Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Co-Workers

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Abstract

This Article addresses one of the most difficult issues under the reasonable accommodation provision of the Americans with Disabilities Act (ADA): how to resolve the conflict that arises when accommodating a disabled employee negatively affects or interferes with the rights of other employees. Several scholars and the Supreme Court (in US Airways v. Barnett)[1] *have weighed in on this debate but their analyses fall short of the ultimate goal of this Article—to achieve equal opportunity for individuals with disabilities without unnecessarily interfering with the rights of other employees. In order to achieve that goal, this Article proposes a statutory amendment to the reasonable accommodation provision of the ADA. This amendment would make reasonable most accommodations that affect other employees, unless the accommodation results in the termination of another employee. In this way, more productive disabled employees will remain employed, while only placing a reasonable burden on the rest of the workforce.*

INTRODUCTION

Employees often have a negative, even visceral reaction to being treated differently from someone else in the workplace. Thus, it is not surprising that a decision to give a disabled

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[1] 535 U.S. 391 (2002).

employee a special benefit or a waiver from a rule or policy applied to all other employees will often be met with significant hostility by other employees. Accordingly, employers are reluctant to provide these benefits or waivers (collectively called accommodations) even when they may be required to allow a disabled employee to remain a productive member of the workforce. The negative reaction is magnified when these accommodations not only benefit the disabled employee but also arguably harm the non-disabled co-workers. This conflict between disabled employees and their non-disabled co-workers is the subject of this Article.

The Americans with Disabilities Act (ADA) was enacted to help individuals with disabilities achieve equal opportunity in the workplace and society.[2] Under Title I of the ADA, an employer is required to provide a qualified disabled employee with a reasonable accommodation that will allow the disabled employee to perform the essential functions of the job.[3] There are several examples of accommodations listed in the statute, and they include making the workplace accessible, modifying the work environment or the job structure, providing alternative work schedules, and reassigning a disabled employee to a different job, if it is not feasible to accommodate a disabled employee in his existing position.[4] Many of these accommodations negatively affect other employees; often, the most significant effect occurs when a disabled employee gets reassigned to another position when other non-disabled employees are interested in the same position. Yet, without the accommodation, the disabled employee would be out of a job, suffering the devastating consequences of unemployment.

This Article will attempt to resolve this conflict by amending the ADA to clearly define when an employer is obligated to accommodate a disabled employee even though the accommodation conflicts with the rights of other employees. The amendment would add a

[2] 42 U.S.C. §12101 et seq.
[3] 42 U.S.C. §12112(b)(5)(A).
[4] 42 U.S.C. 12111(9).

statement to the reasonable accommodation provision,[5] stating: "An accommodation of last resort[6] should not be deemed unreasonable because of its effect on other employees or its violation of a seniority system or other neutral policy of an employer, UNLESS its provision would result in the involuntary termination of another employee."

Part I of this Article will provide the reader with a background of the ADA and will frame the history of the debate over the proper interpretation of the reasonable accommodation provision. This debate culminated in the Supreme Court's only decision thus far to address the scope of the reasonable accommodation provision. The case, *U.S. Airways v. Barnett*,[7] also will be discussed in Part I. Part II will demonstrate that both the legislative history and the statutory language of the ADA support my conclusion that the Court erred in adopting its rule in *Barnett*. Part III will outline the proposed statutory amendment, as well as discuss the rationale for drafting the amendment as it is drafted.

Part IV will outline the normative justifications for this proposal, including: (1) the amendment helps to achieve equal opportunity for disabled individuals; (2) the amendment provides guidance to employers and courts when forced to resolve the conflict between disabled employees and their co-workers; and (3) this proposal can be justified by drawing on well-accepted Title VII jurisprudence. Finally, Part V will address the anticipated criticisms of this proposal. I will respond to two main criticisms: (1) the argument that this proposal will increase the backlash against the ADA; and (2) the criticism that the proposal is unfair because it requires employees to bear some of the burden of accommodation instead of forcing the employer to bear the entire cost of accommodation. This Article will demonstrate that this proposed amendment is

[5] 42 U.S.C. 12112(b)(5)(A).
[6] Accommodation of last resort simply means that the employer and employee have explored and dismissed the possibility of other accommodations; accordingly, the accommodation at issue is the last possible accommodation. If it is not granted, termination will most likely result.
[7] 535 U.S. 391 (2002).

not only necessary to resolve the conflict between disabled employees and their co-workers but that the burden placed on other employees in the workplace is a reasonable one.

I. THE CONFLICT: REASONABLE ACCOMMODATIONS THAT AFFECT OTHER EMPLOYEES.

A. The ADA's Provisions

Unlike other anti-discrimination statutes (such as Title VII) that protect individuals regardless of their sex, race or national origin, the ADA defines very narrowly the class of persons who can sue under the statute. In order to state a prima facie claim of discrimination, a plaintiff must prove that she is disabled, which is defined as follows: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[8] This provision is significant not only because it narrows the number of individuals who can claim they have a disability but also because it precludes a "reverse discrimination" lawsuit. A non-disabled person cannot sue under the ADA, claiming that he was treated worse than the employee with a disability.[9]

The other unique provision of the ADA is its reasonable accommodation provision. Courts and scholars have long recognized that in order for individuals with disabilities to be afforded the same opportunities as non-disabled individuals, occasionally the disabled individuals must be treated differently.[10] A simple illustration will suffice. Assume a person uses a wheelchair and seeks a job in an office building. Other, non-disabled applicants also seek the same job with the same employer. The applicant with the disability might have the same credentials as the non-disabled applicant, but unless the building is accessible for his wheelchair,

[8] 42 U.S.C. § 12102(2).
[9] RUTH COLKER, THE DISABILITY PENDULUM, THE FIRST DECADE OF AMERICANS WITH DISABILITIES ACT 97-99 (New York University Press 2005).
[10] Linda Hamilton Krieger, *Introduction*, *in* BACKLASH AGAINST THE ADA , 3 (Linda Hamilton Krieger ed., The University of Michigan Press 2003); Carlos Ball, *Preferential Treatment and Reasonable Accommodations Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 955 (2004).

he will not even get his foot in the door, literally or figuratively. Accordingly, the ADA drafters sensibly decided that the disabled community could only have the same opportunity to compete for, and work in, the same jobs as non-disabled employees if there was a mechanism to put disabled individuals on an equal playing field with non-disabled individuals.[11] That mechanism is the reasonable accommodation provision.

The ADA states that it is unlawful for employers to discriminate against individuals with disabilities and that the term discriminate includes:

> (5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;[12]

Not only did Congress prohibit the failure to accommodate, but it also defined the term "reasonable accommodation" to include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[13]

The only statutory limitation to an employer's duty to accommodate is that the accommodation cannot pose an undue hardship on the employer.[14] The statute defines undue hardship as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)."[15]

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[11] Carlos Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 955 (2004)
[12] 42 U.S.C. § 12112(b)(5)(A).
[13] 42 U.S.C. § 12111(9).
[14] 42 U.S.C. §12112(b)(5)(A).
[15] 42 U.S.C. § 12111(10). These factors will be discussed *infra* Part II.

The legislative history provides some guidance on the scope of the reasonable accommodation provision. The history states that the reasonable accommodation provision is "central to the non-discrimination mandate of the ADA."[16] Also indicated in the legislative history is that an employer can choose between various effective accommodations and does not have to automatically provide the preferred accommodation requested by the employee.[17] This limitation gives meaning to the concept of "accommodation of last resort." Because an employer does not have to provide an employee his preferred accommodation, the employer is always free to choose the least onerous accommodation, as long as it is an effective accommodation.[18] For instance, the employer is free to choose other accommodations that allow the employee to work in his current job before it considers reassignment.[19] The employer is only required to consider the reassignment accommodation when an employer is unable or unwilling to accommodate the employee in his current job.[20]

In addition to the legislative history, the EEOC's guidelines are instructive regarding the scope of the reasonable accommodation provision under the ADA, specifically the reassignment accommodation.[21] First, reassigning an individual with a disability is only required for current

[16] Legislative History of Public Law 101-336, Serial Number 102-A, Vol. 1, 479 (1990).
[17] Legislative History of Public Law 101-336, at 480; Chai R. Feldblum, *Americans with Disabilities Act: Selected Employment Requirements,* Q217 ALI-ABA 29, 65 (1992).
[18] *Id.*; Hankins v. The Gap, Inc., 84 F.3d 797, 800-01 (6th Cir. 1996).
[19] Feldblum, *supra* note __, at 61; Hankins, 84 F.3d at 800.
[20] Feldblum, *supra* note __, at 63.
[21] Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions, and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 941–42 (2003). These include: formal regulations, 29 C.F.R. §1630.1-1630.16; The Interpretive Guidance of Title I, 29 C.F.R. app. §1630.2(o) (2003); The Technical Assistance Manual, Equal Employment Opportunity Comm'n, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act §10.3 (1992); EEOC No. 915.002, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the American with Disabilities Act (herein after Enforcement Guidance).

employees, not applicants.[22] Second, employers should only consider reassignment if there are no other accommodations available that would allow the employee to perform her current job.[23] Third, a disabled employee only has a right to a truly vacant position. Accordingly, an employer is not required to bump another employee out of a job, nor is an employer required to create a job for the employee with the disability.[24] Fourth, an employer is not required to transfer a disabled employee if he is not qualified for the vacant position. But according to the EEOC, an employer is required to transfer an employee to a vacant position as long as that employee is qualified.[25] In other words, only allowing the employee to compete for the vacant position is not an accommodation according to the EEOC.[26]

B. The Conflict

The conflict discussed in this Article arises because almost all accommodations given to disabled employees affect other non-disabled employees. For instance, if an employer accommodates an employee's disability by not requiring the employee to lift anything over 30 pounds, other employees might be required to do more than their fair share of lifting to get the job done. An employer's accommodation of a disability precluding night shift work or requiring a set schedule or part-time schedule might require non-disabled employees to work less desirable shifts more often. Even offering a disabled employee a leave of absence in order to allow him to heal from a major surgery might mean other employees have to work harder or longer to make up the difference. Finally, giving a disabled employee a transfer to a vacant position might mean

[22] 29 C.F.R. app. § 1630.2(o) (2005). It would seem this would not even need to be stated, since logically, an employer cannot reassign someone who is not yet working. It would also seem that if a disabled applicant realized that a particular position required job duties that he was unable to perform that he could simply apply for a job he could perform.
[23] Enforcement Guidance ¶ 6908 at 5453; 29 C.F.R. app. § 1630.2(o) (2005); Thomas H. Christopher & Charles M. Rice, *The Americans with Disabilities Act: An Overview of the Employment Provisions*, 33 S. TEX. L. REV. 759, 779 (1992).
[24] ADA Title I EEOC Interpretive Guidance, 29 C.F.R. app §1630.2(a); Enforcement Guidance ¶ 6908 at 5453.
[25] This would, of course, be subject to the undue hardship limitation.
[26] *See* Befort, Arizona, *supra* note __, at 943–44 (citing EEOC Enforcement Guidance).

that a non-disabled employee has to forego the opportunity to transfer into the same position. It is this conflict that is most often discussed by courts and scholars.

Prior to the Supreme Court decision in *US Airways v. Barnett*, lower courts primarily discussed the conflict between employees with disabilities and those without in the context of a reassignment accommodation that violated the provisions of a collective bargaining agreement. The majority of cases decided pre-*Barnett* adhered to a per se rule that the ADA does not require employers to violate an applicable seniority provision in a collective bargaining agreement to comply with the ADA's reassignment provision.[27]

However, a few courts have rejected the per se rule regarding collective bargaining agreements and accommodations. For instance, in 1997, the United States Court of Appeals for the District of Columbia rejected the per se rule and adopted a balancing approach to resolve the employee's reasonable accommodation claim under the ADA, though the judgment was later vacated.[28] The Ninth Circuit in *Barnett v. US Airways, Inc.* did an about face from its earlier "per se rule" holdings, when it held that the presence of a seniority system was merely "a factor in the undue hardship analysis."[29] Of course, *Barnett* was different in that its seniority system was unilaterally imposed by the employer, rather than the product of a collective bargaining

[27] Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 809-10 (5th Cir. 1997) ; Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1051 (7th Cir. 1996); Cochrum v. Old Ben Coal Co., 102 F.3d 908, 912-13 (7th Cir. 1996); Kralik v. Durbin, 130 F.3d 76, 83 (3d Cir. 1997); Lujan v. Pacific Maritime Assoc., 165 F.3d 738, 742 (9th Cir. 1999); Willis v. Pacific Maritime Assoc., 236 F.3d 1160, 1160 (9th Cir. 2001).

