NEW YORK LAW SCHOOL

NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 48 | Issue 4 Article 3

January 2004

Introduction: Understanding the Context for the "Coelho Challenge"

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INTRODUCTION: UNDERSTANDING THE CONTEXT FOR THE "COELHO CHALLENGE"

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On March 13, 1998, President Bill Clinton signed Executive Order No. 13078 creating the National Task Force on the Employment of Adults with Disabilities (PTFEAD).[1] Chaired by Secretary of Labor Alexis Herman,[2] the Task Force's charge was "to create a coordinated and aggressive national policy to bring adults with disabilities into gainful employment at a rate that is as close as possible to that of the general adult population."[3]

Ordinarily, presidential directives ordering cabinet officers and other senior presidential appointees to work together in furtherance of the President's agenda do not warrant close study. But Executive Order No. 13078 is an exception. This executive order signaled the beginning of a new phase in the effort to pry open the door of opportunity for Americans with disabilities.

Former Congressman Tony Coelho, who addressed a large audience of students, faculty, alumni, and disabilities advocates at New York Law School on October 24, 2003 under the auspices of New York Law School's Labor & Employment Law Program, was a central and essential figure in both the phase of disability policy that preceded Executive Order No. 13078 and the new phase of disability policy President Clinton's executive order sought to usher in. Thus, Executive Order No. 13078's small but important role in the history of federal disability employment policy offers valuable

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1. Exec. Order No. 13078, 63 Fed. Reg. 13111 (March 13, 1998).
2. *Id.* at § 1 (b).
3. *Id.* at § 1 (c).

insights into the context for Congressman Coelho's address "Our Right to Work, Our Demand to Be Heard: People with Disabilities, the 2004 Election, and Beyond."

THE THREE PHASES OF FEDERAL DISABILITY POLICY

During the century leading up to President Clinton's executive order, federal disability employment policy passed through three phases distinguishable by their diagnoses of the public policy problem to be solved. The earliest phase of federal disability policy — a "sustenance" phase — took as its premise that people with disabilities could not succeed in mainstream workplaces and, therefore, needed income support for their sustenance. Thus, state and federal governments (and employers, on occasion) provided cash assistance and other benefits first to Civil War veterans and, later, other workers with disabilities. State workers' compensation laws enacted during the Progressive era, and amendments to the Social Security Act after World War II creating the Social Security Disability Insurance (SSDI) and Supplemental Security Income programs, were the most important achievements of this sustenance phase.[4]

The end of World War I commenced a "rehabilitation" phase that was founded on a different factual premise: people with disabilities could not work because of their physical and mental conditions, but some conditions could be "healed" sufficiently to permit work. Solving this problem, therefore, required rehabilitating people with disabilities. Accordingly, the federal and state governments provided expanding "vocational rehabilitation" services to prospective workers with disabilities.[5] Yet, this "rehabilitation" phase did not supplant the programs, policies, and premises of the sustenance phase. Rather, the two phases uneasily co-existed without addressing the fundamental contradiction in their views about

4. *See* Richard K. Scotch, *American Disability Policy in the Twentieth Century, in* THE NEW DISABILITY HISTORY 378-81 (Paul K. Longmore & Lauri Umansky eds. 2001). The Javits-Wagner-O'Day program and § 14 (c) of the Fair Labor Standards Act offer further examples of the "sustenance" approach. Since workers with disabilities could not succeed in mainstream workplaces, these two statutes favored "sheltered workshops" and other segregated workplaces for people with disabilities supported, in part, by specially set aside government contracts. *See* Javits-Wagner-O'Day Act, 41 U.S.C. § 46 (2003); Fair Labor Standards Act, 29 U.S.C. § 214(c) (2003).

5. *See* Scotch, *supra* note 4, at 381-83.

whether people with disabilities could and would succeed in the workplace.

An "anti-discrimination phase" in federal disability policy and jurisprudence preceded President Clinton's executive order during the late 20th Century. Unlike its two predecessors, the anti-discrimination phase took as its premise that discrimination, not the conditions of people with disabilities, played the largest role in blocking society's entranceway. Thus, the anti-discrimination phase brought policies based on the view that people with disabilities were entitled to the same rights as other Americans — enforceable through litigation — that would break down societal barriers to full integration.

