The Report Committee for Christine Catherine Bird
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Accommodating Disability: Barriers and Burdens of a Movement Toward Equity in an Equality-Based Justice System

APPROVED BY
SUPERVISING COMMITTEE:

Bartholomew H. Sparrow, Supervisor

Jeffery K. Tulis

Accommodating Disability: Barriers and Burdens of a Movement Toward Equity in an Equality-Based Justice System

by

Christine Christine Bird

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Abstract

Accommodating Disability: Barriers and Burdens of a Movement Toward Equity in an Equality-Based Justice System

Christine Catherine Bird, MA

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Supervisor: Bartholomew H. Sparrow

Social movements can choose between emphasizing a sameness-based equality narrative or alternatively, a difference-based equity narrative. The sameness narrative emphasizes how the marginalized group represented by the social movement is not different from mainstream society and deserves equal treatment. The difference narrative allows the movement to leverage its different attributes to seek accommodation within mainstream society by asserting principles of equity. This narrative, by contrast, emphasizes how the marginalized group represented by the social movement is deserving of inclusion in society, but nonetheless requires affirmative accommodation for their differences. The disability rights movement is an equity-based movement because it requires an affirmative accommodation provision. If a group requiring accommodation seeks only to be treated equally to their counterparts, the unique experiences and needs of the individuals requiring accommodation cannot be met. In order to demonstrate this point, I look to the difficulties of obtain reasonable accommodation under disability policy in the United States.

Table of Contents

I. THEORIZING SOCIAL JUSTICE 7

II. CHALLENGES TO INTEGRATING EQUITY-BASED CIVIL RIGHTS REGIMES 15

III. THE SOCIETAL PROBLEM OF DISABILITY 21

IV. IDENTITY AND DISABILITY 26

V. HISTORICAL ORIGINS OF THE DISABILITY RIGHTS MOVEMENT, DISABILITY-SPECIFIC ACTIVISM AND THE BEGINNINGS OF ISSUE AGGREGATION 30

VI. THE EXPANDING DEFINITION OF DISABILITY THROUGH THE REHABILITATION ACT OF 1973, THE AMERICANS WITH DISABILITIES ACT OF 1990, AND THE AMENDMENTS ACT OF 2008 35

VII. THE FUTURE OF DISABILITY RIGHTS AND EQUITABLE ACCOMMODATION 45

Appendix I. The Civil Rights Movement and Disability Rights Movement Timeline 47

Appendix II. Constitutional Mentions of Equity and Equality 50

References 52

Social movements concerned with civil rights must often choose between two forms of narrative. The movement can emphasize a sameness-based equality narrative, or the group can emphasize a difference-based equity narrative. The sameness narrative emphasizes how the marginalized group represented by the social movement is not different from mainstream society and deserves equal treatment. The difference narrative allows the movement to leverage its different attributes to seek accommodation within mainstream society by asserting principles of equity. This narrative, by contrast, emphasizes how the marginalized group represented by the social movement is deserving of inclusion in society, but nonetheless requires affirmative accommodation for their differences. The disability rights movement is an equity-based movement because it requires an affirmative accommodation provision. If a group requiring accommodation seeks only to be treated equally to their counterparts, the unique experiences and needs of the individuals requiring accommodation cannot be met. In order to demonstrate this point, I turn to one man's experience seeking accommodation on the basis of disability.

Dan, a fifty-five-year-old white man, worked in a high-level managerial position for one of the largest federal administrative agencies for twenty-five years. For many years, Dan silently suffered from dyslexia—a condition defined by medical communities as a learning disability. Dyslexia is a cognitive abnormality that manifests itself through an individual's difficulty to process language learning to read. The condition makes it difficult to "decode" written language through a typical method of identifying regular speech patterns and relate them to written letters and words.[1] Over the course of his life, Dan faced latent societal prejudices toward his disability based on a misunderstanding of his condition. As an elementary school student, Dan's teachers told his parents that he was "slow" and would be lucky to find work in a McDonalds. Dan was

1 The Mayo Clinic, Diseases & Conditions: Dyslexia, www.mayoclinic.org.

also held back in elementary school because his school, in the 1950s, did not understand that Dan's difficulty learning to read was not based in his lack of intelligence, but in a cognitive difference. Dyslexia does not affect intelligence, only society's perception of intelligence. Naturally, these early incidents left Dan with a sense of insecurity and shame surrounding his ability to participate as a full-member of the work force.

Despite this formative experience, Dan found that his disability did not affect how he interpreted numbers. He received a bachelor's degree in Accounting and entered the workforce as any other accountant. For many years, Dan was able to cope with his dyslexia privately and perform his job duties satisfactorily because he relied on an administrative assistant to help him with tasks that were more difficult because of his dyslexia—like typing. Typing and writing lengthy reports was difficult because Dan often flipped or confused letters which made spelling challenging. Instead, he could overcome this shortcoming by giving dictation to his assistant. Eventually, the Agency underwent restructuring which resulted in the centralization of administrative duties and Dan lost his administrative assistant. While other managers also lost their assistants and were inconvenienced by the restructuring, Dan found the change debilitating. After a period of time where he tried to cope with his condition alone, Dan felt embarrassed and depressed because he could no longer perform his job to his full potential.

Recognizing that his inability to perform administrative roles was not a symptom of ineptitude—but rather a side effect of dyslexia he decided to ask his superior for help. Among the accommodation options Dan presented were: 1) an administrative assistant, 2) access to an administrative assistant for only the tasks that were implicated by his disability, 3) dictation software, and 4) form documents that would negate the need to write long narratives for reporting procedures. He was denied all four options. In fact, his manager denied that Dan had

dyslexia at all and instead his supervisor claimed that Dan only had Attention Deficit Disorder (ADD). Dan then decided to file for an accommodation on the basis of his disability with the Agency's equal employment opportunity (EEO) office. The EEO office denied his request for accommodation. The basis of this denial turned on an Agency doctor's evaluation of the case file and a determination by this doctor that Dyslexia was not a medical condition. Even after Dan incurred, at great personal expense, the costs of obtaining an official Dyslexia diagnosis from a psychiatrist who specialized in the diagnosis of learning disabilities such as Dyslexia, his request for accommodation was again denied. At no point did Dan's manager or the EEO office engage in an "interactive process" with Dan to determine if an accommodation for his disability was possible—something also required by the ADA.[2] Dan appealed this decision within the EEO administrative mechanism.

To date, almost eight years later, Dan's case still sits on a bureaucrat's desk waiting review. Because Dan is required to exhaust administrative remedies before he can file a claim against the agency under the Americans with Disabilities Act (ADA) on the basis of a denial of reasonable accommodation, his case has never seen a courtroom. Dan filed his accommodation request over twenty years after the original ADA passed in 1990. The ADA was amended in 2008 to make it easier for the disabled to obtain reasonable accommodations[3]. However

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2 The "interactive process" requirement of the ADA calls on employers and employees requesting accommodation to determine whether a reasonable accommodation can be provided by the employer. Employers and employees may suggest accommodations, but an employer is not required to provide a specific accommodation. The relevant provision of the U.S. Code states, "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 CFR 1630.2(o)(3)

3 Reasonable accommodations are modifications to an individual employee's job duties and responsibilities to assist, in cases of disability, the employee in performing their job. The relevant

procedural barriers and legal technicalities continue to obstruct disability accommodation. The ADA failed Dan. For reasons I explain below, it will continue to fail others.

Dan's story is demonstrative of the current disability rights legal scheme to provide accommodations. Dan benefited from several forms of privilege and advantages and was still denied support. Dan identified as white, cis-gendered male, middle-class. He was college educated, married, and had two daughters. Typically, an individual with Dan's identity would not be the subject of a discrimination study. Despite all of the advantages of society Dan received, he was not immune from disability discrimination. [4] The current disability rights policy regime persistently fails the disabled. This paper argues that the failure stems not from bad policy, but from a legal architecture has not adapted to enforce accommodation provisions.

Political science studies on civil rights are primarily contained to the development of the civil rights movement and women's movement of the 1950s and 1960s. Most of the existing literature on disability rights is written purely for the legal academy, as legal practitioner's guides, or are purely historical studies. Political science is only now starting to seriously consider the disability rights movement and its place in the U.S. civil rights enforcement regime in terms of legal mobilization. Ruth O'Brien's work considers the Americans with Disabilities Act and the disability rights movement more broadly than the legal treatises by arguing that the original intent of the ADA was undermined by federal court rulings in favor of employers by limiting the

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U.S. Code provision states that reasonable accommodations "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 modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 USC § 12111(9)

[4] Dan's experiences are shared here with permission of his family. The author is his daughter.

scope of the definition of disability.[5] More scholars are turning their attention to the disability rights movements in the United States and in other countries furthering O'Brien's research agenda. Jennifer Ekulwater's 2018 article demonstrates tensions between Black activism and disability activism in the early stages of the disability rights movement. Lisa Vanhala (2015) looks at the diffusion of disability rights movements across Europe.[6] Paula Campos Pinto (2017) examines how the United Nations Convention on the Rights of Persons with Disabilities affects implementation of disability rights in Portugal.[7] Other scholars are now producing historical case studies of disability rights movements in various countries including Canada, the United Kingdom, France, Kenya, Australia and New Zealand.[8] This growing body of disability rights

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[5] Ruth O'Brien, *Crippled Justice: The History of Disability Policy in the Workplace*, University of Chicago Press. 2001. Her second book, *Voices From the Edge* (2004), is a collection of interviews with individuals who identify as disabled about their experiences within the system created by the ADA.5

[6] Vanhala, Lisa. 2015. "The Diffusion of Disability Rights in Europe." *Human Rights Quarterly* 37 (4): 831–53. doi:10.1353/hrq.2015.0058.

[7] Pinto, Paula Campos. 2017. "From Rights to Reality: Of Crisis, Coalitions, and the Challenge of Implementing Disability Rights in Portugal." *Social Policy and Society*, October 26. doi:10.1017/S1474746417000380.