[28] Aka v. Washington Hospital Center, 116 F.3d 876, 894–95 (D.C. Cir. 1997), reh'g en banc granted and judgment vacated, 124 F.3d 1302 (D.C. Cir. 1997). The first appellate decision in this case held that the district court erred in resting its dismissal of Aka's "reasonable accommodation" claim on the conclusion that any collective bargaining agreement bars the disabled employee from claiming an entitlement to an accommodation under the ADA. The court in this case found the fact that a requested accommodation does not fall squarely within the terms of the applicable collective bargaining agreement is relevant only insofar as it undermines the employee's claim that the accommodation is reasonable or strengthens the employer's affirmative defense that the accommodation could not be provided without undue hardship. *Id.*

[29] Barnett v. US Airways, Inc., 228 F.3d 1105, 1120 (9th Cir. 2000); *but see* Foreman, 117 F.3d 809-10; Cochrum, 102 F.3d 912-13; Eckles, 94 F.3d 1051; Benson, 62 F.3d 1114 (all following the per se rule that the ADA does not require employers to violate an applicable seniority provision of a collective bargaining agreement).

agreement.[30] The court held that a "case-by-case fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer."[31]

Scholars also disagreed about the proper scope of the reassignment accommodation. As was true in the courts, much of the debate centered on how to handle the situation where a disabled employee needed to transfer to a vacant position as the last resort but other employees had either superior seniority or qualifications.[32] When the conflict involved a more qualified non-disabled employee, some scholars argued that the duty to accommodate should require an employer to give the vacant position to the individual with the disability as a reasonable accommodation.[33] They argued that the ADA's central goal of enabling individuals with disabilities to remain in the "economic and social mainstream of American life" will not be accomplished without the transfer, because the disabled employee would no longer have a job.[34] Other scholars, however, argued that requiring an employer to put the disabled employee in the vacant position when there are better-qualified candidates goes far beyond the intent of the ADA by creating preferences for disabled employees.[35]

Scholarly debate also surrounded the treatment of collectively bargained seniority systems. Some scholars argued that the ADA does not support the per se rule adopted by courts that the reassignment provision should never force an employer to violate seniority rights under a

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[30] Barnett, 228 F.3d at 1118.
[31] Barnett, 228 F.3d at 1120.
[32] *See* Jeffrey Berenholz, *The Development of Reassignment to a Vacant Position in the Americans with Disabilities Act*, 15 HOFSTRA LAB. & EMP. L.J. 635, 653 (1998); Estella J. Shoen, *Does the ADA Make Exceptions in a Unionized Workplace? The Conflict Between the Reassignment Provisions of the ADA and Collectively Bargained Seniority Systems*, 82 MINN. L.R. 1391, 1391-1393, 1401-24 (1998); Stephen F. Befort and Tracey Homes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE. L. REV. 1045, 1064-73 (2000).
[33] Befort and Donesky, supra note __, at 1088; Schoen, supra note __, at 1420-21.
[34] Befort and Donesky, supra note __, at 1088-89.
[35] Jennifer Beale, *Affirmative Action and Violation of Union Contracts: The EEOC's New Requirements Under the Americans with Disabilities Act*, 29 CAP. U. L. REV. 811, 821 (2002); Thomas F. O'Neil III and Kenneth M. Reiss, *Reassigning Disabled Employees Under the ADA: Preferences Under the Guise of Equality?*, 17 LAB. LAW. 347, 350-51 (2001).

collective bargaining agreement. These scholars believe that the per se approach substantially weakens the ADA and violates its intent by making it easier to keep disabled individuals out of the workforce instead of eliminating discrimination.[36] Scholars at the other end of the spectrum favored the per se rule because they believe that a balancing or case-by-case approach to these conflicts would leave employers too vulnerable to the threat of litigation.[37] These debates culminated in the *Barnett* case.

C. The Barnett *Case*

In *U.S. Airways v. Barnett*, the plaintiff Robert Barnett was employed as a cargo handler when he injured his back on the job. His injury precluded him from carrying out some of the functions of his job as a cargo handler.[38] Accordingly, he used his seniority under US Airways' voluntary and unilaterally imposed seniority system (i.e., not a seniority system bargained for under a collective bargaining agreement) to transfer to a position in the mailroom, which he could perform even with the limitations caused by his back impairment.[39] After Barnett spent two years in that position, the company made the decision to open the position to seniority bidding and at least two other employees, both with more seniority than Barnett, expressed interest in the mailroom position.[40] Barnett asked his employer to allow him to remain in the position as a reasonable accommodation for his back disability. The company considered this

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[36] Schoen, *supra* note __, at 1410; Judith Fornalik, *Reasonable Accommodations and Collective Bargaining Agreements: A Continuing Dispute*, 31 U. TOL. L. REV. 117, 140-41 (1999); Robert A. Dubault, *The ADA and the NLRA: Balancing Individual and Collective Rights*, 70 IND. L. J. 1271, 1295-96 (1995) (proposing a balancing approach to the conflict between the ADA and the NLRA when a disabled employee requests an accommodation); Barbara Kamenir Frankel, *The Impact of the Americans with Disabilities Act of 1990 on Collective Bargaining Agreements*, 22 SW U.L. REV. 257, 260 (1992).

[37] O'Neil and Reiss, *supra* note __, at 358; Condon McGlothen & Gary Savine, Eckles v. Consolidated Rail Corp.: Reconciling the ADA with Collective *Bargaining Agreements: Is This the Correct Approach?*, 46 DEPAUL L. REV. 1043, 1044 (1997).

[38] *Id*. at 394.

[39] *Id.*

[40] *Id*.

request, but eventually denied it, and allowed one of the employees with more seniority to transfer into the position, resulting in Barnett's termination.[41]

As noted above, there was disagreement among courts and scholars regarding whose interests should trump—the rights of the employee with a disability under the ADA or the rights of other, non-disabled employees under a seniority system.[42] The Supreme Court decided this issue in favor of the non-disabled employees, holding that, in the majority of cases, a request for a reasonable accommodation should not trump the provisions of a seniority system, regardless of whether the employer is bound to the seniority system by contract (through a collective bargaining agreement negotiated with a union) or has full authority to change the seniority system at will (as in *Barnett*).[43] The court did state that a plaintiff could present evidence of special circumstances making a seniority rule exception reasonable, thus defeating an employer's demand for summary judgment.[44]

In addition to its discussion of the ultimate holding in the case, the Court also addressed the appropriate burden of proof. The Court held that a plaintiff only needs to show that an accommodation seems reasonable on its face, and then the employer has the burden of showing that the accommodation would cause an undue hardship.[45] While one might think that this case would have turned on the undue hardship provision, thereby placing the burden on the employer, the Court held otherwise.[46]

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[41] *Id.*
[42] Carlos Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 956 (2004) (discussing the different sides taken by the appellate courts).
[43] Barnett, 535 U.S. at 406.
[44] *Id.*
[45] *Id*. at 402.
[46] *Id*. This is pure speculation of course, but it seems likely that the Court did not want the decision to turn on the undue hardship analysis, because that term is specifically defined in the statute, where the term "reasonable" can be subject to many different interpretations.

The Supreme Court ultimately concluded that a proposed accommodation is not reasonable if it violates a seniority system, and the ADA does not require case-by-case proof that the seniority system should prevail.[47] The Court cited several reasons to support this conclusion, including the importance of seniority systems to employee-management relations, the fact that seniority systems under collective bargaining agreements trump a requested reasonable accommodation in the context of the linguistically similar Rehabilitation Act,[48] and the fact that several circuit courts have reached similar conclusions.[49] The Court noted that "the relevant seniority system advantages, and related difficulties that result from violations of seniority rules, are not limited to collectively bargained systems."[50]

The Court's final argument in support of its holding was that nothing in the ADA suggests that Congress intended to undermine seniority systems.[51] The Court stated that seniority systems were created to ensure consistent, uniform treatment of employees and their success depends on these expectations.[52] Because requiring an employer to show more than simply the existence of a seniority system would undermine the seniority system's very purpose, the Court held that an employer is ordinarily only required to point to the existence of a seniority system to have summary judgment awarded in its favor.[53] As stated earlier, the Court did note that a plaintiff is free to show special circumstances to prove that the requested accommodation, based on the particular facts, is reasonable despite a seniority system.[54] The plaintiff has the

[47] *Id.* at 403.
[48] The Court's comparison to the Rehabilitation Act is misplaced because the Rehabilitation Act did not contain reassignment as a possible accommodation, while the ADA does. *Infra* notes __ and accompanying text.
[49] *Id.* at 403.
[50] *Id.* at 403.
[51] Barnett, 535 U.S. at 404–05. This is a conclusion with which I completely disagree, as will be discussed below.
[52] *Id.* at 404.
[53] *Id*. at 405.
[54] *Id.*

burden in this regard and must explain why an exception to the seniority system would constitute a reasonable accommodation.[55]

Barnett was not a unanimous opinion. Justices Stevens and O'Connor joined Justice Breyer's majority opinion, but both wrote separate concurring opinions. Justices Scalia, Thomas, Souter, and Ginsburg dissented.[56] While Justice Stevens' concurring opinion adds little, Justice O'Connor argued that the inquiry should turn on whether the seniority system is legally enforceable.[57] However, she realized her separate opinion would have led to a failure of the Court to arrive at a resolution of the case, so she signed on to the majority's opinion.[58]

Justice Scalia's dissent criticized both the uncertainty resulting from the majority's test, and what he believes is a mistaken interpretation of the ADA. In his view, the accommodation provision only requires "suspension (within reason) of those employment rules and practices *that the employee's disability prevents him from observing.*"[59] Justice Scalia believes that the only accommodations that are required are ones to remove a barrier that burdens a disabled person because of his disability. Because, in his view, neutral policies and practices burden everyone equally, accommodations in the form of preferential treatment are not required.[60]

On the other hand, Justice Souter's dissent argued that nothing in the ADA insulates seniority rules from the reasonable accommodation requirement. He argued that the legislative history of the ADA makes clear that there was no intention to carve out an exception for

[55] *Id*. at 406. The Court provides a non-exhaustive list of examples when an employee could show that an accommodation would be reasonable despite a seniority system: the employer has retained the right to change the seniority system unilaterally and exercises that right frequently or the system already contains exceptions and that one further exception is unlikely to matter. *Id.* at 405.
[56] *Id.* at 393.
[57] *Id*. at 408 (O'Connor, J., concurring).
[58] *Id*. at 408.
[59] *Id*. at 412 (Scalia, J., dissenting) (emphasis in original).
[60] *Id*. at 413.

seniority systems.[61] Justice Souter also emphasized the fact that Barnett was already in the mailroom position and that US Airways had full authority to not classify the mailroom position as vacant in the first place.[62]

The majority decision in *Barnett* is troubling because it will lead to the termination of more productive employees with disabilities. Not only does this have consequences to the disabled employee and his family, but it also has negative consequences to the employer, who is losing a valuable employee, and to society, who might have to bear the cost of supporting the disabled employee if he is unable to find another job. Not only is the *Barnett* decision troubling from a normative perspective, but it is also doctrinally wrong, as evidenced by the statutory construction and legislative history.

II. THE ERROR OF *BARNETT*

Regardless of how *Barnett* is interpreted, it falls short of Congress' goal of equal opportunity for individuals with disabilities. This Part will argue that both the expansive view and the narrow view of *Barnett* are erroneous.

A. An Expansive View of Barnett

Some scholars have argued that *Barnett* is not limited to cases where an accommodation violates a seniority system.[63] In fact, Cheryl Anderson believes that a broad reading of *Barnett* could lead to the conclusion that the Court has developed a "neutral policy presumption," whereby any accommodation that violates a neutral rule is presumptively unreasonable.[64] This, she correctly believes, would turn the ADA's reasonable accommodation provision on its head

[61] *Id*. at 420-22 (Souter, J., dissenting).
[62] *Id*. at 423.
[63] Cheryl L. Anderson, *"Neutral" Employer Policies and the ADA: The Implications of US Airways, Inc. v. Barnett Beyond Seniority Systems,* 51 DRAKE L. REV. 1, 35-36 (2002). Several lawyers, giving advice to clients in the aftermath of *Barnett* were uncertain of its breadth. Need cites.
[64] *Id*.

because most accommodations are a deviation from a neutral policy rule.[65] She also is concerned (rightfully so) that *Barnett* will make it harder for disabled employees to get accommodations when those accommodations affect other employees.[66] If *Barnett* could be read broadly to prohibit all accommodations that have a negative effect on other employees or otherwise violate a neutral rule,[67] the statutory language of the ADA flatly contradicts that rule.

As noted in Part I, several accommodations are mentioned in the statutory language of the ADA itself.[68] The only limitation to the reasonable accommodation provision mentioned in the statute itself is the "undue hardship" defense.[69] The statute lists several factors that courts should consider in deciding if a proposed accommodation creates an undue burden. They are:

> (i) the nature and cost of the accommodation needed under this Chapter;
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation under the operation of the facility;
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type and the location of its facilities; and
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[70]

Notably absent from this list is "the effect such an accommodation has on other employees in the workforce." Certainly this omission is not inadvertent. Congress had to know when drafting the ADA, that some (if not most) accommodations would affect other employees and that those

[65] *Id*. at 37.
[66] *Id*. at 41.
[67] For a decision applying the *Barnett* rule beyond the reassignment accommodation, see Shields v. BCI Coca-Cola Bottling Co. of LA, 2005 WL 2045887 (W.D. Wash, Aug. 25) (denying an accommodation for day shift work and limited overtime because of seniority system).
[68] 42 U.S.C. § 12111(9).
[69] 42 U.S.C. § 12112(b)(5)(A).
[70] 42 U.S.C. § 12111(10)(B).

employees might feel that the accommodation gives an unfair advantage to the employee with the disability.[71]

Yet despite Congress's knowledge that many reasonable accommodations will burden other employees, Congress did not write an exception into the statute to protect non-disabled employees. It could have accomplished this in several different ways. First, Congress could have allowed a broader class of persons to bring a complaint alleging a violation of the ADA. In other words, as it stands now, only individuals with a disability (as that term is narrowly defined both in the statutory language itself and even more so by the courts) can bring a claim under the ADA.[72] A non-disabled person cannot bring a reverse discrimination suit under the ADA, claiming that someone with a disability was treated better than he was.[73] If Congress was worried about the effects accommodations might have on other employees, it could have broadened the protected class to include everyone. For instance, it simply could have added "disability" as a protected category under Title VII, but it did not. It chose to draft a very specific statute with a provision not seen in traditional discrimination law. Accordingly, it must have presumed that some non-disabled employees would be affected by some accommodations, yet it chose not to give them a remedy.

