The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective

James Leonard
ARTICLES

THE EQUALITY TRAP: HOW RELIANCE ON TRADITIONAL CIVIL RIGHTS CONCEPTS HAS RENDERED TITLE I OF THE ADA INEFFECTIVE

James Leonard

"Every silver lining's got a touch of grey."¹

Anyone who has taught disability law for nearly fifteen years and studied it for longer, as I have, knows that people with disabilities often live on the margins of American society. Congress's finding in the Americans with Disabilities Act (ADA or the "Act") that "society has tended to isolate and segregate individuals with disabilities"² was not a rhetorical flourish. A humane society does not keep its constituents at arm's length. When the ADA was enacted in 1990, I thought that it was a silver lining emerging from a dark history of marginalization. I was moved by the promise that Title I of the ADA would open up the workplace to persons with disabilities. In the intervening years, the silver tones of optimism have turned grey and sometimes black. Employment levels for persons with disabilities appear to have declined since Title I came into effect. The primary reason for this

¹ Professor of Law, The University of Alabama School of Law. I would like to extend my thanks to Dean Kenneth C. Randall and The University of Alabama School of Law Foundation for their support of this research through a generous grant. Penny Gibson of the Bounds Law Library was effective as usual in obtaining several items via interlibrary loan. Peggy McIntosh, as always, provided first-rate assistance with preparing the manuscript. And, heartfelt thanks to my wife, Professor Joanne C. Brant of Ohio Northern University’s Pettit College of Law, for her critical reading of the text with the eye of a Title VII expert. All mistakes remain my own.


¹ GRATEFUL DEAD, Touch of Grey, on IN THE DARK (Arista Records 1987).
failure, I have now concluded, is that it was a mistake to base disability policy in the workplace on traditional civil rights principles.

I. INTRODUCTION

People with disabilities, like any other group within American society, seek and value equality. Such ambitions are hardly surprising. Equality is an axiom of modern American law. The Supreme Court has consistently viewed the Equal Protection Clause as a directive that state actors treat similarly situated persons alike.\(^3\) Congress, in turn, has extended the equality principle to broad swaths of society with such enactments as the Civil Rights Act of 1964\(^4\) and the Age Discrimination in Employment Act.\(^5\) To some, however, the notion of equality signifies more than a careful weighing of situations by the courts to judge comparability. According to this enhanced egalitarian view, practical consequences should flow from the achievement of equality. An equal should be a full participant in society, able to enjoy the full benefits of the American experience and to take up the corresponding—and ennobling—responsibility of complying with a citizen's obligations. She should not feel marginalized, ignored, or excluded.

Concerns over exclusion are particularly acute in the area of employment, the subject of this Article. In contemporary America, getting and keeping a decent job is the key to leading a self-sufficient life endowed with the qualities of dignity, independence, and personal autonomy. Legislation, such as Title II of the ADA,\(^6\) may well prove to be successful in forcing state and local governments to treat constituents with disabilities on an evenhanded or inclusive basis. Title III of the Act\(^7\) may do the same for the public accommodations that we all depend upon in daily life, such as schools, grocery stores, and doctors' offices. Without the prospect of employment, however, an individual faces a life of dependence and may never experience the sense of inclusive equality that other members of society take for granted.

\(^3\) See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982))).


\(^7\) Id. §§ 12181-12189.
Enactment of the ADA, Title I of which governs employment, was a watershed event in the attempt to extend principles of equality to persons with disabilities. The Act was the culmination of a political and social movement towards regarding disability status as a civil rights issue that should be addressed through antidiscrimination rules. As late as the mid-twentieth century, the prevailing approach was the so-called medical model. Disabilities were regarded as a medical condition either to be cured or ameliorated by charity and government welfare programs providing rehabilitation, cash transfers, or medical services. Other regulations, such as those effectuating section 504 of the Rehabilitation Act, created an antidiscrimination mandate in a wide range of activities, such as employment and public services. Those rules, however, only applied to recipients of federal funds and, along with section 501 of the Rehabilitation Act, to federal agencies. Generally speaking, the ADA took the section 504 antidiscrimination scheme and applied it to American society as a whole, regardless of federal funding.

Rejection of the medical/welfare model of disability policy by persons with disabilities was understandable and in many ways commendable. A public policy that views individuals with disabilities as permanently "sick," however well intentioned, runs the risk of dispiriting and dehumanizing its would-be beneficiaries. Disability advocates have complained sharply about the paternalistic attitudes of caseworkers and about the culture of dependence caused by reliance

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11 Id. § 791.

12 See, e.g., Laura Rothstein, Disability Law and Higher Education: A Road Map For Where We’ve Been And Where We May Be Heading, 63 MD. L. REV. 122, 133 (2004) ("The primary goal of the ADA was to extend the protections of section 504 to a much broader segment of society.").

on welfare programs.\textsuperscript{14} Perhaps the most striking complaint was that welfare-based systems deprive recipients of the full rights of citizenship by excusing them from performing certain social obligations, such as work.\textsuperscript{15}

No doubt resentful of the medical view of disability, theorists within the disability rights movement have attempted to recast disability as a social phenomenon. Under the "social model" of disability, impairments arise from the interaction between a person and her environment.\textsuperscript{16} Individuals with disabilities experience impediments to success because society has erected barriers to their participation in society. Such barriers take many forms, such as physically inaccessible buildings, inadequate transportation, or failures to communicate in a particular media, such as Braille. The social model treats the lack of accommodations for persons with disabilities as a form of social negligence caused by a failure to appreciate their particular needs. For example, a decision to construct a multistory building with stairs but no elevator or ramps reflects an assumption either that all building users are able to use the stairs or that the presence of others is undesirable.\textsuperscript{17} In either case, the building owner's decisions caused arguably avoidable disabling effects.\textsuperscript{18}

To a great extent, the ADA embodies the social model of disability. The Findings and Purposes section of the ADA treats disability discrimination as an attitudinal failure by society. Section 2 of the Act attributes discrimination to

outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.\textsuperscript{19}

This is the language of social neglect. Aside from a single, initial reference to intentional discrimination, the section describes how society has failed to take into account the needs of persons with disabili-
ties. The lack of any reference to the inherent limitations of impairments strengthens the impression that Congress viewed disability as an artifact of attitude.

To combat what it viewed as artificial and needless exclusions from society, Congress took an "integrationist" approach to disabilities in the ADA. For example, section 2(8) of the Act states that disability policy should "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." Put simply, Congress wished to move beyond the traditional civil rights laws' focus on evenhanded treatment; instead, the ADA imposed obligations on covered entities—such as employers—to alter their environments in favor of those with disabilities. These obligations, embodied in Title I's reasonable accommodations mandate, would prevent archaic and unjustifiable attitudes from denying persons with disabilities their proper place in society. The resulting concept of equality is one in which the national government intervenes to eliminate unreasonable conduct (that is, unjustifiable decisions caused by social neglect) towards individuals with disabilities and thereby promotes their participation in society's institutions.

Congress's motives were not purely altruistic. The ADA's Framers believed that moving individuals with disabilities from welfare to work would reduce public expenditures. The National Council on 2005]

20 "Integrationist" is, I acknowledge, a loaded term. For many scholars in the field, it refers to the Act's overarching goal of ending segregation of person with disabilities. See, e.g., Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 TEMP. L. REV. 393, 397 (1991) (arguing that it was Congress's intent that the ADA promote integration); Ann Hubbard, The Major Life Activity of Belonging, 39 WAKE FOREST L. REV. 217, 254-64 (2004) (arguing that participation in society is a major life activity); Jacobsen tenBroek, The Right To Live in the World: The Disabled in the Law of Torts, 54 CAL. L. REV. 841, 843 (1966) (contending that integration should be the goal of disability policy). An emphasis on integration certainly comports with a basic tenet of civil rights law that segregation is inherently harmful. See, e.g., Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (racial segregation is inherently harmful); Olmstead v. L.C., 527 U.S. 581, 600 (1999) (unjustified isolation in institutions is a form of discrimination). See generally Cynthia L. Estlund, Working Together: The Workplace, Civil Society, and the Law, 89 GEO. L.J. 1 (2000) (arguing that integration is a foundational goal of civil rights generally). The disability rights community, however, is no more monolithic than any other social movement. Scholars have suggested alternate purposes for the ADA, such as gaining the power to make one's own decisions free from paternalistic restrictions, for example, Samuel R. Bagenstos, The Americans with Disabilities Act as Welfare Reform, 44 WM. & MARY L. REV. 921, 1010-12 (2003) [hereinafter Bagenstos, Welfare Reform]; relief from stigma arising from an historically excluded status, for example, Samuel R. Bagenstos, Subordination, Stigma, and "Disability," 86 VA. L. REV. 397, 436-45 (2000) [hereinafter Bagenstos, Subordination]; and creation of positive self-images among persons with disabilities seeking employment, see DAVID M. ENDEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003).


22 See generally Bagenstos, Welfare Reform, supra note 20, at 953-74 (analyzing the ADA as a welfare reform measure).
the Handicapped's influential 1986 report, *Toward Independence*, noted that federal disability-related programs were costing more than $60 billion. It suggested that a comprehensive civil rights law that lowered structural and attitudinal employment barriers would reduce these costs. The cost savings theme is reiterated throughout the legislative history of the ADA.

Reactions to the passage of the ADA were jubilant. Sensing that a critical step was taking place in the evolution of civil rights and society generally, proponents were quick to describe the ADA through historical allusions. At the signing ceremony, President George H. Bush said: "As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world." Individual legislators also voiced optimistic sentiments. As in most political moments, there were invocations of the American Dream, but also more pointed predictions that the ADA would establish dignity, independence, and inclusion in American society.

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27 See, e.g., S. Rep. No. 101-116, at 20 (1989) (stating that the ADA demonstrates that America is dedicated to equality, which is the full measure of the American dream); id. at 96 (additional views of Sen. Hatch) (stating that persons with disabilities should have an "equal opportunity to participate in the American dream"); 136 Cong. Rec. 12, 17365 (1990) (statement of Sen. McCain) ("The ADA is an important step in making the American dream available to all."); 135 Cong. Rec. 14, 19800 (1989) (statement of Sen. Harkin) ("The American dream is the dream of opportunity for all. . . . When we free the talents and the abilities of millions of Americans with disabilities, we all win."). See generally Ann Hubbard, *Meaningful Lives and Major Life Activities*, 55 Ala. L. Rev. 997, 1041 n.274 (2004) (citing additional references to the American Dream in the legislative history of the ADA).

28 See, e.g., 136 Cong. Rec. 12, 17370 (1990) (statement of Sen. Harkin) (stating that the purpose of the ADA is to treat people "fairly and decently"); id. at 17033 (statement of Sen. Hatch) (noting that the ADA will provide individuals with disabilities "the fundamental rights to equal opportunity"); id. at 17031 (statement of Sen. Durenberger) (stating that the ADA recognizes that people with disabilities deserve to be treated with dignity and respect). See generally Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabili-
Judging from the nearly unanimous votes in the House and Senate, few legislators seemed to entertain doubts that the ADA would bring millions of disabled citizens into the mainstream of American society. When the cheering stopped, it was clear that Title I of the ADA had failed to open up the labor market to persons with disabilities. Although there is some dispute over the causes, everyone now agrees that the ADA has made no headway in increasing employment levels among persons with disabilities. Statistics documenting the decline in employment are well cataloged elsewhere, so I will limit myself here to a typical example. The most recent snapshot of the employment status of individuals with disabilities is the 2004 National Organization on Disability/Harris Survey of Americans with Disabilities. It indicates an overall employment rate of 35 percent for individuals with disabilities compared to 78 percent for those without disabilities. This is a lenient measure, since the survey includes both full- and part-time employment statistics. There is some variation according to severity of disability. Persons reporting "slight or moderate disabilities" had a 54 percent employment rate compared with only a 21 percent rate for those with "very or somewhat severe disabilities." Notably, the Harris Poll reflected little change in the employment prospects of persons with disabilities over time. Although the 35 percent figure represented an increase from prior surveys in 2000 (32 percent) and 1998 (29 percent), there is little movement from the 34 percent rate in the original 1986 survey.

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29 The ADA passed the House of Representatives by a vote of 355-58, 136 CONG. REC. 12, 17280 (1990), and the Senate by 91-6, id. at 17376.
30 Samuel R. Bagenstos, Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?, 25 BERKELEY J. EMP. & LAB. L. 527, 528 (2004) [hereinafter Bagenstos, Has the ADA Reduced Employment?] ("[N]o knowledgeable observer disputes [that] the ADA has failed significantly to improve the employment position of people with disabilities.").
32 Id.
So what happened? As I discuss in Part III.C of this Article, employer desires to avoid accommodation costs under Title I are the best immediate explanation for the decline in employment among persons with disabilities. The ultimate cause lies in the means provided by Title I for enforcement. Title I has been rendered ineffective because of reliance on traditional civil rights mechanisms. My thesis is that the integrationist goals of Title I are so different from those of traditional civil rights statutes that it was a mistake to use the latter's concepts and mechanisms in the disability setting. To put the matter glibly, Title I has fallen into the equality trap.

The paradigmatic civil rights statute, Title VII of the Civil Rights Act, rests on the assumption that immutable characteristics such as race, gender, or national origin are irrelevant to valid workplace decisions; consideration of such traits is therefore irrational, whether or not tainted with hostile attitudes. With regard to the inalterable traits addressed by Title VII, we are all equal in the sense that membership in a particular group, ideally, should bear no adverse consequences. Disparate treatment claims under Title VII seek to secure our equality interest in being free from racial or gender biases or stereotypes by promoting even-handed treatment. Disparate impact claims, which attempt to eliminate neutral workplace practices with an unjustifiably greater impact on protected classes, are a partial exception to Title VII's view that immutable traits are irrelevant.

The ADA's great innovation is the adoption of an active, integrationist plan in a civil rights context. By traditional standards it is hardly a theory of equality at all. While Title I of the ADA forbids consideration of irrelevant disabilities, its principal tool is the reasonable accommodation requirement. The command that employers alter working environments in favor of persons with disabilities, recognizes that the defining characteristic of the protected class is relevant to the statutory goals. Beneficiaries of the statute can be deemed equal only in an arcane sense, as proposed by the social model of disability, that their exclusion from society has been caused artificially by third-party attitudes. To be effective, moreover, the

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35 See infra Part II.A.1.a (discussing irrelevance of defining traits in traditional civil rights theories).
36 See infra Part II.A (discussing disparate treatment claims).
37 See infra Part II.B (discussing disparate impact claims).
38 See infra Part II.A.2 (discussing disparate treatment claims under Title I).
39 See infra Part ILC (discussing the reasonable accommodation mandate under Title I).
40 See, e.g., Anita Silvers, Reconciling Equality to Difference: Caring (F)or [sic] Justice for People with Disabilities, HYPATIA, Winter 1995, at 48 (arguing that society would be different if persons with disabilities were the dominant group and, accordingly, disability is a conse-
accommodation mandate must abandon the traditional focus on improper group-directed intentions and concentrate instead on the objective reasonableness of the employer's conduct in denying an individualized benefit to a particular worker. In my view, carryover provisions from the Title VII model that focus on the employer's state of mind interfere significantly with Title I's ability to meet its integrationist goals.

I elaborate this thesis as follows. Part II of this Article analyzes the three concepts of equality found in Title I of the ADA. Two of these concepts, disparate treatment and disparate impact, are borrowed directly from the Civil Rights Act's Title VII. The former forbids personnel actions that are based on active consideration of disability when the disability is irrelevant to job performance. Similar to Title VII, disparate impact under Title I of the ADA prohibits work rules and qualification standards having an exclusionary effect on persons with disabilities that cannot be justified on legitimate business grounds. The accommodations mandate completes the equality trilogy but bears little—if any—relationship to the Title VII rule structure. Title I requires that employers make "reasonable accommodations," that is, alterations of work rules or conditions, in favor of individual workers that permit them to perform their jobs. Given the ADA's focus on achieving integration through positive workplace outcomes, its desire to alter indifferent attitudes towards persons with disabilities, and the fact that manifestations of disability vary among individuals, it is difficult to see how the Act could achieve its integrationist goals without an accommodations rule. Workplace adjustments, nevertheless, are conceptually distinct from both disparate treatment and impact rules since they require individualized redistributions of employer resources or privilege based on status.

