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## THE ADA THROUGH THE LOOKING GLASS\*<sup>1</sup>

“The year was 2001, and ‘everybody was finally equal.’”<sup>2</sup> Justice Scalia punctuated his biting dissent in *PGA Tour, Inc. v. Martin*<sup>3</sup> with this cynical foreshadowing: Supreme Court misjudgment of the legislative intent of the Americans with Disabilities Act (“ADA”)<sup>4</sup> will compel the judicial system to play an “Alice in Wonderland” made-up game of distortion.<sup>5</sup> The goal of the game: ubiquitous societal equality as prescribed by the ADA. The resulting problem: the Court might just get what it asked for. In his *Martin* dissent, Scalia likened current society, and the Court’s path, to Kurt Vonnegut’s vision of future American government,<sup>6</sup> where the playing field is leveled in almost every activity imaginable by “imposing brain inhibitors on the intelligent, placing leg weights on top ballet dancers, and reducing the best boxers to the use of one hand,”<sup>7</sup> all in the name of social equality. Recent Supreme Court decisions concerning disability and equality continue to distort the logic of the ADA by fashioning absurd results that demonstrate the ADA’s shortcomings and the Court’s unfamiliarity with the statutory text and relevant legislative intent. Scalia’s prediction, however, is a fanciful one. Rather, statutory and judicial shortcomings will probably lead to ineffective protection against discrimination for disabled Americans.

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<sup>1</sup> A reference to LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS* (Signet Classic 1960) (1865 & 1871).

<sup>2</sup> *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 705 (2001) (Scalia, J., dissenting) (quoting Kurt Vonnegut, *Harrison Bergeron*, in *ANIMAL FARM AND RELATED READINGS* 129 (1997) [hereinafter Vonnegut]).

<sup>3</sup> *Martin*, 532 U.S. at 705.

<sup>4</sup> Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12181, 12182 (2000).

<sup>5</sup> *Martin*, 532 U.S. at 705.

<sup>6</sup> Vonnegut, *supra* note 2, at 129, cited in *Martin*, 532 U.S. at 705 (Scalia, J., dissenting).

<sup>7</sup> Todd A. Hentges, *Driving in the Fairway Incurs No Penalty: Martin v. PGA Tour, Inc. and Discriminatory Boundaries in the Americans with Disabilities Act*, 18 *LAW & INEQ.* 131, 136 (2000).

Thus, while the Court has yet to impose brain inhibitors on the intelligent, in reality, the ADA resembles the stacks of fiction literature more than anticipated.

This Note argues that recent Supreme Court decisions, specifically *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,<sup>8</sup> *PGA Tour, Inc. v. Martin*,<sup>9</sup> *Sutton v. United Air Lines, Inc.*<sup>10</sup> and *Bragdon v. Abbott*,<sup>11</sup> illuminate the ADA's definitional ambiguities. The definition of "disabled" is not only difficult for the judiciary to interpret, but also requires the judiciary to inappropriately inquire into the severity of the plaintiff's disability rather than into the defendant's discriminatory actions.<sup>12</sup> This inquiry not only disempowers the disabled plaintiff, both legally and personally, but leads to unpredictable and inequitable results.

In the above-mentioned cases, the Supreme Court compounded the problem by ignoring statutory and legislative direction, thereby distorting the contours of the ADA beyond the boundaries of legislative intent.<sup>13</sup> Reshaping the statute's parameters rendered the text of the ADA simultaneously over-inclusive and under-inclusive; in each case leaving the congressionally-intended recipients of the benefit without assistance. Where the Supreme Court attempts to protect the physically disabled, its actions are commendable. However, the Court's continued inattention to legislative direction suggests its susceptibility to public opinion<sup>14</sup> and its inability to foresee possibly deleterious legal and social ramifications.<sup>15</sup> Although

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<sup>8</sup> 534 U.S. 184 (2002).

<sup>9</sup> 532 U.S. 661 (2001).

<sup>10</sup> 527 U.S. 471 (1999).

<sup>11</sup> 524 U.S. 624 (1998).

<sup>12</sup> 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, 1469 (1999).

<sup>13</sup> For example, in *Bragdon*, 524 U.S. 624, the Supreme Court failed to take into consideration that the ADA's definition of disability requires that the "major life [activity]" at issue be analyzed in terms of the traits "of such individual" rather than all individuals in the plaintiff's situation. 42 U.S.C. § 12102(2)(A) (2000). This erroneous inquiry will lead to inequitable results. See discussion *infra* notes 148-56 and accompanying text.

<sup>14</sup> *Martin*, 532 U.S. at 691 (Scalia, J., dissenting) ("In my view today's opinion exercises a benevolent compassion that the law does not place it within our power to impose."); see Arlene Mayerson & Matthew Diller, *The Supreme Court's Nearsighted View of the ADA*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 124 (Leslie Pickering Francis & Anita Silvers eds., 2000) [hereinafter AMERICANS WITH DISABILITIES].

<sup>15</sup> See discussion of *Sutton*, *infra*, at notes 168-80 and accompanying text, and *Martin*, *infra*, at notes 186-98 and accompanying text.

the Court has recently arrived at socially palatable conclusions,<sup>16</sup> it arrived there with the wrong measuring stick. Notwithstanding their benefits to many disabled people, the Court's precedents could offset the rights of other social groups and entities that American public policy has found it important in the past to protect.<sup>17</sup> The ADA simply does not have the elasticity to support such dramatic interpretive reshaping.<sup>18</sup>

Instead of distorting statutory text, the Supreme Court should circumvent statutory flaws and fissures and fashion its opinions to better adhere to legislative intent, which directs the courts to prioritize and protect the dignity and self-sufficiency of disabled Americans.<sup>19</sup> The statute mandates that the plaintiff shoulder the burden of proving she is "truly disabled."<sup>20</sup> This requirement generated a long line of convoluted and confusing caselaw, and also disempowers the plaintiff by shifting the focus away from the defendant's inappropriate conduct.<sup>21</sup> Instead, a more effective way to adhere

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<sup>16</sup> I am referring specifically to social commentary surrounding the *Martin*, *Sutton* and *Bragdon* cases, discussion *supra* note 14 and *infra* notes, 18, 249. Note that in examining lower court cases, Matthew Diller, an Associate Professor of Law at Fordham University School of Law, expressed the opinion that substantial numbers of courts have formulated restrictive interpretations of the ADA, which he claims have unnecessarily and unfairly worked to the detriment of the plaintiffs. Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKLEY J. EMP. & LAB. L. 19, 24 (2000). To substantiate his argument, he cites circuit and district court cases, which seem to create a pattern—they all limit the plaintiffs' rights under the ADA. *Id.* at 25. This Note focuses only on the ineptitude of the Supreme Court's reasoning. To the extent that the cases cited by Diller negatively impact the plight of disabled complainants under the ADA, they underscore the defective statutory parameters and erroneous Supreme Court construction thereof. Firstly, perhaps these lower court decisions were made in an attempt to reject the Supreme Court's clear misreadings of the statute. *Id.* at 22. Secondly, these cases emphasize the ADA's faulty draftsmanship: "[C]ourts are constrained from enforcing the [ADA] in a coherent and effective way by statutory language that fails to reflect the goals of the law." *Id.* at 21. See also Cheryl L. Anderson, "Deserving Disabilities": *Why the Definition of Disability Under the Americans With Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83, 85-86 (2002) (citations omitted) (stating that *Martin* diverted attention away from individuals with "genuine disabilities who have been losing their cases under inappropriately narrow interpretations of the term 'disability'").

<sup>17</sup> For example, a recent expansion of a Title II case (Title II proscribes discrimination emanating from public entities and services) improperly stretched the legislative intent as well, thereby offsetting the rights of another vulnerable social group: foster children. *Doe v. County of Centre*, 242 F.3d 437 (3d Cir. 2001) (discussed *infra* notes 157-67 and accompanying text).

<sup>18</sup> See *Martin*, 532 U.S. at 691 (Scalia, J., dissenting) ("The judgment distorts the text of Title III, the structure of the ADA, and common sense.").

<sup>19</sup> 42 U.S.C. § 12101(b) (2000).

<sup>20</sup> 42 U.S.C. § 12102(2).

<sup>21</sup> See discussion *infra* note 241 and accompanying text.

to legislative intent and to protect the dignity of disabled Americans would be for Congress to amend the statute and direct the courts to focus on the defendant's wrongful actions, similar to the approach taken in intentional tort cases.<sup>22</sup>

At first blush, it seems unrealistic that an overhaul of the text or judicial application of the ADA will have sweeping and real positive effects for the disabled. The ten years of case history that have fleshed out Title III of the ADA suggest that the infrequency with which the cases are brought may not yield an "Alice in Wonderland" effect,<sup>23</sup> and that the statute itself is more symbolic than functional. However, if the courts continue to interpret the ADA in accordance with *Toyota*, *Martin*, *Sutton* and *Bragdon*, the statute will lose its potency; the statute as applied will more closely resemble the vision evoked by the Supreme Court than the original vision set forth by Congress.<sup>24</sup>

This Note argues that the legitimacy and integrity of our legal system requires a more concrete legislative mandate regarding some of the ADA's definitions, a more focused inquiry into the defendants' actions (as opposed to the plaintiffs' disability) and a more discerning judicial analysis of legislative structure and intent. Part I provides a history of the enactment of the ADA and an overview of its practical application. Part II reviews Supreme Court decisions

<sup>22</sup> The statutory text of the ADA clearly contradicts legislative intent. See discussion *infra* Part IV.

<sup>23</sup> See generally Ruth Colker, *ADA Title III: A Fragile Compromise*, in AMERICANS WITH DISABILITIES, *supra* note 14, at 293. See also Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 327 n.10 (1997).

<sup>24</sup> In which case, the ADA will resemble *Alice in Wonderland* more than anticipated. Consider the following conversation between Alice and Humpty Dumpty:

Humpty Dumpty said gaily, . . . "that shows that there are three hundred and sixty-four days when you might get un-birthday presents . . . [a]nd only *one* for birthday presents, you know. There's glory for you!"

"I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean a 'nice knock-down argument,'" Alice objected.

"When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I chose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

CARROLL, *supra* note 1, at 188.

By making the words mean what the Supreme Court chooses them to mean, without reference to proper usage and intent, the Court is the "master," as was Humpty Dumpty. The Court "interprets" by furnishing its own rules. However, unlike Humpty Dumpty, its "shell" is much more impermeable than that of the real Humpty Dumpty, as its decisions are rarely reversed.

interpreting and ultimately distorting the fundamental purpose of the ADA. This Part further analyzes the statutory ambiguity of the ADA. Part III discusses the judicial and societal goals affecting the application of the ADA, as well as the ADA's past and future potency and success. Part IV proposes remedies to the current state of affairs, arguing that the legislature mandate or the courts adopt a case-by-case analysis of ADA cases, implement a presumption of disability, and more clearly delineate the boundaries of the ADA. Additionally, this Part explores the possibility of state response to congressional and judicial shortcomings. Finally, this Note concludes in Part V with an invitation for Congress and the Supreme Court to ameliorate the ADA's draftsmanship and application.

## I. HISTORY AND APPLICATION OF THE ADA

### A. *History of the ADA*

While the 1964 Civil Rights Act (hereinafter the "CRA") empowered those experiencing discrimination based on race, color, national origin, sex and religion, those experiencing discrimination based on disability were relegated to the shadows and legally ignored.<sup>25</sup> Although President Johnson and the Supreme Court denounced discrimination against *any* group of people as morally and socially wrong,<sup>26</sup> it seemed as if, for activists and politicians alike, eliminating discrimination against some social groups was a more valuable goal than as against others. Not until the 1970s did activists begin to champion the rights of disabled Americans by seeking to extend civil rights to the disabled.<sup>27</sup> In 1973, Congress finally addressed the need to protect disabled Americans by passing the Rehabilitation Act.<sup>28</sup>

The Rehabilitation Act of 1973 is the most far-reaching of the ADA's predecessors.<sup>29</sup> It enjoins recipients of federal

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<sup>25</sup> Leslie Francis & Anita Silvers, *Achieving the Right to Live in the World: Americans with Disabilities and the Civil Rights Tradition*, in AMERICANS WITH DISABILITIES, *supra* note 14, at xii-xv.

