NOTE

BIG TALK, BROKEN PROMISES:
HOW TITLE I OF THE AMERICANS WITH DISABILITIES ACT FAILED DISABLED WORKERS

The Americans with Disabilities Act . . . has the potential to become one of the great civil rights laws of our generation.¹

— Senator Edward Kennedy

I. INTRODUCTION

The Americans with Disabilities Act² ("ADA" or "the Act") was signed into law in July 1990 with much fanfare. President George H.W. Bush echoed Congress’s belief that it would level the playing field for the disabled in all facets of daily life.³ The President closed his signing ceremony speech by equating the signing of the Act to the crumbling of the Berlin Wall the year before: “[N]ow I sign legislation which takes a sledgehammer to another wall, one which has for too many generations, separated Americans with disabilities from the freedom they could glimpse, but not grasp.”⁴ In the fifteen years since, however, the monumental promise of the ADA, at least with respect to employment, has largely gone unfulfilled. There are a number of reasons for this, three of which will be discussed in this Note.

First, the purposefully broad language adopted by Congress has been interpreted so narrowly by courts that it rarely protects the people for whose benefit it was adopted. Second, there is evidence that courts are abusing summary judgment standards in ADA cases, which has resulted in a staggering bias in favor of employer-defendants. Finally,
despite the history of disability law in the United States, there is a persistent refusal of courts to recognize that the basis of disability rights is civil rights, which results in misinterpretation of the ADA and inconsistent judgments in factually similar situations. Taken together, these factors amount to a massive failure of what President Bush once hailed as the doorway through which “every man, woman, and child with a disability can now pass . . . into a bright new era of equality, independence, and freedom.” As a result of this failure, the number of people actually protected by the Americans with Disabilities Act is much smaller than originally anticipated by the drafters of the legislation. There is also a disincentive for employers to voluntarily comply with the Act because employees rarely prevail in court. Additionally, individuals with disabilities are left with less protection than other protected groups (namely, women and racial or ethnic minorities) despite suffering the same types of discrimination in the workplace.

Part II of this Note provides a brief history of the Americans with Disabilities Act, outlines the basic framework of the Act, and sets out the relevant general language of Title I. Part III addresses each of the three reasons outlined above for the failure of Title I to achieve equality in employment for people with disabilities. Section A focuses on two Supreme Court decisions, Sutton v. United Air Lines, Inc. and Albertson’s Inc. v. Kirkingburg, and explains how the Court’s narrow interpretation of the ADA in those cases has significantly decreased protection under the Act for people with disabilities. Section B recounts empirical research on plaintiff win-rates in ADA cases and demonstrates that judicial abuse of summary judgment standards is responsible for the extreme bias toward defendants. Section C addresses courts’ continuing failure to interpret the ADA as a civil rights statute and reassesses Albertson’s using a civil rights framework. Part IV offers corrective measures to these problems in the form of proposed amendments to the Act and suggested corrective court action.

II. THE AMERICANS WITH DISABILITIES ACT

A. History

In order to understand the purpose of the Americans with Disabilities Act, as well as some of its shortcomings, it is first necessary

5. Id. at 1068.
to understand its genesis. In 1973, amendments to the Vocational Rehabilitation Act adopted and applied the language of the Civil Rights Act of 1964\(^6\) to “otherwise qualified” handicapped individuals.\(^7\) This codification became known as the Rehabilitation Act,\(^8\) and meant that the federal government and entities that received federal funding could not discriminate against individuals on the basis of disability, just as they were already forbidden from discriminating on the basis of race or sex. In fact, the Rehabilitation Act called on federal employers to take affirmative action in the hiring and advancement of people with disabilities.\(^9\)

The Rehabilitation Act recognized that similar forms of discrimination existed across disparate disabilities; that is, people with different disabilities were often subject to the same kinds of discrimination in education, employment, and public access.\(^10\) More importantly, as one of the first laws to link civil rights and disability rights,\(^11\) the Rehabilitation Act opened the door to mainstream participation in many areas of daily life for people with disabilities. However, the Rehabilitation Act suffered from a major omission: it did not apply to the private sector. This meant that private employers were under no obligation to refrain from discriminating against employees or applicants on the basis of disability.

In the early 1980s, then-Vice President Bush was appointed by President Reagan to head the Regulatory Relief Task Force, which was charged with paring down government programs and dismantling “administrative monstrosities” like the affirmative action provision of the Rehabilitation Act.\(^12\) President Reagan believed in the power of the private sector to solve social problems and relied on job placement as a

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\(^{6}\) 42 U.S.C. §§ 1981-2000h-6 (2000). "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d.

\(^{7}\) “No otherwise qualified individual with a [handicap] . . . shall, solely by reason of her or his [handicap] , be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .” 29 U.S.C. § 794(a) (2000). At the time the Rehabilitation Act was passed, “handicapped” was the preferred term for people with disabilities. That term had fallen out of favor by the mid-1980s when work on what would become the ADA began. See S. Rep. No. 101-116, at 21 (1989).


\(^{9}\) 29 U.S.C. § 793(a).

\(^{10}\) See Arlene Mayerson, The Americans with Disabilities Act—An Historic Overview, 7 LAB. LAW. 1, 2 (1991).

\(^{11}\) See id. at 1-2.

solution to the social welfare policy dilemma. 13 In order to succeed, the 
Reagan Administration’s policy on disabilities had to overcome the 
social stigma associated with civil rights laws. 14 Any new law would 
have to focus on employment, but not affirmative action, and on 
opportunities, but not entitlements. 15

Vice President Bush relied heavily on the National Council of the 
Handicapped, a fifteen-member board appointed by President Reagan. In 
1983, the Council presented the Administration with the National Policy 
for Persons with Disabilities. The goals of the policy were to help people 
with disabilities achieve “maximum life potential, self-reliance, 
independence, productivity, and equitable mainstream social 
participation in the most productive and least restrictive environment.” 16
In 1986, the Council recommended that Congress enact a comprehensive 
law requiring equal opportunity for people with disabilities. 17

The first attempt at such a law was introduced simultaneously in 
both houses of Congress in 1988. 18 This version prohibited 
discrimination on the basis of disability in the areas of employment, 
housing, public accommodations, travel, communications, and in the 
activities of state and local governments. Although the bill drew a great 
deal of bipartisan support, 19 it proved too much to undertake in an 
election year and ultimately did not pass. 20

A new draft of the bill was introduced in the Senate in May 1989. 
The Senate Committee on Labor and Human Resources heard testimony, 
and the bill passed in the Senate by a vote of 76-8 on September 7, 
1989. 21 A slightly different draft was introduced in the House in May 
1989 as well, but took a more circuitous route through four House 
committees before passing 403-20 on May 22, 1990. 22 After conference 
negotiations on several amendments, the House voted to pass the Act by 
an overwhelming 377-28 on July 12, 1990. 23 The Senate followed suit

13. See id. at 108.
14. See id. at 109.
15. See id.
16. Id. at 110 (quoting National Policy for Persons with Disabilities).
17. Id.
19. Twenty-three Senators co-sponsored the bill, and during their presidential campaigns, 
both Vice President Bush and Governor Michael Dukakis pledged to pass the bill during the new 
administration. See Berkowitz, supra note 12, at 111.
20. See id.
with an equally impressive 91-6 on July 13, 24 paving the way for President Bush to sign the bill into law on July 26, 1990.

In his speech before signing the Americans with Disabilities Act, President Bush hailed the bipartisan efforts in Congress, the tireless work of numerous disability rights organizations, and the 43 million Americans with disabilities who led the charge.25 He invoked the Preamble of the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights,” but stated that “for too many Americans, the blessings of liberty have been limited or even denied.”26 President Bush said the Act’s power was in its simplicity, and would guarantee people with disabilities the opportunity to “blend fully and equally into the rich mosaic of the American mainstream.”27 If only that had come to pass.

B. The Framework and Language of the Americans with Disabilities Act

1. The Basic Framework

The Americans with Disabilities Act is divided into five sections, called titles, each addressing a different area in which people with disabilities have historically encountered discrimination. Title I addresses employment; Title II covers public services, including public transportation; Title III applies to places of public accommodation; Title IV concerns telecommunications;28 and Title V contains miscellaneous provisions, such as those concerning state immunity and attorney’s fees.

Each title relies on the preamble of the Act for purposes, findings, and general terms applicable to all titles. For example, “disability” is defined in the Act as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.29

25. See Remarks on Signing, supra note 4, at 1068.
26. Id.
27. Id.
28. Title IV amended both Title II and section 711 of the Communications Act of 1934 and is codified separately at 47 U.S.C. §§ 225, 611 (2000).
29. 42 U.S.C. § 12102(2) (2000). A common example under section (B) (those people who
Each title includes its own enforcement procedures and mechanisms, and the provisions of each are enforced by various agencies of the federal government.  

2. Title I

Title I of the Americans with Disabilities Act, the focus of this Note, applies to private employers with fifteen or more employees. It protects qualified individuals with disabilities from discrimination in job application procedures, hiring, advancement, discharge, compensation, and job training, as well as other terms, conditions, and privileges of employment. A qualified individual with a disability is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Discrimination can include limiting, segregating, or classifying an applicant or employee because of his or her disability such that his or her opportunities or status are adversely affected, or not making reasonable accommodations to the known limitations of an otherwise qualified employee or applicant with a disability. The Equal Employment Opportunity Commission (“EEOC”), charged with promulgating regulations and guidelines for the enforcement of Title I, is responsible for investigating all claims of employment discrimination at the federal level.

have a record of having a substantially limiting impairment) is a person whose cancer is in remission and who does not currently suffer the substantially limiting effects of the disease. Section (C) (those “regarded as” having a substantially limiting impairment) refers, for example, to a person with heart disease that does not substantially limit any of his major life activities, but whose employer believes he is unable to perform certain kinds of work. Alternatively, this prong also applies to a gay man whose potential employer fails to hire him based on the false presumption that he has AIDS.

30. The Attorney General’s office and the Secretary of Transportation are responsible for Titles II and III; the Federal Communications Commission oversees Title IV; Title V does not contain enforcement provisions.

31. 42 U.S.C. § 12111(5)(A). During the first two years that Title I was in effect (1992-94), it applied only to private employers with twenty-five or more employees. Id. Also, the ADA does not apply to the federal government, which is already subject to comparable policies under the Rehabilitation Act. See § 12111(5)(B).

32. § 12112(a).
33. § 12111(8).
34. § 12112(b)(1).
35. § 12112(b)(5)(A).
36. See § 12117(b). The regulations for the Americans with Disabilities Act are set out at 29 C.F.R. §§ 1630.1-.14 (2005).
37. For more on EEOC procedures, see infra note 198.
III. WHY TITLE I HAS BEEN UNSUCCESSFUL

A. Narrow Interpretation of Broad Statutory Language

1. Disability

The Americans with Disabilities Act is unique in the civil rights arena because it requires a plaintiff to demonstrate that he is a member of the protected class—that he is disabled—before a lawsuit can proceed. By contrast, for example, Title VII of the Civil Rights Act protects everyone: men as well as women can bring gender discrimination suits, and individuals of any racial classification may allege racial discrimination. The definition of “disability” included in the ADA was drawn nearly verbatim from the Rehabilitation Act, and by using this long-standing, often interpreted definition, Congress thought it was achieving “legal clarity.” Unfortunately, the United States Supreme Court has largely disagreed.

The first Supreme Court decision to interpret the term “disability” as used in the ADA arose under Title III (public accommodations), not Title I. Nevertheless, because the preliminary definitions in the Act apply equally to all titles, Bragdon v. Abbott was an encouraging sign for the disability rights movement. The Court noted that “repetition of a well-established term carries the implication that Congress intended the term [disability] to be construed in accordance with” the Rehabilitation Act. Bragdon involved an HIV-positive plaintiff who had been denied treatment at her dentist’s office. Based on the guidelines promulgated by the Department of Health, Education and Welfare (“HEW,” now the Department of Health and Human Services) for the Rehabilitation Act, the Court held that HIV was a physical impairment that substantially

38. See, e.g., McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295-96 (1976) (holding that Title VII’s terms are not limited to discrimination against members of any particular race and that it prohibits racial discrimination against whites upon the same standards as racial discrimination against non-whites).


42. Id. at 631. This is borne out by the legislative history of the Act as well: “Whenever possible, we have used terms of art from the 1964 Civil Rights Act and from the Rehabilitation Act of 1973[,] phrases already interpreted in courts throughout this land[,] so that business can know exactly what we mean.” 136 CONG. REC. H2427 (daily ed. May 17, 1990) (statement of Rep. Hoyer).
limited the plaintiff’s ability to reproduce, and thus, she was protected as a disabled person under the ADA.43

The first Supreme Court case arising under Title I, *Sutton v. United Air Lines, Inc.*,44 however, soon dashed the hopes of many in the disabled community. In *Sutton*, pilots with severe myopia were prevented from pursuing employment with the defendant airline because their uncorrected vision did not meet the airline’s standards. The plaintiffs’ corrected vision, however, was 20/20 or better, more than sufficient to meet the airline’s requirements. The Court ignored its own directive on the repetition of well-established terms and narrowed the class of people who are covered by the ADA to only those individuals whose impairments, taking into account mitigating measures such as corrective devices or medications, still substantially limit a major life activity.45

The Court made its decision in direct contravention of the EEOC’s regulations on the ADA, which stated that, in determining whether an impairment substantially limits an individual in a major life activity, courts should not consider mitigating measures. 46 In the Court’s view, none of the entities directed to promulgate interpretive regulations for the various Titles in the Act had been empowered to issue regulations regarding the provisions generally applicable to all Titles, particularly the definitions provisions of § 12102.47 The Court instead conducted its own analysis of the term “disability” and based its decision on its cumulative interpretation of three ADA provisions, as explained below.

