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Unreasonable Accommodation and Due Hardship

Abstract

This Article analyzes authoritative sources concerning the Americans with Disabilities Act accommodation requirement and concludes:

(1) Reasonable accommodation and undue hardship are two sides of the same coin. The statutory duty is accommodation up to the limit of hardship, and reasonable accommodation should not be a separate hurdle for claimants to surmount apart from the undue hardship defense. There is no such thing as "unreasonable accommodation" or "due hardship."

(2) The duty to accommodate is a substantial obligation, one that may be expensive to satisfy, and one that is not subject to a cost-benefits balance, but rather a cost-resources balance; it is also subject to increase over time.

(3) The accommodation duty entails mandatory departure from neutral workplace rules, effectively creating a preference for workers with disabilities, but one not to be confused with the affirmative action concept found in other anti-discrimination regimes.

These conclusions are in some respects consistent with, and in other respects quite inconsistent with, leading judicial interpretations, including the single Supreme Court case on accommodations in employment, U.S. Airways v. Barnett. The Article will suggest avenues by which courts may be led back to the correct interpretation of reasonable accommodation by looking to the text of the statute and its legislative history, interpretations by the enforcing agency, judicial construction of analogous language elsewhere in the ADA, and precedent from other jurisdictions.

For twenty years, judicial and scholarly attention focused on who is a person with a disability entitled to the protections of the ADA. Narrow readings of coverage kept many cases with accommodations claims from reaching decision on the merits. Recently, Congress enacted the ADA Amendments Act, vastly expanding the range of covered individuals. After the Amendments, attention will turn to what accommodations employers must provide. This Article is the first to return to the original sources to determine what Congress required and to analyze both Barnett and the lower court cases in light of that understanding.

Unreasonable Accommodation and Due Hardship

The Americans with Disabilities Act requires an employer to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless the employer demonstrates "that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[1] This accommodation duty is the defining characteristic of modern disability discrimination statutes,[2] and the key term distinguishing those enactments from laws that forbid race and sex discrimination.[3] If the ADA is the "Emancipation Proclamation for

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[1] 42 U.S.C.A. § 12112(b)(5) (West 2010). Because of the significant number of recent changes in many statutory provisions cited in this Article, federal statutes will generally be cited to West's United States Code Annotated rather than the official United States Code. This Article focuses on the employment title of the Americans with Disabilities Act, title I, §§ 12111-12117. Hence the term "covered entity" and "employer" will generally be interchangeable. *See* § 12111(2). Other titles cover state and local government (title II), privately-owned public accommodations (title III), telecommunications (title IV), and general matters such as retaliation and attorneys' fees (title V). In this Article, the Americans with Disabilities Act will be referred to as the "ADA," or "Act."

[2] Comparative law sources stress the importance of the obligation in making statutes effective in integrating people with disabilities into the workplace. *See, e.g.,* Lisa Waddington, When It Is Reasonable for Europeans to be Confused: Understanding When a Disability Is "Reasonable" from a Comparative Perspective, http:ssrn.com/abstract=1128295 (visited Apr. 15, 2008). Many authorities describe the ADA's accommodation obligation as crucial. *See, e.g.,* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 1 ("Importantly, the statute takes the concept of forbidden discrimination beyond intentional and overt exclusion; it also treats as discrimination the failure to provide 'reasonable accommodations' to people with disabilities.").

[3] Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 9 (1996) ("[Failure to provide reasonable accommodation] is a far different definition of 'discrimination' than the definition embraced in other areas of employment discrimination law. Title VII, for instance, essentially takes jobs as it finds them. It defines discrimination in a negative sense: employment practices are unlawful only if they prevent individuals from doing the job as the employer defines it."). Some prominent sources take issue with this proposition, but their response is less that the accommodations requirement is conceptually unique than that traditional anti-discrimination provisions also impose economic inefficiencies on employers by doing such things as forbidding hiring and firing on the basis of consumer and co-worker preferences. *See* Samuel Bagenstos, *Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 859-70 (2003) (tracing normative ramifications); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 684-94 (2001) (developing general position); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 616-22 (2004) (tracing economic ramifications). Even those who take broader positions linking reasonable accommodation with other anti-discrimination mandates note that disability discrimination law's reasonable accommodation provision entails differences in interpretation from other statutes. *See, e.g.,* Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 865 (2004).

people with disabilities,"[4] the accommodations requirement is the Thirteenth Amendment: the enforceable duty that requires changes in the way things have always been done, in order to permit people with disabilities to integrate into society on a plane equal to that of others.[5]

Nonetheless, the interpretation of the ADA's accommodations requirement remains severely underdeveloped.[6] For twenty years, judicial and scholarly attention focused on who is a person with a disability entitled to the protections of the law.[7] Narrow readings of coverage provisions kept many cases with accommodations claims from reaching decision on the merits.[8] Ultimately, Congress enacted a new statute—the

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None of the sources contests the importance of a strong accommodation duty in the ADA for achieving functional equality for persons with disabilities.

[4] 136 Cong. Rec. S12017 (daily ed. Aug. 2, 1990) (statement of Sen. Harkin).

[5] *See* Cass R. Sunstein, *Caste and Disability: The Moral Foundations of the ADA*, 157 U. PA. L. REV. PENNUMBRA 101 (2008) (describing reasonable accommodation duty in ADA as "the clearest reflection, in American law, of an anti-caste principle—a principle that raises questions about social and legal practices that turn a morally irrelevant difference into a systematic source of social disadvantage.") (footnotes omitted).

[6] Witness the aptly titled article, John E. Matejkovic & Margaret E. Matejkovic, *What Is Reasonable Accommodation Under the ADA? Not an Easy Answer; Rather a Plethora of Questions*, 28 MISS. C.L. REV. 67 (2008-09). Holdings on reasonable accommodation and undue hardship are contradictory and often poorly reasoned. *See infra* text accompanying notes 149-226 (describing accommodations caselaw).

[7] A vast number of sources collect, analyze, and criticize the even more vast caselaw on this topic. Among the more prominent articles are: Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992 (2008); Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA. L. REV. 397 (2000); Robert L. Burgdorf, *Substantially Limited Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409 (1997); Chai Feldblum, *Definition of Disability Under the Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It*, 21 BERKELEY J. LAB. & EMP. L. 91 (2000); Ann Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217 (2004); Jane Byeff Korn, *Cancer and the ADA: Rethinking Disability*, 74 S. CAL. L. REV. 399 (2001).

[8] *See* Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 358 (2001) ("By constricting the meaning of 'disability' to such an extent, the Court has blocked at the gate the vast majority of claims that would otherwise proceed to trial or settlement."); Ani B. Satz, *A Jurisprudence of Dysfunction: On the Role of "Normal Species Functioning" in Disability Analysis*, 6 YALE J. HEALTH POL'Y L. & ETHICS 221, 247 n. 107 (2006) ("To date, the Supreme Court has so narrowly construed the disability threshold test that few cases have made it through to the reasonable accommodation analysis. Further, since the Court groups the inquiry of whether someone is disabled with whether they are entitled to a remedy, analysis surrounding whether accommodations should be made, and if so, what they should be, is often muddled with disability eligibility questions, making it difficult to determine how courts approach reasonable accommodation."); *see also* Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217 (2008),

ADA Amendments (ADAAA)—designed to end the coverage controversy by disapproving two Supreme Court decisions and vastly expanding the range of covered individuals.[9] After the ADAAA, attention will turn to what accommodations employers must provide in order to comply with the Act.[10]

This Article analyzes authoritative sources concerning the accommodation requirement's intended meaning and concludes: (1) Reasonable accommodation and undue hardship are two sides of the same coin: The statutory duty is one of accommodation up to the limit of hardship, and reasonable accommodation should not be a separate hurdle for claimants to surmount apart from the undue hardship defense offered employers—the title of this Article notwithstanding, there is no such thing as "unreasonable accommodation" or "due hardship." (2) The duty to accommodate is a significant burden, one that may be expensive to satisfy, and one that is subject not to a

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available at http://www.law.northwestern.edu/lawreview/colloquy/2008/44 ("[Before the 2008 Amendments], courts strained to avoid having to make decisions as to the reasonableness of an accommodation by adopting a strict definition of disability."); Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans with Disabilities Act*, 17 GEO. MASON U. CIV. RTS. J. 79, 125 ("By halting . . . claims [of persons with personality disorders] at the claim's definitional stage—where the plaintiff is essentially "classified" for statutory purposes—courts evade the more complex issue of how society must, if at all, accommodate those whose personalities it has labeled as disordered.").

[9] Pub. L. No. 110-325, 122 Stat. 3553 (2008). *See generally* Long, *supra* note 8 (describing expansion of coverage and other provisions in ADAAA). Congress disapproved *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (holding that impairments must be evaluated in their mitigated state in determining if individual is individual with disability), and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184, 197 (2002) (holding that terms of disability definition are to be strictly construed), § 2(b)(2)-(5); provided that impairments are to be evaluated in a state not mitigated by medication, appliances, or bodily systems (except, in general, ordinary eyeglasses), § 3(4)(E); provided that major life activities whose substantial impairment triggers coverage include major internal bodily systems and functions, § 3(2); established that persons covered by virtue of being regarded as having an impairment need not be perceived to have an impairment that limits a major life activity, § 3(3); and made additional changes.

[10] *See* Ani B. Satz, *Disability, Vulnerability, and the Limits of Discrimination*, 83 WASH. L. REV. 513, 540 (2008) ("[B]y including greater numbers of individuals in the protected class, the [AD]AAA will likely focus more attention on whether accommodations impose an undue hardship on an employer."). Some view this shift of focus with alarm. Professor Travis writes, "In fact, if the ADAAA succeeds in its primary objective of shifting litigation focus away from scrutinizing whether an individual is or is not disabled, and toward the issue of whether employers have fulfilled their reasonable accommodation obligations, the ADAAA actually may reinvigorate the backlash as the accommodation mandate becomes more visible and more contested." Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 320 (2009).

cost-benefits balance, but instead to a cost-resources balance that varies with the capacities of the employer; it is also a dynamic obligation liable to increase over time. (3) The accommodation duty entails mandatory departure from neutral workplace rules, effectively creating a preference for workers with disabilities, but one not to be confused with the affirmative action concept found in other anti-discrimination regimes. These conclusions are in some respects consistent with, and in other respects quite inconsistent with, leading judicial interpretations of the accommodations term, including the single Supreme Court case on accommodations in employment, *U.S. Airways v. Barnett*.[11] The Article will suggest avenues by which courts may be led back to the correct interpretation of reasonable accommodation by looking to the text of the statute and its legislative history, interpretation by the federal agency charged with the ADA's enforcement, judicial constructions of analogous language elsewhere in the ADA, and precedent regarding comparable enactments from other jurisdictions.

Significant scholarship exists on the subject of reasonable accommodation and undue hardship,[12] but this Article is the first to return to the original sources to determine what Congress meant and to analyze both *Barnett* and the lower court cases in light of that understanding. This Article contributes to the scholarly debate by suggesting a revised understanding of accommodation—that accommodation and hardship are the same concept, that the burden is significant and subject to grow over time, and that

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[11] 535 U.S. 391 (2002).

[12] In addition to sources cited and discussed later in this article, notable scholarship on accommodations includes: Cheryl L. Anderson, *What Is "Because of the Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323 (2006); Seth D. Harris, *Re-Thinking the Economics of Discrimination:* U.S. Airways v. Barnett, *the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV. 123 (2003); James Leonard, *The Equity Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1 (2005); Helen A. Schartz et al., *Workplace Accommodations: Empirical Study of Current Employees*, 75 MISS. L.J. 917 (2006).

neutral rules are not sacrosanct—supported by the language and legislative history of the ADA, as well as cases interpreting other parts of the ADA and interpretations of other similar enactments.

Part I of this Article discusses Congress's original meaning for the reasonable accommodation-undue hardship provision and draws the conclusions about the provision outlined above. To do so, it discusses methods of statutory interpretation, then the text, legislative history, enforcing agency interpretations, and social context of the ADA. Part II considers judicial interpretations of the term, both at the lower court and Supreme Court level. Part III discusses correcting the courts' interpretation of the accommodations requirement by returning to original sources, drawing on available but untapped precedent, and letting lay triers of fact take the primary role in determining the propriety of accommodations.

I. THE MEANING OF REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

To determine the correct meaning of the reasonable accommodation duty and its undue hardship limit, it is necessary to examine leading theories of statutory interpretation. The most sensible approach to interpretation calls for analyzing the language of the statute, the legislative history, the interpretation of the agency charged with enforcing the law, and the social context in which the law was passed. From that raw material, it is possible to fashion a clear meaning for the ADA's accommodation term.

A. APPROACHES TO STATUTORY INTERPRETATION

There are two leading theories about interpreting statutes: intentionalism and textualism.[13] Intentionalism, sometimes labeled purposivism,[14] interprets statutes so as to accomplish what the enacting legislature wanted to do. When there are ambiguities in text, intentionalists look primarily to authoritative legislative history such as committee reports and the statements of legislators taking a leadership role in the passage of a statute.[15] Intentionalists argue that the courts should be acting as agents of the legislature, and to be a faithful agent, it sometimes is necessary to look beyond the words of a command for the underlying goals of the principal.[16]

Textualists respond that the legislature as a whole is the principal, and that it enacts only the text of the statute.[17] Many view reliance on texts other than those that made it into law as improper avoidance of the legislative machinery established by the

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[13] Some approaches attempt to bridge the main ones. For example, Professor Bell suggests a "public justification" method, which would look only to text of a law and a limited category of institutional statements justifying the law, such as committee reports and committee chairs' comments. Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 8 (1999). This approach permits reference to the legislative materials relied on here in connection with interpreting the ADA. Professors Eskridge and Frickey suggest an approach based on practical reasoning that draws from the theories behind textualism and contrasting approaches. William P. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990). Their approach also countenances the use of legislative history in appropriate circumstances. *See id*. at 356 ("In accordance with the Court's practice, our practical reasoning model also considers the original expectations of the Congress that enacted the statute. . . . The most authoritative historical evidence is the legislative history of the statute . . . ."). A few authorities seem to reject all approaches. For example, Professor Selmi finds neither textualism nor intentionalism satisfactory with regard to interpreting the definition of disability found in the ADA; he also rejects a "positive political theory" approach, which relies on judicial ideas about the preferences of the current, rather than the enacting, Congress. Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 566 (2008).

[14] It is possible to draw a distinction between intentionalism and purposivism, but the present discussion does not require it. *Cf.* Eskridge & Frickey, *supra* note 13, at 325-40 (drawing distinction); Joel Schellhammer, Recent Case, 29 HARV. J.L. & PUB. POL'Y 1119, 1126-29 (2006) (distinguishing "classical interpretivism," textualism, and "modern purposivism").

[15] This includes drafters and floor managers. *See, e.g.,* Jonathan Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457 (2000).

[16] *See* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1313 (1990).

[17] *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 15-16 (2001).

Constitution.[18] Some even challenge the idea that a corporate body has anything that be called an intent,[19] while others note that the legislative process involves compromises among conflicting purposes, making the statements of proponents unreliable as a guide to the purposes of the whole.[20] Textualists view discoveries of enactors' underlying intentions as thinly veiled preferences of the interpreters themselves.[21] They favor use of canons of construction, structure and relationship arguments, even dictionaries when confronted with ambiguous statutory text.[22]

A strict textualist approach has many flaws. Its skepticism of the concept of intent is at odds with textualism's own use of mechanisms such as looking to the meaning of the same words in other statutes and reliance on the enactment's structure, methods that assume that the legislature intended at least something that can be discerned by interpretation.[23] Even if congressional intent is a legal construct, it is hardly different from the intent of corporations or government agencies, something that courts routinely

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[18] *See, e.g.,* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 696-99 (1997) (describing conventional textualist position), 706-37 (describing author's preferred variation on conventional position).

[19] *See, e.g.,* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable.").

[20] *See* Frank H. Easterbrook, *The Supreme Court, 1983 Term-Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 18 (1984) ("If statutes are bargains among special interests, they should be enforced like contracts. . . . Thus the Court will . . . reject efforts by consumers to use litigation to 'improve' the operation of statutes that were not designed to help consumers in the first place.").

[21] *See* Easterbrook, *supra* note 18, at 63 ("Having a wide field to play-not only the statute but also the debates, not only the rules but also the values they advance, and so on-liberates judges. This is objectionable on grounds of democratic theory as well as on grounds of predictability."). Textualists fear that isolated statements in legislative background material, perhaps intentionally planted by congressional staffers and unread by most representatives voting for a measure, will mislead a court interpreting the statute. *See* Manning, *supra* note 18, at 686-89 (presenting conventional view), 731-37 (presenting somewhat more nuanced view).

[22] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29-37 (1997).

[23] Zeppos, *supra* note 16, at 1319; *see also* Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 456 (2005) ("Take, for example, the rule of construction that statutory words are to be given their 'ordinary meaning.' What is the rationale for this rule? It is based on the assumption that legislative drafters are most likely to use words that way. If a court adopts that assumption, it will be more likely to make a decision that is loyal to the legislature's intention.") (footnote omitted).

rely upon in deciding cases.[24] And the textualist approach exalts the power of the judiciary by permitting it to reach results which the legislature, if it has anything that can be called intent at all, would not want to have come about.[25] Among the various places to look for the meaning of unclear statutory terms, legislative history is a far more natural choice than the enigmatic and contradictory canons of statutory construction, or definitions drawn from arbitrarily chosen dictionaries.[26] Legislators rely on party leaders

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[24] *See, e.g.,* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 504 (1993) (discussing proof of intent of corporate employer in context of employment discrimination claim). *See generally* Solan, *supra* note 23, at 428 ("We routinely attribute intent to a group of people based on the intent of a subset of that group, provided that there is agreement in advance about what role the subgroup will play. The legislature is a prototypical example of the kind of group to which this process applies most naturally.").

[25] Zeppos, *supra* note 16, at 1314 ("The tension between textualist theory and representative government is obvious. The textualist focusing on statutory text openly accepts, and indeed mandates, arrival at a result that may often be inconsistent with any notion of what the legislature actually intended."); *see* Solan, *supra* note 23, at 431-32 ("[N]ot taking this sort of information into account increases the likelihood of a court's accepting an interpretation that is absurdly at odds with the intentions of the enacting legislature."). Textualism's methods for resolving the inevitable ambiguities in statutory language are no better a solution for dealing with unknown compromises among representatives or hidden motivations behind votes than any other interpretive method. Zeppos, *supra* at 1322. Both strict textualist interpretation and intentionalist methods such as reliance on legislative history are subject to manipulation in support of the result the interpreter favors. *Id*. at 1323 ("Statutory language has no single or objective meaning. It, like legislative history, is subject to 'manipulation' (or, perhaps more accurately, interpretation). The textualist's claim that he alone is loyal to the true meaning of the text, while others are engaged in manipulation or result-oriented judging, involves no small amount of hubris.") (footnote omitted); *see also* Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 Cornell L. Rev. 549, 595-96 (2002) ("[S]trict textualism wraps judicial discretion in the guise of 'just' reading the text. Hence, it allows judges to make policy choices sub rosa, without either the cognitively valuable exercise of justification or the restraining mindset of a faithful agent seeking to implement the goals of the legislative principal.").

