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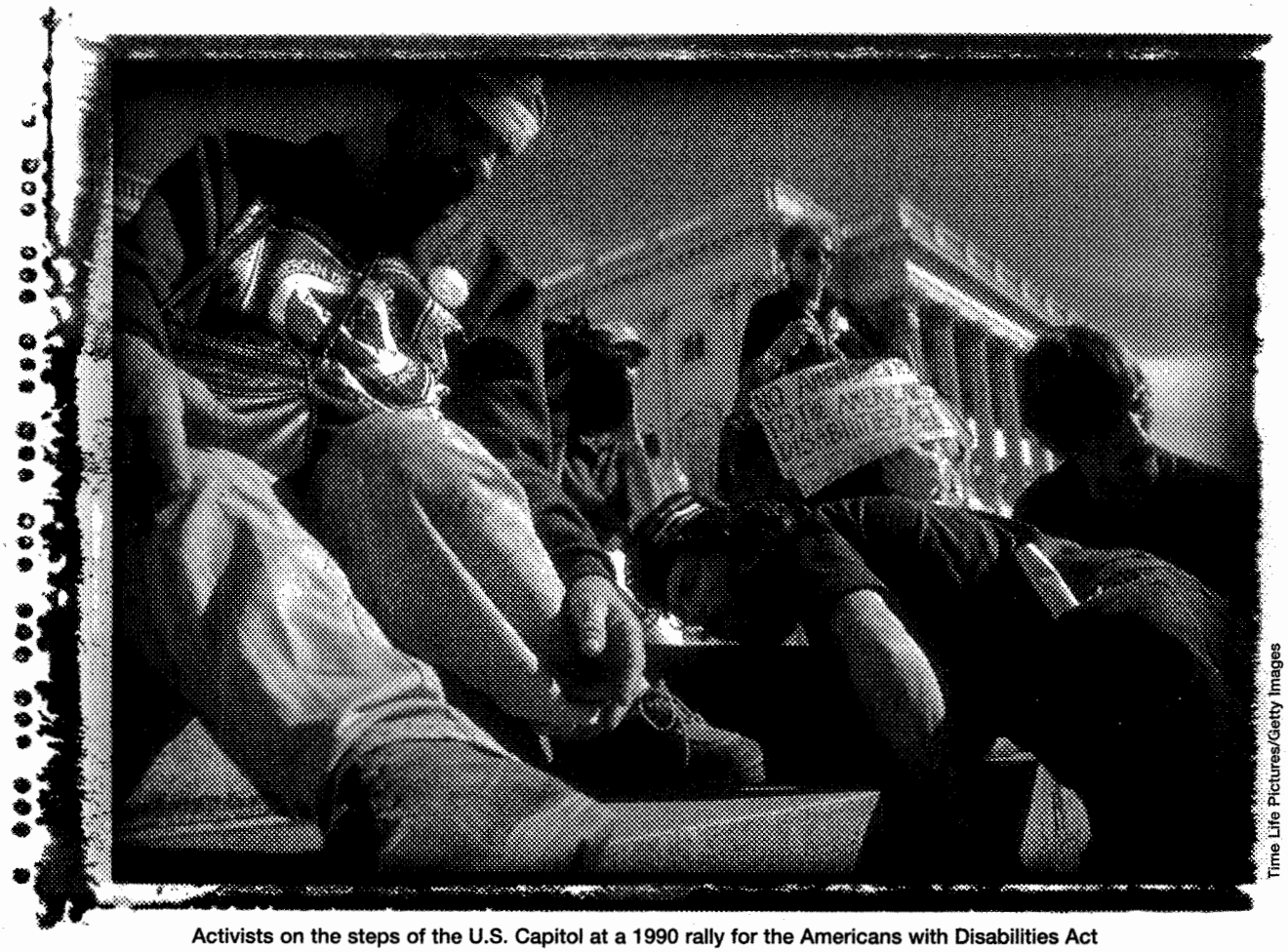

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Activists on the steps of the U.S. Capitol at a 1990 rally for the Americans with Disabilities Act

The Americans with Disabilities Act of 1990

Progeny of the Civil Rights Act of 1964

By Robert D. Dinerstein

As Lawrence Gostin and Henry Beyer observed more than ten years ago, "the Americans with Disabilities Act (ADA) is the most important piece of federal legislation since the Civil Rights Act of 1964." IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS (1993). The comparison is an apt one, as the ADA not only rivals the 1964 Civil Rights Act (Act) in importance, but draws substantially from the structure of that landmark legislation as well, while extending its antidiscrimination protection to a new class of individuals: people with disabilities.

