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DISCRIMINATION WITH A DIFFERENCE: CAN EMPLOYMENT DISCRIMINATION LAW ACCOMMODATE THE AMERICANS WITH DISABILITIES ACT?

SAMUEL ISSACHAROFF* & JUSTIN NELSON**

This Article explains that all employment discrimination laws not only condemn the subjugation of defined groups, they also impose significant redistributive costs. The Article uses the Americans with Disabilities Act as an example to examine how much redistribution is proper under the rubric of nondiscrimination. The most recent ADA cases, most notably Sutton v. United Air Lines, reveal more starkly than prior employment discrimination case law the tension between the nondiscrimination command and the redistributive side of employment opportunity law. The doctrinal difficulties faced by courts interpreting the ADA stem directly from the inability of the anti-discrimination model to control or focus the fundamentally redistributivist command of the ADA. This Article analyzes the Supreme Court's confrontation with the open-ended statutory terms of "major life activity" and "reasonable accommodation" and analyzes the most recent ADA employment decisions as an attempt to create a limited and responsible regulatory framework out of the statute. This Article then considers what tools courts need to fulfill this regulatory function and asks whether courts are the proper institutional actors to carry out this task.

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INTRODUCTION

All employment discrimination laws carry forth a dual objective. These laws embody both a straightforward anti-discrimination command and a redistributive norm. At their simplest, such laws condemn the subjugation of defined groups of people for a variety of reasons—prejudice,¹ fear,² unconscious motivations,³ cognitive distortions,⁴ and assumed characteristics.⁵ They even go so far as to prohibit capitulation to such biases among coworkers, customers, or the public at large.⁶ The anti-subjugation principle has a long history in American equal protection law,⁷ and is a principle that through the

1. See Robert Post, *Prejudicial Appearances: The Logic of American Anti-discrimination Law*, 88 CAL. L. REV. 1, 8 (2000) (“Anti-discrimination law seeks to neutralize widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities.”).

2. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 455 (1985) (Stevens, J., concurring) (condemning a local zoning ordinance for discriminating against the mentally retarded on the basis of “irrational fears”).

3. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) (arguing that a large portion of behavior that produces discrimination stems from unconscious motivations).

4. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995).

5. *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (holding that race-based preemptory challenges violate equal protection law because they perpetuate “the very stereotype the law condemns”).

6. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1074–78 (1995) (asserting that the desire to obtain greater status fuels inter-group discrimination).

7. A notable example is *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879), which struck down a provision that prohibited blacks from serving on juries. The Reconstruction Amendments had addressed equal protection for what were deemed “civil rights” through the Fourteenth Amendment and “political rights” through the right to vote guaranteed under the Fifteenth Amendment. This left the right to serve as a juror, the other recognized political right of the nineteenth century, uniquely outside constitutional protection. Nonetheless, the Supreme Court read into the Fourteenth Amendment a far-

Commerce Clause⁸ may sweep into the functioning of private markets.⁹

But employment discrimination laws are not merely exhortations against the wrongs occasioned by retrograde views. All employment discrimination laws are, at least implicitly, deeply redistributive. These laws seek to alter the outcomes of how employees are selected and how their services are valued in the private market.¹⁰ There would be no compelling reason for the sweeping intrusion into the realm of privately-revealed preferences in market decisions of whom to hire and whom to promote, and how much to pay the employees selected, unless there were a corresponding belief that the revealed market preferences are in some deep sense wrong. As expressed by Professor Jolls, these laws do not “reflect an ideal of forcing only ‘economic rationality’ out of employers.”¹¹ Put most fundamentally, one cannot read Title VII¹² or its legislative history simply as a statement that hostility to blacks in the workplace is opprobrious.¹³

reaching prohibition on the subjugation of the former slaves that would address all forms of formal exclusion from public institutions, including jury service. *Id.* at 305–08.

8. U.S. CONST. art. I, § 8, cl. 3.

9. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 458 (1976) (Stevens, J., concurring) (“[T]he commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment and, therefore, provides the necessary support for the 1972 Amendments to Title VII.”); *id.* at 458 (Brennan, J., concurring) (“Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause.”); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249–62 (1964) (citing legislative history to find the Civil Rights Act of 1964 a valid exercise of Commerce Clause powers).

10. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1628 (1991) (“It is commonly said that the purpose of employment discrimination laws is to redistribute income and wealth in favor of African Americans.”); cf. Christopher J. Willis, *Title I of the Americans with Disabilities Act: Disabling the Disabled*, 25 CUMB. L. REV. 715, 730 (1994) (“The ADA . . . operates as a redistribution of wealth from consumers to disabled persons who take advantage of the ADA’s protections.”).

11. Christine Jolls, *Accommodation Mandates and Anti-discrimination Law*, 53 STAN. L. REV. (forthcoming November 2000) (manuscript at 73, on file with the North Carolina Law Review).

12. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. & 42 U.S.C.).

13. See Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2 (1994 & Supp. IV 1998); see also 110 CONG. REC. 6548 (noting that Title VII’s focus was on opening employment opportunities for blacks in occupations traditionally closed to them, in part to combat “the plight of the Negro in our economy”); George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1465 (1992) (reviewing RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992)) (noting that employment discrimination laws were “designed to open jobs to groups excluded from them”). This pattern is repeated with regard to every major employment discrimination statute. See, e.g., *Age Discrimination in Employment Act*, 29 U.S.C.

Rather, the point of the statute is to combat the consequences of the lack of employment opportunity for blacks. First and foremost among these consequences is the denial of jobs, promotions, and income as a result of invidious discrimination.

What then is the relation between the two objectives of employment discrimination law? Or, put another way, how much redistribution is proper under the rubric of nondiscrimination? The core of this Article will be an exploration of this question with regard to the Americans with Disabilities Act (ADA or the "Act"),¹⁴ particularly in light of the troubling decisions of the Supreme Court during the 1998–1999 term in the ADA accommodation trilogy, *Sutton v. United Air Lines, Inc.*,¹⁵ *Albertson's, Inc. v. Kirkingburg*,¹⁶ and *Murphy v. United Parcel Service, Inc.*¹⁷ In each of these cases, the Court confronted a claim that an employer's unwillingness or inability to provide employment opportunity for disabled workers amounted to forbidden discrimination. Discrimination in this context is established by the ADA's prohibition that no covered employer "shall discriminate against a qualified individual with a disability"¹⁸ if such an individual, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."¹⁹

Our argument is that because of the inherent uncertainty in the obligation to provide "reasonable accommodation," the ADA trilogy reveals more starkly than prior employment discrimination case law the tension between the nondiscrimination command and the redistributive side of employment opportunity law. The Title VII cases required neither an independent normative justification for their redistributive impact nor an independent measure of how much redistribution was appropriate. The redistribution in early discrimination case law flowed directly from the prohibition on discrimination simpliciter and the measure of required redistribution followed tort-based principles of making whole the victims of that

§ 621(b) (1994) (noting that the congressional purpose is to "promote employment of older persons").

14. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (1994) and in scattered sections of 47 U.S.C.).

15. 527 U.S. 471 (1999).

16. 527 U.S. 555 (1999).

17. 527 U.S. 516 (1999).

18. 42 U.S.C. § 12112(a) (1994).

19. 42 U.S.C. § 12111(8) (1994).

discrimination.²⁰ In the ADA context, by contrast, the overwhelming sweep of cases concern not discrimination simpliciter,²¹ but a claimed failure to redistribute in the form of accommodation.²² The ADA cases, therefore, require an independent normative command for the obligation to redistribute or accommodate and some measure of how much redistribution should ensue.

The key to our argument is that courts lack the tools to make these sorts of determinations and that prior employment discrimination law does not provide assistance. Our goal in this Article is not to propose an optimal regulatory framework for the problems facing the disabled in the workplace. Rather, we propose to examine the doctrinal difficulties that courts, most notably the Supreme Court, have faced when defining the scope of employer liability under the ADA. Our thesis is that the doctrinal difficulties faced by courts result from the inability of the anti-discrimination model to direct the fundamentally redistributivist command of the ADA.

Our objective is to explore the tension between the use of the anti-discrimination model and the ADA's marked departure from prior employment law. Our discussion will proceed in three parts.

20. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–21 (1975) (stating that the purpose of Title VII is to eliminate discrimination and make whole the victims of such discrimination); *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (holding that the purpose of a constitutional remedy is to “restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct”).

21. As expressed by Professors Karlan and Rutherglen:

[The ADA uses] a far different definition of “discrimination” than the definition embraced in other areas of employment discrimination law. Title VII, for instance, essentially takes jobs as it finds them. It defines discrimination in a negative sense: employment practices are unlawful only if they prevent individuals from doing the job as the employer defines it. The failure to undertake positive steps to revamp the job or the environment does not constitute discrimination.

Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 9 (1996).

22. See John M. Vande Walle, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled*, 73 CHI.-KENT L. REV. 897, 925 (1998) (arguing that in ADA cases, unlike other discrimination cases, “[r]edistribution is required because of the employee’s status, not because the employer has committed a moral wrong”); Willis, *supra* note 10, at 730 (“[T]he ADA operates as a tool which redistributes wealth from consumers and the labor force as a whole to the disabled persons who choose to invoke it.”); MARK KELMAN, *MARKET DISCRIMINATION AND GROUPS 6-7* (Stanford Pub. Law & Legal Theory Working Paper Series, Working Paper No. 8, 2000) (on file with the North Carolina Law Review) (arguing “that the accommodation norm establishes a distributive claim . . . rather than a right”); see also *infra* pp. 338–39 (questioning whether the ADA truly belongs within an anti-discrimination rubric).

First, we will trace the central conceptual difficulty of the application of the anti-discrimination model to a standard of reasonable accommodation. We will then draw the connections between this central conceptual difficulty and the ADA's regulatory structure.²³ Second, we will examine the issues posed in the 1998–1999 term's ADA employment trilogy in light of this fundamental tension.²⁴ We will analyze the divisions within the Court in its effort to cabin the open-ended quality of the ADA's accommodation standard through one or another of the Act's magic phrases—"disability," "major life activity," or "reasonable accommodation." We will then recast the divisions on the Court as a disagreement on how to create a responsible regulatory framework out of vague legislation and how the Court's focus on the "major life activity" prong of the statute fits into the attempt to mold a workable regulatory structure. Finally, we will consider what tools courts need to fulfill this regulatory function and further ask whether courts are the proper institutional actors to carry out this task.²⁵

I. DIFFERENTIAL TREATMENT AND DISCRIMINATION

The choice of the anti-discrimination model for the ADA was certainly not an oversight. The Act proclaims its primary purpose as being "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."²⁶ The statute begins simply enough by invoking the standard anti-discrimination formula to prevent an employer from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."²⁷ This language is accompanied by florid claims in the legislative history drawing an unbroken line from the Civil Rights Act of 1964²⁸ to the ADA.²⁹ Unlike other major employment

23. See *infra* Part I.

24. See *infra* Part II.

25. See *infra* Part III.

26. 42 U.S.C. § 12101(b)(1) (1994).

27. 42 U.S.C. § 12112(a) (1994).

28. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. 1447 and scattered in 42 U.S.C.).

29. Senator Ted Kennedy proclaimed:

In the 1960s, Martin Luther King, Jr., spoke of a time when people would be judged by the content of their character and not the color of their skin. The

discrimination statutes, however, the ADA runs into immediate difficulty in identifying the protected class.³⁰

Title VII presents a paradigmatic model of the relation of the anti-subjugation command to anticipated redistribution. In its original application, Title VII addressed forcible occupational segregation by race such that black employees were held to the lowest paying and most unattractive jobs. The presumption was that, but for discrimination, black employees, just as their white counterparts, would prefer to work as over-the-road truck drivers instead of local delivery drivers or would prefer to move into skilled trades in the steel industry rather than serve in the dirty and dangerous position of coal shovelers.³¹ Title VII's removal of the discriminatory barriers proved this assumption absolutely correct; black employees did indeed move into the more desirable positions.³² The perfectly

Americans with Disabilities Act ensures that millions of men, women, and children can look forward to a day when they will be judged by the strength of their abilities and not misconceptions about their disabilities. . . . But this journey has not been easy or quick. It was only in the past 2 years, as the Nation approached the 25th anniversary of the Civil Rights Act of 1964—that it became clear that the time has finally come to address the unfinished business of civil rights for those with disabilities.

136 CONG. REC. 17,360–61 (1990). Similarly, Senator Robert Dole announced:

[L]ast month, we celebrated the 25th anniversary of the Civil Rights Act of 1964. The passage of the Civil Rights Act was one of Congress'—and America's—shining moments. And it was one of the great milestones in America's long journey toward civil rights justice. So I am pleased today to join with President Bush in endorsing the Americans With Disabilities Act—the next major step in the civil rights struggle—and a bill that will finally expand civil rights protections for people with disabilities.

136 CONG. REC. 18,879 (1990).

30. See Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 38–39 (2000). For example, Title VII clearly defines its protected class by prohibiting employers from discriminating “because of such individual's race, color, religion, sex, or national origin.” Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2(a) (1994 & Supp. IV 1998). Additionally, the Pregnancy Discrimination Act defines the protected class by stating “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes.” 42 U.S.C. § 2000e(k) (1994 & Supp. IV 1998); cf. *infra* note 44 and accompanying text (discussing the definition of the ADA's protected class).

31. See, e.g., *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 348–49 (1977) (holding that a promotion system effectively “freezing” minority workers into undesirable positions by maintaining the status quo violated Title VII); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (stating the purpose of Title VII was “to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantages of minority citizens”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (“Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).

32. See, e.g., *Int'l Bd. of Teamsters.*, 431 U.S. at 337 (holding that the systematic failure

predictable consequence was a corresponding redistribution of income and opportunity.³³ Indeed, the smooth interrelation between the anti-subjugation command and the ensuing redistribution may explain the unparalleled success of Title VII in its immediate post-enactment period.³⁴

The key to these early Title VII cases was the ease of the syllogism that, but for the improper discrimination, blacks and whites would be similarly situated and would obtain an equitable distribution of social opportunities. The simplicity of that syllogism breaks down as the anti-discrimination norm becomes more venturesome and attempts to subsume differences that are not merely the product of societal construction, but that draw substantially from different sets of employees who are differently situated, as with distinctions according to pregnancy or age.³⁵ What is unique about the ADA is precisely that it is the first employment discrimination law that does not attempt, even as a formal matter, to derive its redistributive objective from the anti-subjugation command. Rather, the concept of discrimination is defined in terms of the failure to redistribute initially.³⁶ Put another way, the core of the anti-

to hire, transfer, or promote black members to higher paying, more desirable positions violated Title VII); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (granting back pay to a victim of discrimination pursuant to Title VII's purposes of eradicating discrimination and making victims whole); *Griggs*, 401 U.S. at 436 (holding unconstitutional an aptitude test that effectively rendered blacks unable to advance beyond the company's lowest paying department).