<sup>26</sup> *Id.* at xiv.

<sup>27</sup> *Id.* at xv.

<sup>28</sup> Rehabilitation Act of 1973 §§ 503-505, 29 U.S.C. §§ 793-795 (2000).

<sup>29</sup> The ADA's predecessors include: the Architectural Barriers Act of 1968, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151-4157) (1995)); the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-146, 89

funds from excluding handicapped persons from public accommodations and jobs.<sup>30</sup> Section 503 of the Rehabilitation Act requires holders of federal contracts in excess of \$10,000 to "take affirmative action to employ and advance in employment qualified individuals with disabilities,"<sup>31</sup> whereas § 504 provides for "nondiscrimination under federal grants and programs" generally.<sup>32</sup> The expense of § 504 had extensive and direct ramifications, and therefore marked a huge triumph for disabled Americans. The legislature not only imposed a major financial disincentive for those entities that relied upon federal funding to engage in discrimination, but also made clear its moral disfavor of discrimination against the disabled. This proved socially and politically empowering to disabled Americans.

Although these provisions were certainly groundbreaking at the time, many proponents of citizens with disabilities recognized the limitations of the Rehabilitation Act. For example, civil rights laws provided unmitigated protection to women and minorities,<sup>33</sup> whereas § 504 prohibits discrimination "solely by reason of . . . disability."<sup>34</sup> Thus, the implication was that disability discrimination is acceptable when joined with other types of bias, and is punishable only when it is found in its pristine form.<sup>35</sup> Further, the Rehabilitation Act is ineffectual to the extent that it does not provide for a private right of action and does not give federal agencies charged with enforcement the power to do anything more than issue findings.<sup>36</sup>

In response to the Rehabilitation Act's evident shortcomings, agencies such as the National Council on the Handicapped, the Leadership Conference on Civil Rights and the American Civil Liberties Union helped to secure support for protection of the disabled and ultimately contributed to the

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Stat. 486 (codified as amended at 42 U.S.C. §§ 1405-1406, 1415-1420) (2000)); the Voting Accessibility for the Elderly and Handicapped Act of 1984, Pub. L. No. 98-435, 98 Stat. 1678 (codified as amended at 42 U.S.C. § 1973ee) (2000)); and the Air Carrier Access Act of 1986, Pub. L. No. 94-435, 100 Stat. 1080, *cited in* Francis & Silvers, *supra* note 25, at xvii.

<sup>30</sup> Francis & Silvers, *supra* note 25, at xvii-xviii.

<sup>31</sup> 29 U.S.C. § 793(a).

<sup>32</sup> 29 U.S.C. § 794(a).

<sup>33</sup> Francis & Silvers, *supra* note 25, at xviii.

<sup>34</sup> 42 U.S.C. 794(a).

<sup>35</sup> Francis & Silvers, *supra* note 25, at xviii.

<sup>36</sup> *Id.* For example, unlike § 503, § 504 does not require affirmative action.

introduction of many proposed, revised and amended versions of the ADA.<sup>37</sup> President George H. W. Bush signed the bill on July 26, 1990, marking an end to pervasive discrimination against persons with disabilities. The 1990 congressional law establishing the ADA represented "the most significant piece of civil rights legislation enacted within the last twenty-five years."<sup>38</sup> The ADA changed the face of employment and civil rights law irreversibly.<sup>39</sup>

### B. *The Inner Workings of the ADA*

The ADA's goal, ending discrimination against individuals with disabilities and bringing those individuals into the economic and social mainstream of American life,<sup>40</sup> seemed like an overwhelming and expensive undertaking. The legislature crafted the structure of the ADA to extend the Rehabilitation Act's non-discrimination principles to state and local governments, public programs, activities and services, whether or not they receive federal funding.<sup>41</sup> The ADA tenders the same civil rights protections to disabled Americans that the CRA provided women and minorities beginning in 1964.<sup>42</sup> The ADA specifically prohibits a public entity from discriminating against a qualified individual with a disability, or excluding such an individual from participation in, or denying the individual the benefits of, any of the entity's services, programs

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<sup>37</sup> *Id.* at xix.

<sup>38</sup> Robert C. Mathes, *Civil Rights—The Status Of Persons Infected With Asymptomatic HIV Under the Americans With Disabilities Act of 1990 After Bragdon—Did The Supreme Court Miss an Opportunity to Protect Disabled Americans? Bragdon v. Abbott*, 118 S. Ct. 1196 (1998), 34 LAND & WATER L. REV. 237, 239 (citing LAURA F. ROTHSTEIN, *DISABILITIES AND THE LAW* § 1.05, 23 (2d. ed. 1997)).

<sup>39</sup> 42 U.S.C. §§ 12101(a)(2), (3), (5). Through the ADA, Congress for the first time made sweeping findings in connection with disabled Americans, stating that more than forty-three million Americans had at least one disability, that the segregation of people with disabilities is a historical reality and the disabled receive inferior educational and economic access to resources, amongst other things. See 42 U.S.C. § 12101(a)(1)-(9). See also H.R. REP. NO. 101-485, pt. 3, at 25 (1990) (citing Louis Harris and Associates, *The ICD [International Center for the Disabled] Survey of Disabled Americans: Bringing Disabled Americans Into the Mainstream (1986)*) ("Compared with persons without disabilities, persons with disabilities are much poorer, have far less education, have less social and community life, participate much less often in social activities that other Americans regularly enjoy, and express less satisfaction with life.").

<sup>40</sup> H.R. REP. NO. 101-485 pt. 3, at 23 (1990).

<sup>41</sup> 42 U.S.C. §§ 12111(8), 12112(a); S. REP. NO. 101-116, at 44 (1998); Helen L. v. DiDario, 46 F.3d 325, 331 (3d Cir. 1995); McDonald v. Massachusetts, 901 F. Supp. 471, 478 (D. Mass. 1995).

<sup>42</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, 2000d, 2000e.



or activities.<sup>43</sup> The ADA provides more comprehensive protection to the disabled than the the CRA provides to minorities and women.<sup>44</sup> However, the ADA and the CRA share the same remedial provisions, such as compensatory and punitive damages, injunctive relief and attorney's fees.<sup>45</sup>

An individual is "disabled" under all four titles of the ADA if he or she has a physical or mental impairment that substantially limits one or more major life activities.<sup>46</sup> Each of the four titles provides its own unique, contextually-dependant protection: Title I proscribes discrimination in the employment sector;<sup>47</sup> Title II proscribes discrimination emanating from public entities and services;<sup>48</sup> Title III proscribes discrimination in the realm of public accommodation and services;<sup>49</sup> and Title IV assumes authority over other miscellaneous matters.<sup>50</sup>

Titles I and III, the foci of this Note's discussion, apply to discrimination against workers and patrons respectively, within businesses and workplaces.<sup>51</sup> Title III provides a broader protection than Title I, because it applies to all individuals with disabilities, regardless of whether they are sufficiently qualified for employment.<sup>52</sup> Whereas Title I functions to ensure

<sup>43</sup> 42 U.S.C. § 12132; H.R. REP. 101-485 pt. 3, at 23 (1990).

<sup>44</sup> For example, the CRA covers only a few categories of public accommodations. 42 U.S.C. § 2000a. See Colker, *supra* note 23 (providing history of Title III).

<sup>45</sup> See Colker, *supra* note 23 (providing history of Title III); see also 42 U.S.C. § 12117(a).

<sup>46</sup> 42 U.S.C. § 12102(2).

<sup>47</sup> 42 U.S.C. §§ 12111-12117. It states, in relevant part, "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees . . ." 42 U.S.C. § 12112.

<sup>48</sup> 42 U.S.C. §§ 12131-12165. It states, in relevant part, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

<sup>49</sup> 42 U.S.C. §§ 12181-12189. Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation." 42 U.S.C. § 12182 (a).

<sup>50</sup> 42 U.S.C. §§ 12201-12213. Titles II and IV are outside the scope of this Note.

<sup>51</sup> It is interesting to note that the circuits split over whether Title II, the public services title, applies to the terms and conditions of employment for government workers. For a citation of cases relating to the circuit split, see Brief for Petitioner at \*29 n. 23, *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (No. 00-24), available at 2000 WL 1706732, which also notes the difference in wording and history between Title II and Title III.

<sup>52</sup> 42 U.S.C. § 12111(8) (defining "qualified individual with a disability" as

that employers have provided accommodations for their employees and applicants with disabilities,<sup>53</sup> Title III operates to ensure that these public businesses and workplaces also provide their disabled patrons with appropriate accommodations.<sup>54</sup> "Thus, it is the *customer* who triggers Title III, just as it is the *employee* who triggers Title I."<sup>55</sup> Therefore, both titles are devoted to eradicating discrimination within the dual forces of the capitalist marketplace.

The Supreme Court spent the years surrounding the turn of the twenty-first century testing the elasticity of the ADA.<sup>56</sup> Prior to 1998, courts generally construed the term "disability" narrowly, immunizing employer discrimination from judicial redress and exposing what many viewed as the judiciary's "blatant hostility towards the profound goals of the ADA."<sup>57</sup> Many commentators criticized this restrictive judicial interpretation of the ADA.<sup>58</sup> However, in 1998, the Supreme Court decided *Bragdon v. Abbott*, expanding the scope of the ADA by determining that HIV substantially impairs the "major life activity" of human reproduction, and thus should be considered a disability.<sup>59</sup> In response, the media and critics quickly accused the Court of expanding the ADA's text too far.<sup>60</sup>

In 1999, the Court, in *Sutton v. United Air Lines, Inc.*, again restricted the rights of the disabled under the ADA by reducing the likelihood of protection for those who have mitigated their disabilities.<sup>61</sup> *PGA Tour, Inc. v. Martin* and

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"an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

<sup>53</sup> 42 U.S.C. § 12112.

<sup>54</sup> 42 U.S.C. § 12182(a).

<sup>55</sup> William E. Spruill, *Giving New Meaning to "Handicap:" The Americans With Disabilities Act and its Uneasy Relationship with Professional Sports in PGA Tour, Inc. v. Martin*, 35 U. RICH. L. REV. 365, 384 (2001).

<sup>56</sup> See generally *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

<sup>57</sup> The goals of the ADA ostensibly are to provide as much protection as possible to disabled Americans. Arlene B. Mayerson, *Restoring Regard for the "Regarded as" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587 (1997). See generally Symposium, *Defining the Parameters of Coverage Under the Americans with Disabilities Act: Who is "An Individual with a Disability?"*, 42 VILL. L. REV. 327 (1997).

<sup>58</sup> See, e.g., Mayerson, *supra* note 57.

<sup>59</sup> 524 U.S. 624, 641 (1998).

<sup>60</sup> See, e.g., Jonathan R. Mook, *Ruling that HIV is a Disability Could Open Pandora's Box of ADA Claims*, 6 EMP. L. STRATEGIST 1 (1998).

<sup>61</sup> *Sutton*, 527 U.S. 471 at 492-94.

*Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, decided in 2001 and 2002 respectively, revealed the pendulous nature of the Court's decision-making by expansively interpreting the ADA in a manner reminiscent of the permissiveness seen in *Bragdon*.<sup>62</sup> In sum, sporadic judicial interpretation of the ADA has exposed the great imprecision of the statute, as well as the flawed grasp that the Court seems to have on its terms and intent. This has, accordingly, roused fear of the judicial potential to spur great and harmful changes in the realm of business practices and civil rights in contradiction to the ADA's legislative intent.<sup>63</sup>

## II. SUPREME COURT JURISPRUDENCE ON THE ADA

### A. *Relevant Case History*

The Court in both *Bragdon v. Abbott* and *Sutton v. United Air Lines, Inc.* expanded the definition of "disability" and distorted the text of the ADA.<sup>64</sup> In *Bragdon*, a dentist refused to treat a patient because of the patient's affliction with asymptomatic HIV, and the patient brought her cause of action under Title III of the ADA.<sup>65</sup> The patient asserted that she was entitled, under Title III, to be provided with the same medical accommodations as all other patients and that because this discrimination was based on her disability alone, it was illegal.<sup>66</sup> The defendant countered that he should have been able to refuse to treat the patient because the patient's infectious condition posed a direct threat to the health and safety of others.<sup>67</sup> The Court remanded the case for a determination as to whether the dentist's refusal to treat the patient was reasonable in light of objective, scientific information.<sup>68</sup> The importance of the case, however, lies in the Court's determination that asymptomatic HIV is a disability under the ADA. The Court stated that HIV substantially

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<sup>62</sup> See generally *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

<sup>63</sup> See Beth Collins, *The Americans With Disabilities Act: Rehabilitating Congressional Intent*, 28 J. LEGIS. 213 (2002).