In Part III of this Article, I address the question of compatibility of concepts. An optimist would argue that the accommodations mandate serves a supplementary function, creating enhanced opportunities for workers with disabilities when traditional disparate treatment and impact analysis fail to make a difference. I do not share this view. Rather, I perceive that certain fundamental assumptions of the dispa-
rate treatment model are so deeply embedded in the structure of the ADA that they interfere with the integrationist agenda represented by the accommodations mandate. Specifically, that the Act’s definition of disability (Part III.A) and its procedural approach to hiring decisions (Part III.B) give controlling influence to the disparate treatment model’s view that defining traits are irrelevant and should be filtered out of the personnel process. The ironic effect is to exclude persons from the workplace who might benefit from accommodations once hired. Similarly, I argue in Part III.C that an overly idealistic and moralistic view of accommodation costs has left Title I without an effective mechanism to gauge the consequences of costs of employment. I offer concluding remarks in Part IV.

II. MODELS OF EQUALITY WITHIN TITLE I

To say that the ADA is a civil rights statute may seem a waste of breath. Civil rights terminology pervades the statute. The “Findings and Purposes” section of the Act42 invokes Justice Stone’s famous footnote in United States v. Carolene Products. Co.43 by identifying persons with disabilities as a “discrete and insular minority.”44 It refers to the historical tendency to “segregate”45 such persons and uses the term “discrimination” or a variant eleven times. Employment provisions in Title I similarly forbid “discrimination” on the basis of disability46 and adopt the enforcement mechanisms of Title VII of the Civil Rights Act of 1964.47 The latter forbids discrimination on the basis of “race, color, religion, sex, or national origin.”48 Both the text of the ADA49 and its legislative history50 indicate that Congress

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42 Id. § 12101(a)-(b).
43 304 U.S. 144, 152 n.4 (1938) (positing that heightened scrutiny may apply in equal protection claims when classifications affect discrete and insular minorities).
45 Id. § 12101(a)(2).
46 Id. § 12112 (“No [employer] shall discriminate against a qualified individual with a disability . . . .”).
47 Id. § 12117(a).
48 Id. § 2000e-2(a)(1).
49 See, e.g., id. § 12101(a)(4) (“[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.”).
50 See, e.g., 136 CONG. REC. 12, 17366 (1990) (statement of Sen. Harkin) (“History is going to show that in 1990, 26 years after the Civil Rights Act of 1964, 43 million Americans with disabilities, gained freedom, dignity and opportunity—their civil rights.”); id. at 17371 (statement of Sen. Simon) (stating that the ADA represents a “declaration of independence” for the citizens with disabilities of this Nation”); id. at 17370 (statement of Sen. Metzenbaum) (stating that the ADA guarantees that “the great civil rights advances of this century no longer exclude Americans with disabilities.”). See generally Craig S. Lerner, “Accommodations” for
viewed disability discrimination as the moral equivalent of discrimination against groups traditionally protected by the civil rights laws, such as Title VII.

As suggested in the Introduction, Title I embodies an integrationist approach inspired by the social model of disability. Yet its vocabulary, structure, and provisions also reflect the traditional approaches to equality embodied by Title VII. Once we pass through the optimistic and uplifting language of the Act’s preamble, we quickly discover that Title I amounts to three different statutes. For some applications, Title I follows the “disparate treatment” model of Title VII. Disparate treatment assumes that discrimination is the product of the majority’s unjustified attitude towards a minority group.\textsuperscript{51} In the employment context, the disparate treatment model posits that race, gender, and other immutable characteristics are irrelevant to proper decisions in the workplace and elsewhere.\textsuperscript{52} Achieving equality, consequently, is a matter of designing systems that detect unjustified reliance of forbidden criteria and offer corrective remedies in individual cases.

A second, distinct approach within Title I centers on the effects of workplace policies rather than the attitudinal failings of employers. “Disparate impact” analysis (sometime referred to as “adverse impact”) was also imported from Title VII\textsuperscript{53} and seeks to disallow employer practices that have the effect, intent notwithstanding, of depriving members of protected classes of employment or benefits.\textsuperscript{54} Employers are required to demonstrate “business necessity” for work rules and standards with an exclusionary effect. Disparate impact rules are a modest form of affirmative action by which work rules are subject to change in favor of certain classes of workers. Unlike disparate treatment, which is oriented towards protecting individuals from unacceptable employer attitudes, the disparate impact model views equality as a matter of removing innocent structural barriers to group participation in the workplace.

Finally, Title I contains provisions requiring that employers provide accommodations to individual workers that permit them to perform their essential job functions.\textsuperscript{55} Other than a now toothless

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\textsuperscript{51} See discussion infra Part II.A.

\textsuperscript{52} See discussion infra Part II.A.1.a.

\textsuperscript{53} See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation”).

\textsuperscript{54} See discussion infra Part II.B.

\textsuperscript{55} 42 U.S.C. § 12112(b)(5)(A)-(B) (2000); see discussion infra Part II.C.
requirement that employers accommodate their workers' religious practices,\textsuperscript{56} the reasonable accommodation mandate has no antecedents in Title VII or any other civil rights laws. Title VII's disparate treatment model reflects an "antidifferentiation principle," that is, a philosophy that employers should not be permitted to draw distinctions based on immutable characteristics.\textsuperscript{57} Disparate impact strays somewhat from antidifferentiation principles by considering racial and other identities when judging whether an innocent practice has an exclusionary effect.\textsuperscript{58} The burdens on employers, however, are relatively modest. They may defend by showing business necessity and at worst must devise new, uniform rules or policies with no or less tendency to exclude.

Title I's reasonable accommodation mandate, however, takes the process several strides forward. The law confers a right to individual benefits under certain circumstances based on the employee's status. In other words, the accommodation requirement reverses the original presumption that an immutable characteristic is irrelevant to the employment relationship. Equality of opportunity (and, in some cases, of result) replaces antidifferentiation as the guiding light. Accommodation rules are the lynchpin of Title I's integrationist agenda. They give effect to the social model's concept of equality by removing subtle attitudinal barriers toward the participation of workers with disabilities in the job market.

In this Part, I will elaborate on the three models of equality found in Title I. Viewed in isolation, the three components of Title I seem to work tolerably well. Mechanisms borrowed from Title VII have placed employers under a significant burden of justification when a plaintiff's disability is genuinely irrelevant to job performance or when work rules have an exclusionary effect. Accommodation requirements likewise seem to give workers with disabilities an advantage in competing for and holding jobs. But nothing occurs in isolation. The use of competing models of equality in the Act has deprived Title I of cohesion and consequently interfered with its overarching goal of improving the employment prospects of persons with disabilities. I will hold that criticism, however, until Part III.


\textsuperscript{58} See id. at 1019-20 ("The statutory method of proof . . . does not require proof of individualized motivation and permits consideration of the group-based effects of an action.").
A. Disparate Treatment

1. In General

Disparate treatment analysis is grounded on the view that reliance on immutable characteristics, such as race and gender, is inappropriate. This idea has three substrata that emerge from the Title VII cases. First, decisions based on immutable traits are normally irrelevant to proper decision making in the work place. Second, judging individuals by race or other group traits is unfair since it prevents individuals from being judged on their own merit. This concept of discrimination, moreover, is not limited to outright hostility but also forbids more benign behaviors, such as reliance on stereotypes. Third, the civil rights model works against the stigmatic effects of discrimination. Thus, the disparate treatment model also forbids actions by employers and others that communicate a lesser sense of worth to persons in protected classifications, even if doing so is economically rational.

a. Irrelevance of Defining Characteristics

A conclusion that race is an irrelevant employment criterion seems obvious and requires limited commentary. Aside from cases of nepotism, patronage, and other forms of favoritism, success at work is a matter of bringing qualities, such as skill, personality, education, or diligence, to bear on a task. Race normally has nothing to do with the ability of an individual to perform a job. Title VII takes for granted that immutable characteristics are irrelevant in the labor market.\(^59\) Chief Justice Burger stated in the early *Griggs v. Duke Power Co.*\(^60\) decision that Congress intended that Title VII would focus employers' attention on actual job classifications "so that race, religion, nationality, and sex become irrelevant."\(^61\) Two decades later, in *Price Waterhouse v. Hopkins*,\(^62\) Justice Brennan extended this philosophy to gender discrimination by arguing that Title VII's rule against discrimination "because of . . . sex"\(^63\) indicates that "gender must be


\(^{60}\) 401 U.S. 424 (1971).

\(^{61}\) Id. at 436; see also L.A. Dep't of Water and Power v. Manhart, 435 U.S. 702, 708 (1978) (holding that Title VII intended to make race irrelevant). There is more than a little irony in the fact that *Griggs* was a disparate impact case in which the racial identity of the plaintiffs was critical. See infra Part II.B (discussing *Griggs* and disparate impact theory).

\(^{62}\) 490 U.S. 228 (1989).

irrelevant to employment decisions." Both opinions are consistent with commentary on constitutional Equal Protection Clause decisions that race and gender rarely offer a justification for differential treatment by state actors.

Title VII's single acknowledgment that immutable characteristics may be relevant is narrow. The BFOQ (bona fide occupational qualification) defense permits employment decisions based on gender and national origin where "reasonably necessary to the normal operation of that particular business or enterprise." Race is noticeably absent from the BFOQ defense, creating the impression that race can never be a proper basis for personnel decisions. Even for gender classifications, the BFOQ has been applied conservatively. Defendants must show that eliminating the proposed criteria threatens the viability of the employer's operations or destroys the "essence of the business operation." Few exclusions meet this test.

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64 Price Waterhouse, 490 U.S. at 240.
65 See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("[W]hen a statute classifies by race, alienage, or national origin [such] factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . ."); Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("Because the Fourteenth Amendment 'protect[s] persons, not groups,' all 'governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry . . . .'") (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).
66 See, e.g., Cleburne, 473 U.S. at 440-41 ("[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."); United States v. Virginia, 518 U.S. 515, 533 (1996) (noting that inherent differences between men and women should not be used to impose "artificial constraints" on an individual opportunity).
68 42 U.S.C. § 2000e-2(e)(1). Title VII also creates a BFOQ defense for religious employment criteria. Id. Religion is the one mutable trait covered by Title VII and as such does not fit well within the civil rights model's focus on immutable characteristics. See, e.g., Garcia v. Gloor, 618 F.2d 264, 269 n.6 (5th Cir. 1980) (noting that Title VII does not protect mutable characteristics except religion). I have argued elsewhere that it is more sensible to assign Title VII's rule against religious discrimination to a First Amendment paradigm rather than an equal rights model. See James Leonard, Bilingualism and Equality: Title VII Claims for Language Discrimination in the Workplace, 38 U. MICH. J.L. REFORM 57, 95-97 (2004) [hereinafter Leonard, Bilingualism].
69 See generally Leonard, Bilingualism, supra note 68, at 88 ("The defense is conspicuously not available in cases of race discrimination . . . .").
71 Dothard, 433 U.S. at 333 (quoting Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971)).
b. Rejection of Stereotyping

Employment decisions based on stereotypes may be more benign than those based on direct animosity. It seems less reprehensible to deny women jobs because of misplaced concerns for safety or the female role rather than raw misogyny. The harm done by stereotyping is nonetheless significant. Stereotypes based on immutable characteristics substitute group-based judgments for individual assessments of merit. They are particularly unfair since the immutability of the defining characteristic leaves individuals unable to escape a class-wide attribution. *Price Waterhouse v. Hopkins*\(^7\) provides the civil rights model's archetypal rejection of stereotyping under Title VII. Ann Hopkins had been passed over for partnership at a prestigious accounting firm, in part, because certain partners regarded her supposedly abrasive personality and behaviors as too masculine.\(^7\) Justice Brennan's opinion rejected gender stereotyping as unfair since "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."\(^7\) Title VII's disapproval of stereotyping comports with the longstanding rejection of stereotyping in the Court's equal protection decisions.\(^7\)

c. Protection of Dignitary Interests

Finally, there is the difficult situation when employers or others rely on immutable characteristics without personal animus. The term "rational discrimination"\(^7\) is sometimes used to describe this phenomenon. According to this concept, managers may be motivated to draw distinctions on the basis of group membership to maximize profits or minimize costs. A homogeneous workforce, for example,

\(^{72}\) 490 U.S. 228 (1989); see also L.A. Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 (1978) (holding that employment decisions may not reflect stereotyped impressions about the characteristics of males or females).

\(^{73}\) *Price Waterhouse*, 490 U.S. at 235.

\(^{74}\) *Id.* at 251.


may simplify internal governance of a firm.\textsuperscript{77} Search costs for hiring decisions may be so high that reliance on proxies becomes economically sensible.\textsuperscript{78} The trade-off for such rational behavior is the risk that persons in protected categories may feel degraded by the use of explicit or even de facto categories. The civil rights model views the trade-off as unacceptable.

In a classic article from the early seventies, Professor Paul Brest argued that the harm of bias often lies in the communication of a message of “differential worth.”\textsuperscript{79} He noted that it would not be strictly irrational to disfavor workers from one racial group if they collectively showed a greater tendency for absenteeism; the Japanese internments during World War II, he further argued, had some justification as a way of preventing sabotage.\textsuperscript{80} We can update these examples by noting that scrutiny of travelers from Middle Eastern countries at international airports bears some relationship—however imprecise—to the goal of preventing terrorist attacks. Even if the previous examples are deemed rational, however, we have to concede that such decisions may have the effect of stigmatizing members of certain classes.\textsuperscript{81}

Brest’s concerns for the stigmatizing effects of differential treatment had already been acknowledged in the Court’s development of equal protection principles. In \textit{West Virginia v. Strauder},\textsuperscript{82} decided in 1880, the Court struck down a state law excluding African-Americans from jury service. Justice Strong’s opinion emphasized that the Equal Protection Clause was intended to confer an “exemption from legal discriminations, implying inferiority in civil society.”\textsuperscript{83} Chief Justice Warren’s opinion in \textit{Brown v. Board of Education}\textsuperscript{84} carried this theme forward into what may have been the Court’s most important decision of the twentieth century. Regarding school segregation, he said, “To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to

\textsuperscript{77} Id. at 60-69; see also Kenneth J. Arrow, The Theory of Discrimination, in \textit{Discrimination in Labor Markets} 3, 24 (Orley Ashenfelter & Albert Rees eds., 1973) (arguing that race and sex are “cheap sources of information” for distinguishing groups of workers).

\textsuperscript{78} See, e.g., Epstein, supra note 76, at 70-71 (describing practice of hiring unskilled laborers though Hispanic organizations because of cheaper costs and reliable workers).


\textsuperscript{80} Brest, supra note 79, at 7.

\textsuperscript{81} See id. at 8 (discussing the “harms which may result from race-dependent decisions”).

\textsuperscript{82} 100 U.S. 303 (1880).

\textsuperscript{83} Id. at 308.

\textsuperscript{84} 347 U.S. 483 (1954).
their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Justice White’s opinion in the more recent decision in *City of Cleburne v. Cleburne Living Center* took for granted that the classification by immutable traits conveys a message that "those in the burdened class are not as worthy or deserving as others."