[8] See: Baudot, Pierre Yves. 2017. "Layering Rights: The Case of Disability Policies in France (2006-2016)." *Social Policy and Society*, November 6. doi:10.1017/S1474746417000392.

Colker, Ruth. 2005, *The disability pendulum: The first decade of the Americans with Disabilities Act*, New York: New York University Press.

Dargan, Cushla. 2016. "New Zealand Accessibility Advancement Re-Imagined: Dis/Ability, Social Change, and the Philosophy of the Be. Institute." *New Zealand Sociology* 31 (4). New Zealand Sociology: 89–110.

Gebrekidan, Fikru Negash. 2012. "Disability Rights Activism in Kenya, 1959–1964: History from Below." *African Studies Review* 55 (3): 103–22. doi:10.1017/S0002020600007228.

Prince, Michael J. 2010. "What about a Disability Rights Act for Canada? Practices and Lessons from America, Australia, and the United Kingdom" 36 (2): 199–214. http://www.jstor.org/stable/25702420.

literature will allow scholars to push our theories of rights forward with systematic empirical evidence stemming from historical instance.

My contribution to this literature is two-fold. First, I offer a new theory to inform our study of social movements based in the legal protection sought—equality or equity. I recharacterize social movements into categories of difference-based movements like disability rights and equality-based movements like the civil rights movement. A difference-based movement seeks for their differences from the status quo to be recognized, included, and even in extreme cases, celebrated. In the case of disability, a person experiencing dyslexia like Dan, would not seek the impossible cure for his condition before he sought integration into the existing social order. Instead, he would want his condition to be understood by those around him in a way that allowed him full access to and participation in society without compromising his identity. Dan seeks equity, not equality. In contrast, an equality-based social movement utilizes rhetoric emphasizing that the out-group is just like the in-group and deserves the same treatment. This division between movements is based on the difference between equity and equality. Legal equity requires the provision of a legal good or status that elevates a disadvantaged or injured individual to the same level as the status quo. Legal equality only requires that the disadvantaged receive the same treatment as the advantaged. This paper presents an argument that situates equality-based rights regimes against equity-based rights regimes. Second, I offer the disability rights movement as a case of an equity-oriented social movement that faces an inability to

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Revillard, Anne. 2017. "Social Movements and the Politics of Bureaucratic Rights Enforcement: Insights from the Allocation of Disability Rights in France." *Law and Social Inquiry* 42 (2). Blackwell Publishing Inc.: 450–78. doi:10.1111/lsi.12174.

completely reverse the effects of marginalization because it has been forced to use equality based legal mechanisms.

The United States civil rights regime relies almost exclusively on the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. This means that when a civil rights case comes before the courts, the fact finder must decide if 1) there was unequal treatment of one group against another and/or 2) there was a denial of a litigant's entitlement on discriminatory grounds.[9] A group's status is often considered in terms of "suspect class" and its historical status as a "discrete and insular minority."[10] Although there is no "equity protection" clause in the United States Constitution, for some people seeking rights protection, the equal protection clause does not go far enough. In order for people to achieve true inclusion in greater society, an accommodation may be required. Accommodation, however, is antithetical in a culture that values equality over all else. An accommodation by its nature is an exception. How can equal protection before law guarantee something that is an exception? Exception implies relativity and difference. Accommodation implies a deviation from the norm. The remainder of this paper is devoted to answering this question. The short answer is that it cannot—at least not to the extent necessary.

I. Equality and Equity—Theorizing Social Justice

The terms equality and equity are often conflated by the public and scholarship despite the terms' distinct legal meanings. This blurring of definition leads to confusion and imprecision in

9 This legal structure originates in footnote 4 of *United States v. Carolene Products Co.* 304 US 144 (1938).

10 Discrete and insular minority classification of groups traces its intellectual history to footnote 4 in *United States v. Carolene Products Co.* as well.

our design and understanding of public policy. Later in this paper, I will show how this conflation occurs within our understanding of disability rights. At their most basic levels, the term equality refers that people be treated the same by the law. On the other hand, equity requires that a person be "made whole." Equity and equality do not guarantee specific ends and they are functionally different concepts. Equity and equality serve different purposes in rights provisions—and equality currently dominates the conversation. Equality turns on relative treatment of groups and the assimilation of groups into one social order. Equity, on the other hand, turns on individualized calculus of what is just. In other words, equity relies on accommodation for integration into the social order. Equity allows for diversity and nuance within society allowing for individual decision rather than requiring a mold producing only artificial equality.

This paper uses one case study—disability policy—to demonstrate the absence of equitable principles in the American civil rights regime. Disability is a prime example for examining the tension between equity and equality because the disability rights movement has goals of equity and equality. The disabled seek equal status with the rest of society, but the method by which this status-equality can be achieved is through accommodations. Ultimately, the disability rights movement's primary goal is to achieve functional equity and not surface-level equality.

Contemporary political theory is beginning to consider the tension between equity and equality within social justice provision. Martha Nussbaum acknowledges in *Frontiers of Justice* (2002) that the disabled have yet to be fully included in American society. She states that the disabled's quest to achieve justice, "requires a new way of thinking about who the citizen is and a new analysis of the purpose of social cooperation (one not focused on mutual advantage)… it seems likely that facing it well will require not simply a new application of old theories, but a

reshaping of theoretical structures themselves." Nussbaum claims that John Rawls himself seemed to acknowledge that the problems achieving social justice for the disabled and for those with different nationalities are problems "on which justice as fairness may fail."[11] I draw upon Nussbaum's statement here and argue that the new theory disability rights advocates need is one outside of the equal protection clause or even the due process clause of the Fourteenth Amendment, but one that provides for social rights more broadly—one based in equity.[12] This new equity-based theory would provide a political and legal path to social justice for the disabled and other difference-based social movements.

Samuel Huntington's American Creed claims that at the crux of the American polity's national identity are the of values including liberty, equality, individualism, democracy, and the Constitutional rule of law.[13] He does not provide enough space for considering deeply complex issues like social equity and disability. Huntington's Creed exemplifies the American bias toward inclusionary movements vs. accommodation-based civil rights. Huntington's focus on equality and individualism does not account for the unique needs and experiences of the disabled. When we look closely to the creed's values, something is missing—equity.

As we look to our political development and evaluate the success and failures of our country's social movements and as we look forward, we must begin to consider what role equity will play in America. Since the founding, our progress has been stunted by our obsession with equality. Equality before the law does not work when the root of a society's problem is not in the inability to recognize sameness, but in an inability to fold in difference. Some segments of

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11 PL 21, Nussbaum 3

12 Nussbaum 2.

13 Samuel P. Huntington, *American Politics: The Politics of Disharmony* (Cambridge: Harvard University Press, 1981) p. 14.

society require equal treatment because the core of the injustice they observe is the society's refusal to treat these segments as equal contributors. The goal for these people is assimilation and to belong within mainstream society as it currently stands. Other segments still require treatment that is different from the other segments of society to correct for a societal misgiving. These difference-based movements seek accommodation into society rather than assimilation to the status quo. Difference-based movements want to retain their identity and unique characteristics rather than to be funneled into a restrictive mold applied broadly and crudely. Accommodation is an affront the status quo. While I acknowledge the dangerous nature of this argument, I urge us to think deeply about what we give up when we focus too much on equality before the law and lose sight of law's equity. In some respects, we have achieved equality before the law because people receive equal treatment—what is lacking is justice. Are equality and justice mutually exclusive? They do not have to be.

Groups that exist on the fringes of society begin to organize once they realize their status as an out-group that has the potential of becoming an in-group. They begin to recognize their potential to inspire change and seek to achieve their rightful place in society. Some of these fringe groups, like disability rights activists, recognize their innate and unchangeable differences from the mainstream cultural identity but do not seek to cleanse the group of this alternative identity. Instead, they may decide to embrace their difference and use it to empower a movement. At one point or another, this outsider experience motivates these groups to take one of two paths-- accommodation or equality—to achieve inclusion in societal folds.[14]

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14 Many social movements originated from deviance and difference. African Americans were—and in some ways still are—considered societal deviants when they do not conform to white ideals of how people should behave. The same can be said for other ethnic minorities. The origins of the women's liberation, black power, gay rights, and trans rights movements are based in deviance from the norm.

When studying social movements, we should be careful to characterize theses movements as organic and developing institutions. There is a tendency in political science scholarship to treat social movements as static institutions and ignore their development and ever-changing compositions. As movements evolve, they can shift their focus between assimilation and accommodative goals. As an example, the women's movement shifted between narratives focused on equality with men and narratives focused on female uniqueness. The Equal Rights Amendment narrative focused on how women and men should be treated equally and have should equal status. Alternatively, the narrative of the pro-choice abortion activists centered on women's unique experiences with family planning burdens compared to men. These social movements are not static players in a game with finite ordered preferences but are ever evolving organic entities that respond to the contexts unfolding around them.

In the United States, interest groups often engage in legal mobilization— a strategy by which reformers choose to use litigation in the court system to challenge rules and procedures that affect their constituency in negative ways. Groups use legal mobilization to achieve policy goals and entrench protections in our common law system which heavily relies on precedent. (Galanter 1974). In the United States, social movements build momentum through an emphasis on winning litigation battles. Moving away from a judge-centric understanding of civil rights protection, the prevailing theories of social movements in political science emphasize the bottom-up momentum a social movement gains through community organizing and litigation. Gerald Rosenberg's *A Hollow Hope* (1991) cautions scholars against overreliance on the Supreme Court to uphold civil rights.[15] Charles Epp (1998) emphasizes the role of an

15 Gerald N. Rosenberg, 1991, *The Hollow Hope: Can Courts Bring About Social Change?*, University of Chicago Press.

institutionalized support structure for civil rights advocates and litigants that are necessary to take civil rights cases through the judicial system.[16] With each instance of successful litigation, legal mobilization allows the social movement builds momentum to a broad policy change. This momentum builds through instances of victory at all levels litigation and in various jurisdictions and eventually will hopefully culminate in a legislative victory having durable impact on the goals of the social movement.