Another, less drastic way Congress could have acknowledged the effects of accommodations on other employees is by limiting the definition of reasonable accommodation.

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[71] *See* Legislative History of Public Law 101-336, at 480 (commenting that unlike other civil rights laws, the ADA would impose costs on others).

[72] 42 U.S.C. § 12111(8) (defining qualified individual with a disability) and § 12112(a) (stating that no employer can discriminate against a qualified individual with a disability); COLKER, *supra* note __, at 18, 97–99. For cases that have limited the definition of disability, see Sutton v. United Airlines, Inc., 527 U.S. 471,482-83 (1999); Murphy v. UPS, Inc., 527 U.S. 516, 525 (1999); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555, 564-65 (1999); Toyota Motor Manufacturing v. Williams, 534 U.S. 184, 197-98 (2002).

[73] COLKER, *supra* note __, at 97–99; Ball, *supra* note __, at 981 (arguing that critics of affirmative action like to refer to the reasonable accommodation provision as reverse discrimination that benefits minorities at other's expense. This criticism is not applicable to reasonable accommodation cases because preferential treatment is required by law); SUSAN GLUCK MEZEY, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT, 43 (2005).

For instance, Congress could have stated: "An accommodation that has a significant effect on other employees is not reasonable." Similarly, it could have included the effect on other employees as a factor under the undue hardship provision. Again, it chose not to. Accordingly, it is safe to assume that Congress considered the interests of the non-disabled, and chose to protect disabled individuals instead.

B. Narrow View of Barnett

Even if we assume that *Barnett* is limited to conflicts under seniority systems and reassignment to vacant positions,[74] there is no statutory support for such a limitation. There is absolutely nothing in the ADA's legislative history to support the Court's holding in *Barnett*.[75] In fact, the legislative history suggests the opposite—that Congress intended the obligation to transfer a disabled employee to a vacant position to be a very broad one.[76] In one of the Senate Reports, it states:

> Reasonable accommodation may also include reassignment to a vacant position. If, an employee, because of his disability, can no longer perform the essential functions of the job that she or he has held, a transfer to a vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker.[77]

The Report also contains language supporting the EEOC's position that reassignment is not available to applicants, that efforts should be made to accommodate in the employee's current

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[74] There is some argument that *Barnett* is not so limited. *Supra* notes __ and accompanying text.

[75] Rebecca Pirius**,** "Seniority Rules": Disabled Employees' Rights Under the ADA Give Way To More Senior Employees – U.S. Airways v. Barnett,29 WM. MITCHELL L. REV. 1481,1499 (2003). (arguing that the Court's ruling in *Barnett* ignores the legislative history regarding the effect of seniority systems under the ADA). Some would argue that there is little sense in referring to legislative history because it cannot possibly represent what Congress thought. COLKER, *supra* note __, at 208 (quoting Justice Scalia, referring to the "fairyland in which legislative history reflects what was in Congress's mind").

[76] *Cf.* COLKER, *supra* note __, at 23 (stating that courts have generally ignored the legislative history of the ADA and have thus interpreted the statute very narrowly).

[77] S. REP. NO. 101–116, at 31–32 (1989).

position before transferring the employee, and that reassignment is only possible to a vacant position—no bumping is required.[78]

As stated earlier, it would have been easy for Congress to add a limitation under the reasonable accommodation provision or undue hardship provision, precluding an accommodation that would cause an employer to violate a seniority system, whether that system was one derived through collective bargaining or unilaterally imposed by the employer. Other commentators have criticized the *Barnett* decision, pointing out that there is no seniority system defense in the text of the ADA.[79] In fact, such an exception was deliberately left out because seniority systems, virtually always established by the nondisabled constituencies, were viewed as part of the problem the ADA was designed to address.[80]

While the Senate Report discusses collective bargaining agreements, it does not mention seniority systems that are not implemented through a contract—such as the unilaterally imposed one in *Barnett*.[81] Even with respect to collective bargaining agreements, the history follows the regulations promulgated under Section 504 of the Rehabilitation Act—that an employer's obligation to comply with the Act is not affected by any inconsistent term of any collective bargaining agreement to which it is a party."[82]

The legislative history does state that a collective bargaining agreement could be relevant in determining whether an accommodation is reasonable. It states: "[I]f a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be

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[78] S. REP. NO. 101–116 at 32.
[79] *E.g.*, Linda Hamilton Krieger, *Sociolegal Backlash*, *in* BACKLASH AGAINST THE ADA 340, 350; *see also* Matthew B. Robinson, Comment, *Reasonable Accommodation vs. Seniority in the Application of the Americans with Disabilities Act,* 47 St. Louis U. L.J. 179, 204 (2003). (noting that both the "House and the Senate Reports contain language to the effect that seniority policies are but one factor in determining whether an accommodation of a disabled employee would be a reasonable accommodation.").
[80] S. REP. NO. 101-116, at 29.
[81] S. REP. NO. 101-116, at 32.
[82] *Id*. at 32 (stating that an employer cannot use a collective bargaining agreement to accomplish what it would otherwise be prohibited from doing).

considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to that job."[83] This sentence is the only arguably relevant language in the legislative history and yet it does more to undermine the Supreme Court's position in *Barnett* than to support it, for several reasons. First, the mailroom position in *Barnett* was not reserved for someone with more seniority than Barnett. Barnett had enough seniority for the job—there was simply someone who had more seniority than he did. Second, the comparative lack of seniority is simply one factor to be considered, and could presumably be outweighed by other factors—such as the fact that the employee stood to lose his job without the transfer. In fact, in discussing the effect of collective bargaining agreements, the House Report also states: "The [collective bargaining] agreement would not be determinative on the issue."[84] Third, and perhaps more importantly, the situation in *Barnett* did not involve a collective bargaining agreement.[85] Violating a collective bargaining agreement through the provision of an accommodation could be relevant to the undue hardship analysis because an employer could be financially liable to the non-disabled employee for breaching the collective bargaining agreement.[86] However, in the situation in *Barnett*, with a unilaterally imposed and modifiable at will seniority system, the threat of litigation by the non-disabled employees is slim, at best.[87]

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[83] *Id*. at 32.

[84] H.R. REP. NO. 101–485 at 63 (1990); *see also* Christopher and Rice, *supra* note __, at 781 (noting that a collective bargaining agreement is not dispositive of the issue, and suggesting that if the transfer is the only accommodation, it might need to be provided even despite a collective bargaining agreement to the contrary). This is significant because under the Rehabilitation Act of 1973, courts were automatically deferring to the collective bargaining agreements but under the ADA, Congress rejected that automatic deference. Feldblum, *supra* note _, at 68.

[85] Barnett, 535 U.S. at 392.

[86] This is the position taken by Professor Stephen Befort, in his article, *Reasonable Accommodation and Reassignment Under the Americans With Disabilities Act: Answers, Questions & Suggested Solutions After U.S. Airways v. Barnett*, 45 ARIZ. L. REV 931 (2003). He argues that the courts should focus on the undue hardship analysis, rather than the reasonableness factor. *Id*. at 982. Befort suggests this proposal because he believes most transfer policies are enacted for the benefit of the employer, not the employees. *Id*. at 980. Accordingly, under the undue hardship analysis, if a non-disabled employee has a legal entitlement to a vacant position under such a system, then reassignment would be inappropriate. *Id*. at 981.

[87] *Supra* notes __ and accompanying text.

Fourth, that statement quoted above (regarding the collective bargaining agreement as a factor), is qualified by a statement in the same report that "Conflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodations may be avoided by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation."[88] Because Congress believed that employers and unions should negotiate their collective bargaining agreements to allow for accommodations under the ADA, it certainly seems that a unilaterally imposed seniority system should contain a provision allowing for accommodations under the ADA. Because Congress discussed in some detail collective bargaining agreements, the absence of any mention of the issue in *Barnett*—seniority systems that are unilaterally imposed—speaks volumes.[89]

Finally, the lack of a statutory exemption for seniority systems of any type (collectively bargained or unilaterally imposed) is another clear signal that Congress did not intend the result in *Barnett*. When drafting the ADA, Congress relied in part on the anti-discrimination provisions of Title VII,[90] which contains a statutory exemption for seniority systems that states: "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system . . ."[91]

[88] S. REP. NO 101–116 at 32.
[89] *See Barnett*, 535 U.S. at 422 (Souter, J., dissenting) (arguing that because Congress did not protect collectively bargained seniority systems, surely it could not have intended greater protection for unilateral ones).
[90] *See*, *e.g.*, Pirius, *supra* note __, at 1483–84 (citing to language in Barnett, 535 U.S. at 403).
[91] 42 U.S.C. §2000e-2(h).

Because Congress was most certainly aware of the seniority system protection in Title VII, its omission of such a provision in the ADA is very significant.[92]

Accordingly, the *Barnett* Court erred by holding that seniority systems trump an employer's duty to provide reasonable accommodations.[93] Not only did Congress not contemplate carving out such an exception, but also logically, it does not make sense. The main argument one can make in support of treating seniority systems differently is that they have an effect on other employees, in that the non-disabled employees have expectations to be treated in accordance with the rules of the seniority system. However, most accommodations have an effect on other employees; some effects are just more subtle.[94] For instance, accommodating an employee with a night vision impairment by giving him the day shift would require other employees to work the less desirable night shift more often.[95] Accommodating an employee with a lifting restriction might mean that a non-disabled employee has to do more than his fair share of the heavy lifting. Providing a leave of absence to a disabled employee might necessitate other employees working longer hours or working harder to make up the difference.[96] And of course, allowing a disabled employee to transfer to a vacant position might affect another employee who wanted that same position. Yet all of these accommodations are mentioned as possible

[92] *See*, *e.g.*, Pirius, *supra* note __, at 1482–83 (stating that, inapposite from Title VII, Congress decided to limit the deference afforded to seniority systems and collective bargaining agreements under the ADA); MEZEY, *supra* note __, at 62; *Barnett*, 535 U.S. at 420-21 (Souter, J., dissenting) ("Because Congress modeled several of the ADA's provisions on Title VII, its failure to replicate Title VII's exemption for seniority systems leaves the statute ambiguous, albeit with more than a hint that seniority rules do not inevitably carry the day.").
[93] *Cf.* Seth Harris, *Re-Thinking the Economics of Discrimination: US Airways v. Barnett, the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV. 123, 180-185 (2003) (arguing that the Barnett decision needed further analysis to see if the seniority system provided enough benefit to outweigh the disadvantage of violating the seniority system by accommodating the employee with a disability).
[94] *See* Anderson, *supra* note __, at 37–38 (arguing that the Barnett decision will hurt other employees with disabilities because many other accommodations affect other employees).
[95] *But see* LaResca v. American Tel. & Tel., 161 F. Supp. 2d 323 (D.N.J. 2001) (holding that an employer was not obligated to accommodate the day shift preference of an employee with a seizure disorder who could not drive at night).
[96] Long, *supra* note __, at 870–71.

accommodations under the ADA.[97] It is non-sensical to assume that Congress would put limitations on some of the listed accommodations but not all of them. Accordingly, the Court's opinion in *Barnett*, which announced a separate rule for reassignments, is simply incorrect.

The Court in *Barnett* also based its decision to protect seniority systems on the "linguistically similar" Rehabilitation Act.[98] However, this reliance is misplaced because the reassignment accommodation was not included in the regulations implementing the Rehabilitation Act of 1973.[99] While most accommodations are taken from §504 of the Rehabilitation Act, reassignment is new to the ADA.[100] Under the Rehabilitation Act, courts were divided as to whether reassignment was a reasonable accommodation. Congress decided to clear up the confusion by explicitly listing it as an accommodation, yet because of the concerns of employers, added language that reassignment is only appropriate to a "vacant" position.[101] This fact leads to the reasonable inference that Congress had some concern for other employees; they should not be bumped out of their job in order to make way for an employee with a disability.[102] However, Congress did not put any further limitation on the reassignment accommodation. It very easily could have listed reassignment to a vacant position as a potential

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[97] 42 U.S.C § 12111(9).
[98] Barnett, 535 U.S. at 403-404
[99] Feldblum, *supra* note __, at 63–64; Katie Eyer, *Rehabilitation Act Redux*, 23 YAL L. & POL'Y REV. 271, 297 (2005) (stating that prior to the passage of the ADA, reassignment to another position was generally not considered a reasonable accommodation under the Rehabilitation Act) (citations omitted); Befort, Arizona, *supra* note __, at 944; Sarah Shaw, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments,* 90 CAL. L. REV. 1981, 2046, n. 25 (2002) (citations omitted); Andrikopoulos & Gould, Note, *Living in Harmony? Reasonable Accommodations, Employee Expectations and US Airways v. Barnett,* 20 HOFSTRA LAB. & EMP. L.J. 345, 363-64 (2003) (arguing that the Barnett court erred in relying on Rehabilitation Act precedent, because there are differences between the Rehabilitation Act and the ADA, most notably the provision of the "reassignment" accommodation under the ADA, yet not under the Rehabilitation Act); Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans With Disabilities Act*, 65 U. PITT. L. REV. 597, 611–12 (2004) (stating that courts almost uniformly held that reassignment was not a required accommodation under the Rehabilitation Act); Befort, *supra* note __, at 449, 451–52 (discussing how prior to 1992, the Rehabilitation Act did not include a reassignment provision).
[100] Feldblum, *supra* note __, at 63.
[101] *Id*.
[102] *Id*.

accommodation and added the exception "unless another employee has superior seniority rights and/or is more qualified for the position." It chose not to.