33. See John J. Donohue III & James J. Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603, 1604 (1991); James J. Heckman & Brook S. Payner, *Determining the Impact of Federal Anti-discrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138, 139 (1989); James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276, 290-97 (1990).

34. See Heckman & Verkerke, *supra* note 33, at 288-91; see also John J. Donohue III & James J. Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713, 1715-22 (1991) (noting the difficulties of assessing the law's impact in light of changing social mores); J. Hoult Verkerke, *Free to Search*, 105 HARV. L. REV. 2080, 2089-97 (1992) (reviewing RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) and offering empirical evidence in defense of Title VII's impact).

35. This is a story that has been previously addressed. *E.g.*, Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 781-87 (1997); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2156-59 (1994).

36. For a discussion of the ADA as requiring affirmative accommodation rather than simply preventing discrimination, see Michelle T. Friedland, Note, *Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability*, 52 STAN. L. REV. 171, 173-74

subjugation command is that similarly situated persons should be treated similarly.³⁷ The ADA's reasonable accommodation standard, however, starts this unique statutory inquiry with the claim that differently situated persons should be treated differently.³⁸ Whether both sets of claims can coexist under the same anti-discrimination rubric is, we shall propose, at the heart of the current interpretive controversies surrounding the ADA.³⁹

Moreover, the ADA marks a further departure from even the extended discussions about the use of facially-neutral criteria. It challenges to standardized admissions tests in higher education, for example, a common critique is to question the ability of the selection mechanism to accurately measure either ability or likely performance.⁴⁰ Yet the basic accommodation claim under the ADA accepts the propriety of the employer's ability to measure productivity while simultaneously arguing that there is an intervening duty to alter the work environment,⁴¹ even if a disabled employee

(1999) ("Although the ADA purports to be an anti-discrimination statute, many of its provisions specifically require that employers, landlords, and other public entities treat some disabled people differently from able-bodied people, not equally with them."). Thus, an employer failing to conform to this affirmative command is not discriminating per se, but rather, failing to properly redistribute according to the ADA's mandate. See Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 952 (2000) ("To achieve equal opportunity for some disabled individuals, the ADA's anti-discrimination provisions must go beyond a simple mandate preventing discriminatory decisions by the employer (i.e., beyond corrective justice) to remove unnecessary employment barriers (i.e., to a redistributive approach).").

37. Professor Mashaw focuses on this feature of ADA claims to show how objective measures of differential treatment fail to carry the same weight in the ADA context as in other anti-discrimination claims: "That [the disabled claimants'] employment and wage rates are lower would seem to represent not discrimination, but the merit selection generally thought necessary in a competitive economy." Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 219 (1994); see also *Erickson v. Bd. of Governors*, 207 F.3d 945, 949, 951 (7th Cir. 2000) ("The ADA's main target is an employer's rational consideration of disabilities The ADA goes beyond the anti-discrimination principle"), *petition for cert. filed*, 69 U.S.L.W. 3003 (June 26, 2000).

38. This approach dovetails with Mark Kelman's distinction between what he terms "simple discrimination" and "reasonable accommodation" in an examination of the public accommodation side of the ADA. KELMAN, *supra* note 22, at 2-7.

39. See *infra* pp. 338-39.

40. E.g., Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 969-80 (1996) (questioning the validity of standardized tests in predicting academic success). For a defense of limited affirmative action that accepts the premise that admissions criteria are not unsound, see Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 674-75 (1998).

41. See *Erickson*, 207 F.3d at 949 ("Title I of the ADA, by contrast, requires employers to consider and to accommodate disabilities, and in the process extends beyond the anti-discrimination principle.").

may never be as productive as a non-disabled potential employee. Thus, the claim, at least in part, is not that employers are enslaved to irrational preconceptions, but that even if the preconceptions reflect actual productivity, there is an independent duty to accommodate a disabled candidate.⁴²

Whereas definitions based on race, sex, or age are in the broad run of cases self-defining, the definition of a disability for purposes of employment is inherently problematic.⁴³ The statute defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."⁴⁴ Each of these terms leaves open critical definitional questions and the interpretive guidelines issued by the Equal Employment Opportunity Commission (EEOC) do little beyond redefining the terms at even greater levels of abstraction.⁴⁵ Not only have these threshold definitional questions consumed ADA litigation,⁴⁶ but they seem deliberately aimed at foreclosing the emergence of a predictable regulatory regime. As expressed by the EEOC, "[t]he determination of whether an individual is substantially

42. This argument is forcefully advanced in the context of claims of educational accommodation for learning disabled students. MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 218–21 (1997).

43. Erica Worth Harris, *Controlled Impairments Under the Americans With Disabilities Act: A Search for the Meaning of "Disability,"* 73 WASH. L. REV. 575, 584 (1998) ("While class membership is essentially assumed under other anti-discrimination schemes such as Title VII, one must actually establish class membership to sue under the ADA.").

44. 42 U.S.C. § 12102(2) (1994).

45. The EEOC guidelines define "physical or mental impairment" to include "[a]ny physiological disorder . . . affecting one or more of nine broad . . . body systems" or "[a]ny mental or psychological disorder." 29 C.F.R. § 1630.2(h)(1)–(2) (2000). In turn, such a disability would "substantially limit" a major life activity if the individual is:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). That determination in turn requires an analysis of "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2).

46. See Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 623–26 (1999) (describing the "rash of litigation over who has a disability"); Harris, *supra* note 43, at 576–77.

limited in a major life activity must be made on a case-by-case basis.⁴⁷

The difficulty of defining the scope of the class and activities protected by the statute is compounded by a similar ambiguity in defining the scope of the employer's corresponding obligation. The difficult issues in any system of redistribution or costly accommodation arise from determining the proper parties to bear the cost burden and the proper level of cost that must be borne. In other anti-discrimination contexts, however, the cost burdens are to greater or lesser extents constrained by the underlying equality norm.⁴⁸ In other words, the costs imposed result from the failure to treat like candidates for employment in like fashion. The ADA eschews this formal equality command by directing that the finding of a disability affecting a major life activity triggers a duty of reasonable accommodation.⁴⁹

The use of the formal discrimination model allowed Congress to disclaim the clear cost consequences of the burden of accommodation it shifted onto employers.⁵⁰ The "unfunded mandate" quality of the

47. 29 C.F.R. pt. 1630 app. § 1630.2(j); see also Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 410 (2000) (noting that "neither the regulations adopted to implement the ADA, nor the Rehabilitation Act regulations on which they are based, provide meaningful assistance in making the vague 'disability' definition concrete"). The same insight can be pushed back further into the definitions of disability for purposes of Social Security benefits. See Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 853 (1976).

48. This is true because most anti-discrimination statutes do not impose on employers an affirmative obligation beyond non-discrimination. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–21 (1975) (stating that the purpose of Title VII is to eliminate discrimination and make whole the victims of such discrimination); *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (holding that the purpose of a constitutional remedy is to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct").

49. We recognize that the line between the anti-discrimination command and the accommodation mandate is not hermetically sealed. For instance, Professor Jolls provocatively argues that the logic of disparate impact law compels a redeployment of resources in much the same way as does the duty to accommodate manifest differences. Jolls, *supra* note 11, at 7–47. While such overlap may occur at the extreme margin of Title VII law, we nonetheless believe that there is a significant departure between an anti-discrimination mandate that assumes *at its core* that distinctions based on irrelevant characteristics should be prohibited, and one that *at its core* assumes that relevant distinctions should be accommodated.

50. This point was made from the time of the ADA's adoption in 1991. For example, academics immediately noted that "the ADA employs potentially unfair taxation to provide in-kind benefits, which a deficit-happy Congress does not want to fund through the budget process." Jerry L. Mashaw, *In Search of the Disabled*, in *DISABILITY AND WORK 70* (Carolyn L. Weaver ed., 1991) (agreeing with Carolyn L. Weaver's analysis that this is one of the "serious concerns" raised by the ADA).

obligation⁵¹ was magnified by the undefined scope of the ensuing responsibility to accommodate.⁵² The problem with the statute is that once a person is deemed disabled, the parties then must litigate at substantial cost the issues of reasonable accommodation,⁵³ business necessity,⁵⁴ and qualification standards.⁵⁵

Again, this issue was clearly known at the time the ADA was adopted because the problem of uncertainty in the reasonable accommodation standard predated the 1991 ADA. In *Gardner v. Morris*,⁵⁶ for example, the Eight Circuit had to determine the accommodation owed under section 501 of the Rehabilitation Act to an employee of the Army Corps of Engineers.⁵⁷ The employee in question sought a transfer to a construction project in Saudi Arabia despite having a manic depressive disorder that required him to submit to periodic blood tests. The distance between the construction site and available medical clinics made the installation of an on-site physician and laboratory at the construction site the only way to

51. The claim that the ADA represents an unfunded mandate emerges from the lack of any funding for the stated ambition that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(8) (1994). As forcefully expressed by Richard Epstein:

Under the ADA, Congress mandates a set of off-budget subsidies not explicitly taken into account in setting federal policy. The expenditures are borne by private firms and by state and local governments, which are left to scramble for resources as best they can. By working through the regulatory mode Congress ensures the fatal separation of the right to order changes from the duty to pay for them.

RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 493 (1992).

52. Karlan & Rutherglen, *supra* note 21, at 8–14 ("The exact scope of [the duty of reasonable accommodation] remains the great unsettled question under the ADA."); see also Lisa A. Lavelle, *The Duty to Accommodate: Will Title I of the Americans with Disabilities Act Emancipate Individuals with Disabilities Only to Disable Small Businesses?*, 66 NOTRE DAME L. REV. 1135, 1171–74 (1991) ("Although Congress provided definitions of 'reasonable accommodation' and 'undue hardship,' those definitions are broad and require further interpretation."); Lance Liebman, *Too Much Information: Predictions of Employee Disease and the Fringe Benefit System*, 1988 U. CHI. LEGAL F. 57, 81 (recognizing the undefined scope of the duty to accommodate and arguing that "[w]e must . . . bring ourselves to quantify or otherwise bound what we mean by reasonable accommodation").

53. 42 U.S.C. § 12113(a) (1994).

54. *Id.*; see also *id.* § 12112(b)(6) (1994) (defining discrimination to include the use of selection criteria that effectively excludes disabled individuals unless "consistent with business necessity").

55. *Id.* § 12113(a); 29 C.F.R. § 1630.2(q) (2000).

56. 752 F.2d 1271 (8th Cir. 1985).

57. *Id.* At 1277–78.

safely accommodate the employee. The court held, presumably properly, that the accommodation sought was beyond what any employer could be compelled to provide. But, in rather typical fashion,⁵⁸ the opinion resolved only that particular case after the fact, rather than through any principled limitation on the duty to accommodate.⁵⁹ There is little in *Gardner*, as in other pre-ADA cases, that gives broader guidance on the limits of the duty to accommodate beyond the facts of the case.

Congress intended courts to use this case-by-case approach, as evidenced by the plain language and the legislative history of the ADA. For example, the statute expressly defines reasonable accommodation to include:

[J]ob restructuring, part-time or modified work schedules, reassignments to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.⁶⁰

The legislative history further confirms that Congress intended this language to be as illustrative as the “other similar accommodations” formulation would indicate.⁶¹ This case-specific approach is also reflected in the ADA’s safe harbor provision, which allows employers

58. See *Olmstead v. Zimring*, 527 U.S. 581, 606 n.16 (1999) (holding that under the ADA “the ‘undue hardship’ inquiry requires . . . a ‘case-by-case analysis’”) (quoting 28 C.F.R. § 42.511(c) (1998)); Robert L. Strayer, II, *Current Issues Regarding the Americans with Disabilities Act: Asserting the Seventh Amendment: An Argument for the Right to a Jury Trial When Only Back Pay Is Sought Under the Americans with Disabilities Act*, 52 VAND. L. REV. 795, 796 n.5 (1999) (“Whether an accommodation creates an undue hardship on an employer such that the employer need not make the reasonable accommodation is a case-by-case determination.”).

59. *Gardner*, 752 F.2d at 1284 (“We emphasize the narrowness of this decision. We do not condone paternalism toward handicapped individuals. . . . [But] Gardner’s illness could not have been reasonably and safely accommodated in [Saudi Arabia] in 1977 and 1978.”).

60. 42 U.S.C. § 12111(9)(b) (1994).

61. The Senate noted that its list of illustrations was “not meant to be exhaustive; rather it is intended to provide general guidance about the nature of the obligation [T]he decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case.” S. REP. NO. 101-116, at 31 (1990) (Sup. Docs. No. Y1.1/8:101-4.85/pt.3). In fact, this passage expressly adopts the history of the prior disability acts as its model: “This fact-specific case-by-case approach to providing reasonable accommodations is generally consistent with interpretations of this phrase under sections 501, 502, and 504 of the Rehabilitation Act of 1973.” *Id.*

to claim that an unreasonable accommodation “would impose an undue hardship on the operation of [its] business.”⁶²

Accordingly, the Court approached the ADA trilogy with a statute that risks inviting an open-ended judicial revisitation of every employment decision affecting any employee claiming to be disabled.⁶³ The professed anti-discrimination norm of the statute conflicted squarely with its redistributive nature. Absent an equal treatment baseline that is at least arguably present in other employment discrimination statutes, the ADA delivers both regulated employers and overseeing courts into an unfocused and unprincipled examination of both the nature of disability and the corresponding duty of accommodation without any guiding principles.

II. MAJOR LIFE ACTIVITIES VERSUS REASONABLE ACCOMMODATION: THE ADA TRILOGY

If, as we have set out thus far, the ADA delivers courts into a regulatory environment bereft of clear markers for regulating potentially costly market activity, then the Supreme Court’s recent ADA trilogy may be viewed as just the latest effort in the Court’s ongoing attempt to define defensible and administrable boundaries for disability accommodation claims. Under this view, the Court’s decisions in *Sutton v. United Air Lines*,⁶⁴ *Murphy v. United Parcel Service*,⁶⁵ and *Albertson’s, Inc. v. Kirkingburg*⁶⁶ are best understood as

62. 42 U.S.C. § 12112(b)(5)(A) (1994); see also *id.* § 12111(10)(B) (defining undue hardship). This defense is no less fact-specific than any other provision of the ADA. The statute identifies numerous factors to be weighed, including “the nature and cost of the accommodation needed,” “the overall financial resources of the facility,” and “the overall financial resources of the covered entity.” 42 U.S.C. § 12111(10)(B)(i)–(iii). The legislative history indicates that Congress did not intend the Act to allow anything beyond a de minimus cost to constitute a defense. Indeed, the House Report expressly disavows a Title VII case allowing a cost defense to a claim of religious accommodation. See H.R. REP. NO. 101-485, pt. 3, at 40 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 463 (Sup. Docs. No. Y1.1/8:101-485/pt.3) (expressly rejecting *TWA v. Hardison*, 432 U.S. 63 (1977)). On the limitations of cost defenses under the ADA, see Lawrence P. Postol & David D. Kadue, *An Employer’s Guide to the Americans With Disabilities Act: From Job Qualifications to Reasonable Accommodation*, 24 J. MARSHALL L. REV. 693, 712–18 (1991); Sue Krenek, Note, *Beyond Reasonable Accommodation: Allocating the Costs of Compliance with the Americans with Disabilities Act*, 72 TEX. L. REV. 1969, 1986–88 (1993).

