

PREFERENTIAL TREATMENT AND REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT

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The Supreme Court in *U.S. Airways, Inc. v. Barnett*¹ recently addressed the important issue of whether the obligation of employers under Title I of the Americans with Disabilities Act (“ADA”) to reasonably accommodate their employees with disabilities trumps the workings of a seniority system. Specifically, the Court addressed the issue of whether an employer is required under the ADA to reassign an employee with a disability to a new position even though there are other employees with greater seniority who are interested in the same position.² Prior to the Court’s ruling in *Barnett*, lower federal courts had grappled with the proper relationship between the duty to accommodate and seniority rights. Most of those courts applied a categorical rule, holding that an employer is never required to accommodate an employee with a disability if it means interfering with the rights of more senior employees.³

The Supreme Court in *Barnett* refused to apply a categorical rule.⁴ Instead, the Court held that, although requests by employees with disabilities that employers depart from their seniority policies are unreasonable in the run of cases, plaintiffs should nonetheless be allowed to present evidence that special circumstances in their particular cases merit a departure from the general rule.⁵

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1. 535 U.S. 391 (2002).

2. *Id.*

3. Courts were unanimous on this point in cases where the seniority rights were part of a collectively bargained agreement. *See, e.g.,* *Kralik v. Durbin*, 130 F.3d 76, 83 (3d Cir. 1997); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997); *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1047-48 (7th Cir. 1996). At least one court of appeals held, prior to *Barnett*, that a seniority policy that is not part of a collectively bargained agreement also trumps the obligations of employers to accommodate their employees with disabilities under the ADA. *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 354 (4th Cir. 2001). In contrast, the Ninth Circuit in *Barnett* held that the existence of a seniority system was only one of several factors to be considered in determining the obligations of employers under the ADA. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1120 (9th Cir. 2000), *rev'd*, 535 U.S. 391 (2002).

4. *Barnett*, 535 U.S. at 398.

5. The Court provided examples of the kind of evidence that a plaintiff might be able to present in order to show that requiring an employer to make an exception to its seniority policy would be reasonable. *Id.* at 405. A plaintiff might be able to show that the employer “retained the right to change the

Not surprisingly, given the main issue in *Barnett*, much of the commentary on the case has addressed the role of seniority systems in the determination of employer obligations under the ADA.⁶ There is another aspect to *Barnett*, however, that also merits attention but has received very little: The Court in *Barnett* for the first time explicitly ruled that the ADA often requires that employers provide their disabled employees with preferential treatment.⁷ The concept of preferential treatment in the context of race and affirmative action has, of course, received a great deal of attention.⁸ It is therefore in many ways surprising that when the Supreme Court rules that the ADA often *requires* preferential treatment of individuals with disabilities, it does not garner more attention from commentators.⁹

The purpose of this Article is to explore the scope and implications of preferential treatment obligations on the part of employers under the ADA. I begin in Part I with a discussion of how some commentators have made the point that the ADA operates under a difference model of equality rather than under the sameness model that serves as the foundation for other civil rights laws such as Title VII.¹⁰ A difference model of equality recognizes that differential or preferential treatment is sometimes required in order to provide equality of opportunity.¹¹ I also in Part I discuss in some detail the Court's ruling in *Barnett* to explain how and why the Court reached the conclusion that it did on the issue of preferential treatment.¹²

It is not possible to discuss preferential treatment in the context of civil rights without addressing the issue of affirmative action. In fact, it has been

seniority system unilaterally [and] exercise[d] that right fairly frequently." *Id.* The Court added that "[t]he plaintiff might [also] show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter." *Id.*

6. See, e.g., William P. Perkins & Kimberley A. Altschul, *Seniority Systems Trump Americans with Disabilities Act*, N.Y.L.J., July 29, 2002, at 4; Sandy Andrikopoulos & Theo E.M. Gould, Note, *Living in Harmony? Reasonable Accommodations, Employee Expectations and U.S. Airways, Inc. v. Barnett*, 20 HOFSTRA LAB. & EMP. L.J. 345 (2003); Rebecca Pirius, Note, "Seniority Rules": *Disabled Employees' Rights under the ADA Give Way to More Senior Employees—U.S. Airways, Inc. v. Barnett*, 29 WM. MITCHELL L. REV. 1481 (2003); Matthew B. Robinson, Comment, *Reasonable Accommodation vs. Seniority in the Application of the Americans with Disabilities Act*, 47 ST. LOUIS U. L.J. 179 (2003); Jan Crawford Greenburg, *Top Court Limits Law On Disabled Workers; Seniority System May Overrule ADA*, CHI. TRIB., Apr. 30, 2002, at 1. For a discussion of the likely impact of *Barnett* on the transfer and assignment policies of employers that go beyond issues of seniority, see Cheryl L. Anderson, "Neutral" *Employer Policies and the ADA: The Implications of U.S. Airways, Inc. v. Barnett Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 34-43 (2002).

7. *Barnett*, 535 U.S. at 397.

8. See, e.g., AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION? (Francis Beckwith & Todd Jones eds., 1997); THE AFFIRMATIVE ACTION DEBATE (George E. Curry ed., 1996); TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR A COLORBLIND SOCIETY (1996); CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997).

9. Stephen Befort has noted and discussed the preferential treatment component of the Court's holding in *Barnett*. See Stephen F. Befort, *Reasonable Accommodation and Reassignment under the Americans with Disabilities Act: Answers, Questions, and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 963-65, 967-72 (2003).

10. See *infra* Part I.A.

11. See, e.g., Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 10-11 (1996).

12. See *infra* Part I.B.

suggested, I believe correctly, that one of the reasons why many courts are reading the ADA narrowly (to the detriment of plaintiffs) is because they view the equality claims made by many ADA plaintiffs as tantamount to improper requests for preferential treatment that are analogous to affirmative action.¹³ There are, however, important differences between reasonable accommodation and affirmative action. In Part II, I explore two of those differences. The first is that reasonable accommodation law calls for an individualized assessment that requires the plaintiff to show that an employer's practice constitutes a barrier to equal opportunity that is specific to that plaintiff.¹⁴ Affirmative action, on the other hand, is a class-based remedy that does not require individualized assessments.

The second difference is that the failure to provide preferential treatment in the context of reasonable accommodation is itself a form of discrimination. Affirmative action, on the other hand, constitutes a type of remedy rather than a category of substantive liability.¹⁵ This second difference between reasonable accommodation and affirmative action is important for two reasons. First, it evinces a difference in Congressional intent: Congress intended that an employer's refusal to treat individuals preferentially could sometimes constitute discrimination under the ADA but never under Title VII.¹⁶ Second, the goal of affirmative action in the workplace is primarily to remedy past discrimination and, as such, is backward looking.¹⁷ Reasonable accommodation law, on the other hand, focuses on an employer's *current* policies as it seeks to address present (or prospective) discrimination.¹⁸

After exploring the general differences between reasonable accommodation and affirmative action, I proceed in Part II to argue that the differences are present even in the particular accommodation cases that some have argued most clearly constitute improper forms of affirmative action, namely, those that involve requests by employees with disabilities to be reassigned to vacant positions when there are other better qualified individuals who are interested in the same positions.¹⁹ I end the Article in Part III with a discussion of why disability rights advocates and litigators should consider making a more explicit case for the necessary and legitimate role that preferential treatment plays in providing equality of opportunity for employees with disabilities.²⁰

