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Deserving Disabilities: Why the Definition under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement

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"Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement

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I. INTRODUCTION

A commentator on a public radio program recently spoke in favor of the Americans with Disabilities Act ("ADA") by asserting that "[t]he blind, deaf, and crippled really *do* deserve our help."[1] Although this commentator purported to support the ADA, his actual message was that the definition of "disability" in the Act is excessively vague and allows individuals not "deserving" of legal protection, such as persons with back impairments and mental impairments, to, in his words, "[hitch] a ride on the disability bandwagon."[2] His argument that the ADA should reach only the claims of "deserving" individuals with disabilities has had powerful resonance since the enactment of the ADA. Recent United States Supreme Court rulings restricting the ADA's protected class demonstrate the persuasiveness of this argument.[3]

Title I of the ADA prohibits discrimination against a "qualified individual with a disability" who, with or without reasonable accommodations, can perform the essential functions of the job in question.[4] "Disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities," "a record of such an impairment," or "being regarded as having such an impairment."[5] According to the view described above, the part of the

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1. Commentary of David Manasian, *Marketplace* (Nat'l Pub. Radio broadcast, Oct. 16, 1998).

2. *Id.* The criticism has been echoed in other commentary. *See, e.g.*, Don C. Brunell, *Mental Disorders at Work*, SEATTLE POST-INTELLIGENCER, June 15, 1997, at J1; David Frum, *Oh, My Aching Back (Head)*, FORBES, Nov. 8, 1993, at 64; Ruth Shalit, *Defining Disability Down: Why Johnny Can't Read, Write, or Sit Still*, THE NEW REPUBLIC, Aug. 25, 1997, at 16.

3. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999) (holding that individuals with correctable impairments that are not presently substantially limited in any major life activities are not covered by the ADA's anti-discrimination provisions).

4. 42 U.S.C. §§ 12111(8), 12112 (a) (1994).

5. 42 U.S.C. § 12102(2) (1994).

definition that requires the impairment be "substantially limiting" operates as a gate designed to allow only a carefully screened few to assert civil rights protections.[6]

The ADA is unlike other civil rights statutes because its protected class must be determined on a case-by-case basis.[7] The extent to which an individual possesses a protected characteristic is not examined in other civil rights contexts before an individual may assert protected class status.[8] In the findings section of the ADA, Congress expressed its concern that persons with disabilities are subject to stereotypic assumptions not truly indicative of individual abilities.[9] There is no real question that Congress intended a case-by-case evaluation of whether the plaintiff has a covered disability.[10] By choosing to frame the inquiry around the question of whether an alleged impairment "substantially limits" a major life activity, however, Congress adopted a process that perpetuates rather than resolves the stereotyping problems that the ADA was designed to combat.

The result of the case-by-case approach has been that courts are making normative distinctions between persons with different disabilities based on their perception of whether the individual is someone the ADA was intended to cover,[11] and inappropriately disposing of cases that should be left to juries.[12]

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6. The Court's reasoning in *Sutton* powerfully demonstrates this concept and is discussed in more detail in Part II of this Article.

7. *See* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 441-42 (1991) (describing how determination of protected class membership under the ADA is different from other anti-discrimination statutes based on race, sex, age, religion, and national origin).

8. *Id.* at 442. For example, in the context of male-on-male sexual harassment, the Supreme Court recently rejected the concept that only certain "sex" plaintiffs should be entitled to proceed under Title VII. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78-79 (1998) (holding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII of the Civil Rights Act of 1964). Male or female status is all that is required for protected class status, and no inquiry into sexual orientation, gender, or any other factor is required. *Id.* (rejecting notion that sexual harassment occurs only when there is sexual desire based on sexual orientation). Sex is, in other words, a self-evident concept for civil rights purposes. "Disability" is not. *Id.*

9. 42 U.S.C. § 12101(a)(7) (1994).

10. *See* 29 C.F.R. app. § 1630.2(j) (1999) (noting that ADA did not set out laundry list of covered disabilities out of recognition that some impairments may be impairing for some individuals and not for others).

11. *See generally* Robert L. Burgdorf, Jr., *Substantially Limited Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409 (1997); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1998); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107 (1997).

12. *See* Colker, *supra* note 11, at 101, 109-10; Catherine J. Lanctot, *Ad Hoc*

Indeed, disability has been given such a narrow interpretation in recent decisions that it is now quite difficult for ADA plaintiffs to get past the summary judgment stage.[13]

An overlooked or, perhaps more properly, disregarded result of the case-by-case protected class approach has been the creation of a subclass of individuals who suffer from physical or mental impairments affecting major life activities and who lose employment or other opportunities because of those impairments, but who have no right of redress under federal disability laws. These are the "not impaired enough" plaintiffs. Both supporters of broad and narrow interpretations of disability apparently believe that some such individuals are properly excluded from coverage; they simply disagree on where the line is to be drawn.[14]

By way of example, Professor Ruth Colker, a leading critic of the way courts have narrowly construed the ADA, characterized the Casey Martin-PGA golf cart case[15] as a "trivial cause" that diverted attention from individuals with

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Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA, 42 VILL. L. REV. 327, 332-33 (1997).

13. *See* Colker, *supra* note 11, at 119, 125-26; Locke, *supra* note 11, at 113-15.

14. *See, e.g.*, Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877, 881 (1997). Professor Blanck explains the purpose of the definition of disability with its requirement that the plaintiff show substantial limitation as follows:

> The first prong definition of disability does not mean that a covered individual must work at the job of his choice. Rather, to fall under the first prong definition, the individual's "access" to the relevant labor market must be substantially limited by the impairment or condition. Put differently, an individual's failure to qualify for one job in a given labor market, even because of a substantial impairment or condition, does not necessarily mean that the individual has a covered disability for purposes of Title I analysis.

Id. at 881.

For a notable recent exception to the view that some individuals with impairments should be excluded from coverage, see Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405 (1999). Eichhorn advocates revising the definition of disability to eliminate any consideration other than the presence of impairment. *Id.* at 1473; *see also infra* notes 265-68 and accompanying text.

15. Martin v. PGA Tour, Inc., 994 F. Supp. 1242 (D. Or. 1998). Martin sued the Professional Golf Association (PGA), alleging that he required the use of a golf cart in order to participate in professional golf tournaments because of a congenital defect in his right leg that placed him at risk for a tibia fracture when walking. *Id.* at 1242. The PGA refused to accommodate Martin, arguing first, that the ADA does not apply to professional golf tournaments, and second, that waiving the walking rule for Martin would fundamentally alter the nature of professional golf competitions. *Id.* at 1244. The court rejected both arguments, finding that use of a golf cart by Martin was a reasonable accommodation of his condition. *Id.* at 1253.

"genuine disabilities who have been losing their cases under inappropriately narrow interpretations of the term 'disability.'"[16] While Professor Colker may be correct in claiming that there are other, more substantially impaired individuals who have been denied the opportunity to proceed with ADA claims, the underlying value judgment of her position is intriguing. It is, indeed, the basic underlying value judgment of the ADA. Namely, that it is proper to draw distinctions among individuals with impairments in order to provide discrimination coverage to the "deserving" disabled.

This Article asks whether the ADA's employment discrimination provisions can be defended as long as the statute bases protected class status on a concept of "substantial limitation."[17] This Article concludes that in order to avoid the perpetuation of stereotypes about the nature of disability, the statute should be revised to remove the "substantially limits" requirement. Part II of this Article demonstrates how the definition of disability found under the ADA evolved as a product of societal, legislative, and judicial attitudes about the nature of disability.[18] The Supreme Court's most recent ADA decisions, in which the Court construed the term "substantially limits" in a way that is arguably consistent with the language of the ADA but which clearly illustrates the inherent problems with definitions for the protected class, are also examined.[19]

Part III then turns to several of the inherent conflicts created by the current statutory definition of disability. More specifically, Part III demonstrates how the ADA treats persons with disabilities differently in a way that undermines the goals of civil rights statutes and the concept of disability as a group-based civil rights issue.[20] Further, Part III argues that the part of the ADA that was specifically designed to address stereotypes, namely the third prong which protects individuals "regarded as" having a disability, is itself inadequate to

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16. Ruth Colker, Martin v. Professional Golf Association: *Why Do We Care?*, THE COLUMBUS DISPATCH, Feb. 19, 1998. Professor Colker suggested that Casey Martin was not a person protected by the ADA because he was someone "who simply walk[ed] at a below average speed or [was] precluded from participating in professional sports." *Id.*

17. I limit my consideration to Title I of the ADA, which prohibits disability discrimination in employment. *See* 42 U.S.C. § 12112(a) (1994). The general definition of disability that is at issue in this Article appears in the general provisions of the ADA and is also applicable to Titles II and III of the Act, which prohibit disability discrimination by public entities and public accommodations, respectively. *See* 42 U.S.C. § 12102(2) (1994) (defining disability as used in this "chapter"); 42 U.S.C. § 12132 (1994) (prohibiting discrimination by public entities); 42 U.S.C. § 12182 (1994) (prohibiting discrimination by public accommodations). Although only employment discrimination is considered in this Article, the underlying reasons I urge for modifying the definition of disability would for the most part apply to the other titles of the Act as well. I reserve for another day consideration of whether Title II or Title III might require their own unique definition of disability in some circumstances.

18. *See infra* notes 25-116 and accompanying text.

19. *See infra* notes 116-54 and accompanying text.

20. *See infra* notes 154-212 and accompanying text.

redress this problem because it also allows courts to make normative distinctions based on "substantially limits."[21] Moreover, unlike individuals who can proceed under the first prong, not-impaired-enough plaintiffs relegated to the "regarded as" prong are likely not entitled to reasonable accommodations necessary for them to perform a job.[22]

Finally, Part IV considers how the ADA would be interpreted and applied if "substantially limits" is removed from the definition of disability.[23] This revision would substantially resolve the conflicts identified in Part III. Moreover, it would place the emphasis in disability discrimination cases on the mechanisms that work more effectively to determine which cases have merit and which do not—the requirements that an individual be "qualified" and that any requested job accommodations be "reasonable."[24]

II. PARADIGMS OF "DISABILITY" AND "SUBSTANTIALLY LIMITS"

What exactly is "disability?" The term is not self-defining. Some definition is needed, however, to establish what class of persons is intended to be benefitted by the ADA. The current definition of disability has a complicated history. On one level, it reflects a conscious choice to emphasize individualized assessment in response to a prior system that failed to treat individuals with disabilities as unique persons with unique needs and skills. On another level, it reflects a lack of insight into the consequences of incorporating concepts about defining the protected class that come from prior statutes with different goals. This Part traces the history of the definition of disability now found in the ADA, culminating with the Supreme Court's most recent rulings on that definition.

A. Models of Thinking About Disability

Early in a disability law course, the professor is likely to emphasize the importance of terminology to students—that "individual with a disability" is preferable to "disabled person" or "handicapped."[25] As one textbook author explains, this is not merely a lesson in political correctness but rather a reflection of evolution in attitude.[26] The evolution of the legal rights of individuals with

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21. *See infra* notes 212-25 and accompanying text.

22. *See infra* notes 227-39 and accompanying text.

23. *See infra* notes 240-316 and accompanying text.

24. *See infra* notes 317-54 and accompanying text.

25. Both of the leading authors of disability law texts raise the importance of discussing "people first" terminology, such as "individual with a disability" in the introductory sections of the course. *See* RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABILITY DISCRIMINATION (TEACHER'S MANUAL) 1 (2d ed. 1998); LAURA F. ROTHSTEIN, DISABILITY LAW: CASES, MATERIALS, PROBLEMS (TEACHER'S MANUAL) 2 (2d ed. 1998).

26. *See* ROTHSTEIN, *supra* note 25, at 2.

disabilities can be seen in the changes in the language used to describe such persons. An examination of the historic treatment of disability issues shows why contemporary disability law places so much emphasis on individual, case-by-case determination of the existence of a protected disability.

In the nineteenth century, the most common label applied to individuals with disabilities was "afflicted."[27] This terminology was rooted in religious belief that "God, in His mysterious wisdom, had afflicted someone with this particular burden, and they were supposed to bear it with patience and faith, trusting that the affliction was part of some larger plan. People were afflicted for a reason—to learn a lesson, to teach other people pity and charity, and so on."[28] Also referred to as the moral model of disability,[29] this form of thinking viewed individuals with disabilities as undeserving of individual rights.[30] Rather, society needed to be protected from these deviants by having them removed to institutions and sterilizing them to prevent future deviants from being born.[31]

The harsh moral model softened into a charity-based concept of benevolence toward people with disabilities, as part of the philanthropic movement of the late nineteenth and early twentieth century.[32] This in turn led to the emergence of a medical model of disability. Under this model, instead of being viewed as a spiritual inferiority, disability was viewed as a physical infirmity that a person should try to overcome by rehabilitation and training.[33] Nevertheless, disability still rendered people different and inferior, and any social disadvantage that such persons suffered was the direct result of the disability itself.[34] Society's only obligation was to provide the individual with treatment for the infirmity through rehabilitation programs.[35] If the person could

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27. Interview of historian Doug Bayton, *Beyond Affliction: The Disability History Project* (Nat'l Pub. Radio broadcast, May 1998), transcript available at <http://www.npr.org/programs/disability/ba_shows.dir/revoluti.dir/prg_3_tr.html>.

28. *Id.*

29. Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 U.C.L.A. L. REV. 1341, 1345-46 (1993).

30. *Id.* at 1346 n.14 (summarizing the views of a Reagan administration official, as recently as 1985, expressing a belief that "the handicapped constituency" was misplaced in seeking legal protection for what they spiritually deserved to bear).

31. Bonnie O'Day, *Discrimination on the Basis of Disability: The Need for a Third Wave Movement, Economics v. Civil Rights*, 3 CORNELL J.L. & PUB. POL'Y 291, 291 (1994) (describing the protectionist model of disability policy).

32. *See* O'Day, *supra* note 31, at 291.

33. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649-50 (1999); Drimmer, *supra* note 29, at 1347.

34. *See* Crossley, *supra* note 33, at 649-50.

35. *See* Drimmer, *supra* note 29, at 1348.

not be "normalized" through rehabilitation, he or she should accept his or her fate as a nonproductive member of society.[36]

The terminology associated with the medical model of disability reflects how the law treated these individuals. Individuals with disabilities were considered "handicapped," such as in "handicapped in the race for life." As historian Doug Bayton describes it, "[w]hile an 'affliction' was a spiritual burden to be borne with faith and lived with as best as possible, in submission to God's wisdom, a 'handicap' was a condition to be conquered, an impediment to worldly success that had to be overcome."[37]

The medical model sought to place "the physically, mentally and socially handicapped in positions where their particular handicap would not interfere with the work to be done."[38] Special employment bureaus were developed for individuals with disabilities.[39] As explained by a sociologist of that era, this approach failed because it was "impossible to create a market for the labor of crippled adults without fitting them, by training in suitable kinds of industry, to compete on practically even terms with those who were not handicapped."[40]

To address the limitations of the employment marketplace, a system of vocational rehabilitation training was then developed, which evolved into a two-tier system. The first tier was for those persons, predominately injured workers and soldiers returning from the World Wars, who were otherwise "able-bodied" but needed assistance returning to the competitive workforce.[41] The second tier was for people with disabilities who were deemed unable to participate in the competitive workforce and consisted predominately of menial employment in "sheltered workshops."[42]

In either respect, these rehabilitation-based approaches perpetuated the idea that a disability was a personal trait to be overcome with the help of outside

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36. Crossley, *supra* note 33, at 650; Drimmer, *supra* note 29, at 1348. Related to the medical model is the social pathology model, which focuses on identification of normal patterns of behavior and deviation therefrom. *See* Drimmer, *supra* note 29, at 1348-49. According to social pathology theory, disability is primarily a question of attitude and acceptance of group norms. *See* Drimmer, *supra* note 29, at 1348-49. Like the medical model, this model also views disability as an individual defect that must be overcome through the help of experts. *See* Drimmer, *supra* note 29, at 1348-49.

37. Interview of Doug Bayton, *supra* note 27.

38. FRANK DEKKER WATSON, THE CHARITY ORGANIZATION MOVEMENT IN THE UNITED STATES 369 (1922).

39. *Id.* at 369-70.

40. *Id.* at 371 (quoting THE CHARITY ORGANIZATION OF THE CITY OF NEW YORK, THIRTIETH ANNUAL REPORT 55 (1912)).

41. Drimmer, *supra* note 29, at 1364.

42. Drimmer, *supra* note 29, at 1369.

experts.[43] The goal was to raise productivity, not to address prejudice and stigma attached to disability itself.[44]

A more contemporary view of disability that addresses issues of prejudice and stigma emerged as a product of the civil rights movement of the 1960s and early 1970s. By the early 1970s, several groups of disability activists had emerged who viewed disability as a civil rights issue. They viewed the rhetoric used by black activists as a powerful tool in accomplishing their own objective of increasing participation of people with disabilities in society.[45] They argued that people with disabilities in this country had a history of decisions being made for them by others and of institutional and structural segregation.[46]

In particular, these advocates argued that barriers to participation in both the private labor market and government-supported services were arbitrary, discriminatory, and not based on individualized assessments of personal capabilities.[47] The limited participation of persons with disabilities was not solely because of their physical or mental limitations, as the moral and medical models assumed, but largely from socially constructed limitations.[48] "Disability," in other words, was not a problem to be overcome by the individual but rather a set of external standards created by a society that believed it knew how people should be.

The present civil rights, or minority rights, model thus attacks assumptions made about persons with disabilities and insists on individualized assessment.

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43. *See* Drimmer, *supra* note 29, at 1365.

44. *See* Drimmer, *supra* note 29, at 1368. An illustration of the exultation of productivity over stigma is the sheltered workshop system. Fred Pelka describes the history of the use of sheltered workshops to provide menial employment to individuals with disabilities in segregated settings, a system that perpetuated itself not because it provided individuals with disabilities skills needed to integrate into the general workforce (the workshop's original purpose), but because there was a ready and productive labor pool available who could be paid little money by the non-disabled managers of the workshops who had guaranteed government contracts. *See* FRED PELKA, THE DISABILITY RIGHTS MOVEMENT 281-83 (1997).

45. RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 31 (1984). The disability rights movement came about slightly later than other civil rights movements because of the diversity of people with disabilities. Robert Scotch has described how these groups had to, in effect, overcome their diversity in order to form a community of activists and advocates. *Id.* at 41.

46. *See* SCOTCH, *supra* note 45, at 31.

47. *See* SCOTCH, *supra* note 45, at 31.

48. *See* Drimmer, *supra* note 29, at 1355-57. Drimmer presents examples of arbitrariness such as "placing the buttons in an elevator at a height where a person in a wheelchair cannot reach them and constructing a doorway too narrow for a wheelchair to enter." Drimmer, *supra* note 29, at 1355 n.57. Both of these are examples of structures designed by cultural norms about use of space, rather than by any actual physical imperative.

Eradicating perceptions of inferiority is at the center of this model.[49] The main causes of discrimination against persons with disabilities are seen to stem from oversight, fear, and prejudice.[50] Remedies for this discrimination are not based on charity or benevolence, but require the enforcement of basic rights necessary to combat the resulting social hierarchy that first defines and then subordinates persons with disabilities.[51]

One particular set of stereotypes that the contemporary view of disability also rejects is the idea that individuals with disabilities are "special," "inspirational," or "courageous."[52] Individuals with disabilities commonly reject these characterizations as labels that magnify their differences and suggest that any success or accomplishment is uncommon or heroic.[53] Yet, this "special" characterization has worked itself inextricably into the way that disability is defined under federal anti-discrimination law.

B. The Rise of the "Substantial Limitation" Concept

Interestingly, the category of persons entitled to participate in early vocational rehabilitation programs was defined quite broadly, at least with respect to physical disabilities. The Smith-Fess Act of 1920[54] extended vocational rehabilitation services to "any person who, by reason of a physical defect or infirmity, whether congenital or acquired by accident, injury, or disease, is, or may be expected to be, totally or partially incapacitated for remunerative occupation."[55] Despite this broad definition, the statute nonetheless reflected a social policy that assumed disability was relevant only to the extent that unemployed, unproductive persons with disabilities had negative economic consequences for the nation.[56] In that sense, the statute not

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49. *See* Drimmer, *supra* note 29, at 1358.

50. *See* Drimmer, *supra* note 29, at 1357.

51. *See* Drimmer, *supra* note 29, at 1358.

52. *See* Burgdorf, *supra* note 11, at 534-35 (describing reaction of disability advocates to characterization of being "special" because they have had to deal with disabling conditions in life).

53. *See* Burgdorf, *supra* note 11, at 534-35.

54. Smith-Fess Act of 1920, ch. 219, 41 Stat. 735 (1920) (codified as amended at 29 U.S.C. §§ 731-41 (repealed and reenacted in the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355(1973))).