Legal mobilization requires, however, a legal mechanism for bringing claims to the court. The U.S. legal system requires that a case be "justiciable" before it will be given attention. This means that the case must be pre-qualified in certain areas. Common points of this prequalification are in a "standing" to sue, proper jurisdiction, and the ripeness of a legal claim. Additionally, a litigant must demonstrate the legal authorization of their claim. This means that a litigant must be able to point to a legal principle that allows the litigant to bring a claim. In civil rights, this legal principle is often found in legislative authorizations of private rights of action. A private right of action is a legal principle, often but not always rooted in legislative or constitutional text, that allows an individual to bring a claim against a public or private entity in a court of law based on a public statute. This means that a litigant with a private right of action can individually sue a governmental or private entity to enforce their rights violation claim. If there is no private right of action, an individual would need to rely on the government to enforce the individual's claim to a right.

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[16] Epp, Charles R. 1998. *The rights revolution: lawyers, activists, and supreme courts in comparative perspective*. Chicago: University of Chicago Press.

In terms of disability rights claims, the ADA, as interpreted by the courts and the EEOC, creates an implied private right of action for a disabled individual to claim discrimination on the basis of disability.[17] Regardless of its status as an implied private right of action to enforce a public statute, the ADA's authorization is widely accepted. This private right of action empowers individuals to seek redress for civil rights violations, but it places the onus of civil rights enforcement on the private individual and not on the government. Because civil rights are interpreted in terms of the due process and equal protection clauses of the Constitution, statutory protections are necessary to further flesh out mechanisms of civil rights. The ADA is one example. However, as we can clearly see, these statutes are not enough. This problem is only exacerbated by the civil rights enforcement regime that is farmed out from federal enforcement procedures to the "private right of action" contained in most federal and state civil rights laws. Sean Farhang outlines these problems in his 2010 book, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.*[18]

Unprotected civil rights in this country range from voting rights to fundamental equal protection claims to questions of discrimination based on immutable characteristics. This lack of protection moves marginalized groups to action. In order to enforce civil rights, groups turn to the courts. In the case of social movements, constitutionally-based legal arguments are paramount for achieving tangible goals. Constitutionally-based doctrine is widely considered difficult to overturn and has a national policy setting effect. Rosenberg's *Hollow Hope* concludes

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[17] 28 CFR §36.501 and 42 USC § 12188(a)(1) "The remedies and procedures set forth in [the Act] are . . . provid[ed] to any person who is being subjected to discrimination on the basis of disability in violation of [this Act]."

[18] Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.*, 2010.

the Supreme Court alone is unlikely to be able to make national policy on its own. While a constitutionally-based doctrine is difficult to overturn outright, the Court may incrementally pull back on the scope of the policy's application. However, people still consider the Supreme Court to be the final guard protecting the public against rights violations.

Whereas other countries explicitly ensure civil rights protection of minority groups (either specific groups or generally), the United States Constitution has no textual provisions so doing.[19] Instead, we rely heavily on the due process and equal protection clauses of the Fourteenth Amendment.

There is no "equity protection" clause in the United States Constitution, but for some people seeking rights protection the equal protection clause does not go far enough. An accommodation may be required for some people to achieve true inclusion in society.

The disabled, among other outside groups, requires accommodations in order to achieve self-actualization. For the disabled, the form self-actualization takes may look different across different categories of disability. In order for self-actualization on any individual level to be possible, accommodations must be made. The prevailing understanding of accommodation in terms of disability is qualified by the word "reasonable." The ADA does not call society to provide any accommodation a disabled person might require, but only those deemed "reasonable" by a court of law. Examples of reasonable accommodations include providing additional unpaid leave, modifying the employee's work schedule, and reassigning the employee to a more appropriate vacant position." Employers, according to Ruth O'Brien, used the qualification of a "reasonable" accommodation to challenge the ADA through litigation. These

challenges, resting on the notion of an "undue hardship" to the employer were relatively successful.[20] Reasonable accommodation cases turned on inconvenience to the employer to provide the accommodation rather than on the disabled individual's requirement of the accommodation. In essence, the ADA began to focus on the needs and burdens of the employer rather than on the disabled as was originally intended.

Social justice is complicated and difficult. Individualized social justice thorough accommodation is even more difficult because it places a larger burden on the institutions charged with providing justice. Accommodation on the basis of disability, while onerous, is necessary if we are to include one of the largest marginalized groups in American society. The greatest difficulty for accommodation-based justice is our reliance on equality legal mechanisms. Our constitutional order promotes surface level equal treatment and does not emphasize society's responsibility to provide equitable opportunity for the disadvantaged. As we struggle with growing inequity and inequality in the coming century, we will continue to face concerns about our constitutional structure and civil rights enforcement mechanisms.

II. Challenges to Integrating Equity-Based Civil Rights Regimes

This paper's theorization of equity-based and equality-based civil rights regimes is generalizable to other social movements seeking civil rights implementation. Examples include African Americans, women, and the LGBTQ population. Other cases exhibit the same tension

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[20] It is important to distinguish between an "undue hardship" as applied to accommodations for religious practice and disability and the "undue burden" standard applied in abortion cases. Undue hardship refers to the challenge undertaken by an employer or other institution that requires a proactive action to adapt a situation to the unique needs of an individual. An undue burden is a standard produced by *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) that prevents a governmental entity from placing restrictions on the right of a person to obtain an abortion.

between accommodation and assimilation strategies. Tensions between equity and equality provision arise between the African American civil rights movement and Black power movement. Black power sought more hard-lined policy reform focusing on the uniqueness of African American experiences where the equality-based movement for African American civil rights focused more on desegregation and inclusion in the mainstream white society. The women's liberation movement faced tensions with more traditional women's groups. Women's civil rights narratives often overlap but can just as easily stand at opposite sides of the ideological scale. Pro-life women face tensions with pro-choice feminists. Women working outside the home tend to stand in philosophical opposition to women who raise children at home. Trans activists face similar tensions with the larger LGBTQ activist community. Recently, the gay and lesbian communities pushed for marriage-equality, a movement where members sought the same status as non-LGBT individuals. The marriage-equality movement based its narrative that the love, affection, and self-fulfillment enjoyed by straight couples should also be available to members of same-sex couples. Equality-oriented activists have not been able to translate their support for transgender issues. Transgender narratives often rely on how the trans experience is wholly different from a cis-gender experience. The current narrative of transgender activism is still based in this "different" identity.

Equity-based civil rights regimes benefit social movements that are unable to conform to mainstream society through equal treatment. Equity-based civil rights are necessary where equality-based civil rights enforcement mechanisms do not quite clear the bar of what our society deems "just."

Many cases of civil rights activism originate with deviant social groups and grassroots activism. The impetus of a social movement seeking equity, like all other out-group

organizations, is based in "otherness" and "outsider" mentality. The outside group, instead of conforming to the status quo, decides to maintain its "outsider" mentality and unique identity by seeking accommodation. Outside groups looking for "special" exceptions are a harder sell than an outside group seeking to be treated the same way as the inside group. Accommodation, however, is antithetical in a culture that values equality over all else.

An accommodation by its nature is an exception. I argue that when people ask for these exceptions or accommodations—they may intentionally or unintentionally—be working against the normalization expected of American society. Our culture has a tendency to rebuff these special provisions. It is possible that from the viewpoint of the accommodating institution, there is a tension between providing an accommodation for an employee and disruption among other individuals inside the institution. It is additionally possible that it may be incredibly burdensome and, in some cases, practically impossible for an institution to provide an accommodation a disabled individual. For example, accommodation for a disabled employee—especially if the disability is not visible—may not always viewed favorably by other employees. If the disability requiring accommodation is not visible, other non-disabled employees may not understand that the special treatment is provided because of a disability and not out of favoritism. Coworkers may not realize the accommodate coworker has a disability at all. Also, due to medical privacy laws, the employer would be prohibited from revealing the accommodated employee's disability to other employees. Instead of understanding the accommodation to have an inclusionary purpose, the other employees may perceive the accommodation as special treatment.

Equal protection does not logically account for accommodations but is better suited to account for treating people in the same or similar ways. Courts can invoke the principles of equity when they find the law does not allow for the right solution. A classic example is where

enforcing a contract that, under all other circumstances, would be enforceable under law but nonetheless violates some fundamental principle of justice. In this situation, the presiding court would invoke equitable principles to reach the right solution.

Moving to a more equity-based civil rights enforcement regime has considerable practical implications which I consider here. Currently, much of the legal system's procedural reforms of the last few decades are designed to streamline the courts ability to handle increasing caseloads. This includes the professionalization of court staffs and reduction of docket size by encouraging out-of-court settlement or arbitration. These reforms are intended to allow judges to give more attention to difficult cases. The move to an accommodation-based civil rights system would put a greater burden on the courts at a time when there is considerable movement to lighten their work load. Accommodation-based systems require a higher burden on the court—especially at the district level.

Accommodation-based litigation also requires the courts to enforce the provision of an accommodation as a good rather than act a pure arbiter of the case. This means that when a court has little to no enforcement power would be hard-pressed to actually see its rulings implemented. American courts do not have a designated enforcement mechanism and must rely on other entities to implement and enforce their rulings. A ruling for an accommodation triggers an affirmative action from a party to a case whereas a ruling against a discriminatory activity only requires passive action—that the offending party no longer engage in discriminatory action. Several studies on judicial behavior attempt to understand how a court's behavior will change based on the difficulty of decision enforcement.[21]

21 Hall, Matthew E.K. 2011. *The Nature of Supreme Court Power*. New York: Cambridge University Press.

If we are to reform our civil rights regime and move to an equity-based system favoring accommodation, we should look to other countries for guidance.

A. Comparing Constitutions:

American-centric studies of justice often assume the rest of the world operates in similar ways because we believe so many world constitutions are in sync with our own. However, this assumption does not reflect reality. In order to determine how other countries treat equity principles within their constitutional structures, I searched the texts of constitutions worldwide for the term "equity" and I ran a separate search for the term "equality." Using the Constitute tool from the Comparative Constitutions Project, I ran a search for constitutions containing the word "equity." This initial search for equity yielded 51 results from different national constitutions.