13. See *infra* notes 92-99 and accompanying text.

14. See *infra* Part II.B.1.

15. See *infra* Part II.B.2.

16. See *infra* notes 151-54 and accompanying text.

17. See *infra* notes 155-59 and accompanying text.

18. See *infra* notes 160-61 and accompanying text.

19. See *infra* Part II.C.

20. See *infra* Part III.

I. PREFERENTIAL TREATMENT AND REASONABLE
ACCOMMODATION DOCTRINE

Prior to the Court's opinion in *U.S. Airways, Inc. v. Barnett*, it was not at all clear that the ADA required employers to provide preferential treatment to their employees with disabilities in order to achieve the statute's equal opportunity goals. As I note in subpart A, several commentators had noted prior to *Barnett* that the ADA sometimes requires differential or preferential treatment of employees with disabilities.²¹ (Although most commentators, in discussing the obligation of defendants under the ADA, have used the phrase "differential treatment" rather than "preferential treatment," I believe, for reasons I explain in Part III, that the latter is more accurate.²² Thus, for most of this Article (in particular, after Part I.A.), I will use the term "preferential treatment" rather than "differential treatment.") Several federal courts of appeals, also prior to *Barnett*, however, rejected the idea that the ADA requires preferential treatment of employees with disabilities.²³ Following this line of reasoning, the defendant in *Barnett* argued before the Supreme Court that the ADA *never* requires preferential treatment.²⁴ In subpart B, I summarize the defendant's arguments and explain why the Court was correct in rejecting them.²⁵

A. *Sameness vs. Difference Model of Equality*

In an important law review Article published several years ago, Pamela Karlan and George Rutherglen noted that the employment provisions of the ADA contain two different kinds of prohibitions against discrimination.²⁶ The first kind, modeled largely on Title VII of the Civil Rights Act of 1964, seeks to prevent employers from making decisions affecting employees with disabilities that are based on stereotypes, myths, and misinformed judgments about their abilities to perform the job.²⁷ Under this first set of constraints on the discretion of employers, the ADA requires job providers to ignore disability in the same way that Title VII requires them to disregard the race, sex, religion, and national origin of employees.²⁸ Under this type of discrimination prohibition, the law simply requires employers to treat individuals with disabilities in the same way that they treat other employees.

This first kind of prohibition against discrimination contained in the ADA is based on a traditional model of equality that imposes on covered

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21. See *infra* Part I.A.
22. See *infra* notes 215-18 and accompanying text.
23. See *infra* notes 36-38 and accompanying text.
24. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002).
25. See *infra* Part I.B.
26. Karlan & Rutherglen, *supra* note 11, at 1.
27. See *id.* at 5, 10.
28. *Id.* at 5.

entities obligations to treat similarly those who are similarly situated.²⁹ As applied to some individuals with disabilities in some employment contexts, this model of equality requires that the disabilities in question be deemed irrelevant to the ability of the disabled employees to perform their jobs, in the same way that their race and sex are deemed irrelevant.³⁰ If a particular disability is indeed irrelevant for purposes of performing a particular job, then the individual with that disability is similarly situated vis-à-vis other employees and is legally entitled to be treated by the employer in the same way.³¹

This application of what can be categorized as a sameness model of equality, however, is not enough to guarantee equality to all individuals with disabilities because sometimes those disabilities, given particular employment contexts and requirements, can negatively affect job performance unless they are accommodated. The second type of discrimination prohibited by the ADA, therefore, consists of the refusal by an employer to reasonably accommodate the disability of an employee.³² In cases where an employee with a disability asks to be accommodated, the employer may be legally required to (1) take the disability into account (as opposed to deeming it irrelevant) in accommodating the employee and, as such, (2) treat the disabled employee differently than able-bodied employees (and differently than other disabled employees with different disabilities) in the same workplace. The legal requirement to accommodate individuals with disabilities, then, embraces a difference (as opposed to a sameness) model of equality, one that calls for differential treatment in order to provide those individuals with meaningful equality of opportunity.³³

The most important principle of disability discrimination law, namely, that of reasonable accommodation, then, operates under a difference model of equality, one which acknowledges that differential treatment of disabled individuals is often necessary in order to provide them with equal opportunity in the workplace. To treat disabled employees in the same way as able-bodied employees often means depriving the former of equal opportunity. Other commentators, in addition to Karlan and Rutherglen, have also noted that the ADA calls for differential treatment of individuals with disabilities. Lisa Eichhorn, for example, argues that “where under Title VII, equality requires similar treatment *despite* differences of race, sex, national origin,

29. See *id.* at 10.

30. See *id.*

31. See *id.*

32. See 42 U.S.C. § 12112(b)(5)(A) (2000); see also *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1021-22 (7th Cir. 1997) (noting that the “ADA encompasses two distinct types of discrimination,” namely, “treating ‘a qualified individual with a disability’ differently because of the disability, i.e., disparate treatment” and “failing to provide a reasonable accommodation”) (internal citation omitted).

33. See Karlan & Rutherglen, *supra* note 11, at 10-11; see also Befort, *supra* note 9, at 971 (noting that “[w]hile consideration of a person’s race and gender may be inappropriate because neither characteristic bears any inherent relationship to an individual’s work-related abilities, consideration of a person’s disability may be required because the individual’s impairment often is directly related to his or her ability to perform the job”) (citation omitted).

and religion, . . . the ADA . . . sometimes requires *different* treatment *because of* disability.”³⁴ Bonnie Poitras Tucker notes that “[i]n recognition of the fact that equal treatment does not lead to inclusion in the mainstream for many people with disabilities, . . . the ADA requires *different* treatment for people with disabilities.”³⁵

Despite the growing consensus in the scholarly literature about the role that differential treatment plays in the law of reasonable accommodation, several federal appellate courts (before *Barnett*) took an altogether different view. The Second Circuit, for example, held that an employer under the ADA was only obligated “to treat [an employee with a disability] *in the same manner* that it treated other similarly qualified candidates.”³⁶ In a similar vein, some courts rejected ADA discrimination claims because they concluded, as a matter of law, that the statute never requires preferential treatment. The Eleventh Circuit, for example, argued that “[w]e cannot accept that Congress, in enacting the ADA, intended to grant preferential treatment for disabled workers.”³⁷ The Seventh Circuit agreed, concluding that under the ADA, an “employer is not required to give the disabled employee preferential treatment.”³⁸

34. Lisa Eichhorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575, 579 (2002); see also ROBERT L. BURGENDORF, JR., *DISABILITY DISCRIMINATION IN EMPLOYMENT LAW* 274 (1995) (arguing that “where people’s disabilities do situate them differently regarding employment opportunities, identical treatment may be a source of discrimination and different treatment may be required to eliminate it”). But see Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003) (questioning the consensus among most academic commentators that the ADA operates under a different theory of equality than does Title VII).

35. Bonnie Poitras Tucker, *The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 344 (2001). Tucker adds that “in most cases treating people with disabilities in the same manner as people without disabilities serves to exclude people with disabilities from mainstream society, rather than to include them in mainstream society.” *Id.* She then, drawing on examples from her experience as a deaf person, notes that:

[i]f I am permitted to enroll in a regular school program alongside hearing peers but am not provided with “different” treatment to assist me in understanding what is said in the classroom, I am excluded from, rather than included in, the educational system. If I am given the same opportunities as my hearing peers to attend a movie, have a telephone and make and receive calls, attend a lecture or play, watch a television show, participate in or observe a court proceeding, but am not provided with “different” treatment to assist me in hearing what is said on the phone or television or at the play, movie or court proceeding, I am excluded from, rather than included in, those activities. Simple equal treatment does not result in my inclusion into mainstream society. To achieve that goal, I need to be treated differently from, not equally to, my hearing peers.

Id.

36. *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 384-85 (2d Cir. 1996) (emphasis added) (citation omitted).

37. *Terrell v. U.S. Air*, 132 F.3d 621, 627 (11th Cir. 1998).