<sup>64</sup> See generally *Sutton*, 527 U.S. 471; *Bragdon*, 524 U.S. 624.

<sup>65</sup> *Bragdon*, 524 U.S. 624.

<sup>66</sup> *Id.* at 629.

<sup>67</sup> *Id.* at 648.

<sup>68</sup> *Id.* at 655.

impairs the major life activity of human reproduction and thus, should be considered a disability.<sup>69</sup>

The definition of "disability" was again at issue in the more recent case of *Sutton v. United Air Lines, Inc.*<sup>70</sup> In *Sutton*, severely myopic job applicants brought a disability discrimination action against United Air Lines under the ADA, challenging the airline's minimum vision requirement for global pilots.<sup>71</sup> The job applicants claimed that their severe vision impairments were a disability, that they were discriminated against by reason of this disability and that the airline was therefore liable under the employment provisions of Title I.<sup>72</sup> The Court held that because corrective lenses ameliorated the applicants' vision to a visual acuity of 20/20, the plaintiffs were not substantially limited in any major life activity.<sup>73</sup> Thus, plaintiffs were non-disabled and ineligible to enjoy the protective shelter of the ADA.<sup>74</sup>

In *Toyota*, a more recent case, the legal question concerned the scope of the definition of "disabled" as applied in Title I situations where the "life activities" that are limited by the impairment are work and manual tasks, amongst other things.<sup>75</sup> In *Toyota*, the claimant, Williams, worked at a Toyota plant contributing to the production of automobiles. As a result of her prolonged use of pneumatic tools, she developed carpal tunnel syndrome, a wrist impairment, that she claimed substantially limited her in performing manual tasks, including housework, gardening and working.<sup>76</sup> Because of this affliction, she claimed that she was unable to perform her job, which included paint inspection and surface repair of automobiles.<sup>77</sup> In response, Toyota placed her in a position where she had to perform modified duties.<sup>78</sup> Nonetheless, Williams missed some work for medical leave, filed a claim under workers' compensation, settled the claim and came back to work.<sup>79</sup> Upon Williams's return, her new position included

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<sup>69</sup> *Id.*

<sup>70</sup> 527 U.S. 471 (1999).

<sup>71</sup> *Id.* at 476.

<sup>72</sup> *Id.* at 476-79.

<sup>73</sup> *Id.* at 488, 494.

<sup>74</sup> *Id.*

<sup>75</sup> *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

<sup>76</sup> *Id.* at 187-88.

<sup>77</sup> *Id.* at 188-89.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 188.

more intense physical activities, causing her ligament and muscle problems to reappear in a more severe form.<sup>80</sup> After she requested reassignment back to her former position, Toyota allegedly refused and terminated her employment.<sup>81</sup> Plaintiff alleged that she was fired on the basis of her affliction, and that Toyota failed to provide reasonable accommodation as required by the ADA.<sup>82</sup>

The Sixth Circuit found that the plaintiff should have shown that her manual disability disadvantageously affected a "class" of manual activities that she was to perform at work.<sup>83</sup> Further, the court disregarded evidence that Williams could not tend to her personal hygiene and could not carry out personal or household chores, and justified this position by claiming that these impairments did not substantially limit her ability to perform the numerous manual tasks associated with working on an assembly line.<sup>84</sup>

In reversing the Sixth Circuit's decision, the Supreme Court stated that when examining whether the condition is severe or not, courts should perform an individualized assessment.<sup>85</sup> The Court held that where the plaintiff claims that her disability interferes with her major life activity of working (performing manual tasks), the central inquiry is not whether the claimant is able to perform tasks only associated with her job, but whether the claimant is able to perform a broad "class" of jobs, including a variety of tasks central to most people's daily lives.<sup>86</sup> Thus, because the plaintiff's disability affected both her ability to work *and* to perform manual tasks, the Court held that the Sixth Circuit should have considered the plaintiff's inability to tend to her personal hygiene and carry out her personal household chores in deciding whether the impairment substantially limited her major life activities.<sup>87</sup> However, the Court reviewed the facts and stated that this plaintiff's disabilities did not sufficiently

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<sup>80</sup> *Toyota*, 534 U.S. at 188-89.

<sup>81</sup> *Id.* at 189-90.

<sup>82</sup> *Id.* at 187-88.

<sup>83</sup> *Williams v. Toyota Motor Mfg., Kentucky, Inc.*, 224 F.3d 840 (6th Cir. 2000), *rev'd*, 534 U.S. 184 (2002).

<sup>84</sup> *Id.*

<sup>85</sup> *Toyota*, 534 U.S. at 199.

<sup>86</sup> *Id.* at 199-200. The *Toyota* Court treated as relevant the plaintiff's inability to carry out household tasks such as gardening and fixing breakfast, and personal chores such as bathing and tooth brushing. *Id.* at 201-02.

<sup>87</sup> *Id.* at 201-02.

affect her performance of personal and household chores to merit the statute's protection.<sup>88</sup>

Finally, the controversy in *Martin* surrounded the definition of Title III's "public accommodation," rather than the term "disability." In *Martin*, Casey Martin, a professional golfer suffering from a circulatory disorder, needed to use a golf cart to traverse the golf course.<sup>89</sup> His circulatory disorder qualified as a disability as defined under the ADA.<sup>90</sup> Martin wanted to use his golf cart while competing in the private PGA Tour, which at that time was held on a public course. Use of a golf cart is in direct conflict with the "Rules of Golf" accepted by PGA Tour, Inc. ("PGA") that require players to walk the length of the course.<sup>91</sup> Martin brought suit against the PGA, arguing that he was an employee of the PGA and thus should receive protection of Title I.<sup>92</sup> Martin also alleged that the PGA discriminated against him in a place of public accommodation in violation of Title III.<sup>93</sup> As for Martin's first cause of action, the district court deemed him an independent contractor and thus denied his claim under Title I.<sup>94</sup> The Court of Appeals for the Ninth Circuit affirmed.<sup>95</sup> On Appeal, the Supreme Court upheld the district court's Title I ruling, and approved Martin's second cause of action.<sup>96</sup>

The PGA moved for summary judgment in the district court on the grounds that it is exempt from coverage under Title III of the ADA because it is a "private club[] or establishment[]," and that the play areas do not constitute places of "public accommodation."<sup>97</sup> The PGA maintained this position throughout the appeals process and additionally asserted, amongst other things, that Title III is concerned only with discrimination against "clients and customers" seeking to obtain "goods and services" at places of public accommodation.<sup>98</sup>

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<sup>88</sup> *Id.* at 202.

<sup>89</sup> *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 661 (2001).

<sup>90</sup> *Id.* at 666.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 678.

<sup>93</sup> *Id.* at 669.

<sup>94</sup> *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1245 n.2 (D. Or. 1998) (finding that Martin is an independent contractor, not an employee, and thus beyond the protection of Title I).

<sup>95</sup> *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000).

<sup>96</sup> *Martin*, 532 U.S. at 661.

<sup>97</sup> *Id.* at 669.

<sup>98</sup> *Id.* at 678.

Further, the PGA asserted that Casey Martin was neither a client nor a customer of the PGA.<sup>99</sup> The Supreme Court rejected all of the PGA's arguments, holding that the golf course, although used in a private PGA Tour, is a place of public accommodation, and further that Martin indeed qualified as a client or customer as he paid a \$3,000 fee to participate in the Q-School tournament, a qualifying tournament through which members of the general public can participate and earn a place on the PGA Tour.<sup>100</sup> Further, the Court ruled that the use of the cart did not significantly alter the nature of the game. Therefore, Martin would be permitted to ride in his cart at PGA events.<sup>101</sup>

B. *Analysis: The Confusing Plight of Red Queen and White Knight:*<sup>102</sup> *The ADA's Imprecise Definitions and the Court's Incorrect Interpretations*

1. The Ambiguous Definition of "Disability"

The definition of "disability" as set forth in 42 U.S.C. § 12102(2) is applicable to all four titles of the ADA. Thus, its ambiguity has a major impact on every ADA proceeding, including the employment and public accommodation discrimination cases discussed herein. A plaintiff must prove that she has a disability before she can continue with her suit under any of the titles.<sup>103</sup> The statute defines disability as "(A) a

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<sup>99</sup> *Id.* The PGA asserted that this claim of discrimination was more job-related and therefore could only be brought under Title I. However, as the district court found, Title I was inapplicable to *Martin* here because Martin was an independent contractor rather than an employee. *Id.*

<sup>100</sup> *Id.* at 679-80. See also Tim A. Baker, *The Law and the Links: How Casey Martin Prevailed in his Legal Battle with the PGA Tour*, RES GESTAE, Sept. 2001, at 17.

<sup>101</sup> *Martin*, 532 U.S. at 683, 690.

<sup>102</sup> The Red Queen and White Knight reference characters in Lewis Carroll's novel, *Alice's Adventures in Wonderland & Through the Looking Glass*. In my version of Carroll's story, the Supreme Court takes the place of the Red Queen, who is "domineering and often unpleasant, but not incapable of civility. She expects Alice to abide by her rules of proper etiquette, even when it should be apparent that she does not know what is happening." *Characters*, Sparknotes, at <http://www.sparknotes.com/lit/alice/characters.html> (last visited Sept. 6, 2002). The White Knight, on the other hand, is like the ADA itself: "[k]ind, gentle, and strangely noble, despite [its] extreme clumsiness. [It] tries to be very clever, but fails in the end." *Id.*

<sup>103</sup> As Lisa Eichhorn notes, Titles I and II of the ADA prohibit discrimination against qualified individuals with disabilities, and Title III, although it is not framed in terms of a protected class of individuals with disabilities, requires a plaintiff to prove her disability in order for the Court to determine whether discrimination on a prohibited basis occurred. Eichhorn, *supra* note 12, at 1473.

physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment."<sup>104</sup> This broad and ambiguous definition leaves the statute susceptible to an infinite array of interpretations,<sup>105</sup> a problem exacerbated by the natural difficulty in defining the concept of disability as compared to race or sex.

The drafters of the ADA drafted the statutory language in an attempt to clarify past ambiguities within the Rehabilitation Act.<sup>106</sup> Congress directed that the ADA grant at least as much protection as provided by the Rehabilitation Act regulations.<sup>107</sup> The ADA maps out rights and obligations with greater specificity than the Rehabilitation Act.<sup>108</sup> For example, Title III articulates a balancing test for weighing the right to access public accommodation against the burden of providing such accommodation.<sup>109</sup> However, in this instance greater specificity does not amount to greater utility or easier interpretation.

Even if a claimant proves that she has a disability, she still has not fully met her statutory burden. She has to further prove that the impairment not only affects a major life activity, but that it substantially limits that activity.<sup>110</sup> The definition of what "substantially limits one or more major life activities"<sup>111</sup> is so convoluted that it prevents courts from fulfilling the ADA's goal to have disabled people fully participating in society.<sup>112</sup> Legislative history is silent regarding the reasoning behind the

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<sup>104</sup> 42 U.S.C. § 12102(2) (2000).

<sup>105</sup> Patricia Illingworth & Wendy E. Parmet, *Positively Disabled: The Relationship Between the Definition of Disability and Rights Under the ADA, in AMERICANS WITH DISABILITIES*, *supra* note 14, at 3, 3. This is perverse given that Congress announced that its purpose in passing the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

<sup>106</sup> Eichhorn, *supra* note 12, at 1421.

<sup>107</sup> 42 U.S.C. § 12201(a) states: "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title."

<sup>108</sup> Eichhorn, *supra* note 12, at 1421.

