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## DISABILITY RIGHTS AND THE DISCOURSE OF JUSTICE

Samuel R. Bagenstos\*

### ABSTRACT

*Although the ADA has changed the built architecture of America and dramatically increased the visibility of disabled people, it has not meaningfully increased disability employment rates. And the statute continues to provoke a backlash. Disability rights advocates and sympathizers offer two principal stories to explain this state of affairs. One, the “lost-bipartisanship” story, asserts that disability rights were once an enterprise broadly endorsed across the political spectrum but that they have fallen prey to the massive rise in partisan polarization in the United States. The other, the “legal-change-outpacing-social-change” story, asserts that the ADA was essentially adopted too soon—that the legislative coalition came together to pass the law before society as a whole was ready for it, leading to a backlash. There is something to be said for both stories. But the most important point is what connects them. The ADA was a bipartisan achievement largely because the efforts to pass the statute—in a brilliant tactical move—skirted difficult arguments about justice. Instead, they relied explicitly on a discourse of costs and benefits—and they relied implicitly on a discourse of charity and pity. But as soon as the ADA was adopted and the burdens imposed by it became apparent, the cost-benefit and charity/pity discourses reached their limit in providing support for the statute. To secure support for disability rights in the future, advocates will need to rely on a discourse of justice. And that will require renewed efforts at social, and not just legal, change.*

### INTRODUCTION

To understand the future of disability rights, it is first necessary to understand the past. The American disability rights movement has been an extraordinarily successful social movement. Essentially nonexistent in 1970, by 1990 the movement could boast enactment of a comprehensive federal civil rights law—the Americans with Disabilities Act (ADA)—as well as a regular role in debates inside the Beltway. When conservative courts imposed restrictive interpretations on the ADA during its first two decades, the movement was able to obtain enactment of legislation—the ADA Amendments Act (ADAAA)—to overturn the bulk of those

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interpretations.

Although the ADA has changed the built architecture of America and dramatically increased the visibility of disabled people in the public sphere, it has not meaningfully increased disability employment rates.<sup>1</sup> And the statute continues to provoke a backlash. Indeed, recent evidence suggests that courts may be resisting the ADAAA just as they did the original ADA.<sup>2</sup> The successes of the disability rights movement thus may be more fragile than at first appear.

What can explain this set of outcomes? Disability rights advocates and sympathizers offer two principal stories to explain, give texture to, and decry the limited success of the ADA. One, which I call the “lost-bipartisanship” story, asserts that disability rights were once an enterprise broadly endorsed across the political spectrum but that they have fallen prey to the massive rise in partisan polarization in the United States. The other, which I call the “legal-change-outpacing-social-change” story, asserts that the ADA was essentially adopted too soon—that the legislative coalition came together to pass the law before society as a whole was ready for it, leading to a backlash.

There is something to be said for both stories. But the most important point, I will argue, is what connects them. The ADA was a bipartisan achievement largely because the efforts to pass the statute—in a brilliant tactical move—skirted difficult arguments about justice. Instead, they relied explicitly on a discourse of costs and benefits—and they relied implicitly on a discourse of charity and pity, even though the latter discourse was in tension with basic principles articulated by the disability rights movement. But as soon as the ADA was adopted and the burdens imposed by it became apparent, I argue, the cost-benefit and charity/pity discourses reached their limit in providing support for the statute. To secure support for disability rights in the future, advocates will need to rely on a discourse of justice. And that will require renewed efforts at social, and not just legal, change.

### I. THE LOST-BIPARTISANSHIP STORY

The ADA was a bipartisan effort.<sup>3</sup> No individual did more to drum up support

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1. See, e.g., Martha Ross & Nicole Bateman, *Only Four Out of Ten Working-Age Adults with Disabilities Are Employed*, BROOKINGS: THE AVENUE (July 25, 2018), <https://www.brookings.edu/blog/the-avenue/2018/07/25/only-four-out-of-ten-working-age-adults-with-disabilities-are-employed/> [<https://perma.cc/65Z6-7F5G>]. The employment effects of the ADA likely differ across different subsets of disabled people. See generally Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527 (2004) (book review).

2. See Nicole Buonocore Porter, *Explaining “Not Disabled” Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL’Y 383, 384–85 (2019); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 3–4 (2014); Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act Amendments Act*, 2015 MICH. ST. L. REV. 1689, 1691–93.