55. Smith-Fess Act of 1920. The early versions of the Act also defined the targeted beneficiaries of the Act as "persons disabled in industry or in any legitimate occupation [for] their return to civil[ian] employment." *Id.*

56. In fact, when the Vocational Rehabilitation Act was amended in 1954 to increase its funding, Congress expressly stated that the purpose of the funding was to "increas[e] not only [handicapped persons'] social and economic well-being, but also the productive capacity of the Nation." Vocational Rehabilitation Act Amendments of 1954, ch. 655, §1, 68 Stat. 652 (1954) (repealed and reenacted in Rehabilitation Act of 1973,

only perpetuated the stigma associated with disability,[57] but in some respects laid the groundwork for the contemporary judicial view of federal disability law as reaching only those persons whose employment opportunities are generally foreclosed.[58]

The earlier definition of the beneficiary class was substantially revised with the Vocational Rehabilitation Act Amendments of 1954.[59] This statute made services available to the "handicapped,"[60] and for the first time the concept of substantial limitation appeared in the definition of the beneficiary class: "'the term physically handicapped individual' means any individual who is under a

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Pub. L. No. 93-112, 87 Stat. 355(1973)).

57. *See* Drimmer, *supra* note 29, at 1368. Drimmer argues that the Act's emphasis on returning persons to the workplace is an application of the medical model of disability, which emphasizes "curing" or "fixing" the person with the disability. Drimmer, *supra* note 29, at 1364-65. Thus, persons with disabilities are perceived as an inferior class, worthy of integration into society only if they can be made able to diminish the financial effects of their assumed lack of productivity. *See* Drimmer, *supra* note 29, at 1368.

58. As will be discussed later in the Article, courts interpreting the ADA have repeatedly stated that plaintiffs in disability discrimination cases must prove more than exclusion from a single, particular job in order to establish that they are "substantially limited in the major life activity of working" under the first prong of the definition of disability. *See infra* notes 114-15 and accompanying text. Even proponents of the ADA appear to accept this proposition under a theory that the Act protects only those individuals whose "access" to the labor market is substantially limited. *See* Blanck, *supra* note 14, at 881 (reasoning that "the first-prong definition of disability does not mean that a covered individual must work at the job of his choice"). This view does not seem far removed from the social attitudes that defined the scope of responsibility as "helping" the disabled by finding them some work they can do "where their particular handicap [will not] interfere with the work to be done." WATSON, *supra* note 38, at 369.

59. Vocational Rehabilitation Act Amendments of 1954 § 11(b).

60. Confusingly, the appropriations section of the 1954 Act referred only to the "physically handicapped" while defining that term to include both physical and mental disability. Section 1 of the 1954 Act provided that its purpose was to appropriate funds to States for "rehabilitating physically handicapped individuals," but the definition of "physically handicapped" in Section 11(b) included both physical and mental disabilities. Vocational Rehabilitation Act Amendments of 1954 §§ 1, 11(b). This appears to have been an odd carryover of language from the Smith-Fess Act which limited coverage to persons with physical infirmities but described the beneficiary class as "persons disabled." Smith-Fess Act of 1920, ch. 219, 41 Stat. 735, 735 (1920); *see also supra* note 54 and accompanying text. In 1943, Congress expanded the services provided under that Act to include persons with mental disabilities, without directly amending the section that defined "persons disabled." Vocational Rehabilitation Act Amendments of 1943, ch. 190, 57 Stat. 374 (1943). The reenactment of the statute in 1954 perpetuated this disjointed structure. Finally, in 1965, Congress amended the Act again and included "technical amendments" that changed the terminology in Section 1 to simply "handicapped." Pub. L. No. 89-333, § 1, 79 Stat. 1282 (1965).

physical or mental disability which constitutes a substantial handicap to employment but which is of such a nature that vocational rehabilitation services may reasonably be expected to render him fit to engage in remunerative occupation."[61]

The legislative history of this revision does not explain what Congress meant when it adopted the term "substantial handicap." The legislative history to the 1954 amendments as a whole reflects a concern that the coverage of the federal law should be expanded in order to provide services to persons with the potential to become productive members of the workforce.[62] Nothing in the legislative history suggests that the law needed to be confined to benefit only truly deserving individuals or that limiting services to those with "substantial handicaps" was the way to accomplish any such goal.

Congress continued an expansive view of the coverage of the rehabilitation acts when it repealed the Vocational Rehabilitation Act and reenacted it as the Rehabilitation Act of 1973.[63] This statute carried forward a definition of "handicapped individual" similar to that found in the old vocational rehabilitation act.[64] At the same time, Congress took steps to broaden the scope of the Act beyond its vocational training model. For example, Congress eliminated the word "vocational" from the title of the Act.[65] Second, and more significantly, it included Section 504, which provides in its entirety, "No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[66]

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61. Vocational Rehabilitation Act Amendments of 1954, ch. 655, § 11(b), 68 Stat. 652, 660 (1954) (repealed and reenacted in the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973)).

62. *See* S. REP. No. 1626, *reprinted in* 1954 U.S.C.C.A.N. (68 Stat.) 2862, 2863-64 (describing need for the legislation in economic terms of returning individuals to "useful" work and eliminating their need to rely on public support).

63. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973).

64. Rehabilitation Act of 1973 §7(6). The definition of "handicapped individual" did reflect several significant changes. First, it expanded the goals associated with rehabilitating the person. Under the 1965 version of the Vocational Rehabilitation Act, which was in effect at the time the new Rehabilitation Act was passed, a candidate for rehabilitation was someone who could "reasonably be expected [to be made] fit to engage in [gainful employment]." Pub. L. No. 89-333, § 10(a), 79 Stat. at 1293. Under the new version, the Act applied to those who "can reasonably be expected to benefit in terms of employability from vocational rehabilitation services." Rehabilitation Act of 1973 § 7(6). The Senate Report explains that this change was made in order to emphasize vocational goals rather than assumptions about fitness. S. REP. NO. 318, at 21 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2094.

65. Rehabilitation Act of 1973 Preamble.

66. Rehabilitation Act of 1973 § 504 (codified at 29 U.S.C. § 794(a) (1994)).

The historic significance of Section 504 cannot be understated. It represents the triumph of disability advocates in reorienting Congress's thinking about disability as a civil rights issue and not merely a rehabilitation issue. The language of Section 504 was in fact modeled on Title VI of the Civil Rights Act of 1964,[67] which prohibits race discrimination by recipients of federal funds.[68] At the same time, however, the Act as a whole continued the vocational rehabilitation model by incorporating the prior statute's limitation of "services."[69] The legislative history of the Act contains no particular discussion of the implications of Section 504 in this regard.[70] Section 504 itself appears to have been a routine inclusion that failed to spark the particular interest of anyone in Congress at the time.[71]

More to the point for purposes of this Article, no connection was made between Section 504 and the "substantial handicap" language in the Act's definition of disability. In other words, Congress did not expressly intend that individualized assessments were required to constrain the civil rights protections of the statute. To the extent that Congress discussed coverage of the Act, it expressed concern that states were providing rehabilitation services only in the "easiest" cases and avoiding working with people with the most severe disabilities whose vocational prospects were more challenging.[72] It wanted to be sure that states made maximum effort to help individuals with severe disabilities, and it required state plans to set out a method of selection giving

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67. 42 U.S.C. §§ 2000d-2000d-7 (1994).

68. 42 U.S.C. § 2000d (1994). Title VI specifically provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994). Scotch describes how the one sentence of Section 504 was added to the already pending rehabilitation bill by a group of congressional staffers who feared the purposes of the Act would be blocked by negative attitudes and discrimination by employers when it came time to hire people who had completed their rehabilitation training. *See* SCOTCH, *supra* note 45, at 52. One of the staffers had worked on prior legislation that was itself based on Title VI of the Civil Rights Act and had the statutory language handy in his office. *See* SCOTCH, *supra* note 45, at 52. The staffers simply adapted that language to the context of disability. *See* SCOTCH, *supra* note 45, at 52.

69. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361 (1973).

70. *See* Mark F. Engebretson, *Administrative Action to End Discrimination Based on Handicap: HEW's § 504 Regulation*, 16 HARV. J. ON LEGIS. 59, 63 (1979).

71. *See* SCOTCH, *supra* note 45, at 5; *see also* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 64-65 (1993) (describing Section 504 as a "legislative afterthought").

72. S. REP. NO. 93-318, at 4, 5, 7-8, 12, 18-19 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, at 2078, 2079, 2081, 2086, 2092.

special emphasis to those with severe disabilities when services could not be provided to all who were eligible.[73]

This did not mean, however, that Congress intended *only* those individuals with the most severe disabilities receive services. The legislative history, at several points, suggests that the statutorily required services were intended to be available to as many persons as possible.[74] Even with a statutory class defined as those with a "substantial handicap," the Rehabilitation Act was intended to be broad reaching.

By 1974, it became clear to Congress that the inclusion of employability standards in the definition of "handicapped individual" excluded a number of people with disabilities who suffered discrimination in government programs.[75] Consequently, Congress amended the definition to expand the coverage of the Act.[76] The result was a three prong definition of handicap: "any person who (A) has a physical or mental disability which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment."[77] The new definition was intended to broaden the scope of coverage beyond the employability context and, in reference to the third prong in particular, provide protection for those individuals who did not have an actual disability but were nonetheless treated as if they did.[78]

Once again, however, the legislative history of the 1974 amendments provides no specific insight into why the term "substantially limits" was incorporated into the new three part test. Congress was not working from a clean slate, and apparently in its attempt to emphasize the broad coverage of the Act, it simply carried over a concept that had generated little if any controversy.

C. Administrative and Judicial Definition of "Substantially Limits"

The actual task of defining "substantially limits" fell to the federal agencies charged with implementing the Rehabilitation Act.[79] The first agency to do so

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73. *See* Rehabilitation Act of 1973 § 101(a)(5).

74. S. REP. NO. 93-318, at 4, 31 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2103, 2104.

75. S. REP. NO. 98-318, at 5.

76. *See* S. REP. NO. 98-318, at 5 (explaining that Section 504 was enacted to "prevent discrimination against all handicapped individuals . . . in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs").

77. Pub. L. No. 93-516 § 111(a), 88 Stat. 1617, 1619 (1974) (codified as amended at 29 U.S.C. § 706(8)(B) (1994)). The same three categories are currently found in the ADA's definition of disability. *See* 42 U.S.C. § 12102(2) (1994).

78. S. REP. NO. 93-1297, at 38-39 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389.

79. *See* Exec. Order 11,758, 3 C.F.R. 116-17 (1974) (directing Department of

was the Department of Labor ("DOL") in 1976, as part of its implementation of Section 503 of the Act, which requires government contractors to undertake affirmative action to hire individuals with disabilities.[80] These regulations defined "substantially limits" to mean "likely to experience difficulty in securing, retaining or advancing in employment because of a handicap."[81] "Difficulty" was not further defined.

Ostensibly, under these regulations, any individual who could prove she was refused a job or fired because of an actual or perceived physical or mental impairment could meet the threshold for inclusion in the protected class.[82] Was this a reasonable interpretation of the statute? Arguably, it was. When Congress rewrote the definition of handicapped individual in 1974 and adopted the three prong approach, it rejected the employability standard because it invoked only the range of coverage of the old vocational rehabilitation acts, which was far too narrow to fulfill the mandate of the civil rights provisions of Sections 503 and 504 of the Rehabilitation Act.[83] Congress's purpose was thus to expand the definition to others forms of discrimination beyond employment.

The history of the term "substantial" discussed previously indicates that Congress did not include that term in the definition of "handicapped" as a means of preventing people from taking advantage of the statute.[84] Nor, for that matter,

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Labor to issue regulations implementing Section 503 of the Rehabilitation Act); Exec. Order 11,914, 3 C.F.R. 117-18 (1976) (directing Department of Health, Education and Welfare to issue regulations implementing Section 504 of Rehabilitation Act).

80. *See* 29 U.S.C. § 793(a) (1994).

81. 41 C.F.R. § 60-741.2 (1976) (amended in 1996 to conform to ADA regulations). The appendix to that section contained a similar definition: "[T]he degree that the impairment affects employability. A handicapped individual who is likely to experience difficulty in securing, retaining, or advancing in employment would be considered substantially limited." 41 C.F.R. § 60-741 app. A (1999).

82. *C.f.* R. Bales, *Once is Enough: Evaluating When a Person is Substantially Limited in Her Ability to Work*, 11 HOFSTRA LAB. L.J. 203, 245 (1993) (advocating a rule that would allow plaintiffs under the ADA to shift the burden of proof to employers upon a showing that the employer relied on plaintiff's actual or perceived impairment without having to show actual or perceived disqualification from a class of jobs or a broad range of jobs). Interpreted this way, a disability discrimination case would proceed in a similar fashion to a race or sex discrimination case involving direct proof of discrimination. *Cf.* Kiel v. Select Artifacts, Inc., 169 F.3d 1131, 1135 (8th Cir. 1999) (acknowledging that disability discrimination plaintiff who shows impermissible criteria played a motivating part in an adverse employment decision may invoke the burden-shifting approach of *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and require employer to bear burden of proof that same decision would have been made had improper criteria not been utilized).

83. *See* S. REP. NO. 93-1297, at 37-38, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389 (explaining that new definition eliminates references to employability because that test is irrelevant to the many forms of potential discrimination covered by Section 504).

84. *See* Part II (b).

did Congress apparently perceive it as a limitation on the coverage of Section 504 specifically.[85] Thus, it would not have been inconsistent with congressional intent to interpret the Act's coverage of employment discrimination to extend to any person who experienced "difficulty" in obtaining or retaining employment because one employer used that person's physical or mental impairment as a criteria in making an employment decision.

Nonetheless, the Department of Health, Education and Welfare ("HEW"), which was charged with implementing Section 504, issued its first set of regulations defining "handicap" in 1977 and took a different approach.[86] These regulations did not attempt to define the term "substantially limits" at all. In the accompanying regulatory analysis, HEW stated that it "[did] not believe a definition of this term is possible at this time."[87] HEW neither explained why it believed the term could not be defined nor commented on the DOL's interpretation.[88]

The next step in defining "substantially limits" came from a decision of the United States District Court for the District of Hawaii in a case entitled *E.E. Black, Ltd. v. Marshall*,[89] a Section 503 case in which the DOL's interpretation was at issue.[90] The court in *E.E. Black* rejected the DOL's approach, expressing its concern that such an approach would read the term "substantial" out of the statute.[91] Instead, the court emphasized that each individual job seeker must be evaluated on a case-by-case basis, with a determination of the number and types of jobs from which that person was disqualified based on the criteria used by the employer.[92]

The *E.E. Black* factor analysis ultimately prevailed over the DOL's employability standard. When Congress subsequently considered the definition of disability under the ADA, the legislative history of the Act reflects that Congress envisioned a case-by-case approach that would find some individuals with impairments to have a disability and others not, depending on the extent of the impairment, not the effect on the employability of the individual.[93] After Congress adopted the same three prong approach to defining disability found in

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85. *See supra* notes 67-78 and accompanying text.

86. *See* 42 Fed. Reg. 22677 (1977) (codified at 45 C.F.R. pt. 84 (1999)).

87. 45 C.F.R. pt. 84, app. A (1999).

88. *See* 45 C.F.R. pt 84, app. A (1999).

89. 497 F. Supp. 1088 (D. Haw. 1980).

90. *Id.* at 1092-93.

91. *Id.* at 1099 (arguing that if Congress thought disqualification from one job was sufficient, Congress would have used the terms "any handicap to employment" or "in any way limits one or more of such person's major life activities").

92. *Id.* at 1100.

93. *See* H.R. REP. NO. 101-485(II), at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 (discussing how definition of disability is to be applied); S. REP. NO. 101-116, at 22-23 (1989) (same).

the Rehabilitation Act,[94] the Equal Employment Opportunity Commission ("EEOC") in turn issued ADA regulations incorporating a factor-based approach similar to that set out by the court in *E.E. Black*.[95]

Those regulations divide the first prong of "disability" into three parts, which are then more specifically defined: "physical or mental impairment,"[96] "major life activity,"[97] and "substantially limits."[98] Relevant to this discussion, major life activities are defined to include such things as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and *working*."[99] "Substantially limits" is first defined generally to mean either "unable to perform a major life activity that the average person in the general population can perform," or "[s]ignificantly restricted as to the condition, manner or duration under which the average person in the general population can perform that same major life activity."[100] That subsection then continues by emphasizing a factor-based analysis that looks to "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[101]

The major life activity of "working" is given additional treatment in the regulations. A more specific list of factors directs courts to consider whether the individual is unable to perform either a class of jobs or a broad range of jobs in various classes because of her disability.[102] The regulations then list additional factors that "may be considered":

> (A) The geographical area to which the individual has reasonable access;
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skill or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical

94. *See* 42 U.S.C. § 12102(2) (1994).
95. *See* 29 C.F.R. § 1630.2(h), (i), (j) (1999).
96. 29 C.F.R. § 1630.2(h) (1999).
97. 29 C.F.R. § 1630.2(i) (1999).
98. 29 C.F.R. § 1630.2(j) (1999).
99. 29 C.F.R. § 1630.2(i) (1999) (emphasis added).
100. 29 C.F.R. § 1630.2(j) (1999).
101. 29 C.F.R. § 1630.2(j)(2) (1999).
102. 29 C.F.R. § 1630.2(j)(3)(i) (1999).

area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).[103]

The EEOC's interpretive guidance to these factors explains that an individual is not substantially limited in the life activity of working "just because he or she is unable to perform a particular job for one employer . . . ."[104]

D. The Consequences of the Factor-Based Approach

The result of the individualized assessment approach reflected in the current regulations is striking. The current regulations require the parties to perform a detailed assessment of exactly what the disability is and how much it affects the person.[105] The "working" regulation essentially requires a vocational analysis examining what work the person is not able to do, and finding the person sufficiently impaired only if he is disqualified from a number of jobs because of his disability. In any case, plaintiffs in disability discrimination suits must spend considerable time litigating the extent of their limitations. This creates quite a dilemma for plaintiffs who, assuming they prove they are impaired enough to have a disability, must then turn around and prove that they are not so impaired as to be unqualified for the job in question.[106]

Considering that the ADA, like the Rehabilitation Act, treats disability discrimination as grounded in basic civil rights principles,[107] the adoption of rules that require a plaintiff to show the extent of disqualification from

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103. 29 C.F.R. § 1630.2(j)(3)(ii) (1999).

104. 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999).

105. The appendix to the definition of "substantially limits" reinforces the case-by-case approach by explaining that "the determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999).

106. *See* Locke, *supra* note 11, at 127 (noting the difficulty plaintiffs face, especially under the major life activity of "working," in proving they are sufficiently impaired so as to have a disability yet not so impaired they are not qualified for the position).

107. Under the initial draft of HEW's Section 504 regulations, disability discrimination would have been handled under a "special treatment" presumption that called for covered entities to make a determination in each case whether the individual with a disability needed to be treated differently or whether equal treatment would meet the goals of the program. *See* Engebretson, *supra* note 70, at 74. The final regulations reversed that perspective, in recognition that it might perpetuate the very kind of discrimination Section 504 was apparently designed to eliminate. *See* Engebretson, *supra* note 70, at 74. Discrimination under Section 504 was ultimately defined using an equal treatment model that authorized different treatment only when necessary to accomplish equal treatment, similar to the treatment of racial and sexual discrimination under statutes like Titles VI and VII. *See* Engebretson, *supra* note 70, at 74.

employment beyond a particular workplace is curious. Certainly if an employer refused to hire or dismissed a person because of race, by way of example, the law would not reject that person's protected status claim on a theory that other jobs were available with other employers.[108]

The legislative history of the 1974 amendments to the Rehabilitation Act reflects the success that advocates of the civil rights model had in influencing Congress's thinking about disability. When the definition of disability was expanded to include not only persons with actual disabilities but also persons who had a "record of" or were "regarded as" having such a condition by others, Congress specifically analogized disability discrimination to race discrimination under Title VII. This was a far cry from the prior congressional rhetoric which framed governmental concern solely in terms of productivity and benefitting the national economy.[109]

To some extent, the acceptance of this definition by the disability community at that time was understandable. The history of the vocational rehabilitation statutes demonstrates the difficulty that the severely disabled had obtaining employment and services.[110] Further, physical exclusion from various facilities of people with severe mobility impairments, especially those requiring use of wheelchairs, was perhaps one of the most prominent disability issues in society at that time.[111] These and other specific disability causes were supported by advocacy groups[112] who received what they sought in the expanded Rehabilitation Act definition.

Overlooked in the federal law's attack on prejudices and stereotypes, however, was the fact that the statute that resulted from Congress's newly found insight into the disability cause itself operates on prejudices and stereotypes. Defining disability to reach only persons whose physical or mental impairments "substantially limit" their major life activities created within the larger group of persons with disabilities a superior/inferior hierarchy. Only those persons with normatively superior (*i.e.*, "substantial") disabilities are afforded civil rights protections.

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108. *Cf.* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 10 (1976) (describing the cumulative harm of generalizations based on race that support denying the use of race as a criteria to disqualify a person from employment even if the employer in question is the only one who would do so and does so based solely on "unprejudiced" efficiency grounds).

