

Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States

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Introduction

The 2008 amendments to the Americans with Disabilities Act (ADA) have renewed public attention to the plight of persons with disabilities. Almost two decades after the enactment of the ADA, Congress sought to undo the damage that court-imposed “demanding standard[s] for qualifying as disabled”¹ had inflicted on the struggle for recognition of persons with disabilities. Directing judges to construe “the definition of disability. . . in favor of broad coverage of individuals,”² legislators dismissed the judiciary’s interpretation of disability as an individual’s functional incapacity that results from a medical impairment. That focus on the nature of medical impairments, rather than on their social effects, had contradicted the conception of disability as caused by social discrimination, not illness.³ For instance, according to that conception, inability to walk is not a disability; what makes it a disability is the lack of wheelchair-accessible buildings. The 2008 ADA Amendments Act⁴ assumes that changing the statutory interpretation of the definition of disability, while leaving the definition intact, will be sufficient to restore the ADA’s original promise of social opportunity and recognition for the 50 million disabled Americans.

1. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

2. Americans with Disabilities Act, 42 U.S.C. § 12102(4)(A) (1990) (amended 2008).

3. See Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 214 (2000) [hereinafter Scotch, *Models*] (“For over a hundred years, disability has been defined in predominantly medical terms as a chronic functional incapacity whose consequence was functional limitations assumed to result from physical or mental impairment.”).

4. ADA Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C. and 29 U.S.C.). The ADA definition of disability remains basically the same as the definition in the Rehabilitation Act of 1973, which defined a person with a disability as “any person who (i) [h]as a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) [h]as a record of such an impairment, or (iii) [i]s regarded as having such an impairment.” 41 C.F.R. § 60-741.2 (2005). However, the ADAAA introduces a distinction in the remedies available for persons who qualify as disabled under the different prongs of the definition by eliminating the requirement for reasonable accommodation for plaintiffs “regarded as” disabled. See ADAAA, sec. 6(a)(1), § 501 (h). For a discussion, see Stephen F. Befort, *Let’s Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the “Regarded As” Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993.

The promise of empowerment and dignity has been resonating around the world. We currently find ourselves at a critical point when domestic and international efforts are converging in a unique moment in the struggle for equality of persons with disabilities.⁵ The landmark United Nations Convention on the Rights of Persons with Disabilities⁶ speaks to the life opportunities of 650 million persons with disabilities worldwide.⁷ The Convention, which came into force in May 2008,⁸ has been hailed as “the highest legal manifestation and confirmation of the social model of disability on the international stage.”⁹ This international document has been negotiated amid a process of reform at national and supranational levels, which has been largely inspired by the social model. Theorized initially in the United Kingdom as a reaction to the “tyranny of paternalism”¹⁰ that characterized the charity approach to disability,¹¹ the social model gained political expression in the United States in the antidiscrimination para-

5. See Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L L. & COM. 241, 242 (2003) (“At no time in history has the confluence of domestic and international efforts challenged lawmakers, scholars, and activists to work together for the creation of binding international, regional, and domestic laws to protect the basic human right of people with disabilities to dignity and equality.”).

6. U.N. Convention on the Rights of Persons with Disabilities and Optional Protocol, Dec. 13, 2006, U.N. Doc. A/61/611 (May 3, 2008).

7. See U.N. Comm'n for Social Development, *Mainstreaming Disability in the Development Agenda*, ¶ 2, U.N. Doc. E/CN.5/2008/6 (Feb. 2008).

8. G.A. Res. 63/192, ¶ 2, U.N. Doc. A/RES/63/192 (Feb. 24, 2009). Both the European Community and the U.S. have become signatories to the Convention, on July 30, 2009, and March 30, 2007, respectively. For a study of the EU's role in the negotiations, see Gráinne de Búrca, *The EU in the Negotiation of the UN Disability Convention*, 35 EUR. L. REV. 174 (2010). Some of the Member States of the EU have already ratified the Convention. As of August 2010, there were 146 signatories to the Convention (89 of which also signed the Optional Protocol), of which 90 had ratified the Convention (including 56 ratifications of the Protocol). Updates are available at <http://www.un.org/disabilities/countries.asp?navid=12&pid=166>. For a study of the Convention, see MICHAEL STEIN AND GERARD QUINN, *THE UNITED NATIONS CONVENTIONS ON THE RIGHTS OF PERSONS WITH DISABILITIES* (forthcoming, Cambridge University Press, 2011). See also Janet E. Lord, David Suozzi & Allyn L. Taylor, *Lessons from the Experience of U.N. Convention on the Rights of Persons with Disabilities: Addressing the Democratic Deficit in Global Health Governance*, 38 J.L. MED. & ETHICS 564 (2010).

9. Lisa Waddington, *A New Era in Human Rights Protection in the European Community: The Implications (of) the United Nations' Convention on the Rights of Persons with Disabilities for the European Community* 3, (Maastricht Faculty of Law Working Papers Series, Paper No. 4, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026581. See also Michael Ashley Stein, *Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES* 17 (Gerard Quinn & Oddný Mjöll Arnardóttir eds., 2009) (discussing the Convention as the first legally enforceable UN instrument specifically directed at persons with disabilities).

10. See James F. Childress, *Ensuring Care, Respect, and Fairness for the Elderly*, 14 HASTINGS CENTER REP. 27, 31 (1984). (“Paternalism motivated by individual or communal benevolence, but unlimited and unconstrained by respect for autonomy, becomes tyrannical . . .”); Gareth H. Williams, *Disablement and the Ideological Crisis in Health Care*, 32 SOC. SCI. MED. 517, 520 (1991).

11. See DORIS ZAMES FLEISCHER AND FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* 7-10 (2001) (describing the charity approach); MICHAEL OLIVER, *UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE* 19-26 (1996) [hereinafter OLIVER, *UNDERSTANDING*]. One of the early social model theorists is SAAD Z.

digm of the ADA and subsequently spread around the world by way of transnational social movements to more than forty legal systems,¹² including the European Union (the “EU”).¹³

Approaching disability reform within this larger comparative framework helps to understand its successes and failures across jurisdictions. This Article compares disability reform in the US and the EU, specifically the resilience of narrow, medicalized approaches to disability in judicial interpretations in both jurisdictions. The scholarly debate about the “judicial backlash”¹⁴ in the US assumes that this phenomenon is unique to ADA litigation. Yet a similar narrow judicial definition of disability can be found at the EU level. The question thus arises whether these two phenomena are in any way related. While one is always well advised to resist simplistic causality claims, especially in an area as complex as disability reform, I argue that an inquiry into the genealogy of the narrow judicial interpretations of the definition of disability shifts the focus to the social model itself. These narrow interpretations of disability represent, at least in part, judges’ reactions to how the normative framework of the social model conceptualizes the relations between illness, impairment, and discrimination.

The concept of medical impairments is especially important in this context. Despite their centrality in the legal construction of disability, medical impairments have remained largely under-theorized within the social model. I suggest that the explanation has to do less with the concept itself than with the argumentative strategy deployed by the advocates of the model. Important here is the attempt of the disability rights movement to de-link disability from illness as a precondition for building a strong,

NAGI, DISABILITY AND REHABILITATION: LEGAL, CLINICAL, AND SELF-CONCEPTS AND MEASUREMENT (1969).

12. For an analysis of the ADA’s worldwide influence as a regulatory model, see generally Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, in *DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES* 3, 10 (Mary Lou Breslin & Silvia Yee eds., 2002). See also Gerald Quinn, *Closing: Next Steps - Towards a United Nations Treaty on the Rights of Persons with Disabilities*, in *DISABILITY RIGHTS* 519 (Peter Blanck ed., 2005). In the EU, the turning point was the *Communication from the Commission on Equal Opportunities for People with Disabilities: A European Action Plan*, at 4, COM (2003) 650 final (Oct. 30, 2003) [hereinafter 2003 *European Action Plan*] (arguing for “a new approach to disability: from seeing people with disabilities as the passive recipients of compensation, society has come to recognise their legitimate demands for equal rights and to realise that participation relates directly to insertion.”). The legal framework is now provided by the Directive Establishing a General Framework for Equal Treatment in Employment and Occupation. See Council Directive 2000/78/EC, 2000 O.J. (L 303) 16.

13. Regarding terminology, I use “European Community” to refer to events or reforms prior to the entry into force of the Treaty of Lisbon, except when reference to the “European Union” is doctrinally warranted under the relevant Treaty provisions then in effect. I use “European Union” to refer to the present and future legal framework and/or policies.

14. See generally BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., 2003).

shared political consciousness.¹⁵ Analogies between impairments and illness were perceived as legitimizing medical expertise and thus perpetuating socially disabling assumptions about the standard of “normality.”¹⁶ However, the de-linking distorted the translation of the insights of the social model into public policy and legal claims in both jurisdictions studied here. The lack of a theory of medical impairments had the effect of alienating judges who needed guidance on how to interpret and apply disability statutes. Without sufficient help in the uncharted waters of the discrimination-centered social model, judges (re)turned to a familiar approach—the medicalized conception of impairments—that allowed them to craft manageable standards and filter out what they perceived as abusive claims. The resilience of the medicalized approaches to disability in judicial interpretations, as a common phenomenon in the US and the EU, is partly the consequence of a convergence in the reaction of courts faced with institutional and administrability concerns and the strategy of the social model to unify the base of the disability rights movement. I offer this as an explanation, not a justification, of the judiciary’s narrow interpretations. The shift from explanatory to normative approaches rests on theories of the judicial role that are themselves open to dispute. According to one such theory, which I endorse, the judiciary’s narrow interpretations represent a failure to respond appropriately to the claims to recognition of persons with disabilities.

Implied in the claim presented in this Article is the importance of one idea—the social model—in the comparative study of disability regulation in Europe and the United States. While other scholars have shown that conflicting legal strategies in the struggle for equality of persons with disabili-

15. See Richard K. Scotch, *Disability as a Basis for a Social Movement: Advocacy and the Politics of Definition*, 44 J. SOC. ISSUES 159, 163 (1988) [hereinafter Scotch, *Social Movement*] (“[D]isability’ as a unifying concept that includes people with a wide range of physical and mental impairments is by no means an obvious category. Blind people, people with orthopedic impairments, and people with epilepsy may not inherently see themselves or be seen by others as occupying common ground. Even greater divisions may exist between people with physical impairments and those with mental disabilities. Thus another prerequisite for collective action may be the social construction and promulgation of an inclusive definition of disability.”) This explains in part the different tracks of the struggle for recognition and/or action/inaction of persons with disabilities. See, e.g., Daniela Caruso, *Autism in the US: Social Movement and Legal Change*, 36 AM. J.L. & MED. 483 (2010). There are difficulties inherent in the effort of defining disability. See Thomas F. Burke, *The European Union and the Diffusion of Disability Rights*, in TRANSATLANTIC POLICYMAKING IN AN AGE OF AUSTERITY: DIVERSITY AND DRIFT 158, 160 (Martin A. Levin & Martin Shapiro eds., 2004) (arguing that “there are seemingly as many definitions [of disability] as there are disabilities”). The Supreme Court of Canada recognized the same point in *Eaton v. Brant County Board of Education* (1997) 1 SCR 241 at 5 (“Disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds. Disability means vastly different things, however, depending upon the individual and the context.”) In the EU context, see the decision of the European Court of Justice in *Case C-13/05, Chacón Navas v. Eurest Colectividades*, 2006 E.C.R. I-6467. For detailed discussion, see *infra* Part II.A.

16. See *infra* text accompanying notes 308–318.

ties are rooted in contradictions of the disability rights movement,¹⁷ this Article traces the conflict one important step further, in the direction of the social model itself. At the core of the model, one finds both a transformative insight and its central shortcoming. The insight is that the cause of disability is not a medical impairment but society's reaction to that impairment. Over the past four decades, this insight has formed the basis of disability reforms and changed the status of persons with disabilities from passive "objects of rehabilitation and cure"¹⁸ to rights holders entitled to make demands on social institutions. The shortcoming, as we have seen, is the readiness to gloss over medical impairments altogether, and in this process, to generate distortion effects that courts have been unwilling or unable to rectify.

The Article is divided into four Parts. Part I uses the framework of social systems theory as a heuristic device to study how the social model of disability traveled back and forth between the United States and the supranational level in Europe.¹⁹ According to this theory, social systems are structurally autonomous systems. Like cells, these systems translate into their unique "code" the information they receive from the outside environment. The social model traveled from the UK to the U.S. where, under the influence of a rights-centered legal and political discourse, it was translated into antidiscrimination "code" in Section 504 of the Rehabilitation Act of

17. Recent disability law scholarship that discusses the social model rarely questions its central tenets. See Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1252 (2007) (arguing that the social model by itself provides insufficient guidance for social policies for persons with disabilities); Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 4 (2004) [hereinafter Bagenstos, *Disability Rights*] (arguing that the antidiscrimination model is insufficient and that the solution to problems of persons with disabilities requires "more than simply mandating that individual employers cease discriminating and provide accommodations; they require direct and sustained government interventions such as the public funding and provision of benefits. In short, the future of disability law lies as much in social welfare law as in antidiscrimination law."); Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 501 (2000) [hereinafter Krieger, *Afterword*] ("few people outside of [a] relatively small circle, including the federal judges empowered to interpret the ADA, understand the social model of disability or adhere to the norms, values, and interpretative perspectives it was designed to advance."). But see David A. Weisbach, *Toward a New Approach to Disability Law*, 2009 U. CHI. LEGAL F. 47, 64-71 (critically discussing some tenets of the social model).

18. Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 94 (2000).

19. My use of social systems theory is heuristic in the sense of assuming elements that are not supported by the theory as formulated in its canonical statements. See, e.g., NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* (2004); NIKLAS LUHMANN, *SOCIAL SYSTEMS* (1995); Gunther Teubner, David Schiff & Richard Nobles, *The Autonomy of Law: Introduction to Legal Autopoiesis*, in *JURISPRUDENCE* (David Schiff & Richard Nobles eds., 2003). For instance, my analogy assumes without more that legal systems are social systems and that the "code" of a system can change over time without endangering the autonomy of the given social system.

1973 and, later, in the 1990 Americans with Disabilities Act.²⁰ Transnational social movements, which had been largely unsuccessful at the national level in Europe,²¹ resorted to the American rights-centered version of the social model as inspiration for legislation at the Community level.²² This influence took the form of specific legal transplants, such as the duty of employers to provide reasonable accommodation to persons with disabilities, as well as a larger antidiscrimination approach to justiciable rights. However, the European system's "code" required that, in the course of implementing the model, rights be supplemented with broader welfare and social policies for "mainstreaming"²³ persons with disabilities in social life. The more holistic approach that European regulations have taken in recent years is now generating a new round of cross-systemic influence.²⁴ It has recently become a source of inspiration for American scholars and activists who argue that the U.S. should move beyond disability civil rights.²⁵ This Part shows how successive acculturations in different political and legal cultures added new layers of meaning to the social model of disability but did not alter its core conception of illness, impairment, and discrimination. This conclusion is noteworthy also from the perspective of methodological

20. See Anne Waldschmidt, *Disability Policy of the European Union: The Supranational Level*, 3 EUR. J. OF DISABILITY RES. 8, 16-18 (2009) (discussing alternative ways of periodization of disability rights in the EU).

21. At the time, only three national systems - the UK, Ireland, and Sweden - had laws protecting from discrimination on grounds of disability. See *infra* text accompanying note 124.

22. See Council Directive 2000/78/EC, 2000 O.J. (L 303) 16.

23. Language also has its own code. See *Commission Staff Working Paper: Disability Mainstreaming in the European Employment Strategy*, at 3, COM (2005) EMCO/11/290605 (Jul. 1, 2005) (stating that "[m]ainstreaming means that the needs of disadvantaged people need to be taken into account in the design of all policies and measures, and that action for disadvantaged people is not limited to those policies and measures which are specifically addressing their needs.").

24. American scholars and activists have expressed dissatisfaction with the American rights-centered model and drawn inspiration from European social model regulations. See SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 136 (2009) (arguing that "disability rights activists must move beyond antidiscrimination law to embrace social welfare interventions if they are to achieve the goals of employment and integration into community life"). For a recent description of the comprehensive EU disability policy, see *Commission Communication: European Disability Strategy 2010-2020*, at 5-10, COM (2010) 636 final (Nov. 15, 2010) [hereinafter 2010 EC Disability Strategy] (identifying the following areas of action: accessibility, participation, equality, employment, education and training, social protection, health, and external action).

25. See, e.g., Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1205 (2007) (advocating a disability human rights paradigm that combines ADA-type civil and political rights with "the full spectrum" of social, cultural, and economic measures); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 23 (2000) (arguing that "[a]lthough there are many advantages to framing the issue as a matter of civil rights, in some ways the civil rights model is not an ideal fit with the problems posed by the issue of disability."). For a general comparative analysis between Europe and the U.S. on general antidiscrimination regimes, see generally Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT'L L. 115 (2010).

debates in comparative law. Legal ideas do not dissolve in the larger cultural, institutional, or ideological context when they migrate across different systems. Comparative legal studies should combine the normativity of legal projects and ideas and the richness and diversity of their broader social, historical, and cultural contexts.²⁶

The genealogy and migration pattern of the social model illuminate otherwise puzzling similarities between narrow judicial definitions of disability across the two jurisdictions studied here. Part II identifies these similarities. Although scholars have amply documented the decisions of American courts,²⁷ those of other courts have received less emphasis. When asked to define disability, in the context of whether illness was covered under the European directive governing disability discrimination, the European Court of Justice (the EU's apical judicial body²⁸) answered that it was not and then supplied a narrow, medicalized definition of disability as "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life."²⁹ This article examines solely the ECJ, but there is evidence to support its conclusions in other jurisdictions, such as the UK³⁰ and Germany.³¹ Despite different background conceptions

26. For a learned argument that comparative law should overcome that uneasiness, see James Q. Whitman, *The Neo-Romantic Turn*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 312, 343-344 (Pierre Legrand & Roderick Munday eds., 2003). For a recent argument about the transformation of legal culture(s) within the European Union in the direction of adversarial legalism, as a consequence of European integration, see R. DANIEL KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION* (2011).

27. One study of ADA cases found that employer-defendants won in 92 percent of all cases brought during the 1990s. See Am. Bar Ass'n, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 *MENTAL & PHYSICAL DISABILITY L. REP.* 403, 403 (1998). The Supreme Court has decided five cases addressing the definition of disability: *Bragdon v. Abbott*, 524 U.S. 624 (1998), *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002). For discussion, see *infra* Part I.B.

28. A note is in order regarding terminology. As of the entry into force of the Treaty of Lisbon, the European Court of Justice has been officially renamed the "Court of Justice." In this comparative study, I will continue to refer to the Court by its traditional name of the European Court of Justice.

29. *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 43.

30. In the UK, one study found that one of the statistically significant influences on the chances of a plaintiff prevailing was the nature of the disability. "[A]pplicants with physical or mobility problems were least likely to succeed, and those with sensory impairments or internal organ problems most likely to." DEPARTMENT FOR EDUCATION AND EMPLOYMENT, REPORT, *MONITORING THE DISABILITY DISCRIMINATION ACT 1995* 126 (1999). For a recent example, see *London Borough of Lewisham v. Malcom* [2008] UKHL 43 (appeal taken from Eng.). The case is discussed in Rachel Horton, *The End of Disability-Related Discrimination in Employment?*, 37 *INDUS. L.J.* 376 (2008).

31. See generally Katharina C. Heyer, *The ADA on the Road: Disability Rights in Germany*, 27 *LAW & SOC. INQUIRY* 723 (2002). As always in comparative analysis, one must proceed with caution. For a nuanced and normatively rich approach to comparative analysis, with particular focus on labor law, see Thomas C. Kohler, *The Disintegration of Labor Law: Some Notes for a Comparative Study of Legal Transformation*, 73 *NOTRE DAME L. REV.* 1311 (1998).

about rights, the state, and the proper institutional role of courts, one can find narrow judicial interpretations of disability in disability discrimination across jurisdictions. Why are courts prone to remaining tied to the medicalized understanding of disability, despite the legislative shift towards the social model?

Part III finds explanations first articulated in the American context and tests them in the European mirror. I divide the explanations into two categories: explanations endogenous and exogenous to legal reasoning. The former category includes doctrinal accounts that point to the courts' textualist methodology, and finally, jurisprudential explanations that place disability discrimination within the larger context of the jurisprudence of equality. Explanations in the latter category trace the resilience of the medicalized approach to ideological factors (the role of both the market and social factors in the discourse of disability reform), sociological factors (the composition of the judiciary), and/or institutional factors (both inter-institutional, between the legislature and the judiciary, as well as intra-institutional, within the judiciary). This Part concludes that these factors are insufficient to explain the staying power of the medicalized approach in the judicial definitions of disability.

Part IV finds the missing explanation in the social model itself, specifically in constitutive tensions at the core of the social model. The social model has been a variable largely absent from studies of the "judicial backlash,"³² but a comparative approach brings it back to the forefront. Identifying the social model itself as the missing explanation for the staying power of the medicalized approach to disability has mixed implications. The good news is that, formally speaking, changes in the judicial definition of disability would go a long way to change the current disability law regime. Defining disability without reference to medical impairments would bring courts closer to a discrimination-centered approach to disability.³³ The bad news is that an impairment-free definition is highly unlikely. There is a path dependency in how concepts are defined, and medical impairments have so often been at the center of the meaning of disability that it might be difficult to shift course radically at this stage. However one envisions the future of disability law, it helps to understand the judicial definition of disability as reflecting deep tensions in the arguments and argumentative strategies in support of the social model. This last Part concludes with recommendations *de lege ferenda*.

32. See generally Krieger, *supra* note 14.

33. Even the boldest proposals for amending the ADA, which sought a formal change in the statutory provisions on the meaning of disability, would have defined disability by reference to "actual, past, or perceived physical or mental impairment." National Council of Independent Living, Major Progress on ADA Restoration: A Potential Deal with the Business Community, <http://www.ncil.org/news/ADARADeal2.html>.

I. From the Body to the Body Politic: The Transformation of Disability Law in the United States and the European Union

My main aim in this Part is to present a comparative history of disability law in the United States and the European Union over the past four decades. While following different paths, the evolution of the disability regimes in these two jurisdictions has also been synchronized. This synchronization is the result of the social model of disability, whose proponents theorized the need for reform and provided the necessary normative framework. The model was first fully theorized in the United Kingdom and reached political influence in the United States with the enactment in 1990 of the ADA, which in turn inspired transnational social movements to lobby for changes in disability legislation in Europe.

Social systems theory is useful, at least partly, as a descriptive framework for how the social model traveled back and forth between the United States and Europe. According to that theory, social systems are structurally autonomous systems that translate into their unique codes the information they receive from the environment.³⁴ This Part analogizes legal systems with social systems and conceptualizes the social model of disability as the normative message that travels back and forth across the Atlantic. At the first stage, the rights-centered American legal discourse translates the basic insights of the social model into antidiscrimination “code.” The model then enters European supranational institutions and discourse, which place antidiscrimination rights within a larger, more comprehensive framework of welfare and social policies that represents Europe’s own “code.” Dissatisfied with the results of the antidiscrimination model, American disability scholars and advocates have recently started looking towards the European expression of the social model.