3. In the words of Professor Robert Burgdorf, one of the key drafters of the bill that became the ADA, “The enactment of the ADA was an exceptionally bipartisan accomplishment, with many heroes on both sides of the congressional aisle.” Robert L. Burgdorf Jr., *A Dozen Things to Know About the ADA on Its 25th Anniversary*, U.D.C. (June 17, 2015), <https://www.law.udc.edu/page/ADAAnniversary> [<https://perma.cc/P4DK-ZG39>]. Burgdorf goes on to detail the many important congressional supporters of the statute on both sides of the aisle. See *id.*

for the bill than Justin Dart Jr.—the Reagan-appointed head of the National Council on Disability and scion of a prominent Republican family.<sup>4</sup> The bill passed in a Congress in which both houses were controlled by Democrats, but it passed overwhelmingly. The vote was 377–28 in the House of Representatives and 91–6 in the Senate. Key congressional supporters included both Democrats and Republicans.<sup>5</sup> President George H.W. Bush enthusiastically signed the bill, and to the end of his life, he regarded the ADA as one of his proudest achievements.

Once President Bush signed the bill into law, the courts became the main actor giving the statute meaning. And throughout the 1990s and early 2000s, they issued a series of decisions dramatically limiting the ADA's coverage.<sup>6</sup> It took a number of years for disability rights advocates to agree to reopen the statute, but eventually they concluded that the risk of *failing* to change the law in response to these judicial decisions was greater than the risk of *trying* to do so.

Once again, the response was bipartisan.<sup>7</sup> Efforts to amend the ADA to overturn the harsh judicial decisions did not move in Congress until the Democrats took over both houses in the 2006 elections. But although the Democratic leadership began the process, Republicans engaged in productive negotiations on an ADA restoration bill. When those negotiations concluded in 2008, the parties had reached agreement on the ADAAA, which was a significant rebuke to the courts—and which represented a major expansion of the ADA's definition of “disability” as compared with the prior case law. Congress passed the ADAAA overwhelmingly—by a voice vote in the House and by unanimous consent in the Senate—and President George W. Bush enthusiastically signed it. Bush expressed a well-deserved filial pride in defending and consolidating one of his father's greatest legacies. Even before he signed the ADAAA, President Bush and his Administration had admirably defended the ADA against a series of legal challenges to the constitutionality of various provisions.

As U.S. politics have become increasingly polarized, however, the bipartisanship attached to disability rights appears to have changed. Many observers point to 2012 as the moment in which disability became a partisan issue. President Obama had signed the international Convention on the Rights of Persons with Disabilities (CRPD)—a human rights treaty that essentially takes the principles of the ADA and applies them worldwide.<sup>8</sup> When the Senate took up a vote on ratification of the treaty, advocates tried to return to the old bipartisan playbook that had succeeded as recently as four years earlier. George H.W. Bush endorsed the CRPD, and former Senate Republican Leader (and 1996 Republican presidential nominee) Bob Dole used his privilege as a retired Senator to appear on the floor and lobby his former colleagues during the vote. But the

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4. See Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 965–66 (2003) [hereinafter Bagenstos, *ADA as Welfare Reform*].

5. See generally Ruth Colker, *The ADA's Journey Through Congress*, 39 WAKE FOREST L. REV. 1, 12 (2004); Burgdorf, *supra* note 3.

6. See Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 192–94 (2008).

7. For an excellent discussion of the history and drafting of the ADAAA, see *id.* at 228–40.

8. See Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

ratification vote fell short, with only Republicans voting in opposition.<sup>9</sup>

Just over four years later, Donald Trump was elected President after a campaign in which he belittled disabled people (among others).<sup>10</sup> And his Administration immediately downshifted from the Obama Administration's aggressive enforcement of the disability rights laws. As I wrote in mid-2017, "The Trump administration is hacking away at disability rights online and in the workplace, while Trump and congressional Republicans work to gut funding for programs people with disabilities rely on such as Medicaid."<sup>11</sup>

Here are a few of many examples. During her confirmation hearings, the new Education Secretary Betsy DeVos suggested that she would prefer to eliminate the federal role in education of disabled children. Soon afterwards, the Trump Department of Justice and Department of Education withdrew joint Obama-era guidance that had protected students with disabilities against discriminatory discipline. The Department of Education slowed down its complaint-resolution process and limited its efforts to respond to allegations of systemic violations of the law. The Department of Justice adopted new consent-decree policies that make it impossible for the federal government to enter into settlements that have a meaningful chance of resolving systemic disability rights problems. It canceled an effort, begun under President Obama, to adopt regulations explaining the ADA's application to online services. It also took the side of ADA *defendants* in some key cases. And, of course, one of Republicans' major domestic policy efforts of the first Trump term has been the effort to repeal the Affordable Care Act—a step that would have been devastating for individuals with disabilities.<sup>12</sup>

Strong elements of the Republican Party thus seem to have abandoned the support for disability rights that characterized the two Bush presidencies. We may have entered an age in which disability has become as polarized as any other issue.