III. ARRIVING AT AN AMENDMENT

A. Other Scholarship on Barnett: *Alex Long's Proposal*

After *Barnett* was decided, several notes, comments and articles were written referencing the *Barnett* case. [103] While many of these pieces were critical of *Barnett*, few offered any concrete proposals for change and none of their analyses go far enough to solve the problems left by the *Barnett* decision.[104] Some scholars have criticized the *Barnett* decision and suggest that the inquiry of whether an employer is obligated to transfer an employee to a vacant position when someone else has more seniority turns on the legitimacy of the co-worker's expectations for uniform treatment under the seniority system.[105] Others believe that the only limitation on the

[103] *See, e.g.*, Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties,"* 68 MO. L. REV. 863 (2003) (agreeing with the result but not the reasoning of *Barnett*); Stephen J. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439 (2002); Befort, Arizona, *supra* note _, at 967 (agreeing with the result in *Barnett* but suggesting a different test; Stephen F. Befort, *Accommodation at Work: Lessons from the Americans With Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615 (2004). Matthew B. Robinson, Comment, *Reasonable Accommodation vs. Seniority in the Application of the Americans with Disabilities Act*, 47 ST. LOUIS U. L.J. 179 (2003) (disagreeing with the result in Barnett in part because of the legislative history of the ADA, as well as the fact that the risk to the employer of litigation by the non-disabled, non-transferred employee is minimal); Barbara L. Campbell, *U.S. Airways v. Barnett: did the Supreme Court Further Cloud Rather Than Clarify the "Reasonable Accommodation" Requirement Under the Americans with Disabilities Act, in Light of Barnett?*, 28 T. MARSHALL L. REV. 101 (2002) (criticizing the result in Barnett, in part because of its lack of clarity); Blake Sonne, Note, *Employment Law: Reasonable Accommodation Under the Americans with Disabilities Act vs. Employee Seniority Rights: Understanding the Real Conflict in U.S. Airways v. Barnett*, 57 OKLA. L. REV. 225 (2004) (arguing that the decision was wrong because it gave disabled employees too much); Sandy Andrikopoulos & Theo E.M. Gould, Note, *Living in Harmony? Reasonable Accommodations, Employee Expectations and US Airways, Inc. v. Barnett*, 20 HOFSTRA LAB. & EMP. L.J. 345 (2003) (arguing that the Barnett decision was too ambiguous and suggesting that the reassignment decision should turn on whether the employer has reserved the right to make exceptions to seniority systems); Paul L. Nevin, Note, *"No Longer in the Middle?": Barnett Seniority System Ruling Eliminates Management's Dilemma with Americans with Disabilities Act, Reasonable Accommodation*, 41 BRANDEIS L.J. 199 (2002) (undecided); Cheryl L. Anderson, *"Neutral" Employer Policies and the ADA: The Implications of US Airways, Inc. v. Barnett Beyond Seniority Systems*, 51 DRAKE L. REV. 1 (2002) (disagreeing with the result in *Barnett*).

[104] The problems I am referring to are the fact that the *Barnett* decision results in the lawful termination of valuable employees with disabilities and the decision leaves quite a bit of uncertainty in its future applications.

[105] *See, e.g.*, Andrikopoulos & Gould, *supra* note __, at 378; Befort, Arizona, *supra* note __, at 979-80.

duty to accommodate an employee with a disability is the undue hardship defense.[106] Many scholars have criticized the approach taken by the majority in the *Barnett* case, but do not offer any reasonable alternative. One scholar, however, did offer a concrete proposal for change and his article warrants further discussion.

In Professor Alex Long's article, *The ADA's Reasonable Accommodation Requirement, and "Innocent Third Parties,"*[107] he attempts to provide a solution to the problem of an accommodation's effect on other employees.[108] Long focuses on how an employer's duty to provide reasonable accommodations to employees with disabilities affects "innocent" third parties, i.e., the co-employees of the disabled employee. He suggests that courts need to focus on how a reasonable accommodation might affect co-employees, but he criticizes other tests, including the Supreme Court's approach in *U.S. Airways v. Barnett*.[109]

Long correctly points out that the greatest conflict over reasonable accommodations is not the costs levied on employers but the negative effect accommodations might have on other employees.[110] While he believes that many needed accommodations have no effect on co-workers because they simply involve a cost to the employer, such as modifying the structural aspects of a disabled employee's workplace,[111] he then notes what has been emphasized here—that many other accommodations have a more prominent effect on other employees.

Regarding the most controversial accommodation, reassignment, Long acknowledges the severity of the impact on the disabled employee if he is denied reassignment, yet finds

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[106] *See, e.g.*, Anderson, *supra* note __, at 41-43.
[107] Long, *supra* note ___.
[108] *Id*.
[109] *Id*. at 865–66.
[110] Long, *supra* note ___, at 869.
[111] *Id*. at 869. This analysis fails to take into account that money spent by the employer on a disabled employee is money that cannot be spent on other employees in terms of wage increases and other benefits. If one assumes that the employer will want the same profit, then the pot of money to spend on employees necessarily decreases when an employer is spending money on a reasonable accommodation for a disabled employee.

significance in the harm to the non-disabled employees if the employee with the disability is accommodated. He states:

> As reassignment is the accommodation of last resort, if a disabled employee is denied the vacancy, the employee will be out of a job and, because of his or her disability, may have difficulty obtaining a new job. If a better qualified employee is denied the vacancy, presumably he or she will still have a job, just not the job desired. However, the impact on the better qualified employee could be more than de minimis. For whatever reason, the employee desired to move into the new position, so presumably the employee considered the vacant position to be an improvement over the employee's current position. Moreover, the vacant position may objectively be an improvement over the current position even though it is not technically a promotion.[112]

Long criticizes the courts' approaches as a "standardless grab bag."[113] While Long believes that the majority's opinion in *Barnett* reached the right result, he criticizes how the majority arrived at its opinion.[114] He states that the focus of the majority's opinion was on the other employees' expectation of consistent, uniform treatment, and this focus provides little guidance to lower courts in cases not involving seniority rules. Instead, he argues, the court's emphasis should be on the tangible effects such decisions have on other employees, rather than the effects of the accommodation on the expectations of consistent, uniform treatment of other employees.[115]

In articulating his own test, Long first argues that Congress did not intend to remedy the problems of individuals with disabilities by requiring that employers take action that would cause other employees to suffer a materially adverse impact, although he recognizes that much of

[112] *Id*. at 884.
[113] *Id*. at 893.
[114] *Id*. at 896.
[115] *Id*. at 897.

the scholarship in this area takes exactly the opposite stance—that the non-contractual rights of other employees are of secondary importance to the interests of a disabled employee.[116] Based on his belief that the rights of non-disabled co-workers should not be ignored, Long proposed the following rule: that a proposed accommodation is not reasonable "when it would violate the contractual rights of another employee or otherwise result in an adverse employment action (as that term is defined through case law) for a non-disabled employee."[117]

B. Long's Missing Link: Comparing the Consequences

While Long's approach makes sense from a doctrinal perspective (because it could be easily applied by using current case law) and seems to make sense from a fairness perspective (because it only denies disabled employees an accommodation if such accommodation would result in an adverse employment action for the other employees), it fails to take into account the relative degree of harm to the two parties. As Justice Souter pointed out in his dissent in the *Barnett* case, if a disabled employee is denied an accommodation, he is *out of a job*, whereas the non-disabled employee who does not get the transfer *still has his job*.[118] This disparity in consequences is troubling, and the fact that it can be accomplished despite the ADA's clear goal of providing equal opportunity to the disabled is even more disturbing.

Because of this disparity in consequences, I sought to develop a balancing test, which I refer to as the "comparative consequences test." The idea of this test is to compare the consequences to the disabled employee if the accommodation is not granted with the consequences to the non-disabled employee if the accommodation is granted. However, when applying this test, one finds that the balancing test is rather a heavy-handed one, leading in most

[116] *Id*. at 898. I, of course, disagree with his assertion that Congress did not believe that eliminating discrimination against individuals with disabilities was more important than protecting non-disabled employees. *Supra* Part II.
[117] Long, *supra* note __, at 901.
[118] Barnett, 535 U.S. at 423 (Souter, J., dissenting).

instances to requiring an accommodation. The reason for this result is that most accommodations that significantly affect other employees (like a reassignment accommodation) are "accommodations of last resort." In other words, the employer has considered and dismissed all other potential accommodations that would allow the employee to remain in his current position and therefore has determined that reassignment is the only option left. If the reassignment accommodation is not given, termination will result.[119]

Accordingly, the balancing test would only favor the non-disabled employee if an accommodation would lead to the non-disabled employee's termination—admittedly, a relatively rare occurrence. Therefore, instead of suggesting Congress adopt a balancing test with its uncertainty and accompanying inefficiencies, this Article proposes a bright line rule that would be easy to apply and would most often reach the same result as the balancing test.[120]

C. The Amendment

This proposed amendment would add language to the reasonable accommodation provision stating: "An accommodation of last resort should not be deemed unreasonable because of its effect on other employees or its violation of a seniority system or other neutral policy of an employer UNLESS its provision would result in the involuntary termination of another employee." According to this amendment, a requested accommodation would be deemed unreasonable only if the accommodation would lead to the involuntary termination of the non-disabled employee.[121]

1. Why Termination?

[119] It should be noted that if there is another accommodation that would not infringe (as much) on other employees' interests, the employer is free to choose that accommodation, as an employer is not required to give a disabled employee his preferred accommodation, only a reasonable one.
[120] For a discussion on why it is fair to place the burden of accommodation on other employees, see *infra* part V.B.
[121] The reader should keep in mind that even if an acc is deemed reasonable pursuant to this amendment, the employer still has the opportunity to demonstrate that the acc creates an undue hardship. This might occur if the employer was subject to significant legal liability because the accommodation violates an employer's contractual rights.

Application of this amendment would obviously lead to a different result in *Barnett*. Even though someone might consider a transfer extremely important, not getting the transfer but remaining employed is still less severe than the harm to the disabled employee if the accommodation is not granted (termination).[122] At worst, the non-disabled transfer seeker can remain in his position until another position becomes vacant, while the worst-case scenario for the disabled employee is much more severe: loss of job.[123]

In balancing the conflicting interests of the employees, the line is drawn at termination. The rationale for this decision is based on the severity of termination, as the workplace equivalent of "capital punishment."[124] Many people have their whole life identity wrapped up in their job and occupation. For them, termination means not only a loss of regular paychecks, but also means "dashed expectation as to future benefits, a loss of character and personal identity,

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[122] Ball, *supra* note __, at 962 (noting that able-bodied employees get to remain employed without the transfer whereas the disabled employee would be out of a job). Professor Anderson also makes an argument similar to the one in this Article, that the other employees denied the transfer if it is given to the employee with a disability, are not harmed that much, because their attainment of a transfer is likely just delayed, rather than the consequences to the individual with a disability who is out of a job without an accommodation. Anderson, *supra* note __, at 42. As an aside, one could also argue that allowing the accommodation transfer is beneficial to the employer as well, because it saves the employer the administrative costs of replacing the employee with a disability. Such costs are estimated at $1,800-2,400, which is roughly 40 times the cost of the average accommodation. Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—the Workplace Accommodations*, 46 DEPAUL L. REV. 877, 903 (1997).

[123] Befort, *supra* note __, at 982–83.

> Consider, in this regard, the respective fates of two employees—one disabled and one not—who each desire the same vacant position. If the disabled employee is denied the requested transfer, he or she is out of a job. Since reassignment is the accommodation of last resort, the opportunity to be placed in this vacant position represents the disabled employee's "last chance" to remain employed with that particular employer. In contrast, the consequences suffered by the non-disabled employee who does not obtain the desired transfer are less severe. The non-disabled worker remains employed in his or her current position, and the chance to move into a more desirable position is deferred rather than lost. Given this significant disparity in consequences, the scale generally should tip in favor of the disabled employee in the absence of a showing of an undue hardship.

Id.

[124] Lorraine A. Schmall, *Keeping Employer Promises When Relational Incentives No Longer Pertain: "Right Sizing" and Employee Benefits,* 68 GEO. WASH L. REV. 276, 277-78 (2000); Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will,* 34 LOY. L.A. L. REV. 351, 353 (citing MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 910 (4th ed. 1998).

and the loss of the financial security one expected."[125] Another scholar has said this about termination:

> Dismissal affects a person's economic, emotional, and physical health in ways unparalleled by less drastic forms of discipline or transitory interruptions of work. Not only does dismissal have immediate financial consequences for the discharged worker, it also has an economic impact into the future. . . . The loss of one's job is felt not only by the individual worker but by members of his or her family and the community. . . . If the termination is the result of factors other than an employee's conduct or performance, the loss can be devastating.[126]

While some might argue that not getting a desired transfer (as in *Barnett*) is very serious, in the world of the workplace, most would agree that job security is the single most important factor for the vast majority of employees.

While I recognize that Congress did not intend to protect non-disabled individuals under the ADA,[127] fairness and justice, as well as a pragmatic concern that providing no protection to the non-disabled co-workers would result in increased hostility against disabled employees, leads me to the conclusion that an accommodation should not be given if it results in the termination of another employee. There is no faster way of ensuring hostility toward the disabled community than taking away job security of other employees, which is at the heart of the benefits sought by most employees.