A. Politics of the Body Disabled: The Medicalized Model in the European Community (1970s to 1996)

The founding treaty of the European Economic Community, signed in Rome in 1957, envisioned the creation of an internal market among its signatories.³⁵ The subject matter of the Rome Treaty closely matched its goals. The treaty established mutual duties on the part of Member States to lift trade barriers and free the circulation of goods, services, persons, and capital.³⁶ Over the next half century, the internal market expanded dramatically both in size, from six to twenty-seven Member States, as well as in institutional complexity.³⁷ These developments called for periodic

34. As mentioned in the introduction, my use of social systems theory is heuristic. See *supra* text accompanying note 19.

35. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, art. 2 [hereinafter Treaty of Rome]. The European Economic Community postdated the creation of a more specialized European Coal and Steel Community. See The Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

36. Treaty of Rome, *supra* note 35, arts. 28-30, 39(1).

37. From six initial signatories (France, Germany, Italy, Netherlands, Belgium, and Luxembourg), membership in the Union grew to 27 states. For a study of the early devel-

revisions of the founding treaty.³⁸ In addition to the necessary institutional reforms, revisions significantly expanded the Community's competencies vis-à-vis Member States. New areas of supranational competence included environmental protection, employment, telecommunications, monetary policy, human rights, justice affairs, and other areas.³⁹ All along, however, the Community remained one of limited and enumerated powers. Member States remained sovereign over subject-matter jurisdictions (such as defense, foreign affairs, and health and social policy) that they had neither implicitly nor explicitly transferred to the Community.⁴⁰ It was not until 1999, when the Treaty of Amsterdam came into force, that the Community acquired the legal basis to pass binding measures regarding the treatment of persons with disabilities across its territory.⁴¹

Lack of formal competencies does not mean that the Community had no initiatives in this area before the very end of the 20th century. Indeed, for two decades after the mid-'70s, the Community had put forth disability policies under the legal framework in place at the time. The earliest policy documents show the Community's concern to mitigate the social effects of medical impairments on persons with disabilities by carving out for them separate, parallel social tracks.⁴² For instance, in the employment context, the policy aimed at their "rehabilitation into vocational life or, where appropriate, by placing them in sheltered industries."⁴³ Such policies of

opment of the Community's institutional framework, see J. H. H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991).

38. For an introductory discussion of the constitutive treaties from The Treaty of Rome (1957) to The Treaty of Nice (2001), see DAMIAN CHALMERS ET AL., *EUROPEAN UNION LAW: TEXT AND MATERIALS* 8-43 (2006). The most recent rearrangement of the Union's institutional structure occurred when the Treaty of Lisbon came into effect in December 2009. For a brief overview of its provisions, see Paul Craig, *The Treaty of Lisbon: Process, Architecture and Substance*, 33 *EUR. L. REV.* 137, 137-166 (2008).

39. See CHALMERS, *supra* note 38, at 12.

40. See *id.* at 11. Despite the Community's numerous transgressions of its limited competency, the first time the European Court of Justice invalidated a Community act as *ultra vires* was Directive 1998/43/EC (banning most forms of tobacco advertisement across the Community). See Case C-376/98, *Germany v. Parliament and Council*, 2000 E.C.R. I-8419. For an analysis of the subsequent tobacco litigation, see Fernanda Nicola & Fabio Marchetti, *Constitutionalizing Tobacco: The Ambivalence of European Federalism*, 46 *HARVARD INT'L L.J.* 507 (2005).

41. See Treaty of Amsterdam, Oct. 2, 1997, art. 6a, 1997 O.J. (C 340) 1. ("Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.")

42. See e.g., Council Resolution Concerning a Social Action Programme (EC) No. 12/02/1974 of 21 January 1974, art. 7, 1974 O.J. (C 013). The separate parallel track that provides income and services apart from institutions that serve the non-disabled majority characterizes the approach of the social welfare model of disability. See Lisa Waddington & Matthew Diller, *Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law*, in *DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES* 241, 244 (Mary Lou Breslin & Silvia Yee eds., 2002).

43. Council Resolution Concerning a Social Action Programme (EC) of 21 January 1974, art. 7, 1974 O.J. (C 013).

segregation assumed the existence of an unbridgeable gap between the social capabilities of disabled persons and those of a (non-disabled) majority. Persons with disabilities were perceived as being in need of “rehabilitation,” though not necessarily entitled to it.⁴⁴ By imposing itself on both social groups at the national level, the scheme created and reinforced specific (self-) understandings of social groups: one formed by the passive beneficiaries of “rehabilitation” policies and the other by charitable, “abled” citizens. This social scheme constituting the foundations of the medical model of disability bred an inevitable—and unmistakable—paternalism that informed the policies of national governments, which remained during this period the exclusive agents of rehabilitative action.⁴⁵ Expressions of paternalism also found their way into the Community’s early policies and sometimes even into official documents.⁴⁶

Lacking the legal basis for the enactment of binding laws, the Community acted at the early stage through soft law measures.⁴⁷ Some of those measures aimed, and succeeded, in creating a common institutional framework in which national officials in charge of disability policies could exchange information and in this process learn from each other’s experiences. But the framework also had perverse effects. First, it reinforced the presuppositions of the medical model that shaped the social policy of the Member States. Second, it failed to “socialize” those states into opening up their disability policies to the Community’s outside scrutiny with bite. Member States proved willing to join in the Community’s information exchange networks as long as the costs of participation were low to non-existent.⁴⁸ But as soon as the Community tried to “harden” its soft measures, for instance by enabling its institutions to follow through with the national implementation of goals in areas such as employment, the Member States were quick to exercise their veto powers.⁴⁹ Similarly, attempts to pass sec-

44. See Rachel Hurst, *The International Disability Rights Movement and the ICF*, 25 *DISABILITY & REHABILITATION* 572, 572 (2003).

45. See LISA WADDINGTON, *DISABILITY, EMPLOYMENT AND THE EUROPEAN COMMUNITY* 21 (1995) [hereinafter WADDINGTON, *DISABILITY, EMPLOYMENT, AND THE EUROPEAN COMMUNITY*].

46. See, e.g., Council Resolution Establishing the Initial Community Action Programme for the Vocational Rehabilitation of Handicapped Persons (EC) of 27 June 1974, 1974 O.J. (C 80) 30, (“The general aim of Community efforts on behalf of the handicapped must be to help these people to become capable of leading a normal independent life fully integrated into society.”). See also WADDINGTON, *DISABILITY, EMPLOYMENT, AND THE EUROPEAN COMMUNITY*, *supra* note 45, at 100 (“the [1974 action program] speaks of the need to ‘help these people,’ rather than to ‘enable’ disabled people to help themselves. Furthermore, no reference is made to the need to consult disabled people on a wide scale, and encourage their participation in the formulation and implementation of policy.”).

47. Soft law measures are legal rules that do not have binding character. For a general discussion, see LINDA SENDEN, *SOFT LAW IN EUROPEAN COMMUNITY LAW* (2004).

48. One such example is the creation of the European Network of Rehabilitation Centers. See WADDINGTON, *DISABILITY, EMPLOYMENT, AND THE EUROPEAN COMMUNITY*, *supra* note 45, at 99.

49. See LISA WADDINGTON, *FROM ROME TO NICE IN A WHEELCHAIR: THE DEVELOPMENT OF A EUROPEAN DISABILITY POLICY* 6-7 (2006) [hereinafter WADDINGTON, *FROM ROME TO NICE*].

ondary legislation in areas such as transportation of persons with disabilities were also unsuccessful.⁵⁰ As one commentator summed it up, the overall impact of disability-specific initiatives was “minimal.”⁵¹

There are a number of possible explanations for the reluctance of Member States to commit themselves to enhanced cooperation in this area during that period. First, national governments were keen to protect their turf vis-à-vis Community encroachment in subject matters such as health policy and social security. Second, since implementation of disability policy can be expensive, national governments were unwilling to submit themselves voluntarily to supranational control with significant financial implications. Third, disability policy never became a priority to any powerful stakeholders and thus could not be the object of grand political bargaining. All three explanations point to disability policy falling outside the hard economic core of the Community project. But one can also interpret these explanations as flowing from the political implications of the medical model itself. When disability is understood as the effect of medical impairments, rather than as the effect of social arrangements, there is limited payoff to investing scarce political capital into disability policy.

For all their limited success, these early programs had one long-lasting impact that eventually shaped the future of disability policy in Europe. These programs provided the institutional framework and secured funding for the continuing existence of the European Disability Forum (the “EDF”) as an umbrella organization at the Community level of the national disability rights movements.⁵² In a strategy typical of the European Commission’s general template of entanglement with social movements, the creation of the EDF was in part the Commission’s political attempt to bypass rigid national governments and bureaucracies by reaching out directly to stakeholders—in this case, the disability rights movement. Moreover, Community funding guaranteed that the Commission would have influence over the EDF’s political choreography. Thus, the Commission not only gained an important ally but also secured control over that

50. See, e.g., *Comm’n Proposal for a Council Directive on Minimum Requirements to Improve the Mobility and the Safe Transport to Work of Workers with Reduced Mobility*, COM (1991) 558 final (Feb. 28, 1991); WADDINGTON, FROM ROME TO NICE, *supra* note 49, at 7–8.

51. See WADDINGTON, FROM ROME TO NICE, *supra* note 49, at 11 (“This was especially true of the policy initiatives. Member States were reluctant to accept binding obligations at [that] time, and unwilling to comply with recommendations requiring concrete changes.”); see also WADDINGTON, DISABILITY, EMPLOYMENT, AND THE EUROPEAN COMMUNITY, *supra* note 45. In his recent work, Daniel Kelemen points to failures of this type in arguing against descriptive claims about European integration through soft law. See KELEMEN, *supra* note 26, at 29–32.

52. See Christine Quittkat & Barbara Finke, *The EU Commission Consultation Regime*, in OPENING EU-GOVERNANCE TO CIVIL SOCIETY: GAINS AND CHALLENGES 194, 201 (Beate Kohler-Koch, Dirk De Bièvre & William Maloney eds., 2008). The EDF, which was created with funds from the Helios II program, continues to be very active. See WADDINGTON, FROM ROME TO NICE, *supra* note 49, at 18; The European Disability Forum, <http://www.edf-feph.org/> (last visited Feb. 11, 2010).

ally's political activities.⁵³ The impact of the EDF in the next decades, often in the form of effective advocacy for American-type rights-based antidiscrimination, cannot be overstated. Its policy papers produced in the early 1990s, which advocated that discrimination should be expanded from race and gender to include disability, prepared the ground for the transformation of Community disability policy in the late 1990s.⁵⁴

B. Discovering the Body Politic: The Antidiscrimination Model in the United States

Since the end of the First World War, federal statutes in the United States concerning persons with disabilities focused mainly on vocational training and social security protection. Disability advocacy started in the 1960s on student campuses such as U.C. Berkeley, spurred by students with disabilities for whom educational opportunities had only recently become available. The early campaigns were successful in creating campus accommodation followed in due course, and with federal funding,⁵⁵ by the organization of a parallel program for nonstudents. Coordinated by persons with disabilities, these centers for independent living ("CIL"), the first of which was incorporated in 1972, took a holistic approach to the question of social integration.⁵⁶ They gained visibility among disability advocates both nationally and transnationally. During this time, disability advocates from Europe would visit the CIL regularly to draw inspiration for how to fight their battles at home more successfully.⁵⁷ However, the relative insularity of the CIL meant that their advocacy was insufficient to generate a broad social movement capable of putting disability policy on the political agenda. As one looks for the causes of the early disability reforms in the second half of the twentieth century, one will not find an outside social movement exerting pressure on the state. Rather, during that time,

53. The alliance paid off, at least in the short run. Indeed, only recently has the EDF spoken out against the Commission's disability policies. See Open Letter to José Manuel Barroso, President of the European Commission, (2009), available at http://www.edf-feph.org/Page_Generale.asp?DocID=17951&thebloc=22810 (last visited Feb. 11, 2010) (arguing strongly for a comprehensive disability-only directive and noting that civil society had not been consulted on the Commission's proposal for a new anti-discrimination directive).

54. See *Commission Communication on Equality of Opportunity for People With Disabilities: A New European Community Disability Strategy*, COM (1996) 406 final (Jul. 30, 1996) [hereinafter 1996 EC Disability Strategy].

55. JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 50, 53 (1993).

56. *Id.* at 53-58.

57. See Heyer, *supra* note 31, at 736 (describing the "the love affair" between the German disability groups and the American disability advocates). "Many German disability groups travelled to the United States to learn about the movement there and returned full of enthusiasm and optimism about what might be possible with a paradigm shift from charity and dependence to equal rights and self-determination. It is safe to say that all the leading figures in Germany's movement today have made at least one trip to the United States, most commonly to Berkeley." *Id.* at 734.

“the social movement was *in* the government.”⁵⁸

In the early 1970s, after failed attempts to list disability as a prohibited ground for discrimination alongside race or national origin in Title VI of the 1964 Civil Rights Act,⁵⁹ Congress included a provision in the Rehabilitation Act of 1973 (regarding federal aid for vocational training) mandating that “[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefit of, or be subject to discrimination under any program or activity receiving Federal financial assistance.”⁶⁰ The inclusion of this provision, which became Section 504 of the Rehabilitation Act, was not a response to societal pressure, but rather it was the outcome of what one commentator aptly calls “anticipatory politics.”⁶¹ Specifically, it reflected the views of government insiders—in particular Congressional staffers—who came to see persons with disabilities as a minority group engaged in a struggle for recognition similar to that of the civil rights and the women’s movements.

Because the Rehabilitation Act covered an array of fields ranging from education to transportation, as well as any other federally-run or federally-funded program, it became necessary to define the meaning of “handicapped individual” for the purpose of section 504.⁶² It was at this critical moment that the perspective shifted in a quasi-official way from medical impairment to a political focus on issues of societal discrimination.⁶³ The term “handicapped individual” was interpreted to refer to “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”⁶⁴ This

58. JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 269 (2002); see also RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* 41-43 (2001).

59. SKRENTNY, *supra* note 58, at 268 (arguing that the attempt to amend Title VI failed due to the timing of the legislative proposal). Cf. Burke, *supra* note 15, at 162 (arguing that the failure was due to fear of opening up the Act or the distinctiveness of disability from the other grounds listed in the Act).

60. Pub. L. No. 93-112, 87 Stat. 355, codified at 29 U.S.C. 701, et seq; 29 U.S.C. § 794. The language of the provision was almost identical with that in Title VI of the Civil Rights Act and Title IX of the Education Amendments of 1972, which applied to sex discrimination.

61. SKRENTNY, *supra* note 58, at 270 (describing how the staffers anticipated that the disabled would want what they were given); see *id.* at 269.

62. The Rehabilitation Act was not the first act applying to “handicapped persons.” See Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 121 (1970) (mandating, for the first time, that children with disabilities were entitled to receive free and appropriate public education).

63. Some observers credit the lawyers in the Department of Health, Education and Welfare with this shift. See Feldblum, *supra* note 18, at 99-100 (describing how, under the social model, “it was myths, fears and stereotypes about people with disabilities that often hampered such individuals’ involvement and advancement in society, not the objective reality of any impact their physical or mental impairment had on their ability to function, perform, or contribute to society.”).

64. H.R. 17503, 93rd Cong. 2nd Sess. (1974) (codified at 41 C.F.R. § 60-741.2 (2005)).

definition would prove more resilient over the following decade than many could have predicted. The definition was later incorporated into the ADA and retained in the ADAAA. It is a definition that shares the assumptions of the social model in its second and third prongs, and arguably in the first prong as well. As one commentator noted, “[e]ven people whose conditions have no ongoing medical significance may experience the prejudice, stereotypes, and neglect that make up disability-based disadvantage . . . [t]hat is the basic insight reflected in the ‘regarded as’ and ‘record’ prongs.”⁶⁵

This basic insight turned out to have unpalatable political consequences. However close the analogy between discrimination on the basis of disability and discrimination on the grounds of race or gender, that analogy dissipated as soon as the costs of implementing the former measures became apparent. It is one thing to force universities that benefit from federal funding to stop discriminating on the basis of race, but it is quite another to make them provide reasonable accommodation for students with disabilities. Confronted with such costs, the executive branch would have delayed *sine die* the issuing of implementation regulations if it were not for the pressure of outside disability groups that by then had begun building up their strength. Organizing that pressure marked “the political coming of age of the disability rights movement,”⁶⁶ as the movement succeeded in getting a reluctant Carter administration to allocate the necessary resources and issue the implementation regulations of Section 504 four years after its enactment.⁶⁷ The shared legal imaginary of modern struggles for recognition is also noteworthy. The rhetoric that galvanized the disability rights movement borrowed heavily from the civil rights movement: protesters framed their opposition to “separate but equal facilities” and celebrated their success against the administration with chants of “We Have Overcome.”⁶⁸

Once the implementation regulations were in place and Section 504 was in effect, discrimination against the disabled was shown to be “nearly everywhere.”⁶⁹ Its roots were so deep and its forms of manifestation so diverse and far reaching that the Rehabilitation Act, which applied solely to federal or federally-funded entities, was soon perceived as insufficient in

65. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 470 (2000) [hereinafter Bagenstos, *Subordination*].

66. SHAPIRO, *supra* note 55, at 68.

67. For the story of the sit-in in the San Francisco regional office of the Department of Health, Education and Welfare, see *id.* at 68-69.

68. See *id.*; see also Richard K. Scotch, *Politics and Policy in the History of the Disability Rights Movement*, 67 MILBANK Q. 380, 386 (1989) (hereinafter Scotch, *Politics and Policy*) (“The shape of the disability rights movement and perhaps its very existence has been the result of available models of these other movements, which have provided examples of political action and ideological frameworks, and which also served as sources of cooperation and competition.”). This is not an exclusively American phenomenon. For similar cross-influences in the Canadian context, see Lisa Vanhala, *Twenty-five Years of Disability Equality? Interpreting Disability Rights in the Supreme Court of Canada*, 39 COMMON L. WORLD REV. 27, 31 (2010).

69. SKRENTNY, *supra* note 58, at 273.

rooting out discrimination against persons with disabilities. The perceived necessity for comprehensive legislation that transcended the federal/non-federal divide by granting rights enforceable in courts provided the movement's rallying cry. As one commentator pointed out, "[d]espite the extraordinary diversity of the community of people with disabilities, disability groups held together largely on the need for a rights law."⁷⁰ The legacy of previous struggles for recognition, with their demands for enforceable rights, as well as the relatively thorough job of the judiciary applying Section 504, explain the calls during the 1980s for comprehensive rights-based legislation.⁷¹

The Americans with Disabilities Act of 1990 answered that call. The Act covered a wide range of areas and social services, from employment to public transportation, private accommodations, and means of communication.⁷² The ADA required any employer with more than 15 employees to provide "reasonable accommodation" to persons with disabilities, provided the accommodation would not be an "undue hardship"; private employers' failure to provide reasonable accommodation constituted discrimination.⁷³ Under the new regime, the ADA created a cause of action in federal courts for employees seeking redress.⁷⁴ This horizontal spread of disability protections is unsurprising from the perspective of the social model. The legislative findings incorporated into the statute reflect that model's conceptual apparatus by noting that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of disability continue to be a serious and pervasive social problem."⁷⁵ At the same time, enforceable rights are the main tool in

70. Burke, *supra* note 15, at 163.

71. The social movement had grown stronger and more influential by 1990 when the ADA was enacted. Some scholars have argued, however, that the movement still lacked visibility and hence that it might not have been in a position to defend the Act's application. See Linda Hamilton Krieger, *Foreword - Backlash Against the ADA: Interdisciplinary Perspective and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 11 (2000) [hereinafter Krieger, *Foreword*].

72. See Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12101 et seq.).

73. ADA Title I, 42 U.S.C. §§12111 (5), (9), (10); 12112(b)(5)(a). A similar stance would be taken by the 2006 UN Convention, which is reminiscent of the EU position. See *Commission Staff Working Paper: Disability Mainstreaming in the European Employment Strategy*, at 3, COM (2005) EMCO/11/290605 (Jul. 1, 2005) ("Failure to provide reasonable accommodation in the workplace can constitute discrimination . . . [r]easonable accommodation is not a positive action left to the discretion of public and private operators, but an obligation whose failure can constitute unfair discrimination.").

74. ADA Title I, 42 U.S.C. §12117(a).

75. *Id.* § 12101(a)(2). See also ADA Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553 § 2, (a)(2) ("in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice. . ."); Krieger, *Afterword*, *supra* note 17, at 481 ("[T]he drafters of the ADA sought to transform the institution of disability by locating responsibility for disablement not only in a disabled person's impairment, but also in 'disabling' physical and structural environments.").

the ADA's toolkit. It is important to understand the rights-centered antidiscrimination regime as the specific form of the social model in American law.

Its supporters hailed the Act as "the most comprehensive civil rights legislation passed by Congress since the 1964 Civil Rights Act."⁷⁶ Newspapers called it "a second independence day."⁷⁷ The Act continued in the tradition of broad, bi-partisan political support that had been a staple of previous disability legislation.⁷⁸ It was noted at the time that "the ADA . . . is unlike any other major piece of civil rights legislation enacted by Congress because there was no serious opposition."⁷⁹ The two political parties supported the legislation for different reasons: Republicans because it promised to end the era of welfare dependency of persons with disabilities and Democrats because of its continuity with previous struggles by disadvantaged groups for recognition.⁸⁰ As one commentator has observed, "lack of visible opposition to disability rights proposals is a pattern one sees in all the polities in which such proposals have reached the legislative agenda."⁸¹ In fact, at the signing ceremony of the ADA, President Bush compared the adoption of the act to the demolition of the Berlin Wall.⁸²

The definition of disability in the ADA remained unchanged from the one used in Section 504. The decision to retain the impairment-based definition of the Rehabilitation Act, which would play a key role in the judici-

76. See Feldblum, *supra* note 18, at 139.

77. Diller, *supra* note 25, at 19 (citing Terry Wilson, *For the Disabled, It's 'Independence Day,'* CHI. TRIB., July 27, 1990, at 1).

78. See Krieger, *Foreword, supra* note 71, at 1 (noting that the vote in the House of Representatives was 377-28 and in the Senate was 91-6).

79. RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 23* (2005).

80. See *id.* at 34, 54.

81. Burke, *supra* note 15, at 167. Indeed, as the New York Times wrote one year before the ADA was adopted, "No politician can vote against this bill and survive." *Blank Check for the Disabled*, NY Times, Sep. 6, 1989, at A24 (cited in COLKER, *supra* note 79, at 1).