[26] *See* Zeppos, *supra* note 16, at 1331 ("The textualist is correct that legislative history does not pass through the article I procedures for making law, but as its name connotes, legislative history is nonetheless a product of the legislature. Through judicial resort to legislative history, Congress and its members have been able to exert continuing influence over policymaking decisions that arise after the enactment of the statute."); *see also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 869-72 (1992) (noting conflicting nature of canons of construction, absence of justification for some of them, and failure of canons to meet expectations of or provide guidance to legislators or those affected by legislation). Many years ago, Karl Llewellyn pointed out that conflicting canons of construction exist on almost every question. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). For a collection of criticism and support of Llewellyn on this issue, see Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1978 (2007).

and congressional subject matter experts whose ideas are reflected in committee reports and other basic legislative history materials, so looking to these sources makes sense.[27]

Despite all the conflicting views about interpretation, there is currently some convergence among textualists and intentionalists in looking first to text and then making cautious use of background materials; accordingly, the textualist-intentionalist divide may be overstated.[28] A limited use of legislative history, one that relies on committee reports and focuses on matters that the drafters of the reports viewed with consensus, is an intentionalist method that sparks the least resistance from the textualists.[29] Moreover,

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[27] *See* Bank One Chi., N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276-77 (1996) (Stevens, J., concurring) ("Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities. If a statute . . . has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee members in casting their votes. . . . [S]ince most Members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress."); Solan, *supra* note 23, at 449 ("It may be true that many who voted for a bill did so because the party leadership told them to, or because the bill contained some benefit for people in their district, or for some other reason having nothing to do with what the bill's authors and planners had in mind. Nonetheless, the bill's planners gave it content. When disputes arise, it would be odd for a member who voted for the bill without knowing what was in it to complain that the court was looking at the details of the planning process . . . ."); *see also* Breyer, *supra* note 26, at 859-60 (1992) (noting that top officials of most large institutions rely on staff to write documents that are fairly viewed as true reflections of institutional positions); *cf. id*. at 855-56 (1992) (discussing example of statements of floor leaders reflecting purposes of various interests and constituencies on complex bankruptcy legislation).

[28] Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3-4 (2006); *id*., at 38 ("[V]irtually all interpreters today—both self-proclaimed textualists and purposivists—tend to exclude legislative history if the text, in context, otherwise is clear.") (collecting sources); Caleb Nelson, *What Is Textualism*, 91 VA. L. REV. 347, 348 (2005) ("[N]o 'textualist' favors isolating statutory language from its surrounding context, and no critic of textualism believes that statutory text is unimportant.") (footnotes omitted). Contemporary textualists do not resist the call to look at the broad historical context of a statute to give meaning to the text. *See* Molot, *supra*, at 35 ("[M]odern textualists may criticize strong purposivism for giving too much weight to context, and for emphasizing certain kinds of context (legislative history) that textualists think should be off limits, but modern textualists do not, in principle, object to the notion that judges should look to context as well as text.") (collecting sources). As Molot notes, even "textualists will sometimes use legislative history to gain a background understanding of the problems Congress was trying to address." *Id*. at 39 (collecting sources).

[29] *See* Molot, *supra* note 28, at 3-4 ("[S]ome textualists will look to legislative history not to glean the intent of a statute's authors, but rather for the more modest purpose of providing a background understanding of the problems Congress was trying to address. . . . The legislative history question remains open, but it no longer is important enough to warrant the attention that it has received in the past It certainly is not important enough to sustain a full-blown scholarly debate.") (notes omitted); *see also* Bell, *supra* note 13, at 84-88 (defending use of selected legislative history, relying on arguments drawn from textualist ideas).

both intentionalists and textualists defer to the interpretive regulations of the administrative entity charged by the legislature with enforcing the statute.[30] Employing a restrained use of intentionalist technique, this Article will examine legislative text, authoritative legislative history, the terms of enforcing agency regulations, and historical context in discussing the meaning of the ADA' reasonable accommodation and undue hardship language.

B. THE STATUTORY TEXT

The ADA bans "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[31] The ADA does not define "reasonable accommodation."[32] Instead, it lists examples of what the term may include. For purposes of employment, reasonable accommodation:

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[30] Thus, both judges associated with textualism and those associated with intentionalism endorse the rule of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), regarding deferral to administrative agencies charged by Congress with the administration of a statute. *Chevron* states that a court is required to ask whether Congress has "directly spoken to the precise question," and must follow clear congressional intent. *Id*. at 842. If the statute is "ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843.

[31] 42 U.S.C.A. § 12112(b)(5)(A) (West 2010). The statutory provision has a subsection (B), which further defines forbidden discrimination to include "denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant." § 12112(b)(5)(B). Title I of the ADA defines unlawful discrimination to include a variety of other things as well, such as limiting, segregating, or classifying job applicants or employees in ways that adversely affect their status or opportunities on the basis of disability, engaging in disparate impact discrimination, and improperly using employment tests. § 12112(b)(1), (6)-(7).

[32] Even those who disagree with this proposition seem ultimately to change their minds when they consider the text and structure of the law. *See, e.g.,* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 148 (2d Cir. 1995) (Newman, J., concurring) ("[T]he ADA contains a definition of 'reasonable accommodation.' [citing 42 U.S.C. § 12111(9)] However, this definition explains only the sorts of modifications and assistance that are included within the phrase "reasonable accommodation" and provides no guidance as to whether, or to what extent, the cost[s] of such items are relevant to a determination of their reasonableness.").

> may include— (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[33]

Some of these accommodations are material in nature: provision of equipment or architectural modifications, for example. Others are mandatory departures from neutral employer practices, such as employers' scheduling demands, allocation of duties among workers, and training protocols. In the text of the ADA, Congress buttressed its requirement that employers depart from otherwise neutral rules by prohibiting standards, criteria, or methods of administration that have the effect of discriminating on the basis of disability,[34] and outlawing qualification standards, employment tests, or other selection criteria that screen out or tend to screen out a person or persons with disabilities unless the qualification standard, test, or other selection criterion, is shown to be job-related for the position in question and consistent with business necessity.[35] So not only may a variance or departure from an otherwise neutral rule or practice be required as a matter of reasonable accommodation,[36] the neutral rule itself may be illegal when applied to an

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[33] 42 U.S.C.A. § 12111(8) (West 2010).
[34] 42 U.S.C.A. § 12112(b)(3)(A) (West 2010).
[35] § 12112(b)(6).
[36] Commentators have emphasized this point. *See, e.g.,* Cheryl L. Anderson, *"Neutral Employer Policies and the ADA: The Implications of* US Airways, Inc. v. Barnett *Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 17 (2002) ("[I]mplicit in reasonable accommodation is the notion that policies may have to be changed, whether they be neutral policies or not. Employers . . . have a duty to alter the work environment, even if the employee . . . does not measure the same as the employee without a disability under facially-neutral criteria.").

applicant or employee with a disability if it has a discriminatory effect or unjustified negative impact.

Unlike reasonable accommodation, "undue hardship" receives a statutory definition. It means "an action requiring significant difficulty or expense, when considered in light of [specified] factors . . . ."[37] The factors include the nature and cost of the accommodation, the overall financial resources of the facility involved, the number of persons employed there, the effect on expenses and resources or the other impact of the accommodation on the facility's operation, the overall financial strength of the employer, the number of its employees, the number, type, and location of its facilities, and, finally, the type of operation of the employer, including the composition, structure and functions of the work force, geographic separateness, administrative, or fiscal relationship of the relevant facility to the employer.[38] The statute places the burden of demonstrating undue hardship on the employer: The duty to accommodate applies "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[39] The text and structure of the statute suggest a substantial obligation to provide accommodation up to the limit of hardship demonstrated by the employer.

C. THE LEGISLATIVE HISTORY

The legislative history of the unreasonable accommodation and undue hardship provision is extensive. Several features stand out: the intent by Congress to adopt interpretations of similar language in the regulations promulgated under section 504 of

[37] 42 U.S.C.A. § 12111(10)(A) (West 2010).
[38] § 12111(10)(B).
[39] 42 U.S.C.A. § 12112(b)(5)(A) (West 2010).

the Rehabilitation Act;[40] the nature and strength of the accommodation duty Congress meant to impose and the characteristics of the hardship defense; and the treatment of employer practices that are neutral on their face.

1. *The Relationship to Section 504's Regulations*. The legislative history of the reasonable accommodations-undue hardship provision of the ADA is partly a regulatory history of an earlier statute. The accommodation requirement originated in the regulations implementing section 504 of the Rehabilitation Act of 1973, which forbids disability discrimination by recipients of federal funding.[41] These final rules became effective June 3, 1977.[42]

Like the ADA, which drew on its language thirteen years later, the section 504 regulations obliged employers who received federal funds "to make reasonable accommodation to the known physical or mental limitations" of a qualified person with a disability "unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."[43] As with the ADA, reasonable accommodation was not defined, but examples were provided: making facilities used by employees readily accessible and usable; undertaking job restructuring, part-time or modified work schedules; acquiring or modifying equipment or devices; providing interpreters or readers; "and other similar actions."[44] The section 504 regulations, unlike the ADA, also lacked a clear definition of undue hardship, but as with the ADA factors to be considered were specified as the overall size of the recipient's program with regard to

[40] Pub. L. No. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C.A. § 794 (West 2010)).
[41] 29 U.S.C.A. 794(a) (West 2010).
[42] Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 42 Fed. Reg. 22676 (May 4, 1977).
[43] 42 Fed. Reg. 22680 (1977) (to be codified at 45 C.F.R. § 84.12(a)).
[44] *Id*. (to be codified at 45 C.F.R. § 84.12(b)).

number of employees; number and type of facilities and size of budget; the type of the operation, including composition and structure of the workforce; and the nature and cost of the accommodation needed.[45]

2. *Standards for Accommodations.* Congress intended to incorporate the section 504 regulations' standards for reasonable accommodation and undue hardship into the ADA.[46] The ADA's congressional supporters recognized that the costs of accommodations might be high. They noted that "expensive accommodations" such as "readers for blind persons, interpreters for deaf persons, and physical accommodations for those with mobility impairments" would be required.[47] Personal attendants, both during the workday and while an employee traveled on business, might also be a mandatory accommodation.[48] Some accommodations that could involve disruption to standard operating procedures were specified as examples: constant shifts rather than day-night rotations for an employee with epilepsy; extra unpaid leave days to receive medical treatment or for recuperation (in an era before the Family and Medical Leave

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[45] *Id*. (to be codified at 45 C.F.R. § 84.12(c)). The President directed HEW to coordinate the rulemaking for all other federal agencies, specifying that thy were to issue regulations consistent with those HEW adopted. Coordination of Federal Agency Enforcement of Section 504 of the Rehabilitation Act of 1973, 43 Fed. Reg. 2132 (Jan. 13, 1978).

[46] H.R. REP. NO. 101-485(II), at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304 ("The ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodations unless it would result in an undue hardship on the operation of the business."). Congress also imposed a duty of reasonable accommodation for individuals with disabilities in the Fair Housing Amendments of 1988, 42 U.S.C. § 3604(f)(3)(B)-(C) (2000).

[47] H.R. REP. NO. 101-485(II), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 315 (also noting that costs of accommodations may be exaggerated); *see also id*. at 71-72, *reprinted in* 1990 U.S.C.C.A.N. 303, 354 (discussing with approval case in which court required employer to provide reader to applicant with dyslexia for test for entry into training program for heavy equipment operator).

[48] *Id*. at 64, *reprinted in* 1990 U.S.C.C.A.N. 303, 346 ("As with readers and interpreters, the provision of an attendant to assist a person with a disability during parts of the workday may be a reasonable accommodation depending on the circumstances of the individual case. Attendants may, for example, be required for traveling and other job-related functions. This issue must be dealt with on a case-by-case basis to determine whether an undue hardship is created by providing attendants.").

Act[49]); and modified schedules for persons with mobility impairments who depend on inaccessible public transportation.[50]

As the last example indicates, Congress intended that accommodations not be limited to those that begin and end at the employer's job site. In a detailed discussion of the reasonable accommodation requirement, the House Education and Labor Committee considered the additional example of a job applicant who could not get to a store located in a mall that has no accessible entrance. The Committee stated: "The store should take the person's application and determine if the person is qualified for the job. The question then becomes whether, with reasonable accommodation, the person can get to the job site. This reasonable accommodation, of course, has an undue hardship limitation."[51] But unless the hardship on the employer is undue, the law requires the employer to provide accommodations to make it possible for employees with disabilities to get to work.

Moreover, as that interpretation and many of the others suggest, the drafters recognized that reasonable accommodation and undue hardship are not separate terms but two sides of the same coin: "As set forth in the substantive section of the Act, of course, the legal obligation of an entity to provide such an accommodation is depending on whether the accommodation would impose an undue hardship on the entity's business."[52] The minority members of the committee voting out the bill commented with

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[49] The Family and Medical Leave Act was enacted in 1993. It guarantees long-term employees in public agencies and larger private companies up to twelve weeks of unpaid leave a year for specified medical and family purposes. 29 U.S.C.A. §§ 2601-2654 (West 2010)).

[50] H.R. REP. NO. 101-485(II), at 62-63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345. Congress also emphasized that the obligation was substantial by declaring it to be "significantly higher" than the duty to provide reasonable accommodations for religion under title VII. *id*. at 68, reprinted in 1990 U.S.C.C.A.N. 303, 350; *see, e.g.,* Anderson, *supra* note 36, at 5.

[51] H.R. REP. NO. 101-485(II), at 61, *reprinted in* 1990 U.S.C.C.A.N. 303, 343.

[52] *Id*. at 57-58, *reprinted in* 1990 U.S.C.C.A.N. 303, 339-40.

approval that in the final draft, "The linkage between reasonable accommodation and undue hardship was . . . clarified so that any duty of reasonable accommodation is limited by the concept of undue hardship."[53]

Judicial interpretations of section 504 in the years preceding adoption of the ADA embraced the interpretation of reasonable accommodation and undue hardship as two sides of the same coin. *Prewitt v. United States Postal Service* involved a Vietnam veteran whose wounds limited the ability to lift items over his head without pain.[54] Among his claims were that the Postal Service had to provide him the accommodation of lowering the ledge on which mail was stacked or giving him a handle device to reach the higher shelves.[55] The court reversed a grant of summary judgment against the plaintiff and said that on remand,

> If the issue of reasonable accommodation is raised, the agency must then be prepared to make a further showing that accommodation cannot reasonably be made that would enable the . . . applicant to perform the essentials of the job adequately and safely; in this regard, the Postal Service must "demonstrate that the accommodation would impose an undue hardship on the operation of its program."[56]

In *Mantolete v. Bolger*, the Postal Service refused to hire an applicant with epilepsy on account of the assumption that she would be exposed to a greater risk of injury.[57] The court overturned a grant of summary judgment to the employer, adopting *Prewitt*'s analysis and treating the absence of a reasonable accommodation as an

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[53] *Id*. at 165, *reprinted in* 1990 U.S.C.C.A.N. 303, 443.
[54] 662 F.2d 292, 308 (5th Cir. Unit A 1981).
[55] *Id*. at 305, 310 n.25.
[56] *Id*. at 310 (quoting 29 C.F.R. § 1613.704(a))
[57] 767 F.2d 1416 (9th Cir. 1985).

affirmative defense, which equates that concept to undue hardship.[58] The court declared that "the burden of persuasion in proving inability to accommodate remains on the employer."[59] It said that "once the employer presents credible evidence that accommodation would not reasonably be possible, the plaintiff has the burden of coming forward with evidence concerning her individual capabilities and suggestions for possible accommodations to rebut the employer's evidence."[60]

Congress relied on these judicial interpretations when it enacted the reasonable accommodation and undue hardship provisions of the ADA.[61] As noted, the legislative history supports the conclusion that Congress meant courts to follow the interpretations of section 504 when construing the ADA. Moreover, in 1992, before an ADA caselaw independent of section 504 emerged, Congress amended section 504 to conform the interpretation of the employment provisions of that statute and those under ADA title I.[62]

3. *Standards for Undue Hardship.* Accommodations that are not reasonable because they constitute an undue hardship are those that require "significant difficulty or

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[58] *Id*. at 1423.
[59] *Id*. at 1424.
[60] *Id*.; *see also* Arneson v. Heckler, 879 F.2d 393, 397 (8th Cir. 1989) ("An unreasonable accommodation is one which would impose undue hardship on the operation of its program.") (internal quotation omitted); .Hall v. U.S. Postal Serv., 857 F.2d 1073, 1080 (6th Cir. 1988) ("An accommodation is not reasonable, and will therefore not be required, if, for instance, it imposes an undue hardship on the operation of the federal employer").
[61] *Prewitt* is cited with approval in the title I legislative history with regard to both undue hardship and discriminatory qualification standards. H.R. REP. NO. 101-485(III), at 42 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 465. *Mantolete* is cited with approval in title I's legislative history on the issue of the defense based on a direct threat to safety. H.R. REP. NO. 101-485(II), at 57 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 339. Judge Newman pointed out that *Mantolete* and *Prewitt* adopt the two-sides-of-the-same-coin approach to reasonable accommodation and undue hardship. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 145 (2d Cir. 1995) (Newman, J., concurring) ("The Ninth Circuit appears to equate "reasonable accommodation" with the absence of "undue hardship," viewing these concepts as opposite sides of the same coin. . . . A similar approach appears to be taken by the Fifth Circuit.").
[62] Rehabilitation Act Amendments of 1992, Pub. L. 102-569, § 506, 106 Stat. 4429 (codified at 29 U.S.C. § 794(d)).

expense," something that varies with the nature and size of the employer's operations.[63] The legislative history states that small enterprises may have limited obligations, but a large school district "might be required to make available a teacher's aide to a blind applicant for a teaching job," and a state welfare agency might have to expend the resources to hire an interpreter for a deaf employee.[64] The reality that accommodations such as architectural modifications or shared assistive devices benefit more than one employee is an additional factor to be considered against a finding of undue hardship.[65] The availability of outside funding also counts against undue hardship; if the employee pays for part of the accommodation, only the employer's share should be considered for undue hardship.[66] The committee rejected deeming the cost of an accommodation above 10% of an employee's salary as undue hardship per se, believing that the more flexible approach of the section 504 regulations was superior.[67] The committee endorsed *Nelson v. Thornburgh*,[68] a section 504 case in which, as the committee described it, a group of state welfare workers who were blind requested accommodations whose costs were

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[63] 42 U.S.C. § 1211(10)(A) (2000). Robert Burgdorf, who drafted the original Americans with Disabilities Act bill introduced in Congress in 1988, traced the origin of the "significant" language and said it may have originated in a report for a proposal to distinguish disability accommodation from religious accommodation by using the term "significant hardship" for the former. The committee stated that hardship would excuse the making of an accommodation only if it was "exceeding or violating propriety or fitness: excessive, immoderate, or unwarranted." 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, 463 n. 249 (1991) (quoting S. REP. NO. 96-316, at 8 n.5 (1979)).

[64] H.R. REP. NO. 101-485(II), at 67 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 350.

[65] *Id*. at 69, *reprinted in* 1990 U.S.C.C.A.N. 267, 351 ("For example, a ramp installed for a new employee who uses a wheelchair not only benefits that employee but will also benefit mobility-impaired applicants and employees in the future. Assistive devices for hearing and visually-impaired persons may be shared by more than one employee . . . . "). For an illuminating discussion of the side benefits of accommodations on employees with disabilities and those without, see Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 841-42 (2008) (discussing improved supervisory practices and other examples). As the ramp and communication devices examples suggest, the Committee was not separating reasonableness of the accommodation from undue hardship, to whatever extent the relevant determination might depend on costs and benefits.

[66] H.R. REP. NO. 101-485(II), at 67 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 351-52.

[67] H.R. REP. NO. 101-485(III), at 41 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 464.

[68] 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984).