Of this body of constitutions examined, 45% of constitutions with equity mentioned in text invoke equity in a social justice context. Constitutions containing reference to legal principles of equity occurred in 41% of constitutions including the United States and the United Kingdom.[22] This data does reveal some overlap. Some constitutions mention both equity in terms of social justice and legal principles of equity. I also coded for constitutions that mention the term

Hall, Matthew E.K. 2014. "The Semiconstrianed Court: Public Opinion, Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation." *American Journal of Political Science*. 58:2, 352-366.

Epstein, Lee and Knight, Jack. 1998. *The Choices Justices Make*. Washington DC: CQ Press.

Staton, Jeffrey K and Vanberg, Georg. 2008. "The Value of Vaugeness: Delegation, Defiance, and Judicial Opinions. *American Journal of Political Science.* 52:3 (504-519).

[22] Equity invoked via a takings or imminent domain clause only yielded one constitution. Equity in terms of the financial market came up in 17% of these constitutions.

"equity" and "equality" within the same constitutional provision. Only 10% of constitutions use both words in a single provision. A table is included in Appendix I.

The main point of contrast between constitutions invoking social justice equity and constitutions invoking legal principles of equity in terms of how their judicial systems and are designed. This data reveals that the worlds' constitutions tend to invoke equity in social justice contexts at a much higher rate than anticipated. For example, Algeria's constitution states, "The more broad statement of equity, "The state shall promote social development by:… b. Promoting social justice, as a duty of the state, through a fiscal policy which ensures justice, equity and solidarity in all areas of national life."[23] In contrast, the United Kingdom's constitutional understanding of equity sits squarely within the context of legal principles of equity. While the U.K. does not have a single, continuous document operating as its constitution, the following provision receives constitutional status. The Senior Courts Act of 1981 reads,

> Subject to the provisions of this or any other Act, every court exercising jurisdiction in England or Wales in any civil cause or matter shall continue to administer law and **equity** on the basis that, wherever there is any conflict or variance between the rules of **equity** and the rules of the common law with reference to the same matter, the rules of **equity** shall prevail.[24]

The United States' Constitution invokes two provisions in Article III and the Eleventh Amendment that are similar to the U.K.'s constitutional provisions concerning equity and judicial power. The full text of Article III, Section 2 reads,

> The judicial Power shall extend to all Cases, in Law and **Equity**, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of

23 Angolan Constitution (2010), Title III, Chapter I, Article 90

24 United Kingdom, Senior Courts Act of 1981, Part II, Heading 4, Subheading 1491

> another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[25]

The Eleventh Amendment reads,

> The Judicial power of the United States shall not be construed to extend to any suit in law or **equity**, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[26]

In Article III, the article describing judicial power, the U.S. Constitution extends federal judicial power to "all Cases, in Law and Equity." In the Eleventh Amendment, the Constitution expands on the powers described in Article III and actively restricts the federal judicial power when certain litigants are involved on the basis of sovereignty. The Eleventh amendment departs from Article III and reads "law *or* equity" instead of "law *and* equity." (Emphasis added). This leads scholars to understand equity as a concept outside of the law itself, but within the confines of a legal boundaries implemented by a judge or other fact finder if need be.

III. The Societal Problem of Disability

The disabled experience varying levels of inclusion within the status quo. Our societal understanding of disability has changed significantly over time. The disabled have been considered societal outcasts and even sometimes became tokenized entertainers. Eventually, society moved to relegate the disabled to institutions and care facilities where they would not interact with the public at large. The modern disability rights movement worked against mass institutionalization and toward methods of allowing for self-actualization. Before the modern disability rights movement, the disabled were relegated to the edges of society for their deviance

25 The United States' Constitution (1789), Article III, Section 2.
26 The United States' Constitution (1789), Amendment XI.

from "normal" society. The civil war pensions for veterans was the first social distribution policy for disabled individuals in the United States. But, as Theda Skocpol's *Protecting Soldiers and Mothers* demonstrates, these protections for the disabled was short lived and did not last through the Progressive era.[27] After World War II, at a time we typically begin the periodization of the civil rights era, American society was inundated with veterans, many of whom bore war-related disabilities. They were no longer "normal." The 1950s and 1960s were obsessed with "normalcy" which prompted the obsession with integration and assimilation. The disabled were deviant from the status quo of a "whole man." The "whole man" theory of disability has plagued the difference-based sector of the disability rights movement ever since. The "whole man" theory of disability stems from the medical-rehabilitation models of disability Ruth O'Brien counters in *Bodies in Revolt*. (2005). The "whole man" theory relied on healing or curing a disability instead of empowering a disabled individual to live life within the bounds of their natural abilities. This theory permeated public attitudes as well as disability policy. O'Brien rebuffs the "whole" man theory of disability and proffers instead a theory of self-actualization.

The disabled were deviant from the status quo of a "whole man." We see remnants of the whole man theory of disability in workers compensation processes and tort law. While it makes sense for a worker's compensation tribunal to weigh factors of returning someone to "whole" status after a job-related injury, the concept does not translate well to accommodation on the basis of disability cases. Disability cases, where there was no on the job injury, do not assume that the disabled individual is not already a whole person, but instead is a person with different

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27 Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States*, Harvard University Press. 1992. Part II, 131-35, 151.

Skocpol, Theda. 1993. "America's First Social Security System: The Expansion of Benefits for Civil War Veterans". *Political Science Quarterly*. 108:1. 85-116.

abilities. The insinuation that a disabled person is not already "whole" in terms contributes to society's continued ill-treatment of disabled individuals.

The political science literature devoted to explaining the development of civil rights laws is almost exclusively devoted to the study of racial minorities and women. This is true because these movements are highly visible and constitute centuries of struggle for equality. We know the names of prominent activists for these movements—Martin Luther King Jr., Rosa Parks, James Baldwin, Malcom X, John Lewis, Jesse Jackson, Wilma Mankiller, Betty Frieden, and Gloria Steinem. Relatively few people and even fewer scholars seriously consider the precarious place of the disabled in our society and we are not as readily able to produce the names of the disability rights movement's leaders. Wade Blank, Justin Dart, Judy Heumann, and Ed Roberts are not yet household names.[28]

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Wade Blank founded ADAPT (American Disabled for Attendant Programs Today) and the Atlantis community for the disabled in Denver, Colorado, in response to notorious nursing home abuse in the area. Justin Dart, who had polio, was an activist in the de-segregationist movement of the 1960s, a founding member of the American Association of People with Disabilities (AAPD) and is considered the "godfather of the ADA." Judy Heumann developed polio in her youth and was active in the Clinton administration's Department of Education and is known for her advocacy in the early disability rights movement and for children with disabilities educational programs. Ed Roberts is considered a pioneer in the independent living movement out of the University of California at Berkley. Like many of his fellow disability rights activists, Roberts coped with polio and mobility disabilities.

See: O'Brien 2004, Woodward, Stephanie, Center for Disability Rights, "A Short History of Justin Dart, Jr., Father of the ADA." http://cdrnys.org/blog/advocacy/a-short-history-of-justin-dart-jr-father-of-the-ada/. Pelka, Fred and Fay, Fred.2002. "Justin Dart Obituary," *Ability Magazine.* https://abilitymagazine.com/JustinDart_remembered.html . Judith Heumann, Oral History Interview, Paul K. Longmore Institute on Disability, Spring 2014, Diva, San Francisco State University https://diva.sfsu.edu/collections/longmoreinstitute/bundles/23064. O'Hara, Susan P. 1994. Oral history interview with Edward V. Roberts. https://www.theindependencecenter.org/disability-rights-activist-highlight-wade-blank/

The disability rights movement is now receiving more attention in political science. The movement's activism in the late 1970s and 1980s, with legislative allies, successfully pressured the Bush administration to pass the Americans with Disabilities Act. The ADA's passage was thought to be the high-water mark of the disability rights movement, but like with other landmark pieces of civil rights legislation, the promises are more difficult to implement than the enthusiasm around the policy and the legislation itself suggests. [29] People know the ADA exists because they are confronted with evidence daily. There are ramps to public buildings, designated parking spaces for individuals in most parking lots, and closed captions are available on television sets. What people do not see is the functionality of the ADA. The ramps outside buildings are not always maneuverable for mobility impaired individuals. Parking spaces may exist, but they are not wide enough for a chair-bound individual to get out of their vehicle. Closed captions are sometimes inaccurate. With the lack of academic study disability rights policy receives, data on attitudes toward the disabled is sparse and inconclusive. We do not yet know how serious resentment of disabled accommodation truly is. But, we know this resentment exists. Clint Eastwood, a prominent American actor, refused to convert his bed and breakfast in

[29] For example, many, including the lawmakers involved in seeing the ADA's passage do not fully appreciate the way the disabled can be included in society. The emphasis here is on *inclusion*, not integration. For example, when signing the ADA into law, President George H.W. Bush said, "And now I sign legislation which takes a sledgehammer to another wall, one which has, for too many generations, separated Americans with disabilities from the freedom they could glimpse, but not grasp." President Bush seems, from this very quote to not entirely "grasp" the difficulties of the disability rights movement himself. For many of the people seeking relief and a path under this law, many of them could not physically glimpse or physically grasp anything due to their difference physical abilities. This disability rights law affected many blind individuals or those with mobility restrictions or even those who did not have hands for which to "grasp." This statement, likely not written by Bush himself, nevertheless bears interesting implications. Bush's metaphorical language signals the insidious ableism that marks how the disability law has been enforced. By focusing on integration and ableism rather than difference, the goals of the disability rights movement are unrealized.

