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Mandatory Reassignment under the ADA: The Circuit Split and Need for a Socio-Political Understanding of Disability

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NOTE

MANDATORY REASSIGNMENT UNDER THE ADA: THE CIRCUIT SPLIT AND NEED FOR A SOCIO-POLITICAL UNDERSTANDING OF DISABILITY

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Standing at the top of the courthouse steps and telling a litigant who uses a wheelchair, "You may come in," is a disingenuous statement of equal opportunity. Explaining to [a] deaf person that his right to participate in a trial has been met by virtue of his physical presence in the courtroom when the proceedings have been conducted in spoken English and without a sign language interpreter does not constitute meaningful access to a fundamental right.[1]

INTRODUCTION

Congress enacted the Americans with Disabilities Act of 1990 (ADA) to integrate the disabled population into "all aspects of American life."[2] The ADA drafters strove for equality in "employment opportunities, government services, public accommodations, transportation, and telecommunications."[3] Though it built on prior civil rights laws, the ADA was unique because it was not merely an antidiscrimination statute; the ADA required covered entities to take affirmative steps to accommodate the disabled in certain contexts. In the employment context, the ADA required employers to make reasonable accommodations for the known physical or mental disabilities of otherwise qualified employees unless such accommodations would impose undue hardships.[4] Reasonable accommodations may include, *inter alia*, job restructuring, part-time or modified work schedules, and reassignment to vacant positions.[5]

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1 Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1062–63 (2004) (citing Lane v. Tennessee, 315 F.3d 680 (6th Cir. 2003), and Popovich v. Cuyahoga County Court Common Pleas, 276 F.3d 808 (6th Cir. 2002)).

2 *See* George H.W. Bush, U.S. President, Statement on Signing the Americans with Disabilities Act of 1990, 26 WKLY. COMP. PRES. DOC. 1165, 1165 (July 26, 1990).

3 *Id.*

4 Americans with Disabilities Act of 1990 § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (2000).

5 *Id.* § 101(9)(B).

As suggested by the opening quote from Professor Laura Rovner, courts have recognized that physical or communicative accommodations are needed to protect the rights of disabled individuals.[6] Today most employers provide auxiliary aids and services or modify policies, practices, and procedures to accommodate disabled employees.[7] However, some employers remain reluctant to reassign employees who become disabled to vacant positions, and the courts have not yet uniformly required employers to do so.

On May 30, 2007, the Eighth Circuit decided *Huber v. Wal-Mart Stores, Inc.*,[8] holding that the ADA does not require an employer to reassign a qualified disabled employee to another position when the employer can fill the vacant position with a more qualified employee. On July 18, 2007, the Eighth Circuit denied the petition of the employee, Ms. Huber, to rehear the case en banc. The U.S. Supreme Court initially granted certiorari in the *Huber* case, but ultimately dismissed the writ after the parties settled the dispute.[9] With the *Huber* decision, the Eighth Circuit joined a circuit split: must an employer reassign a disabled employee to a vacant position when the employee is not the most qualified applicant? Thus far, the Tenth and D.C. Circuits have required reassignment as a reasonable accommodation,[10] while the Seventh Circuit has not.[11]

The circuit split over mandatory reassignment revolves largely around two arguments. The circuits that support mandatory reassignment argue that Congress designed the ADA to compel employers to *make* reasonable accommodations for disabled employees, not simply to *consider* providing accommodations.[12] If reassignment is optional, the argument goes, the ADA's reassignment provision lacks any bite.[13] The circuits that have rejected mandatory reassignment contend that

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6 *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 533 (2004) (arguing that considerations of cost and convenience cannot justify a failure to provide disabled individuals with meaningful access to the courts).

7 *See* S. REP. No. 101-116, at 98 (1989).

8 486 F.3d 480, 483 (8th Cir. 2007), *reh'g en banc denied*, 493 F.3d 1002 (8th Cir. 2007), *cert. granted*, 128 S. Ct. 742 (2007), *cert. dismissed*, 128 S. Ct. 1116 (2008).

9 *See* Huber v. Wal-Mart Stores, Inc., 128 S. Ct. 742 (2007) (granting certiorari); Huber v. Wal-Mart Stores, Inc., 128 S. Ct. 1116 (2008) (dismissing certiorari); *Settlement in Wal-Mart Suit*, WASH. POST, Jan. 15, 2008, at D2.

10 *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164–65 (10th Cir. 1999) (en banc); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1300–01 (D.C. Cir. 1998). *But see Huber*, 486 F.3d at 483 n.2 (suggesting that *Aka* did not require mandatory reassignment, but instead simply rejecting an interpretation of the reassignment provision that only required the employer to allow the disabled employee to apply alongside other applicants).

11 EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1027–28 (7th Cir. 2000) (distinguishing *Aka* and stating that *Midland Brake* is inconsistent with prior Seventh Circuit decisions "that hold that the Americans with Disabilities Act is not a mandatory preference act").

12 *See, e.g.*, *Midland Brake*, 180 F.3d at 1164.

13 *See id.* at 1164–65.

the ADA is an antidiscrimination statute, not a mandatory preference statute. For a court to force employers to reassign disabled employees to vacant positions, even as a last resort, would constitute "affirmative action with a vengeance."[14] Unfortunately, no circuit court has explicitly acknowledged that there are different ways to understand the concept of "disability" and that each understanding provides a different answer to the mandatory reassignment question.

Disability scholars have recognized four primary models or theories to understand disability.[15] The "moral model" regards disability as the result of sin.[16] The "medical model" sees disability as a defect that must be cured.[17] The "rehabilitation model" is quite similar to the medical model, holding that society needs to rehabilitate disabled persons through training and therapy in order to eliminate their individual deficiencies.[18] Finally, the "socio-political model" situates the "problem" of disability externally, in stereotypical attitudes and an environment that fails to meet the needs of the disabled, rather than within disabled individuals themselves.[19] Today, the most prominent models include a hybrid medical-rehabilitative model and the socio-political model.

This Note provides a new look at the circuit split over the reassignment of disabled employees. Part I begins by tracing the development of disability law in the United States from colonial times to present day. This historical account demonstrates the new and transformative nature of the ADA's approach to disability law. Part I then examines the various disability models, focusing in particular on the medical-rehabilitative and socio-political models. Part II analyzes the mandatory reassignment circuit split. First, it discusses the facts behind *Huber v. Wal-Mart Stores, Inc.* and the district and circuit court holdings. Part II then discusses all of the circuits' justifications for and against mandatory reassignment, including arguments based on the text, legislative history, and policies behind the ADA and its reasonable accommodations provision. Part II concludes by discussing how the existing circuit split negatively impacts both the business community and individuals with disabilities.

Part III explains why a socio-political understanding of disability is appropriate and dictates mandatory reassignment. It first explains the primacy of the socio-political model and the need to recognize

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14 *See Humiston-Keeling*, 227 F.3d at 1029.

15 *See* Deborah Kaplan, *The Definition of Disability: Perspective of the Disability Community*, 3 J. HEALTH CARE L. & POL'Y 352, 352–54 (2000).

16 *See id.* at 353.

17 *See id.* at 352.

18 *See id.* at 353–54.

19 *See id.* at 352–53; Rovner, *supra* note 1, at 1044.

that social institutions have not been built neutrally.[20] Part III then discusses how the sharp differences between the ADA and decades of prior disability law suggest that the ADA drafters adopted the tenets of the socio-political model. Part III then argues that the ADA, when viewed through a socio-political lens, demands mandatory reassignment—not as "affirmative action," but as an affirmative step toward equal employment opportunities for the disabled.

I
BACKGROUND

A. History of Disability Law in the United States

American legal thought on disability has changed markedly over the last two centuries. Beginning simply as faith-based efforts to help "the poor," disability law first transformed from a system of charity into a system of rehabilitation and, finally, to a vehicle for societal integration. Understanding the development of disability law is essential to revealing the legal and societal significance of the ADA. Such a historical understanding should also help inform judicial interpretations of modern disability law. Thus, a brief history of disability law follows.[21]

1. *Early Accommodations for the Disabled*

The federal government has protected the disabled population only recently. Early Americans did not consider the hardships faced by the disabled population to be a significant social problem.[22] The colonists considered disabled persons to be part of "the poor"—alongside orphans, the aged, sick, and insane—because financial need was always the defining characteristic of individuals in need of assistance.[23] Many colonists supported the poor through local, faith-based efforts,[24] but because the colonists focused on providing financial sup-

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20 *See* Rovner, *supra* note 1, at 1062 (observing that societal institutions have been created by a non-disabled majority).

21 For more on the history of disability law in the United States, see 1 JONATHAN R. MOOK, AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS §§ 1.03–.04 (Matthew Bender & Co. 2003).

22 *See* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 3–4 (rev. 2d ed. 1990) [hereinafter ROTHMAN, SOCIAL ORDER]; *see also* William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 57 (1996) ("'[I]nsanity was really no different from any other disability; its victim, unable to support himself, took his place as one more among the needy. The lunatic came to public attention not as someone afflicted with delusions or fears, but as someone suffering from poverty.'" (quoting DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 4 (1971))).

23 *See* ROTHMAN, SOCIAL ORDER, *supra* note 22, at 4.

24 *See id.* at 4, 14. Admittedly, it is difficult to generalize about colonial support for the disabled because the surviving records are sparse and fragmentary. *See id.* at 30.

port, persons with physical or mental disabilities still needed to rely primarily on familial support to accomplish daily-living tasks.[25]

Beginning around 1830, American reformers and philanthropists formulated a revised theory of "charity" that informed social policy toward disabled persons.[26] Moving beyond mere financial support, this new theory tried to prevent "all social ailments"[27] through a cooperative relationship between private and public charity.[28] Because the state could provide much-needed funds, Dorothea Dix and other social activists pushed for expanded state support for disabled individuals.[29]

Over time, disability policy shifted toward more state-based assistance, but these efforts also proved inadequate. First, legislators were breaking new ground, and without a firm grasp of the issues, they drafted statutes with imprecise and incomplete language that proved unenforceable.[30] A New Jersey charity statute, for example, identified

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25 *Cf. id.* at 4. Wealthy disabled Americans received help with daily-living tasks, but their caretakers often acted with the intent to preserve the disabled individual's property rather than out of kindness of heart. Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause,* 15 SANTA CLARA LAW. 855, 885 (1975) (citing ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 40 (2d ed. 1949)).