Title VII, as construed by the courts, likewise seeks to defend persons in protected classes from stigmatizing messages of inferiority. The principal manifestation of this goal is Title VII’s refusal to recognize a business necessity defense to facial classifications based on immutable traits. Employers, for example, may be tempted to erect differential compensation systems for various categories of workers motivated solely by cost concerns and without a trace of actual bias. In *City of Los Angeles Department of Water and Power v. Manhart*, an employer had set up an actuarially reasonable pension system under which female employers made higher contributions because of greater average longevity. The Court rejected the employer’s argument that cost differences in providing benefits for men and women removed the practice from the ambit of gender discrimination. In *UAW v. Johnson Controls*, the Court reiterated its unwillingness to create a cost defense to Title VII by holding that the possibility of increased tort liability for exposure to lead did not justify the exclusion of women of fertile age from employment. Employers are certainly barred from disfavoring members of certain groups even though it might be more cost effective to cater to the prejudicial tastes of coworkers or customers. The practice of disallowing rational discrimination has its detractors, but the Civil Rights Act of 1991 re-

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85 Id. at 494.
87 Id. at 440.
89 Id. at 704.
90 Id. at 712-17.
93 See, e.g., EPSTEIN, supra note 76, at 59-78 (arguing for rational discrimination in employment); cf. Mark Kelman, Market Discrimination and Groups, 53 STAN. L. REV. 833 (2001) [hereinafter Kelman, Market Discrimination] (arguing that antidiscrimination principles should coincide with capitalist-rational behavior but criticizing accommodations as inefficient).
solved any question about the lack of a business necessity defense for intentional discrimination under Title VII.

\[94\] See 42 U.S.C. § 2000e-2(k)(2) (2000) ("A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under [Title VII]."); cf. EPSTEIN, supra note 76, at 181 (arguing that Congress would have accepted costs imposed by Title VII even if they were made explicit in legislative debates).

\[95\] 499 U.S. at 199 ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."); see also L.A. Dep't of Water and Power v. Manhart, 435 U.S. 702, 708 (1978) (holding that even true generalizations about a class of persons cannot justify discrimination).

\[96\] 42 U.S.C. § 2000e-2(m) (2000). Employers may raise the limited affirmative defense in a mixed motive case that they would have reached the same result in the absence of the impermissible motivating factor. Id. § 2000e-5(g)(2)(B). The defense does not absolve the defendant of liability, but restricts available remedies to declaratory relief, certain types of injunctive relief, attorney's fees, and costs. Id.

\[97\] Cf. 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 10-11 (3d ed. 1996) (arguing that the central issue in a Title VII case is the employer's motivation).

\[d. Enforcement\]

Enforcing a disparate treatment claim is a matter of demonstrating that the defendant was motivated by the plaintiff's defining characteristic. Title VII is triggered whenever an employer acts "because of" such immutable traits as race or gender. Given the breadth of attitudes targeted by Title VII's disparate treatment provisions, ranging from outright hatred to rational discrimination, it would be counterproductive to require evidence of a specific state of mind on the part of the employer. Justice Blackmun's opinion in Johnson Controls explicitly dispensed with any requirement that employers act with a malevolent motive or any particular state of mind. Title VII furthermore recognizes liability in mixed motive cases as well, that is, when "the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." This ample interpretation of forbidden conduct gives Title VII enough flex to police the employment process for defective criteria and to screen out perfectly rational categorizations that carry implicit messages of lesser worth.

Even though motivation may be easier to demonstrate than a specific form of discriminatory intent, proving that a defendant acted "because of" the plaintiff's status will often be difficult. Plaintiffs may of course offer direct evidence of discriminatory intentions. Sometimes an employer will use racial slurs or make other statements...
that indicate that a forbidden consideration has affected a personnel decision. Employers will occasionally adopt a workplace policy that explicitly treats members of protected groups differently. These situations, however, are rare. Well-counseled managers are polite and smart enough not to use language or to leave records that indicate bias or reliance on prohibited factors. Disparate treatment analysis therefore permits plaintiffs to skirt the lack of direct evidence by raising an inference of discrimination when workers of apparently equal qualifications or status are treated differently.

Inferences of discriminatory intent under Title VII are established through the well-known McDonnell Douglas framework. McDonnell Douglas establishes a prima facie case of discrimination when the plaintiff offers evidence that he or she had similar qualifications to others in the workplace but was treated differently. The test is context sensitive. In a failure-to-hire case, for example, the plaintiff might allege that: (1) he belonged to a protected class of persons (for example, a racial group); (2) he had the qualifications for the sought-after job; (3) he was denied employment; but (4) the position remained open and the employer continued to seek applicants. A plaintiff might establish a prima facie case of discriminatory discharge by alleging that: (1) she was a member of a protected class; (2) she was qualified for the job held; (3) she was discharged; and (4) the position remained open and was ultimately filled by a member outside of plaintiff’s group. In either case, employers must then articulate a legitimate, nondiscriminatory reason for their actions to avoid summary judgment. Once employers meet their burden of production, the prima facie case loses its significance as the issue of discrimination is submitted to trial where the plaintiff carries the ultimate burden of persuasion that discrimination has occurred.

Permitting plaintiffs to proceed by inference opens many claims that would die for lack of direct evidence. The McDonnell Douglas framework permits plaintiffs to raise inferences of discriminatory intent when workers of apparently equal qualifications or status are treated differently.
framework allows plaintiffs to dismiss the two most common nondiscriminatory reasons for employer behaviors, that is, insufficient employee qualifications for the job in question or lack of a job vacancy. Justice Powell, for example, opined that "the prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'" Stated somewhat differently, the prima facie case creates a simple behavioral model in which the presence of an immutable trait is the only variable available to explain the result. At this point, the employer's motivations become sufficiently suspect to require a justification that points to a legitimate variable.

Equally important, McDonnell Douglas operationalizes the assumptions of the disparate treatment model. The model posits that consideration of inalterable characteristics for nearly all purposes is either irrelevant or unfair to individuals. Once the circumstances of a personnel transaction suggest reliance on race, gender, and so forth, it is fair to assume that an employer's decision has been infected by extraneous factors or by stereotyped thoughts. To the extent that a defendant can offer a sensible, nondiscriminatory explanation for his or her actions, however, the likelihood of tainted motivations diminishes. To be sure, the defendant's articulation of a legitimate purpose does not end the inquiry; the plaintiff must respond with evidence that the defendant's explanation is a pretext for discrimination. Nevertheless, the suggestion of a legitimate purpose creates considerable doubt about the intrusion of irrelevancies and stereotypes into the workplace. Hence, we now impose on the plaintiff, as we do in the typical civil case, the burden of persuading a court that the employer's proffered explanations are a pretext or that discrimination has otherwise occurred.

Plaintiffs attempting to vindicate dignitary interests against employer policies that draw facial distinctions (rational or otherwise) on the basis of immutable traits face fewer evidentiary challenges. Here, McDonnell Douglas does not apply because there is no need to infer discriminatory intent. The policy itself provides direct evidence of discrimination. In Manhart, for example, there was no question that

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105 Burdine, 450 U.S. at 254.
106 Id. (quoting Fumco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).
108 See LINDEMANN & GROSSMAN, supra note 97, at 39-40 (noting that a plaintiff does not use the McDonnell Douglas framework when she produces direct evidence).
the employer's pension plan called for high premiums for female em-
ployees. Similarly, the work restrictions in Johnson Controls ap-
plied specifically to women of fertile age.

2. Disparate Treatment in Title I of the ADA

Title I includes a general disparate treatment rule, that is, a restric-
tion on the active consideration of disability status in personnel trans-
actions. Although section 102(a)'s broadly worded, general prohibi-
tion against discrimination "because of" disability implicitly in-
cludes disparate treatment, Congress elected to give more specific

guidance in section 102(b)(1). The latter provision prohibits "limiting,
segregating, or classifying a job applicant or employee in a way that
adversely affects [his or her] opportunities or status." The Equal
Employment Opportunity Commission (EEOC) takes a broad view
that section 102(b)(1) is intended to prevent employers from acting on
the basis of myths or stereotypes about the effects of disabilities in-
stead of making individualized assessments. The EEOC's commen-
tary to Title I regulations states that the rule is intended to forbid pa-
tronizing decisions based on "what is best for an individual with such
a disability" or within his or her presumed capabilities. In addi-

tion, the prohibition against discrimination based on a worker's

known association with an individual with a disability is best clas-
sified as a form of a disparate treatment rule, as are claims of a hostile

work environment.

There are unavoidable differences in the reach of disparate treat-
ment claims under the ADA and Title VII. Disability is sometimes a
relevant and proper point of decision in personnel matters since many
jobs have legitimate physical or mental requirements. We require that
surgical nurses be able to hear instructions from surgeons wearing
masks for a good reason. It is therefore impossible to extend,

112 See id. § 12101(a)(5) (stating congressional findings that persons with disabilities have
been subject to "outright intentional exclusion" as well as discrimination based on neglect and
indifference).
113 Id. § 12112(b)(1).
115 Id.
117 See Flowers v. S. Reg'l Physician Servs., 247 F.3d 229 (5th Cir. 2001) (recognizing
hostile environment claim under Title I); Fox v. Gen. Motors Corp., 247 F.3d 169 (4th Cir.
2001) (same).
118 See Se. Cmty. Coll. v. Davis, 442 U.S. 397, 403, 408 (1979) (recognizing that surgical
nurses must have the ability to hear spoken words).
wholesale, Title VII's assumption that race, gender, etc., are irrelevant to the treatment of disability under Title I. In contrast to Title VII's universal application (except in rare cases, everyone has a gender and at least one racial identification), the ADA limits the protections of Title I to the “qualified individual with a disability.”\(^\text{119}\) To meet this standard, a person must not only be disabled\(^\text{120}\) but must also be able to perform the essential job functions in question with or without a reasonable accommodation.\(^\text{121}\) While the restricted definition of a qualified individual with a disability is intended to protect employers from excessive accommodation costs and operational disruptions,\(^\text{122}\) it also serves to limit Title I's protections to persons whose abilities are roughly comparable to those of the general population.\(^\text{123}\) Thus, Title I confines itself to instances where accommodations are either unnecessary or not overly burdensome.

Genuine disparate treatment, that is, personnel decisions based on an occupationally irrelevant status, occurs only in those Title I cases where the plaintiff can perform job functions without any accommodations. Requests for accommodation inject the plausible possibility that an employer's actions are motivated by factors other than the identity of the worker, for example, costs. In nonaccommodation cases, however, the assumption that the defining characteristic is irrelevant does hold true. Such cases are rare but occasionally occur. \textit{Hoffman v. Caterpillar, Inc.}\(^\text{124}\) was tried, in part, on the theory that a woman who had been born without a lower left arm could nonetheless operate a scanning machine without an accommodation.\(^\text{125}\) A CPA who is paraplegic and has applied for a job in an accounting firm would also likely meet the “qualified individual with a disability” standard\(^\text{126}\) without any accommodations (assuming an accessible work site). In these situations, the disability is irrelevant to the ability to perform the job. Once an accommodation is requested, the assumption that disability status is irrelevant necessarily disappears.

Nonaccommodation cases under section 102(b)(1) theoretically should be governed by the rule in \textit{Johnson Controls.}\(^\text{127}\) (I am, how-

\(^{120}\) \textit{See infra} Part III.A (discussing definitional requirements of Title I).
\(^{121}\) \textit{See id.} (same).
\(^{122}\) \textit{See S. REP. No. 101-116, at 26 (1991)} (“By including the phrase ‘qualified individual with a disability,’ the Committee intends to reaffirm that this legislation does not undermine an employer’s ability to choose and maintain qualified workers.”).
\(^{123}\) \textit{See infra} Part III.A.
\(^{124}\) 256 F.3d 568 (7th Cir. 2001).
\(^{125}\) \textit{Id.} at 573-77.
\(^{126}\) 29 C.F.R. pt. 1630 app., at 368 (2004) (commentary to 29 C.F.R. § 1630.2(m)).
ever, unaware of any ADA case discussing the application of this case to Title I.) To the extent that a disability is irrelevant to a particular job, it would be unreasonable to require proof of a particular state of mind, such as animus, to establish discriminatory conduct. Any consideration of disability status in a nonaccommodation context injects a risk that stereotypes or other improper considerations have tainted an individual assessment. There is certainly no reason to expect that the range of improper motivations experienced under Title VII is less likely to occur under Title I.

Title I should be an effective mechanism for remedying genuine disparate impact cases. (I say "should" since most claims involve a request for an accommodation.) Although a plaintiff may luck out and discover direct evidence of discriminatory intent,\textsuperscript{128} it is more likely that she will need to use the \textit{McDonnell Douglas} test. The Supreme Court has not yet determined a formula for applying \textit{McDonnell Douglas} to ADA cases, and there is variation in the lower courts' formulae for establishing a prima facie case under Title I. Two examples should suffice to demonstrate the distinctions. The Sixth Circuit's decision in \textit{Monette v. Electronic Data Systems Corp.}\textsuperscript{129} phrases the test to require plaintiffs to demonstrate that: (1) they are disabled; (2) they otherwise qualified for the job with or without a reasonable accommodation; (3) they suffered an adverse employment decision; (4) the employer knew or had reason to know of the disability; and (5) the position remained open or the person with a disability was replaced.\textsuperscript{130} A simpler variant of the prima facie case is \textit{Gaul v. Lucent Technologies, Inc.},\textsuperscript{131} in which the Third Circuit held that a plaintiff must establish (1) a disability within the meaning of the ADA; (2) that he or she is "otherwise qualified to perform the essential functions of the job, with or without reasonable

\textsuperscript{128}Hoffman, 256 F.3d at 571 (stating the fact that the manager admitted that the training opportunity was denied because of plaintiff's disability).

\textsuperscript{129}90 F.3d 1173 (6th Cir. 1996).

\textsuperscript{130}Id. at 1185. One should note that the prima facie formula in \textit{Monette}, as well as the one prescribed in \textit{Gaul}, see infra note 131, is used for all Title I claims, including reasonable accommodation claims. A discussion of the wisdom of employing a "unified field theory" for Title I claims is beyond the scope of this essay. See generally Kevin W. Williams, Note, \textit{The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans with Disabilities Act}, 18 BERKELEY J. EMP. & LAB. L. 98 (1997) (discussing the difficulties in using \textit{McDonnell Douglas} test in the ADA context).

\textsuperscript{131}134 F.3d 576 (3d Cir. 1998).
accommodations"; and (3) an "adverse employment decision as a result of discrimination."\(^{132}\)

An in-depth discussion of prima facie proof of ADA employment claims is beyond the scope of this Article. The precise formulation of the test should, however, have little effect in genuine disparate treatment claims. Title I plaintiffs who can perform the functions of a job without accommodations occupy the same position as a race or gender claimant under Title VII. In either case, the defining characteristic is irrelevant while the occurrence of an adverse employment decision creates suspicion that an employer's awareness of such traits has contributed to the outcome.

Let us return to the example of the CPA with paraplegia. Assuming that she has not demanded accommodations, a decision to fire her may prompt suspicions that discrimination is involved. Once there is evidence that the employer has replaced her with a CPA who is not disabled or a non-CPA accountant (the permutations are probably infinite), our suspicions become sufficiently definite to require the employer to offer some justification. We should arrive at this inference, moreover, whether the formula calls for an adverse employment decision stemming from discrimination (the Third Circuit test) or more specifically for evidence that the job was filled by a person who was not disabled (the Sixth Circuit test). There is no guarantee that our plaintiff will prevail on the merits at trial: the employer's explanation may prove credible. The particular system of inferential proof used, however, should not impede a genuine disparate treatment claim.

Title I is reasonably well adapted to deal with instances of occupational segregation, broadly defined. The disparate treatment model's concern for employer practices that convey a message of inferiority through differential treatment is reflected by section 102(b)(1)'s rule against separate benefit systems or segregated working conditions. The EEOC's commentary to regulations implementing this section conveys particular concern over employer practices that remove persons with disabilities from the general workforce, either literally or through the offer of inferior benefits. While the EEOC contemplates that employers may impose restrictions on workers with disabilities if justified on a "case by case basis,"\(^{133}\) for example, out of safety concerns, it seems to regard segregation as inappropriate per se. The EEOC commentary points to separate job tracks, work locations, and

\(^{132}\) Id. at 580.

break facilities as examples of forbidden segregation. At least one court has ratified this approach, holding that requiring an employee with a mental illness to work alone and not speak with others contravenes section 102(b)(1).