38. *Williams v. United Ins. Co. of Am.*, 253 F.3d 280, 282 (7th Cir. 2001); see also *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 679 (7th Cir. 1998) (concluding that “a nondiscrimination statute” such as the ADA is not a “mandatory preference statute”). Some commentators, prior to *Barnett*, also argued that the ADA never requires preferential treatment of employees with disabilities. See Jennifer Beale, Comment, *Affirmative Action and Violation of Union Contracts: The EEOC’s New Requirements Under the Americans with Disabilities Act*, 29 CAP. U. L. REV. 811, 823 (2002) (arguing that “[r]equiring reassignment of a disabled person over a non-disabled person, based on the disability, is a preference favoring the disabled,” which is not required under the ADA); Thomas F. O’Neil, III, & Kenneth M. Reiss, *Reassigning Disabled Employees Under the ADA: Preferences Under the Guise of*

The airline in *U.S. Airways, Inc. v. Barnett* was the first defendant to raise the issue of preferential treatment under the ADA before the Supreme Court.³⁹ I turn next to a discussion of the airline's arguments in that case and of why I believe the Court was correct in rejecting them.

B. U.S. Airways, Inc. v. Barnett

The plaintiff in *Barnett* worked in a cargo-handling position for U.S. Airways.⁴⁰ In 1990, he injured his back while working. The airline followed a policy of setting aside a certain number of positions that it periodically opened up for bidding by employees on the basis of seniority. After Barnett was injured, he invoked his seniority rights to claim one of these positions in the mailroom. The mailroom position was less physically demanding than Barnett's previous position and therefore better suited to him because of his disability.⁴¹ In 1992, the mailroom position once again became open for bidding and two other employees, both with greater seniority than Barnett, expressed interest in it. Barnett then asked the airline to make an exception to its seniority policy in order to allow him to retain the mailroom position. Although the airline considered the matter for several months, it ultimately decided not to make an exception. Barnett lost his job, and litigation under the ADA ensued.

Although the principal issue in the case, as already noted, was whether an employer's obligation under the ADA to accommodate employees with disabilities trumps its seniority policy,⁴² the airline in its brief to the Supreme Court made an interesting argument that is important for our purposes. The airline began by noting that the ADA, like other antidiscrimination laws, prohibits intentional discrimination (i.e., disparate treatment), as well as the application of neutral rules that adversely affect the protected class (i.e., disparate impact).⁴³ The ADA, however, adds a third type of discrimination claim, namely, one that is based on a failure by the employer to reasonably accommodate an employee with a disability.⁴⁴ As the airline noted, Congress imposed on employers the obligation to reasonably accommodate their employees with disabilities in order to address the kind of insensitivity or indifference towards disability-related issues in the work-

Equality?, 17 LAB. LAW. 347, 359 (2001) (arguing that "[p]referential treatment . . . is not consistent with the fundamental notion of a statutorily established level playing field").

39. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002).

40. The summary of facts in the text are taken from *Barnett*, 535 U.S. at 394.

41. The airline did not challenge Mr. Barnett's claim that he was disabled within the meaning of the ADA when it argued the case before a panel of the Court of Appeals. Its effort to raise the issue before the court sitting en banc was rejected by the majority because it deemed the issue waived. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1110 n.1 (9th Cir. 2000).

42. *See supra* notes 1-5 and accompanying text.

43. Brief for Petitioner at 11-12, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (No. 00-1250) [hereinafter *Petitioner's Brief*].

44. *See id.* at 12.

place that is not easily remedied through either disparate treatment or disparate impact claims.⁴⁵

At this point in its brief, the airline attempted to distinguish between reasonable accommodations on the one hand and providing preferential treatment to employees with disabilities on the other. The airline argued that

[u]nder the reasonable accommodation standard, employers . . . must take certain affirmative measures on behalf of disabled individuals to enable them to compete on an equal basis in the workplace. But there is an important distinction between requiring affirmative steps to ameliorate the consequences of a disability on job performance and requiring the establishment of *preferences* for disabled employees over non-disabled employees.⁴⁶

The airline took the position that the statute only requires *equal* treatment of individuals with disabilities and that the plaintiff, in seeking a waiver of the employer's seniority policy, was asking for *preferential* treatment.⁴⁷ Congress, when it enacted the ADA, the airline noted, wanted to provide individuals with disabilities with the opportunity to compete equally with others.⁴⁸ Congress "did not intend to go further than that, however, by requiring employers to accord preferential treatment to disabled employees in employment decisions."⁴⁹

There is an important inconsistency in the airline's arguments. One cannot argue consistently that the ADA requires employers to take affirmative steps to enable employees with disabilities to compete with nondisabled employees, *steps that the employer does not have to take in relation to the latter group*, and at the same time argue that the statute does not require preferential treatment of employees with disabilities.

This point can be illustrated by a further exploration of the accommodation request that involves a reassignment to a vacant position, the type of accommodation that was at issue in *Barnett*.⁵⁰ When a qualified employee with a disability, who is unable to perform his or her current position be-

45. *See id.* at 13.

46. *Id.* at 13 (citation omitted) (emphasis added).

47. *See id.*

48. *Id.* at 10, 13-14.

49. *Id.* The airline noted that "[t]he statute speaks strictly in terms of affording 'people with disabilities the opportunity to compete on an equal basis,' and there is no suggestion in the text of a requirement to give preference to disabled individuals." *Id.* at 13 (quoting 42 U.S.C. § 12101(a)(9)) (2000).

50. The airline argued that the mailroom position was not "vacant" within the meaning of the ADA, see 42 U.S.C. § 12111(9)(b) (2000), because its seniority system automatically assigned someone to that position. The Court rejected the argument by explaining that

[n]othing in the Act . . . suggests that Congress intended the word "vacant" to have a specialized meaning. And in ordinary English, a seniority system can give employees seniority rights allowing them to bid for a "vacant" position. The position in this case was held, at the time of suit, by Barnett, not by some other worker; and that position, under the U.S. Airways seniority system, became an "open" one.

Barnett, 535 U.S. at 399 (citation omitted).

cause of the disability, requests to be reassigned to another position, the employer is usually required, at the very least, to consider the request.⁵¹ Some courts have gone beyond that requirement by holding that, if the employee is qualified for the new position, the employer must reassign the employee even if there are other more qualified individuals who are also interested in the same position.⁵² These are all affirmative steps that the employer is *only* required to take for employees with disabilities. There is no obligation to reassign nondisabled employees who no longer can perform their current jobs; indeed, there is not even an obligation to *consider* nondisabled employees for reassignment. If an employer is required to reassign employees with disabilities but is not required to consider reassignment for nondisabled employees (much less to actually reassign those employees), this means that the former are receiving a form of treatment not available to the latter.

The same kind of preferential treatment is present in other types of reasonable accommodations. Take, for example, the obligation of employers to provide qualified individuals with a disability with “part-time or modified work schedules.”⁵³ A modified work schedule might allow an employee with a disability, for example, to begin the workday earlier in order to be available to receive medical treatment at the end of the day. There may be other employees in the same workplace (for example, employees with young children) who are not disabled and who would also prefer to work on a modified schedule, but there is no obligation imposed by federal law on the employer to permit those employees to do so.⁵⁴ The legal obligation under the ADA to offer the option of a modified work schedule to (at least some) employees with disabilities (when doing so is reasonable) constitutes a form of preferential treatment.

Another example of an accommodation that requires preferential treatment is the reallocation of marginal job functions.⁵⁵ If a qualified employee

51. See, e.g., *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027 (7th Cir. 2000). There appear to be two circuits, the Fourth and the Fifth, in which there is no obligation on the employer to even consider a disabled employee’s request for reassignment. See *infra* note 172.

52. See, e.g., *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1169 (10th Cir. 1999). If the other individuals who are interested in the new position are more senior than the employee with a disability and the employer has a seniority system, then the *Barnett* analysis applies. See *infra* notes 151-52 and accompanying text. I elaborate on the issues arising from reassignment as an accommodation under the ADA in *infra* notes 185-88 and accompanying text.

53. 42 U.S.C. § 12111(9)(b) (2000).

