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The ADA, Respiratory Disabilities and Smoking: Can Smokers at Burger King Really Have It Their Way?

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INTRODUCTION

The debate about the meaning of reasonable accommodation or modification under the Americans with Disabilities Act is raging in different areas. Businesses and employers seek to limit their legal obligations to accommodate patrons and employees, while those customers and employees demand treatment equal to their non-disabled counterparts. One place where it has occurred is over smoking bans in public accommodations, such as bars and restaurants. People with respiratory disabilities have challenged partial smoking bans as limited and inadequate. They argue that the reasonable modification standard under the ADA requires places of public accommodation to ban smoking completely because of the health threat they face from exposure to smoke.

The parameters of the Americans with Disabilities Act (ADA or Act) have not yet been fully defined.[1] The purpose of the law was to break down the barriers which prevented people with disabilities from participating in the "economic and social mainstream of American life."[2] The ADA has been used to eliminate discrimination against people with disabilities in various areas, including employment and places of public accommodation.[3] In those areas, employers or businesses are required to make reasonable accommodation or modification for the person with the disability. The meaning of the term "reasonable" is determined on a case-by-case basis.

The resolution of the meaning of reasonableness in the context of smoking bans has broad implications for the scope of the ADA. The courts have grappled with how far an employer or business must go to make the person with the disability comfortable in other contexts. People with disabilities have argued that they should receive the same treatment as those without disabilities. The response is that reasonable modification does not guarantee equal treatment as long as people with disabilities have an equal opportunity to work or to use a facility.

The difficulty in defining equality under the ADA is compounded when the equal treatment of one group results in the unequal treatment of another. A smoking ban would exclude smokers who wish to smoke from places of public accommodation. One group would have the opportunity to use the services or facilities as they wished at the expense of another group who no longer would enjoy the kind of access that they had previously. The problem

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1. The Supreme Court recently limited the category of people who are considered disabled under the ADA in a series of cases. *See infra* text accompanying notes 394-442.

2. H.R. REP. No. 101-485 (II), pt. II at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304.

3. *See infra* Parts III A, B.

is particularly daunting for businesses which are looking for a way to accommodate both groups. A partial smoking ban would provide a compromise solution, whereas a smoking ban would elevate the interests of one group over those of another.

Part II of the Article provides an overview of the ADA and discusses the origins and meaning of the reasonable modification standard.[4] This section discusses the connection between the reasonable accommodation mandate in Title I of the ADA, which covers employment, and the reasonable modification provision in Title III, which covers public accommodation. The purpose of both sections is to achieve equality for people with disabilities; the meaning of equality is explored throughout this Article.

Part III discusses whether providing equality for people with breathing disabilities requires either employers or public accommodations to ban smoking.[5] People with disabilities argue that reasonable accommodation or modification means a complete ban because that is what they need to be able to use or enjoy that business. Businesses respond that reasonable modification does not require them to ban smoking to provide people with breathing difficulties the ideal facilities. They argue that a partial smoking ban is sufficient because it gives people with disabilities an opportunity to use and enjoy their services in reasonable, if not total, comfort.

Part IV considers the implications of banning smoking on public accommodations.[6] Places of public accommodation will argue that a smoking ban will fundamentally alter the nature of their services, which is to provide hospitality to their customers. A smoking ban will prevent them from welcoming smokers to their facility and thus, will change the character of their business in a way not required by the ADA. In addition, a smoking ban will impose an undue burden on the business because of the increased administrative and financial costs that it will create. This section considers the data presented by businesses in communities with smoking bans about the undue burden imposed by those bans.

Part V suggests two ways that smokers might argue that a complete smoking ban is unconstitutional.[7] First, they could argue that their equal protection rights are violated because they are members of a class who have been unfairly singled out for discrimination. Second, they could claim that a smoking ban infringes on their right of association. The Article concludes that both arguments will fail, but it explores the implications when the

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4. *See infra* notes 9-87 and accompanying text.
5. *See infra* notes 88-128 and accompanying text.
6. *See infra* notes 129-98 and accompanying text.
7. *See infra* notes 199-393 and accompanying text.

interests of two groups, smokers and non-smokers, collide.

Part VI contrasts recent Supreme Court decisions excluding people with disabilities from coverage under the ADA against the principles of inclusion advocated by many commentators.[8] Current standards do not address the needs of the person with the disability adequately so a more far-reaching standard may be necessary. This proposed standard discusses how the ADA could be reshaped to meet the needs of the person with the disability by making that person the norm rather than the exception. The standard would give the person with the disability equal benefits to those conferred on her non-disabled counterparts. Those benefits would include the elimination of smoking from places of public accommodation. The Article concludes that, although courts may not be inclined to move in that direction, a reading of the ADA based on principles of inclusion best comports with its framers' intent.

I. THE PARAMETERS OF THE ADA

A. Scope of Coverage

The Americans with Disabilities Act was designed to protect people with disabilities from discrimination.[9] The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[10] Because breathing is a major life activity, a person who has a physical impairment which affects breathing, such as cystic fibrosis or asthma, will probably be covered by the Act.[11] Not every person with an upper respiratory condition, however, will be considered a person with a disability.[12] For example, a court dismissed one plaintiff from a case because her asthma and allergies to cigarette smoke did not substantially limit any major life activities.[13] She was able to work, exercise and live a normal life and thus was not disabled under the meaning of the

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8. *See infra* notes 394-469 and accompanying text.

9. *See* H.R. REP. No. 101-485, at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303-04. ("The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life.").

10. 42 U.S.C.A. § 12102(2) (1994).

11. 29 C.F.R. § 1630.2(h)(2)(i) (1998) (defining "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

12. The Justice Department regulations to the ADA state that the determination of whether an allergy to cigarette smoke constitutes a disability will be made on a case-by-case basis. 28 C.F.R. § 36.104, pt. 36, app. B, p. 620 (1999). The critical factor is whether the exposure to smoke affects the respiratory functioning in a way that impairs a major life function. *Id.*

13. Emery v. Caravan of Dreams, Inc., 879 F. Supp. 640, 642-43 (N.D. Tex. 1995).

ADA.[14] In contrast, the other plaintiff in the case was disabled because her cystic fibrosis affected her ability to breathe particularly in the presence of cigarette smoke.[15]

Title III of the ADA prohibits public accommodations from discriminating against people with disabilities.[16] The Act defines public accommodations to cover most businesses and facilities that operate in interstate commerce.[17] The list of twelve categories includes hotels, restaurants, bars, movie theaters, airports, museums, and parks.[18] These public accommodations are required to:

> make reasonable modification in policies, practices, or procedures, when such modification are necessary to afford such goods, services, facilities, privileges, advantages, or accommodation to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.[19]

A modification is unreasonable when it would result in an undue hardship.[20]

This requirement raises two related issues for businesses and their customers who seek a smoking ban. The first issue is determining the meaning of reasonable modification, and the second is deciding when those modifications fundamentally alter the nature of the business. In these cases, customers with respiratory disabilities will argue that a complete smoking ban is necessary to satisfy the reasonable modification standard. Businesses will respond that such a ban is unreasonable and that they have already made a reasonable modification, such as establishing smoke-free zones or improving the ventilation in their facilities. Moreover, because they are in the hospitality business, they will maintain that a smoking ban would fundamentally alter the nature of their business by forcing them to be inhospitable to a group of customers. Finally, they will state that the administrative and financial costs of banning smoking would impose an undue burden on their businesses.

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14. *Id.*

15. *Id.* The court noted that people with cystic fibrosis are susceptible to deadly bacterial infections. Exposure to cigarette smoke increases the amount of mucous in their lungs, which in turn, puts them at a higher risk of developing these bacterial infections.

16. 42 U.S.C.A. § 12182 (1995).

17. 42 U.S.C.A. § 12181 (7)(A)-(L) (1995).

18. *Id.*

19. 42 U.S.C.A. § 12182(b)(2)(A)(ii) (1995).

20. 42 U.S.C.A. § 12182 (b)(2)(A)(iii), *see also* 29 C.F.R. § 1630.2(p) (defining "undue hardship" and setting forth factors to be considered in determining whether an accommodation is unreasonable).

B. The Origins and Meaning of Reasonable Accommodation

The reasonable modification standard is similar to the reasonable accommodation mandate in the employment section of the ADA.[21] The term, "reasonable accommodation," originated in regulations about employees' religious practices promulgated under Title VII of the Civil Rights Act of 1964.[22] The principle of reasonable accommodation first appeared in disability law in the regulations to the Rehabilitation Act of 1973.[23] The ADA adopted the language of the Rehabilitation Act and required an employer to make "reasonable accommodations"[24] for the employee unless the employer could show that it would incur an "undue hardship"[25] from the accommodation. In interpreting the meaning of reasonable accommodation under the Rehabilitation Act, the United States Supreme Court explained that an accommodation was not reasonable "if it either imposes 'undue financial and administrative burdens' . . . or requires 'a fundamental alteration in the nature of [the] program.'"[26] Regulations promulgated for the administration of the reasonable modification requirement under the public accommodation section of the ADA also set forth factors to determine when a modification reaches the level of an undue burden.

The principle of reasonable accommodation or modification was designed to fulfill the equality mandate of the ADA.[27] Like many of the civil rights laws on which it was based, one of the ADA's main purposes was to include a group that had traditionally been excluded from society: people with

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21. Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 474 (1991).

22. *Emery*, 879 F. Supp at 642-43; 29 C.F.R. § 1630.2(o)(1)-(3) (1998). Those regulations set forth by the Equal Employment Opportunity Commission provide that employers had to try to "reasonably accommodate an individual's religious observance or practice" unless such an accommodation would cause the business "undue hardship." *Id.*; 42 U.S.C. § 2000 Courts have interpreted the reasonable accommodation language narrowly under Title VII but have assigned a broader meaning to it in disability law. *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 6-8 (1996) (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1997)).

23. 45 C.F.R. § 84.12 (1999).

24. *See* 29 U.S.C.A. §§ 701-796 (1999).

25. Undue hardship was defined as: "an action requiring significant difficulty or expense, when considered in light of . . . (i) the nature and cost of the accommodation . . .; (ii) the overall financial resources of the facility . . .; (iii) the overall resources of the covered entity . . .; and (iv) the type of operation or operations of the covered entity." 42 U.S.C.A. § 12111(10)(A), (B) (1995).

26. School Bd. v. Arline, 480 U.S. 273, 287 n.17 (1987) (quoting Southeastern Community College v. Davis, 442 U.S. 397, 410, 412 (1979)) (alteration in original).

27. 42 U.S.C.A. § 12101(a)(8) (1995).

disabilities.[28] The ADA was intended to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[29] This inclusion could be brought about by recognizing that a person with a disability could perform a task but might need some accommodation to do so. The accommodation simply acknowledged the person's disability and created an opportunity for the person to participate fully in society. The purpose of the accommodation, therefore, was not to confer a benefit on the disabled person that would give him an unfair advantage over a non-disabled person. Instead, the idea was to level the playing field so that the disabled person would be on equal footing with the non-disabled person.

The equality mandate, however, is not absolute.[30] The law does not impose an obligation to equally accommodate the disabled person regardless of the cost of doing so. Instead, the requirement that the accommodation or modification must be reasonable has led courts to engage in a cost-benefit analysis in each case.[31] Thus, even where the cost is reasonable the court may render the accommodation unreasonable for other reasons.[32] Judge Calabresi commented on the flexibility of that analysis in stating that "'Reasonable' is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce."[33]

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28. *Id.*

29. *Id.*

30. *See* Karlan & Rutherglen, *supra* note 22, at 23 ("The ADA generally, and the duty of reasonable accomodation specifically, state this general amalgam of efficiency and equality justifications.").

31. *See, e.g.*, D'Amico v. New York State Bd. of Law Exam'rs, 813 F. Supp. 217, 221 (W.D.N.Y. 1993) ("An individual analysis must be made with every request for accommodations and the determination of reasonableness must be made on a case by case basis."); *see also* H.R. REP. No. 101-485, at 39 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 462 (A "reasonable accommodation should be tailored to the needs of the individual and the requirements of the job.").

32. *See, e.g.*, Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 546 (7th Cir. 1995).

33. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995). In *Borkowski*, the Second Circuit had to determine whether a reasonable accommodation required a school district to provide an aide to a teacher with a disability. *Id.* at 133-34. The Second Circuit reversed and remanded the district court's grant of a motion for summary judgment in favor of the school district because issues on material fact had not been resolved. *Id.* at 144. The court stated that the teacher should have an opportunity to prove that she was entitled to a teacher's aide as a form of reasonable accommodation. *Id.* at 138. The court would perform a cost-benefit analysis to assess whether the proposed accommodation was reasonable. *Id.* According to this analysis, the employer would not have to make excessively expensive modifications even if those modifications would allow that employee to do the job. Those modifications became unreasonable when the costs were "clearly disproportionate" to the benefits. *Id.* (citing Barth v. Gelb, 2 F.3d 1180, 1186 (D.C. Cir. 1993)).

Reasonable accommodation therefore takes into account the benefits to the person seeking the accommodation as well as the effects on the business being asked to provide the accommodation. It may include consideration of the seriousness of the individual's disability, the costs of the proposed accommodation and its resulting benefits to the individual seeking it and to society. Courts have considered the meaning of reasonable accommodation or modification in the employment and public accommodation sections of the ADA. The plaintiff, who is seeking the modification, has the burden of proving that the requested modification is reasonable.[34] This means that the plaintiff must identify modifications that would be "reasonable in the run of cases."[35] If the plaintiff establishes that the proposed modification is generally reasonable, the burden then shifts to the defendant to show that the modification would not be reasonable.[36] The defendant may also raise the affirmative defense that the proposed modification would fundamentally alter the nature of his business or would impose an undue hardship on it.[37]

In considering the meaning of reasonable modification, courts have evaluated whether the requested change is necessary to enable a particular plaintiff to perform a task successfully. A federal district court in *D'Amico v. New York State Board of Law Examiners* emphasized the severity of a particular plaintiff's disability in determining that she should be allowed to spread the bar exam out over a four-day period.[38] In *D'Amico*, the plaintiff, Marie D'Amico, who suffered from a "severe visual impairment," was taking the New York Bar Exam.[39] She petitioned the defendant, the New York State Board of Bar Examiners, for several accommodations including additional time during the two days on which the exam was held.[40] The Board granted all of her requests, but Ms. D'Amico failed the exam.[41] As she prepared to take the exam a second time, she requested a further accommodation of being allowed to spread the extra time over a four-day period instead of the

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34. Johnson v. Gambrinus Co./Spoetzel Brewery, 116 F.3d 1052, 1058-59 (5th Cir. 1997); Riel v. Electronic Data Sys. Corp., 99 F.3d 678, 683 (5th Cir. 1996).

35. *Riel*, 99 F.3d at 683 (quoting *Barth*, 2 F.3d at 1187).

36. *Johnson*, 116 F.3d at 1058.

37. *Id.* at 1059-60 (specifying that the type of evidence proving a fundamental alteration or an undue hardship "focuses on the specifics of plaintiff's or defendant's circumstances and not on the general nature of the accommodation").

38. 813 F. Supp. at 220.

39. *Id.* at 218.

40. *Id.* at 218-19. Plaintiff was also provided a large print exam and allowed to bring with her her own lamp and straight edge. *Id.* Moreover, plaintiff was able to take the exam at a location separate from other exam takers, with a separate proctor present. *Id.* Finally, plaintiff was also allowed to write her answers to the multiple choice part of the exam on separate paper. *Id.* at 219.

41. *Id.* at 219.

traditional two-day period.[42] She submitted a physician's affidavit which stated that her vision problem would be exacerbated by merely giving her the extra time during a two-day period.[43] The Board turned down her request, and Ms. D'Amico sought a preliminary injunction.[44]

The court granted Ms. D'Amico's request for a preliminary injunction and determined that the additional time was a reasonable accommodation of her disability.[45] In considering her request, the court stated that the "most important fact" was the "nature and extent of plaintiff's disability."[46] The essence of the Board's objection to giving Ms. D'Amico four days to take the exam was that it would place her at an "unfair advantage" over other test takers and could compromise the test's integrity.[47] The court did not find the Board's argument compelling because it determined that the extra time was not designed to give Ms. D'Amico something more than had been given to other bar applicants.[48] Instead, the extra time would simply place her on "an equal footing" with non-disabled test takers.[49] If the extra time were spread over only two days, Ms. D'Amico would be subjected to marathon examination days that no other test taker would have to endure. Given the severity of Ms. D'Amico's vision problem, the court concluded that the proposed accommodation recommended by her physician would give her the equal opportunity mandated by the ADA.[50]

Other courts have taken into account the nature and the extent of a plaintiff's disability but have found that the plaintiff's proposed accommodation was not necessary for successful completion of a job. Those courts have evaluated the reasonableness of the accommodation on a case-by-case basis. Two challenges under the employment section of the ADA illustrate some of the factors that courts consider when evaluating reasonableness.