The EEOC's hard-line position against separate work tracks or benefits finds justification in the ADA's text. Section 102(b)(1) conspicuously provides for no defenses. In contrast, defendants may raise an undue hardship to accommodation requests and a business necessity defense to disparate impact challenges to qualifications standards. The lack of a defense is all the more apparent when we note that the ADA's Title III antisegregation rule, governing public accommodations, permits covered entities to provide separate services if necessary to confer an equivalent benefit. The latter strongly implies that Congress did not wish to create any defenses to segregation claims under Title I. Thus, section 102(b)(1) should be read to embody the Manhart rule against differential compensation, benefits, or working conditions, even when it is economically rational to do so.

Proof of occupational segregation or differential benefits is quite simple. There is no need to fall back on the McDonnell Douglas scheme since physical separation or differential terms of a policy will supply direct evidence of discrimination. To take a rather blatant example, an employer who provides a separate break room for disabled employees would be in patent violation of section 102(b)(1). Assigning a worker with a mental illness to work alone and not speak to anyone else would likewise trigger the ban on segregation. In such cases, the plaintiff need only point to the existence of a policy to marshal direct evidence of discrimination.

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134 Id.
135 See, e.g., Duda v. Bd. of Educ., 133 F.3d 1054, 1059-60 (7th Cir. 1998); cf. Tyler v. Ispat Inland Inc., 245 F.3d 969, 973-94 (7th Cir. 2001) (holding that the claim for segregation failed for lack of proof).
137 Id. § 12112(6).
138 Id. § 12182(b)(1)(A)(iii) (prohibiting the provision of a separate benefit as discriminatory unless necessary to confer an equal benefit); cf. id. § 12182(b)(1)(A)(ii) (prohibiting provision of an unequal benefit as discriminatory).
139 See Bagenstos, Supreme Court, supra note 127, at 938 & n.119.
140 See 1 LINDEMANN & GROSSMAN, supra note 97, at 39-40.
142 Duda v. Bd. of Educ., 133 F.3d 1054, 1059-60 (7th Cir. 1998).
B. Disparate Impact Claims

1. In General

"Disparate impact," sometimes called "adverse impact," provides a second approach to the nondiscrimination mandate of Title VII. Unlike disparate treatment claims, disparate impact analysis has nothing to do with employer attitudes; rather, it is concerned with situations in which unequal results arise from the application of neutral policies. Disparate impact is, in sum, a rule against neutral workplace policies with disproportionately negative effects on a protected class that cannot be justified by business necessity.

Disparate impact claims originated in Griggs v. Duke Power Co. There, black employees challenged an employer's educational regulations that had the effect of denying them entry to the more desirable job classifications at a power plant. In the Court's view, however, the regulations lacked a relationship to job performance. Chief Justice Burger's opinion justified the creation of disparate impact liability in two key phrases: "[A]bssence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability" and "Congress directed [Title VII towards] the consequences of employment practices, not simply the motivation." Burger's conclusion was, to say the least, questionable. It is doubtful that Congress, in 1964, envisioned disparate impact claims for Title VII. The matter is now wholly academic since Congress codified disparate impact claims in the Civil Rights Act of 1991. The Court's recent opinion in

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143 I have argued elsewhere that disparate impact claims can be rationalized as a clumsy device for smoking out discriminatory intent. See Leonard, Bilingualism, supra note 68, at 95-97; see also George Rutherglen, Disparate Impact Under Title VII: An Objective Theory of Discrimination, 73 VA. L. REV. 1297, 1299 (1987) (arguing that disparate impact serves to prevent pretextual discrimination).
145 Id. at 427-28.
146 Id. at 433-36.
147 Id. at 432.
148 Id.
150 See supra note 143 and accompanying text; see also 1 LINDEMANN & GROSSMAN, supra note 97, at 85 (discussing codification of disparate impact rules).
Raytheon Co. v. Hernandez characterizes such claims as requiring no showing of a subjective intent to discriminate.

Disparate impact analysis takes a structural and group-oriented view of equality that is somewhat at odds with the disparate treatment model. The goal of the former theory is to remove barriers, even innocent ones, to promote the participation or advancement of protected classes of persons in the workplace. It is also fair to say that disparate impact is a form of affirmative action and not simply an antidiscrimination device. "Affirmative action" is a slippery term that, in its original sense, referred to preferential treatment intended to correct past discrimination. Here, I am using the term in the contemporary sense of an attempt to confer a benefit on a designated class regardless of an employer’s actions or attitudes. There is little doubt that disparate impact rules meet this criterion as the effect of a successful claim is to reorder the workplace to the benefit of the group to which the plaintiff belongs. At the postremedial stage, however, the results of successful disparate impact and treatment claims resemble each other in this respect: the workplace will be subject to rules or practices that apply equally to all workers.

Proof in disparate impact claims is a matter of group-to-group comparison and is normally done on the strength of statistical evidence. The archetypal example is height and weight requirements that tend to disadvantage female job applicants. Once a plaintiff establishes a prima facie case that a protected group is disproportionately affected by a practice or policy, the burden of proof shifts to the defendant to prove business necessity for that practice. Note, that the disparate impact defendant, at this point, shoulders a burden of persuasion that is greater than the disparate treatment defendant’s obligation to articulate a nondiscriminatory reason for his or her actions. Even if the employer meets this burden, the plaintiff may still

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152 Id. at 52.
153 See, e.g., Browne, supra note 149 (interpreting disparate impact as a form of affirmative action).
154 See Tucker, supra note 8, at 345.
156 1 LINDEMANN & GROSSMAN, supra note 97, at 87.
159 See, e.g., Garcia v. Spun Steak Co., 998 F.2d 1480, 1486, 1489 (9th Cir. 1993) (noting that the requirement that the plaintiff show significant impact in a Title VII disparate impact
argue the existence of an alternative practice that would meet business requirements yet impose a lesser burden on the protected class.  

2. Disparate Impact Elements of Title I

Three provisions of Title I fall within the disparate impact category. Section 102(b)(3) of the Act prohibits using standards, criteria, or methods of administration that have the effect of discrimination. Similarly, section 102(b)(6) disallows qualification standards, employment tests, or other selection criteria that do, or tend to, screen out persons with disabilities. Finally, section 102(b)(7) forbids the failure to select or administer tests that accurately measure the tested skill rather than a sensory or other impairment.

At first glance, these rules fit comfortably within the established Title VII framework for disparate impact claims. Take the example of Cripe v. City of San Jose. Defendant police department had a policy that, to qualify for a three-year special assignment position (that is, a desk job), the applicant had to have been a patrol officer for the preceding year and be able to return to that position afterwards. The Ninth Circuit had no trouble determining that such a rule tended to exclude officers with disabilities who could not walk the beat in contravention of section 102(b)(6) of the Act. The remaining question was whether there was a business justification for the qualification standard. The Court said no, finding, inter alia, insufficient links between the exclusionary policy and the defendant's contention that the special assignment policy was necessary to promote readiness for police duties and officer training.

Cripe itself lies squarely within the tradition of Griggs. In both cases, plaintiffs pointed to neutral policies lacking business justification that tended to screen out black workers and police officers with disabilities, respectively, as a class. The individualized nature of disabilities, however, often strains the resemblance between Title I and Title VII disparate impact claims. Section 102(b)(6) permits plaintiffs to demonstrate that qualification standards have a disqualifying effect

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161 Id. § 12112(b)(3).
162 Id. § 12112(b)(6).
163 Id. § 12112(b)(7).
164 261 F.3d 877 (9th Cir. 2001).
165 Id. at 890.
166 Id. at 890-91.
either on a class of persons with a disability or on the individual plaintiff.\footnote{42 U.S.C. § 12112(b)(6); see also Gonzales v. City of New Braunfels, 176 F.3d 834, 839 n.26 (5th Cir. 1999) (noting that the plaintiff may establish disparate impact “by demonstrating an adverse impact on himself rather than on an entire group” (citing 1 LINDEMANN & GROSSMAN, supra note 97, at 333-34)).} The reason for individuating adverse impact appears to be the difficulty in identifying a sufficient number of persons with the plaintiff’s particular disability to permit statistically meaningful group comparisons.\footnote{168 Bagenstos, Has the ADA Reduced Employment?, supra note 30, at 538 (“The wide diversity among disabilities makes comparisons between an employer’s treatment of people with different disabilities largely meaningless . . . .”); Christine Jolls, Accommodation Mandates, 53 STAN. L. REV. 223, 275 (2000) [hereinafter Jolls, Accommodation Mandates]; Steven L. Willborn, The Nonevolution of Enforcement under the ADA: Discharge Cases and the Hiring Problem, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 103, 108 (Peter David Blanck ed., 2000).} (Racial or gender calculations under Title VII are relatively straightforward.) An individuated Title I disparate impact claim, moreover, is difficult to distinguish from a reasonable accommodation claim. To say that a neutral policy should be changed because of its effects on a single person strikes me as the equivalent of a request that the plaintiff be accommodated by a rule waiver.

An additional complication in Title I’s disparate impact scheme lies in the restricted definition of a protected class. Section 102’s disparate impact provision refers to discrimination on the basis of disability\footnote{42 U.S.C. § 12112(b)(3)(A) (2000) (prohibiting standards that have the effect of discrimination “on the basis of disability”).} against individuals with a disability.\footnote{Id. § 12112(b)(6) (referring to qualification standards affecting “an individual with a disability”); id. § 12112(b)(7) (regulating employment tests administered to a “job applicant or employee who has a disability”).} Although I can find no case discussing this matter, I assume that the proper comparison group for a disparate impact claim would be persons who not only share the plaintiff’s impairment but also meet the demanding standards for disability.\footnote{Cf. Jolls, Accommodation Mandates, supra note 168, at 275 (noting that use of a broader comparison group of all disabled persons would facilitate claims but conceding that such an approach is not authorized under current law).} Since such determinations are individualized, most plaintiffs will find it impractical to identify a sufficiently large enough group of legally disabled persons who share her particular impairment and manifestations to meet the comparative requirements of a traditional disparate impact claim. If we further require that the comparison group consist of “qualified individuals with a disability,” the evidentiary burdens would probably make such a claim impossible. In contrast, Title VII’s universality of coverage makes it relatively easy for a claimant to muster a comparison class.
C. Reasonable Accommodations

Reasonable accommodation claims are the principal innovation of the ADA. For Title I, the statutory command is section 102(b)(5)(A), which declares discriminatory an employer's failure to grant a reasonable accommodation unless she can demonstrate that compliance would impose an undue hardship on a business operation. Title I does not offer a fixed definition of reasonable accommodation; rather, it defines reasonable accommodations by example. The goal is that employers should modify job application processes or the work environment to allow an individual with a disability to perform the essential functions of a job short of an undue hardship.

Reasonable accommodations are a novelty in civil rights law. With one exception, they lack antecedents in the Title VII. The latter statute does require employers to make accommodations for employees' religious practices. This rule was gutted, however, by the Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison*, holding that employers need not afford accommodations that involve more than de minimis costs. The legislative history of the ADA, however, makes explicit that Congress did not intend for Title I to incorporate the now anemic *Hardison* standard.

Title I's accommodations mandate is different in three respects from prior civil rights legislation. First, though the reasonable accommodation system shares an indifference to the employer's intentions with the disparate impact model, the focus of the former is exclusively individual. The issue is whether a certain applicant or worker needs help to do a job rather than the effects of a work policy on a group. Second, the accommodation mandate requires that employers treat workers with disabilities differently—perhaps better—than other employees. Disparate treatment claims, in contrast, are based on the notion that the plaintiff is like all other employees and is

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173 Title I states that reasonable accommodations include:

making existing facilities . . . accessible, . . . 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.

*Id.* § 12111(9).
177 See H.R. REP. NO. 101-485, pt. 2, at 68 (1990) (stating that the *Hardison* standard does not apply to the reasonable accommodation requirement of the ADA).
therefore entitled to standard job opportunities, compensation, and benefits, while disparate impact claims seek to fashion uniform rules with the least disadvantaging effects on protected classes. Finally, reasonable accommodation rules impose affirmative obligations on employers to act rather than to refrain from discriminatory actions.

The concept of accommodation is, in fact, radically different from the concepts of the disparate treatment and disparate impact models. Disparate treatment reflects what many commentators call "formal equality," that is, a mandate to treat similarly situated workers the same without regard to a defining characteristic.\textsuperscript{178} I find the terminology puzzling since there is nothing "formal," much less insignificant, about the disparate treatment model's goal of weeding out tainted distinctions among employees. Still, the observation that so-called formal equality calls for employers to apply a single set of rules to all employees and to regard them from a single frame of mind is undoubtedly correct. While the disparate impact model requires that we deviate from formal equality long enough to gauge the effects of policies on particular groups, a successful claim should result in a uniform work rule with no—or at least fewer—adverse effects. By requiring that employers confer individualized benefits on disabled workers, Title I's accommodation requirement drops any pretense of formal equality's insistence on evenhanded treatment to achieve merit-based results. Justice Breyer's opinion in \textit{US Airways v. Barnett}\textsuperscript{179} acknowledges this rather obvious point by stating that, yes, indeed, an accommodation "requires the employer to treat an employee with a disability differently, i.e., preferentially."\textsuperscript{180}

Professor Malloy argues that the ADA must rely on an accommodations system since disabilities, unlike race, are often


\textsuperscript{179} 535 U.S. 391 (2002).

legitimate points of decision in personnel matters and tend to be unique. As a practical matter she is correct. Disability is an umbrella concept that covers countless impairments that usually produce different manifestations or degrees of severity among those affected. Given the infinite variety of disabilities, only a system of individualized adjustments in the workplace would have an appreciable effect on the employment prospects of persons with disabilities, individually and as a group. The accommodations model assumes the desirability of deviating from traditional notions of equality to produce better employment outcomes for individuals with disabilities. Let me be clear that I am not arguing against this assumption as a matter of policy. My purpose here is to establish the remarkable qualitative difference between the accommodationist view of "equality" and that of disparate treatment and impact.

My characterization of accommodations as lying outside the traditional realm of equality is at odds with the social conception of disability that pervades the disability rights movement. As discussed earlier (Part I), the social model views disability as an artifact of social conditions. While adherents to this philosophy acknowledge that impairments exist, they attribute disability status to the interaction between the physical or mental self and the social structures that dominate the environment. This approach corresponds to Professor Minow's well-known "social relations" theory of difference and can be illustrated for our purposes by a simple example. A person with paraplegia experiences a natural disadvantage in mobility. The consequences of her "disability," however, are determined by the decisions of social institutions. Say she wants to get to an office on the top floor of a building. She cannot cross the street to get to the

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182 See, e.g., Bagenstos, Subordination, supra note 20, at 405-06 (noting the difficulty of establishing a core definition for disability when "[c]ommon understanding of "disability" ranges from deafness to quadriplegia, from epilepsy to cancer, from blindness to mental retardation, from mental illness to heart conditions," all of which may involve different manifestations occurring at different stages of life).
183 See, e.g., Crossley, Reasonable Accommodations, supra note 8, at 876 n.65 (noting that advocates of the social model do not deny the biological existence of impairments or the fact of limitations).
184 E.g., id. at 876 (citing, e.g., SUSAN WENDELL, THE REJECTED BODY: PHILOSOPHICAL REFLECTIONS ON DISABILITY 31 (1996)); Bagenstos, Subordination, supra note 20, at 428-32 (discussing the social model's view that disability is an interaction between social barriers and impairments).
building without curb cuts; she may need a power-assist to open the front door; there must be an elevator with an accessible doorway and a control panel within reach; and so forth. The social model would view her disability as "socially constructed" since alternative choices would have rendered her impairment irrelevant. According to this school of thought, accommodations are a remedy to restore conditions of equality that have been lost because of misguided choices.