54. See *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1305 n.29 (D.C. Cir. 1998) (noting that “[n]on-disabled employees may not request part-time or modified work schedules . . . even though they may have excellent reasons to want these conveniences”); Karlan & Rutherglen, *supra* note 11, at 9 n.35 (noting that “an employer is not required to develop flexible work hours even though a rigid work schedule may disproportionately eliminate female workers who have child-care responsibilities”) (citing Joan C. Williams, *Restructuring Work and Family Entitlements Around Family Values*, 19 HARV. J.L. & PUB. POL’Y 753, 756 (1996)).

55. It is not a necessary part of my argument that *every* accommodation in *every* instance requires a form of preferential treatment. There may be some accommodations that do not implicate preferential treatment. My point is simply that reasonable accommodations under the ADA often require preferential treatment of some kind.

with a disability can perform all of the essential functions of the job but can only perform some of the marginal functions, an employer may be required to allocate the marginal functions to other employees.⁵⁶ Nondisabled employees can be terminated if they cannot carry out the functions of a job as determined by the employer, whether those functions are essential or marginal. Disabled employees, on the other hand, cannot be terminated for failure to carry out marginal functions if the reallocation of those functions to other employees is reasonable.⁵⁷

The ADA often requires the kind of preferential treatment of employees with disabilities illustrated by these examples in order to remove employment-related barriers to job performance and to provide those employees with an equal opportunity to compete. *This does not mean that individuals with disabilities under the ADA are provided with unfair advantages.* Given the skepticism that the concept of preferential treatment engenders in our society, we often assume that if an employer treats an employee preferentially, such treatment must necessarily be at the expense of others and is, therefore, unfair to others. The type of preferential treatment required by the ADA, however, is not unfair to others because the treatment is aimed at leveling the playing field rather than at placing the employee with a disability in a position of advantage over nondisabled employees.⁵⁸ There is a very good reason why employers are not under a legal mandate to provide nondisabled employees with preferential treatment: The practices and policies of most employers are developed and implemented in such a way so as to take into account the physical needs and limitations of able-bodied employees. Thus, for example, white collar and clerical employees are as a matter of course given chairs by their employers so that they can perform their jobs in relative comfort. Employers also as a matter of course provide adequate lighting in the workplace so that employees with normal vision can see. The needs and limitations of disabled employees, on the other hand, have been largely ignored by employers, which is why we need the obligations imposed by a statute such as the ADA to begin with.

It is important to explain further why preferential treatment in the context of reasonable accommodation law does not translate into unfair advantages for individuals with disabilities. This explanation is necessary because it is easy to assume the opposite, namely, that if a covered entity treats one party in a preferential manner, that must mean that those who are not eligible for such treatment are at a disadvantage. The famous case of *PGA Tour, Inc. v. Martin*⁵⁹ helps us understand how it is that preferential treatment in

56. See 29 C.F.R. § 1630.2(o) (1999).

57. See *id.*

58. See Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 41 (2000) (arguing that "the reasonable accommodation requirement is not a means of giving people with disabilities a special benefit or advantage; rather, it is a means of equalizing the playing field so that people with disabilities are not disadvantaged by the fact that the workplace ignores their needs").

59. See 532 U.S. 661 (2001).

the context of reasonable accommodation law does not translate into unfair advantages for the disabled. Martin was a professional golfer who had “a degenerative circulatory disorder that obstruct[ed] the flow of blood from his right leg back to his heart.”⁶⁰ As a result of this condition, Martin’s right leg was atrophied and he suffered from severe pain.⁶¹ Martin requested that the PGA accommodate his disability by allowing him to use a cart during the PGA Tour to transport himself from one hole to the next.⁶² The PGA refused, pointing to its policy that required all participants in its Tour competition to walk.⁶³ When Martin sued under the ADA, the PGA argued *inter alia* that his requested accommodation was unreasonable because it would provide him with an unfair advantage over other competitors.⁶⁴

The Supreme Court rejected this argument noting the “uncontested finding of the District Court that Martin ‘easily endures greater fatigue even with a cart than his able-bodied competitors do by walking.’”⁶⁵ The fact that Martin endured greater fatigue with the use of the cart than able-bodied golfers did without the assistance of carts means that, in all likelihood, none of the latter would have been willing to play under the limitations imposed by Martin’s disability even if it meant gaining the supposed advantage of being allowed to use a golf cart. Martin, it is fair to say, was still at a competitive disadvantage *even after* he was allowed to use a cart and *despite* the fact that no one else was permitted to do the same.⁶⁶ The accommodation that he was requesting, while a type of preferential treatment in the sense that others would not be allowed to use carts, did not, because of Martin’s disability,⁶⁷ translate into an unfair advantage over others.

The same reasoning applies to the employment context. At first blush, it may seem that the kind of preferential treatment that Barnett was asking of the airline—namely, an exception to the seniority system that would have allowed him to retain the mailroom position even after more senior employees expressed interest in that position—gave him an unfair advantage over others. After all, if the Court had ordered the airline to accommodate Barnett, other employees with greater seniority would not have had access to the mailroom position. Upon further scrutiny, however, it becomes clear that disabled employees are not similarly situated to their nondisabled peers in their ability to enjoy the benefits that arise from seniority systems.⁶⁸ Dis-

60. *Id.* at 668. Martin’s condition is known as the Klippel-Trenaunay-Weber Syndrome. *See id.*

61. *See id.*

62. *Id.* at 667-69.

63. *Id.* at 669.

64. *Id.* at 683.

65. *Id.* at 690 (citing *Martin v. PGA*, 994 F.Supp. 1242, 1252 (D.Or. 1998)).

66. *See id.*

67. As the Court noted, “[w]alking not only caused [Martin] pain, fatigue, and anxiety, but also created a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required.” *See id.* at 668.

68. This paragraph and the next were greatly informed by Anita Silvers, *Protection or Privilege? Reasonable Accommodation, Reverse Discrimination, and the Fair Costs of Repairing Recognition*, 8 J. GENDER RACE & JUST. ___ (2004, forthcoming).

abled employees are more likely than able-bodied employees to face limitations in their abilities to shift positions within a company regardless of their seniority. For example, an employee with a vision impairment who experiences debilitating headaches when required to read printed materials for several hours a day may not be qualified to seek a transfer from a (less sought after) position on the assembly line to a (more sought after) office clerical position (that becomes open as a result of a seniority system) even if that employee is the most senior person in the company interested in the clerical position. In such a case, a *less* senior able-bodied employee would be able to transfer into the clerical position while the *more* senior disabled employee would not.

The *Barnett* case represents another type of disadvantage, associated with the distribution of seniority rights, faced by employees with disabilities. Disabled employees, once they are bumped from their jobs by more senior employees, have fewer options than their able-bodied counterparts. Had Barnett not been disabled, for example, he might have been able to return to his previous cargo handling position. Instead, once the mailroom position became open for bidding on the basis of seniority, he ended up unemployed.⁶⁹ In contrast, when able-bodied employees are bumped from their current positions by more senior employees, there is a greater likelihood that they will be able to find other positions within the company. Able-bodied individuals are not as restricted in their abilities to shift to other positions as are disabled employees.⁷⁰

As cases such as *Barnett* show, when an employee with a disability, under the workings of a seniority system, cannot be reassigned to (or retained in) a given position because there are more senior individuals interested in the position, he or she is likely to be fired.⁷¹ Able-bodied employees who are not eligible for new positions because of their lack of seniority, on the other hand, will be able to continue working for the same employer, and will be able, therefore, to continue to accrue the necessary seniority that will allow them someday to benefit from the employer's seniority system. As the Court in *Barnett* recognized, well-working seniority systems depend on the expectation that those who wait their turn will eventually benefit from the