"substantial," including the use of readers, Braille forms, and a computer capable of handling data in Braille. Since the costs were only a small fraction of the agency's personnel budget, the accommodations were not an undue hardship.[69] Significantly, this is not a cost-benefits comparison, but rather a costs-total budget comparison. The drafters of the ADA rejected the use of cost-benefit analysis in framing the reasonable accommodation-undue hardship term.[70]

4. *Treatment of Neutral Rules.* The legislative history displays an awareness of the discriminatory effects of neutral rules, and the need to make departures from neutral

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[69] H.R. REP. NO. 101-485(III), at 41 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 464.

[70] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915:002, at question 45 (Oct. 17, 2002) ("Neither the statute nor the legislative history supports a cost-benefit analysis to determine whether a specific accommodation causes an undue hardship. Whether the cost of a reasonable accommodation imposes an undue hardship depends on the employer's resources, not on the individual's salary, position, or status (e.g., full-time versus part-time, salary versus hourly wage, permanent versus temporary).") (footnote omitted), *available at* http://www.eeoc.gov/policy/docs/accommodation.html; *see, e.g.,* Gregory Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans with Disabilities Act*, 26 TULSA L.J. 1, 4 (1990) ("[T]he language of the statute, its legislative history, and the inapplicability in the disability employment accommodation context of the key premises underlying the efficiency orientation all indicate that little if any weight should be given to efficiency considerations in determining the availability of the undue hardship defense for ADA-covered employers."); *id*. at 23 (noting that policy emerging from section 504 caselaw interpretations embodied in ADA, "indicates that a reasonable accommodation must be made, regardless of the size of benefits that will result, so long as the cost of the accommodation is not unduly large relative to the overall financial capacity of the employer."); Karlan & Rutherglen, *supra* note 3, at 22-26; *id*. at 32 ("[R]easonable accommodation under the ADA. . . requires more than efficient reductions of risk, since it demands equal opportunity for the disabled, although in a form limited by the employer's ability to bear the cost of accommodation . . . ."); Cass R. Sunstein, *Cost-Benefit Analysis Without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 U. CHI. L. REV. 1895, 1907 (2007) ("[A]n accommodation might be required under the ADA even if its costs outweigh its benefits . . . . The ADA does not enact Messrs[.] Kaldor and Hicks's understanding of economic efficiency." (footnote omitted)); *see also id*. at 1898 (criticizing judicial approach that uses cost-benefit analysis to determine reasonableness of accommodation without considering text, history, or structure of ADA). *But see* Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003) (employing cost-benefit balancing in analyzing reasonableness of accommodations under ADA; collecting and analyzing judicial and academic sources that support cost-benefit approaches). Some writers criticize the ADA for its failure to mandate cost-benefit analysis for accommodations. *See, e.g.,* Carolyn L. Weaver, *Incentives Versus Controls in Federal Disability Policy, in* DISABILITY AND WORK: RIGHTS AND OPPORTUNITIES 5 (Carolyn L. Weaver ed. 1991) ("The central flaw of the ADA is in the imposition n employers of a duty to accommodate the mental or physical limitations of the disabled worker or applicant without weighing the expected benefits of such accommodation . . . ."); *cf*. Issacharoff & Nelson, *supra* note 8, at 344-45 ("[T]he extent of the accommodation standard is defined not by a uniform obligation across all employers, but by the ability of any employer to pay, regardless of fault or ensuing competitive disadvantage.").

rules as a matter of providing accommodations.[71] The House Committee explained that variances from neutral rules such as set work schedules or rotations of day and night shifts, or provision of extra unpaid leave days, may be mandatory accommodations if they do not cause the employer undue hardship.[72] The congressional understanding matched a 1983 report from the United States Commission on Civil Rights, which had stressed the need to address the problems posed by employers' standard operating procedures and conventional modes of operation on people with disabilities.[73] Congress manifested a similar awareness of the difficulty with uniformly applied, neutral policies and practices of employers by explaining that a "facially neutral" qualification standard, test, or employee selection criterion with a negative effect on people with disabilities is discriminatory unless the employer can show that it is job-related and consistent with business necessity and enacting a prohibition on this form of disparate impact discrimination, as well as requiring reasonable accommodation up to the limit of undue hardship.[74]

Departures from rules that apply to everyone else may be viewed as preferences, which suggests an analogy to racial preferences embodied in some affirmative action programs. In *Southeastern Community College v. Davis,* a 1979 section 504 case concerning accommodations in the training program for a student nurse who was deaf,

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[71] S. REP. NO. 101-116, at 37-38 (1989); H.R. REP. NO. 101-485(II), at 105 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 388 (discussing public accommodation provisions).
[72] *See supra* text accompanying note 50.
[73] U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 102 (1983) ("Discrimination against handicapped people cannot be eliminated if programs, activities, and tasks are always structured in the ways people with "normal" physical and mental abilities customarily undertake them. Adjustments or modifications of opportunities to permit handicapped people to participate fully have been broadly termed 'reasonable accommodation.'"). This report, whose drafters included the person who wrote the original ADA bill, provided a "statutory blueprint" for what eventually became the ADA. Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. ON C.L. & C.R. 241, 244 (2008).
[74] H.R. REP. NO. 101-485(III), at 42 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 465; *see* 42 U.S.C.A. § 12112(b)(3), (6) (West 2010).

the Supreme Court upheld rejecting the student from the program despite her claim that it could be modified to accommodate her.[75] The Court said that accommodations of close, individual attention by an instructor to guarantee patient safety during the clinical portion of the nursing program and waiver of required courses amounted to "affirmative action" and were more than the statute intended.[76]

But in a subsequent case, *Alexander v. Choate*,[77] the Court clarified the distinction *Davis* sought to make between reasonable accommodation and affirmative action, stating that *Davis* meant to exclude from mandatory accommodations only those that make fundamental alterations in programs, which is essentially the undue hardship standard embodied in the ADA.[78] In a footnote, the Court acknowledged that its use of the term "affirmative action" in discussing section 504 failed to recognize the difference between affirmative action to remediate past discrimination and accommodation to eliminate obstacles to inclusion.[79] It then said:

> Regardless of the aptness of our choice of words in *Davis*, it is clear from the context of *Davis* that the term "affirmative action" referred to those "changes," "adjustments," or "modifications" to existing programs that

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[75] 442 U.S. 397 (1979). The question arose in the context of whether the student was an "otherwise qualified individual" protected by section 504, given the impossibility of using lipreading skills in portions of the training program and registered nursing practice, for the evidence indicated that voice was sometimes the only way to communicate immediate demands for instruments or medications, and masks had to be worn during surgery and in other settings. *Id*. at 403, 405-06.

[76] *Id*. at 409-10. The Court conceded that "the line between a lawful refusal to extend affirmative action and illegal discrimination" will not "always be clear."

[77] 469 U.S. 287 (1985).

[78] *Id*. at 300 ("*Davis* . . . struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones.").

[79] *Id*. at 300 n.20 (citing Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982); Mark E. Martin, Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 885-886 (1980); Donald Jay Olenick, Note, *Accommodating the Handicapped: Rehabilitating Section 504 After* Southeastern, 80 COLUM. L. REV. 171, 185-186 (1980)).

> would be "substantial," or that would constitute "fundamental alteration[s] in the nature of a program . . . ," rather than to those changes that would be reasonable accommodations.[80]

The bottom line is thus an obligation of reasonable accommodation up to a limit of undue hardship, in which the undue hardship standard means substantial or fundamental change in programs, and a retreat from using the term "affirmative action" to describe disability accommodations. Notably, the legislative history of the ADA cites *Choate* and completely omits any mention of *Davis*.[81] The drafters of the ADA were aware of *Choate*, and they could hardly have failed to notice that it altered *Davis*'s understanding of some accommodations as forbidden affirmative action. But they chose simply to ignore *Davis* and instead to cite *Choate*.[82]

D. AGENCY INTERPRETATIONS

Under *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, courts must defer to the interpretation of a statute by an agency that it is charged with enforcing, as

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[80] *Id*.

[81] The references to *Choate* are in the portions dealing with the government services portion of the statute, as might be expected since *Choate* concerned the scope of coverage provided under a state Medicaid program. *See* H.R. REP. NO. 101-485(II), at 30, 61, 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 312, 343, 367. Congress also acted to bury the *Davis* case by enacting a definition of mandatory auxiliary aids and services that potentially could have kept the student nurse in her program. *See* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMPLE L. REV. 393, 428-29 (1991) ("To avoid similar misinterpretations of the ADA, Congress added a subsection to the definition of "auxiliary aids and services" to clarify that the Act does include the accommodation requirements disallowed by Justice Powell.") (citing 42 U.S.C. § 12102(1)).

[82] In *School Board v. Arline*, 480 U.S. 273, 287 n.17 (1987), the Court repeated *Choate*'s understanding of what *Davis* said about accommodations, and then went on to state that "Employers have an *affirmative* obligation to make a reasonable accommodation for a handicapped employee," *id*. at 288 n.19 (emphasis added). References to *Arline* are also sprinkled throughout the ADA legislative history, although typically in contexts other than interpreting the meaning of reasonable accommodation and undue hardship, which is understandable because *Arline* primarily dealt with coverage under section 504 of an individual with a contagious disease. *See* H.R. REP. NO. 101-485(II), at 30 (discussing nature of disability discrimination), 53 (discussing definition of disability), 57 (discussing direct-threat standard), 76 (same), (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 312, 335, 339, 359; H.R. REP. NO. 101-485(III), at 30 (discussing definition of disability), 34 (discussing direct-threat standard) , 45 (same) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 453, 457, 468; H.R. REP. NO. 101-485(IV), at 37 (discussing direct-threat standard), 82 (dissenting views concerning definition of disability) (1990), *reprinted in* 1990 U.S.C.C.A.N. 512, 526, 564.

long as the agency interpretation is a reasonable one.[83] Congress charged the Equal Employment Opportunity Commission with enforcing title I of the ADA.[84] The interpretations of the words "reasonable accommodation" and "undue hardship" advanced by the EEOC reinforce the idea that emerges from the legislative history that the duty placed on employers is not a modest burden but a serious one, and further support the two-sides-of-the-same-coin approach. Both the regulations and the interpretive guidance documents issued by the EEOC demonstrate these propositions.

1. *The EEOC Regulations.* With regard to reasonable accommodation and undue hardship, the EEOC regulations for title I of the ADA repeat the prohibition in the statute, stating that it is unlawful for covered entities to fail to make reasonable accommodations unless they can demonstrate that the accommodation would impose an undue hardship on the business operations of the employer.[85] Like the statute, the regulations rely more on example or typology than definition when discussing reasonable accommodation. Reasonable accommodations are (1) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for a desired

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[83] 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of the statute which it administers, . . . [and] the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (footnotes omitted). This proposition is often the beginning of the argument not its end, because if a statutory term is unclear, the agency interpretation may be as well. Additional problems with the application of *Chevron* abound. *See, e.g.,* Molot, *supra* note 28, at 19 n.77 ("Of course, big questions remain regarding how courts go about applying *Chevron*."); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Agency Decisions*, 44 DUKE L.J. 1051, 1068-72 (1995) (discussing when to resort to agency interpretation under *Chevron*). But congruence between the meaning assigned by the enforcing agency and the meaning derived from other sources provides good support for a proposed interpretation.

[84] 42 U.S.C.A. § 12116 (West 2010).

[85] 29 C.F.R. § 1630.9(a) (2009). The following subsection repeats the statutory prohibition on denying employment opportunities to otherwise qualified applicants or employees with disabilities based on the need to make reasonable accommodations. § 1630.9(b). Other subsections provide that failure to receive technical assistance is no excuse for failure to accommodate, and that a person with a disability need not accept an accommodation but may lose the status of a qualified individual if unable to perform the essential functions of the job without the accommodation. § 1630.9(c)-(d).

position; (2) modifications or adjustments to the work environment, or the manner or circumstances under which the position is customarily performed, that enable the individual to perform the position's essential functions; or (3) modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges or employment as are enjoyed by the employer's other similarly situated employees who do not have disabilities.[86] The regulations save their definitional language for undue hardship, essentially tracking the statute.[87] The regulations specifically list difficulties imposed on co-workers not as part of what may make an accommodation unreasonable but as part of what may make hardship undue for the employer.[88]

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[86] 29 C.F.R. § 1630.2(o)(1).

[87] *See* 29 C.F.R. § 1630.2(p).

[88] *See* 29 C.F.R. § 1630.2(p)(2)(v) (2009) (including with "factors to be considered" in "determining whether an accommodation would impose an undue hardship" on the employer "the impact on the ability of other employees to perform their duties"). As Professor Anderson notes, many accommodations might be expected to impose some hardship on co-workers. Anderson, *supra* note 36, at 36 ("[N]ot only reassignment, but other accommodations as well, such as modification of work schedules, job restructuring, and the like . . . intrude[] upon the expectations of other employees."). But these hardships are relevant to ADA cases only insofar as they may cause undue hardship on the employer. For a contrary view, which is supported in part by the Supreme Court's decision in *US Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002), see Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties,"* 68 MO. L. REV. 863, 901 (2003) (arguing that reasonableness of accommodations hinges in part on effects on other employees and proposing that accommodations requiring any adverse employment action with regard to other employees be considered not reasonable). Professor Long acknowledges that the undue hardship provision focuses on hardship to employers, not co-employees. *Id*. at 904. Although his view about reasonable accommodation can claim consistency with title VII interpretations and some virtue as a bright-line rule, the contention of this Article is that it gives an incorrect meaning to reasonable accommodation independent from undue hardship and would inappropriately freeze the interpretation of reasonable accommodation and undue hardship, rather than leaving development of that term to juries over time. Title VII, of course, lacks a reasonable accommodation term except as applied to religion cases, and the term there has a different meaning than that in the ADA, as Professor Long notes. Long, *supra*, at 900 (citing H.R. REP. No. 101-485(II), at 68 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 350). Moreover, title VII protects from discrimination all individuals of whatever race, color, sex, religion, or national origin, while the ADA protects only persons with disabilities. *See* Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 440 (2002) (stressing importance of contrast); Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, The Supreme Court's Response, and the Future of Disability Law*, 78 OR. L. REV. 27, 68 (1999) (noting, perhaps with understatement, that "The ADA Is More Complicated than Title VII and the ADEA"). As a matter of policy, the focus on co-worker burdens also ignores the benefits to co-workers that may flow when employers generalize accommodations such as telecommuting or ergonomic workplaces. *See* Emens, *supra* note 65, at 841.

2. *The Interpretive Guidance.* The EEOC's Interpretive Guidance sheds further light on the meaning of reasonable accommodation and undue hardship.[89] The Guidance places a strong emphasis on equality of opportunity, defined as "an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability."[90] The Guidance stresses that the employer's overall resources have to be considered in the undue hardship determination: "To demonstrate that the cost of an accommodation poses an undue hardship, an employer would have to show that the cost is undue as compared to the employer's budget."[91] A simple comparison of the accommodation's cost to the salary of the employee is not adequate.[92] The analysis is not a cost-benefits analysis of the accommodation. The costs are to be balanced against the available resources of the employer, not against the benefits of the particular accommodation, much less the marginal economic contribution of the employee.[93]

The EEOC's original Enforcement Guidance on Reasonable Accommodation and Undue Hardship elaborates further on the meaning of reasonable accommodation: "The statutory definition of reasonable accommodation does not include any quantitative,

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[89] The Supreme Court views EEOC interpretations of this type as less than controlling authority, but notes that they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (referring to title VII guidelines); *see also* Christensen v. Harris County, 529 U.S. 576, (2000) ("Interpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, . . . are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), but only to the extent that those interpretations have the 'power to persuade,' *ibid*."). At the very least, then the EEOC's interpretation is subject to *Skidmore* deference. *See generally* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 903-08 (2001) (distinguishing proper situations for greater deference under *Chevron* and lesser deference under *Skidmore* and collecting authorities).
[90] ADA Title I EEOC Interpretive Guidance, 29 C.F.R. § 1630 App., § 1630.9 (2008).
[91] *Id*. § 1630 App., § 1630.15(d) (2008).
[92] *Id*.
[93] *See* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, *supra* note 70, at question 45.

financial, or other limitations regarding the extent of the obligation to make changes to a job or work environment."[94] The interpretation continues:

> **The only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship" on the employer.**
>
> Undue hardship addresses quantitative, financial, or other limitations on an employer's ability to provide reasonable accommodation.[95]

The EEOC deleted the boldface font of the first sentence when it revised the Guidance in 2002, but retained its language, and merely substituted a more detailed description of undue hardship for the one in the original.[96]

E. THE HISTORICAL CONTEXT

As noted above, even the most adamant of textualists take note of the historical context in which laws are passed.[97] In 1988-90, when the ADA was written and enacted, there were social developments that affected everyone, but in particular would have been in the consciousness of the members of Congress who drafted and voted on the ADA.

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[94] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, 1999 WL 33305876, at "General Principles" (1999) (hereinafter, "1999 EEOC Reasonable Accommodation Guidance"). This Guidance was modified after the Supreme Court's decision in *US Airways v. Barnett*, 535 U.S. 391 (2002). *See* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, *supra* note 70, at "Purpose." The original document is used here because it may provide a better indication of the original meaning of the Act than the Supreme Court's comments in *Barnett*. *See infra* text accompanying notes 194-226 (discussing *Barnett*), but as noted below the changes are not consequential.

[95] 1999 EEOC Reasonable Accommodation Guidance, *supra* note 94. *See generally* Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 111 (2008) (discussing EEOC Guidance).

[96] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, *supra* note 70, at "General Principles." ("The only statutory limitation on an employer's obligation to provide 'reasonable accommodation' is that no such change or modification is required if it would cause 'undue hardship' to the employer. 'Undue hardship' means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.").

[97] *See supra* notes 28-29 and accompanying text (discussing study of contemporary social context in interpreting statutory terms).

Three developments to note are the excitement over technological advances, the recent emergence of the social model of disability, and the rise of a popular movement in support of disability civil rights.

1. *Technology.* The era displayed an overwhelming optimism over technology and how it would improve the world. Many developments taken for granted today were just emerging and appeared full of promise: The Apple Macintosh, often recognized as the first fully successful personal computer, debuted in 1984;[98] email came into wide use in 1990, and people soon began talking about the World Wide Web.[99] Mobile telephones went from brick-like to pocket-sized around the same time.[100] These technological changes affected the expectations for disability accommodations. New high-tech adaptations of the late 1980s included telecommunications advances as well as software and hardware to assist individuals with mobility, sensory, and orthopedic impairments.[101] Assistive technology for people with disabilities was likely to be particularly prominent in the minds of members of Congress interested in disability issues at the time of the ADA's passage, for Congress in 1987 amended the Developmental Disabilities

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[98] *See* Macintosh, Wikipedia, http://en.wikipedia.org/wiki/Apple_Macintosh (visited Feb. 7, 2009). Though one may be skeptical of their authoritativeness on various matters, Wikipedia and similar sources seem particularly apt as a source on the evolution of computers and the Internet and the popular expectations thus engendered.

[99] *See* The History of Email, Thinkquest, http://library.thinkquest.org/04oct/00047/email.htm (visited Feb. 7, 2009); History of the World Wide Web, Wikipedia, http://en.wikipedia.org/wiki/History_of_the_World_Wide_Web (visited Feb. 7, 2009). The first major action-thriller about the Internet, punningly titled "The Net," did not appear until 1995. *See* Internet Movie Database, http://www.imdb.com/title/tt0113957/ (visited Dec. 1, 2008).

[100] *See* History of Mobile Phones, Wikipedia, http://en.wikipedia.org/wiki/History_of_mobile_phones (visited Feb. 7, 2009); *see also* Matt Richtel, *Promoting the Car Phone, Despite Risks*, N.Y. TIMES, Dec. 6, 2009, at A1, *available at* http://www.nytimes.com/2009/12/07/technology/07distracted.html?_r=1&hp (describing event at Soldier Field in Chicago in 1983 launching mass-market cellphone service).

