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The Judicial Implementation of Statutes

Three Stories about Courts and the Americans with Disabilities Act

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JEFFREY PRESSMAN AND AARON WILDAVSKY MEMORABLY GAVE their book *Implementation* a ridiculously long, old-fashioned subtitle: *How Great Expectations in Washington Are Dashed in Oakland; or, Why It's Amazing That Federal Programs Work at All, This Being a Saga of the Economic Development Administration as Told by Two Sympathetic Observers Who Seek to Build Morals on a Foundation of Ruined Hopes* (Pressman and Wildavsky 1984). Pressman and Wildavsky were concerned with the ways in which states and localities frustrated implementation of federal programs. But the nub of their problem should be familiar even to those unversed in federal–state relationships: When you give someone else a job to do, you cannot be sure they will do it the way you want.

Social scientists call this the "principal–agent" problem, and if one thinks about it, social life is filled with such difficulties. You pay your mechanic to overhaul your car, but how much do you know about what he actually has done, or whether the car needed the fix in the first place? You leave your investments in the hands of a broker, but can you be sure that all the trades she makes are aimed at improving your finances rather than generating more fees? In political science, principal–agent theory has most vigorously been applied to bureaucratic implementation. Political scientists have carefully explored the myriad ways in which bureaucrats frustrate or fulfill the wishes of legislators who, at least theoretically, give them their marching orders. (For a helpful review of this literature and a strong recent contribution to it, see Huber and Shipan 2002.)

Much less political science research has been done on implementation of statutes by courts. The bulk of the research on judicial implementation uses the principal agent perspective to analyze how actors within the two branches strategize to achieve their policy goals. In the court–Congress game, judges are driven by their policy preferences to interpret statutes in ways that sometimes depart from the wishes of the principal, Congress. This inclination on the part of judges is disciplined, however, by the threat of congressional override—Congress can enact new legislation that explicitly

overturns the interpretation. Passing new legislation, though, is "costly" because putting a majority coalition together takes time and energy away from other goals that legislators might want to pursue. The costliness of legislating means judges can on occasion depart from the wishes of Congress without being overruled, because legislators may consider the trouble of correcting the deviation to outweigh the benefit. Through intensive analysis of these kinds of calculations, academics have developed models that attempt to predict how both judges and legislators will behave.[1]

As Barnes has noted, the game-theoretic approach's virtues—parsimony and hypothesis generation—are the flip side of its limitations. By focusing solely on judges and legislators, and thus ignoring the larger context in which statutory implementation occurs, strategic modelers can produce precise predictions about when judges will depart from the wishes of legislators. But if one wishes to see how law operates beyond the formal institutions of courts and legislatures, this literature is of limited use (Barnes 2004).

The richest work on statutory interpretation ventures further outward than the game-theoretic literature. Yet like game theory, it emphasizes the most dramatic moments of judicial policymaking—the points at which courts make particularly far-reaching interpretive decisions—rather than the everyday processes of judicial implementation. For example, Melnick's (1994) *Between the Lines: Interpreting Welfare Rights* demonstrates how welfare, food stamps, and disability education policies were reshaped by federal court decisions interpreting statutes. Melnick's book is filled with insights about the ways in which judges, bureaucrats, and legislators interact in producing policy, and the strategies this creates for interest groups. But because Melnick's book is concerned with high moments of policymaking, it necessarily ignores the seemingly more mundane aspects of judicial implementation—the daily grind of claims and counterclaims in court, and perhaps even more significant, the compliance that happens without court action.

Studying judicial implementation, as opposed to judicial policymaking, turns our attention to less-often explored aspects of the court–Congress game. It focuses us, for example, on the litigants who bring cases at least as much as on the judges who decide them. Judicial implementation, after all, is implementation by plaintiffs, who must press claims before courts even learn of them, and defendants, whose attempts to evade, comply with, or defend against claims determines which cases reach trial. Indeed, it is this reliance on private parties to bring and defend claims that separates judicial implementation from its main alternative, bureaucratic implementation. Thus if we want to understand what judicial implementation looks like, and particularly how it might look different from bureaucratic implementation, we must move beyond the formal institutions, courts and Congress. We must consider the perspectives of the interest groups who campaigned for the legislation, those who fought against it, those who seek to use the law to their advantage, and those on whom the law's commands fall. Indeed, for many statutes, we must even consider the attitudes of the mass public, who, though uninvolved in litigation, may have a decisive impact on processes of implementation. It is the behavior of this much larger cast—litigants, potential litigants, and seeming bystanders—that provides the context in which legislators and judges interact.

In this chapter, I analyze the court–Congress interaction in judicial implementation from this broader perspective. Principal–agent theory provides the starting point for my analysis, but not the endpoint: my purpose is to consider aspects of judicial implementation whose significance has been slighted in the political science literature. My interest in implementation outside the courts and legislatures reflects my grounding in the work of the Law and Society Association, whose members have produced the bulk of research on law outside of formal institutions. In this chapter, I draw extensively on law and society research to help analyze three ways of thinking, three "stories," about judicial implementation of the Americans with Disabilities Act (ADA). These three stories illustrate the complexities of judicial implementation.

THE CASE OF THE ADA

If my goal were simply to show what happens in the ordinary case of statutory implementation by courts, the ADA would not be a good choice. The ADA is an extraordinary statute, and the interaction that has created between the federal courts and Congress has been extraordinary as well. The ADA assigns enforcement to a bunch of federal agencies, but also gives individuals the right to sue to implement the law—and the resulting court decisions trump agency interpretations of the statute.[2] Enacted into law in 1990, the ADA has now had more than a decade of parsing in the federal courts, a process that has infuriated both the drafters of the law and the judges who are charged with interpreting it. A series of Supreme Court ADA decisions in 2001 so exasperated one of the chief congressional sponsors of the law, Representative Steny Hoyer (D-Md.), that he wrote an article titled "Not Exactly What We Intended, Justice O'Connor" (Hoyer 2002). A couple of months later, Supreme Court Justice Sandra Day O'Connor, the primary target of Hoyer's criticisms, complained to a group of business lawyers that the ADA's poor draftsmanship happens when "sponsors are so eager to get something passed that what passes hasn't been as carefully written as a group of law professors might put together" (quoted in Lane 2002). In a shot from the drafters' side, Chai Feldblum, a law professor who, as it happens, helped put together the ADA, summarized the Supreme Court's ADA jurisprudence with some frustration: "The outcomes of the cases have been unexpected and remarkable" (Feldblum 2000, 103).