Social constructions of disability are true in the sense that the human environment often entails a series of choices that presume "normal" capacities. This observation holds, moreover, whether a decision to create an inaccessible environment arises from insensitivity to the needs of persons with impairments or from reliance on stereotypes about their capacities or roles in society. Social construction, however, cannot be a theory of equality in any traditional sense. Although the social model shares with its predecessors the ultimate goal of equal status for all persons, it can achieve them only by affirmatively considering and addressing matters of genuine difference, that is, impairments. Thus, it is extremely difficult to reconcile the accommodationist agenda of Title I with the traditional civil rights model’s assumption that immutable traits are irrelevant to a person’s ability to work or participate in society. It is true that disability, race, and

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186 Bagenstos, Subordination, supra note 20, at 428 (describing social model’s refusal to accept "existing social arrangements as a neutral baseline").

187 Crossley, Reasonable Accommodations, supra note 8, at 877-78 (discussing view that society is obligated to provide a remedy for social structures that disadvantage persons with disabilities).

188 See, e.g., Mark Kelman, Strategy or Principle? The Choice Between Regulation and Taxation 8-9 (1999) (explaining that the ADA is a broad-based redistributive program intending “to funnel social resources to a class of deserving beneficiaries” as a result of its requirement that covered entities “provide beneficial, non-market-rational treatment to certain customers (or workers)”). Professor Kelman regards accommodation requests as demands for resource distributions and an “implicit regulatory tax.” Kelman, Market Discrimination, supra note 93, at 880. Conventional wisdom among academic commentators holds that the accommodations mandate of the ADA is conceptually different from traditional antidiscrimination norms. E.g., John J. Donohue III, Employment Discrimination Law in Perspective: Three Concepts of Equality, 92 Mich. L. Rev. 2583, 2608-09, 2612 (1994); Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 Duke L.J. 1, 1-14 (1996). See generally J.H. Verkerke, Disaggregating Antidiscrimination and Accommodation, 44 WM. & MARY L. Rev. 1385, 1385 n.1 (2003) (collecting sources). Recently some scholars have attempted to demonstrate equivalence between traditional antidiscrimination principles and the accommodation mandate. Professor Jolls has observed as a descriptive matter an overlap between the cost effects of accommodation and disparate impact theories. See Christine Jolls, Antidiscrimination and Accommodation, 115 Harv. L. Rev. 642, 684-97 (2001). Professor Bagenstos, in turn, argues that accommodation and antidiscrimination mandates in the ADA are expressions of an overarching antisubordination norm. Bagenstos, Subordination, supra note 20, at 453-84; see also, e.g., Crossley, Reasonable Accommodations, supra note 8, at 898-944 (finding conceptual similarities between accommodations and disparate impact and hostile environment claims but limited affinity with affirmative action theories); Michael Ashley Stein, Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination, 153
gender discrimination are also "socially constructed" to the extent that they result from the attitudes of employers or others in power. The commonality dissolves, however, once we acknowledge the fundamental assumption that disability status is frequently relevant while race and gender are rarely so. While social construction provides a theoretical justification for Title I's integrationist goals, as manifest in the reasonable accommodations mandate, it should not be viewed as part of the traditional civil rights model.

III. CONSEQUENCES OF EMPLOYING THE CIVIL RIGHTS MODEL

In Part II, I argued that Title I embodies three distinct models of "equality": traditional equal treatment provisions, a group-oriented disparate impact scheme, and a system of personalized accommodations. The next question is whether this multiplicity of approaches makes a difference. Could these three visions of equality serve as complementary means of advancing the interests of persons with disabilities? There are serious issues of compatibility. My observations of the interactions among the three concepts lead me to conclude that the traditional disparate treatment view carried over from Title VII undercuts the integrationist goals of the accommodations mandate. I see interference most clearly in three areas: (1) Title I's definition of who is disabled, (2) the procedural nature of Title I's approach to...
regulating hiring decisions, and (3) Title I’s moralistic approach to the questions of accommodation costs.

A. Definitions of Disability

Definitions of disability in the ADA serve a gateway function that has no counterpart in Title VII. Everyone is protected by Title VII since each person can be assigned to at least one race, gender, national origin and has some religious affiliation or lack thereof. Any notion that Title VII was limited to the protection of minorities was quashed early on with the Court’s decision in *McDonald v. Santa Fe Trail.* Justice Marshall’s opinion concluded that two white workers who had been discharged for stealing antifreeze from a train could state a Title VII claim by alleging that a black worker involved in the same incident had not been similarly discharged. The opinion emphasized that the terms of the statute and the legislative history point to no congressional intention to create a limited protected class. Title I of the ADA, in contrast, abandons Title VII’s universal coverage and protects only those who have a “disability” and are furthermore “qualified individual[s] with a disability.”

Disability is defined in the ADA’s Preamble in a tripartite fashion. Most obviously, the Act protects persons with an actual disability, defined as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” To use a simple example, a person with paraplegia would meet this definition since she has a physical impairment that prevents her from performing the major life activity of walking. Additionally, the Act protects persons who have a record of disability or are regarded as disabled by others. An example of either category would be the cancer survivor who inevitably has extensive medical records from treatment and is viewed as disabled by coworkers.

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189 *Cf. 42 U.S.C. § 2000e(k) (2000) (defining “because of sex” or “on the basis of sex” under the Pregnancy Discrimination Act to actions taken “on the basis of pregnancy, childbirth, or related medical conditions”).
191 *Id.* at 279-85.
192 *Id.* at 279-80.
194 *Id.* § 12111(8).
195 *Id.* § 12102(2)(A).
198 *Id.* § 12102(2)(C).
Being statutorily disabled, however, is just the first of two conditions necessary for coverage. A Title I plaintiff must also demonstrate that he is a “qualified individual with a disability.” Such persons are, under section 101, those “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Thus, to use a second simple example, a deaf applicant for a file clerk position would be a qualified individual in spite of an inability to perform the marginal task of answering the phone. Even if such a task were deemed an essential function, the applicant would qualify if a reasonable accommodation, such as a TTD (Telecommunication Device for the Deaf), would permit performance.

By adopting these definitions of who is disabled and qualified, Congress took a pragmatic approach that balanced the interests of persons with disabilities in finding employment with the legitimate concerns of employers. On the one hand, the definition of disability is remarkably flexible. The statute avoids specifying what conditions constitute a disability for fear that any list would be incomplete and would also fail to anticipate new disorders. Similarly, the Act calls for an individualized assessment of disability status, with the result that medical labeling will not prevent a conclusion that a person is disabled in a particular context. The “record of” and “regarded as” provisions serve to extend the Act’s protections to those who are needlessly penalized by third-party attitudes.

At the same time, these definitions make substantial concessions to business interests. Most obviously, employers may still insist that workers meet employment standards so long as they do not base personnel decisions on factors that are irrelevant or marginally related to a job. Hence, employees must qualify for the job aside from functions that are marginal or can be done with a reasonable accommodation.

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200 42 U.S.C. § 12111(8).
201 Id.
203 See id. § 3.10(6) (describing TDD as a possible reasonable accommodation).
206 Cf. Sutton, 527 U.S. at 489 (discussing stereotypes as the basis for the “regarded as” prong of the statutory definition of “disability” (citing Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 284 (1987))).
208 Id. at 54-55.
are set by the undue hardship and safety defenses provided by Title I. Accommodations are deemed unreasonable when they constitute an undue hardship for an employer\(^{209}\) while antidiscrimination restrictions on qualification standards are subject to a safety defense.\(^{210}\) The latter permits employers to insist that an employee not pose a risk to himself or others in the workplace.\(^{211}\)

Title I’s approach to defining its protected class seems, on first impression, to be a sensible compromise between social progress and business concerns. In practice, Title I’s definitional limitations severely limit the achievement of the Act’s integrationist goals. In spite of the Act’s explicit integrationist agenda, the statutory definition of disability embodies, in many respects, the traditional civil rights model’s assumption that a group’s defining characteristics are irrelevant to personnel decisions. While Title VII’s procedures for eliminating consideration of such traits, especially disparate treatment claims, may be effective in driving race- or gender-inspired decisions out of the workplace, the same is untrue in matters of disability where the disabling condition may be pertinent. The traditional civil rights concepts lurking beneath the ADA’s key definition ensure that only persons whose disabilities are viewed as inconsequential or requiring limited adjustments by employers will benefit from the statute. (Employer reactions to costs, of course, are different from those of Congress. I shall return to this point in Subparts III.B. and III.C.)

Speaking generally, Title I protects two broad groups of persons with disabilities. In the first category are individuals with disabilities that are genuinely irrelevant to working: persons who are regarded as disabled or have a record of such (e.g., the cancer survivor);\(^{212}\) persons whose conditions are disabling because of the attitudes of others (e.g., the accountant with tunnel vision); those who experience discrimination due to association with a person who is disabled (e.g., the mother of an HIV-positive child); and, those whose actual disabilities do not substantially interfere with working (e.g., the voiceless gravedigger). Let us refer to such persons as “Category I” plaintiffs. The traditional civil rights model and mechanisms work tolerably well for this category. As with cases of race and gender, we can deem the un-


\(^{210}\) See id. § 12113(b) (including a qualification standard “that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace”).

\(^{211}\) Id.; see also Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002) (clarifying safety defense to include danger to employee herself as well as to others).

\(^{212}\) Judge Posner has commented that Title I’s “regarded as” claims most closely approximate racial discrimination claims since both phenomena involve reliance on a “vocationally irrelevant characteristic.” Vande Zande v. Wisc. Dep’t of Admin., 44 F.3d 538, 541 (7th Cir. 1995) (Posner, J.).
derlying impairment to be immaterial to sensible personnel decisions. The traditional model’s concern for the dignity of the individual and its desire to banish stereotypes from labor relations flows from the presumption that the disability at issue is extraneous. Moreover, Title VII’s all-important disparate treatment scheme works in comparable Title I situations. Take the example of the cancer survivor who applies for a job as an entry-level bookkeeper. Such a person could make out a prima facie case under Title I by alleging that she is either a “regarded as” or “record of” plaintiff, meets the stated qualifications for experience and education, and finally, that she was passed over in favor of a later, nondisabled applicant.213 The initial inference of discrimination is justified since an apparently qualified plaintiff has been passed over in favor of a nondisabled person.

While the ADA’s legislative history does not discuss Title I in such quintessentially academic terms as the “civil rights model,” there are indications that Congress viewed the position of persons in this broad category as comparable to those who suffer racial or gender discrimination. The Report of the House Committee on Education and Labor expressly viewed “regarded as” and “record of” claims as means to protect individuals from the pointless negative attitudes of third parties.214 It commented that the Act was intended to protect “record of” plaintiffs who have recovered from disabling conditions or been misclassified.215 It further noted that the “regarded as” prong of the disability definition was intended to protect against “accumulated myths and fears” regarding disability.216 These passages all but use the term “irrelevant” in describing these conditions.

Reliance on the traditional model’s irrelevancy standard is also reflected by the denial of “reasonable accommodations” to certain persons in Category I. The exclusion for plaintiffs asserting associational discrimination is explicit in the legislative history217 and has been imposed uniformly by the courts.218 While the availability of accommodations for perceived disabilities is not discussed in the legislative history, the weight of federal judicial authority holds that Congress did not intend “regarded as” plaintiffs to receive

213 See supra Part II.A.2 (discussing requirements for prima facie case under Title I).
214 H.R. REP. No. 101-485, pt. 2, at 52-53 (1990); see also supra note 50 and accompanying text (noting statements in ADA’s legislative history regarding disability discrimination as the equivalent of racial discrimination).
216 Id.
217 Id. at 61-62.
218 See, e.g., Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1090-92 (10th Cir. 1997) (interpreting legislative history to disallow accommodations for association claims).
accommodations. The reasoning in these cases is strained, but the majority result is sensible. Persons without actual disabling impairments do not need accommodations to perform a job; rather, they need an injunction that prevents or repairs the injury of employers relying on irrelevant factors. I am unaware of any decision regarding accommodation requirements in "record of" claims, but there is no reason to treat this variety of perceived disability differently than "regarded as" actions.

Category II consists of claimants who require a "reasonable accommodation." Title I attempts to expand its coverage beyond the bounds of the traditional irrelevancy standard by protecting persons who can perform essential job functions with a reasonable accommo-

219 See, e.g., Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1231-33 (9th Cir. 2003) (holding that "regarded as" plaintiffs are not entitled to reasonable accommodations); Weber v. Stripit, Inc., 186 F.3d 907, 916-17 (8th Cir. 1999) (same); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999) (same); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998) (same). But see Williams v. Phil. Hous. Auth. Police Dep't, 380 F.3d 751, 775 (3d Cir. 2004) (holding that the text and legislative history of Title I indicate that reasonable accommodations are available to "regarded as" plaintiffs); Katz v. City Metal Co., 87 F.3d 26, 32-33 (1st Cir. 1996) (holding that a "regarded as" plaintiff may try the issue of reasonable accommodation with a jury).

220 Both Kaplan, 323 F.3d at 1231-33, and Weber, 186 F.3d at 916-17, conclude that granting accommodations to "regarded as" plaintiffs would lead to a bizarre interpretation of the ADA. The gist of the reasoning is that accommodating "regarded as" plaintiffs would create a windfall in their favor since employees with impairments who were not statutorily disabled would get nothing. The Kaplan court goes on to argue that extending the accommodations mandate would have the perverse effect of inducing employees to encourage misperceptions by employers. Kaplan, 323 F.3d at 1232. While this windfall theory may have merit, there is a simpler route to this conclusion. Accommodations are required only to permit an individual to perform the essential functions of a particular job. See 29 C.F.R. § 1630.2(o)(1)(ii) (2004) (defining "reasonable accommodation" to mean modifications that enable "a qualified individual with a disability to perform the essential functions of that position"); see also Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 883 (6th Cir. 1996) (holding that there is no duty to accommodate when an employee can already perform job functions). A worker who has been misperceived as disabled has no disability to accommodate. In contrast, a worker who is impaired but not statutorily disabled is simply not covered by Title I.

221 School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987), was technically a "record of" case under the Rehabilitation Act. Plaintiff, a schoolteacher, had both a history of tuberculosis and had recently relapsed when she was dismissed. Id. at 276. It is likely that the plaintiff would also have met the test for an actual impairment and that the Court opted for the "record of" category as a matter of analytical convenience, that is, it was easier to point to the record of disability than to conduct an analysis of the plaintiff's present state. The key issue in Arline, however, was whether section 504 covered persons with contagious diseases. After the Court responded affirmatively, it proceeded to set the parameters of the safety defense that was later codified in Title I. See 42 U.S.C. § 12113(b) (2000) ("The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."). The defense calls for a weighing of certain factors regarding the nature of the risk, its duration and probable severity, and the probability that the disease will be transmitted. Arline, 480 U.S. at 287-88. More to the point, defendants are obligated to provide reasonable accommodations that will reduce safety risks to acceptable levels. Id. I suggest that an accommodation requirement here makes sense only when an actual disability is present.
At first glance, the expanded definition promotes the Act’s integrationist agenda by embracing persons whose genuine differences require government intervention to facilitate their entry into the workforce. As discussed in Part II.C, Title I’s accommodation mandate goes beyond both the disparate treatment and impact models by requiring employers to take affirmative steps to provide individualized benefits to a class of workers or job applicants. Nor should this expanded formulation surprise us. In a capitalist economy, even-handed application of neutral rules will not improve the lot of persons whose disabilities leave them at a competitive disadvantage with non-disabled workers. Carrying the definition of disability beyond the traditional model’s focus on immateriality is an attempt to create a necessary correspondence between the Act’s ambitious goals and its protected class.