26 *See* ROBERT H. BREMNER, THE PUBLIC GOOD: PHILANTHROPY AND WELFARE IN THE CIVIL WAR ERA 32–33 (1980).

27 *See id.* at 33–34. Given the historic focus on financial well-being, it is unsurprising that many early efforts focused on preventing the social ailment of "poverty." *See, e.g.*, William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States,* 31 U. RICH. L. REV. 111, 121 (1997) (describing townspeople in Connecticut who "would manage the affairs of people who looked like they might become poor because of 'idleness, mismanagement or bad husbandry.'" (quoting An Act for Relieving and Ordering of Idiots, Impotent, Distracted and Idle Persons (1784), *reprinted in* THE FIRST LAWS OF THE STATE OF CONNECTICUT 98, 99 (John D. Cushing ed., 1982))). When it came to "preventing" disabilities, "[e]ugenic propaganda spread with the swiftness of fanaticism." Burgdorf & Burgdorf, *supra* note 25, at 887.

28 *Cf.* BREMNER, *supra* note 26, at xv ("Historically . . . relations [between public and private activities in the field of welfare], if not always harmonious, have been cooperative and complementary rather than antagonistic."). Although nineteenth-century Americans believed private charity to be of higher quality and less demeaning than public charity, they also recognized the necessity of some public element to coordinate charity efforts. *See id.* at xi–xvi; *see also* Quigley, *supra* note 27, at 117–18 ("In local responsibility, there was a public-private partnership on several levels.").

29 *See* 1 MOOK, *supra* note 21, § 1.03[1][a]. Early state support typically involved confinement and institutionalization, so by 1830 almost all states encouraged or mandated an almshouse for the destitute, sick, and insane. *See* Burgdorf & Burgdorf, *supra* note 25, at 885. Local officials focused on the most expedited way to "deal" with the disabled population rather than the interests of the actual people affected, however, so conditions in these almshouses were very poor. *See id.* Dorothea Dix fought to bring about a more humane approach to the treatment of the disabled, and her efforts ultimately fueled the construction of new facilities nationwide. *See id.* at 886.

30 *See, e.g.*, ROTHMAN, SOCIAL ORDER, *supra* note 22, at 4 (stating that New York's first province-wide legislation "simply charged local officials to 'make provision for the mainte-

the agent to administer relief to "the poor," but failed to describe who qualified for relief.[31] Second, and more problematic, early state remedies often reinforced prejudicial assumptions about the disabled. For example, a 1924 Virginia act purported that the state might best prevent mental disability if it sterilized the mentally disabled.[32] In language now considered insensitive and even cruel, the U.S. Supreme Court upheld the policy:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[33]

Needless to say, such government attitudes did not help address the needs of the disabled.

The focus of disability policy again shifted once the federal government became involved, this time from a focus on charity to one on rehabilitation. After World War I, military personnel returned to the United States with service-connected disabilities, and they faced difficulties adjusting to life at home.[34] In response, Congress passed the first federal disability law, the Smith-Sears Vocational Rehabilitation Act of 1918, to fund job training and education for disabled veterans.[35] In 1920, Congress enacted a similar rehabilitative program for disabled civilians.[36] Then, in 1932, the election of Franklin D. Roosevelt solidified the move to a rehabilitation system. Himself se-

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nance and support of their poor,' and succeeding acts did not add more explicit instructions.").

31 *Id.*

32 *See* Buck v. Bell, 274 U.S. 200, 205 (1927) (discussing the constitutionality of a Virginia statute that prescribed that "the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives").

33 *Id.* at 207 (citation omitted). For a contemporary twist on the sterilization issue, see Maura McIntyre, Note, Buck v. Bell *and Beyond: A Revised Standard to Evaluate the Best Interests of the Mentally Disabled in the Sterilization Context*, 2007 U. ILL. L. REV. 1303 (analyzing the capacity of mentally disabled persons to undergo voluntary sterilization given their cognitive limitations).

34 *See* FRANK BOWE, HANDICAPPING AMERICA: BARRIERS TO DISABLED PEOPLE 12 (1978).

35 *Id.*

36 *Id.*

verely disabled,[37] President Roosevelt signed into law the Social Security Act, which established, among other things, programs for disabled children and adults.[38] The Social Security Act represented the recognition that "assistance to disabled persons was a matter of social justice, not charity."[39] In 1954, Congress amended the Act to provide additional training for the disabled,[40] and future federal efforts continued to focus on rehabilitation.[41]

2. *Civil Rights Era Expanded the Rights of the Disabled*

The social movement that defined the concept of civil rights for African-Americans also expanded the rights of other marginalized groups. From the 1955 Montgomery bus boycott to the lunch-counter sit-ins to the 1963 march on Washington, other reformers adopted the goals and strategies of activists for racial equality in the coming decades.[42] "Civil rights evoked powerful symbols in American political ideology; the phrase had become linked with cultural and political values of equality, fair play, and opportunity."[43] Disability activists of the 1960s and early 1970s used the symbols and rhetoric of the African-American civil-rights movement to portray access for disabled people to societal institutions as a basic civil right.[44]

Legislators also used the civil-rights framework designed to protect and benefit African-Americans as a model to protect other subordinated groups.[45] Title VI of the Civil Rights Act of 1964 prohibited discrimination based on race, color, or national origin in programs receiving federal funds.[46] Congress adopted Title VI because of the

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37 *Id.* at 12–13 ("Roosevelt was severely disabled yet that is not what the American public saw. Instead, it witnessed an able, confident, assertive, and, above all, active, individual leading the country into new and exciting prosperity.").

38 *Id.* at 13.

39 *Id.*; *see* Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935), *available at* http://www.ssa.gov/history/35actinx.html.

40 *See* Vocational Rehabilitation Amendments of 1954, Pub. L. No. 83-565, §§ 2–5, 68 Stat. 652, 652–58 (1954) (repealed 1973) (providing grants to states for vocational rehabilitative services).

41 *See* EDWARD D. BERKOWITZ, DISABLED POLICY: AMERICA'S PROGRAMS FOR THE HANDICAPPED 47 (1987) (noting growing support for rehabilitation by policymakers after World War II).

42 *See* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 24 (1984). For example, the NAACP's Legal Defense Fund served as a model for promoting individual rights through the judicial system, and other activist movements emulated the civil disobedience tactics of the racial equality movement. *See id.* at 25.

43 *Id.* at 41.

44 *See id.*

45 *See id.* at 25 (discussing several civil rights laws enacted in order to end discrimination against African-Americans that later served as models to protect other groups).

46 *See id.* at 26 ("'No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.'" (quoting the Civil Rights Act of 1964, tit. VI, Pub. L. No. 88-352, 78 Stat. 252)).

inconsistency of pursuing a federal policy of nondiscrimination while simultaneously funding entities that discriminated.[47] After its adoption, Title VI served as a model for legislative efforts banning discrimination against women.[48] By the early 1970s, Congress began to accept that disabled people also had a right to social and economic participation.[49] Congress passed the Rehabilitation Act of 1973 to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment,"[50] and section 504 of the Rehabilitation Act closely tracked the civil rights guarantees of Title VI.[51]

Though legislators used Title VI as a model—or perhaps exactly because Congress grafted a civil-rights framework onto federal disability law—it was unclear how the federal government would implement section 504.[52] The Rehabilitation Act did not describe how or when discrimination on the basis of handicap was to be eliminated, or what constituted illegal discrimination.[53] Even after the Office of Civil Rights implemented enforcement regulations, disability law remained plagued with complexities, inconsistencies, and fragmentation.[54] Many disabled Americans who needed public assistance did not receive it. According to the 1980 Census, approximately two-thirds of disabled persons were not receiving Social Security Disability Insurance (SSDI), Supplemental Security Income (SSI), or any other form of public assistance.[55]

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47 *See id.*

48 *See id.* at 27 (noting that Title VI served as a model for Title IX of the Education Amendments of 1972 protecting the rights of women).

49 *See id.* at 43 (noting that on January 20, 1972, Senator Hubert Humphrey proposed amending the Civil Rights Act of 1964 to ban discrimination on the basis of physical or mental handicap in federally assisted programs).

50 Rehabilitation Act of 1973, Pub. L. No. 93-112, § 2(8), 87 Stat. 355, 357.

51 *See* SCOTCH, *supra* note 42, at 58 (explaining the role of Title VI as a model for section 504); *see also* Mark F. Engebretson, Note, *Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulation*, 16 HARV. J. ON LEGIS. 59, 89 (1979) (noting that the Office of Civil Rights modeled its forthcoming enforcement regulations after prior civil rights provisions). Interestingly, Scotch suggests that members of Congress were generally not aware that the Rehabilitation Act included a section modeled after Title VI. SCOTCH, *supra* note 42, at 58. Apparently, there was little debate because no one could argue against a general statement that recipients of federal funds should not discriminate. *See id.* at 57–59.

52 *See* SCOTCH, *supra* note 42, at 60.

53 *See id.* ("Conceivably, Section 504 could have remained a simple statement of good intentions.").

54 *See* NAT'L COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS 7 (1986). President Reagan described the law as "patchwork quilt of existing policies and programs." *Id.* (quoting Ronald Reagan, U.S. President, Remarks on Signing Proclamation 5131, Establishing the National Decade of Disabled Persons, 19 WKLY. COMP. PRES. DOC.1620 (Nov. 28, 1983)).

55 *Id.* at 11–12.