[101] Notably, an entire title of the ADA, title IV, is devoted to telecommunications for persons with disabilities. 47 U.S.C.A. § 225 (West 2010). Federal legislation to promote assistive technology was first passed in 1988, amended in 1994, then replaced by the Assistive Technology Act of 1998, Pub. L. No. 105-394, 112 Stat. 3627 (1998). Nat'l Ctr. on Accessible Info. Tech., What Is Assistive Technology?, *at* http://www.washington.edu/accessit/articles?109 (visited Aug. 28, 2009).

Assistance and Bill of Rights Act to include provisions for assistive technology[102] and in 1988 enacted the Technology-Related Assistance for Individuals with Disabilities Act.[103] If technology was expected to make life in general easier, it certainly was expected to make accommodating people with disabilities easier.[104] Senators and Representatives who drafted and voted on the ADA—like members of the public at large—would have expected that technology would make accommodations that in 1990 imposed undue hardship into the reasonable accommodations of a few years later.

2. *The Social Model of Disability.* The late 1980s had just seen the emergence of the social model of disability, that is, an understanding that physical and mental conditions themselves do not necessarily disable. Instead, disability arises from a dynamic between physical or mental conditions and the barriers—either of environments or attitudes—that keep people with disabilities from full participation in work and in society.[105] This model recognizes that a person using a wheelchair for mobility is not

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[102] *See* Pub. L. No. 100-146, §§ 102(16), 202 (b)(5)(B), 101 Stat. 840 (1987).

[103] Pub. L. 100-407, 102 Stat. 1044 (1988). The Act was sponsored by Representative Jeffords and Senator Harkin. Patricia A. Morrissey & Robert Silverstein, *The Technology-Related Assistance for Individuals with Disabilities Act of 1988*, AM. REHABILITATION, Summer 1989, *available at* http://findarticles.com/p/articles/mi_m0842/is_n2_v15/ai_8200899/. These legislators became two of the prime movers behind the ADA.

[104] Justice Powell recognized the impact of technology as early as 1979, though he spoke in terms of fixing people with disabilities rather than adapting the environment. Se. Cmty. Coll. v. Davis, 442 U.S. 397, 412 (1979) ("Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise qualify them for some useful employment."); *see also* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995) ("Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today."). Some sources confirm that technology has advanced to the point that even if *Vande Zande* was correct about working from home in 1995 it is no longer correct today. *See, e.g.,* Jennifer Tennant*, The Reasonableness of Working from Home in the Digital Age*, REV. DISABILITY STUD., No. 4, 2009, at 10. *See generally* Burgdorf, *supra* note 73, at 314-54 (discussing impact of expected technological change on accessibility).

[105] *See, e.g.,* Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination, and Activism*, 44 J. SOC. ISSUES 3, 6-14 (1988) (developing and elaborating on minority group model of people with disabilities); Harlan Hahn, *Advertising the Acceptably Employable Image: Disability and Capitalism, in* THE DISABILITY STUDIES READER, at 172, 174 (Lennard J. Davis ed. 1997) (describing "minority-group model of disability"); *see also* Paula E. Berg, *Ill/legal: Interrogating the*

disabled but for the existence of curbs, stairs, and other obstacles in the physical environment, and the discriminatory attitudes of individuals with control over economic and social goods.[106] By identifying the environment of physical conditions and human attitudes as the thing to be changed, the model encourages people to look for accommodations that need to be made rather than characteristics of the person that need to be fixed.[107] The ADA, with its focus on eliminating physical and attitudinal barriers rather than ameliorating what is "wrong" with people with disabilities, embodies the social model.[108] The whole point of the accommodation duty in the ADA is to treat the barriers in the environment as not natural or permanent, but instead subject to removal by

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Meaning and Function of the Category of Disability in Antidiscrimination Law, 18 YALE L. & POL'Y REV. 1, 9 (1999) ("This social-political model rejects the premise of the moral and biomedical perspectives that disability is inherent within the individual. . . . [I]t understands disability as contextual and relational, . . . as a broader social construct reflecting society's dominant ideology and cultural assumptions. While it acknowledges the existence of biologically based differences, the social-political model locates the meaning of these differences–and the individual's experience of them as burdensome–in society's stigmatizing attitudes and biased structures rather than in the individual.") (footnotes omitted). Some criticism of the model has emerged, *see* Adam Samaha, *What Good Is the Social Model of Disability*, 74 U. CHI. L. REV. 1251, 1285-1306 (2007); Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 Hastings L.J. 1203 (2007) (finding limits in social model and putting forward disability human rights paradigm, which builds off social-model, development-rights, and capabilities ideas); Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335 (2001) (noting limits on civil rights approach as embodied in ADA), but others have defended the model, *see, e.g.,* Mark C. Weber, *Disability Rights, Disability Discrimination, and Social Insurance*, 25 GA. ST. L. REV. 575 (2009). The Fine and Asch article may be the clearest articulation of the model in the period before the ADA, but the idea took root ten or more years earlier and can be traced still farther back, to the work of Professor tenBroek and others in the 1960s. *See* JENNIFER L. ERKULWATER, DISABILITY RIGHTS AND THE AMERICAN SOCIAL SAFETY NET 29 (2006) ("[T]he social model . . . emerged in the late 1960s and early 1970s to challenge the medical model."). *See generally* Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 814-16 (1966) (urging "integrationist" rather than "custodialist" approach to disability).

[106] *See, e.g.,* Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 480-81 (2000) ("'Disability,' under this conception, resides as much in the attitudes of society as in the characteristics of the disabled individual.").

[107] *See* ERKULWATER, *supra* note 105, at 30-31 (2006) (noting importance of social model in shifting focus of advocacy groups towards changes in social environment).

[108] Burgdorf, *supra* note 73, at 263 ("The ADA embodies a social concept of discrimination that takes the view that many limitations resulting from actual or perceived impairments flow, not from limitations of the individual, but, rather, from the existence of unnecessary barriers to full participation in society and its institutions."); *see* Wendy Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 150 (2005) ("[S]ome scholars have credited the political awareness engendered by the minority model for the passage of the Americans with Disabilities Act and comparable civil rights legislation.") (collecting authorities).

the provision of accommodations.[109] Congress could hardly have been ignorant of the significance of this emerging model in thinking about what would be considered a reasonable accommodation and what would be deemed to impose undue hardship.[110]

3. *The Social Movement.* Closely connected to development two, there was a growing social movement of people with disabilities, which Congress would have expected to continue to change attitudes about what is considered normal and which accommodations are usual, as opposed to extraordinary.[111] The 1970s featured a well-publicized sit-in at HEW Secretary Califano's office and related nationwide demonstrations to force the Carter administration to adopt final regulations to implement section 504.[112] The 1980s witnessed noisy protests over various proposed changes in federal regulations pertaining to disability discrimination and the failure to name a deaf president for Gallaudet University; in other places demonstrators chained their

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[109] *See* Burgdorf, *supra* note 73, at 265 ("The ADA is based on a social or civil rights model (sometimes referred to as a socio-political model), in contrast to the traditional 'medical model.' It views the limitations that arise from disabilities as largely the result of prejudice and discrimination rather than as purely the inevitable result of deficits in the individual."); *see also* Emens, *supra* note 65, at 878 (2008) ("Disability law thus appears to flip the assimilationist demand on its head. That is, instead of demanding that employees assimilate, disability law seems to require the environment, rather than the individual, to change.") (footnote omitted).

[110] *See* Cook, *supra* note 81, at 441 ("Congress was well-aware in enacting the ADA that severe prejudicial attitudes are 'faced day-to-day by people with disabilities.' Congress's solution was not to maintain the isolation of persons with disabilities but, strongly to the contrary, to 'assur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.'") (quoting findings in original ADA) (footnotes omitted).

[111] The militant disability rights movement is sometimes traced to Ed Roberts and other students with physical disabilities who roomed in the hospital at University of California-Berkeley—the only residence on campus that could accommodate them—during the late 1960s. They benefited from and demanded the further implementation of technology to make education more accessible and they collaboratively developed theories about disability in society. *See* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 41-53 (1994) (discussing emergence of disability rights movement at Berkeley). In fact, the movement stretches back much earlier, and includes the demonstrations by the League of the Physically Handicapped against exclusion of workers with disabilities from New Deal jobs programs. *See* PAUL K. LONGMORE, *The League of the Physically Handicapped and the Great Depression*, *in* WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 53, 65-85 (2003).

[112] *See* Cook, *supra* note 81, at 394 (describing sit-in at Califano's office); Ravi Malhotra, The Politics of the Disability Rights Movements, http://dawn.thot.net/ravi_malhotra.html (describing demonstrations in nine cities, including Washington, D.C., where 300 demonstrators sat in at HEW for twenty-eight hours and San Francisco, where disability advocates occupied HEW offices for twenty-five days).

wheelchairs to public transit facilities and large numbers of disability rights lawsuits were prosecuted.[113] There was every reason to believe that the disability rights movement would grow and cause the degree of social change that the movement for racial equality and the women's rights movement did in previous decades. The expectation of change of social attitudes meant that legislators voting on the ADA had strong justification to expect that what would have been viewed as not reasonable in 1990 would be seen as reasonable a few years later. In fact, for Congress the ADA was itself part of an escalating series of laws prohibiting disability discrimination, from the civil rights provisions of the Rehabilitation Act of 1973 prohibiting disability discrimination in federally assisted activity in general,[114] to laws barring disability discrimination in the Foreign Service,[115] in unions representing federal employees,[116] in programs conducted under the Full Employment and Balanced Growth Act,[117] in air travel,[118] and in sale or rental of housing.[119] No better evidence of the growing strength of the social movement for equal rights for persons with disabilities could possibly have been before Congress, nor could there have been any better proof to the individuals voting on the ADA's

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[113] *See* Burgdorf, *supra* note73, at 294-95 (citing additional examples as well); *see also* DORIS ZAMES FLEISHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT 57-70 (2001) (describing proliferation of protests against inaccessible public transit); SHAPIRO, *supra* note 111, at 65-70 (also discussing additional examples of protests); *cf.* OLIVER SACKS, SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF 125-59 (1989) (describing Gallaudet demonstrations).
[114] 29 U.S.C.A. §§ 791-794a (West 2010).
[115] 22 U.S.C.A. § 3905(b)(1) (West 2010).
[116] 5 U.S.C.A. § 7116(b)(4) (West 2010).
[117] 15 U.S.C.A. § 3151(a) (West 2010).
[118] 49 U.S.C. § 41705(a) (West 2010).
[119] 42 U.S.C.A. § 3604(f)(1)-(2) (West 2010). Federal laws against disability discrimination stretch back at least to the 1948 enactment of a statute barring employment discrimination based on physical disability in the Civil Service. Pub. L. No. 617, ch. 434, 62 Stat. 351 (1948). The Architectural Barriers Act, requiring accessibility for federal public spaces, came into being in 1968. 42 U.S.C.A. §§ 4151-4157 (West 2010). Congress viewed these laws and others as part of an accelerating trend of legislation protecting the civil rights of people with disabilities. *See* Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 387-90 (1991) (article describing trend by former senator instrumental in passage of ADA).

language that popular expectations for "reasonable" societal adaptation to the needs of people with disabilities would grow.

It is something of a commonplace among writers on disability discrimination topics to say that the development of the ADA has been hampered by the lack of a real social movement behind it, that the law outstripped the social agitation needed for its continued vitality.[120] This view, however, ignores the sit-ins at Califano's office and the branch offices of HEW that led to the implementation of the section 504 regulations,[121] the other demonstrations,[122] the lawsuits, the letter-writing and telephone campaigns, and all the other public actions that furthered disability consciousness during the period from the 1960s to the 1980s and ultimately caused the transition from requests for charity to demands for rights.[123]

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[120] *See, e.g.,* Selmi, *supra* note 13, at 527-28 ("Without broad public support or a strong social movement pushing to expand our notion of disabilities, it was simply too much to expect the Supreme Court to interpret the ADA expansively, or even to construe the statute consistent with congressional intent so long as the statute provided interpretive room for judicial discretion, which it did."); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 626 (2004) ("Unlike other marginalized minority groups, disabled Americans were empowered by civil rights legislation prior to a general elevation of social consciousness about their circumstances and capabilities."). Stein notes that organizing in the period before the ADA tended to be along disability-category lines, and that it has been a challenge to sustain cross-disability organizational efforts in the period after passage. *Id*. at 627-28. It should also be noted that Selmi's point is directly specifically at definitions of disability and who is covered by the ADA. Selmi, *supra* at 527. The organization of disability activists by impairment category posed difficulties for responding to judicial restrictions on the coverage of the law.

[121] *See* Malhotra, *supra* note 112.

[122] *See id.* (describing repeated disruptions of meetings of American Public Transit Association by disability rights demonstrators and additional public transit activism).

[123] Moreover, when these sources talk of an underdeveloped social movement, they are usually trying to explain courts' restrictive interpretations of the ADA. The reality is that even laws born out of social movements that are thought to have been more visible or more militant also suffer limiting interpretations from courts. This observation has been made time and again by legal scholars, notably those in the field of labor law. *See, e.g.,* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 1937-1941, 62 Minn. L. Rev. 265, 268-69 (1978) (describing limiting construction placed on labor law by courts); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 Mich. L. Rev. 518, 519 (2004) (noting that in interpreting labor law, courts elevate common law rights of employers over statutory rights of workers). Judicial conduct is a weak indicator of the strength of the social movement behind laws.

F. DISTILLING A MEANING

The ADA's text, its history, its agency interpretation, and its social context establish three central ideas about the duty to accommodate: that reasonable accommodation and undue hardship are not separate ideas, but that undue hardship is the limit on reasonable accommodation, its flip side; that the duty is significant, not subject to cost-benefits balancing, but subject to ratcheting up over time; and that neutral rules are not immune to accommodation, but instead accommodation works as a form of preference, though one that should not be mislabeled "affirmative action"

1. *Two Sides of the Same Coin.* The legislative sources make clear that reasonable accommodation and undue hardship are a single concept. The words form parts of a statutory sentence that links them together into the same statutory term. The duty to make reasonable accommodations exists up to the limit of undue hardship. At the point of undue hardship, the accommodation is no longer reasonable. It should be no surprise that the ADA merely gives examples of reasonable accommodation while providing a definition and relevant factors to consider in determining undue hardship. If undue hardship can be determined, there is no need to define what reasonable accommodation is. It is everything that is not undue hardship.[124] Undue hardship is the laboring phrase in the term, not reasonable accommodation. If "unreasonable accommodation" seems not

[124] Many scholars also note that accommodations are reasonable precisely up to the point where they impose undue hardship, thus implicitly recognizing that the two concepts are one. *See, e.g.,* Stein, *supra* note 70, at 81 ("Title I delineates the boundary between reasonable and unreasonable as an otherwise undefined point at which a requested accommodation engenders an 'undue hardship' to the providing employer."); Steven F. Stuhlbarg, Comment, *Reasonable Accommodation Under the Americans with Disabilities Act: How Much Must One Do Before Hardship Turns Undue*, 59 U. CIN. L. REV. 1311, 1316 (1991) (describing undue hardship as reasonable accommodation's "twin concept"). Professor Basas makes the point that for true equality to be achieved, it is necessary to mount resistance against the emphasis on reasonableness of accommodations. Basas, *supra* note 95, at 105. She states, "Resistance demands dropping the language of reasonableness, or at least, shifting attention from gut reactions about reasonableness to more detailed analyses of hardship." *Id.*

to make sense, it is because reasonable accommodation lacks a meaning other than the absence of undue hardship. The terms should be read together, and the opposite of the one is the other. Hence the play on words to make the title of this article: There is no such thing as unreasonable accommodation and due hardship.[125]

A strict textualist might nevertheless complain that this interpretation reads "reasonable" out of the statute. But the words "reasonable" and "undue" are antonyms; reasonable accommodation and undue hardship represent opposites of each other, two poles of a single line. The rest of the statutory text reinforces the interpretation of reasonable and undue as opposites: Reasonable accommodation and undue hardship are linked in the same sentence separated by an "unless," denoting that an accommodation is reasonable unless it produces undue hardship.[126] The structure of the statute as a whole lends further support. There is no definition of reasonable accommodation, but an elaborate one is provided for undue hardship.[127] The fact that the statute places the burden of demonstrating undue hardship on the employer also presents a problem with the separate-terms reading.[128] Congress would not have intended the plaintiff to have the burden on an undefined reasonableness inquiry when it specified that the employer has the burden on its better-defined opposite. Moreover, as developed below, similar

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[125] I acknowledge that I used "unreasonable accommodation" to mean something different in an article a dozen years ago. Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 166 (1998). Trying to sound ironic, I used the term then to describe a duty of accommodation greater than ordinary reasonable accommodation. Under federal law, such a duty applies to the federal government and federal contractors, *see* 29 U.S.C.A. §§ 791(b), 793(a) (West 2010); in the article, I argued that it should be expanded to cover a wider range of employers and further enhanced. But like big hair, irony went out with the 1990s, and the usage never caught on. The phrase, however, has enough power to arrest attention that it seems foolish to let it lie unused.

[126] 42 U.S.C.A. § 12112(b)(5)(A) (West 2010) ("not making reasonable accommodations . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . . .").

[127] *See* § 12111(9).

[128] *See* § 12112(b)(5)(A) ("not making reasonable accommodations . . . *unless such covered entity can demonstrate* that the accommodation would impose an undue hardship . . . .") (emphasis supplied).

language in other parts of the ADA regarding reasonableness and burdensomeness of accommodation has been interpreted as two sides of the same coin.[129] Even rigid textualists rely on constructions of similar language in the same statute.[130]

At the very least, the "reasonable" term is ambiguous, and in that case, looking to the legislative history and regulatory agency interpretation is appropriate. The legislative history repeatedly refers to undue hardship as the limit of reasonable accommodation rather than a separate concept,[131] and manifests the intention to adopt interpretations of section 504 that treat reasonable accommodation and undue hardship as two sides of the same coin.[132] The original EEOC Enforcement Guidance states in boldface type: "**The only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship" on the employer.**"[133] If a textualist reading somehow calls for a

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[129] *See infra* text accompanying notes 236-64 (discussing interpretations of ADA titles II and III).
[130] *See infra* text accompanying note 264 (discussing textualist use of interpretation of similar statutory language).
[131] *See supra* text accompanying notes 52-53 (discussing legislative history).
[132] Even some sources that ultimately adopt other conclusions about the meaning of reasonable accommodation nevertheless agree that the legislative history supports the same-coin interpretation:

> [T]here are intimations in the legislative history suggesting that some in Congress may have viewed "reasonable accommodation" and "undue hardship" as opposite sides of the same coin. Though the statutory terms seem to be quite different, it is noteworthy that the passage in the House Report on the ADA that purports to explain "reasonable accommodation" ends up discussing the employer's burden of proving undue hardship. *See* H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 39-42 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 462-65. It is also relevant that the statutory definition of "undue hardship" permits the employer to sustain its burden, with respect to its affirmative defense, with evidence as to the hardship for both employers generally and the particular employer being sued.

Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 148 (2d Cir. 1995) (Newman, J., concurring); *see infra* text accompanying notes 161-68 (discussing *Borkowski*'s interpretation of reasonable accommodation); *see also* Bryant v. Better Bus. Bureau of Greater Md., Inc, 923 F. Supp. 720, 733 (D. Md. 1996) (adopting different interpretation but stating, "A number of courts treat 'reasonable accommodation' and 'undue hardship' as flip sides of the same coin, i.e., an accommodation which is reasonable does not cause an undue hardship, and an accommodation which would cause an undue hardship would, by definition, be unreasonable.").
[133] 1999 EEOC Reasonable Accommodation Guidance, *supra* note 94.

contrary interpretation, it should be rejected in favor of an intentionalist approach that takes this evidence of meaning into account.