As these comments suggest, the ADA has become one of the most disputed, most controversial statutes in the federal courts. This is reflected in the sheer number of ADA cases on which the Supreme Court has weighed in: between 1997 and 2004, the Court ruled on twenty ADA cases, and there is no sign that this stream of cases will let up. Justice O'Connor went so far as to predict that the 2000–1 term could be remembered as the "disabilities act term," a prediction that seemed justifiable on purely numerical grounds: Five of the Court's docket of eighty-one cases that term involved the ADA (Lane 2002).[3] And the Supreme Court is a relative island of calm next to what's going on in the lower courts, where an array of disputes over such matters as what counts as a disability, what is considered a "reasonable accommodation," and how much consultation employers must conduct with employees with disabilities continue to rage (see Edmonds 2002).[4]

Why has ADA implementation proved such a difficult, controversial enterprise? First, the ADA is a broad, ambitious statute. It aims to open up American society so as to fully include people with disabilities. It does this by barring discrimination against them in a vast array of social settings, from bars and bakeries to parks and zoos. The ADA's fifty pages of text cover a remarkable range of issues, from the ac-

cessibility of buses and subways, to medical screening of job applicants, to the operation of phone systems for deaf people. According to one estimate, the ADA regulates more than 600,000 businesses, 5 million places of public accommodation, and 80,000 units of state and local government (West 1994).

Second, many of the key terms in the ADA are general, vague, and so easily disputed. The main thrust of most civil rights statutes is to ensure that all are treated similarly. The drafters of the ADA realized, however, that because of the diversity of disabilities and individual experiences with those disabilities, ADA enforcement must be handled in a much more case-by-case matter. So rather than simple rules, the ADA provides a list of general standards that must be applied to individual cases. Employers must provide "reasonable accommodations" to people with disabilities, the ADA says, unless this results in "undue hardship." But what is "reasonable" and what "undue"? The ADA applies to "qualified individuals" who can perform a job's "essential functions." But what exactly makes one "qualified" and which parts of a job are really "essential"? The words provide a lot of room for argument, and this has made ADA jurisprudence a morass of adversarial exegesis.

But most important of all, the drafters of the ADA attempted to reshape the way Americans think about disability, a goal that makes interpretation of the statute part of a larger battle over the interpretation of disability in American culture. The dominant, familiar view of disability is that it is a tragedy for the individual, one that inevitably limits one's chances in life. Disability theorists label this the "medical model" of disability because, as with sickness, it locates the problem of disability in the individual. The ADA, by contrast, is premised on a "social model" or "rights model" of disability, in which disability is produced by society.

To see the world in this way requires a radical shift in perspective. In the social model, people with disabilities are disabled not by their impairments, but by structural barriers and prejudicial attitudes. The basic, taken-for-granted arrangements of society, in this vision, are discriminatory because they fail to take into account the full diversity of human beings—the fact, for example, that some of us get around on legs, others on wheelchairs. A building entrance that wheelchairs cannot fit into is, in this view, equivalent to a "no blacks allowed" sign on the door. An employer who refuses to alter workplace practices so as to accommodate an employee with a disability is not simply being unkind, but discriminatory. Traditional approaches to disability that segregate or institutionalize people with disabilities become tokens of an embarrassing past, like Jim Crow laws and white-only schools. Even many seemingly good-hearted organizations devoted to helping people with disabilities—most notoriously Jerry Lewis's Muscular Dystrophy Telethon—take on a sinister cast, because they treat people with disabilities as "childlike, helpless, hopeless, nonfunctioning and noncontributing members of society," as disability activist Evan Kemp put it (Kemp 1981, A19). (Several years after making his critique of the telethon, Kemp became chair of the Equal Employment Opportunity Commission, or EEOC, one of the main federal agencies charged with enforcing the ADA.)

This view of disability is not merely politically controversial; it is hard for many to grasp. As disability activist Bob Funk has written, "the general public does not associate the word 'discrimination' with the segregation and exclusion of disabled people. . . . Historically the inferior economic and social status of disabled people has been viewed as the inevitable consequence of the physical and mental differences imposed by disability" (Funk 1986, 7).

In the social model of disability, however, every sidewalk curb without a "cut," every subway without an elevator, and every elevator without Braille buttons is an act of discrimination. The disability activists who helped draft the ADA hoped it would inspire judges and the other implementers of the statute to redistribute resources, restructure institutions, and transform attitudes so as to achieve an inclusive society—a truly radical goal.

STORY ONE: BACKLASH

By 1999, these hopes had been deflated. It was in that year, as the tenth anniversary of the passage of the ADA neared, that a group of legal scholars and disability activists gathered at an academic conference in Berkeley, California, widely considered the birthplace of the disability rights movement, to analyze the "backlash" against the ADA. It was not a happy meeting. In the hands of federal judges the ADA had become a creature quite different from the one the participants thought had been created (Krieger 2000a, 2000b).