The need for comprehensive reform was apparent. Studies demonstrated that then-existing federal disability programs were not structured or administered in ways that would encourage and assist private-sector efforts to promote opportunities and independence for disabled persons.[56] The demand for federal disability law reform came from many sources: a new class-consciousness among the disabled; an increasing number of disabled persons; and a belief that satisfying the needs of disabled employees and customers would create new business opportunities.[57] Marking another shift in disability policy, in 1990 Congress passed the Americans with Disabilities Act,[58] and President George H.W. Bush signed it into law.[59]

3. *Modern Disability Law: The ADA and Reasonable Accommodations*

Congress designed the Americans with Disabilities Act of 1990 (ADA) to "open up all aspects of American life" to disabled persons.[60] President Bush recognized that then-existing federal disability law failed to address the wide-ranging barriers faced by the disabled population.[61] Moving away from a focus on rehabilitating the disabled population, lawmakers designed the ADA to integrate disabled individuals into society, striving for equality in employment opportunities, government services, public accommodations, transportation, and telecommunications.[62]

The ADA was, and still is, distinct from antidiscrimination laws, because the ADA not only bars discrimination but also requires affirmative steps in certain contexts. Many antidiscrimination laws are based on the idea that prohibiting decisions because of certain personal characteristics— skin color, sex, age, etc.—will provide minorities with equal opportunities.[63] The ADA takes a different approach, holding that equal opportunity for the disabled community sometimes requires both neutral decision making and affirmative efforts by the

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56 *See id.* at 12–14.

57 *See* Joseph P. Shapiro, *Liberation Day for the Disabled*, U.S. NEWS & WORLD REP., Sept. 18, 1989, at 20, 21–22. Furthermore, "no one wanted to look like a bigot fighting a civil-rights bill, particularly one that was rushing through Congress." *Id.* at 21.

58 *See* 136 CONG. REC. H4629 (daily ed. July 12, 1990); 136 CONG. REC. S9695 (daily ed. July 13, 1990).

59 *See* George H.W. Bush, U.S. President, Statement on Signing the Americans with Disabilities Act of 1990, 26 WKLY. COMP. PRES. DOC. 1165 (July 26, 1990).

60 *See id.*

61 *See id.* (noting that existing laws "have left broad areas of American life untouched or inadequately addressed").

62 *See id.*

63 *See, e.g.*, S. REP. NO. 101-116, at 98 (1989) ("In order to provide equal treatment to racial minorities, a business need only disregard race and judge a person on his or her merits.").

nondisabled community.[64] This is because obstacles that at first glance appear neutral may not be neutral for disabled persons.[65] In the employment context, for example, a disabled person faces at least two primary barriers to full participation.[66] First, the disabled person needs the employer to look beyond their disability in the hiring decision; the neutral decision-making principles behind antidiscrimination law generally protect the disabled in this context. Second, the disabled person needs to be able to succeed once on the job, and this could be problematic if the workplace is not consistent with the capabilities of the disabled employee. An employee in a wheelchair might not be able to attend a corporate meeting held in a building without an elevator, for example. The ADA recognizes this second barrier to full participation and requires certain accommodations like auxiliary aids and services.[67]

More specifically, the ADA requires employers to make reasonable accommodations to the known physical or mental disabilities of otherwise qualified employees unless the accommodations would impose undue hardships.[68] The concept of "reasonable accommodation" is central to the ADA[69] and constitutes the primary affirmative responsibility of employers:

> The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles . . . or they may be

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64 *See, e.g., id.* ("To provide equal opportunity for a person with a disability will sometimes require additional actions and costs than those required to provide access to a person without a disability."); *see also* discussion *infra* Part II.B.1.

65 *See* U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 99–100 (1983) (arguing that providing equal opportunities may not be sufficient to allow individuals with disabilities to participate in the workforce).

66 Access to full employment opportunities means more than earning money; in American society, work has become a form of social identity and a source of happiness. *See* Timothy M. Cook, Note, *Nondiscrimination in Employment Under the Rehabilitation Act of 1973*, 27 AM. U. L. REV. 31, 37 n.36 (1977) (citing GEORGES FRIEDMANN, THE ANATOMY OF WORK 122–28 (Wyatt Rawson trans., Transaction Publishers 1992) (1961)).

67 *See* S. Rep. No. 101-116, at 98 (1989).

68 Americans with Disabilities Act of 1990 § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (2000).

69 *See* Sandy Andrikopoulos & Theo E.M. Gould, Note, *Living In Harmony? Reasonable Accommodations, Employee Expectations and* US Airways, Inc. v. Barnett, 20 HOFSTRA LAB. & EMP. L.J. 345, 350–51 (2003) ("One of the ADA's primary vehicles for integrating disabled employees into society is by furnishing them with reasonable accommodations.").

> procedures or rules . . . . Reasonable accommodation removes workplace barriers for individuals with disabilities.[70]

Despite its importance, the definition of the term "reasonable accommodation" is elusive. The ADA does not explicitly define the term "reasonable accommodation"; instead, it provides a series of examples of acceptable accommodations.[71] According to the ADA, reasonable accommodations include job restructuring, part-time or modified work schedules, and reassignment to vacant positions.[72] Regardless of the particular accommodation, the goal is to assist the disabled in obtaining equal employment opportunities.[73] Reassignment, for example, cannot be a ruse for a demotion; employers reassigning disabled employees must select vacant positions with equivalent pay and status.[74] These requirements are consistent with the ADA's focus on modifying the working environment to meet the needs of disabled individuals.[75]

B. Disability Models

Disability scholars recognize four primary models for understanding disability: the "moral model," "medical model," "rehabilitation model," and "socio-political model."[76] The moral model is the oldest of the four, and it regards disability as the result of sin.[77] Though not prevalent today, some cultures still embrace the moral model, choosing to associate disability with guilt that in turn brings shame on the family.[78] The medical model regards disability as a defect that medical intervention must cure.[79] It arose alongside the development of modern medicine in the nineteenth century.[80] The rehabilitation model is similar to the medical model, and it holds that a disabled person needs to be rehabilitated with training, therapy, or counseling

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70 EEOC, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), http://www.eeoc.gov/policy/docs/accommodation.html.

71 *See* Americans with Disabilities Act of 1990 § 101(9).

72 *Id.* § 101(9)(B).

73 *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(o) (2008) (describing "reasonable accommodations" required under the ADA).

74 EEOC, *supra* note 70.

75 *Cf.* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 65, at 102 ("Discrimination against handicapped people cannot be eliminated if programs, activities, and tasks are always structured in the ways people with 'normal' physical and mental abilities customarily undertake them. Adjustments or modifications of opportunities to permit handicapped people to participate fully have been broadly termed 'reasonable accommodation.'").

76 *See* Kaplan, *supra* note 15, at 352–53.

77 *See id.* at 353.

78 *See id.*

79 *See id.* at 352.

80 *See id.* at 353.

to compensate for the deficiencies caused by the disability.[81] Finally, the socio-political model, also known as the "disability model," externalizes the "problem" of disability in negative stereotypes and environmental obstacles.[82] Today, the most common models include a hybrid of the medical and rehabilitative models, and the socio-political model.

1. *Medical-Rehabilitative Model*

The medical model of disability proffers the medical profession as the rescuer of the disabled population. Under the medical model, the difficulties experienced by a disabled person reside within that individual, and the individual must await a "cure."[83] The disabled population is sick, and society should excuse the sick population from normal societal obligations like attending school or working a job.[84] Under the medical model, society has no obligation to accommodate the unique needs of disabled persons because they "live in an outsider role waiting to be cured."[85]

The rehabilitation model is essentially a modern application of the medical model. Like the medical model, the rehabilitation model locates the difficulties faced by a disabled person within the disabled individual—rehabilitation is needed to cure the individual's defects. The idea that disabled individuals need training and therapy gained acceptance when disabled veterans began to return from the World Wars and needed help readjusting to life at home.[86] One can see the modern influence of the rehabilitation model in the Vocational Rehabilitation system,[87] which currently provides services to disabled individuals so that they may obtain and maintain gainful employment.[88]

2. *Socio-Political Model*

The socio-political model regards disability as an ordinary aspect of life. Some individuals have physical or mental impairments while

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81 *See id.* at 353–54.

82 *See id.* at 352–53. Stereotypes often create the improper perception that disabled persons cannot offer meaningful contributions to the community through social interaction. Cook, *supra* note 66, at 33–34.

83 *See* Kaplan, *supra* note 15, at 353.

84 *See id.* at 353–54. To some extent, this view exists today. For example, the Social Security system defines "disability" as the inability to work. *See id.* at 354 (citing 42 U.S.C. § 423(d)(1) (1994)).

85 *Id.* at 353.

86 *See* BOWE, *supra* note 34, at 12 (World War I); Kaplan, *supra* note 15, at 354–55 (World War II).

87 *See* Kaplan, *supra* note 15, at 355.

88 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO REPORT NO. 05-865, VOCATIONAL REHABILITATION: BETTER MEASURES AND MONITORING COULD IMPROVE THE PERFORMANCE OF THE VR PROGRAM 1, 7 (2005).

others do not; individuals who have such impairments struggle at certain tasks, not because of personal defects, but because society has failed to design physical and social structures consistent with their capabilities. The underlying problem lies in a society that provides inadequate support services to the disabled and imposes "attitudinal, architectural, sensory, cognitive, and economic barriers" to full societal participation.[89] Under the socio-political model, to situate the "problem" of disability within disabled individuals themselves is to perpetuate social discrimination.[90]

Under the socio-political model, disability is a social construct. The model holds that there is no static concept of "normal." For some, the "normal" way to travel a mile is to walk; for others, it is to use a wheelchair; and for others, it is to use a bike, bus, or taxi.[91] In all cases, what is "normal" for an individual depends on the individual's environment. To think in terms of the "disabled" and the "extremely capable" as bipolar opposites distorts reality:

> If you imagine "the disabled" at one end of a spectrum and people who are extremely physically and mentally capable at the other, the distinction appears to be clear. However, there is a tremendous amount of middle ground in this construct, and it is in the middle that the scheme falls apart. What distinguishes a socially "invisible" impairment—such as the need for corrective eyeglasses—from a less acceptable one—such as the need for a corrective hearing aid, or the need for a walker? Functionally, there may be little difference. Socially, some impairments create great disadvantage or social stigma for the individual, while others do not. Some are considered disabilities, and some are not.[92]

According to the socio-political model, once one understands the social forces behind the concept of "disability," one can begin to understand how existing disability policies perpetuate confinement and institutionalization rather than societal integration.[93]

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89 *See* Kaplan, *supra* note 15, at 352–53.