2. *A Significant Duty, Not a Cost-Benefits Balance, and a Dynamic Obligation.* The statutory accommodation burden is a substantial one. "Hardship" means something onerous. Moreover, the examples in the statutory text of reasonable accommodation—making facilities accessible, restructuring jobs, acquiring equipment, and hiring new personnel—entail effort and cost. The legislative history reinforces this reading. Accommodations might be "expensive,"[134] and plainly will disrupt routines and standard operating procedures. Changing standard operating procedures is the gist of accommodation, and the dominant theme in the EEOC regulations concerning the statutory term.[135]

The statutory term requires balancing of accommodations' costs, but it is a balance with the overall and site-specific resources of the employer, not with the benefit to the employee anything else.[136] Provision of a reader for a blind public aid caseworker[137] or an aide for a blind schoolteacher[138] or a personal attendant for an employee[139] could well fail an abstract cost-benefits test, but those are accommodations Congress specifically approved.[140] Required accommodations might be those needed to

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[134] H.R. REP. NO. 101-485(II), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 315.
[135] *See supra* text accompanying note 86 (discussing EEOC regulations). As Professor Satz points out, both legal and philosophical arguments support requiring employers to make accommodations that enable people with disabilities to accomplish work tasks in unorthodox manners, even if the employer would prefer accommodations that are more conventional, as with allowing an office worker to use her feet to manipulate objects rather than arm prostheses, if that is easier for her. Satz, *supra* note 8, at 266.
[136] 42 U.S.C.A. § 12111(10)(B) (West 2010).
[137] H.R. REP. NO. 101-485(III), at 41 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 464.
[138] *Id*. at 67, *reprinted in* 1990 U.S.C.C.A.N. 303, 350.
[139] *Id*. at 64, *reprinted in* 1990 U.S.C.C.A.N. 303, 346.
[140] The statutory text specifically lists "qualified readers or interpreters" as mandatory accommodations. 42 U.S.C.A. § 12111(9) (West 2010).

get to work, not just those on the worksite.[141] The reasonable accommodation-undue hardship determination entails close attention to the specific facts about particular employees or applicants and workplaces.[142] More will be expected of wealthier or larger employers.[143] This fact alone means that precedent about one employer being excused from providing an accommodation should not be used to permit another employer, which may have more resources or different needs, to deny the accommodation.

It also is clear that the burden should be viewed as dynamic, one that will change over time depending on what courts and juries consider appropriate as technology and social expectations change. If the social context of the statute has any significance at all, it is that accommodations that seemed beyond the pale yesterday will be considered ordinary tomorrow. As Professors Karlan and Rutherglen noted, the accommodations determination process "resembles, in some important respects, the common-law process of developing and applying standards of negligence."[144] The use of juries is a particularly apt means to be certain that the law conforms to widespread understandings

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[141] *See supra* text accompanying note 51.

[142] *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 484 (1999) (noting that ADA requires case-by-case determinations); Issacharoff & Nelson, *supra* note 8, at 337 ("[A]llowing cases to proceed to the reasonable accommodation inquiry pushes inexorably toward the fact-intensive case-by-case analysis.").

[143] *See* 42 U.S.C.A. § 12111(10)(B) (West 2010); *see also supra* text accompanying notes 92-93 (discussing EEOC Guidance).

[144] Karlan & Rutherglen, *supra* note 3, at 31; *see id*. at 32 ("More broadly, the substantive standard for reasonable accommodation, the wide range of factors that are relevant to the issue of undue hardship, and the procedures for enforcement through individual claims in court, all suggest an analogy to the law of negligence."). *But see id*. at 32 (noting that reasonable accommodation, unlike negligence, "requires more than efficient reductions of risk"); *see also* Issacharoff & Nelson, *supra* note 8, at 352 (asserting that courts are less suited to develop standards for reasonable accommodation than for tort law); *cf.* ; Stewart Schwab & Steven L. Wilborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1268-71 (2003) (comparing balancing of risks and burdens in negligence determinations to reasonable accommodation costs and benefits).

of what constitutes an undue hardship for an employer and that finders of fact will update that understanding as technology and social attitudes advance.[145]

3. *A Preference, Not Neutrality, and Not Forbidden "Affirmative Action."* The ADA's challenge to neutral workplace rules is clear. Accommodations include variances from leave policies, scheduling policies, job assignment policies, training practices, shift arrangements, and practices regarding assignment of aides and helpers. All of those are neutral workplace rules. The fact that work policies and practices are also subject to attack under an adverse-impact test reinforces the conclusion that neutral rules are not sacrosanct.[146] The reasonable accommodation duty thus constitutes a special preference to be given to workers who have disabilities that does not apply to others. But it is hardly an unfair preference. It removes the barriers that currently exist to the full participation of people with disabilities in employment.

By the time of passage of the ADA, the Supreme Court had cleared up whatever confusion it caused by using the term "affirmative action" in *Southeastern Community College v. Davis*.[147] The Court established that the limit of the accommodation duty under section 504 was fundamental alteration of the relevant program. The ADA's legislative history buttresses that understanding by ignoring *Davis* and eschewing any use of affirmative action language.[148]

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[145] Juries came into ADA proceedings not in the original law, but in the Civil Rights Act of 1991, 42 U.S.C.A. § 1981a(a)(2), (c) (West 2010).
[146] *See* 42 U.S.C.A. § 12112(b)(6) (West 2010).
[147] 442 U.S. 397 (1979).
[148] *See supra* text accompanying notes 75-82 (discussing *Davis*).

II. HOW THE FEDERAL COURTS HAVE INTERPRETED REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

Both the lower federal courts and the Supreme Court have had the opportunity to interpret reasonable accommodation and undue hardship. Their interpretations, however, have not been completely faithful to Congress's intentions.

A. THE LOWER COURTS

There are two leading courts of appeals cases on reasonable accommodation and undue hardship. Other lower court cases may be analyzed by looking at those rejecting accommodation claims, and those permitting the claims to go to trial.

1. *Two Leading Cases.* The most prominent court of appeals cases concerning reasonable accommodation and undue hardship are *Vande Zande v. Wisconsin Department of Administration*[149] and *Borkowski v. Valley Central School District*.[150]

Vande Zande involved a state employee with paraplegia.[151] She used a wheelchair for mobility and thus was vulnerable to pressure ulcers, a condition that periodically required her to stay home for several weeks to permit the sores to heal.[152]

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[149] 44 F.3d 538 (7th Cir. 1995) (Posner, J.).

[150] 63 F.3d 131 (2d Cir. 1995) (Calabresi, J.). Perhaps because they are written by two prominent former law professors associated with different wings of the law and economics movement, the cases are remarkably good tools for demonstrating differing approaches to reasonable accommodation. Accordingly, they feature as major cases in past editions of a leading disability law casebook, RUTH COLKER, THE LAW OF DISABILITY DISCRIMINATION 161 (*Vande Zande*), 169 (*Borkowski*) (6th ed. 2007). The seventh edition (2009) drops *Borkowski* while retaining *Vande Zande*, despite *Borkowski*'s validation in US Airways v. Barnett, 535 U.S. 391, 401 (2002) (citing *Borkowski* with approval) and the rejection of *Vande Zande*'s approach in that case. *See infra* text accompanying notes 194-226 (discussing *Barnett*'s interpretation of reasonable accommodation). Professor Stein makes extensive use of the pair in his article on the economic analysis of accommodation requirements. Stein, *supra* note 70, at 97-103. Other sources also juxtapose the cases. *See, e.g.,* MARK C. WEBER, UNDERSTANDING DISABILITY LAW 65-69 (2007); Emens, *supra* note 65, at 869-74.

[151] *Vande Zande*, 44 F.3d at 544.

[152] Id. at 543-44.

Although the employer made some accommodations,[153] it refused to provide her a computer so she could work at home when she was experiencing pressure ulcers and to lower the sink in the office kitchenette, so that she could use it when at work rather than having to use the sink in the women's room.[154] In discussing the accommodation duty, the court declared that the term "reasonable" in "reasonable accommodation" requires a cost-benefit analysis, by which "at the very least, the cost could not be disproportionate to the benefit."[155] Applying these ideas, the court ruled that reasonable jury could not call working from home a reasonable accommodation except in "a very extraordinary case,"[156] and that allowing the plaintiff to work at home subject only to a slight loss of sick leave that might never be needed was "reasonable as a matter of law."[157] Even though lowering the sink would cost only about $150,[158] the court said that step was as a matter of law not a reasonable accommodation given that the plaintiff could use the sink in the bathroom.[159] The court affirmed a grant of summary judgment without ever reaching the issue of undue hardship.[160]

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[153] The court lists these as modifications to the bathrooms and addition of a ramp over a step, some adjustable furniture, paying for half the cost of a cot needed for personal care, schedule adjustments to permit medical appointments, and changes to plans for a locker room in a new building. *Id*. at 544.
[154] *Id*. In the alternative Vande Zande asked that she not be required to use 16.5 hours of sick leave, time she could not work because she lacked home computer equipment. *Id*.
[155] *Id*. The court said that the employee must show that an accommodation is reasonable in both the sense of it being effective and of being proportional to the costs, and that the employer may then respond by proving that "on more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health." *Id*. at 543.
[156] The court asserted that most jobs in organizations cannot be performed alone and without supervision without a substantial loss of productivity, although that "will no doubt change as communication technology advances." *Id*. at 544.
[157] *Id*. at 545.
[158] The $150 amount was for moving the sink on the floor on which plaintiff worked, but even moving all the sinks in the building's kitchenettes would have cost less than $2,000, and would have benefited others as well. *See id*. at 546.
[159] The opinion stated: "[W]e do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers." The argument that being forced to use the bathroom rather than the kitchen was stigmatizing was rejected on the assertion that stigma "is just an epithet." *Id*. As Professor Sunstein points out, the court did not even employ a meaningful cost-benefit analysis in rejecting the accommodation. *See*

Borkowski was an elementary school library class teacher who had sustained neurological injuries in an auto accident fifteen years before becoming employed by the school district.[161] The trauma caused her difficulties with memory and concentration, and diminished her balance, coordination, and mobility.[162] She was denied tenure and resigned after the principal visited her class and found poor classroom management, criticizing her for remaining seated during the library class lesson and reporting that students made noise without being corrected.[163]

Apparently Borkowski recognized the practice of courts to treat reasonable accommodation as separate from undue hardship, for she divided the two concepts and argued that the employee's burden on the accommodation issue had to be slight in order to give effect to the congressional intention that defendants bear the burden of proof on undue hardship.[164] Placing stringent requirements on the plaintiff at the reasonable accommodation stage, as *Vande Zande* did, would effectively shift the burden to plaintiff on the question of the difficulty of providing the accommodation even though the statute says that the defendant bears the burden on undue hardship.[165] The *Borkowski* court vacated the district court's grant of summary judgment to the school district, reasoning that an employee bears only a burden of production on whether an accommodation is reasonable, and declaring that although the question involves a cost-benefits

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Sunstein, *supra* note 70, at 1902 ("Surely it was an inconvenience to Vande Zande, at best, to have to go to the bathroom when she wanted to use the kitchenette. Surely it was unpleasant, and possibly much worse, to be excluded in this way. . . . Why was the loss to Vande Zande worth less than $150 . . . ?").

[160] *Vande Zande*, 44 F.3d at 546.

[161] Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 134 (2d Cir. 1995).

[162] *Id*.

[163] *Id*.

[164] *Id*. at 138.

[165] *See* 42 U.S.C.A. § 12112(b)(3) (West 2010) (outlawing "not making reasonable accommodations . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.").

determination, the burden is light: "It is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits."[166] Then the risk of nonpersuasion falls on the defendant, and the burden of persuasion on reasonable accommodation "merges" with the defendant's "burden of showing, as an affirmative defense, that the proposed accommodation would cause it to suffer an undue hardship."[167] Although the court thus split reasonable accommodation from undue hardship and made them separate burdens, it acknowledged that "in practice, meeting the burden of nonpersuasion on the reasonableness of the accommodation and demonstrating that the accommodation imposes an undue hardship amounts to the same thing."[168]

3. *Cases Restricting Accommodation.* Many federal court decisions limit the accommodation duty, for example by restricting the applicability of the accommodation of reassigning to a vacant position a qualified employee who can no longer do his or her current job because of disability. *Huber v. Wal-Mart Stores, Inc.* held that Wal-Mart did not need to offer a grocery order filler who was injured on the job and could no longer do her required duties a new position as a router, which was a vacant job she could perform despite her incapacitated right arm and hand.[169] Wal-Mart instead could hire an applicant with higher qualifications.[170] The court declared that "Huber was treated exactly as all

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[166] *Id*. at 138.
[167] *Id*.
[168] *Id*. The concurrence noted that more than one court had interpreted the Rehabilitation Act in that manner. *See id*. at 145 (Newman, J. concurring); *see also supra* text accompanying notes 54-60 (discussing precedent under section 504 of Rehabilitation Act). The court found that an issue of fact existed whether the provision of a teacher's aide to help maintain order in the class would be a reasonable accommodation. *Id*. at 141-43.
[169] 486 F.3d 480 (8th Cir. 2007), *cert. dismissed*, 128 S. Ct. 1116 (2008).
[170] The parties stipulated that the individual who received the job was the most qualified candidate, although the opinion gives no indication what qualifications made the candidate superior to Huber. *See id*. at 481.

other candidates were treated for the Wal-Mart job opening, no worse and no better."[171] The court never identified any hardship imposed on Wal-Mart, much less an undue one. In a similar case, *EEOC v. Humiston-Keeling*, Judge Posner rejected the idea of giving preference to qualified, but in the opinion of the employer, "inferior" applicants who have disabilities and are transferring from jobs they can no longer perform, calling it "affirmative action with a vengeance," a form of preference not required by the statute.[172]

Not every court has followed this approach. The District of Columbia Circuit in *Aka v. Washington Hospital Center* pointed out that a preference is required for the employee who can no longer do the current job and wants to transfer to a vacant position:

> [T]he word "reassign" must mean more than allowing an employee to apply for a job on the same basis as anyone else. An employee who on his own initiative applies for and obtains a job elsewhere in the enterprise

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[171] *Id*. at 484.

[172] 227 F.3d 1024, 1029 (7th Cir. 2000). Other cases restrict the availability of reassignment accommodations. *E.g.*, King v. City of Madison, 550 F.3d 598 (7th Cir. 2008) (rejecting transfer on ground plaintiff was not most qualified applicant); Bellino v. Peters, 530 F.3d 543, 550 (7th Cir. 2008) (stating that offer of transfer to lower paid position was reasonable accommodation as matter of law); Filar v. Bd. of Educ., 526 F.3d 1054, 1067-68 (7th Cir. 2008) (refusing to require employer to reassign employee to single work location when others in job category had roving locations); Burns v. Coca-Cola Enters., 222 F.3d 247, 258 (6th Cir. 2000) (upholding failure to reassign on ground that employee failed to complete request for transfer form for each job employee might have obtained); Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 623 (5th Cir. 2000) (affirming summary judgment against employee on ground that transfer to lower-paying position constituted reasonable accommodation even though employee argued that equal-paying positions for which he held qualifications were available); Schmidt v. Methodist Hospital of Indiana, Inc., 89 F.3d 342, 344-45 (7th Cir. 1996) (affirming summary judgment against employee who wished to transfer to other position while still in probationary period contrary to employer policy, when employer offered choice of additional training in existing job or resignation and reapplication for other job); Hankins v. The Gap, Inc., 84 F.3d 797, 801-02 (6th Cir. 1996) (affirming summary judgment against employee who requested transfer away from noisy environment that exacerbated migraine headaches when employer offered leave time instead); Micari v. Trans World Airlines, Inc., 43 F. Supp. 2d 275, 282-83 (E.D.N.Y. 1999) (denying that employer may have obligation to transfer employee with disability to another position); Parisi v. Coca-Cola Bottling Co., 995 F. Supp. 298, 303 (E.D.N.Y. 1998) (same).

> would not be described as having been "reassigned"; the core word "assign" implies some active effort on the part of the employer.[173]

Various other courts follow *Aka*'s approach.[174]

Additional decisions reject requests for the accommodation of job restructuring when the effect is to assign the worker permanently to light duty or to create a new position for the employee, even when the employer makes no showing of undue hardship.[175] Still other cases reject accommodation requests that relate to getting to

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[173] 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc). Discussing the legislative history of the provision, the court stated:

> Had Congress intended that disabled employees be treated exactly like other job applicants, there would have been no need for the report to go on to explain that " 'bumping' another employee out of a position to create a vacancy is not required," and that "if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job," *id.;* there would have been no danger that an employee would be "bumped," or that a job would go to a disabled employee with less seniority.

Id. (citing H.R. REP. NO. 101-485(II), at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N.303, 345).

[174] *See id*. ("Numerous courts have assumed that the reassignment obligation means something more than treating a disabled employee like any other job applicant.") (collecting cases); Smith v. Midland Brake, 180 F.3d 1154, 1164-65 (10th Cir. 1999) (en banc) ("[I]f the reassignment language merely requires employers to consider on an equal basis with all other applicants an otherwise qualified existing employee with a disability for reassignment to a vacant position, that language would add nothing to the obligation not to discriminate, and would thereby be redundant . . . ."). For an illuminating discussion of these cases, see Anderson, *supra* note 36, at 9-11 (emphasizing distinction between ADA's reasonable accommodation obligation and title VII's equal treatment orientation). Additional decisions articulate robust views of the duty to reassign. *E.g.,* Gile v. United Airlines, Inc., 213 F.3d 365, 372-74 (7th Cir. 2000) (upholding jury verdict in favor of employee with severe depression and insomnia who requested transfer to day shift position); Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 100 (2d Cir. 1999) (Sotomayor, J.) ("[T]he law is clear that an offer of an inferior position does not constitute a reasonable accommodation where a position with salary and benefits comparable to those of the employee's former job is available."); *cf.* Vollmert v. Wisc. Dep't of Transp., 197 F.3d 293, 298-302 (7th Cir. 1999) (overturning summary judgment for employer on ground that additional training for dyslexic employee could constitute reasonable accommodation and that offer of transfer to position without same opportunities for advancement did not discharge duty to accommodate employee); Davroll v. Webb, 194 F.3d 1116 (10th Cir. 1999) (upholding claims of police officers seeking transfers to non-police city positions, contrary to city policy).