First, because disability is defined in the present tense (i.e., as an impairment which “substantially limits” a major life activity),48 the Court determined that a person must be currently substantially limited in a major life activity, not hypothetically limited if mitigating measures are not taken.49 Second, § 12102(2) states that disability is to be determined “with respect to an individual,” which the Court held meant an individualized determination of whether an impairment substantially limits a major life activity.50 The Court noted that consideration of an impairment in its unmitigated state runs contrary to such a determination. People with particular impairments would be treated as

43. *Bragdon*, 524 U.S. at 641.
44. 527 U.S. 471 (1999).
45. *Id.* at 482.
46. 29 C.F.R. § 1630, app. § 1630.2(j) (1998).
47. *See Sutton*, 527 U.S. at 479.
49. *See Sutton*, 527 U.S. at 482.
50. *See id.* at 482-83 (citing 42 U.S.C. § 12102(2)).
members of a group having similar impairments, rather than as individuals, each of whom might be affected by the impairment in a different way. Finally, Justice O'Connor relied on Congress’s finding that there were 43 million Americans with disabilities at the time the Act was signed to suggest that Congress did not intend to include every individual whose unmitigated condition reached the level of disability. Interpreting these sections together, the Court held that mitigating measures should be considered in determining whether an individual has a disability. Under that test, because the plaintiffs claimed their corrected vision was 20/20 or better, they were not disabled within the meaning of the Americans with Disabilities Act and could not pursue their claims.

The Court went too far in its holding in Sutton, in part because it created a catch-22 for many plaintiffs. The Act requires a person to be both disabled and qualified to be protected under Title I, and Sutton makes it virtually impossible for many plaintiffs to simultaneously meet both of these threshold requirements. For example, a person is not disabled under Sutton (and therefore not protected by the Act) if his hearing aid mitigates his hearing loss such that he is not substantially limited in the major life activity of hearing. If he were instead considered in an unmitigated state, he would be disabled within the meaning of the Act and then permitted to demonstrate that he is qualified for a particular job. A “qualified individual with a disability” is one who, with or without reasonable accommodation, can perform the essential functions of the job he holds or desires. In this example, the employee’s hearing aid might be a reasonable accommodation that would allow him to perform the essential functions of the job.

51. See id. at 483-84. For example, all people with myopia would be considered disabled because their vision is substantially limited without corrective lenses. The Court’s argument is that those individuals with myopia who can benefit from corrective lenses are not disabled within the meaning of the statute.
52. See id. at 484 (citing 42 U.S.C. § 12101(a)(1)).
53. Id. at 484, 487.
54. Id. at 488-89. The Court came to this conclusion despite the fact that the defendant denied the plaintiffs employment on the basis of their uncorrected vision. See also Murphy v. United Parcel Serv., 527 U.S. 516, 521 (1999) (holding that because an employee’s high blood pressure did not substantially limit any major life activity while medicated, he was not disabled under the ADA).
55. See 42 U.S.C. § 12111(8).
56. See, e.g., Matlock v. City of Dallas, No. 3-97-CV-2735-D, 1999 U.S. Dist. Lexis 17953 (N.D. Tex. 1999). Although the plaintiff was permitted to proceed under the “regarded as” prong of the disability definition, see id. at *16, Ruth Colker notes that this is a cold comfort, because the City did not act based on a presumptive false belief about the plaintiff’s hearing loss, but on his actual hearing loss. See COLKER, supra note 40, at 106-07 & 228 n.30.
Further, the Court’s fear that considering impairments in their unmitigated state will expand the number of individuals eligible for protection under the Americans with Disabilities Act beyond what Congress intended is unfounded. First, and most tellingly, members of Congress explicitly stated throughout their deliberations on the bill that the disability determination was to be conducted without regard to the availability of mitigating measures:

For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.57

Additionally, Congress specifically stated that nothing in the ADA was to be interpreted to provide less protection than was available to people with disabilities under the Rehabilitation Act.58 Under the Rehabilitation Act, people with controllable medical conditions like diabetes and epilepsy were considered disabled.59 Clearly the legislature considered the issue and declined the opportunity to require consideration of mitigating measures.60

Second, Justice O’Connor relied on Congress’s specification that there were 43 million Americans with disabilities as justification to limit protection under the Act to those individuals whose mitigated conditions substantially limit their life activities. However, in its statutory findings, Congress stated, “[S]ome 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.”61 In the Senate debate, Senator Al Gore stated, “No one can tell who might have a disability someday as a result of an accident, illness, or simply as an aspect of the aging

59. See, e.g., Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (epilepsy); Bentivegna v. U.S. Dep’t of Labor, 694 F.2d 619 (9th Cir. 1982) (diabetes).
60. The Court, however, held there was no need to refer to the legislative history of the Act because the text of the statute was clear. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999). This is contrary to later remarks made by Justice O’Connor at Georgetown University Law Center, where she criticized the ADA as ambiguous, saying the Act is what happens when a bill’s sponsors are “so eager to get something passed that what passes hasn’t been as carefully written as a group of law professors might put together.” Charles Lane, O’Connor Criticizes Disabilities Law as Too Vague, WASH. POST, Mar. 15, 2002, at A2.
process."62 As people age, their eyesight and hearing often deteriorate, and corrective lenses, hearing aids, and other assistive devices become more common.63 Additionally, conditions such as heart disease, hypertension, and diabetes often appear or worsen as individuals age.64 Clearly, Congress not only understood that the number of people protected by the Act would increase with time, but also anticipated and considered those conditions associated with aging protected under the Act.

Third, Justice O’Connor wrote that the number itself—43 million—was difficult to ascertain by those whose job it was to do so. The Court referenced at least four different reports that purported to establish the current number of disabled Americans.65 The number of disabled Americans given in one report ranged from an “overinclusive 160 million . . . to an underinclusive 22.7 million.”66 The discrepancy occurs as a result of the particular definition of disability used in the individual report or survey. In the report referred to above, the overinclusive number was based on a “health conditions approach,” which considers all conditions that impair the health or functional abilities of an individual.67 The underinclusive number was based on a “work disability approach,” which only considers impairments that affect an individual’s ability to work.68 Given this wide range, it was unwise for the Court to adopt 43 million as the ceiling figure and conclude that any rule that increases that number is contrary to Congress’s intent.

Finally, a holding that the Act calls for the consideration of unmitigated impairments would not automatically create a rule that considers, for example, everyone with vision impairments disabled. As Justice Stevens wrote in his dissent in Sutton: “[I]t would still be

65. See Sutton, 527 U.S. at 484-86.
66. Id. at 485 (citing NAT’L COUNCIL ON DISABILITY, TOWARD INDEPENDENCE 10 (1986)).
67. Id.
68. Id.
necessary to decide whether that general rule should be applied to what might be characterized as a minor, trivial impairment. Great Britain’s disability discrimination law, for instance, specifies that the disability determination is to be made in the unmitigated state unless the mitigating measure used is corrective lenses. It would be easy for U.S. courts to formulate a similar test under which an individual is not considered disabled within the meaning of the Act where there is a “simple, inexpensive remedy[] that can provide assured, total and relatively permanent control of all symptoms [of the impairment].”

2. Working as a Major Life Activity
   To be disabled within the meaning of the Americans with Disabilities Act, one must have an impairment which substantially limits one or more major life activities. The EEOC regulations for the ADA define “major life activity” to include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” This list was taken verbatim from the regulations promulgated by HEW for the Rehabilitation Act. There is a presumption that “Congress’s repetition of a well-established term carries the implication that Congress intended the term to be construed

69. Id. at 496 (Stevens, J., dissenting) (citation omitted).
70. The United Kingdom’s Disability Discrimination Act reads, in part:
   (1) An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.
   (2) In sub-paragraph (1) “measures” includes, in particular, medical treatment and the use of prosthesis or other aid.
   (3) Sub-paragraph (1) does not apply—
      (a) in relation to the impairment of a person’s sight, to the extent that the impairment is, in his case, correctable by spectacles or contact lenses or in such other ways as may be prescribed.
Disability Discrimination Act 1995, c. 50, § 6, sched. 1 (Eng.). Colker notes that while a limitation like this one makes sense in light of Congress’s goal of protecting those who have been historically discriminated against (because it can hardly be argued that the average wearer of corrective lenses falls into this category), courts would still have to draw the line somewhere, and in doing so may eliminate from protection some people Congress intended to protect (i.e., those with severe vision impairments who use corrective lenses but are not legally blind). See COLKER, supra note 40, at 105-06.
71. Arnold v. United Parcel Serv., 136 F.3d 854, 866 n.10 (1st Cir. 1998). The court held that the unmitigated state of the impairment is determinative, but left open whether this would remain so if the condition could be corrected by something as simple as eyeglasses. Id.
72. 42 U.S.C. § 12102(2)(A) (2000). An individual may also have a record of such an impairment or be regarded as having such an impairment. See § 12102(2)(B)-(C).
73. 29 C.F.R. § 1630.2(i) (2005). This is list is meant to be illustrative, not exhaustive. 29 C.F.R. § 1630, app. § 1630.2(i) (2005).
in accordance with pre-existing regulatory interpretations,"75 and under
the Rehabilitation Act, courts regularly accepted working as a major life
activity.76 In Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,77
an ADA case, the Court itself defined a major life activity as one which
is “of central importance to daily life.”78 According to the 2000 Census,
of the 138.8 million individuals in the American labor force, only 7.9
million (5.6%) were unemployed.79 The average work week is
approximately forty hours; people who work full-time spend nearly 25%
of their time on the job. Clearly, working fits the bill of being “of central
importance” in most people’s daily lives. Nevertheless, the Supreme
Court has, since it began considering ADA Title I cases, questioned
whether working is a major life activity for the purposes of the Act.

In Sutton, the Court wondered if there might be “some conceptual
difficulty” including working as a major life activity because it “seems
to argue in a circle to say that if one is excluded . . . by reason of [an
impairment, from working with others] . . . then that exclusion
constitutes an impairment, when the question you’re asking is, whether
the exclusion itself is by reason of handicap.”80 Three years later, in
Toyota, the Court again expressed concern over the “conceptual
difficulties inherent in the argument that working could be a major life
activity.”81 The Sutton Court also referred to the EEOC guidelines on the
matter, which the Court characterized as “reluctan[1]”82 to include
working as a major life activity because they suggest that working be
considered “only if an individual is not substantially limited with respect
to any other life activity.”83

To the contrary, this is not reluctance, but rather logic, on the part
of the EEOC. If a person has an impairment that substantially limits his

without question or discussion that working is a legitimate major life activity under the
Rehabilitation Act).
77. 534 U.S. 184 (2002).
78. Id. at 197. The Toyota decision concerned the major life activity of performing manual
tasks. Although the plaintiff asserted at trial that she was also substantially limited in her ability to
work, the Court of Appeals did not rule on that matter, so the Supreme Court was not required to
address the issue. Id. at 193.
and citation omitted).
81. Toyota, 534 U.S. at 200. To date, the issue remains undecided.
82. Sutton, 527 U.S. at 492.
83. 29 C.F.R. § 1630, app. § 1630.2(j) (2005).
ability to breathe, for example, he is automatically protected under the Act for that reason, whether or not his impairment also impacts his ability to work. If a person has epilepsy, however (setting aside the mitigation issues raised by *Sutton* and its progeny), he may not be limited in any major life activity except working because, perhaps, his seizures are unpredictable. If an employer fails to hire him because of his epilepsy, he has been discriminated against on the basis of his impairment, and his only protection under the Act arises as a result of being limited in his ability to work. If working is not considered a major life activity, employers would be free to discriminate against some people with disabilities, while others—perhaps with similar impairments—would be protected.

That the Court even suggests that working may not be a major life activity is surprising for several reasons. First, and most simply, if working is not a major life activity, Title I itself is an exercise in futility. Congress made at least three explicit references to employment in the “Findings and Purposes” section of the Americans with Disabilities Act, and alluded to many more. There would hardly be a point to legislators spending countless hours drafting and debating this part of the law if the lawmakers themselves did not consider working to be a valuable and major part of daily life to which all people should have access. Additionally, Title I has spawned more lawsuits than any other title of the Act. Evidently, many people have found working important enough to pursue discrimination claims, despite the attendant costs, time, and potential backlash.

Second, if working is not considered a major life activity, the third prong of the disability definition, the “regarded as” element, largely becomes moot. It is hard to imagine a “regarded as” situation under Title I that does not implicate the major life activity of working, because an

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84. Employment is “a critical area” of life where disability discrimination persists, 42 U.S.C. § 12101(a)(3) (2000); individuals with disabilities are often “relegated to lesser . . . jobs,” § 12101(a)(5); people with disabilities are “severely disadvantaged . . . vocationally,” § 12101(a)(6).

85. “Exclusionary qualification standards and criteria,” § 12101(a)(5); “people with disabilities . . . are severely disadvantaged . . . economically,” § 12101(a)(6); “individuals with disabilities . . . have been . . . relegated to a position of political powerlessness . . . resulting from stereotypic assumptions not truly indicative of the individual ability . . . to participate in, and contribute to, society,” § 12101(a)(7); “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity . . . and economic self-sufficiency,” § 12101(a)(8).