90 *See id.* at 355.

91 *See id.* (quoting David Pfeiffer, The Disability Paradigm and Federal Policy Relating to Children with Disabilities 6 (1998) (unpublished manuscript, on file with The Journal of Health Care Law & Policy)).

92 *Id.* at 356–57.

93 *See id.* at 355.

II
HUBER V. WAL-MART STORES, INC.: EIGHTH CIRCUIT JOINS A CIRCUIT SPLIT

A. The Decision

1. *Facts*

Pam Huber worked for Wal-Mart as a dry grocery order filler and earned $13.00 per hour.[94] While working for Wal-Mart, Huber sustained a permanent injury to her right arm and hand, which prevented her from performing the essential functions of the order-filler job.[95] As a result of her disability, Huber asked Wal-Mart to reassign her to a router position as a reasonable accommodation under the ADA.[96] Wal-Mart refused to automatically reassign Huber to the position,[97] though the company stipulated that the router position was both vacant and equivalent to the order-filler position.[98]

Rather than immediately reassigning Huber, Wal-Mart told her that she must apply and compete for the router position just like any other applicant.[99] Wal-Mart stated that its reassignment decision was consistent with its policy of hiring the most qualified applicant for any position.[100] Wal-Mart found that Huber was qualified to perform the duties of the new job but "was not the most qualified candidate," so the company ultimately denied her the position.[101] Wal-Mart then placed Huber at a different facility in a janitorial position that paid $6.20 per hour.[102] Huber filed suit against Wal-Mart, alleging that the ADA compelled Wal-Mart to reassign her to the router position as a reasonable accommodation for her disability.[103]

2. *District Court Holds for Huber*

Both Wal-Mart and Huber moved for summary judgment in the district court, agreeing that the dispositive question was an issue of law: Under the ADA, must an employer reassign to a vacant position a qualified disabled employee when she is not the most qualified candi-

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94 Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 481 (8th Cir. 2007), *reh'g en banc denied*, 493 F.3d 1002 (8th Cir. 2007), *cert. granted*, 128 S. Ct. 742 (2007), *cert. dismissed*, 128 S. Ct. 1116 (2008).

95 *Id.*

96 *Id.* Huber and Wal-Mart stipulated that Huber's injury is a disability under the ADA. *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.* The parties stipulated that Wal-Mart hired the most qualified candidate. *Id.*

102 *Id.*

103 *Id.* at 482.

date?[104] The court began its analysis by reviewing the ADA's ban on employment discrimination on the basis of disability,[105] and then the court reviewed the ADA's reasonable accommodation rule:

> discrimination occurs if a covered entity [does] not . . . make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.[106]

The court then acknowledged the existence of a circuit split on the issue of mandatory reassignment.[107] Without binding precedent on point, the court proceeded to conduct its own analysis.

The district court held that a prior U.S. Supreme Court decision addressing reasonable accommodations did not resolve the issue.[108] In *US Airways, Inc. v. Barnett*, the Supreme Court held that an employer need not reassign a disabled employee if doing so would conflict with seniority rules in place at the company.[109] According to the district court, *Barnett* did not create a per se rule against mandatory reassignment, however, because *Barnett* allowed any plaintiff to present evidence showing that reassignment, as an exception to a seniority rule, was appropriate.[110] The district court distinguished an employer's policy of hiring the most qualified candidate from workplace seniority rules, finding that the special benefits of a seniority system, like encouraging employees to invest their time and effort in the employing company, do not apply to a merit-based reassignment policy like the one Wal-Mart used.[111]

The district court then held that the ADA requires mandatory reassignment.[112] First, the district court read *Barnett* to mean an accommodation may be reasonable (and therefore required under the ADA) even if it exempts a disabled employee from a company policy that other employees must follow.[113] The court derived this rationale

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104 Huber v. Wal-Mart Stores, Inc., No. 04-2145, 2005 WL 3690679, at *1 (W.D. Ark. Dec. 7, 2005).

105 *Id.* at *2 (noting that the ADA prohibits an employer from discrimination "'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'" (quoting 42 U.S.C. § 12112(a))).

106 *Id.* at *3 (quoting Peebles v. Potter, 354 F.3d 761, 766 (8th Cir. 2004) (internal quotations omitted, alterations in original)).

107 *Id.* The arguments on both sides of the circuit split are discussed *infra* Part II.B.

108 *Id.* at *4.

109 535 U.S. 391, 406 (2002).

110 *Huber*, 2005 WL 3690679, at *4.

111 *Id.* at *4–5.

112 *Id.* at *5.

113 *Id.*

from the ability of a disabled employee to present evidence of extenuating circumstances in order to create an exception to an employer's seniority rules. Second, the district court adopted the reasoning of the Tenth and D.C. Circuits[114] and held that, when reassignment is reasonable, employers may not require qualified disabled employees to compete for vacant positions.[115]

3. *Eighth Circuit Holds for Wal-Mart*

The Eighth Circuit reviewed de novo the district court's grant of summary judgment for Huber.[116] First, the court confirmed that the legal dispute centered on whether the ADA requires an employer, as a reasonable accommodation, to fill a vacant position with a current disabled employee when the disabled employee is not the most qualified candidate.[117] Then the court reviewed the circuit court split.[118]

The Eighth Circuit reversed the district court and held for Wal-Mart. It adopted the reasoning of the Seventh Circuit[119] and held that requiring reassignment would convert the ADA, a nondiscrimination statute, into a "'mandatory preference statute.'"[120] According to the Eighth Circuit, employment decisions on the merits are not discriminatory, and to conclude otherwise would be "'affirmative action with a vengeance.'"[121] The court rejected any attempt to award a job on the basis of disability or any other statutorily protected status.[122]

B. Eighth Circuit Joins Split on "Reasonable Accommodation"

The circuit courts have disagreed over whether the ADA requires mandatory reassignment as a reasonable accommodation to disabled employees who cannot otherwise serve in their prior positions.[123] In *Smith v. Midland Brake, Inc.*,[124] the Tenth Circuit required reassignment. A year prior, the D.C. Circuit had reached the same conclu-

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114 *See id.* at *5–6. For a summary of the reasoning of the Tenth and D.C. Circuits, see *infra* Part II.B.1.

115 *Id.* The district court did not determine whether mandatory reassignment would impose an undue hardship on the employer because the parties stipulated that it would not. *Id.* at *7.

116 Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 482 (8th Cir. 2007), *reh'g en banc denied*, 493 F.3d 1002 (8th Cir. 2007), *cert. granted*, 128 S. Ct. 742 (2007), *cert. dismissed*, 128 S. Ct. 1116 (2008).

117 *Id.* at 482.

118 *Id.* at 482–83.

119 *Id.* at 483. For a summary of the reasoning of the Seventh Circuit, see *infra* Part II.B.2.

120 *Id.* (quoting EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000)).

121 *Id.* at 483–84 (quoting *Humiston-Keeling*, 227 F.3d at 1029).

122 *Id.* at 484.

123 *See infra* Part II.B.

124 180 F.3d 1154, 1164–65 (10th Cir. 1999) (en banc).

sion.[125] The Seventh Circuit reached the opposite conclusion in *EEOC v. Humiston-Keeling, Inc.*[126] As discussed above, the Eighth Circuit adopted the Seventh Circuit's reasoning and did not require reassignment in *Huber v. Wal-Mart Stores Inc.*[127] Other circuits have not addressed the reassignment issue in any depth.[128]

Circuit courts that have addressed the mandatory reassignment issue have typically adopted at least part of the rationale of another circuit and then provided unique justifications for their holdings. The primary justifications relate to the text, legislative history, and policy behind the ADA's reasonable accommodations provision. This Note will now examine each justification offered for or against mandatory reassignment.

1. *Circuit Justifications for Mandatory Reassignment*

a. *Textual*

The ADA prohibits, among other things, employment discrimination on the basis of disability. An employer must make reasonable accommodations to the known physical and mental limitations of otherwise qualified disabled employees unless the employer can demonstrate that an accommodation would impose undue hardship on the business.[129] According to the ADA, "reasonable accommodations" in the employment context may include:

> **(A)** making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> **(B)** job restructuring, part-time or modified work schedules, *reassignment 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.[130]

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125 *See* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304–06 (D.C. Cir. 1998) (en banc). *But see Huber*, 486 F.3d at 483 n.2 (suggesting that *Aka* is a more limited holding).

126 227 F.3d at 1027–29.

127 486 F.3d at 483–84.

128 The Fifth Circuit has suggested that it would not require reassignment, at least when reassignment would violate an established seniority program. *See* Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) ("[W]e do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled."). The Second, Sixth, and Eleventh Circuits have cited the Fifth Circuit's *Daugherty* decision with approval. *See, e.g.*, Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 457, 459 (6th Cir. 2004); Terrell v. USAir, 132 F.3d 621, 627 (11th Cir. 1998); Wernick v. Fed. Reserve Bank of N.Y., 91 F.3d 379, 384–85 (2d Cir. 1996).

129 *See Aka*, 156 F.3d at 1300 (citing 42 U.S.C. § 12112(b)(5)(A) (1994)).

