

## Saint Louis University Journal of Health Law & Policy

---

Volume 12

Issue 2 *Would the ADA Pass Today?: Historical and Political Perspectives on the Americans with Disabilities Act*

Article 3

---

2019

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

Michael Waterstone

Loyola Law School, Los Angeles, [michael.waterstone@lls.edu](mailto:michael.waterstone@lls.edu)

Follow this and additional works at: <https://scholarship.law.slu.edu/jhlp>

 Part of the [Health Law and Policy Commons](#)

---

#### Recommended Citation

Michael Waterstone, *Could We Pass the ADA Today?: Disability Rights in an Age of Partisan Polarization*, 12 St. Louis U. J. Health L. & Pol'y (2019).

Available at: <https://scholarship.law.slu.edu/jhlp/vol12/iss2/3>

This Remarks is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Journal of Health Law & Policy by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

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

MICHAEL WATERSTONE\*

Hi friends. So I clearly drew the short straw amongst my panelists for having to go after Tony Coelho. Let me say it's an honor to share the podium with all the panelists whose work I've gotten to know and learn so much from over the years. I do want to say what an honor it is share the stage with Tony Coelho, who has always been a hero but of late has become a friend. One thing you will hopefully be hearing a lot more from us about is that we are incredibly pleased that at Loyola Marymount University, we are in the process of creating the Coelho Center for Disability Law, Technology and Innovation.<sup>1</sup> It will be a university-wide center, bringing together all the different schools and colleges. It will be housed at Loyola Law School. We really think we will be able to do some really exciting things. We have an ambitious agenda to bring different stakeholders to the table. We seek to convene on issues of employment, on issues of technology, and something that is of utmost importance to this group: increasing the pipeline of lawyers with disabilities. We really believe that we can be a center for important conversations and help make a difference. So stay tuned—you will be learning more about that in the weeks and months to come.

So in coming back to the topic, these days, to be honest, I spend most of my time being 'Dean.' But what I looked at most recently in disability rights is the Disability Rights Movement as a social movement and comparing and contrasting that with other social movements. And I've argued that the Disability Rights Movement's signature feature as a social movement is the ability to transcend typical partisan lines and get federal legislation passed.<sup>2</sup> So we know

---

\* Michael Waterstone is the Dean of Loyola Law School, Los Angeles, and Senior Vice President of Loyola Marymount University. He has also taught at the University of Mississippi School of Law and Northwestern University Law School. He wishes to thank Tony Coelho for his vision and passion in founding the Coelho Center, his colleagues at Loyola Marymount University, and Katherine Perez, the inaugural Director of the Center, for her tireless efforts. Remarks from 2018 AALS Disability Law Panel.

1. *Loyola Partners with Distinguished Congressman to Launch the Coelho Center for Disability Law, Policy, & Innovation*, LOYOLA L. SCH., <https://www.lls.edu/loyola-partners-with-distinguished-congressman-to-launch-the-coelho-center-for-disability-law-policy-innovation/> (last visited Feb. 13, 2019).

2. Michael Waterstone, *Backlash, Courts, and Disability Rights*, 95 B. U. L. REV. 833, 841–42 (2015).

that both the [Americans with Disabilities Act] and the [ADA Amendments Act] passed through Congress with wide margins, and they were signed into law by Republican presidents in an era when it was hard to get postage stamp resolutions enacted into law.<sup>3</sup> Now we say that casually, but clearly that was the result of hard political work done by Representative Coelho and others. When you take a step back, the Disability Rights Movement was uniquely successful in getting federal legislation passed.

Previously contrasting the Disability Rights Movement and other social movements, I've suggested that the Disability Rights Movement has something I've termed "low political salience," meaning that it has not entered the culture wars or provoked the same level of intense political and social opposition as some other social movements.<sup>4</sup> There's really not a comparable level of organized opposition as in other areas. Now this is a mixed bag; it's part of the reason that legislation can get passed. It's created opportunities for federal legislation beyond legislation that was enjoyed by other groups. But I've also suggested that it placed limits on how much transformative change the movement has been able to accomplish.<sup>5</sup>

It's hard to create a revolution if people aren't paying attention and may not care. And one way I talk about this, if we were to walk outside right now and go across the street to Starbucks (because you can always go across the street and find a Starbucks), and if we were either to talk to the barista or the people inside Starbucks, everyone would have views on gay rights. Everyone would have views on religion. Everyone would have views on guns and the Second Amendment. But most people would probably not have strong views on disabilities. Maybe there would be some benevolence or some misunderstanding, some stigma, some cost concerns, but not the same intensity of belief that we would see in other areas.

So I believe, returning to the question today, the current environment raises two questions: has this changed and if so, what does it mean for the Disability Rights Movement? When I say Disability Rights Movement, I want to follow up on what Representative Coelho said: we tend to use that term, perhaps over use it. The Disability Rights Movement is actually a collection of individual groups made up of communities with shared life experiences that come together at political moments in time to get legislation passed.<sup>6</sup> But what, if anything, has changed? Well, if you look back at the presidential campaign, we did see disability enter the campaign. Trump made fun of a reporter, and that was in the

---

3. *Id.*; *The Americans with Disabilities Act*, HISTORY, ART, & ARCHIVES, HOUSE.GOV (July 26, 1990), <https://history.house.gov/Historical-Highlights/1951-2000/The-Americans-with-Disabilities-Act/>.