[175] Watson v. Lithonia Lighting, 304 F.3d 749 (7th Cir. 2002) (upholding employer's failure to provide permanent light-duty position); Martin v. Kansas, 190 F.3d 1120, 1133 (10th Cir. 1999) (upholding refusal to assign light-duty posts to employees with long-term impairments), *overruled in part on other grounds*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 689 (7th Cir. 1998) (upholding policy of forbidding employee with permanent restrictions from remaining in light-duty positions); Allen v. Georgia Power Co., 980 F. Supp. 470, 478 (N.D. Ga. 1997) (holding that assignment to permanent light duty position was not reasonable accommodation); Champ v. Baltimore County, 884 F. Supp. 991, 999-1000 (D. Md. 1995) (holding that police officer need not be assigned to permanent light-duty position); McDonald v. Kan. Dep't of Corrections, 880 F. Supp. 1416 (D.

work, such as shift changes due to transportation problems, distinguishing these proposed rules modifications from accommodations that relate to what happens inside the workplace.[176] Courts have refused to require employers to permit employees to work from home,[177] even though this would be a reasonable accommodation for many jobs and perhaps the most logical response to the difficulties people with disabilities have in using existing transportation options.[178] A court refused to send to the jury a case in which an employee with a mental impairment requested a transfer away from supervisors who imposed undue stress, deeming it not a reasonable accommodation and an undue hardship

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Kan. 1995); *see* Dargis v. Sheahan, 526 F.3d 981, 987 (7th Cir. 2008) (upholding refusal to move correctional officer to position without inmate contact when employer had practice of rotating officers through various positions); Hoskins v. Oakland County Sheriff's Dep't, 227 F.3d 719, 729-30 (6th Cir. 2000) (holding that employee's proposed accommodation of permanent position in position that otherwise rotated among employees was not reasonable); England v. ENBI Indiana, Inc., 102 F. Supp. 2d 1002, 1014 (S.D. Ind. 2000) (upholding refusal to permit press operator to avoid use of one press and modify use of other, when employer had policy of rotating workers among different presses); *see also* Fedro v. Reno, 21 F.3d 1391 (7th Cir. 1994) (upholding refusal to combine two part-time positions into full-time position in Rehabilitation Act case); Smith v. United Parcel Serv., 50 F. Supp. 2d 649 (S.D. Tex. 1999) (same in ADA case); *cf.* McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92, 99 (2d Cir. 2009) (asserting that plaintiff lacked qualifications for vacant secretarial positions).

[176] *See* Bagenstos, *The Future of Disability Law*, 114 Yale L.J. 1, 37 (2004) (citing Wade v. General Motors Corp., No. 97-3378, 1998 WL 639162, at *2 (6th Cir. Sept. 10, 1998)). *Wade*, it may be noted, appears to rely more on the idea that difficulty in getting to work during darkness because of a vision problem does not constitute a substantial limit on the major life activity of working. It is also true, as Bagenstos points out, that some courts have been open to the possibility of requiring accommodations that facilitate getting to work. *See* Bagenstos, *supra*, at 37. Other courts, however, have not. *See, e.g.,* Filar v. Bd. of Educ., 526 F.3d 1054 (7th Cir. 2008) (holding that school district need not assign teacher to single school within walking distance of public transportation as accommodation for teacher's arthritis condition); Earl v. Mervyns, Inc., 207 F.3d 1361 (11th Cir. 2000) (rejecting accommodation of flexible schedule for worker with obsessive-compulsive disorder, reasoning that punctuality constituted essential function of job). Professor Basas concludes, "[C]ases involving a]ccommodations related to getting to work . . . demonstrate the sprit by which 'reasonableness' has been applied thus far: as an imprecise, bias-laden, pro-employer conduit for attitudinal barriers and misconceptions about disability." Basas, *supra* note 95, at 64.

[177] *See, e.g.,* Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001); Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994) (applying Rehabilitation Act); *see also* Mobley v. Allstate Ins. Co., 531 F.3d 539, 547-48 (7th Cir. 2008) ("[W]e note that as a general matter, working at home is not a reasonable accommodation."). *But see* Langon v. Dep't of Health & Human Servs., 959 F.2d 1053 (D.C. Cir. 1992) (overturning undue hardship ruling in Rehabilitation Act case involving working from home).

[178] *See* Basas, supra note 95, at 86 ("Hurdles to arriving at work are magnified for persons with disabilities. Requests to work at home are often prompted by the difficulty of appearing at work, whether because the commute is particularly taxing, or because public transportation is inaccessible or unreliable."). Basas notes that working at home can be an attractive accommodation for other reasons as well: "Often the workplace is not a hospitable environment for building in breaks, taking medicine, or situating one's body comfortably." *Id.*

per se.[179] Another held that assigning a long-term job coach is not a reasonable accommodation.[180] A court rejected as a matter of law a request for a part-time work schedule,[181] even though part-time and modified schedules are an accommodation listed in the ADA itself.[182] A court has held that hiring a "helper" to do some aspects of a job is not a reasonable accommodation as a matter of law,[183] despite the examples cited in the ADA legislative history of readers being required to be hired for blind public aid caseworkers and aides for blind teachers.[184]

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[179] Wiggins v. DaVita Tidewater, LLC, 451 F. Supp. 2d 789, 799 (E.D. Va. 2006); *see also* Weiler v. Household Fin. Corp., 101 F. 3d 519, 526 (7th Cir. 1996) ("In essence, Weiler asks us to allow her to establish the conditions of her employment, most notably, who will supervise her. Nothing in the ADA allows this shift in responsibility."); Wernick v. Fed. Reserve Bank, 91 F.3d 379, 384 (2d Cir. 1996) (holding that essential functions of job included working under assigned supervisor, and "[n]othing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy."); Kolpas v. G.D. Searle & Co., 959 F. Supp. 525, 530 (N.D. Ill. 1997) ("It is not a reasonable accommodation for an employer to have to transfer an employee to a position under another supervisor."). *But see* Kennedy v. Dresser Rand Co., 193 F.3d 120, 122-23 (2d Cir. 1999) ("[T]he question of whether a requested accommodation is a reasonable one must be evaluated on a case-by-case basis. . . . A per se rule stating that the replacement of a supervisor can never be a reasonable accommodation is therefore inconsistent with our ADA case law. There is a presumption, however, that a request to change supervisors is unreasonable . . . .").

[180] Kleiber v. Honda of America Mfg., Inc., 420 F. Supp. 2d 809, 822-23 (S.D. Ohio 2006) (*semble*), *aff'd*, 485 F.3d 862 (6th Cir. 2007)

[181] Treanor v. MCI Telecommunications Corp., 200 F.3d 570, 575 (8th Cir. 2000) ("[T]he ADA does not require an employer to create a new part-time position where none previously existed."); Terrell v. USAir, 132 F.3d 621, 626 (11th Cir. 1998) ("In a specific situation, part-time employment may or may not be reasonable. In this case, where USAir had no part-time jobs when Plaintiff demanded such a position, a request for part-time employment was unreasonable."); Lamb v. Qualex, Inc., 28 F. Supp. 2d 374, 379 (E.D. Va. 1998) (stating that allowing part-time employment would, *inter alia*, "alter the employment pattern universally imposed within the company"), *aff'd*, 33 Fed. App'x 49 (4th Cir. 2002).

[182] *See* 42 U.S.C.A. § 12111(9)(B) (West 2010).

[183] Ricks v. Xerox Corp., 877 F. Supp. 1468, 1477 (D. Kan. 1995) ("As to plaintiff's final contention, the court does not believe that requiring Xerox to hire a 'helper' to assist him in performing the essential functions of any position would, as a matter of law, be a reasonable accommodation.") (footnote omitted), *aff'd*, 96 F.3d 1453 (10th Cir. 1996) (table); *see also* Robertson v. Neuromedical Ctr., 161 F.3d 292, 295-96 (5th Cir. 1998) (affirming grant of summary judgment to employer on neurologist's claim that employer had to hire administrative assistant for him as reasonable accommodation).

[184] *See* Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984); *see also supra* text accompanying notes 47, 69 (discussing legislative history). More than one court has approved the refusal of an employer bound by the ADA or the Rehabilitation Act to provide someone who can read to an employee unable to do so, despite the congressional approval of *Nelson*. Johnson v. Ga. Dep't of Human Res., 983 F. Supp. 1464, 1472-73 (N.D. Ga. 1996) (food stamp caseworker in ADA case); DiPompo v. West Point Military Acad., 770 F. Supp. 887, 894 (S.D.N.Y. 1991) (firefighter in Rehabilitation Act case).

4. *Cases Upholding Accommodations Claims.* Nonetheless, a number of courts view the accommodation obligation expansively and impose significant obligations to accommodate. A court overturned a grant of summary judgment to an employer when the employer denied an employee with epilepsy who could not drive an accommodation to allow her to make bank deposits of store receipts without driving there herself.[185] Another reversed summary judgment when an employer failed to afford the requested accommodation of specialized training to an employee with learning disabilities who had trouble mastering a new computer system.[186] Still another held that summary judgment was improper when a mechanic who could no longer make repetitive motions with his left arm and shoulder contended that he could perform the essential functions of a the job if it were restructured or that he could be assigned a position that may have been open for a recycling foreman.[187] Yet another overturned summary judgment when a production inspector worker with a back impairment who could not work on more than one assembly line was denied an exemption from a rotation system.[188] And a court of appeals ruled that summary judgment should not have been granted an employer when an employee who used a wheelchair and experienced problems clocking in on time requested as an accommodation a variance from a strict punctuality policy.[189] District courts have denied

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[185] Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 217 (2d Cir. 2001) ("The plaintiff suggested several 'plausible accommodation[s]' to enable her to be promoted at S-44, including having the manager of a nearby store drive her or hiring a car service or a driver at her own expense. The proposed accommodations are not, facially, an 'undue hardship' . . . .") (internal citations omitted).
[186] Vollmert v. Wis. Dep't of Transp., 197 F.3d 293, 302 (7th Cir. 1999).
[187] Benson v. Nw. Airlines, 62 F.3d 1108, 1112-15 (8th Cir. 1995).
[188] Turner v. Hershey Chocolate, 440 F.3d 604, 615 (3d Cir. 2006). The rotation system was adopted to decrease the risk of repetitive motion injuries, *id*. at 607, but the finder of fact could find that limiting the plaintiff's participation would not interfere with rotations of other workers, *id*. at 614.
[189] Holly v. Clairson Indus., 492 F.3d 1247, 1261 (8th Cir. 2007) ("[T]he most that can be said for Clairson's position is that a genuine dispute of material fact exists regarding whether punctuality as defined by Clairson's policy is an essential element of Holly's job, and it was thus error for the district court to have taken this issue away from the fact-finder and awarded summary judgment to Clairson."). The problems stemmed from, among other things, the time clock being blocked by furniture and the path to the clock

employers' motions for summary judgment with regard to requested accommodations that included extension of leave of absence beyond one year,[190] moving an employee with mental illness to a day shift,[191] providing a parent aide or other measures to enable a teacher with impaired speech to keep order in the classroom,[192] and, though contrary to the majority position, long-term light duty work.[193]

B. THE SUPREME COURT

The only Supreme Court decision on reasonable accommodations under title I of the ADA is *US Airways, Inc. v. Barnett*.[194] The case involved a cargo handler who injured his back and transferred under the company's voluntary (not collectively bargained) seniority system to a less physically demanding position in the mailroom.[195] He held that position for two years, but the job then became open to seniority-based bidding, and employees with greater seniority wanted it.[196] Barnett asked as an accommodation for his disability that he be allowed to keep the position, making an exception to the ordinary operation of the seniority system.[197] After five months of deliberation, US Airways said no, Barnett lost his job, and he sued under title I of the

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being slow to negotiate in a wheelchair because of various obstacles. *Id*. at 1249-51. Waiver of start-time policies may be required in other contexts as well. *See* Ward v. Mass. Health Research Inst., 209 F.3d 29 (1st Cir. 2000) (holding that in job that permitted starting times between 7:00 and 9:00 a.m. that issue of fact existed whether plaintiff's proposal that employer permit later start time constituted reasonable accommodation).

[190] Switala v. Schwan's Sales Enter., 231 F. Supp. 2d 672 (N.D. Ohio 2002); *see also* Velente-Hook v. E. Plumas Health Care, 368 F. Supp. 2d 1084, 1094 (E.D. Cal. 2005) (stating that employer was obliged to consider personal leave beyond set medical absence period while employee underwent chemotherapy).

[191] Vera v. Williams Hospitality Group, 73 F. Supp. 2d 161, 169 (D.P.R. 1999).

[192] Olian v. Bd. of Educ.,631 F. Supp. 2d 953, 963 (N.D. Ill. 2009).

[193] Leslie v. St. Vincent New Hope, Inc., 916 F. Supp. 879, 888 (S.D. Ind. 1996) (stating that transfer to light duty position may be reasonable accommodation).

[194] 535 U.S. 391 (2002).

[195] *Id*. at 394.

[196] *Id*.

[197] *Id*.

ADA.[198] The district court granted summary judgment for the defendant, relying on the proposition that any exception to seniority would pose undue hardship.[199] The Ninth Circuit reversed en banc, ruling that the seniority system should be only one factor in the undue hardship determination.[200] The Supreme Court vacated and remanded.[201]

Justice Breyer's majority opinion first rejected US Airways' argument that because the ADA merely equalizes treatment of persons with disabilities, a disability-neutral rule such as job assignment under a seniority system should always prevail over a claim for accommodation.[202] The Court declared that the ADA requires preferences for people with disabilities in the form of accommodations in order to afford those who have disabling conditions with the same workplace opportunities as others: "[P]references will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy."[203] Exceptions from neutral rules are prime examples of mandatory accommodations, such as job restructuring, modified work schedules, and provision of specialized equipment.[204]

The Court then rejected Barnett's view that reasonable accommodation means effective accommodation and that since the transfer was obviously an effective accommodation, the Court could move on to the undue hardship analysis.[205] While not

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[198] *Id*.
[199] *Id*. at 395.
[200] Barnett v. US Airways, 228 F.3d 1105 (9th Cir. 2000).
[201] *Barnett*, 535 U.S. at 406.
[202] *Id*. at 397.
[203] *Id*.; *see also id*. ("By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially.").
[204] *See id*. at 398 (discussing accommodations that entail departure from neutral rules).
[205] *Id*. at 400.

advancing the argument that reasonable accommodation are two ends of a continuum or two sides of the same coin, Barnett had argued that placing any greater obligation on the plaintiff at the summary judgment phase than showing that the accommodation is reasonable in the sense of being effective would undermine the congressional intention of having the employer bear the burden of showing that the accommodation imposes undue hardship.[206] The Court took note of the "practical burden of proof dilemma," but said that "reasonable" does not mean "effective" in ordinary language, and that it should be a term separate and apart from undue hardship.[207] The Court also noted that undue hardship is, under the statute, undue hardship on the operation of the business; according to the Court an accommodation could be unreasonable on grounds other than effects on the operation of the business, for example, because of its effect on co-workers.[208] The Court said that neither the statute or any other congressional source indicated that reasonable means no more than effective.[209]

Nevertheless, the majority opinion endorsed the approach taken by Judge Calabresi in *Borkowski* that the way to give reasonable accommodation a separate meaning but not undermine the congressional assignment of the burden on undue hardship to the employer is to ask at summary judgment only whether the accommodation seems reasonable on its face, that is, ordinarily or in the run of cases.[210] Once the plaintiff has shown the accommodation is reasonable on its face or in the run of cases, the defendant must then show "special (typically case-specific) circumstances that

[206] *Id*. at 399-400.
[207] *Id*. at 400.
[208] *Id*. at 400-01.
[209] *Id*. at 401.
[210] *Id*. at 401-02.

demonstrate undue hardship in the particular circumstances."[211] Thus the Court gave an independent meaning to reasonable accommodation, but one that made it an easy hurdle to surmount, and the Court made undue hardship the topic that would require careful, case-specific analysis.

Applying this approach, the Court perhaps put somewhat sharper teeth into the reasonable accommodation requirement in seniority cases than others by saying that ordinarily an accommodation that violates a seniority system would not be reasonable, given the judicial deference to seniority systems in other contexts and the benefits to employees of consistent, uniformly administered seniority systems.[212] Nevertheless, an employee remains free to show that an exception to seniority is reasonable on the facts of the case. The employee might show, for example, that frequent departures from the system have reduced employee expectations of consistent application, or that there are enough exceptions to the system's operation that one more will not matter.[213] The case needed to be remanded for such a showing.[214]

One may fault the Court for failing to recognize that reasonable accommodation and undue hardship are two sides of the same coin, but its reading of reasonable

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[211] *Id*. at 402.
[212] *Id*. at 403-05.
[213] *Id*. at 405.
[214] *Id*. at 406. Two justices concurred. Justice Stevens joined the opinion but emphasized the many factual questions that remained open for determination on remand. *Id*. at 407-08 (Stevens, J., concurring). Justice O'Connor joined the opinion in order to create a majority interpretation of the statute, though she expressed reservations about the Court's test for ascertaining whether an job assignment that violates a seniority system is a reasonable accommodation. *Id*. at 408 (O'Connor, J., concurring). She said she preferred a test under which the effect of the seniority system on the reasonableness of a reassignment accommodation would depend on whether the seniority system is legally enforceable. *Id*. She noted, however, that the Court's approach would often cause the same outcome. *Id*. at 411 (Scalia, J., concurring). Justice Scalia, joined by Justice Thomas, filed a dissenting opinion, as did Justice Souter, whose opinion was joined by Justice Ginsburg. *Id*. at 420 (Souter, J., concurring).

accommodation as an easy burden to surmount,[215] apparently in all cases but those involving seniority,[216] may practically be not too far from the mark.[217] The Court followed congressional instructions by placing the emphasis on the undue hardship test, where the employer has the burden, but the Court did not have any occasion to discuss what level of hardship must occur before it becomes undue. The Court did not impose a cost-benefit analysis on reasonable accommodations, and in all but seniority system cases it gave respect to the trier of fact by holding that even a weak showing on reasonableness—reasonable on its face or in the run of cases—will get the claimant past a motion for summary judgment. It would be more consistent with the correct interpretation of the statute, however, to approach the reasonable-in-the-run-of-cases test

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[215] Professor Anderson is more critical on this count, though she notes that "the Court adopts what might appear to be a plaintiff-friendly standard of facial feasibility or plausibility." Anderson, *supra* note 36, at 28.

[216] To afford this exalted protection to seniority, the Court had to ignore language in the ADA's legislative history that, though it dealt directly with collectively bargained seniority, would appear to apply with greater force to a voluntary seniority system: "For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement would not be determinative on the issue." H.R. REP. NO. 101-485(II), at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345. Justice Souter's dissent relied heavily on this and similar legislative history, which strongly supports the Ninth Circuit's position that seniority provisions, even those in a legally enforceable collective bargaining agreement, are simply a factor in connection with the reasonability of the reassignment accommodation. *Barnett*, 535 U.S. at 421 (Souter, J., dissenting). As Souter pointed out, statements in the ADA's legislative history do not overrule legally enforceable labor contract provisions, but they surely demonstrate that Congress did not want to give greater weight than only-a-factor for seniority systems that are not even in a collective bargaining agreement. *Id*. at 422. Professor Befort believes that reassignment of an employee with a disability is an accommodation that "requires a greater degree of workplace reorganization and imposes extra burdens on both employers and fellow workers as compared to other types of accommodations." Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After* U.S. Airways, Inc. v. Barnett, 45 ARIZ. L. REV. 931 (2003). Perhaps these considerations account for some of the resistance to the congressional command concerning reassignment.

[217] Illustrating this point, even post-*Barnett* cases that overturn summary judgments against employees frequently jump from stating the reasonable accommodation duty to analyzing undue hardship. *See, e.g.,* Ekstrad v. Sch. Dist. of Somerset, 583 F.3d 972, 977 (7th Cir. 2009) (finding no undue hardship in providing teacher with seasonal affective disorder for classroom with natural light).

as a search for obvious examples of undue hardship, rather than an independent inquiry into reasonableness.[218]

The Court's decision firmly rejected the position taken in Justice Scalia's dissent that the ADA's accommodation duty requires only "the suspension (within reason) of those employment rules and practices *that the employee's disability prevents him from observing*."[219] Scalia said it was a mistake to interpret the ADA, as the Court did, to "make all employment rules and practices—even those which (like a seniority system) pose no *distinctive obstacle* to the disabled—subject to suspension when that is (in a court's view) a reasonable means of enabling a disabled employee to keep his job."[220] For Scalia, no exemption should be required with regard to neutral rules that "bear no more heavily upon the disabled employee than upon others," such as "a seniority system, which burdens the disabled and nondisabled alike."[221] According to Scalia, "When one departs from this understanding, the ADA's accommodation provision becomes a standardless grab bag-leaving it to the courts to decide which workplace preferences (higher salary, longer vacations, reassignment to positions to which others are entitled) can be deemed "reasonable" to 'make up for' the particular employee's disability."[222] Justice Scalia relied heavily[223] on *EEOC v. Humiston-Keeling*[224] and similar opinions, such as the dissent in *Aka*.[225]

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[218] My thanks to Professor Cheryl Anderson for this idea.
[219] *Barnett*, 535 U.S. at 412 (Scalia, J., dissenting).
[220] *Id*.
[221] *Id*. at 413.
[222] *Id*. at 414-15.
[223] *Barnett*, 535 U.S. at 416-17 (Scalia, J., dissenting).
[224] 227 F.3d 1024, 1028-29 (7th Cir. 2000) (discussed *supra* text accompanying note 172).
[225] Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 13114-15 (Silberman, J., dissenting) (discussed *supra* text accompanying note 173).