130 Americans with Disabilities Act of 1990 § 101(9), 42 U.S.C. § 12111(9) (2000) (emphasis added).

Some circuit courts have interpreted the ADA's list of reasonable accommodations to mean that an employer must reassign a qualified disabled employee to a vacant position, at least when no other accommodations are appropriate or reasonable.

A common argument supporting "mandatory" reassignment is that the word "reassignment" must mean more than simply allowing an employee to apply for a job on the same terms as other applicants.[131] These textualists argue that the core word "assign" in "reassignment" implies active effort on the part of the employer; after all, employees who on their own apply for and obtain other jobs somewhere else in the company have not been "reassigned."[132] Furthermore, according to these textualists, the ADA's reassignment provision would be redundant if it meant only that employers may not prevent disabled employees from applying for other positions—the ADA already bans discrimination on the basis of disability in regard to job application procedures.[133] Finally, the ADA defines the term "reasonable accommodation" to include "reassignment to a vacant position," not simply "consideration" of reassignment to a vacant position.[134] To suggest that reassignment is optional would mean that the statutory phrase "reasonable accommodation" is mere "surplusage."[135]

Some circuits argue that reassignment must be mandatory because the text of the ADA does not denigrate the reassignment accommodation relative to other accommodations. The ADA lists several reasonable accommodations—job restructuring, part-time or modified work schedules, and modified equipment—alongside reassignment,[136] yet nothing in the text transforms reassignment into a lesser accommodation.[137] Following this logic, because an employer must not only consider but must implement the other accommodations, an employer must also reassign a qualified disabled employee.[138]

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131 *See Aka*, 156 F.3d at 1304.

132 *See id.*

133 *See id.* (citing 42 U.S.C. § 12112(a)).

134 *See* Americans with Disabilities Act of 1990 § 101(9); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164 (10th Cir. 1999). Some critics argue that the phrase "'may include reassignment to a vacant position' cannot mean 'shall include reassignment to a vacant position.'" *Smith*, 108 F.3d at 1184 (Kelly, J., concurring in part and dissenting in part). The response is that the words "may include" precede the list of examples of reasonable accommodation because the list is nonexclusive and accommodations may not be appropriate depending upon the disability, but the phrase does not mean that the accommodations are optional. *Id.* at 1168 n.7 (majority opinion).

135 *See Aka*, 156 F.3d at 1304 (citing Ratzlaf v. United States, 510 U.S. 135, 140 (1994)).

136 *See* Americans with Disabilities Act of 1990 § 101(9)(B).

137 *See Midland Brake*, 180 F.3d at 1167.

138 *Cf. id.* ("There is nothing about a reassignment that transforms it into a lesser accommodation than the others listed, which an employer must not only consider but must also implement if appropriate. . . . We conclude that reassignment of an employee to a

Another justification for mandatory reassignment is that a contrary ruling constitutes a judicial amendment of the statute. The ADA says: "No covered entity shall discriminate against a qualified individual with a disability."[139] According to proponents of mandatory reassignment, if a court permits a merit-based policy to trump the ADA's reassignment provision, then that court (at least implicitly) judicially amends the statutory phrase "'qualified individual with a disability' to read, instead, 'best qualified individual, notwithstanding the disability.'"[140] Courts should avoid such amendments because they owe a duty to enforce the ADA as Congress wrote it;[141] moreover, one amendment would arguably compel courts to amend the requirements of other reasonable accommodations,[142] creating absurd results. For example, a court that permits a merit-based policy to trump reassignment would also need to allow employers to replace with "more qualified" employees those disabled employees who ask for other workplace accommodations, such as modified work schedules.[143]

Finally, circuits that have required reassignment contend that the judiciary should be loathe to stray from the text of the ADA because Congress already created sufficient "safeguards" to protect employers from too much interference with their business operations. First, an employer need only reassign an employee to an existing vacant job; an employer need not create vacancies.[144] Second, the disabled employee must still be qualified[145] for the vacant position.[146] Third, the reassignment need not involve a promotion, and the employer has the flexibility to choose which appropriate vacant job to offer the employee.[147] Finally, an employer does not have to make an accommodation like reassignment if it would impose an undue hardship on the employer's business.[148] Circuits requiring reassignment believe that if

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vacant position in a company is one of the range of reasonable accommodations which must be considered and, if appropriate, offered if the employee is unable to perform his or her existing job.").

139 *See* Americans with Disabilities Act of 1990 § 102(a).

140 *See Midland Brake*, 180 F.3d at 1167–68.

141 *Cf. id.* (analyzing the "Findings and Purposes" of the ADA alongside the ADA's legislative history in order to understand congressional intent).

142 *See id.* at 1167 n.6.

143 *See id.*

144 *See id.* at 1170.

145 An employee is "qualified" if she, with or without reasonable accommodation, can perform the essential functions of the job. Americans with Disabilities Act of 1990 § 101(8), 42 U.S.C. § 12111(8) (2000).

146 *See Midland Brake*, 180 F.3d at 1170.

147 *See id.*

148 *See id.*

further limitations are necessary, they must come from Congress, not the judiciary.[149]

b. *Legislative History*

Proponents of mandatory reassignment concede that Congress expected reassignment to be an employer's last resort, but these proponents also argue that the reassignment provision was not designed to be optional. According to the House Committee on Education and Labor report on the ADA, an employer should try to accommodate a disabled employee in his original position before considering reassignment.[150] But if an employer cannot accommodate the employee in the original position, the employer should transfer the employee to another vacant job to prevent the employee from being out of work and the employer from losing a valuable worker.[151] Examining the legislative reports, the U.S. Equal Employment Opportunity Commission (EEOC) concluded that the ADA requires reassignment:

> Does reassignment mean that the employee is permitted to compete for a vacant position?
>
> No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.[152]

Though not controlling, proponents of mandatory reassignment argue that the EEOC guidelines should aid courts' understanding of congressional intent.[153]

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149 *See id.*

150 *See* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1301 (D.C. Cir. 1998) (en banc) (quoting H.R. REP. No. 101-485(II), at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 267, 345); *see also* S. REP. No. 101-116, at 6 (1989) (describing the nature and extent of discrimination on the basis of disability).

151 *See id.* (quoting H.R. REP. No. 101-485(II), at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 267, 345).

152 EEOC, *supra* note 70, ¶ 29; *see* Gile v. United Airlines, Inc., 95 F.3d 492, 498 (7th Cir. 1996) ("Our review of the ADA, its regulations, and the EEOC's interpretive guidance leads us to the conclusion of the majority of courts that have addressed the issue that the ADA may require an employer to reassign a disabled employee to a different position as reasonable accommodation where the employee can no longer perform the essential functions of their current position.").

153 *See Aka*, 156 F.3d at 1301 (stating that the ADA's legislative history supports the EEOC guidelines and that courts may look to the EEOC guidelines for guidance (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986))). Though no circuit court has yet had an opportunity to apply *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007), to the EEOC's interpretation of the ADA reasonable accommodations provision, some believe that *Long Island Care* requires courts to afford additional deference to the interpretation of an agency like the EEOC. *See, e.g.*, Petition for a Writ of Certiorari at 9–11, Huber v. Wal-Mart Stores, Inc., 128 S. Ct. 742 (No. 07-480) (2007), *cert. dismissed*, 128 S. Ct. 1116 (2008) ("*Long Island Care* . . . emphasized that 'an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted.' . . . The Eighth Circuit [in *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir.

Circuit courts requiring reassignment have dismissed concerns that their holdings mandate preferential treatment because, these courts contend, Congress understood that "special" or "preferential" treatment is sometimes necessary to achieve its goal of prohibiting discrimination on the basis of disability.[154] First, though the ADA's legislative history warns against "preferences" for disabled applicants in hiring decisions,[155] it also indicates that the ban on preferences does not cover reasonable accommodations for existing employees who become disabled.[156] Second, proponents of mandatory reassignment argue that Congress would not have included other safeguards for employers had it intended for employers to treat disabled employees exactly like other job applicants.[157] Without a mandatory reassignment scheme, Congress would not have needed to explain that employers need not "bump" another employee to create vacancy, nor would it have needed to explain that employers may consider collective bargaining agreements in determining whether it is reasonable to assign a disabled employee without seniority to the job.[158] Thus, if Congress understood that some ADA provisions might create "preferences" for disabled persons and Congress nevertheless enacted the provisions, courts should vigorously enforce them.

Finally, the ADA itself arguably supports mandatory reassignment because its own provisions state that the ADA should not be construed to afford lesser protection than afforded under Title V of the Rehabilitation Act of 1973 or its accompanying regulations.[159] Significantly, the Justice Department regulations under the Rehabilitation Act required reasonable accommodation: "A recipient *shall* make reasonable accommodation to . . . an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate . . . an undue hardship . . . ."[160] Proponents of mandatory reassignment con-

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2007)] not only disregarded the statutory text but also entirely ignored the EEOC's interpretation of the Commission's own 'reasonable accommodation' regulations . . . ." (citation omitted)). *But see* Wal-Mart's Brief in Opposition at 11–13, *Huber*, 128 S. Ct. 742 (No. 07-480) (distinguishing EEOC guidance from the Department of Labor's formal position in *Long Island Care*, which the Court found to be part of a formally adopted federal regulation, including notice and public comments).

154 *See* Andrikopoulos & Gould, *supra* note 69, at 350.

155 H.R. REP. No. 101-485(II), at 56 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 338.

156 *See Aka*, 156 F.3d at 1304 (citing H.R. REP. No. 101-485(II), at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345).

157 *See id.*

158 *See id.*

159 *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1165 n.4 (10th Cir. 1999) (quoting 42 U.S.C. § 12201(a)). The U.S. Supreme Court has held that section 501 of the ADA, 42 U.S.C. §12201(a), requires courts to "construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." Bragdon v. Abbott, 524 U.S. 624, 632 (1998).