86. A search of federal cases on Westlaw reveals that more than two-thirds of cases implicating the ADA arise under Title I. WESTLAW, ALLFEDS Database (last searched Jan. 20, 2006), available at WESTLAW:ALLFEDS/search: BG(ADA “Americans with Disabilities Act”). See also COLKER, supra note 40, at 126.
employer is unlikely to have an opinion about the ability of an applicant or employee to perform other major life activities. 87

Finally, to find otherwise flies in the face of one of the original goals of the legislation: “[T]o turn as many of the disabled as possible into taxpaying citizens” 88 by reducing or eliminating barriers to employment. Throughout the debates on the bill in Congress, legislators repeatedly invoked the need to move individuals with disabilities off the welfare rolls and into the workforce. 89 Senator Tom Harkin, the lead Democratic sponsor of the bill in the Senate, noted that disability discrimination created an “unnecessary dependency costing taxpayers and private employers billions of dollars on an annual basis.” 90 Representative Tony Coelho, the principal sponsor of the ADA in the House, stated, “Our entire society bears the economic burdens of this prejudice [against people with disabilities]: dependency is expensive. It increases benefit entitlements and decreases productive capacity sorely needed by the American economy.” 91 Congress explicitly addressed this problem in the Act, presenting Title I as the solution: “[T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.” 92 The belief that the Americans with Disabilities Act would substantially relieve dependency on the government was partially responsible for the Act passing with minimal opposition. 93 Nevertheless, there are currently more than nine million disabled people out of work, 94 approximately

87. COLKER, supra note 40, at 114.
93. Berkowitz, supra note 12, at 112.
94. Men and women ages 21-64 with an employment disability. 2003 American Community Survey, http://factfinder.census.gov/home/saff/main.html?_lang=en (follow “People” hyperlink; then follow “Disability” hyperlink; then follow “Data and Links on Disability” hyperlink; then follow “2003 Data” hyperlink; then follow “PCT045: Employment Disability” hyperlink).
two-thirds of whom want to work,\textsuperscript{95} and 5.9 million of whom rely, at least in part, on Social Security Disability Insurance for income.\textsuperscript{96}

3. “Substantially Limits”

a. Working

Assuming that working is a major life activity, in accordance with the EEOC guidelines and Rehabilitation Act precedent, what does it mean to be substantially limited in the ability to work? The \textit{Sutton} Court held that to be substantially limited in the major life activity of working, a person with a disability must be precluded from working in a broad class of jobs.\textsuperscript{97} Specifically, Justice O’Connor wrote, “[O]ne must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.”\textsuperscript{98} In \textit{Sutton}, then, since the plaintiffs could work as regional pilots, courier pilots, or pilot instructors (among other jobs), the fact that they had been excluded from the specific job of global airline pilot did not mean they were substantially limited in the major life activity of working due to their poor eyesight.\textsuperscript{99}

This part of the \textit{Sutton} holding appears to be sensible on the surface, but there are larger implications. Congress found that “people with disabilities, as a group, occupy an inferior status in our society and are severely disadvantaged . . . vocationally [and] economically,”\textsuperscript{100} and that the “[n]ation’s proper goals regarding individuals with disabilities are to assure equality of opportunity . . . and economic self-
The ruling in *Sutton* does little, if anything, to decrease the disadvantage or promote economic self-sufficiency because it is unlikely that anyone but the most severely disabled would be excluded from such a broad range of jobs. This author has a profound hearing loss and I am unable to talk on the telephone—a significant component of the job I held prior to losing my hearing—without the assistance of a relay operator, which requires a special phone. There are, however, any number of jobs I am capable of doing that do not require the use of the telephone, and that I could do without any other accommodation for my hearing loss. Under *Sutton*, the Court would likely suggest that I take one of those jobs, because they undoubtedly make use of my “skills” if not my “unique talents.” But if people with disabilities are required to show that they are precluded from performing such a broad range of jobs as *Sutton* suggests, they may continue to find themselves relegated to low-income jobs that are incommensurate with their education, training, and experience.

People with disabilities are both less employed and less compensated than those without disabilities. As late as 2003, the American Community Survey revealed that, of men and women aged twenty-one to sixty-four with employment disabilities, only 18% are employed, compared to nearly 77% of men and women without 101. *Id.* § 12101(a)(8).

102. Relay operators type the words of hearing callers for the benefit of deaf or hearing impaired callers.

103. Even more disconcerting to me as an individual with a hearing loss is the likelihood that a court following *Sutton* would find that I am not disabled at all within the meaning of the Act because I use a cochlear implant, a device which helps me hear, although without it I am clinically considered profoundly deaf. I might be protected under § 12102(2)(C)—“regarded as” having a disability that substantially limits my ability to hear—but it is much harder to prove that an employer regards a person as having a substantially limiting impairment. There is currently a circuit split on the issue of whether an individual regarded as having a substantially limiting impairment is entitled to reasonable accommodations in the workplace. See *Kelly* v. Metallics West, Inc., 410 F.3d 670, 676 (10th Cir. 2005) (holding that reasonable accommodations are available to those employees regarded as having a substantially limiting impairment); *D’Angelo* v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005) (holding, as a matter of first impression, that employers are obligated to provide reasonable accommodations for employees regarded as being disabled); *Williams* v. Phila. Housing Auth. Police Dept., 380 F.3d 751, 776 (3d Cir. 2004) (holding that employees who are regarded as being disabled are entitled to reasonable accommodations); *Newberry* v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998) (“[A]n employer need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment.”). The Supreme Court recently declined to hear *Williams*, 544 U.S. 961 (2005), so it is unlikely that this issue will be decided in the near future.
employment disabilities. In 1997, the median earnings for people without any disability were $23,700; for those individuals with a “slight” disability, the median earnings were $20,500; and for those individuals with a severe disability, the median earnings dropped to $13,300. One of the purposes of Title I, particularly the reasonable accommodation provision, was to level the playing field for people with disabilities and assist them in becoming as productive as their non-disabled counterparts. If the law were succeeding, one would not expect to see such a large wage disparity between employees with disabilities and those without nearly fourteen years after Title I went into effect; each worker would be worth as much as the other in the eyes of employers. Clearly this is not the case, and without the full protection of the Act, these trends are not likely to reverse themselves.

b. The Extension of the Sutton Mitigating Measures Rule

In its decision in Albertson’s Inc., v. Kirkingburg, decided the same day as Sutton, the Court held in dicta that even a person’s

104. 2003 American Community Survey, supra note 94. The term “employment disability” is self-defined: Survey participants were asked if they had a physical, mental, or emotional condition lasting six or more months which made it difficult to work at a job or a business and simply answered “yes” or “no.” American Community Survey, 2003 Subject Definitions 35, http://www.census.gov/acs/www/Downloads/2003/usedata/Subject_Definitions.pdf [hereinafter ACS Definitions]. The 2000 Census reported that 21.3 million people aged 16 to 64 have a condition that affects their ability to work at a job or business. DISABILITY STATUS: 2000 2 (March 2003), http://www.census.gov/prod/2003pubs/p23-17.pdf.

105. U.S. CENSUS BUREAU, AMERICAN FACTFINDER, http://factfinder.census.gov/ jsp/saff/SAFFInfo.jsp?_pageId=tp4_disability. More than three times as many people between the ages of 18 and 34 without disabilities have earned bachelor’s degrees as those with disabilities, and nearly three times as many have earned graduate or professional degrees. 2003 American Community Survey, supra note 94 (follow “People” hyperlink; then follow “Disability” hyperlink; then follow “Data and Links on Disability” hyperlink; then follow “2003 Data” hyperlink; then follow “PTC046: Educational Attainment” hyperlink). The survey defined “disability” as follows: [A] long-lasting sensory, physical, mental, or emotional condition. This condition can make it difficult for a person to do activities such as walking, climbing stairs, dressing, bathing, learning, or remembering. It can impede a person from being able to go outside the home alone or to work at a job or business, and it includes persons with severe vision or hearing impairments. ACS Definitions, supra note 104, at 33. Although the reasons for the educational disparity were not explored by the survey, there is evidence elsewhere that people with disabilities have historically been less likely to pursue higher education because they are unlikely to see a return on their investment in the form of higher wages. See Susan Schwachau & Peter David Blanck, The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?, 21 BERKELEY J. EMP. & LAB. L. 271, 275-76 (2000). It would certainly be contrary to the goals of the ADA if this trend were to continue as a result of the minimal protection offered by the Sutton Court.

106. 527 U.S. 555 (1999). This case will be discussed further in Part III.C.4, infra.
spontaneous biological coping mechanisms are considered mitigating measures and should be taken into account in determining whether the individual’s impairment is substantially limiting (and therefore qualifies as a disability). In that case, the plaintiff was afflicted with amblyopia, a condition that resulted in monocular vision, and was fired from his job as a truck driver because he failed to meet the basic vision standards established by the Department of Transportation (“DOT”). The plaintiff’s brain had “developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensate[d] for his disability.” Relying on its decision in Sutton, the Court ruled there was “no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body’s own systems.” Because the issue is whether an impairment substantially limits a major life activity, the Court reasoned that a person like the plaintiff was less limited in the major life activity of seeing than a person with the same condition whose brain made no compensation for monocularity. Therefore, the plaintiff was not disabled within the meaning of the Act.

Like Sutton, at first glance Albertson’s seems well-reasoned and logical, but it is unjust. Individuals who lose one sensory ability are sometimes able to compensate for the loss by using their other senses. For instance, some vision-impaired people have acute hearing that allows them to “see” where people and things are. Under the

107. Id. at 565-66. Another important effect of the mitigating measures rule is that, because the disability definition is contained in the preliminary portion of the Act, the Court’s rulings in Sutton, Murphy, and Albertson’s will be applicable to the other Titles of the Act as well. Ruth Colker illustrates how this might have incongruous results:
   At night, when [a hearing aid user] sleeps at a hotel, he may want to know that the hotel has a system of blinking lights to alert people to an emergency, rather than merely an auditory alarm. But, in deciding whether he is disabled for the purposes of bringing a lawsuit under ADA Title III . . . a court would have to consider him in his corrected state, despite the fact that he is unlikely to sleep while wearing hearing aids.

COLKER, supra note 40, at 108.

108. The plaintiff received a waiver from the Department of Transportation as part of a pilot program, but the defendant refused to rehire him. See Albertson’s, 527 U.S. at 560.

109. Id. at 565 (citing Kirkingburg v. Albertson’s, Inc., 143 F.3d 1228, 1232 (9th Cir. 1998)).

110. Id. at 565-66.

111. Id. at 567. These decisions also call into question the second prong of the disability definition, the “record of” element. There have been very few cases under this definition in the nearly sixteen years since the ADA’s enactment, and Sutton may have effectively closed the door for plaintiffs here because the mitigating measure may be the reason why the individual is not currently disabled. For further discussion, see COLKER, supra note 40, at 108-09.

Albertson’s analysis, a visually impaired person whose hearing is very sensitive might be ruled not disabled, where one whose body failed to make such an accommodation would be considered disabled. Surely the first person has an easier time navigating the world than the second, and therefore the effect of the impairment on his life is less severe, but is it fair to say that one of them is less substantially-limited in seeing than the other? This example is extreme, to be sure, but law is often a matter of degree, and Albertson’s failed to establish effective guidelines for lower courts.

4. Conclusion

The Supreme Court has, by narrowly interpreting Congress’s broad language, substantially reduced the number of people protected by the Americans with Disabilities Act. Some people who use medication or assistive devices to relieve the symptoms or reduce the effects of their impairments are no longer covered by a law that was written with them in mind. It is true, as the Sutton Court emphasized, that some people who use mitigating measures will still be protected because, even with medication or a hearing aid, for example, their activities are still substantially limited. This is cold comfort to most people with disabilities because the stigma they suffer comes not from the effect of the impairment on their lives, but from the simple fact of the impairment and the resulting assumptions other people make about their abilities. It is precisely this stigma that Congress intended to protect against.

indicated no physiological differences between blind and sighted persons with respect to hearing, on some tasks involving hearing or touch, blind persons out-perform sighted persons; likewise, on some tasks that involve vision or touch, deaf persons outperform persons with normal hearing ability).

113. The Albertson’s Court relied on the regulations promulgated by the EEOC: “The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.” Albertson’s, 527 U.S. at 566 (citing 29 C.F.R. § 1630, app. § 1630.2(j) (1998)).

114. The term “substantially limits” is defined by the EEOC as “[u]nable to perform a major life activity that the average person in the general population can perform”; or “[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.” 29 C.F.R. § 1630.2(j)(i)-(ii) (2005).

115. Sutton v. United Air Lines, Inc., 527 U.S. 471, 488 (1999) (“[O]ne has a disability under subsection [§ 12102(2)](A) if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity.”).

116. See 42 U.S.C. § 12101(a)(7) (2000): (“[I]ndividuals with disabilities . . . have been faced with restrictions and limitations . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”).
Excluding some people from protection because the effect of their impairment is abated by a corrective measure or device—or even by their bodies’ own spontaneous coping mechanisms—does nothing to combat true, disability-based discrimination.

Work continues to qualify as a major life activity probably only because the Supreme Court has not been forced to decide the issue. Should the Court have occasion to hear a case where the only limitation imposed by a plaintiff’s impairment is on his ability to work, its dicta in *Sutton* 117 and *Toyota* 118 suggests that it would have difficulty holding that work is a major life activity under the Act. If the Court were to disregard Congress’s desires and the EEOC guidelines on this issue, many people whose impairments only substantially limit their ability to work would be unprotected, subject to disability-based discrimination at the whim of employers who could not be held accountable. Even if the Court were to officially accept working as a major life activity, its interpretation of what it means to be substantially limited in that area assures that almost no one would qualify for protection under that provision.