109. *See supra* note 56 and accompanying text.

110. *See supra* note 72 and accompanying text.

111. *See* SHAPIRO, *supra* note 71, at 41-53 (describing struggle of students with physical mobility limitations to gain access to institutions of higher education in the 1960s and how this led to formation of the Center for Independent Living).

112. Among the most active advocacy groups were those working for the blind, people (children in particular) with mental retardation, and wheelchair users. *See* SCOTCH, *supra* note 45, at 33-34, 36.

Not surprisingly, courts employing the approach initiated by the Rehabilitation Act and now reflected in the ADA regulations frequently dismiss claims because the plaintiff has not shown she is impaired enough.[113] They have been especially harsh on plaintiffs who assert claims based on a limitation of the major life activity of working. Specifically, they tend to characterize the plaintiffs' claims as asserting only the inability to perform a single, particular job,"[114] which the EEOC regulations provide is not a substantial limitation on the major life activity of working.[115]

More significantly, courts view this approach as reflecting a particular set of values about the purpose of the ADA. An often cited passage from a Fourth Circuit Rehabilitation Act decision articulates this point of view:

> The Rehabilitation Act assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular

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113. *See, e.g.*, Aucutt v. Six Flags Over Mid-America, 85 F.3d 1311, 1319 (8th Cir. 1996) (finding individual with angina, high blood pressure, and coronary artery disease failed to present sufficient evidence that he was substantially limited in his ability to perform any major life activities); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 (5th Cir. 1996) (finding individual with breast cancer failed to present sufficient evidence that her ability to work was substantially limited as a result of the cancer and its treatment). Interestingly enough, the early history of litigation under the Rehabilitation Act reflects very little litigation on the issue of disability. *See* Crossley, *supra* note 33, at 623 n.12 (noting that in the first ten years after passage of the Rehabilitation Act, only one court had found a plaintiff under Section 504 to not be handicapped). This trend continued during the first years after passage of the ADA. *See* Locke, *supra* note 11, at 112 (noting the limited litigation over disability status during the early years of the ADA). That trend has definitely been reversed. *See* Colker, *supra* note 11, at 109-10 (reporting that judges have been routinely deciding factual issues regarding disability on summary judgment).

114. *See, e.g.*, Leisen v. City of Shelbyville, 153 F.3d 805, 808 (7th Cir. 1998) (dismissing paramedic plaintiff's claim that depression substantially limited activity of working because plaintiff at most showed it interfered with her ability to do that particular job); Tudyman v. United Air Lines, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (finding plaintiff who was disqualified from flight attendant's job due to weight condition did not have a statutory disability because he was "only prevented from having a single job").

115. *See* 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999).

individual a more general disadvantage in his or her search for satisfactory employment.[116]

The influence of the charity/benevolence model of thinking about disability is apparent in the Fourth Circuit's reasoning. Those with disabilities are different, separate, and in need of special help. Given that point of view, it is not at all surprising that the result of disability discrimination litigation has been restrictions on the class of persons who are entitled to seek the protection of the acts. The unfortunate side effect has been the increase or at least reinforcement of the "us versus them" mentality that permeated the historic treatment of individuals with disabilities.

E. The Supreme Court's ADA Decisions Interpreting "Substantially Limits"

In 1998, the Supreme Court issued *Bragdon v. Abbott*,[117] its first decision addressing the proper interpretation of "substantially limits" under the ADA and the EEOC regulations. Based on *Bragdon*, ADA advocates had some justification to believe that the Supreme Court signaled a broad interpretation of the definition of disability that might avoid some of the unintended consequences of the individualized assessment approach. After the Court's 1999 "substantially limits" trilogy, however, the inescapable conclusion is that the hard-won fight for individualized assessment has backfired.

1. The Promise of *Bragdon v. Abbott*

In *Bragdon*, the Court seemingly endorsed an expansive view of how courts should approach the issue of who is entitled to proceed on protected class status. The impairment at issue was asymptomatic HIV infection, and the major life activity alleged to be substantially limited was reproduction.[118] Reproduction is

116. Forrisi v. Bowen, 794 F.2d 931, 933-34 (4th Cir. 1986). This language has been quoted so often, it has literally become a mantra invoked by courts to emphasize the appropriateness of a narrow interpretation of the ADA. *See, e.g.*, Francis v. City of Meriden, 129 F.3d 281, 286, 287 (2d Cir. 1997) (quoting *Forrisi* to support reasoning that "simple physical characteristic" like weight does not constitute a disability); Williams v. City of Charlotte, 899 F. Supp. 1484, 1487-88 (W.D.N.C. 1995) (quoting *Forrisi* in support of decision that sleep disorder did not place plaintiff sufficiently outside the norm so as to qualify as a disability). Even among commentators generally supportive of a strong ADA, this idea that disqualification from one job is not sufficient to warrant coverage under the Act seems to be accepted. *See supra* note 14 and accompanying text.

117. 524 U.S. 624 (1998).

118. *Id.* at 628, 635-37.

not listed as a major life activity in the regulations.[119] The Court interpreted the basic statutory provision regarding "major life activities" to include all activities of comparative importance or significance to human life, and further concluded that the list of such activities contained in the regulations was illustrative, not exhaustive.[120] Based on comparative importance, the Court concluded that reproduction fell "well within" the phrase "major life activity."[121]

The Court also interpreted "substantially limits" to extend to an asymptomatic disease that, in the case of HIV, affected reproductive activity because of a risk of transmission of the disease to either the reproductive partner or the child that might be conceived.[122] While declining to rule that HIV infection was a disability per se, the Court found the plaintiff to have satisfied the "substantially limits" requirement merely by her unchallenged testimony that her HIV infection controlled her decision not to have a child.[123]

In some respects, this latter aspect of the decision was most hopeful for advocates of a broader definition of disability. The Court's analysis did not limit effect to actual physical function but rather seemed to encompass a more global consideration of effect on the individual's personal and social functioning.[124]

In the months just prior to the Court's 1999 trilogy of decisions, at least one federal court saw *Bragdon* as signaling a "generous" and "forgiving" construction of "substantially limits," at least for purposes of summary judgment.[125] Some commentators characterized the decision as a good, though incomplete, step in the right direction toward opening the courtroom doors to ADA plaintiffs.[126]

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119. *See supra* note 99 and accompanying text.

120. *Bragdon*, 524 U.S. at 639.

121. *Id.* at 638.

122. Bragdon v. Abbott, 524 U.S. 624, 639-41 (1998).

123. *Id.* at 641.

124. Chief Justice Rehnquist in dissent took an actual physical function impairment approach to interpreting substantial limitation. He took issue with the majority's finding that the plaintiff's testimony that she decided not to have children because of her HIV infection was sufficient to meet the evidentiary burden for substantial limitation. In his view, the plaintiff should have been required to present specific evidence regarding how HIV had made her less able to actually engage in sexual intercourse, give birth to a child, and perform manual tasks associated with child rearing. *Id.* at 658-62 (Rehnquist, C.J., dissenting). The majority relied on statistics that addressed the risk of transmission to sexual partners and children born of HIV-infected mothers, not on evidence that HIV positive individuals are less physically able to engage in the activities associated with reproduction. *Id.* at 640-41.

125. *See* Whitfield v. Pathmark Stores, Inc., 39 F. Supp. 2d 434, 438, 440 (D. Del. 1999), *vacating* 971 F. Supp. 851 (D. Del. 1997). This court in fact had earlier granted the employer summary judgment on the grounds the plaintiff failed to adduce sufficient evidence of limitation.

126. *See* Colker, *supra* note 11, at 133 (suggesting that *Bragdon* sets forth a general framework for considering ADA cases that might stem the trend toward granting

Any such advance appears to have been short-lived. Almost exactly one year after *Bragdon*, the Court issued decisions in the "substantially limits" trilogy of cases: *Sutton v. United Air Lines, Inc.*,[127] *Murphy v. UPS, Inc.*,[128] and *Albertsons, Inc. v. Kirkingburg*.[129] Rather than continuing along the lines *Bragdon* appeared to set, these three cases reflect a restrictive view of the ADA's scope. More importantly, they do little to curb the tendency of courts to substitute their own normative views of "substantial" limitation for jury determination of the plaintiff's claim. By requiring every disability claimant to present evidence of the limitations he or she actually experiences, the Court in these decisions endorsed the transformation of individualized assessment from a shield against biased decisionmaking into a weapon to be used against disability law claimants.

2. Substantial Limitation Viewed as an Aggressive Gatekeeper

Sutton contains the bulk of the Court's rationale for endorsing a restrictive view of the definition of disability. Factually, it also reflects one of the most challenging questions about the breadth of the ADA. The plaintiffs in *Sutton* alleged their vision was impaired, and that the impairment in the absence of corrective lenses rendered them unable to perform numerous basic activities like driving a car or watching television.[130] If the Court endorsed a reading of the ADA that extended to these plaintiffs, then potentially every person in the country who wears eyeglasses could have an ADA claim.[131] There is no question that this potential heavily influenced the Court's decision.

The Court in *Sutton* held that a plaintiff claiming disability must establish that her physical or mental impairment substantially limits one or more of her major life activities when the impairment is viewed in its corrected state.[132] The

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summary judgment seen in the lower courts, but the case failed to adequately address issues of burdens of proof).

127. 119 S. Ct. 2139 (1999).

128. 119 S. Ct. 2133 (1999).

129. 119 S. Ct. 2162 (1999).

130. *Sutton*, 119 S. Ct. at 2143.

131. The plaintiffs in *Sutton* had 20/200 or worse in one eye and 20/400 or worse in the left eye. *Id.* Because the Court held that their vision was to be considered in its corrected state, we are left to speculate as to what lines might be drawn between persons with uncorrected bad vision. For instance, would 20/100 be a substantial limitation? Anything less than 20/20? If the latter, then certainly every person in need of corrective lenses would meet the definition of disability. As Justice Stevens points out in his dissenting opinion, however, the number of people who are likely to lose employment because they do not have 20/20 uncorrected vision is not likely to be that large. *Id.* at 2159, 2160 (Stevens, J., dissenting). Arguments that focus simply on the raw number of people with a disorder or condition are, or at least should be, beside the point.

132. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2146 (1999).

Court offered two rationales for this decision. First, the language in the definition section uses the present indicative verb form—"substantially limits."[133] This requires "that a person be presently—not potentially or hypothetically—substantially limited . . .,"[134] and the statute emphasizes individualized assessment of disability in every case.[135] If courts and employers had to determine what the employee's impairment would be in an uncorrected state, the Court feared they would rely on generalized information about how such impairments usually affect people and decide that an individual had a disability simply because that person had a particular impairment.[136]

Second and, according to the Court, "critically," Congress's findings identified only "some 43,000,000 Americans" as having a disability.[137] According to the Court, the primary source for this figure, a report issued in 1988 by the National Council on the Handicapped (now the National Council on Disability) took a functional limitation approach to defining who had a disability —"difficulty performing one or more basic physical activities"—rather than a "health conditions approach" that focused on all conditions that affect health and functioning.[138] The Court acknowledged that the figure used in that report, 37.3 million, was lower than the figure used by Congress, but argued the source of the exact number was not as important as the fact that only studies using a functional limitation approach placed the number with disabilities anywhere near the 43

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133. *Id.* at 2141 (quoting 42 U.S.C. § 12102(2)(A)(1994)) (emphasis added).

134. *Id.*

135. The Court noted statutory language that required disability be evaluated "with respect to an individual" and that impairments substantially limit "major life activities of such individual." *Id.* at 2147 (quoting 42 U.S.C. § 12102(2) (1994)). The Court considered the interpretation urged by the plaintiff and the administrative agencies to disregard this language by asking the employer to speculate about what affect the impairment might have if the plaintiff did not take the corrective measures. *Id.*

136. *Id.* The Court also suggested that adopting the EEOC position would mean employers could not take mitigating measures into account in any respect whatsoever, even if those mitigating measures themselves caused the employee severe side effects. *Id.*

137. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2147 (1999) (quoting 42 U.S.C. § 12101(a)(1) (1994)).

138. *Id.* at 2148 (citing NATIONAL COUNCIL ON DISABILITY, ON THE THRESHOLD OF INDEPENDENCE (1988) [hereinafter ON THE THRESHOLD OF INDEPENDENCE]). ON THE THRESHOLD OF INDEPENDENCE itself relied on a Census Bureau report, which defined disability as "has difficulty performing one or more basic physical activities . . . includ[ing] seeing, hearing, speaking, walking, using stairs, lifting or carrying, getting around outside, getting around inside, and getting into or out of bed." ON THE THRESHOLD OF INDEPENDENCE 9 (1988) (citing U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, DISABILITY, FUNCTIONAL LIMITATION, AND HEALTH INSURANCE COVERAGE: 1984/85, 2 (1985)). The Court in *Sutton* noted that definition suggested 37.3 million people in this country had a disability. *Sutton*, 119 S. Ct. at 2148.

million figure used by Congress.[139] By choosing to include such a figure in the ADA, the Court reasoned, Congress gave content to the terms of the Act.[140]

In the Court's view, Congress thus had some identifiable group in mind when it passed the ADA, and the Court's role was to interpret the Act accordingly. The Act might still cover individuals who could take advantage of mitigating measures, but only if they established a residual substantial functional limitation: "The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are substantially limiting."[141]

The Act's emphasis on individualized assessment, therefore, means no plaintiff has a disability under the first prong of the definition of disability until that person proves what limitations she personally and actually experiences in the present. In another case in the trilogy, *Albertsons, Inc. v. Kirkingburg*,[142] which did not involve a correctable condition, the Court somewhat expanded on the amount of proof a disability plaintiff would have to present.

The plaintiff in *Albertsons, Inc.* had a vision condition called amblyopia, which weakened the vision in his left eye to the point that he was considered to have monocular vision.[143] Although the Court later conceded that most monocular plaintiffs would be found to have a disability and that defendants probably would not often challenge that status, it nonetheless made a point of criticizing the Ninth Circuit for failing to "pay much heed" to the "statutory

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139. *See Sutton*, 119 S. Ct. at 2148. For contrast, the Court looked at two different sets of figures that did not limit themselves to individuals with actual functional limitations. First, the "health conditions approach," which looked to the number of people who had some condition that affected health or functioning, under which the coverage figure ranged to about 160 million people. *Id.* (citing NATIONAL COUNCIL ON DISABILITY, TOWARD INDEPENDENCE 10-11 (1986)). Second, the Court looked to more general statistics that placed the number of people with vision impairments alone at 100 million, *id.* at 2149 (citing NATIONAL ADVISORY EYE COUNCIL, U.S. DEP'T OF HEALTH & HUMAN SERVS., VISION RESEARCH—A NATIONAL PLAN: 1999-2003, 7 (1998)), that placed the number of people with hearing impairments at 28 million, *id.* (citing NATIONAL INST. OF HEALTH, NATIONAL STRATEGIC RESEARCH PLAN: HEARING AND HEARING IMPAIRMENT v (1996)), and that placed the number of people with high blood pressure at 50 million. *Id.* (citing William Tindall, *Stalking a Silent Killer, Hypertension*, BUSINESS & HEALTH, Aug. 1998, at 37).

140. *Sutton*, 119 S. Ct. at 2149.

141. *Id.* In *Murphy*, the other mitigating measures case in the trilogy, the Court also framed the inquiry in the present sense. Murphy v. UPS, Inc., 119 U.S. 2133 (1999). The plaintiff in *Murphy* had high blood pressure that was treated with medication. *Id.* at 2136. The Court suggested the relevant question in such a case was whether the effects of the plaintiff's impairment persisted in his present, medicated state, or whether side effects from the medication constituted substantial limitations. *Id.* at 2137.

142. Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999).

143. *Id.* at 2165-66.

obligation" of individualized assessment of each case.[144] The Court then downplayed this by suggesting it did not intend the burden to be "onerous" and reasserted its view of the proper inquiry: "We simply hold that the Act requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial."[145]

Despite the Court's attempt to characterize the evidentiary burden as not onerous, the practical consequence of the trilogy is that every disability claimant will need to present specific evidence outlining what he can and cannot do at the threshold stage of litigation. Unfortunately, no further guidance is given in any of the three cases about what amount of evidence meets the level of substantiality.[146]

The outcome in the trilogy is likely to be harshly criticized by supporters of the ADA. In fact, one person who had been involved in drafting the ADA was quoted as saying the result was "absurd" because it means that a person could be "disabled enough to be fired from a job but not disabled enough to challenge the firing."[147] The trilogy is not, however, to blame for this absurdity. The language of the ADA is. The absurdity was built into the ADA through its normative definition of disability.

The Court majority can be criticized for overrelying on an estimate of the number of people with disabilities, an estimate whose validity was questioned by its own sources.[148] Congress's reference to 43 million individuals with disabilities should be seen as a signal of inclusion, not exclusion. The finding itself goes on to note that "this number is increasing as the population as a whole is growing older,"[149] reflecting that Congress expected the number in the protected class to expand. Further, the mere fact that the figure mentioned is as

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144. *Id.* at 2164.

145. *Id.* at 2169.

146. The plaintiffs in *Sutton* failed on the substantiality question because their corrected eyesight was 20/20. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2143 (1999). They did not argue that the use of lenses in and of themselves posed a substantial limitation. *Id.* The issue presented on certiorari in *Murphy* asked only whether high blood pressure was a disability per se. Murphy v. UPS, Inc., 119 S. Ct. 2133, 2136 (1999). The Court accordingly sidestepped any consideration of whether a plaintiff's medication or any side effects of that medication supported a finding of disability. *Id.* Finally, the plaintiff in *Albertsons, Inc.* lost on the separate issue of whether he was a "qualified" individual with a disability. *Albertsons, Inc.*, 119 S. Ct. at 2169. Summary judgment for the employer was reinstated and no further consideration of the plaintiff's disability status was made. *Id.*

147. *Sensibly Reading the Disability Law*, CHI. TRIB., June 24, 1999, at 28 (quoting comment of Professor Chai Feldblum).

148. ON THE THRESHOLD OF INDEPENDENCE, *supra* note 138, at 12-13.

149. 42 U.S.C. § 12101(a)(1) (1994).

large as 43 million reflects how far reaching Congress saw the protected class at the time the ADA was passed.

The majority can also be criticized, as reflected in the dissenting opinion,[150] for taking a cramped view of the reach of a civil rights act. Other civil rights statutes, such as Title VII of the Civil Rights Act of 1964,[151] serve as precedent for the idea that the scope of the statute is not fixed by what was specifically contemplated by Congress at the time the legislation was passed.[152] The Court itself only a year ago extended the reach of Title II of the ADA beyond the context set out in the findings and purposes of the Act.[153]

Nonetheless, the fact remains that Congress directed courts to include only those who are "substantially limited" in a major life activity, and the Supreme Court's approach is at least plausibly within the intent and language of the Act.[154]

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150. *See Sutton*, 119 S. Ct. at 2156-58 (Stevens, J., dissenting) (criticizing majority for ignoring its broad remedial approach to construing civil rights statutes).

151. 42 U.S.C. §§ 2000e to e17 (Supp. II 1996).

152. The legislative history of Title VII indicates it was primarily concerned with discrimination in hiring, but the litigation history of Title VII has primarily involved claims of discrimination by individuals who are already employed in the workplace. *See* John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015, 1028 n.140 (1991).

153. Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998). Title II prohibits discrimination by public entities. 42 U.S.C. § 12132 (1994). In *Yeskey*, the Court held that the protections of Title II of the ADA extend to individuals with disabilities incarcerated in penal institutions. *Yeskey*, 524 U.S. at 213. Pennsylvania argued that the statute was ambiguous as to the coverage of penal institutions, in part because the findings and purposes section of the Act did not mention such facilities. *Id.* at 211-12. The Court rejected the significance of the fact that it would possibly be extending the statute to a context not envisioned by Congress: "As we have said before, the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Id.* at 212 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (internal citation omitted)). Arguably, the interpretation issue presented in *Yeskey* is distinguishable from that presented in *Sutton*. The Court was interpreting a term in *Yeskey*, "public entity," which had no implicit message of limitation. *See* 42 U.S.C. § 12131(1)(B) (1994) (defining "public entity" to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government"). However, *Yeskey* stands alongside *Bragdon* as reflecting a broad interpretation of the reach of the ADA prior to the 1999 trilogy.

154. Another likely criticism of the majority's interpretation is that it does not mention the House and Senate Reports that suggest Congress intended the first prong of the definition of disability be applied without regard to mitigating measures. *See* H.R. REP. NO. 101-485(III), at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451; S. REP. NO. 101-116, at 23 (1989). There is also language in the Senate Report, however, that describes medical conditions "under control" as "not currently substantially limit[ing] major life activities." S. REP. NO. 101-116, at 24. This language appears in the Senate's discussion of the coverage of the third prong of the definition of disability, the "regarded

As Part III discusses, the trilogy brings into focus the fact that our vision of disability under the ADA needs more revision than simply extending it to individuals with mitigatable impairments.