4. Waterstone, *supra* note 2, at 844.

5. *See id.* at 846.

6. Richard K. Scotch, *Politics and Policy in the History of the Disability Rights Movement*, 67 MILBANK Q. 380, 380 (Supp. II, Part II 1989).

news.<sup>7</sup> We see of late the Department of Justice rescinding guidelines around disability and *Olmstead*<sup>8</sup> and other areas and [other panelists] will be talking about that. And we saw disability at the center of the health care debate in efforts to repeal Obamacare.<sup>9</sup> So what does this mean? Well, I don't believe that it means that disability is about to enter the culture wars or that disability is something that more people are necessarily going to start paying attention to or caring about. Certainly in the current political environment, we have seen what unleashed more visible and vitriolic opposition to civil rights generally, including hate groups.

Disability is not exempt in that conversation, but I don't think it is front and center. The disability guidances that have been rolled back signal that the era in which disability has almost a unique and special ability within the federal government to get things done in a partisan environment is changing. I think that's real and I think we need to pay attention to that, and we can't take for granted that what has happened in the past will always be in the future. I think health care, what's going on around disability and health care, is potentially the most important, and I'm glad my panelists know more about that than I do. But health care is a key and crucial national conversation, and disability is closer to the center of that than I ever recall in a very visible way.

When friends, not connected to the Disability Rights Movement, are calling me and saying, "Hey Carrie Ann Lucas, she was just on TV. I see she's just got arrested in Colorado for protesting some of the Medicare changes, do you know her?"<sup>10</sup> That says to me, "Oh wow, people are paying attention in a way that they have not before."

One thing we know from other social movements is that opposition creates increased attention, which can be used as leverage to win hearts and minds. And it's important to win the hearts and minds of people outside the core group, including people aligned with other civil rights groups. So I think part of the strategy of the Disability Rights Movement moving forward needs to be a focus on claims that create residents outside of the core group. And I suggested some of what those may be. I do think in an era where there is a rollback of federal

---

7. Liz Spayd, *Not 'She Said, He Said.' Mockery, Plain and Simple*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/public-editor/trump-streep-golden-globes.html>.

8. *Attorney General Jeff Sessions Rescinds 25 Guidance Documents*, U.S. DEP'T JUST. (Dec. 21, 2017), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>; *Statement of DOJ Withdrawal of Disabilities Guidance*, ACLU (Dec. 22, 2017), <https://www.aclu.org/news/aclu-statement-doj-withdrawal-disabilities-guidance>.

9. Harold Pollack, *Health-Care Reform's Disability Blind Spot*, CENTURY FOUND. (Jan. 9, 2018), <https://tcf.org/content/report/health-care-reforms-disability-blind-spot/?agreed=1>.

10. Jaclyn Allen, *Disability Advocates Arrested by Denver Police During Sit-In at Cory Gardner's Office*, DENV. CHANNEL (June 29, 2017), <https://www.thedenverchannel.com/news/front-range/denver/disability-advocates-removed-by-denver-police-from-cory-gardens-office->.

protections,<sup>11</sup> where it was suggested we cannot have confidence in the Department of Justice to make the gains that they did in recent years on issues like *Olmstead* and others,<sup>12</sup> we as a community of academics need to talk about and also support our friends who move to litigate under state constitutions to create a new body of jurisprudence.

There are many state constitutions with protections on disabilities that go above and beyond the federal constitution.<sup>13</sup> I think we need to focus on areas like family law where the right to keep families together is something that has residence outside the disability community. But there are also terrible things happening to parents with disabilities, and this is something we can shine a flashlight on to create residents outside the core community.

So I'm going to sit down there because I want to allow time for reflection and conversation. I do want to say that I know we are moving to a Q & A. I'm going to pose a question that I hope we can get to, and this question is actually specifically for Tony [Coelho]. As scholars we always want our scholarship to be useful to policymakers. I think one of the questions I would have for you when we get there is what type of scholarship can we be doing, how can what we do become useful to the people who do what you do? I think that's vital and most important to most of us about all these issues. Thank you for being here, and I look forward to the conversation and discussion.

---

11. See David M. Perry, *Companies that Exploit Disabled People Have a Friend in Jeff Sessions*, PAC. STANDARD (Jan. 3, 2018), <https://psmag.com/economics/jeff-sessions-roll-back-disability-rights>; see ACLU, *THE DEPARTMENT OF INJUSTICE UNDER JEFF SESSIONS 9* (2019), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_report\\_-\\_department\\_of\\_injustice\\_under\\_jeff\\_sessions\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_report_-_department_of_injustice_under_jeff_sessions_1.pdf); *Statement of DOJ Withdrawal of Disabilities Guidance*, *supra* note 8.

12. ACLU, *supra* note 11, at 9.

13. Michael Waterstone, *Disability Constitutional Law*, AM. CONST. SOC'Y (July 29, 2015), [https://www.acslaw.org/?post\\_type=acsblog&p=11020](https://www.acslaw.org/?post_type=acsblog&p=11020).