<sup>109</sup> *Id.* at 1422. Under 42 U.S.C. § 12182(b)(A)(iii)-(v), the place of public accommodation shall take steps to alter the nature of the facility, service or accommodation to the extent that the alteration is readily achievable, is available through alternate methods or will not result in an undue burden.

<sup>110</sup> 42 U.S.C. § 12102(2)(A).

<sup>111</sup> *Id.*

<sup>112</sup> Eichhorn, *supra* note 12, at 1423.



use of such language,<sup>113</sup> although in 1990 Congress set forth a non-exhaustive list of impairments and disabilities that would qualify a claimant to bring his or her claim under the ambit of the ADA.<sup>114</sup> If a plaintiff is unable to perform activities such as “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working,” she is considered disabled.<sup>115</sup> The list is varied in that it describes functions that range from crucial (breathing) to the arguably more inconsequential (working, caring for oneself).<sup>116</sup> This variation makes it difficult for courts to discern congressional priorities.<sup>117</sup>

The statute’s infirmity is best demonstrated by an analysis of the major life activity of “working”<sup>118</sup> in Title I employment cases. In order for the complainant to prove that she is disabled, she must prove that she has an impairment that limits a major life activity.<sup>119</sup> One of the major life activities that a plaintiff can prove she is unable to perform due to her impairment is the ability to work.<sup>120</sup> If a plaintiff claiming an impairment to the major life activity of working seeks protection of the statute, she must show not only that she has a disability and that the discrimination against her was based on this disability, but also that she can perform the essential function of the job that she holds or desires.<sup>121</sup> The complainant is thus required to perform something just short of magic for the court. She has to show that her ability to work is impaired enough for her to be deemed disabled, and that she is simultaneously able to perform the essential functions of the job. This inherent tension within the statutory scheme underscores the importance for the legislature to redraft the statute in order to redirect the judicial inquiry from the disability status of the plaintiff to the biased acts of the defendant.

The ambiguity inherent in the major life activity of working compelled the Court to conduct an improper inquiry in

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<sup>113</sup> *Id.* at 1428.

<sup>114</sup> H.R. Rep. 101-485 pt. 3, at 28.

<sup>115</sup> *Id.*; 29 C.F.R. § 1630.2(i) (2001).

<sup>116</sup> See Eichhorn, *supra* note 12, at 1429.

<sup>117</sup> See *id.*

<sup>118</sup> 45 C.F.R. § 84.3(j)(2)(ii).

<sup>119</sup> 42 U.S.C. § 12102(2)(A) (1994).

<sup>120</sup> 45 C.F.R. § 84.3(j)(2)(ii).

<sup>121</sup> 42 U.S.C. § 12111(8).

contravention of the equality of opportunity ideology that underpins the ADA. For example, the Court in *Toyota* confronted the problem of determining the scope of the major life activity of working.<sup>122</sup> The statute is unclear as to whether the claimant must be impaired in performing just *her* job, or a broad range of jobs that include manual activities, in order to receive statutory protection when the limitation affects the activity of work.<sup>123</sup> The Court ultimately decided that when the judiciary inquires into the major life activity of working, the claimant's limitation should be analyzed with respect to a "class" of jobs, not whether the claimant is unable to perform the tasks associated with her specific job.<sup>124</sup>

Because the ADA mandates that courts determine statutory violations based on the extent of the claimant's physical impairments, the Court inevitably splits hairs and sets contradictory precedents. First, the Court's determination in *Toyota* means that in the future, claimants' physical limitations will be analyzed differently depending upon whether the claimant asserts that her disability affects her job, or whether it affects her ability to walk.<sup>125</sup> This approach sets the stage for claim-specific judicial inquiry, thereby making this already thorny and tedious litigation path more onerous for both the litigants and the courts.

Second, not only will *Toyota* foster judicial unpredictability, but its holding will potentially complicate and weaken judicial reasoning going forward. For example, in *Toyota*, the Court determined that in deciding whether a claimant has a physical impairment, an individualized assessment is appropriate because physical symptoms vary from person to person.<sup>126</sup> However, in determining that the

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<sup>122</sup> *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

<sup>123</sup> *Id.* at 199-200 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)).

<sup>124</sup> *Id.* at 200. The Court referred to the Equal Employment Opportunity Commission ("EEOC") regulation, which describes what the EEOC has determined the term "substantially limits" to mean with respect to the major life activity of working. 29 C.F.R. § 1630.2(j)(3).

<sup>125</sup> *Toyota*, 534 U.S. at 200-01. Although the Court followed the EEOC's guidance to do this, it should have considered the negative repercussions that flow from splintering the ADA into claim-dependent sub-issues. The Court should be more comfortable with construing the terms of the ADA in the most logical and equitable way possible, despite contradicting agency guidance, because Congress did not convey to any agency the power to define the terms of the ADA. *See infra* text accompanying notes 134-40. As it is, the Court historically has given these agency guidelines a fluctuating degree of deference. *See id.*

<sup>126</sup> *Toyota*, 534 U.S. at 198.

claimant's disability affects the major life activity of working, the Court stated that the judiciary should employ a class-based approach.<sup>127</sup> These confusing directives require plaintiffs who allegedly have disabilities affecting their work to prove that they have physical impairments that are uniquely severe, and at the same time are general enough to affect potential work in a broad range of jobs in which many other people engage.<sup>128</sup> A simultaneously individualized and generalized inquiry reveals the weakness of the statutory structure and the infirm judicial grasp on its contours. The different-rules-for-different-life-activities approach is a neither logical nor efficient judicial strategy, and is one that will convolute judicial investigation immeasurably.

To add to the confusion, the *Toyota* decision differs from the *Bragdon* decision in its acceptance of the individualized analysis. As stated above, the Court in *Toyota* determined that an individualized assessment is appropriate when determining disability, echoing the Court in *Sutton*.<sup>129</sup> The Court in *Bragdon*, however, failed to consider the plaintiff's alleged limitation of a major life activity on an individualized basis.<sup>130</sup> The Court's inattention to statutory text and to legislative intent exposes the unpredictability of its future rulings. The judiciary needs a more rational analytic focus, one that centers on the defendant's alleged impropriety instead of the plaintiff's amorphously-defined disability.

The "substantially limits a major life activity" language also compels the courts to inappropriately inject their own subjective value judgments into their judicial assessments. The requirement that petitioners prove themselves "truly disabled" within the legislative construct of a "major" disability has the judiciary asking the wrong questions. When the Court scrutinizes the value of the plaintiff's disability for the purposes of approving entrance through the courthouse doors, it disempowers the plaintiff by shifting the focus away from the defendant's inappropriate conduct and toward the plaintiff's

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<sup>127</sup> *Id.* at 199-200 (discussed *supra* text accompanying notes 122-24).

<sup>128</sup> *Id.*

<sup>129</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999) (citing 42 U.S.C. § 12102(2) (1998)).

<sup>130</sup> As Chief Justice Rehnquist, joined by Justices Scalia, Thomas and O'Connor noted, the *Bragdon* Court avoided giving due consideration to 42 U.S.C. § 12102(2)(A) (1994). *Bragdon v. Abbott*, 524 U.S. 624, 658 (1998) (Rehnquist, C.J., Scalia & Thomas, JJ., concurring in the judgment in part and dissenting in part, and O'Connor, J., joining as to Part II).

status as disabled.<sup>131</sup> Further, an inquiry into what is and what is not a “major” disability is akin to an inquiry into what gives humans their value; one who cannot perform a major life activity does not have much of a life in the eyes of the ADA.<sup>132</sup> Contrary to the aim of the disability movement, this method of inquiry requires the courts to focus on what the disabled cannot do rather than what they can do and thereby belittles the value of their lives.<sup>133</sup>

Because of the aforementioned statutory ambiguities, the Court became confused by the definition of “disability” and thus looked to agency regulations for guidance.<sup>134</sup> Congress has not delegated to any agency the authority to interpret the term “disability.”<sup>135</sup> Nonetheless, agencies such as the Department of Health, Education and Welfare (“HHS”) and the Equal Employment Opportunity Commission (“EEOC”) have issued their own interpretive lists of the term “disability.”<sup>136</sup> The *Bragdon* Court, to determine if reproduction is a major life activity, looked to the HHS interpretation of the Rehabilitation Act for a more detailed definition of “physical or mental impairment.”<sup>137</sup> The *Sutton* Court considered the EEOC’s regulations as potential guidance for the proper interpretation of the term but ultimately rejected the agency’s definition.<sup>138</sup> Whereas the Court in *Bragdon* embraced agency interpretation

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<sup>131</sup> Eichhorn, *supra* note 12, at 1469.

<sup>132</sup> *Id.* at 1429. One can argue that this is the best type of inquiry for the purposes of ensuring extension of ADA protection only to those who are most in need of such protection. The ADA, however, forces this type of analysis and accompanying value judgment without weighing the impact and nature of the discrimination in question.

<sup>133</sup> *Id.* at 1430.

<sup>134</sup> *Sutton*, 527 U.S. at 480-82 (discussing the Equal Employment Opportunity Commission’s definition of “disability”); *Bragdon*, 524 U.S. at 631-33 (discussing the Department of Health, Education and Welfare’s definition of “physical or mental impairment”).

<sup>135</sup> *Sutton*, 527 U.S. at 479 (citing 42 U.S.C. § 12102(2) (2000)).

<sup>136</sup> 45 C.F.R. § 84.3(j)(2)(i) (1997).

In 1980 the Department of Health, Education and Welfare became the Department of Health and Human Services (“HHS”).

<sup>137</sup> *Bragdon*, 524 U.S. at 632. The Court looked at regulations issued by HHS interpreting the Rehabilitation Act, which define “physical or mental impairment” to mean: “(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary . . . .” *Id.* (citing 45 C.F.R. § 84.3(j)(2)(i) (1997)).

<sup>138</sup> *Sutton*, 527 U.S. at 479-80. The Court looked at regulations issued by the EEOC which set forth its definition of “physical impairment” in 29 C.F.R. § 1630.2(h)-(j). *Id.*

of “disability,”<sup>139</sup> the Court in *Sutton* gave no deference to the EEOC’s guideline that the question of whether or not a person has a disability should be assessed without regard to mitigating measures.<sup>140</sup> The ADA legislative history is not sufficiently detailed regarding the definition of “disabled” to provide courts with guidance when faced with various fact patterns, therefore it invites the Court to consider agency interpretations. Further, the amount of deference that the Court will afford to agency interpretation is unpredictable. The legislature should therefore refine the definition of “disabled.”

In order to ameliorate this improper statutory scheme, Congress should revise the ADA to define an illegal departure from the law in terms of the defendant’s improper stereotyping rather than the severity of the plaintiff’s disability.<sup>141</sup> Plaintiffs under the ADA should have the same ease of access to the justice system as those under the CRA; women and persons of color need not prove their sex or race, and the disabled plaintiff should not be forced to prove her disability.<sup>142</sup> A defendant-focused inquiry is more compatible with the spirit of the legislative intent that the ADA should lead to equitable results.<sup>143</sup>

## 2. The Supreme Court’s Incorrect Interpretation of “Disability” and its Related Terms

If Congress insists upon having a plaintiff-focused pleading standard, it should give clearer directives with reference to the nuanced application of the “disability” definition. Without a clear legislative mandate, the Court has leeway to make decisions in contravention of legislative intent.<sup>144</sup> As a result, the Court has incorrectly interpreted the term “disability.”

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<sup>139</sup> *Bragdon*, 524 U.S. at 632-33.

<sup>140</sup> *Sutton*, 527 U.S. at 480-82 (stating, “[a]lthough the parties dispute the persuasive force of these interpretive guidelines, we have no need in this case to decide what deference is due. . . . We conclude that respondent is correct that the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA.”)

<sup>141</sup> Eichhorn, *supra* note 12, at 1474.

<sup>142</sup> *Id.* at 1424-25.

<sup>143</sup> *Id.* at 1470.

<sup>144</sup> Diller, *supra* note 16, at 21 (stating that the ADA is poorly drafted in light of congressional purposes, thereby constraining courts from enforcing the ADA in a coherent and effective way).