2. Application and Limitations (Bumping)

Generally, this rule would be easy to apply. There are some factual scenarios, however, that would not be so easily resolved. Suppose both a disabled and a non-disabled employee want a transfer to a vacant position and suppose the non-disabled employee has more seniority. We must also assume (for purposes of this example) that: the vacant position has different hours or more flexible hours than the current position in which the non-disabled employee is working; she

[125] Schmall, *supra* note __, at 278.
[126] Young, *supra* note __, at 353.
[127] *Supra* notes __ and accompanying text.

is seeking the vacant job because it better suits her child care arrangements, and she has decided that if she does not get the position, she will quit her job and look for something more flexible. While this represents a close call,[128] the scales would tip in favor of the disabled employee because termination would be voluntary for the non-disabled employee, whereas if the accommodation is not granted, termination for the disabled employee would be involuntary. Furthermore, it is likely more difficult for an individual with a disability to find a job than a non-disabled employee.[129] Finally, the employer has a legal obligation to accommodate the disabled employee and does not have a similar obligation with respect to the non-disabled employee.[130]

Admittedly, under this proposed amendment, there are not many scenarios where the non-disabled employee's interests would trump the interests of the disabled employee—I can imagine one. Suppose an employer is preparing to engage in a mass layoff, and both the disabled employee and a non-disabled employee with more seniority attempt to transfer to another department that will not be affected by the lay-off. In this case, both employees are threatened with loss of their jobs and the rights of the disabled employee should not trump.[131]

This proposed amendment would adhere to the statutory language of only allowing an accommodation to a "vacant" position.[132] Accordingly, an employer would not be required to bump a non-disabled employee out of his position so that the disabled employee could have the

[128] This is an especially difficult issue for me to resolve because I care deeply about issues surrounding working mothers, and I think employers should offer more flexibility to working mothers. *See, e.g.*, Nicole Porter, *Re-Defining Superwoman: An Essay on Overcoming the Maternal Wall in the Legal Workplace*, 13 DUKE J. GENDER L. & POL. 55 (2006). Some have argued that the reasonable accommodation principle should apply to other contexts and it is my sincere hope that the ADA will result in employers realizing there are benefits to restructuring positions and other accommodations given to the disabled and that this will result in a willingness to expand these accommodations to non-disabled employees, including working mothers.

[129] Long, *supra* note __, at 884.

[130] If in fact the employer had a legal obligation to give the non-disabled employee the preferred shift (perhaps under an FMLA obligation) then the employer should give the schedule variance in the non-disabled employee's current position.

[131] I recognize that the harm from termination is likely to be worse for the disabled employee because it likely will be more difficult for him to find a job. However, based on the severity of termination and the concern for hostility, this result is the correct one.

[132] 29 C.F.R. § 1630.2(o)(2)(ii).

physically easier job, because presumably bumping an employee out of his job would result in that employee's termination. There might be situations where an employer could force an employee out of his position to make room for a disabled employee, but then assign the displaced employee to another position of similar quality and pay. In this situation, one could argue that bumping a non-disabled employee does not lead to his termination and therefore, the proposed amendment should allow the bumping. However, that result is unjustifiable for a couple of reasons.

First, it would be directly contradictory to the statutory language of the ADA. While this Article has suggested an amendment to the ADA, the amendment is consistent with the legislative history and statutory language of the Act. In other words, it is this author's belief that if Congress had given sufficient attention to the conflict between disabled employees and non-disabled employees, it likely would have supported a result similar to the one this Article is advocating. On the other hand, Congress did give sufficient attention to the issue of bumping and decided that bumping would not be allowed.[133]

A second justification for not allowing disabled employees to bump other employees can be gleaned from the endowment effect used by social scientists.[134] Applying this theory lends support for my position that bumping an employee from his position is qualitatively worse than allowing a disabled employee to transfer to a vacant position ahead of a non-disabled employee. The endowment effect theorizes that individuals value entitlements they are in possession of

[133] The reasonable accommodation provision states that an appropriate accommodation might be "reassignment to a ***vacant*** position." 42 U.S.C. §12111(9) (emphasis added); *see also* S. REP. NO. 101-116 at 31-32 (indicating that no bumping is required to transfer a disabled employee).

[134] *See* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003). A disclaimer is needed. I am not a social scientist and this Article does not purport to undertake an in-depth analysis of the endowment effect. Instead, I am merely using evidence of this effect to support what is very intuitive to me: that being bumped from your current job is substantively more unfair and troubling than not being allowed a transfer to a job you do not yet have.

more than ones they are not.[135] A related theory, and perhaps one that is more relevant in this context, is the status quo bias, which theorizes that "individuals tend to prefer the present state of the world to alternative states, all other things being equal."[136] Researchers are not quite sure what causes the endowment effect, but one hypothesis is relevant here. It has been suggested that loss aversion is a cause of the endowment effect and that this loss aversion may occur because individuals form attachments to what they have.[137] This seems especially true with jobs. Even despite our society's increased mobility in the workforce, many individuals view even a voluntary job change with trepidation, and being forced from one's job, even if placed in another position, would certainly increase that emotional response. Accordingly, the endowment effect explains the intuitive conclusion that bumping an employee from his job is worse than not allowing him to transfer into a new position because a disabled employee is placed in the new position instead.

One might argue that allowing a disabled employee to transfer into a position ahead of a non-disabled employee with more seniority is taking away the seniority rights of the non-disabled employee, to which he undoubtedly has a strong sense of entitlement. I do not disagree that employees operating under a seniority system have a strong interest in their competitive seniority within the company. Competitive seniority determines not only transfers but also dictates shifts, layoffs, and recall from layoffs.[138] The more seniority an employee has, the more protection he has from being subject to a layoff.[139] But this proposed amendment does not take away the non-disabled employee's seniority and does not put the disabled employee ahead of the non-disabled employee in the seniority queue. It only affects one transfer to one position. As has

[135] Korobkin, *supra* note __, at 1228.
[136] Korobkin, *supra* note __, at 1228-29.
[137] Korobkin, supra note __, at 1251.
[138] Franks v. Bowman Transportation Co., 424 U.S. 747, 766 (1976); Barnett at 404-05.
[139] Franks 424 U.S. at 766, Barnett at 404-05.

been stated by many other scholars who criticized the result in the *Barnett* decision, if the non-disabled employee did not get the desired transfer, he would still have the opportunity and the requisite seniority to transfer into the next available position in which he was interested.[140] Accordingly, this proposal does not take away the seniority rights of non-disabled employees; it only requires one transfer at one time, when necessary to keep a valuable employee employed.

Finally, this proposed amendment is not the only limitation on the reasonable accommodation requirement. This amendment does not negate the undue hardship defense, and there are many accommodations that would truly pose such a hardship to employers.[141] This proposed amendment would be limited to the situation where the accommodation does not pose any undue hardship to the employer based on an analysis of the factors (and is in fact often costless)[142] but does negatively affect other non-disabled co-workers. Put another way, this amendment only determines the reasonableness of the accommodation. It does not answer the next question in the analysis—whether the accommodation creates an undue hardship for the employer.

IV. JUSTIFICATIONS FOR THE PROPOSED AMENDMENT

A. Achieving Equal Opportunity

[140] *See, e.g.*, Befort, *supra* note __, at 982–83.
[141] For instance, forcing an employer to undertake significant legal liability, via suits by other employees, would possibly place an undue hardship on the employer. Thus, in situations where an employer is bound to a seniority system via contract, that employer might face legal liability if it violates the seniority system to give a transfer to a disabled employee. However, as suggested in my discussion of the legislative history, for collective bargaining agreements adopted after the ADA was enacted, an employer and a union should include a provision exempting accommodations made pursuant to the ADA from coverage under the collective bargaining agreement. *Supra* notes __ and accompanying text; *see also* Anderson, *supra* note __, at 41 (arguing that these issues should turn on the undue hardship analysis, which supports Congress's intent in wanting to rid of the over-protection of employer's policies that serve to subordinate the disabled); Befort, *supra* note__, at 981–82.
[142] Many accommodations, in fact, cost very little or nothing. Blanck, *supra* note __, at 902.

The legislative history of the ADA indicates that discrimination results not only from actions or inactions "that discriminate by effect as well as by intent or design,"[143] but also from the "adoption or application of standards, criteria, practices or procedures that are based on thoughtlessness or indifference—that discrimination resulting from benign neglect."[144] Accordingly, Congress declared that: "the Nation's proper goal[] regarding individuals with disabilities [is] to assure equality of opportunity. . . ."[145] Because Congress sought to give equal opportunity to individuals with disabilities, it sensibly included the reasonable accommodation provision. This proposal helps to further the goal of equal opportunity. Disabled individuals must have an opportunity equal to that of non-disabled employees to compete and work in the workplace, considered in its entirety and not just in one particular job.[146] Critics of this proposal might argue that with respect to a reassignment request, simply allowing a disabled employee to compete for the vacant position serves the goal of equal opportunity[147] because the disabled individual is being given the same opportunity as the non-disabled employees.[148] That argument might make sense if the goal of equal opportunity is limited to one particular position.

However, the language and history of the ADA reveals that Congress envisioned an equal opportunity goal that encompassed the entire workplace of the employer and not just one position. Evidence of this intent can be gleaned from the fact that Congress included "reassignment" as a potential accommodation under the ADA.[149] This inclusion is even more telling because, as stated earlier, the reassignment accommodation was not included in the

[143] Legislative History of Public Law 101-336, at 302.
[144] *Id*.
[145] 42 U.S.C. § 12101(a)(8).
[146] Matthew Diller, *Judicial Backlash, the ADA, and Civil Rights Model of Disability, in* BACKLASH AGAINST THE ADA 62, 85 ("Individuals should have access to the entire range of jobs available in the relevant labor market, not simply a means of obtaining some minimal foothold in the world of paid labor.").
[147] EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1027 (7th Cir. 2000).
[148] *Id*.
[149] 42 U.S.C. 12111(9).

regulations implementing the Rehabilitation Act of 1973, from which the reasonable accommodation provision of the ADA was derived.[150] The fact that Congress chose to add the reassignment accommodation leads to the reasonable inference that Congress conceptualized a level of equality greater than simply allowing the disabled employee to have an opportunity to work in the one position for which he was hired; instead, Congress envisioned an equal opportunity goal that encompasses the entire workplace.

If the goal of the ADA is to give disabled employees an equal opportunity to compete and work in the "workplace," defined more broadly to include the entire company, then this proposal serves that goal of equal opportunity.[151] If a non-disabled employee is not given a transfer, he still has the opportunity to continue to work for his employer. On the other hand, if a disabled employee is not given a transfer, he does not have the same opportunity to work for the employer; he would be terminated.[152] Thus, my proposal, which would most often allow transfer accommodations, furthers the ADA's clearly expressed goal of equal opportunity.[153]

Other scholars have made arguments that support this approach. Professor Diller notes that courts' suggestions that, rather than seek an accommodation, plaintiffs should find another

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[150] Feldblum, *supra* note __, at 63–64; Katie Eyer, *Rehabilitation Act Redux*, 23 YALE L. & POL'Y REV. 271, 297 (2005) (stating that prior to the passage of the ADA, reassignment to another position was generally not considered a reasonable accommodation under the Rehabilitation Act) (citations omitted); Befort, Arizona, *supra* note __, at 944; Sarah Shaw, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments,* 90 CAL. L. REV. 1981, 2046, n. 25 (2002) (citations omitted); Andrikopoulos & Gould, *supra* note __, at 363–64 (arguing that the Barnett court erred in relying on Rehabilitation Act precedent, because there are differences between the Rehabilitation Act and the ADA, most notably the provision of the "reassignment" accommodation under the ADA, yet not under the Rehabilitation Act); Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans With Disabilities Act*, 65 U. PITT. L. REV. 597, 611–12 (2004) (stating that courts almost uniformly held that reassignment was not a required accommodation under the Rehabilitation Act); Befort, *supra* note __, at 449, 451–52 (discussing how prior to 1992, the Rehabilitation Act did not include a reassignment provision).

[151] *Cf*. Diller, *supra* note __, at 69–70 (noting that some courts suggest that the ADA only requires a baseline level of access to some jobs, but that this is a quite different objective than equal opportunity). Some have even gone further to suggest that equality of opportunity in the broad sense is the chance to lead as happy of a life as everyone else. Pamela S. Karlan and George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodations,* 46 DUKE L. J. 1, 25 (1996).

[152] *See* Diller, *supra* note __ at 75 (stating that Barnett's request for an accommodation is not a claim for redistribution of employer assets; instead it is a claim for "equality, fair play, and meritocracy").

[153] 42 U.S.C. § 12101(b).

job where no accommodation is needed, "runs counter to the basic proposition for which ADA Title I stands, that people with disabilities should have access to the fullest possible range of jobs, within the limits of the reasonable accommodation principle."[154]

Some have argued that a transfer accommodation is different from other accommodations because other accommodations are needed to eliminate the obstacles and barriers caused by the non-disabled majority.[155] For instance, re-configuring machines or job functions is more readily seen as equal opportunity because those obstacles prevent the disabled person from successfully working and were put in place with a bias toward the non-disabled.[156] But a transfer accommodation can be seen in the same light.[157] The only reason a disabled employee needs a transfer is because the employer is unable or unwilling to modify the employee's existing job to rid of the barriers put in place without consideration of disabled individuals.[158] Accordingly, a transfer accommodation is the same as any other type of accommodation: it simply eliminates the subordination of the disabled caused by designing workplaces around the bodies of the able-bodied.[159]

While critics might argue that special or preferential treatment cannot be equal opportunity, other disability-rights scholars disagree with that assertion. As Professor Ball has

[154] Diller, *supra* note __, at 69.
[155] Long, *supra* note __, at 871–72.
[156] Ball, *supra* note __, at 960.
[157] *Id*. at 962 (arguing that even a transfer accommodation serves the goal of equal opportunity because the transfer does not give the disabled employee an unfair advantage).
[158] *Id*. at 986–87.
[159] Harlan Hahn, *Equality & the Environment: The Interpretation of "Reasonable Accommodations" in the Americans with Disabilities Act*, 17 J. REHAB. ADMIN. 101, 103 (1993). Everything has been standardized for a model human being whose life is untouched by disability. All aspects of the built environment, including work sites, have been adapted for someone; the problem is that they have been adapted exclusively for the nondisabled majority. *Id*.

argued: the disability rights movement needs to "break the taboo that accompanies a discussion of preferential treatment in our society."[160] He further states:

> [T]he basic equality goals of the ADA will remain unfulfilled unless we are willing to provide individuals with disabilities, when appropriate, with reasonable forms of preferential treatment. Such treatment is not inconsistent with equality of opportunity in the area of disability; instead . . . the former is a necessary means for the attainment of the latter.[161]

Because our society has been designed around the able-bodied, sometimes the only way to allow a disabled individual to remain a productive member of the workforce is to grant preferential treatment in the form of reasonable accommodations. This proposal furthers Congress' goal of equal opportunity by giving reasonable accommodations to individuals with disabilities when doing so is necessary to allow such an individual to remain employed.