There was, for example, the issue of who is considered "disabled" under the statute. This had not seemed during the enactment of the ADA to be a concern. There were major controversies in Congress over the cost of accommodations, rules for the hiring of people with contagious diseases, and coverage of drug addicts. The disability definition matter was, in contrast, resolved rather easily. The drafters simply took the language from a statute, Section 504 of the 1973 Rehabilitation Act, which had barred discrimination against the "handicapped" (then the standard term) by entities receiving federal government funds. To be considered handicapped under Section 504, one had to be "substantially limited" in a "major life activity."[5] These terms were lifted out of 504 into the ADA, and were never seriously debated in Congress.

Section 504 had been litigated extensively, and the question of who counted as handicapped had not arisen as a major issue. In perhaps the most prominent Section 504 case, *School Board of Nassau v. Arline*, the Supreme Court ruled in favor of a teacher fired because she had bouts of tuberculosis. The Court concluded that the plaintiff was handicapped simply because her disease "was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment" (*School Board of Nassau v. Arline*, 480 U.S. 273, at 280–81 [1987]). Given the Court's nonchalant handling of the "who counts as disabled" issue in *Arline*, the drafters of the ADA did not anticipate that it would arise much in ADA litigation (Feldblum 2000, 126–35).

But defendants in ADA cases saw an opportunity. Defending ADA employment claims on grounds of "reasonable accommodation" or "undue hardship" involved a close examination of employer practices—and a legal headache. Moreover, these were likely to be matters for a jury to decide, and defense lawyers would rather avoid the danger and cost of a jury trial. If, instead, defendants could convince a judge that the plaintiff was not disabled, the case would never get to trial; the plaintiff had no legal claim under the ADA. So defendants began arguing that plaintiffs in ADA cases were not really disabled.

They attacked the two prongs of the ADA's definition of disability, challenging both the claim that the plaintiff was "substantially limited" and that the limitation was in a "major life activity." The attack seemed to catch plaintiffs' attorneys off guard. In many cases, they simply used the plaintiff's own statement about his im-

pairment as evidence for the "substantial limitation" prong. This was in line with the belief that the prong merely ruled out minor impairments, like an injured finger. But defense attorneys cited EEOC regulations specifying that "substantially limited" means "significantly restricted as to the condition, manner or duration" that a person can perform a major life activity as compared to the ability of "the average person in the general population."[6] Defendants won many cases on summary judgment—before a trial—when federal judges ruled that the plaintiff had not assembled sufficient expert evidence making this comparison (Van Detta and Gallipeau 2000, 515–23).

The "major life activity" prong proved even more troublesome for plaintiffs. The EEOC created a list of major life activities that was exemplary rather than exhaustive; it included very basic activities such as "caring for oneself." Plaintiffs who could not make a case that they were substantially limited in one of the EEOC's listed activities had to create their own. When they did, they were met by the argument that, for example "lifting," or "interacting with others" was not major enough, or was too poorly defined. Many plaintiffs, and many courts, focused on "working" as the life activity, but this created myriad problems for plaintiffs.[7] One problem is that, again according to EEOC regulations, plaintiffs have to show that they are limited not only at their particular job or employer but at a broad range of jobs in their region. Proving this involves assembling a convincing assessment of the regional economy, not an easy task for the typical plaintiff (Van Detta and Gallipeau 2000, 526–35).[8]

Given all these difficulties, it soon seemed almost impossible to be declared disabled under the ADA. Plaintiffs with breast cancer, stroke-induced paralysis, spastic colon aggravated by multiple sclerosis, brain tumor, epilepsy, hemophilia, heart disease, diabetes, cancer, ulcerative colitis, carpel tunnel syndrome, depression, paranoia, and bipolar syndrome all were declared nondisabled by federal courts (see Diller 2000, 24–26).

And there was more. The EEOC had declared that the assessment of whether a person is substantially limited in a major life activity should be made "without regard to mitigating measures such as medicines, or assistive or prosthetic devices"; 29 C.F.R. Pt. 1630, App. Section 1630.2(j); EEOC Compliance Manual Section 902.4(c)(1). Defendants successfully challenged this rule in a trio of Supreme Court cases in 1999. In *Sutton v. United Air Lines*, 527 U.S. 471 (1999), the Court concluded that two sisters with severe myopia who sought jobs as airline pilots were not disabled because their glasses mitigated their limitations. In *Murphy v. UPS*, 527 U.S. 516 (1999), the Court declared that a man fired because of his high blood pressure was not disabled because medication mitigated the effects of his condition. And in *Albertson's v. Kiringburg*, 527 U.S. 555 (1999), the Court reversed a lower court's finding that a truck driver fired because he had vision in only one eye was disabled. The Court concluded that the lower court had failed to consider whether the truck driver's impairment was mitigated by his brain's ability to compensate for the loss of vision. The Supreme Court's mitigating measures decisions have made it even more difficult for plaintiffs to get themselves considered disabled under the ADA.

There have, of course, been victories for plaintiffs in ADA cases at the Supreme Court.[9] The most famous is *PGA v. Martin*, in which the justices ruled that the use of a cart was a "reasonable accommodation" for mobility-impaired professional golfer Casey Martin. That case is by far the most well-known of all ADA decisions, receiving lots of front page coverage and media analysis, on both sports and news pro-

grams. Many other Supreme Court ADA cases can be considered draws.[10] But overall, the record of ADA plaintiffs in federal courts has been lousy. In Colker's much-cited study of ADA employment litigation, defendants prevailed in 94 percent of cases at the trial court level. Losing plaintiffs who appealed lost 84 percent of the time. Of the 6 percent of cases in which plaintiffs won at the trial level, defendants won on an appeal 48 percent of the time (Colker 1999, 108). These remarkably one-sided statistics, more than anything else, have fueled claims of a backlash against the ADA.