For example, the Court in *Bragdon* had little congressional guidance when it faced the difficult task of deciding whether asymptomatic HIV falls within the ADA's definition of disability.<sup>145</sup> Prior to *Bragdon*, Congress already established that HIV is a disability under the ADA.<sup>146</sup> For asymptomatic HIV to qualify under the ADA, however, it must affect a major life activity. As stated above, the Court determined that asymptomatic HIV qualifies as a disability because it affects the major life activity of reproduction.<sup>147</sup>

The *Bragdon* Court failed to consider that the ADA's definition of a disability requires that the major life activity at issue be analyzed in terms of the traits "of such individual."<sup>148</sup> The proper inquiry would have been whether the plaintiff herself did or did not engage in life activities that included such pursuits as reproduction.<sup>149</sup> The Court's decision in *Bragdon* therefore excludes individuals who should receive the ADA's protection and includes those who should not.<sup>150</sup>

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<sup>145</sup> *Bragdon*, 524 U.S. at 624.

<sup>146</sup> H.R. REP. NO. 101-485 pt. 3, at 28.

<sup>147</sup> *Bragdon*, 524 U.S. at 639 (holding that the Rehabilitation Act regulations support the inclusion of reproduction as a major life activity).

<sup>148</sup> 42 U.S.C. § 12102(2)(A) (2000). It is interesting to note that Chief Justice Rehnquist, joined by Justices Scalia, Thomas and O'Connor assert that the *Bragdon* majority avoided giving due consideration to this requirement of the ADA. Chief Justice Rehnquist states that the Court "truncates the question, perhaps because there is not a shred of record evidence indicating that, prior to becoming infected with HIV, respondent's major life activities included reproduction." *Bragdon*, 524 U.S. at 658 (Rehnquist, C.J., Scalia, J., & Thomas, J., concurring in the judgment in part and dissenting in part, and O'Connor, J., joining as to Part II). Also note that the *Sutton* Court explicitly and wholeheartedly embraced the "with respect to an individual" requirement when it disapproved statutory coverage for a corrected case of severe myopia. *Sutton*, 527 U.S. at 483.

<sup>149</sup> *Bragdon*, 524 U.S. at 658 (Rehnquist, C.J., Scalia & Thomas, JJ., concurring in the judgment in part and dissenting in part, and O'Connor, J., joining as to Part II). It is important to note that an individual inquiry can sometimes be unjustly applied, as it does not allow room for a complainant's change of heart. Consider, for example, if the complainant in this case, despite her initial assertion that she did not want children, decided in the future that childbearing was a viable and desirable option for her. In that scenario, individual inquiry would disappoint justice. Problems flowing from not conducting this individual inquiry, however, are equally as vexing on a societal level. The bottom line is that both legislation and caselaw have laid out the requirement that this be an individualized inquiry. 42 U.S.C. § 12102(2) (stating that disability determination must be made "with respect to such individual"); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999) (finding that monocular vision is not invariably a disability, but must be analyzed on an individual basis). Therefore, the legislature made, and the Court interpreted, value judgments. By oscillating between an individual and a "most people" inquiry, the Court garners the approval of social consensus and deflates the legitimacy of its rulings.

<sup>150</sup> *Mathes*, *supra* note 38, at 253-61.

First, the Court's decision allows future courts to utilize the major life activity of reproduction as a tool to single out those plaintiffs with HIV, as well as other attributes prohibitive to reproduction, and dispossess them of the protection of the ADA.<sup>151</sup> HIV-infected persons who are unable to procreate due to sterility, obesity, age and sexual preference might not enjoy the protections of the ADA because they are incapable of reproduction independently of their HIV status.<sup>152</sup> It is clear from legislative history that Congress did not intend to justify discrimination in this manner.<sup>153</sup>

Alternately, the *Bragdon* holding suggests that subsequent courts might protect not only individuals with HIV, but also people who are unable to procreate due to sterility, obesity, age and sexual preference,<sup>154</sup> thereby extending protections to recipients not anticipated or intended by Congress.<sup>155</sup> Because the *Bragdon* decision provides fodder for two new forms of pleadings with contrary dispositions, some view it as the key to the proverbial Pandora's Box of litigation.<sup>156</sup>

Although the judiciary stirs public compassion when it expands ADA protection, extending more rights may ultimately work to devalue and deflate the rights and benefits that others

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<sup>151</sup> *Id.* at 254-55. Mathes states that "[t]he holding that asymptomatic HIV-infected persons are disabled because of limitations on their ability to reproduce could be construed to protect only those asymptomatic HIV infected persons who are otherwise reproductively capable." *Id.* at 254.

<sup>152</sup> *Id.* at 254.

<sup>153</sup> H.R. REP. No. 101-485, pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334; S. Rep. No. 101-116, at 22 (1990). See also 136 CONG. REC. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens); 136 CONG. REC. H4626 (daily ed. July 12, 1990) (statement of Rep. Waxman); 136 CONG. REC. 11,453 (daily ed. May 22, 1990) (statement of Rep. McDermont); 135 CONG. REC. 19,867 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy), cited in Mathes, *supra* note 38, at 261 n.128.

<sup>154</sup> Mathes, *supra* note 38, at 253-54.

<sup>155</sup> *Id.* Unfortunately, homosexual American citizens are not a protected social class, unlike women and racial minorities. Therefore, their due process claims are reviewed under a rational basis standard, despite their rich history of discrimination. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Note, however, that the expansion of the statutory text in *Bragdon* might actually reinforce homosexual plaintiffs' legal armory in discrimination cases in the context of an equal protection violation, if not a due process violation. Because *Hardwick* was determined on due process grounds and has yet to be overturned, an equal protection violation is probably much more vulnerable to this form of attack. See generally *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>156</sup> See generally Mook, *supra* note 60, at 1. Mook stated that the *Bragdon* decision will undoubtedly be cited by plaintiffs as support for: (1) inclusion within the definition of disability of innumerable conditions such as cancer that is in remission and controlled diabetes; (2) the contention that health care plans may not legally exclude treatment for impotence; and (3) claims that may further complicate the analysis of who the ADA covers. *Id.*

enjoy. As a result of the *Bragdon* decision, the ADA may not extend its coverage to subgroups of disabled persons who are arguably more vulnerable than their counterparts.

The Third Circuit in *Doe v. County of Centre, PA*,<sup>157</sup> illustrated how injustice results when the judiciary unintentionally devalues the rights of subgroups of disabled persons. In *Doe*, the adoptive parents of "Adam," a child with AIDS, approached the Foster Child Care Program in County of Centre, Pennsylvania, seeking to become foster parents.<sup>158</sup> The county claimed that unless the Does hosted foster children with the same infectious disease as Adam, and the biological parents of the foster child executed a written consent in return, the Does would not be eligible to host a foster child.<sup>159</sup> County officials claimed foster children should not be exposed to an "infectious" illness like Adam's.<sup>160</sup>

The Does refused to comply with the terms of this policy and sued the county, alleging disability and discrimination in violation of Title II of the ADA, among other statutes.<sup>161</sup> The Does claimed that because they associated with a person who had a disability (Adam), it was improper under the ADA to discriminate against them based on that disability.<sup>162</sup> The County of Centre justified its disparate treatment of the Doe family as compared to other potential foster families by relying on the "direct threat exception" of the ADA, which allows for discrimination if a disability "poses a direct threat to the health or safety of others."<sup>163</sup> The Third Circuit rejected this and other justifications, reversing the district court's grant of summary judgment, and stated that the risk of HIV transmission from casual contact, even intense physical contact, is negligible.<sup>164</sup>

The Does argued that they were being denied a public service (foster care) by virtue of their status as parents of a child with disabilities.<sup>165</sup> The Pennsylvania legislature,

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<sup>157</sup> 242 F.3d 437 (3d Cir. 2001).

<sup>158</sup> *Id.* at 444-45.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 441.

<sup>162</sup> *Doe*, 242 F.3d at 447. The ADA additionally prohibits discrimination against those who are associated with those who are disabled. 42 U.S.C. § 12112(b)(4) (2000).

<sup>163</sup> *Id.* at 447-48. Note that this is the same defense that the defendant in *Bragdon* used. See *supra* note 66 and accompanying text.

<sup>164</sup> *Id.* at 451.

<sup>165</sup> *Id.* at 447.



however, intended that the service provided benefit the foster child, not the potential foster parents.<sup>166</sup> The court never recognized this distinction. If courts follow *Doe's* course in future cases regarding HIV-AIDS and the direct threat exception, there is potential for devaluation of foster care as a benefit to foster children. This will disserve subgroups of disabled children with infectious diseases who may not be afforded the same protections as other disabled children within the foster care system. As in *Bragdon*, the court in *Doe* did not consider or foresee the negative ramifications that such flawed analysis would impose on subgroups of disabled individuals.<sup>167</sup>

Another example of problematic precedent is the Court's decision in *Sutton*, where it held that myopic plaintiffs were not entitled to claim disability under the ADA because they had improved their vision impairments with corrective lenses.<sup>168</sup> Although this holding appears logical at first blush, it will have serious, detrimental effects on future disabled plaintiffs who have mitigated their disabilities with corrective measures.<sup>169</sup>

The *Sutton* decision represents the Court's blatant disregard for legislative history. The Senate Report stated, "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."<sup>170</sup> Instead of disregarding the mitigating measures as directed by the

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<sup>166</sup> See, e.g., 23 PA. CONS. STAT. ANN. § 2530 (2001) (stating that foster children should not be placed in a foster home unless a home study containing a favorable recommendation for placement has been completed); 23 PA. CONS. STAT. ANN. § 5303 (1991) (stating that in making an order for custody, the court should consider the preference of the child as well as all factors that affect the child's well-being).

<sup>167</sup> See *Doe*, 242 F.3d 437. The *Doe* opinion is devoid of reference to foster care's intended benefit to foster children. The court improperly held that the foster parents were deprived of the benefit, whereas the benefit of foster care and protection from discrimination in the issuance of the benefit resided with the foster child and was not for the foster parents to claim.

<sup>168</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488-89 (1999). The Court in *Sutton* discusses mitigating myopia with the assumption that myopia, at least in extreme forms, is a disability in its unmitigated state. See *id.* at 475 (stating that without corrective lenses, each petitioner "effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores"). I adopt the Court's assumption in my discussion of *Sutton*.

<sup>169</sup> As the Supreme Court noted, there are approximately 100 million people with vision impairments in this country, and if Congress had intended to include all of them under the umbrella of the ADA, then it would have cited 143 million persons as disabled Americans instead of the forty-three million that it put forth in its findings. *Sutton*, 527 U.S. at 487.

<sup>170</sup> S. REP. NO. 101-116, at 23 (1989), quoted in *Sutton*, 527 U.S. at 499 (Stevens & Breyer, JJ., dissenting).

Senate, the Court imposed its own judgment and failed to cite a single relevant case that supported this part of its holding.<sup>171</sup> The Court arrived at its holding by noting the pervasiveness of nearsightedness, insinuating that it would be absurd to afford ADA protection to so many people.<sup>172</sup> Noting a report by the National Council on Disability that defined disability as “functional disability,”<sup>173</sup> the Court ruled that with corrective lenses, the plaintiffs had no functional disability because they could still see.<sup>174</sup> The Court employed its logic outside of legal rules and thus further complicated the already convoluted term “substantial limitation.”

*Sutton’s* holding that nearsightedness is not a disability in its corrected state “leads to the perverse result that a person with a disability who avails him- or herself of the benefits of technological and medical advances thereby risks losing protection from job discrimination.”<sup>175</sup> Thus, the Court has instated the following dilemma: the more irrational<sup>176</sup> the discrimination, the less vulnerable it is to judicial scrutiny.<sup>177</sup> Further, the Court opened the door for employer-defendants to argue that if a disabled person can “mitigate” her situation by being able to work elsewhere, then the employer-defendants should avoid liability.<sup>178</sup>

The purpose of the Act is to recognize the dignity of disabled Americans.<sup>179</sup> Giving disabled Americans a chance to mitigate their disabilities restores their dignity to an extent. Yet, it might also leave them without the protection of the ADA in the face of prejudicial treatment. Disabled Americans should

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<sup>171</sup> *Sutton*, 527 U.S. at 482-90. The Court based its reasoning on the application of the “substantially limits” criterion to the facts in the case. *Id.* at 482. The Court stated that the claimants, after using their corrective lenses, were not “substantially limited” in the major life activity. *Id.* The Court required that the claimants be presently—not potentially or hypothetically—substantially limited in order to demonstrate disability. *Id.*

<sup>172</sup> *Id.* at 484-87. Note that the CRA protects women, who comprise about half of the population, and minorities, both groups that are well-represented in society.