82. See Krieger, *Foreword, supra* note 71, at 1. The same is reflected in the ADA's signing statement: "The Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusions of persons with disabilities from the mainstream of American life. As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world." (President George H. W. Bush, Statement on Signing the Americans with Disabilities Act of 1990, July 26, 1990). Though domestic policies often have foreign policy implications, the foreign policy implications of U.S. disability policy are nevertheless noteworthy. See NATIONAL COUNCIL ON DISABILITY, *FOREIGN POLICY AND DISABILITY I* (2001) ("The unparalleled legal protection given Americans through the Rehabilitation Act, ADA, and other disability rights laws won the admiration of people with disabilities, human rights activists, and people of goodwill around the world. These laws underscored the authority of the United States to speak not only as a rich and powerful nation but also as a good and moral one. By demonstrating its strong commitment to the equality of all people, including those with disabilities, the United States strengthened its global position." (quoted in Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L L. & COM. 241, 248 (2003))).

ary's application *ratione personae* of the Act, was not disputed during the drafting process.⁸³ Although some of the previous drafts proposed a more detailed definition, it was believed that retaining the existing definition was advisable given courts' familiarity with it.⁸⁴ A calculus about risk allocation and institutional behavior trumped whatever considerations there might have been, from a social model standpoint, to re-center the definition of disability on societal discrimination rather than on medical impairment. In a sense, that calculus was understandable. Under Section 504, disability had been interpreted to cover 'traditional' disabilities, such as blindness or deafness, as well as medical conditions, such as diabetes or epilepsy. It also covered people with a record of disabilities and those whose medical conditions, such as asymptomatic HIV, have disabling effects that carry societal stigma.⁸⁵ It was only later, when courts started departing from the broad interpretation of disability, that the consequences of retaining this definition of disability became clear. Clarifying Congress' aims retrospectively, the 2008 ADAAA states that "while [it] expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation [had] not been fulfilled."⁸⁶ However, it is telling that even in 2008, Congress refused to modify the definition of disability and considered it sufficient to direct courts to "construe (the definition of disability) in favor of broad coverage of individuals . . . , to the maximum extent permitted by this chapter."⁸⁷

To be sure, there was more in the ADA than the interpretation of the definition of disability that surprised its initial supporters. As far as employment levels were concerned, unemployment levels for persons with disabilities stayed high. The causal connection between the existence of disability and poverty levels remained strong. Both the Supplemental Security Income (SSI) and the Social Security Disability Insurance (SSDI) grew larger throughout the 1990s.⁸⁸ Why exactly the ADA's effects have fallen far short of expectations is a matter of dispute. Some observers place the blame on the courts; others have pointed to the mistaken reliance on a model of accommodation mandates for private employers.⁸⁹ Still others have pointed to limitations inherent in the antidiscrimination model, which does not deliver the broad social welfare reforms indispensable for the social integration of persons with disabilities.⁹⁰ Some scholars

83. See Feldblum, *supra* note 18, at 129. The issue was so low key that, as one commentator involved in the negotiations writes, "the Section 504 definition of disability was hardly a topic of conversation in the negotiations on the ADA." *Id.*

84. See *id.* at 126-134.

85. For an account of just how bold the approach was, see Krieger, *Foreword, supra* note 71, at 3.

86. ADA Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553 § 2, (a)(3) (2008).

87. ADA Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553 § 4 (2008).

88. See Burke, *supra* note 15, at 163.

89. See generally RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

90. See e.g., Stein & Stein, *supra* note 25.

have pointed to unresolved contradictions in the eclectic strategies and demands originating from within the social disability movement.⁹¹ While it is beyond the purpose of the paper to adjudicate definitively these different accounts, I submit that the comparison with the European Union brings to the surface some tensions inherent in both the social model as well as in the adjudication of the social model that remain obscured when the focus is solely on the American experience. What makes the comparative analysis even possible is that, for all its shortcomings, the ADA's rights-based model has been tremendously influential abroad. Indeed, it has been so successful that observers have quipped that the Act has been more influential abroad, and especially in Europe, than at home.⁹²

C. Trans-Systemic Influences: The Migration of the Antidiscrimination Model from the United States to Europe

The ADA's influence at the level of the European Community in the early 1990s occurred mostly via the U.S.-inspired advocacy of the European Disability Forum (EDF). In 1994, the EDF published a white paper that introduced the discrimination paradigm, which, together with a study released the year before in which the EDF brought the concept of dignity to bear on the plight of persons with disabilities, opened the way for a shift in Community policy.⁹³ In 1996, the European Commission issued "A European Community Disability Strategy,"⁹⁴ which transformed the Community's disability policies. Integration replaced accommodation as the regulative ideal of the Community disability policy.⁹⁵ The document took a rather uncharitable view of the charity model that had characterized Community policy over the previous two decades. After "rethinking [the] many years of public policy aimed at accommodating people to their disabilities," which it now deemed "insufficient," the Commission embraced the fundamental insight of the social model that "[c]hanges in the way we organise our societies can substantially reduce or even overcome obstacles found by people with disability."⁹⁶ The absence— or "virtual invisibility"— of persons with disabilities from the mainstream perpetuated stereotypes and the continuation of cycles of exclusion.

If integration, or mainstreaming,⁹⁷ represented the new goal of Com-

91. See BAGENSTOS, *supra* note 24.

92. See *id.* at 11 ("The ADA, for all its limitations, has made our society more accessible, so much so that the United States is the envy of disability rights activists around the world.").

93. See generally *Commission Green Paper on European Social Policy*, COM (93) 551 (Nov. 17, 1993).

94. 1996 *EC Disability Strategy*, *supra* note 54.

95. The Council endorsed the social model approach a year later. Council Resolution on Equality of Opportunity for People with Disabilities (EU) of 20 December 1996, 1997 O.J. (C 12) 1, 2.

96. 1996 *EC Disability Strategy*, *supra* note 54, at 2.

97. *Id.* at 8 (defining mainstreaming as "the formulation of policy to facilitate the full participation and involvement of people with disabilities in economic, social and other processes, while respecting personal choice. . . the relevant issues should no longer be considered separately from the mainstream policy-making apparatus.").

munity disability policy, there were some changes in the means by which the Community sought to accomplish it. The persistent lack of a legal basis for antidiscrimination measures, through the 1990s, compelled the Community to continue relying exclusively on the soft law measures that had characterized its past disability policies.⁹⁸ At the same time, the emphasis on antidiscrimination made rights central to the new disability strategy.⁹⁹ The reasons for choosing a rights-based strategy are not immediately apparent. Indeed, if the problems of discrimination are structural, deep, and broad, as advocates of the social model argue, then an emphasis on rights is somewhat mystifying. In the American context, the rights formulation of the social model is understandable given that rights have historically provided the template in which struggles for recognition are carried out. But, why a rights approach in Europe?

To start, one should note that the antidiscrimination model was also normatively consistent with the social model of disability, which advocated against a passive stance of persons with disabilities and in favor of enabling them to make demands on social institutions. Secondly, disability is not the first instance where the Community used rights as a template against discrimination.¹⁰⁰ For instance, in the gender context, Article 119 in the original Treaty of Rome stipulated the principle of equal pay for men and women at work.¹⁰¹ Over time, the sphere of application of the principle expanded to cover access to employment, vocational training and working conditions,¹⁰² as well as occupational social security schemes.¹⁰³ Interestingly, this expansion of gender equality was achieved under pressure from the judiciary,¹⁰⁴ which was itself called upon to act as part of the larger mobilization of the social movement.¹⁰⁵ The mainstreaming approach, which has been successfully advocated in the case of disability

98. See Deborah Mabbett, *The Development of Rights-based Social Policy in the European Union: The Example of Disability Rights*, 43 J. COMMON MKT. STUDIES 97, 102 (2005).

99. See Council Resolution on Equality of Opportunity for People with Disabilities (EU) of 20 December 1996, 1997 O.J. (C 12) 1, 2.

100. "Template" here should be understood broadly. As commentators have rightly noted, there are significant differences between discrimination based on race and disability on the one hand, and gender on the other. See Lisa Waddington & Mark Bell, *More Equal than Others: Distinguishing European Union Equality Directives*, 38 COMMON MKT. L. REV. 587, 588 (2001) [hereinafter Waddington & Bell, *More Equal than Others*] ("In adopting these new directives the Community has not simply extended the already existing protection, standards and concepts applicable with regard to sex discrimination to the newly covered areas."). However, the commonalities among these struggles for recognition remained strong despite relevant differences among gender, race and disability. See KELEMEN, *supra* note 26, at 213 ("The disability rights movement rode the rights wave that was sweeping over EU politics at the end of the 1990s, gaining strength by linking its fortunes to those of other human rights and antidiscrimination causes.")

101. Treaty of Rome, *supra* note 35, art. 119.

102. See Council Directive 76/207/EEC, 1976 O.J. (L 039) 40-42.

103. See Council Directive 86/378/EEC, 1986 O.J. (L 225) 40-43.

104. See Gräinne de Búrca, *Stumbling into Experimentalism: The EU Anti-Discrimination Regime*, in EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION: TOWARDS A NEW ARCHITECTURE 215, 219 (Charles F. Sabel & Jonathan Zeitlin eds., 2010).

105. See *id.* at 219.

rights,¹⁰⁶ was also the strategy that the Treaty of Amsterdam would later endorse for gender equality. Yet despite its lack of novelty as a tool, there was no tradition at the level of the European Community for using courts for social change through rights adjudication.

For all the influence of the American approach to disability rights, it is important to note that the American model was not transplanted *tale quale*. For instance, unlike its counterpart disability rights movement in the United States, the EDF has no history of engaging in litigation as a means for achieving social change.¹⁰⁷ Moreover, the social model itself went through a number of adaptations required by the European legal framework. Borrowing the vocabulary of social systems theory, one can say that the social model was translated by the Community's own jurisprudential vocabulary—or “code”—to require that broader social measures supplement an American-type antidiscrimination model. First, the American model received a specifically European, principle-centered expression.¹⁰⁸ The European rights strategy takes as a starting point the principle of equality, which entails the concept of equal opportunities that itself subsumes the principle of non-discrimination.¹⁰⁹ Second, the antidiscrimination model became part of a broader understanding of the social model that implied, but was not reduced to, rights. Unlike in the United States, Community policies do not evidence the need for choosing between rights and broader social measures. The roots of the American perception of a stark, binary choice can be traced to a general distrust of the state, which created ambiguities at the heart of the civil rights or women's rights movements. But specifically in the disability context, the rejection of broad social measures under the antidiscrimination (civil rights) model also has to do with how that model established itself in contrast to the earlier social welfare model with its emphasis on medical impairments and paternalistic social implications. The distrust of the state and the culture of individualism would have perhaps made the battle particularly stark in the United States, even if it had been fought at the same time both there and in Europe. But, in fact, by the time the EDF brought it to Europe, that battle had already been fought in the United States and it had shaped the collec-

106. See *id.* at 220; Consolidated Version of the Treaty on the Functioning of the European Union, art. 10, Sep. 5, 2008, 2008 O.J. (C 115) 68 [hereinafter TFEU] (“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”).

107. See WADDINGTON, FROM ROME TO NICE, *supra* note 49, at 19 (describing the activities of the EDF as including campaigning at the European level and active involvement in policy development and implementation in the EU).

108. See generally PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast eds., 2006).

109. For this conceptual scheme, see 1996 EC Disability Strategy, *supra* note 54. See also Case C 555/07 Seda Küçükdeveci. v. Swedex GmbH & Co. KG, 2010 E.C.R. I-0000. For an analysis of the application and scope of the principle of non-discrimination in EU law after *Küçükdeveci*, see Anja Wiesbrock, Case Note, Case C 555/07 *Küçükdeveci*. v. Swedex, *Judgment of the Court (Grand Chamber) of 19 January 2010*, 11 GERMAN L.J. 539 (2010).

tive memory of the disability advocates. Some of those memories will be lost as the antidiscrimination model becomes acculturated on European soil. The European social tradition softened what American advocates of the antidiscrimination model perceived as a stark choice between rights and broader social policy.

Placing rights within the broader social model had a reinvigorating effect on Community disability policy, particularly on its soft law programs. Once the social model moved toward the center, the politics of equality was re-energized as soft law measures became more ambitious and less vague. These measures ranged from political dialogue among Member States, which resulted in the creation of the High Level Group of Member States' Representatives on Disability, to social dialogue between employees and unions and civil dialogue among NGOs.¹¹⁰ Later documents spell out these ambitious measures in greater detail, for instance the use of the open method of coordination in the areas of employment, social inclusion, and lifelong learning.¹¹¹ This was possible because the Commission retained throughout this period its role of coordinator and facilitator of information-exchange among the Member States.¹¹²

D. Disability Rights: The Social Model in Europe (after 1996)

The 1996 policy shift to the social model of disability at the Community level occurred as Member States were negotiating the Treaty of Amsterdam. In addition to the changes in the overall institutional structure, the Treaty (signed in 1997 and in force two years later) provided for the first time the legal basis necessary to combat with traditional, "hard" legal measures discrimination on a number of grounds, including disability. Adopted after long-standing opposition mounted by the conservative UK government,¹¹³ Article 13 (now Art 19-1 TFEU) expanded the traditional ban on discrimination based on nationality in Article 12 (now Art 18 TFEU) to enable the Council, on a proposal from the Commission and after consulting the European Parliament, to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."¹¹⁴ The unanimity requirement in the Council and its lack of direct effect indicate the sensitive political

110. See 1996 *EC Disability Strategy*, *supra* note 54, at 4, 10-11.

111. See 2003 *European Action Plan*, *supra* note 12, at 4-6.

112. See 2003 *European Action Plan*, *supra* note 12, at 12. ("Most actions in the field of disability are principally a matter of Member State responsibility and most effectively dealt with at national level.")

113. *United Kingdom White Paper of 12 March 1996 on the IGC: an association of nations*, available at http://www.europarl.europa.eu/igc1996/pos-en_en.htm ("On European citizenship, human rights and non-discrimination, the UK Government does not believe the EU is an appropriate forum for the protection of fundamental human rights, and opposes introducing a general non-discrimination clause covering gender, sexual orientation, race, religion, age and disability. In general, the UK is concerned that the creation of new rights might lead to the need to establish new duties, something which it does not favour on the grounds that the EU is not a state as such.")

114. Treaty of Amsterdam, Oct. 2, 1997, art. 13, 1997 O.J. (C 340) 1.

nature of this provision.¹¹⁵

Within a year after the Treaty of Amsterdam came into effect, the Community had already adopted two directives under Article 13. The first was the Race Equality Directive, which prohibited discrimination on the ground of race and ethnic origin in fields such as employment, vocational training, education, social protection, and access to goods and services.¹¹⁶ The second directive was the Employment Equality Directive, known as the Framework Directive.¹¹⁷ This Directive prohibited direct and indirect discrimination, including harassment, on the basis of religion or belief, disability, age, or sexual orientation in the areas of access to employment, self-employment, occupation, vocational guidance, and training.¹¹⁸ The Framework Directive, which applies to both private and public employers, transplants into Community law the American model of reasonable accommodation for persons with disabilities.¹¹⁹ Importantly, like Article 13 itself, the directive does not define disability. As the next section shows in detail, this policy choice set the stage for the European Court of Justice to fill in the Community meaning of disability.

The Framework Directive was the Community's first rights-conferring instrument for persons with disabilities.¹²⁰ The rhetoric surrounding its adoption matches the rhetoric around the ADA. The Commission referred to it in glowing terms as a path-breaking piece of legislation.¹²¹ It forecast the Directive's "very great" impact given that the new regulatory framework would require "major changes" in the legal systems of Member States, with "huge implications" for employers.¹²² A first glance at its provisions would

115. The same remains true under the Lisbon regime. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities art. 19(1), Dec. 13, 2007, 2007 O.J. (C 306) 24 ("Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.").

116. Council Directive 2000/43/EC, art. 3, 2000 O.J. (L 180) 24.

117. Council Directive 2000/78/EC, 2000 O.J. (L 303) 16.

118. See *id.* at 18-19, arts. 1-3.

119. See *id.* at 19, art. 5. For an argument about the influence of American law, see WADDINGTON, FROM ROME TO NICE, *supra* note 49, at 24 ("It is submitted that (the ADA) directly influenced the drafting of Art. 5 of the Framework Employment Directive. In particular, it is submitted that the term 'reasonable accommodation' . . . was determinant of the terminology used in Article 5. A conscious choice was made to use the term 'reasonable accommodation' in the Directive because of the level of familiarity with this particular element of the ADA amongst relevant Commission staff, some Member States, and disability NGOs.").

120. See generally Richard Whittle, *The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Rights Perspective*, 27 EUR. L. REV. 303, 305 (2002).

121. See *Commission Staff Working Paper: Disability Mainstreaming in the European Employment Strategy*, at 3, COM (2005) EMCO/11/290605 (Jul. 1, 2005). For an analysis of the Commission's broader strategy of regulation under conditions of political fragmentation through justiciable rights, in the disability area and beyond, see KELEMEN, *supra* note 26, 208-224.

122. 2003 *European Action Plan*, *supra* note 12, at 15.

make such statements surprisingly self-congratulatory. Compared to the regime that applies to discrimination on the basis of race or gender, the provisions in the Framework Directive are rather general and open-ended. For instance, unlike the Race Directive—but like the American ADA—the Framework Directive does not stipulate the creation of a specialized body for the promotion of equal treatment on the grounds of race and ethnic origin. Reflected here is a more general view that, given wide differences in the nature of the employment market within the different Member States, national governments need the leeway necessary to achieve their desired aims. At the same time, allowing for leeway legitimizes the argument that there is a hierarchy of grounds and legal regimes within the European equality jurisprudence, with race at the top followed by gender and then disability and age, and finally sexual orientation.¹²³ However, the enthusiasm regarding the disability part of the Directive is easier to understand once one recalls that, at the time of its adoption, only the UK, Ireland, and Sweden had comprehensive civil laws prohibiting discrimination on grounds of disability.¹²⁴ While even those legal systems had to at least face the possibility of having to amend their legislation in order to implement the Directive,¹²⁵ the Directive would have far-reaching implications in the legal systems that did not prohibit discrimination on the basis of disability.¹²⁶

Like the Treaty itself, the Directive does not define disability.¹²⁷ There are numerous possible reasons for not including a definition in the text of the Directive: an attempt to side-step the unfortunate judicial evolution of the ADA in the United States (or similar experiences in the UK);¹²⁸ the difficulty in crafting a definition (it is sometimes said that “there are . . . as many definitions [of disability] as there are disabilities”¹²⁹);¹³⁰ the fact

123. See Waddington & Bell, *supra* note 100, at 610–11 (noting this hierarchy and arguing that it is a result of political pragmatism).

124. See Mark Bell & Lisa Waddington, *Reflecting On Inequalities in European Equality Law*, 28 EUR. L. REV. 349, 367 (2003). [hereinafter Bell & Waddington, *Reflecting On Inequalities in European Equality Law*]. For instance, the UK Disability Discrimination Act of 1995 defines a disabled person as a person with “a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities.” DDA, Section 1 (1). Employers have routinely challenged whether the plaintiffs are disabled under the Act, thus giving courts ample opportunities to develop an extensive jurisprudence with respect to all four parts of the definition (“impairment,” “adverse effect,” “substantial condition,” and “long-term condition”). See *Goodwin v. Patent Office*, [1999] I.C.R. 302 [308] – [310] (Eng.).

125. See Bell & Waddington, *supra* note 124, at 367 n.13 (noting that the British Disability Discrimination Act does not address indirect discrimination and that the provisions on reasonable accommodation of the Irish Employment Discrimination Act are too limited by the standards of the Framework Employment Directive).

126. See generally Lisa Waddington, *Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion*, in *DISABILITY RIGHTS IN EUROPE: FROM THEORY TO PRACTICE* 107–134 (Anna Lawson & Caroline Gooding eds., 2005).

127. See Council Directive 2000/78/EC, 2000 O.J. (L 303) 16.

128. Katie Wells, *The Impact of the Framework Employment Directive on UK Disability Discrimination Law*, 32 INDUS. L.J. 253, 263 (2003).

129. See Burke, *supra* note 15, at 160.

that Community legislation generally does not define suspect grounds, thus leaving that task to the ECJ;¹³¹ the political unpalatability of seeking to overcome differences in the definition of disability among the Member States; the fear that including a definition would stifle experimentation with regulatory regimes; and the belief that the definition of disability may be less important under a social, as compared to a medicalized, model.¹³² Whatever the real reason for failing to include a definition of disability, the ECJ interpreted it as a gap that it had a duty to step in and fill.

The Community disability policy after the enactment of the Framework Directive retained the spirit of the 1996 policy shift by seeking to incorporate rights within a larger framework. The social model, now expressly mentioned in the relevant Community documents,¹³³ was interpreted to legitimize a comprehensive approach to the disability regulation.¹³⁴ If anything, the approach at that stage was too comprehensive. As the Commission remarked, “[a]ttitudes do not change automatically or spontaneously. It is a complex process that requires co-ordinated and integrated policies at all levels of society in order to raise awareness and remove social and environmental barriers while at the same time enabling people with disabilities to become involved.”¹³⁵ Seen from this holistic perspective, the connection between disability and poverty becomes both visible and possible to conceptualize as the economic offshoot of social exclusion.¹³⁶ The Community documents mention a three-prong policy, namely “(1) EU anti-discrimination legislation and measures, which provide access to individual rights; (2) eliminating barriers in the environment that prevent disabled people from exercising their abilities, and (3) main-

130. See Mary Lou Breslin, *Introduction*, in *DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES* xxviii (Mary Lou Breslin & Silvia Yee eds., 2002).

131. See e.g., Case C-13/94, P v. S and Cornwall County Council, 1996 E.C.R. I-2143 (involving discrimination based on sex); Case C-249/96, Grant v. South-West Trains Ltd, 1998 E.C.R. I-621 (involving discrimination based on sexual orientation).

132. I offer this as a simple conjecture. One can in fact argue the opposite, namely that given the diversity of disabilities, an inclusive definition is necessary as a way of creating a group identity. See Scotch, *Social Movement*, *supra* note 15, at 163 (“‘disability’ as a unifying concept that includes people with a wide range of physical and mental impairments is by no means an obvious category.”). Scotch then concludes that, for this reason, a prerequisite for collective action is the social construction and promulgation of an inclusive definition of disability.

133. See *Commission Communication: Towards a Barrier Free Europe for People with Disabilities*, at 3, COM (2000) 284 final (May 12, 2000) (“The approach to disability endorsed by the European Union acknowledges that environmental barriers are a greater impediment to participation in society than functional limitations . . . [R]esponsibility for these issues remains mainly with the Member States.”).

134. See *id.* (calling for “greater synergy between related issues in the fields of employment, education and vocational training, transport, the internal market, information society, new technologies and consumer policy”).

135. *Comm’n Proposal for a Council Decision on the European Year of People with Disabilities*, at 4, COM (2001) 271 final (Aug. 28, 2001).