Appellate opinions in ADA cases support the backlash narrative. One sees little evidence that the social model of disability, the transformative vision that animated the disability rights movement, is guiding the judges. Instead the dominant concern seems to be that the ADA could turn into a litigation nightmare if it is interpreted too broadly. In some cases federal judges voiced these fears, as in this passage in which an appellate judge approvingly cites a district judge's tirade against the ADA:

> This Court agrees with the *Pedigo* court's observation:
>
> that the ADA as it [is] being interpreted [has] the potential of being the greatest generator of litigation ever . . . [it is doubtful] whether Congress, in its wildest dreams or wildest nightmares, intended to turn every garden variety worker's compensation claim into a federal case.
>
> The court doubts that the ultimate result of this law will be to provide substantial assistance to persons for whom it was obviously intended. . . . One of the primary beneficiaries of [the ADA] will be trial lawyers who will ingeniously manipulate [the ADA's] ambiguities to consistently broaden its coverage so that federal courts may become mired in employment injury cases, becoming little more than glorified worker's compensation referees.[11]

This passage exemplifies another tendency commentators see in ADA opinions: judges simply ignore the difference between the conception of "disability" in the ADA as opposed to welfare and workers' compensation programs. In the disability welfare programs, disability means "inability to work" or, even more broadly, "helplessness." Those who are able to work are by this definition nondisabled and therefore ineligible for the ADA's protections (Feldblum 2000, 140). But this view turns ADA enforcement into an incomprehensible muddle. The vision behind the ADA, after all, is that people with disabilities are perfectly capable but hindered by prejudicial attitudes and structural barriers. According to this view, people with disabilities, with and without mitigating measures, should be expected to function in society, and the ADA's purpose is to eliminate barriers to their flourishing. If, instead, the ADA is interpreted to apply only to those so disabled that they cannot work or participate in society, it is hard to see what purpose the law serves—the statute only covers those who are not in a position to use it. In the backlash narrative, then, ADA implementation has been derailed by an outdated, inappropriate conception of disability (see O'Brien 2002).

If the backlash story is correct, why did not the disability groups who advocated the ADA get Congress to reverse the Supreme Court's interpretation of the law? There was talk about this, especially after the trio of mitigating measures cases. But as disabilities rights advocates explained, the dangers were great (*Successful Job*

Accommodations Strategies 1999). Opening up the law to amendment could wind up making it even weaker. Although research found that ADA plaintiffs were losing in droves, media reports suggested that disability rights litigation had run amok. It was not a favorable media climate for an expansion of the ADA (LaCheen 2000). Moreover, as principle-agent theory suggests, the bipartisan coalition that enacted the law could splinter depending on the amendments offered. So even we assume that a majority of the Congress, if given the chance, would vote against the Supreme Court's rulings (an assumption perused below), it might not be in the interest of disability rights supporters to bring up such legislation. Thus the backlash narrative highlights the power of courts in the principal–agent game, their ability to defect from the wishes of the agent, Congress and the president.

STORY TWO: SYMBOLIC POLITICS

The backlash story measures the vast distance between what the drafters of the ADA intended and what the federal courts have been doing. But, one might argue, does this not conflate the aspirations of the drafters with the wishes of Congress? After all, drafters do not make statutes into law—Congresses do, usually with the president's signature. Thus to understand intent we must find out what all the members of Congress who voted in favor of the measure and the president who signed it intended. This is one of the main problems of principal–agent theory as applied to the implementation of statutes in general, and American statutes in particular. The problem is that there is no single "principal," but instead many principals, the vast majority of whom have given no explicit indication of what they want their agent to do in a specific case.[12]

Take, for example, the definition of disability under the ADA. What was the intent of Congress? Feldblum, who helped draft the text, notes that the Supreme Court has made much out of the preamble of the ADA, which states that there are 43 million Americans with disabilities. Surely if that is true, Justice O'Connor reasons in her opinion in *Sutton v. United Airlines*, Congress could not possibly have intended the law to apply to people with eyeglasses.[13] But Feldblum argues that there was not much intent at all behind the number:

> I can attest that the decision to reference 43 million Americans with disabilities in the findings of the ADA was made by one staff person and endorsed by three disability rights advocates, that the decision took about ten minutes to make, and that its implications for the definition of disability were never considered by these individuals. Moreover, it was my sense during passage of the ADA that this finding was never considered by any Member of Congress, either on its own merits or as it related to the definition of disability. By contrast, I can attest that the statement in three separate committee reports that mitigating measures should *not* be taken into account in determining the existence of a disability was extensively discussed by Congressional staff members, disability rights advocates, and some Members of Congress. (Feldblum 2000, 154)

Following the conventions of statutory interpretation, Feldblum analyzes what participants in the legislative process *said* to demonstrate legislative intent. Statutory

interpreters often quote from committee hearings, floor debates and other aspects of the legislative process to prove they have gotten intent right. But these bits of data simply cannot tell us what every member of Congress intended, because the vast majority never spoke up. As a matter of convention, one can *assume* that those who do not speak up consent to how others characterize legislation, but ultimately it is only the text that they agree to—a text that in this case includes 43 million estimate and excludes any language on the issue of mitigating measures. The text is the only way in which most of the principals in this principal–agent game spoke.

The fact that statutes have many (silent) principals undermines the backlash narrative about the ADA. Just because the drafters envisioned a fundamental transformation of American society, there is no reason to believe that this belief was widely shared among the members of Congress, many business-friendly Republicans and Democrats, who voted for the ADA, or George H. W. Bush, who signed it. Indeed there is an alternative narrative about the ADA that is at least equally plausible, though maddeningly cynical: the politicians who voted for the ADA did so because it was a low-cost vote-getter, a symbolic law. They are, according to this storyline, quite content with the federal courts' narrow interpretation of the ADA.