III. THE PARADOXES OF DEFINING DISABILITIES AS ONLY THOSE THAT SUBSTANTIALLY LIMIT

As Part II demonstrated, "substantial limitation" was added to the vocational rehabilitation statutes to emphasize to States the need to extend training and education services to individuals with severe disabilities. Congress incorporated the "substantial limitation" concept into Section 504's broad prohibition on discrimination against individuals with disabilities without any reflection on the requirement's purposes or consequences. As a result, confirmed by the 1999 trilogy, courts perform the role of "disability experts" much like that played by vocational experts under the old vocational rehabilitation acts, in which they decide which among those with physical and mental impairments are intended to benefit from the statute.

The difference from the old vocational rehabilitation acts, of course, is that now these "experts" determine what basic rights an individual has in society, rather than merely whether that person is entitled to participate in rehabilitation programs. Worse, these new experts are subject to a whole new set of influences that did not pertain to the vocational rehabilitation programs—in particular, the traditional reluctance of the judicial system to intrude on the business judgment of employers.

Admittedly, disability is arguably different from other civil rights protected characteristics, and that without this inquiry it cannot as readily be determined whether someone in fact has the characteristic that is protected (the theory being that many disabilities are "hidden"[155] and that everyone has a race but not everyone has a disability). Further, without this type of inquiry, it would be too easy for someone to "select into" disability status.[156] Both of these premises,

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as" prong. S. REP. NO. 101-116. How Congress envisioned the handling of controlled impairments is, therefore, not without debate.

155. Locke, *supra* note 11, at 115; *see also* PELKA, *supra* note 44, at 155-56 (defining "hidden" disabilities to include impairments not apparent to a casual or uninformed observer, such as head injury, fibromyalgia, lupus, AIDS, and the early stages of multiple sclerosis).

156. This argument seems to underlie the reasoning of courts that employ the "one particular job" rationale to dismiss disability discrimination claims. For example, the Second Circuit asserted that the Rehabilitation Act regulations could not be "interpreted to . . . include working at the specific job of one's choice." Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (citing Tudyman v. United Airlines, 608 F. Supp. 739, 754 (C.D. Cal. 1984)). While these courts ostensibly rely on the regulations' language in support of this reasoning, in fact they appear to have developed a test that requires plaintiffs to meet an evidentiary standard of showing their general unemployability. *See* Locke, *supra* note

however, depend on the legitimacy of mandating that only those persons with "substantial limitations" are properly afforded protection under the statute.[157]

This Part addresses the legitimacy of that mandate. First, the conflict created among various goals of the statute from the inclusion of "substantially limits" in the definition of disability and how it inevitably allows courts to make value judgments about the "deserving disabled" in a way that undermines the concept of disability as a group-based civil rights issue, is discussed. Two examples, blindness and carpal tunnel syndrome, are then used to demonstrate how these inconsistencies affect the actual application of the statute.

Next, this Part demonstrates that the current ADA perpetuates the notion of disability discrimination law as granting "special rights" because of the statute's inability to support a coherent defense to claims it is anti-efficient. Finally, this Part concludes by addressing the "regarded as" prong, the supposed safety valve to ensure that the ADA reaches all forms of disability discrimination, which arguably should resolve many of the conflicts raised, but which does not because it is also undermined by the concept of substantial limitation.

A. Conflicts Between Individualized Determination of Protected Class Status, Anti-Stereotyping, and Disability as a Group-Based Civil Right

Arguments are sure to be raised that the Supreme Court's 1999 trilogy of decisions undermines the goals of the ADA.[158] The results of the 1999 trilogy

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11, at 122-23.

157. The argument that people will be able to "select into" disability status also ignores the language of the ADA and Rehabilitation Act that extends protection only to "qualified" individuals with disabilities. 42 U.S.C. § 12112(a) (1994) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability . . . ."). The qualification inquiry then focuses on what are the essential functions of the job in question and whether the individual with a disability is able to perform them with or without reasonable accommodations. *See* 42 U.S.C. § 12111(8) (1994). The EEOC itself seems to have problems separating the issue of disability from the issue of qualification. Its interpretive guidance to the definition of "substantially limits" gives as examples of persons who do not have disabilities, a person with a vision impairment who cannot fly a commercial airliner but who can co-pilot the airliner or fly other types of planes, and a professional baseball pitcher with a "bad elbow" who can no longer throw a baseball. 29 C.F.R. pt. 1630.2, app. § 1630.2(j) (1999). Both examples seem to more properly raise issues of whether these people are qualified because they are unable to perform essential functions of the jobs in question, rather than whether they have a disability. Even the court in *E.E. Black* recognized that such particular job arguments would be appropriately handled through the "qualified" analysis. *See* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100 (D. Haw. 1980) (rejecting analogy that person not hired as running back for Dallas Cowboys could have disability claim unless the single job rule was adopted).

158. *See, e.g.*, Susan J. McGolrick, *Disabilities Discrimination: Supreme Court's*

certainly highlight an inherent paradox in defining disability by reference to impairments that "substantially limit" major life activities. A statute designed to focus on ability and eliminate stereotyping of individuals with disabilities requires those individuals to focus on their limitations in order to convince a court they are impaired enough to be allowed to assert protection of a civil right. But does the result of the trilogy really undermine the overarching goals of the disability movement?

As previously discussed,[159] disability advocates wanted to move away from categorical treatment of "the disabled." They sought means to attack stereotypes about disability. They sought to have society speak of "individuals with disabilities," separating the person from the impairment. Arguably, the ADA after the 1999 trilogy accomplishes that separation. The Supreme Court's view does not presume that a person who must be assisted is a person with a disability. No stereotypes are applied about what it means to use a wheelchair, to rely on medications, or so on.

The irony of individualized assessment here cannot be denied. Disability civil rights laws were supposed to reflect the movement away from viewing individuals with disabilities by what they cannot do. Yet, the anti-stereotyping rationale supporting these laws has resulted in individuals having to place particular attention on their limitations before reaching the merits of their claim.

Take for example a person with insulin-dependent diabetes who is currently able to control the effects of the disease by taking insulin injections. Prior to the 1999 trilogy, disability advocates, with the support of the EEOC and eight of the nine circuit courts of appeals that had addressed the issue, considered that the "proper" interpretation of whether this individual has a disability to be determined without regard to insulin injections.[160] According to the position adopted by the majority in *Sutton*, however, the "proper" interpretation requires only consideration of either the residual effect of the diabetes itself after insulin has been ingested or the effect of having to take insulin-injections for diabetes.[161] If the diabetes is fully controlled by insulin injections, the individual presumably

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Three ADA Decisions Disappoint Disability Rights Advocates, 132 DAILY L. REP. (BNA), July 12, 1999, at C-1 (reporting reactions of disability rights advocates who describe Supreme Court trilogy as disappointing and failing to understand the policy implications of the Act).

159. *See supra* notes 45-53 and accompanying text.

160. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2153 & n.1 (1999) (Stevens, J., dissenting) (listing circuit cases that at the time of the *Sutton* decision had stated positions on the EEOC's interpretation of the mitigating measures issue); 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999). The Department of Justice also issued similar guidance for application to Titles II and III of the ADA. *See* 28 C.F.R. pt. 35, app. A § 35.104 (1998); 28 C.F.R. pt. 36, app. B § 36.104 (1998).

161. *See Sutton*, 119 S. Ct. at 2149.

would have only a qualifying disability if the residual effects of the insulin shots themselves substantially limit one or more major life activities.[162]

The previous majority view inevitably required speculation as to what degree of impairment the plaintiff would have if the assistive device were not used. The plaintiff had to create a hypothetical regarding what his condition would be if insulin were not available or ineffective.[163] That approach arguably did something disability rights advocates sought to eliminate—it placed the emphasis on diagnosis rather than on effect on the individual. While more disability cases passed the initial threshold, such an approach sacrificed the integrity of the process. Individualized assessment was essentially lost as arguments focused on categorical expectations regarding the effects of the alleged impairment.[164]

The post-*Sutton* approach retains the emphasis on individualized assessment but poses a difficult burden for the plaintiff with diabetes. Dependency on insulin is much easier to conceive of as having an "effect" on major life activities than as having a "substantial effect."[165] The Court's narrow construction of the ADA will probably exclude this plaintiff because she cannot prove she is sufficiently impaired.

Justice Ginsburg in her concurring opinion in *Sutton* offers an additional rationale to support this narrow construction of "substantially limits" based on the statement in the findings and purposes of the ADA that "individuals with disabilities are a discrete and insular minority . . . subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness in our society."[166] She found this statement "inconsistent with the enormously embracing definition of disability" urged by the plaintiffs in *Sutton*.[167]

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162. *Id.* at 2147.

163. *See* Erica Worth Harris, *Controlled Impairments under the Americans with Disabilities Act: A Search for the Meaning of "Disability,"* 73 WASH. L. REV. 575, 581-82 (1998) (arguing EEOC interpretation requires contemplation of "potential medical diagnosis of a disability's effect in a hypothetical world").

164. *See, e.g.*, Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 630 (7th Cir. 1998) (finding insulin-dependent diabetic was substantially limited because of effects of untreated diabetes on the body). In *Baert*, the Seventh Circuit was willing to accept the general proposition that insulin-dependent diabetics would lapse into a coma when not treated with insulin. *Id.* After making that finding, the court pointed out that the plaintiff in that particular case had a medical history that included hospitalization when he was not taking his insulin, but the court had already concluded that the plaintiff survived summary judgment on the general characteristics of insulin-dependent diabetes alone. *Id.*

165. For instance, having to maintain a regular schedule of injections would affect "caring for oneself." *See* 29 C.F.R. § 1630.2(i) (1999).

166. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2152 (1999) (quoting 42 U.S.C. § 12101(a)(7) (1994)).

167. *Id.*

The apparent purpose of the "discrete and insular" characterization was not necessarily to further define the protected class, but rather to overrule the Supreme Court's ruling in *City of Cleburne v. Cleburne Living Center*[168] that individuals with disabilities do not possess "quasi-suspect" status for purposes of constitutional scrutiny.[169] In *Cleburne*, the Court concluded that individuals with mental retardation were too "different, immutably so," from each other, and States' need to respond to those differences too great, to grant them as a group heightened class status.[170] By labeling individuals with disabilities a discrete and insular minority subject to political powerlessness, Congress apparently attempted to "ratchet up" equal protection rights for individuals with disabilities by taking advantage of the power granted it under Section 5 of the Fourteenth Amendment.[171]

Justice Ginsburg's observation reflects, however, something of the uneasy relationship between the kind of individualized determination of disability advocated by the social construct model of disability and the treatment of individuals with disabilities as a protected class for purposes of civil rights protections. The social construct theory of disability denies that there is a precise definition of disability and rejects attempts to label individuals "disabled" because they have some impairment.[172] The ADA implements this theory by refusing to consider anyone as having a disability without an analysis of the

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168. 473 U.S. 432 (1985).

169. *See* Robert E. Rains, *A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications*, 11 ST. LOUIS U. PUB. L. REV. 185, 198-99 (1992). Professor Rains suggests that Congress appeared to be using the "Ratchet Theory" from *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which held that the Fourteenth Amendment allows Congress to increase but not restrict or dilute equal protection guarantees. *Id.* at 201 n.101. Professor Rains notes that the theory had never before been used by Congress to create a quasi-suspect or suspect class by statute. *Id.* at 202.

170. *City of Cleburne*, 473 U.S. at 442-46.

171. *See* Rains, *supra* note 169, at 202. The effectiveness of this maneuver is questionable in light of recent Supreme Court rulings restricting the reach of Congress's Section 5 powers. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2207 (1999) (holding that Congress exceeded its Section 5 powers in enacting the Patent and Plant Variety Protection Remedy Clarification Act of 1992); City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997) (holding that Congress exceeded its Section 5 powers in enacting the Religious Freedom Restoration Act of 1993). Full development of the scope of Congress's power to enact the ADA as Section 5 legislation is beyond the scope of this Article. For a discussion of the equal protection issues prior to the Court's recent decisions, see Lisa A. Montanaro, Comment, *The Americans with Disabilities Act: Will The Court Get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621 (1995).

172. Drimmer, *supra* note 29, at 1355; Eichhorn, *supra* note 14, at 1412-13.

degree of the individual's personal limitations. In this regard, disability need not be seen as different from other protected characteristics.

For example, many excellent critiques have argued that race is itself socially constructed.[173] There is no substantial objective basis for labeling anyone as having a particular race.[174] As with the ADA's prohibition on discrimination based on disability, the statutory prohibitions against discrimination based on race are founded in a rejection of stereotypes and arbitrary barriers to employment.[175] Yet, in race discrimination cases, the extent to which race has impacted a plaintiff's employment opportunities is not examined. Further, discrimination claims are not rejected simply because they are brought by individuals who, because of socioeconomic status or skin tone, may have been able to avoid many of the limitations race places upon opportunity.[176] In other words, we are willing to presume the validity of the value judgment inherent in limiting use of race characteristics in employment decisions regardless of the strength of the status claim of the particular plaintiff.[177]

At the same time, "discrete and insular" implies a unity of group identity that can be traced to a particular (though arbitrary) characteristic that is the source of the political powerlessness experienced by the group.[178] The

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173. For a recent work that addresses not only how race and its relation to intelligence has been socially constructed, but also how the same is true for mental retardation, see ROBERT L. HAYMAN, THE SMART CULTURE (1998).

174. HAYMAN, *supra*, note 173, at 127-29 (describing the weak scientific basis for the concept of "race").

175. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971) (articulating the intent of Congress in enacting Title VII as removal of artificial and arbitrary barriers to employment).

176. The same is true for discrimination based on sex, where we do not, for example, reject the claims of male plaintiffs who allege sexual harassment despite the law of sexual harassment having been initially justified as one which addresses unequal power between the sexes. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (allowing male plaintiff to proceed with claim that male co-workers sexually harassed him). In *Oncale*, the Supreme Court noted that male-on-male sexual harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Id.* at 79.

177. The Supreme Court emphasized this in *Oncale* when it directed courts to apply the statutory prohibition on "discriminat[ion] . . . because of . . . sex" to any sexual harassment case. *Id.* at 79-80 (alteration and omissions in original). The Court reasoned that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislatures by which we are governed." *Id.*

178. For example, the Supreme Court has described alienage as a "prime example" of a discrete and insular minority protected from denial of government benefits absent compelling justification. *See* Graham v. Richardson, 403 U.S. 365, 372, 374 (1974). While "aliens" may not share similar cultures or color of skin, they have a group identity by virtue of their non-native, non-citizen status.

characteristic matters in defining the class, not the extent to which a particular individual holds that characteristic. If relevant, the manifestations of the characteristic or extent to which an individual holds that characteristic are considered later in the process, when evaluating the lawfulness of the employer's conduct.[179] By emphasizing the degree of deviance from the "norm" in defining disability, however, the ADA perpetuates the notion that disability is not really a group-based issue but rather a personal issue involving individual "flaws."[180] This ignores the fundamental point well articulated by Professor Catherine Lanctot that "[p]rejudice is not tailored to a person's particular set of symptoms [and] is not determined by the degree to which a medical condition substantially limits a major life activity. Prejudice stems from over-generalizations, myths and stereotypes, unwarranted assumptions and fear."[181]

Professor Robert L. Burgdorf, Jr., who drafted the original version of the ADA introduced in Congress in 1988, has suggested that "protected class" under the Act has been analytically misperceived as "special protected class."[182] In other words, courts have been unable to separate the historic view of individuals with disabilities as objects of pity and charity, such that any actions taken to benefit them are special benefits, which in turn invokes long standing judicial hostility toward "special rights."[183] While he argues that this is a misconstruction

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179. Again analogizing to the law of sexual discrimination, that law does not ask about the sexual characteristics of the plaintiff in order to establish that person's right to assert Title VII. *See Oncale*, 523 U.S. 75, at 78-79 (rejecting standards that would have inquired into the sexual characteristics of both plaintiff and defendant before allowing a Title VII sexual harassment claim). However, the law does recognize that sexual characteristics might be relevant to decisions about particular jobs under the bona fide occupational qualifications exception to Title VII. *See* 42 U.S.C. § 2000e-2(e) (1994); *see also* Dothard v. Rawlinson, 433 U.S. 321 (1977) (holding that all-male prison may categorically refuse to hire women for "contact positions" within the facility because of concerns about possible risk to other inmates from violence directed toward female guards by convicted sex offenders).

180. Current EEOC Commissioner Paul Steven Miller has noted the difficulty in persuading society to accept disability as a civil rights issue because society does not view individuals with disabilities as sharing common characteristics. *See* Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. PA. J. LAB. & EMPL. 511, 521 (1998). He focuses his analysis on resulting employer attitudes. He argues that as long as disability is perceived as an individual "flaw," employers are less likely to recognize that their actions are affected by negative stereotypes. *Id.* His point applies more generally to the ADA itself. The ADA undermines viewing individuals with disabilities as a group by using substantial limitation to create classes within the class of disability.

181. *See* Lanctot, *supra* note 12, at 337.

182. Burgdorf, *supra* note 11, at 568.

183. Burgdorf, *supra* note 11, at 568-69.

of the ADA as written,[184] in reality the structure of the ADA perpetuates such thinking by drawing distinctions between impairments based on the degree of effect. Consider in that regard the two examples discussed in the next section, which would probably be treated the same today as they were before *Sutton* was decided: blindness and carpal tunnel syndrome.

B. A Tale of Two Stereotypes

An individual who is completely unable to see has no difficulty meeting the definition of substantially limited in the ADA regulations because she is "[u]nable to perform a major life activity that the average person in the general population can perform."[185] Even after *Sutton*, a simple assertion of the inability to see will probably suffice to meet the threshold requirement that a plaintiff be a member of a protected class. If litigation occurs over the impact of blindness on the individual's life, it will occur in the battle over whether this person is a qualified individual with a disability and whether the employer could reasonably accommodate that individual without undue hardship.[186]

On the other hand, a plaintiff who alleges carpal tunnel syndrome in his wrists will be required to specifically establish that this characteristic had some actual and substantial impact on his life. This is true even in cases in which the employer explicitly or implicitly concedes that the plaintiff's physical condition was the basis for the adverse employment decision.[187] The defendant is likely

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184. Burgdorf, *supra* note 11, at 571-72. In particular, Burgdorf suggests that the third prong of the definition of disability, the "regarded as" prong, should be "properly" understood to cover situations when an employer "purposefully inflicted a negative consequence upon an individual because of a physical or mental impairment (whether real or perceived)." Burgdorf, *supra* note 11, at 571-72. As a matter of policy, this makes sense, but as I later discuss, it ignores the language of the third prong which incorporates the "substantial limitation" language of the first prong. *See infra* notes 216-18 and accompanying text. Under the revision I propose, Burgdorf's conception of the third prong will be accomplished because the substantial limitation requirement is eliminated.

185. 29 C.F.R. § 1630.2(j)(1)(i) (1999).

186. *See* White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995) (assuming plaintiff established genuine issue of material fact regarding blindness as a disability and evaluating summary judgment issues only as to plaintiff's qualifications and reasonable accommodations).

187. *See* Wilmarth v. City of Santa Rosa, 945 F. Supp. 1271, 1274, 1277 (N.D. Cal. 1996) (finding plaintiff with carpal tunnel syndrome failed to establish either actual or perceived disability despite employer acknowledging it believed plaintiff was unable to perform the position she held); Khan v. Cook County, No. 96 C 1113, 1997 WL 370199, at *7 (N.D. Ill. June 27, 1997) (court found employee with carpal tunnel syndrome not impaired enough to state an ADA claim despite employer having refused to allow employee back to work until all medical restrictions related to his condition were lifted).

to move for summary dismissal of the plaintiff's claim,[188] in response to which the plaintiff will need to convince the judge that (1) the pain and physical limitations associated with carpal tunnel syndrome are actual; and (2) whatever loss of major life activity the plaintiff alleges is important enough, both in terms of the status of the life activity and the degree of limitation.[189] Even if the plaintiff tries to avoid this burden of proving an actual disability and instead alleges that the employer regarded him as having a disability under the third prong of the definition,[190] he will still have to show the employer's perception of his condition met the substantiality requirement.[191]

Stereotypes about disability can still be seen at work in either case. In the case of blindness, the historic presumption that absence of a function equals disability is employed.[192] Although the statute purports to require a case-by-case analysis, the individual's blindness in and of itself will in most every case answer that inquiry.[193] In contrast, the carpal tunnel claimant faces a

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188. *Cf.* Colker, *supra* note 11, at 107-08 (reporting the success of ADA defendants in obtaining dismissal of claims at trial court level).