136. See Ann Elwan, *Poverty and Disability: A Survey of the Literature* 14 (The World Bank, Social Protection Discussion Paper No. 9932, 1999) (“The evidence from the developed countries is that disabled people have lower incomes than non-disabled people, even when age is taken into account.”).

streaming disability issues in the broad range of Community policies which facilitate the active inclusion of people with disabilities.”¹³⁷ While concepts such as ‘mainstreaming’ are terms of art in Community policy,¹³⁸ the pillars of the Community policy are nevertheless defined with striking largesse. Indeed, one reads between the lines the attitude of a body that is not responsible for their application.

Even with the social model in full swing, the Community continued to ascribe to itself some of its early role as coordinator of Member States. As such, its responsibility for the implementation of substantive policy is ancillary at best: “most actions in the field of disability are principally a matter of Member State responsibility and most effectively dealt with at a national level.”¹³⁹ Staple soft law policies also remained in place, only this time within a different theoretical framework—the social model—and complementary to hard law. Originating in the Commission is “a commitment to making full use of voluntary cooperation methods which provide for adequate participation of all stakeholders: Member States, social partners, civil society, etc.”¹⁴⁰ The same trend continues under the Treaty of Lisbon, which includes both a general provision on the “mainstreaming” of disability,¹⁴¹ while at the same time retaining the antidiscrimination paradigm.¹⁴² The European Disability Strategy for 2010-2020 details a comprehensive approach that requires reliance on both soft and hard law measures to achieve goals that range from employment and health to non-discrimination, social protection, education, and training.¹⁴³

The previous sections analyzed the disability reform movements in both the United States and Europe under the influence of the social model, as it was acculturated differently in these two political systems. These legislative measures were bound to give rise to legal litigation. The next part turns to this issue; specifically, to how the medicalized approach to disability survived the legislative shift towards a discrimination regime, in the medium provided by judicial decisions.

137. *Commission Communication: Situation of Disabled People in the Enlarged European Union: The European Action Plan 2006-2007*, at 3, (COM (2005) 604 final (Nov. 28, 2005)).

138. See, e.g., *Commission Staff Working Paper: Disability Mainstreaming in the European Employment Strategy*, at 3, COM (2005) EMCO/11/290605 (Jul. 1, 2005) (“Mainstreaming means that the needs of disadvantaged people need to be taken into account in the design of all policies and measures, and that action for the disadvantaged people is not limited to those policies and measures which are specifically addressing their needs.”).

139. 2003 *European Action Plan*, *supra* note 12, at 12.

140. *Id.* at 4.

141. TFEU, *supra* note 106, art. 10. (“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”)

142. See *id.* art. 19.

143. See 2010 *EC Disability Strategy*, *supra* note 24.

II. What's in a Name? Judges and the Definition of Disability

This Part documents the staying power of the medical approach to disability in the judicial interpretation of the definition of disability. It shows that this phenomenon is present both in the U.S. and the EU. The following sections identify the judicial decisions in which judges have exercised the greatest of powers: the power to define concepts such as disability and change the social, political, and legal discourse of the struggle for equality of persons with disabilities. Notwithstanding significant differences in their respective tasks—unlike the American ADA, the Community Framework Directive does not include a definition of disability—courts have operated with similar mindsets in interpreting or stipulating the meaning of disability.

A. The Definition of Disability in EU Law

Sonia Chacón Navas had been ill at home for eight months and awaiting surgery when, on a Friday in May 2004, she received notification from her employer, Eures Colectividades S.A., that her contract had been terminated, effective the following Monday. The employer, a catering firm, gave Navas no explanation for her dismissal. However, the notification letter acknowledged that her dismissal was “unlawful” and it included the employer’s offer to pay Navas financial compensation.¹⁴⁴

Spanish law distinguishes between “lawful,” “unlawful,” and “void” dismissals.¹⁴⁵ Lawful dismissals are dismissals that meet all statutory requirements of procedure and content. Dismissals are unlawful when they fail some of the statutory requirements, for instance, the requirement that the employer justify to the employee why she or he is dismissed. Finally, void dismissals are dismissals in breach of the employee’s public freedoms or fundamental rights, such as the right not to be discriminated against on grounds such as gender or disability. Differences in the available remedies explain the importance of the distinction between unlawful and void dismissals. In the case of unlawful dismissals, the employer has the obligation to pay the former employee financial compensation. If the dismissal is deemed void, the employee has the right to be reinstated in the position from which he was wrongfully dismissed, as well as the right to any unpaid remuneration.

In her action before the national court, Navas sought a declaratory judgment that her dismissal was void on the ground that Eures could only have fired her because of her illness. According to the plaintiff, discrimination on grounds of illness is a form of disability discrimination. Navas therefore demanded that she be reinstated in her position.¹⁴⁶

The labor court in Madrid agreed, factually, that illness was the reason she was fired.¹⁴⁷ However, it did not follow that under Spanish law, her

144. *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 18.

145. *See id.* ¶ 21.

146. *Id.* ¶ 19.

147. *Id.* ¶ 20.

dismissal was void. First, the applicable statute did not include illness alongside age, disability, gender, or race as an enumerated ground that renders a dismissal void. Second, it was settled precedent under Spanish law that “illness” was distinct from “disability,” and therefore could not be read into the prohibited grounds. Put differently, Spanish law allowed Eurest to lawfully act upon its cost-benefit analysis that paying Navas financial compensation for unlawful dismissal was more cost effective than filling her position with temporary workers until her health allowed her to return to work.

Had Spanish law been Navas’ only source of rights, the Madrid tribunal would have had to conclude its analysis at this step and hold that financial compensation was the only remedy for her unlawful dismissal. However, Navas was also a citizen of the European Union and her legal heritage includes, in cases such as this, rights granted under Community law.¹⁴⁸ As both a domestic and a Community court, the national tribunal must adjudicate cases under the laws of both legal orders.¹⁴⁹ If illness is an enumerated ground for unlawful employment dismissals under Community law, or if disability discrimination under Community law protects employees dismissed on the basis of their illness, then Navas’ dismissal would be reclassified as void. Recognizing her right to be reinstated in her position would thus invalidate the legal effects of her employer’s cost-benefit analysis about how to fill her position while she was ill at home. The national court sent a preliminary reference to the European Court of Justice asking for clarification of whether illness is a prohibited ground for discrimination under the Directive, either separately or implicitly, under disability.¹⁵⁰

On the first question, the ECJ adopted a textualist stance and found that illness – or “sickness,” as the Court called it – is not explicitly mentioned as a distinct, prohibited ground either in the text of the Directive or in Article 13 EC, which constituted the general antidiscrimination provision and the Directive’s legal basis.¹⁵¹ The more difficult question is whether primary or secondary Community legislation prohibits implicit discrimination based on illness as part of disability discrimination. In the Court’s opinion, the answer to that question depends on the definition of disability in Community law, specifically in the context of employment and occupation. However, neither the Directive nor the EC Treaty defines the concept of disability.¹⁵² Nevertheless, the European Court of Justice saw in the lack of a definition a gap to be filled. In a manner familiar to the

148. See Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen* 1963 E.C.R. 1, ¶ 3.

149. See Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629; Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentación SA*, 1991 E.C.R. I-4135.

150. See *Chacón Navas*, 2006 E.C.R. I-6467, ¶¶ 1-2.

151. See *id.* ¶¶ 46-47, 54-55.

152. See Council Directive 2000/78/EC, 2000 O.J. (L 303) 16; *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 39. As the previous section speculated, this silence was likely not a legislative oversight. See *supra* text accompanying notes 128-132.

student of its jurisprudence,¹⁵³ the Court considered it incumbent upon itself to articulate “an autonomous and uniform interpretation” of the concept of disability.¹⁵⁴ It proceeded to define disability as “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.”¹⁵⁵

This definition is surprising in a number of ways. First, it is strikingly reminiscent of the medical model, which the Community had explicitly rejected in 1996.¹⁵⁶ Even a cursory foray into the political origins of the Framework Directive would have unveiled the social model, which conceptualizes disability as the effect of societal discrimination, not the individual’s medical condition. One would have reasonably expected—indeed, commentators did expect¹⁵⁷—that the definition of disability would reflect legislative intent. Instead, the Court assumes that medical impairments themselves, not the work environment, hinder professional life. Both stakeholders and academics reacted with surprise to the Court’s narrow definition of disability. Scholars pointed out that the Court’s definition is the same as the individual/medical model of disability,¹⁵⁸ and some of them have gone as far as to argue that this particular definition puts Community legislation at odds with the Community’s commitments as a signatory of the UN Convention on the Rights of Persons with Disabilities.¹⁵⁹ The disa-

153. See, e.g., Case 327/82, *Ekro v. Produktschap voor Vee en Vlees*, 1984 E.C.R. 107, ¶ 11; Case C-323/03 *Comm’n v. Spain*, 2006 E.C.R. I-0000, ¶ 32.

154. *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 40, 42 (reasoning that this “follows from the need for uniform application of Community law and the principle of equality”).

155. *Id.* ¶ 43. The Court here followed Advocate General Geelhoed, who defined persons with disability, within the meaning of the directive, as persons with “serious functional limitations (disabilities) due to physical, psychological or mental afflictions.” Opinion of Advocate General Geelhoed, Case C-13/05, *Chacón Navas v. Eurest Colectividades SA*, 2006 E.C.R. I-6467, ¶ 76. The act of discrimination is a reaction to the social effects of the medical condition, and it is severable from it: “the health problem as cause of the functional limitation should in principle be distinguished from that limitation.” *Id.* ¶ 77.

156. See 1996 *EC Disability Strategy*, *supra* note 54. The court relied on the definition of disability set out by the World Health Organization’s International Classification of Functioning, Disability, and Health. According to the court, this definition provides that “‘disability’ is a generic term that includes defects, limitations of activity, and restriction of participation in social life. Sickness is capable of causing defects which disable individuals.” *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 22.

157. See Wells, *supra* note 128, at 261 (“There is nothing in the Directive or other Community materials that supports a definition of disability which limits the scope of the Directive to considerations of medical impairment rather than disability in the wider social sense.”).

158. Both defining elements of the individual model are present in the Court’s definition: first, the location of the problem of disability within the individual, and second, an understanding of disability stemming from “the functional limitations and psychological losses which are assumed to arise from disability.” OLIVER, UNDERSTANDING, *supra* note 11, at 32.

159. See Lisa Waddington, *Case C-13/05, Chacón Navas v. Eurest Colectividades SA, judgment of the Grand Chamber of 11 July 2006*, 44 COMMON MKT. L. REV. 487 (2007). *But see* Waddington, *supra* note 9, at 18 (noting that the Commission does not “share the opinion that the Court was out of line with the Convention”). Interestingly, one of the most recent official documents from the Commission glosses over the Court’s definition

bility rights movement, which played a critical role in pushing the disability agenda to the forefront of Community politics, also reacted forcefully to the definition.¹⁶⁰ Shortly after the *Navas* judgment was announced, the European Disability Forum demanded the adoption of a comprehensive disability directive that would “provide guidance, based on the social model of disability, on when the person shall be regarded as disabled for the purposes of the directive.”¹⁶¹

Second, the definition is surprising because neither it nor the opinion of the Court distinguishes among different kinds of medical impairments. Although the Court explicitly rejects the argument that the Directive protects an employee as soon as he develops “any type of sickness,”¹⁶² there are important differences between i) medical conditions that are “transitory and minor,”¹⁶³ ii) conditions such as cancer, MS, or depression, whose long-term effect is known from the moment when they are diagnosed; and iii) medical conditions that can develop into long-term illness.¹⁶⁴ Moreover, some illnesses (heart disease, diabetes, asthma, depression) have long-term effects so debilitating that, while the impairment itself might not be similar in nature to that of deafness or muscular dystrophy, it leads to comparable social disadvantages.¹⁶⁵ In any event,

by stating that “[t]here is no EU-wide definition of disability.” See *Commission Staff Working Document accompanying the Commission Communication: European Disability Strategy 2010-2020*, at 4, SEC (2010) 1323 final (Nov. 15, 2010). The document then mentions the definition of disability included in the UN Convention. See *id.*

160. See, e.g., European Disability Forum, Proposal by the European Disability Forum for a Comprehensive Directive to Combat Discrimination Against Persons with Disabilities 6-7 (2008) (“The Court’s judgment showed a lack of understanding of the social model and relied on an out-dated medical approach in developing a definition of disability for the purposes of the Directive.”) http://www.edf-feph.org/Page_Generale.asp?DocID=13854&thebloc=13856.

161. See European Disability Forum, EDF Absolute Demands on the Future Non-Discrimination Directive, http://www.edf-feph.org/Page_Generale.asp?DocID=18330 (“The Directive must provide guidance, based on the social model of disability, on when the person shall be regarded as disabled for the purposes of the directive.”).

162. See *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 46.

163. See ADA Amendments Act of 2008, Pub. L. No. 110-325 § 3, 122 Stat. 3553, 3553 (2008) (One of the grounds of “disability” is “being regarded as having such an impairment (as described in paragraph (3)).” *Id.* (1)(C). “Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.” *Id.* (3)(B)); see also *Commission Communication: Towards a Barrier Free Europe for People with Disabilities*, at 4, COM (2000) 284 final (May 12, 2000) (“People with disabilities do not constitute an homogeneous group and there is a broad range of disabilities and issues. Disabilities may be apparent or hidden, severe or mild, singular or multiple, chronic or intermittent.”).

164. For this distinction, including specific examples, see European Disability Forum, EDF Analysis of the First Decision of the European Court of Justice on the Disability Provisions of the Framework Employment Directive 7 (2006) <http://cms.horus.be/files/99909/MediaArchive/pdf/edf%20interpretation%20of%20the%20ecj%20judgement.pdf>.

165. See, e.g., World Health Organization, Diabetes Fact Sheet, <http://www.who.int/mediacentre/factsheets/fs312/en/> (last visited Feb. 20, 2011) (noting that diabetes and its complications “have a significant economic impact on individuals, families, health systems and countries”).

surprising in the Court's failure to fine-tune the legal analysis is not its unawareness of these distinctions, but the implicit—read, unjustified—refusal to deem the distinctions relevant.¹⁶⁶ Such distinctions certainly did not look irrelevant in Navas' case. Although the record did not contain details regarding the plaintiff's medical condition, the Court nevertheless had sufficient evidence to conclude that her illness was not minor, and that it had lasted far too long to be labeled transitory. Chronic illness, temporary disability, and other such categories blur the lines between illness, impairment, and disability in the Court's analysis and reveal its thin conceptual grounds.

Finally, the definition is surprising because the Court's reasoning seems markedly uninformed by the historical, political, and normative debate regarding the meaning of disability in Europe and abroad. Not once in the entire judgment does the Court so much as hint at the transformation of disability law from the medical to the social model. As I have argued elsewhere, this type of legal analysis is the inescapable consequence of a collegial form of judgment.¹⁶⁷ Allowing judges to enter separate and concurring opinions would bring about a discursive turn in the Court's jurisprudence, rendering its judicial reasoning more transparent and perhaps even deepening it. For instance, one effect might have been to limit the holding. Even assuming the Court's intention to reject the view of the referring court that "a worker should . . . be protected [as disabled] as soon as the sickness is established,"¹⁶⁸ which indeed many social advocates would also oppose, it does not follow that the Court should have adopted a far-reaching, impairment-centered definition of disability. However, despite the fact that the final judgment does not contain any traces of disagreement about different interpretations of disability, it would be unwarranted to assume that the array of approaches and concerns laid out by American courts do not apply in the European context.¹⁶⁹

166. To his credit, the Advocate General at least signaled—without offering solutions—the relevance of distinguishing among different kinds of medical impairments. Opinion of Advoc. Gen. Geelhoed, *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 63 ("One of the characteristics often referred to in the literature to distinguish disabilities from diseases is the permanence of the physical or mental defect. In most cases there is indeed a sound basis. However, there are progressive diseases entailing serious and long-lasting losses of function which impede the functioning of patients so badly that they do not differ significantly in society from 'permanently' disabled people.").

167. See Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 VA. J. INT'L L. 307, 367 (2009).

168. See Opinion of Advoc. Gen. Geelhoed, *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 27.

169. The judgment of the *Navas* court comes close to the medicalized approach to disability of UK courts. Even if the UK DDA implements a medicalized approach, courts have gone out of their way to limit the *ratione personae* of the statute beyond what the medical model would have required. For instance, judges have introduced a third category of physiologically-caused impairments alongside mental and physical impairments, which the DDA mentions explicitly. In cases involving plaintiffs with physical impairments, such as shoulder injuries, neck and spine injuries, and severe back pain, that had no identifiable physical cause but certifiable effects, courts considered the physiological nature of the impairment and denied plaintiffs DDA coverage on the ground that the impairments lacked a "clinically well recognized" diagnostic. See *Rugamer v. Sony Music Entertainment UK Ltd*, [2001] IRLR 644; *McNicol v. Balfour Beatty Rail Mainte-*

It is often remarked that American courts pay no heed to the jurisprudence of their foreign counterparts. But a similar phenomenon is overlooked when the culprit is a foreign court, including supranational courts such as the ECJ. Had the ECJ looked at American litigation of the ADA, either of its own initiative or at the invitation of the Advocate General (“AG”), the Commission, or the parties, it might have learned important lessons about the risks involved in not only defining disability narrowly, but also, and perhaps more importantly, in dwelling on the definition of the protected class in the first place. The next section briefly sketches the American experience.

B. The Definition of Disability in American Law

Writing a decade after the Americans with Disabilities Act (“ADA”) was enacted, Richard Scotch noted that “the legal system [had] become the primary arena for challenges to the ADA’s broad focus and underlying assumptions.”¹⁷⁰ This development is not entirely surprising in a society where most struggles for recognition eventually end up in courts. More striking, however, is the dramatically one-sided effect of courts in the direction of limiting the ADA’s reach and undermining its ambition. A study from 1998 found employer-defendants winning in 92 percent of cases under the ADA.¹⁷¹ Many of these cases ended at the summary judgment stage after courts found that the plaintiffs failed to meet the statutory definition of disability.¹⁷² Since earlier studies show plaintiffs winning in about one-third of all ADA cases that got to the jury or the judge on a bench trial,¹⁷³ one gets a better sense of how many suits were terminated at the summary judgment stage. Scholars have referred to this combination of a narrow definition of disability and the use of summary judgments as a “powerful one-two punch.”¹⁷⁴ This section describes briefly the first jab, so to speak, namely the definition of disability.

The ADA defines “disability” as (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, or (b) a record of such an impairment, or (c) being regarded as having such an impairment.¹⁷⁵ This definition was almost identical to the

nance Ltd [2002] ICR 381 (EAT). “[S]hort of satisfactory medical evidence of a diagnosed or diagnosable clinical condition or other mental disorder of a recognizable type, evidence simply of a restriction of a person’s level of function or activity accompanied by a general suggestion that this is (or may be) a manifestation of some psychological state will not meet the statutory threshold for establishing mental impairment.” *Id.* ¶ 45. Of course, to the extent that physical and mental impairments require medical diagnosis, disability cases involve complex questions of fact whose determination at the trial level is likely to be upheld on appeal. On this point, see Wells, *supra* note 128, at 256.

170. Scotch, *Models*, *supra* note 3, at 213.

171. Am. Bar Ass’n, *supra* note 27, at 403.

172. See COLKER, *supra* note 79, at 96; see also *id.* at 78 (noting a trend over time for more employment discrimination cases, not just ADA cases, to be decided by summary devices rather than by completed trials).

173. *Id.* at 71.

174. *Id.* at 115.

175. 42 U.S.C. § 12102(1).

definition of “handicap” in Section 504 of the Rehabilitation Act of 1973; Congress was legislating against the backdrop of courts adopting a broad view of the definition of “handicap” in Section 504 litigation.¹⁷⁶ Stated retrospectively, on the occasion of the 2008 ADA, “while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation [had] not been fulfilled.”¹⁷⁷ What happened?

The short answer is that, instead of continuing their earlier practice of interpreting broadly the protected class of persons with disabilities, judges reached for the magnifying glass and began scrutinizing the different components of the definition of disability. After years of litigation in lower courts, cases made their way up to the Supreme Court in the later 1990s.¹⁷⁸ The Court started developing from the top down an intricate jurisprudence on the meaning of “physical or mental impairment that substantially limits one or more of the major life activities,” as well as on the “regarded as” prong of the statutory definition.¹⁷⁹ The net result has been a shift away from litigation over the content of the duty to provide reasonable accommodation,¹⁸⁰ coupled with a narrow interpretation of the protected class, which resulted in denial of protection to many plaintiffs who would have been covered under the 1973 Act. As Congress noted retrospectively in 2008, this created an “inappropriately high level of limitation necessary to obtain coverage under the ADA.”¹⁸¹

A landmark case from 1999, *Sutton v. United Airlines*,¹⁸² exemplifies the judiciary’s approach. That case involved a challenge to United Airlines’ minimum vision requirement for global pilots. The plaintiffs, two seriously myopic twin sisters whose visual acuity was 20/200 or worse, challenged as discriminatory under the ADA the airline’s refusal to hire them

176. See Feldblum, *supra* note 18, at 93.

177. ADA Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553 § 2, (a)(3) (2008).

178. See Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. Rev. 1279 (2000) (analyzing the six ADA decisions during the 1998 Term, which involved statutory interpretation). Earlier, the Supreme Court had refused to recognize mental disability as a suspect class. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). For a discussion of *Cleburne* as well as other Supreme Court equal protection cases, from the perspective of the minority group model, see Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, 21 BERKELEY J. EMP. LAB. L. 166, 182-191 (2000).

179. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (holding that asymptomatic HIV infection constitutes a disability under the ADA). For a review of the early cases on the “regarded as” prong, see generally Risa M. Mish, “*Regarded as Disabled*” Claims Under the ADA: *Safety Net or Catch-All?*, 1 U. PA. J. LAB. & EMP. L. 159 (1998).

180. See Diller, *supra* note 25, at 25 (“The problem is not that the courts view all accommodations as “unreasonable” or “undue burdens” on employers, but that they rarely even get to the point of reaching such issues.”).

181. ADA Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553, 3554 § 2 (b)(5) (2008).

182. 527 U.S. 471 (1999). In a companion case, the Court had to decide whether blood pressure controlled by medication constituted a disability within the meaning of the ADA. See *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999).

on the ground that they failed to meet a minimum requirement of uncorrected visual acuity of 20/100 or better.¹⁸³ Although eyeglasses or contact lenses entirely corrected the sisters' vision, the plaintiffs argued that, left uncorrected, their visual impairments substantially limited a major life activity, namely work. In the Court's view, the case raised the question of whether corrective measures, such as assistive or prosthetic devices, should be taken into consideration in determining whether a plaintiff is disabled within the meaning of the ADA. Unlike under the Rehabilitation Act of 1973, where the courts would have considered the plaintiffs disabled and then proceeded to determine whether they had been the subject of discrimination, the Sutton court dwelled on the question of whether the plaintiffs met the statutory requirements of disability.¹⁸⁴ Here, in order for the Court to advance to the discrimination analysis, the court would need to determine that corrective measures that mitigate an individual's impairment should not be taken into consideration in determining whether that individual is disabled under the ADA, as the implementation guidelines of the EEOC suggested.