63. This is a variant of the Court’s concern in *Bishop v. Wood*, 426 U.S. 341, 347 (1976), that the public employment due process cases would leave the federal courts as the functional equivalents of labor practices tribunals.

64. 527 U.S. 471 (1999).

65. 527 U.S. 516 (1999).

66. 527 U.S. 555 (1999).

an attempt to create a gatekeeping mechanism within an inherently ambiguous legislative standard.⁶⁷ Further, the rather arcane points of departure between the majority and dissents in these cases may similarly be cast as disagreements concerning the capacity to develop administrable standards for the Act.

The structure of the Act provides the Court with two major avenues to direct judicial oversight of ADA claims. First, the Court could impose threshold filters on which employees are covered by the Act, either through the definitions of "disability" or "major life activities." If, as we read the recent trilogy of cases, the Court were to direct its attention to limiting the definition of disability, and therefore allow this provision of the Act to serve as the gatekeeper to the "reasonable accommodation" standard, the three critical definitional questions involve the terms (1) "impairment," (2) "regarded as disabled," and (3) "major life activity." Under this approach, courts would avoid the ensuing envelopment into the minute factual details of each individual accommodation claim by raising the barriers to entry into ADA litigation. This is of all the greater significance if ADA claims are thought to be amenable to resolution at the summary judgment level. Because the structure of the Act lends itself to the threshold disability claim being the plaintiff's burden and the ability to reasonably accommodate being the defendant's reply,⁶⁸ the debate in the ADA trilogy had major implications for the judicial administration of ADA claims.⁶⁹

67. For a similar view of these categories as providing a gatekeeping function, see Bagenstos, *supra* note 47, at 404. Professor Bagenstos, however, takes a far more expansive view of the ability of courts to administer his understanding of "disability as subordination," without any particular connection to fault-based behavior on the part of any particular employer. *Id.* at 445-52.

68. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 117 (1999) ("Plaintiffs bear the burden of proving that they are disabled and that an accommodation is reasonable under the ADA, while defendants bear the burden of proving that a proposed accommodation creates an undue hardship."); Deborah Landan Spranger, Comment, *Are State Bar Examiners Crazy?: The Legality of Mental Health Questions on Bar Applications Under the Americans with Disabilities Act*, 65 U. CIN. L. REV. 225, 272 (1996) ("If the plaintiff can make a prima facie showing that he is otherwise qualified, the public entity bears the ultimate burden of proving that accommodation of the plaintiff's disability is impossible or unreasonable.").

69. See, e.g., *McKay v. Toyota Motor Mfg.*, 110 F.3d 369, 371-74 (6th Cir. 1997) (interpreting the division between the majority and the dissent over the definition of work as major life activity as a disagreement over the availability of summary judgment as a matter of law, or whether claims of disability are matters reserved to the jury). Nonetheless, courts have disagreed about the burdens of proof in ADA cases. See, e.g., *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 146-47 (2d Cir. 1995) (describing the "lenient approach" of the Ninth Circuit and the "more burdensome approaches" of the District of Columbia and Seventh Circuits while purporting to follow a middle course

Alternatively, the Court could allow the definition of covered potential employees to remain flexible and use the employer's reasonable accommodation obligation to develop standards through the evolution of case law. In other words, the Act could either be read restrictively at the first-level definitional stage of covered employees or, consistent with the legislative history, the Act could be read to leave the critical definition of disability to case-by-case assessment. If the Court decided to forego this first method, litigation pressure would shift to the development of an accommodations case law that would allow lower courts and, by extension, employers to anticipate what levels of dislocation and cost are comprised within the statutory requirement of reasonable accommodation.

A. *Defining Disability Under the ADA Trilogy*

In these three cases, most notably in *Sutton v. United Air Lines*,⁷⁰ the Court attempted to impose gatekeeping functions upon the ADA. In *Sutton*, the most expansively reasoned of the three cases, twin sisters sued United alleging that they had been denied employment based solely upon their poor eyesight.⁷¹ Both sisters applied for a job as an airline pilot, and United invited both of them for an interview and a flight simulator test because they met the company's age, education, experience, and FAA certification requirements. At the interview, United informed them that it had made a mistake inviting them to the next round of interviews because the sisters did not meet the company's minimum vision policy that required 20/100 vision without the aid of corrective lenses.⁷²

After United refused to hire the sisters, they filed suit, alleging that United had discriminated against them "on the basis of their disability" or because United "regarded [them] as having a disability."⁷³ The lower courts dismissed their claims because the sisters could fully correct their visual impairments and thus were not substantially limited in any major life activity.⁷⁴ Consequently, they could not establish a claim that they were disabled within the meaning of the ADA. The Supreme Court affirmed the lower courts,

between the two).

70. 527 U.S. 471 (1999).

71. *Id.* at 476.

72. Both sisters had severe myopia, with an uncorrected visual acuity of 20/200 or worse in their right eyes and 20/400 or worse in their left eyes. With the aid of corrective lenses, however, their vision was 20/20 or better. *Id.* at 475.

73. *Id.* at 476.

74. *Id.*

holding that the sisters were not disabled within the meaning of the ADA because they had normal vision with the aid of corrective lenses.⁷⁵ In other words, disability should be judged in its corrected state. The holding did little to resolve the case, however, because regardless of whether the sisters were actually disabled, United clearly regarded them as such when denying their employment applications on the basis of their uncorrected vision. Furthermore, the Court went on to state that irrespective of United's view of the sisters' disabilities and the fact that United did not hire them because of their eyesight, they did not meet the threshold definition of "disability" because their uncorrected vision did not *substantially limit* them in any *major life activity*.⁷⁶

The same day the Court decided *Sutton*, it handed down decisions in two related cases, *Murphy v. United Parcel Service*⁷⁷ and *Albertson's, Inc. v. Kirkingburg*.⁷⁸ In *Murphy*, UPS fired Vaughn Murphy as a mechanic because he had high blood pressure. Murphy claimed this violated the ADA because the firing was triggered by his either being disabled or being regarded as disabled. Unmedicated, Murphy's blood pressure was an elevated 250/160, though with medication he could "function normally."⁷⁹ Murphy's claim revealed an additional source of complication under the ADA. As an essential part of Murphy's job, he had to drive commercial motor vehicles, which in turn required fulfilling federal health requirements imposed by the Department of Transportation (DOT). One requirement of the DOT was that a driver of a commercial motor vehicle have "no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely."⁸⁰ When Murphy was hired in August 1994, he was erroneously granted certification even though his blood pressure did not meet the DOT criteria and, because he had DOT certification, he was allowed to begin working. The next month, a UPS medical supervisor reviewed Murphy's file, noticed his high blood pressure, and asked Murphy to have his blood pressure retested. When the results revealed that his blood pressure exceeded the maximum DOT level, UPS fired Murphy because of its "belief that his blood pressure exceeded the

75. *Id.*

76. *Id.* at 481-89.

77. 527 U.S. 516 (1999).

78. 527 U.S. 555 (1999).

79. *Murphy*, 527 U.S. at 519 (quoting testimony of Murphy's doctor).

80. *Id.* (quoting 49 C.F.R. § 391.41(b)(6) (1998)).

DOT's requirements for drivers of commercial motor vehicles."⁸¹ Relying on *Sutton's* critical definition of major life activity, the Supreme Court held that Murphy was neither disabled nor regarded as disabled and therefore affirmed the lower courts' dismissal of the lawsuit.⁸²

Similarly, in *Kirkingburg*, the Albertson's supermarket chain fired Hallie Kirkingburg after one year with the company and ten years of experience as a truck driver⁸³ because he did not meet the federal vision standards for commercial truck drivers. The DOT set the vision requirement at corrected distant visual acuity of at least 20/40 in each eye and distant binocular activity of at least 20/40.⁸⁴ Kirkingburg suffered from a condition called amblyopia, an uncorrectable condition that left him with 20/200 vision in his left eye and monocular vision. When Kirkingburg first applied for a job, a doctor erroneously certified that he satisfied the DOT criteria, so Albertson's hired him. A few months later, Kirkingburg received another physical when he returned to work from a medical leave of absence that revealed his actual vision. He was informed that, in order to continue to drive, he would have to obtain a waiver from the DOT. The DOT had recently begun a program granting DOT certification to applicants with deficient vision who had three years of recent accident-free driving. A waiver applicant had to agree to have his vision checked annually and to report certain information about his driving record to the Federal Highway Administration.⁸⁵ Although Kirkingburg applied for a waiver, Albertson's fired him because he did not meet the DOT vision standard for his job. Even after Kirkingburg received the DOT waiver, the company refused to rehire him. Although Kirkingburg was clearly fired as a result of his disability, he did not sue under the "regarded as" prong because there appeared to be no issue that his vision was a physical impairment within the meaning of the ADA.⁸⁶ The Court held that despite this physical impairment, Kirkingburg was not a "qualified" individual with a disability because he had not passed the DOT regulations. Relying on statutory incorporation of minimum qualifications,⁸⁷ the

81. *Id.*

82. *Id.* at 521-25.

83. *Kirkingburg*, 527 U.S. at 558-60.

84. *Id.* at 558-59 (citing 49 C.F.R. § 391.41(b)(10) (1998)).

85. *Id.* at 560.

86. *Id.* at 563.

87. See 42 U.S.C. § 12113(a) (1994) (noting that employers can impose qualification standards on disabled individuals as long as the standards are "job-related and consistent with business necessity, and . . . performance cannot be accomplished by reasonable

Court stated that despite the waiver program, Albertson's was justified in firing him because he did not meet the DOT standards. Perhaps showing its frustration with the potential sweep of ADA claims, the Court virtually abandoned the narrow statutory structure and interposed a broader policy concern about the statute: "It is simply not credible that Congress enacted the ADA . . . with the understanding that employers choosing to respect the Government's sole substantive visual acuity regulation in the face of an experimental waiver program might be burdened with an obligation to defend the regulation's application according to its own terms."⁸⁸ Thus, the Court upheld the dismissal of the claim on summary judgment.

The first potential gatekeeper of the ADA is the threshold definition of disability, which effectively triggers the regulatory functions of the Act. Here, the Court confronted a circuit split on whether a correctable condition would qualify as a disability or whether the ADA claimant should be evaluated when her disability condition was under medical control, as with medical treatment of high blood pressure. The EEOC and some courts had taken the position that the threshold determination of whether an individual suffered from an impairment had to be made based upon the person's *uncorrected condition*.⁸⁹ That is, a person who is nearsighted or who

accommodation").

88. *Kirkingburg*, 527 U.S. at 577-78.

89. For the EEOC's position prior to the ADA trilogy, see 29 C.F.R. pt. 1630 app. § 1630.2(j) (1998) ("The determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."). A significant number of cases followed the EEOC Guidelines. *E.g.*, *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 156 F.3d 321, 329 (2d Cir. 1998) (holding that self-accommodations that mitigate a person's disability are not to be considered in determining disability status under the ADA); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-31 (7th Cir. 1998) ("We determine whether a condition constitutes an impairment, and the extent to which the impairment limits an individual's major life activities, without regard to the availability of mitigating measures such as medicines, or assistive or prosthetic devices."); *Arnold v. United Parcel Serv. Inc.*, 136 F.3d 854, 859-66 (1st Cir. 1998) ("Congress intended a reviewing court to evaluate [disabilities] based on [the] underlying medical condition without considering the ameliorative effects of . . . medication."); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-38 (3d Cir. 1997) ("[D]isabled individuals who control their disability with medication may still invoke the protections of the ADA."); *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997) ("Our analysis of whether [a person] is disabled does not include consideration of mitigating measures."); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 519-23 (11th Cir. 1996) (holding that Graves disease uncontrolled by medication can constitute a disability under the ADA). The Fifth Circuit followed the EEOC Guidelines with regard to serious impairments only. *See Washington v. HCA Health Servs. of Tex., Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998) (holding that "only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history—diabetes, epilepsy, and hearing impairments—will be

suffers from some controllable medical condition would be considered disabled if that person would not be able to perform a major life activity within normal ranges were the corrective device not available.⁹⁰

Writing for the Court in *Sutton*, Justice O'Connor rejected the EEOC view of the threshold issue by concluding that the severe myopia of the *Sutton* plaintiffs could not satisfy the statutory definition of disabled for three separate, if perhaps unavailing, reasons. In the first instance, relying on the grammatical structure of the Act, the Court reasoned that because the definition of disability—"substantially limits a major life activit[y]"—is in the present indicative verb form, Congress sought to require ADA claimants to be "presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."⁹¹ The fact that a disability is under medical control or subject to temporary correction does not necessarily compel the conclusion that it no longer exists "presently," however. Moreover, to the extent that this exercise in sentence diagramming was intended to ferret out legislative purpose, it is certainly possible that even as the phrase is structured, Congress intended "substantially limits" to include *all* disabilities, including those that are amenable to correction.

Second, the *Sutton* Court said that the ADA requires that each disability inquiry be individualized.⁹² Here the Court construed this requirement to preclude a definition turning on an uncorrected condition on the theory that if a person were to be judged in an uncorrected state, it would undermine the statutorily-required, person-by-person analysis. Nothing in the determination of disability suggests that judging people based upon their uncorrected states would affect this individualized inquiry, however. Just because some cases might require a generalization of what the world would look like in an uncorrected state does not mean that it is impossible ever to determine whether a person is disabled in an unmitigated state. In the *Sutton* case, for example, the Court had ample individual-specific

considered in their unmitigated state"), *vacated by* HCA Health Servs. v. Washington, 527 U.S. 1032 (1999).

90. See Harris, *supra* note 43, at 581; see also *H & W Contracting Co.*, 102 F.3d at 519–23 (holding that the plaintiff's unmitigated disease constituted a disability); *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1430 (N.D. Iowa 1996) (holding that the plaintiffs' impaired vision was a disability because "[c]learly, [plaintiffs'] uncorrected vision substantially limits the major life activity of working"), *rev'd and remanded for entry of judgment*, 221 F.3d 1343 (8th Cir. 2000).

91. *Sutton v. United Air Lines*, 527 U.S. 471, 475 (1999).