69. U.S. Airways, Inc v. Barnett, 535 U.S. 391, 394 (2002).

70. See Silvers, *supra* note 68.

71. See *Barnett*, 535 U.S. at 394; Carter v. Tisch, 822 F.2d 465, 469 (4th Cir. 1987) (employer (1) successfully relied on existence of seniority system to refuse to reassign disabled employee and (2) fired that employee after he was no longer able to continue working in original position due to the disability); Mason v. Frank, 32 F.3d 315, 319-20 (8th Cir. 1994) (same); Duabert v. United States Postal Service, 733 F.2d 1367, 1370 (10th Cir. 1984) (same); see also Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1286-87 (D.C. Cir. 1998) (disabled employee with nineteen years of seniority was dismissed after he was hospitalized with heart and circulatory problems and employer refused to reassign him to vacant position); EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1026-27 (7th Cir. 2000) (disabled employee was dismissed after she was unable to perform the essential functions of original position and employer refused to reassign her to another position); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1160-64 (10th Cir. 1999) (disabled employee was dismissed after he was unable to perform the essential functions of original position and employer argued that it was not required to accommodate him by finding him another position within the company).

application of those systems.⁷² Employees with disabilities are less likely to so benefit because they are more likely to end up unemployed.⁷³

In short, seniority systems, which seem neutral on their face, provide employees with disabilities with fewer options than they afford able-bodied employees. Given that employees with disabilities, when seeking the benefits of a seniority system, begin from a position of disadvantage vis-à-vis able-bodied employees, a type of preferential treatment that protects them from being bumped by more senior employees does not translate into unfair advantages over others.

Barnett's case, as well as the example, noted above, of the employee with a vision impairment who cannot seek a transfer to a clerical position despite his or her seniority, illustrates how seniority systems provide benefits to the able-bodied that are not available to the disabled. Once we place the preferential treatment requested by an employee such as Barnett into the broader context framed by the interrelationship between purportedly neutral rules (such as seniority systems) and the limitations imposed on some employees by their disabilities, it becomes clear why the preferential treatment that Barnett was asking for (which would have allowed him in effect to jump the seniority cue) would not have translated into an unfair advantage over other workers. Barnett's disability placed him, as an initial matter, at a disadvantage vis-à-vis able-bodied employees. The preferential treatment that would have allowed him to retain the mailroom position (like the preferential treatment that allowed Casey Martin to use the golf cart) was necessary in order to place him on a more equal footing with others.

The examples of preferential treatment under the ADA that I have noted so far,⁷⁴ then, should be seen as a means to the attainment of the ultimate end, which is the provision of equality of opportunity. The preferential treatment is sometimes necessary in order to place individuals with disabilities in a position where they are similarly situated to their nondisabled counterparts.⁷⁵ It does not, however, confer unfair advantages on the disabled.

All of this means that the distinction that the defendant in *Barnett* tried to draw between affirmative steps required to provide equality of opportunity on the one hand and preferential treatment on the other is a distinction without a difference.⁷⁶ Preferential treatment in the context of reasonable accommodation law is sometimes necessary in order to provide equality of opportunity. And that equality of opportunity, as I have explained here, can be provided through discreet and limited (i.e., reasonable) forms of preferential treatment without creating unfair advantages for employees with disabilities.

72. *Barnett*, 535 U.S. at 404.

73. See sources cited in footnote 73.

74. See *supra* notes 50-57 and accompanying text.

75. See Befort, *supra* note 9, at 971 (arguing "that preferential treatment is not inimical to the ADA's purpose, but part and parcel of the statutory design for enabling the disabled to move into the mainstream of American life and its workforce").

76. See *supra* notes 46-49 and accompanying text.

The airline in its brief was particularly adamant in its objection to accommodation requests that would require employers to make an exception to neutral rules when such an exception would mean treating disabled employees preferentially when compared to other employees.⁷⁷ The airline explained that it was not arguing that *any* exception to a neutral rule was an impermissible requirement to impose on employers; only those exceptions, the airline contended, that require preferential treatment are objectionable.⁷⁸

The problem with the airline's attempt to limit the kinds of accommodations that should be deemed unreasonable as a matter of law because they call for preferential treatment is that the airline failed to identify any neutral rule, an exception to which, under its own reasoning, would *not* constitute a form of impermissible preferential treatment. It is, in fact, difficult to conceive how the ADA can require employers to make exceptions to neutral rules *only* when employees with disabilities are involved, without, at the same time, requiring the employers to treat those employees preferentially. An employer, to return to an example already discussed,⁷⁹ may have in place a neutral rule that does not allow for modified work schedules. The fact that the rule is neutral, however, will not exempt the employer from its obligations under the ADA to modify the rule for an employee with a disability when doing so is reasonable.⁸⁰ The airline's effort to completely exclude some neutral rules from the reach of the statute (because an exception to them would constitute preferential treatment), while arguing that others remain subject to the statute, was doomed from the start because any exception to a neutral rule that is only legally required for some employees and not others entails the preferential treatment of the former.

It is not surprising, therefore, that the Supreme Court rejected the airline's position that the ADA never mandates preferential treatment. The Court unequivocally concluded that the ADA requires preferential treatment in order to provide individuals with disabilities with equality of opportunity. The Court noted that

[the defendant's] argument fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for

77. See Petitioner's Brief, *supra* note 43, at 18-19.

78. See *id.*

79. See *supra* notes 53-54 and accompanying text.

80. The Court noted that if it adopted the defendant's interpretation of the ADA, a series of employers' policies would then be beyond the scope of the statute:

Neutral office assignment rules would automatically prevent the accommodation of an employee whose disability-imposed limitations require him to work on the ground floor. Neutral "break-from-work" rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits. Neutral furniture budget rules would automatically prevent the accommodation of an individual who needs a different kind of chair or desk.

U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397-98 (2002).

those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special “accommodation” requires the employer to treat an employee with a disability differently, *i.e.*, preferentially.⁸¹

In its brief, the airline also attempted to distinguish between accommodations that are related to an employee’s disability and those that are not. The airline pointed out that an employee who needs to take periodic breaks in order to take medication may not be able to perform the job effectively in a workplace that limits the number of breaks that employees can take during the workday.⁸² Thus, accommodating that employee (by making an exception to the neutral rule that limits the number of daily breaks) is related to the disability and therefore reasonable.⁸³ The airline contrasted this example to the facts of its case where, according to it, there was no relationship between Barnett’s disability and the accommodation that he was requesting, namely, that he be allowed to retain the mailroom position despite the existence of the seniority policy.⁸⁴

It seems, in fact, that there was a relationship between Barnett’s disability and his request to be allowed to stay in the mailroom to the extent that the accommodation would have been unnecessary had Barnett been able to perform the essential functions of his original cargo handling position.⁸⁵ It was the plaintiff’s disability, in other words, that directly led to the need for the reassignment accommodation. Furthermore, it was the employer’s seniority policy that stood in the way of the plaintiff’s requested accommodation. Regardless of whether the plaintiff’s disability was sufficiently related to the requested accommodation, however, what is important for our purposes is that the example provided by the airline in its brief of what it considered to be an *appropriate* accommodation (*i.e.*, that of providing additional daily breaks for some employees with disabilities) is yet another example of preferential treatment: The employees who because of their disabilities need to take additional breaks during the day to take their medications are entitled to something that their fellow nondisabled employees are not.

Justice Antonin Scalia, in his dissent in *Barnett*, agreed with the airline’s argument that there must be a close relationship between a plaintiff’s disability and the requested accommodation.⁸⁶ Justice Scalia argued that the ADA only requires employers to address “those barriers that would not be

81. *Id.* at 397-98 (emphasis in original).

82. *See* Petitioner’s Brief, *supra* note 43, at 19.

83. *See id.*

84. *See id.*

85. As Stephen Befort puts it, “Barnett sought a job reassignment only because his disability eliminated his capacity to perform the functions of his former position. Thus, *Barnett’s* request for a job reassignment certainly was related to his disability, even if the seniority system, in the abstract, was not.” Befort, *supra* note 9, at 972 (emphasis added).

