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DISABILITY, DISPARATE IMPACT, AND CLASS ACTIONS

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ABSTRACT

Following Title VII's enactment, group-based employment discrimination actions flourished due to disparate impact theory and the class action device. Courts recognized that subordination that defined a group's social identity was also sufficient legally to bind members together, even when relief had to be issued individually. Woven through these cases was a notion of panethnicity that united inherently unrelated groups into a common identity, for example, Asian Americans. Stringent judicial interpretation subsequently eroded both legal frameworks and it has become increasingly difficult to assert collective employment actions, even against discriminatory practices affecting an entire group. This deconstruction has immensely disadvantaged persons with disabilities. Under the Americans with Disabilities Act (ADA), individual employee claims to accommodate specific impairments, such as whether to install ramps or replace computer screens, have all but eclipsed a coherent theory of disability-based disparate impact law. Moreover, the class action device has been virtually nonexistent in disability discrimination employment cases. The absence of collective action has been especially harmful because the realm of the workplace is precisely where group-based remedies are needed most. Specifically, a crucial but overlooked issue in disability integration is the harder-to-reach embedded norms that

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require job and policy modifications. The Article argues that pandisability theory serves as an analogue to earlier notions of panethnicity and provides an equally compelling heuristic for determining class identity. It shows that pandisability undergirds ADA public service and public accommodation class actions in which individualized remedy assessments have been accepted as part of group-based challenges to social exclusion. The Article also demonstrates that this broader vision of collective action is consistent with the history underlying the class action device. Taking advantage of the relatively blank slate of writing on group-based disability discrimination, it offers an intrepid vision of the ADA's potential for transforming workplace environments. In advocating for a return to an earlier paradigm of collective action in the disability context, the Article also provides some thoughts on challenging race- and sex-based discrimination.

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Future workplace policies should plan for “all jobs to include some physical activity” unrelated to job qualifications in order to “dissuade unhealthy people from coming to work at Wal-Mart.”¹

1. Steven Greenhouse & Michael Barbaro, *Wal-Mart Memo Suggests Ways to Cut Employee Benefit Costs*, N.Y. TIMES, Oct. 26, 2005, at C1 (publishing a memorandum from Wal-Mart's Executive Vice President for Benefits to its Board of Directors).

INTRODUCTION

The period following enactment of Title VII of the Civil Rights Act of 1964² was a high-water mark in group-based employment discrimination theories. In a typical narrative of a Title VII case, an individual from a racial or ethnic minority group led a class action against a common employer. The class comprised members of her own minority group, other minority groups, or sometimes all minority groups. Collectively they alleged that employment policies had excluded them from workplace opportunities. Not only were individuals permitted to proceed as a class and thereby challenge a variety of employment policies; they were encouraged to do so.

Group dynamics were crucial to these cases. Courts recognized that, historically, employment practices had harmed entire communities of minority workers.³ To ameliorate this situation, plaintiff classes were defined by their members' exclusion. In other words, the effects of subordination defined the group and bound its members together. This was true even when a class requested relief that, due to its variety and scope, was subsequently addressed individually rather than communally. Throughout this period, group-based employment discrimination theories played a crucial role in restructuring the workplace.

Undergirding the definition of group identity for these classes was the notion of panethnicity. Panethnicity is a heuristic used by mainstream society, including employers and judges, through which groups that are not inherently related are treated as having a common, overarching identity. Viewing Chinese Americans, Japanese Americans, and Korean Americans who possess distinct historical, linguistic, and cultural norms, as Asian Americans is an example of panethnicity. Although the concept is a social construct, post-Title VII cases recognized panethnic identities when applying disparate impact theory and the class action device. Both of those legal frameworks, however, have subsequently been eroded by stringent judicial interpretation; Title VII disparate impact cases are now chiefly directed toward a single remedial policy, and class certification analysis applies the federal pleading requirements of commonality and adequacy in a

2. 42 U.S.C. §§ 2000e-2000e-17 (2000).

3. As noted by the Supreme Court, the purpose of Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

manner that constricts group identity. As a result, it has become increasingly difficult to predicate collective employment action on a unifying group-based identity. This is true even when actions aim to enjoin discriminatory practices that the group commonly experiences.

The deconstruction of group-based theory has immensely disadvantaged persons with disabilities. Unlike race- and sex-based employment discrimination theories, disability law has not been litigated on the basis of group identity. Under the Americans with Disabilities Act (ADA),⁴ individual claims to accommodate specific impairments in particular jobs have all but eclipsed a coherent theory of disability-related disparate impact law. Moreover, the class action device, which historically played a central role in group-based discrimination theory (while often going hand in hand with robust disparate impact litigation), has been virtually nonexistent under the statute's employment provisions. We therefore advocate for pandisability theory as an appropriate response to the common and unifying interest of the disability classification in eradicating common subordination, however individually those harms must be resolved. Because prejudice and stereotypes arise from misperceptions about the characteristics of a class of individuals, it is appropriate and effective to pursue classwide solutions. Put most elementarily, we argue that group-based discrimination requires group-based action.

We frame our arguments within the context of a growing debate on the efficacy of disparate impact law in light of prevailing workplace realities. Commentators agree that for racial minorities and for women, success in the working world is contingent on eradicating, in turn, facially discriminatory and facially neutral policies. After confronting the more obvious forms of discrimination through disparate treatment theory, the thrust of employment discrimination litigation has been directed at altering workplace hierarchies whose bases are harder to discern. Scholars also agree that barriers in the modern workplace are more deeply embedded in unstated cultural norms and manifest in more nuanced modes of discrimination. They sharply divide, however, on whether disparate impact theory can alter these latter, subtler norms. A nihilist school claims that nothing can be done regarding entrenched workplace culture,⁵ whereas a more optimistic perspective advocates for greater

4. 42 U.S.C §§ 12101–12213 (2000).

5. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006) (averring that disparate treatment and impact

use of disparate impact theory.⁶ Notably, the preceding academic conversation (as well as the pertinent case law) has occurred without much discussion of the current exclusion or the future potential of a disparate impact theory under the ADA.⁷ This absence, in turn, reinforces the erroneous notion that the statute's individualized assessment principle militates against group-based theories. It is this lacuna that we address. Taking advantage of the relatively blank slate of writing on group-based disability discrimination, we offer an intrepid vision of the ADA's potential for transforming workplace environments.

This Article challenges the exclusion of disability-based employment discrimination claims from group-based theories, and in so doing advocates for applying disparate impact theory to what have heretofore been individualized ADA failure to accommodate claims. Although we acknowledge the difficulty of transferring disparate impact standards to the disability realm, we also believe that a return to earlier notions of group-based rights—in this case expressed through the lens of pandisability theory—argues persuasively for reinvigorating these areas of law. Recurring juridical dialogue on

models of discrimination are ill-suited to redistribute power and remedy unintentional discrimination); Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1325–26 (1987) (establishing that Title VII's disparate impact theory “does not allow for challenges to male bias in the structure of business, occupations, or jobs”); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 738–53 (2006) (arguing that disparate impact theory has only proven useful in a limited universe of testing cases); Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 758 (2000) (reviewing JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000)) (suggesting that employment discrimination law cannot “actually alter the dominant norms of most workplaces or the kinds of roles that men and women play within them”); see also Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1205–07 (2000) (noting the decline of disparate impact).

6. See, e.g., Charles A. Sullivan, *Re-Reviving Disparate Impact* 59–67 (Seton Hall Pub. Law Research Paper No. 9, 2004), available at http://papers.ssrn.com/abstract_id=581503 (commenting on limited ways courts have interpreted disparate impact law, and suggesting a “more hopeful future” for disparate impact theory); see also Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 666 (2005) (advocating the restructuring of disparate impact theory to provide private rights of action based on the realities of work culture); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 92 (2005) (arguing that, with a different interpretation of “workplace essentialism,” Title VII and ADA disparate impact law could have greater impact).

7. E.g., Samuel R. Bagenstos, “Rational Discrimination,” *Accommodations, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 835 (2003) (“For purposes of this Article, then, my definition of ‘antidiscrimination law’ is limited to prohibitions on intentional discrimination or disparate treatment.”).

disability discrimination has focused on individualized physical accommodations, as expressed through individual decisions whether to place ramps or to replace computer screens; extending a group-based paradigm to these types of cases would be a positive development. The discussion, however, ought not to stop there. A prevailing but almost unaddressed issue in disability integration is the existence of unstated occupational norms and cultural expectations that stymie workplace opportunity for workers with disabilities.⁸ Received wisdom asserts that Title VII largely removed the more overtly illegitimate race- and sex-based policies from the modern workplace, and what remains are legitimate, if unfortunate, barriers to disability inclusion. But this conclusion is based on a cramped and disability-free view of what disparate impact can and should do. Disability-related challenges to the modern workplace, as expressed through a return to an earlier paradigm of disparate impact theory and class action law, can help level the playing field and better incorporate the members of other protected groups. Thus, although we present our arguments within the context of ADA actions, these same concepts are relevant to the larger universe of Title VII claims.

The Article proceeds as follows. By way of background, Part I briefly reviews post-Title VII group-based employment discrimination theories. Focusing first on disparate impact, it describes early challenges to seemingly neutral workplace rules that disproportionately affected members of protected classes. Over this period, panethnicity was used as a proxy for satisfying the requirements of class action certification, particularly the commonality and adequacy of representation conditions. Subsequently, group-based actions, whether viewed through the lens

8. To illustrate the difference between facially neutral rules and unwritten cultural norms, consider two of the requirements for being a successful law firm summer associate. The formal, neutral rules described might include research and writing memoranda, observing depositions and trials, and helping to prepare more senior attorneys for oral argument. The first wave of disparate impact litigation ensured these sorts of policies did not have a disproportionate effect on protected groups. An example of an impermissible "neutral" rule would be a firm that only hired students from law schools that admitted a disproportionately low number of minority students. Classic disparate impact cases did not, however, reach deeper cultural norms that equally govern occupational success. Accordingly, summer associates continue to be judged on their ability to interact with members of the law firm and its clients in a "professional manner," to socialize at various events outside the workplace, to provide stimulating conversation (and appear interested) at numerous summer associate lunches, and to be perceived of as "team players." Because these sorts of closely assessed job requirements are not formally stated requirements, they have proven harder to reach under Title VII disparate impact law.

of disparate impact theory or class action procedures, have been curtailed by restrictive interpretations of group identity.

Next, Part II turns to the different trajectory of ADA employment law. In the ordinary course of disability employment cases, plaintiffs will claim that their employers failed to provide requested reasonable accommodations, and thereby discriminated against them. Although the prejudice asserted derived from the plaintiffs' membership in the disability classification, the case focuses on their particular situations and the specific job alterations requested. This circumstance can be understood as a result of the ADA defining the denial of a reasonable accommodation as one form of prohibited discrimination, as well as its emphasis on individualized assessments. Nevertheless, this approach is neither desirable nor inevitable: the ADA conceptualizes disability-based discrimination as a group-based phenomenon and provides for group-based action.

Part III advocates for group-based ADA (Title I) employment cases. Pandisability theory presents an analogue to earlier notions of panethnicity and serves as an equally valid heuristic for determining class identity. Class actions have been recognized in both public service (Title II) and public accommodation (Title III) suits, even when those cases sought individualized remedies. The underlying rationale for their certification is that group-based stigma and exclusion militates in favor of collective action as an appropriate judicial response to classwide harms. This view is consistent with the history underlying the class action device. Accordingly, group-based actions provide the most fruitful means through which to challenge and alter deeply embedded workplace hierarchies and norms. Taking advantage of the absence of disparate impact law under the ADA, the Article advocates a return to an earlier paradigm of collection action in the disability field through pandisability theory. Such an adoption provides an exemplar for rethinking the challenges facing Title VII race- and sex-based discrimination.

I. TITLE VII GROUP-BASED DISCRIMINATION THEORIES

In the period immediately following Title VII's enactment, courts were receptive to group-based discrimination theories. Racial minorities and women challenged policies and practices that had the effect, if not the intent, of historically excluding them from employment opportunity. By liberally construing disparate impact law and class certification standards, courts condoned and even

encouraged these groups to challenge practices that had precluded their occupational participation.

A. Disparate Impact Theory

The prevailing framework for analyzing employment-based discrimination divides employers' discriminatory actions by motive. If the discriminatory action is alleged to be intentional (whether systemically or against an individual), then the analysis proceeds to look at the effects of "disparate treatment."⁹ When a prejudicial act is based on seemingly neutral policies that have a disproportionately negative effect upon individuals in protected classes, courts are asked to examine the legitimacy of the policies causing that "disparate impact."¹⁰ Both theories permit the use of group-based evidence to aver the exclusion of protected group members; this is especially true for disparate impact claims, in which statistical evidence can create a strong presumption of discrimination even in the absence of actual proof of motive.

The difference between these doctrines can be illustrated by comparing two seminal Supreme Court decisions. In *International Brotherhood of Teamsters v. United States*,¹¹ the Court found that the plaintiffs had proven their prima facie claims of intentional discrimination with respect to the union's practices regarding the hiring and promotion of African Americans.¹² One fact that was especially probative of intentional discrimination was the absolute lack of African American line truck drivers at the time of litigation.¹³ The Court found this absence to be the direct result of a policy through which people of color were systematically excluded from

9. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (finding a discriminatory motive critical to a claim of disparate treatment).

10. One litmus test of whether an employer's action manifests into one that is properly remedied through disparate impact analysis is that banning the seemingly neutral rule will have a differential impact upon a protected group. See Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 259-62 (1971) (setting forth justifications for a "blanket ban" on race-based differential wage structures). For an overview of disparate impact's evolution, see generally George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987).

11. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

12. *Id.* at 336-37. Ultimately, the evidence presented included "over 40 specific instances of discrimination." *Id.* at 338.

13. *Id.* at 337.

employment opportunities left open to white employees.¹⁴ By contrast, *Griggs v. Duke Power Co.*¹⁵ established that an employer may violate Title VII without intentionally discriminating against members of protected groups, even in the pursuit of laudatory policies.¹⁶ In *Griggs*, the employer required a high school education or the passing of certain tests to work in the more desirable sectors of its work force, and funded employees' participation in relevant educational programs.¹⁷ The Court held that as a result of those employment policies disproportionately excluding African Americans from employment opportunities, Duke Power had violated Title VII.¹⁸ Central to the opinion was the ruling that the focus in a disparate impact case is on "the consequences of employment practices, not simply the motivation."¹⁹ Because disability-based exclusion arises from subtle forms of exclusion and stigma that fall within the province of disparate impact theory, our focus is on that doctrine.²⁰

The *Griggs* interpretation of disparate impact theory is most commonly used in situations in which it is difficult or even impossible to prove motive.²¹ Under *Griggs*, plaintiffs could assert that, despite a lack of concrete evidence of discriminatory intention, statistically sustainable circumstantial evidence still pointed to something "wrong with the picture" of defendant's employment practices.²² For example, in *Griggs*, plaintiffs offered evidence that 34 percent of white males in North Carolina, but only 12 percent of black males, had completed

14. *Id.* Hence, disparate treatment exists in circumstances where an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical." *Id.* at 335 n.15.

15. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

16. *Id.* at 432.

17. *Id.* at 427-32.

18. *Id.* at 430, 432.

19. *Id.* at 432.

20. *See infra* Part III.A.

21. It was (further) codified in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k) (2000) ("An unlawful employment practice based on disparate impact is established under this subchapter only if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . .").

22. *See, e.g.*, MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 247-51, 366-73 (6th ed. 2003) (discussing statistical proof in disparate impact cases); GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 78-81 (2001) (same for class action disparate impact litigation); *see also* DAVID BALDUS & JAMES W.L. COLE, STATISTICAL PROOF OF DISCRIMINATION (1989).

high school.²³ Although the lower court had found that the employer did not engage in intentional discrimination, the Supreme Court held that these statistics proved a disparate impact, and the high school requirement was held to violate Title VII.²⁴

B. *Panethnicity and Class Actions*

By its nature, disparate impact theory is group based and provides plaintiffs the means by which to challenge demographic snapshots of their respective employment situations. Stated plainly, plaintiffs allege that due to discriminatory policies or practices, there are no (or proportionately not enough) other employees of the same race or sex as themselves. In *Griggs*, for example, plaintiffs argued that their employer used a high school graduation requirement as a proxy that correlated with race, and in doing so excluded African Americans.²⁵ Because disparate impact focuses on groups, it was natural that the post-Title VII period saw the theory go hand in hand with another juridical recognition of group identity, the class action device.²⁶

Panethnicity was interwoven throughout both disparate impact and class action law during this time frame. Developed by social scientists, panethnicity describes the heuristic processes through which ethnic minority groups that might internally consider themselves heterogeneous are externally perceived by the nongroup majority as homogeneous.²⁷ Thus, even if the African-American class in *Griggs* was

23. *Griggs*, 401 U.S. at 430 n.6.

24. *Id.* at 428, 435.

25. *Id.* at 428–29.

26. See, e.g., *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982) (“[R]acial discrimination is by definition class discrimination.”); *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (“[S]uits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs.”); see also *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969) (“A suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic.”).

27. See generally YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES* (1992) (discussing the construction of pan-Asian ethnicity by accounting for heterogeneities among this population); Jeff Chang, *Local Knowledge(s): Notes on Race Relations, Panethnicity and History in Hawai’i*, 22 *AMERASIA J.* 1 (1996) (describing the effects on self-identification on individuals of overlapping multiethnic origins); Jose Itzigsohn & Carlos Dore-Cabral, *Competing Identities? Race, Ethnicity and Panethnicity Among Dominicans in the United States*, 15 *SOC. FORUM* 225 (2000) (exploring the intersection of national identity and Hispanic/Latino identity among one group of American immigrants); David Lopez & Yen Le Espiritu, *Panethnicity in the United States: A Theoretical Framework*, 13 *ETHNIC & RACIAL STUD.* 198 (1990) (offering thoughts on how to approach a then-relatively new discipline).

diverse in terms of economic status or other factors, the members formed a cohesive unit for the purpose of antidiscrimination litigation. Because employers historically used race-based proxies to exclude African Americans as a group from the workplace, it was deemed equitable also to allow them to proceed as a community when challenging those practices.²⁸

At its core, the class action device allows a group of individuals who have a similar claim as the named plaintiff communally to seek relief. For certification purposes, a putative class must show (amongst other things) that there are questions of law or fact common to the class, that the claims and defenses of the representative parties are typical of the claims or defenses of the class, and that the representative will fairly and adequately protect the interests of the class.²⁹ These requirements are often referred to, respectively, as commonality, typicality, and adequacy.³⁰ During the period following Title VII's enactment, courts adopted a flexible approach to these Rule 23 requirements,³¹ routinely certifying "across-the-board" classes.³² This meant that courts allowed a plaintiff who was a member of a protected class to represent all members of that class in their various and different employment

28. For recent work on the internal, and often conflicting diversity within African American civil rights communities, see generally Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005), and Tomiko Brown-Nagin, *Race As Identity Caricature: A Local Legal History Lesson in the Salience of Intra-Racial Conflict*, 151 U. PA. L. REV. 1913 (2003).