92. *Id.* at 483.

evidence of the exact unmitigated vision of the plaintiffs—20/200. Thus, the Court’s conclusion that an examination of the unmitigated condition precludes individual-specific inquiries ignores the actual, individualized evidence in the case before it. Whatever the policy reasons for which the Court needed to reach the conclusion that uncorrected vision is not a disability, nothing in the nature of an individualized inquiry compels that result.

Third, and according to the Court, “critically,” *Sutton* relied on a congressional finding that “some 43,000,000 Americans have one or more physical or mental disabilities.”⁹³ The problem is that the Court itself acknowledged that nobody knows exactly what the 43 million number includes or even where came it from.⁹⁴ The number itself was a rough estimate, which appears unsupported in the introductory line of the text, as a preamble to the Act itself. Most importantly, it is possible that the 43 million includes the plaintiffs in *Sutton* and in *Murphy*.⁹⁵ The *Sutton* pilots had a form of severe myopia, striking only two percent of the population.⁹⁶ *Murphy*, the driver with

93. *Id.* at 484 (citing the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a) (1994)).

94. *Id.* at 484–86.

95. The origin of the 43 million figure is unclear. If their myopia counts as legal blindness, the plaintiffs in *Sutton* and *Murphy* would probably be encompassed in the statutorily-intended definition.

96. *Id.* at 507 (Stevens, J., dissenting) (quoting J. ROBERTS, BINOCULAR VISUAL ACUITY OF ADULTS, 1960–1962, at 3 (Nat’l Ctr. for Health Stats., Dep’t of Health & Welfare, Series 11, No. 30, 1968)).

The majority traces the history of the 43 million figure to a study reported “in an article authored by the drafter of the original ADA bill introduced in Congress in 1988.” *Id.* at 484. That article reported that the source of the 36 million figure appearing in the 1988 version of the bill was a report by the National Council on the Handicapped. See Robert L. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.–C.L. L. REV. 413, 434–35 n.117 (1991). The Court then looked to an updated report issued by the Council stating that 37.3 million Americans had a disability, and made up the difference between that number and 43 million by inferring that Congress included certain groups of persons in its estimate that were excluded from the Council’s report. *Sutton*, 527 U.S. at 486. The Court did not, however, justify this inference with any legislative history. Furthermore, as the dissent pointed out, even if the 43 million figure is taken as an accurate estimation of the class Congress meant to protect, the majority’s approach to defining “disabled” specifically excludes a group of persons that make up that number. *Id.* at 512 (Stevens, J., dissenting). Controllable impairments such as severe hypertension and diabetes were included as disabilities in both the Act’s Committee Reports and the studies the Court relies on as the source of the 43 million figure. *Id.* at 512 n.6 (Stevens, J., dissenting); see also NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 6 (1986) (including “hypertensive disease” in a list of “types of disability”); Lisa Eichhorn, *Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evils*, 31 ARIZ. ST. L.J. 1071, 1113 (1999) (reporting that “none of the Court’s cited sources employed a definition exactly like the ‘disability’ definition appearing in the Rehabilitation Act and the ADA” and “the

hypertension, also might fit into the category of disabled under the legislative history of the Act depending on the severity of his hypertension.

This last attempt to craft a statutory definition of disabled to fit some rather oddly selected number is itself a peculiar connect-the-dots approach to statutory interpretation. But, unfortunately, once the problem of narrowing the definition of disability to preclude an inquiry into a claimant's uncorrected condition is tackled, it turns out to do little work. In any case in which the condition of a plaintiff is put before a court as a reason for the denial of an employment opportunity, the question whether the condition is in fact a disability becomes irrelevant. The Act's prohibitions are triggered not only by the fact of having a disabling impairment, but by the *employer's regarding* a potential employee as having such an impairment. As soon as an employer denies a benefit based on a potential employee's condition, the issue of whether that condition is actually within the statutory definition of impairment is irrelevant. The employer, by denying employment on that basis, has brought the condition within the protections of the ADA.

Consequently, the second potential gatekeeper, the "regarded as disabled" prong, provides little protection from potential ADA liability for an employer who is imposing a job requirement such as the eyesight requirement in *Sutton*. After all, regardless of whether the person is *actually* disabled, the employer is treating her *as if* she were disabled, except under the undeveloped pronouncement in *Kirkingburg*. Indeed, seemingly by definition, a person who was fired because of a disability who was not actually disabled would *a fortiori* fit under the "regarded as disabled" category. Under this reasoning, the definitional prongs of disability cannot serve as effective protections against an ADA claim going to trial when the employer has actually refused to hire an individual on the basis of a characteristic deemed essential to successful job performance. Rather, the use of a defined personal characteristic, whether actually an impairment or simply regarded as such, shifts the statutory inquiry to the capacity of the employer to reasonably accommodate that impairment.

number of covered individuals is likely to fall far below the forty-three million figure because it will exclude some people who, according to the documents from which the figure supposedly derived, were specifically included among the forty-three million reported individuals").

B. Is Working a Major Life Activity?

The Court evaded the dilemma of the open-ended quality of the “regarded as” and “disability” prongs of the ADA by going back to the remaining component of the statutory definition of being disabled. Following the lead of several lower courts,⁹⁷ the Supreme Court interpreted the phrase “substantially limits a major life activity” to mean that plaintiffs must allege that “they are unable to work in a broad class of jobs.”⁹⁸ The Court in *Sutton* openly entertained the rather astonishing possibility that working might not satisfy the statutory definition of “major life activities.”⁹⁹ Without resolving whether employment would ever be considered a major life activity, the Court clearly held that the statutory definition of “major life activity” can never be satisfied by an inquiry that considers only the job for which the plaintiff actually applied:

To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.¹⁰⁰

Thus, if plaintiffs, such as the Suttons or Murphy, allege only that they cannot work in a *particular* job, then their claims will not survive. Consequently, the Court held that, “[b]ecause the position of global airline pilot is a single job, this allegation does not support the claim that [the employer] regards [the plaintiffs] as having a substantially limiting impairment.”¹⁰¹

The Court’s interpretation is a curious formulation for an employment discrimination statute for at least two reasons. First, it essentially presumes the fungibility of jobs, a strikingly odd presumption in the context of a statutory scheme designed to end

97. See, e.g., *McKay v. Toyota*, 110 F.3d 369, 372 (6th Cir. 1997) (addressing carpal tunnel syndrome); *McKenzie v. EAP Mgmt. Corp.*, 40 F. Supp. 2d 1369, 1375–76 (S.D. Fla. 1999) (relating to a steel rod in a limb); *Kidwell v. Shawnee County*, 40 F. Supp. 2d 1201, 1219–20 (D. Kan. 1998) (concerning breathing difficulties around smoke); *Schluter v. Indus. Coils, Inc.*, 928 F. Supp 1437, 1447 (W.D. Wis. 1996) (concerning poor vision).

98. *Sutton*, 527 U.S. at 491.

99. *Id.* at 492.

100. *Id.*

101. *Id.* at 493.

occupational segregation.¹⁰² What the Court ignores in this analysis is that all jobs are not created equal. ADA plaintiffs do not seek the ability to join the workforce generally, but aim to enforce a vision of the statute that places them in the same positions as their non-disabled counterparts. Thus, under the Court's analysis, black truck drivers in the 1960s would not have been substantially limited if they could work as intra-city deliverymen, regardless of whether they were not allowed to drive long-haul routes. The reason why discrimination was deemed invidious in early discrimination claims, such as the denial of long-haul routes to black truck drivers, was precisely the very tangible differences in occupational opportunity within the same general field of work: the consequences of discrimination were directly observed in the fact that long-haul routes paid better and conferred more benefits than daily delivery routes. While the truck-driving situation exemplifies pure "but for" discrimination, it illustrates the difficulty in the Court's reasoning. Just because a person can get a low-paying, nonunionized job as a flight instructor instead of a high-paying, unionized job as a global airline pilot, or a low-paying, nonunionized job as an intra-city delivery driver instead of a high-paying, unionized job as a long-haul truck driver, does not mean that there is no consequence to the selection mechanism that substantially affects a major life activity. Although well-established Title VII law would undoubtedly say that the black truck driver's job prospects are substantially limited, the Court refused to say the same for the sight-impaired airline pilot.

Second, the Court's definition, if accepted at face value, would virtually deny the capacity of any plaintiff to prevail under the ADA. No employer ever makes a determination that an employee is unfit for service in any part of the industry. At most, the employer will conclude that an applicant's impairment may render her incapable of working in that particular position. The Court even implies that such a job limitation would be valid even if all employers began to use that same job requirement.¹⁰³ In other words, if the regional airlines or the flight instruction schools fail to hire the Sutton twins because of their eyesight, they *still* might not be substantially limited in a major life activity because if any employer had the sight regulation, it would be a valid restriction.

The introduction of a more muscular statutory inquiry into the ability of an applicant to work at a "broad range of jobs" results from

102. Diller, *supra* note 30, at 25.

103. See *Sutton*, 527 U.S. at 492.

the Court's decision to settle on the third potential gatekeeper to stem the tide of ADA suits: the definition of "major life activity." The Court strongly hinted that this approach could be expanded to preclude working from serving as a "major life activity" under any circumstances.¹⁰⁴ After all, if working is not a major life activity, then anyone with a disability that only affects his job will not be classified as disabled under the statute.¹⁰⁵

Nor was this the Court's first encounter with the "major life activity" prong of the ADA. Most notably, in *Bragdon v. Abbot*,¹⁰⁶ the Court delved into a bizarre inquiry about whether a dental patient, denied in-clinic treatment because of her HIV status, was capable of procreation and transmitting the virus to her children. In construing the public accommodation provisions of the ADA, the Court had to find a corresponding failure to accommodate on the basis of a disability affecting a major life activity. The issue in *Bragdon* had little to do with this inquiry. Rather, the Act would appear to condemn the failure to treat the HIV-positive individual as she desired only if the decision were medically unfounded or based on prejudicial animus. But, in order to trigger statutory inquiry, the Court had to find that the plaintiff was disabled in a major life activity, to wit procreation, even though this had nothing to do with her visit to the dentist.¹⁰⁷ The Court felt compelled to develop this line of inquiry because if no major life activity was limited, a person

104. While the *Sutton* Court assumed for the sake of argument that working is a major life activity, it implied that had the issue been squarely presented, it would have decided that working is not a major life activity. *Id.* In support of its contention, the Court cited a 1986 Transcript of a Supreme Court Oral Argument in which Solicitor General Charles Fried introduced the idea that defining work to be a major life activity in the disability rights area might be circular. *Id.* (citing Transcript of Oral Argument at 15, *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1986) (No. 85-1277) (argument of Solicitor General)). The Court then cited EEOC regulations for the proposition that even the EEOC is reluctant to define "major life activities" to include work. *Id.* (citing 29 C.F.R. pt. 1630 app. § 1630.2(j) (1999)). This evidence fails to support the conclusion reached because the guidelines the Court used are also clear that working *is* a major life activity. 29 C.F.R. pt. 1630 app. § 1630.2(j) (2000) ("If an individual is substantially limited in any *other* major life activity, no determination should be made as to whether the individual is substantially limited in working." (emphasis added)).

105. The difficulty of reading employment out of life's major activities is revealed by comparison to some other forms of activity that have been held to be covered by the accommodations provisions of disability protection laws. *See, e.g., Calloway v. Glassboro Dep't of Police*, 89 F. Supp. 2d 543, 546 (D.N.J. 2000) (holding that being questioned in a police station is covered).

106. 524 U.S. 624 (1998).

107. For an extended look into the *Bragdon* opinion that develops the convoluted nature of its reasoning, see KELMAN, *supra* note 22, at 32-38; Harris, *supra* note 43, at 604-07.

could not be disabled under the statute. Thus, if the plaintiff in *Bragdon* had undergone a tubal ligation, whether or not known to the dentist, the public accommodations provision of the ADA presumably would not have been triggered. Consequently, the Court bizarrely construed the ADA to ensure that a person with HIV is classified as disabled for purposes of a visit to the dentist—something that could not possibly be affected by whether a person is able to procreate. *Bragdon* might well be explained by an underlying concern that the dentist's refusal to provide in-office treatment could be occasioned by animus, prejudice, or unjustified fear. But the doctrinal inquiry that follows is curiously unconnected to the issues involved in a routine visit to the dentist.

Sutton, *Murphy*, and *Kirkingburg* are merely extensions of the Court's reasoning in *Bragdon*. As in *Bragdon*, the Court in the most recent trilogy hunted for an illogical animus that shadowed the case. Unlike *Bragdon*, the Court found that no irrational motive or fear drove the employers in any of the three more recent cases. Instead, employers were responding to a rational weighing of the costs versus the benefits. Indeed, although they were private parties, the employers were in reality sitting as judges for the costs to society as well. Some of the employers' decision not to hire the Suttons, Murphy, or Kirkingburg can be explained as a desire to avoid the increased risk of a potentially disastrous occurrence, like a plane or car crash. Even if the risk is virtually *de minimus*, it is greater than the risk of having a pilot who can see without corrective lenses or a driver who has actually passed DOT regulations.¹⁰⁸ The employer internalizes the costs to society by making a judgment that even the small risk of potentially devastating litigation and tort claims is not worth the benefit of employing these people. Yet the *Sutton* Court, as in *Bragdon*, cannot acknowledge that this fundamental, animus versus redistribution point underlies the outcome. Instead, the Court engaged in some statutory legerdemain in order to fit the square peg of disability-definition into the round hole of cost-benefit analysis.

The Court strained the wording of all three prongs of the statute so much because the definition of disability is the ballgame. Once an employee or potential employee overcomes the initial hurdle of being classified as disabled, the lawsuit moves to an inherently ambiguous and time-consuming search for the specific facts in each case. This almost inevitably results in an inquiry into the employer's claim that the disability could not be reasonably accommodated or that such

108. See Bagenstos, *supra* note 47, at 515.

accommodation would impose equally uncertain “undue burdens.”¹⁰⁹ So, the Court ended up with odd reasoning. For instance, despite the fact that the ADA is an *employment* statute and Americans spend very substantial parts of their lives working, the Court was reluctant even to view work as a major life activity. But if work is not a major life activity, what else is a major life activity?¹¹⁰ We know from *Bragdon* that procreation is a major life activity. But it would be extremely peculiar for Congress to have brought disability status within the rubric of employment discrimination law if working were not intended to satisfy the threshold statutory definition. The Court does not even take the most basic step of holding that working is a major life activity because it is concerned that the doors of the courts will open too wide. On this reading, this risk was not present in defining procreation as a major life activity in *Bragdon* because the ADA will rarely be implicated in procreation; rather, the Act is aimed at employment.

