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Preface

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The Americans With Disabilities Act (ADA), signed into law by President George H.W. Bush in 1990, is indisputably a sweeping piece of civil rights legislation that has had a profound impact on the lives of persons with disabilities and, more generally, on the entire American social, political, and economic landscape. The ADA, of course, has not been without controversy and has been the fountainhead for a great deal of debate and discussion, not to mention litigation. Much of the controversy has focused on its interpretation, its appropriate scope, its enforcement, and thus, its viability and effectiveness in protecting persons with disabilities from discrimination. As such, this controversy has shown itself to be a matter of particular concern to constitutional scholars, public policy analysts, social scientists, and practitioners in the area of disability rights. The discussion has become only more pronounced with each issuance of the newest United States Supreme Court decision, the flow of which seems to have continued unabated throughout the past few years.

In the Fall of 2000, to mark the tenth anniversary of the Americans With Disabilities Act, the *University of Michigan Journal of Law Reform* sponsored a two-day symposium to tap into this very discussion in accordance with its mission to "promote the improvement of the law in all areas in which needs are disclosed and useful proposals can be advanced." Over a score of professors from law, the humanities, and the social sciences along with practitioners from the disability rights community came to the University of Michigan Law School to present their insights and offer their proposals for reform in this area. These individuals participated on six different panels dealing with:

- the purposes and the efficacy of the ADA;
- the extent to which "disability" is defined under the ADA and potential conflicts with societal definitions of "disability";
- the impact of ADA on education, especially as it concerns special education;
- the possibilities of coverage for those with mental health disabilities under Title I and Title III of the ADA;
- the constitutional challenges against the ADA, especially as it concerns Title II and its conflicts with the current Court's protection of state sovereignty;
- other avenues by which the ADA might be reformed.

Following the symposium, a number of the presenters turned their presentations and papers into articles, the culmination of which is presented in the eight articles that appear in this double issue. These articles run the gamut of topics that were considered during the symposium and are offered as thoughtful voices to the continuing discussion in this area.

The *Board of Trustees of the University of Alabama v. Garrett* decision, recently rendered by the U.S. Supreme Court in 2001, dramatically impacted the constitutionally permissible scope of the ADA with regards to state governments under the doctrine of state sovereign immunity. Professors Wendy Parmet and Judith Brown of Northeastern University Law School tackle this decision and the doctrine of state sovereignty in their article on sovereign immunity and the ADA. Professor Pamela Brandwein, of the University of Texas-Dallas, also tackles the *Garrett* case, this time from a sociological perspective. She uses the *Garrett* case as an example of the difficulties of translating the social model of disability into the language of constitutional law, where constitutional doctrine is used as a "paring tool" to decide what evidence is relevant and what is not.

The two articles that follow take a comparative look, using other laws from the present and the past to shed light upon areas where the ADA might be reformed and improved. San Francisco State University Philosophy Professor Anita Silvers and William and Mary Law Professor Michael Stein do this by comparing the current disability discrimination law against the development of sex discrimination law and contend that current disability relies on an outmoded model of determining sex equality and should instead rely on the current standard for sex equality, a standard they contend better ensures the equality sought. University of Iowa Law Professor Peter Blanck and economist Chen Song use a point of comparison found in an earlier stage of American history—the pension disability program established for Union Army veterans after the Civil War. Through empirical analysis, they demonstrate that the situation that many ADA plaintiffs find themselves in today is quite similar to the situation that pension disability plaintiffs faced, in terms of the social and political challenges that needed to be overcome. They contend that lessons learned from the plaintiffs' experiences under the pension program can prove helpful to current ADA plaintiffs.

Moving from an examination of how other pieces of legislation might improve the ADA, the next article, by Professor Ruth Colker of the Ohio State University College of Law, takes a look at how the ADA has affected another statutory provision—that of Section 504 of

the Rehabilitation Act of 1973, which has been understood to cover employees of employers receiving federal assistance and to cover students attending schools of primary, secondary, and higher education. Through an empirical presentation, she suggests that the ADA has resulted in the demise of Section 504, at least in the employment area, and quite possibly in the education area.

Delving into a more specific area of disability law, Professor Michael Perlin of New York Law School examines the *Olmstead v. L.C.* decision, in which the U.S. Supreme Court ruled that state hospital residents have a right to treatment in an integrated rather than an isolated setting and the impact of this decision on the rights of those with mental disabilities. Professor Alison Barnes of Marquette University Law School focuses on those in need of protection from age and disability discrimination and, as such, examines the ADA alongside the Age Discrimination in Employment Act (ADEA) and assesses the future for making claims under these two statutes, especially by an aging American populace.

The issue concludes with an article by Professor Stanley Herr of the University of Maryland. Professor Herr's article continues the trend of a number of the other authors in examining the ADA from a comparative perspective, here with the disability laws of other countries, specifically Israel. Alongside this examination, Professor Herr assesses the various ways the laws of other countries might strengthen the protection of disability rights under the ADA and how the ADA, in turn, might provide guidance in shaping the laws of other countries. Professor Herr sadly and unfortunately passed away during the earliest stages of editing on his article and the editors trust that the posthumous publication of his article on an issue close to Professor Herr's heart will serve as a fitting tribute to his memory.

While the topics, the analyses, and the approaches may differ, the common thread that runs through each of these pieces is a thread of an unyielding concern for those with disabilities. The *Journal* editors wish to thank the authors for their written contributions to this issue and for the assistance they provided in seeing this issue through to completion. This issue marks the thirtieth symposium and the twentieth year that the *University of Michigan Journal of Law Reform* has been sponsoring symposia on areas of law that are ripe fields for reform. It is therefore fitting that this timely statute be examined during the tenth anniversary of its passage, especially at a time when the national conversation on the ADA is both ever-changing and diverse. It is the *Journal*'s hope that this issue both reflects and adds to that conversation in a meaningful way.