29. FED. R. CIV. P. 23(a).

30. See generally 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE* §§ 1763, 1764, 1765, 1771 (3d ed. 2005).

31. For a discussion of this "flexibility," see Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 818 (2004). See also Charles Mishkind et al., *The Big Risks: Class Actions and Pattern and Practice Cases*, 591 PUB. L. INST. 329, 338 (1998) ("Prior to 1977, employment discrimination lawsuits were routinely certified as class actions based on the rationale that such claims were inherently of a class nature, and presumptively appropriate for class certification.").

32. See, e.g., *Gibson v. Local 40, Int'l Longshoreman's and Warehouseman's Union*, 543 F.2d 1259, 1264 (9th Cir. 1976) (holding that a class may maintain claims of generalized discrimination even though discrimination manifested itself in various ways toward different class members); *Crockett v. Green*, 534 F.2d 715, 718 (7th Cir. 1976) (holding that class action status is particularly appropriate in cases involving group discrimination); *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 524 (6th Cir. 1976) (holding that race discrimination is class discrimination); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 340 (10th Cir. 1975) (holding that although it may appear as if named plaintiffs have not suffered discrimination, this does not prevent them from representing the class); *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 548 n.5 (4th Cir. 1975) (holding that even if a named plaintiff's claim is denied, a class action may still be appropriate); *Reed v. Arlington Hotel Co.*, 476 F.2d 721, 723 (8th Cir. 1973) (noting the parallels between Title VII and class actions).

relationships with a common employer. A Mexican-American worker who had been denied a promotion allegedly on the basis of race, for example, could represent other Mexican Americans who had not been hired. This was viewed as the most practical and efficient way of challenging discrimination, for it allowed a "broad, rather than . . . piecemeal, attack upon discriminatory employment practices."³³ Although the members of the class might be diverse in their relationship to their employer, the class was bound together by the common experience of discrimination.³⁴

Courts also allowed members of one racial minority to represent other racial minorities. For example, in *Sanchez v. Standard Brands, Inc.*,³⁵ the court held that a Mexican-American plaintiff had standing to challenge employment discrimination on behalf of a class of present and future Mexican-American and African-American employees of the defendant.³⁶ Similarly, in *Harvey v. International Harvester Co.*,³⁷ the court held that an African-American plaintiff could represent a class of "all minority groups" that alleged discrimination.³⁸ And in *Ellis v. Naval Air Rework Facility*,³⁹ the court held that named plaintiffs who were African American and Mexican American could represent a class of all minority workers.⁴⁰ Courts also held that African-American plaintiffs alone could also represent Mexican Americans,⁴¹ people with Spanish

33. *McLendon v. M. David Lowe Pers. Servs., Inc.*, No. 75-H-1185, 1977 WL 15, at *2 (S.D. Tex. Apr. 29, 1977); *see id.* ("[T]his Court must reject the thesis that a named plaintiff must have been the victim of the entire gamut of ways in which a policy of racial discrimination is manifested by an employer. To hold otherwise would be to burden the Courts with a multiplicity of suits involving piecemeal adjudication of discrimination claims as to each employer. This would be plainly an inefficient method of implementing the policies of Title VII.").

34. *See Johnson v. Ga. Highway Express*, 417 F.2d 1122, 1124 (5th Cir. 1969) ("While it is true, as the lower court points out, that there are different factual questions with regard to different employees, it is also true that the 'Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class.'" (quoting *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 186 (D. Tenn. 1966))).

35. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970).

36. *Id.* at 459.

37. *Harvey v. Int'l Harvester Co.*, 56 F.R.D. 47 (N.D. Cal. 1972).

38. *Id.* at 48.

39. *Ellis v. Naval Air Rework Facility*, 404 F. Supp. 391 (N.D. Cal. 1975).

40. *Id.* at 396-97.

41. *E.g.*, *Penn v. Stumpf*, 308 F. Supp. 1238, 1239, 1240 n.1 (N.D. Cal. 1970); *McLendon v. M. David Lowe Pers. Servs., Inc.*, No. 75-H-1185, 1977 WL 15, at *3 (S.D. Tex. Apr. 29, 1977); *Nat'l Org. of Women v. Bank of Cal.*, No. C-72-441, 1972 WL 246, at *4 (N.D. Cal. Dec. 19, 1972).

surnames,⁴² Native Americans,⁴³ and Asian Americans.⁴⁴ In these cases, courts consistently found that cross-minority representation did not defeat adequacy of representation, and that claims made by one minority could be typical of other minorities because the alleged discrimination bound their interests together.⁴⁵ This flexible approach to class certification countenanced a judicial recognition of the need and desirability of group-driven litigation challenging policies and practices that favored the traditional labor force of white male employees.⁴⁶

Classes that were defined this broadly—in some cases, so broadly that they represented all minorities⁴⁷—were grounded in the idea that a key issue for courts to tap into was the way that the traditional in-group labor force perceives the newly emerging workforce.⁴⁸ Whether intentionally or not, this notion was undergirded by the concept of panethnicity. To illustrate, consider the following hypothetical: thirty-four Latina Americans file a racial and sexual discrimination suit under Title VII against Big Impersonal Corporation, claiming illegal

42. *Martinez v. Oakland Scavenger Co.*, 680 F. Supp. 1377, 1396–97 (N.D. Cal. 1987); see also *Jones v. Milwaukee County*, 68 F.R.D. 638, 640 (E.D. Wis. 1975).

43. E.g., *Carter v. Gallagher*, 452 F.2d 315, 317 (8th Cir. 1971); see also *Jones v. Milwaukee County*, 68 F.R.D. 638, 640 (E.D. Wis. 1975).

44. E.g., *Ellis*, 404 F. Supp. at 396–97.

45. See *McLendon*, 1977 WL 15, at *2–4 (“Although the named plaintiffs in these actions are of Black and Chicano ancestry . . . they can adequately represent the claims of a broad spectrum of minority workers . . .”); *Jones*, 68 F.R.D. at 640 (“Black plaintiffs are not precluded from representing a class in a Title VII action which contains persons of other minority racial and ethnic groups.”).

46. In *Penn v. Stumpf*, for example, plaintiff alleged that the Oakland Police Department had discriminated against African Americans, Mexican Americans, and Spanish surnamed people. 308 F. Supp. at 1239. He further argued that the defendant did not take into account the cultural differences of non-Caucasian communities in their testing, interview, and background investigation procedures. The case was allowed to proceed as a class action despite the fact that the named plaintiff was an African American who represented members of two other ethnic groups, and had not progressed beyond the testing phase of the application process (hence, he could not yet have been discriminated against in interviewing and background investigations). *Id.* at 1242, 1239, 1240 & n.1. The lawsuit thus triggered a broader discussion of how the Oakland Police Department had (albeit unintentionally) created a working environment that catered to and maintained the “traditional” workforce to the exclusion of new members. *Id.* at 1242.

47. See, e.g., *Carter*, 452 F.2d at 317.

48. *Martinez v. Oakland Scavenger Co.*, 680 F. Supp. 1377 (N.D. Cal. 1987), provides a clear example. Defendant trash company was started by persons of Italian ancestry, who “[b]y virtue of hard work and good management” created an expansive and prosperous business. *Id.* at 1381. As the enterprise grew, the original owners needed additional staffing, and “hired other ethnic minorities at the bottom of the economic ladder, Blacks and Hispanics.” *Id.* These “new” minorities claimed that defendants were not sharing the higher-level opportunities in the enterprise with them. *Id.* at 1381, 1383–85.

employment practices.⁴⁹ Of the women comprising the class, thirty are American-born (of whom ten are of Puerto Rican descent, eight are of Mexican origin, six are of Chilean descent, five trace their origins to Spain, and one to Peru), two were born in Cuba, one in Mexico, and one in the Dominican Republic. Twenty of the women are currently employed as administrative assistants, ten as vice presidents, two are word processors, and two are secretaries. Twenty-four hold university degrees, twenty-two speak Spanish in varying amounts, nineteen have dark complexions, seventeen are from affluent backgrounds, and one is openly lesbian.⁵⁰

Although these individuals are clearly diverse (and because of that diversity, perhaps at odds with one another in other contexts),⁵¹ the fact that they are all “Latinas” or “female Hispanics” allows the social majority to treat them as a single group.⁵² We argue in Part III that a parallel construction of “pandisability” is a useful theoretical construct for linking the interests of individuals with diverse disabilities for disparate impact and class action purposes.

C. *Judicial Erosion of Collective Action*

Group-based statistical evidence regarding disparate impact, combined with liberal class certification standards, contributed to the post-Title VII era being an exemplar of judicial acceptance of group-based discrimination theories. Courts focused on the socially imposed

49. We return to this hypothetical, *infra* text accompanying notes 178–79, to expand the reasons for suit.

50. See generally W. Christopher Arbery, *The Threat of Employment Class Actions Hovers: Companies Need Not Be Always in a Defensive Position on Such Cases*, NAT’L L.J., Jan. 13, 2003, at C24 (describing the diversity within a “typical” race-based class action).

51. See *supra* note 27 and accompanying text. Lawrence Friedman offers the following argument in the context of the construct of “Asian Americans” which applies equally to other groups:

The people who collectively are called Asian-American certainly did not cohere in any meaningful way in Asia itself. Indeed, some of the groups . . . roundly hated each other back home. In Asia, there was no pan-Asian sense among Koreans, Japanese, and Chinese; to the contrary, they were historic enemies. And any notion that they had anything in common with Samoans or Cambodians would have struck them as bizarre.

LAWRENCE FRIEDMAN, *THE HORIZONTAL SOCIETY* 103 (1999).

52. For an articulation of diversity within the Latina/o community through a LatCrit perspective, see generally Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 U.C. DAVIS L. REV. 751 (2000); Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. 575 (1999); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997).

views of minority groups, as reinforced by panethnicity, and allowed this common heuristic to bind groups together for litigation purposes. Over time, however, a fundamental shift has taken place in the way that courts view group-based action. Rather than being attentive to the cultural connections that tie groups together for litigation purposes, courts became focused on intragroup differences, and in particular on the specific relief individuals requested. As remedies became increasingly viewed as more individualized, group-based discrimination theories were cut back.

This change was perhaps most dramatic within disparate impact law. As applied in *Wards Cove Packing Co. v. Atonio*,⁵³ and later codified in the 1991 Civil Rights Act,⁵⁴ a plaintiff must show that a particular employment practice, used by the employer, creates the disparate impact.⁵⁵ In this way, Title VII disparate impact law is tethered to specific acts of discrimination, which by and large precludes a discussion of deeper structural relationships—despite the contrary wishes of commentators,⁵⁶ as well as some legislators.⁵⁷ In *Anderson v. Douglas & Lomason Co.*,⁵⁸ for example, a class of African

53. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

54. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e-2(k)(1) (2000)).

55. *Wards Cove*, 490 U.S. at 656; 42 U.S.C. § 2000e-2(k)(1)(A)–(B) (2000). The statute does permit the decision-making process to be analyzed as one employment practice when the plaintiff can prove that “the elements of [an employer’s] decision making process are not capable of separation for analysis.” § 2000e-2(k)(1)(B)(i). Despite this, many commentators dismiss this statutory provision as neither widely used nor effective. See Sullivan, *supra* note 6, at 54–55 (discussing specific cases where courts struggled to find disparate impact “in instances in which it is not clear what, if any, employer practice causes a particular bad bottom line”); see also Stout v. Potter, 276 F.3d 1118, 1124 (9th Cir. 2002) (“We doubt that the overall screening process should be treated as one employment practice for purposes of disparate impact analysis.”); Bagenstos, *supra* note 5, at 13 (“[T]hat burden has proven difficult for employees to sustain as many decisionmaking processes can plausibly be separated into constituent elements.”).

56. See Bagenstos, *supra* note 5, at 13–14 (“These features of disparate impact doctrine make it a poor tool for addressing discrimination that does its work through an accumulation of small, repeated instances of biased perception and evaluation.”); see also Green, *supra* note 6, at 654–58 (explaining how the disparate impact theory “falls short” because of the doctrine’s difficulties in “addressing work culture as a source of discrimination”).

57. In 1963, Senator Hubert Humphrey testified that the Civil Rights Act of 1964 should respond to the “many impersonal institutional processes which nevertheless determine the availability of jobs for nonwhite workers.” William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 713 (2000) (quoting Senator Hubert Humphrey, testifying in 1963 before the Senate Labor Committee).

58. *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277 (5th Cir. 1994).

Americans contended that the defendant employer discriminated against them in hiring and promotion on the basis of their race.⁵⁹ In support of this assertion, plaintiffs pointed to a number of factors including policies requiring individuals to fill out applications in person, failing to post promotion opportunities, lacking written criteria, and giving certain employees temporary upgrades to promotion spots.⁶⁰ Citing *Wards Cove*, the court held that plaintiffs could not avail themselves of the disparate impact theory because they “merely launched a wide-ranging attack on the cumulative effects” of the defendant’s policies rather than “isolating and identifying the specific employment practices” that created specific inequities.⁶¹

Anderson and other cases like it stand for the proposition that courts will be fairly rigid in policing the requirement that plaintiffs argue an objective, rather than circumstantial, causal connection between a specific employment practice and a specific disparate impact. Claims that subtle, intertwined, and hard-to-detect factors combine to keep minorities from the workforce will preclude use of the disparate impact proof structure. Thus, in *EEOC v. Joe’s Stone Crab*,⁶² the fact that a restaurant was almost completely devoid of female waiting staff, despite large numbers of women in the relevant labor market, was held inadequate to the task of proving discrimination.⁶³ Although plaintiffs struggled to point out an official policy or practice that caused these low numbers, the best they could come up with was that defendants maintained an “old world” atmosphere. The Eleventh Circuit declined to find that this was an “employment practice” within the province of disparate impact.⁶⁴ Courts also have held that mere employer

59. *Id.* at 1281.

60. *Id.* at 1282–83.

61. *Id.* at 1284.

62. *EEOC v. Joe’s Stone Crab*, 220 F.3d 1263 (11th Cir. 2000).

63. *Id.* at 1276.

64. *Id.* at 1278. The court did remand, however, on whether this was sufficient evidence of systemic disparate treatment. *Id.* at 1268. For discussion of the implications of this case for disparate impact sex discrimination claims, see L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341, 366–67 (2005). See also Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 505–07 (2003) (stating how the Eleventh Circuit’s decision in *Joe’s Stone Crab* demonstrates how “the standards of identification and causation codified in [the Civil Rights Act of 1991] can be insurmountable barriers to establishing a prima facie case”); Christine Jolls, *Is There a Glass Ceiling?*, 25 HARV. WOMEN’S L.J. 1, 13–14 (2002) (discussing *Joe’s Stone Crab* and how those circumstances indicate that “[w]omen are prevented by discrimination from attaining positions that are higher level, and pay more, than the ones they have traditionally occupied”); Kimberly A. Yuracko, *Private*

“passivity” in light of disparate circumstances is insufficient to prove discrimination. Instead, the challenged policy or practice must have been “actively” adopted.⁶⁵

This sea change away from group-based discrimination claims had started even earlier, within the realm of class action law. In *General Telephone Co. v. Falcon*,⁶⁶ the Supreme Court tightened the reins on class certification standards. Criticizing “across-the-board” classes, the Court held that the general proposition that “racial discrimination is by definition class discrimination,” though perhaps true, did not mean that an allegation of racial discrimination necessarily satisfied all of Rule 23’s requirements.⁶⁷ Rather, named class representatives had to demonstrate a greater unanimity of interest with the proposed class. After *Falcon*, courts have held that plaintiffs who suffered discrimination in hiring may not represent plaintiffs who were discriminated against in promotion decisions, and vice versa. The doctrinal pleading basis for limiting class representation was that these forms of representation did not rise to the level of typicality or adequacy of representation required by the federal rules.⁶⁸

Although *Falcon* has been criticized for creating a cramped view of group identity,⁶⁹ it was not completely revolutionary. Even during

Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination, 92 CAL. L. REV. 147, 188–89 (2004) (describing how “[t]he slippery slope created by permitting employers to make hiring decisions based on sex-specific soft characteristics poses serious group-based equality-of-opportunity dangers”).

65. See, e.g., *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 305 (7th Cir. 1991) (holding that an employer’s word of mouth recruiting was a form of “passive reliance” and not an employer policy for purposes of disparate impact analysis, despite arguments by the EEOC that passive reliance had caused a disparate impact on blacks).

66. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147 (1982).

67. *Id.* at 157; see *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405–06 (1977) (“We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law and fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable.”).

68. See *Griffin v. Dugger*, 823 F.2d 1476, 1493 (11th Cir. 1987) (holding that a class could not be certified when one representative complained promotion practices were discriminatory and another alleged the qualification exam was discriminatory); see also *Wagner v. Taylor*, 836 F.2d 578, 595–96 (D.C. Cir. 1987) (holding supervisors are not in same class as non-supervisors because they may have conflicting interests); *Roby v. St. Louis Sw. Ry. Co.*, 775 F.2d 959, 962 (8th Cir. 1985) (holding that employees could not represent a class of individuals affected by the railroad’s promotion policies or those who were discharged for violating company rules because the employees’ complaint did not derive from either of these circumstances).

69. See Hart, *supra* note 31, at 819–20 (“In the years after the Court emphasized the importance of adherence to the requirements of Rule 23, the number of class action suits filed in

the height of judicial acceptance of group-based discrimination theories, a limited number of cases had restricted the ability of internally heterogeneous groups to use the class action device.⁷⁰ For example, in *Pagan v. DuBois*,⁷¹ a proposed class of Latino inmates challenged a lack of Spanish-speaking prison staff and Latino cultural programs.⁷² Denying certification, the court reasoned that the designation "Latino" was "too general to be useful in formulating the specific judicial remedy sought here," and also created intraclass conflicts that precluded adequate representation.⁷³ The court thus attached greater importance to intragroup differences than plaintiffs' allegations that the defendant viewed plaintiffs as a homogenous group of Latinos. As we discuss in Part III, it is this view of class certification that has carried over to disability discrimination cases, namely, that perceived differences within the group are considered more salient than the common umbrella of alleged discrimination, and, as a consequence, classes are rarely certified.⁷⁴

This conspicuous refusal to accept group claims on the basis of common, though socially imposed, identities has similarly restricted the efficacy of group-based ADA employment discrimination claims. As

federal court decreased significantly."); see also Scotty Shively, *Resurgence of the Class Action Lawsuit in Employment Discrimination Cases: New Obstacles Presented by the 1991 Amendments to the Civil Rights Act*, 23 U. ARK. LITTLE ROCK L. REV. 925, 935 (2001) (indicating that *Falcon* ended widespread certification of across-the-board class actions in discrimination lawsuits because "[i]t was no longer sufficient for one plaintiff, represented by one law firm, to allege across-the-board discrimination"); John A. Tisdale, *Deterred Nonapplicants in Title VII Class Actions: Examining the Limits of Equal Employment Opportunity*, 64 B.U. L. REV. 151, 171 (1984) ("The case signals an end to the procedural favoritism often granted Title VII plaintiffs by the federal courts and effectively rejects the across-the-board concept of class certification.").

