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Disability Law Section

AALS 2018

Could We Pass the ADA Today?

Disability Rights in an Age of Partisan Polarization

Is There a Danger of Repeal?

Laura Rothstein©

January 3, 2018 – 3:30 pm

Panel Overview

Disability rights advocates have long been willing to cross the aisle. The Americans with Disabilities Act (ADA) of 1990 stands out as a model of bipartisan law-making. Reagan appointees in the National Council on Disability helped draft the legislation. A Republican senator and a Democratic congressman first sponsored the bill. It passed the Democratic-controlled Senate and House of Representatives by high margins—78 to 8 and 377 to 28 respectively—before being signed into law by a Republican president.

Early signs seem to indicate that this degree of bipartisan support for disability rights may be eroding in the Trump era. Proposed legislation like the American Health Care Act (“TrumpCare”) and the ADA Education and Reform Act of 2017 threaten to roll back the legal protections for people with disabilities. Has America’s longstanding history of bipartisan disability rights finally come to an end? This panel will explore whether the ADA could pass in the current polarized political climate. It also looks to the future asking how we might build consensus across parties to further not only disability rights but also civil rights generally.

ABSTRACT

Using Lennard Davis's book *ENABLING ACTS: The Hidden Story of How the ADA Gave the Largest US Minority Its Rights* as historical guidance, the presentation examines what are the factors that were in place in 1990 that are not in place today. These include bipartisan support and the ability to compromise. It included ensuring that opponents did not succeed in "divide and conquer" techniques (as was attempted by trying unsuccessfully to exclude HIV coverage). Another critical factor was the "lack" of technology that allowed for secret meetings to negotiate key principles. Today's ever present cell phone usage and social media would make it quite challenging for key players to maintain the secrecy they did at the time of the ADA. Also key was a president who supported the values and principles of the ADA.

The related question is how likely it is that a repeal can occur. While the Trump administration is making efforts at the edges (through regulatory and agency guidance changes and reduced enforcement) and reducing funding for research and data collection, it is possible that other statutes might be amended and thus indirectly affect rights against discrimination on the basis of disability. Such amendments might include areas of special education, school choice, Affordable Care Act, access to the internet (which allows for speedy connection of disability advocates).

The key to ensuring that the basic principles remain in place is the same key to maintaining virtually all of the progressive legislation that is under attack. There must be a realistic and thoughtful assessment of some of the areas that do need improvement ("mend it, don't end it") and coordinated and constructive communication about how policy changes will impact everyone (particularly middle income Americans). Also building alliances across interest groups is essential.

One example of an issue meriting constructive reconsideration is the rights and remedies related to architectural barriers design issues and the aggressive and sometimes "vexatious" litigation that may be counterproductive. Other areas include attention to clarity on web page accessibility, animals on planes, danger to "self" in higher education, and the application of ADA to Uber/Lyft and Airbnb.

There is a drumbeat of not allowing guns in the hands of those with mental illness that is sounded whenever there is a mass shooting. It will be important that policy responding to that concern does not have the unintended consequence of requiring mental health professionals to report all mental health treatment to government agencies. That could be a deterrent to treatment.

Finally, it will be important to watch is the "stealth repeal" by judicial appointments, signaled by the appointment of Justice Gorsuch recently and the number of other federal judicial appointments in the pipeline that have the potential of rolling back disability rights and other social justice policies through narrow judicial interpretation of rights.

SLIDE 1

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SLIDE 2

Background of the issue

Rehabilitation Act – 1973
Americans with Disabilities Act – 1990
ADA amendments of 2008

Could it pass today?

Is it being “repealed” indirectly?
Trump administration agency actions
Congress
Judiciary

SLIDE 3

1973 – the Year the Rehabilitation Act was Passed

{Image – young couple leaning against a car in 1973}

SLIDE 4

1973- the Year the Rehabilitation Act was Passed

{Image – picture of Billie Jean King and Bobby Riggs from 1973 and picture of poster for the Battle of the Sexes movie in 2017}

SLIDE 5

1973 – the Year the Rehabilitation Act was Passed

{Image – picture of Watergate panel and picture of Robert Muller}

SLIDE 6

1973: Section 504 of the Rehabilitation Act Passes

No otherwise qualified individual with a disability... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...

Not result of major advocacy movement

Initial impact was on higher education and health care – major recipients of federal financial assistance

SLIDE 7

Rehabilitation Act Model Regulations – April 28, 1977

{Images – protesters in wheelchair, and sign for protest in San Francisco}

SLIDE 8

1990 – Year of the ADA

{Image of two girls ages 13 and 10 at a Bat Mitzvah}

SLIDE 9

Americans with Disabilities Act

1990: Expands coverage more broadly

1999: Supreme Court narrows definition of disability

2008: Congress returns to broad definition (result of sustained advocacy effort similar to 1990 efforts – to counter judicial narrowing)