C. *The Reasonable Accommodation Alternative*

The interpretive weaknesses in the ADA trilogy did not escape unnoticed by the dissents. The main dissent in *Sutton*, written by Justice Stevens, pointed out that while “Congress certainly did not intend to require United Air Lines to hire unsafe or unqualified pilots,” the ADA mandates that courts treat individuals such as the Sutton sisters as disabled.¹¹¹ The dissent first noted that the majority’s reliance on the 43 million figure in the Act’s preamble could not

109. Diller, *supra* note 30, at 25.

110. Perhaps we can look to the census form. The long version of the 2000 census asks two questions which might hint at a major life activity as well as a substantial limitation:

16. Does this person have any of the following long-lasting conditions:
 - a. Blindness, deafness, or a severe vision or hearing impairment?
 - b. A condition that substantially limits one of more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying?
17. Because of a physical, mental, or emotional condition lasting 6 months or more, does this person have any difficulty in doing any of the following activities:
 - a. Learning, remembering, or concentrating?
 - b. Dressing, bathing, or getting around inside the home?
 - c. . . . Going outside the home alone to shop or visit a doctor’s office?
 - d. . . . Working at a job or business?

United States Census 2000, Form D-61B (informational copy available at <http://www.census.gov/pub/dmd/www/pdf/d-61b.pdf>) (on file with the North Carolina Law Review). Of course, if we use these definitions, the Suttons, Murphy, and Kirkingburg would probably have established, at the very least, that they were disabled or regarded as disabled with regard to a major life activity, and accordingly would have survived summary judgment.

111. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 495 (1999) (Stevens, J., dissenting).

reasonably be treated as dispositive of Congress's intent.¹¹² It then gave the example of a war veteran who lost his limb yet wears a prosthetic device, and argued that if an employer refuses to hire that individual on the basis of his prosthesis, the "employer has unquestionably discriminated against the individual" even if the injury "in no way affects his ability to do the job."¹¹³ Justice Stevens then read into the second prong of the definition of disability, covering cured ailments, support for the proposition that courts should only inquire whether a present or past impairment "substantially limits, or did so limit, the individual before amelioration."¹¹⁴ In other words, the determination of disability is to be judged without regard to corrective devices, a point with substantial support in the Act's legislative history. Thus, the Act's primary legislative exposition, the Senate Report, clearly announced that the disability determination is to be decided "without regard to the availability of mitigating measures."¹¹⁵

The dissent's next move is the most interesting, however. Justice Stevens argued that even if a person is classified as disabled, she will not prevail in her discrimination claim unless she can show that the employer took action because of the impairment and that the employer is able to provide her with reasonable accommodation.¹¹⁶ Thus, the dissent would open the courts to hear the claim of disability on the merits, without fear of an unstoppable surge of such claims: "Inside that door lies nothing more than basic protection from irrational and unjustified discrimination because of a characteristic

112. *Id.* (Stevens, J., dissenting); see also *supra* text accompanying notes 94-96 (discussing the majority's reliance on this figure).

113. *Id.* at 498 (Stevens, J., dissenting).

114. *Id.* at 499 (Stevens, J., dissenting).

115. *Id.* (Stevens, J., dissenting) (quoting S. REP. NO. 101-116, at 23 (1989)). The Report further states that the goal of the "regarded as" prong of the disability definition was "to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified." *Id.* at 500 (Stevens, J., dissenting) (quoting S. REP. NO. 101-116, at 28 (1989)). The dissent also cited a House report clarifying a part of the Senate's bill: "The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in less-than-substantial limitation." *Id.* (Stevens, J., dissenting) (quoting H.R. REP. NO. 101-485, pt. III, at 28 (1990)). For good measure, Justice Stevens tossed in parallel EEOC regulations as further proof that disability is decided without regard to mitigating measures. *Id.* at 501-03 (Stevens, J., dissenting) (citing 29 C.F.R. pt. 1630 app. § 1630.2(j) (1998)).

116. *Id.* at 503 (Stevens, J., dissenting).

that is beyond a person's control."¹¹⁷ Thus, Justice Stevens wrote that "it seems to me eminently within the purpose and policy of the ADA to require employers who make hiring and firing decisions based on individuals' uncorrected vision to clarify why having, for example, 20/100 uncorrected vision or better is a valid job requirement."¹¹⁸ In other words, the dissent would shift the burden of proof, thereby requiring employers to litigate job requirements to prove that they are necessary to job performance rather than a pretext for discrimination.

Having cast the ADA into the familiar burden-shifting inquiry of Title VII,¹¹⁹ the dissent took the majority to task for its strained reading of the statute.¹²⁰ It chastised the majority for construing the Act in a way "that will obviously deprive many of Congress' intended beneficiaries of the legal protection it affords."¹²¹ In addition, it asked why the Court should not treat the definition of disability to include uncorrected vision in as much as the employer regards the plaintiffs as unqualified because "they cannot see well without glasses."¹²² The dissent concluded by denigrating the Court's reliance on the 43 million figure as the basis for its decision, calling it a "'thin reed upon which to base' a statutory construction."¹²³ Indeed, the dissent noted

117. *Id.* at 504 (Stevens, J., dissenting).

118. *Id.* at 506-07 (Stevens, J., dissenting).

119. *See generally* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (laying out the basic burden-shifting standard under Title VII); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining that once a complaint establishes a prima facie case of racial discrimination, the burden of proof shifts to the employer to justify not hiring the potential employee for a legitimate, nondiscriminatory reason). Some courts, as well as commentators, have noted the difficulty of applying the *McDonnell Douglas* standard to ADA cases. *See* STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 527 (2d ed. 1998) (noting cases). For a more recent application of the burden-shifting standard to ADA cases, see Harris, *supra* note 43, at 586-94.

120. *See Sutton*, 527 U.S. at 495-513 (Stevens, J., dissenting).

121. *Id.* at 511 (Stevens, J., dissenting).

122. *Id.* (Stevens, J., dissenting).

123. *Id.* (Stevens, J., dissenting) (quoting Nat'l Org. for Women v. Scheidler, 510 U.S. 249, 260 (1994)); Lianne C. Knych, Note, *Assessing the Application of McDonnell Douglas to Employment Discrimination Claims Brought Under the Americans With Disabilities Act*, 79 MINN. L. REV. 1515, 1533 (1995) ("[I]t is inaccurate to assume courts should apply Title VII's burden of proof allocations to ADA cases simply because they both deal with employment discrimination."); Kevin W. Williams, Note, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans With Disabilities Act*, 18 BERKELEY J. EMP. & LAB. L. 98, 160 (1997) (arguing that the *McDonnell Douglas* standards is appropriate only in ADA cases in which the employer claims that the employment action was unrelated to the plaintiff's disability).

that the majority's construction of the Act would deny protection to many of the "core group" of 43 million.¹²⁴

Despite the familiar form of a debate over statutory construction, the dispute between the majority and the dissent goes beyond the niceties of statutory interpretation and involves a complicated assessment of policy and judicial administration of the ADA. The real point of separation comes with the issue of what should serve as the gatekeeper for access to the courts under the ADA. Whereas the majority saw no alternative but to halt the inquiry with an elevated plaintiff's burden, the dissent asked, in effect, why the same sort of case-by-case development could not emerge on the employer's burden of reasonable accommodation. The dissent explicitly asserted that an expanded definition of disability will not cause any increase in the filing of "baseless or vexatious lawsuits."¹²⁵ Even if it would, Justice Stevens wrote, the "anxiety" of "requiring employers to answer in litigation for every employment practice that draws distinctions based on physical attributes . . . should be addressed not in this case, but in one that presents an issue regarding employers' affirmative defenses."¹²⁶

The dissent's attempt to craft its own judicially manageable standards turned on the ability to define "reasonable accommodation" in a fashion that would give courts substantive guidance. Oddly, the Court's ability to decide *Kirkingburg* on the basis of reasonable accommodation shows just how difficult the definition of the employer's obligation might be. Recall that the plaintiff in *Kirkingburg* had an uncorrected vision of 20/200 in his left eye, as well as de facto monocular vision, while the DOT expressly required visual acuity to be at least 20/40 in each eye and distant binocular activity to be at least 20/40. The plaintiff unequivocally failed to meet the DOT guideline and was discharged accordingly. The Court was able to fashion a bright-line rule that a deviation from the "[g]overnment's sole substantive visual acuity regulation" is per se evidence that the employer was not under a further duty to reasonably accommodate the employee.¹²⁷

But what of cases lacking the clear signposts of *Kirkingburg*? Absent some unequivocal, governmentally-imposed rule defining job qualifications, courts will have no choice but to delve into the factual

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

125. *Id.* at 511 (Stevens, J., dissenting).

126. *Id.* (Stevens, J., dissenting).

127. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 577-78 (1999).

minutia of each individual case. Indeed, the Court's opinion, unanimous on this point, stated that it "is crucial . . . that Albertson's here was not insisting upon a job qualification merely of its own devising, subject to possible questions about genuine appropriateness and justifiable application to an individual for whom some accommodation may be reasonable."¹²⁸ Instead, the Court could look objectively to the *government's* own job qualification standard, which *by law* was binding on Albertson's.¹²⁹ This pre-existing bright-line standard allowed the Court unanimously to reach the "reasonable accommodation" question as each Justice knew that courts could resolve such cases with ease.¹³⁰

By contrast to *Kirkingburg*, the Court could not resolve the same issue of DOT certification in *Murphy* because a factual question remained about whether the petitioner actually met the certification requirements.¹³¹ The lesson from *Kirkingburg* is that unless the record is unequivocal about both the nature of the employer's obligation and the facts giving rise to that obligation, concerns over judicial administrability of the ensuing claims will force the analysis into the definition of "disability" itself rather than the "reasonable accommodation" standard. One way to read the majority in the ADA trilogy is that the Court will only permit limited forays into the definition of "reasonable accommodation" when both the facts and the law are so clear that the case is in principle susceptible to summary judgment review.

Conversely, allowing cases to proceed to the reasonable accommodation inquiry pushes inexorably toward the fact-intensive case-by-case analysis. Theoretically, the Court could take an approach that looked at average productivity levels within a given workforce and compared how much the hiring of the disabled worker

128. *Id.* at 570.

129. *Id.* (citing 49 C.F.R. § 391.11 (1998)).

130. *See id.*

131. *See* *Murphy v. United Parcel Service*, 527 U.S. 516, 522 (1999). One might ask why the court did not apply the same reasoning to *Murphy*, as the plaintiff in *Murphy* was also violating a DOT regulation made binding upon the employer. The simple, pragmatic answer is that the Court did not grant certiorari on the reasonable accommodation question; rather, it took the case to resolve the definition of disability itself. Indeed, the Court in *Murphy* hinted that had the issue been directly raised, the Court might have decided the case on the *Kirkingburg* standard, where failure to comply with a neutral government regulation gives an employer a *per se* affirmative defense against the reasonable accommodation claim. *See id.* at 522-23 (concluding that the Court need not resolve the issues neither addressed by the lower court nor raised in the petition for certiorari, such as whether the employer had a defense based on DOT regulations).

would affect that productivity.¹³² It could even devise a rule similar to the one in *Hazelwood School District v. United States*,¹³³ such that a plaintiff can come close to proving per se discrimination by showing that the productivity loss would be less than two or three times the standard deviation from the employer's mean output per employee.¹³⁴

The difficulty in drawing analogies to prior uses of statistical presumptions in discrimination cases is precisely the problem identified at the beginning of this Article. Unlike the normal operation of anti-discrimination laws, the ADA does not begin with the presumption that but for some forbidden discrimination, there would be no disparity in the treatment of statutorily protected groups. In addressing other discrimination cases, the Court was able to fashion a presumption of discrimination based on statistical evidence in *Hazelwood* and other Title VII cases¹³⁵ because the type of discrimination at issue in those cases was amenable to proof that presumptively equivalent groups were treated disparately. The Court could compare the percentage of black teachers hired with the percentage of qualified black teachers in the area because "it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."¹³⁶ This "but for" discrimination rationale simply does not translate to the ADA cases. The ADA does not readily lend itself to a simple statistical model that assumes that but for prohibited considerations, there should be a strong presumption of statistical convergence between the treatment of

132. The legislative history of the ADA disfavors one version of this approach. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), for example, the Court interpreted the reasonable accommodation standard of Title VII's protection of religious groups to preclude liability if the cost of accommodation was more than trivial. *Id.* at 84. Congress expressly disavowed this case law precedent. See Karlan & Rutherglen, *supra* note 21, at 5-14.

133. 433 U.S. 299 (1977).

134. *Id.* at 308-09 n.14 (citing *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977)). In *Hazelwood*, the Court allowed a class of plaintiffs to introduce statistical evidence showing that the school district had hired black teachers at a percentage substantially lower than the number of qualified teachers in the area. The facts revealed that 1.8% of the teachers were black, compared to 5.7% qualified black teachers in the area. Because the actual number of black teachers and the expected number of black teachers varied by more than "two or three standard deviations," the Court allowed the plaintiffs to use this evidence as "prima facie proof of a pattern or practice of discrimination." 433 U.S. at 307-08 & n.14.

135. See *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Castaneda*, 430 U.S. at 482.

136. See *Hazelwood*, 433 U.S. at 307 (quoting *Int'l Bd. of Teamsters*, 431 U.S. at 340 n.20).

different groups. Because the ADA's reasonable accommodation standard assumes differently situated employees by virtue of a statutorily encompassed disability, there is no reason to expect any convergence in productivity and, in fact, every reason to presume the contrary.

Furthermore, the Court has cautioned on numerous occasions that the ADA mandates that each claim be treated on a case-by-case basis.¹³⁷ This emphasis in turn requires an individualized inquiry into the abilities of a particular employer and the actual demands of a specific job. The Court had an easier time using statistical evidence in cases like *Hazelwood* and *International Brotherhood of Teamsters*¹³⁸ because the claims at issue involved class-wide litigation, instead of individual claims.¹³⁹ Indeed, the Court in *Hazelwood* cautioned against using statistical evidence in the type of cases always at issue in the ADA: "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."¹⁴⁰

Certainly, the task of judicial interpretation commonly requires the filling out of vague textual terms. But in almost every other case, the Court is either interpreting the Constitution or is receiving at least some modicum of guidance from Congress. The Constitution is by definition open-textured, and certainly the Court has the right, if not the duty, to fill in these terms as a constitutional common law or as a sub-constitutional regulatory regime.¹⁴¹ While the Court must interpret congressional intent regularly, it at least receives guidance from the text, the legislative history, or an agency. As we shall develop in the last section of this Article, what is striking about the

137. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484 (1999).

138. *Int'l Bd. of Teamsters*, 431 U.S. at 337-40.

139. See *Hazelwood*, 433 U.S. at 308.

140. *Id.* at 308 n.13.

141. See, e.g., Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 *passim* (1975) (arguing that constitutional interpretation relies upon "constitutional common law"); Melissa Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603 *passim* (2000) (arguing that the *Shaw v. Reno* line of cases is best understood as the Court imposing a sub-constitutional regulatory regime in order to achieve the goals of the Fourteenth Amendment).