The symbolic story about the ADA gains credence when we consider the broader context of the ADA's passage. For politicians, the ADA was close to something for nothing, a statute that allowed them to stand for something that was noble and heroic-sounding at little cost. Unlike many other ways of improving the life chances of people with disabilities, supporting the ADA did not tap the federal budget; it merely created mandates against states and localities and nongovernmental organizations. Moreover, the ADA did not establish a federal agency to enforce the law; it simply added responsibilities to existing agencies, often without commensurate funding increases (see Moss et al. 2001). This shifted much of the burden for implementation away from the government to plaintiffs. For the politicians who sponsored it, then, the ADA was a low-cost law, requiring no great principled vision of social change. No surprise, then, that Congress has failed to react to the stream of prodefendant ADA rulings in the federal courts.

The political scientist Murray Edelman wrote extensively about the place of symbolism in politics generally and in statutory implementation specifically. Edelman argued that many regulatory statutes delivered symbolism to the mass public while failing to deliver material benefits. "Some of the most widely publicized administrative activities," he wrote, "convey a sense of well-being to the onlooker because they suggest vigorous activity while in fact signifying inactivity or protection of the 'regulated'" (Edelman 1974, 39). Bureaucratic agencies come into daily contact with the regulated; regulators often take jobs in the regulated industries. Thus agency personnel take on the attitudes and interests of the regulated. They become "captured." Yet the agency and the law that created it can still symbolically reassure the public that a social problem is being addressed.

Courts are not captured by powerful interests in exactly the way that Edelman and others suggested often happens with bureaucratic agencies. Yet powerful interests can dominate courts, as the work of Marc Galanter has shown. Galanter analyzes judicial implementation as a game in which the key variable is experience with the legal system. Repeat players—big corporations, government agencies, large organizations—are on the most experienced side of the continuum. One-shotters, as the name implies, arrive at a lawsuit with no experience. This gives repeat players

huge advantages over one-shotters (Galanter 1974, 95–151; Kritzer and Silbey 2003).

Civil rights laws such as the ADA typically match a one-shotter plaintiff against a repeat-player defendant, a large corporate or governmental organization. There are repeat-player ADA plaintiffs—public-interest organizations and government agencies that bring disability rights cases strategically, just as the NAACP did in mobilizing civil rights law. But especially in employment, ADA lawsuits have principally been brought by lawyers hired only to advance the interests of one-shotter plaintiffs. In this circumstance—a battle between repeat-player defendants and one-shotter plaintiffs—Galanter's theory predicts that the law over time will benefit the interests of defendants. Because defendants have a long-term interest in building up precedents in their favor, Galanter argues, they will settle cases that make bad precedents, and take weak claims to court. Plaintiff one-shotters have no corresponding interest in building precedent and so will settle when it is to their advantage. Moreover, lacking the expertise of repeat players, they will frequently advance weak claims. The resulting body of precedent will consist overwhelmingly of plaintiff wins, Galanter argues, particularly in areas in which precedent is valuable to defendants, and so will over time tilt heavily to the defense side. Galanter's theory looks like a plausible explanation for what has happened with the ADA, one that does not depend much on the political composition of the judiciary or the difficulty of the transformative goals behind the statute.

If Galanter's theory is correct, judicial implementation is an excellent method of symbolic politics. Occasional symbolic victories like Casey Martin's Supreme Court triumph will be trumpeted, but the vast number of much more significant losses will be ignored. And these losses are predictable because of the stronger resources and position of the defendants. Far from a "backlash," or a turning away from the "original intent" of the ADA, in this story the experience of ADA implementation is a predictable exercise in regulatory symbolism.

STORY THREE: LAW OUTSIDE OF COURTS

The conjunction of stories one and two raise familiar concerns about legislatures and courts, and thus of principal–agent theory as applied to judicial implementation. They are about the ways in which formal institutions, courts and legislatures, deal with law, and the strategies by which plaintiffs, defendants, and other interested parties shape implementation. But this focus misses perhaps the most important aspects of judicial implementation of statutes, the mechanisms by which laws and litigation penetrate the larger society, the routines of nongovernmental organizations, and the everyday consciousness of citizens. Even in a book about the court–Congress relationship, then, we must venture beyond these formal institutions to understand the distinctive qualities of judicial implementation of statutes. Story three is about the generative quality of judicial implementation, its capacity to create new worlds.

One potentially important example from ADA case law is provided by *Olmstead v. LC*, 527 U.S. 581 (1999), a Supreme Court decision that seems to have led to a reexamination of the way states handle people with severe disabilities. In *Olmstead*, a 6–3 majority concluded that it is discriminatory under the ADA to institutionalize people with disabilities who could instead be placed in a community setting. The *Olmstead* decision, however, left a lot of room for argument about what exactly the ADA commanded. The decision delegated to lower courts the issue of whether the plaintiffs' demand for deinstitutionalization and community placement would be so disruptive and expensive for the defendant, the state of Georgia, that it would "fundamentally alter" state programs, a defense under the ADA. Justice Ruth Bader Ginsburg's majority opinion in *Olmstead* suggested that states could comply with the ADA by developing "a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings" together with "a waiting list that moved at a reasonable pace" (527 U.S. 605–6).

Olmstead has generated a wave of follow-up lawsuits in roughly half the states (Fox-Grage, Folkemer, and Lewis 2003, 4). But as Ginsburg's opinion seemed to request, it has also catalyzed a nationwide review of institutional and community care programs. The federal Centers for Medicare and Medicaid Services have granted millions of dollars to states to develop reports on how they intend to comply with the *Olmstead* rules. Nearly all the states have created task forces to compile such reports, which identify barriers to deinstitutionalization and strategies for overcoming them. In some states, the effort has gone beyond mere planning. Massachusetts, for example, has closed a state hospital, moved hundreds of people into group or private homes, and created additional community services to facilitate closing more institutions (Dembner 2002, A1).