In *Vande Zande v. Wisconsin Department of Administration*, the United States Court of Appeals for the Seventh Circuit drew an analogy between the reasonableness standard under the ADA and the doctrine of reasonable care in negligence law.[51] In *Vande Zande*, the plaintiff, Lori Vande Zande, sought

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42. *Id.*
43. *Id.* at 220 (citing Lerner Aff. ¶12).
44. *Id.* at 218.
45. *Id.* at 222 (stating that the Board's "expertise" in testing procedures should not exempt Dr. Lerner's medical opinion); *see also id.* at 223-24.
46. *Id.* at 221.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 223.
51. 44 F.3d at 542.

workplace accommodation for her paralysis.[52] Her employer took several steps to accommodate her, including modifying the building in which Ms. Vande Zande worked, adjusting her work schedule, reconfiguring the office and providing her with special furniture.[53] The employer, however, drew the line at making two additional accommodation: permitting Ms. Vande Zande to work at home and lowering a kitchen sink at the workplace to make it wheelchair accessible.[54] Ms. Vande Zande sued her employer arguing that it had a duty under the ADA to make the requested changes.

Writing for the majority, Chief Judge Posner stated that the principle of reasonable accommodation was "at the heart of this case."[55] He stated that the meaning of accommodation was clear: "The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work."[56] In comparing reasonable accommodation under the ADA to the negligence principle of reasonable care, Judge Posner wrote that both "require[d] something less than the maximum possible care," and both considered the costs and benefits to the defendant.[57]

Costs alone, however, do not determine the reasonableness of an accommodation. For example, the cost of lowering the kitchen sink on Ms. Vande Zande's floor was only $150.00, but the court still held that the requested change was unreasonable.[58] The court stated that Ms. Vande Zande still had access to the bathroom sink and had not established that using that sink would affect either her work performance or her physical comfort.[59]

Ms. Vande Zande argued unsuccessfully that using the bathroom sink instead of the kitchen sink "stigmatized her as different and inferior."[60] The court acknowledged that the reasonableness of an accommodation depended on the emotional as well as physical barriers that the disabled person faced.[61] Nevertheless, the court determined that the employer did not have a duty to provide "absolute identity in working conditions" for its disabled and non-

52. *Id.* at 543-44.
53. *Id.* at 544.
54. *Id.* at 544, 545.
55. *Id.* at 543.
56. *Id.* at 542 (stating further that "reasonable" was the difficult term to define).
57. *Id.* at 542. Chief Judge Posner explained in a parenthetical that "[t]his is explicit in Judge Learned Hand's famous formula for negligence." *Id.* (citing United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947)).
58. *Id.* at 546.
59. *Id.*
60. *Id.*
61. *Id.*

disabled employees.[62] The ADA did not guarantee Ms. Vande Zande equal treatment to that accorded non-disabled employees; she simply was afforded access to the workplace. As long as the employer allowed the employee to work in "reasonable comfort," it had fulfilled its mandate under the ADA.[63] The court suggested that the employer did not have to make every requested modification and implied that the employee might have to make some accommodation as well.[64]

Similarly, a district court determined that an employer could not be made to provide the ideal workplace accommodation as long as the company reasonably accommodated an employee's disability.[65] In *Equal Employment Opportunity Commission v. Newport News Shipbuilding and Drydock Company,* the Equal Employment Opportunity Commission sued a company under the ADA on behalf of an employee who claimed that the company refused to accommodate his need for a mold-free work environment.[66] The employee claimed that his allergies were exacerbated by his HIV status and that he became ill from airborne mold and fungi in the workplace.[67] As an accommodation for his disability, he requested his employer to eliminate mold in the building where he originally worked. Instead, the employer moved the employee to another building and placed him on short-term disability while it improved conditions in the new building.[68]

The court rejected the employee's argument that the employer's accommodation was unreasonable.[69] Although the changes were not the specific ones that the employee had requested, the company was not obligated to honor those requests.[70] The court noted that the ADA requires the company only to make the accommodation that would allow the employee to perform his job's "essential functions."[71] In this case, the court found that the company "extended more than reasonable efforts" to accommodate the employee.[72]

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62. *Id.*
63. *Id.*
64 *Id.*
65. EEOC v. Newport News Shipbuilding & Drydock Co., 949 F. Supp. 403 (E.D.Va. 1996).
66. *Id.* at 404.
67. *Id.*
68. *Id.* at 405-07.
69. *Id.* at 407-08.
70. *Id.* at 408.
71. *Id.* at 408 (citing Harmer v. Virginia Elec. & Power Co., 831 F. Supp. 1300, 1306 (E.D. Va. 1993)).
72. *Newport News*, 949 F. Supp. at 409 (stating that plaintiff's employer periodically contacted plaintiff's physician and followed the physician's recommendations, making several improvements to the work environment).

In its opinion, the court commended this employer for the steps that it had taken and cautioned against deterring other employers from making similar efforts to accommodate disabled workers.[73] The court noted the significant discrimination that employees with HIV face in other companies.[74] In contrast, the employer here went out of its way to ascertain what the employee needed and made those improvements.[75] The court suggested that the employer's efforts to follow the recommendations of the employee's doctor deserved praise rather than criticism.[76] Moreover, the court continued, a finding that these accommodations were not reasonable would set the standard too high for other employers and would discourage them from "voluntarily attempting to accommodate those genuinely disabled."[77] Therefore, the court concluded that, as a matter of law, the employer's efforts met the standard of reasonable accommodation.[78]

Like the employee in *Newport News*, who argued that mold needed to be eliminated from his workplace, a person with respiratory ailments could argue that smoking must be eliminated completely from places of public accommodation. The issue therefore is whether reasonable modification for people with smoke sensitivities requires a business to ban smoking entirely rather than establish non-smoking sections within the business. The business will argue that while a smoking ban may represent the ideal accommodation, it is only required to make reasonable ones. The person with respiratory ailments could make a similar argument to the plaintiff's "emotional appeal" in *Newport News* that the allergies could lead to an infection which could kill him.[79] The plaintiff could argue that anything less than a complete smoking ban could jeopardize his health because any exposure to smoke could render him unable to breathe.[80] The plaintiff in *Newport News* did not prove that his allergies were life-threatening.[81] The burden would be on the person with the respiratory ailment to prove that her life would be threatened from smoke

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73. *Id.*

74. *Id.* (stating that historically "many employers isolate, ostracize or discharge HIV positive employees").

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 408.

80. *See generally* Amber Smith, *How to Avoid Asthma at Work,* POST STANDARD, Sept. 6, 1999, at C3 (stating that the American College of Occupational and Environmental Medicine claimed that asthma sufferers should avoid second-hand smoke because of its aggravating consequences); Dr. Mitchel Hecht, *Second-Hand Smoke Compounds Asthmatics' Problems*, NEW ORLEANS TIMES-PICAYUNE, Aug. 26, 1999, at E8 ("Cigarette . . . smoke is irritating to lungs, and it's especially irritating to the lungs of someone who suffers from asthma.").

81. *See Newport News*, 949 F. Supp. at 408-09.

exposure.[82]

These cases raise two issues that underlie the principle of reasonable modification. The first issue is the extent to which an employer or business must go to accommodate a person with a disability. The reasonableness of a modification seems to depend on whether it is necessary to enable the plaintiff to perform a particular endeavor successfully. In *D'Amico*, the court found the plaintiff's requested accommodation reasonable because the defendant's solution resulted in marathon test days, which no one else had to endure and which an expert said undermined the plaintiff's performance.[83] In *Vande Zande* and *Newport News*, the courts did not find that the plaintiffs' requested accommodations were reasonable because the plaintiffs could not link those accommodations to successful job performance.[84] As long as the defendants provided an accommodation that allowed the plaintiffs to work in reasonable comfort, the courts did not require them to provide the employee with the optimal, desired conditions.

The second issue is the meaning of equality in the context of reasonable accommodation. The courts are consistent that equal opportunity, but not equal treatment, is required under the ADA. Equal opportunity means that the person with the disability must be given a chance to complete a task successfully. It does not require a business or employer to make modifications that would provide identical conditions for disabled as well as non-disabled customers or employees. Therefore, the state was required to allow Ms. D'Amico more days for the bar exam to give her an equal opportunity to pass the exam.[85] Ms. Vande Zande's employer, however, did not have to provide her with a separate kitchen sink to make her work conditions identical to those of other employees.[86] The court determined that as long as the bathroom sink was available, she had access to what she needed: a sink for her dishes.[87] The ADA does not require the employer to provide the same conditions for disabled and non-disabled employees as long as a comparable substitute is available.

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82. *See, supra* notes 34-37 and accompanying text.
83. *See D'Amico*, 813 F. Supp. at 220; *see also* notes 38-50 and accompanying text.
84. *See Vande Zande*, 44 F.3d at 542; *Newport News*, 949 F. Supp. at 409; *supra* notes 51-64, 65-78 and accompanying text.
85. *D'Amico*, 813 F. Supp. at 223.
86. *Vande Zande*, 44 F. 3d at 546.
87. *Id.*

II. REASONABLE MODIFICATIONS AND SMOKING BANS

A. Employment Cases

A few courts have considered these issues under the ADA when evaluating whether reasonable accommodation required a complete smoking ban in the workplace.[88] In one such case, *Muller v. Costello*, a prison guard argued that being given a gas mask was not a reasonable accommodation for his asthma.[89] Although the court did not provide much rationale, it determined that the guard should have the opportunity to prove his case to a jury.[90]

The guard argued that a mask was not a reasonable accommodation because it was ineffective and it posed a "security risk."[91] The prison responded that it did not have to provide the ideal modification requested by the guard as long as the mask enabled him to work in "reasonable comfort."[92] To prevail at trial, the guard would probably have to demonstrate that the mask impaired his ability to perform the essential functions of the job.

If he had also argued, as the plaintiff in *Vande Zande* did, that the

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88. Courts have also addressed whether reasonable accommodation requires smoking bans under other federal and state laws. In one such case, Vickers v. Veterans Admin., 549 F. Supp. 85 (W.D. Wash. 1982), a federal district court discussed the meaning of reasonable accommodation under the Rehabilitation Act of 1973. *Id.* at 86. An employee who was sensitive to smoke sued the Veterans Administration (V.A.) arguing that it had a duty to reasonably accommodate him and that it had failed to do so because it allowed smoking in his office. *Id.* at 87. The court determined that the V.A. had taken sufficient measures to accommodate the plaintiff by separating smokers from non-smokers in the office and installing a ventilation system. *Id.* at 88-89. The court held that the reasonable accommodation provision did not require the V.A. to ban smoking in the workplace and the rights of other employees to smoke on the job. *Id.* at 89. The court stated that the plaintiff should have taken steps to minimize his exposure to smoke such as closing his office door and/or moving his desk closer to the window and away from the door. *Id.* Because he did not do so, he could not expect the V.A. to eliminate smoking at the expense of his co-workers' rights.

In Hall v. Hackley Hosp., 532 N.W.2d 893 (Mich. Ct. App. 1995), the Michigan Court of Appeals considered an employee's claim that her employer had a duty under Michigan state law to ban smoking from the workplace. *Id.* at 893. The plaintiff sued under the provision of the Handicappers' Civil Rights Act which places a duty of reasonable accommodation on employers. *Id.* at 896 (citing MICH COMP. LAWS ANN. § 37.1101 *et seq.* (1985 & Supp. 1999)). In dismissing the claim on a summary judgment motion, the court determined that the plaintiff had not met her burden of proving that a genuine issue of material fact existed about whether the defendant was required to ban smoking to satisfy its duty of reasonable accommodation. *Id.* at 898.

89. No. 94-CV-842 (FJS), 1996 WL 19177, at *1 (N.D.N.Y. Apr. 16, 1996).

90. *Id.* at *17 (citing Staron v. McDonald's Corp., 51 F.3d 353 (2d Cir. 1995)).

91. *Id.*

92. *Id.*

accommodation was unreasonable because it would stigmatize him, he probably would not have been successful.[93] The guard could maintain that the gas mask singled him out as being different and inferior from other employees and thus caused him emotional harm. He probably would not prevail with that argument because the ADA does not guarantee him equal treatment; it only requires his employer to enable him to perform his guard duties. If he can perform those duties, with the assistance of a mask, then the employer probably has fulfilled its mandate under the ADA.

Similarly, the court in *Harmer v. Virginia Electric & Power Co.*, emphasized that the duty of reasonable accommodation did not require an employer to make "absolute accommodation" for its employees.[94] The plaintiff, Robert Harmer, had asthma.[95] He requested that his employer, Virginia Electric and Power Company, ban smoking on the floor where he worked in an unenclosed cubicle.[96] In response, the company modified its policies incrementally to restrict smoking in the workplace.[97] Initially, the company installed fans, smokeless ashtrays and air purifiers and separated the work spaces of smokers from those of non-smokers.[98] A few months later, Virginia Power took additional steps to comply with the state's Indoor Clean Air Act[99] by banning smoking in common areas such as elevators, stairways, and hallways.[100] When Mr. Harmer stated that these measures were still insufficient, the company reviewed his case, including his medical history, and relocated two co-workers who smoked in cubicles near his work space.[101] Just before trial, the company announced that it would confine smoking to designated smoking rooms on each floor of the building where Mr. Harmer worked.[102] The company indicated that it took this final step in response to an Environmental Protection Agency report about some of the hazards of second-hand smoke in the workplace.[103]

The court granted Virginia Power's motion for summary judgment

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93. *Vande Zande*, 44 F.3d at 546 (noting that emotional harm is relevant to determining whether the accommodation is reasonable). The problem with locating fault in the person with the disability has been addressed by Martha Minow. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW, 110-20 (1990).

94. *Harmer*, 831 F. Supp. at 1306.

95. *Id.* at 1302.

96. *Id.* at 1303. The plaintiff later amended this request to include a ban on smoking in the entire building. *Id.* at 1304 (citing Harmer Dep. Ex. 27).

97. *Id.* at 1304.

98. *Id.* at 1303 (citing Hamer Dep. Ex. 23).

99. VA. CODE ANN. §15.2 (Michie 1997).

100. *Id.* at 1304 (citing Harmer Dep. Ex. 24).

101. *Id.* at 1303-04.

102. *Id.* at 1304.

103. *Id.*

because Mr. Harmer had not demonstrated that he was entitled to a complete smoking ban as an accommodation of his disability.[104] The court stated that the purpose of reasonable accommodation was twofold: to enable an employee to perform the "essential functions" of his job or to allow him to "enjoy equal privileges of non-disabled employees."[105] As long as the employee could perform the essential functions of his job, the employer's accommodations were reasonable, and the company had no further obligation to make "absolute accommodation."[106] In this case, the changes that Virginia Power had made to improve ventilation and isolate smoking areas enabled Mr. Harmer to perform the essential functions of his job and gave him access to the workplace.[107]

In its opinion, the court performed a cost-benefit analysis to explore whether the company had reasonably accommodated the employee's disability.[108] In weighing those costs, the court stated that Virginia Power could consider the effect of a smoking ban on other employees and on the entire workplace.[109] The court determined that the cost of the ideal modification, a smoking ban, was not justified by the increased productivity that it might yield.[110] Although the particular needs of Mr. Harmer were taken into account, the benefits that would accrue to him from a complete ban on smoking had to be considered in light of the costs to the workplace as a whole.

This rationale is helpful to owners of places of public accommodation. They can argue that the issue of reasonable modification is broader than the needs of an individual patron who seeks a smoking ban as an accommodation of her disability. The reasonableness of that request must be considered in light of the effect of that ban on other customers and on the business.[111] If a smoking ban drives away other customers and results in the loss of business, then those costs mitigate against the reasonableness of a ban.[112] A court may reach the same conclusion as the *Harmer* court did where it found that a smoking ban was optimal for the plaintiff but an unreasonable demand on the

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104. *Id.* at 1306, 1307.
105. *Id.* at 1306.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 1304 (stating that Virginia Power had to weigh several considerations before the non-smoking policy could be adopted, including the effects on employee morale, the potential loss of productivity from employees who smoke and the additional costs of the change).
110. *Id.* at 1306.
111. *See supra* notes 51-64 and accompanying discussion.
112. *See infra* notes 165-86 and accompanying discussion.

defendant in light of the defendant's other efforts to accommodate people with smoke sensitivities.

B. Public Accommodation Cases

This issue of a smoking ban as a reasonable modification has been left open in the few cases litigated under Title III, the public accommodation provision of the ADA.[113] Customers with respiratory ailments have argued that reasonable modification requires a business to ban smoking completely.[114] No court has yet held that a complete smoking ban is required under the reasonable modification standard.

In *Staron v. McDonald's*, the United States Court of Appeals for the Second Circuit did not reach the question of whether defendants could be required to eliminate smoking completely from their fast-food restaurants.[115] The Second Circuit stated that the lower court was incorrect in holding that a complete ban on smoking was unreasonable as a matter of law.[116] The court remanded the case to give the plaintiffs the opportunity to prove that such a ban was reasonable and necessary.[117] Because the case was settled before trial, the court never resolved the question.