189. The Sixth Circuit provides a recent example of how exacting courts can be regarding the plaintiff's evidence of limitation in carpal tunnel cases. *See* McKay v. Toyota Motor Mfg, U.S.A., Inc., 110 F.3d 369 (6th Cir. 1997). In *McKay*, the plaintiff was an assembly line worker who lost her job after developing carpal tunnel syndrome that limited her ability to lift over twenty pounds, use vibrating tools, and make repetitive use of her right hand. *Id.* at 370. Toyota dismissed her because of excessive absences pursuant to its medical leave policy. *Id.* The Sixth Circuit held that the plaintiff failed to present sufficient evidence that she was significantly restricted from performing a class of jobs, specifically manufacturing jobs. *Id.* at 373. The court distinguished between light, medium, and heavy manufacturing work and characterized plaintiff's evidence as indicating only that she was disqualified from light work:

> Since plaintiff's work history at Toyota involved only light work, and she made no showing she ever was able to perform medium or heavy work, one is hard pressed to comprehend how she could have been regarded as a 'qualified individual' with respect to medium and heavy work.
>
> . . . [A]t best, her evidence supports a conclusion that her impairment disqualifies her from only the narrow range of assembly line manufacturing jobs that require repetitive motion or frequent lifting of more than ten pounds.

Id. By characterizing the class of jobs affected in this fashion, the Sixth Circuit was able to dismiss the obvious and substantial degree of limitation imposed by the plaintiff's carpal tunnel syndrome.

190. 42 U.S.C. § 12102(2)(C) (1994).

191. *See, e.g.*, Lessard v. Osram Sylvania, 175 F.3d 193, 199 (1st Cir. 1999) (requiring plaintiff who alleges employer regarded him as substantially limited in ability to work to show that employer believed plaintiff had an impairment that would have excluded plaintiff from broad range of jobs).

192. The ADA regulations provide that the inability to perform a major life activity that can be performed by an average person in the community meets the first alternative definition of "substantially limits." 29 C.F.R. § 1630.2(j)(1)(i) (1999).

193. The Supreme Court in effect acknowledged this process of defining disability

presumption that he is not a deserving party entitled to protection from arbitrary stereotypes that impede his ability to compete fairly in the labor market. He must prove the extent to which his physical impairment causes his ability to perform major life activities to deviate from what the "average" person can do.[194] Except in limited cases where carpal tunnel plaintiffs can muster enough such evidence of limitation, the impairment is simply a personal trait for which the individual will have to bear the consequences.[195]

Instead of focusing on whether the employer took the individual's physical capabilities into account, the law diverts the issue into assessing the strength of the individual's status claim. It is, in essence, a hunt for the "special" case. This cannot help but invoke stereotypes about disability and lead to the "special rights" perception Burgdorf described.[196]

C. The Productivity Paradox Created by "Substantially Limits"

The special rights perception is influenced by another powerful force, the traditional tension between civil rights laws and employers' "freedom" to run their businesses in the way they see fit. This tension illustrates another of the inconsistencies of the current definition of disability that allows employers to

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when in *Albertsons, Inc.* it noted that it had reviewed medical literature on monocular vision and, based on that information, suggested plaintiffs with such vision "ordinarily" will be able to show they have a disability. Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162, 2169 (1999).

194. *See* 29 C.F.R. § 1630.2(j)(1)(ii) (1999) (defining "substantially limits" based on significant restriction of a major life activity as compared to the condition, manner, and duration under which an average person in the community can do that same activity).

195. The skepticism of courts approaching claims involving "non-traditional" disabilities such as carpal tunnel syndrome can be seen in cases like *Lamboy-LaSalle v. Puerto Rico Tel. Co.*, 8 F. Supp. 2d 122 (D.P.R. 1998), in which the court began its discussion of the plaintiff's disability claim this way: "There is no rule that carpal tunnel syndrome cannot qualify as a disability under the Act, but still a plaintiff must demonstrate that the impairment has been substantially limiting." *Id.* at 125. The court in *Lamboy-LaSalle* then proceeded to dismiss the claim because it found the plaintiff's difficulties not broad enough and long-lasting enough to constitute a disability. *Id.*

196. *See supra* notes 182-86 and accompanying text. Professor Lanctot makes a similar point, questioning "whether the current judicial fixation on fact-sensitive medical analyses can ever achieve [the] objective [of eradicating prejudice against people with disabilities]." Lanctot, *supra* note 12, at 338. Her solution is to treat some disabilities like blindness and diabetes, which she characterizes as "inherently substantially limiting," as per se disabilities. *See* Lanctot, *supra* note 12, at 338. For the reasons set out in the text of this Article, I believe such an approach furthers the idea that some disabilities are more deserving of civil rights protections than others, which undermines the concept of disability as a basic civil right and perpetuates the notion that these are "special" rights.

freely discriminate against not-impaired-enough plaintiffs who could be readily accommodated to perform their jobs.

The tension between civil rights protections and free market concerns is particularly strong in the disability context because the law requires employers to make modifications to the job in order to accommodate qualified individuals with disabilities.[197] Some of the strongest critics of the ADA argue that it substitutes government regulation for employer discretion and forces employers to make inefficient choices about uses of resources.[198] These critics contend that whereas other protected characteristics such as race and sex are largely irrelevant to job performance, and banning job choices based on those characteristics imposes little if any costs, disability usually involves the ability to perform a job and granting anti-discrimination protection based on that characteristic necessarily restricts employers' control and flexibility.[199] Disability anti-discrimination laws in effect work as a subsidy paid by employers through "reasonable accommodation," a subsidy likely to be borne disparately within the labor market.[200]

Proponents of the ADA reply by asserting their own efficiency and productivity arguments. Borrowing a theme from prior vocational rehabilitation acts, Congress's findings in the ADA assert that disability discrimination "costs the United States billions of dollars in unnecessary expenses resulting from

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197. *See, e.g.*, 42 U.S.C. § 12112(b)(5)(A) (1994) (defining discrimination to include not making reasonable accommodations to known physical or mental disabilities of otherwise qualified individual employees or applicants).

198. *See* Andrew Kull, *The Discrimination Shibboleth*, 21 SAN DIEGO L. REV. 195, 198 (1994); Mark A. Schuman, *The Wheelchair Ramp to Serfdom: The Americans with Disabilities Act, Liberty, and Markets*, 10 ST. JOHN'S J. LEGAL COMMENT. 495, 499-500 (1996); *cf.* RICHARD A. EPSTEIN, THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 9, 28-58 (1992) (arguing that all civil rights statutes should be repealed to allow the market to operate efficiently on its own to eliminate discrimination).

199. *See* Schuman, *supra* note 198, at 499. Schuman argues that "any regime to forbid discrimination based on disability inevitably becomes a regime to control the duties and performances an employer may require for a job. The ADA has produced just such controls, which go far beyond what was originally envisioned under earlier anti-discrimination laws." *See* Schuman, *supra* note 198, at 499.

200. *See* EPSTEIN, *supra* note 198, at 488-93. Epstein argues that disability discrimination laws create subsidies by requiring employers to expend money to accommodate individuals with disabilities within their workplaces when those individuals could find work at other workplaces. *See* EPSTEIN, *supra* note 198, at 491. He argues that it is more economical for individuals to change positions than for every employer to redesign its workplace. *See* EPSTEIN, *supra* note 198, at 491. He further argues that the costs imposed on employers in this fashion are ultimately borne by consumers, including those with disabilities who are too impaired to work, such that these individuals not only do not receive the benefit of the statute supposedly designed to protect them, they actually subsidize the employment of others with disabilities. *See* EPSTEIN, *supra* note 198, at 491-93.

dependency and nonproductivity."[201] Commentators point out that efficiency is not determined solely on cost of providing accommodation, but also on added value from retaining employees and creating good will with customers.[202] They argue that much of what is perceived about costs associated with hiring and retaining individuals with disabilities is really the product of attitudes toward and assumptions about such persons, and not an actual assessment of their productivity.[203]

The arguments characterizing the ADA as anti-efficient directly or indirectly seem to hold great sway with the courts.[204] Courts in particular tend to confuse efficiency arguments with equality arguments. One illustration of this

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201. 42 U.S.C. § 12101(a)(9) (1994).

202. *See* Blanck, *supra* note 14, at 879.

203. *See* Blanck, *supra* note 14, at 883-84; *see also* Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 222 (1994) (asserting that prior assumptions that employing individuals with disabilities could not generate efficiency gains may be unfounded and that employers who have pioneered hiring such individuals often report economic gains from their efforts to reconceptualize jobs and tasks in ways that enable individuals with disabilities). Blanck and Marti have also reported on the emerging empirical data on workplace accommodations which show the average costs of accommodations is less than $500, and that many accommodations cost little or nothing. *See* Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 377-78 (1997) (reporting on studies conducted of Sears, Roebuck & Co. and surveys by the Job Accommodation Network).

204. The significance of efficiency concerns can be seen in courts' discussion of the duty to provide reasonable accommodations. Judge Posner provides an excellent example in his decision in *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995). He first expressed his opinion about how the issue of reasonable accommodation raises a different type of discrimination issue:

> The . . . problematic case is that of an individual who has a vocationally relevant disability—an impairment such as blindness or paralysis that limits a major human capability, such as seeing or walking. In the common case in which such an impairment interferes with the individual's ability to perform up to the standards of the workplace, or increases the cost of employing him, hiring and firing decisions based on that impairment are not "discriminatory" in a sense closely analogous to employment discrimination on racial grounds. But [Congress was] unwilling to confine the concept of disability discrimination to cases in which the disability is irrelevant to the performance of the disabled person's job.

Id. at 541. Posner then addressed allocations of the burden of proof regarding what accommodations are reasonable or pose an undue hardship to the employer. *See id.* at 542-43. He decided that that the plaintiff bore an initial burden of showing that the cost of the accommodation was reasonable in terms of being proportionate to the benefits received by the plaintiff. *Id.* at 543. He supported this conclusion by pointing to the fact that the findings accompanying the ADA "marketed" the Act as a "cost saver." *Id.* He explained that "[t]he savings will be illusory if employers are required to expend many more billions in accommodation that will be saved by enabling disabled people to work."

is their insistence that the ADA could not have been intended to give employees the right to work at the specific job of their choice.[205] Apparently, such a rule would somehow give employees more than equal opportunity. This thinking is illustrated by one court's explanation of why a plaintiff's lifting impairment did not warrant the accommodation of light-duty assignment or assignment to another vacant position:

> Plaintiff argues that such substantial accommodations are owed to him, but not to other employees who are terminated because they lack the ability to perform a particular job, because he is "disabled." As defendant suggests, it arguably turns the very purpose of the ADA on its head to require that an employer give a job preference, over all other employees or applicants, to an individual who, while having an impairment that affects his ability to perform one kind of job, is not unable to perform a range of other comparable jobs not affected by the impairment.[206]

In other words, the fault of the ADA lies not so much in a perception that it increases costs to employers per se, but in the fact that it constrains the freedom of the employer in order to convey "special rights" to a certain group of employees. Such a viewpoint is not surprising from a judicial system that in other anti-discrimination contexts has developed a set of rules that largely defer to the "legitimate business reasons" advanced by employers in defense to charges of discrimination, especially absent direct proof of intentional discrimination.[207]

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205. *See, e.g.*, Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (asserting that the regulations cannot be interpreted to extend the definition of disability to working at the specific job of one's choice); Byrne v. Bd. of Educ., 979 F.2d 560, 565 (7th Cir. 1992) (citing *Daley*).

206. McCollough v. Atlanta Beverage Co., 929 F. Supp. 1489, 1497 (N.D. Ga. 1996).

207. The concerns that anti-discrimination law not unduly intrude on employer's economic decisionmaking are prominently illustrated in the Supreme Court's approach to "disparate impact" discrimination claims. Under the disparate impact approach, the plaintiff does not need to prove he was intentionally treated differently than others based on a protected characteristic such as race. Rather, the plaintiff can prove discrimination by showing the employer used some facially neutral criteria in the employment process that had the effect of disqualifying a statistically greater number of people who had a protected characteristic such as race in common. *See* 42 U.S.C. § 2000e-2(k)(1)(A) (1994); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). The Supreme Court in *Wards Cove* made this type of claim particularly difficult to prove by requiring the plaintiff to identify the specific employment practice that caused the disparity. *Wards Cove*, 490 U.S. at 656-58. The Court expressed concern that otherwise employers could be held liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Id.* at 657 (quoting Watson v. Fort Worth Bank

The paradox of the argument made by efficiency critics who urge a narrow reading of the ADA is that, following their view, the only purpose of the law would then be to force employers to accommodate the most impaired individuals in society, whose disabilities presumably would require more substantial accommodations. There is a similar paradox inherent in the argument of efficiency supporters of the ADA, who urge the productivity benefits of the ADA in bringing the severely disabled into the workforce while ignoring the productivity losses incurred by the less severely impaired who may still be fired at will. This may be a carryover of the old vocational rehabilitation concern that the most marginalized among people with disabilities receive services, or it may be an acceptance of the idea that courts should limit their intrusion into employment decisions. Either way, the inconsistency undermines the concept of disability as a basic civil rights issue.

Such a construction of disability discrimination law allows employers to pass certain employees along onto other employers, increasing the likelihood that these impaired but not impaired enough employees will be limited to part-time or other low paying types of employment, if they can find any employment at all. An example of this phenomenon can be seen in a Seventh Circuit case in which the plaintiff was fired from her job teaching special education students because she had a relapse of symptoms associated with her diagnosis of paranoid schizophrenia.[208] The Seventh Circuit found that the plaintiff was not substantially limited in the major life activity of working in large part because she had found another teaching job.[209] The court ignored the fact that the plaintiff's other teaching position was only that of a substitute teacher.[210] In other words, because the plaintiff found some other teaching employment, that was sufficient justification to deny her claim, without regard to the fact she was relegated to part-time, nonpermanent employment.[211]

& Trust, 487 U.S. 977, 992 (1988)). Congress subsequently endorsed this approach in the Civil Rights Act of 1991, albeit including a limited exception if the employer uses a number of employment practices that are not capable of segregation. 42 U.S.C. § 2000e-2(k)(1)(B)(I) (1994). In another part of the *Wards Cove* decision, the Court cautioned that "'[c]ourts are generally less competent than employers to restructure business practices,' consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring practice in response to a [discrimination] suit." *Wards Cove*, 490 U.S. at 661 (internal citation omitted).

208. Patterson v. Chicago Ass'n for Retarded Citizens, 150 F.3d 719, 720-23 (7th Cir. 1998).

209. *Id.* at 726 (reasoning that the plaintiff could not argue she was substantially limited in her ability to work as a teacher because she "was and continued to be regularly employed as a teacher" with another school system).

210. *Id.* at 723.

211. Professor Mashaw has called attention to the fact that some 700,000 people are rejected each year in this country for Social Security Disability benefits, only a small percentage of whom are ever again employed for substantial wages. *See* Mashaw, *supra*

The proper focus in that case should have been on whether a teacher experiencing symptoms of paranoid schizophrenia is a "qualified individual" for a teaching position, not on whether this individual's schizophrenia was substantial enough. If her symptoms could have been reasonably accommodated without undue hardship to the employer, the result would have been more efficient. The employee would retain her job, avoiding the costs associated with unemployment or underemployment. The employer would avoid the error costs associated with losing a trained employee while retaining productivity enhancement from an employee able to perform her job properly. Moreover, society benefits from the fully integrated value of this individual.[212] Conversely, if the individual cannot be reasonably accommodated, efficiency is advanced by redirecting the individual to other employment. At that point, the arbitrary barriers to integration have been removed and the individual is in no different position than anyone else in society who wishes to hold a job beyond his or her abilities.

The productivity paradox is built into the ADA. The construction of the ADA amounts to an open invitation to courts use strict gatekeeping to combat this perceived anti-efficient statute. The Act encourages courts to ignore the consequences of eliminating individuals able to be productive in the positions they hold, by limiting its coverage to only those who can meet the substantial limitation threshold.

D. The "Regarded As" Prong in the Definition of Disability

Arguably, the criticisms of the ADA raised so far can be resolved or at least greatly limited by the application of the third prong of the disability definition, which protects individuals who are only "regarded as" having a disability.[213] This prong at least potentially protects not-impaired-enough individuals from arbitrary actions on the part of their employers, because unlike under the first prong, the degree of actual physical or mental limitation is not relevant here.[214]

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note 203, at 222-23 (citing 1992 statistics from the HOUSE COMMITTEE ON WAYS & MEANS, 102D CONG., GREEN BOOK 65 (1992)). He argues that much of this residual unemployment cannot be explained except in terms of employer stereotyping about productivity issues. *See* Mashaw, *supra* note 203, at 223. He concludes that the purely economic losses from excluding these otherwise productive individuals could be enormous. *See* Mashaw, *supra* note 203, at 223.

212. The added irony of *Patterson* is that the plaintiff was a teacher of children with mental retardation, whose employer avoided having to even consider whether her mental impairment could be reasonably accommodated to allow her to continue her work. Instead, the employer characterized her as not deserving of protection from disability discrimination, despite having decided she was too impaired to be an effective teacher. *See Patterson*, 150 F.3d at 721-23.

213. 42 U.S.C. § 12102(2)(C) (1994).

214. *See* 29 C.F.R. § 1630.2(k) (1999) (describing coverage of the "regarded as"

On the surface, this argument looks good. Congress after all added that prong to extend coverage to persons who did not have an actual disability but who were affected by negative attitudes toward them based on a perception of disability.[215] There are several reasons, however, why this prong cannot be relied upon to fix the problems that including "substantially limits" in the first prong creates.

The first is that the ADA as written incorporates the substantial limitation requirement into the perceived disability. The third prong covers individuals "regarded as having *such* an impairment."[216] By its plain language, this means a disability that substantially limits a major life activity.[217] In the two 1999 mitigating measure cases, *Sutton* and *Murphy*, the Supreme Court confirmed this reading of the statute when it concluded that the plaintiffs in those cases had proved only that their employers regarded their impairments to limit their ability to perform a particular job, and not their general ability to "work" as a major life activity.[218] The "regarded as" prong thus incorporates the flawed idea that only certain impairments, real or perceived, are deserving of anti-discrimination protection.

Another reason the "regarded as" prong fails as a gap-filler relates to the anti-stereotyping agenda behind its inclusion in the ADA. As previously established, the third prong of the statutory definition of disability was added to specifically address biases and stereotypes about people with disabilities.[219] At the same time, the "regarded as" prong has an open-ended character that could vastly increase the number of people protected by the ADA over the 43 million figure contained in the statutory findings and purposes section.[220] One way to limit the size of the potential protected class is to use the presence or absence of stereotyping as part of the test for deciding which employers should be held liable.

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prong).

215. *See* H.R. REP. NO. 101-485(III), at 30, *reprinted in* 1990 U.S.C.C.A.N. 445, 453-54; *see also supra* note 78 and accompanying text (discussing why the third prong was originally added to the Rehabilitation Act definition of "handicapped").

216. 42 U.S.C. § 12102(2)(C) (1994) (emphasis added).

217. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2149-50 (1999) (interpreting 42 U.S.C. § 12102(2)(C) (1994) to incorporate basic terms of definition of disability in Section 12102(2)(A) (1994)).

218. *Id.* (holding that employer disqualified employee from only the job of "global airline pilot"); Murphy v. UPS, Inc., 119 S. Ct. 2133, 2137 (1999) (holding employer disqualified employee only from mechanics positions that required driving a commercial vehicle, not mechanics jobs in general).

219. *See supra* note 78 and accompanying text.

220. The language of the findings appears to refer to individuals with actual disabilities. The findings provide that "some 43 million Americans *have* one or more physical or mental disabilities." 42 U.S.C. § 12101(a)(1) (1994) (emphasis added).

For example, the Third Circuit recently created what it called "a limited reasonability defense" that allows an employer to escape liability for mistakenly regarding an employee as having a disability as long as the mistake is not based on stereotypes about the plaintiff's impairment, occurs during an individualized assessment of the employee, and is the result of some errors or omissions by the employee in providing information to the employer.[221] The court defended its adoption of this defense by reasoning that when there is no evidence that the decisionmakers were infected with stereotypes or prejudice against the disabled, the aims of the ADA are best served by letting the employer off the hook as long as the employer at least initiates individualized assessment of the employee's actual condition.[222] In other words, stereotypes are the principal evil of the statute, and where it can be reasonably argued they are not at play because there was an individualized assessment process at work, the ADA's concerns have been satisfied.[223]

By contrast, some courts reject the idea that evidence that the employer relied on stereotypes is itself sufficient to state a perceived disability claim.[224] They point out that the plaintiff must still first show that the disability as

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221. Taylor v. Pathmark Stores, 177 F.3d 180, 193 (3d Cir. 1999).

222. *Id.* at 192-93.

223. The decision in *Taylor* seems at odds with a prior Third Circuit decision in which the court reasoned that innocent mistakes as to the severity or existence of an impairment can support a finding of a perceived disability under the third prong. *See* Deane v. Pocono Med. Ctr., 142 F.3d 138, 144 (3d Cir. 1998) (en banc). The Third Circuit defended the rule it adopted in *Taylor* as being consistent with *Deane*'s requirement that the employer take reasonable steps to learn the true extent of the employee's impairment. *See Taylor*, 177 F.3d at 194. The Third Circuit in *Taylor* apparently reconciled the two cases by viewing the exception it created in *Taylor* as limited to cases where the plaintiff is to blame for the confusion. In actuality, the court added the requirement that the plaintiff prove that he acted reasonably in informing the employer of the actual extent of his physical or mental condition.