Limitations on the accommodations mandate, however, roll back the coverage in Category II to the point that it resembles the irrelevance standard of the traditional model. These constraints are implicit in the very terminology chosen for the accommodations mandate. Employers are only required to make workplace alterations that are “reasonable.” The parallel to Title VII is striking. That statute treats reliance on the irrelevant fact of race as per se unreasonable in spite of any compliance costs. Use of gender and national origin in personnel decisions that do not meet the strict BFOQ test is similarly disfavored. Title I takes the same approach for Category I plaintiffs. Hence, Title VII and both categories of Title I claims use reasonableness as the threshold of discrimination. The primary difference in the traditional scheme (epitomized by Title VII and Category I under the ADA) and Category II’s accommodation mandate is treatment of costs.

Title VII, as noted in Part II.A.1.c, does not recognize a cost defense. The reasoning of Johnson Controls prevents Title VII defendants from arguing that race- or gender-conscious classifications are economically rational or even designed to avoid the economic consequences of customer preferences or coworker reactions. It would, of course, be an error to argue that third-party attitudes do not impose costs on employers. A heterogeneous workforce (in some circum-

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223 See supra Part II.A.1.a (discussing the irrelevance of defining traits).

224 See id.
stances) may result in lost sales or higher personnel management costs. That imposition is tolerable, however, since the negative attitudes giving rise to these costs will fade, one hopes, as the civil rights agenda operates as a catalyst to transform popular feelings about race or gender in America. Accommodation costs under Title I, in contrast, are "real" in the sense that they require direct expenditures or variations in work procedures. Aside from truly cost-free accommodations, an employer must bear the initial and sometimes continuing expense of workplace alterations. Such costs may persist even if accommodations yield the desired result of creating an enlightened workplace imbued with a sense of inclusion and heightened awareness that comes from successful collaboration between persons with and without disabilities.

Since accommodations often entail costs (some small, some large) and since labor expenses are a legitimate concern for employers, Title I limits coverage to reasonable accommodation demands. Title I itself does not offer a general definition of what constitutes a reasonable accommodation; rather, it proceeds by example, stating that reasonable accommodations may include such actions as job restructuring, provision of interpreters, and so forth. The judiciary has provided definitional refinements, fashioning a two-step approach to issues of reasonableness. Title I plaintiffs lead off by demonstrating that a proposed accommodation is "reasonable in the run of cases." This is an easy standard. Plaintiffs simply have a burden of production rather than persuasion. Equally important, the standard is objective and does not consider the employer's individual circumstances. Once plaintiffs meet this minimal burden, defendants are obliged to respond by raising the affirmative defense of undue hardship. The latter concept is defined as "an action requiring significant difficulty or expense" and must be judged by reference to certain factors pertinent to the defendant's operations.

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225 See Epstein, supra note 76, at 69-72 (discussing advantages of homogeneous workforce in internal governance).
226 See Verkerke, supra note 188, at 1411 (noting capacity of antidiscrimination rules to set new social norms and alter popular attitudes).
229 Id.
230 Id.
232 Id. § 12111(10)(B). These factors are numerous and include: the nature and cost of the accommodation, the financial resources of the facility in question, the number of persons employed at such facility, the effect on expenses and resources, the impact of an accommodation on operations, and so forth.
far as demonstrating imminent bankruptcy, meeting the undue hardship standard is plainly more difficult than the plaintiff's trifling burden of production on the issue of reasonableness.

Title I's allocation of proof burdens on reasonableness and undue hardship is decidedly pro-plaintiff. In the larger scheme of things, however, limiting relief to reasonable accommodations erects a stone wall within the larger class of persons with disabilities. On one side of that barrier are persons whose impairments are not so serious that they require overly expensive accommodations. We are willing to grant accommodations to persons whose presence does not unduly impinge on a business operation. Here, a refusal to accommodate is not reasonable since business operations are largely unaffected. We regard an employer's rejection of the supposedly light accommodation burden as the functional equivalent of relying on race, gender, or other immutable traits. Across the "reasonableness" line are persons whose impairments prove unacceptably expensive to accommodate. Under the Title I scheme, these costs are deemed relevant. We regard personnel actions based on them to be unbiased in ways that reliance on race and gender are not. In effect, Title I's protected class has more in common with victims of racial or gender bias than with those who have occupationally disqualifying impairments.

Why do we stop coverage at the edge of cost-defined reasonableness? Why does Title I favor persons with less serious impairments? The simple answer is that going further would be too costly for employers. The legislative history makes clear that the undue hardship defense was included at the insistence of business interests. To say that broader coverage is too expensive, however, begs the question of what the ADA—and the law generally—should do in favor of persons with disabilities. There is no inherent reason to say that persons with severe impairments are less likely to benefit from integration into the workplace. Indeed, there is a good argument that the benefits of an integrationist regime—both to the individual and to society—increase with the severity of impairment and diminish only when an individual is too incapacitated for any sort of job.

233 Compare Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 136 n.2 (2d Cir. 1995) (questioning bankruptcy view of undue hardship), and Van Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (same), with Barth v. Gelb, 2 F.3d 1180, 1187 (D.C. Cir. 1993) (suggesting that undue hardship arises when an accommodation would fundamentally alter a defendant's operations).

234 See Alex Long, State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act, 65 U. PRR. L. Rev. 597, 611 & n.101 (2004) (noting that undue hardship provision was a compromise demanded by business interests who objected to broad accommodation provisions in earlier drafts of the ADA).
No right-thinking person would maintain that employers should be liable for any and all costs associated with bringing an individual with a disability into the workplace. Limitless liability is incompatible with our profit-driven, capitalist system. It might even have the perverse effect of drawing workers with disabilities to firms that have successfully accommodated in the past and away from recalcitrant employers. The ADA, however, errs in the opposite direction. Title I's expansive version of the traditional irrelevance threshold has excluded the class of persons with the greatest need from the principal statute setting disability policy in the workplace. Reliance on the Title VII model, moreover, cuts off alternative strategies for achieving the socially beneficial goal of moving persons with disabilities into the workplace. That strategies such as wide-scale tax credits for hires, subsidies for on-the-job-training, or even hiring quotas are forms of affirmative action should not dissuade us from considering them as part of a truly genuine integrationist policy. Let me be clear that I am neither advocating nor rejecting any of these options. My point is that the traditional civil rights mentality curtails Title I's ability to reach its integrationist goals.

B. The Procedural Approach to Regulating Hiring Decisions

Clearing the definition hurdle is simply the first step toward employment under Title I. After the Act's definitions have excluded an indeterminate but substantial number of persons, the remaining "covered" individuals must still convince an employer to hire them. Here the ADA builds upon the pattern of the traditional civil rights model by taking an essentially procedural approach to regulating hiring. As set out more fully in Part II.A, Title VII does not mandate hiring in any particular instance. Rather, it attempts to banish consideration of irrelevancies such as race and gender from personnel decisions. With regard to hiring decisions, Title I also takes aim at the methods by which employers arrive at personnel decisions. Unlike sections 501 and 503 of the Rehabilitation Act, which impose affirmative action requirements on federal employers and federal contractors respectively, Title I has no employment targets. Rather, the Act ap-

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237 See 29 U.S.C. § 791(b) (2000) (requiring all federal agencies to develop affirmative action plans for "hiring, placement, and advancement of individuals with disabilities"); id.
approaches the hiring issue indirectly by attempting to control information about disability. There are reasons to doubt that this attempt has been successful.

Title I’s device for controlling information about disability is section 102(d), which governs preemployment inquiries into disability status and medical examinations.\(^\text{238}\) Perhaps sensing that enforcement at the hiring stage would be tricky, Congress included a rule against preemployment medical examinations and inquiries into disability status.\(^\text{239}\) The gist of the rules is that employers may not, at the preoffer stage, subject applicants to medical examinations or ask questions regarding disability status. The latter prohibitions include indirect inquiries such as: “Have you ever filed for workers’ compensation insurance?”\(^\text{240}\) Employers may only ask whether and how an applicant would perform job-related functions.\(^\text{241}\) Job offers may be conditioned on medical exams so long as all entering employees are subjected to the same requirement.\(^\text{242}\)

Rules prohibiting preoffer inquiries and exams epitomize the procedural nature of Title I. The obvious goal of these restrictions is to create a hiring environment free of irrelevant information about disability whenever possible. Hiring decisions could then purely be based on issues of competence and comparative advantage. This laudable concept works well in theory but seems to fail in practice. Job applicants with “invisible” disabilities, such as alcoholism or a prior cancer diagnosis, are most likely to benefit from the preoffer bans. It is inevitable, however, that apparent disabilities, such as partial paralysis or blindness, will enter into the thoughts of potential employers. The EEOC’s Interpretive Guidance acknowledges this fact when it gives employers latitude to ask applicants with known disabilities how they would be able to perform a job, even if other applicants are not so queried.\(^\text{243}\)

\(^\text{239}\) Id. § 12112(d)(2)(A).
\(^\text{240}\) EEOC, A TECHNICAL ASSISTANCE MANUAL OF THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 5.5(b) (1992).
\(^\text{243}\) 29 C.F.R., pt. 1630 app., at 380 (2004) (commenting on 29 C.F.R. § 1630.14(a)). The example given in the Interpretive Guidance is: “an employer may ask an individual with one leg who applies for a position as a home washing machine repairman to demonstrate or to explain how, with or without reasonable accommodation, he would be able to transport himself and his tools down basement stairs.” Id.
Now we reach a “tipping point” in the statutory scheme. Employers must ignore visible impairments while attempting to assess the benefits of hiring particular applicants if the Act is to achieve its integrative goals. This reliance on goodwill and mental discipline places too much faith in human nature. For reasons developed at greater length in Subpart III.C, the primary motivation for refusing to hire a person with visible disabilities—or applicants who have identified themselves as disabled—is probably fear of costs. Such concerns may take several forms, ranging from direct expenditures for reasonable accommodations to loss of worker flexibility to fear of legal liability. As anticipated costs increase, so does employer motivation not to hire a worker with a disability. How does Title I react to this possibility? In my opinion, the procedural nature of the Act’s hiring rules encourages it.

Recall that Title I mandates no particular result in questions of hiring, promotion, or retention. An employer may take any action regarding a “qualified individual with a disability” so long as the disability was not a factor in the decision. For example, preferring a nondisabled job applicant when a qualified applicant with a disability had equal education and experience would not violate Title I. It is probably acceptable to prefer the nondisabled applicant with inferior credentials so long as the decision was not based on the fact of a competitor’s disability. The ADA was not intended to preempt employer discretion in the subtle process of building and managing an effective workforce. Violations occur when an employer allows disability to become a factor in the decision.

Consider also that hiring is an inescapably comparative process by which employers attempt to find the best match for an open position. The fact that an applicant can perform the essential functions of a vacant job, with or without an accommodation, qualifies her for protection under Title I as a “qualified individual with a disability.” It does not get her a job. An employer may legitimately prefer a nondisabled employee for a multitude of job-related reasons. When done right, hiring is a matter of sifting through nuances. For example, a

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244 See Kincaid v. City of Omaha, 378 F.3d 799, 805-06 (8th Cir. 2004); Malabarba v. Chi. Tribune Co., 149 F.3d 690, 700 (7th Cir. 1998) (holding that Title I does not require that individuals with disabilities be given priority in hiring).

245 See Susan Schwochau & Peter David Blanck, The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?, 21 BERKELEY J. EMP. & LAB. L. 271, 283 (2000) (implying that employers may prefer nondisabled applicant with inferior credentials to an applicant with a disability—but who does not request an accommodation—in the absence of discriminatory motive).

246 See, e.g., Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) (finding that the ADA does not require affirmative action).
retailer may favor a nondisabled applicant over an otherwise equally qualified individual with a disability on the grounds that the former’s references indicate extraordinary self-control in dealing with angry customers. Indeed, a good personnel manager would never use such a stiff test as whether someone can perform the essential functions of a job. Such an approach all but takes professional judgment out the hiring process.

Title I’s inability to remove consideration of obvious disabilities from personnel decisions, in tandem with its reluctance to curtail hiring discretion, makes employment of “qualified individuals” optional. Well-counseled employers can always shape a job search file to reflect that the successful applicant was chosen for neutral, job-related reasons. Employers who are concerned about the costs associated with a particular applicant can simply decline to hire and later offer seemingly legitimate reasons based on comparative qualifications. If an employer is concerned that its failure to hire individuals with disabilities over time suggests a pattern of discrimination, she could engage in “cream-skimming,” that is, strategic hires of persons with less serious disabilities in order to avoid taking on persons with more severe impairments.

Dynamics unique to the hiring process, moreover, make successful Title I enforcement actions unlikely. Except for cases in which the EEOC becomes involved, enforcement depends on a complaint or a charge by a disappointed applicant. A charge, in turn, depends upon the applicant becoming convinced that discrimination has occurred. Such an event is far less likely to occur at the hiring stage. Incumbent employees may have a course of dealings with management that could suggest discriminatory motives, as well as a sense of job ownership that prompts a person to defend his position from threats of discipline or dismissal. Job applicants lack these contextual clues about employer behaviors. Nowadays, most personnel managers are trained to be consistently polite and encouraging. Good manners go a long way in diffusing frustrations over denial of employment. Equally important, the applicant usually does not see the competition. He will not get the sense of discrimination that comes from seeing a job go to

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247 See Jolls, Accommodation Mandates, supra note 168, at 275 & n.100 (“[The ADA] may stimulate the employment of some people with disabilities via “cream” of those workers with the least-serious disabilities . . . .” (quoting Richard V. Burkhauser et al., How People with Disabilities Fare When Public Policies Change, 12 J. POL’Y ANALYSIS & MGMT. 251, 264-65 (1993)).


249 See id. (authorizing individuals to enforce Title I); see also id. § 2000e-5(e)(1) (requiring that charges be filed within 180 days with EEOC or 300 days with authorized state agency).
someone he thinks is less qualified. Finally, applicants just do not have the same sense of possessiveness about a job as a sitting employee. Human nature leaves us less motivated to defend a lost opportunity than a lost position.

How often are "qualified individuals" turned away at the hiring stage? I would not hazard a precise guess but am convinced that the phenomenon occurs frequently. While there does not appear to be empirical findings on this exact point, existing information implies that employers are practicing a form of negative selection at the hiring stage. EEOC statistics indicate that only about 10 percent of charges involve allegations of hiring discrimination while the balance pertains to post-hiring issues. This information tends to confirm the observation that job applicants are less litigious than incumbent employees. More important, the fact that employment rates for persons with disabilities declined after the ADA's enactment coupled with a decline in dismissals suggests that the ADA's negative effects center on the hiring process.

It is instructive to compare the ADA's influence on the hiring process to its effects on incumbent employees. If I am correct that Title I lacks positive effects on initial employment decisions, then we should expect that persons with disabilities in the workforce will tend to fall into one of three groups. First, there will be those whose impairments were "invisible" at the time of hiring. Although employers who comply with the prehiring prohibition on disability inquiries are still likely to pass over applicants with known disabilities, we can expect them to hire applicants with invisible impairments such as alcoholism or certain mental illnesses—unless the applicants volunteer the information. Second, there are employees who become disabled after being hired. EEOC charge data, for example, indicate that 20.9 percent of merit resolution claims involve nonparalytic orthopedic (8.4 percent) and orthopedic and structural impairments of the back (11.8 percent). These categories of impairments are associated

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250 See Jan William Stumer, Arbitration, Labor Contracts, and the ADA: The Benefits of Pre-Dispute Arbitration Agreements and an Update on the Conflict Between the Duty To Accommodate and Seniority Rights, 21 U. ARK. LITTLE ROCK L. REV. 455, 469 & n.61 (1999) (citing EEOC statistics indicating that from July 26, 1992—the effective date of the ADA—through September 30, 1997, only 9.4 percent of charges received by the EEOC related to hiring); Willborn, supra note 168, at 103 (noting that the ratio of discharge to hiring cases is ten to one under Title I).


with long-term physical labor, such as lifting or typing. Finally, there are employees who were hired in spite of a known disability, that is, applicants who did not need the ADA since employers viewed them positively.