The plaintiffs in *Staron* were three children with asthma and a woman with lupus who sued McDonald's and Burger King.[118] The plaintiffs claimed that the defendants' policy of permitting smoking discriminated against them under the ADA.[119] A magistrate judge determined that the plaintiffs' request for a complete smoking ban in the defendants' restaurants was not a reasonable modification;[120] and, accordingly, the district court dismissed the case.[121]

On appeal, the Second Circuit first discussed whether the language and legislative history of the ADA permitted consideration of smoking bans an accommodation for people with smoke-sensitive disabilities.[122] The court concluded that it could "see no reason why, under the appropriate

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113. *See, e.g., Staron*, 51 F.3d at 357; *Emery*, 879 F. Supp. at 644.
114. *See Staron*, 51 F.3d at 355; *Emery*, 879 F. Supp. at 642.
115. *Staron*, 51 F.3d at 357.
116. *Id.* at 357-58.
117. *Id.*
118. *Id.* at 354-55.
119. *Id.* at 355.
120. *Id.* at 355, 356.
121. *Id.* at 355.
122. *Id.* at 356-57 (citing 42 U.S.C.A. § 12201(b) (1995), which states that "[n]othing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking . . . in places of public accommodation").

circumstances, a ban on smoking could not be a reasonable modification."[123]

The court then considered whether the plaintiffs' proposed ban on smoking was unreasonable as a matter of law.[124] The court concluded that it could not make such a determination without further findings of fact.[125] The court noted that in analogous cases brought in the employment arena, courts had determined that a complete ban on smoking in a workplace was unreasonable only after giving plaintiffs the opportunity to prove their case.[126] In those cases, the courts found that less restrictive modification, such as improving ventilation systems and separating smokers from non-smokers, made a complete smoking ban unnecessary.[127] The issue of whether McDonald's modification, such as banning smoking in corporate-owned restaurants, satisfied the reasonable modification standard was left to a fact-finder.[128]

Under both the employment and public accommodation provisions, reasonableness is determined on a case-by-case basis. However, reasonableness may be easier to predict in the employment context than in the public accommodation area. This is because employment cases set a minimum standard that an employer must meet to make the workplace accessible to the employee with the disability. In employment, the purpose of any accommodation is to allow the disabled employee to perform the "essential functions" of the job. As long as the employee can do the job with the accommodation, the employer does not have to provide the ideal accommodation. This is true even if that accommodation would enable the employee the opportunity to do the job more easily or with greater comfort. In the context of banning workplace smoking, this means that a company such as Virginia Power in *Harmer* could predict with some certainty that confining smoking to certain areas of the workplace would amount to reasonable accommodation. The company could be confident of its decision as long as the accommodation enabled the employee to perform the essential functions of his job.

In contrast, the baseline is not as clearcut in public accommodation cases because there is no equivalent to the "essential functions" standard. McDonald's may not be able to predict with certainty that taking measures, such as establishing smoking and non-smoking sections or installing fans in its restaurants, will satisfy the reasonable modification requirement. Although

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123. *Id.* at 357.
124. *Id.*
125. *Id.* at 358.
126. *Id.* at 357 (citing *Harmer*, 831 F. Supp. at 1300; *Vickers*, 549 F. Supp. at 85).
127. *Id.* at 357-58.
128. *Id.* at 358.

people with respiratory ailments might be able to go to a McDonald's that has only a partial smoking ban, the impediments created by the presence of smoke still may exist. Those customers may smell the smoke when they walk into the restaurant, go to the counter to order, or seek access to restrooms. Businesses may not be as confident as employers that these incremental steps are sufficient modification to fulfill their reasonable modification mandate.

If, however, the analysis in public accommodation cases follows the rationale of employment decisions, then a smoking ban may not be required because it represents an ideal but not a reasonable modification. Just as employers did not have to provide employees an environment of total comfort by eliminating smoke completely, so too would public accommodation only be expected to provide a reasonably comfortable environment for their customers. They would not be expected to ban smoking as long as they reduced the amount of smoke and limited it to certain areas of their facilities.

Taken together, these cases suggest that people with respiratory ailments can argue that reasonable modification or accommodation means a complete smoking ban. Courts have shown their willingness to consider this argument and probably will give plaintiffs an opportunity to demonstrate that such a ban is necessary. However, plaintiffs may have a difficult time in proving their case. The plaintiffs will have to show that other measures, such as an improved ventilation system or the establishment of smoke-free areas, are inadequate and, therefore, do not constitute reasonable modification. Absent such a determination, a court probably will not interpret reasonable modification to require a smoking ban.

Even if the plaintiffs can show that banning smoking is a necessary modification, a defendant may still argue that a ban would fundamentally alter or impose an undue burden on its business. They will argue that a ban would force the business to exclude smoking customers and thus would deprive it of the opportunity to provide hospitality, which is the essence of the business. Furthermore, defendants will insist that the financial and administrative costs of enacting a smoking ban impose an undue burden on their businesses.

III. FUNDAMENTAL ALTERATION AND UNDUE BURDEN

A. Smoking Bans as a Fundamental Alteration

The ADA requires businesses to make reasonable modification unless it "can demonstrate that making such modification would fundamentally alter the nature" of the business.[129] The United States Supreme Court first

129. 42 U.S.C.A. § 12182(b)(2)(A)(ii).

considered the meaning of fundamental alteration under the Rehabilitation Act of 1973. In *Southeastern Community College v. Davis*, the Court determined that requiring a college to modify its clinical nursing program to accommodate a hearing-impaired student represented a fundamental alteration in the nature of its educational program.[130] The Court explained that the college would have to redesign the clinical program to make it exclusively academic.[131] Because the purpose of the program was to provide clinical training to nursing students, the elimination of that component would fundamentally alter the nature of the program.

In subsequent decisions, lower courts have elaborated on the meaning of fundamental alteration under the ADA. As in *Davis*, the core issue in these cases is the effect of the modification on the program's essential purpose. If the modification changes the program's or service's central purpose, then a court is likely to find that modification unreasonable.

In *Roberts v. KinderCare Learning Centers*, the parents of a disabled child sued a day-care center for failing to make reasonable modification for him in violation of the ADA.[132] The parents argued that reasonable modification meant that the center had to provide individual care for their child instead of its standard group care.[133] The day-care center maintained that this modification was unreasonable because the provision of one-on-one care would fundamentally alter the nature of its business.[134]

The parents argued unsuccessfully that the purpose of the day-care center was to provide child care, but the court rejected this characterization of the services as overly broad.[135] The court divided child care services into two categories: group child care and individual child care.[136] Because the two kinds of child care are so different, the movement from group to individual child care shifts the focus and direction of the services. In this case, the court refused to impose such a change because it would be inconsistent with the purpose of the business and would essentially place the day-care center "into a child care market it did not intend to enter."[137] Although the day care center would still be providing child care, the court concluded that provision of individual as opposed to group care would fundamentally alter the nature of

130. 442 U.S. 397, 410 (1979) ("Such a fundamental alteration in the nature of a program is far more than the 'modification' the regulation requires.").
131. *Id.*
132. 896 F. Supp. 921, 923, 925 (D. Minn. 1995).
133. *Id.* at 924.
134. *Id.* at 926.
135. *Id.*
136. *Id.*
137. *Id.*

its program.

Similarly, in *Easley v. Snider*, the United States Court of Appeals for the Third Circuit considered a program's purpose when it determined that Pennsylvania was not required to change the requirements for its personal care attendant program.[138] The state-funded program was designed to enable physically disabled individuals to assume control of financial, employment and personal aspects of their lives through the assistance of a personal care attendant.[139] The program specifically excluded physically disabled people who were not "mentally alert" because they were incapable of both supervising an attendant and assuming control over their lives.[140] When the plaintiffs were declared ineligible for the program because of lack of mental alertness, they challenged the requirement under the ADA.[141]

The Third Circuit first determined that the "essential nature" of the program was to provide "greater personal control and independence for the physically disabled."[142] Because mental alertness was a prerequisite to achieving the program's objective, the elimination of that requirement would alter the essential nature of the program.[143] The court then considered whether the use of surrogates to satisfy the mental alertness requirement was a reasonable modification.[144] The court concluded that it was not reasonable because it also would alter the fundamental purpose of the program.[145] Again, the court emphasized the need for the program recipient to assume control over her life.[146] The use of a surrogate to supervise the personal care attendant and make other decisions for the program recipient would defeat the purpose of the program.[147] The physically disabled person could substitute someone else's mental alertness for her own and thus fundamentally alter the program in a way that the legislature never intended.[148]

In *Martin v. PGA Tour, Inc.*, a federal district court held that providing a disabled golfer with a cart during tournaments did not fundamentally alter the nature of the PGA Tour.[149] The plaintiff, Casey Martin, sued the PGA under

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138. 36 F.3d 297, 303 (3d Cir. 1994).
139. *Id.* at 299 (citing 62 P.S. § 3053 (1996)).
140. *Id.*
141. *Id.* at 298-99.
142. *Id.* at 303.
143. *Id.* at 304.
144. *Id.* at 304-05.
145. *Id.* at 305 (stating the use of surrogates would "change the entire focus of the program").
146. *Id.* at 304.
147. *Id.* ("Allowing a decision by a surrogate is at complete odds with the program objectives.").
148. *Id.* at 303.
149. 994 F. Supp. 1242, 1252 (D. Or. 1998). The United States Court of Appeals for the

the ADA when the organization refused to allow him to use a golf cart during tournaments as an accommodation for a vascular disorder.[150] The court assessed the individual circumstances[151] in this case before concluding that Mr. Martin's use of a cart would not compromise the integrity of a PGA tournament.[152]

The court evaluated the purpose of the walking requirement in PGA tournaments.[153] The court first consulted the Rules of Golf and noted that the language of the rules did not make walking the golf course a requirement of the game.[154] In addition, the court noted that the rules have been further interpreted to allow for the use of golf carts unless such use violated local course rules.[155] Although a preamble to a PGA pamphlet about local rules made walking the course mandatory, it also gave the rules committee discretion to waive the rule.[156]

The court next considered the PGA's stated purpose for its walking rule: to "inject the element of fatigue into the skill of shot-making."[157] The court dismissed the notion that walking the course caused significant physical fatigue.[158] The court deferred to experts who had testified that the fatigue often results from factors such as dehydration and heat rather than from the activity of walking.[159] The court also observed that fatigue has a

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Ninth Circuit affirmed the district court's decision in *Martin v. PGA Tour*, Nos. 9B-35309, 9B-35509, 2000 WL 245356, at *1 (9th Cir. 2000). The Ninth Circuit held that the district court did not err in determining that a disabled golfer's use of a cart did not fundamentally alter the nature of the PGA and Nike tournaments. *Id.* at *8. The court explained that a golf cart merely provided the golfer with "access" to the Tour, as mandated by the ADA, and did not give him an "unfair advantage" in competition play. *Id.* at *5, *8. The court further noted that the essence of a golf competition was in the shot-making and that the golfer was only using the cart between shots to get him to the place where he could make those shots. *Id.* at *5. In reaching this conclusion, the court emphasized the individualized nature of the accommodation and the district court's proper reliance on the specific circumstances of this case. *Id.* at *6. For these reasons, the court determined that the golfer's use of a cart between shots did not fundamentally alter the nature of Tour play. *Id.* at *8.

150. *Martin*, 994 F. Supp. at 1243.

151. *See id.*, at 1251-52; *see also id.*, at 1250 (stating that plaintiff's individual circumstances are relevant to the inquiry of whether allowing him to walk would fundamentally alter the program).

152. *Id.* at 1252.

153. *Id.* at 1249.

154. *Id.*

155. *Id.*

156. *Id.* (stating further that the walking rule had been waived previously where considerably distance is involved).

157. *Id.* at 1250.

158. *Id.*

159. *Id.*

psychological component to it and can be exacerbated by stress.[160] According to experts, walking may alleviate some of those psychological effects by reducing stress. As a result, walking the course may actually benefit golfers in their playing so they often choose walking over using a cart.[161] Therefore, the stated purpose of the walking rule did not withstand judicial scrutiny.

Given the fact that walking was not conclusively linked to causing fatigue, the court was willing to examine a waiver of the requirement for Mr. Martin. Walking was not an option for Casey Martin who was in pain, at risk of injury and extremely fatigued when required to do so during tournaments.[162] The modification of the rule in his particular case would not undermine the purpose of the tournament and would reasonably accommodate his disability.[163] The court concluded that the defendant had failed to demonstrate that allowing Mr. Martin to use a cart would alter the essential purpose of PGA tournaments.[164]

The analysis of fundamental alteration in the smoking cases presents courts with the same dilemma that they confronted in *Roberts, Easley* and *Martin*. The court must determine whether reasonable modification requires a business or program to redefine its purpose. The courts rejected the arguments in *Roberts* and *Easley* that reasonable modification required the defendants to expand the nature of the services to include individual child care or personal care attendants for non-mentally alert individuals. In these cases, the plaintiffs wanted the defendants to alter the scope of their businesses to accommodate their needs. According to the courts' reasoning in *Roberts* and *Easley*, fundamental alteration does not require businesses to change their mission or essential nature to make the modification.

Restaurants, hotels and other public accommodations may be successful in arguing that banning smoking would alter the essential nature of their businesses. As in the cases discussed above, the critical issue is whether the proposed modification changes the purpose of the program or service. The purpose of places of public accommodation is to provide hospitality to all of their customers. This means that they must try to accommodate both the smokers and non-smokers who use their businesses. A smoking ban would deprive businesses of the ability to be hospitable to smokers. According to the rationale of *Roberts, Easley*, and *Martin*, businesses do not have to sacrifice their hospitality mission to accommodate non-smokers with disabilities.

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160. *Id.* at 1251.
161. *Id.*
162. *Id.* at 1251-52.
163. *Id.* at 1252.
164. *Id.*

B. Smoking Bans as an Undue Burden

Courts will also analyze whether the proposed modification imposes an undue burden on the public accommodation. The ADA excuses a business from modifying its services if the accommodation imposes an undue burden on the business.[165] The undue burden analysis takes into account the financial or administrative impact of the accommodation on the business.[166] In assessing the impact, courts will consider factors such as: "the financial resources of the site involved; the number of persons employed at the site; the effect on expenses and resources; the administrative and financial relationship of the site to the corporation; and if applicable, the overall financial resources of the parent corporation and the number of its facilities."[167]

Courts have evaluated these factors in light of the individual circumstances presented by each case.[168] In *Roberts*, the district court concluded that the obligation to provide one-on-one care to a disabled child would impose "an undue financial or administrative burden" on the day-care provider.[169] Citing financial considerations, the court noted that the day-care center was already operating "on a shoestring budget;" that its parent corporation was just coming out of bankruptcy; that it would cost the day-care center $200 per week for one-on-one care; and that the day-care center would only receive about $100 weekly in tuition for the disabled child.[170] In addition, the provision of one-on-one care for the disabled child created significant administrative problems. The court stated that it was not feasible to shift existing personnel around to provide the child with individual care.[171] This would leave other areas of the day-care understaffed and other tasks there unperformed. For these reasons, the court found that the day-care was not required to accommodate the disabled child.[172]

In *Easley*, the court evaluated the effect of expanding the Personal Care Attendant Program to allow surrogates to act on behalf of non-mentally alert

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165. *See, e.g., Roberts*, 896 F. Supp. at 926.

166. *See* 28 C.F.R. §36.104.

167. *Roberts*, 896 F. Supp. at 927 (citing 28 C.F.R. §36.104).

168. For example, in *Hall*, 532 N.W.2d 893, the court determined that the defendant had met its burden of producing evidence that a smoking ban would impose an undue hardship on its business. *Id.* at 897. The defendant, a hospital, had argued that a smoking ban "would threaten the mental and physical health of its patients." *Id.* The court concluded that the defendant met its undue burden standard by producing evidence of "a sound medical basis for permitting the patients to smoke." *Id.*

169. *Roberts*, 896 F. Supp. at 927.

170. *Id.* (internal quotations omitted).