86. *Barnett*, 535 U.S. at 412-13 (Scalia, J., dissenting).

barriers *but for* the employee's disability."⁸⁷ He contended that the seniority system "burdens the disabled and nondisabled alike."⁸⁸ As a result, Justice Scalia argued, the seniority system was not a "disability-related" obstacle for the plaintiff and thus an exception to its application was not mandated by the statute.⁸⁹ It is interesting to note, however, that after making this argument, Justice Scalia distanced himself from the defendant's *other* argument that the ADA never requires an exception to a neutral rule if the exception would lead to the preferential treatment of the plaintiff.⁹⁰ Even Justice Scalia, in other words, appears to have agreed with the proposition that the obligation of reasonable accommodation under the ADA includes within it the need to provide preferential treatment to individuals with disabilities, at least in those cases where there is the (for Justice Scalia) requisite connection between the disability and the accommodation sought.

The unequivocal way in which the majority in *Barnett* recognized that preferential treatment is often an intrinsic part of reasonable accommodation law, when coupled with Justice Scalia's more implicit recognition of that same principle in his dissent, is a significant moment in the history of the judicial interpretation of the ADA. As already noted, prior to *Barnett*, courts sometimes dismissed ADA discrimination claims because they understood the plaintiffs to be making requests for preferential treatment, a type of treatment, those courts argued, that is not required by the statute.⁹¹ After *Barnett*, we know that this interpretation of the ADA is incorrect.

II. REASONABLE ACCOMMODATION AND AFFIRMATIVE ACTION: TWO DIFFERENT KINDS OF PREFERENTIAL TREATMENT

Several commentators have noted that many federal courts have interpreted the ADA quite narrowly, making it much more difficult for plaintiffs to prevail.⁹² Matthew Diller has argued that one of the apparent reasons for the judicial skepticism toward the ADA is that the statute has gotten tangled

87. *Id.* at 413.

88. *Id.*

89. *See id.* The majority in *Barnett*, by failing to apply Justice Scalia's causation standard, can be understood to have implicitly rejected it. *See Giebeler v. M&B Assoc.*, 343 F.3d 1143, 1150 (9th Cir. 2003) (arguing that "*Barnett* indicates, inferentially if not expressly, that a required accommodation need not address 'barriers that would not be barriers *but for* the . . . disability'") (quoting *Barnett*, 535 U.S. at 413 (Scalia, J., dissenting)). Two recent circuit court opinions, however, have held that "there must be a causal connection between the major life activity that is limited and the accommodation sought." *Wood v. Crown Redi-Mix, Inc.* 339 F.3d 682, 687 (8th Cir. 2003); *Felix v. New York City Transit Auth.*, 324 F.3d 102, 104-05 (2d Cir. 2003) (same).

90. *See Barnett*, 535 U.S. at 417 (criticizing majority for "mistakenly and inexplicably conclud[ing] that my position here is the same as that attributed to US Airways") (internal citation omitted).

91. *See supra* notes 36-38 and accompanying text.

92. *See, e.g.*, Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999); Diller, *supra* note 58; Tucker, *supra* note 35, at 354-62; Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000).

up with the broader legal and cultural debates over affirmative action.⁹³ He notes that although the ADA has been sold politically as an antidiscrimination statute that follows the model of traditional civil rights laws, the fact that the ADA often calls for differential treatment in order to provide equality of opportunity to the protected class strikes many as a departure from the consensus position in this country on civil rights, namely, that members of minority groups should be treated in the same way as everyone else.⁹⁴ The differential (or preferential) treatment component of the ADA has led many individuals, including judges, to lump the ADA with affirmative action.⁹⁵ In the area of race and gender, Diller points out, “the judiciary has shown [a] ‘growing discomfort with the slightest hint of special rights or preferences.’”⁹⁶ (It has not helped matters, Diller notes, that the ADA was enacted at around the same time that the Supreme Court has ratcheted up what the government must show in order to defend the constitutionality of affirmative action programs.)⁹⁷ Diller adds that the “same skepticism of claims that equal opportunity requires that protected groups be treated differently underpins many of the negative trends in the case law dealing with the ADA.”⁹⁸

Bonnie Poitras Tucker has assessed the judicial approach to the ADA in a similar way. She argues that

the courts view the reasonable accommodation requirement as an *additional* step that must be taken by covered entities, which goes above and beyond the provision of traditional civil rights. In particular, judicial decisions severely limiting the scope of the ADA . . . are probably the result of the courts’ reluctance to impose what they view as widespread affirmative action responsibilities on specific entities under the guise of a traditional civil-rights/nondiscrimination mandate.⁹⁹

93. Diller, *supra* note 58, at 40-47.

94. *Id.* at 44.

95. *See id.* at 40-47.

96. *Id.* at 46 (quoting Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1463 (1998)).

97. *Id.* at 44-46 (citing *inter alia* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

98. *Id.* at 46. Diller believes that there has been a judicial backlash against the ADA. This backlash, he notes, does not necessarily consist of an intentional effort on the part of judges to sabotage the ADA. *Id.* at 22. Instead, Diller argues,

[R]esistance to the ADA may result from a failure to comprehend and therefore to accept the premises underpinning the statute. Such widespread misunderstanding might generate a pattern of erroneous decisions that on the surface appear unrelated. If backlash is used in this sense, the case for a judicial backlash against the ADA is strong.

Id.

99. Tucker, *supra* note 35, at 353; *see also* Ruth Colker, *HyperCapitalism: Affirmative Protections for People with Disabilities, Illness, and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 229 (1997) (arguing that “one technique courts may use to limit the scope of the [ADA’s] affirmative action potential is to limit the range of claimants permitted to bring suit”).

The apparent conflation by courts, whether purposeful or not, of affirmative action and reasonable accommodation is, at first blush, understandable. There are some similarities between affirmative action and reasonable accommodation. First, from a broad policy perspective, both can be understood as seeking to address social stereotypes and stigmas that have significantly limited the opportunities of marginalized groups.¹⁰⁰ Second, and more particularly, there are similarities in the specific obligations on employers imposed by affirmative action plans and by reasonable accommodation law. In both scenarios, the employer is asked to treat members of the protected class differently than the nonprotected class. In the affirmative action context, for example, a minority employee may be allowed, consistently with Title VII, to participate in a training program even if there are other (white) employees with greater seniority.¹⁰¹ As we have seen, there can be a similar result under the ADA after the Supreme Court in *U.S. Airways v. Barnett*¹⁰² stated that, in at least some instances, an employer's obligation to accommodate under the ADA can trump an employer's seniority system.¹⁰³ There can also be a similar result, as we have also seen, in those jurisdictions that require an employer to reassign a qualified employee with a disability to a vacant position even if there are more qualified individuals interested in that position.¹⁰⁴

There are, however, crucial differences between the preferential treatment that can be part of affirmative action plans and that which can be part of obligations under reasonable accommodation law. Unfortunately, those differences are somewhat subtle and complex. The result, I fear, is that the similarities between affirmative action and reasonable accommodation tend to be more readily apparent than the differences. This is one of the reasons why I argue in Part III that the disability rights movement needs to be more proactive in defending the legitimacy and necessity of preferential treatment in the context of the ADA.¹⁰⁵

The conflation between reasonable accommodation and affirmative action can also be explained by the terminology that is used. It is often assumed, for example, that preferential treatment and affirmative action are synonymous.¹⁰⁶ It is incorrect, however, to label every kind of preferential

100. See Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 457-58 (2000); Kenneth R. Davis, *Undo Hardship: An Argument for Affirmative Action as a Mandatory Remedy in Systematic Racial Discrimination Cases,* 107 DICK. L. REV. 503, 519 (2003).

101. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

102. 535 U.S. 391 (2002).

103. *Id.* at 405; see *supra* notes 4-5 and accompanying text.

104. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1169 (10th Cir. 1999). I return to this issue in *infra* Part II.C.