Olmstead seems to have stimulated a reexamination of institutions for people with disabilities that is mostly happening outside the courts. But because it began with a judicial ruling, *Olmstead* is still a conventional saga of judicial implementation of statutes. To move further beyond the formal institutions, we must consider enforcement and compliance that takes place entirely outside of courts. Sociolegal research suggests that the dispute that reaches trial is the exception; the vast majority of enforcement action takes place before disputes ever become court filings. In the standard metaphor of the "disputing pyramid," the base is all grievances that arise, cases in which people believe that they have been harmed by someone else's illegal conduct; the tip is trial and appellate cases, where the mechanisms of principal–agent theory become relevant. In a classic study of "middle-range" disputes the ratio between grievances and court filings was estimated at 20 to one. When the grievance involved discrimination, the ratio was even greater, 125 to one (Miller and Sarat 1980, figs. 1A and 1B, 544). Mostly people "lumped" their grievances, or negotiated an end to them outside the legal system.

If this study accurately represents disputing, analyzing judicial implementation through the lens of the court–Congress game misses most of the action. Indeed, a truly successful statute would never register in the court–Congress game. Few grievances would arise, because potential defendants would comply fully. Those disputes that did develop would be resolved before anyone contacted a lawyer, much less filed a lawsuit. The vision of lawsuit-free implementation of civil rights laws like the ADA is attractive to large organizations, which often employ sophisticated, elaborate strategies to ensure that disputes are smoothed out long before they reach the legal system, as Lauren Edelman and her colleagues have analyzed in a series of studies (see Edelman, Erlanger, and Lande 1993; Edelman 1990, 1999; see also Scheid and Suchman 2001). Edelman's research analyzes the techniques by which organizations "internalize" law, creating their own parallel processes for implementing workplace statutes such as the ADA. These typically feature dispute resolution systems that allow aggrieved individuals to bring their complaints "in-house."

In the process of internalization, Edelman concludes, the goals of civil rights laws are subtly reinterpreted. Complaint handlers within companies are typically not lawyers, and they do not worry about the niceties of the law. They read the law as requiring "fairness," by which they typically mean due process, consistency and respect (Edelman, Erlanger, and Lande 1993, 514–15). Concerns about institutionalized inequality and prejudice are deemphasized. Instead, complaint handlers tend to see disputes as arising from poor management and personal skills. Because the goal of the in-house process is dispute resolution, complaint handlers may provide a remedy even when they believe the complaint is ill-founded. Thus Edelman concludes, "the legal right to a nondiscriminatory workplace in effect becomes a 'right' to complaint resolution" (Edelman, Erlanger, and Lande 1993, 529). The radical social critique that informs the disability rights movement's reading of the ADA is turned into a matter of insensitive and inept management.

If organizations read the ADA in their own ways, so do individuals with disabilities. David Engel and Frank Munger have produced a study that beautifully illustrates this aspect of the ADA. Engel and Munger interviewed sixty people with disabilities about their life experiences. They did not ask about the Americans with Disabilities Act, or the disability rights movement, or even about law. Instead, the two researchers simply asked the interviewees to provide a life history, and then studied the extent to which the ADA entered into these autobiographical accounts. Not surprisingly, they found quite varying levels of engagement with the ADA. Some of the interviewees did not seem to know about the law; others had only a foggy sense of it. But for some the ADA was wrapped up in a process that transformed their identities and lives. Jill Golding, a nurse with learning disabilities, thought of herself as an unintelligent and uncooperative student when she was growing up, and thus accepted her exclusion from the mainstream educational system. But when as an adult she came to see herself as a person with a learning disability, she reconceived her treatment as illegitimate, a violation of her rights (Engel and Munger 2003, 33–34). Sara Lane, a newspaper editor who uses a wheelchair, hesitated to invoke the ADA in negotiating working conditions with her employer, but when the newspaper realized that the law applied to her, it became much more accommodating. "We treated you terribly. And we'll now try to make and try to do something" (Engel and Munger 2003, 26–27). Neither Lane nor Golding, nor any of the other fifty-eight interviewees in the study, ever made a formal complaint based on the ADA. Yet Engel and Munger fill an entire book describing the differences the ADA has made in their lives.

Engel and Munger's other purpose is to show how life experiences and beliefs frame reactions to the ADA and even understandings about what the law requires. Golding, the nurse, thinks of ADA rights as enforcing a "commitment to caring" that is the core of her value system. Her view is that employers, educators, and other organizations have duties of care to the individuals they come in contact with, and these duties involve accommodating differences like disability (Engel and Munger 2003, 35). Another interviewee, Raymond Militello, a hard-nosed businessman, mistakenly thinks the ADA creates affirmative action preferences for people with disabilities like himself. Although he believes the preferences illegitimate, and says he would vote against the ADA if he were a member of Congress, Militello also thinks it would be foolish not to take advantage of them (Engel and Munger 2003, 73–75). Sean O'Brien, a recent college graduate who is quadriplegic, interprets the "reasonable accommodation" standard in the ADA through his religious faith, considering for example whether an accommodation will benefit others as well as him—not a consideration in the law itself (Engel and Munger 2003, 157, 165). Political beliefs, life experiences, and religious faith shape the interviewees' understandings of the law. Their ADA is neither the drafter's, nor the Supreme Court's, but their own.