The Court disagreed with the EEOC guidelines and held that corrective measures ought to be taken into consideration.¹⁸⁵ Put differently, only those plaintiffs whose use of corrective measures does not mitigate the effect of their medical impairment, and whose impairment is substantially limiting as to one or more of the major life activities, are considered disabled. Dismissing in no uncertain terms the relevance of congressional purpose that the Act should cover the use of corrective measures,¹⁸⁶ the Court adopted a textualist method of interpretation.¹⁸⁷ Specifically, the Justices pointed out the use of the present indicative verb form in the definition of disability as an impairment that *substantially* limits a major life activity, and interpreted it as a need that a person be substantially limited at present by the impairment.¹⁸⁸ Moreover, examining impairments in their uncorrected state would bring within ADA coverage a number far beyond the 43 million Americans that Congress mentioned in the ADA's preamble.¹⁸⁹ The need for an individualized assessment is itself interpreted as mandated by the text, specifically the mention of "such individ-

183. See *Sutton*, 527 U.S. at 475.

184. See *id.* at 481-94.

185. See *id.* at 482.

186. *Id.* ("Justice Stevens relies on the legislative history of the ADA for the contrary proposition that individuals should be examined in their uncorrected state. Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history.")

187. The literature on textualism in American law is extensive. See generally John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005).

188. See *Sutton*, 527 U.S. at 482.

189. See *id.* at 487 ("Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings."). For instance, in the case of corrected vision alone, that figure would be higher than 100 million. See Feldblum, *supra* note 18, at 153-154.

ual” in the statutory definition of disability.¹⁹⁰ In addition to clarifying the first, “substantially limits,” definition of disability, the Sutton Court interpreted other parts of the definition of disability.¹⁹¹ For instance, the court rejected the plaintiffs’ claim that poor vision affected their capacity to “work” as a major life activity within the meaning of the statute.¹⁹² The plaintiffs’ ability to work as global airline pilots had been affected; however, their skills qualified them for other positions, such as regional pilot or pilot instructor. This line of argument makes apparent the consequences in the definitional shift that represents a novelty in ADA adjudication compared to the 1973 Rehabilitation Act. Assuming that the discrimination—not the conceptual/definitional analysis—was the center of gravity of the legal analysis, fears of either diluting the protection afforded to persons with disabilities or of increased litigation would be unwarranted. As the dissenters in Sutton point out, vision is important to airline pilots, but it is not nearly as important to most other employers.¹⁹³ Plaintiffs that would try to benefit from abusively enlarging the protected class under the ADA would be easily filtered out at the discrimination stage of the analysis.¹⁹⁴ However, that later stage of the analysis is seldom reached when litigation focuses on the conceptual issue of the definition of disability.

The ascendancy of Sutton’s conceptualist approach led to some bizarre results in subsequent cases.¹⁹⁵ Scholars documented how, between 1995 and 1996, from a total of 110 cases decided on the definition of disability, only one plaintiff out of six met the statutory definition.¹⁹⁶ Impairments

190. See *Sutton*, 527 U.S. at 482. “The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting.” *Id.* at 488. The requirement of an individualized approach has become a landmark of the court’s jurisprudence in this area. See *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999) (mentioning a “statutory obligation to determine the existence of disabilities on a case-by-case basis.”); see also *Toyota Motor Mfg. Ky., Inc.*, 534 U.S. at 198-99 (holding that the determination of the existence of disability should be made in a “case-by-case manner” through “[a]n individualized assessment of the effect of an impairment . . .”). The Court has, however, mentioned that “[s]ome impairments may invariably cause a substantial limitation of a major life activity.” See *Albertson’s, Inc.*, 527 U.S. at 556.

191. For instance, the court interpreted the “regarded as” prong of the definition of disability. See *Sutton*, 527 U.S. at 489 (“There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities.”) The court then pointed out that this prong applies to protect persons with disabilities from “stereotypic assumptions” based on “myths and fears about disability.” *Id.*

192. See *id.* at 492.

193. See *id.* at 510 (Stevens, J., dissenting).

194. See *id.*

195. The scholarly literature has faulted the Sutton court for both logical and normative flaws in the reasoning. See COLKER, *supra* note 79, at 105 (interpreting *Sutton* as instructing courts to “determine whether the plaintiffs were disabled in their *corrected* state, despite the fact that the employer insisted that they take the test in the *uncorrected* state.”) (emphasis in original).

196. See Feldblum, *supra* note 18, at 139.

such as epilepsy, cancer, and diabetes were not recognized as covered. The 1999 Supreme Court cases in a sense ratified this development of the jurisprudence. Narrow statutory construction of concepts such as “major activity” and “substantial limitations” meant that individuals with impairments among the most serious (breast cancer, MS, lymphoma, brain tumors, hemophilia, epilepsy, and depression¹⁹⁷) might not qualify for ADA protection. Meeting the definition of disability became especially burdensome on plaintiffs and explains why many failed in the courts.¹⁹⁸ As one commentator noted with appropriate sarcasm, “despite the enormity of [the figure mentioned in the ADA preamble], the court decisions suggest that the people who choose to sue under the ADA are seldom among this group.”¹⁹⁹

This trend of narrowing the definition of disability, and by consequence, the class of individuals protected from discrimination, continued in future cases. In *Toyota Motor Manufacturing v. Williams*, the Court expanded further on the meaning of “substantial limitation” of a major life activity, as well as on the meaning of “major life activity.”²⁰⁰ The case raised the question of whether the plaintiff-worker’s carpal tunnel syndrome and other conditions involving her wrists, elbows, and shoulders substantially limited her in the major life activity of performing manual tasks at the Toyota facility where she was an employee.²⁰¹ As to the methodology, Justice O’Connor wrote, for a unanimous court, that it was “guided first and foremost by the words of the disability definition itself.”²⁰² The court found that an impairment “substantially limits” a major life activity when it limits it “to a large degree” or “considerabl[y]” in terms of nature, severity and duration.²⁰³ Regarding the meaning of “major life activity” itself, it referred, in the Court’s interpretation, to activities that are of central importance to daily life.²⁰⁴ Thus, “to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”²⁰⁵ Since repetitive work with hands and arms extended at or above the shoulder for extended periods of time is not an important part of most people’s daily lives, the plaintiff was not included in the protected class under the ADA.²⁰⁶ That a plaintiff suffering from medical conditions such as carpal tunnel syndrome, myotendinitis, and thoracic outlet compression would not be recognized as disabled under the ADA explains why the Court’s narrow definition was meant expressly to “create . . . demanding stan-

197. See Diller, *supra* note 25, at 26.

198. See *id.* at 28 (“[ADA] cases require plaintiffs to amass a wealth of demographic and economic data, potentially turning individual ADA cases into battles of labor market experts.”).

199. *Id.* at 26.

200. See *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 196–97.

201. See *id.* at 196.

202. *Id.*

203. *Id.*

204. *Id.* at 197.

205. *Id.* at 198.

206. See *id.* at 201.

dard[s] for qualifying as disabled.”²⁰⁷

An alternative approach would have been to interpret the concept of disability broadly and shift the bulk of the legal analysis to the question of discrimination.²⁰⁸ Instead, the court channeled more of its interpretative energy towards the definitional question. It looked specifically at the medical impairment—and even then, it did not ask the question of the impairment’s social effects, but rather turned to issues such as: “the nature and severity of the impairment; the duration or expected duration of the impairment; the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.”²⁰⁹ In the 2008 ADAAA, Congress rejected the judicial narrowing of “the broad scope of protection intended to be afforded to the ADA, thus eliminating protection for many individuals whom Congress intended to protect.”²¹⁰ However, without a deeper understanding of the root causes of the courts’ approach, Congress’ action is a mere reprimand that will unlikely lead to the desired results. Uprooting the backlash depends on answers to questions such as: why is the impairment-centered approach to disability so appealing; why can’t courts break away; and, why do they remain tied to the medicalized understanding of disability, despite the legislative shift away from it?

III. Explaining the Resilience of the Medicalized Model in Judicial Definitions of Disability

Part III identifies explanations offered for the medicalized, narrow interpretations of disability in the American context and asks if they help in understanding the comparable approach of European courts. The explanations are divided into two categories. Among explanations endogenous to legal reasoning, the first section discusses doctrinal, interpretative, and jurisprudential explanations. In the second group are explanations exogenous to law, understood quasi-autonomously. The explanations in this second group find the causes of the conceptual turn outside of law and legal doctrine, specifically in the composition of the judiciary, in its ideological commitments, or in the institutional tensions between courts and legislators. Because I do not believe in a strict approach to law’s autonomy, the distinction between endogenous and exogenous explanations aims

207. *Id.* at 197.

208. The focus on the definitional stage is part of a larger approach to rights in American law. The resistance of American constitutional law to the proportionality method is one example. See generally Matthias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT’L J. CONST. L. 574 (2004).

209. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2 (j)(2) (listing factors that should be considered in determining whether an individual is substantially limited in a major life activity).

210. ADA Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553, 3553 § 2 (a)(4) (2008). In the 2008 ADA Amendments Act, Congress explicitly overruled *Sutton* and *Toyota*. With respect to *Sutton*, it rejected “the requirement. . . that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures.” *Id.* (b)(2).

solely to bring structure and clarity to the analysis. Any account of the judiciary's definitional work in this area will draw on both types of explanations. My aim in this section is to show that at least in the European context, these accounts are insufficient, taken both severally and together. In the next section I offer an additional explanation for the staying power of the medicalized approach to disability in judicial definitions of disability that applies to Europe and might also enhance the understanding of the comparable phenomenon in the United States.

As a caveat before we proceed, it is important to recall that there are important differences between the American and the European contexts. The textual starting point of judicial interpretation is different. American courts interpreted the ADA's statutory definition of disability, whereas the Community Directive included no specific definition. Moreover, the American experience with the ADA has been ongoing for almost two decades, in contrast to the European experience at the supranational level. Differences in the number of disability cases can be explained by reference to the relatively short period that has passed since the deadline for the implementation of the Framework Directive. These differences are also related to the distinct positions that the ECJ and the US Supreme Court occupy in their respective jurisdictions. Thus, the analysis in this section is by necessity provisional in character. It is too early now for a comprehensive analysis of the impact that *Chacón Navas* will have in the national laws of the member states. We do know that it led to the rejection of Ms. Chacón Navas' own claim by the referring court.²¹¹ While there are decisions of national courts that have cited to different aspects of the *Navas* opinion,²¹² a comprehensive impact study would be premature.

A. Endogenous Explanations

This section analyzes doctrinal, interpretative, and jurisprudential explanations of the resilience of the medicalized approach in judicial definitions of disability.

1. *Doctrinal Explanations: The Illusion of Retrospective Determinism*

It is sometimes argued that plaintiffs lose under the ADA because their claims are weak under the law.²¹³ They either fail to prove that they are "disabled" within the meaning of the ADA, or, when they have standing, they cannot convince courts that employers owe them a duty to provide reasonable accommodation for their disability.²¹⁴ By itself, this doctrinal

211. See *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 2.

212. See *Paterson v. Comm'r of Police of the Metropolis* (EAT (UK)), [2007] I.C.R. 1522; *Chief Constable of Dumfries and Galloway Constabulary v. Adams* (EAT(Sc)), [2009] I.C.R. 1034 (UKEATS/46/08) (discussing the "normal day-to-day activities" and "professional life" prongs of the definition). For a decision of the Irish Equality Tribunal where the ECJ's narrow interpretation was detrimental to the plaintiff alleging discrimination on the basis of disability, see DEC-E2010-045, *Laurence O'Rourke v. JJ Red Holdings Ltd.*, ¶ 5.7.

213. See Diller, *supra* note 25, at 21.

214. See *id.* at 25.

explanation—which sounds more like a description of judicial holdings than an explanation—is an instance of what the French philosopher Henry Bergson called “the illusions of retrospective determinism.”²¹⁵ Like all doctrinal explanations, this account is self-evident to the extent that the losing party will have, retrospectively and from a formal juridical standpoint, the weaker legal claim. But this explanation ignores the doctrinal hurdles imposed on plaintiffs by courts interpreting the ADA. For instance, such an account must explain why medical conditions such as hemophilia, cancer (active or in remission), or diabetes, which had been covered under the 1973 Rehabilitation Act, were deemed by courts to fail to meet the statutory definition of disability under the ADA, considering that the definition had been transposed from the 1973 Act.²¹⁶ The rates at which plaintiffs lost under the ADA brings to the forefront the doctrinal hurdles—especially regarding standing—that courts erected by narrowly interpreting the statutory definition of disability. A doctrinal edifice built on a statutory provision, such as the statutory definition of disability, must by necessity be supplemented with an account of the method of interpretation that courts used in erecting that edifice. And since no text interprets itself, the choice of the method of interpretation takes us beyond legal doctrine. I will discuss that choice in the next section.

The doctrinal explanation is harder to dismiss in the European context because neither primary nor secondary Community legislation included a definition of disability. The ECJ filled that gap and stipulated an “autonomous and uniform application (of the Directive) throughout the Community.”²¹⁷ In the Court’s view, allowing national jurisdictions to interpret the meaning of disability according to their national laws would result in a differential application of the Directive across the Union territory, and thus lead to disparate protection of persons suffering from similar disabilities. At least *prima facie*, this is a sound, doctrinal explanation of the need for a definition of disability at the Community level.

The real question is whether the Court had doctrinal reasons for choosing the particular impairment-centered definition of disability, instead of other available definitions.²¹⁸ For instance, the ECJ explained that the legislature deliberately used “disability” as opposed to “sickness,” and hence “the two concepts cannot . . . simply be treated as being the same.”²¹⁹ But there are a number of possible definitions that do not con-

215. TIMOTHY GARTON ASH, *HISTORY OF THE PRESENT* xiv (1999) (quoting Henri Bergson).

216. See Diller, *supra* note 25, at 21 n.20.

217. *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 40.

218. See *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 22; World Health Organization, International Classification of Functioning, Disability, and Health (2001) <http://www.nda.ie/cntmgmtnew.nsf/0/6877A99815DA544980257066005369D1?OpenDocument> (defining disability as “the negative aspects of the interaction between an individual (with a health condition) and that individual’s contextual factors (environmental and personal factors)”).

219. *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 44.

flate disability with “any type of sickness.”²²⁰ The Court also noted that the Directive mandates employers to provide reasonable accommodation for their disabled employees, while at the same time making explicit that the duty is not owed to employees that cannot perform the essential functions of the position.²²¹ Yet it hardly follows that an employee who misses work cannot perform the essential functions of the position. For instance, the essential functions of a job might not require a fixed schedule. An atypical work schedule is not tantamount to “missing work,” but rather, it can represent accommodation in the form of a “flexible schedule.”

There are situations—including *Navas*’ situation itself, where at least some scenarios could not be ruled out given the limited information that courts had about her condition—where the employees might suffer from an illness “capable of causing defects which disable individuals.”²²² Disability often occurs during adulthood and often causes disruption in physical, mental, sensory, or intellectual functions, which in turn cause people to miss work. An employee, like *Navas*, who becomes disabled while employed, will presumably have to miss a substantial amount of work for disability-related reasons. During that period in which the disability might not yet be fully realized, such a person is not (or not-yet) disabled, but ill. The result of denying persons in this category the remedy of reinstatement, when their medical impairments are the reasons for their dismissal, would lead to the bizarre conclusion that a person would be better off becoming impaired while unemployed, since that eliminates the social and psychological burden of being fired from a job where one could expect to return. There are thus doctrinal reasons why, as the Madrid Tribunal argued in its reference to the ECJ in *Navas*, “a worker should be protected as soon as sickness is established.”²²³

I do not mean to take a stand—at least not yet—on whether those are good doctrinal arguments. The doctrinal solution of the ECJ in *Navas* rests on theoretical premises about a continuum between impairment and disability. Some social actors share these normative assumptions. For instance, the European Disability Forum took the same position, arguing that the difference between disability and illness is quantitative, and that any illness that has long-term effects (such as heart disease, diabetes, asthma, depression) constitutes a disability.²²⁴ However, there are strong arguments, some from within the disability movement, to oppose the continuum approach. Others argue, for reasons I will discuss in Part IV, in favor of a binary approach to illness and disability. As a consequence, they generally support the holding in *Navas* and the American approach that the ADA “is not a general protection of medically afflicted persons . . . [if] the employer discriminates against them on account of their being (or being believed by him to be) ill, even permanently ill, but not disabled, there is

220. See *infra* Part IV.A.

221. *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 49.

222. *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 22.

223. Opinion of Advoc. Gen. Geelhoed, *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 27.

224. European Disability Forum, EDF Analysis, *supra* note 164, at 8.

no violation.”²²⁵ But the point here is that doctrine is only the consequence of a larger theoretical standpoint about the relationship between disability, impairment, illness, and discrimination. The doctrinal explanation is insufficient because the doctrinal solutions themselves are not free standing.

2. *Methods of Interpretation: Textualism*

The U.S. Supreme Court used textualism as its method of choice in interpreting the ADA and especially the statutory definition of disability. Textualism here refers to a method of interpreting the statutory definition of disability literally, without attention either to its purpose or to legislative history. As Justice O'Connor wrote in *Toyota Motor Manufacturing v. Williams*, for a unanimous Court, the Court's inquiry is “guided first and foremost by the words of the disability definition itself.”²²⁶ As we saw, the Court decided cases by focusing on the present indicative verb form in the definition of disability (as an impairment that substantially limits a major life activity),²²⁷ the figure of 43 million persons with disabilities included in the ADA's preamble, and the constitutive elements of disability: impairment that “substantially limits” a “major life activity.”²²⁸ The Court declined to look beyond the words to their origin and purpose, or to the larger political and legal context in which the definition was enacted. Many commentators have been surprised by the judicial turn to textualism, especially given that courts had broadly interpreted the almost identical 1973 Rehabilitation Act definition of “handicapped persons,” rarely pausing over it, and accordingly, over the contours of the protected class. Congress expressed a similar surprise when it amended the ADA in 2008.²²⁹ However, from the Court's perspective, the gap between legislative intention and statutory text should not be blamed on the interpreter. Although it remains an open question of legislative craft whether laws can be so worded to reflect perfectly the legislative intent, Justice O'Connor chastised the drafters of the ADA precisely for failing to express their intentions accurately.²³⁰ In any event, it is apparent that the choice of textualism was

225. *Christian v. St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051, 1053 (7th Cir. 1997); see also *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996) (affirming judgment for the employer where plaintiff was disqualified from being a firefighter based on his hemophilia because hemophilia is not a disability per se, and the field of firefighting jobs was so narrow that plaintiff was not substantially limited in the major life activity of working).

226. *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 196.

227. See *Sutton*, 527 U.S. at 482.

228. See *id.* at 487.

229. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553 § 2, (a)(3) (2008) (“[W]hile Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.”).

230. The question of Congressional intent is complex. The ADA's over-reliance on litigation is notable, by contrast to alternative institutional strategies, such as the creation of an agency, as a means for addressing deep-rooted discrimination against persons with disabilities. I am thankful to Richard Stewart for discussion on this point. *But see*

made at the expense of methods that would have given weight to legislative intent. Even so, however, the words of the definition of disability could have been interpreted narrowly or broadly. Thus, the Court's choice of a narrow textualist interpretation must also be explained.²³¹

Reference to textualism needs to be even more nuanced when applied to the ECJ's decision in *Navas*. The Framework Directive did not contain a definition that the Court could interpret. However, the Court did rely on a textualist (and generally non-purposivist) method, which it combined with purposivist and selective historical methods of interpretation.²³²

The reader will recall that the preliminary reference in *Navas* was two-fold: first, the referring court asked the ECJ whether illness is included as part of disability; second, should the court answer the first question in the negative, the referring court asked if illness constituted a separately prohibited ground.²³³ Like the U.S. Supreme Court, the ECJ did not inquire into the legislative process that had produced the Directive. As we saw in Part I, the Directive had been the culmination of the Community's policy shift from the mid-1990s toward a social model of disability; we also saw that legislative history would conflict with the narrow definition that the Court adopted in the decision. Nevertheless, legislative history was not entirely absent from the Court's opinion if we expand its framework of authority to include the Opinion of Advocate General ("AG") Geelhoed, whose conclusions on this matter the Court could be read as endorsing. AG Geelhoed treats legislative history in a selective—one might say strategically selective—fashion. Specifically, his analysis papers over the legislative history of the Framework Directive but dwells at length on "the restraint shown by the authors of the Treaty" in then-Article 13 EC, which the Directive's recitals mention as its legal basis.²³⁴ In his interpretation, the history of the article justifies a narrow, literal interpretation. *Per a contrario*, an expansive interpretation would disrupt the fragile equilibrium between the Community and the Member States that underlined the negotiations for then-Article 13. The equilibrium is reflected in the text of the provision: it provides a legal basis only for "appropriate action"; the enumeration of prohibited grounds is exhaustive;²³⁵ its subsidiary nature; and the express mention of the limits on the Community's powers.²³⁶ In AG Geelhoed's view, a broad interpretation of disability, one that would for instance encompass illness, risks making then-Article 13 an all-purpose tool in the hands of the Community, thus undermining the sovereignty of Member States in areas such as health care policy and social security where the

COLKER, *supra* note 79, at 4 ("The problem with the ADA's failed promises . . . largely lies with the Supreme Court rather than Congress's basic framework in enacting the ADA.").

231. *But see* Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 *YALE L.J.* 992 (2008).

232. *See generally* *Chacón Navas*, 2006 E.C.R. I-6467.

233. *See id.* ¶ 25.

234. Opinion of Advoc. Gen. Geelhoed, *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 46.

235. *But see* Treaty of Lisbon, *supra* note 115.

236. Opinion of Advoc. Gen. Geelhoed, *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 47.

Treaty guarantees their sovereignty.²³⁷ Legislative history is thus invoked here to justify a narrow, textualist method of interpretation. The very choice of the textualist method answers the first question of the referring court about whether illness is part of disability. The second question, whether illness can be interpreted as a separate ground, in a sense answers itself. By labeling the enumeration of prohibited grounds in the provision as exhaustive and interpreting it literally, the Court made all but unavoidable the conclusion that illness is not a separately prohibited ground.²³⁸ Following the logic of AG Geelhoed's argument, if the legislature had intended to include "mere" illness among the protected grounds, it would have enumerated illness alongside other grounds.