### B. Abuse of Summary Judgment Standards

With a significantly narrowed class of protected individuals, it logically follows that a larger number of cases can be decided on summary judgment, 119 which lessens the strain on a court’s docket. Generally this is a welcomed result, as most courts are overburdened. In the context of the ADA, however, ruling out plaintiffs on the grounds that they are not disabled within the meaning of the statute means that the more fact-specific determinations of whether an individual with a disability is “otherwise qualified” for the job, 120 or whether an accommodation imposes an “undue hardship” on the employer 121 never reach the jury.

In the case of *Sutton* (dismissed for failure to state a claim) or *Albertson’s* (decided on summary judgment for the employer), not only were the plaintiffs precluded from an opportunity to demonstrate that they had been victims of disability-based employment discrimination,

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119. This is because fewer plaintiffs are found to have standing to sue under the Act. See Charles B. Craver, *The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act*, 18 LAB. LAW. 417, 435 (2003).
121. Id. § 12111(10)(A).
but also the employer-defendants were never required to demonstrate that their employment standards were reasonable. In similar cases at lower levels, courts are simply following Supreme Court precedent, and only Congress or the Court itself can change the rules. More troubling, however, is the evidence that courts often abuse the basic rules of summary judgment in ways that result in an extreme bias in favor of employer-defendants.

1. Empirical Data

Ruth Colker has done extensive research into the decisions of trial and appellate courts in ADA cases. She discovered that trial courts routinely find in favor of defendants on motions for summary judgment, despite the rule that evidence is to be considered in the light most favorable to the non-moving party. This problem is compounded by the appellate courts’ failure to reverse these errors on appeal. Between 1992, when the employment provisions of Title I took effect, and 1998, Colker’s research shows that defendants in ADA cases prevailed at trial in 94% of the cases reviewed. Similarly, defendants prevailed in 84% of cases in which plaintiffs appealed the outcome below. A brief look at the hundred most recent decisions published to Westlaw indicates that

122. It is a valid defense to a charge of employment discrimination that an alleged application of qualifications standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation. Id. § 12113(a).

123. See, e.g., United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Nuzum v. Ozark Auto. Distribs., Inc., 432 F.3d 839, 842 (8th Cir. 2005) (“Summary judgment should be entered only if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”).

124. See COLKER, supra note 40, at 115.

125. Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999). Colker examined all appellate decisions in ADA cases that were available on Westlaw and supplemented these cases with others available via different electronic resources. Id. at 103. This figure includes cases decided by dismissal, summary judgment, or verdict. Id. at 108. Colker’s figure is supported by data collected by the American Bar Association, which found that employer-defendants prevailed in nearly 93% of ADA cases. ABA Comm’n on Mental & Physical Disability, Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints, 22 MENT. & PHYS. DIS. L. REP. 403, 403 (1998).

126. Colker, supra note 125, at 108. When defendants appealed pro-plaintiff trial outcomes, plaintiffs prevailed 52% of the time. Id. However, because there were only forty-five pro-plaintiff outcomes in the data set (out of 475), and just twenty-seven were appealed, this figure represents only fourteen cases. Id. It appears that plaintiffs are more likely to appeal adverse trial court decisions in ADA cases than are defendants. For a discussion of why this might be, see Ruth Colker, Winning and Losing under the Americans with Disabilities Act, 62 OHIO ST. L.J. 239, 250-51 (2001) [hereinafter Colker, Winning and Losing].
the trend has not slowed in the past eight years. Ninety-three of the one hundred cases reviewed were decided at the trial level by either dismissal, summary judgment for the defendant, or jury verdict for the defendant. On appeal, seventy-seven pro-defendant outcomes were upheld (nearly 83%).

More than 12% of the appellate decisions in Colker’s data set were appeals by plaintiffs from dismissals below, and a full 75% were appeals by plaintiffs from grants of summary judgment for the employer-defendants. Although Colker is careful to caution against extrapolation from this limited data set to the results of ADA cases overall, she points out that reliance solely on published or publicly available decisions probably overstates plaintiffs’ success on appeal, because unpublished opinions typically are affirmances of pro-defendant results at the trial level.

2. Discussion

If more than 90% of suits filed under the Americans with Disabilities Act are resolved in favor of defendants without ever debating the merits of the claims, as Colker’s research seems to suggest, what accounts for this apparently extreme result? Colker proffers two theories, what she calls “a powerful one-two punch against plaintiffs.”

127. ADA Title I cases published on Westlaw between May 2005 and March 2006. Nearly all ninety-three cases were decided at summary judgment. WESTLAW; ALLFEDS Database (last searched Mar. 18, 2006), available at WESTLAW:ALLFEDS/search: BG(ADA “Americans with Disabilities Act” & employ!).

128. However, all seven jury verdicts or bench trial verdicts issued for plaintiffs were upheld on appeal.

129. Colker, Winning and Losing, supra note 126, at 246. Here the cases were retrieved solely from Westlaw, so only decisions made available in that format were included. Id. at 244.

130. Id. The opinions in the data set are non-representative of all judicial decisions because they are appellate decisions and because they are made available to the public, facts which Colker suggests require “special caution.” Id. Another reason to be cautious about relying too heavily on data extracted solely from published opinions is the “black hole of Title I data.” Scott Burris, et al., Disputing Under the Americans with Disabilities Act: Empirical Answers, and Some Questions, 9 TEMP. POL. & CIV. RTS. L. REV. 237, 249 (2000). Between 1992 and 1998, more than 175,000 charges of employment discrimination were filed with the EEOC, and more than 122,000 were closed by the agency without a resolution. Id. at 249-50. All of these claimants were entitled to seek relief in court, but judicial opinion data account for a very small percentage of this population. Id. at 250. Burris and his colleagues estimate that over 121,000 potential lawsuits are “unaccounted for,” which makes it nearly impossible to accurately evaluate how well the ADA dispute resolution system works. Id.

131. See Colker, Winning and Losing, supra note 126, at 247; see also Colker, supra note 125, at 108.

132. COLKER, supra note 40, at 115.
First, the narrow interpretation of the term “disability” has made it easier for courts to decide cases at the threshold level, but has simultaneously made it much more difficult for plaintiffs to prevail on the most basic question in any ADA lawsuit: Is the plaintiff disabled within the meaning of the Act?

Second, Colker offers evidence that many courts, even at the appellate level, are abusing the summary judgment device in order to find in favor of employer-defendants. This occurs in two ways: judges create an impossibly high threshold of proof a plaintiff must meet to defeat a motion for summary judgment, and judges decide issues of fact that are, in similar cases under other statutes, ordinarily reserved for the jury.

a. Threshold of Proof

The Supreme Court addressed the issue of the threshold of proof necessary to defeat a motion for summary judgment in *Anderson v. Liberty Lobby, Inc.* In that case, which dealt with libel, the Court held that although the moving party bears the burden of showing that no issue of material fact exists, “the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict . . . but must set forth specific facts showing that there is a genuine issue for trial.” The Court elaborated that it did not intend to remove factual decisions from the province of the jury, and that the plaintiff “need only present evidence from which a jury might return a verdict in his favor.” This, noted the Court, “necessarily implicates” the standard of proof required at trial, meaning that, in considering how much evidence is enough to defeat a motion for summary judgment, a court should take into account how much a plaintiff would be required to prove at trial. In ADA cases, this is the preponderance of the evidence standard.
In ADA lawsuits generally, plaintiffs bear the burden of proving, among other things, that they are disabled within the meaning of the Act.\(^{142}\) Defendants, meanwhile, bear the burden of showing that accommodations pose an undue burden or that a plaintiff’s disability presents a direct threat to others in the workplace.\(^{143}\) It should be easier, then, for a plaintiff to defeat a defendant’s motion for summary judgment on the direct threat issue, for example, than on the issue of disability.\(^{144}\) Furthermore, under Anderson, even where the plaintiff bears the burden of proof, he should not have to provide uncontrovertable evidence in order to reach the jury.\(^{145}\) According to Colker, however, the conservative Fourth Circuit has ignored the Anderson rule on threshold of proof in at least two cases.

In Ennis v. National Association of Business and Educational Radio, Inc.,\(^{146}\) the plaintiff claimed she had been fired from her job as a bookkeeping clerk because she adopted an HIV-positive child.\(^{147}\) Ennis offered proof that, shortly before she was suspended (and later discharged), her employer circulated a memo warning that all employees’ insurance premiums would go up dramatically if “[the company] ha[...]s a couple of very expensive cases.”\(^{148}\) Ennis also produced evidence that the company had recently had a very expensive case and asked the court to find that she had been discriminated against because of the potentially “catastrophic impact”\(^{149}\) the cost of her son’s care might have on the company’s insurance plan. The trial court found that Ennis had established a prima facie case of discrimination, but held she had failed to raise a triable issue on whether the defendant’s non-

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142. This is clear from the statute. Only “qualified individuals with . . . disabilit[i]es,” are protected from discrimination, so a plaintiff would have to prove that he falls into that category in order to move forward with his suit. 42 U.S.C. § 12112(a) (2000).
143. This is also evident from the statute. See 42 U.S.C. § 12111(10)(B) (listing factors to consider when determining whether an accommodation poses an undue hardship; these factors are primarily within the purview of a defendant-employer); id. § 12113(b) (falling under the heading “Defenses” and stating that the term “qualification standards” can include a requirement that the employee or applicant not pose a direct threat to the health or safety of others in the workplace).
144. See Colker, supra note 125, at 117-18.
145. Id. at 118.
146. 53 F.3d 55 (4th Cir. 1995).
147. Ennis filed suit under § 12112(b)(4), which defines discrimination to include “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship.” Id at 57.
148. Id.
149. Id.
discriminatory reason given for the discharge was merely pretext for discrimination.\textsuperscript{150} On appeal, the Fourth Circuit affirmed, ruling that Ennis had offered only “unsupported speculation”\textsuperscript{151} on the defendant’s state of mind, which was not enough to defeat a motion for summary judgment.

The problem with this decision is that Ennis had few, if any, other avenues through which she could have demonstrated her employer’s state of mind with regard to her discharge.\textsuperscript{152} Because meetings are often closed to employees and rarely recorded, “office memoranda are often the best indicators of [decision makers’] state[s] of mind.”\textsuperscript{153} The Fourth Circuit decision sent a message to the lower courts that judges may grant summary judgment motions in cases turning on state-of-mind evidence, provided they determine that the evidence requires too much inference for the jury to make.\textsuperscript{154}

Another case, \textit{Runnebaum v. NationsBank},\textsuperscript{155} involved an asymptomatic HIV-positive man who was fired from his job in the defendant-bank’s trust department. In his lawsuit, the plaintiff alleged that he had been discharged because of his illness, in violation of the ADA. At trial, the defendant conceded (and the court did not disagree) that Runnebaum was disabled within the meaning of the Act. However, the court found he had not made out a prima facie case of employment discrimination and granted summary judgment to the defendant. On appeal, the Fourth Circuit originally reversed the trial court’s ruling and held that Runnebaum had, in fact, presented enough evidence to raise an issue of material fact.\textsuperscript{156} In an \textit{en banc} rehearing of the case, a divided panel reversed the trial court with respect to Runnebaum’s being disabled and held that he had not presented sufficient evidence to meet the Act’s definition of disability.\textsuperscript{157} The panel then affirmed the grant of summary judgment for the employer, agreeing with the trial court’s original decision that Runnebaum had not established a prima facie case of discrimination.\textsuperscript{158}

\textsuperscript{150}. The defendant claimed Ennis was discharged because she was not performing her job competently. \textit{Id.}
\textsuperscript{151}. \textit{Id. at} 62.
\textsuperscript{152}. See \textit{COLKER, supra} note 40, at 117.
\textsuperscript{153}. \textit{Id.}
\textsuperscript{154}. \textit{Id.}
\textsuperscript{155}. 123 F.3d 156 (4th Cir. 1997) (\textit{en banc}).
\textsuperscript{156}. 95 F.3d 1285 (4th Cir. 1996). The court here found that Runnebaum qualified for protection under 42 U.S.C. § 12102(2)(C), the “regarded as” prong. \textit{Id. at} 1290.
\textsuperscript{157}. \textit{Runnebaum}, 123 F.3d at 172.
\textsuperscript{158}. \textit{Id. at} 175.
The court’s rationale for its disability determination was that “asymptomatic HIV does not substantially limit procreation [or other major life activities] for purposes of the ADA.” The court went further, holding that, even if Runnebaum’s ailment qualified as an impairment under the Act, he had not demonstrated that he had forgone having children as a result of his diagnosis, and so had not been substantially limited in his ability to reproduce. This holding seems absurd in light of the fact that neither the defense nor the trial judge disputed that Runnebaum was disabled within the meaning of the Act.

Similarly, the appeals court held that there was no proof that NationsBank regarded Runnebaum as having a substantially limiting impairment. Again, the court ignored the fact that Runnebaum did not need to produce such evidence, as the defense conceded as much in its summary judgment memoranda. Ruling against the plaintiff for failing to produce evidence about his reproductive choices and the actions of his employer when his disability status had not been contested by his opponent is an example of “an appellate court that was very eager to embrace summary judgment principles to the detriment of a plaintiff in an ADA lawsuit.”

With regard to whether Runnebaum established a prima facie case of discrimination, both the trial court and the Fourth Circuit ignored the Anderson standard for threshold of proof. There was more than enough evidence for a reasonable juror to conclude that Runnebaum was fired because of his illness. Runnebaum provided evidence of his supervisor’s “panic” upon learning about his diagnosis, that another supervisor learned about his diagnosis two months before she terminated him, that no negative employment information was placed in his file until

159. Id. at 172. The following year, the Supreme Court determined the opposite in Bragdon v. Abbott, 524 U.S. 624, 641 (1998), holding that the asymptomatic and HIV-positive plaintiff was disabled within the meaning of the Act because of the disease’s effect on the plaintiff’s ability to reproduce.