171. *Id.*

172. *Id.*

clients.[173] The court noted that the use of surrogates would increase state costs because non-mentally alert individuals, who were eligible for other state programs, would now be eligible for this program.[174] This would open the program to far more people than either the legislature had intended to cover or the agency could accommodate. As such, the use of surrogates would impose "an undue and perhaps impossible burden on the State, possibly jeopardizing the whole program."[175] The court therefore held that the use of surrogates was an unreasonable modification under the ADA.[176]

At least one court has considered whether a smoking ban places an undue burden on a business. In *Emery v. Caravan of Dreams*, the court examined the economic effect of imposing a smoking ban on the defendant's theater.[177] The plaintiffs, who suffered from cystic fibrosis and asthma, sought to enjoin the defendant from allowing smoking in its theater whenever they wanted to attend a show there.[178] They argued that a smoking ban was a necessary modification and would enable them to attend concerts at the defendant's venue.[179] The court rejected this argument and determined that the smoking ban imposed too high a cost on the defendant's business.[180] The defendant had presented evidence that nationally known bands would refuse to play at its theater if a smoking ban were in effect.[181] A boycott by national bands would jeopardize the theater's economic viability and could result in the theater going out of business.[182] The court concluded that the ADA did not require a business to endanger its livelihood in an effort to accommodate some patrons.[183]

Other businesses may similarly argue that a smoking ban imposes undue administrative or financial costs. The administrative costs to the business can arise from the effect of smoking bans on other customers. Businesses often make modification to comply with the ADA, and non-disabled customers frequently do not notice or care about those changes. For example, a store may widen its aisles to accommodate wheelchairs, or a business may install Braille instrument panels in an elevator. Other customers are not

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173. *Easley*, 36 F.3d at 305.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Emery*, 879 F. Supp. at 644.
178. *Id.* at 642.
179. *Id.* at 644.
180. *Id.*
181. *Id.*
182. *Id.* (citing New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982)).
183. *Id.* at 644-45.

inconvenienced because they still can walk through the store aisles, perhaps even more easily, and can use the non-Braille instrument panel in the elevator.

In contrast, a smoking ban has an immediate impact on other customers who will not be able to ignore the effects of a smoking ban. Some will approve of it because they do not like being exposed to second-hand cigarette smoke. Others, such as the companions of smokers, may be inconvenienced by the ban. The companions of smokers certainly will feel the effect of the ban when they wait outside while a person is smoking. If they also know the reason for the exclusion, this knowledge may well exacerbate tensions between smokers and non-smokers. This will place the business owner in the untenable position of having to choose between the two groups. As she seeks to accommodate the non-smoker, she may be excluding the smoker and her companions. Therefore, public accommodations face a unique challenge to keep the business of both smokers and their companions and people with disabilities.

The financial costs of a smoking ban are also direct and immediate. Unlike the *de minimis* cost of modification such as wider aisles or Braille instrument panels, a smoking ban may have a significant economic impact on a business.[184] When Braille instrument panels are installed on elevators, for example, the cost to the business is relatively low. In fact, the slight increase in cost brought about by this type of modification can be built into the cost of doing business and passed on indirectly to other customers, probably without their noticing.

This may not be not true of a smoking ban. The cost of a ban may be high if it causes smokers and their companions to stay away from the business. Of course, disabled customers who are seeking a non-smoking environment may offset the loss of this business because they now have access to the public accommodation. Unlike other modifications, however, a smoking ban is not easily built into the cost of doing business and passed on to other customers. While modifications, such as widening store aisles, are made once and impose a one-time cost on the business, the cost of a smoking ban is ongoing and potentially greater. If it threatens the economic viability of the business, then a court will probably find that it is an unreasonable modification.

The experiences of state and local governments, which have instituted smoking bans, provide insight into how those bans can threaten the economic viability of businesses. State and local governments have had mixed success in banning smoking from places of public accommodation. Some communities, such as Montgomery County, Maryland, are in the initial stages

184. *See infra* notes 190-98 and accompanying text.

of eliminating smoking from certain public places.[185] Others, particularly California, have been at the forefront of banning smoking in bars and restaurants.[186]

Both California and Maryland have enacted legislation banning smoking in bars and restaurants but not in other public accommodations. In California, the smoking ban for restaurants went into effect in 1995 and for bars in 1998. Since the legislation was passed, many opposing bills to overturn the smoking ban in part or as a whole have been introduced in the California legislature. All have failed.[187] A public opinion poll taken by the California Department of Health Services suggests that the majority of Californians approve of the smoking ban.[188] Many cite health concerns about the dangers of exposure to second-hand smoke as a reason for their approval.[189]

Most of the objections to smoking bans focus on the economic hardship to both the businesses banning smoking and to their employees.[190] Bar and restaurant owners argue that smoking bans will drive smoking customers

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185. Montgomery County has passed a law prohibiting smoking in bars and restaurants that will take effect on January 1, 2002. *See* MD. CODE ANN., LAB. & EMPL. § 5-314(c) (Supp. 1998). *See also,* Candus Thomson, *County Passes Smoke Ban; Montgomery to Bar Lighting Up in All Restaurants, Bars; Move Takes Effect in 2002*, THE BALTIMORE SUN, Mar. 3, 1999, at 1B.

186. California legislation banning smoking in all enclosed places of employment, including restaurants, went into effect in 1995. *See* CAL. LAB. CODE § 6404.5 (West Supp. 1999). This exemption was initially premised on the belief that the state or federal government would promulgate ventilation standards that would create "safe" smoke levels. *See* Robert Gunnison, *Assembly Oks Repeal of Smoking Ban in Bars; Bill Wouldn't Take Effect Until 1999*, S.F. CHRON., Jan. 29, 1998, at A1.

187. Two bills attempting to repeal § 6404.5 restrictions as applied to bars, taverns, and gaming clubs have failed to pass. Assembly Bill 297 passed the California State Assembly less than one month after the smoking ban on bars, taverns, and gaming clubs took effect. However, it has been stalled in the California State Senate since March 1998. *See* A.B.297, Reg. Sess. (Cal. 1997-98). Assembly Bill 1216, the latest attempt to repeal § 6404.5, as applied to bars, taverns, and gaming clubs, was defeated in April 1999. *See* A.B.1216, Reg. Sess. (Cal. 1999-00). Two additional bills have attempted to create exemptions within § 6404.5 for bars, taverns, and gaming clubs. Senate Bill 1513 would have allowed smoking to resume if workers in these establishments consented to work amid smoke or if establishment owners installed state approved ventilation systems. The bills failed in June 1998. *See* S.B.1513, Reg. Sess. (Cal. 1997-98). Assembly Bill 1159 would allow smoking to resume if bar, tavern, or gaming club owners install special ventilation systems. This bill is still active. *See* A.B.1159, Reg. Sess. (Cal. 1999-00).

188. *Bar Patrons Back Ban on Smoking, State Poll Finds*, L.A. TIMES, Oct. 6, 1998, at A24.

189. Sixty-eight percent of those surveyed said that they were very or somewhat concerned about the effects of secondhand smoke. *Id.*

190. *See, e.g.*, Thomson, *supra* note 185, at 1B; Patrick McGreevy, *City Council Beefs Up Smoking Enforcement Law for Taverns Health: Bar Owners Will be Required to Post a Toll-Free Number that Patrons Can Call to Report Violators. Two Inspectors Will Investigate Claims,* L.A. TIMES, Feb. 27, 1999 at B7.

away.[191] The resulting loss of business will force them to lay off employees. Thus, the very laws designed to protect bar and restaurant employees ironically will lead to their dismissal.[192]

In response, proponents of smoking bans point to the California experience. They argue that non-smokers can offset the loss of business from smokers because they will be more likely to go to smoke-free bars and restaurants.[193] Anecdotal evidence from owners and employees of bars and restaurants, however, suggests that the trade of a smoking for a non-smoking patron may not be even. As one restaurant employee commented: "[Smokers] stay longer, eat and drink more, and tip higher."[194] Therefore, any smoking ban may impose an undue burden on businesses.

Another related objection to smoking bans in Montgomery County, Maryland was that a ban would place businesses located in that county at an economic disadvantage to those in neighboring communities which did not ban smoking.[195] They feared that smokers simply would take their business into the neighboring District of Columbia or across Maryland county lines.[196] The lack of uniform smoking bans by localities therefore would lead to a kind of forum-shopping where smokers would bring their business to those areas that welcomed them. California attempted to address the issue of inconsistent, local treatment of smoking by making its ban state-wide. The legislature stated that a purpose of the ban was to "create a uniform statewide standard . . . to eliminate the confusion and hardship that can result from enactment or enforcement of disparate local workplace smoking restrictions."[197] Although this does not eliminate the problem in California communities adjacent to other states, it may ameliorate an individual county's

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191. One restaurant owner, who voluntarily banned smoking, saw a twenty percent decline in business and discontinued the ban. *See id.*

192. For example, the California smoking ban was blamed for the layoff of seventy-five employees at Bay 101, a card casino in San Jose. Mark Simon, *No Smoking Law Blamed for Layoffs; San Jose Casino Sees 10% Drop in Business*, S.F. CHRON., Jan. 22, 1998, at A15. Some California bar and restaurant owners are invoking California's owner-operated exemption to avoid having to enforce smoking bans in their establishments. *Smoking Ban Added Hardship to Lake County*, PROHIBITION NEWS UPDATE, May 7, 1998 at A1. They are laying off employees and running the business alone.

193. *See, e.g., Proposed End to Ban Snuffed Out Again*, AP WIRES, Apr. 21, 1999. Only twenty-five percent of bar patrons in California said that they were smokers and it is unclear whether the number of non-smoking bar patrons has increased as a result of California's smoking ban. *Bar Patrons Back Ban on Smoking, State Poll Finds*, *supra* note 188 at A24.

194. Thomson, *supra* note 185 at 1B.

195. *See id.*

196. *See id.* Opponents of the smoking ban stated that the $200,000 that Montgomery County, Maryland set aside to assist small businesses in competing with businesses in neighboring counties was inadequate. *See id.*

197. CAL. LAB. CODE § 6404.5(a) (West Supp. 1999).

or city's concerns.

A state-wide ban, however, does not answer the concern about lack of compliance to a smoking ban. California has had significant problems enforcing the smoking ban, particularly in bars.[198] Because many bars disregard the ban, smokers can find places to smoke. The bar owner who adheres to the smoking ban may lose business to establishments which permit smoking. In effect, she is penalized for her law-abiding behavior while her counterpart is rewarded for breaking the law. This resulting loss in business could impose the kind of financial costs that rise to the level of an undue burden.

IV. CONSTITUTIONAL ANALYSIS

A. Equal Protection

Smokers may try to argue that interpreting the ADA to require places of public accommodation to ban smoking violates their rights under the equal protection clause.[199] An equal protection violation may exist if a law unfairly discriminates against members of a class.[200] Here, smokers might argue that they are members of a class that has been singled out for discriminatory treatment. They will maintain that the effect of judicial enforcement of the reasonable accommodation provision of the ADA to require a smoking ban is to exclude them in violation of the clause.

Smokers most likely would not prevail under this theory. First, they

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198. One study suggests that about one-half of San Francisco bars are not in compliance with the smoking bans. Jonathan Curiel, *S.F. Ready to Stub Out Illegal Smoking in Bars: Surprise Visits, Fines Part of New Directive*, S.F. CHRON., Jan. 15, 1999, at A1 (citing a California Health Department survey). In Los Angeles, the Fire Department has just begun to enforce the ban. Until recently, the city lacked the resources to implement the eighteen-month old law. The city also has posted telephone numbers in bars so that patrons can report violations of the no-smoking law. *Id.* The city imposes a fine of up to $100 on first-time offenders. *Id.* McGreevy, *supra* note 190 at B7. *See also, Los Angeles to Enforce State Ban on Smoking*, N.Y. TIMES, July 8, 1999, at A14. San Diego has some of the toughest enforcement policies in the state. Undercover vice squad officers enforce the ban, and the fine for first-time offenders can reach $273.00. *San Diego Police Tough on Violators of State Smoking Ban*, AP WIRES, Feb. 22, 1999.

199. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

200. Different treatment does not automatically constitute discriminatory treatment. Kotch v. Board of River Port Pilot Comm., 330 U.S. 552, 556 (1947). The Fourteenth Amendment's mandate of equal protection "does not prevent the states from resorting to classification for the purposes of legislation," but it does require that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

cannot establish that they are a class.[201] A court is likely to find that smoking is an activity instead and, therefore, can be regulated without violating the equal protection clause. A law can prevent people from engaging in an activity, such as smoking, as long as it does not discriminate against a class.[202] To understand why smokers' equal protection arguments necessarily fail, it is useful to consider the appropriate level of review that a court will give their claims and the parameters of that level. Traditionally, a court will analyze an equal protection claim under one of three levels of scrutiny: rational basis, an intermediate level and strict scrutiny.[203] The appropriate level of review is determined by the nature of the legislation at issue.[204] The highest standard of review is reserved for laws which group people by "race, alienage, or national origin" or those which implicate a fundamental right.[205] Those laws must pass a strict scrutiny test and will be struck down unless they are narrowly tailored to achieve a compelling state interest.[206]

Courts use an intermediate level of review when a law classifies a person by gender or legitimacy.[207] The law "must serve important governmental objectives and must be substantially related to achievement of those objectives."[208]

Smokers would probably fail to get their equal protection claims evaluated under either strict scrutiny or the intermediate standard of review. Smokers are not claiming discrimination based on their race, alienage or national origin, nor can they successfully maintain that a fundamental right is at issue.[209] Furthermore, because smokers cannot claim gender bias, a court would not analyze their claim under the intermediate level of review.

Legislation that addresses economic issues is presumed valid as long as

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201. "Class" is defined as: "A group of persons, things, qualities, or activities, having common characteristics or attributes." BLACK'S LAW DICTIONARY 170 (6th ed. 1991).

202. The equal protection clause does not require Congress to pass a law guaranteeing smokers the right to smoke on private property.

203. Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985); Plyler v. Doe, 457 U.S. 202, 216-18 (1982) (and footnotes therein).

204. *Cleburne*, 473 U.S. at 440-42.

205. *Cleburne*, 473 U.S. at 440; United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980).

206. *Cleburne*, 473 U.S. at 440 (citations omitted).

207. Clark v. Jeter, 486 U.S. 456, 461 (1988) (legitimacy); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (gender); Mills v. Habluetzel, 456 U.S. 91, 99 (1982) (legitimacy); Craig v. Boren, 429 U.S. 190, 197 (1976) (gender).

208. *Craig*, 429 U.S. at 197; *see also Clark*, 486 U.S. at 461; *Hogan*, 458 U.S. at 724.

209. *Fritz*, 449 U.S. at 174. Smokers may argue that a right to smoke is part of a right of expressive association. *See infra* Part V.B. This argument should fail because there is no right to smoke, just as there is no right to drink despite a constitutional amendment repealing Prohibition.

it is "rationally related to a legitimate state interest."[210] Courts grant a high degree of deference to lawmakers under the rational basis test because, as the Supreme Court has explained, incorrect classifications could be corrected by "democratic processes."[211] A court would probably review smokers' equal protection arguments under a rational basis standard. An interpretation of the ADA to mean that a complete ban on smoking constitutes a reasonable accommodation would probably be seen as rationally related to a state's legitimate interest in safeguarding the health of people with respiratory ailments as well as that of the general public.[212] Thus, the legislation most likely would be found constitutional under a traditional rational basis review.[213]

The Supreme Court, however, seems to have suggested that some legislation may be analyzed under a heightened rational basis standard. In cases such as *Cleburne v. Cleburne Living Center*[214] and *Romer v. Evans*,[215] the Court seems to reject the rigid, three-tiered approach to equal protection analysis in favor of a more fluid approach.[216] The Court analyzed the legitimacy of the state's interests for the legislative classification at issue as it examined the complex interplay between the "constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[217] When the interests were those of mentally retarded people to live in a particular neighborhood or homosexuals to be protected against discrimination, the Court struck down the laws in question as reflecting an "irrational prejudice" toward mentally retarded people[218] and, in the case of homosexuals, "a

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210. *Cleburne*, 473 U.S. at 440 (citations omitted).

211. *Id.* In granting such deference to legislatures, the Supreme Court also seeks to limit the judiciary's ability to dictate social or economic power. *Fritz*, 449 U.S. at 175 (citation omitted).

212. *Fritz*, 449 U.S. at 179 ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end.").

213. *Id.*; *Plyler*, 457 U.S. at 216.

214. *Cleburne*, 473 U.S. at 432.

215. 517 U.S. 620 (1996).

216. In *Cleburne*, the Court explicitly stated that it "refus[ed] to recognize the retarded as a quasi-suspect class." *Cleburne*, 473 U.S. at 446. The *Romer* Court makes no such representation, leaving commentators to debate about whether homosexuals are members of a quasi-suspect class. *See* Tobias Barrington Wolff, Case Note, *Principled Silence: Romer v. Evans*, 106 YALE L.J. 247 (1996); Kevin H. Lewis, Note, *Equal Protection After Romer v. Evans: Implications For The Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175 (1997); William M. Wilson, III, *Romer v. Evans: 'Terminal Silliness' Or Enlightened Jurisprudence?*, 75 N.C. L. REV. 1891 (1997).

217. *Cleburne*, 473 U.S. at 460 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973)).

218. *Cleburne*, 473 U.S. at 450.

bare . . . desire to harm a politically unpopular group."[219]

Although some members of the Court have claimed that this analysis is consistent with traditional rational basis review,[220] others have been quick to note that the label belies the reality.[221] The reality is that the Court is subjecting some legislation to more searching inquiry than is typically conducted under rational basis review.[222] An understanding of the Court's heightened review in *Cleburne* and *Romer*, therefore, may provide insight into how smokers might argue that a smoking ban violates equal protection.