For example, two widely followed judicial decisions — *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*[6] and *Mills v. Board of Education of the District of Columbia*[7] — invoked the Fifth and Fourteenth Amendments' equal protection and due process clauses to assure children with disabilities access to public education. This judicial recognition of constitutional protections for schoolchildren with disabilities, in turn, led Congress to enact the Education for All Handicapped Children Act of 1975 (EAHCA). The EAHCA established specific statutory protections designed to integrate children with disabilities into the schools.[8]

Congress also relied on a rights-based strategy to integrate the workplace when it enacted the Rehabilitation Act of 1973.[9] The seminal anti-discrimination provisions of the Rehabilitation Act were quite limited, however, covering only federal employment, federal contractors, and federal or federally funded programs.[10] Broader protections arrived when Congress enacted the Americans with Disabilities Act of 1990 — the landmark civil rights legislation which seemingly guaranteed equal opportunity in all employment,

6. 334 F. Supp. 1257 (E.D. Pa. 1971) (three-judge panel) *and* 343 F. Supp. 279 (E.D. Pa. 1972) (same).

7. 348 F. Supp. 866 (D.D.C. 1972).

8. *See* Education for All Handicapped Children Act of 1975, Pub. L. 94-142 (1975). The EAHCA was renamed the Individuals with Disabilities Education Act and reauthorized in 1990. Individuals with Disabilities Education Act, Pub. L. 101-476, 104 Stat. 1103 (1990). It was again reauthorized and modified in 1997. Individuals with Disabilities Education Act, Pub. L. 105-17, 111 Stat. 37 (1997).

9. *See* Rehabilitation Act of 1973, P.L. 93-112, 87 Stat. 355 (1973).

10. *Id.* at tit. 7 §§ 501, 503, 504.

public accommodations, transportation, and other aspects of society.[11] Unlike the Rehabilitation Act, the ADA extended its prohibitions on discrimination to cover private entities and state and local governments without respect to federal funding.[12]

The anti-discrimination phase left the legislative and programmatic achievements of the sustenance phase and the rehabilitation phase largely unchanged.[13] As a result, three sets of programs, policies and premises relating to the employment of people with disabilities remained in place, at times frustrating each others' efforts to achieve sometimes related, sometimes contradictory goals.

Executive Order No. 13078 recognized that, while necessary, the ADA and the anti-discrimination phase's other constituent parts would not be sufficient to fully integrate people with disabilities into American society, especially given that federal policies and programs from the sustenance and rehabilitation phases did not always serve the same goals. In particular, the goal of substantially increasing the employment of people with disabilities — a central motivating force behind passage of the ADA[14] — did not appear to be any closer roughly six years after the civil rights law's protections against employment discrimination had taken effect.[15] In fact, data from the Census Bureau's Survey of Income and Program Participation show that the employment rate of adults with severe disabilities between the ages of twenty-one and sixty-four remained fairly steady at or around thirty percent through the 1990s, even when the overall unemployment rate suggested the tightest labor markets in a generation.[16]

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11. Americans With Disabilities Act, Pub. L. 101-336, 104 Stat. 327 (1990).

12. *See* 42 U.S.C. § 12111(2) (2003) (defining "covered entity" as an employer, employment agency, labor organization, or joint labor-management committee).

13. *See generally* DUANE F. STROMAN, THE DISABILITY RIGHTS MOVEMENT: FROM DEINSTITUTIONALIZATION TO SELF-DETERMINATION 75-81 (2003) (collecting 20th Century legislation relating to disabilities).

14. *See* 42 U.S.C. § 12101(a)(8) (2003) (providing that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.").

15. *See* 42 U.S.C. § 12111(5)(a) (2003) (the effective date of the ADA for employers of 25 employees or more was 1992; the effective date of the ADA for employers of 15 employees or more was 1994).

16. *See* John M. McNeil, *Employment, Earnings, and Disability* (2000), available at http://www.census.gov/hhes/www/disable/emperndis.pdf (discussing the employment rate for people with "severe disabilties"). The Census Bureau defines people with

THE COURSE-CORRECTION PHASE: RE-ENGINEERING FEDERAL DISABILITY POLICY

President Clinton's executive order emphasized a different strategy to address the low employment rate for adults with disabilities. In large part, its new policy direction reflected a different diagnosis of the problem. The ADA adjudged private parties and, to a lesser extent, state and local governments to be the principal purveyors of the segregation of people with disabilities.[17] The executive order, on the other hand, laid a sizable share of the blame for the low rate of employment among people with disabilities at the doorstep of the federal government and its disparate disability policies.[18] Without expressly rejecting or condemning the remaining programs from the sustenance and rehabilitation phases, the executive order's substantive agenda focused almost exclusively on re-engineering existing federal policies.[19] Thus, President Clinton's