Carmel, California to accommodate people with disabilities. He saw his defiance as standing against disabled people's "whining" and received an onslaught of media attention for his obstinance.[30]

The very nature of an accommodation requires specialization tailored to a specific individual—a deviation from the "normal." In spite of the individualistic nature of American society, our institutions are designed to meet the needs of the "normal." The disability rights movement is steeped in an understanding of the "normal" vs. the "non-normal." Our societal understanding of disability has changed significantly over time. Before the modern disability rights movement, the disabled were relegated to the edges of society for their deviance from "normal" society. The disabled were defined as a group and as individuals according to their medical infirmities. The disabled were considered to be such a burden to society that, under certain sets of circumstances, they were legally prohibited from reproducing.[31] After World War II, at a time we typically begin the periodization of the civil rights era, American society was inundated with veterans—many of whom bore war-related disabilities. They were no longer "normal." The 1950s and 1960s were obsessed with "normalcy" which prompted the obsession with integration and assimilation.[32]

Our culture has a tendency to rebuff these special provisions of accommodation which may stem from our society obsession with normalcy and assimilation. From the viewpoint of the accommodating institution, there is a tension between providing an accommodation for an

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30 Johnson, Mary. 2003. *Make Them Go Away: Clint Eastwood, Christopher Reeve, and the Case Against Disability Rights*. Louisville, KY: The Avocado Press. 151.

31 At this time, the scientific study of genetic selection, then called eugenics, was misappropriated by the government to prevent those deemed "unfit" from reproducing. An example is *Buck v. Bell* 274 U.S. 200 (1927). This case has never been overturned, and still carries precedential value.

32 O'Brien 2001. 75-79.

employee and disruption among other individuals inside the institution. For example, accommodation for a disabled employee—especially if the disability is not visible—is not always viewed favorably by other employees. Instead of understanding the accommodation to have an inclusionary purpose, the other employees may perceive the accommodation as special treatment. There are those that would see a religious accommodation—an employee who cannot work on the Sabbath and is therefore given a different and in some ways more preferable shift—as a parasitic abomination to the mutual advantage. A non-disabled worker might see a disabled coworker receiving a telecommuting accommodation as unfair and therefore parasitic. A university applicant who is "passed over" for admission in favor of a candidate benefiting from an affirmative action initiative may claim superior merit or an unequal playing ground. If a "normal" person cannot be convinced of the mutual benefit of social movements demanding difference-based policy outcomes, the movement's endeavor will be undercut.

IV. Identity and Disability

In spite of a similar inclusionary goal, tangible tensions exist between disability rights activists and African American rights activists. Why have these groups faced such strong division over similar goals? In fact, the disability rights movement owes much of its success to the tactics employed by the African American civil rights activists of the 1960s. Using the lens of intersectionality to examine the disability rights movement is becoming increasingly important. According to medical statistics, members of racial minorities are more likely to struggle with disability than whites. (Erkulwater, 2018). Existing studies of disability policy history are hyper-focused on the experiences of white individuals. Erkulwater (2018) opens her study with a description of the sit in that took place April 1977 in San Francisco's Health,

Education and Welfare (HEW) federal building protesting the Carter administration's lack of effort to implement Section 504 of the Rehabilitation Act of 1973. This sit in is one of the lesser known episodes of peaceful activism despite the demonstration lasting nearly a month, with twenty-five straight days of demonstration. Erkulwater describes this demonstration as a broadly inclusive collection of minority groups that also had disabilities. Although this protest was coordinated by the American Coalition of Citizens with Disabilities (ACCD), the sit in also included support from the gay rights group known as the Butterfly Brigade, and the Black Panther Party. This sit in was intentionally designed by the ACCD to emulate the tactics of the African American civil rights movement and to symbolically connect disability rights activists and civil rights activists as pursing the same end—full participation in the American social order. This historical account of a particular instance of disability rights activism drawing on the African American experience allows us to ascertain how strong the African American civil rights movement's influence on the disability rights movement truly was.

One possible reason for the remaining tension between African American rights activists and disability rights activists is that Black people tend to identify as black first and disabled second. The literature on African American group identity politics invokes the concept of *linked fate*. (Dawson, 1994; Gay & Tate, 1998; Jaynes & Williams, 1989). Linked fate describes black group consciousness based in the collective understanding that "individual life chances are inextricably tied to the race as a whole" and there is a psychological impetus for group consciousness and loyalty based primarily on racial identity[33] In her 2005 study, Evelyn Simien uses survey

33 Evelyn M. Simien, 2005. "Race, Gender, and Linked Fate," *Journal of Black Studies* 35:5, 529-550. Simien employs evidence from a survey instrument to ascertain the levels of linked fate experienced between black men and black women.

responses to ascertain the difference between black men and black women's sense of linked fate. Supporting our move toward understanding the world through an intersectional lens, Simien finds that Black men identified more with her study's conceptualization of the Black political agenda than Black women which indicated the women struggled more with gender issues. Other empirical work shows that whites, women, and other identity groups do not exhibit strong collective linked fate—which in turn leads to issue fracturing.[34]

Conceptualizations of identity matter. For most, there are prevailing identities that take precedent over other identifications. In this way, identity is made up of layers of characteristics and biographical information making up an individual identity. Collective identity, tends to center on a singular trait shared by a group of individuals—something that suppresses the individuals' other layers of identity that are not held in common. This inability to achieve unifying identify and rhetoric is oddly reminiscent of the women's movement's struggles. For example, the women's movement faced several internal factions. At the National Women's Conference in 1977, one of the most notable schisms bourgeoned to the surface. Women split over support for the Equal Rights Amendment. Women supporting traditional roles and "family values" headed by Phyllis Schlafly faced off against women supporting abortion rights and rights

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34 Claudine Gay and Jennifer Hochschild. 2010. "Is Racial Linked Fate Unique? Comparing Race, Ethnicity, Class, Gender, and Religion."

Claudine Gay, Jennifer Hochschild, & Ariel White. 2016. "American's Belief in Linked Fate: Does the Measure Capture the Concept?" *Journal of Race, Ethnicity, and Politics*. 1:1, 117-144.

Sanchez, G. (2006). "The Role of Group Consciousness in Political Participation among Latinos in the United States." American Politics Research 34(4): 427-450.

Sanchez, G. (2008). "Latino Group Consciousness and Perceptions of Commonality with African Americans." Social Science Quarterly 89(2): 428-444.

for lesbian women led by Gloria Steinem. This event received substantial media attention and the narrative of "family values" women vs. "pro-choice" women permeates any discussion of women's rights in the modern era. Additionally, because the women's movement, at least until recently, failed to adopt intersectional attitudes, the movement was unable to include non-white women's viewpoints and was further unable to incorporate non-white women into their strategic choices. The African American disabled, because of the strength of linked fate principles, would likely identify as African American above their coexistent identity as disabled. The white disabled—having never had to rank order their identities as a racial group due to occupying a dominant racial space—identify as disabled first. Surveys of the disabled who also identify as African American, Latino, LGBTQ, Asian, or another marginalized group would be helpful to ascertain how these groups rank order their identities.

With the increase in scholarly attention to studying the intersectionality of identity and how public policy is and should be created to account for disenfranchised people, a thorough study of the disability movement is necessary. Currently more scholars are starting to identify this gap in the literature and are starting to turn their attention to the subject.[35] A product of black feminist political thought, Kimberle Crenshaw coined the term "intersectionality" to describe an intellectual framework that accounts for how mechanisms of power are interconnected in a way that compounds marginalization of certain peoples. Crenshaw's theory allows for varieties of marginalization, including race, gender, class, sexual orientation, age, and disability, exist within one person.

35 See Erkulwater 2018, Baudot 2017, Pinto 2017, Dargan 2016, Gebredikan 2012, and Prince 2010.

V. Historical Origins of the Disability Rights Movement, Disability-Specific Activism, and the Beginnings of Issue Aggregation.

a. Historical Origins of the Disability Rights Movement

The historical disability policy literature periodizes eras of disability rights in a tripartite structure: 1) the charity model, 2) the medical model, and 3) the sociopolitical or minority model of disability. This tripartite model of disability rights policy bears some use in that it provides three lenses through which to view disability policy. However, moving forward, it is best to understand the three models as influencing and complementing one another with the sociopolitical model at the forefront. Nevertheless, it is important here to quickly outline the different models and their historical implications for the development of the disability rights movement.

Originally, disabled people were forced to rely on charitable organizations and most often churches in order to receive necessary services. Additionally, the disabled were treated by the state as "problems" to be dealt with and brought shame to their families. "Within families, persons with disabilities were hidden, disowned, or even allowed to die through the withholding of life-support services."[36] Even colonial immigration polices prohibited disabled people from

36 Fleischer and Zames, at 11. Quoting Frank Bowe, "An Overview Paper on Civil Rights Issues of Handicapped Americans: Public Policy implications," *Civil Rights Issues of Handicapped Americans: Public Policy Implications* (Washington, D.C.: A Consultation Sponsored by the United States Commission on Civil Rights, May 13-14, 1980), 8-9.

entering the country.[37] As time progressed, disabilities came to be nearly exclusively considered a medical issue from the time of 1817 to the end of the First World War.[38]

The sociopolitical/minority era, beginning around the early 1930s, began to recognize the true diversity among disabled people. Disability affected individuals from all races, genders, ages, religions, socioeconomic backgrounds, levels of education, and regional origins. Groups representing their interests include comprehensive groups advocating on behalf of all persons with disabilities as well as those representing single disabilities. Other comprehensive disability activist groups include the National Council on Independent Living (NCIL), The National Organization on Disability, and the America Association of People with Disabilities.[39] Examples of single-disability groups are: The National Federation of the Blind, the National Association of the Deaf, the Paralyzed Veterans of America, the National Alliance for the Mentally Ill, and several HIV/AIDS advocacy groups among many others.[40] From this desire for autonomy came the sociopolitical movement for disability rights. This was in essence a rejection of the previous charity and medical models of disability.

b. Issue Aggregation

The 1977 sit in orchestrated by the American Coalition of Citizens with Disabilities ACCD discussed earlier in this paper exemplifies how the disability rights movement began to aggregate

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37 Doris Zames Fleischer and Frieda Zames, at 11. *Civil Rights Issues of Handicapped Americans: Public Policy Implications* (Washington, D.C.: A Consultation Sponsored by the United States Commission on Civil Rights, May 13-14, 1980), 8-9.