Persons falling into these categories may occupy their jobs for some time before conflicts arise. To my knowledge, published statistics do not sort out claims by length of time on the job before a charge is filed. Nonetheless, it is reasonable to assume that many conditions will take time to manifest and interfere with work performance. Alcoholics tend to have well-honed coping skills that allow them to perform a job for a long time before bottoming out. Back impairments and repetitive motion disorders often develop over years. Cancers may be diagnosed in the prime of a career.

Reactions of incumbent employees to adverse job actions are inevitably different from those of passed-over applicants. The desire to defend employment status is an aspect of human nature's command that we defend our possessions. The longer a worker remains in a position, the stronger the possessory sentiment becomes. Fear of long-term unemployment may also come into play. A worker with a manifest disability has good reason to fear reentry into the labor market. For such an individual, a record of discharge or discipline may complicate the usual hiring-stage problems for persons with known disabilities. Another difference between employees and applicants is that the former are usually aware of the process that has led to an adverse job action. Unlike applicants, who typically do not see the hiring process unfold, incumbent employees have a course of dealings with management and fellow employees that may suggest unfair treatment.

EEOC charge statistics confirm that incumbent employees tend to pursue enforcement proceedings under Title I. For the period from July 26, 1992 though September 30, 1997, nearly nine-tenths of charges pertained to the post-hiring stage. Complaints regarding hiring, in contrast, accounted for only 9.4 percent of charges. Ironically, post-hiring accommodation claims are usually unsuccessful conciliations. *Id.*

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253 See Weber, supra note 222, at 133 n.52 (noting that the prevalence of discharge charges "supports Judge Friendly's point that people are more likely to be concerned over the loss of something they have than the failure to get something they want" (citing Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296 (1975))).

254 Over half of all charges related to discharge (52.3 percent) while 29 percent concerned a failure to provide reasonable accommodations, 12.6 percent harassment, 8 percent discipline, 4.5 percent layoff, 3.9 percent promotion, 3.8 percent benefits, 3.5 percent wages, 3.3 percent rehiring, and 2.3 percent suspension. See Stumer, supra note 250, at 469 & nn.61-63.

255 *Id.*
ful in spite of the incumbent employee's greater willingness to bring enforcement actions. EEOC charge data indicate that the Commission found that only 17.8 percent of charges were meritorious. Claimants also fare poorly in federal courts. Professor Colker's study of federal court dispositions determined that employers had a 93 percent success rate in federal district courts and an 84 percent rate on appeal.

While Title I's attempt at regulating post-hiring conditions may seem as unsuccessful as the recruitment-stage rules against inquiries and medical examinations, the reasons for the former likely have nothing to do with the traditional civil rights elements in the ADA. The dynamics of Title I's post-hiring rules are different. Unlike the hiring rules, rules protecting incumbent employees are essentially substantive. At this stage, Title I is no longer preoccupied with controlling or ignoring information about disability status. In fact, it positively encourages employers to acquire information about a worker's disabilities, permitting any inquiries that are job related and consistent with business necessity. Since information about a worker's disabilities is on the table (or could be), the focus now becomes whether a specific employee, under the circumstances, is entitled to a reasonable accommodation or has been discharged because of a failure to grant one. This analysis also lacks the comparative quality of a hiring decision. In sum, the emphasis on individual entitlement moves post-employment claims away from the traditional civil rights model, in which the defining trait is irrelevant, into a context where the nature of a disability is paramount. The issue now is whether a redistributive act should occur in light of a legal standard.

Many advocates assert that plaintiffs' poor success rates stem from the federal bench's hostility toward the ADA. While it is possible

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257 Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999); see also Ruth Colker, Winning and Losing Under the Americans with Disabilities Act, 62 OHIO ST. L.J. 239, 248-57 (2001) (finding that defendants gain full reversal in 42 percent of appeals and reductions in the damages in another 17.5 percent of cases, while plaintiffs obtain reversal in only 12 percent of cases); ABA Commission on Mental and Physical Disability, Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (1998) (noting that Title I employment plaintiffs win in 7.89 percent of cases).

258 See 42 U.S.C. § 12112(d)(4)(A) (2000) (permitting inquiries "shown to be job-related and consistent with business necessity").

259 E.g., Matthew Diller, Judicial Backlash, the ADA, and the Civil Rights Model, 21 BERKELEY J. EMP. & LAB. L. 19 (2000); Linda Hamilton Krieger, Foreword - Backlash Against
that plaintiffs lose ADA claims for lack of merit, a suggestion of a judicial reaction against Title I is not implausible. The Supreme Court has gone out of its way to narrow the statutory definition of who qualifies as disabled by holding that determination of disability status must be judged in light of mitigating circumstances \(^{260}\) and by taking a narrow view of what is a major life activity.\(^{261}\) Conclusions on this point, however, must remain tentative. Whatever judicial hostility actually exists, many incumbent employees may have experienced success in gaining accommodations in less formal settings. Remember that separations from employment do not appear to have increased since the enactment of the ADA.\(^{262}\) It is possible that some employers have opted to grant accommodations rather than absorb the cost of defending claims. An unfortunate lack of data concerning negotiated settlements or informal resolutions of Title I disputes makes it difficult to determine the degree to which employers engage in such strategic behavior, much less the true prevalence of accommodations in the workplace.\(^{263}\)

It is also unclear whether more vigorous enforcement at the post-hiring phase would make a significant difference. A more sympathetic EEOC or federal bench might result in more dispositions requiring the provision of accommodation or reinstatements. I find it difficult to believe that success in post-hiring claims would alter the composition of the workforce. Incumbent workers with disabilities are generally the same people who would have been hired in the absence of the ADA. These are workers who were deemed "safe bets" either because they had no obvious impairment at the point of hiring or their disabilities were deemed inconsequential. Title I's adoption of the traditional civil rights model's procedurally oriented hiring scheme leaves employers free to continue to avoid hiring persons with known disabilities. Successful enforcement of post-hiring accommodation claims would probably have the ironic effect of making employers even more reluctant to hire persons with disabilities.

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\(^{261}\) See Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 195-98 (2002) ("We . . . hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.").

\(^{262}\) See Acemoglu & Angrist, supra note 251, at 940-41.

C. The Cost Problem

In the film *All the President's Men*, depicting the Washington Post’s investigation of the Watergate Scandal, a mysterious inside source called “Deep Throat” (played by Hal Holbrook) counseled reporters Bob Woodward (played by Robert Redford) and Carl Bernstein (played by Dustin Hoffman) to “follow the money.” This generally sound advice also holds true for investigating Title I’s failure to make significant progress toward its integrationist goals. The nub of the problem is that mandating accommodations imposes costs on employers that they would rather avoid. Congress, in my view, failed to appreciate the effect of accommodation costs on employment practices, particularly at the hiring stage. Title I’s provision that employers absorb “reasonable” costs for accommodations reflects the traditional civil rights model’s normative, moral view that cost concerns cannot ratify decisions that are based on immutable characteristics. While subordination of economic goals to social goals is commonly accepted in matters of race and gender, the effects have apparently been less desirable in matters of disability policy.

Title VII tends to be indifferent to employer concerns about the costs of taking on workers in protected classes. Disparate treatment claims under Title VII are not subject to business necessity or cost defenses. This exclusion reflects the traditional model’s desire to protect minorities from stigmatizing suggestions of inferiority. Hence, the gender-conscious pension system in *Manhart* and the job exclusions in *Johnson Controls* were impermissible even if they were economically rational. The closest approximation to a cost defense in disparate treatment claims is the BFOQ defense. One could argue that casting a woman as Henry V might reduce box office receipts considerably (in spite of the novelty value). Concerns over costs, however, seem secondary to the BFOQ’s desire to preserve artistic integrity.

Only in disparate impact cases does Title VII trouble itself with costs. Employers may raise a business necessity defense to a claim that a neutral rule disproportionately affects a protected class. Taking employer costs into account does seem more acceptable in disparate impact claims since the superficially neutral rules at issue do not

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264 *ALL THE PRESIDENT’S MEN* (Warner Brothers 1976).
266 See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(2) (2004) (indicating that gender may be a BFOQ for acting due to the need for “authenticity or genuineness”).
267 See Sullivan *supra* note 158, at 1513-15 and accompanying text.
have the same stigmatizing effect as direct race or gender classifications. The cases do not, however, paint a clear picture of the permissibility of considering the costs of reaching less discriminatory equilibriums in job rules or requirements.\(^{268}\) Perhaps it is better to view the business necessity defense in noneconomic terms. I have argued elsewhere that disparate impact scenarios may be better regarded as creating an inference of discriminatory motivation.\(^{269}\) By demonstrating business necessity, the defendant proves that his or her motivations were proper commercial factors rather than an improper bias.\(^{270}\) The Court, however, takes the traditional view.\(^{271}\)

Title I shares the traditional civil rights model’s moralistic view that even genuine cost factors should remain a limited factor in the antidiscrimination calculus. Section 102(b)(1) of the ADA, which creates disparate treatment liability, recognizes no cost defense at all.\(^{272}\) Disparate impact claims, epitomized by section 102(b)(6)’s ban on qualification standards that tend to screen out individuals or classes with disabilities, follows Title VII by providing a business necessity defense.\(^{273}\) Disparate treatment and impact claims, however, make up a small portion of ADA claims.\(^{274}\) The typical Title I claimant alleges harm from the denial of an accommodation. Even here, though, Congress took a moral view of costs.

Congress’s decision to privilege moral over economic concerns is implicit in Title I’s dual mechanism for addressing concerns over

\(^{268}\) Compare Robinson v. Lorillard Corp., 444 F.2d 791, 799 n.8 (4th Cir. 1971) (disallowing cost defense in challenge to seniority system), and Liberles v. County of Cook, 709 F.2d 1122, 1133 (7th Cir. 1983) (holding that savings to taxpayers do not justify compensation system with disparate racial impact), with Wambheim v. J.C. Penney Co., 705 F.2d 1492, 1495 (9th Cir. 1983) (recognizing business necessity defense based on cost of extending employer-provided health insurance).

\(^{269}\) Leonard, Bilingualism, supra note 68, at 96-97.

\(^{270}\) Id.


\(^{273}\) Id. § 12112(b)(6). Additionally, Title I’s ban on standards, criteria, and methods of administration with discriminatory effects, id. § 12112(b)(3), lacks an explicit reference to a business necessity defense, as does the rule against testing devices that measure disability rather than skill, id. § 12112(b)(7). The EEOC, however, has supplied such a defense by regulation. See 29 C.F.R. § 1630.15(c) (2004) (establishing a business necessity defense for disparate impact claims).

\(^{274}\) EEOC statistics alluded to in Part III.B, see Sturner, supra notes 250, 254-56 and accompanying text, indicate that discharge claims accounted for 52.3 percent of charges while failure to accommodate claims tallied only 29 percent for the period from July 26, 1992 through September 30, 1997. These statistics underline the role of the accommodation mandate since discharge claimants often contend that a failure to accommodate led to a dismissal. The common perception is that most claims involve accommodations. See, e.g., Alison M. Barnes, The Americans with Disabilities Act and the Aging Athlete After Casey Martin, 12 MARQ. SPORTS L. REV. 67, 86 (2001) (noting that most Title I claims involve demands for accommodations).
accommodation costs. The first is the requirement that accommoda-
tions be “reasonable.” This requirement has been applied in a decid-
edly pro-employee fashion. The Court’s recent decision in *US Air-
ways, Inc. v. Barnett*275 observed that plaintiffs have the burden of
demonstrating that a proposed accommodation is “reasonable on its
face.”276 Although Justice Breyer’s opinion gives little guidance as to
the threshold of reasonableness, it cites with approval lower court
decisions that deem accommodations acceptable so long as expenses
are not disproportionate to the benefits realized.277 This is an objective
standard that compares costs to the employer with benefits conferred
on the worker. This analysis pointedly avoids the sort of calculation
that employers want to perform: the effects of incremental costs on
profitability. The employer is further disadvantaged by the tendency
of many lower courts to impose only a burden of production on plain-
tiffs.278 Once the plaintiff brings forward some plausible evidence of
reasonableness, the employer must respond by raising the difficult
affirmative defense of undue hardship.279

Undue hardship is Title I’s primary mechanism for screening out
unacceptably expensive accommodations. Section 102(b)(5) of the
Act requires that employers provide needed accommodations for
known disabilities of workers unless they would thereby incur “undue
hardship.”280 The Act defines this situation vaguely as “significant
difficulty or expense,”281 then provides subjective factors to consider
whether an undue hardship has arisen: the nature and cost of the ac-
commodation, the financial resources of the facility in question and of
the defendant as a whole, and the type of operation involved.282 Ulti-
mately the evidence must show that an accommodation would signifi-
cantly hurt the defendant’s business, though the employer need not go
so far as to prove that bankruptcy is imminent.283 Significantly, undue
hardship is an affirmative defense for which the defendant bears the
burden of proof.284 From a procedural perspective, defendants obvi-

276 *Id.* at 401.
277 *Id.* at 402 (citing, e.g., *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir.
1995)).
278 *See, e.g., Borkowski*, 63 F.3d at 138 (holding that plaintiff bears only a burden of pro-
duction).
279 *See Barnet*, 535 U.S. at 402 (“Once the plaintiff has [met the burden of production],
the defendant/employer then must show special (typically case-specific) circumstances that
demonstrate undue hardship in the particular circumstances.”).
281 *Id.* § 12111(10)(A).
282 *Id.* § 12111(10)(B)(i)-(iv).
283 *See sources and cases cited supra notes 231-233 and accompanying text.
ously face greater difficulties in establishing undue hardship than do plaintiffs in demonstrating the reasonableness of an accommodation.

Even though Title I uses the language of costs and economic burdens, the undue hardship rules are in reality more a statement of an employer's moral (and now legal) obligation to assist workers with disabilities. Employers—at least theoretically—hire workers because they contribute more to a firm than they cost. Under the standard labor demand model, employer behavior in hiring is governed by a desire to maximize a firm's profits. Even though Title I uses the language of costs and economic burdens, the undue hardship rules are in reality more a statement of an employer's moral (and now legal) obligation to assist workers with disabilities. Employers—at least theoretically—hire workers because they contribute more to a firm than they cost. Under the standard labor demand model, employer behavior in hiring is governed by a desire to maximize a firm's profits. Even though Title I uses the language of costs and economic burdens, the undue hardship rules are in reality more a statement of an employer's moral (and now legal) obligation to assist workers with disabilities. Employers—at least theoretically—hire workers because they contribute more to a firm than they cost. Under the standard labor demand model, employer behavior in hiring is governed by a desire to maximize a firm's profits.

285 E.g., Schwochau & Blanck, supra note 245, at 283 n.65 (citing RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 4 (4th ed. 1991)). Standard labor theory also makes the unrealistic but analytically facilitating assumption that individuals and firms always act rationally, have perfect market information, and work in perfectly competitive labor and product markets. Id.

286 See id. at 286. ("If capital and customer buying behavior is fixed, the amount of labor demanded is a function of its costs . . . ").

287 See id.

288 See 42 U.S.C. § 12111(10)(B) (2000) (listing cost as only one of several factors in undue hardship calculus); see also Van Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (holding that financial condition of the employer is only one consideration in determining whether an accommodation would impose an undue hardship).

Congress that it is fair to impose obligations on employers if the burden is relatively light. So long as the demanded accommodation is reasonable (as defined by the courts rather than the market), does not create an "undue" hardship, does not invoke safety concerns, and permits the worker to perform the core functions of a job, the employer's cost concerns melt away in favor of a congressional judgment that the employer has no legitimate reason to oppose assisting a worker with a disability. Put differently, the refusal to spend money is the moral equivalent of an inherently unreasonable decision to consider race or gender in a personnel matter. For the sympathetic mind, it is a short leap from the established axiom that race or gender are occupationally irrelevant to the new contention that disabilities addressable by "reasonable" accommodations should not influence personnel outcomes negatively.