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"severe disabilities" to include those who are unable to perform one or more functions of daily living. People with "disabilities" merely have "difficulty" performing one or more such functions. *See* Census Brief, *Disabilities Affect One-Fifth of all Americans*, available at http://www.census.gov/prod/3/97pubs/cenbr975.pdf; *see also* Monthly Lab. Rev., *Share of Workers Experiencing Unemployment at Record Low* (1998), available at http://www.bls.gov/opub/ted/1998/Dec/wk3/art03.htm (discussing the overall unemployment rate in the 1990s). The measurement of employment and unemployment among people with disabilities has posed vexing and complicated definitional as well as statistical problems. As with the ADA, the problem arises with the proper definition of "disability." *See generally* John M. McNeil, *Employment, Earnings, and Disability* (2000), available at http://www.census.gov/hhes/www/disable/emperndis.pdf. Executive Order No. 13078 directed the Labor Department's Bureau of Labor Statistics to address this problem, but in recognition of the great difficulty associated with it, imposed no time line for developing a reliable measure of unemployment for people with disabilities. Exec. Order No. 13078, 3 C.F.R. 140 § 2 (f) (1998 Comp.).

17. *See supra* note 12 (providing the AAA's definition of a covered entity).

18. *See, e.g., Re-Charting the Course: First Report of the Presidential Task Force on the Employment of Adults with Disabilities*, Nov. 15, 1998, at 19 available at http://www.ilr.cornell.edu/library/downloads/keyWorkplaceDocuments/DisabilitiesAdultEmploy/DisabilitiesRechartingtheCourse1998.pdf (Executive Summary) ("The Task Force recognizes that many of these multiple barriers to employment are embedded in the public policies of our nation. Too many programs continue an antiquated, paternalistic attitude about disability in their approach to providing services and supports, rather than empowering people with disabilities with control and choice in recognition of their competencies and contributions to the workforce. As a result, the reality in our nation today is that Americans with disabilities do not have opportunities to pursue the array of life opportunities and options that are afforded most people without disabilities.") [hereinafter "First Report of the Presidential Task Force"].

19. *See infra* notes 22 and 23 and accompanying text.

executive order departed from the anti-discrimination phase of federal disability policy and commenced a new and distinct phase: the course-correction phase.[20]

The executive order did not purport to map out a thoroughgoing course correction for federal disability policy, however. President Clinton might have justifiably echoed his predecessor Lyndon Johnson: "A President's hardest task is not to do what is right, but to know what is right."[21] The means to the desired end of greater employment opportunity for people with disabilities were not entirely clear. As a result, the executive order offered only a policy skeleton onto which the PTFEAD's members and staff were expected to hang a fleshier agenda for re-engineering federal policy regarding the employment of adults with disabilities.

For example, the executive order required the PTFEAD to "develop and recommend options to address health insurance coverage as a barrier to employment for people with disabilities"; "analyze State and private disability systems . . . and their effect on Federal programs and employment of adults with disabilities;" and "analyze youth programs related to employment . . . and the outcomes of those programs for young people with disabilities."[22] Yet, the executive order did not detail the particular problems to be solved in these arenas, the solutions to be proposed, or even the specific goals to be met. The only further direction to the PTFEAD from the executive order, beyond the broad, long-term goal of increasing employment among adults with disabilities to the extent possible, was a general mandate to "analyze the existing programs and policies of Task Force member agencies to determine what

20. The executive order also placed employment at the center of the disabilities agenda. This was not an inevitable choice. The ADA treated employment discrimination as one evil equivalent to the evils of discrimination in public accommodations and discrimination in transportation. *See* 42 U.S.C. § 12101 (2003) (the ADA is comprised of three main titles: Employment, Public Services and Public Accommodations). Other legislative proposals pending at the time of the executive order would have focused on independent living for people with disabilities and treated expanded employment opportunities as an ancillary, if welcome, consequence. *See, e.g.*, Medicaid Community Attendant Services Act of 1997, H.R. 2020, 105th Cong. (1997).

21. Lyndon B. Johnson, State of the Union Address, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON: 1965 9 (1966).