105. See *infra* Part III.

106. Professor Tucker's article is an example of this. For instance, she argues, using her own hearing impairment as an example, that

[i]f we require an employer to pay for and provide me with an interpreter so I can perform a job, a theater to pay for and provide me with an interpreter so I can watch a play, and a hotel to pay for and provide me with special equipment so I can make telephone calls, then we are requiring those entities to take affirmative steps for my benefit. We are requiring these enti-

treatment as affirmative action. This is so because preferential treatment is (or should be) a broader term than is affirmative action. There are some examples—reasonable accommodation, as I argue below,¹⁰⁷ is one of them—of preferential treatment that do not constitute affirmative action as that term is legally understood.

The bottom line is this: If (1) reasonable accommodation law often requires a form of preferential treatment and (2) preferential treatment always entails a type of affirmative action, then those who are skeptical of affirmative action have reason to be skeptical of reasonable accommodation as a legal mandate. Although I argued in Part I that the first premise in the previous sentence is correct, I argue in this Part that the second is not. The differences between reasonable accommodation and affirmative action should lead individuals (including judges) who are skeptical of preferential treatment in the context of civil rights to be less skeptical of the former than they are of the latter.

I begin, in Part II.A., with a discussion of the ways in which the Supreme Court has (somewhat unhelpfully) addressed the relationship between reasonable accommodation and affirmative action.¹⁰⁸ In Part II.B., I explore two crucial differences between reasonable accommodation and affirmative action.¹⁰⁹ The first difference is that the former (unlike the latter) calls for an individualized assessment of the discrimination claim at issue. The second difference is that the failure to provide preferential treatment in the context of reasonable accommodation is itself a form of discrimination. Affirmative action, on the other hand, constitutes a type of remedy rather than a category of substantive liability. In Part II.C., I argue that these differences between reasonable accommodation and affirmative action are present even in the accommodation cases that some courts have contended most clearly constitute improper forms of affirmative action, namely, those that involve the request by an employee with a disability to be reassigned to a vacant position when there are other better qualified individuals who are interested in the same position.¹¹⁰

There are two important points that I need to make before delving into the differences between reasonable accommodation and affirmative action. First, I limit myself below to a discussion of affirmative action in the context of race. I do so because this is the paradigmatic form of affirmative action in our country and it is the one that has been subjected to the greatest

ties to spend money and/or reorganize their policies to treat me differently—that is, to take affirmative action on my behalf (which action is labeled as “reasonable accommodations” under the ADA).

Tucker, *supra* note 35, at 345. Professor Tucker does note that there are “difference[s] between affirmative action and reasonable accommodations [such as] that the former looks to remedy past discrimination, while the latter looks to remedy immediate or prospective discrimination.” *Id.* I elaborate on the significance of this difference in *infra* notes 155-64 and accompanying text.

107. See *infra* Part II.B.

108. See *infra* notes 112-32 and accompanying text.

109. See *infra* notes 122-66 and accompanying text.

110. See *infra* notes 167-212 and accompanying text.

amount of criticism. Second, although I will be arguing that reasonable accommodation is in important ways different from affirmative action, and that, as a result, critics of preferential treatment in the context of civil rights should be less skeptical of the former, I do not mean to imply that the criticisms of affirmative action programs justify their elimination. I believe that affirmative action is often necessary to remedy the effects of past discrimination and appropriate in providing racial minorities with an equal opportunity to compete with those who have for generations benefited from the discriminatory practices and norms of American public and private institutions. Given the long and invidious history of racism in this country, to require, in every instance, that members of minority groups be treated in the same way as whites undermines rather than promotes equality. It is not the purpose of this Article, however, to defend affirmative action from its critics. Instead, the purpose of this Article is to explore the role that preferential treatment plays in determining the obligations of employers under the ADA.¹¹¹ In pursuing this issue, I hope to explain why many of the objections raised by critics of preferential treatment in the context of affirmative action are not applicable in the context of disability discrimination law.

*A. The Supreme Court, Reasonable Accommodation,
and Affirmative Action*

In *Southeastern Community College v. Davis*,¹¹² the Supreme Court for the first time addressed the obligation of defendants to reasonably accommodate under disability discrimination law. The plaintiff in *Davis*, who was hearing impaired, was denied admission to the defendant's nursing program because of her impairment.¹¹³ The plaintiff sued under section 504 the Rehabilitation Act of 1973 arguing that she was qualified to participate in the program if the defendant accommodated her disability.¹¹⁴ In particular, she argued that she could be given "individual supervision by faculty members whenever she attend[ed] patients directly."¹¹⁵ She also requested that some course requirements be waived.¹¹⁶

111. I realize that it is usually opponents of affirmative action who use the term "preferential treatment" (probably because it more easily evokes the idea of special rights and unfair advantages for minority groups), while proponents use less stigmatizing (and stigmatized) terms such as "race-conscious policies." Compare Lino A. Graglia, *The "Affirmative Action" Fraud*, 54 WASH. UNIV. J. URB. & CONTEMP. L. 31, 31 (1998) (arguing that "[a]ffirmative action" has become simply a deceptive label for racial preferences") with Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209, 233 (1993) (referring to "what is [usually] called affirmative action" as "race conscious remedies"). I have chosen to use the term "preferential treatment" in the context of affirmative action because that is the term that I am using to discuss reasonable accommodations. My point is that even if we view both reasonable accommodation and affirmative action as calling for preferential treatment, the two are nonetheless, for the reasons noted below, different in important respects. See *infra* notes 133-66 and accompanying text.

112. 442 U.S. 397 (1979).

113. *Id.* at 400-02.

114. See *id.* at 400-04.

115. *Id.* at 407.

116. *Id.*

The Supreme Court, in a unanimous opinion written by Justice Powell, held that the defendant was not required to make the changes to its program requested by the plaintiff because those changes would constitute a fundamental alteration of the program.¹¹⁷ The Court concluded that “[i]t is undisputed that respondent could not participate in [the defendant’s] nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.”¹¹⁸

Davis has become a leading case in the meaning of the fundamental alteration defense under both the Rehabilitation Act and the ADA.¹¹⁹ What is intriguing for our purposes is why the Court viewed the case primarily through the lens of affirmative action rather than through that of reasonable accommodation. In framing the issue, for example, the Court stated that the plaintiff “contends . . . that § 504, properly interpreted, compels [the defendant] to undertake affirmative action that would dispense with the need for effective oral communication.”¹²⁰

The most obvious reason why the Court approached the case from the perspective of affirmative action may have been that the defendant in *Davis*, like the defendant in *Barnett*,¹²¹ argued that the plaintiff was impermissibly asking for affirmative action.¹²² This argument may have found a sympathetic ear in Justice Powell who only a year before had penned his famous affirmative action opinion in *Regents of University of California v. Bakke*.¹²³ It may be that Justice Powell saw *Bakke* and *Davis* as raising similar issues. Both cases involved student applicants seeking admission to medicine-related programs sponsored by educational institutions. Both plaintiffs argued (admittedly, for very different reasons) that the denials of their admission applications were illegal. Although *Bakke* was a constitutional case, and *Davis* a statutory one, the plaintiffs in both cases sought to rely on federal law to limit the admission-related discretion of educational institutions in order to prevent what the plaintiffs considered to be illegal discrimina-

117. *Id.* at 409.

118. *Id.* at 413 (footnote omitted).

119. A recent Westlaw search revealed that the case has been cited over 2,500 times.

120. *Davis*, 442 U.S. at 407.

121. See *supra* notes 46-49 and accompanying text.

122. See Brief for Petitioner at 19-22, 51-52, *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979) (No. 78-711). A review of the plaintiff’s brief to the Court, however, reveals that the plaintiff used the term “affirmative action” action only once, and that was as a quotation to a Senate Committee Report. See Brief for Respondent at 34, *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979) (No. 78-711) (quoting S. REP. NO. 93-1297, at 39 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6390). Rather than articulating a claim to affirmative action, the brief spoke of the “affirmative relief” to which the plaintiff was entitled to and of the corresponding “affirmative obligations” placed on the defendant. *Id.* at 33-36. Even if, in hindsight, it appears that the plaintiff’s attorneys should not have used the adjective “affirmative” as often as they did in their brief (because it may have contributed to the Court’s insistence in viewing the case through the lens of affirmative action), it is not at all clear, as the Court seemed to recognize in a later case, that analyzing *Davis* as an affirmative action case was either appropriate or helpful. See *infra* notes 127-30 and accompanying text.