It is unsurprising that Congress took a moral view of accommodation costs. Before the ADA, Congress had limited experience with mandatory accommodations in the civil rights sphere. Title VII included a provision for accommodation of workers' religious preferences, extending protection to religious observances and practices unless the employer could demonstrate an undue hardship.290 This requirement, however, was gutted by the Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison.*291 It is true that recipients of federal funds have been obliged to accommodate workers with disabilities since the issuance of regulations under section 504 of the Rehabilitation Act in 1977.292 These obligations, however, are accepted voluntarily. Title I, in contrast, aims to regulate all but the smallest employers293 and thus represents an attempt to regulate the labor market. Finally, Congress likely believed that most accommodation costs would be minimal. Witnesses in hearings on the ADA suggested that the average accommodation was inexpensive,294 that costs were often exaggerated,295 and that technology would reduce expenses.296 A perception that accommodations were usually not

291 432 U.S. 63, 84 (1977) (limiting the accommodation mandate to requests involving no more than de minimis costs).
293 42 U.S.C. § 12111(5)(A) (2000) (limiting Title I coverage to employers with fifteen or more employees).
296 See id. (referring to statement of Charles Crawford that technology will reduce accom-
pricey no doubt reinforced the view that nonaccommodation was simply unreasonable and therefore wrong.

Why does all this matter? Legislative conceptions of "fairness" or good social policy must inevitably deal with the realities of economic conditions and employment practices. Human nature, particularly the desire for profit and prosperity, is difficult to alter by legislative fiat. In the normal flow of events, business managers want to minimize costs in order to maximize profits. Indeed, employer concerns about accommodation costs were evident in their insistence on an undue hardship defense during the ADA's legislative process. The emergence of a political compromise on accommodation costs, however, is no indication that employers will voluntarily curb their customary economic behaviors.

If I am correct that Title I's procedural approach to hiring has rendered the statute difficult to enforce, then we should expect employers to exploit this gap in Title I to avoid hiring workers who demand accommodations in favor of equally qualified workers who do not. Even if the average accommodation cost is as cheap as the congressional witnesses suggested, there is no reason to believe that profit-maximizing employers would not take advantage of smaller savings. Some accommodations will prove very expensive. A typical employer's reaction to an accommodation demand, however, is likely to turn on factors besides upfront outlays. She is likely to entertain the possibility that a disability may worsen over time and require more extensive accommodations. Employees who can perform the essential functions of the job in question—but few others—lack the quality of flexibility that most employers desire. Finally, why take a chance on someone who may sue you later when equally qualified nondisabled applicants are available?

Cost avoidance by employers has probably played an important role in the ADA's failure to improve the employment status of persons with disabilities. Two employment studies have come to the conclusion that Title I's accommodation mandate actually depressed employment of persons with disabilities. The DeLeire study, which observed that employment rates for men relative to their nondisabled

- 297 See supra note 234 and accompanying text.
- 298 See supra Part III.B (discussing the tendency of Title I's procedurally oriented rule to facilitate the nonhiring of persons with disabilities).
- 299 See, e.g., Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1514, 1516-17 (2d Cir. 1995) (holding that the plaintiff's request that her employer pay $300 to $520 per month for a parking space, that is, 15–26 percent of a worker's salary, may be a reasonable accommodation).

300 Id. at 708.

301 Id. at 708-09.

302 Id. at 705.

303 Id. at 705.

304 Acemoglu & Angrist, supra note 251, at 950.

305 Id. at 936-37.

306 Id. at 949.

307 Id. at 949-50.

308 Id. at 950.
circumstances. More specifically, Summers reasons that one of two things should happen when comprehensive mandates are imposed. If the value of the mandated benefit to the workers is greater than the cost to the employer, then employment levels will rise but wages will diminish. Under this scenario, workers are more likely to accept employment since total benefits will be greater in spite of the employer's decision to drop wages to cover the cost of the mandated benefit. If the value of the benefit to workers is less than the cost to the employer, then employment levels and wages will fall. Here, wage reductions to cover benefit costs will yield compensation that is acceptable to fewer workers.

Accommodation mandates, such as Title I, that apply to segments of the workforce are subject to a different economic dynamic. These requirements create two labor pools consisting of workers favored by the new requirement and everyone else. The precise effect of the division of markets depends primarily on whether the rule imposing accommodations on employers effectively forbids differentials in employment and wages, that is, prevents employers from refusing to hire or fire persons in protected categories or from discounting wages to cover the costs of accommodations. Laws creating accommodation mandates, such as the ADA, generally have an antidiscrimination provision that forbids such differentials. To a labor market analyst, however, the question is not whether such provisions exist but whether they are "binding," that is, enforceable.

Several permutations can arise under the issue of whether mandates apply only to targeted groups. For example, mandates may have binding rules against employment and wage differentials or simply have nonbinding wage differentials. Title I, however, falls most naturally into the category of mandates with a binding rule against wage but not employment differentials. Wage differences between workers with disabilities and others are easy to detect. The DeLeire study, notably, found no decrease in wage rates for workers with dis-

310 Summers, supra note 309, at 180.
311 Id.
312 Jolls, Accommodation Mandates, supra note 168, at 240.
313 See, e.g., 42 U.S.C. § 12112(a) (2000) (providing a general prohibition on disability discrimination in the terms and conditions of employment).
315 Id. at 243-53.
316 Id. at 257-61.
317 See generally id. at 255-57 (analyzing situations in which a rule is binding on wage but not employment differentials).
On the other hand—as I argued in Part III.B—the procedural nature of Title I makes enforcement extremely difficult. Professor Jolls observes that binding wage restrictions make accommodated workers more expensive to employ. Nonbinding employment differentials, in turn, permit employers to act on their natural incentive not to hire. Put more plainly, employers cannot get away with paying accommodated workers lower wages or benefits but can weasel out of hiring them. Ironically, targeted workers will be worse off under this scenario since binding restrictions on wage differentials will prevent them from accepting jobs whose wages have been reduced to reflect accommodation costs.

In sum, it appears that Title I’s accommodation mandate has contributed—in a predictable fashion—to diminished employment opportunities for persons with disabilities. There remains some doubt about the effects of accommodation costs in the labor market. Some scholars have attempted to discredit the DeLeire and Acemoglu/Angrist studies by arguing that they used a “work limitation” measure of disability that is narrower than the ADA’s definition and hence inappropriate. The gist of the argument is that employment levels have actually increased among those who meet the statutory definition of a qualified individual with a disability. Professor Bagenstos, however, finds these conclusions artificially narrow since “ADA-qualified” persons represent only a small part of the group that Congress wished to help and because employers are most likely to consider costs when evaluating workers who require accommodations to overcome work limitations. There may also be

318 DeLeire, supra note 300, at 705.
319 See supra Part III.B (arguing that the procedural nature of Title I makes enforcement difficult); see also Jolls, Accommodation Mandates, supra note 168, at 275 (noting that the ADA’s rule against employment differentials is difficult to enforce).
320 Jolls, Accommodation Mandates, supra note 168, at 255.
321 Id.
322 Id.
323 See, e.g., Douglas Kruse & Lisa Schur, Does the Definition Affect the Outcome?, in DECLINE 279, supra note 33, at 284-86 (noting numerous criticisms of the DeLeire and Acemoglu studies, including the possibilities that the work-limitation measure may be both over- and underinclusive of the ADA classification); see also Peter Blanck et al., Is It Time To Declare the ADA a Failed Law?, in DECLINE 301, supra note 33, at 315-18 (describing the definition of disability as one of a number of problems with the studies).
324 See, e.g., H. Stephen Kaye, Employment and the Changing Disability Population, in DECLINE 217, supra note 33, (arguing that persons with disabilities who were able to work experienced increase in employment during the nineties); Kruse & Schur, supra note 323, at 291-92 (noting a 5.9 percent increase in employment of persons with severe functional limitations who could nevertheless work).
325 Bagenstos, Has the ADA Reduced Employment?, supra note 30, at 545.
326 See id. at 546 (suggesting that employers may selectively hire disabled workers who do not need accommodation rather than hiring those that do).
a relationship between relaxation of SSDI (Social Security Disability Insurance) eligibility rules in the early 1990s and disemployment among the individuals with disabilities. It is difficult to say, though, whether the SSDI program lured workers away from the labor market or cushioned the effects of the accommodation mandate.

Resolving the macroeconomic effects of Title I is not the purpose of this Article. I am content to treat accommodation costs as a contingent problem to be explored by others (although I am obviously skeptical of claims that accommodation costs have no effect on the labor market). To the extent that the actual or perceived costs of the accommodations interfere with employment opportunities, the civil rights model embedded in Title I is ill equipped to respond. Unpopular accommodation mandates must have an effective enforcement mechanism. Title I's dedication to the traditional model's procedural approach fails to achieve this necessary precondition to success. The Act's enforcement methods at the hiring stage have effectively made the employment of persons who require accommodation optional. Equally important, Title I's moral approach to accommodation costs is so far removed from the dynamics of hiring that many (and perhaps most) employers are likely to dismiss compliance as a waste of time. One can expect that personnel managers operating in competitive industries are keenly aware of marginal labor costs. The average hourly wage in a Chinese facility is approximately $0.40, compared to the current U.S. minimum wage of $5.15.

I am not suggesting that there is an easy solution to the problem of distributing accommodations costs in a highly competitive labor market. Some concessions might leave employers more likely to comply with Title I's hiring and accommodation rules. Perhaps we could limit the number of workers an employer must accommodate or limit expenditures to a percentage of salary. In the absence of effective enforcement, however, it is difficult to imagine that employers would not continue to act to avoid even reduced costs. A more promising solution might be a tax credit for accommodation expenditures. A

327 See id. at 550-55 (arguing that changes in SSDI eligibility had a significant effect on the rising unemployment rate).
328 See supra Part III.B.
331 Tax credit programs of limited scope already exist. The disabled access tax credit, 26 U.S.C. § 44(a) (2000), permits small businesses a 50 percent tax credit on accessibility expenditures up to $10,250. Eligible small businesses are those with not more than thirty employees or gross receipts not exceeding $1,000,000 per year. Id. § 44(b). The work opportunity credit, id. § 51, provides partial tax credits in pertinent part for workers who have been referred by a vocational rehabilitation agency, id. § 51(d)(6), and qualified SSI recipients, id. § 51(d)(9).
dollar-for-dollar credit would warm the heart of the cruelest cost accountant. Unfortunately, record federal budget deficits make this solution unlikely in the near term. In any event, striking a balance between workplace regulation and subsidy for persons with disabilities will be a challenging process. My purpose in the Article is not to suggest the ultimate solution; rather, I am suggesting that the process of reexamining workplace disability policy must begin with the acknowledgment that Title I’s unenforceable command to provide accommodations short of undue hardship has not put a dent in the problem of opening up the workplace to persons with disabilities.

IV. CONCLUSION

Accommodation requirements are the crux of the Title I’s integrationist agenda. They give life to the social model that underlies that statute. They attempt to redress the effects of disability that the social model regards as created or aggravated by the attitudes of society. Above all, the Act’s accommodation program implicitly recognizes that the defining trait of its protected class is relevant to bettering their status in society. Title I’s reliance on the forms and structures of the civil rights model, however, inevitably imports traditional notions of equality. Developed to meet the challenges of race and gender discrimination, the traditional model views those defining traits as pointless intrusions into personnel decisions. Traditional civil rights theories are simply ill suited to carry out an integrationist agenda for persons with disabilities. Antidiscrimination is the soul of the civil rights model, embedded in Title VII’s command that employers not let irrelevancies affect personnel decisions. The soul of the integrationist agenda is affirmative action—a conscious attempt to consider and react to the ADA defining quality: disability.

I hope to have shown not only that Title I of the ADA is a mélange of equality concepts but also that the antidiscrimination suppositions of the statute interfere with the accommodationist agenda. Title I is a flawed, contradictory statute that is unlikely to achieve its

These programs are underutilized owing to a lack of employer awareness. Francine J. Lipman, Enabling Work for People with Disabilities: A Post-Integrationist Revision of Underutilized Tax Incentives, 53 AM. U. L. REV. 393, 418-20 (2003). Ironically, many small firms that might benefit from these credits are not covered by Title I since they do not employ fifteen or more persons. Id.

integrationist goals. The implication of this conclusion is that Title I needs to be recast as an affirmative action instrument free from the counterproductive assumptions of the traditional model. If American society wants to facilitate the integration of persons with disabilities into the workplace, then its legislation must abandon the goal and rhetoric of equality and focus disability policy on more direct forms of assistance. Reconceiving disability policy in this way will come at a psychological cost. The ADA's goals of advancing equality of opportunity, full participation, independent living, and economic self-sufficiency are expressions of equality as well as status. It will be unsettling to set aside this rarely doubted social and legal norm. Yet, it is not realistic to treat disability as a pertinent defining trait while employing legal mechanisms that narrow the protection to persons with the least burdensome conditions; rely on procedural hiring rules that protect only those with invisible disabilities; and finally, wish away the economic pressures of the labor market. Difference makes a difference. The principal statutory statement of disability policy should be altered to reflect this fact.

There is a role for historical antidiscrimination principles in disability law. Category I plaintiffs (discussed in Part III.A) have actual or perceived disabilities that do not in fact limit their ability to work a particular job. In these cases, the defining traits are truly irrelevant; hence, the disparate treatment provisions of the ADA will work as well for this subgroup as Title VII works for racial minorities or women. Here, Title I can make a genuine contribution to the social goals of promoting personal dignity, avoiding reliance on stereotypes, and eradicating subtle but demeaning messages of inferiority. Resolving these types of discrimination does not require a resort to accommodations.

What should replace Title I? Suggesting the terms of a successor statute is beyond the realm of this Article. There are alternative strategies that Congress and other should at least consider. Tax credits or other government subsidies\(^3\) come to mind, as do hiring quotas.\(^4\) Each proposal will present challenges, trade-offs, and balances of

\(^3\) See, e.g., Sue A. Krenek, Beyond Reasonable Accommodation, 72 TEX. L. REV. 1969, 2012-13 (1994) (suggesting that government pay for costs of accommodations to counter disincentives to hire persons with disabilities); see also EPSTEIN, supra note 76, at 493 (characterizing accommodations mandate as an off-budget subsidy and arguing that a federal grant system would end the "fatal separation of the right to order changes from the duty to pay for them"); Sherwin Rosen, Disability Accommodation and the Labor Market, in DISABILITY AND WORK 18, 29-30 (Carolyn L. Weaver ed., 1991) (advocating direct subsidies funded through tax revenues).

\(^4\) See, e.g., Mark C. Weber, supra note 222, at 142-74 (advocating affirmative action and job set-asides for persons with disabilities).
interests. Sending Title I back to Congress is likely to frighten disability rights advocates. Those advocates may fear that resulting legislation will be inferior to the rights now conferred by the ADA. In light of our experience with accommodation costs under Title I, it is reasonable to expect that concerned entities would quarrel about the allocation of costs under any successor plan. Proposals for a tax credit program would have to reckon with the constraints of the federal budget: credits for accommodations would have to be funded either by cutting other programs or by deficit spending. Any quota program would encounter resistance from business interests.

Many of Title I's problems, however, stem from the fact that the accommodations cost issue was never subjected to realistic political debate. Judge Newman once complained that Congress's compassionate desire to allow persons with disabilities to work productively was not matched by practical guidance on burdens of proof in employment discrimination claims.\textsuperscript{335} Congress's commitment to assist individuals with disabilities also seems to have diverted its attention from the hard realities of accommodation costs. The legislature's optimistic belief that accommodations were usually inexpensive—paired with its moralistic view that withholding accommodations was wrong—sidetracked serious discussion of Title I's microeconomic effects. A new political debate over who must shoulder the burdens of accommodation costs and related issues, such as scope of coverage under the Act, would be spirited at best and perhaps threatening. But the result of such a process might be a statute that strikes a workable compromise among the many interests affected and the desire to improve the employment prospects of persons with disabilities.

\textsuperscript{335}Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 144 (2d Cir. 1995) (Newman, C.J., concurring).