22. Exec. Order No. 13078, 3 C.F.R. 140 (1998 Comp.) at §§ 1(c)(2), (c)(3),(c)(7).

changes, modifications, and innovations may be necessary to remove barriers to work faced by people with disabilities."[23]

THE COURSE-CORRECTION PHASE: A POLITICAL STRATEGY

Executive Order No. 13078 did not merely change the substantive focus of disability policy making.[24] It also subtly hinted that a new strategy was needed to guarantee the success of the course-correction phase. This new strategy was rooted in the peculiar history of the anti-discrimination phase's legislative successes. Unlike the civil rights bills that prohibited discrimination on the basis of race, the ADA and its predecessors were not the end products of great and wrenching social transformation. The Rehabilitation Act's anti-discrimination provisions were mere congressional afterthoughts apparently little understood by their sponsors.[25] As Joseph Shapiro observed not long after the ADA took effect, "disabled people got their rights without dramatic Freedom Rides, church bombings, or 'I Have a Dream' speeches to stir the conscience of a guilty nation. African-Americans had changed a nation's attitudes and then won civil rights law."[26] The result was a "gap between the newly militant self-perception of disabled people, and the confused, still stereotypical thinking of the rest of the country."[27] Thus, the challenge of the course-correction phase was the quintessentially political task of bridging the gap between existing federal policies, which largely codified the unreformed thinking of non-disabled Americans, and the expectations of people with disabilities that the

23. *Id.* at § 1(c)(1). Among other process requirements in Section 1 of the executive order, Section 2 contained several specific directives for particular agencies to cooperate in the creation of reports on subjects identified in Section 1 and other related topics. *Id.* at § 2. President Clinton gave the PTFEAD slightly less than four years to complete its work, although the latter eighteen months of the PTFEAD's life extended beyond the end of President Clinton's second term in office. *Id.* at § 1(d)(2).

24. President Clinton amended Executive Order No. 13078 on October 25, 2000 to expand the PTFEAD's focus to include youth. Exec. Order No. 13172, 65 Fed. Reg. 64,577 (October 27, 2000).

25. *See* RICHARD SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 51-52 (1984).

26. JOSEPH SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 323-24 (1994).

27. *Id.* at 328.

ADA's promise of equal employment opportunity would be fulfilled.[28]

One important signal of this strategy change came when President Clinton selected the PTFEAD's leadership. President Clinton chose Tony Coelho to be the PTFEAD's Vice-Chair.[29] At the time, Coelho was the Chair of the President's Committee for the Employment of People with Disabilities. But Coelho was better known as a former six-term congressman representing central California. He had risen to become the third-ranking Democrat in the U.S. House of Representatives — the Majority Whip — after successful service as the chairman of the House Democrats' campaign and fundraising committee.[30] Even eight years after his departure from Congress, Coelho was still widely acknowledged as one of Washington's leading experts in the art, science, and business of politics.[31]

Coelho's selection intimated that the success of the course-correction phase, and ultimately the employment of adults with disabilities, would depend on politics as much as or more than the creation of new legal rights and responsibilities enforced through litigation or government compulsion. This implicit but unmistakable suggestion was surprising for two reasons.

First, Coelho, although a non-lawyer, was closely identified with the rights-based strategy that characterized the anti-discrimination phase. In particular, he was the principal author of the U.S. House of Representatives' version of the Americans with Disabilities Act.[32] At the first meeting of the PTFEAD in April 1998, however, Coelho disclaimed an unbending loyalty to the anti-discrimination strategy:

> With the ADA, we began a transformation of the proverbial ladder of success for some Americans into a ramp of opportunity for all Americans; yet we would not be here

28. *See First Report of the Presidential Task Force*, *supra* note 18.

29. *See* Exec. Order No. 13078, 3 C.F.R. 140 (1998 Comp.) at Sec. 1(b).

30. *See* Linda Greenhouse, *Men in the News: 3 Democrats Rise in 100th Congress's House Leadership: Anthony L. Coelho*, N.Y. TIMES, Dec. 9, 1986, at B17.

31. *See, e.g.*, David A. Vise, *Tony Coelho, Soldier of Fortune: He Left Congress and Found His True Worth*, WASH. POST, Jan. 9, 1994, at F1. One illustration of this fact is that Congressman Coelho was chosen by Vice-President Al Gore to chair his unsuccessful campaign for President. *See* Todd S. Purdum, *It's California or Bust, It Seems in '00 Campaign*, N.Y. TIMES, Dec. 9, 1999, at A22.

32. *See* Tony Coelho, *Our Right to Work, Our Demand to be Heard: People with Disabilities, the 2004 Election, and Beyond*, 48 N.Y.L. SCH. L. REV. 729, 734 (2004).

> today if the ADA, a piece of civil rights legislation, was the solution to the employment problems, the problems experienced by millions of people with disabilities throughout our great country.[33]

In sum, Coelho understood, as President Clinton also apparently did, that the time had arrived for a new phase in disabilities policy.