<sup>173</sup> *Sutton*, 527 U.S. at 485-86.

<sup>174</sup> *Id.*

<sup>175</sup> Mayerson & Diller, *supra* note 14, at 124.

<sup>176</sup> If a disabled person mitigates her disabilities, she is less disabled and thus similar to non-disabled persons. Therefore, entities or persons who discriminate against her are less rational because the disabled individual functions similarly to non-disabled persons. The less rational the bias, the more obvious and perhaps reprehensible it is.

<sup>177</sup> Mayerson & Diller, *supra* note 14, at 124-25.

<sup>178</sup> *Id.*

<sup>179</sup> 42 U.S.C. § 12101(b) (2000).

not be forced to prioritize one form of self-help over another; they should be able to take full advantage of both medical *and* legal assistance. This would not only maximize their self-sufficiency, but also would most successfully effectuate congressional intent. In its decisions, the Court ignored the underlying ideology of the ADA, which is about equality of opportunity—a fair opportunity to perform all jobs for which one is qualified.<sup>180</sup>

### 3. The Court's Incorrect Interpretation of "Public Accommodation" Under Title III

For a plaintiff to prevail under a Title III claim, she must show, among other things, that she was discriminated against in a place of public accommodation, and that the defendant operates that place of public accommodation.<sup>181</sup> The courts not only must determine whether individuals satisfy the definition of "disabled" under Title III as they do under Title I, but also have the difficult task of determining whether the place of business at issue is one of public or private accommodation.<sup>182</sup> In an effort to prove that they were discriminated in a place of "public accommodation," plaintiffs often choose to show that they are clients or customers of the defendant.<sup>183</sup> Ambiguities in proper statutory construction arise when a court faces a situation wherein it is difficult to tell whether the plaintiff is a "customer" or an "employee" of the public accommodation. In such situations, it is important for a court to examine who is providing the good offered and who is enjoying the good.<sup>184</sup> Once a court miscategorizes "customer" and "employer," it causes Titles I and III to overlap, which in turn contradicts legislative intent to create two separate and distinct titles—Title I pertaining to employment and Title III pertaining to public accommodation.<sup>185</sup>

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<sup>180</sup> Mayerson & Diller, *supra* note 14, at 125.

<sup>181</sup> 42 U.S.C. § 12182(a).

<sup>182</sup> Congress in 42 U.S.C. § 12182(b)(1)(A)(iv) states "[f]or the purposes of clauses (i) through (iii) of this subparagraph, the term 'individual or class of individuals' refers to the clients or customers of the covered public accommodation that enter into the contractual, licensing or other arrangement."

<sup>183</sup> The "clients or customers" limitation is set forth in 42 U.S.C. § 12182(b)(1)(A)(iv).

<sup>184</sup> *Id.*

<sup>185</sup> Brief for Petitioners at \*20-21, *Martin* (No. 00-24), available at 2000 WL 1706732.

*Martin* is one example where the Supreme Court struggled with the definition of “client” or “customer,” and in the end got it wrong. The Court ultimately held that Casey Martin was a client or customer of the PGA Tour<sup>186</sup> and cited his entrance fee of \$3,000 as evidence of his status as customer under Title III.<sup>187</sup> The Court ignored congressional intent to delineate between audience and performers, and between merchants and patrons;<sup>188</sup> it is discrimination against buyers, not sellers, with which Title III is concerned,<sup>189</sup> and legislative history confirms that “Title III is not intended to govern any terms or conditions of employment by providers of public accommodations.”<sup>190</sup>

The PGA is a money-making entity, and Martin is a highly talented golfer. Thus, the PGA will likely earn substantial advertising, sponsorship and attendance fees, well in excess of \$3,000, by having Martin participate in the tournament.<sup>191</sup> Indeed, the district court deemed his relationship to the tour to be “job related;” his highly esteemed skills served to enhance both audience attendance and the PGA’s revenues.<sup>192</sup> However, the district court determined that Martin was an independent contractor and thus exempt from Title I’s protection.<sup>193</sup> Martin won in the Supreme Court by turning this original argument on its head; instead of pleading under Title I, he sought the protection of Title III. He argued that instead of being the performer/employee of the PGA, he was the recipient of the “goods and services” of the PGA, and

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<sup>186</sup> This determination meant that Martin was a recipient of goods or services of the PGA and was therefore entitled to the protection under Title III.

<sup>187</sup> *Martin*, 532 U.S. at 680.

<sup>188</sup> See Brief of Amicus Curiae United States Golf Association, *Martin* (No. 00-24), available at 1 VA. J. SPORTS & L. 110, 116 (1999) (“Congress drew a line between the seating area in a movie theater and what appears on the screen. Even though the theater is a place of public accommodation and the seating area accordingly is covered by the ADA, the movie need not be closed-captioned.”) (citing H.R. REP. NO. 101485, pt. 3, at 59 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 482) [hereinafter USGA Brief].

<sup>189</sup> *Id.* See also Brief for Petitioner at \*23-24 (“[w]hen respondent seeks access to a golf course as a participant in Tour events, he becomes part of the business of providing entertainment to the spectators. His claim of discrimination about job-related terms and conditions is thus cognizable, if at all, only under Title I, not Title III.”).

<sup>190</sup> H.R. REP. NO. 101-485, pt. 2, at 99 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 382.

<sup>191</sup> See Brief for Petitioner at \*20-21.

<sup>192</sup> *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1245 n.2 (D. Or. 1998).

<sup>193</sup> *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 (2001). See *Birchem v. Knights of Columbus*, 116 F.3d 310, 312 (8th Cir. 1997) (holding that Title I of the ADA does not apply to independent contractors).

thus a customer.<sup>194</sup> The Court erroneously endorsed this argument. Because Martin earned much more money for the PGA than he received in “goods and services” from the tour, the Court should have considered Martin an employee, not a customer, of the PGA Tour.<sup>195</sup>

More questions about the definition of “public accommodation” are left unanswered as a result of *Martin*.<sup>196</sup> For example, “[i]f a law firm obtained exclusive use of a golf course for a day and invited only its clients to play on that day, would the golf course be a place of public accommodation. . . . Or would the character of the venue as public or non-public depend on its use for that particular day?”<sup>197</sup> Does the *Martin* holding now demand that every private club that meets in an auditorium, a place of public gathering,<sup>198</sup> enroll all interested disabled members of the general public? Can a contract create the “client or customer” status, thereby enabling private individuals to extend the protection of the ADA on their own terms?<sup>199</sup> *Martin* suggests that courts will answer these

<sup>194</sup> *Martin*, 532 U.S. at 678.

<sup>195</sup> *Id.* Consider *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (Or. Ct. App. 1999), which yields an interesting perspective on ADA Title delineation, specifically the delineation between Titles I and II, and emphasizes the importance of proper statutory classification. This argument can certainly be used to criticize the *Martin* case, even though *Martin* illuminates the difference between Titles I and III. *Zimmerman* describes the difference between Titles I and II in terms of “inputs,” such as employment (Title I), and the “outputs” of a public agency (Title II).

Employment by a public entity is not commonly thought of as a ‘service, program, or activity of a public entity.’ Second, the ‘action’ words in the sentence presuppose that the public entity provides an output that is generally available, and that an individual seeks to participate in or receive the benefit of such an output.

*Id.* at 1174. In applying the input/output model in the *Doe* foster care case, a puzzling problem emerges: What is the output and who gets it—the foster parent or the child? In applying the *Zimmerman* model to the *Martin* case, it seems as if Martin input much more than he received output. Martin was, therefore, more of an employee than a customer, and thus, the *Martin* case should have been considered a Title I case, not a Title III case. Martin and other golfers inputted their time and energy in order to make the PGA a lucrative enterprise; Martin’s skills and fame earned the PGA Tour money and sponsorship.

<sup>196</sup> Prior to the *Menkowitz*, discussed *infra* note 209, and *Martin* decisions, however, there was a trend in caselaw toward defining “public accommodation” with more specificity. For example, the court in *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-14 (3d Cir. 1998), stated that “public accommodation” is “all of the services which the public accommodation offers, not all services which the lessor of the public accommodations offers, which fall within the scope of Title III. . . . Restricting ‘public accommodations’ to places is in keeping with the jurisprudence concerning Title II of the Civil Rights Act. . . .” *Menkowitz*, 154 F.3d at 127.

<sup>197</sup> USGA Brief, *supra* note 188, at 117.

<sup>198</sup> 42 U.S.C. § 12181(7)(D) (2000).

<sup>199</sup> Although the Court in *Martin* states that contractual relationships will not

questions in the affirmative when they consider them in the future. This compromises many of the business and personal freedoms that Americans have until now taken for granted; private congregation is no longer private when the government is in attendance. The Court's holding erroneously expanded Title III to provide protection to persons who are neither clients nor customers of public accommodations as defined by the ADA.

The *Martin* decision will likely damage the rights and economic viability of small business owners by expanding the protection of Title III to independent contractors.<sup>200</sup> The definition of "public accommodation" includes such places as restaurants, retail establishments, service establishments and schools.<sup>201</sup> As a result of the *Martin* decision, small businesses that hire independent contractors may be subjected to higher overhead costs because they may face increased litigation relating to their hiring and other job-related decisions.<sup>202</sup> Further, the *Martin* Court extended Title III beyond clients and customers to providers of goods and services—entities meant to be exclusively covered by Title I—thereby providing an opportunity for plaintiffs to bring Title I claims under the umbrella of Title III.<sup>203</sup> Plaintiffs can more easily bring a suit

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expand a public accommodation's obligations beyond its own clients or customers, *Martin*, 532 U.S. at 678, the balance of its language in *Martin* speaks differently. For instance, *Martin* established himself as a client of the PGA in the Court's eyes by paying the \$3,000 entrance fee for the golf tournament, even though *Martin*'s well-respected status as a golfer surely served to raise revenue for the PGA. The Court looked to this contractual payment relationship between *Martin* and the PGA as evidence of his "client or customer" status and ignored the fact that *Martin* was actually an independent contractor outside of the scope of ADA benefits. This implies that going forward, the judiciary might be more apt to more closely scrutinize terms of a private agreement established within the context of public accommodation or employment, rather than examine the reality of the relationship.

<sup>200</sup> See Brief for Petitioner at \*15-20, \*29, *Martin* (No. 00-24), available at 2000 WL 1706732; Amicus Brief of the Equal Employment Advisory Council in Support of Petitioner at \*13-14, *Martin* (No. 00-24), available at 2000 WL 1706760.

<sup>201</sup> 42 U.S.C. § 12181(7)(A)-(L) (2000). Note that the definition also includes golf courses. Courts held in cases such as *Clegg v. Cult Awareness Network*, 18 F.3d 752 (9th Cir. 1994) (finding that a national organization formed for the purpose of public education was not a place of public accommodation) and *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1269 (7th Cir. 1993) (finding that the Boy Scouts organization lacked a sufficiently close connection to a "structural facility" to qualify as a public accommodation), however, that membership organizations that hold meetings and tournaments at different sites each week lacked the close connection to a particular facility or location and therefore fall outside the bounds of Title III. USGA Brief, *supra* note 188, at 110, 119.

<sup>202</sup> Brief for Petitioner at \*28-29.

<sup>203</sup> *Id.*

under Title III than under Title I. Before instituting a Title I claim, a plaintiff must first exhaust administrative remedies by filing a Charge of Discrimination with the EEOC, and the scope of the civil complaint is usually limited to the charge filed with the EEOC and the resulting investigation.<sup>204</sup> If the Court in *Martin* succeeded in expanding Title III to include Title I, it undermined the rationale for creating separate titles and made way for future petitioners to circumvent the more burdensome procedural requirements of Title I.<sup>205</sup>

While the ADA was indeed intended to effectuate sweeping reform,<sup>206</sup> it is clear that Congress intended to restrict coverage of the ADA to places that are considered to host "community activities."<sup>207</sup> Congress did not intend for the requirements of the Act to result in the closure of "mom and pop" neighborhood stores<sup>208</sup> or the loss of jobs.<sup>209</sup> As a result of the Court's rulings, small businesses may now be negatively affected by heightened administration costs in the realm of hiring practices and potential litigation costs.