The majority firmly rejected Scalia's argument, identifying its fundamental error. There is no valid analytic distinction between a seniority system or other neutral employment rule that imposes a difficulty on an employee with a disability because the employee can do no other job and a neutral rule such as an office assignment policy that imposes a difficulty on an employee with a disability because the employee cannot use a particular work station.[226] There is no such distinction in the statute and no basis to impose one by judicial fiat.

III. CORRECTING THE COURTS' INTERPRETATION OF REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

The judicial interpretations do not match the observations that this Article has put forward about the proper interpretation of the accommodation duty in light of evidence of congressional intentions. Nevertheless, there is ample authority to rely on in correcting the interpretation of the provision. These sources buttress the conclusion that reasonable accommodation and undue hardship are the same concept rather than two separate hurdles for claimants, that the burden on employers is substantial, and that required accommodations frequently require departures from neutral employer policies.

A. TWO SIDES OF THE SAME COIN

The statute itself and its legislative history are the best sources on the proposition that reasonable accommodation and undue hardship are two ends of the same concept, two sides of the same coin. This interpretation, however, is also consistent with the

[226] *Barnett*, 535 U.S. at 397 ("By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach."), 397-98 ("Neutral office assignment rules would automatically prevent the accommodation of an employee whose disability-imposed limitations require him to work on the ground floor. . . . Neutral furniture budget rules would automatically prevent the accommodation of an individual who needs a different kind of chair or desk.").

Supreme Court's interpretation of comparable terms of other titles of the ADA, and with the interpretations of courts other than the federal judiciary interpreting similar statutes.

1. *Looking to the Statute and Its History.* Despite what the courts said in *Vande Zande* and even *Borkowski* and *Barnett*, the reality is that the statute makes the accommodations term a single concept and a single test: accommodation up to the limit of hardship. It may, of course, be argued that failure of Congress to overrule *Barnett* through new legislation constitutes a ratification of *Barnett*'s interpretation. The Supreme Court frequently disregards such arguments,[227] though at times it relies on them.[228] Even if the arguments might be persuasive in some cases, they are not so with regard to the meaning of reasonable accommodation and undue hardship in title I of the ADA. The Supreme Court's sole case dealing with those terms is bounded by the unique—perhaps peculiar—desire to insulate seniority systems from attack and is widely known only with regard to its holdings about reassignment under seniority systems.[229] As noted below, it is at odds with the Court's interpretation of comparable terms in titles II and III of the same statute.[230] The ADA has not been reenacted in the years following *Barnett*, and the ADA Amendments Act of 2008 embraced only a limited set of the most urgent corrections to judicial interpretations of the law, hardly constituting a comprehensive fix for the statute's potential problems of judicial interpretation.[231]

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[227] *See, e.g.,* Monnell v. Dep't of Soc. Servs., 436 U.S. 658, 695-701 (1978) (overruling previous interpretation of 42 U.S.C. § 1983 based on rereading of relevant legislative history of statute passed in 1871).

[228] *See, e.g.,* Patterson v. McLean Credit Union, 491 U.S. 164, 175 (1989), *superseded by statute in part not relevant*, Pub. L. No. 102-166 § 101, 105 Stat. 1071 (1991).

[229] This fact is well demonstrated by the reassignment-specific nature of the academic commentary. *See, e.g.,* sources cited *supra* notes 12, 88, 216 (articles discussing *Barnett*).

[230] *See infra* text accompanying notes 238-50 (title III), 251-260 (title II), 261-64 (both).

[231] *See* Long, *supra note* 8 (noting that ADAAA focuses on definition of disability, reacting to judicial interpretations on that topic); *see also* Travis, *supra* note 10, at 320 ("[T]he ADAAA was driven by a

Moreover, as emphasized above, it is only after more cases start to make it past the coverage phase of litigation that problems with judicial interpretation of reasonable accommodation and undue hardship are likely to become apparent.[232] The need for a congressional fix is not yet obvious.

Even if *Barnett* is unlikely to be overruled or disapproved in the near future, it should be read extremely narrowly as to the burden placed on claimants to show reasonableness of an accommodation: simply that there is no obvious undue hardship caused by the accommodation. This is hardly unrealistic. *Barnett*'s language suggests that in all but seniority system cases the claimant's burden should be light.[233] Courts should be encouraged to think of the reasonableness step as unnecessary altogether. As Professors Karlan and Rutherglen declared half a decade before *Barnett*, "Although . . . it would technically be possible for an accommodation both to be reasonable and to be unduly burdensome, as a practical matter the two concepts operate in tandem."[234] They noted that "courts that find a particular accommodation to be 'reasonable' are unlikely to exempt employers from undertaking it, and courts that find a particular accommodation to impose an 'undue hardship' are correspondingly unlikely to demand that an employer shoulder it."[235]

2. *Looking to Interpretations of Analogous Terms in the ADA.* The decisions with respect to reasonable accommodation in employment—even *Barnett*, which is more "accommodating" than those of many lower courts—are out of sync with those in other

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coalition of disability rights activists, shepherded through Congress by a few personally interested members, and received little media attention . . . .").

[232] *See supra* text accompanying notes 8, 10.

[233] *See Barnett*, 535 U.S. at 401-02 (discussing with approval lower courts' holdings that "a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an "accommodation" seems reasonable on its face, i.e., ordinarily or in the run of cases.").

[234] Karlan & Rutherglen, *supra* note 3, at 11.

[235] *Id*.

areas. Title III of the ADA applies to places of public accommodation, such as stores, restaurants, movie theaters, and offices open to the public.[236] The language of what it requires of those who operate those places is not precisely the same as that of title I, but it is closely comparable. Title III requires providers of public accommodations to make reasonable modifications in their policies (the analogue of reasonable accommodation) unless the provider can show the modifications would fundamentally alter the nature of the public accommodation (the analogue of undue hardship).[237]

The key Supreme Court case on reasonable modification in places of public accommodation is *Martin v. PGA Tour*,[238] a well-known decision involving professional golfer Casey Martin, whose degenerative leg disease prevented him from playing without the use of a golf cart. Professional golfers normally enter the PGA tour circuit by submitting letters of recommendation and paying a fee to compete in a qualifying tournament called the Q-School. Golf carts are permitted during the first two rounds of the Q-School, but all competitors must walk in the final one, and the PGA refused Martin's request that he be provided the accommodation of a waiver of the no-carts rule. Martin sued under title III of the ADA.

The Supreme Court upheld an injunction that Martin be permitted to use a cart. After determining that the tour was in fact a public accommodation,[239] the Court held that waiving the requirement that golfers walk the course is not a modification of practices that would fundamentally alter the nature of the PGA tournaments. Justice Stevens wrote

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[236] 42 U.S.C.A. §§ 12181-12189 (West 2010).
[237] § 12182(b)(2)(A)(ii). *See generally* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1118-32 (comparing duties under various ADA titles and section 504 of Rehabilitation Act).
[238] 532 U.S. 661 (2001).
[239] *Id*. at 677.

in the majority opinion that the waiver was a reasonable modification, stating that the PGA admitted that using a cart was necessary for Martin to play without suffering incapacitating injury.[240] "Martin's claim thus differs from one that might be asserted by players with less serious afflictions that make walking the course uncomfortable or difficult, but not beyond their capacity."[241] In that instance, "an accommodation might be reasonable but not necessary."[242] In this instance, however, "the narrow dispute" was whether waiver of the walking rule would fundamentally alter the nature of the tournament.[243] The Court thus treated reasonable modification and fundamental alteration as one term, two sides of the same coin.

On the question whether use of a cart rather than walking constitutes a fundamental alteration of the nature of the enterprise, Justice Stevens reasoned in his majority opinion that modifications of rules might be fundamental alterations if they (1) altered an essential aspect of the game, such as the diameter of the hole, so that the modification would be unacceptable even if all players were affected equally, or (2) made a less significant change with a minor impact, but one that would give the recipient of the modification a competitive advantage.[244] Number one did not apply, because the essence of golf is making shots, rather than walking, even when golf is played at the highest

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[240] *Id*. at 682 ("Petitioner does not contest that a golf cart is a reasonable modification that is necessary if Martin is to play in its tournaments.").
[241] *Id*.
[242] *Id*.
[243] *Id*. Justice Stevens explained in a footnote that the law entailed three questions: if the requested modification is reasonable, if it is necessary for the person with a disability, and whether it constitutes a fundamental alteration. In logic, said the Court, there is no necessary order in which the questions must be answered, and "In routine cases, the fundamental alteration inquiry may end with the question whether a rule is essential." *Id*. at 683 n.38. Therefore, some cases might entail an investigation whether a modification is reasonable that is in some respect divorced from the fundamental alteration inquiry, but as soon as the modification is shown to be necessary for the plaintiff to obtain a benefit from the public accommodation, the inquiry is satisfied and the case moves on to consider fundamental alteration.
[244] *Id*. at 682-83.

levels.[245] The Court deemed any effect on outcome to be insignificant given that competitors never play under precisely identical conditions and the effects of fatigue from walking a golf course are usually minimal.[246] Martin himself suffered far greater fatigue from walking to and from the cart than golfers without disabilities who walk the whole course.[247] Justice Scalia, writing in dissent for himself and Justice Thomas, argued that the rules of all games are arbitrary and thus it makes no sense to deem one or another rule inessential.[248] Moreover, the waiver of any rule could have an effect on outcome, particularly given that golf is primarily a game of skill.[249]

The Court in *Martin* not only treated the reasonable modification duty (comparable to reasonable accommodation) and the fundamental alteration limit (comparable to undue hardship) as a single term, it also displayed a high level of skepticism about the value of standard operating procedure and uniform treatment of all persons subject to a set of rules. It opened itself to criticism for dictating what is essential to someone else's activity and what is not, which is very much what the statute requires a court to do, but what courts have proven themselves generally unwilling to do in employment cases under title I of the ADA.[250]

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[245] Id. at 683-86. The Court consulted the widely accepted Rules of Golf written by the United States Golf Association and the Royal and Ancient Golf Club of Scotland (as opposed to the specific rules adopted for the third round of the Q-School and most of its other tournaments by the PGA) and looked to the history of the game and the more recent history of the use of carts. *Id* at 683-85.
[246] *Id*. at 686-88.
[247] *Id*. at 690.
[248] *Id*. at 700-01 (Scalia, J., dissenting). For Scalia, whether walking is a fundamental aspect of golf is an "incredibly difficult and incredibly silly" question that "[e]ither out of humility or out of self-respect (one or the other) the Court should decline to answer." *Id*. at 700.
[249] *Id*. at 701. Moreover, Scalia noted, the modification of the rule potentially favored only one player. *Id*. The other Supreme Court case on reasonable accommodation under title III, *Bragdon v. Abbott*, 524 U.S. 624 (1998), also provoked a stinging dissent from Justice Scalia, but that case dealt primarily with whether a person with asymptomatic HIV infection was covered under the ADA, rather than what accommodations she should receive.
[250] It is true, as Professor Waterstone points out, that the accommodation in *Martin* did not cost money. Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV.

Non-employment related precedent under title II of the ADA[251] also reveals a liberal approach to that title's analogues to reasonable accommodation and undue hardship, as well as the treatment of the concepts as two sides of the same coin. Regulations promulgated to enforce title II require "reasonable modifications" in programs and activities conducted by state and local governments, and afford the governmental entities a defense if the modifications constitute "fundamental alterations" of services and programs.[252] In *Olmstead v. L.C.*, the Supreme Court considered the case of two women with mental disabilities who had lived for many years in state institutions, even though treatment professionals believed that they could be served in community-based residential programs that would afford them more freedom and better opportunity for participation in community activities.[253] The Court affirmed in part and vacated in part a ruling that the state violated title II of the ADA by failing to place the women in the community. Justice Ginsburg's opinion concluded that title II, whose regulations provide that a "public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities"[254] supported the plaintiffs' claim for a community placement.[255] The opinion

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1807, 1852-53 (2005). But the fact that the PGA pursued the case to the Supreme Court is only one indication of how important the PGA felt the rule was to its operation. The PGA also enlisted celebrity golfers and other witnesses to develop an extensive testimonial record in the case.

[251] 42 U.S.C.A. §§ 12131-12134 (West 2010). Title II contains simply a definitions section, a broad declaration that disability discrimination by state and local government agencies is illegal, a remedies provision, and a delegation to the Attorney General to promulgate regulations to implement that prohibition.

[252] 28 C.F.R. § 35.130(b)(7) (2009) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

[253] 527 U.S. 581, 593-94 (1999).

[254] 28 CFR § 35.130(d) (1998).

[255] *Olmstead*, 527 U.S. at 597-603

nevertheless cautioned that the state's responsibility was "not boundless."[256] Citing the reasonable modifications-fundamental alterations language, Justice Ginsburg said that while the state must alter its placement practices, the regulation required consideration of state resource allocations concerns in light of the need to provide community placement to the all the people with mental disabilities for whom state was responsible and who desired it. The opinion pointed out that the state could not necessarily save money by closing institutions if some residents still needed or wanted institutional settings; community placements, if scarce, needed to be allocated fairly.[257] But the Court did require a comprehensive, effective working plan to place individuals in less restrictive settings, and a waiting list that moved at not less than a reasonable pace,[258] a rate not controlled by any effort to keep the institutions populated.[259]

The Court thus imposed on the state a significant duty to accommodate persons with disabilities under the reasonable modification standard. As importantly, the lead opinion also read "reasonable modifications" and "fundamental alteration" as the same term.[260] It did not ask first whether the expansion of available community placements was reasonable in the run of cases, and then whether on a more particularized showing, it would constitute a fundamental alteration under the facts of the case. Instead, the opinion spoke of "the fundamental-alteration component of the reasonable-modifications

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[256] *Id*. at 603. This part of the opinion had the votes of its author and Justices O'Connor, Souter, and Breyer. Justice Stevens concurred in the result and joined the rest of the opinion, but said that the issue was disposed of in earlier proceedings in the case and was not properly before the Court. *Id*. at 607 (Stevens, J., concurring). Justice Kennedy also concurred in the judgment. *Id*. at 610-15 (Kennedy, J., concurring).
[257] *Id*. at 604
[258] The Court equated a reasonable pace to "'asking [a] person to wait a short time until a community be is available.'" *Id*. at 606 (quoting oral argument of state's attorney).
[259] *Id*. at 605.
[260] Justice Stevens's vote would have made the opinion a majority, and it seems clear from his opinion in *Martin* that he would have embraced an approach similar to that of Justice Ginsburg on this issue; his endorsement of the lower court decision, which balanced the cost of accommodating the two plaintiffs against the entire relevant expenditures of the state, displayed an attitude even more favorably disposed to the plaintiffs' position. *See supra* text accompanying notes 238-50 (discussing *Martin* opinion).

regulation," saying that it allowed "the State to show that, in the allocation of available resources, immediate relief for plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities."[261] The opinion went on to develop the limits on the community-placement modification that it believed were fundamental alterations, but it never discussed the pairing of reasonable modification and fundamental alteration as anything but two aspects of the same idea.

Lower court cases under titles II and III involving issues other than employment manifest a similar approach to *Martin* and *Olmstead* in interpreting the titles' reasonable accommodation and undue hardship analogues. In title II cases, courts typically omit or give only the slightest attention to any reasonable modification determination and instead leap to considering fundamental alteration, thus taking the reasonable modification-fundamental alteration question as the same inquiry.[262] Even some employment cases concerning the federal agency provisions of the Rehabilitation Act, whose accommodation language parallels that of the ADA, manifest a two-sides-of-the-same-coin approach.[263] The interpretation of titles II and III by the Supreme Court and the

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[261] *Olmstead*, 527 U.S. at 604.

[262] *E.g.*, Disability Advocates, Inc. v. Paterson, 598 F. Supp. 2d 289, 356 (E.D.N.Y. 2009) (denying all motions for summary judgment in case concerning adequacy of integration of individuals with mental illness in adult home placements and treating reasonable modification and fundamental alteration as alternatives, stating "The court will consider all of this evidence together in determining whether the requested relief would be a 'reasonable modification' or 'fundamental alteration' of Defendants' programs and services."); AP v. Anoka-Hennepin Indep. Sch. Dist. No. 11, 538 F. Supp. 2d 1125, 1141 & n.13 (D. Minn. 2008) (denying summary judgment on request for accommodations for child's diabetes in public day care program, with limited exception as to damages claim, considering reasonable modification and fundamental alteration together and giving primary consideration to fundamental alteration defense).

[263] *See* Arneson v. Sullivan, 946 F.2d 90, 92 (8th Cir. 1991) ("An unreasonable accommodation is one which would impose undue hardship on the operation of its program.") (quoting Arneson v. Heckler, 879 F.2d 393, 397 (8th Cir. 1989)) (internal quotation omitted); Meisser v. Hove, 872 F. Supp. 507, 520 (N.D. Ill. 1994) ("Since defendant made some accommodation, the court views the issue of whether that accommodation was reasonable under the circumstances as analytically inseparable from the issue of whether additional accommodation could have been made without undue hardship."); *see also* cases cited

other courts in a manner that treats makes the concept of accommodation a continuum from reasonable modification to fundamental alteration, from reasonable accommodation to undue hardship, should be highly persuasive. Even authorities wedded to textualism look to interpretations of the same or similar language in other parts of a statute or comparable statutes in interpreting terms of the statute in question.[264] It is entirely apt to rely on these title II and III decisions in future employment accommodations cases.

3. *Looking to Interpretations in Other Jurisdictions.* As the precedent regarding titles II and III indicates, reasonable accommodation and its analogues, and undue hardship and its analogues, need not be read as separate terms. Notably, Canadian law, like American law, requires reasonable accommodation[265] and establishes an undue hardship defense,[266] but the Canadian Supreme Court has declared that the reasonable accommodation duty and the undue hardship defense "are not independent criteria but are alternate ways of expressing the same concept."[267] Viewing the terms as part of the same concept, two sides of the same coin rather than independent criteria, has an impact on disability discrimination cases.[268] For example, in contrast to the United States Supreme Court's treatment of seniority rights as all but untouchable in *Barnett*, the Saskatchewan Court of Appeal in *Regina (City) v. Kivela* required as a reasonable accommodation the award of retroactive competitive seniority credit for a truck driver with cerebral palsy

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supra note 55-60 (discussing pre-ADA Rehabilitation Act precedent). Federal agency employees are covered under section 504 rather than under title I of the ADA.

[264] Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 348 (2010).

[265] Employment Equity Act, 1995 S.C., ch. 44 § 5(b).

[266] *Id*. § 6(a). These provisions are federal; provincial legislation is similar. *See, e.g.,* Human Rights Code of Manitoba, 1987-88 S.M., ch. 45 § 9(1).