Second, the executive order suggested that the President — the chief executive officer of the federal executive branch, among other things — would need skilled political hands to help change his own government's disability policies. President Clinton's selection of Alexis Herman[34] and Tony Coelho to lead the PTFEAD disclosed his apparent belief that directing his own senior political appointees in the executive branch to change direction might not work. In other words, even "knowing what's right" would not be sufficient. Moving bureaucracies, their associated interests, and their congressional defenders to adopt and implement more effective policies would require the hands-on leadership of master political tacticians.

President Clinton's course-correction strategy achieved some successes during the PTFEAD's short life.[35] For example, President Clinton re-engineered the federal government's role in the employment of adults with disabilities by issuing Executive Order No. 13163 which directed executive branch agencies and departments

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33. Tony Coelho, Remarks for the Inaugural Meeting of the Presidential Task Force on Employment of Adults with Disabilities (April 22, 1998) (on file with author).

34. Although a long-time expert in workforce matters, Secretary Herman was also a well-respected political strategist. She had served as the Chief of Staff to the Chairman of the Democratic National Committee and the White House's Director of Public Liaison before becoming Secretary of Labor. *See, e.g.*, Alison L. Maxwell, *Labor Secretary Willing To Get Dirt Under Her Nails Herman Believes She Can Make A Difference*, USA TODAY, Aug. 28, 2000, at 6B.

35. The PTFEAD effectively ceased functioning on January 21, 2001 after President Bush took office. Although President Bush did not repeal Executive Order No. 13078, the PTFEAD's work was largely folded into the Bush Administration's "New Freedom Initiative" which purported to continue the course-correction phase in federal disability policy. *See* George W. Bush, Editorial, *An American Independence Movement; I Pledge To Uphold And Strengthen The Americans With Disabilities Act*, PITTSBURGH POST-GAZETTE, July, 28, 2000, at A21. By operation of the executive order, the PTFEAD went out of existence on July 26, 2002. Exec. Order No. 13078, 63 Fed. Reg. 13,111 at Sec.1(d)(2) (March 13, 1998).

to hire 100,000 people with disabilities before July 26, 2005.[36] On December 17, 1999, President Clinton signed the Ticket to Work and Work Incentives Improvement Act of 1999 into law and effected a small-scale re-engineering of the Social Security Disability Insurance (SSDI) system.[37] The "Ticket to Work Act" allows states to encourage people with disabilities to leave the disability rolls by assuring access to and funding for job training and accessibility services and continued access to health insurance through Medicaid or Medicare.[38] In a related effort to increase the employment prospects of SSDI recipients, the Social Security Administration increased by forty percent the amount of money SSDI recipients could earn without losing their benefits.[39] Even with these successes and others, however, no fair assessor of the course-correction phase could argue that it had reached a successful end when President Clinton left office.[40]

THE SUPREME COURT AND THE ANTI-DISCRIMINATION PHASE

President Clinton and his Executive Order No. 13078 were not the only forces effecting a course correction in disability policy during the late 1990s. The Supreme Court had undertaken its own

36. *See* Exec. Order No. 13163, 65 Fed. Reg. 46,563 (July 28, 2000).

37. *See* Elliot Pisem and Ezra Dyckman, *Internal Revenue Code Changes Favor Real Estate Trusts*, N.Y. L.J., Dec. 23, 1999, at 5; Barabara Melman, *Changes in Social Security Guidelines Set to Take Effect Soon*, CHICAGO SUN TIMES, Aug. 13, 2000, at 4.

38. *See* 42 U.S.C. § 1305 (2003).

39. *See* Substantial Gainful Activity Amounts, 65 Fed. Reg. 82905 (Dec. 29, 2000) (codified at 20 C.F.R. pt. 404 and 416).

40. Even by its own measures, the PTFEAD did not accomplish everything it had concluded should be accomplished. For example, the PTFEAD issued a report in 1999 listing more than one dozen recommendations for action. *See Re-Charting the Course: If Not Now, When?: Second Report of the Presidential Task Force on the Employment of Adults with Disabilities*, Nov. 15, 1999 (Ch.1) at http://www.ilr.cornell.edu/library/downloads/keyWorkplaceDocuments/DisabilitiesAdultEmploy/DisabilitiesRechartingTheCourse1999.pdf. Many of those proposals were never implemented. In addition, many of the PTFEAD's recommendations in its 1998 report were not implemented. *See Re-Charting the Course: First Report of the Presidential Task Force on the Employment of Adults with Disabilities*, Nov. 15, 1998 at http://www.ilr.cornell.edu/library/downloads/keyWorkplaceDocuments/DisabilitiesAdultEmploy/DisabilitiesRechartingtheCourse1998.pdf; *Re-Charting the Course: If Not Now, When?: Second Report of the Presidential Task Force on the Employment of Adults with Disabilities*, Nov. 15, 1999 (Ch.2) at http://www.ilr.cornell.edu/library/downloads/keyWorkplaceDocuments/DisabilitiesAdultEmploy/DisabilitiesRechartingTheCourse1999.pdf.