160 28 C.F.R. § 41.53 (2008) (emphasis added).

tend that if employers need only consider a disabled employee for a vacant position, the ADA would provide less protection than that afforded by the regulations of the Rehabilitation Act.[161]

c. *Policy*

Some circuits have held that mandatory reassignment is the only way to prevent employers from completely circumventing the reasonable accommodations provision of the ADA. According to this argument, the ADA would lose its bite if employers could avoid it simply by adopting a merit-based policy similar to the one adopted by Wal-Mart.[162] Employers would need only go through the illusory process of considering a disabled employee's application and then denying it in every instance. "It would be cold comfort for a disabled employee to know that his or her application was 'considered' but that he or she was nevertheless still out of a job . . . ."[163]

Circuit courts requiring reassignment reject claims that they have mandated "affirmative action." Not only did Congress implement safeguards for employers,[164] but also the ADA reasonable accommodation requirement itself inherently treats disabled persons differently than the rest of the population; for example, an employer need not agree to part-time or modified work schedules for non-disabled employees.[165] If Congress believed disparate treatment was necessary to achieve equality for the disabled, courts have no authority to question that judgment. Congress chose to include reassignment in the definition of "reasonable accommodation," so courts should simply enforce the reasonable accommodation provision by requiring employers to reassign disabled employees.[166]

2. *Circuit Justifications Against Mandatory Reassignment*

a. *Textual*

Those circuit courts that rejected mandatory reassignment found support for their holdings in the text of the ADA's reasonable accommodation provision.[167] According to these circuits, had Congress intended to grant a preference to the disabled population, Congress would have clearly said so.[168] Instead, the statute simply states that

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161 *See Midland Brake*, 180 F.3d at 1165 n.4.

162 Huber v. Wal-Mart Stores, Inc., No. 04-2145, 2005 WL 3690679, at *7 (W.D. Ark. Dec. 7, 2005).

163 *Midland Brake*, 180 F.3d at 1167.

164 *See supra* Part II.B.1.a.

165 *See* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1305 n.29 (D.C. Cir. 1998) (en banc).

166 *See Midland Brake*, 180 F.3d at 1167.

167 For the language of the provision, see *supra* text accompanying note 130.

168 *See Midland Brake*, 180 F.3d at 1183 (Kelly, J., concurring in part and dissenting in part) ("'If the Congress had intended to grant a preference . . . it would certainly not have

"[t]he term 'reasonable accommodation' may include . . . reassignment to a vacant position,"[169] which is distinguishable from "shall include reassignment."[170] According to critics of mandatory reassignment, a sensible reading of the text is that the employer must consider the feasibility of assigning the disabled employee to a different position, but the employer does not have to award him or her the job.[171] Such an interpretation prevents employers from establishing blanket bans on reassignments,[172] and it prevents employers from deeming a disabled employee less qualified for a vacant position on the basis of his or her disability.[173]

b. *Legislative History*

Critics of mandatory reassignment argue that Congress designed the ADA to provide equality, not special preferences, for disabled Americans. Congress enacted the ADA pursuant to a finding that disability discrimination "denies people with disabilities the opportunity to compete *on an equal basis* and to pursue those opportunities for which our free society is justifiably famous."[174] Furthermore, Congress intended the ADA to complement existing federal and state laws encouraging employers to consider all persons on their merits.[175] According to the critics, to require employers to fill vacant positions with less-qualified individuals solely because of their disabilities would undermine the objective of considering all persons on their merits.[176] Circuit courts that have rejected mandatory reassignment have acknowledged that the EEOC guidance appears to require reassignment,[177] but these circuits also contend that courts need not afford deference to the guidelines, particularly where the guidelines appear to conflict with the text or policy aims of the ADA.[178]

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done so by slipping the phrase "reassignment to a vacant position" in the middle of this list of reasonable accommodations.'" (quoting *Aka*, 156 F.3d at 1314–15 (Silberman, J., dissenting))).

169 Americans with Disabilities Act of 1990 § 101(9), 42 U.S.C. § 12111(9) (2000).

170 *Midland Brake*, 180 F.3d at 1184 ("[T]he phrase 'may include reassignment to a vacant position' cannot mean 'shall include reassignment to a vacant position.'").

171 *See* EEOC v. Humiston-Keeling, Inc., 227 F.3d. 1024, 1027–28 (7th Cir. 2000).

172 *See Midland Brake*, 180 F.3d at 1184 (citing H.R. REP. No. 101-485(II), at 58 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 340).

173 *See id.*

174 Americans with Disabilities Act of 1990 § 2(a)(9) (emphasis added).

175 *See Midland Brake*, 180 F.3d at 1181.

176 *See id.* at 1181–83 (discussing the Fifth, Seventh, and Eleventh Circuits' rationales for finding that reassignment of disabled employees is not required under the ADA).

177 *See supra* note 153.

178 *See Midland Brake*, 180 F.3d at 1184; *see also* Wal-Mart's Brief in Opposition at 11, Huber v. Wal-Mart Stores, Inc., 128 S. Ct. 742 (No. 07-480) (2007), *cert. dismissed*, 128 S. Ct. 1116 (2008) (arguing that *Auer v. Robbins*, 519 U.S. 452, 461 (1997), holds that deference is appropriate only when the language of the regulation or statute is ambiguous).

c. *Policy*

A strong argument against mandatory reassignment is that it would convert the ADA—a nondiscrimination statute—into a mandatory preference statute.[179] Circuit courts that reject mandatory reassignment contend that awarding the job to the best applicant is always nondiscriminatory,[180] whereas mandatory reassignment gives "bonus points" to people with disabilities, in a way similar to the operation of veterans' preference statutes.[181] These circuits argue that the ADA should require employers to eliminate obstacles to hiring the best applicant for a job, but to require employers to hire inferior applicants because they are disabled misses the mark and is "affirmative action with a vengeance."[182]

C. U.S. Supreme Court Missed an Opportunity to Resolve the Split

The U.S. Supreme Court nearly had an opportunity to resolve the circuit split regarding mandatory reassignment under the ADA. On December 7, 2007, the Supreme Court granted certiorari in the *Huber* case, limited to the following question:

> If a disability prevents an employee from performing the essential functions of his or her current position, does the ADA require:
>
> (a) that the employer reassign the employee to a vacant, equivalent position for which he or she is qualified, as the Tenth and District of Columbia Circuits have held; or
>
> (b) that the employer merely permit the employee to apply and compete with other applicants for the vacant, equivalent position for which he or she is qualified, as the Seventh and Eighth Circuits have held?[183]

Presumably, the Supreme Court agreed with Huber that the circuits are in conflict regarding mandatory reassignment.[184]

Unfortunately for those interested in seeing the circuit split resolved, the Supreme Court dismissed the writ of certiorari in mid-January 2008.[185] The Court dismissed the writ pursuant to Supreme

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179 *See* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1027–28 (7th Cir. 2000).

180 *See id.* at 1028.

181 *See id.* at 1027.

182 *See id.* at 1028–29.

183 Petition for a Writ of Certiorari at i, *Huber*, 128 S. Ct. 742 (No. 07-480); *see also Huber*, 128 S. Ct. 742 (granting certiorari on the first question presented by the petition).

184 *See* Reply to Brief in Opposition at 1, *Huber*, 128 S. Ct. 742 (No. 07-480) (arguing that only Wal-Mart denies the existence of a circuit split).

185 *See* Huber v. Wal-Mart Stores, Inc., 128 S. Ct. 1116, 1116 (2008).

Court Rule 46,[186] apparently after Huber and Wal-Mart agreed to settle the dispute.[187] Thus, the circuit split continues.

D. Impact of the Continuing Circuit Split

1. *Negative Repercussions for the Business Community*

As with any circuit split, disagreement over the ADA's reassignment provision has created uncertainty in the business environment. In the economic analysis of law, consistency is a "touchstone of rationality"—the idealized "rational agent" needs uniformity to properly order personal and business affairs.[188] Legal uncertainty prevents business owners, employers, employees, and their lawyers from making fully informed decisions.[189]

The existing ADA circuit split has created an additional problem—it has encouraged businesses to adopt inconsistent reassignment policies. A company that operates in multiple states spanning different circuits faces a difficult situation. In those jurisdictions that do not require reassignment, the company may adhere to its wholly merit-based employment policy and not reassign a less-qualified disabled employee. The same company, however, must reassign disabled employees in those circuits where reassignment is mandatory. This inconsistency presumably reduces the morale of disabled employees in circuits where reassignment is not required because those disabled employees have a comparatively more difficult time retaining their jobs. It may also create unnecessary confusion and encourage forum shopping or vigorous jurisdiction-based legal battles.[190] Of course, a

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186 *See id.*; *see also* SUP. CT. R. 46(1) ("At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal.").

187 *See Settlement in Wal-Mart Suit*, *supra* note 9. As a result, courts in the Eighth Circuit continue to allow merit-based policies to trump reassignment obligations under the ADA. *See, e.g.*, Willnerd v. First Nat'l of Neb., Inc., No. 8:05CV482, 2007 U.S. Dist. LEXIS 69837, at *36–38 (D. Neb. Sept. 19, 2007) ("In light of the recent decision in *Huber*, th[is] court finds that [the employer] had no duty to accommodate plaintiff by automatically awarding him a position for which he met the minimum requirements.").

188 Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1162–63 (2002) (describing the idealized rational agent as preferring a coherent ordering of possible states of affairs and avoiding normative evaluations of the agent's own beliefs or choices).

189 *Cf.* J. Richard Broughton, Note, *"Business Curtilage" and the Fourth Amendment: Reconciling* Katz *with the Common Law*, 23 DEL. J. CORP. L. 513, 543 (1998) (recognizing that inconsistent Fourth Amendment jurisprudence in the area of "business curtilage" creates instability and uncertainty for business owners, employees, lawyers, and law enforcement officials).