38 Id.

39 Scotch, Richard. 1984. *From Good Will to Civil Rights: Transforming Federal Disability Policy*. Philadelphia: Temple University Press. at 180.

40 Id. at 181.

disability issues into one voice. The protest coordinated activists from across disability designations. One activist, Judith Heumann, suffered from polio and required a wheelchair, participated in organizing the demonstration and went on to become one of the most influential disability rights activists of her generation. Heumann even served as the Assistant Secretary of the Office of Special Education and Rehabilitation Services in the Department of Education during the Clinton Administration. She described the San Francisco protest as a moment where the disability rights movement coalesced and made great strides toward empowerment and rejecting pity and charity as solutions to disability marginalization. She remarked, "Through the sit-in we turned ourselves from being oppressed individuals into being empowered people. We demonstrated to the entire nation that disabled people could take control over our own lives and take leadership in the struggle for equality." She went on to describe the diversity of those participating in the San Francisco protest, "Blind people, deaf people, wheelchair users, disabled veterans, people with developmental and psychiatric disabilities… all came together."[41]

The disability rights movement seemed to find that issue aggregation was a successful tactic and the aggregation dominates contemporary disability policy. The ADA is a piece of legislation that aggregates rights for the disabled across a variety of contexts including employment, public accommodation, public services, telecommunications, and discrimination. It is however not a fully comprehensive piece of legislation that is supplemented by the previously mentioned Genetic Information Nondiscrimination Act (GINA), the Individuals with Disabilities Education Act (IDEA), and the Pregnancy Discrimination Act (PDA), among others. The ADA's provisions seem to not be as connected as other large civil rights legislation. Aggregation of

41 Judith Heumann, Oral History Interview, Paul K. Longmore Institute on Disability, Spring 2014, Diva, San Francisco State University https://diva.sfsu.edu/collections/longmoreinstitute/bundles/23064.

particularized conditions into one overarching social movement for the disabled presents scholars with an interesting puzzle. Why was such a large and diverse group able to achieve a comprehensive policy goal where women were not? An important characteristic of the disability rights movement is the aggregation of a multitude of different physical and mental conditions under the umbrella term of "disability." The disability rights movement traces its lineage back to more specialized interest group activism. As these groups gained momentum, they began to work together, as many other interest groups representing other social movements joined forces. Combining efforts required a streamlining of message and rhetoric. These specialized interest groups that had previously organized around specific medical conditions coalesced into the modern disability rights movement.

Schattsneider's *The Semisovereign People* (1975) argues that in order for social movements to achieve success, they must be able to expand the scope of the conflict by "extending the sphere" of their movement. This might be true—but what becomes of a social movement that becomes so broad that it represents an aggregation of all interests. Is this the ultimate goal—to build an all-inclusive movement—or does it reflect when a social movement becomes absorbed by the status quo. This is a cyclical failing-- the movement rises against an oppressor, it expands to include segments of the oppressing population to become palatable, and then expands so widely that it becomes the status quo itself.

The ADA aggregates rights for the disabled across a variety of contexts including employment, public accommodation, public services, telecommunications, and discrimination. The modern legal definition of disability is so broad, it is difficult to find a condition that does not constitute disability. The range of disabilities covered under the current disability rights policy is as broad as it is deep. In terms of policy depth, there is no threshold of life-activity

disruption that must be met.[42] Any instance of life-activity disruption qualifies for protection under the ADA. In terms of policy breadth, if a physical or intellectual condition is found to interfere with a life activity, the condition qualifies as a disability and is thus protected under the ADA.

The aggregation of physical and intellectual conditions under one definition of disability helped secure support for the Americans with Disabilities Act. However, this aggregation becomes problematic when it detracts from a group's agency to pursue policy goals that benefit themselves in more targeted ways. Additionally, when the definition of disability becomes so broad, it loses its categorical and identifying meaning. This over-inclusion of the legal definition of disability has negative effects including a triggering of non-disabled resentment toward the "special treatment" a disabled person may appear to receive. A second negative affect of this broad aggregation of disabilities is that issue aggregation necessarily requires the court system to do more heavy lifting when applying accommodation-based policy. This requires more work at the district level fact finder to discern what a "reasonable" accommodation entails. The

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[42] 42 U.S. Code § 12102, §§ 1. The ADA states the definition of disability as, "a physical or mental impairment that substantially limits one or more major life activities; a record or history of such impairment; or being regarded as having a disability."[42] This statutory definition is made up of several terms of art including "substantially limits" and "major life activities."

42 U.S. Code § 12102, §§ 2 (A) gives examples of "major life activities" including: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. (B) gives extends this definition to the "operation of a major bodily function" including: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

EEOC, "Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA" https://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm

29 CFR § 1630.1(4).

prevailing understanding of accommodation in terms of disability is qualified by the word "reasonable." The ADA does not call society to provide any accommodation a disabled person might require, but only those deemed "reasonable" by a court of law.[43] All cases are highly fact-oriented and will require more extensive government resources than discerning only if discrimination occurred.

VI. The Expanding Definition of Disability Through The Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and the Amendments Act of 2008.

A. The Rehabilitation Act of 1973

Prior to 1973, disability rights activists attempted unsuccessfully to amend the Civil Rights Act of 1964.[44] Until the Rehabilitation Act of 1973 passed, there was virtually no civil rights protections for the disabled. The Rehabilitation Act of 1973 was enacted on September 26, 1973. Section 504 of the Act contains civil rights guarantees to people with disabilities. This section seeks to shield disabled individuals from discrimination "based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of employers such as avoiding exposing others to significant health and safety risks."[45] This statute only applies to the federal government and government contractors.

B. The Americans with Disabilities Act of 1990

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43 The definition expands on its previous statement with an example from the ADA. "Under [the ADA], an employer must make reasonable accommodations for an employee's disability. Examples of reasonable accommodations include providing additional unpaid leave, modifying the employee's work schedule, and reassigning the employee to a more appropriate vacant position."

44 Blanck at 1-7.

45 Lindemann at 13-18.

The Americans with Disabilities Act was a bipartisan legislative manifestation of disability rights policies signed into law on July 26, 1990 by President George H.W. Bush. The passage of the ADA did not overturn the Rehabilitation Act, but actually expanded the protections afforded in the Rehabilitation Act to more people, especially those employed in the private sector.[46] "The ADA [does not] invalidate or limit any other federal, state, or local law that provides a *greater or equal protection* for the rights of individuals with disabilities."[47] Congress's stated purpose in enacting the ADA was to "provide a clear and comprehensive national mandate for the elimination of discrimination against people with disabilities."[48] The findings section of the ADA describes the disabled population as "a discrete and insular minority who have been faced with restriction and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."[49]

The ADA extends the civil rights protections afforded to government employees and contractors to the public at large among other rights provisions. There are five titles of the ADA.[50] Title I, the subject of this comment, encompasses the regulations on employment.[51] Title I applies to all employers who have "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[52] The language barring discrimination based on disability in employment reads,

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the

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46 *Id.*

47 (LINDEMANN 13-11, 13-12, emphasis original, internal quotations omitted).

48 (BLANC p. 2-1 and LINDEMANN, GROSSMAN, AND WEIRICH 13-6).

49 BLANCK, HILL, SIEGAL & WATERSTONE, *id.* at 2-1.

50 BLANCK, 2-1.

51 BLANCK, 2-1.

52 LINDEMANN, GROSSMAN & WEIRICH, *id.* at 13-17.

> hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[53]

Title I also encompasses the "same standards" set out in the regulations implementing §504 of the Rehabilitation Act.[54]

To understand the importance role litigation plays in disability discrimination policy under the ADA, a brief overview of procedural mechanisms is necessary. Litigation of disability cases follows a mechanical procedural structure. First, in employment cases, the individual claiming disability discrimination must present a *prima facie* case demonstrating the necessary evidence for the plaintiff's claim to advance in the legal process. In discrimination cases, the individual claiming disability bears the burden of presenting this evidence. Prima facie means "on its face" or "at first glance." A prima facie case is a procedural instrument typically used in tort cases and is designed to streamline the fact-finding process. If the evidence the plaintiff submits to satisfy the prima facie requirements is inadequate, the plaintiff loses this case and further proceedings are not allowed.

Under the ADA, a disabled individual's prima facie case in the context of employment has three prongs: 1) the employee has a disability, a history of disability, or was perceived by the employer as having a disability; 2) the employee was qualified for the position and was able to perform essential functions of the position with or without reasonable accommodation; 3) the facts of the case suggest that the negative employment-related action was based on the plaintiff's disabled status. For accommodation cases, the prima facie case requires the plaintiff to show that 1) the employee has a disability as defined by the ADA; 2) the employer knew of his or her condition and the employee requested accommodation; 3) the accommodation requested would

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53 BLANCK, 2-1.

54 LINDEMANN, GROSSMAN & WEIRICH, *id.* at 13-11.

have been effective and not placed an undue hardship on the employer and 4) the accommodation was not provided.

To be considered as a "qualified individual" under the ADA, an employee must be able to perform the "essential functions" of the job, with or without reasonable accommodation.[55] This provision of Title I was "intended to preserve an employer's privilege to choose and retain only qualified workers, while circumscribing the privilege with major duties."[56] Employers are given deference to decide which job functions are considered "essential."[57] The EEOC purports to examine the following factors when determining how essential a function is to a particular job position:

> [1] the employer's judgment; [2] a written job description prepared before advertising or interviewing applicants for a job; [3] the amount of time spent performing the function; [4] the consequences of not requiring a person in the particular job to perform a function; [5] work experience of people who have performed the job in the past or people who currently perform similar jobs; [6] the nature of the work operation and the organization structure of the employer.[58]

Particularly, if an employer has made an effort to advertise to potential applicants which particular functions are "essential," that job description may serve as evidence.[59] However, whether a function is "essential" or not must be evaluated in context of the other job duties and the operations of a position as a whole.[60]

Disability cases follow a legal precedent known as the "McDonnell Douglas Burden Shifting Scheme." *McDonnell Douglas Corp. v Green* is a 1973 Supreme Court case that established a

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55 Lindemann, Grossman & Weirich, *id.* at 13-80.
56 Henry H. Perritt, Jr., Americans with Disabilties Act Handbook 33 (1990).
57 Id.
58 Goren at 19.
59 Id.
60 Id. at 33.

burden-shifting procedure holding that if a plaintiff establishes its prima facie case for discrimination the burden then shifts to the employer to provide a legitimate, non-discriminatory reason for the adverse employment action. If the employer satisfies this requirement, the burden then shifts back to the plaintiff to establish the employer's reason for the adverse employment action was simply pretext for discrimination[61] The highly mechanical nature of disability cases—and employment cases in general—are not typically favorable of the employee's position.