effort to reinterpret and dramatically narrow the applicability of the anti-discrimination phase's signal accomplishment: the Americans with Disabilities Act.[41]

The ADA's authors apparently believed that human variation does not become "disability" until a human condition interacts with an environment that will not accommodate it.[42] Yet, human variation is endless and workplaces take many and varied physical and organizational forms. Thus, the ADA's authors could not codify a static definition of "disability." Instead, the ADA contains a contingent definition of "disability:" "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."[43]

For the same reasons, the ADA does not codify a particular approach to how each worker with a disability should be fitted into a workplace. Rather, the ADA requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . , unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [the employer]."[44] Most important, the ADA does not specifically define the two phrases that are most important to the integration of work-

41. Studies in the late 1990s also suggested that the lower courts showed a surprising degree of hostility to ADA Title I plaintiffs. *See* Linda Hamilton Krieger, *Introduction, in* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 6-8 (Linda Hamilton Krieger, ed. 2003) (discussing studies by the American Bar Association and Professor Ruth Colker).

42. *See* Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?, in* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS, *supra* note 41 at 26-37 (discussing the ADA's adoption of a "sociopolitical" definition of disability); *see also* Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Construction of the Meaning of Disability, in* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS, *supra* note 41 at 124-28 (tracing the history and sources of the ADA's definition of "disability").

43. 42 U.S.C. § 12102(2) (2000). The ADA also defines "a record of such an impairment" or "being regarded as having such an impairment" to be sufficient to satisfy the law's definition of "disability." 42 U.S.C. § 12102(2) (2000).

44. 42 U.S.C. § 12112(b)(5)(A) (2000). More precisely, the ADA holds that "[n]o 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 hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a) (2000). The ADA then defines failure to provide reasonable accommodation to be "discrimination." 42 U.S.C. § 12112(b)(5)(A) (2000).

ers with disabilities — "reasonable accommodation" and "undue hardship."[45] Instead, the ADA's Title I established a problem-solving approach to the integration of people with disabilities into the workplace.[46] Rather than mandating particular accommodations, the ADA requires employers to engage in an "interactive process" in which their employees with disabilities may propose accommodations and employers may either accept or reject the proposals or counter-propose alternatives until appropriate and cost-effective accommodations can be found.[47]

When the interactive process fails, however, the task of defining "reasonable accommodation" and "undue hardship" falls to the courts. And therein lay an opening for an activist Supreme Court to effectively amend the ADA. By empowering judges to offer their own definitions of the ADA's critical terms, the problem-solving approach propounded by the ADA's authors contained the seeds of a dramatic narrowing of the ADA's scope.[48]

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45. Section 101(9) offers only an illustrative list of "reasonable accommodations." *See* 42 U.S.C. § 12111(9) (2000). Section 101(10)(A) defines "undue hardship" as "an action requiring significant difficulty or expense," when considered in light of four contingent factors set forth in section 101(10)(B). 42 U.S.C. § 12111(10) (2000). Congress rejected two amendments to the definition of "undue hardship" that would have defined the phrase as any cost that exceeds five or ten percent of an employer's net profits. *See* RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE 175 (2001).

46. *See* S. REP. NO. 101-116, at 34 (1989) ("A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations . . . employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation."); H.R. REP. NO. 101-485, pt. 2, at 65 (1990) (same).

47. *See* 29 C.F.R. § 1630.2(o)(3) (2003) (EEOC regulations on the interactive process); 29 C.F.R. Pt. 1630, app. § 1630.9 (2003) (interpretive guidance stating that the employer "must" engage in the interactive process).

48. Matthew Diller properly warned against blaming the ADA's authors for the Supreme Court's reinterpretations of the ADA: "While the courts certainly have seized on statutory language to create imposing obstacles for plaintiffs, the key phrases in the ADA are, ultimately, vague. Vague language can be interpreted broadly, as well as narrowly. Despite judicial claims that the courts are simply applying the 'plain meaning' of the statute, the courts are affirmatively choosing narrow readings over broad ones, even in the face of expansive administrative interpretation and strong evidence that Congress intended the statute to be interpreted expansively." Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, *in* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS, *supra* note 41 at 63.