224. *See, e.g.*, Lessard v. Osram Sylvania, 175 F.3d 193 (1st Cir. 1999). In *Lessard*, the plaintiff alleged that his employer fired him because of assumptions about his inability to work as a spot welder because of a scarred and disfigured hand. *Id.* at 195. He argued that his former employer was motivated by stereotypes that he was injury prone and would drive up insurance costs. *Id.* at 199. The First Circuit rejected the idea that a perceived disability claim can rest on such "myth-motivated actions," concluding that Congress by the language it chose could not have intended that the scope of protection of perceived disabilities be broader than the scope of protection of actual disabilities. *Id.* In other words, regardless of the motivation of the employer, unless it perceived the plaintiff's limitations to be substantial, which here meant it disqualified him from general employment, the plaintiff could not establish a covered disability. *Id.* at 198-99; *see also* Ceretti v. Runyon, No. 97-3109, 1998 WL 403199, at *2 (8th Cir. July 6, 1998) (rejecting plaintiff's claim because "[w]hile the evidence does show that the . . . hiring supervisors relied upon the medical opinions to conclude that [the plaintiff] was not medically qualified to perform particular jobs, nothing in the record suggests that they regarded him as disabled").

perceived by the employer would have substantially limited a major life activity.[225] Under this approach, no matter how evil the stereotype, the plaintiff's case fails unless the stereotype has sufficient implication regarding the extent of limitation. Under this approach, the potential number of people covered under the third prong is as a result limited by elevating "substantially limits" over anti-stereotyping concerns.[226]

As the reasoning of these courts reflects, the anti-stereotyping rationale of the third prong fails to produce a coherent basis for doctrinal development. Instead, it allows courts to manipulate coverage of that prong to satisfy their vision regarding how large the protected class should be.

Finally, relying on the "regarded as" prong as a gap-filler opens up another set of problems for the plaintiff even if he can get past the definition stage. There is an emerging split of opinion among the federal courts as to whether a plaintiff who is only perceived as having a disability is entitled to be reasonably accommodated.[227] A recent example demonstrating the potential conundrum this poses for a plaintiff comes out of the Sixth Circuit.

The plaintiff in a Sixth Circuit case, *Workman v. Frito-Lay, Inc.*,[228] suffered from irritable bowel syndrome, which at times necessitated leaving her production line job several times an hour to use the bathroom.[229] The court was willing to agree that she had an impairment and that controlling one's bowels was a major life activity.[230] In contrast to a similar case out of the Second

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225. *See Lessard*, 175 F.3d at 198-99.

226. It is also not unusual for a court to invoke the stereotyping concern of Congress as an explanation why a particular impairment should not be included in the category of "disability." For example, one federal court reasoned that "inability to handle stress" was not an impairment for ADA purposes because the purpose of the ADA was "'to combat the effects of 'archaic attitudes,' erroneous perceptions and myths that work to the disadvantage of persons with or regarded as having disabilities'" and not to "categorize people with common personality traits as disabled." Mundo v. Sanus Health Plan, 966 F. Supp. 171, 173 (E.D.N.Y. 1997) (quoting Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995) (citations omitted)). This court bolstered its reasoning by citing the language from *Forrisi* that the high purpose of the statute would otherwise be debased. *Id.* at 173 (quoting Forrisi v. Bowen, 794 F.2d 931, 934-35 (4th Cir. 1986)); *see also* Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997) (citing *Forrisi*).

227. *Compare* Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996) (reasoning that Congress probably intended to allow employees perceived to have a disability to be reasonably accommodated) *with* Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999) (reasoning that individual only perceived to have disability is not entitled to accommodation from employer). *See also* Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc) (discussing but not deciding whether perceived disability plaintiff is entitled to reasonable accommodation and noting EEOC has yet to take a position on this issue).

228. 165 F.3d 460 (6th Cir. 1999).

229. *Id.* at 463.

230. *Id.* at 467.

Circuit,[231] the Sixth Circuit was also willing to accept the jury's finding that the plaintiff's condition substantially limited that major life activity.[232] This was significant, because the court stated that if the plaintiff had had to proceed under the "regarded as" prong, she would not have been entitled to leave the production line as an accommodation to her condition.[233] Instead, her only recourse would have been to show that the employer generally allowed employees to be temporarily replaced on this line during a shift, and that by firing her, the employer therefore treated the plaintiff differently because of her disability.[234]

In a case such as that, there are two possible approaches. One is to say what the Sixth Circuit did, that "regarded as" plaintiffs do not receive reasonable accommodations. But that leads to an anomalous result in which a plaintiff who cannot convince a judge that her need for bathroom breaks is a substantial enough limitation also will not receive the breaks she indisputably needs, unless everybody else already receives them, in which case she is unlikely to be in court requesting the accommodation. The other possible approach is to say that "regarded as" plaintiffs are entitled to reasonable accommodations of the disability they are perceived to have. But this also leads to anomalous results. The EEOC's attempt to further define categories of "regarded as" individuals illustrates these difficulties.

The EEOC defines three categories of individuals who may be "regarded as" having a disability.[235] Two of those categories include individuals who have physical or mental impairments that are not substantial enough to qualify under the actual disability prong, but who are perceived as such either by the employer or as a result of the attitudes of others.[236] The third category includes persons

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231. *See* Ryan v. Grae & Rybicki, 135 F.3d 867 (2d Cir. 1998). The plaintiff in *Ryan* was a legal secretary who suffered from colitis. *Id.* at 868. During flare-ups of the condition, the plaintiff had to immediately be able to use the bathroom. *Id.* The Second Circuit upheld a summary judgment in favor of her employer after applying the factor analysis articulated in the EEOC's regulations defining substantially limited. *Id.* at 871-72 (applying 29 C.F.R. § 1630.2(j)(2) (1999)). The court found the condition did not have sufficient duration or impact on the plaintiff's major life activities because it was asymptomatic for long periods and varied in intensity. *Id.* The Sixth Circuit in *Workman* did not expressly apply the factor analysis in upholding a jury verdict in that case. *Workman*, 165 F.3d at 467. Under the reasoning of the Second Circuit, Workman probably would not have had an actual disability because at the time of her dismissal, her condition had stabilized such that her bathroom use was within the "normal" range according to her doctor. *Id.* at 463. She was seeking accommodation "just in case" the condition in the future required her to leave the line several times an hour. *Id.* at 464.

232. *Workman*, 165 F.3d at 467.

233. Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999).

234. *Id.*

235. 29 C.F.R. § 1630.2(l)(1)-(3) (1999).

236. An individual regarded as having a disability can be one who "[h]as a physical or mental impairment that does not substantially limit major life activities but is treated

who have no impairment but are treated as if they do.[237] Accommodation is not generally going to be an issue with the third category, where there is no actual physical or mental impairment of any kind that might need to be accommodated. Clearly, all that needs to be eliminated there is the stereotyped attitude.

As for the first two categories, a similar, plausible argument exists that these "regarded as" plaintiffs should not be entitled to "reasonable accommodation," at least to the extent it means changes in the structure of the position itself. The "regarded as" prong was intended to address stereotypes, and arguably the recourse here as well should be removal of the stereotype at issue. In other words, because they do not have an actual disability, these individuals are at most entitled to be treated without regard to the impairment. If individuals who fall under the third prong because of less-than-substantial impairments are entitled to the same sort of accommodations as individuals who fall under the first prong because of substantial impairments, then there is no real difference between the two.

Yet, by defining individuals regarded as having a disability separately from individuals who have disabilities, Congress created a distinction that must be held to mean something.[238] The reasonable accommodation approach to the "regarded as" prong effectively reads "substantially limits" out of the statute. Technically, this convolution results only because the basic statutory definition of disability distinguishes between individuals with impairments.

The EEOC was correct in perceiving that people with impairments that do not fit the first prong's definition are also subject to arbitrary action based on those impairments. The solution does not lie, however, in ignoring the current statutory distinctions. The solution is to place all individuals with impairments of major life activities into the first prong and all persons without such impairments into the third prong.[239]

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by a covered entity as constituting such a limitation;" or one who "[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment." 29 C.F.R. § 1630.2(l)(1), (2) (1999).

237. 29 C.F.R. § 1630.2(l)(3) (1999).

238. *Cf.* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 741-42 (1989) (rejecting proposed tests to interpret the "work for hire" standard under the Copyright Act of 1976 because it would ignore the structure of the statute and the distinctions Congress drew regarding ways in which a work can be deemed for hire).

239. The specifics of how this would work are set out in Part IV(B) *infra*. So far, I have not addressed the middle prong, which protects individuals who have a "record of" a disability. *See* 42 U.S.C. § 12102(B) (1994). That prong raises similar problems in the employment context as the ones I point out in the text for the "regarded as" prong, because in theory, the individual relying on the middle prong also does not actually have an impairment that is substantially limiting. *See* 29 C.F.R. pt. 1630, app. § 1630.2(k) (1999).

IV. "DISABILITY" DEFINED WITHOUT "SUBSTANTIALLY LIMITS"

How would the ADA operate under a revised definition of disability that eliminates "substantially limits"? This Part argues that elimination of the "substantially limits" requirement would result in a superior ADA on several levels. The ability of courts to use stereotyping as a means to either include or exclude individuals from the protected class would be substantially controlled. The convoluted relationship between actual and perceived disability could be sorted out. The function of the "major life activity" requirement would be clarified, and its definition could be simplified. Finally, the focus in disability cases would be placed where it belongs: on issues of qualification and accommodation.

A. Granting Only a Limited License to Make Normative Distinctions

In the discussion of the mitigating measure cases, the example of insulin-dependent diabetes was used.[240] Under the current ADA, after the 1999 trilogy, individuals alleging that they have diabetes will be required to establish their personal level of limitation as someone who takes injections of insulin. Even under the now-rejected approach urged by the EEOC, the inquiry would have been what level of impairment is experienced by someone who has this type of diabetes. Either way, the courts are invited to impose a normative standard about what degree of deviation from the norm is substantial enough.

Under the revision proposed, the inquiry in such a case is simplified: Is insulin-dependent diabetes a physical or mental impairment? If so, does it have an effect on the individual's major life activities? Because there is no requirement to show "how much" effect, the plaintiff proceeds with her claim under a much less burdensome standard. More importantly, this approach recognizes that disability is indeed different in important respects from other protected characteristics, but only to the extent that disability is often a "hidden" characteristic.[241] The suggested revision gives courts a limited license to inquire into the sufficiency of the plaintiff's allegation of protected class status. The purpose of the inquiry is not to compare the plaintiff to others with disabilities or to determine some unavoidably arbitrary standard about degree of deviation from the norm.

This standard is not unlike the evidentiary standard for proof of harm in a personal injury claim. The disability discrimination plaintiff must show the existence of a functional limitation as the result of a physical or mental impairment just as the plaintiff in a tort claim must prove physical or emotional

240. *See supra* notes 160-65 and accompanying text.

241. *See* Locke, *supra* note 11, at 114-15 (noting the difficulty in determining protected class status for individuals with "hidden" impairments that do not have easily recognizable manifestations).

harm resulted from the tort.[242] Some disability cases may require a medical expert to establish the existence of the impairment, but many will not.[243] In most cases, the plaintiff should be able to establish the "effects" standard by his or her own testimony.[244]

This standard might, at first glance, seem inconsistent with this Article's earlier critique of the way the ADA approaches different disabilities like blindness and carpal tunnel syndrome.[245] The point there was that the law treats these individuals differently regarding their basic right to claim civil rights protections based on stereotypes about the impairment itself. Under the revised definition, the question is more straightforward and of an evidentiary nature, one that is the same for all impairments. Blindness affects vision and carpal tunnel affects the ability to perform manual tasks. It might be easier to meet the evidentiary standard to show effect in the case of blindness, but the person with

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242. I recognize there is some danger in raising this analogy, because in a personal injury case, the jury makes a type of substantiality determination when it assesses a monetary damages award. There is a preliminary determination the jury must make that the plaintiff in fact suffered an injury as a result of the tort, and that is the standard to which I am analogizing. *Cf.* Rhoades v. Boren, 486 F.2d 132, 134 (5th Cir. 1973) (distinguishing jury's role in determining amount of damages from its role in determining the existence of damages).

243. In regard to the need for an expert, I depart from the personal injury standard that generally always requires use of a medical expert. *See, e.g.*, Hensley v. Danek Med., Inc., 32 F. Supp. 2d 345, 350 (W.D.N.C. 1998) (articulating general rule that jury awards in personal injury cases cannot be sustained in the absence of expert medical testimony as to causation). Disability cases will not always require medical experts because the cause of the impairment itself is not at issue, unlike in personal injury cases. In many disability instances, the existence of the impairment can be readily established by lay testimony. Also, when an expert is needed, I do not suggest plaintiffs must hire highly paid trial experts. *Cf.* Burgdorf, *supra* note 11, at 570 (criticizing ADA rulings on "working" in particular that require plaintiffs to hire expensive vocational experts). Rather, a plaintiff in a disability case will often have a personal doctor or counselor who has been working with the individual on issues relating to the physical or mental impairment. It may not even be necessary for the plaintiff to present a formal diagnosis of a medical condition. *See* Leisen v. City of Shelbyville, 153 F.3d 805 (7th Cir. 1998). In *Leisen*, the plaintiff claimed a "mental impairment like depression." *Id.* at 808. The Seventh Circuit concluded she created a jury question on the issue by presenting evidence from her counselor that she suffered sleep and memory problems, anxiety, suicidal ideation, and "some depression." *Id.* If the disability inquiry is viewed from a revised evidentiary perspective, the standard becomes less rigid.

244. It is already the case that plaintiffs seek to establish the substantially limiting effects of an impairment by their own testimony. For example, in *Bragdon v. Abbott*, the Supreme Court concluded the plaintiff established that her major life activity of reproduction was substantially limited when she testified that her HIV infection controlled her decision not to have a child. *See* Bragdon v. Abbott, 524 U.S. 624, 640-41 (1998).

245. *See supra* notes 185-96 and accompanying text.

carpal tunnel has the same right to participate in the protected class as the person who is blind.

This Article does not suggest that all consideration of a "norm" must be eliminated. The need for some norm is inescapable. Otherwise, the protected class would have no defining characteristics. The proposed revision retains the definition of impairment found in the regulations and interpretive guidance.[246] Specifically, physical traits like eye color, hair color, and height and weight within "normal" ranges; cultural and economic characteristics like lack of education and poverty; and characteristics like age and pregnancy that are not considered disorders, all mentioned in the current regulations,[247] would still not be considered impairments. Disorders and medical conditions that might be associated with those characteristics would be considered impairments.[248] The distinctions drawn here are largely defined by medical science which, though not perfect, may be the most objective source available.[249]

Courts are accustomed to assessing medical evidence from their experience in handling personal injury claims. This is not to say that personal injury litigation avoids normative decisionmaking.[250] By recasting the inquiry into disability status as more akin to the evaluation of the sufficiency of evidence of injury in tort cases, however, the revised ADA would remove emphasis from the deserving status of the plaintiff and place it on more universal evidentiary

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246. *See* 29 C.F.R. § 1630.2(h) (1999); 29 C.F.R. pt. 1630, app. § 1630.2(h) (1999).

247. 29 C.F.R. pt. 1630, app. § 1630.2(h) (1999).

248. 29 C.F.R. pt. 1630, app. § 1630.2(h) (1999).

249. I recognize that some disability advocates find reliance on a medical approach to determining disability objectionable. *See* Burgdorf, *supra* note 7, at 443 (quoting TOWARD INDEPENDENCE, *supra* note 140, at A-22 to A-23). The basis for this objection appears to be the fact that such an approach invokes the medical model of disability, which in turn invokes the idea that disability is some deviation from an arbitrary physiological standard that must be fixed or cured. *Cf.* Drimmer, *supra* note 29, at 1347-48 (criticizing the underlying concepts of the medical model). I do not believe, however, that looking to medical diagnosis as the means to determine impairment leads to adopting the medical model of disability. The medical model denies that the reality of disability lies as much in attitude and societal-imposed stigma as in physiology. *See* Drimmer, *supra* note 29, at 1347-48. Although a revised ADA necessarily would place emphasis on physiological standards to determine impairment, it would deemphasize the need to litigate the extent of limitations in order to obtain protected class status. At the same time, it would recognize the practical reality that there needs to be some means to identify the characteristic that the statute protects under the first prong of the definition of "disability."

250. For a discussion of the intersection between tort law and the law relating to disability, which raises issues about the normative application of tort law, see Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 CATH. U. L. REV. 323 (1999).

concerns. The result should be less confusing and more predictable than the current state of affairs.

Employers currently have to evaluate not just whether the employee has a covered impairment, but also whether the employee is impaired enough to be afforded ADA protection.[251] To make this preliminary decision under the revised ADA, employers would be able to rely more directly on the evidence of impairment and its effects presented by the employee either personally or through the employee's healthcare providers, rather than requiring up front a detailed determination of what the employee can and cannot do.[252] Employees should similarly find it less difficult to know whether they have the right to rely on the protections offered by the ADA.[253]

B. The Convolution of the First and Third Prongs of the Definition of Disability Is Resolved Under the Revised ADA

Revising the first prong of the definition of disability to ask only if the plaintiff has an impairment that affects major life activities would clarify the coverage of the "regarded as" prong as well. The elusive search for evidence of how impaired the employer perceived the individual to be could be eliminated. If the employer takes adverse employment action such as refusing to hire, firing, or demoting an individual because of a perception of some physical or mental impairment that does not actually exist, the employer's acts would be unlawful under the ADA. No other inquiry as to the extent of the impairment would need be conducted.

The revision would also settle the question of whether an individual only perceived to have a disability is entitled to reasonable accommodation. The revised ADA would recognize that "regarded as" disability discrimination is most akin to other forms of discrimination because the condition of the person has no real connection to the ability to do the job.[254] For that reason, the recourse of the individual affected can be limited to injunctive relief and reinstatement or

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251. One reference source for employers suggests that employers should not "get caught up in" making decisions about whether an employee is disabled because it is a legal conclusion and requires medical certification of what the employee can and cannot do. *See* Arthur D. Rutkowski & Barbara Lang Rutkowski, *You Have to State Which Major Life Activity is Affected to Be Covered by the ADA*, EMPLOYMENT L. UPDATE, May 1999, at 7.

252. Employers who have worked with workers compensation programs will probably find this process quite familiar.

253. The likely effect on employee litigation choices is addressed in Part IV(C) *infra*.

254. *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 8 (1996) (describing victim of "perceived" disability discrimination as victim of "traditional discrimination" for whom reasonable accommodation is irrelevant).

damages in the same fashion as it is in a race or sex discrimination case.[255] No accommodation is necessary because no function of the individual is impaired.

On the other hand, in cases involving actual disabilities, the person's condition does have a connection to his or her ability to perform a job. This prong of the definition should retain its role as the means to eliminate arbitrary physical and institutional barriers to full participation unique to disability. But those barriers exist only if the individual has an impairment that has an effect on his or her functioning. The ADA would truly be vulnerable to the characterization of creating "special rights" rather than equal rights if a wholly open-ended right to claim discrimination through failure to accommodate was created.

An example is useful to illustrate these points. In *Rodriguez v. Loctite P.R., Inc.*,[256] a case arising out of the Federal District Court for the District of Puerto Rico, the plaintiff was diagnosed with systemic lupus erthematosus, commonly known as lupus.[257] She alleged that she was subjected to a hostile work environment based on her disability and that this resulted in her constructive discharge.[258] There was no dispute that the plaintiff had been diagnosed with lupus or that the employer knew this.[259] The plaintiff lost her perceived disability claim, however, because the court concluded the employer did not perceive her as substantially limited in a major life activity.[260] To the contrary, the employer appeared to view her as a malingerer.[261] She also lost her actual disability claim because the court found the history of sporadic symptoms she alleged did not add up to a substantial limitation of any major life activities.[262]

Under the revised definition of disability, the plaintiff would not have been required to prove that her employer perceived her as having a substantial limitation of major life activities. She would only have been required to prove

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255. Title VII damages for race and sex discrimination are limited to either injunctive and equitable relief under 42 U.S.C. § 2000e-5(g)(1) (1994), or, in cases of intentional discrimination, compensatory and punitive damages under the Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1) (1994). The Civil Rights Act of 1991 expressly provides that the same damages apply in cases brought under Title I of the ADA. *See* 42 U.S.C. § 1981a(a)(2) (1994).

256. 967 F. Supp. 653 (D.P.R. 1997).

257. *Rodriguez*, 967 F. Supp. at 653.

258. *Id.* at 656.

259. *See id.* at 657, 658.

260. *Id.* at 658.