160. Runnebaum, 123 F.3d at 172. The Bragdon Court did not require a personalized determination of whether the plaintiff herself had forgone having children as a result of her HIV-positive status: “[T]he disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable.” Bragdon, 524 U.S. at 641.

161. “NationsBank did not regard or perceive Runnebaum as having [a substantially limiting] impairment, and the record does not contain evidence demonstrating otherwise.” Runnebaum, 123 F.3d at 174.

162. Id. at 177 (Michael, C.J., dissenting) (citation omitted).

163. COLKER, supra note 40, at 118. Colker goes on to argue that this portion of the ruling can only be explained as the result of homophobia. Id. at 119.

164. Runnebaum, 123 F.3d at 162.

165. Id. at 162-63.
after his diagnosis became known to his supervisors,\textsuperscript{166} and that another employee whose work performance was significantly worse than Runnebaum’s was retained.\textsuperscript{167} Yet the court characterized this evidence as merely “unsupported speculation.”\textsuperscript{168} It is difficult to imagine what other proof Runnebaum could have provided to overcome the threshold and convince the court that his discrimination case should reach the jury.

\textbf{b. Issues of Fact}

It is well settled that questions of law are the province of the judge and questions of fact are the province of the jury.\textsuperscript{169} The distinction is not always an easy one to make, and often the same issue can be argued either way. In making the determination, courts often rely on a functional test, which assesses whether the issue is better suited for resolution by a judge or jury.\textsuperscript{170} With respect to the ADA, Colker posits that prior rulings on similar issues are highly relevant in determining whether an issue should be decided by a judge or jury.\textsuperscript{171} Because the Americans with Disabilities Act was modeled on section 504 of the Rehabilitation Act and Congress expressly required that the ADA be interpreted in accordance with section 504,\textsuperscript{172} case law under that section should provide ample guidance for courts.

Under section 504, courts have routinely determined that questions such as whether a person is disabled, whether an accommodation is reasonable, whether an accommodation imposes an undue burden on an employer, and whether a person’s disability poses a direct threat to others in the workplace are matters for the jury, not the judge.\textsuperscript{173} In \textit{School Board of Nassau County v. Arline},\textsuperscript{174} a prominent Rehabilitation Act case, the Supreme Court specifically noted the factual nature of the direct threat defense.\textsuperscript{175} Courts are regularly failing to apply this

\begin{enumerate}
\item[166.] Colker, supra note 40, at 120.
\item[167.] Runnebaum, 123 F.3d at 187 (Michael, C.J., dissenting).
\item[168.] Id. at 164 (citation omitted).
\item[169.] See, e.g., John M. Facciola, District of Columbia Jury Instructions, SK055 ALI-ABA 459, 461 (2005) (“The judge . . . must rule upon questions of law arising during the trial . . . . [T]he function [of] jurors is to decide the facts.”).
\item[170.] Colker, supra note 125, at 111.
\item[171.] Id.
\item[172.] 42 U.S.C. § 12201(a) (2000).
\item[173.] Colker, supra note 125, at 111-12.
\item[174.] 480 U.S. 273 (1987).
\item[175.] Id. at 287 (“[T]he district court will need to conduct an individualized inquiry and make appropriate findings of fact . . . while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.”). For more examples of circuit court rulings on this issue under the Rehabilitation Act, see Colker, supra note 125, at 112-
functional test, and plaintiffs are suffering. Colker singles out the usually moderate Sixth Circuit to illustrate this point.

In *EEOC v. Prevo’s Family Market, Inc.*, the plaintiff was fired from his job as a produce clerk after informing his employer that he had tested HIV-positive and refusing to provide additional medical information or submit to a medical examination. The plaintiff prevailed below on summary judgment and was awarded over $50,000 in damages by the jury. The United States Court of Appeals for the Sixth Circuit then reversed, ruling that the trial court should have granted summary judgment for the defendant, finding that the requested medical examination was “job-related and consistent with a business necessity,” despite the fact that the defendant bore the burden of proof on the issue. The defendant claimed that if the plaintiff was indeed HIV-positive, he posed a direct threat to others in the workplace, a valid defense under the ADA to a charge of discrimination. However, pursuant to the ADA, the Centers for Disease Control (“CDC”) maintains a list of infectious diseases that can be transmitted through food handling. Neither HIV nor AIDS has ever been placed on the list. The court’s claim, then, that the trial court’s ruling required the defendant to become “an expert in the field of HIV transmission and control” is patently false. Employers can rely on the expertise of the CDC in determining whether a particular condition poses a threat to the food supply. In spite of the factual dispute about the lawfulness of defendant’s medical examination request, the Sixth Circuit declined to defer to Rehabilitation Act precedent and allow the jury to decide the issue.

14. Colker also indicates that similar issues under other civil rights statutes have been held to be factual issues. See Colker, supra note 125, at 114.
176. 135 F.3d 1089 (6th Cir. 1998).
177. Id. at 1093.
178. It is a defense to a charge of discrimination that a requested medical examination is “job-related and consistent with business necessity.” 42 U.S.C. § 12113(a) (2000).
179. See id. § 12113(b).
180. See id. § 12113(d)(1)(B).
182. Prevo’s Family Market, 135 F.3d at 1097.
183. Colker, supra note 40, at 122.
184. The dissent in Prevo’s Family Market went so far as to suggest that the employer was motivated by fear, and that the majority permitted the employer “to elevate . . . ignorance over information, and mythology over medicine.” 135 F.3d at 1104 (Moore, C.J., dissenting).
Another Sixth Circuit case, *Estate of William C. Mauro v. Borgess Medical Center*,185 also involved an HIV-positive plaintiff. After his employer learned he was HIV-positive, Mauro was fired from his job as an operating room assistant because he refused to accept reassignment to a job that did not involve patient contact. The employer claimed Mauro would present a direct threat to the health and safety of others if he were to remain in his original position. At trial, there was a factual dispute as to whether Mauro performed any of the “exposure-prone” procedures considered by the CDC to pose a heightened risk of infection.186 Mauro testified that his job was to hand instruments to the surgeons and to occasionally hold a retractor with one hand in the wound area, but that he never placed his hands inside the body cavity of the patient.187 A witness testified that a person in Mauro’s position was sometimes, though rarely, asked to assist the surgeon in a way that would require his hands to be inside the body cavity.188 Notwithstanding this conflicting testimony, the trial court granted summary judgment for the defendant and denied Mauro the opportunity to have his case heard by the jury. As in *Prevo’s Family Market*, the Sixth Circuit in *Mauro* concluded there was no issue of material fact and affirmed the lower court’s ruling.189 Both of these decisions contravene the similar cases decided under the Rehabilitation Act and other civil rights statutes, and make a strong case for judicial abuse of summary judgment standards.

3. Conclusion
Assuming, arguendo, that the *Sutton* and *Albertson’s* rulings are reasonable and plaintiffs should be protected based on the effect of their impairments, courts have taken it upon themselves to effectively narrow the protected class even further by deciding questions of fact rightfully reserved for a jury. Although it is impossible to calculate the exact impact of this abuse of discretion, we can surmise that at least some of the plaintiffs being erroneously turned away at summary judgment

185. 137 F.3d 398 (6th Cir. 1998).
187. See Estate of Mauro, 137 F.3d at 404.
188. Id. at 405.
189. In both *Prevo’s Family Market* and *Estate of Mauro*, the defendants bore the burden of proof, as each was asserting an affirmative “direct threat” defense. In each case, the court failed to consider the *Anderson* standard in granting the defendants’ motions for summary judgment. See Colker, supra note 125, at 120-22.
would prevail at trial.190 This alone is disturbing enough, but there are other troubling outcomes as well.

First, fewer employees may be willing to come forward with claims of disability-based discrimination. If the likelihood of having a case heard on the merits is slim and the employer is overwhelmingly likely to succeed at summary judgment (both indicated by Colker’s research), a disabled employee who experiences discrimination will probably be less likely to come forward with the allegation. Perhaps an unaccommodated job or an underpaying job is better than rocking the boat and risking having no job at all.191

Second, fewer plaintiffs’ lawyers may agree to take on ADA cases. Typically, plaintiffs’ lawyers take cases on contingency, meaning they are paid out of any damages awarded when a plaintiff prevails.192 If the plaintiff’s case fails, the lawyer is not paid.193 Notwithstanding the possibility of prevailing on the merits, where the probability of even

190. Across all employment discrimination actions, plaintiffs prevail in approximately 30% of bench or jury trials. See Colker, supra note 40, at 79. Of course, given the reversal rate on appeal, see Colker, supra note 125, at 108, prevailing at trial is no guarantee of an overall “win” for the plaintiff.
191. One federal judge explains some of the difficulties an employee may encounter if he chooses to pursue litigation against his current employer:
   [I]n a situation where an employee is suing for accommodation by the employer and is looking to keep [his] job, it presents . . . unique problems and issues:
   1. How do the litigants continue working together throughout the lawsuit when they are essentially in an adversarial situation? Can there be open communication about the job? Is there a feeling of betrayal and mistrust that carries over into the workplace?
   2. When the case is over, especially where an employee is vindicated, how do [the parties] maintain a good working relationship/environment when someone (perhaps both litigants) feel that they have “lost”?
   3. Throughout the litigation, especially during the times of pretrial discovery and gathering of the evidence, how can people work together without feeling that the other litigant is gathering “evidence” against them?
   4. When the litigation is over and the accommodations have been ordered, how do [the parties] ever undo the sense of mistrust and betrayal that is a natural feeling between the employer and employee?
   E-mail from the Hon. Kathleen Cardone, U.S. District Court for the Western District of Texas, to Melanie Winegar (Nov. 9, 2005, 17:05:07 MST) (on file with author). Given these practical obstacles, some employees might choose to forgo a lawsuit in order to keep the peace, and their jobs.
193. Id.
194. Across all employment discrimination cases, both those filed under the Americans with Disabilities Act as well as those filed under other civil rights statutes, information complied by the Administrative Office of the United States Courts indicates that, between 1992 and 2000, plaintiffs prevailed in 33.8% of cases decided via bench or jury trial. Colker, supra note 40, at 79. The
an opportunity to proceed on the merits is so slim, lawyers are bound to take on fewer cases, and then only those where there is overwhelming evidence of discrimination.

Third, assuming a plaintiff is able to secure counsel, fewer defendants are likely to settle even meritorious claims. When the likelihood of having to try the case on the merits is approximately one in ten, and the chances of a pro-defendant outcome at trial are approximately seven in ten, employers have little incentive to fairly assess the evidence and make a reasonable settlement offer—financial or otherwise—to the employee. While confidentiality concerns keep much settlement data private, the EEOC does keep track of all charges filed and their outcomes. Between July 1992, when the employment provisions of the Americans with Disabilities Act went into effect, and September 2005, the last month for which data is available, the EEOC resolved over 230,000 claims of employment discrimination. Of these, only 7.1% (fewer than 17,000 claims) were resolved by settlement. An additional 4.9% (fewer than 12,000 claims) were resolved under the
heading “Withdrawal with Benefits,” meaning the charging party withdrew the claim after receiving the desired benefits from the respondent. A third pro-plaintiff category, successful conciliations—those instances where reasonable cause has been found and conciliation with the employer results in “substantial relief to the charging party and all others adversely affected by the discrimination”—accounts for only 2.2% of the total resolutions. Thus, in more than twelve years, fewer than 15% of cases (about 33,000 claims) resulted in pro-plaintiff outcomes.

Individually and collectively, these outcomes have the ultimate and disquieting result of permitting employers to practice illegal, disability-based employment discrimination without fear of reprisal.

C. Disability Rights as Civil Rights

1. History of Disability Law in the United States

In the 1950s, disability law as we know it today did not exist. The emphasis under President Eisenhower’s disability policy was on two areas: the expansion of the social security program to cover the risk of disability and the expansion of federal grants to assist people with disabilities in finding employment. A paradox existed, however, in that some people found themselves too disabled to work, yet not disabled enough to qualify for disability insurance. At the time, there was no discussion that this might be a kind of disability-based...
discrimination, and there was certainly no conceptual link made between civil rights and disability policy.\textsuperscript{207}

In 1964, the Civil Rights Act\textsuperscript{208} ("CRA") was passed, which protected women and minorities from, among other things, discrimination in employment.\textsuperscript{209} Shortly afterward, Congress enacted a number of laws that benefited the disabled, including Medicare\textsuperscript{210} and the Elementary and Secondary Education Act ("ESEA").\textsuperscript{211} Congress also expanded the Vocational Rehabilitation Act.\textsuperscript{212} By the end of the decade, disability policy was centered on Social Security Disability Insurance ("SSDI"), Vocational Rehabilitation, the ESEA, and Kennedy-era mental retardation programs.\textsuperscript{213}

A number of policy shifts occurred in the 1970s. Among them were a broadened definition of mental retardation that included developmental disabilities,\textsuperscript{214} the eligibility of SSDI recipients to receive Medicare,\textsuperscript{215} and the passage of the Education of the Handicapped Act.\textsuperscript{216} Disability rights and civil rights, however, were still not linked in the minds of lawmakers. The policies implemented were driven mainly by the needs and concerns of professionals, including special educators, vocational rehabilitation counselors, and mental retardation researchers, rather than by any underlying belief that people with disabilities had a fundamental right to access these programs.\textsuperscript{217}

It was not until 1973 and the passage of the Rehabilitation Act\textsuperscript{218} that the connection between civil rights and disability rights was finally made in legislation. The Rehabilitation Act protected "otherwise qualified" individuals with disabilities from discrimination by the federal government and federally funded entities.\textsuperscript{219} The wording of section 504 of the Rehabilitation Act came directly from Title VI of the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{207} Id.
\item \textsuperscript{208} 42 U.S.C. §§ 1981-2000h-6 (2000).
\item \textsuperscript{209} 42 U.S.C. § 2000e-2(a).
\item \textsuperscript{210} 42 U.S.C. §§ 1395-1395b-7 (2000).
\item \textsuperscript{213} See Berkowitz, \textit{supra} note 12, at 101.
\item \textsuperscript{215} See Berkowitz, \textit{supra} note 12, at 102.
\item \textsuperscript{216} This was the name by which codification of the amendments to the ESEA came to be known. Id.; see also Pub. L. 91-230, Apr. 13, 1970, 84 Stat. 121.
\item \textsuperscript{217} See Berkowitz, \textit{supra} note 12, at 102.
\item \textsuperscript{218} 29 U.S.C. §§ 701-796l (2000).
\item \textsuperscript{219} Id. § 794(a).
\end{enumerate}
\end{footnotesize}
Civil Rights Act. Not only was the language of the law firmly entrenched in civil rights, but also the enforcement of section 504 became the responsibility of the EEOC, the agency which enforced the CRA and other civil rights laws, rather than of the vocational rehabilitation agency.