The *Bragdon* and *Martin* decisions, although they are Title III cases, will also potentially affect the employment sector, which in turn might disadvantage disabled Americans.<sup>210</sup> Facilitation of litigation will naturally lead to

<sup>204</sup> 169 A.L.R. Fed. 439 (2001) (citing 42 U.S.C. §§ 12111-12117); *Reddinger v. Hosp. Cent. Servs., Inc.*, 4 F. Supp. 2d 405 (E.D. Pa. 1998).

<sup>205</sup> It is interesting to note that courts have heretofore held that Title III was never meant to apply to the "workplace." *Bercovich v. Baldwin Sch., Inc.*, 133 F.3d 141, 154 (1st Cir. 1998); S. REP. NO. 101-116, at 58 (1989).

<sup>206</sup> H.R. REP. NO. 101-485, pt. 3, at 23 (1990).

<sup>207</sup> 136 CONG. REC. H2627 (daily ed. May 22, 1990) (statements of Representative Gejdenson) (stating that the ADA "eases disabled persons' access into the work force and other central community activities"), cited in USGA Brief, *supra* note 188, at 110, 114, 115.

<sup>208</sup> Senator Orrin Hatch stated, in support of his proposed amendment to give tax breaks to small businesses, which have to make appropriate accommodations under the Act, that:

[s]omeone has to pay for our desire, Congress' desire, if you will, to accommodate persons with disabilities where such accommodations increase costs. In the case of small businesses, they are required to provide auxiliary aids and services for their customers when necessary and to provide them with access so long as doing so does not cause undue burden. . . . Even though in theory these requirements impose less costs, these costs will be more than de minimis where necessary to provide access. For some small businesses, any additional cost or administrative burden can be very troublesome.

135 CONG. REC. S10,737 (1989).

<sup>209</sup> H.R. REP. NO. 101-485, pt. 3, at 55 (1990) (discussing the improvement of business accommodations for the disabled in the financial context of what is "readily achievable").

<sup>210</sup> It is also important to note that *Martin's* holding seems to fortify a related

increased burdens on various private business operations. The *Bragdon* decision could burden the implementation of private employers' practices and policies concerning employment and insurance. *Bragdon* made it more difficult for employers to determine who is covered by the ADA, because they must now consider undetectable "disabling" conditions such as asymptomatic HIV.<sup>211</sup>

The *Martin* decision will also affect private businesses to the detriment of disabled Americans. In *Martin*, the Court extended the scope of Title III beyond the public access areas intended by Congress. Consequently, organizations that were once considered private entities now must comply with the requirements of Title III. Entities that have multiple types of business operations that make them quasi-public (described by

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Third Circuit decision, *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3d Cir. 1998). I suggest that both decisions were improperly decided and that both will negatively affect the employment sector and the interests of vulnerable social subgroups, as illustrated by *Doe. Doe v. County of Centre, PA*, 242 F.3d. 437 (3d Cir. 2001). *Menkowitz* involved a physician who, upon being diagnosed with attention-deficit disorder, provided the hospital with a written report that the disorder would not affect his ability to properly treat patients. *Id.* at 115. The hospital subsequently accused him of various infractions of hospital policies, and soon after suspended his medical staff privileges without notice. *Id.* The court held that a physician with attention-deficit disorder, who was not an employee of the hospital, could assert a claim under Title III of the ADA for denial of "full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation." 154 F.3d at 116 (citing 42 U.S.C. § 12182(a) (2000)). The court also held that because the plaintiff had an arrangement with the hospital more akin to that of an independent contractor, the plaintiff could take advantage of Title III because the hospital, a place of public accommodation, was denying him benefits due to his disability. *Id.* at 122.

It is clear that the *Menkowitz* opinion, because it is so similarly related to *Martin*, will have effects similar to those of *Martin* upon subgroups of disabled persons. The Third Circuit in *Menkowitz* distorted congressional intent in order to substantiate its determination that the non-employee physician at the hospital was a customer or client of the hospital. *Id.* at 122. Although the *Menkowitz* court found scant legislative history to bolster its holding, it gleaned its tenuous justification from a broadly worded House report which stated that "[t]he purpose of [T]itle III . . . is to extend these general prohibitions against discrimination to privately operated public accommodations and to bring individuals with disabilities into the economic and social mainstream of American life." *Id.* at 120 (citing H.R. REP. NO. 101-485, pt. 2, at 99 (1990) as well as other legislative history that seemingly endorsed such a sweeping application).

An EEOC amicus brief written in support of the petitioner in *Martin* most poignantly refutes the *Martin* and *Menkowitz* holdings, stating that "[i]n its zeal to find a cause find a cause of action, the Third Circuit overlooked the obvious: that the 'service' a hospital provides is medical care to the public, and that the staff privileges of a particular non-employee doctor are merely antecedent to that service." Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner at \*16 n.3, *Martin* (No. 00-24), available at 2000 WL 1706760.

<sup>211</sup> Mathes, *supra* note 38, at 256-57.



the Department of Justice as “mixed-use” entities),<sup>212</sup> will be considered public operations and thus have increased obligations under Title III. For example, a wholesale grocer who runs a roadside stand selling produce to the public, or a hotel that has a residential wing and a public wing, must conform each public and private segment of its facilities to the provisions of the ADA.<sup>213</sup> This is a degree of breadth and burden not contemplated by Congress, and it is not reflected in the history or language of the ADA.<sup>214</sup>

The most important thing that the ADA promises is to expand the rights and freedoms of disabled Americans. A combination of statutory limitations and judicial construction, however, yielded a reality that does not reflect the goals of the law. Every sophisticated employer is aware of, and wishes to avoid, the thorny tentacles of the unpredictable ADA.<sup>215</sup> Employers might consider a staff consisting of disabled persons as a source of vulnerability to future ADA violations and litigation. Therefore, many business entities will likely avoid hiring disabled employees for fear that the firm will be tapped of financial and emotional resources if faced with a claim under the ADA. In the end, the ADA’s somewhat draconian provisions and accompanying judicial unpredictability probably hurt disabled Americans more than it helped, an outcome contrary to legislative intent and public policy.

### III. THE ADA’S FUTURE: ITS POTENCY AND SUCCESS

Fueled by both public sentiment and the genuine need for sweeping legislative intervention, Congress enacted this arching piece of legislation but prescribed definite parameters; those businesses that lack the sophistication, the capital or the need to employ such physical and procedural accommodations are exempt from safeguarding their businesses and activities for the benefit of disabled citizens. Therefore, while it is true

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<sup>212</sup> Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner at \*13.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at \*15.

<sup>215</sup> The employment provisions of the ADA apply to only employers that have “15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . .” 42 U.S.C. § 12111(5)(A) (2000). However, nearly all states have laws prohibiting discrimination against disabled employees or applicants; these laws may affect employers with fewer than fifteen employees. Diane L. Kimberlin & Linda Ottinger Headley, *ADA Overview and Update: What Has the Supreme Court Done to Disability Law?*, 19 REV. LITIG. 579, 582 (2000).

that Congress intended the ADA to assume an expansive character,<sup>216</sup> it is also clear that Congress did not intend to bestow *carte blanche* discretion upon the courts to level the playing field for everyone, irrespective of certain important functional limitations.<sup>217</sup> Conversely, Congress did not intend for courts to “backlash” against the broad terms of the ADA by unreasonably restricting plaintiffs’ rights.<sup>218</sup> Although it is useful to expound upon statutory text where necessary to achieve equity,<sup>219</sup> it is equally important for courts to recognize that the “evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law . . . and effective review of the law by the courts.”<sup>220</sup> Ironically, it is ultimately the disabled Americans who will suffer the most.

General public policy suggests that most Americans, as employers, employees, patrons and citizens, would like to see those who are disabled receive the maximum possible benefit of protection from the legislature. Society’s desire for benevolence, however, is in tension with its desire to limit the ADA’s assistance to those who are “truly disabled.” Unfortunately, society views those with undetectable impairments with distrust and suspicion.<sup>221</sup> Often, disability is a less apparent

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<sup>216</sup> 42 U.S.C. § 12101(b) (outlining purpose of ADA); 135 CONG. REC. 19,802 (daily ed. Sept. 7, 1990) (statement of Sen. Harkin quoting Attorney General Richard Thornburgh) (“We must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country.”); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1320 (E.D. Pa. 1994) (stating that legislative history of the ADA provides for a broad reading of the ADA).

<sup>217</sup> For example, under Title I, once a plaintiff has passed the threshold by demonstrating that she has a disability under the ADA, she then has the burden to show that she is qualified to perform the essential functions of her job and that she was discriminated against because of her disability. 42 U.S.C. §§ 12111-12117.

<sup>218</sup> See Diller, *supra* note 16, at 20-21 (implying that the “dismal” outcomes for plaintiffs in lower courts is in part due to judicial backlash).

<sup>219</sup> It has often been argued that when a statute is “applied in situations not expressly anticipated by Congress[, this] does not demonstrate ambiguity. It demonstrates breadth.” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

<sup>220</sup> *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998).

<sup>221</sup> Eichhorn, *supra* note 12, at 1444. Eichhorn discusses *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144 (2d Cir. 1998), in the context of determining the scope of “major life activities.” In *Reeves*, the court held that an agoraphobic condition, which limited the plaintiff’s ability to “take vacations,” “go to the shopping mall alone” and travel “along a route which might cause [one] to cross a bridge or tunnel,” did not limit the plaintiff’s major life activity. Eichhorn, *supra* note 12, at 1444. Eichhorn stated that the court’s distrust “coincides with society’s desire to assist only the ‘truly disabled’ and to view those with invisible impairments with suspicion. This distrust, in turn, led the court to overlook the obvious disability of a man who apparently has severe difficulties functioning in the modern world.” *Id.*

characteristic than race or gender, which might account for society's measured compassion. The Court seemed attuned to the tension between society's compassion and society's distrust when deciding these high-profile cases, and its opinions appear crafted to invoke political complacency. Although it is commendable that the Court adjudicated in accordance with compassionate public policy, the intended benevolent result may never be realized.<sup>222</sup>

Predictions about the negative impact that the Court's opinions will have on the rights of future disabled plaintiffs are arguably tempered by the limited ability of plaintiffs to bring a cause of action under the ADA. Ruth Colker, in her essay entitled *ADA Title III: A Fragile Compromise*, critiqued Title III's tenuous framework and its tendency to foster ineffective and unsuccessful litigation.<sup>223</sup> Her findings suggest that the ADA is rarely an effective tool for plaintiffs: "[t]he lack of success under ADA Title III has been hidden by the seeming success of the plaintiff in the first major ADA Title III case—Sidney Abbot [in *Bragdon*]."<sup>224</sup> Judging from the overwhelming number of cases that are filed per year,<sup>225</sup> plaintiff success stories seem to be the exception rather than the rule. According to Colker, from June 1992 to July 1998, courts rendered only twenty-five appellate decisions concerning the ADA generally<sup>226</sup>—too few to establish how effectively Title III remedied problems.<sup>227</sup>

Colker suggests that the ADA failed to succeed because it was modeled in part after the CRA, and Congress adopted its

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<sup>222</sup> The *Bragdon*, *Sutton*, *Martin* and *Toyota* cases might result in greater societal distress than they were anticipated to allay. Expansion of the statutory text of Title III has undoubtedly increased access to the societal privileges and benefits of public accommodation for many disabled Americans. However, this result came at the expense of other subgroups of disabled Americans who are arguably more politically and physically vulnerable.

<sup>223</sup> See Colker, *supra* note 23.

<sup>224</sup> *Id.* at 294 (citing *Bragdon v. Abbott*, 524 U.S. 624 (1998)). Colker credited the relief given to Abbot to the ideological commitment of both parties to resolve the matter, rather than to the design of the statute.

<sup>225</sup> See Note, *Developments in the Law—Employment Discrimination*, 109 Harv. L. Rev. 1568, 1617 (1996) (stating that as of September 30, 1995, the EEOC received almost 55,000 ADA charges).