Employers viewed the ADA's definitions of "disability," "reasonable accommodations," and "undue hardship" with alarm. From their perspective, the statute imposed no explicit limits on employers' obligations to accommodate employees with disabilities beyond the loosely defined protection against "undue hardship."[49] Courts of appeals decisions holding that only accommodations "costs which are substantially disproportionate to benefits" would impose an "undue hardship" likely reinforced employers' fears that Title I mandated unpredictable, diverse, and expensive accommodations of any person with a disability wielding an employment application.[50] To avoid this seemingly unbridled accommodations mandate, employers asked the courts to shut the door to the ADA's protected class.

The Supreme Court has largely complied.[51] In a trilogy of cases — *Sutton v. United Airlines*,[52] *Albertson's, Inc. v. Kirkingburg*,[53] and *Murphy v. United Parcel Service*[54] — the Court excluded a large number of people from the ADA's protections by holding that efforts undertaken by people with disabilities to "correct" the effects of an impairment must be taken into account in courts' determinations of whether that impairment "substantially limits" a "major life activity."[55] The *Sutton* Court also held that workers with disabilities

49. *See, e.g.*, O'BRIEN, *supra* note 45, at 163-64, 200-01 (discussing employers' lobbying efforts during Congress' consideration of the ADA and quoting employers' advocates on subsequent judicial decisions).

50. *See* Borkowski v. Valley Central School Dist., 63 F. 3d 131 (2nd Cir. 1995) (holding that an undue hardship exists when the costs to the employer of providing the employee with an accommodation substantially outweigh the benefits of the accommodation); Vande Zande v. Wis. Dep't. of Admin., 44 F. 3d 538, 543 (7th Cir. 1995) (providing that the employee must show that an accommodation is both effective and proportional to costs to establish that it is reasonable, then employer may defend on grounds of undue hardship if the employer can show that "an accommodation reasonable to a normal employer would break him").

51. In Bragdon v. Abbott, the Supreme Court widened access to the ADA's protected class by holding that "reproduction" is a major life activity which asymptomatic HIV "substantially limits." 524 U.S. 624, 647 (1998). The Court also offered an inclusive interpretation of the definition of "disability" in PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001). Yet, *Bragdon* and *Martin* proved to be exceptions to the Rehnquist Court's ADA jurisprudence.

52. 527 U.S. 471 (1999).

53. 527 U.S. 555 (1999).

54. 527 U.S. 516 (1999).

55. *See Sutton*, 527 U.S. at 488; *Albertson's*, 527 U.S. at 565; *Murphy*, 527 U.S. at 521.

are not substantially limited in the major life activity of "working" unless they have been excluded from a "broad class of jobs."[56] Thus, even workers with impairments that substantially limit their ability to perform their jobs may not have a "disability."

In *Toyota Motor Manufacturing v. Williams*,[57] the Supreme Court used similar logic to further narrow the entranceway into the ADA's protected class. The *Williams* Court held that "the central inquiry" when determining whether an individual's impairment substantially limits a major life activity "must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job."[58] Thus, a worker whose severe carpal tunnel syndrome and tendinitis starkly limited her work and home lives was not substantially limited in the major life activity of "performing manual tasks" because she could brush her teeth, tend her garden, and fix her breakfast.[59]

The Supreme Court did not limit itself to using the ADA's ambiguous text as a means to narrowing the statute's reach. In *Trustees of the University of Alabama v. Garrett*,[60] the Court relied on its newly rejuvenated federalism jurisprudence to strike down employment discrimination claims for damages by state employees with disabilities. The Court held that Congress had exceeded its authority under Section 5 of the Fourteenth Amendment by abrogating the sovereign immunity of states and subjecting them to employment discrimination claims for damages by employees with disabilities in Title I of the ADA.[61]

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56. *Sutton*, 537 U.S. at 491 (the Court assumed without concluding that "working" is a "major life activity").

57. 534 U.S. 184 (2002).

58. *Id.* at 200.

59. *Id.* at 202.

60. 531 U.S. 356 (2001).

61. *Id.* at 374. *Garrett* was one of several decisions in which the Supreme Court, by the narrowest margin, used the Eleventh Amendment to expand state immunity from congressional power. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999) (Fair Labor Standards Act); Federal Maritime Comm'n v. South Carolina State Ports Authority, 535 U.S. 743 (2002) (Shipping Act); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) (Age Discrimination in Employment Act). *But see* Nevada Dept. of Human Resources v. Hibbs, 123 S.Ct. 1972 (2003) (Family and Medical Leave Act).