1. Cleburne

The *Cleburne* case arose when the city of Cleburne, Texas interpreted its zoning ordinance to require a special use permit for a group home for mentally retarded adults and then denied the permit to the group home.[223] The operators of the group home challenged the zoning ordinance on its face and in its application as violating the equal protection rights of people with mental retardation.[224] Using rational basis review, the Supreme Court concluded that the ordinance was applied unconstitutionally.[225] The majority opinion, authored by Justice White, was divided into two parts. In the first part he discussed the appropriate level of review,[226] and in the second he analyzed the constitutionality of the zoning ordinance as applied in this case.[227]

In the first part of the opinion, Justice White enumerated four reasons that the ordinance should be evaluated under the rational basis standard.[228]

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219. *Romer*, 517 U.S. at 634 (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

220. *See* Heller v. Doe, 509 U.S. 312, 320-21 (1993) (explaining that the *Cleburne* Court applied a rational basis review and placed the burden on the group home to establish that no rational basis existed for the classification).

221. *Cleburne*, 473 U.S. at 456 (Marshall, J., dissenting).

222. Under traditional rational basis review, when *any* 'plausible' reason for a classification exists, the Court looks no further into the legislative body's reasoning because "[i]t is . . . constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *Fritz*, 449 U.S. at 179 (quoting Fleming v. Nestor, 363 U.S. 603, 612 (1960)). But in *Cleburne*, for example, the Court *did* examine the stated purposes for the classification to ensure that they were not "so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446.

223. *Cleburne*, 473 U.S. at 436-37.

224. *Id.* at 437.

225. *Id.* at 435.

226. *Id.* at 439-47.

227. *Id.* at 447-50.

228. In Frontiero v. Richardson, 411 U.S. 677 (1973), the Court used a heightened standard of review to evaluate statutes which gave benefits to spouses of male members of the armed services but not to the spouses of female members. The Court justified its use of a heightened standard because sex is an immutable characteristic which is not related to the abilities of its members. *Frontiero*, 411 U.S. at 687. Mental retardation is similarly an

First, the Court noted that the immutable differences between people with mental retardation and the rest of the population gave legislative bodies a "legitimate" interest in acknowledging those differences.[229] The Court concluded that the judiciary should defer to legislative efforts in this area by reviewing them under the rational basis standard.[230] Second, the Court expressed an unwillingness to subject the ordinance to a heightened review because this might cause courts to review legislation designed to assist people with mental retardation under a similarly heightened standard.[231] The result could be a chilling effect on positive legislative efforts on behalf of people with mental retardation.[232] Third, the Court observed that the many laws protecting the interests of people with mental retardation reflected that group's political power.[233] Given their political influence, people with mental retardation might not need the additional protection afforded by a heightened standard of review.[234] Finally, the Court expressed reluctance to extend quasi-suspect status to people with mental retardation because of the precedent that it might set.[235] Other groups would seek similar protection, and the courts would be flooded with claims for quasi-suspect status.[236] For those reasons, the Court determined that it would review the zoning ordinance under a rational basis standard.[237]

Under a traditional rational basis review, one would expect the Court to uphold the zoning ordinance as being rationally related to a legitimate state interest.[238] In Part II of his opinion, however, Justice White struck down the ordinance because of the unconstitutional way that it was applied to a group

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immutable characteristic although it is distinguishable from a sex classification because it affects some of the abilities of its members. In *Cleburne*, however, the abilities of people with retardation were not relevant to the decision not to allow a group home in the community. *Cleburne*, 473 U.S. at 443. The Court in both cases took into account the gains that both groups had made in the political arena, but concluded in the words of the *Frontiero* Court that "women still face pervasive, although at times more subtle, discrimination." *Frontiero*, 411 U.S. at 686; *Cleburne*, 473 U.S. at 440-41. The *Cleburne* Court acknowledged that people with mental retardation face such discrimination as well. *Cleburne*, 473 U.S. at 446. Even while using the language of rational basis review, the Court in *Cleburne* in reality was employing a heightened level of review.

229. *Cleburne*, 473 U.S. at 442.
230. *Id.* at 443.
231. *Id.* at 444-45.
232. *Id.*
233. *Id.* at 445.
234. *Id.*
235. *Id.* at 445-46.
236. *Id.*
237. *Id.* at 446.
238. *See Heller*, 509 U.S. at 319-21; *Fritz*, 449 U.S. at 179; Williamson v. Lee Optical, 348 U.S. 483, 488-89 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109-10 (1949).

home for people with mental retardation.[239] The explanation for this result can be found in the majority opinion's interpretation of the rational basis test. Usually, courts unquestioningly accept the state's explanation of its interest in drawing a particular classification and conclude that the interest is legitimate.[240] Here, the Court probed the city's stated interests in singling out the group home for differential treatment and denying it a special use permit.[241] The Court determined that the city had not shown that the group home would "pose any special threat to the city's legitimate interests" in a way that other establishments would not.[242] Therefore, the city did not have a rational basis for treating the group home differently, and the ordinance, as applied, was unconstitutional.[243]

In reaching that conclusion, the Court evaluated the reasons given by the city for such differential treatment. The Court first considered the argument that nearby property owners objected to the presence of a group home in their neighborhood.[244] In rejecting that argument, the Court stated that "mere negative attitudes" did not provide a rational basis for treating a group home differently from other kinds of residences.[245]

The Court next dismissed the city's concern about the proximity of the group home to a junior high school. The Court explained by noting that students at the school were already accustomed to being around people with mental retardation because mentally retarded students were enrolled in the school.[246]

The Court then responded to concerns expressed about the location of the group home on a 500 year-old flood plain. The Court noted that the same flooding problem could arise with other establishments, such as hospitals, yet they were not required to obtain a special use permit.[247] Finally, the Court did

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239. *Cleburne*, 473 U.S. at 450.

240. *See Williamson*, 348 U.S. at 491 (Law subjecting opticians to regulation but exempting sellers of ready-to-wear glasses is not violative of Equal Protection Clause because legislature may regulate one portion of a given field while neglecting the others.); *Railway Express Agency*, 336 U.S. at 110 ("Local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem [as those who rent ad space on their trucks to others] in view of the nature or extent of the advertising which they use."); *Kotch*, 330 U.S. at 556 (Selective application of a regulation may deny equal protection if "rested on grounds wholly irrelevant to achievement of the regulation's objectives," but nepotism in selection of river boat pilots is not unrelated to the objective of operating an efficient and safe pilotage system.).

241. *Cleburne*, 473 U.S. at 448-50.

242. *Id.* at 448.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 449.

247. *Id.*

not find a rational basis for requiring a special use permit because of the size of the group home and number of occupants.[248] The Court commented that the city did not appear to have similar concerns about the size or occupancy of other kinds of group residences, such as apartments or dormitories.[249] Therefore, the Court concluded that the city should not single out the group home for differential treatment on that basis.[250]

In sum, the Court found that the city's requirement of a special use permit was based on "an irrational prejudice against the mentally retarded."[251] Because the city did not have a rational basis for its differential treatment of the group home, its application of the ordinance was unconstitutional.

In his dissenting/concurring opinion, Justice Marshall pointed out that the majority's rational basis analysis was far more exacting than traditional rational basis review.[252] Justice Marshall characterized the majority's insistence that it was using a rational basis level of review, when it is in fact something more, as "unfortunate."[253] Under traditional rational basis review, the Court would not evaluate the city's justifications for its differential treatment of people with mental retardation.[254] Instead, the legislation would be presumptively valid.[255] In contrast, according to Justice Marshall, the majority in *Cleburne* analyzed the ordinance with "precisely the sort of probing inquiry associated with heightened scrutiny."[256] Justice Marshall noted that the majority felt constrained by the three-tiered format of equal protection analysis to identify its reasoning as something that it was not.[257]

2. Romer v. Evans

In *Romer v. Evans*, the Court evaluated the constitutionality of an amendment to the Colorado Constitution barring governmental efforts to protect homosexuals from discrimination.[258] As in *Cleburne*, the majority in *Romer* stated that it was analyzing the amendment under a traditional rational

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248. *Id.*
249. *Id.*
250. *Id.* at 450.
251. *Id.* This kind of prejudice would be sufficient to justify heightened review in other cases. *See Frontiero*, 411 U.S. at 686-87.
252. *Cleburne*, 473 U.S. at 456-60 (Marshall, J., dissenting in part and concurring in part).
253. *Id.* at 459.
254. *Id.* at 459-60.
255. *Id.* at 459.
256. *Id.* at 458.
257. *Id.* at 478.
258. *Romer*, 517 U.S. at 620.

basis standard, but in reality, it was using heightened rational basis review.[259] In so doing, the Court arguably extended additional protection/quasi-suspect status to homosexuals.[260] This time, the Court did not find the Equal Protection violation in the ordinance's application. The Court determined that the ordinance was unconstitutional on its face[261] because it singled out homosexuals and "impose[d] a special disability on those persons alone."[262]

The majority opinion, authored by Justice Kennedy, concluded that the amendment did not pass constitutional muster under even the most "deferential" level of equal protection scrutiny, rational basis review.[263] Justice Kennedy stated that he was analyzing the constitutionality of the ordinance under the "conventional inquiry" of a rational basis review.[264] Citing numerous precedents, he noted that a law would be found constitutional under a rational basis standard as long as it "advance[s] a legitimate government interest."[265] He further explained that the state could meet its burden under this standard even if "the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[266]

The law could fail rational basis review, however, if it was "drawn for the purpose of disadvantaging the group burdened by the law."[267] Justice Kennedy perceived that the amendment at issue fell into the latter category.[268] Justice Stevens' concurring opinion explained that equal protection means that the government will not single out one group for unequal treatment.[269] This is particularly so when the singling out may be motivated by "animosity" toward the class of persons affected.[270] Turning to precedent, the Court observed that "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[271] The Court qualified this statement by explaining that a law may impose "incidental disadvantages" on individuals;[272] however, the Court determined that the

259. *Id.* at 635.
260. *See* discussion *supra* notes 234-36.
261. *Romer*, 517 U.S. at 635.
262. *Id.* at 631.
263. *Id.* at 632.
264. *Id.*
265. *Id.* (citations omitted).
266. *Id.* (citations omitted).
267. *Id.* at 633 (citations omitted).
268. *Id.*
269. *Id.* (Stevens, J., concurring).
270. *Id.* at 634.
271. *Id.* (quoting *Moreno*, 413 U.S. at 534).
272. *Id.* at 635.

Colorado amendment went beyond incidental disadvantages.[273] The harm here was "immediate, continuing and real" and outweighed any legitimate reasons offered for it.[274] The government's stated interests included protecting the association rights of those who objected to homosexuality on religious or moral grounds and preserving governmental resources to combat other kinds of discrimination.[275] The Court dismissed these reasons as being "far removed" from the breadth of the legislative classification.[276] Because the amendment made homosexuals "stranger[s] to its laws," the Court determined that it was unconstitutional.[277]

As in *Cleburne*, the *Romer* Court stated that it was using a rational basis test, but seemed to subject the legislation to heightened review.[278] Under traditional rational basis analysis, the great deference accorded to the legislature should have meant that the reasons the state offered for its amendment were sufficient to withstand an equal protection challenge.[279] In both cases, they were not. In *Romer*, the Court determined that the singling out of homosexuals for differential treatment was unrelated to a legitimate government purpose.[280] In *Cleburne*, the Court similarly determined that the exclusion of a group home for people with mental retardation reflected bias and animosity rather than legitimate government interests.[281] The question that remains is whether smokers can successfully argue that they too have been discriminated against under the reasonable accommodation provision of the ADA for reasons unrelated to a legitimate government interest.

3. Heightened Rational Basis and Smokers' Claims

Smokers may argue that an interpretation of the ADA to require a complete ban on smoking in places of public accommodation represents "a

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273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. Justice Stevens at one point refers to the Colorado amendment as being "at once too narrow and too broad," terms not traditionally used in applying the rational basis test. *Id.* at 633. (Stevens, J., concurring). *Romer* may show why Justice Stevens' idea of equal protection is the best approach. Justice Stevens wants to do away with the tiers of review because they are too formal and restrictive. *Cleburne*, 473 U.S. at 451-55 (Stevens, J., concurring). In *Romer*, we may have a not quite quasi-suspect class—homosexuals—with a not quite fundamental right—political participation. Nevertheless, a law which unfairly targeted the group was considered discriminatory and a violation of the equal protection clause. *Romer*, 517 U.S. at 633.
279. *Fritz*, 449 U.S. at 179; *Williamson*, 348 U.S. at 489; *Railway Express Agency*, 336 U.S. at 110.
280. *Romer*, 517 U.S. at 635.
281. *Cleburne*, 473 U.S. at 448-50.

bare . . . desire to harm a politically unpopular group"[282] and thus reflects the same kind of "irrational prejudice"[283] displayed toward people with mental retardation and homosexuals in *Cleburne* and *Romer*. This argument should fail for two reasons. First, smokers, unlike people with mental retardation and homosexuals, cannot establish that they are members of a class. Second, although legitimate state interests did not drive the laws in *Cleburne* and *Romer*, such interests arguably are present here and motivate the state to regulate smoking.[284] The state's legitimate interest in limiting others' exposure to smoke is behind a smoking ban in public accommodations. Smokers cannot show that they are held to the same kind of unpopularity as homosexuals or people with mental retardation because their unpopularity is based on their decision to engage in unhealthy behavior.[285]

As a threshold matter, smokers have to establish that they constitute a class and thus are eligible to sue under section 1983 of the Civil Rights Act of 1964 to prevent a civil rights violation created by the ADA. The effect of an equal protection claim is that the law cannot mistreat a class.[286] Smokers will analogize their claims to those brought by people with mental retardation in *Cleburne* and homosexuals in *Romer* and argue that they too are singled out for unfair treatment if smoking bans are imposed.[287]

In a concurring opinion in *Cleburne*, Justice Stevens enumerated questions that arise in every equal protection claim. They include a determination of "what class is harmed by the legislation" and whether it has been "subjected to a 'tradition of disfavor,'" an evaluation of the "public purpose" behind the law, and an identification of the "characteristic of the

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282. *Romer*, 517 U.S. at 634 (quoting *Moreno*, 413 U.S. at 534).

283. *Cleburne*, 473 U.S. at 450.

284. Statistics indicate that "smoking kills more than 400,000 Americans" each year, and that up to 3,000 additional lung cancer deaths can be linked to "second-hand" smoke. CHARLES LEWIS & THE CENTER FOR PUBLIC INTEGRITY, THE BUYING OF THE CONGRESS: HOW SPECIAL INTERESTS HAVE STOLEN YOUR RIGHT TO LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS 106 (1998).

285. *Id.* (Smoking is linked to emphysema, as well as various types of cancer, including cancer of the lungs, pharynx, larynx, esophagus, bladder, kidney, and pancreas.).

286. *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534.

287. *See* Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257 (1996). The authors identify a "pariah principle" running through Supreme Court equal protection cases. *Id.* at 271. According to this theory, the Court is sympathetic to the interests of those who are the outcasts of society and will strike down legislation excluding them. *Id.* at 268. Using rational basis review, the Court determines that no legitimate government interest exists for the law. *See also* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994). Professor Sunstein suggests that the Court should abandon traditional equal protection review and consider whether the legislation creates "second-class citizenship, or lower-caste status" for a group. *Id.* at 2429. For an interesting comparison of the two theories, *see* LEWIS, *supra* note 284, at 193-94.

disadvantaged class" used as a rationale for the disparate treatment.[288]

Even if smokers do constitute a class, it is difficult to say that they have been subjected to a tradition of disfavor. Although recent legislative measures have restricted the rights of smokers,[289] a powerful smoking lobby has protected smokers' interests in Congress and in state legislatures for many years.[290] Moreover, the stated purpose of the ADA is to safeguard the interests of people with disabilities.[291] The specific purpose of interpreting the reasonable accommodation provision to include a smoking ban in places of public accommodation would be to protect the health of people with respiratory ailments. Finally, it may be difficult to identify a class "characteristic" when smokers' behavior may be the issue.

The central issue is whether smokers constitute a class or whether smoking is merely a behavior which can be regulated without violating equal protection. The resolution of this issue hinges on the distinction between mutable and immutable characteristics. This is important because in other decisions the Court has expressed a desire to give greater protection to people who are discriminated against on the basis of an "immutable characteristic."[292] In *Frontiero v. Richardson*, for example, the Court explained that sex is an immutable characteristic because it is "determined solely by accident of birth."[293] Likewise, mental retardation is an immutable condition over which an individual has no control or choice.[294] Although there is still disagreement about whether homosexuality is genetically predetermined or a chosen lifestyle, there is still a belief among courts and scholars and scientists that it may be genetic, and a substantial body of literature suggests that it too is an immutable characteristic.[295] Smokers will

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288. *Cleburne*, 473 U.S. at 453 (Stevens, J. concurring) (citation omitted).