The Americans with Disabilities Act drew heavily on the structure of the Civil Rights Act of 1964, grew directly out of the Rehabilitation Act of 1973, and used a civil rights framework. For instance, Congress’s findings draw on civil rights rhetoric, the law itself characterizes adverse employment decisions made on the basis of disability as “discrimination,” and the remedies available to ADA plaintiffs are the same as those available under the Civil Rights Act. Furthermore, the EEOC also investigates claims arising under and enforces compliance with Title I of the ADA. These facts, bolstered by lawmakers’ statements calling the ADA an “Emancipation Proclamation” for people with disabilities and an end to “American apartheid,” lend credence to the idea that the law was meant to be a “second generation” civil rights statute. Somewhere along the way, however, the legacy of disability rights as civil rights has fallen by the wayside.

2. The ADA Versus The Civil Rights Act

The Americans with Disabilities Act was intended to provide protection for people with disabilities comparable to that provided by


221. See Berkowitz, supra note 12, at 106.


223. In fact, by its terms, the ADA is to be interpreted consistently with the Rehabilitation Act. 42 U.S.C. § 12201(a) (2000).

224. See § 12101(a)(2) (“[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”).

225. See generally § 12112.

226. See § 12117(a).

227. See id.


Title VII of the Civil Rights Act for women and racial and ethnic minorities. As such, one might expect to find fairly consistent judicial decisions between cases involving the two statutes, but at least one researcher has determined that this is not the case. Ruth Colker compiled data for plaintiff win-rates on appeal under both Title VII and the ADA. When Title VII claims were joined to ADA claims, the overall plaintiff-success rate for those claims was not any greater than for the ADA-only claims in Colker’s data set. When brought separately, however, outcomes of Title VII claims were more heavily pro-plaintiff. Colker’s research shows that Title VII plaintiffs won reversals on appeal in 34% of cases, but ADA plaintiffs succeeded on appeal in only 21% of cases. Defendants won reversal on appeal in only 41% of Title VII cases, but in a full 60% of ADA cases.

This data on Title VII cases is surprising, given that the Americans with Disabilities Act is based on the Civil Rights Act, by way of the Rehabilitation Act. Colker suggests that the disparity could be the result of any number of things. A major difference between the CRA and the ADA is the availability of “reverse discrimination” claims, which are not available under the ADA and might account for some of the disparity. Also, because the CRA is much older than the ADA, lawyers may be better able to make accurate predictions about appellate

231. Colker, Winning and Losing, supra note 126, at 251. Of the 86 Title VII claims in Colker’s database appealed by plaintiffs, only 6 (6.9%) were reversed; plaintiffs in ADA cases won reversal on appeal in only 12% of the cases in the database. Id. at 252. Colker also compared win rates when ADA claims were joined to age discrimination claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000), and found that of the 54 ADEA claims in the database appealed by plaintiffs, only 4 (7.4%) were reversed. Id.

232. Contra Moss et al., supra note 198, at 44 (“[EEOC] outcomes for the ADA are about the same as, if not more favorable than, those obtained under Title VII and the ADEA.”).

233. Colker, Winning and Losing, supra 126, at 253. This data comes only from published decisions available on Westlaw. Id. A reversal on appeal of a pro-defendant verdict below does not necessarily translate to an overall win for the plaintiff. For example, if a dismissal decision is reversed, the plaintiff might still lose on summary judgment on remand, or might lose on the merits at trial.

234. Id. Colker does not provide comparable data on ADEA cases, but my own brief research reveals a pro-defendant leaning nearly as severe as that in ADA cases. I searched Westlaw headnotes for 100 ADEA cases in federal court that were not joined with ADA claims and found that pro-defendant outcomes below were affirmed on appeal in more than 70% of the cases. WESTLAW: ALLFEDS Database (last searched Jan. 20, 2006), available at WESTLAW:ALLFEDS/search: BG(ADEA “Age Discrimination in Employment Act” % ADA “Americans with Disabilities Act”).

235. Whites claiming discrimination on the basis of race, for example. See, e.g., McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295-96 (1976) (holding that Title VII’s terms are not limited to discrimination against members of any particular race and prohibits racial discrimination against whites upon the same standards as racial discrimination against non-whites).

236. See Colker, Winning and Losing, supra note 126, at 254-55.
outcomes and only pursue those appeals that are most likely to succeed.\textsuperscript{237} Perhaps some judges have strong anti-ADA biases or are biased against people with disabilities. It is also possible that some “invisible” disabilities\textsuperscript{238} remain hidden throughout Title VII suits, but become known to the judge with the addition of an ADA claim, triggering the judge’s bias.\textsuperscript{239} Whatever the reason, the implications for plaintiffs are the same, and fairly disconcerting.

If a plaintiff is moderately more likely to succeed on a Title VII claim filed alone, but will probably lose that claim if he joins it to an ADA claim, he might file the suits separately, which increases his costs. Of course, the defendant would almost certainly move to join the claims, an action which both defeats the purpose of filing separately and decreases the plaintiff’s likelihood of success on the Title VII claim.\textsuperscript{240} Furthermore, if Colker’s research proves true, the specter of unaccountability for employers looms. If a plaintiff knows that he is more likely to succeed in his Title VII claim than in his ADA claim, and that his chances for success in his Title VII claim decrease if he joins it to his ADA claim, he might opt to pursue only the gender or race discrimination allegation. In that situation, the employer receives a pass on the potentially illegal disability-based discrimination.

3. Disability Rights: Civil Rights or Subsidy?

The idea that the problems facing people with disabilities are similar to those facing women and minorities (namely that they are denied equal opportunities because of irrational stereotypes and social structures that fail to consider them) forms the basis for both the structure and the rhetoric of the Americans with Disabilities Act.\textsuperscript{241} The civil rights approach shifts the focus of disability-based discrimination from the individual with a disability to the actions of the employer and uses the power of the state to compel compliance and obtain equality.\textsuperscript{242}

\textsuperscript{237} See id.
\textsuperscript{238} For example, heart disease or diabetes.
\textsuperscript{239} Colker, Winning and Losing, supra note 126, at 252-53.
\textsuperscript{240} A search of Westlaw for federal cases revealed 121 employment discrimination cases between January 2003 and January 2006 in which both Title VII and the ADA were implicated. WESTLAW, ALLFEDS Database (last searched Jan. 20, 2006), available at WESTLAW:ALLFEDS/search: BG(ADA “Americans with Disabilities Act” & “Title VII” & employt).
\textsuperscript{241} Matthew Diller, Judicial Backlash, the ADA, and the Civil Rights Model, 21 BERKELEY J. EMP. & LAB. L. 19, 32 (2000).
\textsuperscript{242} Id. at 35.
The judiciary, however, has become increasingly hostile to civil rights claims in general, and ADA plaintiffs are suffering as a result.

One possible explanation for this animosity is that “many judges are not strongly imbued with the notion that basic civil rights are at stake in ADA cases,” and therefore they fail “to accept the premises underpinning the statute.” Although judicial backlash of this sort may not be intentional, there are, nevertheless, consequences. When judges ignore the civil rights framework, they often see ADA plaintiffs as nothing more than “supplicants” waiting for handouts from the government. This view is often reinforced by the media, who claim that the Americans with Disabilities Act makes people with disabilities “eligible for a lifelong buffet of perks, special breaks, and procedural protections, a web of entitlement that extends from cradle to grave.” Through this lens of subsidization, many judges focus on threshold issues, such as the definitions of “disability” or “substantially limits,” rather than on the defendant’s actions. They look to the plaintiff’s character to determine if he is morally worthy of protection; that is, whether he is truly “disabled enough” to warrant inclusion under the law. If the disability in question does not appear to be sufficiently severe, judges often believe there is no basis for distinguishing between the plaintiff and other employees who are subject to the natural hazards.

243. Id. at 38. See also Samuel R. Bagenstos, The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination, 55 ALA. L. REV. 923, 944 (2004).
244. Diller, supra note 241, at 46.
245. Id. at 22. For additional explanations, all of which Diller discounts in favor of the explanation explored in this section, see id. at 21-22. See also Bagenstos, supra note 243, at 923-24.
246. Diller, supra note 241, at 48.
247. Ruth Shalit, Defining Disability Down, NEW REPUBLIC, Aug. 25, 1997, at 16, 18; see also Thomas Sowell, Spoiled Brat Politics, BALTIMORE SUN, Oct. 13, 2005, at 15A; Eric Peters, Disability Suits Point to Need for Federal Reform, DAILY ITEM (Sunbury, Pa.), Feb. 8, 2006, at A8. These editorial pieces attack plaintiffs suing under Title III (public accommodations), but their effect is the same on plaintiffs across titles, and on all people with disabilities. Much like Bagenstos’s “spread effect,” see infra note 277 and accompanying text, the specific complaint that people with disabilities are abusing the enforcement mechanism in cases involving Title III will likely be generalized by readers to apply to all ADA cases.
249. Id. This view is especially invidious in the context of disability benefits cases, where courts are concerned about “double dipping” and believe that plaintiffs are already being “taken care of.” Id. In order to qualify for Social Security disability benefits, an applicant must be unable to work as defined by the Social Security Administration (SSA), see 20 C.F.R. § 404.1520(a)(4) (2005), but an ADA plaintiff claims the ability to work but for the alleged discrimination by the defendant. But see Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 805 (1999) (holding that, because the SSA does not consider the possibility that an employer might make reasonable accommodations for the disability, Social Security disability benefit applicants are not barred from bringing ADA lawsuits).
of at-will employment, and thus they can find no reason to provide the plaintiff with an accommodation or protection from termination.250

This viewpoint has particularly unfortunate consequences in the determination of whether a requested accommodation is reasonable. Title I provides that a qualified individual with a disability is one who can perform the essential functions of his job, with or without reasonable accommodation.251 A reasonable accommodation can include making existing facilities readily accessible to individuals with disabilities,252 job restructuring,253 reassignment to a vacant position,254 or the provision of a qualified interpreter.255 Unless the accommodation would pose an undue hardship for the employer,256 the employer must provide the accommodation.257

When judges perceive the ADA as a need-based doctrine, the fact that there are other jobs that an individual can do without accommodation (as opposed to the job the individual currently holds, for which he is requesting accommodation) leads to the conclusion that the requested accommodation is unnecessary (i.e., unreasonable).258 The individual can simply get a different job. Although Sutton did not involve the reasonable accommodation provision of the Act, turning instead on the definition of “disability,” this attitude was plainly at work in that case: “If a host of different types of jobs are available, one is not precluded from a broad range of jobs.”259 Interpreting accommodations as required only when they would permit the individual to remain in the work force is contrary to the true purpose of the provision: providing equal access to a wide range of jobs,260 not merely a “minimal foothold in the labor market.”261 One of the goals of the Americans with Disabilities Act was to decrease dependence on government assistance.262 Judges who perpetuate the myth of the Act as welfare legislation do nothing to further this goal.

252. Id. § 12111(9)(A).
253. Id. § 12111(9)(B).
254. Id.
255. Id.
256. Id. § 12112(b)(5)(A). “‘[U]ndue hardship’ means an action requiring significant difficulty or expense . . . .” Id. § 12111(10)(A).
257. Id. § 12112(b)(5)(B).
258. Diller, supra note 241, at 48.
260. Diller, supra note 241, at 49.
261. Id.
262. See supra notes 88-90 and accompanying text.
4. Reframing *Albertson’s, Inc. v. Kirkingburg*

One of the most cogent arguments for the assertion that courts do not understand the Americans with Disabilities Act as civil rights legislation can be found in cases that have “analogs in civil rights laws involving race and gender discrimination.”263 When courts ignore established principles of civil rights law in these analogous disability cases, they lend support to the idea that judges see disability discrimination as distinctly less serious or problematic than racial or gender discrimination.

a. *Albertson’s Revisited*

One such case is *Albertson’s, Inc. v. Kirkingburg*,264 where the Supreme Court unanimously found for the defendant, even though principles established under Title VII suggest a pro-plaintiff outcome.265 In that case, Kirkingburg was fired from his job as a truck driver for Albertson’s because he had amblyopia, a condition that resulted in monocular vision. The defendant required all its drivers to meet the Federal Highway Administration’s (“FHWA”) vision requirements for commercial truck drivers, and Kirkingburg was initially hired as the result of an oversight. Sometime before the plaintiff was discharged, the FHWA instituted a waiver program that allowed experienced drivers with good records to drive trucks, notwithstanding the agency’s normal vision requirements. The FHWA’s waiver program was implemented in order to assess whether the usual vision requirements were still necessary for safety purposes. After he was terminated, Kirkingburg applied for and received a waiver, but Albertson’s refused to rehire him, and the ADA lawsuit followed.