This view is far from unanimous. Its most famous critic, Justice Scalia, has commented that the idea "that this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful 'prophylactic' restrictions upon Congress and the States" would give rise to "an immense and frightening antidemocratic power . . . [which] does not exist." *Dickerson v. United States*, 120 S. Ct. 2326, 2337 (2000) (Scalia, J., dissenting).

ADA is the extent to which the Act leaves courts in the role of legislating so extensively in Congress's stead.

Moreover, the reasonable accommodation test forces the courts into the uncomfortable role of weighing public safety into the balance. After all, the perils of having a pilot unable to see because a contact lens pops out during landing or a hypertensive mechanic who crashes his truck on the way to a repair take the added expense of "reasonable accommodation" outside of the normal employment productivity calculus. All the more so in a case such as *Kirkingburg* in which federal regulatory authorities have already mandated certain vision requirements for the position in question. But even when federal regulations do not cover the exact issue, how should courts answer the question whether United Air Lines should have to place another co-pilot in each cockpit for every pilot whose vision is worse than 20/100? If not, is it worth the added risk, even if it is extremely slight, that the pilot will be marginally disabled during the flight and thus dramatically increase the chances of a catastrophic accident?¹⁴² If a pilot is hypertensive, should United be forced to place a doctor in the cockpit in order to give life-sustaining CPR in the case of a heart attack? All of these examples might seem ludicrous: Of course the employer should not have to hire an extra pilot, or place a doctor in each cockpit. The problem is, however, that even these absurd claims must have their day in court to test whether the employer's failure to accommodate was "reasonable" or whether it imposed "an undue burden," if the ADA is read to include the Suttons or Murphy within the definition of disabled.

III. COURTS IN THE REGULATORY ABYSS

We now turn our attention to the features of the ADA that differentiate it from other employment discrimination statutes, such as Title VII. Our focus is primarily on the cost burdens of the ADA and, in particular, on the lack of risk-spreading among similarly situated employers that is a distinct feature of the statutory reasonable accommodation standard. Under the employment provisions of the ADA, the issue of who bears the burden of paying

142. Lest this scenario seem too far-fetched, at least one crash in recent history has been blamed on a faulty contact lens worn by the pilot, and at least one other crash was nearly averted after a pilot's contact lens popped out of his eye during the landing approach. See Matthew L. Wald, *The Crash of Egyptair 990: The Case Histories*, N.Y. TIMES, Nov. 6, 1999, at A12 (documenting a 1996 crash that occurred because a pilot was wearing the wrong type of contact lens).

for necessary accommodation is primarily decided by the rather arbitrary procedure of which person happens to apply for employment to a particular employer or which employee contracts a sudden illness or suffers a tragic accident. This Part first examines proposals that attempt to overcome this lack of risk distribution and explains why these ideas ultimately do not work in the context of the ADA. The problem of risk distribution is compounded by the fact that Congress has not funded the costs imposed by the ADA, which in effect taxes some employers *sub silentio* while leaving other employers in the same market less affected by the regulatory regime. We then suggest other places to look, particularly the German equivalent of the ADA, for ways to spread the costs more evenly across employers.

We attempt to show that significant drawbacks to the employment provisions of the ADA exist beyond the apparent lack of fit between its invocation of the anti-discrimination norm and its redistributive core. By focusing on the cost feature of the statute, we raise the additional concern about the statutory mechanism by which a class of affected employers can bear the costs equitably, as opposed to one particular employer shouldering society's burden and thereby placing it at a relative disadvantage to all other employers.

A. A Social Insurance Model of Accommodation

At this point, the reader experienced in the ways of incomplete regulation may rightly wonder whether the ADA is really so clearly deficient. It may well be that the ADA fits poorly in the framework of employment discrimination law, but does that truly set it apart from the less than perfect world of regulation? Is the ADA that different from the less than clear commands of the Clean Air Act¹⁴³ or the Endangered Species Act¹⁴⁴ or the judicially-crafted rule of reason in antitrust law?¹⁴⁵ Nor can it be that unusual that a well-intentioned statute not bear a full accounting of its potential costs. Certainly a large number of statutes, from the Black Lung Act¹⁴⁶ to the

143. 42 U.S.C. §§ 7401–7671 (1994).

144. 16 U.S.C. §§ 1531–1544 (1994).

145. The “rule of reason” doctrine states that the Sherman Act does not prohibit all restraints on trade but only those that are “unreasonable.” See *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179 (1911).

146. 30 U.S.C. §§ 901–945 (1994).

Environmental Policy Act,¹⁴⁷ fail to account for the full range of costs imposed under their commands.¹⁴⁸

Indeed, some authors, notably Professors Karlan and Rutherglen, have even compared the case-by-case process of forming the law of reasonable accommodation under the ADA to the incremental process of creating the law of negligence under tort law.¹⁴⁹ Karlan and Rutherglen acknowledge the similarity of Title VII and the ADA, even noting that “[t]he central prohibitions of the ADA are all taken, directly or indirectly, from Title VII,”¹⁵⁰ with the notable exception of the problematic reasonable accommodation standard. They have observed that the ADA creates a dilemma by mandating that an employer have the burden of proof whenever the plaintiff makes a prima facie showing that she is disabled and that reasonable accommodation is possible.¹⁵¹ Once an employee passes this initial hurdle, summary judgment becomes exceedingly difficult for the employer. Given the case-by-case analysis that Congress mandates¹⁵² and the difficulty of a party with the ultimate burden of proof at trial establishing the absence of a disputed “genuine issue of material fact,”¹⁵³ there is the risk that the prima facie case alone could

147. 42 U.S.C. §§ 4321–4375 (1994 & Supp. IV 1998).

148. *See, e.g.*, Black Lung Benefits Act, 30 U.S.C. §§ 901–945 (1994). The Black Lung Act sets up a scheme whereby the states, the federal government, and private employers bear some responsibility for payment. Indeed, the Act specifically contemplates that each operator of a coal mine shall secure the payment of benefits.” 30 U.S.C. § 933(a). Although the amount is proscribed by law, the full range of costs is unknown because the total number of beneficiaries is also unknown. *Cf.* 42 U.S.C. § 4332 (1994) (requiring environmental impact statements before implementation of federal action, even if they create significant delays or additional costs).

149. *See* Karlan & Rutherglen, *supra* note 21, at 31–32.

150. *Id.* at 5.

151. *See id.* at 12–13.

152. *See id.* at 12–13 & n.49.

153. FED. R. CIV. P. 56. The ability to shift the intermediate burden of production at summary judgment is present only when the party seeking summary judgment does not bear the ultimate proof at trial on that issue. Once the employer is charged with disproving the possibility of reasonable accommodation, the employer becomes the party with the ultimate burden of proof on that issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323–27 (1986) (establishing intermediate burden shifting at summary judgment); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 73–82 (1990) (setting forth the availability of summary judgment after *Celotex* only for the party without the ultimate burden of proof on that issue). There is some evidence that employers prevail a surprising amount of the time, despite the allocation of burdens under the ADA. For example, one study by Professor Colker reports defendants winning an astonishing ninety-three percent of ADA cases. *See* Ruth Colker, *The Americans With Disabilities Act: A Windfall For Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999). This unbelievably high win rate would be completely at odds with the continued filing of cases by lawyers seeking to be compensated only if they

force a defendant to trial, no matter how unreasonable the claim for accommodation might appear.

Nevertheless, Karlan and Rutherglen propose a normative justification by casting the ADA into the model of an implicit insurance arrangement.¹⁵⁴ To do so, they posit a world of individuals in an original position in which their particular attributes could not be known at the time the social policy had to be created. By asking what the world would look like behind such a Rawlsian veil of ignorance, Karlan and Rutherglen can posit that because people would have no way of knowing whether they would become disabled, everyone would want some form of accommodation for the possibility of having a disability.¹⁵⁵ Consequently, they argue, the ADA could properly be seen as a form of workplace insurance against the common risk that anyone *could have been* the individual suffering a disabling misfortune.¹⁵⁶

prevail. Indeed, such a win rate over virtually the entire history of the ADA should have dissuaded the filing of any ADA claims, something that clearly has not happened. These data are culled from Professor Colker's review of reported and unreported cases at the district and appellate level from 1992-1998 that are available on Westlaw. *Id.* at 103. As she readily acknowledges, there are difficult methodological issues in extrapolating to the complete domain of litigation that occurs in the small subset of cases prompting judicial opinions that are in turn available through electronic services. *Id.* at 104. Although the article argues, correctly, that reported decisions serve as the benchmark from which parties may subsequently bargain in the shadow of the law, the data set is nonetheless too sparse to sustain the claim that the entire class of ADA plaintiffs has not fared well through litigation under the Act. Thus, the study reports only 615 cases during the entire six-year period—a figure that is not remotely comprehensive for the entire six years. Even assuming the study to be representative—as opposed to comprehensive—Colker reports that less than 40% of these 615 cases were resolved through summary judgment, an astonishingly low figure given the prevalence of employers' judgments. More critically, the data set does not account for cases that settled favorably following a denial of summary judgment, an event that is generally unlikely to produce a written opinion but that would dramatically alter the bargaining dynamic heavily in the plaintiff's favor. *See* Issacharoff & Loewenstein, *supra* at 102-03 (providing a model of why the denial of summary judgment improves the bargaining position of the surviving plaintiff). In light of the ADA's insistence that cases are to be decided on an individualized basis, there is reason to speculate that courts may routinely deny summary judgment in ADA cases without opinions. Moreover, the part of the win rate for defendants may be the result of plaintiffs' attorneys, whose experience is likely to be drawn from other fields of civil rights, having difficulty with the more open-textured quality of ADA claims. *See* Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 574-78 (2000) (providing qualitative assessments of the types of errors leading to plaintiffs' losses in reported ADA decisions).

154. *See* Karlan & Rutherglen, *supra* note 21, at 26-28.

155. *See id.*

156. *See id.*

While the Karlan and Rutherglen insurance model presents a useful starting point for analysis, ultimately it does not completely capture the true nature of the employer's liability under the ADA. Under a veil of ignorance, not only is it impossible to know whether one will actually be disabled, it is also impossible to guess whether any particular person will bear the primary burden of paying for this insurance. In other words, their model answers only half of the question. An insurance scheme not only must avoid the adverse selection problem, it also must have the capacity to smooth the risk pool over the entire class. While Karlan and Rutherglen neatly capture the first part, they barely address the lack of risk-spreading in the ADA. In any insurance program, the insurer must be able to spread its risk across a sufficient number of people to reduce the potential that chance alone will cause costs and liabilities to soar dramatically.¹⁵⁷

It is the lack of risk-spreading that distinguishes the ADA from a true insurance pooling arrangement. The ADA's accommodation standards are triggered first by the fact that a potential employee selected one employer rather than another to apply to for a job. Thus, any individual employer may be subject to costs of unknown dimensions¹⁵⁸ while her competitors are not. In turn, the extent of the

157. Karlan and Rutherglen anticipate this point, but they do not develop it adequately. They suggest that perhaps the government should take a more prominent role in granting reasonable accommodations because it has the ability to spread costs more widely. *See id.* at 28–29. They leave unanswered the question of whether the current ADA adequately addresses the risk-spreading problem.

158. It is frequently stated that the costs of accommodations are trivially low in the ADA employment context. *See, e.g.,* MARK KELMAN, STRATEGY OR PRINCIPLE? THE CHOICE BETWEEN REGULATION AND TAXATION 51 n.14 (2000). The source cited for this proposition is invariably data contained in *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1619–20 (1996). Were the potential financial scope of such ADA accommodations truly so limited, one might wonder what all the shouting is about. Further examination, however, reveals that these data actually establish very little. The source for the data contained in the *Harvard Law Review* Development is a report to Congress on the Job Accommodation Network (JAN), which supplies information regarding specific accommodations to callers requesting help in complying with the ADA. *See generally* Job Accommodation Network, JAN Publications and Other Guidances, at <http://jan.wvu.edu/english/pubs/index.htm> (last modified May 8, 2000) (on file with the North Carolina Law Review) (listing available publications and providing state-by-state reports of calls). JAN then gathers data about the cost of accommodation by sending questionnaires to those who call and relying on them to return the questionnaires with information regarding whether or not they in fact made the suggested accommodation, and if they did, how much it cost. It is questionable whether the results of such a process could estimate the actual cost of accommodation. By relying on the caller to return the questionnaire, the report's statistics exclude those employers who did not wish to alert a government agency of its failure to make an accommodation, perhaps because the accommodation was too costly. Furthermore, the sample does not include

accommodation standard is defined not by a uniform obligation across all employers, but by the ability of any employer to pay, regardless of fault or ensuing competitive disadvantage.¹⁵⁹ By contrast, a true insurance model would tax employers either on a standard scale, or perhaps on some experience-rated scale, and then pay off the ensuing costs out of the insurance pool. The key to a genuine insurance view of employer costs is that costs either become an across-the-board feature of doing business for all employers (as with the minimum wage) or they provide some other mechanism to pool risk (as with unemployment insurance).¹⁶⁰

Another member of the emerging Virginia school of statutory remediation,¹⁶¹ Professor Verkerke, tries to fill in the gap left by Karlan and Rutherglen.¹⁶² Professor Verkerke argues that the ADA could properly be viewed as equitably spreading risk if, instead of imposing costs on all employers, it directed disabled employees to those employers who were best able to accommodate them in a cost-effective fashion.¹⁶³ This approach to the ADA might not fully resolve the inter-employer equity problem, but it would claim great social utility because it would efficiently allocate the societal costs of

those employers who choose not to call in the first place because, while they do not know exactly how to make an accommodation, they know or suspect the cost would be high. It seems reasonable to infer that a large number of employers who call such a service already feel the accommodation would be cost-beneficial and are simply seeking information on how to best follow through. Thus, these self-selected data cannot bear the evidentiary burden placed on them.

159. This point is insightfully addressed by Professor Kelman, who questions whether this feature of the ADA may come closest to an unconstitutional exaction or taking:

[D]oes the statement in the ADA that every public accommodation owner owes disabled customers reasonable accommodation state an implicit tax liability that is general enough, or does the fact that the dollar amount of the liability will turn on particular facts about the owner's business and the nature of the required accommodation make such a regulatory tax suspect?

KELMAN, *supra* note 158, at 68.

160. See Issacharoff & Rosenblum, *supra* note 35, at 2216 ("The premise of unemployment insurance is that employees should be protected against the vagaries of market cycles, but that employers should be able to pool risk so as not to suffer the compound effects of a market slowdown and increased exposure to claims of laid off workers.").

161. We note that, at the time of publication, Professors Karlan, Rutherglen, and Verkerke were all members of the Virginia School of Law faculty. We believe that it is a tribute to that school's scholarly tradition that three of its faculty should be grappling with the difficult issues of justifying the costs of the ADA.