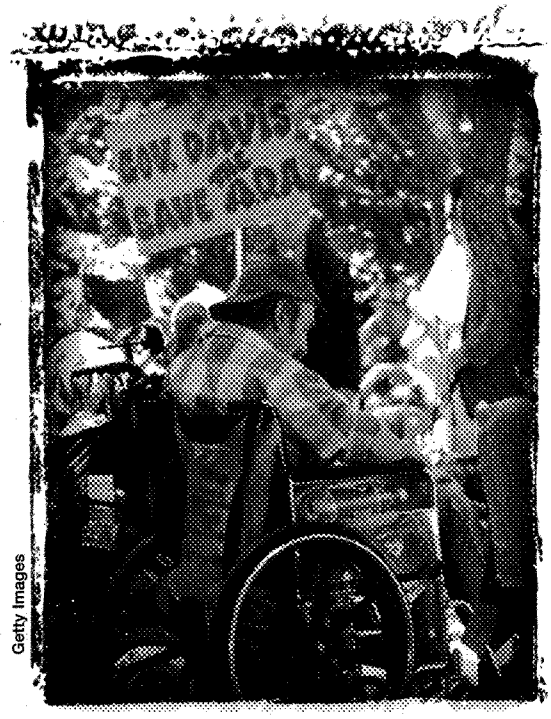
After several attempts during the 1970s and 1980s to amend the Civil Rights Act of 1964 to add nondiscrimination on the basis of disability, advocates and lawmakers changed direction in the mid-1980s to push for a stand-alone statute that would extend the principle of nondiscrimination to people with disabilities. Following extensive hearings, and with broad bipartisan support, Congress enacted the ADA in 1990. The legislation had two primary antecedents. Substantively, it derived significant content from section 504 of the Rehabilitation Act of 1973. Structurally, the ADA relied heavily on the 1964 Civil Rights Act, with many of its titles finding parallels in its precursor. For example, Title I of the ADA, which bans employment discrimination by private employers on the basis of disability, parallels Title VII of the Act. Title III of the ADA, which proscribes discrimination on the basis of disability in public accommodations, tracks Title II of the 1964 Act while expanding upon the list of public accommodations covered. Title II of the ADA, which addresses discrimination in public services, is based on section 504 of the Rehabilitation Act, which, in turn, is

based on Title VI of the 1964 Act.

The connection between the two statutes is further evidenced by Title I of the ADA's explicit adoption of the Act's Title VII enforcement provisions for the investigation and adjudication of employment discrimination claims. The Equal Employment Opportunity Commission, created by the 1964 Act, now has authority to investigate disability complaints as well as those based on the Act categories, and has promulgated Title I regulations and important regulatory guidances interpreting the ADA's employment provisions.

But if the ADA is in many ways a logical descendant of the 1964 Civil Rights Act, some critical differences between the two statutes have led to a series of judicial interpretations of the ADA that have limited its scope and cut back on its anticipated protections. The Civil Rights Act of 1964 protects an individual against discrimination on the basis of race, color, religion, national origin, and, in some cases, sex, without defining these terms and irrespective of whether the individual is in the minority within the above categories. In contrast, the ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." No matter how egregious the alleged discrimination may be, an individual who cannot satisfy the above definition—especially one who cannot demonstrate that his or her impairment is substantially limiting—will not even be able to challenge the defendant's actions, let alone prevail on the merits. To the initial surprise of many experienced legal observers, an extraordinary number of cases have focused on this threshold definition, and many courts have held that individuals with disabilities that the ADA's drafters clearly meant to cover—for example, diabetes, cancer, epilepsy, multiple sclerosis—were insufficiently disabled to meet the statutory definition.

The ADA definition conundrum has overshadowed what otherwise might have been the most significant difference between the 1964 Act and the ADA—the nature of discrimination on the basis of race, color, religion, sex, or national origin as compared to discrimination on the basis of disability. We assume that the former categories rarely if ever are relevant to the distribution of societal goods, and thus ban discrimination outright on these grounds. But disability is sometimes relevant in ways that race would never (legitimately) be. Thus, in the workplace, the ADA's protections extend not to every individual, or even to every individual with a disability (as defined above), but instead to a "qualified individual with a disability," who is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." While this definition recognizes that a person's disability sometimes precludes employment, the inclusion of the concept "reasonable accommodation" in the statutory definition (a term found in the 1964 Act, but defined much more expansively in the ADA) is an important recognition that pure equality of circumstances insufficiently protects the rights of people with disabilities.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A 2000 protest against California's challenge in the U.S. Supreme Court to the Americans with Disabilities Act

Supporters and opponents of the ADA alike predicted upon its passage that much litigation would focus on the meaning of such opaque terms as "reasonable accommodation," "undue hardship," and "fundamental alteration" (the latter two terms being limitations on the nondiscrimination requirement), and there has certainly been substantial litigation in these areas. But the definitional problem described above has overwhelmed the substantive litigation under the statute, and has highlighted one of the significant Catch-22s in the ADA: if an individual is "insufficiently disabled," he or she will not be covered by the statute, but if he or she is "too disabled," the individual will not be qualified for the position in question (or meet program requirements if suing under Title II or III). As a result, ADA plaintiffs have been much less successful than plaintiffs suing under the 1964 Civil Rights Act in vindicating their right to live in a discrimination-free society.

Of course, the differential fate of civil rights plaintiffs in the courts may say less about the nature of discrimination than about the tenor of the times in which we live, and about the consequences of litigating first-impression statutory claims before a more conservative judiciary. But even if the substantive protections of the ADA have turned out to be less extensive than many had hoped, the significant protections the law *has* provided, and the powerful symbolism of a broad-based federal disability antidiscrimination statute, make the ADA a worthy successor to the landmark 1964 Civil Rights Act.

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