70. The court in *Black Grievance Committee v. Philadelphia Electric Co.*, 79 F.R.D. 98 (E.D. Pa. 1978), for instance, held it was "clear that black plaintiffs possess the same interest and suffer the same injury as only the black class members who experienced the alleged racial discrimination," but "do not share the same interest as Spanish-surnamed [workers] who have allegedly suffered discrimination on the basis of national origin," *id.* at 110.

71. *Pagan v. DuBois*, 884 F. Supp. 25 (D. Mass. 1995).

72. *Id.* at 26.

73. To quote the court at length:

Latin-America is a continent comprised of many countries consisting of people of many races and ethnic origins. There is a potential conflict within the proposed Latino class between Latinos who are citizens of Brazil, for example, and Latinos who are citizens of the United States . . . and between Latinos whose culture derives from Africa and those whose culture derives from Western Europe What Latino culture is to be taught and celebrated?

Id. at 28.

74. See *infra* Part II.B.

shown in the next Part, rather than focusing on common membership in the disability classification, courts and commentators have dwelt on internal differences within the class, and in particular on what they perceive to be inherently individualized requests for relief. This, in turn, has limited the ability of people with disabilities to challenge workplace barriers that persist in keeping them as a group out of the workforce.

II. THE ORDINARY COURSE OF ADA CLAIMS

The early development of ADA Title I has followed a different path than its conceptual predecessor, Title VII. Whereas the period following the Civil Rights Act of 1964 embraced group-based discrimination theories, disability-based employment suits have proceeded almost entirely on an individualized basis.⁷⁵ In doing so, antidiscrimination jurisprudence has missed a crucial opportunity for developing ADA principles.

A. *Failure to Accommodate*

Cases under Title I of the Americans with Disabilities Act, and especially plaintiffs' claims for reasonable accommodations, have developed as the antithesis of collective action. The dominant theme of these ADA cases has been an almost exclusive focus on an individual plaintiff's particular circumstances and the specific accommodation that was requested. Yet many of the entrenched barriers keeping people with disabilities out of the workplace are a result of prejudice and neglect (rather than outright animus) that derive from membership in the disability classification. Further, these barriers can affect a wide range of disabilities beyond the specific individual in question.⁷⁶

The ADA defines employment discrimination to include "not making reasonable accommodations to the known physical or mental

75. However, it bears noting that ADA litigation is encumbered by the same selection bias that affects Title VII suits. Because plaintiffs' lawyers typically operate on a contingency fee basis, they prefer discharge cases, especially ones involving well remunerated employees. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991) (citing a study that found that 80 percent of wrongful termination suits in California were filed by workers "who had been terminated for inadequate performance" and only 20 percent of workers "lost their jobs due to exogenous economic factors"). Hence, plaintiffs who seek to bring failure to hire claims under the ADA are relatively unattractive to rational attorneys, as are non-hired Title VII plaintiffs.

76. See *infra* Part II.B.

limitations of an otherwise qualified individual with a disability” who is a job applicant or current employee.⁷⁷ Reasonable accommodations encompass a wide range of adjustments to existing workplace conditions, but are mainly conceptualized as falling into one or another of two categories. The first category requires the alteration or provision of a physical plant.⁷⁸ An obvious example is ramping a stair to accommodate the needs of an employee who uses a wheelchair. These types of accommodations involve “hard” costs, meaning that they invoke readily quantifiable out-of-pocket expenses.⁷⁹ Furthermore, their existence becomes quickly known in the workplace; a ramp at the entrance to a store may be welcome but its presence is not unobtrusive. The second type of accommodation involves an alteration of the way in which a job is performed, or the criteria for obtaining that job.⁸⁰ Examples of this latter form of accommodation include dispensing a wheelchair-using store employee from having to stack high shelves, or eliminating eye examinations as job criteria for psychologists, some of whom may be visually impaired. These accommodations bring into play “soft” costs, which are more difficult to quantify.⁸¹ Soft-cost accommodations are harder to discern: there is no reason to know that a coworker is off administering an insulin injection rather than having a bathroom break, or that an employee was not subjected to a Rorschach ink blot test because some persons with cerebral palsy cannot perceive the depth of the diagrams.⁸²

Failure to accommodate cases typically proceed in a highly atomistic way, with individual claimants requesting what they deem as a reasonable (hard- or soft-cost) accommodation that will enable

77. 42 U.S.C. § 12112(b)(5)(A) (2000). Seven other forms of conduct defined as discriminatory are set forth in this provision. We return to the broader, more ecumenical ones, *infra* text accompanying notes 112–16.

78. 42 U.S.C. § 12111(9)(A) (2000) (requiring an employer to make “existing facilities used by employees readily accessible to and usable by individuals with disabilities”).

79. Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1677–81 (2000).

80. 42 U.S.C. § 12111(9)(B) (allowing job restructuring or modification, variation in existing methods of administration, and the provision of readers or interpreters).

81. Stein, *supra* note 79, at 1677.

82. See generally STEDMAN’S MEDICAL DICTIONARY 1301 (27th ed. 2000) (listing symptoms of cerebral palsy).

them to perform the essential functions of a particular job.⁸³ Should the employer decline the accommodation request as part of the “interactive process,”⁸⁴ the aggrieved workers may file a complaint with the Equal Employment Opportunity Commission (EEOC).⁸⁵ In the event that parties cannot resolve their differences, plaintiffs can file suits asserting that the denial of their individual accommodation requests violates the ADA’s mandates.⁸⁶ If the trial court finds a requested accommodation to be reasonable,⁸⁷ then that accommodation is provided, and the specific workplace policy is altered for an individual.⁸⁸ Wholly absent from this emblematic account is a discussion of whether other individuals with disabilities might be impacted by the provision of this accommodation.⁸⁹

83. 42 U.S.C. § 12111(8). Statutory protection also extends to disabled workers capable of performing essential job functions without provision of reasonable accommodations, *id.*, but those individuals are beyond the scope of this Article.

84. 29 C.F.R. §§ 1630.2(o)(3), 1630.9 (2006). One would think that profit-maximizing employers acting in their own self-interest would have already expended resources to figure out the “real costs,” including positive and negative externalities, of employing disabled workers. That they fail to do so suggests a market failure. See Michael Ashley Stein, *Labor Markets, Rationality, and Workers with Disabilities*, 21 BERKELEY J. EMP. & LAB. L. 314 (2000); see also Sharon Hartman & Pamela M. Robert, *The Social Construction of Disability in Organizations: Why Employers Resist Reasonable Accommodation*, 25 WORK & OCCUPATIONS 397 (1998) (concluding that although employers frame their resistance to providing accommodations in terms of economics, their real motivation is to maintain hierarchical control of the workplace and the way it is organized).

85. 42 U.S.C. § 2000(e)(5) (2000); see 29 C.F.R. § 1601.6–1601.8 (2006) (establishing the guidelines for this process). At this point, either the employer or the employee can request mediation of their differences, which the ADA does not require, but strongly advises. 42 U.S.C. § 12212 (2000). In a self-evaluation, the EEOC found the process to be effective. See E. PATRICK MCDERMOTT ET AL., AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM (2000), <http://www.eeoc.gov/mediate/report/summary.html> (last visited Oct. 15, 2006) (finding “a high degree of participant satisfaction with the EEOC mediation program”).

86. Other claims beyond failure to accommodate can also be alleged, for instance, disability harassment. See Holland M. Tahvonen, *Disability-Based Harassment: Standing and Standards for a “New” Cause of Action*, 44 WM. & MARY L. REV. 1489, 1494–95 (2003) (“[D]isability harassment as a cause of action is modeled after the Title VII harassment claim.”).

87. Although the reasonable accommodation mandate is fundamental to disability-based employment discrimination, neither the ADA nor interpreting courts have provided much guidance on how to determine the reasonableness of accommodations. For an initial, hopefully useful, economic framework, see generally Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003).

88. For a political science perspective on the hierarchy shift this entails, see RUTH O’BRIEN, *BODIES IN REVOLT: GENDER, DISABILITY, AND A WORKPLACE ETHIC OF CARE* (2005).

89. According to Richard Epstein, the prospect of having workers with disabilities employed by the same firm is a positive event; rather than “handicap ghettoization,” the

Similarly, these cases do not delve, either statistically or anecdotally, into the employer's historical or current patterns of accommodating (or hiring or promoting) people with disabilities in the workplace.⁹⁰

Under this existing model, failure to accommodate claims do not consider the possibility of disparate impact theory. To date, published federal decisions have not specifically determined a single failure to accommodate employment claim under disparate impact analysis.⁹¹ The Supreme Court decision in *Raytheon Co. v. Hernandez*⁹² provided a notable exception by acknowledging the broad proposition that "disparate-impact claims are cognizable under the ADA."⁹³ *Raytheon*, however, did not involve workplace accommodation, and the Court did not elaborate its reasoning as to the viability of disparate impact theory in the disability discrimination context.⁹⁴ Because *Raytheon* did not express an opinion one way or the other on disparate impact being

concentration of workers with disabilities at particular sites increases the likelihood that physical plant or equipment accommodations will see repeated usage. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 480-94 (1992). Similarly, J.H. Verkerke argues that employees ideally should be matched with a company capable of duplicating accommodations because an economy of scale would ultimately bring down the accommodation cost. J.H. Verkerke, *Is the ADA Efficient?*, 50 UCLA L. REV. 903, 935-37 (2003). An important point that is tangential to this Article bears noting. When advocating in favor of the efficiency of repeated accommodations, Professors Epstein and Verkerke both support, by inference, the notion of directed placements, meaning that they favor specific vocational placements for workers with disabilities who evidence certain skills. To the extent that this policy either limits the development of disabled workers or shunts them into certain careers, we very strongly disagree. However, to the extent that such a policy duplicates *some* of the gains made in the past through vocational rehabilitation that afforded recipients job support and options, we endorse it.

90. See Wendy Wilkerson, *Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act*, 38 S. TEX. L. REV. 907, 910-15 (1997).

91. Some, however, acknowledge the possibility of disparate impact in dicta when the immediate decision is not favorable to the plaintiff. See, e.g., *Reichmann v. Cutler-Hammer, Inc.*, 183 F. Supp. 2d 1292, 1296 (D. Kan. 2001) (questioning, tangentially, the application of disparate impact theory to an employment-related medical inquiry).

92. *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

93. *Id.* at 53.

94. *Raytheon* was remanded to the Ninth Circuit to determine whether the defendant had discriminated against Hernandez on the basis of his disability. *Id.* at 55. As a former drug user, Hernandez fell within the ADA's aegis. *Id.* at 50 n.4. Raytheon asserted that it declined to rehire the rehabilitated Hernandez because he had violated company rules while under the influence of drugs, and hence not (then) disabled. *Id.* at 48-50, 55. Admittedly, Mr. Hernandez, a drug user working for a missile-making defense contractor, *id.* at 46, does not provoke very sympathetic arguments in favor of disparate impact litigation for disabled workers. However, putting to the side Mr. Hernandez's personal circumstances (as well as fears of public injury), the dynamic of the rules he challenged can be extrapolated to individuals with disabilities more generally. See *infra* Parts II.B, III.

applied to failure to accommodate claims, it should be viewed as a floor, not a ceiling, to the type of ADA claims that can be brought under disparate impact theory.

Class action litigation is also notably missing from the realm of failure to accommodate cases. Only a handful of disability employment-related class actions have been brought. In this limited pool of reported cases, denials of class certifications vastly outnumber grants of class status. Courts have denied certification to five classes containing individuals with a range of disabilities, and their respective denials were predicated on the notion that the remedies granted, if any, were based on individualized inquiry into disability and the accommodation needed, and thus lacked typicality.⁹⁵ Conversely, two classes have been certified which were comprised of individuals with the same types of disability (hearing and visual impairments).⁹⁶ One class comprised of two discrete types of disability (diabetes and

95. See *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 680–81 (7th Cir. 1998) (affirming the denial of class certification of employees with various forms of repetitive stress disorder); *Sokol v. New United Motor Mfg., Inc.*, No. C 97-4211 SI, 1999 U.S. Dist. LEXIS 20215, at *3–4, *14–18 (N.D. Cal. Sept. 17, 1999) (denying class certification of individuals with various wrist and shoulder injuries on the ground that two of the four challenged practices were “inseparable from the interactive process of determining reasonable accommodations”); *Mandichak v. Consol. Rail Corp.*, 94-CV-1071, 1998 U.S. Dist. LEXIS 23005, at *30–31 (W.D. Pa. Aug. 20, 1998) (denying, on the ground of lack of typicality, class certification of diversely disabled employees asserting defendant engaged in a pattern or practice of discrimination in denying workplace accommodations); *Davoll v. Webb*, 160 F.R.D. 142, 146 (D. Colo. 1995) (refusing to certify a class of injured police officers seeking reassignment to light duty because individualized inquiries were needed to determine disability of plaintiffs); *Lintemuth v. Saturn Corp.*, No. 1:93-0211, 1994 U.S. Dist. LEXIS 18601, at *1–15 (M.D. Tenn. Aug. 29, 1994) (magistrate report and recommendation) (eschewing class certification of individuals with carpal tunnel syndrome and/or nerve ailments on the basis that individualizing inquiry necessarily failed the typicality requirement), *enforced*, No. 1-93-0211, 1994 U.S. Dist. LEXIS 17379 (M.D. Tenn. Oct. 31, 1994); see also *Frank v. United Airlines*, 216 F.3d 845, 856–57 (9th Cir. 2000) (precluding a suit by flight attendants for discrimination based on maximum weight requirements on several grounds, including that plaintiffs failed to demonstrate a causal connection between alleged eating disorders and the contested policy); *Schroedel v. N.Y. Univ. Med. Ctr.*, 885 F. Supp. 594, 597–600 (S.D.N.Y. 1995) (denying certification of class action of hearing impaired people for emergency room sign language interpreters on the ground that the named plaintiff failed to demonstrate a likelihood of needing such service in future).

96. See *Bates v. UPS*, 204 F.R.D. 440, 449 (N.D. Cal. 2001) (certifying a class of employees who “use sign language as a primary means of communication due to a hearing loss or limitation” (quoting Plaintiff’s Motion for Class Certification)); *Wilson v. Pa. State Police Dep’t*, No. 94-CV-6547, 1995 U.S. Dist. LEXIS 9981, at *1–12 (E.D. Pa. July 14, 1995) (certifying challenge by individuals with correctable visual impairments under both Title I and the Rehabilitation Act).

epilepsy) has been certified,⁹⁷ as has one class motion granted for individuals with a variety of disabilities seriously injured in a hog slaughtering plant (including individuals with various workplace injuries that created permanent workplace restrictions).⁹⁸ When these suits are certified as class actions it is either the wholesale exclusion of diversely disabled people, or the specific exclusion of a homogeneous group of disabled people, that forms a sufficiently unifying theme to pass Rule 23 muster.⁹⁹

With non-disability discrimination, class action litigation has played a central role in systemic challenges to employment exclusion.¹⁰⁰ This is especially true when actions are brought as part of a program of vigorous public implementation.¹⁰¹ Public enforcement authorities like the Department of Justice and the EEOC that extensively litigate employment class action cases under Title VII,¹⁰²

97. See *EEOC v. Nw. Airlines*, 216 F. Supp. 2d 935, 937–38 (D. Minn. 2002) (certifying a class of anti-seizure medicated epileptics and insulin-dependant diabetics who were denied positions as cleaners or equipment service employees).

98. See *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 687, 700 (7th Cir. 1998) (reporting, and not reversing, the district court's certification of a class of "former production workers . . . who were injured on the job and placed on medical layoff after they received permanent medical restrictions that precluded them from performing their regular jobs and any other available production jobs at the plant").

99. Thus, the court in *Bates* reasoned that the entire class sought "to remedy policies and practices at UPS that allegedly discriminate illegally against the hearing disabled." 204 F.R.D. at 447.

100. On the role that class actions play in employment discrimination as a means and incentive toward changing business practices through combining statistical evidence and proof, see Maimon Schwarzschild, *Public Law By Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 914–29 (discussing the transformative effect of class action litigation).

101. See Drew S. Days, III, "Feedback Loop": *The Civil Rights Act of 1964 and Its Progeny*, 49 ST. LOUIS U. L.J. 981, 987–88 (2005) (suggesting that forceful and prompt enforcement of Title II of the Civil Rights Act of 1964 was crucial to its success in creating social change); see also U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 10 (1971) ("Within a few months after enactment, the Department . . . brought several enforcement actions that tested the constitutionality of the public accommodations law.").

102. For example, the analysis of one Nobel prize winning economist and three of his colleagues indicates that it was protracted governmental enforcement of Title VII that had the greatest effect on narrowing the race-based wage gap in the South. John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603, 1605 (1991) ("When all aspects of the Federal attack on Southern discrimination are considered, there is significant alignment the strength of the Federal pressure in the South and the accompanying rise in black economic status there."); James J. Heckman & Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138, 173 (1989) ("Government activity . . . seems to be the most plausible source

however, have not shown a proclivity toward bringing ADA class action suits.¹⁰³ The same is true for public interest law firms that have shown themselves willing to use the class action device in disability discrimination cases outside the employment context.¹⁰⁴ Instead, because courts and commentators hesitate to view individuals with diverse disabilities as having a sufficient community of interest to proceed under a group-based discrimination theory, Title I litigation has focused on the definition of disability or the reasonableness of individual accommodations.¹⁰⁵

B. Missed Potential

The use of group-based discrimination theories of disparate impact law and the class action device could have facilitated the entry of people with disabilities into the workplace, much as they previously did on behalf of persons of color and women. Modeled after Title VII, the ADA shares in its desire to eradicate historical and avoidable barriers to workplace participation—the “built in headwinds” that form the provenance of disparate impact theory.¹⁰⁶ As articulated by Judge Richard Posner in a nondisability disparate

for this change [in black economic progress].”); see Richard Butler & James J. Heckman, *The Government's Impact on the Labor Market Status of Black Americans: A Critical Review*, in EQUAL RIGHTS AND INDUSTRIAL RELATIONS 235, 252 (Leonard J. Hausman et al. eds., 1977).

103. This is not to belittle either individual employment suits, or actions brought under other provisions of the statute. They are important. However, the commitment to using civil rights statutes to leverage broad social change has been glaringly absent in the context of disability discrimination. For instance, although the EEOC's workload increased dramatically due to the addition of ADA disputes, its budget remained largely unchanged. See Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 73 (2001) (“With the enactment of the ADA, the EEOC experienced a 53% increase in yearly charge receipts [from 1990 to 1994] During this time of a tremendous increase . . . , the EEOC yearly budget rose less than 10% in real dollar terms While the 15% budget increase approved by Congress for the 1999 fiscal year has helped increase staffing and resources, this increase is still not commensurate with the increase in workload the EEOC has experienced in the past decade.” (footnotes omitted)).