{Image – protesters crawling up the steps of Congress}

SLIDE 10

Bipartisan Legislation – Result of strong advocacy organization efforts

{Image – President George H.W. Bush signing the ADA}

SLIDE 11

The Story Behind the ADA

{Image – book cover of “Enabling Acts” by Lennard Davis}

SLIDE 12

The Story Behind the ADA and What May Be Lacking Today

{Images – pictures of Congressman Tony Coelho and Congressman Paul Ryan}

SLIDE 13

The Story Behind the ADA and What May Be Lacking Today

{Image – President Trump “mocking” individual with disability}

SLIDE 14

The Story Behind the ADA and What May Be Lacking Today

Ability to do things in secret

{Image – Senator Jeff Flake on a “hot mike” saying “If we become the party of Roy Moore and Donald Trump, we are toast.”}

SLIDE 15

The Story Behind the ADA and What Could Provide Support for Passage Today – OR prevent repeal

Quick rally of many advocacy groups

{Image – wheelchair user in hallway of Congressional building}

SLIDE 16

The Story Behind the ADA and What Could Provide Support for Passage Today – OR prevent repeal

Renewed activism -- awareness and organization

Women standing in line in the rain to vote in Virginia

Defeat of Roy Moore

{Images – women standing in line in rain to vote in Virginia; Roy Moore riding Sassy to vote}

SLIDE 17

The Story Behind the ADA and What Could Provide Support for Passage Today OR Prevent Repeal

Public support – one in five Americans has a disability (and almost everyone has a close family member with a disability)

{Image – chart showing types of disabilities for 57 million Americans}

SLIDE 18

The Story Behind the ADA and What Could Provide Support for Passage Today OR Prevent Repeal

Public support – people with disabilities in popular culture

{Image – Peter Dinklage (short stature actor in major role) pictured in Game of Thrones scene}

SLIDE 19

Statutory amendment or repeal? A can of worms?

{Image – A can of worms}

SLIDE 20

2018 – where are we now?

Molly and Rachel and Skip

{Images – 9 month old and 3 year old girls; little white dog looking serene}

SLIDE 21

Statutory amendment or repeal? Are there areas that would benefit?

{Image – picture of United States Capitol building}

SLIDE 22

Statutory amendment or repeal? Or regulatory change...

Some areas worth considering -- Title III enforcement and impact on small businesses – “drive by lawsuits”

{Image – picture from ABC TV story about 1700 lawsuits}

SLIDE 23

Statutory amendment or repeal? Or regulatory change...

Some areas worth considering -- Airlines and support animals

{Image – turkey sitting in passenger seat on plane}

SLIDE 24

Statutory amendment or repeal? Or regulatory change...

Some areas worth considering -- Website design standards

{Image – web access keyboard image}

SLIDE 25

Statutory amendment or repeal? Or regulatory change...

Some areas worth considering -- “Danger to self” in higher education

{Image – college student looking stressed}

SLIDE 26

Statutory amendment or repeal? Or regulatory change...

Some areas worth considering Application to Uber/Lyft and Airbnb

{Image – wheelchair user in Uber vehicle; sign about access improvements for individuals with disabilities in Airbnb}

SLIDE 27

Guns and Those with Mental Illness – Unintended Consequences

{Image – February 2015 image from John Oliver talking about how fewer than 5% of the 120,000 gun related killings were perpetrated by those with mental illness}

SLIDE 28

Administrative Agency Oversight Cause for concern

Regulations
Regulatory guidance, opinion letters, etc.
Internal agency structure and prioritization
Enforcement priorities

SLIDE 29

Department of Education – Secretary Betsy DeVos

{Image – photo of Betsy DeVos and ED logo}

SLIDE 30

Department of Health & Human Services

{Image – Photo of former HHS Secretary with delete symbol through photo and HHS logo}

SLIDE 31

Department of Justice – Attorney General Jeff Sessions

{Image – photo of Jeff Sessions and DOJ logo}

SLIDE 32

Enforcement – EEOC Commissioner Chai Feldblum

{Image – photo of Chai Feldblum and EEOC logo}

SLIDE 33

Shrinking Resources -- reduced appropriations for grants and reduced staffing for enforcement

{Image – shrinking \$100 bill}

SLIDE 34

Appropriations for federal implementation -- enforcement

{Image – indication of agencies with ADA oversight – EEOC, DOJ, others}

SLIDE 35

Appropriations for research from Congress?

{Image – chart showing Democrats supporting scientific research more than Republications}

SLIDE 36

The stealth “repeal” by the judiciary

Supreme Court overrules 10th Circuit Judge Neil Gorsuch in special education *Endrew* decision during confirmation hearings

{Image – Judge Gorsuch at hearings}

SLIDE 37

Long term concerns about judicial interpretations -- future federal judges?

Court impact of new appointments
– significant lean towards non-diverse and conservative judges
Court packing plan
– to add appellate judges

{Image – chart of court vacancies}

SLIDE 38

Final Thoughts

“[T]he most important office, and the one that all of us can and should fill, is that of private citizen.

The duties of office of private citizen cannot under a republican form of government be neglected without serious injury to the public.”

– Louis Brandeis – April 14, 1903

{Image – picture of Louis D. Brandeis}