289. *See* CAL. LAB. CODE § 6404.5 (West 1999) (prohibiting smoking in the workplace); N.H. REV. STAT. ANN. § 155:66 (1994) (requiring smoking sections in "[a]ll enclosed places of public access" or total prohibition of smoking if effective segregation impossible).

290. LEWIS, *supra* note 284, at 105-25 (detailing the lobbying efforts of the tobacco industry, including the fact that tobacco interests spent almost $26,000,000 lobbying Congress in 1996 alone, regularly send lawmakers on expensive business trips to Arizona, Florida, Puerto Rico, Las Vegas, California, and Sweden, and have successfully avoided tax increases repeatedly since 1951).

291. *See* H.R. REP. No. 101-485, at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303-04.

292. *Frontiero*, 411 U.S. at 686.

293. *Id. See also* Kahn v. Shevin, 416 U.S. 351, 357 (1974) (discussing the need to subject a law to "close judicial scrutiny . . . because it focuses on generally immutable characteristics over which individuals have little or no control").

294. *Cleburne*, 473 U.S. at 442.

295. *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446, 457 n.10 (7th Cir. 1996) ("We express no opinion on whether sexual orientation is an 'obvious, immutable or distinguishing' characteristic. However, it does seem dubious to suggest that someone would choose to be homosexual, absent some genetic predisposition, given the considerable discrimination leveled

argue that smoking also is an immutable characteristic because it is an addiction over which an individual has little control or choice.[296]

A difficulty with categorizing smoking as mutable or immutable is that it may be either at different points in time.[297] An individual makes the initial choice to smoke. At that point, she has engaged in an activity which she controls. Over time, however, an individual who continues to smoke may become addicted to nicotine.[298] The resulting addiction may remove smoking from the realm of choice and control and transform it to an immutable characteristic.[299]

Smokers can argue that immutability should not depend on whether one has been born with a particular trait. Instead, the important factor in determining immutability should be whether the public perceives that a group exists. The Court usually extends heightened protection to a group when its members have been singled out because of a "highly visible characteristic," such as race or sex.[300] It is easy for society to categorize quickly based on such obvious traits, and the Court wants to ensure that such classifications are legitimately motivated.[301]

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against homosexuals."); Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris J., concurring) ("Although the causes of homosexual are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change."); High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, J., dissenting) ("There is every reason to regard homosexuality as an immutable characteristic for equal protection purposes."). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1427 (2d ed. 1988) (discussing the possibility of applying heightened scrutiny of homosexual class); Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205, 240-43 (1993); Mark Strasser, *Suspect Class and Suspect Classifications: On Discriminating, Unwittingly or Otherwise,* 64 TEMP. L. REV. 937, 957-60 (1991); Marcia Barinaga, *Is Homosexuality Biological?,* 253 SCI. 956 (1991). *But see, High Tech Gays*, 895 F.2d at 573 (stating that homosexuality is not an immutable characteristic but is behavioral); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("Homosexuality, as a definitive trait, differs fundamentally from those defining any recognized suspect or quasi-suspect classes.").

296. In their article, Farber and Sherry suggest that a group is more likely to fall within the pariah principle if the legislation at issue singles the group out because of an immutable characteristic. Farber & Sherry, *supra* note 287, at 268-69.

297. Immutability may indeed be a fluid concept based not on sheer ability to change, but on the difficulty involved in changing a trait. Consider, for example, that gender is considered immutable, yet modern science has given those who wish to change gender the ability to do so rather effectively.

298. Estimates indicate that 3,000 teenagers start on the road to addiction daily by smoking their first cigarette. LEWIS, *supra* note 284, at 107.

299. The same can be said about addiction to drugs and alcohol. It is unlikely that courts would accommodate those addictions.

300. Sunstein, *supra* note 287, at 2432-33; LEWIS, *supra* note 284, at 194.

301. *Cleburne*, 473 U.S. at 446-47.

Although the public might argue that it does not perceive smokers as a group, they do have readily identifiable characteristics. First, smokers are easily identifiable as a group when they are smoking. In addition, society recognizes smokers as a group. The way that restaurants and other public spaces are grouped into smoking and non-smoking areas is one example of the public perception.

Smokers may further rely on the Court's analysis in *Department of Agriculture v. Moreno* to bolster their argument that they constitute a class.[302] In *Moreno*, the plaintiffs successfully argued that their equal protection rights were violated when an amendment to the Food Stamp Act denied them coverage because they were unrelated to other household members.[303] The Court found that the amendment had singled out unrelated household members for discriminatory treatment because it arbitrarily distinguished between related and unrelated people living in the same household.[304] The legislative history of the amendment suggested that the provision was designed to exclude hippies and hippie communes from coverage.[305] The Court concluded that such an animus was not sufficient to uphold the legislative classification.[306]

In *Moreno*, unrelated household members were considered a class even though they were not connected by an immutable characteristic.[307] The common bond was their living arrangement. Smokers will argue that they, like the plaintiffs in *Moreno*, should constitute a class even if they are not connected by an immutable characteristic. Like hippies, they are engaged in a behavior that makes them "politically unpopular," but that unpopularity does not amount to a legitimate government interest in singling them out for differential treatment.[308]

Even if smokers are considered a class because smoking is not a behavior, they still have to establish that no legitimate reason exists for banning smoking in places of public accommodation. Smokers may argue that an animosity toward smokers as a group drives a smoking ban.[309] They will point to other examples of legislatures' desire to limit the rights of

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302. *Moreno*, 413 U.S. at 528.
303. *Id.* at 534-35.
304. *Id.* at 535-36.
305. *Id.* at 534 (citations omitted).
306. *Id.* at 534-35.
307. *Id.* at 534.
308. In fact, the *Romer* Court cited *Moreno* for the proposition that a law cannot single out a group for discriminatory treatment because of some "animosity" toward members of that group. *Romer*, 517 U.S. at 634.
309. *See id.*

smokers and claim that a smoking ban is yet one more example.[310] They will further explain that a smoking ban directly targets them and therefore "inflicts on them immediate, continuing, and real injuries" that outweigh any legitimate reasons for the ban.[311]

In response, the government would argue that the smoking ban advances legitimate interests. Those interests include the protection of the health of people with respiratory ailments as well as the general public's health.[312] Although banning smoking from public accommodation undoubtedly would disadvantage smokers, the inconvenience would be justified by the resulting public health benefits. In *Romer*, the Court found that the protection of the association interests of people who objected to homosexuality was "far removed" from the scope of the ordinance.[313] In contrast, the government's interest in protecting the association interests of those who object to being exposed to smoke for health reasons is closely related to a smoking ban.[314] Therefore, a smoking ban would have a "rational relationship to a legitimate legislative governmental purpose . . .": the public's health.[315]

Furthermore, smokers do not need heightened protection because they can turn to the "democratic process" to protect their interests.[316] In the same way that people with mental retardation and homosexuals are recognized as having political power, the smoking lobby is a politically powerful group which easily commands lawmakers' attention.[317] This power suggests that smokers may not have to rely on the courts when they can safeguard their

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310. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-601.01 (West 1993 & Supp. 1999) ("Smoking tobacco in any form is prohibited in any . . .[e]levator, indoor theater, library, art museum, lecture or concert hall, or bus which is used by or open to the public; . . .[w]aiting room, rest room, lobby or hallway of any health care institution . . ."); CAL. HEALTH & SAFETY CODE § 118895 (West 1996) (This section is one of several sections of the California Code that prohibits smoking within the State.); CONN. GEN. STAT. ANN. § 19a-342 (West Supp. 1999) (requiring no smoking in, *inter alia*, certain public places, health care facilities, retail food stores, restaurants (under certain circumstances), and elevators); N.Y. PUB. HEALTH LAW § 1399-o (McKinney Supp. 1999) (prohibiting smoking in, *inter alia*, auditoriums, elevators gymnasiums, classrooms, means of public transportation, and child care services); 35 PA. CONS. STAT. ANN. § 1230.1 (West 1993) (prohibiting smoking in certain public places, public meetings and certain workplaces).

311. *See Romer*, 517 U.S. at 635.

312. *See* R.I. GEN. LAWS § 23-20.7-3 (1998).

313. *Romer*, 517 U.S. at 635.

314. Reducing exposure to "second-hand" smoke logically will reduce the risk of illness caused by "second-hand" smoke.

315. *Romer*, 517 U.S. at 635 (citation omitted).

316. *Cleburne*, 473 U.S. at 440.

317. LEWIS, *supra* note 284, at 105-25 (The industry does employ at least 150 lobbyists and donates amounts that add up to millions to the congressional campaigns of candidates from both major political parties.).

interests through legislation.[318]

Ultimately, a court would probably find that interpreting reasonable accommodation to require a smoking ban would not violate equal protection because the law was not "drawn for the purpose of disadvantaging" smokers.[319] In *Cleburne* and *Romer*, the laws at issue targeted one group directly and were motivated by prejudice. In *Cleburne*, the zoning ordinance excluded only group homes for people with mental retardation while it included other comparable residential arrangements.[320] In *Romer*, the Supreme Court determined that the amendment to the Colorado Constitution singled out homosexuals for the purpose of "mak[ing] them unequal to everyone else."[321]

In contrast, smokers probably will not be able to establish that the ADA directly targets them. Although they are most affected by the smoking ban, the disadvantage imposed on them is "incidental" to the primary purpose behind the legislation.[322] The purpose was to make accessible places of public accommodation to people who have traditionally been excluded because of their disabilities. A court would most likely find that this was a legitimate purpose and that a ban would not be the manifestation of an "irrational prejudice" directed toward a politically unpopular group.[323] Therefore, an interpretation of reasonable accommodation to include a smoking ban should be given great deference and should withstand an equal protection challenge.

As a threshold matter, however, smokers would have to establish that they are eligible to sue under the ADA. Unlike people with mental retardation, who, despite their differences in abilities, constituted a recognized class, smokers may not enjoy a similar status. If smoking is considered a behavior, then it can be regulated without any equal protection implications. In that situation, the government would not even have to meet the rational basis test before using the ADA to exclude smokers from places of public accommodation. If, however, smokers constitute a class, then the equal

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318. Besides lobbyists, the tobacco industry also gets support from the National Smokers Alliance, a non-profit organization created by Philip Morris to fight "excessive regulation" of smoking and discrimination against smokers, as well as members of Congress such as John Boehner of Ohio, who in 1995 passed out campaign checks from Brown and Williamson Tobacco Corporation to fellow house members. Such a practice has now been banned, but it does demonstrate the strength and reach of the tobacco industry. LEWIS, *supra* note 284, at 112, 120.

319. *Romer*, 517 U.S. at 633.

320. *Cleburne*, 473 U.S. at 449-50.

321. *Romer*, 517 U.S. at 635.

322. *Id.*

323. *Cleburne*, 473 U.S. at 450.

protection clause at least is implicated, although ultimately a smoking ban under the ADA would probably be held constitutional. Just as in *Cleburne*, a court faced with smokers' claims of discrimination would have to decide what level of review to use.[324] Because smokers are not claiming either discrimination based on race, national origin or alienage or the violation of a fundamental right, a court would not use the strict scrutiny test.[325] The choice therefore is between a rational basis test or an intermediate level of scrutiny. Here, the Court's reasoning in *Cleburne* is instructive.

In *Cleburne*, the Court took into account the effect of the varied nature of the class.[326] That variety led the Court to want to give the legislature deference in treating this group.[327] The Court could accomplish this goal by using a rational basis test to review legislative decisions. Similarly, smokers are a varied class who may require individualized treatment. This may also lead courts to want to give legislatures the freedom to pass laws affecting them. A review of those laws using a rational basis test would give Congress and other legislative bodies the necessary flexibility to determine such matters as the appropriateness of smoking bans in places of public accommodation.[328]

Finally, to classify smokers as "quasi-suspect" would open the doors for other equally amorphous groups to claim that laws affecting them should receive this intermediate level of review.[329] There would be no principled way of distinguishing among these groups who, like smokers and people with mental retardation, "can claim some degree of prejudice from at least part of the public at large."[330] For these reasons, a court would probably conclude that the rational basis test is the appropriate level of review.

Using a rational basis test, the ADA would be presumed valid and would be upheld if the classification was rationally related to a legitimate state interest.[331] Unlike the ordinance in *Cleburne*, the ADA would probably be found constitutional in its application to smokers. The state interest here would be the general one of preserving the public's health and the specific interest in safeguarding the welfare of people with asthma and other severe respiratory ailments. Under those circumstances, a court could easily find that a smoking ban in places of public accommodation did not reflect an

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324. *Id.* at 439-42.
325. *Id.* at 440.
326. *Id.* at 442.
327. *Id* at 432.
328. *Id.* at 441-42.
329. *Id.* at 445.
330. *Id.*
331. *Id.* at 440.

"irrational prejudice" against smokers.[332] Instead, a smoking ban might represent a legislative concern about the public's health and welfare.

B. Expressive Association

A second and related constitutional issue is whether it is possible to exclude smokers from places of public accommodation without depriving them of their right to association.[333] The resolution of this issue depends on how the court resolves two other matters. The first matter is whether smokers comprise a class or are simply engaged in a kind of behavior. If smokers are members of a class, then the second question is whether they are being excluded from a fundamental right. The deprivation of a fundamental right would be subject to strict scrutiny and would not survive on review.

The issue of whether smoking is a behavior which the government can appropriately regulate as opposed to whether smokers constitute a class has been addressed in the equal protection section of this article.[334] In addition to the reasons discussed above for a court to consider smoking as a behavior, a further justification exists for such a characterization. If smoking is classified as an activity, then courts will not have to make difficult value choices about whether to exclude smokers as opposed to non-smokers from places of public accommodation. Although courts may be comfortable making those choices, they do not have to engage in that debate if the focus is on the behavior rather than the individuals engaging in that behavior.

In a famous law review article, Professor Herbert Wechsler discussed the judiciary's role in making value choices when the interests of two competing groups are at stake.[335] Professor Wechsler urged courts to embark on a course of "principled decisions" which rely on "reasons that in their generality and their neutrality transcend any immediate result that is involved."[336] These reasons should give courts enough flexibility "if and when competing values, also having constitutional dimension, enter on the scene."[337] According to Wechsler, the role of courts is to uphold a legislature's value choices absent a sufficient reason to overturn them.[338]

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332. *Id.* at 450.

333. The U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

334. *See supra* notes 292-308, and accompanying discussion.

335. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

336. *Id.* at 19

337. *Id.*

338. *Id.*

In applying his thesis to the school desegregation arena, Professor Wechsler examined the competing values at stake when segregationists squared off against integrationists in *Brown v. Board of Education*.[339] From his perspective, the issue was not whether discrimination existed.[340] Instead, the question was whether segregated schools unconstitutionally deprived blacks and whites alike of their right to associate with each other.[341] This concern about protecting the rights of whites and blacks to associate necessarily impeded the rights of segregationists.[342] Segregationists could argue that integration would interfere with their associational interests because they found it "unpleasant or repugnant" to send their white children to school with black children.[343] Professor Wechsler agreed that the decision to desegregate public schools would affect the associational interests of segregationists.[344] Such interference with their rights, however, was a necessary by-product of protecting the rights of integrationists to associate.[345] Because the two sets of interests were opposed, the Supreme Court had to choose between them.[346] Professor Wechsler concluded that he hoped that such a choice would rest on neutral principles, but he suspected that the decision was more a product of the Court's value choice.[347]

Similarly, if smokers constitute a class, then their interest in associating with others in places of public accommodation will square off against the rights of people with respiratory ailments to have access to smoke-free public accommodations.[348] Courts will be required to choose between smokers and non-smokers as to whose associational rights should prevail. Courts may decide that smoking in bars, hotels and other places of public accommodation is "unpleasant or repugnant" and seek to limit smokers' access to these places.[349] Alternatively, they may decide to try to balance the competing interests and allow smoking in certain places but not in others.[350] Regardless

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339. 347 U.S. 483 (1954).
340. Wechsler, *supra* note 335, at 34.
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.* Twenty-five years after Wechsler's thesis, the Supreme Court agreed that one's associational rights can be infringed by forced association, stating that "[f]reedom of association therefore plainly presupposes a freedom not to associate." Roberts v. Jaycees, 468 U.S. 609, 623 (1984).
345. Wechsler, *supra* note 335, at 34.
346. *Id.*
347. *Id.*
348. *See id.*
349. *Id.*
350. Smokers have argued that a ban infringes on their civil liberties. They argue that smokers and non-smokers alike should have a choice about smoking in public

of their ultimate choice, courts will be making the kinds of value choices in this context that Professor Wechsler warned should be guided instead by "neutral principles."[351]

Assuming, however, that smokers constitute a class, then the inquiry is whether a complete smoking ban violates a fundamental right. In this situation, the right implicated is the freedom of association. The principle of freedom of association has evolved in two separate groups of Supreme Court cases.[352] The first group is concerned about private, associational interests such as the right to procreate[353] or to make educational decisions on behalf of one's child.[354] These cases focus on the freedom of association as a way of preserving "the fundamental element of personal liberty."[355] In addition to these cases involving the freedom of "intimate association,"[356] the Court has also identified a freedom of "expressive association."[357] This interest protects one's right to associate with others in furtherance of First Amendment activities such as speech and assembly.[358] Smokers may invoke this right of expressive association as they demand access to places of public accommodation.[359]

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accommodations. When the government deprives smokers of the choice to smoke in a bar or restaurant, it unjustifiably interferes with private behavior. Smoking customers at one California bar commented: "I feel persecuted . . . ."; "We feel like pariahs."; "The next thing they're going to do is tell me I can't have a martini." Jim Carlton, *The Bar is Raised in California's Bid to Put Out Smoking: Tavern, Casino Operators Fear Toughest Ban in U.S. Will Clear Clients and the Air*, WALL ST. J., Jan. 2, 1998, at 12. In Maryland, one individual commented: "I presume the next thing on our agenda is banning Big Macs and Whoppers." Candus Thomson, *County passes smoke ban; Montgomery to bar lighting up in all restaurants, bars; Move takes effect in 2002*, THE BALTIMORE SUN, Mar. 3, 1999, at B1.