Title I plaintiffs able to squeeze into the ADA's judicially streamlined protected class faced further obstacles erected by the Supreme Court. For example, in *US Airways v. Barnett*,[62] the Supreme Court manufactured out of whole cloth a new defense for employers seeking to avoid accommodating their employees with disabilities. After *Barnett*, any accommodation that violates an employer's unilaterally imposed seniority system would be considered "ordinarily unreasonable" unless the employee/plaintiff with a disability can demonstrate "special circumstances."[63] This implied "seniority system defense" finds no support in the text of the ADA and offers broader protection to employers than express "bona fide seniority system" defenses established by other employment discrimination statutes.[64] The Supreme Court also gave an expansive definition to the so-called "job-related/business necessity defense" in *Chevron v. Echazabal*.[65]

Thus, the central accomplishment of the anti-discrimination phase — the ADA — faced stern judicial attack in the waning years of the Clinton Administration. And the work of the course-correction phase of federal disability policy had barely begun.

THE "COELHO CHALLENGE"

On October 24, 2003, Tony Coelho addressed a large audience at New York Law School at the invitation of New York Law School's Labor & Employment Law Program. His address commemorated National Disability Employment Awareness Month. The philosophy of New York Law School's Labor & Employment Law Program is that law derives principally from politics and policy, rather than objective and neutral reasoning. Thus, it seemed appropriate to commence its 2003-04 Law & Public Policy Events Series with an address

62. 535 U.S. 391 (2002).

63. *Barnett*, 535 U.S. at 403. For a more expansive discussion of *U.S. Airways v. Barnett*, *see* Seth D. Harris, *Re-thinking the Economics of Discrimination: US Airways v. Barnett, the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV.123 (2003).

64. *See, e.g.*, 42 U.S.C. § 2000e-2(h) (2000) (Title VII permits employers to "apply different . . . terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system").

65. 536 U.S. 73 (2002).

by one of the nation's leading experts on politics and disability policy.

Congressman Coelho offers a unique perspective on disability policy. In addition to his painful personal experiences,[66] Coelho played a leading role in the latter stage of the anti-discrimination phase and an equally leading role in the course-correction phase of disability policy. His unique status made him an eyewitness to and a possible bridge between these two phases. In addition, Coelho's historical importance gives immense authority to his vision of the road ahead.

Congressman Coelho's address — reproduced below — sets forth an agenda befitting the unique historical role of the speaker. First, the address advocates conserving the anti-discrimination edifice undermined by the Supreme Court at the end of the 20th Century. Congressman Coelho's proposal for an ADA Restoration Bill is central to defending the most important achievement of the anti-discrimination phase and one of Congressman Coelho's greatest legislative accomplishments.

Second, the address promotes a revivification of the course-correction phase which President Clinton commenced by issuing Executive Order No. 13078. In particular, Congressman Coelho demands the expansion of federal employment and contracting opportunities for people with disabilities and the reform of the Javits-Wagner-O'Day program which sets aside certain federal contracts for the employers of people with severe disabilities. He also proposes comprehensive reform of the SSDI system to build on the promise of the Ticket to Work Act. We can assume that the PTFEAD's agenda would have included these proposals had it survived the 2000 presidential election. In this respect, Congressman Coelho seeks to finish the course-correction phase's unfinished business.

Finally, the address tantalizingly hints at the need for a new phase of disability employment policy premised on the idea that private parties must do more than merely refrain from discriminating against people with disabilities. Congressman Coelho's proposal that the next President require employers doing business with

66. *See* Tony Coelho, *Our Right to Work, Our Demand to be Heard: People with Disabilities, the 2004 Election, and Beyond*, 48 N.Y.L. SCH. L. REV. 729, 740-41 (2004).

the federal government to engage in affirmative action for people with disabilities moves beyond the course-correction phase's focus on the federal government's responsibility for the low employment rate among people with disabilities. It implicitly suggests that even a thorough re-engineering of federal policy, building on a restored anti-discrimination strategy, will not be enough to achieve substantially increased employment opportunity for adults with disabilities. A new strategy of expanded private responsibility will also be needed.

Perhaps the most important aspect of Congressman Coelho's address is its intended audience. This is not a typical law review article directed at scholars, courts, and lawyers. Congressman Coelho self-consciously and directly summons the disability community to take on the challenge of forcing change through the political process. He also challenges the 2004 presidential candidates to draw on the potential vote-getting power of the disability community by endorsing the agenda set forth in the address. In essence, Congressman Coelho seeks to answer the challenge described by Joseph Shapiro to forge the political support and power necessary to transform not only policy, but society.

At the time of this writing, this so-called "Coelho Challenge" has been widely adopted by disability organizations and endorsed by most of the 2004 presidential candidates. There is every reason to believe that this address will play an important role in shaping progressive disability policy at the federal level for many years to come.