104. See, e.g., *Henrietta D. v. Bloomberg*, 331 F.3d 261, 265 (2d Cir. 2003) (class action challenging accommodations in New York City Social Services); *Barden v. City of Sacramento*, 292 F.3d 1073, 1075 (9th Cir. 2002) (class action challenging inaccessible sidewalks); *Nelson v. Miller*, 170 F.3d 641, 644 (6th Cir. 1999) (class action challenging Michigan voting systems).

105. See RUTHERGLEN, *supra* note 22, at 71 & n.37 (suggesting that the “most notable example” of a lack of disparate impact class action litigation is the ADA).

106. See, e.g., *DiBiase v. SmithKline Beechum Co.*, 48 F.3d 719, 734 (3d Cir. 1995) (“The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past” (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971))).

impact employment discrimination case: "The concept of disparate impact was developed for the purpose of identifying situations in which, through inertia or insensitivity, companies were following policies that gratuitously . . . excluded black or female workers from equal employment opportunities."¹⁰⁷ Yet, neither judges nor scholars have felt comfortable replacing "black or female workers" with "disabled workers."¹⁰⁸ In consequence, the ADA's first fifteen years may be justly criticized as having missed opportunities to challenge barriers excluding workers with disabilities.¹⁰⁹ The shift by courts away from an earlier paradigm of race- and sex-based collective action has exacerbated this failing. This wholesale exclusion of group-based discrimination theories from Title I is myopic, and certainly not inevitable.¹¹⁰ Despite the interpretive regulations' discussion of individualized assessments,¹¹¹ the ADA itself does not foreclose collective action.

107. *Finnegan v. Transworld Airways, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992).

108. Cf. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 643, 643-44 (2001) ("[O]bservers sharply contrast Title VII . . . and other older civil rights enactments, which are said to be 'real anti-discrimination law[s],' with the [ADA] . . . said to be 'accommodation' laws. On these observers' view, 'antidiscrimination' focuses on 'equal' treatment, while 'accommodation' focuses on 'special' treatment." (second alteration in original) (footnotes omitted)).

109. Several studies have documented the inability of the ADA to move people with disabilities in greater numbers into the workforce. The federal government's National Health Information Survey found that when disability is defined as an impairment that imposes limitations on any life activity, the employment rate for working-age people with disabilities declined from 49 percent in 1990 to 46.6 percent in 1996. See H. STEPHEN KAYE, *IMPROVED EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH DISABILITIES* 9 & fig.1 (2003). Similarly, a 2000 Harris Survey of working-age people with disabilities showed that only 32 percent of people with disabilities reported being employed, compared with 81 percent of the general population. NAT'L ORG. ON DISABILITY, 2000 N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES 27 (2000). This is not to say that we characterize the overall ADA experience negatively. The jury is still out on how efficacious the statute has been and, perhaps more importantly, on how to measure success. At the same time, much ink has been, and will continue to be spilled on this issue. A balanced, but far from unanimous critique, are the essays in *THE AMERICANS WITH DISABILITIES ACT: EMPIRICAL PERSPECTIVES* (Michael Ashley Stein & Samuel Estreicher eds., forthcoming 2007).

110. For an intra-Title comparison of ADA litigation, see generally Michael E. Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807 (2005).

111. See 29 C.F.R. pt. 1630 app. (2006) ("[T]he determination of whether an individual is qualified for a particular position must necessarily be made on a case-by-case basis. . . . [A]n accommodation must be tailored to match the needs of the disabled individual with the needs of the job's essential functions. This case-by-case approach is essential. . . . [N]either the ADA nor this part can supply the 'correct' answer in advance for each employment decision"); see also *id.* § 1630.2(j) ("The determination of whether an individual has a disability is not

As an initial matter, the dearth of failure to accommodate claims treated under the Title VII disparate impact framework is puzzling. In addition to prohibiting denials of reasonable accommodation requests, the ADA also proscribes other actions corresponding to those barred by Title VII.¹¹² Specifically, it forbids the use of administrative methods, criteria, and standards that tend to exclude disabled workers in the manner proscribed by disparate impact theories.¹¹³ This confluence is the result of Congress's conscious decision to model the ADA after Title VII.¹¹⁴ Correspondingly, Title I is as silent on the motivation behind a refusal to provide accommodation as the Civil Rights Act of 1964 is on the level of necessary intent.¹¹⁵ That failure to accommodate claims were intended to fall somewhere within the panoply of previous civil rights remedies can also be inferred from the

necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.”).

112. 42 U.S.C. § 12112(b)(5)(A)–(B) (2000); *see also id.* § 12112(b)(1)–(7) (listing seven varieties of prohibited employment-related activities).

113. *Id.* § 12112(b)(3), (6), (7) (banning practices with disproportionate effect). The ADA also makes illegal the conscious exclusion and segregation of disabled workers typical of disparate treatment analysis. *Id.* § 12112(b)(1), (b)(2), (b)(4) (prohibiting overt treatment policies).

114. *See* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 464 (1991) (averring that the “ADA committee reports expressly declare congressional intent that the ‘futile gesture’ doctrine recognized by the courts in actions under Title VII of the Civil Rights Act of 1964 should also apply to actions under this Act.” (footnote omitted)); *see also* H.R. REP. NO. 101-485(II), at 82 (1990), *as reprinted in* 1990 U.S.C.A.N. 303, 305 (“An agreement was made that people with disabilities should have the same remedies available to all other minorities under Title VII of the Civil Rights Act of 1964.”); S. REP. NO. 100-116, at 42–43 (1989) (“[T]he [ADA] legislation specifies that the remedies and procedures set forth in Sections 706, 707, 709, and 710 of the Civil Rights Act of 1964 shall be available with respect to . . . any individual who believes that he or she is being subjected to discrimination on the basis of disability . . .”); Richard K. Scotch, *Making Change: The ADA as an Instrument of Social Reform*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 275, 276 (Leslie Pickering Francis & Anita Silvers eds., 2000) (“Using the Civil Rights Act of 1964 as a legislative template, the ADA seeks to eliminate the marginalization of people with disabilities through established civil rights remedies to discrimination.”).

115. 42 U.S.C. § 12112(b)(5)(A)–(B) (2000). So, too, are the Equal Employment Opportunity Commission’s promulgated interpretive guidelines. *See* 29 C.F.R. § 1630.9(b) (2006) (stating that discrimination occurs when a covered entity “den[ies] employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual’s physical or mental impairments”).

inclusion of all ADA remedies among those antidiscrimination provisions amended by the Civil Rights Act of 1991.¹¹⁶

Although federal courts have not articulated a reason for not applying disparate impact analysis to ADA failure to accommodate claims, three plausible juridical reasons can be inferred.¹¹⁷ First, although the handful of judges who have addressed the possibility of applying disparate impact theory to failure to accommodate cases do so tangentially, their oblique references suggest that federal courts view allegations of failure to accommodate as a mutually exclusive and stand-alone alternative to disparate impact claims. For example, while addressing a potential claim, the Seventh Circuit in *Hoffman v. Caterpillar, Inc.*¹¹⁸ held that once a disabled plaintiff establishes her qualifications to proceed under the ADA, “she may show discrimination in either of two ways: by presenting evidence of disparate treatment or by showing a failure to accommodate.”¹¹⁹ The notion that a plaintiff might proceed with a disparate impact theory was not considered by the court as being within the realm of possibility. Similar statements have been made, in dicta, by other courts, thereby lending credence to this supposition.¹²⁰ However, neither the ADA’s text nor its legislative history support this mutually exclusive perception.¹²¹

116. 42 U.S.C. § 1981a(a) (2000) (incorporating the provisions of both Title VII and the ADA).

117. Another plausible (although less appealing) political reason might be judicial hostility to the ADA. To quote one disability rights advocate: “[M]any, perhaps most, courts are not enforcing the law, but instead are finding incredibly inventive means of interpreting the ADA to achieve the opposite result that the Act was intended to achieve.” Bonnie Poitras Tucker, *The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 338 (2001). Tucker’s assertion has been endorsed by a number of scholars. See, e.g., Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 93 (2000) (“How did those of us who helped draft the ADA so completely misread how the courts would apply its definition of disability?”). See generally Linda Hamilton Krieger, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

118. *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568 (7th Cir. 2001).

119. *Id.* at 572; cf. *Butleineyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1283 (7th Cir. 1996) (“[T]his is not a disparate treatment claim, but a reasonable accommodation claim, and it must be analyzed differently.”).

120. See, e.g., *Henrietta D. v. Bloomberg*, 331 F.3d 261, 275 (2d Cir. 2003) (“Other courts have explicitly distinguished claims based on failure reasonably to accommodate from those based on disparate impact.”); *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1166 (1st Cir. 2002) (“In addition to forbidding disparate treatment of those with disabilities, the ADA makes it unlawful for an employer to fail to provide reasonable accommodations”); *Wright v. Ill. Dep’t of Corr.*, 204 F.3d 727, 730 (7th Cir. 2000) (“There are two types of disability discrimination claims under the ADA: disparate treatment claims and failure to accommodate

A second, related reason that courts may hesitate to apply disparate impact theory to ADA claims is if they believe Title I to have a relatively less clear statutory basis for disparate impact than Title VII.¹²² The 1991 amendments to Title VII, enacted in the aftermath of *Wards Cove*, unequivocally state that the disparate impact proof structure may be applied to all actions brought under its aegis.¹²³ In contrast, the ADA does not contain as firm a statutory foundation for upholding disparate impact law. But this, too, is unpersuasive. As noted in the previous Section, the Supreme Court held in *Raytheon* that disparate impact claims may be brought under the ADA.¹²⁴ Although the Court in *Raytheon* had no occasion to consider whether failure to accommodate claims could also be brought under disparate impact theory, there is no statutory reason they should not be. Indeed, in *Raytheon*, the Court held that “standards, criteria, or methods of administration,” and “qualification standards, employment tests, or other selection criteria” were cognizable under disparate impact theory,

claims.”); *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 646 n.9 (1st Cir. 2000) (“[T]he ADA does more than prohibit disparate treatment. It also imposes an affirmative obligation to provide reasonable accommodation to disabled employees.”); *Dunlap v. Ass’n of Bay Area Gov’ts*, 996 F. Supp. 962, 965 (N.D. Cal. 1998) (“A disability discrimination claim may be brought either on the theory that defendant failed to make reasonable accommodations or on a more conventional disparate treatment theory . . .”).

121. If anything, the legislative history supports the opposite conclusion. *See, e.g.*, S. REP. NO. 101-116, 30 (1989) (“Subparagraphs (B) and (C) [of § 102(b)(3) of the ADA] incorporate a disparate impact standard to ensure that the legislative mandate to end discrimination does not ring hollow. This standard is consistent with the interpretation of section 504 [of the Rehabilitation Act] by the U.S. Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985).”); *see also Americans with Disabilities Act of 1989: Hearing on S. 933 Before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 321 (1989) (statement of Arlene Mayerson, Directing Attorney, Disability Rights Education and Defense Fund) (“It is well accepted under Title VII that selection procedures that have a disparate impact on racial minorities and women must be necessary to safe and efficient job performance. The ADA extends that protection to persons with disabilities who, as demonstrated earlier, are often subject to disqualifying physical or mental criteria that bear no relationship to job performance.”).

122. This may not be surprising as the clarity and persuasiveness of legislative history itself differentiates two recent Supreme Court ADA opinions. *Compare* *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (majority of the Court unconvinced of the sufficiency of legislative history of States discriminating in employment), *with* *Tennessee v. Lane*, 541 U.S. 509, 529–30 (2004) (Court majority won over by legislative evidence of States discriminating in the provision of services).

123. *See* 42 U.S.C. § 2000e-2(k)(1)(A) (2000) (providing that “[a]n unlawful employment practice based on disparate impact is established under this title only if—,” and then continuing by describing disparate impact proof structure).

124. *See supra* text accompanying note 93.

because they were part of Title I's definition of disability.¹²⁵ "Not providing reasonable accommodations" is likewise part of the same statutory definition of disability.¹²⁶

A third reason why courts may not have embraced failure to accommodate as disparate impact cases relates to perceived similarities between the ADA and the Age Discrimination in Employment Act¹²⁷ (ADEA).¹²⁸ In 2005, in *Smith v. City of Jackson*,¹²⁹ the Supreme Court clarified that disparate impact claims can be brought under the ADEA.¹³⁰ Before *Smith*, however, courts that had not readily recognized disparate impact theory in ADEA cases¹³¹ may have viewed the ADA in the same vein.¹³² However, in addition to Supreme Court clarification on both accounts, the argument for applying disparate impact to ADA failure to accommodate claims is even stronger than in the ADEA context. Both the ADA and Title VII were promulgated as a means of eradicating historical barriers to

125. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 51 (2003) (quoting 42 U.S.C. § 12112(b)).

126. 42 U.S.C. § 12112(b)(5)(A) (2000).

127. 29 U.S.C. §§ 621–634 (2000).

128. *Stevens v. Kay Mgmt.*, 907 F. Supp. 169, 171–72 (E.D. Va. 1995) ("When called upon to interpret the ADA, other courts often have looked to the [ADEA] . . . for guidance. The ADA [and] ADEA . . . have virtually identical definitions and liability schemes and all are designed with a common purpose: to prohibit discrimination in employment."). The most extensive treatment of this (now incorrect) analogy in the legal literature is by Samuel Issacharoff. See Samuel Issacharoff, *The Difficult Path from Observation to Prescription*, 77 N.Y.U. L. REV. 36, 37 (2002) (concluding that the creation of causes of action for disability and age discrimination required "significant contortions" of antidiscrimination law); see also Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 781 (1997) (positing that "the ADEA statutory scheme misconstrues the antidiscrimination model"); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 314 (2001) (citing the ADA's reasonable accommodation standard as unique in that it, unlike Title VII, begins its inquiry with "the claim that different sets of employees who are differently situated").

129. *Smith v. City of Jackson*, 544 U.S. 228 (2005).

130. *Id.* at 233–40.

131. The basis of this position is *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), wherein the Supreme Court suggested, but did not expressly hold, that disparate impact theory does not apply to the ADEA, see *id.* at 610 ("Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA.").

132. According to that argument, age, like disability, reduces individuals' productivity. Consequently, both forms of regulation engender additional costs that employers must bear. When businesses are required to forego discriminatory practices under the ADA, they overlook the same type of lower net-product margin that they do for workers under the ADEA, and thereby redistribute wealth from otherwise profit-maximizing employers to those less economically efficient but protected employees. See *supra* note 128.

workplace participation, the traditional province of disparate impact theory.¹³³ The ADEA, in contrast, placed greater emphasis on disparate treatment type of discrimination.¹³⁴ Most crucially, the ADEA applies to individuals nearer to the end of their livelihoods than those individuals vulnerable to discrimination over the course of their careers.¹³⁵ As a consequence of this different timing, groups of workers covered by Title VII and the ADA are more likely to be adversely affected to the extent that they will not develop their own human capital.¹³⁶ In the case of people with disabilities, for whom special welfare legislation has in the past been enacted on the

133. See, e.g., *DiBiase v. SmithKline Beechum Co.*, 48 F.3d 719, 734 (3d Cir. 1995) (“The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past” (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971))); see also 42 U.S.C. § 12101(a)(2)–(5) (2000) (setting forth the legislative findings regarding the historical exclusion of people with disabilities from American society, including the workplace).

134. See, e.g., *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (10th Cir. 1996) (noting that “the legislative history of the ADEA suggests it was not enacted to address disparate impact claims”); *Hiatt v. Union Pacific R.R.*, 859 F. Supp. 1416, 1436 (D. Wyo. 1994) (“In *Griggs*, the critical fact was the link between the history of educational discrimination and the use of that discrimination as a means of presently disadvantaging African-Americans. These concerns simply are not present when the alleged disparate impact is based on age.”); Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625, 647 (1996) (noting that the congressional concern “with eliminating arbitrary barriers to employment” in the Title VII context cannot be extended “to an history of past discrimination against these particular individuals who were previously younger and possibly the beneficiaries of . . . age discrimination” (quoting *Hiatt*, 859 F. Supp. at 1436)).

135. See 29 U.S.C. § 631(a) (2002) (applying to workers at or over the age of forty).

136. This is because individuals who are dissuaded by bleak prospects of fully participating in the labor market lower their own expectations, internalize poorer self-worth, and invest less in their own development, for example, in educational or vocational training. This brings about a self-fulfilling prophecy that shunts those individuals toward lower paying, under-demanding positions. See generally Gary S. Becker, *Investment in Human Capital: A Theoretical Analysis*, 70 J. POL. ECON. (SUPPLEMENT) 9, 9 (1962) (“The many ways to invest [in human capital] includ[ing] schooling . . . [and] training . . . improve the physical and mental abilities of people and thereby raise real income prospects.”); Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 215–16 (1997) (“America’s version of capitalism . . . [wrongly] assumes that utility and efficiency for the entrepreneurial class must be the dominant principles. [Other Western countries, however] favor the welfare of the worker out of the conviction that such policies benefit both workers and the economy as a whole.”). This situation also reinforces the notion of people with anomalous biological traits being construed as inauthentic workers. See Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1898 (2000) (“[C]ourts all too often accept as an excuse for job segregation that women ‘lack interest’ in the higher-paying, more desirable positions held by men. . . . [W]omen’s work preferences . . . are seen as fixed by forces that are ontologically and temporally prior to [their] experiences in the world of paid work.”).

presupposition that they cannot work,¹³⁷ the worst-case effect of discouragement from seeking integration in the workplace is that they feel compelled to accept public assistance for sustenance, and are thereby excluded from labor market participation.¹³⁸

Yet even if any of these explanations accurately describes the way in which courts have been reluctant to engage in traditional employment discrimination analyses when disability-related accommodations are at issue, it nonetheless still begs the question of why courts would adopt this approach.¹³⁹ Both employment discrimination and disability law literature are nearly silent on the potential for group-based discrimination theories for people with disabilities. There is some limited discussion about the similarities between disparate impact law and reasonable accommodation,¹⁴⁰ but most commentators are otherwise fairly dismissive of the potential of group-based discrimination theories (expressed through disparate

137. MICHAEL J. PIORE, *BEYOND INDIVIDUALISM: HOW SOCIAL DEMANDS OF THE NEW IDENTITY GROUPS CHALLENGE AMERICAN POLITICAL AND ECONOMIC LIFE* 36–44 (1995) (“The goal of employment policy is preeminently individualistic: it is the distribution of jobs and work rewards on the basis of the personal merit of the employee. . . . The law was designed to sanction exceptional departures from meritocracy.”).

138. See, e.g., U.S. COMM’N ON CIVIL RIGHTS, *ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES* 97 (1983) (“The assumption that handicapped people are fundamentally different and inherently restricted in their ability to participate becomes self-fulfilling as handicapped people are excluded from education, employment, and other aspects of society by these consequences of the handicapped-normal dichotomy.”).