351. Wechsler, *supra* note 335, at 17 ("Is not the relative compulsion of the language of the Constitution, of history and precedent—where they do not combine to make an answer clear itself a matter to be judged, so far as possible, by neutral principles by standards that transcend the case at hand?").

352. *Jaycees*, 468 U.S. at 617.

353. Griswold v. Connecticut, 381 U.S. 479, 494 (1965).

354. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

355. *Jaycees*, 468 U.S. at 618.

356. *See* People ex rel. Gallo v. Acuna, 929 P.2d 596, 609 (Cal. 1997), *cert. denied*, Gonzalez v. Gallo, 521 U.S. 1121 (1997) ("At bottom, protected rights of association in the intimate sense are those existing along a narrow band of affiliations that permit deep and enduring personal bonds to flourish, inculcating and nourishing civilization's fundamental values, against which even the state is powerless to intrude.").

357. *Jaycees*, 468 U.S. at 618.

358. *Id.* The Court in *Healy v. James*, 408 U.S. 169 (1972), stated more particularly that "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." *Healy*, 408 U.S. at 181.

359. In *Jaycees*, the Supreme Court stated that "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage

To be successful, smokers must convince a court that they are engaged in an activity protected by the First Amendment. They may have a difficult time doing so. The Supreme Court has recognized that the freedom of expressive association encompasses a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[360] In one case, the Court recognized that the right provides protection from government actions which "impose penalties or withhold benefits from individuals because of their membership in a disfavored group."[361]

In *Healy v. James*, the Court had to determine whether students' associational interests were violated when their application to form a chapter of the Students for a Democratic Society (SDS) was denied by the president of a state-run university.[362] The Court began its opinion by noting that the "right of individuals to associate to further their personal beliefs" is not enumerated in the Constitution but is contained within the rights of speech, assembly and petition.[363] The Court noted that this right is abridged when a school deprives students of the opportunity to join an organization which has otherwise complied with the school's application procedure.[364] As much as school administrators might disagree with the organization's philosophy or goals, the school does not have the right to restrict students' association with that organization.[365] The Court concluded that, the resulting "wide latitude" afforded to the right to association can lead to the "infringement of the rights of others;"[366] however, such an infringement is a necessary, although not necessarily desirable, price to pay for safeguarding the associational interest.[367]

Smokers may concede that protecting their associational interests can infringe on the rights of non-smokers, particularly people with respiratory ailments. Smokers may compare themselves to the students in *Healy* who were denied access to an organization with "repugnant views."[368] They will argue that the decision to exclude them from places of public accommodation is based on their membership in a politically unpopular group.[369] They may

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in group effort toward those ends were not also guaranteed." Jaycees, 468 U.S. at 622.

360. *Id.*
361. *Id.* (citing *Healy*, 408 U.S. at 180-84).
362. *Healy*, 408 U.S. at 169.
363. *Id.* at 181.
364. *Id.* at 181-84.
365. *Id.* at 187-88.
366. *Id.* at 194.
367. *Id.*
368. *Id.* at 187.
369. *Jaycees*, 468 U.S. at 622 (citing *Healy*, 468 U.S. at 180-84).

further maintain that the government is withholding benefits from them by depriving them of the right to associate with others in places of public accommodation.

This analogy, however, probably will not hold up because of the difference between the associational interests of students and those of smokers. Students were deprived of the right to join a formal, politically motivated organization, the SDS, while smokers are deprived of the right to engage in a particular behavior in a particular location. The interests of smokers may be more analogous to those of teenage dance hall patrons in *City of Dallas v. Stanglin*,[370] for as the Supreme Court has noted, the right of expressive association may be broad, but it is not "absolute."[371]

In *Stanglin*, the Court explored the limitations of that right in determining the constitutionality of an ordinance which restricted admission to a dance hall to teenagers between the ages of fourteen and eighteen.[372] The teenage patrons of the dance hall argued that they were involved in expressive activity protected by the First Amendment.[373]

Writing for a seven-person majority, Justice Rehnquist ruled that attending a dance hall does not constitute protected activity under the First Amendment.[374] Justice Rehnquist noted that the ordinance limits the ability of teenagers and adults to interact and, therefore, restricts interests that commonly could be considered associational.[375] Justice Rehnquist further explained that these associational interests, however, do not receive constitutional protection for a number of reasons.

First, the dance hall patrons do not belong to an "organized association" which might place them under the First Amendment umbrella.[376] Second, the only connection among them is that they frequent the same business.[377] Finally, they do not engage in any of the activities protected under the right to expressive association in other cases, such as "tak[ing] positions on public questions."[378] Justice Rehnquist concluded by distinguishing between protected and unprotected expression:

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370. 490 U.S. 19 (1989).
371. *Jaycees*, 468 U.S. at 623.
372. *Stanglin*, 490 U.S. at 20.
373. *Id.* at 24.
374. *Id.* at 24.
375. *Id.*
376. *Id.*
377. *Id.* at 24-25.
378. *Id.* at 25 (quoting Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987)).

> It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.[379]

Thus, the dance hall patrons' right of expressive association did not rise to the level of constitutionally-protected activity.

This analysis is instructive in understanding why smokers' interests probably do not rise to the level of constitutionally-protected activity. First, like the dance hall patrons in *Stanglin*, smokers are not members of an organized group.[380] They, like the dance hall patrons, participate in the same activity, but they do so independently. If they organized as a group or club, their associational interests might be protected because the desire to meet together or to interact with others is at stake. Second, however, they have little in common with each other aside from smoking and are in fact generally "strangers to one another."[381]

Finally, smokers may argue that they have a protectable interest because, unlike dance hall patrons, they do "take positions on public questions" as a group.[382] They will maintain that the right to smoke is a public question because it has been debated by legislatures, courts, and the public.[383] The right to smoke arguably is more of a public question than the right of teenagers and adults to frequent the same dance hall. Nevertheless, it still might not rise to the level of a protectable association interest as established by other courts.

The Second Circuit recently considered whether the associational interests of members of a New York City police boxing organization were violated when the police commissioner withdrew official recognition of the club.[384] In *Fighting Finest, Inc. v. Bratton*, the boxing club argued that the right to belong to the organization was a protected form of expressive association.[385] The boxing club conceded that its activities were not among the "civic, charitable, lobbying or fundraising activities" traditionally protected under the right of expressive association.[386] Nevertheless, the

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379. *Id.*
380. *Id.* at 24.
381. *Id.* at 25.
382. *Id. See also, Board of Dir. of Rotary Int'l*, 481 U.S. at 548 ("As a matter of policy, Rotary Clubs do not take positions on 'public questions,' including political or international issues.") (citation omitted).
383. *See supra* notes 316-18 and accompanying discussion.
384. *See* Fighting Finest, Inc. v. Bratton, 95 F.3d 224 (2d Cir. 1996).
385. *Id.* at 227.
386. *Id.* at 227 (quoting *Jaycees*, 468 U.S. at 626-27).

members of the boxing club successfully argued that its activity fell within the "wide variety of political, social, economic, educational, religious, and cultural ends" covered by expressive association.[387] To prevail, the boxing club had to distinguish its activities from those of the dance hall patrons which were not protected in *Stanglin*.

The Second Circuit noted that the dance hall patrons in *Stanglin* were people who were associating "solely for recreational pursuits."[388] In contrast, the police boxing club "arguably benefit[ed] some public interest" both by promoting the image of police officers and contributing to the widows and orphans fund.[389] Therefore, the court found that the right to associate in the boxing club was distinguishable from the right to patronize a dance hall.[390] The court, however, equivocated as to whether the right to associate in the boxing club was constitutionally protected, holding that even if it is protected by the First Amendment, the commissioner's actions did not "rise to the level of a First Amendment violation."[391]

Smokers will have a hard time arguing that their activities benefit the public interest. Unlike the activities of the police boxing club, smoking has neither intangible nor tangible benefits: it does not enhance the image of those who smoke, and smokers as a group do not contribute to charitable causes. It is more likely that a court will find that smokers, like dance hall patrons, are associating "solely for recreational pursuits."[392] Therefore, while the activity of smoking may contain more than a "kernel of expression," it is not a form of constitutionally protected association.[393]

V. THE SUPREME COURT AND POST-INTEGRATIONISTS: COMPETING VISIONS OF THE ADA

Although the Supreme Court has not yet interpreted the meaning of reasonable modification under the ADA,[394] it has considered the meaning

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387. *Id.* (quoting *Roberts*, 95 F.3d at 622).
388. *Id.* at 228.
389. *Id.* at 227-28.
390. *Id.* at 228.
391. *Id.*
392. *Id.* (citing *Stanglin*, 490 U.S. at 24).
393. *Stanglin*, 490 U.S. at 25. *See also*, New York State Club Ass'n Inc. v. City of New York, 487 U.S. 1, 13 (1988) ("This is not to say, however, that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution.") (citations omitted).
394. Between 1992 and 1999, the Supreme Court heard only three cases brought under the ADA. One disability rights lawyer observed: "What I'm seeing in the lower courts now are more and more decisions focusing on reasonable accommodation by employers and what does that mean . . . . This is very encouraging because that is what the heart of the law is and those will be the next questions for the Supreme Court." Marcia Coyle, *Supreme*

of "disability" in a series of recent decisions.[395] The Court chose a narrow interpretation of disability in those cases. This may signal that the Court will interpret reasonable modification equally narrowly. Alternatively, having tightened up the threshold disability requirement, the Court might choose a less restrictive interpretation of reasonable modification. A broad interpretation would be consistent with the approach espoused by a number of commentators who have been labeled post-integrationists.[396] An examination of these recent Supreme Court decisions in conjunction with the ideas of post-integrationists offers two different readings of the ADA.

A. The Supreme Court Vision

The Supreme Court has considered whether people whose disabilities could be corrected by measures, such as eyeglasses or medication, were covered by the ADA.[397] In all three cases, the Court took a hard line approach and held that the plaintiffs were not disabled within the meaning of the ADA.[398] The three cases involved a truck driver who was almost blind in one eye, a mechanic with high blood pressure, and twin sisters who were extremely myopic.[399] All of these individuals were able to correct these impairments with medication or corrective lenses.[400] The Court held that those corrective measures should be taken into account when determining whether these individuals were disabled under the ADA.[401]

The Court's analysis in *Sutton v. United Airlines* offers the most complete explanation of its narrow reading of what constitutes a disability under the ADA.[402] In *Sutton*, the plaintiffs were twin sisters with severe near-sightedness, a condition that was corrected by eyeglasses or contact lenses.[403] The defendant, United Airlines, rejected their applications for commercial

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Court Could Redefine ADA This Term, NAT'L L. J., May 3, 1999, at A1.

395. *See* Murphy v. United Parcel Serv., 119 S.Ct. 2133 (1999); Sutton v. United Airlines, 119 S.Ct. 2139 (1999); Albertsons, Inc. v. Kirkingburg, 119 S.Ct. 2162 (1999).

396. *See* Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, __ U. ILL. L. REV. (forthcoming 2000).

397. *See, e.g., Sutton*, 119 S.Ct. at 2141.

398. *Murphy*, 119 S.Ct. at 2138; *Sutton*, 119 S.Ct. at 2152; *Albertsons, Inc.*, 119 S.Ct. at 2165.

399. *Murphy*, 119 S.Ct. at 2136; *Sutton*, 119 S.Ct. at 2143; *Albertsons, Inc.*, 119 S.Ct. at 2165-66.

400. *Murphy*, 119 S.Ct. at 2136; *Sutton*, 119 S.Ct. at 2143; *Albertsons, Inc.*, 119 S.Ct. at 2166.

401. *Murphy*, 119 S.Ct. at 2137; *Sutton*, 119 S.Ct. at 2146; *Albertsons, Inc.*, 119 S.Ct. at 2168-69.

402. *Sutton*, 119 S.Ct. at 2146.

403. *Id.* at 2143.

pilot positions on the ground that they did not meet the company's minimum vision requirement.[404] The plaintiffs sued alleging discrimination under the ADA.[405] The district court dismissed their claim, and the court of appeals affirmed the dismissal.[406]

In affirming the lower courts' opinions, the Supreme Court considered whether the plaintiffs were disabled under two provisions of the ADA. First, the Court determined that the plaintiffs did not have a physical impairment which substantially limited them in a major life activity.[407] Second, the Court found that the plaintiffs had not stated a claim that they were "regarded as" having an impairment that substantially limits them in a major life activity.[408]

Under the first provision, the critical question was whether the determination of disability should look at the condition in its corrected or uncorrected state.[409] The plaintiffs argued that the Court should look at their visual impairment in its uncorrected state.[410] They cited EEOC and Justice Department guidelines, which advocated that interpretation, in support of their position.[411] The defendants countered that the plain meaning of the ADA required the Court to evaluate the condition in its corrected state.[412]

In a 7-2 opinion authored by Justice O'Connor, the Court agreed with the defendant's interpretation of the meaning of disability.[413] The Court gave three reasons for its conclusion that the condition should be viewed in its corrected state.[414] First, the Court stated that the language of the ADA must be read literally.[415] Because the ADA requires the person's impairment to "substantially limit a major life activity," the provision demands an actual disability rather than a speculative, future condition.[416] The Court stated that the provision was drafted in the present tense because the law did not intend to cover the person whose corrected impairments do not substantially limit her in a major life activity.[417] This means that if a person is taking medication or wearing glasses, a court will evaluate her ability in a corrected condition to determine whether she is substantially limited in a major life activity.

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404 *Id.*
405. *Id.*
406. *Id.* at 2141.
407. *Id.* at 2142.
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.* at 2141.
412. *Id.* at 2142.
413. *Id.* at 2143.
414. *Id.*
415. *Id.* at 2145.
416. *Id.*
417. *Id.* at 2147.

Second, the Court explained that the individualized nature of determining whether a person is substantially impaired in a major life activity requires an evaluation of that person's disability in its corrected state.[418] When that determination is based on an uncorrected disability, courts will have to rely on general information about how that disability usually affects people.[419] For example, a diabetic whose condition may be under control through the use of insulin would be considered disabled simply because she had diabetes.[420] This results in less accurate determinations about who is substantially impaired and in a disregard for a particular person's abilities or disabilities.

Finally, the Court discussed the significance of the Congressional finding that 43 million people are disabled.[421] The Court explained that this number reflects Congress' intent not to include people whose impairments have been corrected among the disabled.[422] The Court noted that this number would increase four-fold if people with corrected conditions were included in that category.[423] The Court concluded that if Congress had intended to include those conditions in that category, it would have cited a larger number in the findings.[424] For these reasons, the Court held that the plaintiffs had not stated a claim that they were substantially limited in a major life activity.[425]

The Court next determined that the plaintiffs did not satisfy the prong of the ADA that would require them to show that they were disabled because they were regarded as having a disability.[426] The plaintiffs alleged that the defendant had discriminated against them because it erroneously believed that they were substantially limited in the major life activity of working.[427] The Court stated that the substantial limitation requirement would only be met if plaintiffs had not been able to work in "a broad class of jobs."[428] In this case, the plaintiffs had alleged that their near-sightedness prevented them from attaining specific jobs as global airline pilots.[429] Therefore, they had not satisfied the standard that their poor eyesight substantially limited them in the

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418. *Id.* (declining to consider whether HIV infection is a per se disability under the ADA) (citing Bragdon v. Abbott, 524 U.S. 624 (1988)).
419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.*
423. *Id.* at 2148.
424. *Id.* at 2149.
425. *Id.*
426. *Id.*
427. *Id.* at 2150.
428. *Id.* at 2151.
429. *Id.*

major life activity of working.[430]

In a concurring opinion, Justice Ginsburg reflected on Congress' intent when drafting the ADA.[431] She observed that the stated purpose of the ADA was to protect "a discrete and insular minority" who were "politically powerless."[432] She determined that it would be inconsistent with that purpose to include among the disabled the large number of people whose disabilities had been corrected.[433] This concern about the scope of the plaintiffs' "enormously embracing definition of disability" led her to conclude that disabilities should be viewed in their corrected state.[434]

The opinion has been hailed as a victory for employers and a severe setback for people with disabilities.[435] Although its impact on reasonable accommodation or modification cases cannot be predicted with certainty, it provides important insights into the Court's thinking on the ADA.