Section 511 of the ADA "explicitly excludes certain conditions" from coverage.[62] Sexual orientation, gender identity, pedophiles, exhibitionist, voyeurs, sexual behavior disorders, compulsive gambling, kleptomaniacs, pyromaniacs, psychoactive substance abuse disorders, and illegal drug users are not protected under the ADA. [63] An employee is not protected under the ADA if they pose a "direct threat" to the health or safety of themselves or others in the workplace. [64]

For litigants, proving the existence of a disability or that a specific condition qualifies as a disability, is one of the most difficult critical moments in a case. Ruth O'Brien's *Crippled Justice* demonstrates how the federal court system essentially gutted the original ADA's disability definition application through individual rulings like *McDonnell Douglas*.[65] How do we define disability and how do we limit the class of people who identify as disabled? Disability has an exceedingly nebulous legal definition. There are several working definitions of disability

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61 *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973).

62 Perritt at 24.

63 Lindemann, Grossman & Weirich, *id* at 13-39.

64 Perritt at 85-87.

65 Ruth O'Brien, *Crippled Justice: The History of Disability Policy in the Workplace*, University of Chicago Press. 2001. Her second book, *Voices From the Edge* (2004), is a collection of interviews with individuals who identify as disabled about their experiences within the system created by the ADA.[65]

that I will discuss here in order to demonstrate the range of definitions available. Colloquially, a disabled person is someone who suffers from some type of medical impairment that differentiates them from a healthy person. The folk prototype of a disabled person like is someone who is affected by a clearly ascertainable condition such as blindness or is mobility impaired and restricted to a wheelchair. The legal definitions prove to be more nuanced.

Social security and workers compensation statutes add adjectives to further classify disabilities. The adjectives commonly used to describe the range of disabilities include: developmental, partial, permanent, physical, temporary, temporary total, total, canonical, and civil.

The ADA's states the definition of disability as, "a physical or mental impairment that substantially limits one or more major life activities; a record or history of such impairment; or being regarded as having a disability."[66] This statutory definition is made up of several terms of art including "substantially limits" and "major life activities." Countless legal briefs are filed every year arguing the nuanced application of these terms to factual occurrences in individual cases.[67]

C. The Amendments Act of 2008

The ADA was amended on September 25, 2008. References to the 2008 amendments are indicated using the term "Amendments Act" or "ADAAA." In 2008, eighteen years after the passage of the original ADA, Congress enacted the Americans with Disabilities Act

66 42 U.S. Code §12102, §§1.

67 42 U.S. Code §12102, §§2 (A) gives examples of "major life activities" including: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. (B) gives extends this definition to the "operation of a major bodily function" including: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Amendments Act (ADAAA) in order to "broad[en] the coverage of the Act."[68] The changes and expansions of coverage for the disabled became effective on the first of January the following year.[69] Arguably, one of the most significant changes made to the original policy by the ADAAA is the placement of the word "discrimination."[70] The original ADA prohibited discrimination "against a qualified individual with a disability because of the disability of such individual."[71] The Amendments Act changed the ADA's original language to read: "prohibiting discrimination against a qualified individual on the *basis* of disability."[72] It can be discerned that by making an affirmative change to the original language, Congress intended a different definition to form.

Part of the reason the original ADA was amended was to correct a narrow interpretation of the definition of disability. The ADAAA specifically states that the definition of disability is to be interpreted broadly "in favor of broad coverage of individuals."[73] O'Brien claims this expansion of the definition of disability has more reach than simply making litigation easier on the disabled. She claims, "[The definition of disability] transforms disability from a medical category that involves a limited group of people into one that describes the human condition."[74]

The Equal Employment Opportunity Commission, as the agency charged with enforcement of the ADA, subscribes to this statutory definition. The statutory definition

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68 School Board of Nassau County v. Arline, 480 U.S. 273, (1987).
69 Lindemann at 13-15.
70 Id.
71 Id. (Internal Quotations Omitted).
72 Understanding the New Disability and Genetic Discrimination Laws 19 (Joy Waltemath, David L. Stephanides, Joyce Gentry, Brett Gorovsky, Cynthia L. Hackerott, Deborah Hammonds, Pamela Wolf, eds., 2008). (emphasis added).
73 EEOC, "Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA" https://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm
74 Ruth O'Brien, *Bodies in Revolt: Gender, Disability and a Workplace Ethic of Care* (New York: Routledge, 2005) p. 1.

classifies people with both physical and cognitive disabilities as protected under the law. With our advancement in medical science and our growing societal understanding of mental health, the class of people who identify as having a cognitive disability is growing exponentially.[75] The legal definition of a disability is intentionally broad. This broadness concerns many people who assert concern about the abuse of this definition. However, these concerns can be assuaged by an understanding that even though the definition of disability is broad, the definition and application of accommodation is not.

Statutory or *per se* disabilities are conditions listed in regulations produced by the EEOC interpreting the 2008 Amendments Act to the ADA. A per se disability is, by itself or through itself, a disability its existence cannot be challenged by a fact finder. This function of a per se disability allows a plaintiff claiming discrimination on the basis of disability a "pass" from establishing the existence of a disability in as part of the prima facie case the plaintiff would otherwise be required to present in order for a court to hear his or her claim. This allows for more efficiency in the litigation process because plaintiffs with per se disabilities are not required to prove 1) the existence of a disability and 2) the disability has an effect on the plaintiff's major life activities. Historically, plaintiffs had difficulty passing the initial stage of establishing the presence of a disability in litigation.

The concept of a per se disability did not originate in the Amendments Act, but instead originated in case law. The EEOC recognized the utility of per se designations of disability and created their own list through regulations shortly after the passage of the Amendments Act.

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[75]42 U.S. Code § 12102, §§ 1.

On May 24, 2011, the EEOC proffered regulations listing per se disabilities. These conditions are classified by the EEOC to be disabilities in "virtually all cases."[76] The list provided by the EEOC is not a complete list of all disabilities that can be considered per se disabilities, but it instead leaves open the possibility for a court to hold a disability as per se.

Table 1: Per Se Disabilities under EEOC Regulations

- Autism
- Cancer
- Deafness
- Blindness
- Intellectual Disability (including learning disabilities)
- Missing limbs
- Mobility impairments requiring a wheelchair
- Cerebral palsy
- Diabetes
- HIV
- Multiple sclerosis
- Muscular dystrophy
- Major Depressive Order
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive compulsive disorder
- Schizophrenia

Disability occurs in a variety of forms, intensities, and durations. Some disabilities are outwardly ascertainable by larger community while others are invisible. Due to the relative successes of the disability rights movement, both visible and invisible disabilities are potentially protected the ADA. Individual disabilities, as with any medical condition, are associated with particular symptoms. These symptoms do not always present themselves in the same ways across individuals. Any combination of symptoms and levels of severity are possible. This diversity of disability lends itself to a spectrum of visibility or invisibility. A single type of disability may

76 29 CFR 1630.2(j)(3)(i)-(iii)

manifest itself in an invisible way at one point in time and may eventually transition to a visible disability. The opposite may also occur. Further, the same disability present in two different individuals may manifest itself in a visible way in one person but an invisible way in another. As an example, an individual struggling with an intellectual disability like Tourette's syndrome may exhibit clear markers of the disability like consistent stuttering or violent verbal outbursts to the outside world. Another individual with the same disability may only exhibit mild signs of the syndrome like a mild eye twitch or bouts of anxiety that are not identifiable to other people. On the other hand, some disabilities, like a mobility impairment that results in a need for a wheelchair is highly visible, and in all forms, will be highly visible.

Table 2. Visible and Invisible Disability

Disability	Visible	Invisible	Both
Autism	X	X	X
Cancer	X	X	X
Pregnancy	X	X	X
Blindness	X		
Deafness	X		
Intellectual Disability	X	X	X
Missing Limbs	X		
Mobility Impairment	X		
Cerebral Palsy	X		
Diabetes	X	X	X
HIV	X	X	X
Multiple Sclerosis	X		
Muscular Dystrophy	X		
Major Depressive Disorder	X	X	X
Bipolar Disorder	X	X	X
PTSD	X		
OCD	X	X	X
Schizophrenia	X	X	X
Scoliosis	X	X	X
Chronic Migraines		X	
Post Ovarian Cyst Disorder		X	

When we consider the purpose of the ADA—to protect disabled people from discrimination by the outside world—why would the statute need to protect people with disabilities that are not visible? The answer to this question lies in the anti-discrimination goals of accommodation. While some disabilities may be visible and obvious accommodations are needed to make a community more accessible, some invisible disabilities need less obvious accommodation for the community to by wholly accessible. A wheelchair ramp built to make a museum entrance accessible is a cost society seems willing to bear. But, a "trigger warning" sign placed outside the same museum entrance warning visitors of graphic content intended to help those with Post Traumatic Stress Disorder decide whether to enter a specific exhibit can be deemed "unnecessary" by segments of the community. The source of this disconnect stems from a societal misunderstanding and fear of disability. Related, is the American emphasis on equality instead of equity. Understanding disability accommodation as a form of equity to create social justice has the potential to generate a greater societal empathy for the disabled.