162. See J. HOULT VERKERKE, AN ECONOMIC DEFENSE OF DISABILITY DISCRIMINATION LAW *passim* (Univ. of Va. Sch. of Law Legal Studies Working Paper Series, Working Paper No. 99-14), available at http://papers.ssrn.com/paper.taf?abstract_id=170014 (on file with the North Carolina Law Review).

163. See *id.* at 26.

accommodation. If Professor Verkerke is right, there would be a strong normative justification for the regulatory processes of the ADA as achieving a maximum of accommodation by the cheapest cost providers of that accommodation. Unfortunately, this argument also has a fundamental shortcoming: Nothing in the ADA, its case law, or its regulations explains how the ADA will provide for the most effective accommodation.

The ADA specifies that once an employee qualifies as disabled, the employer has the duty to accommodate unless such accommodation proves unduly burdensome.¹⁶⁴ That inquiry, in turn, is not a comparative one that would allow proof that another employer exists that could provide accommodation at a lesser price, at least not under the current positive case law of the ADA. Under the reasoning of the Court in *Sutton*, for example, an employee would not even be classified as disabled in the first instance if she could transition into any other job within a broad category of employment.¹⁶⁵ But even if we carve out the recent ADA trilogy, it is still not clear what the mechanism is that avoids a liability determination until the least costly accommodator is found. Not only does Professor Verkerke admit that there is no tie-in to the case law at present,¹⁶⁶ but it is also unclear what legal standards he would like to see emerge. Certainly no other area of employment discrimination law has evolved a defense to discrimination on the basis of a rival firm being a cheaper alternative for an unwanted employee.

Professor Verkerke's argument also might create perverse incentives for employers to fight all forms of accommodation for their current employees. Under current law, many cases that make it past the first hurdle of proving a disability and the potential for reasonable accommodation settle because of the uncertain nature of both recovery for monetary damages and injunctive relief.¹⁶⁷ Consequently, many employees and employers accept a compromise when the employer makes some form of minimal accommodation in exchange for the employee returning to the job and dropping the lawsuit.¹⁶⁸ Professor Verkerke's plan would discourage even this minimal amount of accommodation because once an employer made some type of accommodation, that employer would become a magnet for other disabled employees. Under a comparative accommodation

164. See 42 U.S.C. § 12112(b)(5)(A) (1994).

165. See *Sutton v. United Air Lines*, 527 U.S. 471, 491 (1999).

166. See VERKERKE, *supra* note 162, at 26.

167. See Karlan & Rutherglen, *supra* note 21, at 19–20.

168. See *id.*

approach, even a marginal difference in accommodation would permit other employers to use the first employer as evidence that someone else could better accommodate the disabled employee. Thus, more disabled employees would “match”¹⁶⁹ with employers who already accommodated either through settlement or coercion, or simply because the employer thought it was the right thing to do. Employers might shy away from making any affirmative or voluntary steps toward accommodation if they thought that it would require them to employ a heavier concentration of disabled workers with attendant higher costs. Indeed, the workplaces that would best match disabled workers might be those workplaces that happened through chance to accommodate first, thus not resolving the fundamental point about the ADA’s lack of risk pooling.¹⁷⁰

B. The Costs of Redistribution

This uneven distribution of risk, without any subsidy from Congress, sets the ADA apart from other statutes. The difference is not simply the imperfection of a regulatory structure, nor is it the fact that the legislature has not internalized the costs. Rather, it is that the Act has both these facets while at the same time imposing costs that are not smoothly distributed across the market and across all employers. There are those who argue that all legislation must internalize the full costs of compliance, precisely to avoid the potential for legislative irresponsibility that arises whenever “unfunded mandates” permit avoiding the hard questions of allocating scarce social resources.¹⁷¹ While the unfunded mandates

169. See VERKERKE, *supra* note 162, at 26.

170. This argument has more force when comparing employers within a given class of jobs, rather than between classes of jobs. Even between classes of jobs, Verkerke’s plan would in effect relegate a group of disabled workers who otherwise might have been able to work at a higher-paying or higher-prestige job to a job that is lower on society’s rungs.

171. As articulated by Justice Scalia:

The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved “off-budget,” with relative invisibility and thus relative immunity from normal democratic processes Subsidies for these groups may well be a good idea, but because of the operation of the Takings Clause our governmental system has required them to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident.

Pennell v. City of San Jose, 485 U.S. 1, 22–23 (1988) (Scalia, J., concurring in part and dissenting in part) (citations omitted). For an economic argument that tax and spend provisions transfer wealth more efficiently than regulations, see Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 *passim* (1994).

charge is troubling, we do not in any sense want to argue that Congress may never impose costs that are not fully supported by a tax and transfer mechanism. Indeed, sound normative and legal reasons, including federalism and economic efficiency, support a policy of not mandating that Congress fully fund all programs it authorizes.¹⁷² There are innumerable contexts in which the significant administrative costs of governmental programs would make a direct tax and transfer program unnecessarily expensive.¹⁷³ For example, it would be extremely difficult and expensive for an administrative body to determine the true cost of compliance with health and safety protections across a diverse set of workplaces. It would also be tremendously burdensome (if not outright impossible) for such a regulatory body to acquire accurate information about the hazards in any particular workplace. Forcing the state to pay for all protective health and safety measures would not only burden such employee protection programs, but would invite fraud and waste by employers who have no incentive to weigh the true costs and benefits of any particular remedial effort.¹⁷⁴

On the other hand, the fact that perfectly valid reasons may exist for not requiring all federal legislation to be financed by tax-and-transfer schemes does not end the inquiry. The issue of the inter-employer distribution of costs under the ADA harkens back to the debates at the founding of the modern regulatory state concerning the proper distribution of the cost of providing social benefits. Indeed, it is useful to revisit the debate prompted by Justice Sutherland in his opinions holding the minimum wage to be unconstitutional and later

172. For a critique of the federalism issues involved in unfunded regulations, see Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1143 (1997) (challenging the “assumption that unfunded federal mandates are presumptively ‘bad’ rather than legitimate policy choices”); David A. Dana, *The Case for Unfunded Environmental Mandates*, 69 S. CAL. L. REV. 1, 36 (1995) (arguing that unfunded mandates are the most efficient means to achieve some federal objectives); Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulations*, 93 NW. U. L. REV. 351, 382 (1999) (arguing that unfunded mandates can produce long-term efficiency gains over funded mandates).

173. See, e.g., Jeffrey N. Gordon, *Employees, Pensions, and the New Economic Order*, 97 COLUM. L. REV. 1519, 1523 (1997) (noting that, in the context of pension plans, “a general tax and transfer program, may be expensive . . . and inefficient”); Anthony J. Vlatas, *An Economic Analysis of Implied Warranties of Fitness in Commercial Leases*, 94 COLUM. L. REV. 658, 686 n.148 (1994) (noting that, in the area of welfare law, “the cost to administer a tax and transfer system . . . may make such a system inefficient from a wealth-maximization perspective”).

174. The problems with imposing a uniform model of full governmental subsidy for all regulatory costs are addressed in KELMAN, *supra* note 158, at 76–78 (discussing perverse disincentives for firms to address problems more efficiently).

in his dissents from the early cases upholding the New Deal.¹⁷⁵ Justice Sutherland argued that the imposition of a minimum wage was invalid in part because of the arbitrary imposition of duties on parties unable to shoulder the cost. Sutherland wrote that the minimum wage “amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.”¹⁷⁶ Sutherland asked what would happen if a family who relied on the grocer or the baker as their regular source of provisions lost its ability to support itself. Would the grocer have a duty to provide groceries for a reduced sum, or even for free? If so, for how long and to how many people?¹⁷⁷ To Justice Sutherland, the minimum wage was unconstitutional precisely because the statute required in effect that the grocer offer goods at a free or reduced price.

The rejoinder to Justice Sutherland focused on the actual burden on an employer occasioned by the minimum wage.¹⁷⁸ Contrary to the assertion that the minimum wage was a random and non-dischargeable obligation that struck an employer as unpredictably as the fate of the greengrocer having to provide for a family suddenly

175. See *West Coast Hotel v. Parrish*, 300 U.S. 379, 400–13 (1937) (Sutherland, J., dissenting); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 561 (1923), *overruled by West Coast Hotel*, 300 U.S. at 400.

176. *West Coast Hotel*, 300 U.S. at 409 (1937) (Sutherland, J., dissenting).

177. See *id.* at 410–11 (Sutherland, J., dissenting). Sutherland wrote that:

“Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.”

Id. (Sutherland, J., dissenting) (quoting *Adkins*, 261 U.S. at 559).

178. See *id.* at 396–97 (Holmes, J., dissenting) (arguing that the actual burden on the employer is low because those who will be paid the minimum wage “will not be employed at even the lowest wages allowed unless they earn them, or unless the employer’s business can sustain the burden” (quoting *Adkins*, 261 U.S. at 570)).

facing unemployment, the key feature of the minimum wage was not only that its attendant costs could be passed through to any particular employer's customers, but that it had the same effect across the class of all employers. The higher cost of labor imposed by the minimum wage became the cost of doing business and it was imposed on *all employers* such that none would be at a relative disadvantage. By contrast, any *one* particular grocer would be at a competitive disadvantage if he had to cover the subsidy to the unemployed family, as his rivals would not have to raise their prices unless they were also subsidizing the unemployed.¹⁷⁹ Indeed, Chief Justice Taft, writing for the dissent in *Adkins* and who would later be vindicated when the Supreme Court upheld the minimum wage in *West Coast Hotels v. Parrish*,¹⁸⁰ cited the fact that the minimum wage covered all employers as a reason for sustaining its validity.¹⁸¹

So, where does the ADA fit in? Is it more like the minimum wage in its ability to spread costs over all employers, as well as in its ability to force the employer to pass on the higher wages in the market prices for all goods and services? Or is it more like the arbitrary imposition of a duty upon Sutherland's grocer, one that very well may put the unfortunate cost bearers out of business?¹⁸² Although the Karlan and Rutherglen model assumes the former, the evidence is not convincing. The nature of the ADA—requiring individualized determinations of each disability—strongly implies that in many instances, the employer is like the lone grocer. The higher cost is not spread to all employers, but rather to the ones who unluckily employ a person who later becomes incapacitated or who hire a disabled person in the first instance.¹⁸³ The odd quality of the

179. A grocer might rationally decide to offer reduced prices to long-standing customers or to anyone in the hope that he will reap long-term rewards in the form of community goodwill and loyalty. This rationale is, of course, different than a mandated individual subsidy because the grocer himself is making a rational economic decision balancing the short-term loss with the possibility of a long-term gain.

180. 300 U.S. 379, 400 (1937).

181. See *Adkins*, 261 U.S. at 566 (Taft, C.J., dissenting) ("The cases covered restrictions in wide and varying fields of employment and in the later cases it will be found that the objection to the particular law was based, not on the ground that it had general application, but because it left out some employments.").

182. Justice Sutherland noted in *Adkins* that:

It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss.

Id. at 557.

183. Cf. *Browne v. CNN Am., Inc.*, No. 98 Civ. 1768 (JSM), 1999 U.S. Dist. LEXIS

ADA is that risk is not pooled through the broad market, but through the random act of a prospective employee applying for a job, a feature that is only somewhat offset by the requirement that the employer have at least fifteen employees to fall under the statute's mandates.¹⁸⁴ By itself, however, that lone number is not a fully satisfactory definition of an ability to avoid adverse selection or arbitrary bad luck. A workplace with fifteen employees does not command a sufficient market presence to pass off the cost to consumers or have a presumptive surplus from other employees.

Moreover, the ADA is fundamentally different from other statutes such as the Sherman Act,¹⁸⁵ the Clean Air Act,¹⁸⁶ and the Endangered Species Act.¹⁸⁷ In almost all other statutes in which Congress uses vague terms, it does so within the overall aim of the statute itself. For example, courts know that poorly defined words in environmental regulation statutes still fit under the general goal of improving the environment, even if their cost-benefit contours are hazy. Indeed, in almost all of these statutes, Congress and the implementing agencies have expressly acknowledged the wealth-redistributive aspect of the statute. The fundamental distinction between these statutes and the ADA is that the latter forces the inquiry within the poorly-fitted context of a "but for" discrimination model. With regard to the Sherman Act, for example, courts are able to confer a meaning on a broad and vaguely-worded statute because both the courts and Congress have recognized the long common-law tradition of judicial involvement in this area.¹⁸⁸ If Congress does not like a decision, it can enact a statute overturning the ruling; both Congress and the courts work under a shared understanding of the basic meaning of the terms, even if they might disagree on the result

17699, at *20-21 (S.D.N.Y. Nov. 16, 1999) (refusing to punish an employer for taking the risk of hiring a disabled employee in the first instance), *aff'd* by No. 99-9494, 2000 U.S. App. LEXIS 25480, at *4-6 (2d Cir. Oct. 6, 2000).

184. See 42 U.S.C. § 12111(5)(A) (1994).

185. 15 U.S.C.A. §§ 1-7 (West 1997 & Supp. 2000) (outlawing contracts or conspiracies in restraint of trade but allowing courts to graft common-law traditions onto the statutes, thus limiting the phrase "every contract").

186. 42 U.S.C.A. §§ 7401-7701 (West 1997 & Supp. 2000) (defining in detail such items as air quality criteria, § 7408, hazardous air pollutants, § 7412, and maximum allowable increases in pollutants, § 7473).

187. 16 U.S.C. §§ 1531-1544 (1994) (setting out the policy and defining specifically how and when to determine the existence of an endangered or threatened species).

188. See, e.g., *Apex Hosiery v. Leader*, 310 U.S. 469, 499 (1940) ("[T]he restraint of trade contemplated by section 1 of the [Sherman] Act took its origin from the common law, and . . . the Sherman Act was adapted to the prevention, in modern conditions, of conduct or dealing effecting the wrong, at which the common law doctrine was aimed.") (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 54, 55, 58 (1911)).

in any given case. When Congress disagrees with the Court's interpretation of the Sherman Act under say, a rule of reason standard, Congress knows exactly how to overrule the Court's decision.

Yet the resolution is not so clear cut in the ADA cases. Fundamentally, the ADA is distinct from statutes like the Sherman Act because the ADA runs counter to the common law, rather than supplementing it. The history of the courts' involvement in antitrust law lends itself relatively well to judicially-crafted rules.¹⁸⁹ By contrast, courts have traditionally been extremely wary of crafting rulings when it receives so little guidance from Congress in areas that have a profound effect on private market ordering and wealth redistribution. The courts' common-law experience with discrimination statutes is centrally within the realm of "but for" discrimination. Courts have the competence to decide whether the government or a private actor is discriminating against a person based solely upon that person's skin color or sex. Courts tread on more precarious turf when the "but for" discrimination aspect becomes secondary to the unstated wealth redistribution goal of the statute.