139. Parenthetically, the exclusion of failure to accommodate suits from either prong of the traditional framework might also be a result of courts viewing those claims as equivalent to non-accommodation suits in the religious discrimination context. See generally Laura S. Underkuffler, “Discrimination” on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment, 30 WM. & MARY L. REV. 581 (1989) (exploring the line between religious belief and Title VII religious discrimination in the workplace). Although religion-based protection requires the provision of *de minimis* (rather than reasonable) accommodations, 42 U.S.C. § 2000(e) (2000), courts have also routinely treated religious non-accommodation claims as falling outside the scope of standard discrimination analysis. See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 83 (1977) (finding that an employee’s request to observe Sabbath involved an undue hardship for the defendant-employer as it required violating a collective bargaining agreement involving seniority). Whether this reasoning actually motivates courts to reject failure to accommodate claims must remain a matter of conjecture. If judges believe that this parallel exists between disability and religious accommodation claims, they have yet to articulate this position.

140. See, e.g., Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 911 (2004) (“The fundamental likeness between reasonable accommodation and disparate impact lies in their common goal of eliminating unjustified barriers to equal workplace opportunity and inclusion.”); see also Jolls, *supra* note 108, at 645 (“[S]ome aspects of antidiscrimination law—in particular its disparate impact branch—are in fact requirements of accommodation.”).

impact and/or class action law) in disability employment discrimination cases.

Although not clearly articulated, the argument against group-based theories seems to be predicated on the notion that race and sex have, as groups, two unifying features that the disabled are missing. First, race and sex are biologically and socially distinct categories, whereas the disability classification is comprised of people with many individual variations.¹⁴¹ Second, racial minorities and women can request classwide relief from discriminatory policies in a “one-size-fits-all” manner, but that people with disabilities need specific accommodations that vary from individual to individual.¹⁴²

The next Part challenges these assumptions. Viewed through the lens of pandisability, we argue that disability is much like race (and to a lesser degree, sex) in being a social construct when used as an exclusionary proxy. The group-based external perception of the disabled, like earlier notions of race and sex, should create a common umbrella for purposes of disparate impact law and class certification. Thus, even if disabled workers request accommodations that are “individualized”—a concept that itself is overblown when one considers the notion of Universal Design¹⁴³—it is their commonly experienced stigma that should bind the class together for purposes of group-based litigation theories.

III. THE ADA AS GROUP-BASED DISCRIMINATION

Part II demonstrated that group-based discrimination theories have neither been actively pursued nor accepted under Title I. Section A argues for the use of pandisability theory as a heuristic for determining group-based disability employment claims. Next, Section

141. See George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 *FORDHAM L. REV.* 2313, 2319 (2006) (“[F]ew class actions are brought under the employment provisions of the ADA because of the predominance of individual issues, such as the nature and extent of a plaintiff’s disability . . .”).

142. Issacharoff and Nelson come the closest to articulating this point:

[H]ow should courts answer the question whether United Airlines should have to place another co-pilot in each cockpit for every pilot whose vision is worse than 20/100? . . . If a pilot is hypertensive, should United be forced to place a doctor in the cockpit in order to give life-sustaining CPR in the case of a heart attack?

Issacharoff & Nelson, *supra* note 128, at 340–41.

143. Universal Design is an architectural concept whose goal is to design products that are usable by all people, to the greatest extent possible, without the need for adaptation or special design. Ctr. for Universal Design, N.C. State Univ., Principles of Universal Design, http://www.design.ncsu.edu/cud/about_ud/about_ud.htm (last visited Oct. 17, 2006).

B demonstrates the neat convergence of the pandisability model with the class action procedure. Finally, Section C shows how group-based disability employment actions, as conceived by pandisability theory and framed by the class action device, can start to challenge deeply entrenched norms that bar disability workplace participation.

A. Pandisability Theory

Panethnicity has been used as a proxy to treat internally heterogeneous individuals as having a set and unifying identity for the purpose of externally addressing that group's social standing.¹⁴⁴ What makes this norm particularly salient in race discrimination is modern-day recognition that race is an artificial construct.¹⁴⁵ Having evolved from an historical understanding as an inherent biological fact (correlated at one time by the number of African "drops of blood" a person possessed),¹⁴⁶ race is understood as a contextual¹⁴⁷ and politically contingent category.¹⁴⁸ The Civil Rights Act of 1964 created a similar standard for the less-malleable category of sex¹⁴⁹ by

144. See *supra* note 27 and accompanying text.

145. A good illustration of this fact is the treatment of race as being capable of encompassing more than one category ("multi-racial") in the most recent census. This represents a significant break with past practice, as it is the first time that individuals may claim multiple racial identities. U.S. Census Bureau, Racial and Ethnic Classifications Used in Census 2000 and Beyond, <http://www.census.gov/population/www/socdemo/race/racefactcb.html> (last visited Oct. 17, 2006). Scientific evidence also clearly indicates that, from a genetic perspective, race is either a non-existent or an insignificant factor. Noah A. Rosenberg et al., *Genetic Structure of Human Populations*, 298 SCI. MAG. 2381, 2381 (2002).

146. F. JAMES DAVIS, ONE NATION'S DEFINITION 1-15 (1991); IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 124-29 (1996); see, e.g., *Marre v. Marre*, 168 S.W. 636, 640 (Mo. Ct. App. 1914); *Younger v. Juda*, 111 Mo. 303, 308 (Mo. 1892); *People v. Dean*, 14 Mich. 406, 430 (Mich. 1866).

147. Ariela Gross's scholarship on the historical use of law in determining race adds further evidence to the notion of race as a social construct. Professor Gross wisely demonstrates how, because the fractions of blood were not determinative, trials in nineteenth century Southern county courts investigated the "racial 'essence' inhering in one's blood" by asking juries to decide whether particular individuals "performed" white or black. See Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 111 (1998).

148. For recent assertions by two commentators on how race is currently perceived through the lens of behavior rather than biology and so discrimination must be engaged on that level, see Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1269 (2005) and Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 366 (2006).

149. 42 U.S.C. 2000e-2(a)(1) (2000). Exceptions from this rule are those few individuals who change their sex. See, e.g., Julie A. Greenberg, *An Interdisciplinary and Cross-Cultural*

examining socially created gender roles;¹⁵⁰ as a consequence, the Supreme Court has come to evaluate claims of physical difference and equality in light of social convention.¹⁵¹

Traditional employment law scholarship draws a bright line between race and sex discrimination, on the one hand, and disability discrimination, on the other. Indeed, the view that disability discrimination is inherently different is so prevalent that one scholar has termed it “canonical.”¹⁵² According to this received wisdom, discrimination on the basis of race or sex is unjust because these characteristics do not correlate with job performance; conversely, disability is relevant because it is a biological reality that corresponds to lower productivity. In consequence, providing workplace accommodations to the disabled does more than level an uneven playing field, it elevates them to a position that is more than equal.¹⁵³ As argued previously by one of the coauthors, this is a false dichotomy.¹⁵⁴ It is chiefly predicated on notions regarding disability that parallel now-discredited social conventions that women were

Analysis of Binary Sex Categories, in TRANSGENDER RIGHTS: HISTORY, POLITICS, AND LAW 212 (Paisley Currah & Shannon Minter eds., 2003).

150. See generally Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167 (2004) (arguing that Title VII protects against personal trait discrimination that stems from gender norms and stereotypes that are incongruent with workplace equality).

151. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (observing that sex-based differential treatment was merely a codification of empirically unsubstantiated social convention); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“And what differentiates sex from such nonsuspect statuses . . . and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”).

152. Jolls, *supra* note 108, at 643 (“[L]egal requirements that actors take affirmative steps to ‘accommodate’ the special, distinctive needs of particular groups, such as individuals with disabilities . . . strike many observers as fundamentally distinct from, broader than, and often less legitimate than legal requirements within the canonical ‘antidiscrimination’ category.”).

153. See, e.g., Sherwin Rosen, *Disability Accommodation and the Labor Market*, in DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES 21 (Carolyn L. Weaver ed., 1991) (“Fundamentally the ADA is not an antidiscrimination law. By forcing employers to pay for work site and other job accommodations that might allow workers with impairing conditions defined by the law to compete on equal terms, it would require firms to treat unequal people equally, thus discriminating in favor of the disabled.”).

154. Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 581–84 (2004).

physically less capable than men,¹⁵⁵ and that race was a biological absolute.¹⁵⁶

If these lessons of race and sex as group-based categories have been learned (at least as far as formal legal recognition), society still grapples with the concept of artificial constructs respecting disability. Courts and commentators continue to treat the essential nature of disability as an objectively determinable medical fact¹⁵⁷ that manifests in lower abilities than nondisabled persons.¹⁵⁸ From a group-based litigation perspective, disability is also viewed as being too individualized for claims and interests to be aggregated. In other words, the disability designation is seen to capture too wide a range of

155. In particular, it was asserted that women's reproductive functions evidenced their frailty. BARBARA EHRENREICH & DEIDRE ENGLISH, *FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN* 134 (1979) ("Doctors had established that women are sick, that this sickness is innate, and stems from the very possession of a uterus and ovaries.").

156. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 30-72 (1981) (describing the use of scientific thought to mold thinking about the intellectual inferiority of blacks); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 270 (1995) (noting that in the past "science reinforced white supremacy").

157. Although the ADA is often cast in terms of being a creation of the "civil rights" model of disability, see PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW & POLICY: CASES & MATERIALS* 4-4 to -6 (2005), the primary focus of ADA litigation, especially in the employment context, has focused on who is covered under the Act, see, e.g., RUTHERGLEN, *supra* note 22, at 221-23 (surveying principal cases of the last twenty years dealing with the issue of who is covered under the Act). These cases have focused on whether an individual has a physical or mental impairment that substantially limits that individual in one or more major life activities. See 42 U.S.C. § 12102(2) (2000) (requiring that impairment limit a major life activity). The disproportionate emphasis on whether individuals meet this definition actually brings the ADA closer to an earlier (non-civil rights) model of disability, where medical professionals opined whether individuals were truly "disabled." See, e.g., BLANCK ET AL., *supra*, at 3-4 to -23. Furthermore, even though the definition of a disability was intended to include society's response to disability, it has generally not been interpreted by courts in this way. See 42 U.S.C. § 12102(2)(C) (2000); Arlene Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587 (1997) (discussing courts' restrictive interpretations of the "regarded as" definition of the term "disability").

158. See Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 92 (2002) ("Historically, courts have addressed the constitutionality of limiting opportunity for classes delineated in terms of biological differences by considering two related questions. First, does the class members' biological difference relate to . . . 'reduced ability to cope with and function in the everyday world,' . . . ? Second, does the class members' reduced ability to cope and function usually place the public in need of special protection?" (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985))); see also Harlan Hahn, *Advertising the Acceptably Employable Image: Disability and Capitalism*, 15 POL'Y STUD. J. 551, 551-53 (1987) (highlighting the medical orientation and economic understanding used to analyze disabilities).

human variation to be treated as a coherent community.¹⁵⁹ Much heavy weather is made of the heterogeneity of disability with the result that, rather than being viewed as systemically excluded by the environment, disability is held to be the by-product of individual workers not fitting into particular workplace circumstances.¹⁶⁰ Consequently, assertions of disability discrimination have been closeted into a narrow category that examines the reasonableness of a particular accommodation to a single individual rather than questioning the larger issue of whether a hostile workplace environment was constructed that excluded employees with disabilities.

Contrary to this endogenous view, Disability Studies scholars (much like their Critical Race predecessors) challenge the disability classification as contingent on biological fact. They argue for a "social" model of disability in which the physical environment and the attitudes it reflects play a controlling (if not central) role in creating what society terms "disability." Factors external to a person's own

159. Disability Studies scholars take issue with this position, averring that disabled people share a common culture. See, e.g., SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 4 (1998) ("We[,] [people with disabilities,] are all bound together, not by [a] list of . . . collective symptoms but by the social and political circumstances that have forged us as a group."); Sharon N. Barnartt, *Disability Culture or Disability Consciousness?*, 7 J. DISABILITY POL'Y STUD. 1, 2 (1996) ("I suggest that the concept of collective consciousness better describes what is occurring within the disability community . . . [which] has implications for policymaking."); Paul K. Longmore & Lauri Umansky, *Introduction: Disability History: From the Margins to the Mainstream*, in NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES 1, 4 (Paul K. Longmore & Lauri Umansky eds., 2001) ("There has always been a variety of disability experiences. At the same time, . . . experiences of cultural devaluation and socially imposed restriction of personal and collective struggles for self-definition and self-determination[] recur across the various disability groups throughout their particular histories."); Susan Peters, *Is There a Disability Culture? A Syncretisation of Three Possible World Views*, 15 DISABILITY & SOC'Y 583, 598 (2000) ("The roots of disability cultural identity are the elements of culture contained in the historical/linguistic world-view where we have collectively produced our own cultural meanings, subjectivities and images; e.g. a common language/lexicon that connotes pride and self-love, cohesive social communities."); Susan Reynolds Whyte, *Disability between Discourse and Experience*, in DISABILITY AND CULTURE 267, 279 (Susan Reynolds Whyte ed., 1995) ("In practice . . . the experience of disability is still embedded in cultural assumptions and social relations, the 'local moral worlds,' of which even the most committed empathetic humanism must take account."); cf. Richard K. Scotch & Kay Schriener, *Disability as Human Variation: Implications for Policy*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 148, 154-57 (1997) (asserting that humanity, by definition, is varied with disability merely comprising one manifestation from an idealized norm).

160. Ruth O'Brien terms this phenomenon the "whole man" schema and avers that it is influenced by vocational rehabilitation policies. RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE 63-87 (2000).

impairments are therefore determinative of an individual's ability to function in society.¹⁶¹ This is in sharp contrast to the "medical" model of disability that views a disabled person's limitations as naturally (and thus properly, even if unfortunately) excluding her from the mainstream.¹⁶² Several branches of Disability Studies scholarship grapple with the historical origin of the disability classification,¹⁶³ and thus with the source of able-bodied society's negative feelings toward people with disabilities.¹⁶⁴ A few of these commentators identify the source of aversive treatment as animus.¹⁶⁵ And, to be fair, statutory,¹⁶⁶

161. See, e.g., SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 35 (1996) ("[T]he biological reality of a disability and the social construction of a disability . . . are interactive not only in that complex interactions of social factors and our bodies affect health and functioning, but also in that social arrangements can make a biological condition more or less relevant to almost any situation."); Ron Amundson, *Disability, Handicap, and the Environment*, 23 J. SOC. PHIL. 105, 110 (1992) ("[A] handicap results from the interaction between a disability and an environment."); Scotch, *supra* note 114, at 275 ("[A] social model of disability that conceptualizes disability as a social construction that is the result of interaction between physical or mental impairment and the social environment.").

162. See CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT* 11 (1988) ("The medical/pathological paradigm of 'disability legislation' effected a shift from physical inferiority to social inferiority by forcing an emphasis on the handicapped individual, and by discouraging acknowledgement of socially created sources of deviance."); Kenny Fries, *Introduction to STARING BACK: THE DISABILITY EXPERIENCE FROM THE INSIDE OUT* 1, 6-7 (Kenny Fries ed., 1997) ("[T]his view of disability . . . puts the blame squarely on the individual.").

163. See generally Douglas Baynton, *Disability and the Justification of Inequality in American History*, in *NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES*, *supra* note 159, at 33, 33-57; Hanoch Livneh, *On the Origins of Negative Attitudes Towards People with Disabilities*, 43 *REHABILITATION LITERATURE* 338 (1982).

164. For a sociological approach, see MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* (1990); R. William English, *Correlates of Stigma Toward Physically Disabled Persons*, 2 *REHABILITATION RES. & PRAC. REV.* 1 (1971); Norman Goodman et al., *Variant Reactions to Physical Disabilities*, 28 *AM. SOC. REV.* 429 (1963); Stephen A. Richardson et al., *Cultural Uniformity in Reaction to Physical Disabilities*, 26 *AM. SOC. REV.* 241 (1961).

165. See, e.g., ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 5 (1963) (asserting that stigma manifests when "we believe the person with a stigma is not quite human"); Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy For People With Disabilities*, 40 *UCLA L. REV.* 1341, 1343-1345 (1993) (identifying intolerance and discrimination as part and parcel of the reasons excluding people with disabilities' equal social participation); see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461-62 (1985) (Marshall, J., concurring in part and dissenting in part) ("Fueled by the rising tide of Social Darwinism, the 'science' of eugenics, and the extreme xenophobia of those years . . . [a] regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled . . . the worst excesses of Jim Crow.").

166. For example, over the period 1900 to 1928 more than twenty-five states enacted mandatory sterilization laws for the disabled, often directed at impairments known not to be hereditary such as blindness and epilepsy. See Laurence A. Stith, *Sterilization of the Unfit*, 32

anecdotal,¹⁶⁷ and case law¹⁶⁸ evidence does lend selected support to that claim.¹⁶⁹ Nonetheless, the vast majority of these commentators believe that differential treatment is grounded in pity and paternalism.¹⁷⁰ At the same time, nearly all also accord some influence (whether resulting in overt or unconscious differential treatment) to the phenomenon of “existential anxiety,” which inspires an able-bodied person to think “there but for the grace of God go I” when encountering a person with a disability.¹⁷¹ Existential anxiety can lead to both awkward interaction

LAW NOTES 108 (1928); Amos Reynolds, *The Prevention of Pauperism*, in PROCEEDINGS OF THE SIXTH ANNUAL CONFERENCE OF CHARITIES HELD AT CHICAGO 210–16 (1879), quoted in DONALD K. PICKENS, *EUGENICS AND THE PROGRESSIVES* 187 (1968) (“[T]he state should prohibit the marriage of all persons who . . . are suffering from any incurable bodily infirmity or deformity.”). A recent and comprehensive treatment is EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE* (2003).

167. Compiled in S. REP. NO. 101-116 (1989), the more compelling anecdotal evidence included testimony by a wheelchair-using future undersecretary of the Department of Education who was removed from an auction house for being deemed “disgusting to look at,” and about an academically competitive and nondisruptive child who was barred from attending public school because of a teacher’s allegation that his physical appearance “produced a nauseating effect” upon classmates. *Id.* at 6–7.

168. See, e.g., *Otting v. J.C. Penney Co.*, 223 F.3d 704, 712 (8th Cir. 2000) (ruling that a jury could have reasonably found that the employer had acted maliciously).

169. A different and interesting approach is provided in Michelle A. Travis, *Perceived Disabilities, Social Cognition, and “Innocent Mistakes,”* 55 VAND. L. REV. 481 (2002). Applying cognitive psychology literature, Professor Travis describes from a psychological perspective how and why members of society, including employers and judges, would consider a nondisabled person as being disabled. *Id.* at 509–42.