Engel and Munger do not dwell on the role of the media in framing understandings of the ADA, but especially for nondisabled Americans, this is likely a primary influence. In the news and entertainment media, the ADA's requirements are often portrayed as capricious and trivial. Thus ADA stories have become part of a larger frame about the overuse of courts and the litigiousness of Americans (see McCann, Haltom, and Bloom 2001; see also Burke 2002). One of the most common narratives in ADA journalism is the "litigation horror story," an amusingly outrageous claim. A story that was widely reported in the summer of 2002 concerned a wheelchair user who sued a strip club because its space for private lap dances was located up a flight of stairs; the story even reached the *New York Times*, one of nine occasions in which the *Times* reported on ADA lawsuits in 2002.[14] While *Olmstead*, the deinstitutionalization lawsuit, received little media attention, the case of Casey Martin, the professional golfer, loomed large.[15] His readily understandable, dramatic story fueled radio and television talk show debates over sportsmanship, fairness, and the nature of golf. The view of the ADA advanced in entertainment programs was predictably more one-sided. On *The Simpsons*, for example, Homer Simpson tries to gain 300 pounds so that he can become obese enough to be disabled under the ADA. The episode references other "disabilities" such as "achy breaky pelvis" and "juggler's despair" (LaCheen 2000, 228). Thus, while Engel and Munger's disabled interviewees struggle to make sense of the ADA, perhaps the most common media frame is that the law resists sense: It is simply absurd. If within the courtroom the ADA is understood in strikingly different ways, outside the courtroom the range of interpretations is even greater.

THREE (CONFLICTING?) STORIES

I have presented three stories about the ADA and, by extension, about judicial implementation of statutes. In one, the ADA is derailed by the federal courts because its revolutionary goals run up against powerful adversaries—and firmly entrenched conceptions about disability. In another, the ADA is a symbolic statute, enacted by Congress as a feel-good, low-cost law, and implemented by courts in just the way many of those who voted for it prefer. Yet another story looks beyond both the courts and Congress to see how government officials, the media, business, and people with disabilities themselves interpret the law and incorporate it into their lives.

We need not choose between the stories, for they all capture a truth about the judicial implementation process. The ADA *is* a revolutionary statute, and its handling in the federal courts *has* blunted a transformation in the way Americans understand disability. The ADA is also a symbolic statute, and there are doubtless congressional supporters, perhaps even a majority, who are perfectly happy with the way the law has been implemented by the courts. But beyond this, the ADA is also an extra-institutional statute, a law whose meaning cannot be fixed by either courts or Congress, that has a life, indeed many lives, outside both.

The great literary theorist Stanley Fish once titled a book of essays *Is There a Text in This Class?* The title comes from a question a somewhat clueless student put to Fish's colleague. The colleague, thinking the student had asked a mundane question about required books, answered that an anthology of literature would serve as the text. At this the student replied: "No, no, I mean in this class do we believe in poems and things, or is it just us?" (Fish 1980, 305). The student, having taken Fish's literature course the previous semester, and having learned a little about literary theory, was trying to ask whether the instructor would insist that texts have determinate meanings, so that there would be a single text for all students, or whether the instructor would, like Fish, insist on the indeterminancy of texts. The student's question gets Fish a little wrong, because he does not believe that it is "just us" who interpret texts: we make sense of communication, he says, by drawing on a "background of practices, purposes, and goals" that is social, not individual (Fish 1980, 318). Still the question, and the instructor's confusion about the question, nicely illustrates the openness of texts, the ability of humans to read them in strikingly different ways.

I draw on Fish's story not merely to note that legal texts are indeterminate, that statutes like the ADA will be read differently by different actors. That, after all, is a point that has been made in law at least since the rise of Realism in the early twentieth century. My chief point is to highlight how many readers of statutes there are—not just the judges, legislators, and bureaucrats who populate most studies of court–Congress interaction but also defendants, plaintiffs, lawyers, administrators, journalists, and even the mass public. Each of these actors starts from different contexts, different interests, and different interpretive frames, and so reads statutes differently. For a statute as wide-ranging as the ADA, that can create a surprising array of interpretations. Who would have thought the ADA was a statute about the conduct of professional golfing? Managerial skill? Affirmative action–like preferences? The process of implementing a big, complex statute like the ADA can generate hundreds and hundreds of surprising interpretations.

This is one of the ways in which statutes that are implemented by lawsuit seem different from bureaucratically administered laws. Because they are enforced by private individuals as well as governmental entities, judicially implemented laws are likely to penetrate more deeply into society. The ADA, because it is so wide-ranging and controversial, is a particularly powerful example. Many judicially implemented statutes regulate smaller spheres and so do not have the salience of civil rights statutes like the ADA. Still, by delegating enforcement to many actors rather than one agency, all judicially implemented statutes push the process of interpreting statutes outward into society. This creates an array of statute readers, and gives birth to an array of readings.

Inside the courtroom, the generativity of statutes, their life-giving capacity, is matched by an equally strong force: the murderousness of judges. Judges are, in the coinage of Cover, "jurispathic": "Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest" (Cover 1995, 157). With every decision, a judge kills some interpretations in authorizing his own. And of course, judges have destroyed some interpretations of the ADA. *Sutton v. United Airlines*, for example, killed the idea that being nearsighted enough to need eyeglasses was a form of disability. In the principal–agent game between Congress and the courts, this is far from the last move. Congress, the nominal principal, can, if it passes a law, restore to life any interpretation. Moreover, Congress can itself act as killer, eliminating an interpretation a court has authorized. Yet judges, simply because they review statutes every day, have the greatest opportunity to impose their own readings.

But we miss a lot if we think only about courts and Congress in isolation. As the case of the ADA illustrates, the court–Congress game takes place in the context of readings of others—by the claims plaintiffs choose to advance, by the strategies of defense lawyers, by media stories about outrageous lawsuits, and by public opinion. ADA jurisprudence has become focused on who counts as disabled not because judges chose this issue, but because defendants raised it. Professional golfer Casey Martin became an ADA celebrity not because the Supreme Court promoted his story but because it proved to be easily digestible for the news media. (*Olmstead*, a much more significant but less entertaining case, was largely ignored.) It is at least plausible that the torrent of media stories about abuse of the ADA has persuaded some wavering members of the Supreme Court to adopt narrowed readings of the law—and may have contributed to the decision of disability rights activists not to seek a congressional override of the statute. The court–Congress game is played on a field that is contoured by other actors.