B. Providing Guidance to Employers and Courts

Another justification for this proposal is that it provides a bright-line rule to give guidance to employers and courts when dealing with the conflicting interests of employees with and without disabilities. The state of the law is in flux regarding an employer's obligation to accommodate a disabled employee when that accommodation affects other employees. If one accepts the narrow view of *Barnett*—that it only applies to reassignments that violate a seniority system—even that rule is subject to an exception. The Court stated in *Barnett* that ordinarily the defendant need only point to the existence of a valid seniority system to avoid accommodation,[162] but the plaintiff can still demonstrate special circumstances to prove that the accommodation is reasonable despite the seniority system.[163] Justice Scalia and others criticized the Court's failure to develop a bright-line rule precisely because the lack of a clearer standard is

[160] Ball, *supra* note __, at 995.
[161] *Id*.
[162] Barnett, 535 U.S. at 405.
[163] Barnett, 535 U.S. at 406.

likely to increase litigation.[164] Furthermore, as discussed earlier, some believe that *Barnett* is not limited to cases where an accommodation violates a seniority system.[165] Because the scope of *Barnett* is unclear, employers, courts, and lawyers will continue to be confused regarding an employer's obligation to provide reasonable accommodations when they affect other employees.[166]

This confusion serves no one well. It increases litigation because employers and disabled employees (as well as their lawyers) are unsure of the scope of an employer's obligation to accommodate under the ADA. Uncertainty in the law also harms employers because it leads them into the proverbial catch-22. Employers often want to follow the law, and most employers would not enjoy terminating a disabled employee, especially if that employee was a valuable worker, despite his disability. But if an employer accommodates the disabled employee in a way that affects other employees, those employees are likely to protest such an action. Accordingly, employers are conflicted regarding whether or not to provide the accommodation, especially because the law as is stands now does not dictate the result. Even with respect to the reassignment accommodation, *Barnett* does not dictate the result. *Barnett* only states that an employer is often not required to accommodate—it does not state that the employer cannot accommodate. Especially when the employer's seniority system is unilateral and the employer

[164] Barnett, 535 U.S. at 412 (Scalia, dissenting); Campbell, *supra* note __; Andrikopoulos & Gould, *supra* note __ at 347; Long, *supra* note __, at 893 (referring to the Court's approach as a "standardless grab bag"); *see also* McDermott Will & Emery, "U.S. Supreme Court Bolsters the Integrity of Seniority Systems in Disability Case" (May 2002) (advising employers that questions remain after the *Barnett* decision).

[165] *See supra* notes __ and accompanying text.

[166] Evidence of this confusion can be gleaned from the bulletins or newsletters written by lawyers representing employers. For instance, attorneys from Kirkpatrick & Lockhart advised their clients that the *Barnett* rule could be extended to other disability-neutral workplace policies. Kirkpatrick & Lockhart, *K & L Alert: Employment Law* (May 2002). They stated: "If an accommodation request violates a clearly established and closely adhered to personnel policy, *and* the accommodation would be unfair and disruptive to other employees and their expectations under the policy, an employer could deny the request as unreasonable." *Id*. Adams & Reese, LLP attorneys also questioned whether "the Supreme Court's decision [applies] to other disability-neutral employment policies that control job assignments?" Adams & Reese, *Labor and Employment ALERT: Bona Fide Seniority System Usually Trumps ADA Accommodation Request* (June 2002).

has reserved the right to modify it at will (which most employers do), the employer can choose to make an exception to the seniority system by giving the disabled employee the transfer even though someone with more seniority also wants the position. Therefore, employers must make the difficult decision to favor either the disabled employee who needs the transfer to remain employed or the non-disabled co-workers who might be upset if the accommodation is given to the disabled employee.

This proposal takes away that discretion by providing an easily applied bright-line rule. While some employers might prefer to have that discretion, others would likely prefer having the law dictate the result, in part because it gives the employer a justifiable excuse for accommodating the disabled employee: it is required by law. If this proposal was enacted, eventually employers would write exceptions into their seniority systems to let employees know that accommodating a disabled employee does not constitute a violation of the seniority system. Once this provision is known to employees, they would not have their expectations dashed when the employer transfers the disabled employee instead of the non-disabled co-workers.

Because disabled employees and employers stand to benefit by the bright-line rule proposed in this Article, Congress should enact this amendment. Indeed, the fact that many employers might prefer this bright-line rule may help the political feasibility of the amendment's enactment.

C. Drawing an Analogy to Title VII

Since the ADA's enactment, there have been several attempts by scholars to categorize the reasonable accommodation provision of the ADA into the broader anti-discrimination vs. affirmative action debate.[167] In other words, are accommodations necessary simply to achieve

[167] Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 828 (2003)

equal opportunity or do accommodations tip the scales in favor of disabled individuals and therefore constitute affirmative action?[168] This subpart will briefly discuss this debate. However, regardless of whether reasonable accommodations are considered necessary to avoid discrimination or are considered affirmative action, this subpart will demonstrate that the amendment proposed in this Article is appropriate by drawing analogies to (relatively) well accepted Title VII jurisprudence.

1. Anti-Discrimination or Affirmative Action?

Although the ADA was modeled in part after Title VII of the Civil Rights Act of 1964,[169] some believe it is premised on a very different theory of equality.[170] The ADA was referred to as a "second generation" civil rights statute, "advancing formal and structural models of equality by imposing both a duty of accommodation and a duty of formal nondiscrimination."[171] Title VII is primarily an anti-discrimination statute, not requiring an employer to do anything affirmative, but rather, only requiring an employer not to discriminate.[172] Other than in the religion context,[173] Title VII does not require an employer to take any affirmative steps on behalf of a protected employee, and in fact, forbids an employer in most instances from granting preferential treatment to members of a minority group.[174] Whereas Title VII only requires an employer to treat individuals equally, and not consider any prohibited classifications when making an

[168] This question matters to many people because traditional anti-discrimination law is viewed more favorably than affirmative action.
[169] 42 U.S.C. §2000(e) et seq.
[170] Krieger, *supra* note __, at 3.
[171] Krieger, *supra* note _, at 5.
[172] *Id*. at 3.
[173] 42 U.S.C. §2000e(j); Trans World Airlines v. Hardison, 432 U.S. 63 (1977); Feldblum, *supra* note __, at 66-67.
[174] 42 U.S.C. §703(a); *but see* United Steel Workers of America v. Weber, 443 U.S. 193 (1979).

employment decision,[175] the ADA is referred to as a "special treatment" statute, because it requires employers to sometimes treat employees differently because of their disability.[176]

In fact, some argue that not only are accommodation mandates substantively different from antidiscrimination mandates, but that they actually rise to the level of affirmative action. For example, in one case,[177] Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit criticized the EEOC's position that reassignment to a vacant position required an employer to transfer a qualified, disabled employee even if he was not the most qualified for the position.[178] The EEOC's argument was that only requiring the employer to consider such an employee does not amount to an accommodation at all, but rather is an empty promise.[179] Judge Posner referred to the EEOC's policy as "affirmative action with a vengeance."[180] The allure of lumping together reasonable accommodations and affirmative action is compelling. Both concepts require an employer to take positive steps to overcome the historic disadvantages experienced by the subordinated group.[181]

But these arguments do not tell the whole story, nor do they tell the more compelling story. From a practical perspective, reasonable accommodations vary from traditional affirmative action because reasonable accommodations focus on individuals rather than groups.[182] On a

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[175] Matthew Diller, *Judicial Backlash, the ADA, and Civil Rights Model of Disability*, *in* BACKLASH AGAINST THE ADA 62, 65.
[176] *Id*. at 65 ("The ADA's requirement of 'reasonable accommodation' rests on the idea that, in some circumstances, people must be treated differently to be treated equally.").
[177] EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000).
[178] *Id.* at 1027-28.
[179] *Id.* at 1027
[180] *Id.* at 1029.
[181] Kay Schriner and Richard K. Scotch, *The ADA and the Meaning of Disability*, *in* BACKLASH AGAINST THE ADA, 164, 184; *see also* Karlan and Rutherglen, *supra* note __, at 14 ("Reasonable accommodation is affirmative action in the sense that it requires an employer to take account of an individuals disabilities to provide special treatment to him for that reason."). Other scholars, however, note that even though commentators analogize affirmative action to the reasonable accommodation provision under the ADA, the statute in fact requires no affirmative action, and this actually hurts the disabled. Marta Russell, *Backlash, the Political Economy, and Structural Exclusion, in* BACKLASH AGAINST THE ADA 254, 260; Blanck, *supra* note __, at 893.
[182] *Supra* notes ____ and accompanying text.

theoretical level, many scholars have argued that accommodations simply further the goal of nondiscrimination, and are therefore not much different than other, more accepted anti-discrimination laws.[183] There are two primary arguments made. First, avoiding discrimination under traditional anti-discrimination statutes (such as Title VII) often costs an employer money much in the same way as accommodating an employee under the ADA.[184] Second, the perceived physical limitations that require accommodation are not caused by the disability itself but by socially installed barriers put in place by the non-disabled majority. According to this argument, accommodations are needed simply to remedy the discrimination inherent in a workplace and society structured around the able bodied.[185]

Christine Jolls makes the first argument above—that the accommodation requirements of statutes such as the ADA and the Family Medical Leave Act (FMLA) are not much different from other anti-discrimination laws, specifically Title VII of the Civil Rights Act, because both impose costs on employers for the benefit of a particular class of employees.[186] Her argument that accommodations are similar to other anti-discrimination measures is based primarily on a comparison to disparate impact law under Title VII.[187] Employers often have to avoid hiring

[183] *See, e.g.*, Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination,* 153 U. PA. L. REV. 579, 597 (2004); Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 898–920 (2004) (arguing that the reasonable accommodation provision is very similar conceptually to our other antidiscrimination theories); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 652 (2001) (arguing that other aspects of traditional antidiscrimination law, notably the disparate impact theory, are the same as accommodation requirements); Bagenstos, *supra* note __ at 834-35.
[184] *See supra* sources cited at __.
[185] *See supra* sources cited at __.
[186] Jolls, *supra* note __, at 649-51.
[187] Jolls, *supra* note __, at 651.

practices that have a disparate impact on minority groups even when those practices are economically efficient for the employer to use.[188]

Scholars also argue that even avoiding simple discrimination (not making a distinction based on a protected category, such as race or sex) costs employers money if that discrimination could be considered "rational" discrimination. Because antidiscrimination law prohibits "rational discrimination," that is, using race or sex as a proxy in what might be an economically sensible way for an employer, Samuel Bagenstos argues that "accommodation mandates . . . do nothing more than present a special case of the general problem of rational discrimination."[189]

As indicated above, the other primary argument made to equate accommodation mandates with anti-discrimination mandates is that accommodations are needed to remedy the discrimination inherent in a workplace structured around the able-bodied. For instance, Mary Crossley argues that "antidiscrimination laws are broadly concerned with the removal of barriers that prevent historically disadvantaged groups from enjoying equal opportunities to participate fully in the richness of American society"[190] and that these barriers are not related to the disability itself but are caused by the way society has structured our world without consideration of the needs of the disabled person in mind.[191]

Crossley also argues that because our society has been erecting barriers that deprive disabled persons of the full participation in society, that process itself is discriminatory.[192]

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[188] Jolls, *supra* note __, at 652. Disparate impact liability is a theory of liability first recognized by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and later codified in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k). A claim brought under a disparate impact theory does not allege that the employer had the intent do discriminate against the individual or group of individuals; but rather, argues that a neutral employment practice or selection criteria have a disproportionate adverse impact on the protected group. Griggs, 401 U.S. at 431. If the employer wishes to continue using such a criteria or following such a practice, it must prove that the practice is both job related and supported by business necessity. Griggs, 401 U.S. at 431; 42 U.S.C. § 2000e-2(k)(1)(A)(i).
[189] Bagenstos, *supra* note __, at 866.
[190] Crossley, *supra* note _, at 863.
[191] Crossley, *supra* note __, at 863-64.
[192] Crossley, supra note __, at 890.