170. See, e.g., ALAN GARTNER & TOM JOE, *IMAGES OF THE DISABLED, DISABLING IMAGES* (1987) (demonstrating how the disabled are characterized as feeble or incapable, and are often objectified); PAUL LONGMORE, *WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY* 1131–48 (2003) (describing images of pity that Hollywood and other mass media disseminate about people with disabilities); Feldblum, *supra* note 117, at 165 (asserting that the general public’s view is that “disabled people lack value and are to be pitied”). These assertions are substantiated by at least one public opinion poll. See LOUIS HARRIS & ASSOCS., *THE INTERNATIONAL CENTER FOR THE DISABLED SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM* 13 (1986) (74 percent of Americans felt pity toward disabled individuals).

171. The term originates with Harlan Hahn, a political scientist from University of Southern California and one of the founders of the Disability Studies movement, who asserted that repugnance to disabled bodily difference, combined with fear of also attaining such variation in the future, results in a sociological desire to segregate people with disabilities from the mainstream. See, e.g., Harlan Hahn, *The Politics of Physical Differences: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 43–44 (1988) (“Probably the most common threat from disabled individuals is summed up in the concept of existential anxiety: the perceived threat that a disability could interfere with functional capacities deemed necessary to the pursuit of a satisfactory life.”).

("people with disabilities make me uncomfortable"¹⁷²) and to pity ("always be nice to blind people"¹⁷³); both instances manifest in a sense of "otherness" and exclusion that, combined, is unique to the disabled.

Societal perceptions and reactions are crucial to defining disability. Exogenous factors (such as the way mainstream societies create environments), rather than endogenous qualities, are what by and large create the disability classification.¹⁷⁴ Much like people of color, people with disabilities are not inherently dissimilar from one another because of medically ascertainable facts. Rather, the disabled are placed outside the mainstream and constitute a coherent "other" group that society considers as being apart from the biological norm. Yet, separation and its social consequences are precisely what cause people with disabilities to be alike for group identification purposes. Thus, an individual with cerebral palsy (who has a genius level IQ) and a person with congenitally missing arms (who happens to be a champion marathon runner) will each be considered different from the mainstream in the negative sense of being less capable (as opposed to being stronger or smarter), and this common prejudicial experience in turn reinforces their membership in a disability classification. Put another way, disabled persons are identified as "disabled" and subjected to stigma that derives from membership in an externally created class; in turn, the collective experience of being treated as "disabled" creates an overall and unifying identity. Disability heuristics create both prejudice and group classification.¹⁷⁵

172. People with disabilities aver that they can sense when nondisabled people are bent out of shape by their presence, much as gays and lesbians do.

173. A graphic illustration of this phenomenon (literally) appears in the autobiography of politically incorrect quadriplegic cartoonist John Callahan, as part of a series that he has drawn on "How to relate to handicapped people." Among the behavioral don'ts are: (a) acting "over friendly"; (b) being "patronizing"; (c) "directing your questions to the friend of the handicapped person"; (d) "being over-apologetic"; and (e) "acting like Leo Buscaglia [a professor at the University of Southern California known for his writings on demonstrating love]." JOHN CALLAHAN, *DON'T WORRY, HE WON'T GET FAR ON FOOT* 189-99 (1989).

174. A particularly strong version of this assertion is that of feminist and disability rights advocate Susan Wendell, who alleges that "the entire physical and social organization of life" has been created with the notion in mind that "everyone was physically strong, as though all bodies were shaped the same, as though everyone could walk, hear, and see well, as though everyone could work and play at a pace that is not compatible with any kind of illness or pain." WENDELL, *supra* note 161, at 39. Professor Wendell's point, although valid, should not be overstated.

175. Several scholars have written on why group membership, as opposed to individual circumstance, is necessary to justify antidiscrimination protection for people with disabilities. See Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 422-68

This is because group identity norms almost by definition equate with negative stereotypes; otherwise, there would not be a need to eliminate civil rights violations that flow from their invocation.¹⁷⁶

Pandisability theory parallels earlier notions of panethnicity, and demonstrates how disability serves as an equally valuable socially constructed heuristic for determining class identity. A pandisability theory allows us to once more capture the commonality of class interest, as both unwillfully receiving and wishing to eradicate a particular form of group-based stigma and subordination. Just as prejudice and stereotype arise from misperceptions about a category of individuals, so too must litigation be group-based if it is to ameliorate those barriers.

A central predicate to a group-based discrimination proof structure is that people with disabilities have a common-enough group identity to aggregate their interests. This is the case under class action law, in which collective interests must be sufficiently cohesive to meet the typicality, commonality, and adequacy of representation standards. It is equally true under disparate impact doctrine, in which joint interests must be aligned to contrast statistical disparities with the majority group (in this case, workers without disabilities). Shared perceptions provide people with disabilities the commonality of interest necessary to proceed under group-based discrimination theories of class actions and disparate impact proof models.¹⁷⁷ It is to these subjects that we now turn.

(2000) (arguing that ADA coverage ought to be circumscribed to those individuals whose disability-related stigma subjects them to systematic disadvantage); Mark Kelman, *Does Disability Status Matter?*, in *AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS*, *supra* note 114, at 91, 96–99 (proposing that norms are best enforced as group, rather than individual, protections because the larger societal benefits stemming from the prevention of market discrimination relate to the incorporation of those groups into the social and economic mainstream).

176. See generally Anita Silvers, *Double Consciousness, Triple Difference: Disability, Race, Gender and the Politics of Recognition*, in *DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE* 75 (Melinda Jones & Lee Ann Basser Marks eds., 1999).

177. Earlier the Article focused on disparate impact first and then on the class action device, due to their chronology within non-disability discrimination cases. It now reverses field and treats the ramifications of class action disability discrimination claims before disparate impact theory. This is because the shared group experience, expressed through class action procedure, should precede and lend structure to the doctrinal application of disparate impact theory.

B. The Class Action Device

At the class certification stage, courts have shifted their focus in race- and sex-based employment discrimination cases away from ties that are commonly viewed as socially constructed (as defined by panethnicity) and toward greater intragroup hegemony requirements. One by-product of this increased stringency is that Title I class actions have been viewed with special skepticism when analyzed under Rule 23 criteria. However, it is not inevitable that courts should interpret disability-related collective actions in this manner.

As an initial matter, Title I class actions are fundamentally like their classical Title VII counterparts, despite the putative assumption that the latter request "one-size-fits-all" remedies, whereas the former necessitate individualized remedies. The notion that race and sex classes each request univocal remedies is overstated. Within these classes, each member may well need a different variation of the generally agreed-upon relief. Returning to the hypothetical, pre-*Falcon* Title VII employment discrimination class action brought against Big Impersonal Corporation,¹⁷⁸ some of those women might challenge on disparate impact grounds. Among them might be a challenge to an employer's interviewing policy that emphasizes aggressiveness and thereby excluded their hiring on the basis of sex; others may point to a seniority system that instantiated historic exclusion on the basis of race and precluded their promotion; still others may claim that they were harassed about their cultural and linguistic heritage, and so suffered injuries on the basis of their national origin; and a number may assert that their religious observance led to poor performance evaluations and dismissal. Assuming the suit is successful, at least four general policies (hiring, promotion, hostile work environment, and retention) will need to be altered.¹⁷⁹

178. See *supra* notes 49–50 and accompanying text.

179. We acknowledge that since the Supreme Court's decision in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), it has become more difficult to take an "across-the-board" approach to challenge employer discrimination (at least in the absence of class representatives who have been directly affected by each employment policy), see *supra* Part I.C. Even post-*Falcon*, however, some courts have allowed members of one racial minority to represent another minority. See *Ramirez v. DeCoster*, 203 F.R.D. 30, 32 (D. Me. 2001) (holding that class representatives who were migrant farm workers of exclusively Mexican origin could represent a class of all Hispanics who had worked at the defendant's egg farm); see also *Gulino v. Bd. of Educ. of N.Y.*, 201 F.R.D. 326, 331 (S.D.N.Y. 2001) (holding that a Latina woman of unspecified origin, an African-American woman, and an African-American man could represent a class of all African-

More trenchantly, the application of each of those changed policies will be different for each of the class members. In spite of the shared experience of discrimination, which in turn arises from an external view of their shared qualities as Latinas, each of these individuals is unique in terms of her qualifications, qualities, and experiences of discrimination.¹⁸⁰ Along the same lines, the individuality of ADA relief is likewise overstated. Many requests for accommodation dealing with physical accessibility and environmental design, for instance, can be commonly remedied by use of Universal Design principles.

Second, although very few class actions have been brought (and fewer still, certified) in Title I cases, collective action is routinely seen in ADA cases involving discrimination in public services (under Title II) and privately owned places of public accommodation (under Title III). Title II classes have been certified for individuals with various mobility and/or vision disabilities challenging inaccessible sidewalks,¹⁸¹ and individuals with various disabilities who were eligible under California's Medicaid program and received services at a hospital that was slated for termination.¹⁸² Similarly, Title III class actions seeking to enforce public accommodation accessibility requirements are regularly certified for groups of diversely disabled individuals,¹⁸³ even when those classes are defined as encompassing "all persons in the

American and Latino teachers). Similar cases exist outside of employment law. See *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 59 (S.D.N.Y. 2003) (class of non-Caucasian policyholders who alleged racial discrimination in formation, performance, modification, and termination of insurance contracts in violation of § 1981); *Ashe v. Bd. of Elections in N.Y.*, 124 F.R.D. 45, 46 (E.D.N.Y. 1989) (class of all Black and Hispanic citizens alleging racial discrimination in voting procedures).

180. Parenthetically, given that it is beyond the scope of this Article, we also note that the preceding hypothetical does not even account for instances of multiple discrimination, where an individual experiences prejudice because of her membership in more than one vulnerable group. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1371 (1988) (describing the cumulative effects of being African American and a woman).

181. *Barden v. City of Sacramento*, 292 F.3d 1073, 1074–75 (9th Cir. 2002).

182. *Rodde v. Bonta*, 357 F.3d 988, 996 (9th Cir. 2004) (including urological and ancillary services, rehabilitation of spinal cord injuries, amputation services, services for chronic liver disease, post-stroke rehabilitation, services for diabetics, and pressure sore management); see also *Armstrong v. Davis*, No. 99–15152, 2000 WL 369622, at *1 (9th Cir. Apr. 5, 2000) (class of all present and future California state prison inmates and parolees with various physical and learning disabilities).

183. See, e.g., *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 357–63 (D. Colo. 1999) (approving certification of a class comprised of both wheelchair and scooter users); *Bacal v. Se. Pa. Trans. Auth.*, No. 94–6497, 1995 WL 299029, at *9 (E.D. Pa. May 16, 1995) (granting certification for "[a]ll persons eligible for paratransit service" under the ADA).

United States with disabilities" excluded from one medical care facility,¹⁸⁴ or "all physically handicapped persons who were denied full and equal access" to a ski resort.¹⁸⁵ The uncontroversial acknowledgment of disability group identity as sufficient to justify class actions in nonemployment settings provides a clear example for parallel application in Title I suits.¹⁸⁶

What unifies the classes of disabled persons in these cases? Because the respective classes incorporate individuals with varying modes of disabilities, it cannot be said that the uniting feature is identical biology in the sense that each of the named individuals deviates from the perceived bodily norm in the same way. Instead, it is the confluence of policies, practices and environmental features under the common defendant's control that excludes each of the class members from employment opportunity. Nor is every plaintiff affected in the same way. Uncurbed sidewalks likely affect people with mobility impairments, whereas it is lack of tactile bumps in the same pavements that impact people with visual impairments. Just as nuances in sidewalk construction produce sundry incommodations on assorted categories of disabled people, so too does the relief that each category of individuals will seek. Nevertheless, this class was certified on the ground that the complained-of discrimination (i.e., neglecting to account for ecumenical accessibility when constructing and maintaining sidewalks) sufficiently unified the class and its interests.¹⁸⁷

To illustrate how this principle could be incorporated into Title I class actions, assume that Snobb Academy, a private elementary school, is hiring teachers. One of the essential job requirements, in addition to proper educational degrees, teaching experience, personal charm, and references, is the ability to safely convey children out of a building during fire alarms (and, especially, in case of a genuine fire). Antonio, whose epilepsy is not readily discernable, applies for a

184. *Access Now, Inc. v. AHM CGH, Inc.*, No. 98-3004, 2000 U.S. Dist. LEXIS 14788, at *16 (S.D. Fla. July 12, 2000).

185. *Leiken v. Squaw Valley Ski Corp.*, No. S-93-505, 1994 U.S. Dist. LEXIS 21281, at *10 (E.D. Cal. June 28, 1994).

186. Clearly, this would be a very different than the typical ADA Title I case, which often focuses at the outset on whether the plaintiff actually meets the definition of disability under the statute. *See, e.g., Sutton v. United Airlines*, 527 U.S. 471, 478 (1999) (holding that plaintiffs were not disabled within meaning of statute because in their mitigated states, they were not substantially limited in a major life activity). Nevertheless, there is no salient reason why what can be done in Title II and III cases cannot be done in Title I cases. The ADA's definition of disability, 42 U.S.C. § 12102(2) (2000), is the same for the entire statute.

187. *Barden v. City of Sacramento*, 292 F.3d 1073, 1074-75 (9th Cir. 2002).

teaching position and is offered a job. After accepting, Antonio reveals to the school his epileptic condition and requests, as a reasonable accommodation, that the strobe lights in the fire alarms (which can initiate epileptic seizures), be replaced with an alternative form of emergency illumination. Snobb Academy refuses on the ground that replacing the lighting will be too expensive, and hence unreasonable. Antonio sues. Assuming that the accommodation did not rise to a level of imposing an undue hardship on the school (and is therefore disposed of through summary judgment),¹⁸⁸ the trial proceeds on the issue of whether Antonio's requested accommodation was in fact reasonable. Whoever wins, the resulting verdict reflects the reasonableness of the non-strobe light accommodation. It does not, however, address whether or not Snobb Academy was upholding a workplace norm that adversely impacted other disabled individuals beyond Antonio.

Now consider how Antonio's case might look as a class action. Even under a limited view of the class certification requirements of typicality and adequacy of representation, Antonio should be able to serve as a class representative for other employees (or potential employees) with epilepsy who would be similarly disadvantaged by the strobe light system. But the class represented can be conceived of in an even broader manner, embracing individuals with other disabilities who might be similarly excluded by the strobe light system. People with balance difficulties, brain injuries, and certain visual atypicalities could similarly have been excluded from teaching positions. Thus, any individual with a disability who can identify being excluded from a vocational opportunity at Snobb Academy because of the strobe light alarm could participate in Antonio's class action.

The discrimination here alleged is the maintenance of a workplace feature that rightly serves the interests of teachers and students without disabilities, but which in doing so disserves teachers

188. Common sense would seem to indicate that the issue of reasonableness ought to necessitate just the type of factual inquiry that defeats motions for summary judgment, namely a determination by a jury based upon the set of facts presented by the opposing parties. Thus, granting summary judgment at this stage prevents the type of functional inquiry that appears to be envisioned by the statute. See 42 U.S.C. § 12101 (2000) ("It is the purpose of this chapter . . . to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."). Nonetheless, it is the governing practice. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101 (1999) ("Courts are abusing the summary judgment device . . . [by] refusing to send 'normative' factual questions to the jury.").

and students with disabilities. Although Antonio's fellow class members may have different disabilities, they are unified by their communally experienced exclusion and social stigma. For commonality purposes, the common issues of fact are how Snobb Academy did (or did not) perceive the needs of people with disabilities, including what prejudices and mutual stigmas it associated with the disability designation, as well as the effectiveness and reasonableness of the requested accommodations.¹⁸⁹ The common legal issue is whether accommodations appropriate for class members as a whole are required under the ADA.¹⁹⁰

Equally, this case can also satisfy the elements of typicality and adequacy of representation,¹⁹¹ which are often analyzed together.¹⁹² In the event that Antonio's requested accommodation benefits other individuals with similar disabilities, there is a complete alignment of requested relief between the class representative and the class, and typicality should be easily met. If, as in the circumstance of the sidewalk case, different class members need dissimilar accommodations to facilitate their entry into Snobb Academy, their shared exclusion should still serve to certify the class.¹⁹³ If the

189. FED. R. CIV. P. 23(a)(2).

190. This tracks the common legal and factual issues in Title VII cases. In *Reeb v. Ohio Department of Rehabilitation*, 203 F.R.D. 315 (S.D. Ohio 2001), a sex discrimination case where the defendant was alleged to have engaged in a general pattern or practice of discrimination against women by its employment actions that disproportionately harmed female employees, the court held that the requirement of commonality was met because the issue of whether defendant's alleged practices violated Title VII was common to the class, *id.* at 321; *see also* *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) ("Allegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of Rule 23(a)."); ALBA CONTE & HERBERT NEWBERG, *NEWBERG ON CLASS ACTIONS* § 3:10, at 283 (4th ed. 2002) ("Common issues of actions charging discrimination on the basis of race or sex are the presence of a discriminatory rule or practice and a general policy of discrimination."). The same is true for ADA non-Title I cases. *Anderson v. Pennsylvania Department of Public Welfare*, 1 F. Supp. 2d 456 (E.D. Pa. 1998), presents a class action challenging a managed care program's compliance with ADA Title II, *id.* at 461-62. The court rejected the defendant's arguments that commonality was not met on the ground that there would be individual fact issues regarding each putative class member's impairment and ability to obtain medical care. *Id.* at 462.

191. FED. R. CIV. P. 23(a)(3), (a)(4).

192. *See* *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether . . . the interests of the class members will be fairly and adequately protected in their absence.").

193. Again, this is a common feature of ADA non-employment law cases. In *Wyatt v. Poundstone*, 169 F.R.D. 155 (M.D. Ala. 1995), a class of residents in state-operated facilities argued that defendants violated Title II of the ADA by not providing sufficient number of

requested remedies are too dissimilar, subclasses may be appropriate.¹⁹⁴

When considering what qualities unify groups for purposes of group-based discrimination actions, courts routinely recognize financial interests as sufficient to certify a class. Consider securities fraud cases, which are often brought as class actions and regularly certified, despite the defendant's conduct having affected the class members in different ways.¹⁹⁵ The typicality element of Rule 23 usually is met in these cases even when the named plaintiffs bought numerous categories of stock,¹⁹⁶ or there were differences in overall damage amounts;¹⁹⁷ class members purchased stock in dissimilar manners (for example, at separate times or relying on distinct documents),¹⁹⁸ were diverse types of investors,¹⁹⁹ and varied greatly in

community-based placements, *id.* at 158. Defendants argued that the class should be decertified because it was divided between individuals who advocated community placement of residents and those that did not. *Id.* at 160. The court rejected this argument. *Id.* at 162.

194. See, e.g., *Quigley v. Braniff Airways, Inc.*, 85 F.R.D. 74, 84 (N.D. Tex. 1979) (holding, in an employment discrimination action, that conflict over relief between the plaintiff and the class representative could be resolved by subclasses when the proper time arose).

195. See JOHN C. COFFEE, JR. & JOEL SELIGMAN, *SECURITIES REGULATION: CASES AND MATERIALS* 1217-27 (9th ed. 2003) (discussing securities litigation, the frequency of class actions, and how members of the same class may have been affected in different ways). See generally CONTE & NEWBERG, *supra* note 190, at ch. 7 (discussing class determination generally and citing many securities cases that had been properly certified).