The Court's (including AG Geelhoed's) narrow approach to then-Article 13 is not baseless. That provision was indeed the object of heated deliberations among Member States, some of which—for instance, the conservative U.K. government—adamantly opposed it.²³⁹ This history in part informed the Court's jurisprudence that denies then-Article 13 direct effect. However, there are a few flaws in this narrow interpretation. First, it is selective. Once the center of gravity shifts from then-Article 13 to the Framework Directive itself, the Directive's own legislative history, as part of the new disability policy that had been adopted by the Community in 1996, suggests a very different interpretation.²⁴⁰ Second, some of the ECJ's landmark interpretive strategies expose the false necessity in the literalist, narrow approach to then-Article 13. Any student of European law familiar with the Court's teleological interpretation can state the form it would have taken in this case. In line with its longstanding tradition, the Court would have pointed out that then-Article 13 was only an instantiation of the larger principle of equality, which demands that EU citizens be granted protection from discrimination across the EU territory.²⁴¹ The principle of nondiscrimination, as part of the larger principle of equality, would have been an available—and indeed plausible—hook for a teleological argument that would not have left Ms. Navas unprotected.²⁴² Finally, on the issue of illness as a separate ground, the Court's argument is weakened when put to a comparative test. None of the comprehensive antidiscrimination provisions in the national constitutions of the Member States expressly mention illness among the prohibited grounds. Thus, it is just as possible to conclude that illness is not mentioned expressly because it is implicitly protected as part of disability, as it is to say that it was not intended to be protected in the first place.

237. See *Id.* ¶¶ 54, 56.

238. See *Chacón Navas*, 2006 E.C.R. I-6467, ¶ 57.

239. See EVELYN ELLIS, EU ANTI-DISCRIMINATION LAW 13 n.59 (2005).

240. See de Búrca, *supra* note 104, at 219.

241. In fact, as we will see in the next section, the Court had relied on such an argument in an earlier preliminary reference concerning the meaning of the same directive. See *infra* text accompanying notes 254-266.

242. The ECJ's recent equality jurisprudence indicates just such a broad approach. For an analysis, see Andrea Eriksson, *European Court of Justice: Broadening the Scope of European Nondiscrimination Law*, 7 INT'L J. CONST. L. 731, 733 (2009).

3. *Jurisprudential Explanations: Equality's Path-Dependency*

In the American context, scholars have at times explained the narrow judicial interpretation of disability as part of a “judicial backlash” against the ADA, which itself was part of a larger backlash against the positive discrimination aspect of the jurisprudence of equality.²⁴³ Scholars have debated to what extent the struggle for recognition of persons with disabilities relies on a group model that borrows from the civil rights model not only in terms of rhetoric and political strategy, but also in terms of the jurisprudence of equality. Disability claims for reasonable accommodation have sometimes been interpreted as tantamount to licenses for positive discrimination.²⁴⁴ Bereft of an objective basis on which to arbitrate competing rights arising from affirmative action claims, courts feared that their institutional legitimacy would diminish whenever they attempted to administer the ‘positive’ aspects of the jurisprudence of race and gender equality.²⁴⁵ Courts used their familiar framework to conceptualize disability claims, and backlashed—preemptively—by limiting plaintiff standing.

In light of these developments, it might be surprising to recall the hope of the ADA’s initial supporters that the Act would breathe new life into the jurisprudence of equality by, for instance, making stigma an element of antidiscrimination analysis.²⁴⁶ For all the important scholarly work on disability discrimination and social structures,²⁴⁷ it seems clear now that the ADA has not only failed to transform equality jurisprudence, but that it has been a victim of the conceptual framework that some hoped it would change. The connection between reasonable accommodation and positive discrimination helps to explain this state of affairs. Claims that the former is an instance of the latter are debatable, and disability rights advocates have sought to dispel them.²⁴⁸ Although the formal ideal of equality, to

243. See Diller, *supra* note 25, at 39 (arguing that such claims came to courts at a time when they were “decidedly inhospitable to expansive interpretations of civil rights protections in general”).

244. See Scotch, *Models*, *supra* note 3, at 222 (“In some ways, the concept [of affirmative action with respect to race] is analogous to the positive accommodations needed to make employment, education, public accommodations, and other institutional spheres truly accessible to Americans with disabilities.”).

245. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1499 (2004).

246. Right after its adoption, many commentators had expressed the hope that the ADA’s broad, structural approach to equality—whose “regarded as” prong operationalized stigma—could itself shape equality jurisprudence in other nondiscrimination areas. See Krieger, *Foreword*, *supra* note 71, at 6 (“The ADA promised to revive the concept of stigma as a powerful hermeneutic for the elaboration and judicial application of American civil rights law.”).

247. See generally Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009); Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008).

248. For an example from Europe, see Lisa Waddington, *Case C-303/06, S. Coleman v. Attridge Law and Steve Law*, *Judgment of the Grand Chamber of the Court of Justice of 17 July 2008*, 46 COMMON MKT. L. REV. 665, 679 (2009) (“The use of the term ‘discrimination’ in this context, albeit ‘positive discrimination,’ implies that non-disabled people somehow lose out when the accommodation is provided to the disabled person, but that this loss is justified and therefore allowed.”).

treat like cases alike, is so entrenched as to have become almost intuitive, disability advocates have argued that equality also requires that different cases be treated alike when the difference is irrelevant in the eyes of the law.²⁴⁹ They conclude that a commitment to equality may at times require differential, as opposed to similar, treatment.²⁵⁰ However, the jurisprudential explanation need not show that association between disability claims and positive discrimination is correct. Rather it is sufficient to show that judges think it is correct and act accordingly. The question thus becomes whether the equality-based explanation has an equivalent in the cases of the ECJ. Specifically, is the Court's impairment-centered definition of disability in *Navas* a reaction to the Court's own equality jurisprudence?

Although it is difficult to find a perfect analogy with positive discrimination in the European context, the equality rationale does provide an equivalent to the jurisprudential explanation both at a general, institutional level as well as at the applied level of the jurisprudence of equality. At the institutional level, the emphasis is on the ECJ's transition from its early assertive stance, when it acted as a propeller of the European project, towards a more minimalist approach.²⁵¹ The institutional reading of the jurisprudential explanation seeks to illuminate the AG's rather subdued reference in *Navas* to the "policy of equality" under then-Article 13 as an example of the Court's recalibrated institutional self-understanding.²⁵² At the applied level of the jurisprudence of equality, the jurisprudential explanation points to the rather subdued equality analysis in *Navas*, explaining it as a backpedaling from the Court's latest antidiscrimination decisions, such as *Mangold*.²⁵³

For all its ingenuity, the jurisprudential explanation fails to account for the turn to conceptualism in *Navas*. Even assuming *arguendo* that the Court has entered a more moderate stage, where it does not reach by default to the teleological method in its interpretative toolkit, the narrow interpretation of disability is not part of that more moderate animus. First, there is nothing moderate about the narrow judicial definition of disability. Given the legislative history of the Framework Directive, the Court's interpretation represented a bold, radical departure from what all accounts indicate was the intended aim of the authors of the directive. Second, and

249. See Diller, *supra* note 25, at 23 ("The ADA's requirement of 'reasonable accommodation' rests on the idea that in some circumstances people must be treated differently from others in order to be treated equally.")

250. See *id.* at 40 ("Many of the problems emerging from judicial decisions concerning the ADA stem from the ADA's reliance on a vision of equality that is particularly controversial—the principle that differential treatment, rather than the same treatment, is necessary to create equality.")

251. See Eriksson, *supra* note 242, at 753.

252. This approach departs from the adopted textualism insofar as it ignores the reference to the "principle of equal treatment" in Article 1 of the Framework Directive. ("The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.") Council Directive 2000/78, *supra* note 12, art. 1.

253. Case C-144/04, *Mangold v. Helm*, 2005 E.C.R. I-09981.

more importantly, the Court's subsequent interpretations of the disability provisions in the Framework Directive fail to support the judicial shift from bold teleology to strategic moderation. Contrary to the claims of the jurisprudential explanation, *Navas* represents a departure from the Court's equality cases. That departure can be explained on grounds peculiar to disability.

In *Mangold*, the Court held that "the principle of non-discrimination on grounds of age must . . . be regarded as a general principle of Community law."²⁵⁴ To the disbelief (and excitement) of the academy,²⁵⁵ it noted that "the source of the actual principle underlying the prohibition" can be found in the "various international instruments and the constitutional traditions of the Member States" and held that national courts have a duty to set aside national law that violates this principle, even before the period of implementation of a directive has expired.²⁵⁶ According to the jurisprudential explanation, the rather tepid commitment to equality in *Navas* is a reaction to these earlier statements. However, a subsequent preliminary reference under the Framework Directive undermines that argument.

In *Coleman v. Attridge Law*, the ECJ answered a preliminary reference question from an employment tribunal in the UK to interpret whether the Framework Directive extends its protection to employees discriminated against on the basis of their association with a person with disability.²⁵⁷ Ms. Coleman claimed that her employer discriminated against her because of her disabled newborn, for whom she was a primary caretaker.²⁵⁸ Since according to the textual interpretation of the UK Disability Discrimination Act of 1995, prior to changes to incorporate the 2000 Directive, national law did not protect discrimination by association, the question arose whether the incorporation of the Directive extended antidiscrimination protection to persons such as the plaintiff in the main action. The ECJ held that it did.²⁵⁹ Even if the text of the Directive is silent on this point, the Court found that the principle of non-discrimination protects employees treated less favorably because of the disability of their children whose care they provide.²⁶⁰ The Court's approach explicitly rejected calls for a narrow interpretation of the principle of equal treatment on the ground that such an interpretation would hamper the social and economic integration of disabled persons.²⁶¹

254. *Id.* ¶ 75.

255. See Alan Dashwood, *From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?*, 9 CAMBRIDGE Y.B. EUR. LEGAL STUD. 81, 108 (2007); Sebastian Kreber, *The Social Rights Approach of the European Court of Justice to Enforce European Employment Law*, 27 COMP. LAB. L. & POL'Y J. 377, 381 (2006); Marlene Schmidt, *The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's Mangold Judgment*, 7 GERMAN L.J. 505 (2006).

256. See *Mangold*, 2005 E.C.R. I-09981, ¶¶ 74, 76; see also Case C-555/07, *Kücükdeveci v. Swedex GmbH & Co. KG*, 2 COMMON MKT. L. REP. 33 (2010).

257. Case C-303/06, *Coleman v. Attridge Law*, 2008 E.C.R. I-05603.

258. *Id.* ¶ 22.

259. *Id.* ¶ 56.

260. See *id.* ¶ 38.

261. See *id.* ¶¶ 42-43, 47.

In a forceful Opinion, AG Maduro urged the Court to reach this result and laid down the decision's normative foundations. In stark contrast to AG Geelhoed in *Navas*, AG Maduro invoked the principle of equality, referring to it as "not merely a political ideal and aspiration but one of the fundamental principles of Community law."²⁶² Moreover, he identified the normative aim of Article 13 and the Directive as the protection of the dignity and autonomy of persons who belong to the suspect classifications listed in the text.²⁶³ Denial of protection against discrimination by association would harm persons with disabilities by limiting the protection of their caregivers.²⁶⁴ As AG Maduro noted in his Opinion, "[p]eople belonging to certain groups are often more vulnerable than the average person, so they have come to rely on individuals with whom they are closely associated for help in their effort to lead a life according to the fundamental choices they have made."²⁶⁵ The normative interplay between vulnerability and dignity plays an important role in the AG's opinion. After establishing that Article 13 expresses the Community's commitment to equality, and that the values underlying equality are human dignity and autonomy, the opinion concludes that "[t]he aim of Article 13 and of the Directive is to protect the dignity and autonomy of persons belonging to those suspect classifications."²⁶⁶

However one might label this analysis, it certainly does not portray a court retreating into a minimalist stance. To the contrary, it is as assertive as any of the Court's earlier bold, teleological pronouncements. The puzzle is how to square its approach here to that in *Navas*. Ms. Navas was also in a vulnerable situation. Having been laid off from her catering firm, she was sick at home without the prospect of returning to a job when she recovered, if she recovered fully. What the AG pointed out in *Coleman* in the context of getting a job surely applies in the context of keeping a job: "it is of fundamental significance for every individual, not merely for as a means of earning one's living but also as an important way of self-fulfillment and realization of one's potential."²⁶⁷ To be fired exclusively because of a

262. Opinion of Advoc. Gen. Maduro, *Coleman*, 2008 E.C.R. I-05603, ¶ 8.

263. The AG Opinion in *Navas* refers to the "policy" of equality. Opinion of Advoc. Gen. Geelhoed, *Navas*, 2006 E.C.R. I-6467, ¶ 53. The AG in *Coleman*, on the other hand, speaks forcefully of the "principle" of equality. See Opinion of Advoc. Gen. Maduro, *Coleman*, 2008 E.C.R. I-05603, ¶ 8.

264. In AG Maduro's view, the Directive does not protect an employee from being treated less favorably only because of her own disability; it is sufficient that she be treated less favorably because of "disability" —hers or others. See Opinion of Advoc. Gen. Maduro, *Coleman*, 2008 E.C.R. I-05603, ¶ 23.

265. *Id.* ¶ 14. It is noteworthy that this statement contains none of the paternalism of the charity model according to which persons with disabilities must rely on others. AG Maduro in fact emphasizes common human vulnerability and asserts that the legal regime that protects people's fundamental choices also respects their dignity.

266. *Id.* ¶¶ 8-10. (arguing that the principle of human dignity necessitates that "individuals and political institutions must not act in a way that denies the intrinsic importance of every human life").

267. See *id.* ¶ 11 ("Access to employment and professional development are of fundamental significance for every individual, not merely as a means of earning one's living but also as an important way of self-fulfillment and realisation of one's potential.").

health condition reduces one to a lower status and denies her equal opportunities for self-fulfillment. Sometimes employers discriminate against employees whose medical condition impacts on their public lives because they don't want to have them around. Other times, they do it because it is too costly or too burdensome to work out accommodations for them. Whatever the employer's reasons, why should the Directive be interpreted as requiring anything other than similarity of treatment, namely prohibition?

Interestingly, the AG's opinion in *Coleman* more or less ignored the *Navas* decision, or at least its justification. The Court's judgment mentions it by way of answering the submissions of Member States that relied on *Navas* to convince the Court not to expand protection under the Directive *ratione personae* or *ratione materiae* beyond the explicit provisions of the text. The Court rejected this interpretation and pointed out that *Navas* did not hold that the principle of equal treatment should be interpreted strictly within the scope of the Directive.²⁶⁸ According to the *Coleman* Court, *Navas* interpreted narrowly only the protected classes to which the Directive extends generous protection under the principle of equal protection.²⁶⁹ This is a surprising argument. First, the Court's medical interpretation of disability in *Navas* violated the basic dialectic of legal interpretation, according to which the architecture of a text might provide the pathway by which its central concepts need to be interpreted. That is what respect for a text means. In the case of a law, structural interpretation—reading one provision in light of all others—helps to identify the normative spirit of the text. Even a reader unconcerned with the Court's departure from legislative history cannot help but see the disconnect between the spirit of the Directive and the Court's definition of disability. Second, the Court's own interpretation of *Navas*, combined with its holding and justification in *Coleman*, refutes the jurisprudential explanation. It was not the Court's timidity toward the claims of equality that explain the *Navas* decision.

The jurisprudence of equality does not explain the narrow definition of disability in *Navas*. We will not understand that definition better by approaching it through the lens of equality, at least not in this doctrinal way. A different explanation is necessary. In this subsection, I have discussed and rejected three grounds for the narrow medical model of disability. These grounds, which are endogenous to legal reasoning, explained the turn to conceptualism by reference to doctrine, the method of interpretation, and the jurisprudence of equality. I turn next to a brief discussion of three possible exogenous explanations.

B. Exogenous Explanations

This section introduces three explanations of the judicial turn to conceptualism that are exogenous, so to speak, to the internal logic of legal reasoning in the cases that marked the turn. The explanations focus on the

268. See *Coleman*, 2008 E.C.R. I-05603, ¶ 46.

269. See *id.*

larger ideological currents and crosscurrents that have characterized the political and legal debates surrounding the protection of persons with disabilities (ideological explanations) and, more briefly, on the institutional actors (sociological explanations) and the relations among them (institutional explanations). As in the preceding section, these are explanations first articulated in the American context and whose cogency can be tested when put to a nuanced comparative test. Finding European equivalents to this set of exogenous explanations will be more difficult than the explanations discussed in the previous section. In addition to obvious differences in the political and institutional environments in the U.S. and the EU, difficulties stem from these explanations resting on hypotheses that can be tested only over periods of time longer than the one which has passed since the implementation of the Framework Directive. The rich experience of litigation under the ADA makes possible the fuller articulation of these explanations in the American context. Nevertheless, even if some of their European equivalents are by necessity incomplete, understanding the judiciary's approach requires at least the specification of these hypotheses. This section shows that exogenous explanations do not, either severally or together, offer full and cogent explanations of the judicial turn to conceptualism.

The following analysis can be read "deconstructively," as a study of strategies the European Court of Justice deployed in rationalizing its pre-deliberative outcome. Seeking to explain a judicial outcome by reaching to elements outside judicial reasoning might signal that the outcome itself is the expression of bias to the extent that the reasons supporting the outcome simply cover judges' initial preferences or intuitions about the case. Such a deconstructive reading is helpful but likely implausible and in any event insufficient. After learning whatever deconstruction can teach, one might still want to know why the judicial preferences and intuitions aligned the way they did—in our case, why they aligned with the narrow interpretation of disability. And that is a question that the explanations discussed below cannot fully answer.

1. *Ideological Explanations: The Market and the Social as a Political Double Helix*

An impairment-centered definition of disability, in the employment context, narrows the class of persons who can claim protection and frees employers to rely on their market analysis when making employment decisions. For instance, Ms. Navas' employer can decide that replacing her with temporary workers is more costly for the business than paying her financial compensation for an unlawful dismissal. Put differently, employers can act based on cost-benefit analysis more often than if they were bound to respect their employees' nondiscrimination rights. Does this market-ideology reading explain the narrow interpretation of disability?

As always with ideological arguments, one must distinguish a simple—or simplistic—version from a more sophisticated one. According to the former, judges are part of a conservative elite that furthers the interests of

their caste by enhancing the economic power of employers over and above the rights of vulnerable employees, whom they leave at the mercy of not particularly merciful market forces. The problem with this approach is that judges are not always, or even often, drawn from the privileged elite and, even if they were, it would hardly follow that they would therefore feel inclined to protect their caste. In the more nuanced version, as applied in the case of disability litigation, the ideological implications of judicial decisions are seen as unintended consequences of the rhetoric deployed in the political genesis of disability antidiscrimination statutes. Two different grounds form the double helix of that rhetoric: equality of opportunity and market efficiency. The ideological explanation places central emphasis on courts' unwillingness or incapacity to disentangle the two grounds. Failure to disentangle these grounds means that conflicts of interpretation and application of disability statutes will be fueled by deeper conflicts of these values. The ideological lens shows that, as between equality and market efficiency, courts will favor the market.

Both equal opportunity and market efficiency figured prominently in how actors across the political spectrum converged in their support for the disability legislation on both sides of the Atlantic. As we saw in Part I, legislation for the protection of persons with disabilities enjoyed large bipartisan support.²⁷⁰ This was true both in the U.S. and the European Community, although for different reasons. In the American context, the explanation has to do with market-based arguments that convinced conservative Republicans to throw their support behind that legislation. It is economically inefficient, this argument goes, when persons with disabilities who are able to work are denied that opportunity and instead receive welfare benefits. In the context of the European Community, the explanation has to do with its transcendent economic purpose and nature. Yet, despite the different origins in the preeminence of the economic rationale for disability nondiscrimination legislation, the ideological explanation seeks to demonstrate that the judicial turn to conceptualism is a function of economic rationality being deployed to "cover" the principle of equal opportunity. In what follows, I briefly present the different roots of the economic rationale and then investigate the soundness of the ideological explanation.

Bipartisan political support for disability legislation represented the convergence of political parties and institutions acting on different motivations. In the U.S., it was assumed that the political left would support disability legislation, at least after the struggle for recognition of persons with disabilities followed, in both claims and rhetoric, the template of struggles for recognition of previous civil rights and women's rights movements, which the left had supported.²⁷¹ More surprising, however, was the support for disability legislation from the political right. Apart from serendipitous stories of political leaders supporting the plight of disabled

270. See *supra* text accompanying notes 79-81.

271. See SKRENTNY, *supra* note 58, at 269.

individuals for personal reasons, the political right was driven to embrace the cause of disability rights by traditional arguments for market efficiency.²⁷² It was a market inefficiency to keep unemployed persons with disabilities at home on social security payroll, if they were perfectly capable of working.²⁷³ While the rhetoric of market efficiency did not come easily to the political left, or to some disability rights advocates, embracing it seemed like a worthwhile tradeoff since it delivered broad bipartisan support that guaranteed legislative success. Market efficiency and the equality of opportunity rationale became intertwined in the political origin of the bill.²⁷⁴

The market and social reasoning also provide the political double helix of disability policy at the European supranational level. The Directive expressly mentions the principle of equal opportunity in Article 1.²⁷⁵ The Commission's 1996 strategy, which sanctioned the social model and marked a turning point in the Community disability policy, mentions that "[i]n economic terms, structural exclusion and discrimination on the grounds of disability also sap labor market efficiency. A market that structurally excludes a significant proportion of its human resources cannot be described as efficient, much less fair. Society as a whole (including the taxpayer) loses out when ability is not duly acknowledged and enabled to work."²⁷⁶ Under this model, it is typical to find references to persons with disabilities as "a much-underused source of labor in Europe, which could contribute to overall economic growth."²⁷⁷ The rationale of market efficiency is intertwined with the principle of equal opportunity. For instance, the official action plan for 2008–2009 mentions "the growing economic dimension: [t]he exclusion of people with disabilities from the labor market is a serious concern, from the perspective of equal opportunities. There is also an economic dimension to this problem: faced with a

272. A number of critiques from academics argue that the ADA does not promote market efficiency. See Scotch, *Models*, *supra* note 3, at 219 (citing Carolyn L. Weaver, *Incentives versus Controls in Federal Disability Policy*, in *DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES* 6–7 (Carolyn L. Weaver ed., 1991) ("[The ADA] includes in the protected population people who, in an economic sense, are not as productive or do not make the same contribution to profitability of the firm as other people with the same qualifications While promoting the employment of this much broader group may be a highly desirable social goal, the antidiscrimination-reasonable accommodation approach is a costly and inefficient way of doing so and is likely to have highly undesirable distributional consequences.").

273. See SKRENTNY, *supra* note 58, at 267; Burke, *supra* note 15, at 162; Scotch, *Models*, *supra* note 3, at 218–221; Scotch, *Politics and Policy*, *supra* note 68, at 394–397 (discussing policy advocacy in a conservative era).

274. See Americans with Disabilities Act, Preamble, ¶ 5.

275. See Council Directive 2000/78, *supra* note 12, art. 1.

276. See 1996 EC Disability Strategy, *supra* note 54, at ¶ 12. The social model figured prominently even before 1996. For a description of the economic justification of non-discrimination on grounds of disability in the early stages of Community action in this area, see Gerard Quinn, *The European Social Charter and EU Anti-Discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose*, in *SOCIAL RIGHTS IN EUROPE* 279 (Gráinne de Búrca & Bruno de Witte eds., 2005).