VII. The Future of Disability Rights and Equitable Accommodation

What the study of the development of the political institutions helps us understand is that no path is linear. The path winds, takes sharp turns, dead ends, forks, and sometimes requires building a bridge. When scholars look to the development of social movements, especially those that are marginalized in multiple ways, a failure to recognize the complexity of the path to political change can be devastating to our understanding of social process.

There are still ample opportunities for the disability rights movement to make progress toward their version of inclusion in American society. While attitudes toward the disabled seem to be improving—gone are the days of rampant institutionalization and mandatory sterilization—

the Equal Employment Opportunity Commission still receives upwards of 25,000 charges of disability discrimination a year. Between 1997 and 2017, disability charges make up between twenty and thirty percent on average of all charges filed with the Agency. In fiscal year 2017, the EEOC processed 26,838 disability charges making up 31.9% of all charges filed that year. In 2016, the EEOC processed 28,073 disability charges comprising 30.7% of the charges filed for that year.[77] This steady stream of charges seems to indicate that even with the protections and expansions of the 2008 amendments act, the societal attitude toward the disabled has not been cured. In order to move forward, the disability rights movement should seek opportunity by pushing the boundaries of our legal regime. They should advocate for change via equitable terms rather than on equality grounds.

The disability rights movement is an accommodation-based movement. In order for accommodations to be granted, our understanding of civil rights provision and enforcement needs to be reoriented away from pure equality understanding of civil rights and toward an equitable understanding of civil rights. Equality is not the only path to self-actualization for marginalized groups and may, in fact, cause more problems than it solves. In order for the disabled to achieve self-actualization in society, the accommodation process must be individualized and not predicated on relative equality to those in the status quo.

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77 Equal Employment Opportunity Comission, Statistics, accessed August 7, 2018. https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm

APPENDIX I:
The Disability Rights Movement and Civil Rights Movement Timelines:

Civil Rights Movement Timeline:[78]

1868- The Fourteenth Amendment Passes
1896- *Plessy v Ferguson* upholds separate but equal.
1909- The National Association for the Advancement of Colored People NAACP forms.
1913- President Wilson segregates the federal government.
1948- President Truman desegregates the military.
1953- The first black bus boycott in Baton Rouge, Louisiana
1954- *Brown v. Board of Education of Topeka*
1955- Emmett Till murdered in Mississippi after being accused of whistling at a white woman. Rosa Parks refuses to relinquish seat on a Montgomery Bus, The Montgomery Bus Boycott
1956- The "Southern Manifesto" encouraging resistance to the desegregation mandate issued in *Brown* is signed by 101 southern lawmakers.
1957- The Little Rock Nine begin attending Central High School in Arkansas; The Student Nonviolent Coordinating Committee (SNCC) forms.
1960- The Greensboro Four stage the first sit-in at a whites'- only lunch counter in Greensboro, North Carolina to protest segregation. Ruby Bridges attends an all-white elementary school in New Orleans, Louisiana.
1961- Freedom Rides begin supporting the Supreme Court's ruling banning segregation in interstate buses in *Boynton v Virginia*.
1962- James Meredith begins attending Ole Miss and John F. Kennedy deploys troops to escort Meredith to his classes.
1963- The Sixteenth Street Baptist Church in Birmingham is bombed where four young girls die. The March on Washington takes place and Martin Luther King Jr. delivers his "I Have a Dream" speech.
1964- The Civil Rights Act passes under the Johnson Administration. Freedom Schools opened throughout the south to train community organizers in civil disobedience.
1965- February 21: Malcom X is assassinated in Harlem, New York; March 7: MLK and 2,000 people marched planned to march from Selma to Montgomery leading to a confrontation with police on the Pettus Bridge; March 25: MLK delivers "How Long, Not Long" speech; August 6: Voting Rights Act signed into law; August 11: Watts Riots in Los Angeles break out as a result of tensions between the police and African American community members. 34 people died.

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78 Francis, Megan Ming. 2014. *Civil Rights and the Making of the Modern American State*. Princeton, NJ: Princeton University Press.

Klinkner, Philip and Smith, Rogers M. 2002. *The Unsteady March: The Rise and Decline of Racial Equality in America.* Chicago, IL: Chicago University Press.

Kotz, Nick. 2005. *Judgment Days: Lyndon Baines Johnson, Martin Luther King, Jr. and the Laws that Changed America*. New York: Houghton Mifflin Company.

1966- The Black Panther Party founded by Huey P. Newton and Bobby Seale in Oakland, California.
1967- *Loving v. Virginia* declares state statutes prohibiting interracial marriage unconstitutional; Detroit riots break out in response to tensions between police and African American communities 43 people died.
1968- April 4: MLK is assassinated in at the Lorraine Motel in Memphis, Tennessee
1978- *Bakke v. Regents of University of California* declares racial quotas unconstitutional.
2003- *Grutter v. Bollinger* upholds racial considerations in university admissions.
2013- *Shelby County v. Holder* strikes down Section 5 of the Voting Rights Act.

Disability Rights Movement Timeline[79]:

1817- School for the Deaf established in Hartford Connecticut.
1829- Braille system developed.
1841- Dorthea Dix campaigns for better condition for incarcerated and impoverished people with disabilities.
1880- The National Association for the Deaf founded.
1903- Hellen Keller's autobiography published.
1914- The War Risk Insurance Act enacted.
1917- The Smith-Hughes Vocational Education Act enacted.
1918- The Smith-Sears Veterans Rehabilitation Act enacted.
1920- The Disabled American Veterans of the World War founded.
1921- The American Foundation for the Blind founded; FDR diagnosed with polio; The United States Veterans Bureau established (currently called the Department of Veterans Affairs)
1932- FDR elected president.
1935- Social Security Act enacted.
1956- Disabled people over 50 can qualify for Social Security Disability Insurance.
1960- The Social Security disability program is amended to allow people under 50 years old to qualify for Social Security Disability Insurance.
1962- Edward Roberts secured admission via legal challenge to the University of California. (The same year James Meredith begins to attend Ole Miss).
1965- The Social Security Act is amended and establishes Medicare and Medicaid
1970- Urban Mass Transportation Assistant Act enacted.
1972- Demonstrations in Washington D.C. protesting Nixon's veto of legislation that would be adapted into the Rehabilitation Act of 1973; Edward Roberts established Center for Independent Living in Berkeley, California; The Supreme Court rules in *Mills v. Board of Education* that school-age children, regardless of the severity of their disability are entitled to a free public education
1973- The Rehabilitation Act of 1973 enacted.
1977- Disability rights activists organize protests across the country. The Supreme Court establishes a private right of action under Section 504 of the Rehabilitation Act of 1973 in *Lloyd v. Regional Transportation Authority.*
1979- Disability Rights Education and Defense Fund established.

79 O'Brien 2002.

1981- The United Nations declares 1981 the "International Year of Disabled Persons"; The Center for Disease Control and Prevention issue a report describing what would become the HIV/AIDS epidemic
1988- The Fair Housing Act amended to include protections for disabled persons.
1990- Americans with Disabilities Act enacted.
1995- The American Association of People with Disabilities established.
1996- The Supreme Court holds that the issue of physician-assisted suicide is within the jurisdiction of individual states in *Vacco v. Quill* and *Washington v. Glucksberg*.
1999- The U.S. Supreme Court decides in three employment cases, *Sutton et al. v. United Air Lines, Inc.*, *Murphy v. United Parcel Service, Inc.,* and *Albertsons, Inc. v. Kirkingburg*, that individuals whose conditions do not substantially limit any life activity and/or are easily correctable are not disabled according to the Americans with Disabilities Act.
2002- The U.S. Supreme Court decides in *Toyota v. Williams* that Williams, in seeking a "reasonable accommodation" under the ADA at her workplace, had not demonstrated whether her carpal tunnel syndrome and related impairments had prevented or restricted her from performing tasks of central importance to most people's daily lives.
2008- The ADA Amendments Act (ADAAA) enacted broadening the definition of disability; The Genetic Information Discrimination Act (GINA) enacted.
2011- The Equal Employment Opportunity Commission issues regulations implementing the ADAAA.

APPENDIX II:
Constitutional Mentions of Equity and Equality

Constitutions Containing the Term "Equity" [80]

Country	Social Justice	Takings	Financial	Legal Equity	And Equality
Algeria	X				
Angola	X				
Austria			X		
Bhutan	X	X			
Bolivia	X				
Brazil	X				
Cape Verde	X				
Chile			X		
Colombia	X				
Congo (DR)				X	
Croatia					
Cuba				X	
Dominican Republic					X
Ecuador	X		X	X	X
Egypt	X				
Gambia				X	
Ghana				X	
Guatemala	X				
Haiti	X				
Honduras	X		X		
Indonesia				X	
Iran	X				
Kenya	X				X
Korea			X		
Kuwait	X				
Malaysia			X		
Mexico	X				X
Morocco	X			X	
Nepal	X				

80 Zachary Elkins and Tom Ginsburg (2018), Comparative Constitutions Project.

These provisions invoked equity terms of either 1) social justice, or 2) government takings of private land, 3) financial market equity, and/or 4) legal principles of equity. I denote these different usages of equity in this chart. I also notated which constitutions also mention the term "equality" within this corpus of constitutions.

New Zealand	X			X	
Nigeria				X	
Pakistan	X				
Palau				X	
Panama				X	X
Papua New Guinea				X	
Philippines			X		
Samoa				X	
Sierra Leone				X	
Solomon Islands				X	
Somalia			X		
South Africa	X				
South Sudan	X				
Sudan	X				
Switzerland			X		
Thailand				X	
Tonga				X	
United Kingdom				X	
United States				X	
Venezuela				X	
Zambia				X	

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28 CFR §36.501

29 CFR §1630.1(4).

29 CFR 1630.2(j)(3)(i)-(iii)

29 CFR 1630.2(o)(3)

42 U.S. Code § 12102, §§ 1

42 U.S. Code § 12102, §§ 2 (A)

42 USC § 12111(9)

42 USC § 12188(a)(1)

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