The Supreme Court held that Albertson’s was entitled to rely on the prima facie vision requirements established by the FHWA, despite the fact that the plaintiff had obtained a waiver from that very agency. The Court rejected arguments from the EEOC on Kirkingburg’s behalf that because Albertson’s had not asserted a “direct threat” defense,266 it had no other basis for a safety-based qualification standard. The Court relied

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263. Bagenstos, supra note 243, at 924.
265. Bagenstos, supra note 243, at 924. The focus in this Note is on *Albertson’s* because of the discussion of the case in Part III.A, supra, in connection with *Sutton*. However, Bagenstos argues that the plaintiff would have also prevailed in another major ADA case, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002), if the Supreme Court had decided it within a civil rights framework. See generally Bagenstos, supra note 243.
in part on the EEOC’s own regulations, which provide a defense when an employer’s action is “required or necessitated by another Federal law or regulation.”267 In other words, the FHWA’s regulations took priority over the general requirement of the ADA that employees and applicants receive individualized assessments of their impairments and potential accommodations.268

At least one scholar believes this argument does not hold up under careful scrutiny. According to Samuel Bagenstos, there is no conflict between the FHWA vision regulations and the ADA’s individualized inquiry requirement.269 The waiver program was simply an alternate avenue for individuals who could not meet the usual vision requirements to become eligible to drive commercial trucks.270 Instead, Bagenstos argues, the Court seemed to rest its decision on the idea of fairness to employers:

[It would be unreasonable] to read the ADA as requiring an employer like Albertson’s to shoulder the general statutory burden to justify a job qualification that would tend to exclude the disabled, whenever the employer chooses to abide by the otherwise clearly applicable, unamended substantive regulatory standard despite the Government’s willingness to waive it experimentally. . . .271

Going even further, the Court determined that a disparate reading would require employers to “reinvent the Government’s own wheel” on a case-by-case basis.272 But, as Bagenstos points out, the “Government’s own wheel” included the waiver program,273 so an employer would be justified in relying on it in making qualifications standards decisions.274 Therefore, because Albertson’s relied on the FHWA in determining whether applicants or employees were qualified to drive commercial trucks, and the FHWA was willing to allow Kirkingburg to drive despite

267. 29 C.F.R. § 1630.15(e) (2005).
268. Bagenstos, supra note 243, at 928. This reasoning is surprising, given the Court’s emphasis on the individualized inquiry in Sutton, decided the same day as Albertson’s. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (“The definition of disability also requires that disabilities be evaluated ‘with respect to an individual’ . . . .”) (citing 42 U.S.C. § 12102(2)).
269. Bagenstos, supra note 243, at 928.
270. Id. at 928-29
271. Id. at 929 (quoting Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555, 577 (1999)).
272. Albertson’s, 527 U.S. at 577.
273. Bagenstos, supra note 243, at 929. The waiver program was established through the same notice and comment rulemaking procedures as the prima facie regulations. See Albertson’s, 527 U.S. at 560 n.5.
274. Bagenstos, supra note 243, at 929.
his amblyopia, Albertson’s should have rehired Kirkingburg once he received his FHWA waiver.

Excluding a class of people because members of that class are believed to be less productive than other workers is called statistical discrimination.\textsuperscript{275} It is easy to understand how an employer might rely on generalizations of this kind in making business decisions, even if he harbors no prejudice against the particular class. Because individualized inquiries into an applicant’s abilities can be costly, especially for smaller employers, it is often more efficient for the employer “to rely on the crude proxy of race or sex.”\textsuperscript{276} The same might be said of people with disabilities as a result of the “spread effect,” where an impairment in one area is assumed by others to indicate a more general disability.\textsuperscript{277} This is “profit-maximizing behavior,” and seems rational to many bottom-line oriented business owners and others,\textsuperscript{278} but it is illegal under Title VII of the Civil Rights Act.\textsuperscript{279}

b. Statistical Discrimination Under Title VII

Long before 1991, when the Civil Rights Act was amended to expressly reflect this principle, the Supreme Court interpreted Title VII as forbidding rational discrimination. In \textit{City of Los Angeles, Department of Water \\& Power v. Manhart},\textsuperscript{280} female employees objected when the Department required them to make larger monthly contributions to the group pension plan than their male co-workers. The rationale was not prejudice, but rather the generalization that women live longer than men and therefore will draw more money from the plan. Although the Court recognized the rationality of the Department’s reasoning, it nevertheless determined that “[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.”\textsuperscript{281} Where an employer engages in conduct that results in disparate treatment (i.e., where the plaintiff is singled out for disadvantage by the employer because of his status as a

\textsuperscript{275} \textit{Id.} at 925.
\textsuperscript{276} \textit{Id.} at 936.
\textsuperscript{278} Bagenstos, supra note 243, at 936.
\textsuperscript{279} See 42 U.S.C. § 2000e-2(k)(2) (2000) (“A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination . . . .”).
\textsuperscript{280} 435 U.S. 702 (1978).
\textsuperscript{281} \textit{Id.} at 708.
protected person\textsuperscript{282}), business justification is not a defense.\textsuperscript{283} This case is the bedrock upon which \textit{Albertson’s} should rest.

c. \textit{Albertson’s} Within a Civil Rights Framework

In \textit{Albertson’s}, the Court relied on the notion of fairness to the employer and, specifically, on the difficulty an employer would encounter in justifying its refusal to hire an applicant who had obtained an FHWA waiver.\textsuperscript{284} Because the employer would have to show that a driver with monocular vision was unsafe notwithstanding the waiver—an almost insurmountable task, given the government’s willingness to allow the applicant to drive—the Court seemed to suggest it would be unfair to force the employer to make that showing.\textsuperscript{285} Of course, this is circular and unsatisfying logic. Under the ADA, the employer bears the burden of showing either that the applicant poses a direct threat to others that cannot be alleviated by an accommodation,\textsuperscript{286} or that the qualification standards which screen out disabled individuals are “job-related and consistent with business necessity,”\textsuperscript{287} neither of which \textit{Albertson’s} claimed. The Court has, in effect, created another defense for employers, one which is not authorized by the statutory language of the Act. Perhaps, as Bagenstos argues, the employer should be forced to “bear the burden of uncertainty” and hire the individual who has received an FHWA waiver,\textsuperscript{288} or, in this case, rehire Kirkingburg.

The \textit{Albertson’s} Court was very concerned with what it considered conflicting pronouncements made by the FHWA.\textsuperscript{289} Because the FHWA “made it clear that it had no evidentiary basis for concluding that the pre-existing standards could be lowered consistent with public safety,”\textsuperscript{290} employers could not be sure that drivers with FHWA waivers were safe.

\begin{itemize}
\item \textsuperscript{282} Bagenstos, \textit{supra} note 243, at 935.
\item \textsuperscript{283} The Court reasserted this principle in \textit{International Union v. Johnson Controls, Inc.}, 499 U.S. 187 (1991). In that case, a policy that excluded potentially fertile women from jobs that would expose them to large amounts of lead for the purpose of protecting fetuses from harm was ruled illegally discriminatory. \textit{Id.} at 197. The Court held that “[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.” \textit{Id.} at 199.
\item \textsuperscript{284} Bagenstos, \textit{supra} note 243, at 942.
\item \textsuperscript{285} \textit{Id.}
\item \textsuperscript{286} 42 U.S.C. § 12113(b) (2000). After \textit{Echazabal}, it is also a defense to show that the employee or applicant poses a direct threat to himself. \textit{See} Chevron U.S.A. Inc. v. \textit{Echazabal}, 536 U.S. 73, 84 (2002).
\item \textsuperscript{287} 42 U.S.C. § 12113(a).
\item \textsuperscript{288} Bagenstos, \textit{supra} note 243, at 942.
\item \textsuperscript{289} \textit{Id.} at 942-43.
\item \textsuperscript{290} \textit{Albertson’s}, Inc. v. \textit{Kirkingburg}, 527 U.S. 555, 574 (1999).
\end{itemize}
The FHWA, when it instituted the prima facie vision requirements for commercial truck drivers, stated that it was necessary to exclude drivers with monocular vision for safety reasons.\textsuperscript{291} When the agency later enacted the waiver program, it did so because it was no longer sure that a broad prohibition on monocularity was warranted and wanted to gather data on the issue.\textsuperscript{292} Therefore, a reasonable employer in the position of Albertson’s might understandably engage in a rational kind of statistical discrimination in making hiring decisions and assume that drivers with amblyopia are unsafe.\textsuperscript{293} If this behavior is legal for an employer, as the Court suggested in \textit{Albertson's}, it is difficult to explain why it is only acceptable in the context of disability discrimination.

The prohibition against rational statistical discrimination is “deeply ingrained”\textsuperscript{294} in the civil rights arena, and any shift toward acceptance should be subject to serious scrutiny.\textsuperscript{295} A departure from this prohibition creates a slippery slope of sorts because “virtually all discrimination is ‘rational’ in the sense that the discriminator effectively seeks to advance some goal by discriminating . . . .”\textsuperscript{296} It would be extremely difficult for courts to articulate a standard, to pick and choose which interests of employers are rational and which are not.\textsuperscript{297} Given that the Court did not rely on any Title VII cases as precedent in \textit{Albertson’s}, or even suggest that the principle established by the case would have any bearing on race or gender discrimination cases, it is unlikely that the rule applies outside the context of disability discrimination.\textsuperscript{298}

5. Conclusion

Why, then, do courts interpret the ADA differently than other civil rights statutes? One likely explanation is that disability is perceived as a more accurate reflection of ability than either race or gender. It somehow seems fairer to most people to make distinctions based on disability as opposed to other factors.\textsuperscript{299} “Disabled,” after all, literally means “not

\textsuperscript{291} Id. at 573.
\textsuperscript{292} Id. at 574-75.
\textsuperscript{293} Bagenstos, supra note 243, at 943.
\textsuperscript{294} Id. at 944.
\textsuperscript{295} Id.
\textsuperscript{296} Id. at 944 (citing Samuel R. Bagenstos, ”Rational Discrimination,” Accommodation, and the Politics of (Disability) Civil Rights, 89 VA. L. REV. 825, 899 (2003)).
\textsuperscript{297} Id.
\textsuperscript{298} Id. at 945. In \textit{Echazabal}, the Court went so far as to expressly distinguish a seemingly analogous gender discrimination case, which indicates that the holding of \textit{Echazabal} is limited to disability-based discrimination. \textit{Id.} See Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 86 n.5.
\textsuperscript{299} Bagenstos, supra note 243, at 946 (relying on Michael Kinsley, \textit{Impractical and Ideal},
able," and if one is unable to do a particular thing, the impairment might conceivably translate into an inability to do other things as well. This is the historic view of disability, that a disabled person is devoid of "economic usefulness." The fact that this view persists even today makes it acceptable to society that employers exclude potential employees because of disability, despite society’s general intolerance for exclusion based on race or gender.

Although it is clear that disability "is a condition marked by the kind of subordination and second-class citizenship that [is] the appropriate target of civil rights laws," the courts have regularly disagreed, and instead have found the disabled to be uniquely situated with respect to discrimination. This provides less protection for people with disabilities who suffer comparable exclusion from the employment arena as other minorities, and has contributed to the overall failure of Title I.

IV. PROPOSED SOLUTIONS

The problems discussed in this Note are interdependent. Each of them is, in part, responsible for the others. For example, judges without a clear understanding of disability rights as civil rights often make it difficult for ADA plaintiffs to have their cases heard on the merits. In turn, these cases create precedent in the interpretation of the Act, and the cycle begins again. In the end, people with disabilities who want to work are left without the protection promised under the Act. What can be done to alleviate this general "climate of hostility" against the Americans with Disabilities Act found in the courts and in the culture?

A. Interpretation of Terms

An amendment to the statute seems to be the most logical solution, but would only solve the problem of interpretation. Congress can amend

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300. CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT 9 (1988). In fact, in order to justify the distribution of public benefits in the 19th century, society had to classify the beneficiary as “impotent.” Id. at 10.

301. One complicating factor is the importance of the ADA’s reasonable accommodations provision, which calls for disabled people to be treated differently in some circumstances, not just equally (as required under civil rights laws). Krieger, supra note 230 at 3-4; see also Bagenstos, supra note 243, at 948. This widens the gap of perception between civil rights and disability rights. Id. For an in-depth discussion of this issue, see Bagenstos, supra note 277, at 452-66.

302. Bagenstos, supra note 277, at 420.

the Act to better define its terms and intentions, thereby offering greater guidance to a strict textualist court.

1. Definition of “Disability”

Ideally, any proposed amendment would rewrite the definition of disability in the Act to expressly prohibit the consideration of mitigating measures. The purpose of such an amendment would be to restore to the ADA the protection promised to millions of individuals with disabilities that are controlled by medication, hearing aids, prosthetics, and the like. This should result in fewer cases being decided on threshold issues, and should also have the effect of requiring employers to defend their employment practices on the merits or make amends to their injured employees. For example, the new definition of disability might look like this:

§ 12102. Definitions

2) Disability

(a) The term “disability” means, with respect to an individual—

(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(2) a record of such impairment; or
(3) being regarded as having such an impairment.