<sup>226</sup> Of these twenty-five, defendants prevailed in the lower courts through either dismissal or summary judgment in 72% of the cases, and after the appellate process was complete, defendants still prevailed in the majority of the cases. Colker, *supra* note 23, at 303.

<sup>227</sup> *Id.* at 302.

compensatory scheme accordingly.<sup>228</sup> Although the CRA remedial scheme has been effective in defending the rights of racial minorities who were denied access to public accommodations, it is too limited for disability cases,<sup>229</sup> and courts have interpreted it too narrowly.<sup>230</sup> For example, unlike in racial discrimination cases, remedying disability discrimination often requires a physical renovation of the public accommodation, which is often costly; in contrast, desegregating public accommodations to include minorities and women would likely increase patronage and, therefore, revenues.<sup>231</sup> Further, the general construction of the ADA makes it difficult to file a class action and recover remedies thereunder.<sup>232</sup>

Colker's representations regarding the relative lack of success of the statute are likely an exaggeration; the practical applications and peripheral effects of the four decisions discussed in this Note are not captured by statistics or math. Whatever effectiveness the ADA has is likely due to voluntary compliance rather than litigation.<sup>233</sup> Further, these cases will likely increase awareness of the ADA and inspire potential plaintiffs to test its power via litigation. The question that remains is whether the mounting litigation will evoke positive change. As ADA filings continue to mount, many federal courts have demonstrated their hostility to claims of discrimination on the basis of disability.<sup>234</sup> But if a high percentage of the cases results in voluntary compliance, an increase in the number of cases filed may nonetheless result in increased freedoms for the disabled. Hopefully, increased voluntary compliance is more common than refusal to hire the disabled. Unfortunately, however, the imprecision of the statute and the unpredictability of the judicial opinions construing it probably

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<sup>228</sup> See *id.* at 293-95.

<sup>229</sup> Remedying discrimination under the ADA is different than remedying it under the CRA. One example of the difference is a restaurant not serving a person because of her ethnicity, as compared to a restaurant effectively denying service by having a step before the entrance. From a purely economic standpoint, it is more business savvy to discontinue discrimination against persons because of their race because it increases patronage. Discontinuing discrimination of the disabled, however, requires physical revamping of an entire business in some cases, and the threat of injunctive relief is often not enough to encourage compliance. *Id.* at 301.

<sup>230</sup> *Id.* at 295.

<sup>231</sup> Colker, *supra* note 23, at 301.

<sup>232</sup> *Id.* at 312 n.17.

<sup>233</sup> *Id.* at 295.

<sup>234</sup> Lanctot, *supra* note 23, at 328.

encouraged many hiring employers to avoid hiring the disabled altogether; this is contrary to the result the drafters of the ADA intended.

Perhaps the best hope for maximizing the effectiveness of the ADA would be to positively affect employer attitudes about persons with disabilities,<sup>235</sup> thereby encouraging them to hire the disabled, create less discriminatory work policies and places of public accommodation, and to avoid the convoluted and costly process of litigation. Grass-root social advancement incentives, borne of a spirit reminiscent of the 1970s activist movement,<sup>236</sup> would arguably be a more direct and valuable catalysts for change.

#### IV. SOME PROPOSED REMEDIES

Both the legislature and the judiciary must reconsider the structure and application of the ADA to better effectuate equality for disabled Americans. The definition of "disability" changes with progression in the medical field and changing social policies,<sup>237</sup> and the judiciary needs direction to react appropriately. As it stands now, legislative directives surrounding the definition of "disability" compromise the legislative intent of the ADA—to instill a sense of respect and integrity towards and within the disabled community. For example, the current definition of "disability" is unworkable, because the "substantially limits a major life activity" phrase prompts the courts to inquire about inappropriate topics, such as the severity of the plaintiff's disability status, rather than focus on the defendant's biased actions.<sup>238</sup>

The inadequacy of the "disabled" definition is further exemplified when courts are prompted to analyze a claimant's impairment of the major life activity of working with respect to a "class" of jobs, not whether the claimant is unable to perform the tasks associated with her specific job.<sup>239</sup> These erroneous inquiries ignore the value of the job with respect to individual

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<sup>235</sup> Andrew I. Batavia, *Ten Years Later: The ADA and the Future of Disability Policy*, in AMERICANS WITH DISABILITIES, *supra* note 14, at 283, 289.

<sup>236</sup> See discussion *supra* Part I.A.

<sup>237</sup> See generally CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT* (1988) (discussing the background of social politics). Liachowitz wisely stated that "social policies help to create disability and social policies can help to erase it." *Id.* at 107.

<sup>238</sup> Eichhorn, *supra* note 212, at 1469.

<sup>239</sup> *Id.* at 1454.

preference and disregard the underlying equality of opportunity ideology of the ADA, which guarantees a fair opportunity to perform all jobs for which one is qualified.<sup>240</sup> In every case, the nature of the investigation (a plaintiff-centered focus) compromises the disabled individual's personal integrity.

Instead, Congress should borrow an approach utilized in tort practice. The statute should direct courts to scrutinize the defendants' biased actions more closely, putting the burden on the plaintiff to show that the defendant acted in a discriminatory way, rather than demand that the plaintiffs shoulder the burden of proving disability from the outset. According to classic tort law, in intentional tort cases, liability is extended to the defendant even in cases where the defendant could not easily have foreseen the resulting harm to the plaintiff "upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim."<sup>241</sup> The courts should use this test—a defendant's affirmative act, paired with intent to discriminate against a disabled plaintiff to ascertain violations of the ADA. This test would remove the burden from the plaintiffs to prove their disabilities and would therefore promote judicial efficiency by establishing a presumption of disability. In the rare case that the plaintiff is not disabled, the defendant should shoulder the burden of rebutting the presumption. As it stands now, the plaintiff is victimized both by the discriminatory actions of the defendant and by the burdensome pleading requirements of the ADA. This proposal would better empower disabled Americans within society and within the courtroom.

Judicial construction of the ADA must be revamped. In determining what is or is not a disability, the Court should adopt *Sutton's* case-by-case approach<sup>242</sup> (but not its attention to mitigating factors) rather than *Bragdon's* generalized approach. For example, in *Bragdon* it is evident that a case-by-case approach to major life activity would have been more

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<sup>240</sup> Mayerson & Diller, *supra* note 14, at 125.

<sup>241</sup> W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 40 (5th ed. 1984) (citing *Watson v. Rheinderknecht*, 82 Minn. 235 (1901); *Vosberg v. Putney*, 80 Wis. 523 (1891), amongst others).

<sup>242</sup> In *Sutton*, the Court required the claimants to show why the physical impairments substantially limited their specific "major life activities." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481, 483 (1999). Claimants had to show that they performed these specific life activities and that their disabilities significantly deterred them from performing these activities. *Id.* at 483.

effective and precise in affording protection to those disabled Americans who actually need it. The Court determined that asymptomatic HIV qualifies as a disability because it affects the major life activity of reproduction,<sup>243</sup> thereby excluding individuals who should receive protection of the ADA and including those who should not. If the Court had required a searching inquiry into whether the plaintiff's inability to reproduce impaired her ability to carry out her own unique life functions, the interest of justice and equity would have been better served.

Although the case-by-case analysis would provide for more equity in dispensation of statutory protection, it has drawbacks, including the risk of increased administrative costs.<sup>244</sup> Case-by-case analyses bestow too much discretion upon the judiciary to conclude that many apparently disabling conditions do not fit within the ambit of the statute.<sup>245</sup> Each ADA plaintiff potentially will be considered in a vacuum.<sup>246</sup> Therefore, not only is it possible that judicial construction will exclude many persons in need of protection from the shelter of the ADA, but it is also possible that the ADA will operate to impose "massive confusion" upon employers and lower courts.<sup>247</sup> Disability cases have caused massive confusion in the courts as it is, as a result of the myriad of nuanced constructions that the Court has superimposed upon the ADA. As long as Congress maintains its position that the inquiry is to be centered upon the disability of the claimant, rather than the alleged misdeeds of the defendant, the Court should choose one path of construction *Sutton's* individualized, case-by-case analysis.

The Supreme Court should also better observe the ADA's legislative history. Where the legislative directive is clear, as in cases regarding mitigation of disability and in cases concerning the construction of the term "public accommodation," the Court continually overlooks congressional intent.<sup>248</sup> Critics suggest that the Court finds license to distort

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<sup>243</sup> *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998).

<sup>244</sup> For a more in-depth discussion, see *Mathes*, *supra* note 38, at 259-60.

<sup>245</sup> *Lanctot*, *supra* note 23, at 331.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 332-33.

<sup>248</sup> For example, in *Sutton*, legislative history specifically stated that upon evaluating a person's disability, his or her mitigating or corrective measures should not be taken into account; the majority did not recognize this in their reasoning. *Sutton v. United Air Lines Inc.*, 527 U.S. 471, 499-500 (1999) (Stevens, J. dissenting) (citing S. REP. NO. 101-116, at 23 (1989)). Also, the *Martin* majority disregarded the

the statutory text through its own pity and benevolent compassion rather than through legislative mandate.<sup>249</sup> Regardless of the motivation, the Court continues to overstep its bounds. For example, the Court in *Martin* took what should have ended as a failed Title I case and tried it as a Title III case, disregarding the clear legislative directive to delineate between employer and patron, and private and public accommodation.<sup>250</sup> The Court ignored legislative direction and legal ramifications and thus erroneously expanded and distorted the text of the ADA.<sup>251</sup>

Additionally, perhaps expansion of state legislation will compensate for these congressional and judicial inadequacies. After passage of the CRA, many states passed their own civil rights legislation that provided broader remedial provisions than Congress provided in the CRA.<sup>252</sup> Unfortunately, the ADA has not spurred a similarly strong state response.<sup>253</sup> Although nearly every state has statutes prohibiting disability discrimination at places of public accommodation, many of the statutes are antiquated.<sup>254</sup> There is great room for improvement within the state statutory schemes, and therefore if states are persuaded to update their statutes, they might be persuaded to improve their remedial schemes as well.<sup>255</sup> For example, states probably have a more comprehensive understanding of their own commercial residents' accommodation inadequacies and can promulgate enactments that most effectively address these shortcomings. The most successful cure for statutory inefficiencies might be for states to "gap fill" in order to compensate for the ineffectiveness of federal legislation.

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client/customer language set forth in 42 U.S.C. § 12182(b)(1)(A)(iv) (2000). See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 693 (2001) (Scalia, J., dissenting).

<sup>249</sup> See *Martin*, 532 U.S. at 691 (Scalia & Thomas, JJ., dissenting) ("In my view today's opinion exercises a benevolent compassion that the law does not place it within our power to impose."); Mayerson & Diller, *supra* note 14, at 125 ("By attempting to limit the ADA to the 'truly disabled,' the Supreme Court continues to look at disability as a matter for pity rather than equality.").

<sup>250</sup> *Martin*, 532 U.S. 661.

<sup>251</sup> *Id.* at 691 (Scalia, J., dissenting).

<sup>252</sup> Colker, *supra* note 23, at 306-09.

<sup>253</sup> *Id.* at 306.

<sup>254</sup> *Id.* at 308.

<sup>255</sup> *Id.* Yet, because the states usually use the federal government as a "benchmark" for discerning what the proper parameters of the statute should be, perhaps the only significant change would come about if the federal government were to spearhead remedial reform. *Id.* at 308-09.



## CONCLUSION

The goals and structure of the ADA are so broad and ambitious that they have led to ambiguity in construction. Ambiguity in turn has led to judicial expansion and contraction of the text. Both of these phenomena have frustrated the legislative intent to provide protection to those who actually need it. Congress needs to step in and redefine the statutory parameters so that the analytical lens is focused on the defendant's deleterious acts of discrimination rather than on the nature of the claimant's disability. "The success of future disability policy will depend upon the extent to which it continues to empower individuals to achieve their goals."<sup>256</sup> The ADA can only empower individuals to achieve their goals if the statute is enveloped with a quality of legitimacy, which is a product of sound draftsmanship and application.

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<sup>256</sup> *Id.*

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