190 For businesses operating in multiple jurisdictions, forum shopping might become a major concern. A multi-jurisdictional business like Wal-Mart could be susceptible to suit where the alleged incident occurred, where the disabled individual resides, or where the company has its corporate headquarters. With different rules in different circuits, litigants

business could avoid such inconsistent results by embracing mandatory reassignment nationwide, but that choice may reduce morale of non-disabled employees who believe their employer awards "bonus points" to their disabled colleagues.[191]

2. *Negative Repercussions for the Disabled*

Clearly, disabled persons that work in jurisdictions where reassignment is not mandatory may ultimately find themselves unemployed. Disabled persons in those jurisdictions may also have different employment-related rights than disabled persons in other jurisdictions simply because of their physical location.[192] Less obvious, however, is how rejecting mandatory reassignment harms the disability-rights movement. When deciding issues of disability law, the analytical framework employed by courts fundamentally defines what equality means for people with disabilities.[193]

To reject mandatory reassignment because it would constitute "affirmative action" or special treatment is to embrace the medical-rehabilitative model of disability.[194] When a court holds that mandatory reassignment constitutes special treatment, the court implicitly says that the accommodation itself is "special."[195] The accommodation is "'special' precisely because there is something 'wrong' with the disabled person that makes her unable to interact 'normally' with the environment."[196] A court can see the accommodation as "special" only if the court conceives of the original way in which the job is structured as "natural" and the accommodation as something more than simply a way to dismantle employment discrimination.[197] A court that views accommodation as "special" embraces the medical-

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will have a great incentive to litigate over the suit's proper location, making it even more difficult for a business to order its affairs with certainty or predict its exposure to liability.

191 EEOC v. Humiston-Keeling, 227 F.3d 1024, 1027 (7th Cir. 2000).

192 *See* Petition for a Writ of Certiorari at 15, Huber v. Wal-Mart Stores, Inc., 128 S. Ct. 742 (2007) (No. 07-480), *cert. dismissed*, 128 S. Ct. 1116 (2008) ("An employee with a disability in Kansas City, Missouri, has lesser rights under the ADA than an employee with a disability in Kansas City, Kansas. That state of affairs intolerably undermines Congress's express purpose 'to provide a clear and comprehensive *national* mandate for the elimination of discrimination against individuals with disabilities.'" (quoting 42 U.S.C. § 12101(b)(1) (2000) (emphasis added)).

193 *See* Rovner, *supra* note 1, at 1045–46. For example, disabilities scholar Lennard Davis found that use of the term "special" in disability rights cases invokes an image of the disabled plaintiff as self-centered and narcissistic, reducing chances at recovery. *See id.* at 1077 (citing Lennard J. Davis, *Bending Over Backwards: Disability, Narcissism, and the Law*, 21 BERKELEY J. EMP. & LAB. L. 193, 196–98 (2000)).

194 For a discussion of the medical-rehabilitative model, see *supra* Part I.B.1.

195 *See* Rovner, *supra* note 1, at 1076.

196 *Id.*

197 *See id.* (quoting Jennifer Lav, *Conceptualizations of Disability and the Constitutionality of Remedial Schemes Under the Americans with Disabilities Act*, 34 COLUM. HUM. RTS. L. REV. 197, 226 (2002)).

rehabilitative model of disability because it locates the "problem" of disability in the disabled person rather than in the disabling environment.[198]

Judicial adoption of the medical-rehabilitative model disempowers the disability-rights movement. In handing down disability-related holdings, courts make implicit judgments about the disabled.[199] Such judgments impact the disability movement because the movement looks to the law to assist in political self-definition.[200] More specifically, judicial dialogue informs the politics, vision, and demands of the disability movement.[201] Like other identity-based social movements of the late twentieth century—including the movements for women's liberation and gay rights—the disabled population needs the judiciary to properly understand the legal and societal challenges it faces before the movement can expect to achieve sustainable societal change.[202]

III
A Socio-Political Understanding of Disability Mandates Reassignment

The circuit split regarding mandatory reassignment has generated much debate about the text, legislative history, and policy behind the ADA.[203] Yet no circuit court has discussed how the different disability models impact that debate. Through a socio-political understanding of disability, one begins to recognize both that our social institutions were not built neutrally[204] and that mandatory reassignment is an appropriate response to such inequality.

A. The Primacy of the Socio-Political Model

The socio-political model of disability properly traces the major problems faced by disabled persons to the restraints imposed by the disabling environment.[205] For many individuals with physical, mobility-related impairments, the primary barrier to full societal participation stems from architectural barriers—buildings without elevators,

198 *See id.*

199 *See id.* at 1045.

200 *See id.* at 1046.

201 *See id.*

202 *Cf. id.* at 1081–82 (discussing Professor William Eskridge's theory that for the identity-based social movements of the late-twentieth century, legal rules and institutions were necessary elements of three preconditions—definition of a class, forums to object, and events triggering community mobilization).

203 *See generally supra* Part II.B.

204 *See* Rovner, *supra* note 1, at 1062 (noting that societal structures and institutions created by the nondisabled majority often do not account for the variety of human needs).

205 *See* Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning*, 21 Berkeley J. Emp. & Lab. L. 166, 173 (2000).

narrow paths that cannot accommodate mobility equipment, etc.; likewise, communicative barriers continue to restrain individuals with sensory impairments.[206] Such impairments would largely disappear in a world adapted to the needs of all its inhabitants.[207] Today's "disability problem" is not that some individuals have personal "defects"; rather, the problem is that our present environment was "'designed for the average human being, plus or minus half a standard deviation.'"[208] Only the socio-political model recognizes these realities.

Moreover, the socio-political model is consistent with contemporary understandings of race and gender because it challenges the assumption that "biology is destiny."[209] Like the race and gender theories that preceded it, the socio-political model contends that the disadvantages the disabled population faces, like those suffered by African-Americans and women, are the product of social forces.[210] Throughout history, the majority has used bodily traits—skin color, sex, disability—as the bases for differentiating and discriminating against minorities.[211] "In the case of people with disabilities, bigotry or bias is evoked either by visible bodily differences or by stigmatized labels attached to physiological attributes."[212] This social understanding means that the socio-political model offers a better chance of crafting solutions to eliminate biases against the disabled population.

Further, the socio-political model of disability correctly recognizes that the disabled population cannot fully participate in society as a self-fulfilling prophecy.[213] The problem is that mainstream media portrays disabled people as either "helpless cripples" or "courageous overcomers."[214] Such presentations then operate at a subtextual level to denigrate the disabled population, fostering unexamined and hostile—or ignorant—attitudes toward disabled people that ultimately result in negligently or hostilely built environments.[215] Such negative attitudes also support, at least implicitly, a social and legal system that excludes the disabled population.[216]

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206 *See id.*

207 *See id.*

208 *See* Harlan Hahn, *Reconceptualizing Disability: A Political Science Perspective*, 45 REHABILITATION LITERATURE 362, 364 (1984) (quoting an unspecified "noted urban planner").

209 SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 143 (1998).

210 *See* Rovner, *supra* note 1, at 1051–52.

211 *See* Hahn, *supra* note 205, at 174.

212 *Id.*

213 *See* Rovner, *supra* note 1, at 1052.

214 *See id.* at 1053.

215 *See id.* at 1054. Disabled people often express the opinion that the single greatest obstacle they face is attitudes. *See* Hahn, *supra* note 205, at 175; *see also* Cook, *supra* note 66, at 35.

216 *See* Hahn, *supra* note 205, at 174–75. As a result, "[d]isabled persons often find themselves trapped in an 'approved disabled role' and find that their behavior becomes organized around this role. . . . Their major concern may become 'acceptance' and it is

Finally, the socio-political model of disability, unlike the medical-rehabilitative model, is politically transformative because it empowers the disability-rights movement. For over forty years, the disability-rights movement has tried to reframe the way people think about individuals with disabilities.[217] The medical-rehabilitative model locates the problem within the individual, perpetuating notions of incapacity and dependence that trigger social and economic isolation.[218] By rejecting the idea that individuals with disabilities suffer from personal defects, the disability movement has been able to promote changes to the physical and social environment while dodging attacks of "special treatment."[219] Judicial embrace of the medical-rehabilitative model represents backsliding.[220]

B. A Socio-Political Model Underlies the ADA

The ADA was watershed legislation because it adopted many of the tenets of the socio-political model of disability.[221] For example, the ADA's findings demonstrate that the "disability problem" resides in the external environment, not within disabled individuals. First, Congress used the ADA to describe individuals with disabilities as members of a discrete and insular minority:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[222]

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not surprising that disabled individuals attempt to 'pass as normal' if their handicap is not too severe." Cook, *supra* note 66, at 35.

217 *See* Rovner, *supra* note 1, at 1043.

218 *See id.* (quoting Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 219 (2000)).

219 *Cf. id.* at 1049. ("By starting from the premise that the 'problem' of disability is an inherent physical flaw, any attempts to require changes in the environment to account for such 'flaws' were necessarily viewed as 'special treatment' . . . ."). Today, power is not a stable and steady force; who can wield power depends, at least in part, on the way in which we as a society view the interrelationships amongst people. *Cf.* ROLAND BLEIKER, POPULAR DISSENT, HUMAN AGENCY AND GLOBAL POLITICS 135–36 (2000). The socio-political model, by isolating the source of the "disability problem" in the external environment, creates a new way of thinking about how disabled persons should be able to interact with the rest of society. If the socio-political model is successful, people will begin to address the disability problem by examining external physical and communicative barriers rather than the "defects" of disabled individuals themselves.

220 *See* Rovner, *supra* note 1, at 1046.

221 *See id.* at 1044.