And many commentators have decried this new polarization around disability rights. As early as 2017, left-of-center professor and journalist David Perry implored that "[w]e must reclaim our bipartisan consensus on these basic issues."<sup>13</sup> Middle-of-the-road disability law scholar Laura Rothstein lamented in early 2019 that "given the fractured and greatly polarized political climate," the ADA could not be enacted today.<sup>14</sup> I myself wrote two-and-a-half years ago that

9. See generally Arlene S. Kanter, *Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities*, 35 *TOURO L. REV.* 301, 334–35 (2019).

10. See, e.g., David A. Graham, *How Did Disabilities Become a Partisan Issue?*, *ATLANTIC* (Sept. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/09/clinton-disabilities-speech/500954/> [<https://perma.cc/PFH4-5VFX>].

11. Samuel R. Bagenstos, *How Congress Is Hacking Away at Disability Rights*, *REUTERS* (Sept. 25, 2017, 9:54 AM) [hereinafter Bagenstos, *Hacking Away at Disability Rights*], <https://www.reuters.com/article/us-bagenstos-disability-commentary/commentary-how-congress-is-hacking-away-at-disability-rights-idUSKCN1C022V> [<https://perma.cc/5MEH-9425>].

12. See S.E. Smith, *Republicans' Push to Strip Health Care from Vulnerable People Shows Disability Rights Are No Longer Bipartisan*, *REWIRE.NEWS* (Sept. 25, 2017), <https://rewire.news/article/2017/09/25/republicans-push-strip-health-care-vulnerable-people-shows-disability-rights-no-longer-bipartisan/> [<https://perma.cc/9UNW-5WQ9>].

13. David M. Perry, *Can Disability Rights Stay Bipartisan?*, *PAC. STANDARD* (Mar. 22, 2017), <https://psmag.com/news/can-disability-rights-stay-bipartisan> [<https://perma.cc/89HH-UURT>].

14. Laura Rothstein, *Would the ADA Pass Today?: Disability Rights in an Age of Partisan Polarization*, 12 *ST. LOUIS U. J. HEALTH L. & POL'Y* 271, 272 (2019).

“[t]he bipartisan consensus favoring disability rights represented the best of America’s ideals of equality, opportunity, and fair play.”<sup>15</sup> The lost-bipartisanship story, then, is that partisan polarization is bad for disability rights enforcement. The remedy is to “reclaim” the “consensus” that once united the parties on the issue.

## II. THE LEGAL-CHANGE-OUTPACING-SOCIAL-CHANGE STORY

So lost bipartisanship is one story about the limitations of disability rights law. There is another common story, however: that disability rights law, and particularly the ADA, is an example of elite-driven legal change progressing more quickly than the societal changes that could support and sustain it. During the first decade or so of the ADA, as the apparent judicial backlash to the law came into clear focus, this legal-change-outpacing-social-change story became a sort of conventional wisdom. Professor Bonnie Tucker, for example, argued in 2001 that courts were “finding incredibly inventive means of interpreting the ADA to achieve the opposite result that the Act was intended to achieve.”<sup>16</sup> They were doing so, she argued, because “[t]he ADA was enacted ahead of its time, in that much of the country [was] not yet ready to embrace the precepts on which the ADA is premised.”<sup>17</sup>

Professor Linda Krieger fleshed out the argument around the same time in a careful sociopolitical analysis. She explained that “[t]ransformative legal regimes can emerge at earlier or later stages of a social justice struggle.”<sup>18</sup> Enactment of the Civil Rights Act of 1964 represented the culmination of more than a decade’s highly public legal and social activism, including the Montgomery bus boycott, the Freedom Rides, lunch counter sit-ins, the Birmingham Campaign, and the March on Washington<sup>19</sup>—not to mention the highly socially salient Supreme Court decision in *Brown v. Board of Education*. The expansion of disability rights law, by contrast, had largely been driven by elites with comparatively little public agitation. The first major disability rights law, Section 504 of the Rehabilitation Act of 1973, was a brief provision inserted into a long and complex statute “based on the spontaneous impulse of a small group of Congressional staffers.”<sup>20</sup> President Nixon vetoed the Rehabilitation Act, but he did so based on objections to other aspects of the bill; he did not mention Section 504. When Congress voted to override the veto, it is doubtful that many of its members even knew about the new civil rights provision.