Even the analogy to tort law development is fundamentally distinct from the ADA. In tort cases, courts are able to balance the risks versus the benefits¹⁹⁰ and do so classically, even within the employment relationship. As Karlan and Rutherglen point out, "[n]egligence law places the loss on the party, either plaintiff or defendant, who could have reduced the risk that caused the harm to the plaintiff at the least cost."¹⁹¹ The ADA, by contrast, does not rely on efficiency per se; rather, it looks to equalize the workforce without giving substantive guidance or effect to the meaning of terms like "reasonable accommodation" and "undue hardship."¹⁹²

189. See, e.g., *supra* note 145 (describing the judicially crafted "rule of reason").

190. See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169, 173-74 (2d Cir. 1947) (Hand, J.). See generally RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 147-51 (3d ed. 1986) (explaining the Hand formula and its application to certain cases).

191. Karlan & Rutherglen, *supra* note 21, at 32.

192. See *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995) (Posner, J.); David Harger, *Drawing the Line Between Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act: Reducing the Effects of Ambiguity on Small Businesses*, 41 KAN. L. REV. 783, 783-84 (1993) (recognizing the ambiguity of the statutory definitions of "reasonable accommodation" and "undue hardship" and proposing more specific definitions of those terms); Lavelle, *supra* note 52, at 1138 ("Although Congress provided definitions of 'reasonable accommodation' and 'undue hardship,' those definitions are broad and require further interpretation. The potentially broad implications of the employer's duty under the ADA worry small businesses, and the uncertain meaning of the terms provoked some to call this Act a

The problem with the ADA is a combination of factors yielding a series of concerns, the first two of which are most apparent, while the third is potentially the most problematic. First, the statute poorly confronts its core concern with accommodation by invoking time-tested anti-discrimination norms. Second, the statute does not confront the costs that must be borne to meet the redistribution it impliedly envisions. These two concerns yield some failure of political accountability for the trade-off in using societal resources for access as opposed to other goals. While troubling, these concerns are present in large areas of the regulatory landscape and do not set apart the ADA. By contrast, the third concern, the failure of the statute to insure that costs are borne equitably across the class of affected employers, may be addressed independently.

In deciding who should bear the cost of regulation, our animating principle is that one particular employer or a small subset of employers should not be subject to higher costs unless they in some sense “deserve” to pay a higher price, either because they have not completely internalized their own costs or because they are in some sense morally different than those who do not pay the added costs. These principles derive from well-established norms in the law. That parties should pay for their wrongdoing when they are morally culpable is simply the basis of civil liability, including liability in the employment discrimination area. Similarly, when parties force others to bear the costs of their behavior, with the classic example being pollution, a liability regime forces a party to internalize the full costs that it imposes. In economic terms, such regimes prevent parties from imposing cost externalities, particularly if the cost bearers are likely to be a diffuse group with little incentive for any individual to sue on his or her own behalf. Finally, there may be reasons based on defensible social policy to tax one but not another group for the cost of social programs, as most classically found in a use tax on those who derive the clearest benefit from a government program, as with national parks. Not all financial burdens imposed by government need to occur in the taxation context, of course. Indeed, having every program take place through the tax and spend mechanism can stifle innovation by disincentivizing private industry from trying to cut

‘lawyer’s dream.’ ”); Elizabeth Clark Morin, Note, *Americans with Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U. L. REV. 189, 211 (1990) (noting that “the nature of the definition of undue hardship will leave employers guessing about whether they are in compliance”) (footnote omitted). See generally Karlan & Rutherglen, *supra* note 21, at 32 (noting that the ADA demands equal opportunity for the disabled).

costs.¹⁹³ Yet this fact is not a license for all financial burdens imposed by government to take place by the more opaque means of regulation, as opposed to the more politically accountable process of taxation.

When a regulation imposes a cost on a broad swath of society in an equitable manner, as with the minimum wage, no special concerns are raised. Because the minimum wage is imposed on all employers, the effect is to pass the costs along to the consuming public, in effect a proxy for a general tax. Since all those in a similarly situated group have the increased cost, no one employer is relatively worse off than its direct competitors. And certainly when the regulation merely ensures that a company or an employer internalizes its own costs, as in the context of pollution prevention, no special concerns arise. When, however, a law imposes burdens on a small subclass of people that disadvantages them relative to similarly-situated parties, our guard should be raised. While rational reasons might exist for imposing a set of obligations upon a class of employers, singling out a particular employer on a completely arbitrary basis is the paradigmatic example of a lack of a rational basis underlying the law.

It bears emphasis that concern over the burden of redistribution is not necessarily a condemnation of all regulation that imposes costs. For example, one may contrast the employment provisions of the ADA with the public accommodation section of the Act along these lines. Under Title III of the ADA, owners of commercial establishments that routinely hold themselves open to public visitation must make their places of business accessible to the disabled.¹⁹⁴ Clearly, this command is redistributive because the proprietors of such establishments are also forbidden from passing on the costs to individual disabled patrons. At the same time, there is a significant difference. The need for most accommodations under this provision of the ADA are not triggered by the presence of any particular disabled patron, but by the fact that a business holds itself open to the public. Thus, in the case of the most typical accommodations, ramps or accessible parking or restrooms, the costs of accommodation are one-time fixed costs that fall on the entire class of similarly situated proprietors—precisely the argument made in defense of the minimum wage. While there are incremental costs associated with special services for particular disabled patrons, these

193. See, e.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967); *supra* notes 144–45 and accompanying text.

194. 42 U.S.C. §§ 12182–12183 (1994); 28 C.F.R. pt. 36 (1999).

are the rare exceptions.¹⁹⁵ By contrast, on the employment side of the ADA, such exceptions are the norm.¹⁹⁶ Paradoxically, concerns about spreading the costs of accommodation more broadly among society as a whole brings the ADA more closely into conformity with the claims of disability rights activists, who “insist that society as a whole has a responsibility to eliminate the social and physical structures that deny people with ‘disabilities’ access to opportunities and thereby create the ‘disability.’ ”¹⁹⁷

The German equivalent of the ADA provides another example of how costs can be spread more evenly. The German Handicapped Act mandates what might be termed a “pay or play” regime: It requires all public and private employers with more than fifteen workers to hire one severely disabled person for every sixteen job slots or pay a monthly fee of two hundred deutsche marks for each unfilled quota position.¹⁹⁸ The German law provides as an explicit goal that 6% of the workforce should be composed of disabled people.¹⁹⁹ While, by 1990, disabled workers composed only 4.5% of the targeted workforce, the law’s stated goals and tradeoffs allowed employers, disabled workers, and the electorate to assess openly the costs, as well as the benefits, associated with employing the severely disabled.²⁰⁰ Germany set the tradeoff at about two hundred deutsche marks per month.²⁰¹

195. See, e.g., *Mayberry v. Von Valtier*, 843 F. Supp. 1160, 1162 (E.D. Mich. 1994) (denying summary judgment to a doctor who argued that providing an interpreter to a hearing-impaired patient at no additional cost would lead to a loss of money from providing services).

196. The ADA defines reasonable accommodation by giving specific examples of accommodations that the legislature perceived to be reasonable. See *supra* text accompanying note 60. Most of these examples are incremental, ongoing accommodations by their very nature.

197. Bagenstos, *supra* note 47, at 430; see also Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1028 (1998) (arguing that the ADA requires “changes in social norms in order to alter the significance of a medical impairment”).

198. Leo J.M. Aarts et al., *Convergence: A Comparison of European and United States Disability Policy*, in *NEW APPROACHES TO DISABILITY IN THE WORKPLACE* 299, 319, 327–28 (Terry Thomason et al., eds., 1998) (citing The German Handicapped Act of 1974 (Erstes Gesetz zur Änderung des Schwerbehindertengesetzes (Schwerbehindertengesetz or SchwbG)).

199. See Mary C. Daly, *Who is Protected by the ADA? Evidence from the German Experience*, in *THE AMERICANS WITH DISABILITIES ACT: SOCIAL CONTRACT OR SPECIAL PRIVILEGE?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 101, 104 (1997).

200. See *id.* For a more detailed discussion of the German disability system, see Richard V. Burkauer & Petri Hirvonen, *United States Disability Policy in a Time of Economic Crisis: A Comparison with Sweden and the Federal Republic of Germany*, *MILLBANK Q.* 166–94 (Supp. 2 1989); Klauss Jacob et al., *Germany: The Diversity of*

More fundamentally, the ability to opt out of employing disabled workers in exchange for paying a fee to the government means that *all* employers must contribute toward the admirable societal goal of full employment of disabled workers.²⁰² Moreover, allowing the tradeoff gives an employer the flexibility to decide, for example, whether it is worth employing a person who has a history of hypertension or paying a fee in lieu of employing that person.²⁰³ Passing the costs through to all employers, as opposed to those employers “unlucky” enough to have a disabled worker, permits some predictability in costs. Furthermore, because everyone must bear some of the increased costs, the real beneficiaries are the disabled workers themselves: German workers who are disabled are much more integrated into the work force than disabled workers in the United States.²⁰⁴ The penalty that employers must pay goes into a fund that is divided between two government agencies—the state welfare offices (Hauptfürsorgestellen) and the federal employment office (Bundesanstalt für Arbeit).²⁰⁵ The federal employment office uses its share to help employ disabled persons.²⁰⁶ While the German system has its flaws as well,²⁰⁷ it addresses what we consider the

Pathways, in TIME FOR RETIREMENT: COMPARATIVE STUDIES OF EARLY EXIT FROM THE LABOR FORCE (Marin Kohli et al. eds., 1991).

201. For other examples of a subsidy and fine system for employment market discrimination, see Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 144–49 (1994).

202. France also has a system giving quotas for the employment of disabled workers while allowing workers to opt out of the system. Employers who do not want to abide by the quota must pay a fine to a fund for the integration of disabled people into the workplace. See Bernard Gutow, *Survey of Rights of Workers With Disabilities: Comparison of the United States with the European Community*, 11 N.Y. INT’L. L. REV. 101, 120–21 (1998). In total, ten members of the European Community have some sort of quota system, although only France and Germany have the opt-out provision. See *id.* at 119–21.

203. This system bears some resemblance to Rip Verkerke’s model. See Verkerke, *supra* note 162, at 23–28.

204. Aarts et al., *supra* note 198, at 309 tbl. 4 (noting that 58.4% of German disabled males work full time compared to 45.6% of American disabled males).

205. SchwbG, § 11, abs. 4.

206. *Id.*; *id.* § 33, abs. 1, nr. 3. (describing duty of federal office); see also Carol D. Rasic, *A Comparative Analysis of Federal Statutes for the Disabled Worker in the Federal Republic of Germany and the United States*, 9 ARIZ. J. INT’L. & COMP. L. 283, 313–14 (1992) (discussing the German penalties for noncompliance).

207. The major complaint about the German system is not with its conceptual framework but with the fact that it is simply ineffective in providing sufficient incentives to employers to hire persons with disabilities. Jerry L. Mashaw describes this inefficiency as follows: “One third of employers hire no severely disabled workers and 40% of employers have less than their quota. That means that 73% of German employers are not in compliance with the quota.” Mashaw, *supra* note 37, at 236. He continues by noting that

fundamental drawback of the ADA—the lack of an equitable cost-spreading feature.

The ADA trilogy may be seen as a response to this difficult regulatory void—in effect an ADA rule of reason. Perhaps the reason these cases are so problematic is not the substance of the outcome in terms of whether these particular individuals should be able to hold positions with evident public safety implications. The reason why this ADA trilogy seems so troubling is that the Court is making this judgment *sub silentio* and without any real guidance from Congress on this point. In these cases, the result might seem substantively correct, but what about in other cases where there is only a marginal increased cost to the employer and no increased risk to the public at large? Perhaps the Court might take a more aggressive view in these cases, yet probably it would adhere to the formula outlined in *Sutton* because the Court is fearful that they will open the doors of justice too wide. Perhaps *Kirkingburg* and *Bragdon* combine to focus on the possibility of decisions borne of pure animus. And perhaps the Court would like to create some type of rational-basis-with-teeth review. But the question remains whether the Court's impatience with ADA claims has so far closed the door on ADA claims as to preclude even the pure animus claims from going forward.

CONCLUSION

Our goal is to show that behind the odd interpretations in the latest round of ADA employment cases lies a difficult problem of judicial administration of a poorly-crafted statute. The seeming inconsistencies of the recent ADA trilogy stem from the fact that while the ADA purports to be a statute attacking “but for” discrimination, it is really a statute inviting an unspecified amount of redistribution. Although other statutes since Title VII have had to balance the anti-discrimination command with an implicit commitment to redistribution, only the ADA finds its primary statutory concern in the anticipated shift of resources to its intended beneficiaries. No doubt a wealthy and benevolent society may direct substantial resources to facilitate the integration of the disabled or any other disadvantaged group. But while such societal objectives are entirely noble, there is insufficient political responsibility in passing

the \$100 per month German employers must pay for each worker under the quota is considered by most commentators to be “much too low, and that there would be major improvements if it were raised by a factor of two to four.” *Id.*

statutes that are only marginally related to their true objectives. The ADA is not just another anti-discrimination statute, and it was incumbent on Congress to address how it was to be implemented and at what cost.

While we hesitate to offer any magic bullet to the problems we have identified, we note that were Congress to address the cost implications of the ADA head-on, some legislative progress could be had. For example, Congress could give more robustness and clarity to the meanings of reasonable accommodation or undue hardship. Although it stayed away from setting a percentage cap on the cost increase that would constitute an undue hardship,²⁰⁸ Congress could at least set a *prima facie* standard, say a ten percent increase, by which the burden could shift back to the plaintiff to show that the measure really is a reasonable accommodation. Congress could also offer more tax incentives to employers who take steps toward reasonable accommodation.

But no solution resting on present statutory interpretation is likely to be effective until Congress confronts the disjunction of fitting a statute with such wealth-redistributive aspects into a context of “but for,” Title VII-like discrimination. Until then, the Court’s narrowing of the definition of “disabled” may prove the easiest and most effective way for the Court to limit the seemingly unfathomable potential sweep of ADA claims. By constricting the meaning of “disability” to such an extent, the Court has blocked at the gate the vast majority of claims that would otherwise proceed to trial or settlement. Yet *Bragdon* indicates that the Court would still leave enough of a gap to ferret out those cases where the exclusion of the disabled is simply the product of irrationality, ignorance, or animus. If so, the ADA would finally begin to resemble a classic employment discrimination statute. Unfortunately, it is difficult to reconcile this hope for an anti-discrimination command with the curious pronouncements on work, career and “major life activities” that emerged from the ADA employment trilogy.

208. See Karlan & Rutherglen, *supra* note 21, at 38.