277. See *Commission Staff Working Paper: Disability Mainstreaming in the European Employment Strategy*, at 5, COM (2005) EMCO/11/290605 (Jul. 1, 2005).

shrinking workforce resulting from demographic change, the 2006 Spring European Council highlighted the need to make the most of the untapped potential of many people excluded from the labor market and identified disabled people as one of the key priority groups.”²⁷⁸

The prominence of market explanations alongside equality can also to some extent be explained on non-ideological grounds. The Community’s initial economic aims created a path dependency that lives on in the language of policy. Moreover there is the lingering concern with how policies fit within the competencies scheme of a Community of limited powers. The prominence of the market rationale points to that dimension of disability antidiscrimination policies aimed at bringing them squarely within the Community’s competence. It is therefore unsurprising to find a structural, competence layer in both arguments about “the policy of equality”²⁷⁹ as well as in arguments about “the principle of equality.”²⁸⁰ The same is true, and largely for similar reasons, about the language and arguments in which the Community’s gender equality policies have been cast.²⁸¹

The explanatory power of the ideological perspective is nevertheless significant. For instance, it points to the mixture of conflicting political rationales and their corresponding political values, to understand statements such as the AG’s in *Navas* to the effect that “there is even less room . . . for widening the scope of Article 13 EC by relying on the general policy of equality.”²⁸² Article 13 would have had a larger radiating effect if the AG had invoked the principle of equality.²⁸³ From an ideologically-focused prism, on display here are the effects of how the market efficiency rationale shapes—or corrupts, in the language of social systems theory—

278. *Commission Communication: Situation of Disabled People in the Enlarged European Union: The European Action Plan 2008-2009*, at 3, COM (2007) 738 final (November 26, 2007); see also *Commission Communication: Situation of Disabled People in the Enlarged European Union: The European Action Plan 2006-2007*, at 3, (COM (2005) 604 final (Nov. 28, 2005) (“Given the current demographic situation, the economic potential of disabled people and the contribution they can make to economic and employment growth must be further activated on the basis of the Social Agenda for 2005-2010”).

279. For instance, AG Geelhoed in *Navas*, after noting that the legislative history and grammar of the Treaty do not support an expansive definition of disability, dedicated a more substantial part of his Opinion to policy arguments, warning against the “potentially far-reaching economic and financial consequences” of an expansive definition of disability.” *Opinion of Advoc. Gen. Geelhoed, Navas*, 2006 E.C.R. I-6467, ¶¶ 49, 51. In his view, such a definition would interfere with the Member States’ sovereign decisions about the allocation of available public resources, thus impacting on areas such as employment policy and social welfare in which the Community has mostly complementary powers. See *id.* ¶ 52.

280. See *Opinion of Advoc. Gen. Maduro, Coleman*, 2008 E.C.R. I-05603, ¶ 8.

281. See *Burke, supra* note 15, at 168 (“[The] redefinition of disability as an issue of economic competitiveness has a venerable tradition at the European Union: it parallels the primary rationale for EU-level action on gender equality that began in the 1970s.”).

282. *Opinion of Advoc. Gen. Geelhoed, Navas*, 2006 E.C.R. I-6467, ¶ 53.

283. The Court had previously relied on the general principle of nondiscrimination in Community law, for instance in the context of age discrimination. See *Mangold*, 2005 E.C.R. I-09981; David L. Hosking, *A High Bar for EU Disability Rights*, 36 *INDUS. L.J.* 228, 231 (2007).

the equality rationale in the genealogy of disability policy.²⁸⁴

The ideological explanation captures something important about the legal implications of political rhetoric surrounding the judicial interpretation of disability antidiscrimination statutes. This explanation supplements endogenous accounts by showing that the market rationale coexists with the equal opportunity rationale in the formulation of disability policy. Part of its claim must also be that the judicial turn to conceptualism is the effect of the market rationale normatively corrupting the equality rationale. But it falls short as a comprehensive explanation of that phenomenon. The ideological explanation does not show why courts focus on the definition of the protected class, rather than seeking to cut back on antidiscrimination protection at the discrimination stage of the analysis. The same ideological biases would presumably manifest themselves in the later stage of litigation, when courts must determine whether the employer discriminated against the disabled employee. We have seen that many cases do not even reach this analysis since they end at the stage of determining whether the plaintiff meets the statutory definition of disability. Why, then, do courts focus their analysis at that step? One possible answer, consistent with the ideological explanation, would be that the definitional focus gives judicial analysis at least the appearance of ideological neutrality. But that answer still does not capture what in the conceptual structure of disability protection makes the definitional moment a pressure point that could be exploited: why, under pressure—ideological or not—does the model break at that particular point? Without an answer to that question, the ultimate explanation of the resilience of the medical model in the narrow interpretation of disability remains elusive.

2. *Sociological Explanations: The Vagaries of Professional Judgment*

The resilience of the medicalized model of disability in the judgments of American courts is sometimes explained as a spillover effect of broader developments within the legal and political system. According to this account, the Supreme Court's 1999 decisions represented the judicial ratification of the ADA's implementation guidelines. To understand the resilience of the model, one needs to take into consideration the mindsets and professional experiences of those who drafted the guidelines.²⁸⁵ Specifically, there were two such implementation regulations, one issued by the Department of Justice ("DOJ") and the other by the Equal Employment Opportunity Commission ("EEOC").²⁸⁶ The DOJ regulations were similar to the ones that had directed the Section 504 regulations implementing

284. See Case C-217/91, *Spain v. Commission*, 1993 E.C.R. I-3953, ¶ 37.

285. This sociological analysis also applies to the training of employment lawyers that later litigated ADA cases. These training sessions focused to a great extent on conceptual issues regarding the definition of disability. See Feldblum, *supra* note 18, at 138.

286. See 56 Fed. Reg. 35726 (July 26, 1991) (codified at 29 C.F.R. pt. 1630) (EEOC regulations); 56 Fed. Reg. 35544 (July 26, 1991) (codified at 28 C.F.R. pt. 36) (DOJ regulations).

the 1973 Rehabilitation Act.²⁸⁷ The EEOC regulations, however, departed from the Section 504 regulations in two important respects. Those regulations “included, for the first time, a definition of the term ‘substantially limits’” and required, for the first time in disability jurisprudence, an individualized assessment to determine whether a person met the statutory definition of disability.²⁸⁸ The EEOC regulations also introduced regulations on the major life activity of “working,” which commentators regarded as remnants of the medical model whose traces in this definition are still visible today.²⁸⁹ Thus, according to the sociological account, the narrow interests of professionals in charge of overseeing the ADA’s implementation prevailed over the drafters’ intentions.²⁹⁰ This sociological account helpfully expands the relevant framework of analysis. However, the sociological argument cannot tell the whole story. It matters greatly who the actors are, beyond and including judges, but that is only one of the many things that matter. The sociological account does not explain what made the definition of disability malleable because the same outcomes would have been achieved should implementation regulations and courts have decided to interpret the discrimination prong of the disability analysis narrowly.

Of all the explanations discussed in Part III, the sociological explanation is perhaps the one most difficult to find equivalences between the U.S. and Europe, at least so long as the conversation about the latter remains focused at the supranational level. In the absence of implementation regulations at the EU level, there are not enough elements to construct analogies. Such analogies would perhaps be possible if we reached into the national bureaucracies. But it is simply too soon to tell what effects the Directive has had at that level, given that national cases involving the interpretation of disability have not yet found their way to the national courts of last resort, in light of the ECJ’s decision in *Navas*.

3. *Institutional Explanations: In Search of Systemic Equilibrium*

Finally, there is an institutional reading of the conflict between courts and Congress regarding the ADA’s interpretation of disability. From this

287. See Feldblum, *supra* note 18, at 134. The only medical impairment they addressed specifically was HIV, which as we have seen, courts had encountered in the 1980s. See *id.* at 135.

288. See *id.* at 135–36 (citing 29 C.F.R. § 1630.2(j)(1) (1999); 29 C.F.R. pt. 1630, App. at 349 (1999)).

289. See Feldblum, *supra* note 18, at 143 “The resonance of the requirement that an individual be unable to work, in a whole range of jobs no less, in order to meet the ADA’s definition of disability reflects the staying power of the historical image of a ‘disabled person’ as a person who is unable to work and unable to function in society. This imagine may well make intuitive sense to people because society does, indeed, provide cash payments for those who qualify for disability benefit plans. The idea, however, that the ADA was designed to prohibit discrimination against people with disabilities who can work, and hence, for example, are not seeking disability cash benefits, does not seem to have penetrated the minds of many judges.” *Id.* at 143.

290. See Krieger, *Afterword*, *supra* note 17, at 501 (“[F]ew people outside of [a] relatively small circle, including federal judges empowered to interpret the ADA, understand the social model of disability or adhere to the norms, values, and interpretive perspectives it was designed to advance.”).

perspective, *Sutton's* unambiguous rejection of legislative history was an institutional "power grab."²⁹¹ Using the same logic, the 2008 ADA Amendments Act represents Congress' comeback. It has often been noted that "[a] lack of *visible* opposition to disability rights proposals is a pattern one sees in all the polities in which such proposals have reached the legislative agenda."²⁹² When combined with the ideological explanation, the institutional account shows how the ideological balance and systemic equilibrium are restored on institutional grounds. What this account has a hard time explaining is why courts chose the battlefield of the definition of disability to flex their muscles at Congress. And that question does not have an institutional answer.

It is quite difficult to find an equivalent of this explanation in the European context. The argument that the ECJ's decision in *Navas* was meant to restore the institutional equilibrium by countering powerful social movements, who had enshrined their agenda in the Framework Directive, rings hollow. The European system has other mechanisms for restoring institutional equilibrium when imbalances are present. There is, however, a different way of framing the institutional argument as to fall squarely within a larger debate about the relationship between courts and political institutions. This perspective points to the institutional consequences of judicial intervention, even when those interventions are not motivated by strategic ideological action. Thus, even when courts do not act on any ulterior motives, their interventions inflict damage to the extent they undermine regulatory experimentation.²⁹³ *Navas* illustrates the danger of judicial intervention. In just one case, the ECJ managed to undermine political efforts for a new disability policy that had been underway in Europe since 1996. Moreover, its intervention entrenched an autonomous and unitary "European meaning of disability."²⁹⁴ Even if that definition is a floor, and not a ceiling, the low floor changed the disability policy landscape.²⁹⁵ The Court's decision was not informed by the rich history of thinking about disability regulations, which had informed the Framework Directive.

291. See COLKER, *supra* note 79, at 201-202 ("In *Sutton*, [the Court] has told Congress that the Court is entirely uninterested in the record Congress creates while drafting legislation. These conflicting methodological approaches to examining the work of Congress can be understood only as power grab by the Court at the expense of Congress. Ultimately, individuals with disabilities are the losers in the separation-of-powers battle.").

292. Burke, *supra* note 15, at 167 (emphasis in original).

293. The new governance literature makes this point in intricate detail. See, e.g., Neil Walker & Gráinne de Búrca, *Reconceiving Law & New Governance*, 13 COLUM. J. EUR. L. 519 (2007). For an argument about experimentalism in the European context, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

294. See *supra* text accompanying note 154.

295. See, e.g., de Búrca, *supra* note 8, at text accompanying notes 48-50 (discussing the changes in the Commission's position in negotiating the UN Convention on the Protection of Persons with Disabilities); *supra* text accompanying notes 160-161 (documenting the reaction of the disability rights movement, specifically the call for a comprehensive disability directive).

According to this interpretation of the sociological explanation, much is lost when courts intervene in the legislative process in this uninformed manner. However, this explanation disregards that enforceable rights need independent institutions such as courts to enforce them. As we will see in Part IV, framing the question as one of rights has been crucial in the evolution of the self-understanding of the disability rights movement. This explains why calls to action after *Navas* have not demanded that courts be sidestepped, but only that they act to enforce the political program embedded in the Framework Directive.²⁹⁶

IV. Impairment, Discrimination, and the Legal Construction of Disability

The explanations discussed in Part III—doctrinal, interpretative, jurisprudential, ideological, institutional and sociological—are insufficient to understand the staying power of the medicalized approach to disability in judicial decisions. In this section, I seek to provide the missing parts of the explanation. I turn to the social model itself and specifically to the interplay between, on the one hand, its conceptualization of illness, impairment, and disability and, on the other hand, the broader argumentative strategies that the disability rights movement deployed in its struggle for recognition of the equal status of persons with disabilities.²⁹⁷ As we will see, it is difficult to disentangle the substance of the model's main claims from the argumentative strategies deployed in advocating for disability reform both in Europe and in the United States.

The analysis is divided into two sections. In Part IV.A., I argue that failure to provide an account of medical impairments left courts bereft of guidance on how to interpret disability according to the social model and made them seek refuge in the more familiar territory of the medicalized approach. The decision to leave medical impairments under-theorized was not an accident. It was, rather, the response of social model theorists to the perceived risk that an analogy between impairments and illness would legitimize the dominion of medical expertise and perpetuate socially disabling assumptions about normality. This argumentative strategy distorted the claims to recognition of persons with disabilities. In Part IV.B., I suggest that the medicalized approach is the effect of convergence between courts' institutional concerns with administrability of potentially sweeping

296. The above observations refer to the *inter*-institutional dimension. But there are also relevant *intra*-institutional aspects. For instance, administrative issues such as an unmanageably large docket or the lack of built-in scrutiny in the practice of unanimous decisions are also relevant. As was mentioned in Part II, the lack of even an inkling of the social model in the *Navas* judgment is striking. See *supra* text accompanying notes 155-156. The assumption that reasonable accommodation is a form of positive discrimination in *Coleman* is another. See *Coleman*, 2008 E.C.R. I-05603, ¶ 42.

297. See also BAGENSTOS, *supra* note 24, at 54 (commenting on the Supreme Court's definition-of-disability cases, noting that "[t]hose decisions are deeply flawed but they do not belong to the Supreme Court alone. Instead, they flow directly from the minority-group model and the independence frame that disability activists themselves formulated and promoted.").

disability statutes, on the one hand, and the social movements' fears that only a strong social discrimination approach could create the shared political consciousness necessary for reform, on the other hand. I present this as an explanatory account that does not aim to justify the survival of narrow, medicalized definitions of disability.

One caveat is necessary before we proceed. My argument in this section refers to the social model and assumes that the social model informed the claims of the disability rights movement(s). However, as Samuel Bagenstos has recently shown, the social movement, at least in the United States, has spoken in different—and oftentimes conflicting—voices.²⁹⁸ Some disability advocates have supported a minority-based approach whereas others have argued that disability is a matter of degree. Some strands of the movement have embraced the welfare policies for persons with disabilities, others have opposed them; some have been reluctant to criticize the ascendancy of medical professionals, others yet have spoken viscerally against the claims of medical experts over the lives of persons with disabilities.²⁹⁹ These positions seem so fundamentally different that one can reasonably question their unity. Anticipating precisely such questions, Bagenstos traces their commonality to a shared allegiance to the social model. He writes that “the one position that approaches consensus within the movement . . . [is] the endorsement of a social rather than a medical model of disability.”³⁰⁰ The social model is, in this view, compatible with the wide diversity of projects that characterized the social movement for disability rights. Yet for that to be true, the social model would need to be more like a vague insight about the social rootedness of disability than a full-blown, articulate model. That seems to be Bagenstos's view, and the reason why he focuses the analysis on the different projects of disability rights advocates, rather than on the social model that underpins these overall social movements. I take a different approach and focus instead on the social model, and especially on its early theorists, and only tangentially on the diverging claims of the disability rights movement. If one seeks to understand the staying power of the medicalized model, especially in judicial definitions of disability, I believe that this approach is preferable. Rather than a vague insight, the social model appears as a set of claims whose intellectual origins explain and influence over time; it adds the missing elements to the previously discussed explanations for the staying power of the medicalized model in judicial definitions of disability.

A. Conceptual Forensics: Medical Impairments

Medical impairments remain central to the definition of disability even in regulatory regimes purportedly grounded on a conception of disability as the result of social discrimination, rather than illness. The ECJ interpreted the silence of the European Framework Directive and defined disa-

298. *See id.* at 12–33.

299. *See id.*

300. *Id.* at 13.

bility as “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.”³⁰¹ The ADA’s current disability prong defines a person with a disability as someone with “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”³⁰² As we have seen in Part I, the drafters of the ADA did not consider it necessary to modify this definition, which was taken almost *ad litteram* from the 1973 Rehabilitation Act.³⁰³ The 2008 ADA Amendments Act (ADAAA) also leaves that definition unmodified. Impairments would have remained central to the definition of disability even in the bolder proposals for the amendments, which were eventually deemed politically unpalatable.³⁰⁴ Those bolder proposals would have defined disability as a present, past, or perceived impairment.³⁰⁵ I argue below that even those proposals would have been insufficient to deliver the kind of reform for which disability advocates hope. In the American case of a statutory definition, or the European case, where the highest court stipulates the definition in order to fill a gap in legislation, the question of the subsequent interpretation of medical impairment is consequential. The definition of disability itself should provide a guide to how to interpret medical impairments.

Consider the options available to courts in interpreting the concept of medical impairments from the perspective of both the medical and social models. The latter interpretation centers on society’s discriminatory reaction to the existence—or perception—of a present—or past—impairment. The social model interpretation emphasizes the social effects of impairments. By contrast, the medical model underscores the relevance of factors intrinsic to the medical impairment. For instance, in the United States, the EEOC interpretation guidelines recommended the consideration of “(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; (iii) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impair-

301. *Chácon Navas*, 2006 E.C.R. I-6467, ¶ 43. The Court here followed AG Geelhoed, who endorsed this approach. He argued that the emphasis is on the “serious functional limitations (disabilities) due to physical, psychological or mental afflictions.” Opinion of Advoc. Gen. Geelhoed, *Chácon Navas*, 2006 E.C.R. I-6467, ¶ 76. The act of discrimination is a reaction to the social effects of the medical condition, and it is severable from it: “the health problem as cause of the functional limitation should in principle be distinguished from that limitation” *Id.* ¶ 77.

302. 42 U.S.C. § 12102(1). Moreover, and as we have seen, the Court’s interpretation of the present-disability prong, and specifically its focus on the “major life activities” prong at the expense of the other elements of the definition had the effect of actually folding “the later two spikes into the first spur so that the question of defining whether or not a plaintiff has a disability is determined almost exclusively by disputes about the loss of a major life activity.” Hahn, *supra* note 178, at 171. Hahn goes on to argue that judges’ confusion over impairment and disability led to the neglect of the second and third prong of the ADA definition of disability. See *id.*

303. See *supra* text accompanying notes 83–84.

304. See BAGENSTOS, *supra* note 24, at 45.

305. See *id.* at 44.

ment.”³⁰⁶ This focus on the nature, rather than the social effect, of medical impairments goes against the tenets of the social model. The question arises, how have the theorists of the social model attempted to steer the interpretation of medical impairments away from their nature and to their social effects?

Evidence suggests that little was done in this regard. Social model theorists shied away from theorizing about medical impairments altogether. Indeed, because definitions of disability made either direct reference to medical impairment, or were interpreted by judges to imply such references, courts failed to theorize about medical impairments, which explains in part why the medicalized approach to disability survived in judicial interpretations of the definition of disability. What then explains failure to theorize about medical impairments within the broader context of the social model?

This failure was not accidental, but rather the outcome of strategic choices. Social model theorists acknowledged the need to theorize about medical impairments but only within a comprehensive social theory of disability, and not in the confines of the social model. While one should always be cautious not to overlook differences on this point among social model theorists, many of its early advocates believed that including a theory of impairment in the social model could undermine the model’s political effectiveness. As one of the model’s prominent theorists put it, “[t]he denial of impairment has not, in reality, been a denial at all. Rather it has been a pragmatic attempt to identify and address issues that can be changed through collective action rather than medical or other professional treatment.”³⁰⁷ This pragmatic political awareness was more than an additional strategic layer to a self-standing normative argument; it pervaded the normative core of the social model. That core, and the political strategy for conveying the claims effectively, remained deeply entangled.

The key for understanding their entanglement is to recall that the project of transformation that social model theorists envisaged was—and to some extent still is—comprehensive, not piecemeal. The wholesale shift from an individual to a social approach is premised on disconnecting disability from illness: “The achievement of the disability movement has been to break the link between our bodies and our social situation, and to focus on the real cause of disability, i.e. discrimination and prejudice. To mention biology, to admit pain, to confront our impairments, has been to risk the oppressors seizing on evidence that disability is ‘really’ about physical

306. 29 C.F.R. § 1630.2(j)(2) (1999).

307. OLIVER, UNDERSTANDING, *supra* note 11, at 41-42 (“We must not assume that models in general and the social model in particular can do everything: that it can explain disability in totality. It is not a social theory of disability and it cannot do the work of social theory. . . . An adequate social theory of disability must contain a theory of impairment So let’s develop a social model of impairment to stand alongside a social model of disability but let’s not pretend that either or both are social theory.”).

limitation after all.”³⁰⁸ From the perspective of the social model, there are at least three reasons for the radical break from the medical model by severing the links between disability and illness. First is to rescue the fate of persons with disabilities from the conceptual framework of medical expertise that labeled them “patients” in need of help.³⁰⁹ Second is to challenge unwarranted but widely shared presuppositions of normality. Third, such a separation would prevent the “dilution” of the class of persons with disabilities and thus clear some of the hurdles in the formation of their common identity. I take up the third reason in the next section, in which I discuss the arguments from medical expertise and presuppositions of normality.

Like most forms of expertise, medical expertise has the tendency to impose its interpretative code on social contexts that extend beyond its proper domain. Hence the predicament of disabled individuals under the reign of medical expertise: “The problem arises when doctors try to use their knowledge and skill to treat disability rather than illness. Disability as a long-term social state is not treatable medically and is certainly not curable. Hence many disabled people experience much medical intervention as, at best, inappropriate, and, at worst, oppressive.”³¹⁰ By placing the decisional center in the hands of medical professionals and outside the lives of persons with disabilities, this approach denies the latter’s agency and undercuts their opportunities for self-determination.³¹¹ The expert physician is at the interface between society and persons with disabilities, denying them “the dignity of risk.”³¹² It is the expert that can assist the disabled individual to overcome his or her impairment and (re)learn how to work. The social opportunities of persons with disabilities follow from the classifications determined by the medical professional.³¹³ If, for

308. See *id.* at 39 (citing Tom Shakespeare). From this perspective, impairment and illness should be kept separate. The latter requires medical treatment, impairments might not. The confusion results from the colonizing tendency of the medical approach.

309. See Scotch, *Social Movement*, *supra* note 15, at 162 (“By promoting the image of disabled people as dependent and in need of professional help, medical and rehabilitation professionals retain control over program beneficiaries at the cost of severely constraining the disabled person.”).

310. OLIVER, *UNDERSTANDING*, *supra* note 11, at 36. Oliver continues, “[t]his should not be seen as a personal attack on individual doctors, or indeed the medical profession, for they, too, are trapped in a set of social relations with which they are not trained or equipped to deal.” *Id.*

311. MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT* 5 (1990) [hereinafter OLIVER, *POLITICS*]. “The problem . . . is that medical people tend to see all difficulties solely from the perspective of proposed treatments for a ‘patient’, without recognising that the individual has to weigh up whether this treatment fits into the overall economy of their life.” *Id.* (quoting Simon Brisenden, *Independent Living and the Medical Model of Disability*, 1 *DISABILITY, HANDICAP & SOC’Y* 173, 176 (1986)).