261. *See id.*

262. Rodriguez v. Loctite P.R., Inc., 967 F. Supp. 653, 659 (D.P.R. 1997). The plaintiff actually failed to identify any major life activities limited by her condition, instead arguing that "it [was] reasonable to infer [that her symptoms were] impairments which limit one or more major life activities." *Id.* at 658. The court rejected this argument out of hand, indicating the argument went counter to the mission of the ADA to eliminate stereotypes associated with disabilities. *Id.*

that the employer took actions against her because she was diagnosed with lupus. In the context of what was essentially a disability harassment claim,[263] she would have been required to prove the same elements as in a similar claim under Title VII—a workplace "permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the plaintiff's employment and create an abusive working environment."[264] The employer in such a case is using the characteristic possessed by the employee, here the diagnosis of lupus, as a means to harass and limit equal participation in the workplace. The extent to which the employer views the plaintiff as affected by lupus is irrelevant, just as the extent to which an employer views someone as being feminine or black is irrelevant in Title VII cases.

Should the plaintiff seek to assert a right to be accommodated in her employment because she suffers from lupus, the inquiry necessarily must change. Now, the extent of the plaintiff's limitations and how they impede her ability to perform the job in question must be considered. If accommodation is required here, it is not simply because it is "reasonable" in terms of cost and effect. Rather, accommodation is made because the individual holds the status of a member of a group that has been denied equal participation in the labor market. That denial is the result of improper consideration of functional limitations.

Accommodation in this sense is the removal of improper consideration of the plaintiff's functional limitations, "consideration" of which is manifested through the adoption of certain job duties or expectations or through the physical structuring of the workplace. "Special" rights are not involved because arbitrary reliance on functional limitation creates unequal opportunity to participate in the labor market with others who do not have that functional limitation. Theoretically, if the plaintiff has no actual functional limitation, provision of accommodation cannot be said to fill that same role. The employer in that case is not required to treat that person "differently" in order to provide equal job opportunities.[265]

263. Whether there is a claim for hostile environment disability discrimination is, at present, an open question. The court in *Rodriguez* assumed such a claim existed because of the similarity between the ADA and Title VII, which both prohibit discrimination in the "terms, conditions, or privileges of employment." *Rodriguez*, 967 F. Supp. at 662; *see* 42 U.S.C. § 12112(a) (1994); 42 U.S.C. § 2000e-2(a)(1) (1994). Resolution of this question is beyond the scope of this Article.

264. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

265. *See* Karlan & Rutherglen, *supra* note 254, at 10-11 (articulating reasonable accommodation doctrine as resting on a "difference" model of discrimination).

C. The Revised Definition of Disability Clarifies the Role of "Major Life Activities"

Following the line of thought that reasonable accommodations are not required when the individual has no actual limitation of physical or mental function raises the question of whether the revised ADA should simply identify impairment as a requisite for protected status and then move on to consideration of whether accommodations must be provided. In other words, should plaintiffs still be required to identify major life activities limited by a physical or mental impairment under a revised ADA?

One recent article suggests that the standard should be "impairment-only."[266] This approach attempts to avoid having courts make any sort of value judgment about the plaintiff's status by shifting the entire inquiry to the accommodation stage, which presumably would be more difficult for courts to dismiss on summary judgment.[267] This arguably would not have a significant effect on the duty to reasonably accommodate because accommodations are only required when an impairment limits a person's opportunities to perform a job or to participate on an equal basis in the benefits and privileges of the job.[268] If no impairment exists or if no barrier to performance is posed, then no accommodation is required.[269]

While the definition of disability should be revised because it currently allows rampant application of normative standards to judge between individuals with disabilities, shifting the entire inquiry to the reasonable accommodation issue is not the best option. The inquiry into effect on "major life activities" serves an important purpose in requiring a connection between the existence of an impairment and the functional limitation for which the plaintiff seeks accommodation.

The criticism of including "major life activities" in the definition of disability is based on its reliance, like that of "substantially limits," on some assumed norm.[270] Just what is a "major" life activity? Resolution of that

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266. Eichhorn, *supra* note 14, at 1475-76.

267. Eichhorn criticizes the definition of major life activity as failing to set out a consistent scheme of analysis and thereby allowing courts to draw distinctions out of distrust of the impairments alleged by plaintiffs. *See* Eichhorn, *supra* note 14, at 1443-44, 1449. She does not specifically address whether adopting her standard will result in fewer summary judgments because courts view the reasonable accommodation issue as not amenable to determination as a matter of law. The case law nonetheless seems to suggest that courts are more cognizant of the need for jury determination of both that issue and whether an individual is "otherwise qualified." *See* Colker, *supra* note 11, at 112-15 (summarizing holdings of circuit courts that accommodations and qualifications issues are issues of fact that should not be decided on summary judgment).

268. *See* Eichhorn, *supra* note 14, at 1476-77.

269. *See* Eichhorn, *supra* note 14, at 1476-77.

270. *See* Eichhorn, *supra* note 14, at 1428 (reasoning that the categorization of

question requires a subjective evaluation of the comparative significance of the life activities alleged.[271] Unlike the norm that accompanies "substantially limits," however, this norm cannot be escaped.[272] At some point, the extent of the plaintiff's functional limitations has to be assessed, even under the impairment-only approach. The participants have to know what must be accommodated. A value judgment about that limitation ultimately is still made in the impairment-only approach, but it ends up being part of an open-ended evaluation of reasonableness.

Retaining an intermediary step of assessing functional limitation can serve as an effective means of avoiding an over-inclusive rule by supplying a needed causal element. It would keep plaintiffs from creating jury questions on accommodation by relying simply on the coincidence of some work-related issue and the presence of an impairment.

For example, in a case out of the Fifth Circuit, *Hamilton v. Southwestern Bell Telephone Co.*,[273] the plaintiff claimed that he suffered from post traumatic stress disorder, which accounted for his actions in verbally abusing and striking a co-worker on the job.[274] He sought to be accommodated by transfer off of a project in which his department was participating because he claimed the project was exacerbating his stress.[275] His employer instead fired him for refusing to participate in the project.[276] The Fifth Circuit dismissed the case by finding the plaintiff had not established sufficient evidence of substantial limitation of a major life activity.[277]

Had the standard for determining disability status been "impairment-only," the plaintiff in a case like the one described above may well have been able to get his case past the protected class issue and to the accommodation issue without having to show that his abusive behavior was a result of his impairment.

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some activities as "major" incorporates the historic arbitrariness inherent in the label "disability" which itself depends on arbitrary notions about what activities people should be able to perform and how).

271. *See* Eichhorn, *supra* note 14, at 1440. The comparative significance standard comes from *Bragdon v. Abbott*, 524 U.S. 624 (1998). Applying a "comparative importance" or "significance" standard, the Court concluded that reproduction was a major life activity because it was "central to the life process itself." *Id.* at 638.

272. The EEOC's technical assistance on reasonable accommodation presently incorporates a comparison to the norm in evaluating how much accommodation must be provided: "An equal employment opportunity means an opportunity to attain the same level of performance or to enjoy equal benefits and privileges of employment as are available to *an average similarly-situated employee without a disability*." EEOC, ADA TITLE I TECHNICAL ASSISTANCE MANUAL I-3.3 (1992) (emphasis added).

273. 136 F.3d 1047 (5th Cir. 1998).

274. *See Hamilton*, 136 F.3d at 1049.

275. *Id.*

276. *Id.*

277. *Id.* at 1051.

Disability discrimination law is not intended, however, to allow employees to structure jobs to suit their personal preferences.[278] Retaining an intermediate determination of the plaintiff's functional limitation serves both to avoid creating jury questions in mere preference cases and to limit the ability of the employer to divert the jury's attention from the established limitation when arguing the reasonableness of the requested accommodation.

Of course, this so far ignores the underlying argument behind the impairment-only approach that determinations of major life activities contain normative distinctions similar to those criticized earlier in this Article. Designation of an activity as "major" creates a hierarchy among activities that is itself socially constructed. One illustration offered in support of this view is hearing.[279] Hearing is not a major life activity to one born deaf; hearing is a major life activity because society has deemed it so.[280] Just as with "substantially limits," the standards here invite courts to use them as devices to weed out claims by claimants they deem unworthy.[281]

After "substantially limits" is eliminated, however, "major life activities" should be understood as the means to identify functional limitation caused by the physical or mental impairment for purposes of moving on to the reasonable accommodation analysis, nothing more.[282] Much of the current difficulty with "major life activity" can be explained by the fact that courts are not altogether capable of separating the concept of major life activity from the concept of substantiality in the definition of disability.

An opinion out of the Second Circuit forcefully reflects this tendency. In evaluating the major life activity alleged by the plaintiff (everyday mobility), the court expressed the following concern:

> [W]hile it might be hard to show that a very mild cough substantially limits the major life activity of "breathing," it would be far easier to make an individualized showing of a substantial limitation if the major life activity were instead defined more narrowly as, say, the major life activity of "breathing atop Mount Everest." . . . Narrowing and diluting the definition of a major life activity, which in turn might

278. *Cf.* Burgdorf, *supra* note 11, at 569-70 (noting that ADA was intended to provide evenhanded treatment and not preferences to individuals with disabilities).

279. *See* Eichhorn, *supra* note 14, at 1411.

280. *See* Eichhorn, *supra* note 14, at 1411.

281. Eichhorn also uses procreative versus non-procreative sex as an example of a distinction appellate courts will likely be called upon to make after *Bragdon v. Abbott*. *See* Eichhorn, *supra* note 14, at 1441-42. This example also clearly invokes socially constructed distinctions between types of sexual activity that draw on ideas of significance or worthiness.

282. The requirement of showing functional limitation in any event only applies to cases brought under the first prong. Perceived disability cases do not depend on any actual limitations, so the issue of major life activities is irrelevant there.

> lessen the plaintiff's burden of proving a substantial limitation, would undermine the role of the statute's "substantially limit[ation]" inquiry in ensuring that only impairments of some significance are protected by the ADA.[283]

Similarly, in cases alleging limitations in the ability to lift, courts tend to link "major life activity" and "substantially limits" and bypass the issue of whether lifting itself is a major life activity[284] by viewing such cases as raising only the question of whether a plaintiff who cannot lift objects over a certain weight has a disability.[285]

When "substantially limits" is removed from the definition, that linkage is broken. In the case of lifting, it becomes irrelevant how many pounds an individual can or cannot lift when determining that person's protected class status.[286] The only question is whether "lifting" is a function of comparative importance in human activity, a question that should be relatively easily answered in the affirmative.[287]

As the Second Circuit excerpt set out above suggests, because of the difficulty in establishing substantial limitations of the major life activities identified in the regulations, plaintiffs have been forced to attempt to carve out some level of functioning at which their impairments can be perceived as

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283. Reeves v. Johnson Controls Worldwide Serv., Inc., 140 F.3d 144, 152 (2d Cir. 1998) (alteration in original). The plaintiff in *Reeves* experienced panic attacks associated with agoraphobia. *Id.*

284. The ADA regulations do not specifically list lifting as a major life activity but the interpretive guidance to those regulations does. *Compare* 29 C.F.R. § 1630.2(i) (1999) (defining major life activities to include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working) *with* 29 C.F.R. § 1630.2(i) pt. 1630, app. § 1630.2(i) (1999) (describing the list as non-exhaustive and asserting that other activities such as sitting, standing, lifting, and reaching are included). In *Bragdon*, the Supreme Court accepted the characterization of the list as non-exhaustive and agreed that reproduction was another function properly included in the list. Bragdon v. Abbott, 524 U.S. 624, 638 (1998).

285. *See, e.g.*, Williams v. Channel Master Satellite Sys., 101 F.3d 346, 349 (4th Cir. 1996) (finding as a matter of law that a twenty-five pound lifting limitation does not constitute a significant restriction on lifting or any other major life activity); Aucutt v. Six Flags over Mid-America, 85 F.3d 1311, 1319 (8th Cir. 1996) (rejecting significance of twenty-five pound lifting restriction as proof of disability).

286. Consideration of the amount a person can lift would then become part of the "qualified" and "reasonable accommodation" analysis. For instance, the interpretive guidance to Title I specifically describes a reasonable accommodation process for an employee with a lifting impairment who holds a position requiring lifting fifty pound sacks and carrying them from a loading dock to a storage room. *See* 29 C.F.R. pt. 1630, app. § 1630.9 (1999).

287. *See* Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir.), *cert. denied*, 120 S. Ct. 45 (1999).

substantially limiting. For example, in a Tenth Circuit case, *Pack v. K-Mart Corp.*,[288] a plaintiff diagnosed with depression alleged that she was substantially limited in her ability to both sleep and concentrate.[289] She apparently alleged impairment to her ability to concentrate because her sleep deprivation was only "periodic."[290] Indeed, the district court dismissed both claims, finding neither periodic sleep deprivation nor concentration major life activities.[291] The Tenth Circuit decided that sleeping was a major life activity, but agreed that concentration was not.[292] The court then proceeded to confirm the dismissal of the claim because the plaintiff had not shown that her sleep disruption had anything other than a temporary impact.[293]

The plaintiff in *Pack* likely alleged concentration as a major life activity in that case because she expected the sleeping claim to fail. Under the revised ADA, this would have been unnecessary. In addition, major life activities already identified in the regulations, such as caring for oneself and performing manual tasks, are broad enough to cover the effects of impairments like depression, if the plaintiff does not need to deal with a normative "substantially limits" standard.[294] Accordingly, plaintiffs will generally be less vulnerable under the new standard to having their claims dismissed for failure to adequately identify a major life activity.[295]

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288. *Pack*, 166 F.3d at 1300.

289. *Id.* at 1303.

290. *Id.*

291. *Id.*

292. *Id.* at 1305.

293. *Id.* at 1306.

294. *Bragdon* is another example where the choice of major life activity alleged was probably influenced by the difficulty of proving substantial limitation. The Court remarked about the fact that the plaintiff in that case chose to assert reproduction as the major life activity affected, when the disease had been described by the plaintiff and various amici as having a "profound impact on almost every phase of the infected person's life." Bragdon v. Abbott, 524 U.S. 624, 637 (1999). The plaintiff probably did so because of the difficulty of proving actual impact on other activities already included in the regulatory definition, such as caring for oneself. *See also* Deas v. River West, L.P., 152 F.3d 471, 479 n.18 (5th Cir. 1998) (dismissing claim of plaintiff who argued "awareness" should be considered a major life activity substantially limited by her seizure disorder associated with epilepsy), *cert. denied*, 119 S. Ct. 2411 (1999).

295. *Cf.* Poindexter v. Atchison, Topeka & Santa Fe Ry., 168 F.3d 1228 (10th Cir. 1999). The Tenth Circuit reversed a jury award for the plaintiff in *Poindexter* because the plaintiff had not sufficiently identified what major life activity was affected by a physical or mental impairment. *Id.* at 1231-32. The plaintiff alleged that she suffered from panic attacks, which affected her ability to commute from her home in Kansas City to Topeka, where her office had been relocated after she started work. *Id.* at 1229-30. According to the Tenth Circuit, the plaintiff had to articulate with precision what impairment she alleged and what major life activity was affected by that impairment. *Id.* at 1232 (citing Bragdon v. Abbott, 524 U.S. 624 (1999)). The court's review of the

D. *"Working" Should Be Eliminated as a Separate Major Life Activity*

The revised ADA also would permit the elimination of one major life activity which has proved quite troublesome: "working." As originally envisioned, this category was based on a sense that, for some people, an impairment may not be severe enough to prevent them from performing basic life tasks but may prevent them from performing the higher functioning tasks associated with working.[296] The EEOC interpretive guidance directed courts to consider this major life activity only in cases in which sufficient limitation of any other major life activity cannot be found.[297] Despite this, working seems to be the most common major life activity alleged to be affected,[298] and there are examples of cases in which courts have imported an "affects employability" standard even into cases alleging some other major life activity.[299]

The inclusion of "working" with other major life activities was problematic from the start. It is different in character from the other types of major life activities described in the statute. The other activities include such things as

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record indicated the case went to the jury without identifying any particular impairment of major life activities. *Id.*

If the plaintiff is proceeding under the current version of the ADA, the reluctance to specify a major life activity is understandable. The burden of proving substantial limitation of a *particular* activity is daunting. Under the revised ADA, it would not be onerous to require a plaintiff to identify precisely which major life activity or activities are alleged to be affected. Cases in which a plaintiff, even under a minimized burden, cannot explain what affect an impairment has should not be able to proceed to evaluation of accommodations.

296. Locke, *supra* note 11, at 115.

297. 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999). Some view this guidance as recognizing that limitation in the ability to work is harder to conceive, and that plaintiffs should not have to overcome the heavier burdens associated with it when other major life activities are affected. *See* Locke, *supra* note 11, at 115-16.

298. This has been especially true in cases involving diseases like diabetes and cancer. *See, e.g.*, Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 630 (7th Cir. 1997) (plaintiff with insulin-dependent diabetes asserted only impairment of life activity of working); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 190 (5th Cir. 1996) (plaintiff with breast cancer raised issue only of limitation on major life activity of working). These cases probably proceeded under working only because of the higher standard required to prove actual limitation of other basic life functions under "major life activity."

299. *See, e.g.*, Castro v. Local 1199, 964 F. Supp. 719, 725 (S.D.N.Y. 1997) (reasoning that for plaintiff's asthma to qualify as substantially limiting her ability to breathe, she had to show it has an overall effect of restricting her employment opportunities generally). Plaintiffs themselves might be to blame for the confusion, as some cases suggest that they have not adequately separated arguments about other major life activities from arguments about their limitations on working. *See, e.g.*, Hilburn v. Murata Elec. N. Am., Inc., 17 F. Supp. 2d 1377, 1381-82 (N.D. Ga. 1998), *aff'd* 181 F.3d 1220 (11th Cir. 1999) (plaintiff who initially alleged 10 pound lifting restriction apparently framed her case as establishing disqualification from a class of jobs).

walking, seeing, breathing, and learning, which are described as "basic functions."[300] There is universal understanding of the definition of these functions,[301] and they can therefore be treated categorically. Working, on the other hand, consists of a constellation of other functions. Rather than breaking down each of those functions, the regulations define working in terms of securing employment.[302] The regulations set out a detailed list of factors for determining when a person is substantially limited in the major life activity of working, which focuses on how many jobs from which the person has been disqualified within the geographical area to which the person has reasonable access.[303]

The problem with this, however, is that the concept of working as a major life activity does not work well in theory or in application. The Supreme Court has criticized it as invoking circular reasoning: disability is established by proving exclusion from work, but the basic question is whether disability resulted in exclusion from work.[304] Perhaps because of this, courts have been particularly hostile to cases alleging limitations of the major life activity of working, especially those cases proceeding under the "regarded as" prong.[305] By adopting a narrow interpretation of substantially limits in the context of working, illustrated by the exclusion-from-one-job rule discussed above,[306] courts can avoid reaching the actual merits of these cases.[307] In fact, courts often substitute analysis of disability for what should be analysis of qualification, allowing employers off the hook without ever having to justify the criteria used to exclude the individual from the job.

Lifting restrictions again provide a useful example.[308] In one Eighth Circuit case, the plaintiff was fired from a position as a computer repair technician because of a permanent lifting restriction imposed by his doctor after a work accident led him to develop carpal and cubital tunnel syndromes in both wrists.[309] The plaintiff brought suit under the ADA alleging substantial

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300. *See* 29 C.F.R. pt. 1630, app. § 1630.2(i) (1999).

301. Locke, *supra* note 11, at 115-16.

302. *See* 29 C.F.R. § 1630.2(j)(3) (1999); *see also* Locke, *supra* note 11, at 116.

303. *See* 29 C.F.R. § 1630.2(j)(3)(i), (ii) (1999).

304. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2151 (1999) (citation omitted).

305. *See* Burgdorf, *supra* note 11, at 459. Burgdorf suggests that federal district courts have in particular been influenced by Fourth Circuit's reasoning in *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986), about the need to protect the "high purpose" of the statute, as discussed in Part II(C) of this Article.

306. *See supra* notes 114, 116 and accompanying text.

307. Burgdorf, *supra* note 11, at 459.

308. The case involving the teacher with paranoid schizophrenia discussed in Part III(B) of this Article is also an example of this tendency. *See* Patterson v. Chicago Ass'n for Retarded Citizens, 150 F.3d 719, 725-26 (7th Cir. 1998).

309. Gutridge v. Clure, 153 F.3d 898, 900 (8th Cir. 1998), *cert. denied*, 119 S. Ct.

limitation in the life activity of working.[310] The Eighth Circuit dismissed the claim, finding that the plaintiff had not presented sufficient evidence of exclusion from the position of computer repair technician.[311] The court's rationale was that the plaintiff was "still able . . . to function as a computer technician for other employers who either do not require lifting as part of their job duties or can provide assistance."[312] In fact, the plaintiff had found another computer technician position with an employer who did not impose the same lifting requirements.[313]

The proper inquiry in that case should have been on whether that employer's lifting requirements were essential or arbitrary.[314] There was no question that the employer fired the employee because he was unable to perform tasks it deemed "necessary" to his job.[315] However, because the court was able to invoke the narrow interpretation of substantially limited in the life activity of working, the employer was never required to prove that lifting was in fact a necessary qualification for the job, and the plaintiff was never given the opportunity to prove he could indeed perform whatever lifting was necessary. Instead, the case was framed as appropriate for summary dismissal because of the plaintiff's failure to create a jury question on the factual issue of disability.[316]

If the definition of disability no longer turns on substantial limitation, then reason for the inclusion of working as a major life activity disappears. A residual category is no longer needed because plaintiffs like the computer technician should be able to make their cases based on impairment of the other basic types of functions contemplated by the definition of major life activity.[317] In turn, because those cases will now look only to the existence of some effect on the individual, courts will not be able to invoke the idea that as long as other

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1758 (1999).