196. *Endo v. Albertine*, 147 F.R.D. 164, 167-69 (N.D. Ill. 1993) (finding the typicality requirement was met where the named plaintiffs bought only Class A common stock whereas the class members purchased debentures and notes as well as common stock).

197. See, e.g., *Mayer v. Mylod*, 988 F.2d 635, 640 (6th Cir. 1993) (noting that although the named plaintiff made money from the relevant investment while other class members claimed losses, class certification was not necessarily defeated); *Clark v. Cameron-Brown Co.*, 72 F.R.D. 48, 53 (M.D.N.C. 1976) ("[A] difference in damages between [members] . . . of the proposed class . . . does not affect the proper class formation.").

198. See, e.g., *Spicer v. Chicago Bd. Options Exch., Inc.*, 1990 WL 16983, at *6 (N.D. Ill. Jan. 31, 1990) ("[T]he fact differences relating to the price at which each series traded do not undermine typicality . . .").

199. See *In re Mellon Bank S'holder Litig.*, 120 F.R.D. 35, 37 (W.D. Pa. 1988) (holding that the typicality requirement was met even though the shareholder class contained institutional investors who bought stock based on internally developed research); *Backman v. Polaroid Corp.*, No. 79-1031-MC, 1982 U.S. Dist. LEXIS 17640, at *6 (D. Mass. July 16, 1982) ("While the plaintiffs' knowledge and their methods of making trading decisions may differ from those of the class of investors which they seek to represent, those differences do not make plaintiffs atypical or inadequate representatives."); *Greenfield v. Flying Diamond Oil Corp.*, No. 78 Ci. 3723, 1981 WL 1621, at *6 (S.D.N.Y. Mar. 30, 1981) (finding that the claims of arbitrageurs were not legally different from other shareholders).

the misrepresentation that influenced their purchases.²⁰⁰ This is because the underlying inquiry for typicality was whether the same alleged unlawful conduct affected both the named plaintiff and the class seeking to be represented.²⁰¹ Similarly, variations in the manner in which class members relied on the alleged misrepresentation do not defeat the class certification requirement of adequacy of representation.²⁰² What is clear is that within securities law, a defendant's conduct does not have to affect every class member in the same way. Instead, the umbrella covering the entire class is the alleged unlawful conduct that has impacted every class member.

Specific requests for monetary relief are, however, a poor proxy for the deeper social dynamics that unify groups of individuals. Rather than a onetime financial loss, it is shared human experience that is far more significant in defining common identity. Securities fraud plaintiffs are united only in the sense that they feel collectively aggrieved to the point of seeking financial redress. Beyond the boundaries of the suit, these individuals may not (and need not) share any identity characteristics. For these claimants, the class action procedure defines their joint identity. By contrast, pandisability (and panethnicity) plaintiffs are bound together by their respective

200. See, e.g., *Priest v. Zayre Corp.*, 118 F.R.D. 552, 555 (D. Mass. 1988) ("The fact that plaintiff's investment decisions were influenced by his own subjective preferences and determined in part by a computer program incorporating a number of factors does not render him atypical." (footnote omitted)); *Baum v. Centronics Data Computer Corp.*, No. C85-363-L, 1986 WL 15784, at *2 (D.N.H. May 15, 1986) ("Reliance on the advice of others will not defeat typicality if the information from the third parties is based on the alleged misrepresentations that form the basis of plaintiffs' action.").

201. See *CONTE & NEWBERG*, *supra* note 190, § 22:24 ("Under this view, the typicality prerequisite may be satisfied though varying fact patterns may underlie individual claims."); see also *Green v. Wolf Corp.*, 406 F.2d 291, 299 (2d Cir. 1968) (suggesting that the trial court could find that the typicality requirement was met in a case charging a company with inflating its stock price by issuing false prospectuses, even though the named plaintiffs bought shares relying on a third prospectus, not on the prior two, as the other plaintiffs had done); *Sargent v. Genesco, Inc.*, 75 F.R.D. 79, 83 (M.D. Fla. 1977) (holding that the typicality requirement was met despite the existence of a subclass because all of the plaintiffs' claims "are premised on the same theories and will survive or fall to the same defenses").

202. See, e.g., *Fox v. Equimark Corp.*, No. 90-1504, 1994 WL 560994, at *5 (W.D. Pa. July 18, 1994) (holding that reliance, by the plaintiffs, on a *Wall Street Journal* article rather than on defendant's alleged misrepresentation did not render representation inadequate); *Fritesch v. Refco, Inc.*, No. 92 C 6844, 1994 WL 10014, at *7 (N.D. Ill. Jan. 13, 1994) (determining that significant differences in content prospectuses between class representatives and some class members did not render representation inadequate); *Priest*, 118 F.R.D. at 555 (concluding that the named plaintiff's reliance on factors other than the alleged misrepresentations did not undermine his adequacy as a class representative).

experiences of social stigma and subordination. They may coalesce around the focal point of an employer's particular policy or practice for litigation purposes, but their essential identities as people with disabilities (or persons of color) are independent of these claims. The social responses that the group undergoes while mediating society both precede and follow any judicial interaction. Put concretely, disabled people as a whole are subjected to differential treatment and social exclusion throughout their lives because of social constructs created by the able-bodied majority, and identify with one another because of this occurrence. It is this shared life experience that defines both their real world, as well as their legally constructed identities.

Finally, it bears noting that certifying a class of people with diverse disabilities that has been affected by a common set of attitudes and discriminatory behaviors is consistent with the history underlying the class action device. As demonstrated by the scholarship of Stephen Yeazell,²⁰³ the procedure arose as an expedient way to adjudicate the common interests of an already socially constructed group.²⁰⁴ The earliest forms of collective action that Professor Yeazell documents occurred on behalf of villagers suing individuals or other villages for grievances impacting the village as a whole,²⁰⁵ and tenants challenging the amount that the lord of the manor could exact for permitting succession to a tenancy.²⁰⁶ The

203. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); Stephen C. Yeazell, *From Group Litigation to Class Action: Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514 (1980) [hereinafter Yeazell, *From Group Litigation to Class Action: Part I*]; Stephen C. Yeazell, *From Group Litigation to Class Action: Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980); Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977).

204. See YEAZELL, *supra* note 203, at 40 ("[M]ost medieval group litigation involved groups whose organization antedated the lawsuit itself Unlike some modern collective litigation, medieval group litigation did not overcome the difficulties of organizing a group for collective action. That task had already been done.").

205. *Id.* at 38–39 (discussing a 1199 case wherein the rector of Barkway "sued the parishioners of Nuthamstead, a Hertfordshire village, in a suit involving his entitlement to certain offerings and theirs to daily services of mass," and a different case a century later where "three villagers, 'for themselves and for the whole community of the vill of Helpingham,' sued two named persons 'and the whole community of the town of Donington' . . . for the alleged failure of the [defendant] villagers to assist the Helpingham villagers in repairing local dikes").

206. See Yeazell, *From Group Litigation to Class Action: Part I*, *supra* note 203, at 516–18 (noting how this policy applied to all tenants and evolved into "early group litigation because the custom in question was one theoretically applicable to all tenants holding under similar circumstances").

socially constructed bonds amongst the villagers and tenants provided the necessary community of interest for the group-based litigation.²⁰⁷ Indeed, the litigation itself was a fairly insignificant unifying force for the group, given the breadth of their shared communal identity.²⁰⁸ The idea of a litigation campaign forming the community of interest for the group is of a distinctively more recent vintage. We therefore agree with Professor Yeazell that for “many modern classes the class members are not a social group but simply those members of society who share some hypothesized interest.”²⁰⁹

C. *Challenging Workplace Norms*

Just as the class action device is the legal procedure through which to challenge disability-related employment discrimination, disparate impact law provides the theoretical framework for challenging those workplace hierarchies. Classically, disparate impact litigation highlights statistical disparities in an occupational demographic profile that are traceable to an employer’s policies or practices.

Absent direct evidence of a facially discriminatory practice, for example a blanket policy of not considering deaf workers for employment positions,²¹⁰ circumstantial evidence forms the basis for a prima facie case of discrimination and shifts the burden to employers of proving that their business practices have a legitimate, nondiscriminatory purpose.²¹¹ In other words, plaintiffs claim that due

207. See YEAZELL, *supra* note 203, at 46–57 (describing both the villagers’ common status and the organization of village life as unifying circumstances).

208. *Id.* at 57 (“[T]o the extent that the issues at stake in such litigation involved incidents of status rather than claims of individual right, group litigation seemed inevitable rather than remarkable.”); *id.* (“[U]nlike the modern class action, medieval group litigation did not, in itself, alter the relations of power between the group and its adversary.”).

209. *Id.*; see also Yeazell, *From Group Litigation to Class Action: Part I*, *supra* note 203, at 516–20 (discussing the move from social entities to litigative units).

210. See *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1182 (10th Cir. 2003) (holding that the plaintiff established a prima facie case of discrimination when a call center in the Philippines was set up to handle only non-vocal communication and the company did not consider people with deafness for employment).

211. *E.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (giving the burden of proof structure for cases involving circumstantial proof, whereby a plaintiff establishes a prima facie case of discrimination, which shifts the burden to the defendant to present a legitimate, nondiscriminatory reason for the challenged employment action, which in turn shifts the burden back to the plaintiff to demonstrate that the defendant’s proffered reason is a pretext for discrimination). In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Court clarified that direct evidence of discrimination is not required to shift the burden of proof to the

to the effects of a particular practice of the employer, something is wrong with the overall employment snapshot—people of color apply, but are not hired; women are hired, but not promoted—and frame this discriminatory picture within statistical evidence of relevant labor market demographics.²¹² Because disparate impact law is dependent on asserting statistical groupwide disparities (“no/very few people who resemble me/us have been granted employment opportunities by the defendant”), it cannot be theoretically conceived of as atomistic. Even when brought by a lone claimant,²¹³ disparate impact cases must be understood in terms of questioning larger structured relationships that affect a broader number of individuals and that in turn challenge those hierarchies.²¹⁴

Consequently, disparate impact theory as applied to failure to accommodate cases is necessary to challenge facially neutral policies and practices that have a disproportionately negative effect on people with disabilities. Even commentators who are skeptical of disparate impact litigation have noted its successes in eliminating formal policies that contribute to the unequal exclusion of racial minorities and women.²¹⁵ The existing literature and case law, however, has not

defendant in a mixed-motive discrimination case, i.e., where legitimate and illegitimate reasons motivated the employment action, *id.* at 101–02; see Charles Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911 (2005) (arguing that it would be a mistake for *Desert Palace* to create a renewed emphasis by academics and courts on disparate treatment litigation).

212. Determining the appropriate baseline demographic is at the heart of this econometric pursuit. Courts have divided over whether plaintiffs ought to focus on actual applicants, the available labor pool within geographic proximity, or national statistics. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 337 (1977) (comparing the proportion of minority workers employed as over-the-road drivers to the proportion of minorities in the national population); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977) (using the proportion of blacks in the relevant labor market as a baseline for evaluating a school district's hiring practices); *Dothard v. Rawlinson*, 433 U.S. 321, 347–48 (1977) (White, J., concurring) (noting the importance of the applicant pool data in *Hazelwood*, *supra*).

213. See *Heagney v. Univ. of Wash.*, 642 F.2d 1157, 1163 (9th Cir. 1981) (“Although the disparate impact theory is ordinarily asserted in class actions, an individual claimant may seek relief under such a theory as well.”), *overruled on other grounds*, *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987).

214. For a sociological account of this argument, see Mark Gould, *Law and Sociology: Some Consequences for the Law of Employment Discrimination Deriving from the Sociological Reconstruction of Economic Theory*, 13 CARDOZO L. REV. 1517 (1992).

215. See Selmi, *supra* note 5, at 754–55 (noting that disparate impact theory, despite its limitations, has had some successes eliminating discriminatory written tests); see also Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 137 (2003) (“[D]isparate impact theory has proven an invaluable tool for reducing employer reliance on job requirements that are

focused on this most elemental application of disparate impact theory to ADA Title I cases. We therefore turn to this untapped potential.

Employers are unlikely to formally and overtly bar disabled employees, as with the “no deaf worker” policy described at the beginning of this Section.²¹⁶ Instead, exclusion is more likely to follow the course seen in *Chevron U.S.A. v. Echazabal*,²¹⁷ in which Chevron required healthy workers,²¹⁸ or the recommended Wal-Mart policy quoted at the beginning of the Article that workers be required to engage in job-unrelated “physical activity” in order to wean away “unhealthy applicants.”²¹⁹ To be fair (and putting to the side for the moment the irrelevance of motive to related legal claims), employers may promulgate these policies in an effort to promote what they view as neutral and cost-effective job descriptions. If questioned, they might justify their actions along the following lines: “It is too bad that the disabled employees are not as capable and cost-effective (i.e., qualified) as nondisabled ones, but that is both unavoidable and unrelated to any morally incorrect action. We did not construct these facilities, and if we did, we only did so according to established norms. Moreover, the job descriptions and criteria reflect what we have learned from experience as being necessary. We would have been

unrelated to job performance but that stand in the way of minority progress. Without such a tool, employers would have been free to adopt facially neutral job requirements that maintained the exclusion of blacks and minorities from vast areas of employment.”).

216. Cases involving these more subtle situations often fall within the realm of disparate treatment claims, which are easier to handle. For a discussion of current forms of disparate treatment, see Bagenstos, *supra* note 7, at 849–50 (arguing that present day disparate treatment often takes the form of either rational statistical discrimination, “in which employers rationally use protected-class status as a proxy for lower productivity,” or cost-based discrimination, where employers discriminate based on “the costs [they] believe they will incur in the course of integrating a firm or in managing the conflicts that inevitably arise in a diverse workforce”).

217. *Chevron U.S.A. v. Echazabal*, 536 U.S. 73 (2002).

218. *Id.* at 74. Mario Echazabal was denied employment by Chevron because Chevron believed the job would exacerbate his hepatitis. *Id.* at 76. The Court agreed, holding that Title I allows employers to decide whether qualified people with disabilities should be excluded from the workplace based on the employer’s conclusion that they create a direct threat of harm solely to themselves. *Id.* at 74. Although the plaintiffs in *Sutton v. United Airlines*, 527 U.S. 471 (1999), twin sisters with myopic vision, were not covered by the ADA’s definition of disability, *id.* at 489, the policy at issue—a broad policy excluding pilots with a particular level of uncorrected vision—is another example of the type of policy that could be challenged under disparate impact law, but to date has not been.

219. See *supra* note 1 and accompanying text; see also Randy Dotinga, *Can Boss Insist on Healthy Habits?*, CHRISTIAN SCI. MONITOR, Jan. 11, 2006, at 15 (“In 2006, Weyco employees who refuse to take mandated medical tests and physical examinations will see their monthly health insurance premiums jump by \$65. By next year, their annual insurance bills will grow by more than \$1,000 if they still fail to follow instructions.”).

pleased to employ disabled workers,” they might aver. “It isn’t our fault they were unable to meet our criteria.” Nevertheless, the result is unnecessary and systemic exclusion.

Along the same lines, employers might not consider, as an initial matter, that disabled persons ought to equally participate in the employment sector. Much as the circumstances of people of color and women were once ignored in the workplace, employers either create or continue to maintain physical and administrative environments that exclude those with disabilities. As with historical race- and sex-based exclusion, many embedded policies and practices obstructing the disabled are based on the assumption that, despite their biology, new entrants to the work force should interact with their environment in the same way as traditional groups.²²⁰ Whereas previous restrictions on participation were based on notions that people of color should not intermingle with whites (because of animus), and that women as workers needed limitations that were responsive to their frailties (due to paternalism),²²¹ historic treatment of people with disabilities lends itself to social incredulity about their workplace participation.²²² Each social convention yields a misperception that the respective workers are “inauthentic.”²²³ Traditional failure to accommodate cases are not structured to reach, in a systemic fashion, this more subtle type of workplace exclusion.²²⁴

Returning to the Snobb Academy example presented in the previous Section, assume that Antonio forgoes pursuing a typical ADA failure to accommodate suit, of the sort that would allege that

220. “As a practical matter, persons with disabilities are far more likely than are blacks or women to regularly face built-in headwinds in the form of performance standards, job structure, or workplace environment.” Crossley, *supra* note 140, at 918. See generally O’BRIEN, *supra* note 160 (detailing instances where disabled workers must either fit into existing norms or be excluded).

221. This point is discussed in greater detail in Stein, *supra* note 154, at 608–16.

222. This is true to the extent that several Supreme Court Justices seem to deny the ADA’s role as a civil rights statute. Perhaps the most obvious example is Justice Kennedy’s concurrence in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). Instead of evaluating the circumstances that caused the suit, or referencing the notion of rights, Justice Kennedy characterized the issue as one that invoked a wrestling match between “our own human instincts” on the one hand, and “the better angels of our nature” that sympathize for “those disadvantaged by mental or physical impairments,” on the other. *Id.* at 375–76.

223. For a discussion of “inauthentic workers,” see Schultz, *supra* note 136, at 1919–28.

224. Congress recognized this action as “benign” paternalism. 42 U.S.C. § 12101(a)(5) (2000) (recognizing “overprotective rules and policies” as a form of discrimination); see also *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 85 (2002).

the Academy's refusal to alter the fire alarm system precluded his employment prospects. Instead, using disparate impact theory Antonio presents statistical evidence of a near-complete absence of people with disabilities at Snobb Academy. Rather than being limited to proving the impact of the denial of a specific accommodation, Antonio has made a *prima facie* case that some official policy or practice has made Snobb Academy an unwelcoming employer for disabled persons.²²⁵ The strobe lights may have caused other individuals with disabilities to be rejected for the same position, or they may have discouraged other disabled persons from applying. Regardless, Antonio's suit (as discussed previously,²²⁶ brought as a class action with him as the class representative) has gained leverage by broadly challenging the dearth of other employees with disabilities. As a group-based, statistically supported disparate impact suit, Antonio can examine the school's history (or lack thereof) of employing teachers and other employees with disabilities.²²⁷ Some may have had visibly identifiable disabilities. Others, like Antonio, may have impairments that are harder to detect. Antonio can also demonstrate that the requested accommodation (changing the existing method of alerting people of an emergency) would also benefit individuals with disabilities who have epilepsy and various brain or vision impairments.²²⁸

225. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988) (holding that the disparity caused by subjective employment criteria sufficed to establish the plaintiff's *prima facie* case). Antonio would argue that the Title I claims based on failure to accommodate are doctrinally cognizable under a disparate impact theory, and that nothing in *Raytheon* suggests to the contrary. See *supra* notes 122–24 and accompanying text.

226. See *supra* notes 189–94 and accompanying text.

227. See, e.g., *NAACP v. Town of E. Haven*, 70 F.3d 219, 225 (2d Cir. 1995) (directing the district court, on remand, in a disparate impact case, to consider the employer's defense in light of the plaintiff's showing of the "inexorable zero").