Moreover the court–Congress game hardly dominates legal interpretation. Out beyond the formal institutions, there are readings of statutes that are barely touched by court and Congress. Engel and Munger's subjects are blissfully ignorant of the intricacies of Supreme Court ADA jurisprudence; their reading of the law is shaped by their own frames and life experiences. Meanwhile, in the corporate human resources systems that Lauren Edelman and her colleagues study, the ADA is read through a managerial discourse of fairness that has little to do with what judges, members of Congress, or disability activists see as the essence of the statute. And in the popular culture, the ADA has yet another life, in which figures like Casey Martin take center stage. The most commonly recognized problem with principal–agent theory as applied to judicial implementation is that there are many principals. The case of the ADA suggests another problem: too many agents.

NOTES

1. One influential article argues that judges look to the committee reports and other bits of "legislative history" because it provides a signal of how likely Congress is to overturn a judicial ruling that goes against legislative intent (see Schwartz, Spiller, and Urbiztondo 1994).
2. Moreover, the agencies charged with enforcing the ADA can only act on a small percentage of the complaints that come into their offices, leaving much of the action to the judiciary (see Moss et al. 2001).
3. The five ADA cases decided during the 2001–2002 term were *Barnes v. Gorman*, 536 U.S. 181 (2002); *Chevron v. Echazabal*, 536 U.S. 73 (2002); *U.S. Airways v. Barnett*, 535 U.S. 391 (2002); *EEOC v. Waffle House Inc.*, 534 U.S. 279 (2002); and *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002).
4. Courts are divided over whether "interacting with others" counts as a disability. See, e.g., *Steele v. Thiokol*, 241 F.3d 1248, 1255 (10th Cir. 2001); *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997), with *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234–35 (9th Cir. 1999); and on what counts as a "mitigating measure," *EEOC v. Sears*, 233 F.3d 432, 439 (7th Cir. 2000).

5. This definition was contained in a 1974 amendment to sections 501, 503, and 504 of the 1973 Rehabilitation Act; HR 17503, 93rd Cong., 2nd Sess. (1974).
6. Equal Employment Opportunity Commission, *EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act*, 29 C.F.R. 1630.2(j)(1)(i)–(ii).
7. Feldblum notes that the EEOC regulations specify that "working" should be considered as a major life activity only in the rare case in which this is the only arena in which a person is substantially limited. She blames judges for focusing on "working" because of its close relationship to traditional notions about disability—an inability to work is in the eyes of many (and under some government programs) the very definition of disability (see Feldblum 2000, 140). Van Detta and Gallipeau focus more blame on plaintiffs, who they argue sometimes make a "fatal error" in relying on working as a major life activity (Van Detta and Gallipeau 2000, 522).
8. Another, even more fundamental, problem with "working" as a life activity is that the ADA plaintiff who is proving that he is substantially limited as a worker must then show that he is qualified to perform the "essential functions" of the job with "reasonable accommodation." If he is found to be too disabled, he may be deemed unqualified. Or if he is found to be too qualified, he may be deemed nondisabled.
9. The clearest victories are *Bragdon v. Abbott*, 524 U.S. 624 (1998) (dentist who refuses to treat HIV-positive patient violates the ADA); *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999) (institutionalization of people with disabilities rather than community placement can be a form of discrimination prohibited by the ADA); *PGA Tour v. Martin*, 532 U.S. 661 (2001) (provision of a golf cart is "reasonable accommodation" for a professional golfer with a mobility disability); and *EEOC v. Waffle House*, 534 U.S. 279 (2002) (EEOC is not barred from suing in federal court by arbitration agreement signed by ADA complainant and employer).
10. In the 2002 case *U.S. Airways v. Barnett* (535 U.S. 391), the Court ruled that the ADA's requirement of "reasonable accommodation" of an employee with a disability did not normally require the employer to disregard seniority rules. But the Court left open the possibility that the plaintiff could prevail depending on the strength of an employer's seniority rule.
11. *Fussell v. Georgia Ports Authority*, 906 F. Supp. 1561, 1577 (S.D. Ga. 1994), quoting *Pedigo v. P.A.M. Transport, Inc.*, 891 F. Supp. 482, 485–86, as quoted in Van Detta and Gallipeau 2000, 512–13.
12. The problem is deepened by Kenneth Arrow's Impossibility Theorem, which demonstrates that in a system of majority rule, there is usually no single, stable preference that a majority will prefer, but instead a cycle of preferences. In other words, there can be no true majority outcome. According to this theorem, legislative outcomes, like the enactment of the ADA, are "structure-induced," in other words, a reflection of the fact that some in Congress have control over the process by which the law was debated and decided upon. The academics that have applied principal–agent theory to court–Congress interactions are, of course, aware of the fact that there is no true principal, and make simplifying assumptions to address this in their theories. For example, Schwartz, Spiller, and Urbitztondo assume there is a pivotal member of Congress whose preferences can stand in for the preferences of Congress (Schwartz, Spiller, and Urbitztondo 2000, 56–57, footnotes 16 and 17).
13. This reads: "findings enacted as part of the ADA require the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities. Congress found that 'some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.' This figure is inconsistent with the definition of disability pressed by petitioners" (*Sutton v. United Airlines*, 427 U.S., at 484).
14. Liptak 2002a. A LEXIS-NEXIS search for "Americans w/5 Disabilities" in the headline or first paragraph for the 2002 run of the *New York Times* turned up thirty-nine "hits," nine of which were news stories about ADA litigation. One of those involved a star football player's widely scorned claim that he had been discriminated against because of his depression (see Battista 2002).
15. A simple Lexis-Nexis search provides one modest measure of the difference in attention the two cases received. A search among "major papers" for the six months following the decision in *Olmstead* for any article with "Americans w/5 disabilities" and either "Olmstead," "Georgia," and "retarded," or "Georgia" and "institution," resulted in 26 unique articles. A similar search for "Americans w/5 disabilities" and "Casey Martin" found 159 articles.