> In that light, an order to "stop discriminating" will require employers and other entities covered by the ADA not only to stop building new barriers, but also to dismantle barriers already in place. Just as an order to take down a "whites only" sign over a drinking fountain is viewed not as a special benefit for black people, but as ending discrimination, so should the obligation to remove a less overt barrier to a disabled person's participation be viewed.[193]

Crossley also suggests that accommodations are only seen as seeking preferential or special treatment because the starting point by which we compare disabled individuals is the able-bodied population.[194] She states:

> [O]ur view of accommodations as something special for disabled people fails to appreciate that our society constantly accommodates the needs of the non-disabled majority. We just do not recognize those accommodations because of the ableist ethic that suffuses our society. We fail to recognize how much of the existing workplace scheme is built around the needs of the non-disabled, and we assume that this existing scheme is maximally productive just the way it is and that, consequently, any accommodation altering the dominant scheme will increase workplace cost and decrease productivity.[195]

Thus, critics of accommodation costs use as a baseline for comparison a status quo that has already excluded the participation of disabled persons in the workforce.[196]

Perhaps the most compelling argument is also the one most easily understood: accommodations are different from affirmative action, and therefore more like anti-discrimination mandates, because they do not result in an unfair advantage for the disabled person. Rather, they simply level the playing field.[197] The accommodation is needed simply to

[193] Crossley, *supra* note __, at 890.
[194] Crossley, *supra* note __, at 891. A similar argument is made by some feminists, who argue that women are only deemed inferior based on childbearing and childrearing responsibilities because the comparator is always a man.
[195] Crossley, supra note __, at 892-93. Anecdotally, I have noticed this phenomenon most often relating to work schedules and shifts. Employers often have set schedules and shifts not because they have determined that they maximize productivity but because they have always operated in a particular way and are unable or unwilling to conceptualize any schedule other than the status quo. Unfortunately, because schedule and shift changes are the most frequently requested accommodations, this bias toward the structures put in place by the able-bodied majority make it difficult for a disabled employee to get the accommodation she needs.
[196] Stein, *supra* note __, at 598.
[197] Ball, *supra* note __, at 960.

undo the discrimination inherent in the employer's failure to structure the workplace considering the needs of all employees—rather than only the able-bodied (often male) employees.[198]

2. Failure to Accommodate Equals Discrimination: This Proposed Amendment Remedies the Discrimination

If accommodation mandates are the equivalent of antidiscrimination mandates, then the failure to accommodate is the equivalent of discrimination.[199] And in fact, that is precisely what the ADA states.[200] With respect to the reassignment accommodation, which is the focus of this Article as well as the Supreme Court decision in *Barnett*, accommodation is necessary to remedy the discrimination inherent in the employer's failure[201] to restructure the workplace to allow the disabled employee to continue to work in his or her current or original position. In other words, reassignment remedies the discrimination without the necessity of proving discrimination in the first case.

The question then becomes whether reassignment, with its burdens on other employees, is an appropriate remedy. An analogy to Title VII jurisprudence suggests the answer is yes. Specifically, I am referring to the Supreme Court case of *Franks v. Bowman Transportation Co.*[202] The issue in that case was whether the court should grant retroactive seniority to victims of discrimination when doing so would arguably affect the seniority rights of other employees who were not in the class of persons discriminated against.[203]

In *Franks*, the plaintiffs were a class of individuals who alleged that the employer had engaged in racially discriminatory hiring and discharge policies for its over-the-road truck driver

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[198] *Supra* notes __ and accompanying text.
[199] *See* Crossley, *supra* note __.
[200] 42 U.S.C. § 12112 (b)(5)(A).
[201] This failure is either an inability or unwillingness to restructure the workplace. While I recognize that some positions simply cannot be modified to meet the physical restrictions of some disabled employees, many (if not most) jobs could be modified if the employer (and its managers) were able to see "outside the box."
[202] 424 U.S. 747 (1976).
[203] Franks, 424 U.S. at 750.

positions.[204] The court agreed with the plaintiffs.[205] When deciding the appropriate remedy, the Court first noted that one of the central purposes of Title VII is to "make persons whole for injuries suffered on account of unlawful employment discrimination."[206] Without granting retroactive seniority, the Court stated it would be impossible to put the victim of discrimination where he would have been absent the discrimination.[207] Recognizing the importance of seniority systems, the majority held that "class-based seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate under [Title VII]. . . ."[208]

The Court then addressed the issue of the effect such an award of retroactive seniority will have on "innocent" third parties, namely the employees already hired. The Court stated:

> [I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make whole" objectives of Title VII. These conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy.[209]

The Court also pointed out that if relief can be denied simply because other employees are unhappy about the relief received by victims of discrimination, "there will be little hope of correcting the wrongs to which the Act is directed."[210]

Justices Burger and Powell, concurring in part and dissenting in part, emphasized the inequity of granting competitive-type seniority relief at the expense of innocent employees. For instance, Chief Justice Burger stated:

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[204] Franks, 424 U.S. at 750.
[205] Franks, 424 U.S. at 780.
[206] Franks, 424 U.S. at 763 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)).
[207] Franks, 424 U.S. at 765-66 ("Adequate relief may be well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application.").
[208] Franks, 424 U.S. at 779.
[209] Franks, 424 U.S. at 774.
[210] Franks, 424 U.S. at 775 (citations and internal quotations omitted).

> [C]ompetitive-type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning. More equitable would be a monetary award to the person suffering the discrimination. An award such as "front pay" could replace the need for competitive-type seniority relief. Such monetary relief would serve the dual purpose of deterring wrongdoing by the employer or union—or both—as well as protecting the rights of innocent employees. In every respect an innocent employee is comparable to a "holder-in-due-course" of negotiable paper or a bona fide purchaser of property without notice of any defect in the seller's title. In this setting I cannot join in judicial approval of "robbing Peter to pay Paul."[211]

Despite Chief Justice Burger's discomfort with what he sees as the inequity of retroactive seniority, the Court stated that their holding—"sharing of the burden of the past discrimination is presumptively necessary"—is consistent "with any fair characterization of equity jurisdiction . . . ."[212] Furthermore the Court noted that it has long held that "employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest."[213]

The lesson from this case is simple: If seniority systems bargained for under a collective bargaining agreement can be violated in order to remedy discrimination even when there is specific statutory provision protecting seniority systems under Title VII,[214] then certainly a seniority system can be violated in order to remedy discrimination under the ADA, where there

[211] Franks, 424 U.S. at 780-81 (citations omitted).
[212] Franks, 424 U.S. at 777 (citations omitted).
[213] Franks, 424 U.S. at 778 (citations omitted).
[214] 42 U.S.C. 2000e-2(h). This section states: "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . ." *Id.*

is no equivalent to the seniority system exemption under Title VII.[215] If one accepts the argument that the failure to accommodate is the equivalent of discrimination, then the "remedy" of reassignment, even when it violates a seniority system, is an appropriate one.

3. If Accommodation Equals Affirmative Action, This Proposal Represents Lawful Affirmative Action

As stated above,[216] many scholars have argued that the reasonable accommodation provision of the ADA is substantively different from traditional anti-discrimination laws, and is indeed more akin to affirmative action. I have already disagreed with this conclusion above, but even if one accepts the argument that reasonable accommodations amount to affirmative action, the amendment proposed in this Article should still be considered valid as lawful affirmative action under well-settled (although not uncontroversial) Title VII affirmative action jurisprudence. Specifically, this proposed amendment would pass the test announced in the leading Title VII affirmative action case, *United Steelworkers of America v. Weber*.[217]

In that case, the employer and the union agreed to remedy the significant disparity of minority craft workers by implementing a training program to allow current production workers to receive training that would allow them to move up into one of the craft positions.[218] Selection of those eligible for the training program was made on the basis of seniority except that at least 50% of the new trainees had to be black until the percentage of black skilled craft workers in the

[215] This argument was also made in a Note by Sandy Andrikopoulos and Theo E. M. Gould, *Living in Harmony? Reasonable Accommodations, Employee Expectation and US Airways, Inc. v. Barnett*, 20 HOFSTRA LAB. & EMP. L.J. 345 (2003). They argued that the Court's decision in *Barnett* was at odds with the Court's decision in *Franks*, stating "The Supreme Court found that while accommodating the racially discriminated employee would have some detrimental impact on his coworkers' interests, 'employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest.' " *Id.* at 372. The authors are correct about the holding of the *Franks* decision but they missed an important distinction. In *Franks,* there was already a finding that the employer had discriminated against minority employees. Accordingly, the issue was one of remedy. In order to argue that this precedent is binding, we first need to make the argument that the reassignment accommodation is needed as a remedy for the discrimination inherent in the employer's failure to accommodate the employee in his original position.

[216] *Supra* Part IV.C.1.

[217] 443 U.S. 193 (1979).

[218] Weber, 443 U.S. at 199.

plant was approximately the same as the percentage of blacks in the local work force.[219] The affirmative action plan was challenged by a white employee who was passed up for the training program in favor of a black employee with less seniority.[220] The Supreme Court, relying on the legislative history of Title VII, held that voluntary affirmative action plans may be valid under Title VII, as long as they meet the following test.[221] First, the Court looked at whether the employer has a justification for undertaking an affirmative action effort.[222] To make such a finding, the plan must have as its purpose the elimination of a manifest racial imbalance.[223] Second, the court then considered the burdens of the plan on the rights of those who are not beneficiaries.[224] As the *Weber* court stated, the plan must not "unnecessarily trammel the interests of white males."[225] In determining that the plan in *Weber* did not unnecessarily trammel the interest of the white employees, the Court looked at the following factors: (1) the plan did not require the discharge of white workers and their replacement with new black hirees; (2) the plan did not create an absolute bar to the advancement of white employees; and (3) the plan was a temporary measure, not intended to maintain racial balance but to eliminate the manifest racial imbalance.[226]

If the amendment proposed in this Article was adopted, accommodations given pursuant to it would clearly pass this test. First, it is beyond debate that there has always been and will likely always be in the future, a manifest imbalance in the number of disabled persons in the

[219] Weber, 443 U.S. at 199.
[220] Weber, 443 U.S. at 199.
[221] Weber, 443 U.S. at 208. In all fairness, the Court did not definitively state that this was a "test" for courts to follow but it has since been perceived as such. *See* Chris Engels, *Voluntary Affirmative Action in Employment for Women & Minorities Under Title VII of the Civil Rights Act: Extending Possibilities for Employers to Engage in Preferential Treatment to Achieve Equal Employment Opportunity*, 24 J. Marshall L. Rev. 731, 748 (1991) (noting that while the court refused to set a clear line of demarcation, the guidelines in *Weber* have been interpreted by the Supreme Court and lower courts as a "test" to apply).
[222] Engels, *supra* note __, at 747.
[223] Weber, 443 U.S. at 208.
[224] Engels, *supra* note __, at 747.
[225] Weber, 443 U.S. at 208.
[226] Weber, 443 U.S. at 208.

workforce. Second, an accommodation pursuant to the amendment will never unnecessarily trammel the interests of non-disabled individuals.

The proposed amendment meets the second part of the test because the proposed amendment does not require the discharge of non-disabled employees and the hiring of disabled employees.[227] Furthermore, a reassignment accommodation would not keep non-disabled employees permanently relegated to inferior jobs. The able-bodied employee who does not get the transfer (if it is given to a disabled employee as an accommodation) is still employed and will have other opportunities to transfer in the future. Unlike a Title VII affirmative action plan where there might be many women and/or minorities who could conceivably continue to get the desired positions ahead of white males, in the case of an accommodation under the ADA, there simply are not that many disabled individuals. Furthermore, the ADA requires that decisions regarding whether someone is disabled and whether an accommodation should be given must be made only after an individualized inquiry,[228] which is very similar to the case-by-case approach used in the Court-approved affirmative action plan in *Johnson v. Transportation Agency*.[229]

Professor Silvers has drawn a similar comparison between the affirmative action test in *Weber* and reasonable accommodations.[230] She argues that as long as accommodations to disabled individuals can be seen as sharing privilege and recognition, rather than shifting it from one group to another (i.e., from the non-disabled to the disabled) then accommodations should be given.[231] In so arguing, she recognizes some of the resentment toward affirmative action, but argues that courts have traditionally accepted or rejected affirmative action programs based on

[227] *See* Engels, *supra* note __, at 787-88 (noting that the Court in *Weber* makes a point of emphasizing that the affirmative action plan did not require the discharge of white employees and the hiring of minorities).
[228] Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999); *See* 42 U.S.C. 12102.
[229] Engels, *supra* note __, at 775 (citing to Johnson v. Transportation Agency, 480 U.S. 616 (1987)).
[230] Silvers, *supra* note __. Other scholars have suggested that the lessons taken from disability law, and especially, reasonable accommodation law, can be used as an example for racial and gender discrimination by eliminating the fallacy that jobs can only be structured in one particular way. *See generally*, Karlan & Rutherglen, *supra* note __.
[231] *Id.* at 562.

differences between sharing privilege and merely shifting it from one group to another.[232] By unnecessarily presuming that accommodating disabled workers under the ADA means shifting privilege rather than sharing it, Silvers argues that the Supreme Court has misjudged the nature of the reasonable accommodation provision.[233]

Comparing disability law to other discrimination law, Silvers argues that courts have long distinguished between remedies that result in reverse discrimination because they shift recognition from one group to another, and remedies that pass constitutional and statutory tests because they share recognition.[234] Reasonable accommodations given under the ADA, according to Silvers, would share recognition, not shift recognition, and should therefore be seen similarly to lawful affirmative action programs. This is so because most accommodations given under the ADA do not unnecessarily trammel the interests of the non-disabled employees, which is the hallmark of a lawful affirmative action program under Title VII.[235] Silvers suggests that drawing the line between accommodations that do and do not unnecessarily trammel the interests of non-disabled employees is difficult.[236] This proposal will help draw that line.