[267] Cent. Okanagan Sch. Dist. No. 23 v. Renaud [1992] 2 S.C.R. 970 ¶ 26 (Can.) (religious accommodation case).

[268] This point may seem obvious from the discussion of *Vande Zande* and other cases that throw out accommodation claims without ever reaching hardship or where the showing of hardship is nonexistent or weak, *see supra* text accompanying notes 169-72, 175-83 (discussing cases not reaching undue hardship), but the contrast with results in jurisdictions that use the two-sides-of-the-coin approach remains instructive.

whose disability kept him from performing extra manual labor assignments that permitted other workers to accrue greater credit toward seniority.[269] Similarly, a Canadian labor tribunal required maintenance of full-time benefits for an employee whose disability permitted only part-time work, emphasizing that no undue hardship was proven.[270]

B. A SIGNIFICANT DUTY, NOT A COST-BENEFITS TEST

The ADA and its history, interpretations of other, analogous terms of the ADA, and the better-reasoned of the precedent all support the idea that the accommodation duty is strenuous, not subject to cost-benefits balancing, but subject to an increase of obligations as technology and expectations advance. Restoring the proper interpretation of the statute may be done most effectively by encouraging courts to step back and let juries make accommodations determinations.

1. *Looking to the Statute and Its History.* Accommodations such as aides for blind teachers or readers for blind or deaf caseworkers, or personal attendants at work and travel all cost money, and all might fail a cost-benefits balance. Yet these are accommodations the legislative history specifies. And their imposition is consistent with the language of the statute, which rejects only "significant difficulty or expense," when considered in light of factors such as the overall financial resources of the employer.[271]

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[269] [2006] 275 Sask R. 271 (Sask. Ct. App.) (Can.).

[270] Ins. Corp. of B.C. v. OPE.I.U. Local 378, [2003] 123 L.A.C. (4th) 422 ¶ 48 (B.C. Arbitration Bd.) (Can.); *see* id. at ¶ 27 (discussing undue hardship); *see also* O.S.S.T.F., Dist. 10 v. Peel (County) Bd. of Educ., [1999] 73 L.A.C. (4th) 183 (Ontario Arbitration Bd.) (Can.) (requiring that teacher with multiple sclerosis working two-thirds of normal school day and applying sick leave for remainder of day receive income and pension benefits of full-time teacher). In general, Canadian decisions impose a strong accommodation duty on employers, *see* Michael Lynk, *Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada*, in LAW SOCIETY OF UPPER CANADA SPECIAL LECTURES 2007: EMPLOYMENT LAW 189 (Randall Scott Echlin & Chris Paliare eds. 2008), *available at* http://www.irwinlaw.com/books.aspx?bookid=479 (collecting and analyzing Canadian cases on reasonable accommodation), though accommodations appear to be more plentiful in the unionized sector than in non-unionized employment, *see* Ravi Malhotra, *A Tale of Marginalization: Comparing Workers with Disabilities in Canada and the United States*, 22 J. L. & SOC. POL'Y 79, 101-02 (2009) .

[271] 42 U.S.C.A. § 12111(10)(B) (West 2010).

2. *Looking to Interpretations of Analogous Terms in the ADA.* Professor Waterstone has documented that results in cases brought under titles II and III are much more favorable to claimants than in cases under title I, and he concludes that "courts are not as troubled by the accommodations mandate in the title II and III contexts."[272] Examination of individual title II opinions confirms the liberality of the courts' approach to reasonable modifications as well.[273] As noted, the Supreme Court's decisions on titles II and III impose significant unwanted burdens on the defendants.

3. *Looking to (Selected) Precedent.* As noted above, many federal courts, particularly courts of appeals, have permitted finders of fact to determine that quite onerous accommodations are required under the reasonable accommodation-undue hardship test.[274] Some state court cases interpreting analogous state law provisions also

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[272] Waterstone, *supra* note 250, at 1849 (contending that either this is true or courts are finding other ways to reach pro-plaintiff results and finding reasons to believe former is correct); *see also id*. at 1828-29 (in study of title II and III appellate cases available on Westlaw, finding in title II cases that defendants obtain full reversal in 34% of cases and plaintiffs obtain reversal in 24% of cases and in title III cases that defendants obtain full reversal in 50% of cases and plaintiffs obtain reversal in 24% of cases, compared with study of title I appellate cases showing that defendants obtain reversal in 42% of cases and reduction in damages in 17.5% of cases, while plaintiffs obtain full reversal in 12% of cases; further reporting pro-plaintiff results at trial in 24% of title II cases and 20% of title III cases in pool of appealed cases contrasted with study showing 6% of pro-plaintiff trial results in title I cases in similar pool); *see also id*. at 1853 ("My research shows very few Title III cases have been decided against plaintiffs at the appellate level because the requested accommodation was too expensive."); *cf*. Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 240 (2001) (reporting success rate for defendants in 93% of title I cases at trial level and 84% in cases reaching courts of appeals).

[273] *See* Waterstone, *supra* note 250, at 1845-48 (collecting cases involving public benefits, voting, and removal of architectural barriers). The analogous accommodations provision of the Rehabilitation Act, 29 U.S.C.A. § 794 (West 2010), forbidding disability discrimination by federal government in its activities and programs has also been read expansively. *See, e.g.,* Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1267-74 (D.C. Cir. 2008) (holding that modifications to paper currency to permit blind persons to distinguish denominations met test of reasonableness if that test were applied, that absence of tactile or other features denied meaningful access to currency, and that Treasury Department failed to show undue burden).

[274] District court opinions denying accommodations may be an unrepresentative sample given that a district court is more likely to write an opinion when granting a defendant's summary judgment motion, a decision that is final, than denial of the motion, which is interlocutory. *Cf*. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) ("[A] decision to grant summary judgment is more likely to result in a written opinion than a decision to dismiss or enter a verdict . . . .").

impose stringent duties. In *McDonald v. Department of Environmental Quality*,[275] the Montana Supreme Court took a position quite different from that in cases such as *Vande Zande* that a cost-benefit analysis must be applied to accommodations and that requests will be viewed harshly. *McDonald* overturned the dismissal of a state law reasonable accommodation claim asserted by an employee with mental and other impairments who had already been permitted to use a service dog to help her keep her balance while walking and to keep her alert while at her desk, but whose dog could not navigate tiled floor surfaces without slipping and occasionally falling and injuring itself.[276] The court ruled that installing carpet runners or another non-slip floor surface in the building to permit use of the dog could constitute a reasonable accommodation.[277] Other state courts applying state statutory duties of reasonable accommodation have also found triable issues of fact on accommodations many federal courts would likely find too unusual or expensive. For example, a California court required trial over the reasonableness of the employer's furnishing a motorized scooter to a production supervisor with a hammertoe condition so he could more easily move around the factory floor.[278]

4. *Looking to the Jury.* A serious challenge to plaintiffs making accommodations claims is the reluctance of federal district courts to defer to jury decisions and a reluctance—though perhaps not quite as great—on the part of courts of appeals to force them to do so. In the mid-1980s, the United States Supreme Court signaled to lower federal courts that they had more freedom to use summary judgment than previously

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[275] 214 P.3d 749 (Mont. 2009).
[276] *Id*. at 764.
[277] *Id*. Montana law is similar to the ADA with regard to reasonable accommodation and undue hardship. *See* MONT. CODE ANN. § 49-2-101(19)(b) (West 2010).
[278] Ayzenshteyn v. Rexam Beverage Can Co., NO. B196458, 2009 WL 27188 (Cal. Ct. App. Jan. 6, 2009) (unpublished-noncitable). The California Fair Housing and Employment Act's language on reasonable accommodation and undue hardship matches that of the ADA. *See* CAL. GOV. CODE § 12940(m) (West 2010).

exercised.[279] In ADA cases, courts have taken this authority and run with it. The frequent use of summary judgment in cases having to do with reasonable accommodation has led to fewer decisions in which juries, drawing on common experience, have the opportunity to draw conclusions about reasonability different from those of judges inclined to sympathize with employers.[280] Sometimes the courts' use of language is revealing. For example, in *Filar v. Board of Education*, a substitute teacher with osteoarthritis who could not drive or walk long distances and thus needed assignment to a school close to public transportation, asked for a variance from the school board's roving substitute assignment system.[281] The court of appeals affirmed a grant of summary judgment against the teacher.[282] It commented that "the question is whether her

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[279] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ("We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure. . . . In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-56 (suggesting greater availability of summary judgment in public-figure defamation case); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 595-98 (1986) (upholding entry of summary judgment in factual context of antitrust case).

[280] Colker, *supra* note 274, at 101 ("My review of the litigation outcome data-combined with my individualized review of every appellate decision and many of the district court cases decided since the ADA became effective in 1992-leads to the conclusion that district and appellate courts are deploying two strategies that result in markedly pro-defendant outcomes under the ADA. Courts are abusing the summary judgment device and failing to defer to agency guidance in interpreting the ADA."); *see also* Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 326-29 (2008) (discussing role of judicial attitudes in accounting for low win rates in ADA employment litigation). Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505 (2000) (collecting and analyzing "data from jury research in connection with actual litigation, [that] reveals a general public that is much more enlightened on issues of disability and workplace accommodation than are many employers--and is thus much less likely to produce pro-defense outcomes than current dispositive motion practice," but attributing failure to reach juries to poor advocacy in litigated cases). These authors attribute the failure to reach juries to poor advocacy. *Id.* Lawyers often have little to work with, however. While courts of appeals say they apply a de novo standard in reviewing grants of summary judgment, *see, e.g.,* Bellino v. Peters, 530 F.3d 543, 548 (7th Cir. 2008), too often they defer to lower courts' reasonability determinations. *See* Stein, *supra* note 70, at 93.

[281] 526 F.3d 1054, 1059 (7th Cir. 2008).

[282] *Id*. at 1068.

requested accommodation was reasonable, and *we don't think it was*."[283] The court conceded that the claim had "surface appeal," but said that "aspects of the request *convince us* that it was just not reasonable."[284] The court asserted that even if working around the existing collective bargaining agreement were possible, there would remain the administrative burden of researching schools in the city that would satisfy the teacher's restrictions.[285] The court never asked whether a reasonable jury might have come to a different conclusion after hearing the evidence.[286]

It will not be easy to wean lower court judges from deciding accommodations cases on the basis of their own gut reactions. Litigants will need to appeal to the judges' professionalism and restraint and remind the courts of what Congress intended in 1990 and what courts have required in analogous contexts. A lay jury is in so many respects a better decider of whether accommodations are reasonable or whether they impose undue hardship.[287] Twelve member of the community will collectively be much more familiar with the modern workplace than a judge whose non-legal work experience may have come decades earlier. Many jurors will be far more aware of modern technology and its

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[283] *Id*. at 1067 (emphasis added).
[284] *Id*. (emphasis added). The court said that one of the convincing aspects was that the accommodation "would have amounted to preferential treatment, which the ADA does not require." *Id*.
[285] *Filar*, 526 F.3d at 1068.
[286] A matter of some concern is that the greater license afforded district courts to dismiss cases at the pleadings stage under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), may exacerbate this condition. *See* Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372296 (expressing concern that Twombly may lead to more frequent dismissals of ADA cases). Given the presence of an EEOC charge in an ADA title I case, it seems doubtful that the employer needs the federal court complaint to be on notice of what the case is about. The dismissals on the pleadings thus seem more significant for the judge's underlying message, "In my opinion, this is a weak claim. Go away." *See* Torres v. Am. Auto Parts, No. 07 C 3702, 2008 WL 2622835 (N.D. Ill. June 30, 2008) (noting contents of EEOC charge and right to sue letter filling out information about case, but nevertheless dismissing case brought pro se concerning alleged failure to accommodate by making plaintiff stand while doing work).
[287] Professor Sunstein, it should be noted, is skeptical of the use of juries in accommodations cases. *See* Sunstein, *supra* note 70, at 1905-06. Much of his concern, however, stems from doubts about juries' ability to make cost-benefits analyses, something they should not be doing under a proper reading of the statute.

potential than judges will. Moreover, since jurors are not bound by determinations about what was not required in a previous case, they can approach the case with a more dynamic view, a view in all respects closer to that envisioned by the framers of the ADA.

C. PREFERENCES, NEUTRAL POLICIES, AND "AFFIRMATIVE ACTION"

Judicial errors about the ADA's supposed failure to enact preferences, and preservation of neutral policies may be challenged by attention to the statute and its history, its interpretation in *Barnett*, and the interpretation of comparable provisions in other jurisdictions. The comparison to "affirmative action" is wrong and should be abandoned.

1. *Looking to the Statute and Its History.* As noted above, the statute in its text, history, and regulatory agency interpretation, requires preferences for workers with disabilities. These preferences are in the form of accommodations—variances from otherwise neutral rules. The preferences are part of treating someone differently in order to treat the person fairly.[288] If departure from an otherwise neutral rule is sought, the statute and its contextual materials are the first line of support.

2. *Looking to* Barnett.. The second line is *Barnett*. The Court could not have made it clearer that the ADA's accommodations provision requires preferences: "The Act requires preferences in the form of 'reasonable accommodations' that are needed for

[288] The unadorned use of the term "preference" may be criticized on the ground that what is a preference from one perspective, that of the person without a disability, is simply equal treatment from the perspective of the person with a disability. *See* Anita Silvers, *Protection or Privilege? Reasonable Accommodation, Reverse Discrimination, and the Fair Costs of Repairing Recognition for Disabled People in the Workforce*, 8 J. GENDER RACE & JUST. 561, 571 (2005) ("The ADA proposes to alter social practice so as not to exclude individuals with the kinds of biological differences that people have come to label "disabilities. But, in *Barnett* and other ADA cases, the Court has stigmatized the recognition that policies for accommodating their differences afford the disabled by characterizing such accommodations as preferential.") (footnote omitted); *see also* Burgdorf, *supra* note73, at 298 ("*Barnett*'s designation of reasonable accommodation as "special" and "preferential,". . . is inartful, misguided, and damaging. It fosters the misconception that the ADA gives people with disabilities some type of advantage over people without disabilities."). Nevertheless, the subtlety of that point would likely have been lost on lower courts, who have had trouble enough even requiring any departures from seemingly neutral rules.

those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy."[289] That Justice Scalia would dissent on this issue is unremarkable; obviously, some courts and other authorities took this position before *Barnett* came down.[290] What is more surprising, however, is that so many courts have failed to realize that the majority of the Supreme Court rejected this reasoning. *Humiston-Keeling* continues to be followed; *Aka* and similar cases feel more like the exception as courts continue to assert that the ADA does not require "preferences" for employees with disabilities or departure from neutral rules.[291]

3. *Looking to Interpretations in Other Jurisdictions.* When federal courts ignore the clear implications of a Supreme Court decision, it may be quixotic to expect them to follow state court cases. Nevertheless, it should be noted that many state decisions interpreting statutes similar to the ADA reject the position that neutral employment practices such as filling all positions with the person most qualified provide a justification not to afford a reasonable accommodation such as preferential transfer of employees with disabilities who cannot do their jobs to vacant positions they can perform. In a case

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[289] US Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002); *see also id*. ("By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially."). Many commentators have pressed this point. *E.g.*, Elizabeth A. Pendo, *Substantially Limited Justice?: The Possibilities and Limits of a New Rawlsian Analysis of Disability-Based Discrimination*, 77 ST. JOHN'S L. REV. 225 255 (2003) ("By definition a special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach."). The Supreme Court foreshadowed its conclusion that reasonable accommodation entails preferences when it held that a state could act rationally in the constitutional sense if as an employer it denied accommodations in order to continue to use existing inaccessible facilities. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001).

[290] The position bears a similarity to that in Gary Lawson, *AIDS, Astrology, and* Arline*: Towards a Causal Interpretation of Section 504*, 17 HOFSTRA L. REV. 237, 249 (1989) (proposing reading of section 504 of Rehabilitation Act to cover only instances in which claimant's disability medically causes a limit on specific physical activity). For a response to Professor Lawson see Weber, *supra* note 237, at 1112 n.130.

[291] *See, e.g.,* Filar v. Bd. of Educ., 526 F.3d 1054, 1059 (7th Cir. 2008) (asserting that ADA does not require preferences for employees with disabilities). Professor Anderson points out that title VII thinking may lie at the root of these interpretations. *See* Anderson, *supra* note 36, at 15 ("Courts likely place so much emphasis on the characterization of the employer's policy as 'legitimate' and 'nondiscriminatory' because they cannot get beyond thinking about the ADA in traditional Title VII terms.").

under the California Fair Employment and Housing Act, the court reversed a grant of summary judgment to a bank that had failed to find offer a job reassignment of a full-time position to an employee who, after being the victim of a bank robbery, suffered post-traumatic stress disorder and could no longer work with the public or with money.[292] Noting that the bank had not "definitively" established that it had no vacant positions the employee could fill,[293] the court rejected the claim that an employee with a disability is entitled to no more than the right to compete for open slots: "To the extent Wells Fargo rejected Jensen for positions for which she was qualified because it had applicants who were more qualified or had seniority, it overlooks that when reassignment of an existing employee is the issue, the disabled employee is entitled to preferential consideration."[294]

4. *Banishing the Ghost of "Affirmative Action."* Acknowledging that the ADA enacts a form of preference by requiring accommodation does not, of course, say anything at all about affirmative action, and the two terms should not be confused. As Professor Ball notes, reasonable accommodation requires an individualized assessment of specific individuals whereas affirmative action is a class-based approach; moreover, affirmative action is a remedy not a right, whereas failure to provide accommodations is defined as a form of discrimination itself.[295] Thus affirmative action and reasonable accommodation may both entail preferences, but affirmative action and reasonable

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[292] Jensen v. Wells Fargo Bank, 102 Cal. Rptr. 2d 55 (Ct. App. 2000).
[293] *Id*. at 68.
[294] *Id*. at 69.
[295] Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 973-81 (2004) (collecting and analyzing authorities); *see also* Ravi Malhotra, *The Implications of the Social Model of Disablement for the Legal Regulation of the Modern Workplace in Canada and the United States*, MANITOBA L. REV. (forthcoming 2010) ("It cannot be said that Mr. Barnett argued that he ought to receive a preference in interpreting seniority rights because of a history of systemic discrimination against people with disabilities. Rather, the request for exemption from the seniority system was based on an individual assessment of how his impairment affected his ability to perform the essential functions of his job in a specific workplace.").

accommodation are different in both character and operation.[296] This all should have been clear since *Alexander v. Choate*[297] twenty-five years ago, but courts seem strangely drawn to the erroneous understanding.

CONCLUSION

The core of the ADA is the accommodation obligation, and the next few years will show whether courts will prove true to the ADA as Congress enacted it. To be true to the statute, courts need to return to its text, its history, and its authoritative interpretations. If they do so, they will apply an obligation to accommodate up to a limit of due hardship, rather than separating out reasonableness from what is undue. They will impose a substantial, dynamic obligation using a cost-resources balance, and defer appropriately to jury decisions. And they will not shy away from requiring preferential treatment when an accommodation does not entail an undue hardship. Doing so is no more than obeying Congress's command.

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[296] *See* Ball, *supra* note 295 at 966 (characterizing reasonable accommodation and affirmative action as two different kinds of preferential treatment); *see also* Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both*, 57 WASH. & LEE L. REV. 1045, 1082-86 (2000) (noting equal-but-different treatment foundation of reasonable accommodation and contrast with remedial measures such as affirmative action); Malhotra, *supra* note 295 ("[A] failure to provide reasonable accommodation under the ADA in itself constitutes discrimination against people with disabilities, provided that it does not impose an undue hardship on the employer. In contrast, under Title VII, affirmative action is merely a remedy when discrimination has already been demonstrated to have occurred in the past.").

[297] 469 U.S. 287 (1985).