Act: A Socio-Legal Perspective on the Promise and Limits of Individual Rights* (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2557177](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557177).



## CONCLUSION

All social movements are unique, existing at different times and generating unequal support and opposition. Yet, particularly amongst groups seeking to assert civil rights, there can be important similarities. The Civil Rights Act of 1964 provided a framework for much of what disability rights advocates hoped to accomplish with the Americans with Disabilities Act. Yet their sociopolitical journeys are markedly different. This Essay has attempted to offer some initial insights for those who focus on the role and utility of backlash to civil rights.