First, the Court's narrow reading of who is disabled suggests that it might interpret reasonable modification in a similarly narrow fashion. Under this interpretation, a complete smoking ban could be considered an unreasonable modification because it is too sweeping in scope. While reasonable modification might include less extreme measures, such as creating non-smoking sections, it would not require workplaces or businesses to ban smoking outright.

Second, the Court's literal reading of the ADA does not leave much room for including smoking bans within the meaning of reasonable modification. When interpreting "substantially limits" in *Sutton*, the Court discussed the implications of phrasing the requirement in the present tense.[436] The Court explained that the present tense meant that a person could not be "potentially" or "hypothetically" limited; she had to be currently limited in

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430. *Id.*

431. *Id.* at 2152 (Ginsburg, J., concurring).

432. *Id.*

433. *Id.*

434. *Id.*

435. *See* Laurie Asseo, *Correctable Conditions not Disabilities Under ADA*, LEGAL INTELLEGENCER, June 23, 1999, at 4 ("A disability-rights group called the three decisions a 'profound setback.'"); Linda Greenhouse, *High Court Limits Who Is Protected By Disability Law*, N.Y. TIMES, June 23, 1999, at A1 (calling the decisions "a great victory for management"); Robert S. Greenberger, *Supreme Court Narrows Scope of Disability Act*, WALL ST. J., June 23, 1999 at B1 (calling the decisions a "sweeping win for business").

436. *See Sutton*, 119 S.Ct. at 2146; *see also, Albertsons, Inc.*, 119 S.Ct. at 2168 (distinguishing the ADA requirement of "a significant restriction" on an individual's manner of performing a major life activity and the lower court's determination that the plaintiff's manner of performing that activity was significantly "different" from the way of others).

performing a major life activity.[437] The Court's close attention to the text in these opinions suggests that it would not stray too far from the ADA in interpreting the meaning of reasonable modification. A literal reading of the term would not require places of public accommodation to take drastic measures to accommodate people with respiratory disabilities as long as they took reasonable steps. Even though a smoking ban might represent the ideal modification, the public accommodation would not be required to institute one under a reasonable modification standard.[438]

Third, the Court almost certainly will evaluate the necessity of smoking bans on an individual basis. As the Court explained in *Sutton*, it is better to decide whether a particular person is substantially limited in a major life activity than to make the parallel construction determination based on that person's membership in a group.[439] Similarly, the Court is likely to decide whether a smoking ban is reasonable under the particular circumstances of a case rather than as a general matter.[440]

Fourth, the Court's desire to limit the number of people who are disabled to 43 million reflects its concern about overwhelming the judiciary with ADA cases.[441] A concern about a similar flood of litigation could also deter the Court from interpreting reasonable accommodation to require a smoking ban.[442] Both expanding the class of disabled to include people with special sensitivity to smoke and the meaning of reasonable accommodation to cover smoking bans arguably will increase the number of plaintiffs and impose additional burdens on employers. In both instances, the Court would be

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437. *See Sutton*, 119 S.Ct. at 2146.

438. *See, e.g., Harmer*, 831 F. Supp. at 1306 (explaining that duty of reasonable accommodation does not mean "absolute accommodation"); Muller v. Costello, No. 94-CV-842-(FJS), 1996 WL 191977, at *1 (N.D.N.Y. April 16, 1996) (stating that employer does not have to provide employee the ideal modification as long as it allows the employee to work in "reasonable comfort").

439. The Supreme Court in *Sutton* set forth that "[t]he 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." *Sutton*, 119 S.Ct. at 2147. (quoting 29 C.F.R. pt. 1630, app. § 1630.2(j)); H.R. REP. No. 101-485 III, pt. III, at 39, *reprinted in* 1990 U.S.C.C.A.N. 445, 461 (1990) ("Reasonable accommodation should be tailored to the needs of the individual and the requirements of the job.").

440. *See, e.g., D'Amico*, 813 F. Supp. at 221 ("An individual analysis must be made with every request for accommodations and the determination of reasonableness must be made on a case by case basis.").

441. *See Sutton*, 119 S.Ct. at 2158 (Stevens, J. dissenting) ("It has also been suggested that if we treat as 'disabilities' impairments that may be mitigated by measures as ordinary and expedient as wearing eyeglasses, a flood of litigation will ensue.").

442. *See, e.g.*, Wendy E. Parmet, Mark A. Gottlieb, & Richard A. Daynard, *Accommodating Vulnerabilities to Environmental Tobacco Smoke: A Prism for Understanding the ADA*, 12 J.L. & HEALTH 1, 3 (1997-98).

limiting the scope of the Act to preserve its integrity.

Fifth, a broad interpretation of reasonable modification might also contravene the ADA findings that focus on the law's purpose of protecting a "discrete and insular minority." As Justice Ginsburg noted in her concurring opinion, that definition is inconsistent with the "enormously embracing definition of disability" which the plaintiffs advocated in *Sutton*.[443] The Court might find that including smoking bans in the definition of reasonable modification was similarly overbroad and inconsistent with a law whose stated purpose was to protect a discrete and insular minority.

Finally, the Court may not want to expand the scope of reasonable modification out of concern about diluting the meaning of the ADA.[444] This issue has arisen in the context of defining who is disabled. Disability rights advocacy groups are divided among themselves about who should be included under the ADA, and some have been reluctant to favor coverage for people who wear eyeglasses or take blood pressure medication.[445] For example, if someone who wears glasses is considered disabled under the ADA, then the law would not distinguish between that person and someone with a severe visual impairment. Both have equal status. Some disability advocates fear that the effect of expanding coverage will be to group the serious cases with less serious cases and, thus, minimize the need for accommodation of people with serious disabilities.

In the context of reasonable accommodation, the concern would be that mandating smoking bans for people with respiratory ailments will trivialize requests for other kinds of accommodation. If reasonable modification requires a complete smoking ban, then individuals with other, perhaps less severe, disabilities may seek more extensive accommodation under the law. These accommodations can deplete the resources of businesses and leave them unable to accommodate other more urgent requests. The dangers are in transforming the ADA into a vehicle for validating insignificant claims[446] or using a single disabled individual to further an unrelated political agenda.

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443. *Sutton*, 119 S.Ct. at 2152.

444. *See* Parmet, Gottlieb & Daynard, *supra* note 442, at 3 ("For some advocates of disability rights, the use of the ADA [to challenge smoking policies] may seem an unwarranted extension of the ADA [and] [t]hese advocates fear that such a use may weaken the Act's potential to prohibit 'real discrimination' against individuals with traditional disabilities.").

445. Greenberger, *supra* note 435, at B1 ("There is a sentiment, even a growing sentiment, that the definition was already being read too broadly and perhaps even diluting the rights of those that someone would refer to as the 'truly disabled.'").

446. Some disability rights groups refused to join in plaintiffs' cases against Burger King and McDonald's for smoking bans because they did not want to jeopardize their credibility in other ADA lawsuits.

The answer to concerns about trivializing the ADA and opening the courts to a flood of ADA litigation lies in the role of the judiciary. First, the courts are well-equipped to distinguish trivial claims from valid ones. In addition, the requirement that the plaintiff prove discrimination on the basis of her disability further ensures that only plaintiffs with legitimate claims will have a remedy under the ADA. Finally, the results in recent smoking ban cases brought under the ADA do not suggest that the courts will be overwhelmed by cases. Very few courts have considered the issue. In those that have, no court has yet determined that a smoking ban was required to reasonably accommodate a smoke-sensitive plaintiff.[447] Although some courts left open the door on the matter, the plaintiff still has the burden of showing that other, less extreme smoking restrictions are inadequate.[448]

B. The Post-Integrationist Vision

The Court's thinking on this issue seems to be at odds with the interpretations of the ADA advocated by many commentators. Mark Weber has grouped these interpretations together under the label "post-integrationists."[449] Post-integrationists argue that an integrationists approach is limited. Integrationists believe that society must attempt to bring people with disabilities into society but impose some limits on these efforts. This integrationist approach seeks to include people with disabilities in places of public accommodation as long as those individuals can be included without changing the nature of the business.[450] This preserves the status quo because the person with the disability must, with reasonable accommodation, fit into the existing structure.[451] The business will not be reshaped to meet her needs; she must adapt to it.

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447. *See, e.g.*, Staron v. McDonald's Corp., 51 F.3d 353, 358 (2d Cir. 1995).

448. *Id.* at 358. One source from the American Heart Association stated that in order to arrive at some acceptable standard of indoor smoke levels, "'you'd literally need a wind tunnel blowing at gale force' to remove cancer-causing carcinogens from rooms where people smoke." Max Vanzi, *California and the West Smoking Ban Foe Mounts Offensive Legislation: Assemblyman Vincent of Inglewood, Author of Bill to Repeal the Law, Says the Issue is Choice, Not Health. Critics Contend He is Acting on Behalf of Hollywood Park Casino*, L.A. TIMES, March 23, 1998, at A3.

449. Weber, *supra* note 396.

450. In a seminal article, Jacobus tenBroek and Floyd W. Matson discussed the movement of disability law from principles of "custodialism" to those of "integrationism." Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 815 (1966). Other commentators have further explained how the ADA represents integrationist principles. Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMPLE L. REV. 393 (1991); Weber, *supra* note 396.

451. Weber, *supra* note 396, at 26 (stating that the ADA "uses the person without disabilities as the norm, and measures what it requires by the effort needed to depart from the norm").

Commentators have pointed out the weaknesses of the integration model under the ADA.[452] One flaw in the model is that it makes people without disabilities the norm and measures people with disabilities against that norm.[453] Almost without exception, the person with the disability will not meet the norm. This approach requires the business to give the person with the disability simply the opportunity to fit into the "normal," non-disabled world.[454] The person must be accommodated only to the point where she has access to the facility or service, and any accommodation beyond that may be unreasonable.

Another shortcoming is that the integrationist approach imposes most of the cost of accommodation on the person with the disability.[455] Although the business has some financial obligation to accommodate the person with the disability, it need not incur an "undue hardship."[456] This means that the person with the disability must shoulder the majority of costs associated with using the public accommodation.

Post-integrationists have proposed alternative ways of examining the relationship between society and the person with the disability.[457] One underlying principle of post-integrationism is that society needs to re-examine its obligations to people with disabilities.[458] The current, limited approach requires businesses only to make reasonable accommodation and thus places too much of the burden on the person with the disability.[459] This could change if the focus shifted away from the non-disabled world to the needs of the person with the disability.[460] If the laws were reconfigured around meeting the needs of that person, then the person with the disability would not

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452. *See, e.g.*, Weber, *supra* note 396, at 25.

453. Weber, *supra* note 396, at 26. See MINOW, *supra* note 93, for an extensive discussion of this problem; *see also* Martha T. McCluskey, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 871 (1988) ("[I]n terming the physical needs of people with disabilities 'different,' 'special,' and in need of 'accommodation,' society implies that able-bodied people are the norm, and that people with disabilities are the deviations.").

454. *See* Weber, *supra* note 396, at 26; McCluskey, *supra* note 453 at 871; *see generally* MINOW, *supra* note 93.

455. Weber, *supra* note 396, at 29-31.

456. *See supra* notes 165-86, and accompanying text.

457. *See generally*, Harlan Hahn, *Equality and the Environment: the Interpretation of "Reasonable Accommodations" in the Americans With Disabilities Act*, 17 J. REHAB. ADMIN. 101 (1993) (discussing the meaning of equality as giving everyone an equal benefit); *see also* MINOW, *supra* note 93, at 80-86.

458. Weber, *supra* note 396, at 39-54 (drawing on John Rawls's notions of equality, feminist writers' discussions of anti-subordination theories, and writers who connect the current status of people with disabilities to the American economic system).

459. *See supra* notes 34-87 and accompanying text.

460. *See* Weber, *supra* note 396, at 43.

have to fit into an existing norm.[461] She would define the norm.

A second and related principle of post-integrationism is a shifting of the costs of accommodation from the person with the disability to those making the accommodation.[462] Under existing laws, the person with the disability bears the bulk of the cost of participating in society.[463] Post-integrationists are comfortable with the fact that this shift in cost-bearing will probably lead to a "significant redistribution" of resources.[464] They justify this position by pointing out that this redistribution is necessary to secure equality for people with disabilities.[465]

Some post-integrationists reject rights-based notions of laws which value autonomy over interdependence.[466] Martha Minow describes this "social relations" approach which resists grouping people into categories, such as disabled and non-disabled, and seeing them as having competing sets of rights.[467] Instead, the social relationship model emphasizes the connections among people and seeks to address their needs in the context of their relationships with each other.[468]

Finally, some post-integrationists redefine equality to give all people equal benefits rather than equal opportunity.[469] This places a burden on businesses to make whatever changes are necessary regardless of cost or effect on the provision of services. Under this definition, a business might be required to make fundamental alterations in the nature of its services to allow a person with a disability to enjoy the benefits of that business. For example, a business could not argue that the cost of installing an elevator is too great. Although that argument might pass muster under the "undue hardship" standard of integrationism, it would fail under post-integration analysis.

The post-integrationist approach has interesting implications for people with disabilities who are seeking smoking bans in businesses. Although their

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461. *Id.* at 43 ("A world that is oriented around persons with disabilities as much as it is now oriented around persons without them would be a radically different world from the present one.") (citations omitted).

462. *See* Weber, *supra* note 396, at 47.

463. *Id.* at 31 (discussing how people with disabilities bear most of the costs for participating in the work force).

464. *Id.* at 46, 53-54.

465. *See Id.*, 46-48 (applying Rawlsian notions of justice to people with disabilities).

466. Martha Minow has written eloquently and extensively about social relationship theory. *See* MINOW, *supra* note 93.

467. *Id.*

468. *Id.* at 224.

469. *See, e.g.*, Hahn, *supra* note 457, at 104 ("In the American legal tradition, equality usually has been construed to mean equality of opportunity instead of equal shares."); *see also* Weber *supra* note 396, at 43-54 (discussing further ideas regarding equality under post-integrationist theories).

claims may falter under the ADA's integration approach, they may find greater support under a post-integrationist model.

First, the post-integrationist approach would require businesses to go much farther than reasonable accommodation of the person who is seeking a smoking ban. The analysis would center on the needs of the person whose respiratory condition necessitated a smoke-free environment. Because society would be required to meet those needs, a place of public accommodation might have to be reconfigured to eliminate smoking. Creating a smoke-free environment might entail significant structural changes to the business, but the issue would not be whether the costs of those changes would create an undue hardship for those businesses. Instead, the focus would be on how a business could best meet the needs of those whose interests were paramount: people with disabilities.

Furthermore, businesses would bear the costs of eliminating smoking. This would enable people with disabilities to enjoy the full benefits of public accommodation, which they may not be able to do under the current partial smoking bans. The person with the disability will not have to incur the financial and psychic cost of being excluded from public accommodation because she cannot tolerate smoking.

Under the social relationship approach, the perspective of the person with the disability would be the primary consideration. The debate would not center on the competing rights of people with disabilities and those of smokers. If the person with the disability needs to have a business eliminate smoking, then the business should do so. In that way, the business receives the benefits of her patronage without marginalizing her. Therefore, this solution values the relationship between the person with the disability and society.

Finally, post-integration equality principles would dictate that a smoking ban was necessary to give someone with a disability benefits that are equal to someone without a disability. The only way to make someone with asthma equal to someone without it may be to eliminate the carcinogens caused by smoking. The person with asthma should not have to adapt to an environment in which smoke was present, even to a small degree. Instead, equality for that person would necessitate a smoking ban.

CONCLUSION

This article concludes that, although courts may not be ready to interpret the ADA to include smoking bans, equal treatment of people with respiratory disabilities should require them to do so. People with disabilities will prevail

only if they can convince a court that other less restrictive measures to eliminate smoke are insufficient. Furthermore, they will face their stiffest opposition from arguments that a complete ban fundamentally alters the nature of the public accommodation or imposes an undue burden on it. They are likely to overcome equal protection or expressive association challenges to smoking bans that smokers raise. Their greatest chance of success is in convincing courts that equality under the ADA means more than equal access and requires equal treatment. Under that interpretation, businesses could not simply crack open the door for people with disabilities by providing a non-smoking section. Those businesses would have to throw the door wide open and welcome people with disabilities into a smoke-free environment.