V. ADDRESSING THE CRITICISMS

A. The Backlash Issue

Despite the overwhelming enthusiasm that accompanied the passage of the ADA,[237] there is just as much agreement that the ADA, at least Title I of the ADA that governs employment,

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[232] *Id*.
[233] *Id*. This result not only sets up disabled people for resentment from fellow workers but also results in the failure to respond affirmatively to their differences.
[234] *Id.* at 563.
[235] *Id*. at 580 (citing United Steel Workers of America v. Weber, 443 U.S. 193 (1979), the major employment affirmative action case); *see also* Ball, *supra* note __, at 963 (arguing that accommodations do not give disabled employees an unfair advantage over able-bodied employees).
[236] *Id*. at 580.
[237] COLKER, *supra* note __, at 5–6.

has not lived up to its potential.[238] An often-cited study indicates that employers have prevailed in 92% of ADA cases filed in court.[239] After exploring and dismissing other reasons for the lack of success in ADA cases—weak claims, poorly drafted statute, confusion over a new statute—Professor Diller suggests that the high failure rate of ADA cases is caused by a judicial backlash against the ADA.[240] He states: "The term backlash suggests an hostility to the statute and toward those who seek to enforce it. The backlash thesis suggests that judges are not simply confused by the ADA; rather, they are resisting it."[241] Diller opines that the backlash may not be an intentional effort to thwart the rights of the disabled. Instead, it may be the failure to comprehend and accept the underpinnings of the statute.[242] Other scholars have devoted entire books or sections of books to discussing the backlash against the ADA and there appears to be very little debate that the backlash does indeed exist.[243]

The backlash is most profoundly seen in the narrow interpretation the Supreme Court has given to the definition of "disability."[244] Professor Mezey states: "There is consensus among most disability scholars and disability rights advocates that the federal courts, particularly the Supreme Court, are chiefly responsible for the constrained implementation of the ADA. . ."[245] In addition to the narrow interpretation the Court has given to the term "disability," this Article demonstrates that the Court has given a similarly narrow interpretation to the phrase "reasonable accommodation."

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[238] *See, e.g.*, Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 59 VAND. L. REV 1807 (arguing that while there is plenty of scholarship devoted to the failure of Title I, there has been more success under Titles II and III).
[239] COLKER, *supra* note __, at 71–84; *see also* Diller, *supra* note __, at 62.
[240] *Id*. at 63–64.
[241] *Id*. at 64.
[242] Diller, *supra* note__, at 65.
[243] Krieger, *supra* note _; MEZEY, *supra* note __; COLKER, *supra* note __, 96-125.
[244] *Supra* sources cited at note __; MEZEY, *supra* note __, at 48–58; COLKER, *supra* note __, at 96.
[245] MEZEY, *supra* note __ at 44.

Some have suggested that ignoring the rights of the non-disabled[246] will contribute to the backlash against the ADA. Professor Long states:

> Several authors have charged that courts are reluctant to give full effect to the ADA because they view the statute as creating "special rights" for individuals with disabilities or because they are resistant to the notion that sometimes equality of opportunity may require unequal treatment. There can be no question that the ADA requires "preferential" treatment in the sense that it may require different treatment of disabled and non-disabled employees. However, it does not necessarily follow that "preferential" treatment of individuals with disabilities should amount to detrimental treatment of non-disabled employees. There is perhaps no better way to ensure that courts remain reluctant to fully effectuate the ADA's broad remedial goals than to adopt such a reading of the statute.[247]

Similarly, Professor Colker has argued that because the failure of the ADA is caused by hostility by the judiciary, even amending the statute is unlikely to solve the problems with the ADA.[248]

I am very cognizant of the potential that any statutory amendment that would give additional protection to individuals with disabilities will be viewed with hostility. One step this proposal takes to ameliorate additional hostility toward disabled individuals is to ensure that no non-disabled person would be fired because of the reasonable accommodation provision under the ADA. However, I realize that this might not be enough, and that there is a very real concern that the backlash against the ADA would continue unless it is possible for additional legislation to influence public opinion and the judiciary's opinion of the ADA. Some have argued that legislation can influence society's beliefs. Professor Ball, for example, believes that we need to educate the public and judges to destigmatize the idea of preferential treatment for the disabled. He states:

> The public, as well as judges, need to be educated on the crucial role that preferential treatment can play in providing equality of opportunity to individuals with disabilities. . . . We need, in other words, to shift our understanding of

[246] I do not think my proposal ignores the rights of the non-disabled. Instead, I believe it sensibly and fairly weighs the interests of both the non-disabled and disabled individuals.
[247] *Long,* supra *note* ___, at 899.
[248] COLKER, *supra* note __, at 3.

> preferential treatment in disability discrimination law from one that renders such treatment as suspect to one that views it as legitimate and necessary. One way of doing this is to make a positive case on behalf of preferential treatment by explaining the role that it plays in promoting equality of opportunity for individuals with disabilities.[249]

Others agree that education is what is missing in the disability movement.[250] Professor Davis believes that we will never have a reversal of the backlash against the ADA until the majority of Americans are educated about individuals with disabilities.[251] Maybe an amendment will help serve the purpose of educating the courts and the public.

B. Sharing the Burden of Accommodation: A Communitarian Approach

Perhaps the most significant argument to be made against this proposal is that employers should have to bear all of the cost of accommodation, rather than passing some of the cost onto the rest of the workforce. In other words, even if we accept that the disabled employee should be accommodated, the question remains, who should pay the cost of accommodation? Because it is often the employer who has created the workplace and its structures with a bias toward the able-bodied, there is a compelling argument to be made that the employer should have to bear the cost of remedying that discrimination. This argument is similar to the one made in the concurrence/ dissent in the *Franks* case discussed earlier, where Justice Burger compared the innocent employee whose seniority is trumped to a "holder-in-due-course" of negotiable paper in the commercial context.[252] Justice Burger made the argument that if the employer has two competing obligations—to the victim of discrimination and to the other employees in the workplace—the employer should have to bear the cost of its discrimination.[253]

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[249] Ball, *supra* note __, at 989–90
[250] Leonard J. Davis, *Bending Over Backwards: Disability, Narcissism, & the Law, in* BACKLASH AGAINST THE ADA 98,112 (noting that we teach our children about sex and race but not about disability).
[251] *Id.* at 117.
[252] *See supra* Part IV.B.2.; Franks, 424 U.S. at 781.
[253] *See* Franks, 424 U.S. at 781.

The argument is especially compelling in light of the fact that the legislative history of the ADA states that after the passage of the Act, employers and unions should negotiate their collective bargaining agreements in a way that does not interfere with the provisions of the ADA.[254] In other words, it was Congress's intent that issues like the one in *Barnett* would not arise because employers and unions would have drafted exceptions to their seniority systems in order to comply with the Act. Certainly if Congress intended employers and unions to negotiate their collective bargaining agreements to make way for the ADA, employers with unilateral seniority systems also would be expected to have an exception written into their seniority systems to handle the scenario in *Barnett*. For all of these reasons, it is indeed a strong argument that employers should have the burden of "paying" for its conflicting obligations to both the disabled employee under the ADA and the non-disabled employee under the seniority system. While a payment of money would not have been sufficient for Barnett, for whom there was no other job within the company, a payment of money might have pacified the individual with more seniority that wanted Barnett's mailroom position.

However, a rule that does not allow an employer to shift some of the "cost" of accommodation to the rest of the workforce would be unworkable, contrary to Congress's intent and inefficient. In reality, if an employer can give another accommodation that does not adversely affect other employees, it will often choose to do so. It may not want to infringe on other employees' rights, so it bears the burden itself. For instance, one employer with rotating shifts might allow itself to be under-staffed on one shift and over-staffed on another to avoid having to make other employees work the less desirable shifts more often in order to accommodate the disabled employee who needs a set schedule. But if the employer did not choose to voluntarily mismanage its shifts (or became weary of doing so after having

[254] S. REP. NO. 101-116 at 32.

accommodated for awhile), this employer might have a decent argument that such a sacrifice creates an undue burden for the employer. Accordingly, under the current structure of the ADA, a proposal putting the burden of all accommodations on an employer would likely lead to many accommodations not being given because they would result in an undue hardship for the employer. One might argue that we should then eliminate the undue hardship defense, but that proposal would clearly be contrary to Congress's intent when drafting the ADA.[255]

A rule that would put the entire burden of accommodation on the employer is also inefficient. Using the example above (rotating shifts), it is more efficient for other employees to rotate through the less desirable shift more often than it is for the employer to over-staff and under-staff its shifts in order to accommodate the disabled employee. The same inefficiency can be found with the reassignment accommodation. If we required a result where an employer could not pass the "burdens" of accommodation onto its other employees (at least not without compensation), an employer would have to pay extra to the non-disabled employee who does not get the transfer, when that employee is not performing any additional tasks to warrant the extra compensation, nor is he any more valuable.

In addition to these pragmatic concerns, another justification for passing some of the costs of accommodation onto other employees can be drawn from the literature regarding the "communitarian theory." The communitarian theory is considered one critique (of several) of liberal theory, which bases its view of equality on the idea that our shared human traits do more to define us than the things that make us different, like sex, race, national origin, etc.[256] Liberal theory considers individuals as self-reliant and autonomous, without dependence on other

[255] Need cite.
[256] Carlos A. Ball, *Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 Ohio St. L.J. 105, 114, 123-26 (2005).

individuals.[257] Professor Ball argues that the ADA, specifically the reasonable accommodation provision, is at odds with the liberal theory of equality, precisely because the liberal theory both emphasizes the role that "sameness plays in its vision of equality" and because it understands individuals to be "equally self-reliant and independent beings."[258] He looks to both feminist theory and communitarianism as providing alternative theories to support the ADA.[259]

Communitarians criticize the liberal view that conceptualizes individuals as separate and distinct from the communities to which they belong. Instead, communitarians believe that the communities to which we belong, including our family, employer, and neighborhood, help to define who we are and what we believe.[260] Professor Ball states that: "Communitarians argue that individuals have no meaningful identity independent of their ties to others. Instead, ties of friendship, obligation, and loyalty provide individuals with their sense of identity and bind them to the lives and well-being of others."[261] Communitarians also criticize liberal theory's attempt to put individual rights ahead of the public good. While they believe in individual rights, they believe that those rights too frequently trump the responsibilities that individuals owe to others as well as what is in the public's best interest.[262] Accordingly, communitarians believe that liberal theory causes individuals to alienate each other because everyone is only concerned for themselves and their own interests.[263]

When one views reasonable accommodations that affect other employees, the communitarian theory supports this Article's attempt to spread the burden of accommodation beyond the employer's pocketbook and to the rest of the workplace, as a community. It is

[257] Ball, *supra* note __, at 113.
[258] Ball, *supra* note __, at 113.
[259] Ball, *supra* note __, at 114. I only will be focusing on the communitarian theory in this Article.
[260] Ball, *supra* note __, at 122-23.
[261] Ball, *supra* note __, at 123.
[262] Ball, *supra* note __, at 125.
[263] Ball, *supra* note __, at 125-26.

without doubt that the ADA furthers the interests of not just disabled individuals but of society as a whole, who are all better off by increasing the employment opportunities for qualified individuals with disabilities, and thereby decreasing those individuals' reliance on public subsidies. Instead of requiring only the employer to bear the cost of accommodation, when it is much more efficient to spread that cost out to other employees, a communitarian approach supports sharing the cost of accommodation. Consider the above example of an employee requiring a set shift, presumably the sought-after day shift, when all other employees are required to rotate through the shifts. As noted above, if there was a rule that precluded an employer from giving an accommodation that affected other employees, the employer would be required to under-staff its afternoon and night shifts, and over-staff its day shift, which is undoubtedly an inefficient result. The communitarian approach would look to the community as a whole, and the ties that bind that community of "friendship, obligation, and loyalty" and would deem it not only fair but necessary to spread the burden in a reasonable way to the rest of the workforce, by asking that everyone rotate through the less desirable shift more often in order to provide the accommodation of the straight shift to the disabled employee without unduly tying the hands of the employer.

What occurs with reasonable accommodations for disabled individuals is really no different than the type of community support and accommodation that takes place every day in the workplace. Employees help other employees. If one employee experiences a death in the family, other employees would certainly rally around that employee to give her the support she needs, and to cover for her during her absences. If another employee injures himself skiing, certainly his co-workers would not balk at having to do more of the heavy lifting because he is temporarily unable to do so. Employees do these things because they care about the community

in which they work, and they realize that the loyalty given to that community also benefits them. While many people look at individuals with disabilities as the ultimate "other" with a strong sense of "that could never be me," the truth is that any one could become disabled at any time. Keeping valuable disabled employees in the workforce not only benefits the company as a whole, but being part of a community that shares each other's burdens, in the long run, benefits everyone.

CONCLUSION

Congress's goal in enacting the ADA was to provide equal opportunity for individuals with disabilities.[264] Achieving this goal must include an attempt to accommodate disabled employees as often as possible in order to allow them to remain productive and valuable members of the workforce, even when such an accommodation affects other employees. Because the comparative consequences to the two groups of employees almost always favors accommodation, this Article has suggested that Congress amend the ADA to add a rule to the reasonable accommodation provision, requiring employers and courts to grant accommodations of last resort even if the accommodation does or could affect the rights or interests of other employees, unless the accommodation would result in another employee's termination.[265] This amendment is necessary to remedy the discrimination inherent in the inability or unwillingness of employers to restructure their workplaces to rid of discriminatory barriers, and is a reasonable burden to share with the rest of the workforce without unnecessarily infringing on their rights.

[264] 42 U.S.C. § 12101(a)(8).
[265] *Supra* Part III.A.