The enactment of the statute catalyzed the nascent U.S. disability rights movement. And movement actors did engage in some key protests, including a twenty-five-day occupation of the federal building in San Francisco in 1977 to

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15. Bagenstos, *Hacking Away at Disability Rights*, *supra* note 11.

16. Bonnie Poitras Tucker, *The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 338 (2001).

17. *Id.* at 337–38.

18. Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 488 (2000).

19. *See id.* at 488–89.

20. *Id.* at 489.

pressure the Carter Administration to issue regulations implementing Section 504. The “Capitol Crawl” of 1990, in which disability rights activists left their wheelchairs and crawled up the marble steps of the Capitol to dramatize the harms of inaccessibility, also plays a major role in the lore of the movement. But, as Krieger notes, efforts like these did not make a significant impression on the broader public. The ADA was enacted in 1990; a Harris poll conducted the next year found that “only 18 percent of those questioned were even aware of the law’s existence.”<sup>21</sup> Krieger concludes:

In short, by the time the ADA was passed, very little popular consciousness-raising around disability issues had occurred. Few Americans outside a relatively small circle were familiar with the notion that the obstacles confronting persons with disabilities stemmed as much from attitudinal and physical barriers as from impairment *per se*. Most people simply did not understand the theoretical constructs, social meaning systems, and core principles on which the disability rights movement, the Section 504 regulations, and the ADA were based.<sup>22</sup>

As Michael Waterstone puts it, “Though the passage of the ADA certainly resulted from a concerted political effort, it was not borne out of any high public awareness of, or values clash over, the inclusion, or lack thereof, of people with disabilities in society.”<sup>23</sup>

To Tucker, Krieger, Waterstone, and others, the key story is not one about bipartisanship and polarization. It is one about the limits of elite-driven social and legal change.

### III. CONNECTING THE STORIES—AND DEVELOPING A DISCOURSE OF JUSTICE

In this section, I will attempt to connect the lost-bipartisanship story with the legal-change-outpacing-social-change story. The connection, I suggest, can be found in the answer to the following question: If the ADA was enacted in advance of any broad and deep societal support for disability rights, why was its enactment so bipartisan? The requirements imposed by the ADA were far-reaching and in some ways radical. The statute extended disability antidiscrimination principles to every state and local government and retail good or service provider, as well as every employer of any significance, in the nation. And it did not merely bar discrimination in the traditional sense. Its requirement of reasonable accommodation both challenged traditional managerial prerogatives regarding the design of jobs and imposed significant costs of barrier removal.<sup>24</sup> None of this

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21. *Id.* at 491.

22. *Id.*

23. Michael E. Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 587, 607–08 (2015).

24. See Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 906 (2003) [hereinafter Bagenstos, *Politics of (Disability) Civil Rights*] (arguing that the ADA’s enactment “with substantial Republican support” was “striking, for the ADA seemed a doubly expansive civil rights statute” by both “add[ing] disability to the list of

was hidden. It was all apparent on the face of the statute. It is hard to believe that a law with such disruptive impact could be adopted without the support of a major social movement.

And yet, the law drew overwhelming, bipartisan support in Congress and was enthusiastically signed by a Republican President. How can this be?

The answer, I submit, is that support for disability rights was broad but shallow. People across the political spectrum agreed that a civil rights law for disabled persons was a good idea, but they did not inquire deeply into what it entailed. To the contrary, most gave it little thought. As Waterstone aptly puts it, “Although the disability rights community certainly viewed the law as transformative and reflective of a vision of a mandate to extend full citizenship in every form to people with disabilities, most people did not see the law that way, to the extent they were aware of it all.”<sup>25</sup>

Bipartisan support for disability rights laws was supported by two distinct discourses. One was the discourse of pity, charity, and admiration. Ironically, one of the key projects of the disability rights movement had been to *challenge* that discourse. For disability rights advocates, the view of disability as a personal tragedy stigmatized disabled people, defined them as outsiders to the community of citizens, and distracted attention from the social decisions that made society inaccessible and thereby attached disadvantage to particular conditions.<sup>26</sup> But it seems clear from polling taken at the time of the ADA’s passage that the overwhelming majority of Americans viewed disability in precisely these terms of pity, charity, and inspirational overcoming. “On the eve of the enactment of the ADA, the pitiable poster child and the inspirational ‘supercrip’ remained the defining images of disability.”<sup>27</sup> The broadly held feelings of generosity and sympathy toward people with disabilities no doubt drove the bipartisan enactment of disability rights law.