312. See BAGENSTOS, *supra* note 24, at 26.

313. Since the impairments that befall human beings are the same everywhere, classification of impairments can transcend national borders and secure the convergence of technical terms. In the influential 1980 classification of the World Health Organization, medical expertise becomes the unlikely site of residual cosmopolitanism. It is not surprising that, despite arguments in favor of dispensing with classifications altogether, the 1980 WHO rules were instead modified in the 2001 International Classification of

instance, the fixation of the spine is at 30 degrees or more from the natural position, then that person is entitled to cash benefits.³¹⁴ This medicalized approach has a deep-going social effect because it offers non-disabled social actors a lens for de-coding situations in ways that legitimize asymmetries of social roles. Paternalism, a staple feature of the charity model and medical approaches, takes root in these social asymmetries that become taken-for-granted fixtures of the social landscape.³¹⁵

Underlying the primacy of medical expertise is a certain ideal of normality as regularity. The task of the doctor is to “restore the disabled person to normality, whatever that means.”³¹⁶ A “normal” life, in this view, is the kind of life that any rational person would want to live. Conversely, no one who is rational could want to live with a medical impairment. The medical expert is therefore available to help the individual become the way any rational person wants to be.

Because the social model took issue both with claims of medical expertise and “normality,”³¹⁷ its task became to delink illness from disability. The decision not to theorize about medical impairments as part of the social model was perceived as an integral part of fulfilling that task. While medical impairments are different from illness, theorizing about impairments would, in the view of social model theorists, reinforce the misunderstanding that “disability is ‘really’ about physical limitation after all.”³¹⁸ Failure to theorize about impairments as part of the social model left a blind spot in the claims of the different disability rights movements. Yet even when such theorizing did occur as part of a social theory of disability, acknowledging Abberley’s point that “a theory of disability . . . then must offer what is essentially a social theory of impairment,”³¹⁹ those theories

Functioning, Disability and Health (ICF). This is a typical situation of a conflict of rationalities between, on the one hand, the medical experts who relied on classifications to structure their understanding and reporting of disease and, on the other hand, disability rights advocates. See generally Rachel Hurst, *Disabled Peoples’ International: Europe and the Social Model of Disability*, in *THE SOCIAL MODEL OF DISABILITY: EUROPE AND THE MAJORITY WORLD* 67–70 (Colin Barnes & Geof Mercer eds., 2005).

314. But see JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 52–54 (1985) (noting that although Congress attempted to separate disability from unemployment, this binary classification is not in fact so absolute; the statute also makes the claimant’s age, education, and work experience independently significant).

315. See Williams, *supra* note 10, at 520 (arguing that, for some people with disabilities, “the benevolence of welfare institutions can appear more deadly than the harsh conditions often encountered in the outside world.”). On paternalism, see also Hahn, *supra* note 178, at 181–182.

316. OLIVER, *UNDERSTANDING*, *supra* note 11, at 36 (“The whole medical and rehabilitation enterprise is founded upon an ideology of normality and this has far reaching implications for rehabilitation and treatment. Its aim is to restore the disabled person to normality, whatever that may mean.”).

317. See *id.* at 36–37 (describing the implications of the ideology of normality as resulting in the justification of surgical intervention and physical rehabilitation, whatever its costs in terms of pain and suffering of persons with disabilities).

318. See *id.* at 39 (quoting Tom Shakespeare, *A Response to Liz Crow*, *COALITION*, 1992).

319. OLIVER, *POLITICS*, *supra* note 311, at 12.

were of limited use to political and legal claims. The theories were almost exclusively dedicated to the cultural production of impairment and disability.³²⁰ Culture was understood as the culture of groups, by contrast to the culture of individualism.³²¹ The subjective experience of disability was the only standpoint from which the social problem of disability could be legitimately approached: “A social theory of disability, however, must be located within the experience of disabled people themselves and their attempts, not only to redefine disability but also to construct a political movement amongst themselves and to develop services commensurate with their own self-defined needs.”³²²

The problem with this cultural theorizing about impairments is that, even assuming its soundness on the merits,³²³ it fails to distinguish impairment from illness. Much of what it says about the cultural production of disability and impairments could be said about the cultural production of illness. This is a problem because distinguishing between impairment and illness was the task it set out to accomplish. Another problem with this approach is its reluctance to place itself in a cultural context. The need to disconnect impairment from illness should itself be understood in a cultural context that shapes self-understanding, public policies, and legal rules. Culturally speaking, the rise of the social model was closely related to advancement in medical technologies that allowed individuals to live longer lives despite illnesses or impairments.³²⁴ Similar changes in medical and non-medical technologies have changed what it means and what it takes for an individual to be a dependent.³²⁵ Moreover, in a legal context, awareness of cultural context might lead one to ask if, for instance, the asymmetries noted in the medical model can be counter-balanced in a legal system that recognizes a constitutional right to health.³²⁶ These elements of cultural contextualization were often disregarded by theorizing about medical impairments in the context of a social theory of disability.

However sound the need to delink medical impairment from illness, social movements were bereft of arguments to invoke in the public sphere—and notably, in courts of law—regarding the interpretation of impairment in the definition of disability from the perspective of the social model. Moreover, as I will show in the next section, the disability rights movement

320. See *id.* at 12–14.

321. See *id.* at 11 (discussing “the ways in which disability is ‘produced’ as an individual and medical problem within capitalist society.”).

322. *Id.*

323. See Colin Barnes & Geof Mercer, *Understanding Impairment and Disability: Towards an International Perspective*, in *THE SOCIAL MODEL OF DISABILITY: EUROPE AND THE MAJORITY WORLD* 5–6 (Colin Barnes & Geof Mercer eds., 2005).

324. See Scotch, *Social Movement*, *supra* note 15, at 164 (discussing how “physical impairment [became] less handicapping than the barriers of stereotyped attitudes and architectural constraints.”).

325. Monique A. M. Gignac & Cheryl Cott, *A Conceptual Model of Independence and Dependence for Adults with Chronic Physical Illness and Disability*, 47 *SOC. SCI. MED.* 739, 748–49 (1998).

326. See, e.g., S. AFR. CONST. 1996, § 27(1)(a) (“Everyone has the right to have access to health care services, including reproductive health care.”).

lacked the incentive to correct for this missing account of medical impairments. Yet the concept of medical impairment continued to figure prominently in the definitions of disability, which included chronic health problems such as high blood pressure or diabetes.³²⁷ In the next section, I show how the lack of guidance on how to interpret the concept of medical impairment led courts—both in the United States and in Europe—toward a medicalized approach as a way of quieting their institutional misgivings about possible abuses of disability statutes.

B. The Disability Rights Movement and the Role of the Judiciary

Let us now take a closer look at the antidiscrimination model and the significance of enforceable rights as the framework in which the struggle for recognition of persons with disability was cast both in the United States and the European Union (as well as gradually in the national politics of the Member States). Rights—enforceable rights—played a key role in the transformation of disability policy. In this process, the U.S. acted as “an exporter of disability rights consciousness.”³²⁸ From the late 1960s through the 1990s, the American antidiscrimination regime framed the horizon of the legal imagination of disability advocates across Europe. But the importance of rights transcended their strategic use. The idea of enforceable rights was also deeply embedded in the normative assumptions of the social model. The medicalized approach had failed “to take into account wider aspects of disability,”³²⁹ such as the experiences of disabled persons. An emphasis on rights changes the social status and social understanding of persons with disabilities from powerless recipients of their peers’ charity to right-holders capable of making demands on the world.³³⁰

Antidiscrimination rights are granted to individuals as a means to defend them from society’s discriminatory reaction to real or perceived, present or past medical impairments. In the eyes of the law, as well as from the perspective of the social movement, right-holders belong to a special protected class of persons with disabilities. However, having a right might be insufficient for the individuals to see themselves as belonging to the protected group. This gap between self-understanding, on the one hand, and the status of belonging to a certain social category, on the other hand, is particularly significant in the case of persons with disabilities because of the wide array of medical impairments that triggers social discrimination.³³¹ Yet social reform depends on effective political advocacy that itself

327. See data from the U.S. Census Bureau, cited in Weisbach, *supra* note 17, at 60.

328. Heyer, *supra* note 31, at 758.

329. OLIVER, *POLITICS*, *supra* note 311, at 5.

330. See Scotch, *Models*, *supra* note 3, at 216 (“Rights empower people with disabilities. With rights, people with disabilities may legitimately contest what they perceive to be illegitimate treatment of them.” (quoting PAUL C. HIGGINS, *MAKING DISABILITY: EXPLORING THE SOCIAL TRANSFORMATION OF HUMAN VARIATION* 199–200 (1992))).

331. See Scotch, *Social Movement*, *supra* note 15, at 163 (“‘disability’ as a unifying concept that includes people with a wide range of physical and mental impairments is by no means an obvious category. Blind people, people with orthopedic impairments,

turns on the shared consciousness of participants in the social movement. Unlike with other social groups that struggled for recognition, where such commonality—on grounds of race, gender, sexual orientation, etc.—could be more or less taken for granted, the formation of a shared consciousness of persons with disabilities required that the protected class be carefully delineated. From this perspective, linking impairments and illness would expand the ambits of the protected class, dilute the shared political identity of the class members, and delay, perhaps *sine die*, political emancipation. From the perspective of the social movements, allowing persons who are ill to receive disability protection would undermine the conditions for the development of a collective consciousness that could support effective political action. This idea of a special class, a group, was central to the architecture of the social model.³³² From within that model, the transition from the medical to the social approach brought with it a shift from an individual approach to a group perspective. At the very core of the social model, at least in its early formulations, was the need for a “process of empowerment of disabled people as a group” by contrast to the individualized assessment of the medicalized approach.³³³ Implied in this shift is the acceptance of a binary approach to disability (including a categorical conception of dependence/independence³³⁴), and conversely, a rejection of the view that it is best to conceptualize disability along a continuum.³³⁵ It is thus apparent how this political strategy shaped the core claims of the social model, particularly the lack of theorizing about medical impairments. From this perspective, the ECJ’s refusal to extend the Directive’s protection to cover Navas’s illness was correct. The social model provides counter-arguments to the position of the Madrid Labor Court, the referring court in *Navas*, to the effect that “a worker should . . . be protected as soon as the sickness is established.”³³⁶

The concerns of the judiciary are different from the formation of shared identity of persons with disabilities. Courts see themselves as

and people with epilepsy may not inherently see themselves or be seen by others as occupying common ground. Even greater divisions may exist between individuals with physical impairments and those with mental disabilities. Thus another prerequisite for collective action may be the social construction and promulgation of an inclusive definition of disability.”).

332. As always in these situations, there is a risk of essentializing the traits that delimit the protected class. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 191 (2006) (“the liberty paradigm [protects] the authentic self better than the equality paradigm. While it need not do so, the equality paradigm is prone to essentializing the identities it protects.”).

333. OLIVER, *UNDERSTANDING*, *supra* note 11, at 37.

334. For a critique, see Gignac & Cott, *supra* note 325.

335. See, e.g., Williams, *supra* note 10, at 522. On the subordination approach, as contrasted with competing alternatives, see Bagenstos, *Subordination*, *supra* note 65, at 445–84.

336. See Opinion of Advoc. Gen. Geelhoed, *Navas*, 2006 E.C.R. I-6467, ¶ 27. *But see* European Disability Forum, EDF Analysis, *supra* note 164, at 8 (arguing that the difference between disability and illness is quantitative, and that any illness that has long-term effects (such as heart disease, diabetes, asthma, depression) constitutes a disability).

entrusted with the interpretation and application of statutes in a clear, rational, and administrable fashion. I will refer to these as the judiciary's institutional self-understanding. If adjudication is understood as line-drawing and line-policing, then the question of preventing abuse becomes a central concern.³³⁷ Courts cannot fulfill their institutional task without filtering out abusive claims. In order to do this, judges must draw and enforce the boundaries of the group of persons to whom the law grants special entitlements. How they draw those boundaries will have an impact on the formation of political consciousness, yet that impact is not likely to be a concern of the judiciary. The stakes in the definition of disability are a function of its far-reaching implications for both courts and the social movement, albeit for different reasons.³³⁸ Because of these high stakes, the definition of disability has become the battleground of different approaches.³³⁹

These institutional concerns explain why courts interpreted the concept of impairments according to a medicalized approach, while at the same time refusing to extend disability protection to any person who was discriminated against because of illness. Consider for now this second issue. Although the determination of this issue arose differently in the ECJ as compared to the American courts, with the ECJ stipulating a definition in *Navas* and American courts interpreting the statutory definition of disability, American law takes a similar position as that of the *Navas* court. That is, American courts declined to protect discrimination based on illness under the disability heading. For instance, in *Christian v. St. Anthony Medical Center, Inc.*, the plaintiff argued that the ADA protects an employee from being fired because of an illness.³⁴⁰ The court held, unequivocally, that it does not.³⁴¹ Likewise, in *Rodriguez v. Loctite Puerto Rico, Inc.*, judges

337. For an attempt to deconstruct the layers of argument about social structure in antidiscrimination law, see generally Emens, *supra* note 247.

338. Harlan Hahn has criticized courts for their failure to adopt a minority group model of disability based on the social model. See Hahn, *supra* note 178, at 176 ("The sociopolitical definition [of disability] is the foundation of the minority group model of disability which contends that disabled Americans are entitled to the same legal and constitutional protection as other disadvantaged groups."). Hahn has developed the minority group model in Harlan Hahn, *The Minority Group Model of Disability: Implications for Medical Sociology*, in 11 RESEARCH IN THE SOCIOLOGY OF HEALTH CARE 3 (Rose Welt & Jeanne J. Kronenfield eds., 1994). As I argue in this section, I do not believe that Hahn is right in arguing that courts have failed to adopt a minority group model. In fact, the court's turn back to a narrow definition of disability has arisen precisely because judges operated within that framework.

339. See, e.g., Scotch, *Social Movement*, *supra* note 15; see also BAGENSTOS, *supra* note 24, at 45 ("Passing judgment on the Supreme Court's definition-of-disability decisions . . . entails passing judgment on the strategies and ideals of disability movement activists themselves.").

340. See 117 F.3d 1051, 1052-53 (7th Cir. 1997).

341. See *id.* at 1053 ("The Act is not a general protection of medically afflicted persons . . . [i]f the employer discriminates against them on account of their being (or being believed by him to be) ill, even permanently ill, but not disabled, there is no violation."); see also *Bridges*, 92 F.3d 329 (affirming judgment for employer where plaintiff was disqualified from being a firefighter based on his hemophilia because hemophilia is not a disability per se and the field of firefighting jobs was so narrow that plaintiff was not

found as a matter of law that the plaintiff – who allegedly suffered from Lupus – was not disabled under the ADA because the illness did not limit any of her major life functions.³⁴² The court explained, “An illness cannot in and of itself be considered an impairment. Only its symptoms and/or ramifications actually limit the inflicted person’s ability to perform major life activities.”³⁴³

Institutional concerns are so deeply embedded in their legal rationality that they regularly surface in judicial decisions. When the ECJ in *Navas* stated that “[t]here is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness,”³⁴⁴ what it indicates is its fear that plaintiffs with trivial and transitory conditions will abuse the Directive. In the *Sutton* context, fears of abuse were compounded by the factual context of the case, which referred to a very common medical condition of suboptimal vision.³⁴⁵ Commentators have pointed out that the facts in this case were less than ideal as a vehicle for getting a statement of principle on the first prong of the definition of disability. Other legal systems, for instance the UK’s, have excluded eyeglasses or contact lenses, understood as corrective measures for suboptimal vision, from disability protection.³⁴⁶ One can therefore see how this very common measure—correcting suboptimal vision—might have initially obscured the far-reaching implications of denying ADA protection to individuals that applied corrective measures to their impairments.

Administrability is also a part of courts’ concerns with dispensing their institutional task. The dissenters in *Sutton* noted the majority’s concern with “the tidal waves of lawsuits”³⁴⁷ that presumably would have followed from authorizing plaintiffs to bring claims despite the alleviating effects of measures that mitigate their impairment. These are familiar institutional concerns with the administrability of judicially-produced standards. This administrability is connected to the idea of formal equality, that all cases must be treated alike.

There was little to answer courts’ institutional concerns that a social model, effect-based interpretation of disability would not make it impossible to identify and weed out abusive claims. With no other anchors within

substantially limited in the major life activity of working). For a discussion of the tort-based public policy exception to the at-will doctrine available under state law to employees fired for absenteeism due to temporary total disability, see Seth J. Hanft, *Creating a Public Policy Exception for Absenteeism Due to Temporary Total Disability: Common Law or Codification?*, 77 U. CIN. L. REV. 655 (2008).

342. 967 F. Supp. 653, 659 (D. Puerto Rico, 1997).

343. *Id.*

344. *Chácon Navas*, 2006 E.C.R. I-6467, ¶ 46.

345. 527 U.S. at 475. To be fair, the severe myopia only affected 2% of the population. See *id.* at 507 (Stevens, J., dissenting).

346. See COLKER, *supra* note 79, at 105 (citing Nick Wenbourne, *Disabled Meanings: A Comparison of the Definitions of ‘Disability’ in the British Disability Discrimination Act of 1995 and the Americans with Disabilities Act of 1990*, 23 HASTINGS INT’L & COMP. L. REV. 149 (1999)).

347. *Sutton*, 527 U.S. at 508 (Stevens J., dissenting).

reach (societal attitudes or health condition, illness, etc), judges relied on the concept of medical impairment, understood in a narrow, medicalized way, in drawing the boundaries of the class of persons to whom disability statutes apply. Developing a theoretical account of medical impairments would have been a *sine qua non* condition for operationalizing the social model for the use of courts. The tension between the judiciary's concerns and the aims of the disability movement provides the additional explanation that none of the factors discussed above—doctrine, interpretation, the jurisprudence of equality, sociology of the legal professions, institutional structure, or ideology—could capture satisfactorily.

The explanation proposed above does not seek to justify courts' approaches to the definition of disability. Put differently, the reaction of courts is understandable, but not—or not necessarily³⁴⁸—justified. The question of justification depends on one's conception of the institutional role of courts. Consider for instance the asymmetry in the social roles of judges and disability advocates. One can start from observing this asymmetry and construct a view of the judiciary's role whereby judges should anticipate and remedy the self-inflicted distortions of the kind that have led the disability rights movement to specific legal constructions of disability.³⁴⁹ Leaving medical impairments under-theorized was such a distortion effect that occurred in the process of translating the insights of the social model into public policy and legal claims. If one believes that courts are under a duty of responsiveness, then the narrow, medicalized definition of disability represents a failure of responsiveness on the part of courts.

This approach has important implications *de lege ferenda*. At least at a formal level, the lessons would be easier to implement in the EU where the path dependency in the definition of disability is less severe than in the US. For instance, proposals for a new Equal Treatment Directive mention the UN Convention on the Rights of Persons with Disabilities as "guidance" in defining the concept of disability. In the US, the 2008 ADAAA represents Congress' wish to restore the initial aims of the ADA, but leaves the definition of disability intact and fails to give courts definitive guidance on how to interpret the concept of medical impairments.³⁵⁰ One effect will be that ADA litigation will be channeled toward the "regarded as" prong in the hope of steering away from definitional disputes. While many anticipate

348. Some disability law scholars have forcefully argued against attempts to separate description from justification. See Martha T. McCluskey, *How the Biological/Social Divide Limits Disability and Equality*, 33 WASH. U. J. L. & POL'Y 109, 112 (2010) ("In the case of disability, as with gender, the positivist inquiry into what the relevant difference is cannot be separated from the normative inquiry into what the relevant difference should be.").

349. Constructing such an institutional account of the role of courts goes beyond the aim of this paper. I have sketched out such an approach in Vlad Perju, *Cosmopolitanism and Constitutional Self-Government*, 8 INT'L J. CONST. L. 326 (2010).

350. For an example of recent case where courts operated the interpretative shift dictated by Congress in the ADAAA, see *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234 (D. Mass. 2010).

that this is the likely development in the foreseeable future, institutional concerns with administrability will sooner or later lead judges to seek objective grounds for their decisions and thus revert back to the definitional analysis.

Another option, in both the EU and the US, would be to do away with a reference to medical impairments in the definitions of disability. Yet it is unlikely that such a proposal would be realistically accepted. There is a path dependency in how concepts are defined, and medical impairments have been so much at the center of the meaning of disability that it might be difficult to radically shift course at this stage. A more moderate proposal would encapsulate the lessons of the past and have greater chances for success. Specifically, the new approach would define disability as the social effect of real or perceived medical impairments. Such a definition would shift judicial analysis away from the nature of the medical impairments and towards the discriminatory social effects. This may not be the guidance that judges needed all along, but it would be a step in the right direction.

Conclusion

Proposals for future reforms in disability law reform depend on first facing the legacy of the past. This Article has cast that legacy in a different light. Using a comparative framework, I have argued that distortion effects in the formulation of claims rooted in the social model are a previously overlooked factor that explains in part the resilience of the medicalized model in judicial definitions of disability. I have made this argument by first identifying a synchronized evolution of disability law in Europe and the United States. This synchronization was the effect of the social model of disability on the legal and political cultures of both jurisdictions, as well as of the cross-influence of disability rights movements. One aspect of the synchronization is the presence of narrow judicial interpretations of disability in both the EU and the U.S. These interpretations drastically limited the class of intended beneficiaries of legislation aimed at implementing a discrimination based approach to disability. While American scholarship has investigated at great length the decisions of U.S. courts, scholars have rarely looked across the Atlantic in order to gain a new perspective on the state of affairs in American disability law. I argued that the social model itself must be included—alongside ideology, text, doctrine, institutional structure, or professional consciousness—in the explanation of the judiciary's narrow interpretations. Specifically, I have examined the interplay between, on the one hand, the social model's conceptualization of illness, impairment, and disability, and on the other hand, the broader argumentative strategies that the disability rights movement deployed in its struggle for recognition of the equal status of persons with disabilities. The confluence of these two factors explains the failure to conceptualize medical impairments, to which I referred as a distortion effect in the translation of the insights of the social model into public policy and legal claims. Thus,

the decision to leave medical impairments under-theorized was the response of social model theorists to the perceived risk that an analogy between impairments and illness would legitimize the dominion of medical expertise, and that it would perpetuate socially disabling assumptions about normality. These distortion effects left courts bereft of guidance on the social model interpretation of disability and made them seek refuge in the more familiar territory of the medicalized approach. Narrow judicial interpretations of disability are the answer to how judges, consumed by institutional concerns with the administrability of potentially sweeping disability statutes, reacted to the fears of social movements that only a strong social discrimination approach could create the shared political consciousness necessary for reform. I offered this answer as an explanation, not a justification, of the work of courts in both the EU and the US. This broad, comparative approach puts the struggle for recognition of persons with disabilities in a new light.