222 Americans with Disabilities Act of 1990 § 2(a)(7), 42 U.S.C. § 12101(a)(7) (2000).

The "constitutional code words" of "discrete and insular minority" have historically been used to identify a group that has faced *externally* imposed obstacles in public and private life.[223] Second, like the socio-political model, the ADA findings declare that the primary obstacles to the disabled achieving full participation in society include the discrimination imposed by architectural, transportation, and communicative barriers, along with the failure to modify facilities.[224]

In addition, the reasonable accommodations provision itself reflects a socio-political understanding of disability. First, the provision demonstrates Congress's understanding that people with disabilities cannot fully participate in society until public and private entities modify the physical environment.[225] The problem of disability is not located in the person who must use a wheelchair for mobility; instead, it is located in societal structures that exclude the disabled through narrow doorways and entrances without ramps.[226] Second, the ADA reasonable accommodations provision mandates reform; it properly recognizes that combating systematic exclusion requires society to restructure the environment.[227]

Additionally, the ADA appears to have adopted the tenets of the socio-political model when it defined "disability." The ADA defines disability in terms of identity: "The term 'disability' means, with respect to an individual—(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."[228] Of particular import is part C, which recognizes disability status for an individual simply if others perceive him or her as having a disability.[229] For example, if an employer believes an employee has recently become disabled and conse-

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223 *See* Rovner, *supra* note 1, at 1061.

224 *See id.*; *see also* Americans with Disabilities Act of 1990 § 2(a)(5) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.").

225 *See* Rovner, *supra* note 1, at 1063. By including the reasonable accommodations provision in the text of the ADA, congressional drafters "'sought to transform the institution of disability by locating responsibility for disablement not only in a disabled person's impairment, but also in "disabling" physical or structural environments.'" *Id.* at 1064 (quoting Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 481 (2000)).

226 *See id.* at 1063–64 (stating that the problem partially results from the fact that society has built many of its institutions without "a range of needs and abilities in mind").

227 *See id.* at 1064.

228 Americans with Disabilities Act of 1990 § 3(2).

229 *See id.*; Kaplan, *supra* note 15, at 358. The U.S. Equal Employment Opportunity Commission's ADA Title I technical assistance manual provides further clarification:

quently fires the employee, the employer would be discriminating under the ADA even if the employee had not, in fact, become disabled.[230] Such a result is only possible because the ADA, like the socio-political model, recognizes that societal attitudes toward those identified as "disabled" form the basis for discrimination.[231]

Finally, the ADA was a policy commitment to the social inclusion of people with disabilities. The ADA was the product of years of proactive efforts by persons with disabilities, the disability-rights movement, legislators, and other visionaries.[232] Disability advocates purposefully chose some of the methods and approaches of the African-American civil-rights movement to secure legal guarantees of equality.[233] Legislators recognized the goal of social equality in their early reports that lay the groundwork for the ADA:

> [Preceding] handicap nondiscrimination laws fail to serve the central purpose of any human rights law—providing a strong statement of a societal imperative. An adequate equal opportunity law for persons with disabilities will seek to obtain the voluntary compliance of the great majority of law-abiding citizens by notifying them that discrimination against persons with disabilities will no longer be tolerated by our society.[234]

As discussed above, societal integration is a primary goal of the socio-political model.

C. A Socio-Political Understanding Mandates Reassignment

Critics of mandatory reassignment are correct when they say Congress did not intend the ADA to be an affirmative action program for employees with disabilities.[235] Affirmative action is a transitional policy designed to eliminate the effects of past prejudice.[236] Yet the ADA

> The individual may have an impairment which is not substantially limiting, but is *treated by* the employer *as having such an impairment. For example:* An employee has controlled high blood pressure which does not substantially limit his work activities. If an employer reassigns the individual to a less strenuous job because of unsubstantiated fear that the person would suffer a heart attack if he continues in the present job, the employer has 'regarded' this person as disabled.

EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 2.2(c) (1992).

230 *See* Kaplan, *supra* note 15, at 358–59.

231 *See id.*

232 *See* JANE WEST, *Introduction—Implementing the Act: Where We Begin*, *in* THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE, at xi, xi–xii (Jane West ed., 1991).

233 *See* Rovner, *supra* note 1, at 1059.

234 Scotch, *supra* note 218, at 216 (quoting NAT'L COUNCIL ON THE HANDICAPPED, *supra* note 54, at 18).

235 *See, e.g.*, Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 397–98 (E.D. Tex. 1995).

236 *See generally* Thomas Sowell, Weber *and* Bakke *and the Presumptions of "Affirmative Action,"* 26 WAYNE L. REV. 1309, 1310–11 (1980) (arguing that affirmative action has

does require affirmative steps to eliminate barriers to full societal participation. Why? Because the problems faced by the disabled population are different from those faced by other marginalized groups, the remedy must be different too. In the context of race, a nondiscrimination statute that bans the consideration of race in employment decisions may be relatively effective at combating race discrimination.[237] But the same statute cannot protect the disabled population—an employer who treats disabled employees exactly the same as non-disabled employees may still—at least implicitly—privilege non-disabled employees.[238]

Employers may provide unfair advantages to non-disabled employees because existing societal institutions and the physical environment constrain opportunities for the disabled.[239] Under a sociopolitical understanding of disability, many employment environments exhibit the same biases as other physical environments. To use an earlier example, the problem is not that the employee in a wheelchair is unwilling to attend a corporate meeting; instead, the problem is that the meeting is held in a building without an elevator. The solution is not to change the disabled employee; rather, the solution is to reshape the environment. In the employment context, reshaping the environment means requiring employers to make reasonable accommodations—including, as a last resort, reassignment—that allow disabled individuals to compete alongside others in the workplace.[240]

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evolved from the original idea of "cease and desist" to now require affirmative mitigation of past discrimination).

237 *See* Riel v. Elec. Data Sys. Corp., 99 F.3d 678, 681 (5th Cir. 1996); *see also* McAlindin v. County of San Diego, 192 F.3d 1226, 1237 (9th Cir. 1999) ("The essence of the concept of reasonable accommodation is that, in certain instances, employers must make special adjustments to their policies for individuals with disabilities.").

238 *See McAlindin*, 192 F.3d at 1237. Arlene Mayerson, one of the drafters of the ADA, offers her perspective, noting:

> As drafters of the ADA . . . we incorporated nondiscrimination provisions from section 504 implementing regulations that assured that different treatment would be provided when necessary to achieve equal opportunity. We were insistent that reasonable accommodation *was not* affirmative action but simply part and parcel of meaningful nondiscrimination. Unlike the women's movement, which has been hotly debating the wisdom of ever veering from the equal treatment paradigm, the disability movement has known from the outset that for people with disabilities, a civil rights statute based solely on equal treatment would fall far short of achieving the goals of inclusion and participation.
>
> In other words, we conceptualized equal protection as equal opportunity, which by necessity required affirmative steps to eliminate barriers to participation.

Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535, 536–37 (2001) (citations omitted).

239 *See* Rovner, *supra* note 1, at 1062.

240 *See* US Airways, Inc. v. Barnett, 535 U.S. 391, 397–98 (2002).

Only mandatory reassignment reshapes the employment environment. By analogy, a "wholly merit-based" reassignment policy like the one at Wal-Mart assumes that the disabled population may fairly compete in the "employment race" so long as all contestants are evenly lined up at the starting line.[241] Yet such an understanding ignores the environmental obstacles faced by the disabled community.[242] For many disabled people, the racetrack is already littered with obstacles like physical inaccessibility, communicative barriers, stigma, and discriminatory attitudes.[243] To ensure a fair race, society must force employers to clear the track, and if employers cannot clear the track, they should reassign the disabled contestants to an equivalent, but clear, track. Mandatory reassignment puts disabled employees on truly equal footing with non-disabled employees.

CONCLUSION

By granting certiorari,[244] the Supreme Court acknowledged the circuit split over mandatory reassignment.[245] Though the parties in *Huber v. Wal-Mart*[246] settled, preventing immediate Supreme Court resolution, the Court will likely have another opportunity to determine whether an employer must reassign a disabled, qualified employee to a vacant, equivalent position. By exacerbating legal and business uncertainties, creating inconsistent legal rights for disabled Americans, and directly impacting the political framework of the disability-rights movement, the circuit split has assuredly created an incentive for various parties to litigate this issue in the future. Thus, the remaining question is: how will the Supreme Court—or a previously "silent" circuit court—resolve the issue in the future?

This Note demonstrates that courts should use a socio-political model of disability to interpret the ADA. Disability law advanced from its early roots in local charity to a system of rehabilitation for war veterans. The ADA represents the most recent shift in disability law to a socio-political model that recognizes that the disability "problem" resides not in the disabled individual, but in societal institutions and environments designed only for the "average person plus or minus half a standard deviation."[247] By recognizing physical and communi-

241 *See* Hahn, *supra* note 205, at 189 n.120.

242 *See id.*

243 *See id.*

244 *See* Huber v. Wal-Mart Stores, Inc., 128 S. Ct. 742 (2007), *cert. dismissed*, 128 S. Ct. 1116 (2008).

245 *See* Reply to Brief in Opposition at 1, *Huber*, 128 S. Ct. 742 (No. 07-480) (arguing that only Wal-Mart denies the existence of a circuit split).

246 *See* Huber, 128 S. Ct. 1116 (2008); *Settlement in Wal-Mart Suit*, *supra* note 9.

247 Hahn, *supra* note 208, at 364.

cative barriers, the socio-political model offers the best hope for social and economic integration of the disabled.

A socio-political understanding of disability requires an employer to reassign a disabled employee to a vacant, equivalent position when no other accommodation is reasonable. Voluntary reassignment policies like the one used by Wal-Mart, even under the mantra of "meritocracy," disguise the environmental obstacles that preclude full and fair economic participation by the disabled population. Requiring employers to make reasonable accommodations, including reassignments, is not "affirmative action" to employ disabled individuals because of their class status; rather, it is an embodiment of the idea that society cannot challenge environmental and attitudinal discrimination in the same ways it countered biases against other marginalized groups. The ADA was watershed in its recognition that only affirmative steps to eliminate discrimination will allow individuals with disabilities to experience meaningful societal participation. Courts should follow the ADA's lead and embrace a socio-political model of disability by requiring reassignment.