228. Conceptually, Antonio would argue that the strobe light is an environmental feature that creates two groups—those without disabilities that are not affected by it, and people with disabilities who are adversely affected. But not every person with a disability will be disadvantaged by the strobe light. Deaf employees, for example, might benefit. Doctrinally, then, under existing disparate impact law, Antonio will need to show that the strobe light has deterred a certain subgroup of people with disabilities from employment. Some courts have held this permissible under the ADEA. See *Graffam v. Scott Paper Co.*, 848 F. Supp. 1, 4–5 (D. Me. 1994) ("[I]t is permissible, under the ADEA, for Plaintiffs' [sic] to show that an employer's actions had a disparate impact on a subgroup of individuals within the protected class."); see also *Klein v. Sec'y of Transp.*, 807 F. Supp. 1517, 1524 (E.D. Wash. 1992) (holding that the plaintiff prevailed after proving that the hiring practices of the FAA "had a definite disparate impact on qualified applicants over the age of fifty"); *EEOC v. Borden's, Inc.*, 551 F. Supp. 1095, 1098–99 (D. Ariz. 1982) (holding that an employer's "severance pay policy did have an

Working through the Snobb Academy hypothetical demonstrates how ADA reasonable accommodation theory is more akin to Title VII disparate impact law than most commentators acknowledge.²²⁹ To further demonstrate this point, Christine Jolls offers the following five examples of facially neutral (1) no-beard rules that disparately impact African American males whose skin conditions preclude regular shaving;²³⁰ (2) job selection criteria that tend to exclude women (sometimes for aggression, sometime for passivity)²³¹ and racial groups (chiefly, standardized ability tests);²³² (3) English-only rules that adversely effect individuals with alternative national origins;²³³ (4) refusals of non-FMLA pregnancy leave time requests disparately impacting women who elect to bear children;²³⁴ and (5) actions effectuating policies on the ground of business necessity that tend to exclude members of protected groups.²³⁵ Professor Jolls demonstrates that eviscerating disparate impact in each of five “cases of equivalence” in turn necessitated the provision of an accommodation-type remedy.²³⁶

Transforming Professor Jolls’s non-ADA related accommodation examples to a parallel disability context (something that Jolls herself does not do), these instances could now include, respectively, facially neutral (1) rules on the use of physically inaccessible venues when alternative accessible venues are available

adverse disparate impact on those employees over fifty-five years of age”). Other courts have held it is not. *See* *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1372–73 (2d Cir. 1989) (rejecting appellants’ use of sub-groups, stating that “[w]e find no support in the case law or in the ADEA for the approach to disparate impact analysis appellants advocate”); *see also* *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950 (8th Cir. 1999) (“The EEOC is thus asking us to expand our recognition of disparate-impact claims under the ADEA to include claims on behalf of subgroups of the protected class. We decline to do so.”). Particularly with the ADA, we believe that the former position is appropriate. Courts have readily acknowledged subgroups of people with disabilities in other contexts, *see supra* note 104, and the limits of statistical analysis will render disparate impact cases impossible to prove where subgroups are too small to obtain statistical results, *see Graffam*, 848 F. Supp. at 4 n.6 (“[The] limits of statistical analysis will render disparate impact cases impossible to prove where subgroups are too small to obtain reliable statistical results.”).

229. This overlap was first noted by Christine Jolls. *See* Jolls, *supra* note 108.

230. *Id.* at 653 (citing *Bradley v. Pizzaco of Neb., Inc.*, 939 F.2d 610, 611–12 (8th Cir. 1991)).

231. *Id.* at 656 (citing *Lanning v. Se. Pa. Trans. Auth.*, 181 F.3d 478, 482–83 (3d Cir. 1999)).

232. *Id.* at 657 (citing *Banks v. City of Albany*, 953 F. Supp. 28, 30 (N.D.N.Y. 1997)).

233. *Id.* at 658 (citing *EEOC v. Synchro-Start Prods., Inc.*, 29 F. Supp. 2d 911, 912 (N.D. Ill. 1999)).

234. *Id.* at 661 (citing *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 650 (N.D. Ill. 1991)).

235. *Id.* at 665 (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 648–49 (1989)).

236. *Id.* at 652–66.

(such as placing a workstation up a flight of stairs where it is dangerous for someone with a balance disorder); (2) job selection criteria that tend to exclude people with disabilities, for example the use of physical ability (e.g., asking a quadriplegic bank teller to lift weights) and/or standardized testing (for instance, written tests that severely dyslexic persons may not be able to perceive); (3) rules that require the use of specific systems that adversely affect individuals using alternative formats (i.e., visually impaired people who use Braille, computerized readers, or large print); (4) refusals of leave time or alternative work venue requests (like telecommuting by people with ulcerative bedsores); and (5) general actions effectuating policies on the ground of business necessity (for example, not allowing a schizophrenic to take a ten minute respite to refocus her attention and eliminate delusional distractions).

Two pertinent themes are common to the foregoing sets of examples. In every situation a court will challenge whether a given work policy was in fact necessary to a particular business; and those employers who are compelled to, will hire or retain workers they previously viewed as less capable.²³⁷ Here, the confluence between the statutes is clear. Correspondingly, the possible argument that a one-size-fits-all remedy prevails for Title VII, but not Title I, is unconvincing.²³⁸ Returning to some of the preceding examples, a class-based disparate impact challenge to non-shaving rules benefits more than African American men with pseudofolliculitis barba; it also benefits Sikh, Muslim, and Jewish men who do not shave for religious reasons. Changing interview and promotion modalities protects not only feminine, nonaggressive women, but also passive men. Nor is there a Title VII/Title I divide. Eliminating a spoken English-only rule benefits non-English speakers and deaf persons (who write or can be sign interpreted). Inversely, eliminating irrelevant medical criteria (e.g., regular blood pressure as a criteria for the exciting job of accountant) helps both the disabled and African American men who historically have high blood pressure.

In this way, applying even basic disparate impact theory would enable people with disabilities to challenge the type of "neutral" workplace policies and practices that Title VII has had success

237. A third theme, beyond the scope of this Article, is that all employers will be required to bear additional costs when those policies causing disparate impact are abnegated. This is discussed in Stein, *supra* note 154.

238. See *supra* text accompanying notes 178–79.

eliminating for women and racial minorities. Admittedly, there is less consensus on whether subtler workplace barriers (referred to as “structural” barriers or part of “workplace culture”) are susceptible to disparate impact challenges.²³⁹ The scholarship addressing this divide relies heavily on social science research showing the influence of unconscious biases on an increasingly decentralized workplace.²⁴⁰

To demonstrate the difference in successfully applying disparate impact claims to workplace culture issues, consider the law firm summer associate example discussed earlier in the Article.²⁴¹ A summer associate with a disability who is precluded from participating in law firm lunches, softball games, or dinners at (perhaps inaccessible) partners’ houses may be viewed as not being “a team player.”²⁴² These occupational norms create an inhospitable job environment for people with disabilities, yet are exactly the types of workplace culture issues Title VII disparate impact law has not had much success in challenging. Similarly, to the extent Antonio is able to demonstrate a specific policy or practice creating statistical disparities in Snobb Academy’s hiring and retention history regarding disabled workers, he may be able to achieve some restructuring of the workplace. But, as noted by commentators, the more entrenched

239. See *supra* notes 5–6.

240. See Jody David Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 751–59 (1995) (describing the formation and manifestation of an unconscious social bias concerning race and sex); see also Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 147 (2004) (detailing how implicit biases against women and minorities remain widespread); Green, *supra* note 215, at 99–104 (discussing the “shift in the operation of bias from the blatant to the more subtle and complex”); Linda Hamilton Krieger, *The Context of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–1217 (1995) (discussing psychological theories of racism and arguing that “disparate treatment does not necessarily manifest discriminatory notice or intent, but a motive or intent to discriminate must be present to prevent it”); Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Opportunity*, 85 MINN. L. REV. 587, 602–12 (2000) (explaining the shift in American society from an overt racism to an unconscious, difficult-to-perceive racism, and concluding that in light of this shift, “[i]t is a mistake . . . to then conclude that discrimination no longer affects the employment opportunities of blacks and women”); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 597–613 (2001) (detailing the changing nature of discrimination in the workplace).

241. See *supra* note 8.

242. Michelle Travis discusses one such norm, which she terms “workplace essentialism,” meaning that a “good job” includes strong preferences for “full-time work with very long hours or unlimited overtime, rigid work schedules for core work hours, uninterrupted worklife performance” and performance at a central location. Travis, *supra* note 6, at 9–10.

issues of the school's culture and unstated workplace norms, symptomatic of deeper attitudes and hidden biases about disability, have proven elusive under existing Title VII disparate impact law in the race and sex context.²⁴³

Heretofore unaddressed in the literature is the issue of how these more deeply entrenched norms and current workplace realities affect the labor market participation of disabled workers. Technological advances and increasingly horizontal hierarchies are evolving the way that all people, including those with disabilities, work.²⁴⁴ One might expect commentators who are chary about disparate impact's potential to eliminate embedded workplace norms in the Title VII context to feel it equally limited when applied to the ADA. Although we take to heart the caveats raised by the nihilists as to Title VII, to move the debate forward we sketch an affirmative vision of what this theory can mean when applied to the ADA. As George Rutherglen notes, disparate impact law has an individualized history within the context of different civil rights statutes.²⁴⁵ Beyond the basic type of disparate application sketched out in the preceding paragraph, an even greater ambition is to reach more deeply entrenched norms. We turn now to that aspiration.

There are reasons to believe that, even within the parameters of the existing restrictive race- and sex-based disparate impact doctrine, disability-based disparate impact theory stands a better chance at reaching these difficult workplace-norm barriers. The types of accommodations requested in disability cases often relate directly to the way jobs are performed. Accommodations like workplace

243. See Green, *supra* note 6, at 656 (arguing that Title VII's "particular employment practice" provision limits its ability to target workplace culture); see also Bagenstos, *supra* note 5, at 17 (arguing that the same provision limits the ability of disparate impact to restructure workplaces).

244. See, e.g., Letter from Peggy Mastroianni, Assistant Legal Counsel, Equal Employment Opportunity Comm'n (Oct. 27, 2005), available at http://www.cupahr.org/publicpolicy/Washington_insider/files/BO2986.PDF (last visited Oct. 19, 2006) (focusing on the potential for ADA discrimination in Internet recruitment and hiring); see also WILLIAM ERICKSON, A REVIEW OF SELECTED E-RECRUITING WEBSITES: DISABILITY ACCESSIBILITY CONSIDERATIONS (2002), <http://digitalcommons.ilr.cornell.edu/edicollect/95>. See generally KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004) (discussing, in particular, the importance of peer review, telecommuting, and the growing prominence of the Internet in workplace recruitment and hiring).

245. See Rutherglen, *supra* note 141, at 2314–23 (exploring the development of disparate impact theory under Title VII, ADEA, Voting Rights Act, and ADA).

attendance and schedule modifications,²⁴⁶ job reassignment,²⁴⁷ creating a pool of light duty positions,²⁴⁸ purchasing equipment or modifying existing equipment enabling an employee with a disability to perform essential job functions,²⁴⁹ and provision of interpreters and job coaches²⁵⁰ fundamentally impact the pragmatic modalities of job performance. Accordingly, their modification goes directly to issues of workplace culture, defined elsewhere as “a process of social interaction and impression management, the social creation of a set of practices that signal membership in a group.”²⁵¹ Workplace culture lies in the “rituals of day-to-day conformity.”²⁵² Disability accommodations (unlike, for example, the high school requirement in *Griggs*²⁵³) require changes in the daily process of job performance. Over time, these emendations gently guide supervisors and coworkers toward a greater acceptance and understanding of the justice of varying the workplace in a way that existing race- or sex-based policies have not yet captured.²⁵⁴

Moreover, statutory factors unique to the ADA may make it even better suited than Title VII to challenge the barriers inherent in the modern workplace through disparate impact theory. Unlike Title VII, Title I requires an interactive dialogue between the employer

246. See *Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir. 2001) (“[W]e will not say that attendance is an essential function of every employment position . . .”).

247. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174–75 (10th Cir. 1999) (“The ADA’s list of reasonable accommodations specifically refers to ‘reassignment to a vacant position.’”).

248. See *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 696 (7th Cir. 1998) (“Our case law and the EEOC’s interpretation of the ADA have approved of an employer’s offer of light-duty assignments as a reasonable accommodation for injured workers.”).

249. See Heather Ritchie & Peter Blanck, *The Promise of the Internet for Disability: A Study of Online Services and Web Site Accessibility of Centers for Independent Living Web Sites*, 20 BEHAV. SCI. & L. 5–10 (2003) (noting how new, Internet-based technology has revolutionized the range of available accommodations).

250. See *EEOC v. Hertz*, No. 96-72421, 1998 WL 5694, at *2 (E.D. Mich. Jan. 6, 1998) (noting that providing a temporary job coach to assist in job training might be a reasonable accommodation); see also *Miami Univ. v. Ohio Civil Rights Comm’n*, 726 N.E.2d 1032, 1042 (Ohio Ct. App. 1999) (holding that the accommodation of a job coach was reasonable for a plaintiff suffering from mental retardation who did not require job coaching beyond the first week or so in any of her previous jobs).

251. Green, *supra* note 6, at 627.

252. JUDITH S. MCILWEE & J. GREGG ROBINSON, *WOMEN IN ENGINEERING: GENDER, POWER, AND WORKPLACE CULTURE* 17 (1992).

253. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

254. Michelle Travis sounds a similar optimistic note about the potential for the ADA to change traditional notions of workplace essentialism. See Travis, *supra* note 6, at 46.

and the applicant or employee requesting an accommodation.²⁵⁵ This process creates an initial opportunity for an exchange of information between the employer and employee that does not arise in the race and sex context.²⁵⁶ More importantly, from a disparate impact standpoint, this dialogue takes away an employer's ability to claim that passivity (that is, not taking active steps) is not a "particular employment practice" and therefore outside the purview of Title VII disparate impact law. To commentators' chagrin, this has proven a limiting factor in restructuring structural relationships based on race and gender.²⁵⁷ Under the ADA, the employer is forced into a choice—to make or not make the accommodation. This choice becomes the employment action that is later challengeable under disparate impact law.²⁵⁸

By freeing ourselves of restrictive disparate impact doctrine (particularly the "particular employment practice" requirement), these types of cases can be even more successful in combating deeper exclusionary workplace norms.²⁵⁹ If Antonio, for example, was able to proceed under an earlier race and sex based disparate impact paradigm, he could use the combination of class action law and disparate impact law to challenge multiple workplace policies—both

255. At least one circuit has gone so far as to hold that an employer who does not engage in the interactive process may be precluded from obtaining summary judgment on a failure to accommodate claim. *See Barnett v. U.S. Airways, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000) (en banc), *vacated on other grounds*, 535 U.S. 391, 407 (2002).

256. The interactive process also provides an opportunity for employers to voluntarily comply with the ADA, whether from concerns of litigation costs or from a desire to increase workplace diversity.

257. *See Green, supra* note 6, at 654–57 (“[C]ourts have held that an employer’s ‘passive reliance’ on relational means of exclusion is not subject to disparate impact attack.” (quoting *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 298 (7th Cir. 1991))); *see also Sullivan, supra* note 6, at 55 (“‘Passive reliance’ on employee action is not an employer policy for purposes of disparate impact analysis.” (quoting *Chicago Miniature Lamp Works*, 947 F.2d at 298)). However, in *DeClue v. Central Illinois Light Co.*, 223 F.3d 434 (7th Cir. 2000), the plaintiff challenged an employer’s failure to provide restroom facilities. Although the court failed to find that this constituted sexual harassment, it did suggest that “insofar as absence of restroom facilities deters women . . . but not men from seeking or holding a particular type of job . . . the absence may violate Title VII” under an impact theory. *Id.* at 436. Sullivan, *supra* note 6, correctly suggests that this could be a particularly broad use of impact theory, *id.* at 55.

258. *See Council 31, Am. Fed’n of State, County & Mun. Employees v. Ward*, 978 F.2d 373, 377 (7th Cir. 1992) (rejecting the idea that a single decision by an employer is beyond disparate analysis because “almost any repeated course of conduct can be traced back to a single decision”).

259. Although perhaps aspirational, this is certainly not doctrinally precluded. As discussed earlier, *see supra* notes 215–16 and accompanying text, unlike Title VII, there is a near complete absence of case law explaining and applying disparate impact law to ADA Title I claims.

obvious and hidden—that contribute to an inhospitable working environment for people with disabilities.²⁶⁰ Antonio could also represent, and show statistical proof, that various communities of people with disabilities were disadvantaged by this workplace environment.²⁶¹ Yet until courts and commentators take the concept of pandisability to heart, these and other benefits of group-based discrimination theories for workers with disabilities will remain unrealized. Also lost will be the potential for disability-related claims that stimulate workplace culture challenges in the broader Title VII context.

CONCLUSION

Congress's impetus for passing Title VII (and then amending it in 1991) was strikingly similar to that underlying enactment of the ADA's employment provisions. In both cases, Congress recognized the need to eliminate barriers that historically had excluded groups from the workplace. Within the context of race and sex, however, there existed a period wherein the courts were an active partner in realizing Title VII's aspirations. Crucial to this effort were group-based discrimination theories that were supported by disparate impact theory and the class action device. A parallel circumstance has not (yet) existed in regard to the ADA. Indeed, individual claims to accommodate specific impairments in particular jobs have all but eclipsed a coherent theory of disability-related disparate impact law. This absence in turn reinforces the erroneous notion that the statute's individualized assessment principle militates against group-based theories. Taking advantage of the relatively blank slate of writing on group-based disability discrimination, this Article offers an alternative and intrepid vision of the ADA's potential for transforming workplace environments.

This Article challenged the exclusion of disability-based employment discrimination claims from group-based theories, and in so doing advocated for applying disparate impact theory to what have

260. See, e.g., *Martinez v. Oakland Scavenger Co.*, 680 F. Supp. 1377, 1381 (N.D. Cal. 1987) (holding that excluding blacks and Hispanics from owning company shares allowed plaintiffs to win on a disparate impact theory); *Penn v. Stumpf*, 308 F. Supp. 1238, 1239–40 (N.D. Cal. 1970) (challenging, in a class action disparate impact case, an employer's testing, interview, and background investigation procedures which together contributed to white males being favored in the workplace over non-Caucasians).

261. See *supra* notes 35–45 and accompanying text.

heretofore been individualized ADA failure to accommodate claims. It demonstrated that there is nothing inherent in the doctrines of disparate impact and class action precluding their use in disability discrimination cases. More importantly, it showed that the theoretical basis for aggregating race and sex claims—panethnicity—can and should be imported to disability discrimination employment claims. Pandisability provides a tool to connect the interests of individuals with diverse disabilities. It is the common experience of social exclusion and stigma that binds these groups together in real life. It should do no less for litigation purposes.