But there was another discourse as well—that of costs and benefits. As I have shown, in the legislative debates leading up to the ADA, advocates of the bill insistently and persistently pressed the case that disability antidiscrimination would save society money. It would, these advocates argued, move individuals with disabilities off of the welfare rolls and into the workforce, thus creating new taxpayers and saving the public fisc \$60 billion or more in transfer payments each year.<sup>28</sup> And this argument appears to have been crucial in persuading many Republicans to support the new law. Reagan appointee Justin Dart Jr. testified that:

ADA is an authentic issue for conservatives. It is the status quo

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characteristics broadly protected against discrimination by public and private entities” and imposing “the broad mandate of reasonable accommodation—a mandate that did not appear in earlier race or sex discrimination statutes” (footnotes omitted)).

25. Waterstone, *supra* note 23, at 610–11.

26. See SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 18–19 (2009).

27. JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 328 (1993).

28. See Bagenstos, *ADA as Welfare Reform*, *supra* note 4, at 957–75.



discrimination and segregation that are unaffordable, that are preventing persons with disabilities from becoming self-reliant and that are driving us inevitably toward the economic and moral disasters of giant, paternalistic welfare bureaucracies, businesses, families, taxpayers, are already paying unaffordable and rapidly escalating billions in public and private funds to maintain ever increasing millions of potentially productive Americans in unjust, unwanted dependency.<sup>29</sup>

Republican legislators repeatedly invoked these cost-benefit arguments on the House and Senate floors.<sup>30</sup>

The discourse of pity and charity, paired with the discourse of costs and benefits, played an important role in securing passage of the ADA. But those discourses did not provide the tools to defend the statute once it started to be applied in contexts in which it imposed significant burdens. When, for example, Philadelphia's then-Mayor Ed Rendell criticized the ADA's sidewalk-accessibility requirements as placing an expensive, unfunded mandate on local governments,<sup>31</sup> disability rights advocates were unable to identify readily monetizable benefits that offset that cost. Although legislative inertia protected the ADA against being amended in response to those criticisms, concerns about the statute's perceived burdens were pervasive in public and political debate. That public climate doubtless influenced the courts in their narrow interpretations of the ADA. And, at least in part because the statute was sold as a cost-saving measure, courts "engaged in some statutory legerdemain in order to fit the square peg of [the ADA] into the round hole of cost-benefit analysis."<sup>32</sup> Most people may be comfortable providing charity but not at a significant net cost to themselves. The pity/charity and cost-benefit discourses largely run out before we get to many key applications of the ADA.

So, what is necessary to secure the future of disability rights law? I would argue that we need to move beyond the discourses of charity and costs and benefits to a discourse of justice. People with disabilities deserve to be fully included as equal participants in our society, not because disability is a tragedy that deserves pity and not because including disabled people serves the bottom-line financial interests of society at large. People with disabilities deserve to be treated as full and equal participants because it is the just thing to do. Basic principles of equality should be understood to prohibit societal decisions that attach disadvantage to stigmatized group statuses.<sup>33</sup> And, even if total monetary costs exceed the monetizable benefits, those of us "who have a choice between participating in a

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29. *The Americans with Disabilities Act of 1989: Joint Hearing on H.R. 2273 Before the H. Subcomms. on Emp't Opportunities & Select Educ. of the Comm. on Educ. & Labor*, 101st Cong. 57-58 (1989).

30. See Bagenstos, *ADA as Welfare Reform*, *supra* note 4, at 970.

31. See, e.g., *Federal Mandates on State and Local Governments: Hearing Before the S. Comm. on Governmental Affairs*, 103d Cong. 93 (1993) (testimony of Edward G. Rendell, Mayor, Philadelphia).

32. Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act*, 79 N.C. L. REV. 307, 332 (2001). For a more extensive elaboration of this point, see generally Bagenstos, *ADA as Welfare Reform*, *supra* note 4, at 948.

33. See generally Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 461-62 (2000) (articulating a justice-based argument for disability accommodation).

subordinating system and working (at reasonable cost) against such a system have a moral obligation to respond in a way that reduces subordination.”<sup>34</sup>

To gain broader support for intrusive disability rights legislation, advocates will need to engage in an overt social and political struggle. Rather than opportunistically attaching themselves to the charity/pity and cost-benefit discourses that have supported the disability rights movement’s biggest successes, activists must make the case in society and politics for disability rights as a matter of justice—and of the responsibility of everyone in society to work to disestablish the structures that continue to segregate and stigmatize disabled people. Only by redoubling the efforts of disability rights as a social movement can we make further progress in achieving the goal of disability equality.

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34. Bagenstos, *Politics of (Disability) Civil Rights*, *supra* note 24, at 838.