(b) The determination of whether a physical or mental impairment substantially limits one or more of the major life activities of an individual is to be made on a case by case basis, without regard to mitigating measures.305

In adopting such an amendment, Congress would overrule the Supreme Court’s decisions in Sutton, Albertson’s, and Murphy v. United Parcel Service, Inc.306 Former Representative Tony Coelho, one of the

305. This is the wording the EEOC used in its original “Interpretive Guidelines” for the ADA. See 29 C.F.R. § 1630, app. § 1630.2(j) (1998). The EEOC has since amended its guidelines, presumably in response to Sutton and its progeny, and now does not indicate that mitigating measures are not to be considered. See 29 C.F.R. § 1630, app. § 1630.2(j) (2005).
306. 527 U.S. 516 (1999) (decided the same day as Sutton and holding that an employee’s high
original sponsors of the ADA, welcomes the opportunity to “[l]et the Supreme Court . . . know that Congress knew what it was doing [and] meant what it was doing.”

The Supreme Court’s concern in *Sutton* that, for example, people who use corrective lenses are not the people whom Congress intended to bring under the umbrella of the Act can be easily relieved. One possibility is to include a clause similar to that in the United Kingdom’s law, specifying that mitigated disabilities are covered except where the mitigating measure used is corrective lenses. Another is to include a clause like that suggested in *Arnold v. United Parcel Service, Inc.*: Where a simple, inexpensive remedy provides total and nearly permanent control over the symptoms of the disability, the mitigating measure can be taken into account when making the disability determination.

2. Major Life Activity

An additional amendment codifying the major life activities might also alleviate some confusion in the courts, at least with regard to whether working is a major life activity. The generally accepted major life activities are currently set out in the Code of Federal Regulations and include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” Congress could adopt the EEOC’s position that “[O]nly [i]f an individual is not substantially limited with respect to any other major life activity, then blood pressure did not substantially limit any major life activity when treated with medication, and therefore did not reach the level of disability under the ADA). The Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, S. 2088, 108th Cong. §§ 101-714 (2004) [hereinafter proposed Civil Rights Act of 2004], a proposed amendment to the Civil Rights Act of 1964, is a good example of the structure Congress might choose for any proposed amendments to the ADA. The findings section reasserts Congress’s true intent and explains that the amendment is necessary because of the Court’s misinterpretation of the CRA. See, e.g., § 101(8).

307. *All Things Considered* (National Public Radio broadcast Jan. 12, 2004). Former Representative Coelho suffers from epilepsy. Ironically, if his condition is medically controlled, it is likely, based on the holdings of *Sutton* and its ilk, that he would not be protected by the ADA should he find himself the victim of employment discrimination. He is not happy about this prospect. In a radio interview, Coelho said, “I wrote that bill. I know what the intent was. . . . The intent was definitely to include those of us with epilepsy and other disorders. And for the Supreme Court to say that was not the intent of Congress is just mind-boggling.” *Id.*

308. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494 (1999) (Ginsburg, J., concurring) (“[P]ersons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination.”).

309. *See supra* note 70.

310. *See* 136 F.3d 854, 866 n.10 (1st Cir. 1998).

311. 29 C.F.R. § 1630.2(i) (2005).
activity [may] the individual’s ability to perform the major life activity of working . . . be considered.”312 This would protect the epileptic in my earlier example,313 and ensure that disability-based discrimination is not slipping through the cracks simply because an individual’s impairment does not substantially limit him in more traditional life activities.314

However, as with any statute, the creation of a specific list of major life activities presents the potential for misinterpretation or confusion. Because it is often said that the express inclusion of certain things implies the intended exclusion of all others,315 Congress may be hesitant to take such a step and risk leaving out important life activities.316

3. Discussion

While some, like former Representative Coelho, are eager to have Congress rewrite parts of the Act,317 there is a good deal of apprehension in the disability rights community about proposing amendments to the ADA. The amendment process is not controlled by the disability rights movement, but by Congress, and there is fear that opponents of the Act would use the opportunity to propose measures that would narrow the scope of the legislation and erode protection even further than the

312. 29 C.F.R. § 1630, app. § 1630.2(j).
313. See supra Part III.A.2. Again, notwithstanding the Sutton mitigating measures rule.
314. Another possibility is to use an occupational therapies approach, which would cover "activities of daily living, instrumental activities of daily living, education, work, play, leisure, and social participation." See Beth Ann Wright, What Will Guide the Courts in Interpreting the Term "Major Life Activities" Under the Americans with Disabilities Act?, 15 GEO. MASON U. CIV. RTS. L.J. 1, 10 (2004).
315. This is the principle of expressio unius est exclusio alterius: to include one thing is to exclude another. See Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 HARV. L. REV. 405, 455 (1989). Courts sometimes use this rule when Congress has specified a group entitled to benefits to support the conclusion that groups not included are not entitled to the benefit. Id. The principle easily translates to the situation posed here.
316. The current regulations state that the list is illustrative, not exhaustive. 29 C.F.R. § 1630, app. § 1630.2(i) (2005). For other suggested amendments to the ADA, see, for example, Amanda L. Van, Note, Intolerable Uncertainty: An Examination of the Inconsistent Treatment of Fibromyalgia Under the Americans with Disabilities Act, 27 T. JEFFERSON L. REV. 421, 450 (2005) (proposing an amendment allowing courts to find substantial interference with a major life activity when a combination of symptoms significantly interferes over time with at least one major life activity); Mark A. Rothstein et al., Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act, 80 WASH. U. L.Q. 243, 270-71 (2002) (suggesting an amendment “direct[ing] the EEOC, after notice and comment rulemaking, to publish medical standards for determining disability for the most common . . . impairments,” which would create presumptive coverage under the Act for those individuals whose impairments met the standards). See generally Alex Long, State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act, 65 U. PITJ. L. REV. 597, 601 (2004) (“Congress might possibly use [the] more expansive state statutes as models for federal legislation.”).
Supreme Court decisions already have. In fact, Representative Mark Foley, a Florida Republican, has thrice introduced the ADA Notification Act, a proposed amendment to Title III which would require, among other things, that businesses be given ninety days to correct alleged violations before being sued. The amendment has not yet passed, but should it, opposition to other portions of the Act can be expected to gain momentum.

B. Abuse of Summary Judgment Standards

In order to remedy the abuse of summary judgment standards, higher courts (including the Supreme Court) should begin overruling lower court decisions where traditional issues of fact have been decided by a judge rather than a jury. For guidance on this issue, courts should look to analogous cases decided under other statutes, most notably the Rehabilitation Act, as Congress expressly required that the ADA be interpreted consistently with section 504. This means that the threshold question of whether a plaintiff has a disability should be a matter for the jury, along with the determinations of whether an accommodation is reasonable or poses an undue hardship, whether an applicant or employee is otherwise qualified, and whether an applicant or employee poses a direct threat to others in the workplace. It is only when the ADA is understood in its proper context—as a descendant of the Rehabilitation Act—that judges will appropriately apply summary judgment standards to Title I cases.

C. Disability Rights as Civil Rights

The signing of the Americans with Disabilities Act was only an “interim victory” in the struggle for civil rights for people with

318. See id.
321. As of June 8, 2005, the amendment had been referred to the House Committee on the Judiciary. To date, no other proposed amendments to the Act have been introduced.
323. Colker, supra note 125, at 111-14; see also Brennan v. Stewart, 834 F.2d 1248, 1262 (5th Cir. 1988) (“[O]ur precedent requires that the ‘reasonable accommodation’ question be decided as an issue of fact—meaning, of course, that it is one for the trial court or jury . . . .”); Tuck v. HCA Health Servs., Inc., 7 F.3d 465, 470 (6th Cir. 1993) (holding that whether an employee is “otherwise qualified” is a question of fact for the jury); Oesterling v. Walters, 760 F.2d 859, 861 (8th Cir. 1985) (holding that whether a plaintiff has a disability is a question of fact).
disabilities, not the end of the battle. It is necessary to continually remind society and the courts that the Act has its foundation in civil rights. This is probably the most difficult obstacle for the disability rights movement to overcome. The proposed amendments might be one way to accomplish this, because Congress can reassert its original purposes in the findings section of any suggested change. But the disability rights movement cannot rely solely on something as uncertain as a potential change in the law to achieve its goals.

Another possible solution would be for courts to look more regularly to Title VII cases as precedent for factually similar ADA cases, as Samuel Bagenstos suggests. In cases like Albertson’s, for example, where an employer has engaged in rational discrimination on the basis of disability, courts should rely on analogous cases under the Civil Rights Act to find that the employer illegally discriminated against the disabled plaintiff. This is much easier said than done, of course, and would first require the Supreme Court to effectively overrule its decision in Albertson’s. Given the history of the Court with respect to the Americans with Disabilities Act, particularly Title I, this seems unlikely.

Perhaps, then, the only way to persuade the judiciary to remember the roots of the law is to first convince the public that people with disabilities have a basic civil right to equal access. In order to do this, the disability rights movement should take a multifaceted approach, much like the one suggested by Cary LaCheen. Especially important in this context is to shift the focus in the media away from the question of whether a particular individual “deserves” the protection he seeks and toward the issue of the exclusionary treatment or discrimination he experienced. In tandem with an effort to publicize other ADA news

324. Diller, supra note 241, at 51.
325. See proposed Civil Rights Act of 2004 §§ 101(1)-101(16), supra note 306.
326. Bagenstos, supra note 243, at 924.
327. The Court might have to overrule Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002), as well, because the Court in that case appeared to rest its decision on the fact that the employer’s decision with regard to the plaintiff rationally served the employer’s bottom line. Bagenstos, supra note 243, at 925. The Echazabal Court also expressly distinguished several Title VII cases on the grounds that the CRA forbids paternalism generally on the broad basis of gender, while the ADA direct threat defense requires an individualized assessment of risk. Echazabal, 536 U.S. at 85 n.5. Therefore, the Court is unlikely to be convinced in the future that Title VII and ADA cases raise similar issues. Bagenstos, supra note 243, at 945.
328. See generally Cary LaCheen, Achy Breaky Pelvis, Lumber Lung and Juggler’s Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio, 21 BERKELEY J. EMP. & LAB. L. 223, 238-44 (2000). LaCheen’s emphasis is on the media generally, not civil rights specifically, but many of her suggestions can also be used to improve society’s understanding of the ADA as a civil rights law.
329. Id. at 238.
besides litigation, this would help dissipate some animosity towards people with disabilities and promote an understanding that the problems addressed by the ADA affect large numbers of people.\footnote{Id. at 242-43.}

Another crucial aspect of this campaign is to use the history of the disability rights movement to demonstrate that people with disabilities are fighting for the same kind of inclusion and acceptance that women and racial minorities achieved more than forty years ago.\footnote{Id. at 242-43.} As LaCheen points out, nearly everyone knows about Jim Crow laws and women’s suffrage, but few people realize that children with disabilities were regularly institutionalized because conventional wisdom said they could not learn.\footnote{Id. See also LIACHOWITZ, supra note 300, at 99-103 (discussing the long-standing belief that children with disabilities should be taught in segregated classrooms, away from “normal” children).} As part of this history-based tactic, people with disabilities should also tell their own stories, and should do so often, so that society comes to realize the magnitude of what many individuals still experience today,\footnote{Id. at 243.} and so the effect of disability-based discrimination becomes a concrete reality to those people who have never been subjected to it.\footnote{Id. at 243.} It will undoubtedly take time to reverse the view that the ADA is an entitlement law and for the Act to be safely ensconced in the realm of civil rights, but it is imperative that the time be invested and used wisely.

V. CONCLUSION

Equality—of opportunity, of access, of any kind—is “a long term goal that society moves towards only tentatively, with many barriers along the way.”\footnote{Diller, supra note 241, at 51.} This has certainly been true in the disability rights arena. A movement that began in earnest more than thirty years ago with the Rehabilitation Act has fallen on difficult times in the more than fifteen years since the passage of the Americans with Disabilities Act. Congress’s bold pronouncement that the law would create “a place for everyone”\footnote{136 CONG. REC. H2426 (daily ed. May 17, 1990) (statement of Rep. Hoyer).} has largely proven untrue. Courts have taken it upon themselves to narrow the broad language that Congress adopted, and in doing so, have significantly decreased the number of people protected by the Act. Judges at lower levels have routinely ignored established
standards for summary judgment, instead setting impossibly high thresholds of proof and deciding normative issues of fact that are ordinarily reserved for the jury. As a result, employers win more than 90% of cases and can discriminate on the basis of disability with near impunity. In part, these actions can be explained by a general refusal on the part of the judiciary to accept the ADA’s basic foundation: People with disabilities have a fundamental civil right to equal treatment and access under the law. Instead, courts often see disabled plaintiffs as lazy or greedy, a view that is regularly perpetuated by the media.

In order to restore the ADA to its rightful place alongside the Rehabilitation Act and the Civil Rights Act as a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” changes must take place in Congress, in the courts, and in the culture. An amendment to the ADA, clarifying its purposes and terms, can only go so far. Courts must also make a commitment to protect people with disabilities by following the rules of summary judgment proceedings, and by interpreting the ADA consistently with its predecessor statutes. The disability rights movement can assist in the restoration by aggressively promoting a positive, but realistic, image of the Act and of people with disabilities in the media. Over time, this multi-pronged approach should ensure that Congress’s twin goals of eliminating disability-based discrimination and providing equal access to the job market are reached, so that every person with a disability truly has the promised “opportunity to blend fully and equally into the rich mosaic of the American mainstream.”

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338. Remarks on Signing, supra note 4, at 1068.

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