310. *Id.*

311. *Id.* at 901.

312. *Id.*

313. *Id.*

314. *See* 42 U.S.C. § 12111(8) (1994) (defining a qualified individual with a disability as one who can perform the essential functions of the job with or without reasonable accommodation).

315. Gutridge v. Clure, 153 F.3d 898, 900 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 1758 (1999). The employer sent Gutridge a letter of termination that explicitly stated that his "condition unfortunately prevent[ed him] from being able to fully accomplish the tasks necessary to perform your job functions." *Id.*

316. *See* Colker, *supra* note 11, at 125. Professor Colker's empirical study of the outcomes of ADA cases suggests that courts have been too willing to take cases away from juries and render verdicts in favor of defendants through use of the summary judgment device.

317. Individuals with carpal tunnel should be able to show effect on "performing manual tasks." *See* 29 C.F.R. § 1630.2 (i) (1999) (defining major life activities to include the function of performing manual tasks).

people will hire the individual in that type of position, whatever reliance the employer may have placed on the individual's impairment is irrelevant.

E. Redefining Disability Will Result in More Principled Evaluations of "Qualified" and "Reasonable Accommodation"

Clearly, revising the definition of disability to eliminate "substantially limited" would shift much of the inquiry in a discrimination case. An individual's qualifications and an employer's reasonable accommodations would be considered in a greater number of cases. This would be beneficial because shifting the focus may better foster a body of precedent that employers and employees alike could use to guide their expectations. The result will be a more predictable statute that does a better job of eliminating decisions based on stereotypes and prejudices.

After looking at the "working" cases in particular, it is difficult to escape the conclusion that one reason courts have been so restrictive in defining "disability" is their fear of (or distaste for) the reasonable accommodation requirements of the Act. As discussed in Part III(C),[318] courts are reluctant to make what they perceive to be business judgments. If called upon to decide whether an employer must accommodate an employee and how, courts feel they are doing just that, especially if there is no evidence of discriminatory animus on the part of the employer.[319] Judicial reluctance here is not unlike that found in sexual harassment cases, in which courts repeatedly express concerns about not imposing codes of workplace standards on employers.[320]

As also discussed above,[321] judicial reluctance additionally stems from a view that reasonable accommodation creates "special" rights. This is especially true for accommodations such as job restructuring and job reassignment,[322]

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318. *See supra* notes 204-07 and accompanying text.

319. *See, e.g.*, Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir.), *cert. denied*, 120 S. Ct. 59 (1999) (rejecting plaintiff's claim that employer should not have fired him after verbal dispute relating to his request for TDD telecommunications device and expressing view that courts should not sit in judgment of employers' management decisions absent evidence of discriminatory intent); Ward v. Massachusetts Health Research Inst., Inc., 48 F. Supp. 2d 72, 78 (D. Mass. 1999) (suggesting plaintiff's request to modify work schedule did not provide sufficient reason to override deference that should be given employer's judgment regarding what hours employees should work).

320. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998) (justifying decision to allow same-sex sexual harassment claims as not expanding Title VII into a general civility code); Indest v. Freeman Decorating, Inc., 164 F.3d 258, 263 (5th Cir. 1999) (citing *Oncale* for proposition that Supreme Court emphasized that Title VII is not a general civility code for the workplace).

321. *See supra* notes 182-83 and accompanying text.

322. *See* 42 U.S.C. § 12111(9)(B) (1994) (defining reasonable accommodation to include job restructuring and reassignment to a vacant position).

which appear to be a form of affirmative action.[323] Even the basic concept of reasonable accommodation, which calls for an individualized process of fitting individuals to jobs, suggests personalized special treatment or affirmative action.[324] The tendency of courts to impose restrictive, normative standards on the issue of "disability" can thus be viewed as part of the backlash that has been growing in this country against affirmative action in general.[325]

When courts choose to dismiss cases at the threshold level of "disability," they subvert critical evaluation of actual employer practices. The real issue of disability discrimination is never reached. In 1983, the United States Commission on Civil Rights identified the essential reason why reasonable accommodation is needed: "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."[326] Yet, this is exactly what results if courts engage in aggressive gate-keeping regarding "disability."

The irony is that if more cases reached issues of qualification and reasonable accommodations, the ADA might be more easily applied. The scope of employers' duty of reasonable accommodation under the ADA has been described as "the great unsettled question."[327] Besides the basic regulations prohibiting the failure to make accommodations,[328] there is an extensive set of interpretive guidance on how to determine when accommodation is necessary and what accommodation is required.[329] This is a reflection of Congress's purposeful adoption of a standard that must be sorted out on a case-by-case basis.[330]

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323. *See* RUTH COLKER, AMERICAN LAW IN THE AGE OF HYPERCAPITALISM: THE WORKER, THE FAMILY, AND THE STATE 65 (1998) (arguing that reasonable accommodation does constitute affirmative action when it includes job restructuring and job reassignment). Professor Colker also articulates the rebuttal to the affirmative action characterization. Reasonable accommodation requires removal of barriers that denies individuals with disabilities equal opportunity to participate in the workplace. *Id.* at 71-72. It is not like affirmative action in the race and gender sense, which is thought to provide a "plus" so that an individual might be hired over another, more qualified individual. *Id.* at 72.

324. *See* Karlan & Rutherglen, *supra* note 254, at 14, 21.

325. *See* COLKER, *supra* note 323, at 65.

326. U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 102 (1983).

327. Karlan & Rutherglen, *supra* note 254, at 8.

328. 29 C.F.R. §§ 1630.4, 1630.9 (1999).

329. *See* 29 C.F.R. app. §§ 1630.2(o), 1630.9, 1630.15(d) (1999); *see also* EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, EEOC NOTICE 915.002 (1999).

330. *See* H.R. REP. NO. 101-485(II), at 62, *reprinted at* 1990 U.S.C.C.A.N. 344 (explaining the definition of reasonable accommodation is not exhaustive and was intended to be determined on the particular facts of the individual case).

A case-by-case approach does not mean, however, an ad hoc approach. Professors Pamela Karlan and George Rutherglen have suggested that precedent developed on reasonable accommodation cases can avoid such problems:

> While it is certainly possible that this case-by-case approach to enforcement could deteriorate into purely ad hoc judicial decisionmaking, precedent counteracts this tendency, both at the level of formal legal doctrine and by providing the parties with templates of reasonable accommodation for settlement and compromise. Accommodations imposed, or approved, in prior cases simplify the process of later negotiations over accommodations for other employers and employees. With the accumulation of decisions, the adequacy of any particular accommodation will become both better known to the parties and more easily evaluated by a court.[331]

Reasonable accommodation law seen this way creates a bargaining range.[332] Both employers and employees have incentives to favor negotiated rather than fully litigated accommodations, which means the minimum accommodations employees are likely to accept will be less than the maximum required by law.[333] Consistent with this thesis, studies show the cost of most accommodations has been considerably lower than critics of the ADA predicted.[334] Moreover, the

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331. Karlan & Rutherglen, *supra* note 254, at 21.

332. Karlan & Rutherglen, *supra* note 254, at 30.

333. Karlan & Rutherglen, *supra* note 254, at 30. Among the disincentives to individuals with disabilities to insist on the maximum accommodations identified by Karlan and Rutherglen are that their search costs and dislocation expenses are likely to be higher than those incurred by individuals without disabilities because their ability to locate other employment may be compromised by their disability, and that they may face retaliation by their employers, which undermines the potential for effect implementation of accommodations in their workplace. *See* Karlan & Rutherglen, *supra* note 254, at 20. Karlan and Rutherglen suggest that when the uncertainty of outcome that is inherent in any litigation is added to the picture, the result is that individuals with disabilities may be biased in the first place toward locating jobs that they can perform with minimal accommodations. *See* Karlan & Rutherglen, *supra* note 254, at 20. Looking beyond the hiring context, Karlan and Rutherglen's analysis also suggests that employees who develop disabilities while already holding a position will be more likely to make minimal accommodation demands on employers out of concern about losing that position. *See* Karlan & Rutherglen, *supra* note 254, at 20.

334. *See* Blanck & Marti, *supra* note 203, at 377-78. Blanck and Marti report studies of Sears, Roebuck & Co. that show most accommodations at that company have required little or no cost. *See* Blanck & Marti, *supra* note 203, at 377-78. In addition, they report studies by the Job Accommodation Network ("JAN") that show that two-thirds of accommodations implemented after consultation with that organization have cost $500 or less. Blanck & Marti, *supra* note 203, at 378; *see also* O'Day, *supra* note 31, at 299 (reporting similar JAN findings).

data indicate that companies that effectively implement the law experience substantial economic benefits in terms of increased work productivity, effectiveness, and efficiency, not only for individuals with disabilities but also for individuals without disabilities.[335] In other words, the fears about the cost of broad-based duty to accommodate are not supported by the empirical data.[336]

If courts are gatekeeping out of a fear of cost, then they are engaging in the same stereotypical thinking about the burdens disability imposes on society that the ADA was enacted to address. Broadening the definition of disability does not mean that more suits would be filed. The data suggests it can have the opposite effect of encouraging more parties to settle disputes, resulting in a more productive workforce.

As an illustration of these points, consider again the *Pack* case discussed above.[337] In that case, the plaintiff was a pharmacist who was diagnosed with major depression, moderate to severe.[338] The primary effects of her depression were difficulty concentrating and periodic sleep disturbances.[339] She began making technical errors in filling prescriptions.[340] Her problems in that regard continued even after two medical leaves.[341] She was eventually discharged by her employer because of those errors.[342] In her lawsuit against her employer, she alleged that it failed to accommodate her depression by transferring her to another position or providing some other reasonable accommodation.[343]

As noted above, the Tenth Circuit decision turned on whether she had sufficiently alleged "disability." The court held she had not. It concluded that concentration was not a major life activity, that sleep was a major life activity but that periodic sleep disturbances did not substantially limit that life activity. Under a revised definition of disability, the plaintiff would have met her threshold burden of proving disability with her evidence that the depression affected her ability to sleep. The fact it was only a periodic effect would not be taken into consideration at that stage in the analysis.

The periodic nature of the impairment would be taken into account, however, at the next level of inquiry. This asks whether the plaintiff is a qualified individual who can perform the job with or without reasonable accommodation.[344] Certainly, a qualification for being a pharmacist is the ability

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335. *See* Blanck & Marti, *supra* note 203, at 377-79.

336. *See* Blanck & Marti, *supra* note 203, at 375.

337. *See* Pack v. Kmart Corp., 166 F.3d 1300 (10th Cir.), *cert. denied*, 120 S. Ct. 45 (1999); *see also supra* notes 286-94 and accompanying text.

338. *Pack*, 166 F.3d at 1302.

339. *Id.* at 1303.

340. *Id.* at 1302.

341. *Id.* at 1302-03.

342. *Id.* at 1303.

343. *Id.*

344. 42 U.S.C. § 12111(8) (1994) (defining qualified individual with a disability as someone who can perform essential functions of the job in question with or without

to properly fill prescriptions. If she were able to perform that function with the accommodation of a modified work schedule or additional time off, the question becomes whether the unpredictability of her need for that leave renders the accommodation unreasonable.[345] One rule that has emerged from reasonable accommodation cases is that regular and reliable attendance is required for most jobs.[346] Short leaves of absence may be reasonable but extended, unpredictable and excessive leaves will likely not be.[347] Following Karlan and Rutherglen's concept of reasonable accommodation law creating a bargaining range,[348] the plaintiff and her counsel are likely to take this into account when deciding whether to press forward with a disability discrimination claim.

A similar analysis results regarding any duty the employer might have to transfer the plaintiff to another position.[349] Finally, because disability discrimination law does not give individuals with disabilities the right to avoid consequences that are not based on their disabilities, the employer may have a defense if its actions were based on legitimate, nondiscriminatory reasons.[350]

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reasonable accommodations); 42 U.S.C. § 12112(a) (1994) (stating general prohibition against qualified individuals with disabilities because of such disabilities).

345. More precisely, the question is whether the plaintiff can establish that the accommodation is possible and the costs of it are not disproportionate to the benefits it would produce. *See* Gaul v. Lucent Tech., Inc., 134 F.3d 576, 580-81 (3d Cir. 1998); *accord* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (reasoning that employee must show accommodation is reasonable in sense of being both efficacious and proportional to costs). If the employee succeeds in this showing, the burden shifts to the employer to prove as an affirmative defense that the accommodation was unreasonable or would pose an undue hardship. *Gaul*, 134 F.3d at 581; *see also* 42 U.S.C. § 12112 (b)(5)(A) (1994) (defining discrimination to include not making reasonable accommodations to known disabilities unless entity can show the accommodation would pose an undue hardship on the operation of the entity's business). The employer may also show that the employee is not qualified for a position because she poses a direct threat to the health and safety of other individuals in the workplace. *See* 42 U.S.C. § 12113(b) (1994). The text example of a pharmacist who is not capable of accurately filling prescriptions suggests a direct threat issue.

346. *See, e.g.*, Tyndall v. National Educ. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994) (holding that need for frequent absences could not be reasonably accommodated for individual with teaching position).

347. *See, e.g.*, Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 600-01 (7th Cir. 1998) (distinguishing request for 2-4 weeks leave from rule providing employer is not required to provide unlimited leave as accommodation).

348. Karlan & Rutherglen, *supra* note 254, at 30.

349. For example, the ADA includes reassignment to a vacant position within the types of reasonable accommodation that may be required under the Act. 42 U.S.C. § 12111(9)(B) (1994). Courts have held that this does not require the employer to create a new position for an employee with a disability or to "bump" an incumbent employee from an existing position. *See* Weiler v. Household Fin. Corp., 101 F.3d 519, 526 (7th Cir. 1996).

350. *See, e.g.*, Bailey v. Amsted Indus., 172 F.3d 1041, 1044-45 (8th Cir. 1999)

This doctrine was developed primarily under Title VII, but that law serves as precedent to guide employer decisions in the ADA context as well.[351]

This is not to suggest that placing the emphasis on qualification and reasonable accommodation analysis is a panacea. There are certainly examples of courts defining the legal standards regarding these issues in ways that seem unduly narrow.[352] At the same time, some courts have shown a willingness to reconsider their prior positions. The Fifth Circuit, for instance, recently backed away from a per se rule that individuals with insulin-dependent diabetes are not qualified for positions as commercial drivers.[353] In addition, the Tenth Circuit very recently ruled en banc that individuals with disabilities seeking job reassignment need only show they are qualified for the vacant position they seek, not the position from which they seek reassignment because of their disability, reversing an earlier panel decision to the contrary.[354]

(finding employer had legitimate, non-discriminatory reasons for firing employee for taking 72 absences from work, vast majority of which were not for medical reasons and not related to his disability). This rule comes from the general framework for analyzing Title VII discrimination cases first set out in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and is generally accepted in the circuit courts as applicable to ADA cases. *See* Daigle v. Liberty Life Ins., 70 F.3d 394, 396 (5th Cir. 1995) (applying the Title VII burden-shifting framework to ADA cases); DeLuca v. Winder Indus., 53 F.3d 793, 797 (7th Cir. 1995) (same); Ennis v. National Ass'n of Bus. & Educ. Radio, 53 F.3d 55, 57 (4th Cir. 1995) (same); Smith v. Barton, 914 F.2d 1330, 1339-40 (9th Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991) (same).

351. *See, e.g.*, Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1135 (8th Cir.) (analogizing to Title VII cases interpreting legitimate, non-discriminatory reasons), *cert. denied*, 120 S. Ct. 59 (1999); *see also infra* note 349.

352. *See, e.g.*, Barnett v. U.S. Air, Inc., 157 F.3d 744, 752 (9th Cir. 1998) (holding that ADA does not create liability on the part of an employer for failing to engage in an interactive process with employee when determining what accommodations if any would be reasonable) *vacated, reh'g granted*, 2000 WL 130725 No. 96-16669 (9th Cir. Feb. 01, 2000); *see also* Colker, *supra* note 11, at 101, 119 & n.112.

353. *See* Chandler v. City of Dallas, 2 F.3d 1385, 1395 (5th Cir. 1993) (holding as a matter of law that individuals with insulin-dependent diabetes are not otherwise qualified for positions as commercial drivers), *cert. denied*, 511 U.S. 1011 (1994). *Chandler* was called into question by *Kapche v. City of San Antonio*, 176 F.3d 840, 846-47 (5th Cir. 1999), which found that new technology and understanding of safety concerns about diabetes requires reevaluation of prior per se rule. The *Kapche* court remanded the case for determination of the current state of safety risks posed by insulin-dependent diabetics.

354. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1167 (10th Cir. 1999). A prior panel of the Tenth Circuit ruled that an individual with a disability must first prove that he is qualified for the position he currently holds, with or without accommodation, before he is entitled to be reassigned. *See* Smith v. Midland Brake, Inc., 138 F.3d 1304, 1308-09 (10th Cir. 1998), *rev'd en banc*, 180 F.3d 1154 (1999). Because employees typically only seek reassignment when they are not able to perform the position they hold even with accommodation, the effect of this earlier ruling was to restrict job reassignment

Revising the ADA would send a strong signal to courts that Congress does not approve of the courts' unduly narrow approach to disability discrimination issues. Further, employers have their own set of incentives for non-litigation resolutions if the emphasis is placed on reasonable accommodation, not the least of which is the safe harbor from damages for employers who demonstrate a good faith effort to identify and make those accommodations.[355] A revised ADA would place the correct focus on the fit between the individual and the job. The result should be a statute better designed in application and theory to extend civil rights protections to individuals based on disability.

V. CONCLUSION

Disability rights advocates argue that courts have undermined the goals of the ADA by adopting an excessively narrow interpretation of the law. As this Article has demonstrated, Congress itself set that process in motion by adopting a definition of disability under the ADA that is inherently flawed. The statutory definition got caught up in the disability rights movement's struggle within society for self-identification. In order to effectively function as a civil rights statute, the ADA needs to move away from that struggle and look to more objective criteria regarding what is a "disability."

There is likely to be some movement now in Congress to respond to the recent trilogy of Supreme Court decisions. Unfortunately, the most likely response will be to specifically delineate certain conditions as per se covered disabilities.[356] This may in turn trigger a new course of litigation in which disability discrimination claimants must argue that their impairment is of comparative significance to those contained in the list, while courts interpret the list in a restrictive fashion. This would not represent a positive step in treating disability as a civil rights issue. It essentially would repeat the sins of the past.

The position taken in this Article should not be construed to diminish the experience of those individuals within our society who have experienced severe forms of functional limitation. It is certainly true that some individuals have been subjected to greater isolation from the benefits of society because of the nature of their disability.[357] The ADA must be an effective tool in whatever form

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to only a narrow set of circumstances when the employer proves undue hardship in keeping the employee in his current position.

355. *See* 42 U.S.C. § 1981a (a)(3) (1994).

356. The EEOC initially considered adopting a list of "commonly disabling impairments," but dismissed that approach out of concern that it might be misinterpreted as implying that an individual with a listed impairment was automatically covered by the statute. *See* AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS 3-15 to 3-16 (Jonathan R. Mook ed., 1996).

357. At least one individual with a disability has publicly praised the balance struck by the Supreme Court in the "substantially limits trilogy," because in his words:

It doesn't make sense to group me, a quadriplegic, with someone who is near-

it takes to provide these individuals with equal employment opportunities. There are other ways to address their particular concerns, however, besides reserving general disability discrimination protection for only a "deserving" few.[358]

In a sense, disability is everyone's issue. At any point in time, any person may find himself or herself experiencing disability. The ultimate way to eliminate the stigma associated with disability is to drive home that point. The most effective way to drive home that point is to revise the ADA and do away with the notion that there must be proof of substantial limitation before an individual with an impairment that limits major life activities deserves anti-discrimination protection.

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sighted but wears glasses.

. . . [T]he effect of diluting the definition of disability . . . would ultimately have hurt those who really need accommodations the most. . . .

Now it is time to go about the more difficult and important work of investing in medical research to find better treatments for real disabilities like paralysis and genetic disorders.

Marco Sorani, *Are the Rights of the Disabled in Jeopardy? Help for the Helpless* (Letter to the Editor), N.Y. TIMES, June 28, 1999, at A16.

358. For example, affirmative action programs and other programs that provide specialized services might use lists of "targeted disabilities" or other strict eligibility criteria rather than the broad based definition of disability found in the general provisions of the ADA. *See* Burgdorf, *supra* note 11, at 583.