123. 438 U.S. 265 (1978).

tion.¹²⁴ What ultimately convinced Justice Powell in *Bakke* that the affirmative action program in that case was proper was its role in the promotion of diversity in educational institutions.¹²⁵ Diversity was not an issue raised by the parties in *Davis* and it did not therefore provide Justice Powell with a rationale to uphold what he considered to be the plaintiff's request for affirmative action.¹²⁶

124. *Davis*, 442 U.S. at 400; *Bakke*, 438 U.S. at 277-78.

125. *Bakke*, 438 U.S. at 311-15.

126. Although the issue of diversity in the context of disability and education goes beyond the scope of this Article, it is not immediately clear why a diversity-type argument could not succeed in that context. If, for example, a public university were to purposefully admit a greater number of disabled students in order to add different perspectives and experiences to its educational activities, such a policy would be presumptively constitutional after *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003). This is especially the case given that the Court has held that distinctions on the basis of disability do not merit heightened scrutiny under the Equal Protection Clause. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-47 (1985).

In fact, the general differences between reasonable accommodation and affirmative action should be distinguished from the particular constitutionally-based differences between affirmative action in the context of disability and affirmative action in the context of race. The Supreme Court has held that courts must subject all racial classifications, even those meant to benefit racial minorities, to strict scrutiny. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989). In contrast, the Court in *Cleburne* held that when the government makes distinctions on the basis of disability, those distinctions will be upheld as long as they are rationally related to a legitimate state interest. *Cleburne*, 473 U.S. at 442-47. In refusing to apply heightened scrutiny to disability classifications, the Court noted that the government in the context of disability, unlike in that of race, has valid reasons for treating disabled individuals differently than the nondisabled. *Id.* The low level of constitutionally-mandated judicial scrutiny of laws and policies that distinguish on the basis of disability means, for example, that under the Rehabilitation Act of 1973, agencies of the federal government, as well as entities that contract with it, can be required to implement affirmative action programs for individuals with disabilities without running afoul of the Constitution. *See* 29 U.S.C. § 791(b) (2000) (requiring executive branch agencies to "submit . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities"); *id.* § 793(a) (stating that "[a]ny contract in excess of \$10,000 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities"). The only case that I have been able to find that challenged the constitutionality of the Rehabilitation Act's affirmative action provisions was dismissed for failure to exhaust administrative remedies. *Goya de P.R., Inc. v. Herman*, 115 F. Supp. 2d 262 (D.P.R. 2000). For a discussion of affirmative action obligations under the Rehabilitation Act, see, e.g., *Woodman v. Runyon*, 132 F.3d 1330, 1337-38 (10th Cir. 1997); Kathryn W. Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?*, 67 TEX. L. REV. 781 (1989); Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 150-59 (1998).

Mark Weber argues that the ADA, with its requirement that employers reasonably accommodate their employees with disabilities, will only have a marginal effect on reducing the unemployment rates among disabled individuals. Weber, *supra*, at 137-38. "If the law is followed," Weber notes, "the employees with disabilities who will benefit will be those who were marginally superior in the first place (but whose superiority was ignored because of prejudice or stereotyping) and those who become marginally superior to employees without disabilities because of the forced provision of reasonable accommodations." *Id.* at 138. This will leave the large number of individuals with (usually more severe) disabilities who cannot compete with nondisabled employees (even when reasonably accommodated) without an opportunity to work. *See id.* at 135-38. For this reason, Weber recommends that the government go beyond reasonable accommodation by requiring private employers to institute affirmative action programs akin to those that are meant to increase the number of racial minorities and women in the workplace. *See id.* at 164-66.

In any event, regardless of why the Court decided to approach *Davis* from the perspective of affirmative action, its decision to do so was quickly criticized in the law reviews.¹²⁷ The Court acknowledged that criticism several years later in *Alexander v. Choate*.¹²⁸ In *Alexander*, the Court explained that “[r]egardless of the aptness of [its] choice of words in *Davis*,” its intent was simply to distinguish between those accommodations that fundamentally alter a program (which the Court in *Davis* categorized as improper requests for affirmative action) and accommodations that are reasonable because they do not constitute fundamental alterations.¹²⁹ The Court in *Alexander* seemed to acknowledge that it unnecessarily confused matters in *Davis* by raising the issue of affirmative action in what was essentially an accommodation case.¹³⁰

In *U.S. Airways, Inc. v. Barnett*,¹³¹ the Court went one step further in distinguishing between reasonable accommodation and affirmative action. In that case, as we have seen, the Court explicitly rejected a categorical rule that would deem as per se unreasonable any type of accommodation that would constitute affirmative action, that is, one that (as the defendant put it) required the employer to provide a disabled employee with preferential treatment.¹³² In doing so, however, the Court did not elaborate on the differences between reasonable accommodation and affirmative action. It is to an exploration of those differences that I turn to next.

B. *The Differences Between Reasonable Accommodation and Affirmative Action.*

There are two important differences between reasonable accommodation and affirmative action that are relevant to our discussion. The first difference is that the former (unlike the latter) calls for an individualized assessment of the discrimination claim at issue. The second difference is that the failure to provide preferential treatment in the context of reasonable accommodation is itself a form of discrimination. Affirmative action, on the other hand, constitutes a type of remedy rather than a category of substantive liability. As I explain below, these differences should make critics of preferential treatment in the context of civil rights less skeptical of reasonable accommodation than they are of affirmative action.

127. See Mark E. Martin, Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 885-86 (1980); Donald Jay Olenick, Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171, 185-86 (1980).

128. 469 U.S. 287, 300 n.20 (1985) (citing sources cited in previous note).

129. *Id.*

130. *Id.*

131. 535 U.S. 391 (2002).

132. See *supra* notes 77-81 and accompanying text.

1. *Individuals vs. Classes*

The first important difference between reasonable accommodation and affirmative action is that the former calls for a highly individualized form of analysis that looks to the particular (and variable) interaction between an employee's disability and the essential functions of a job. Given that there are many different types of disabilities with differing severities that manifest themselves differently in different individuals, the reasonable accommodation that is most appropriate in any given case depends on the employee involved.¹³³ Furthermore, the legitimate workplace circumstances and expectations vary from employer to employer, which makes the determination of what constitutes a reasonable accommodation also turn on the needs of particular employers.¹³⁴ As Karlan and Rutherglen put it, "[a]ccommodations worked out largely in negotiations between individual employers and employees are necessarily tailored to their own particular circumstances. Under the ADA, the extent—and even the existence—of an accommodation depends on the needs of the individual employee and the requirements of the particular job."¹³⁵ The preferential treatment that is present in reasonable accommodation cases, in other words, is closely connected to the particular needs and circumstances of both the employee and the employer.

Affirmative action, on the other hand, is a class-wide remedy that is available to any individual (regardless of particular circumstances) who is a member of the protected group. The Supreme Court has held that affirmative action in the context of race, when required or implemented by the government, is constitutionally permissible when there is evidence of "pervasive, systematic, and obstinate discriminatory conduct."¹³⁶ If the plaintiffs in any particular case can establish that the defendant in the past engaged in such conduct, the only additional requirement is that they be members of the same protected group that was discriminated against. It is not necessary, in

133. See Karlan & Rutherglen, *supra* note 11, at 15.

134. See Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 652 (1st Cir. 2000) (O'Toole, J., dissenting) (noting that the term "[r]easonable accommodation is . . . a capacious term, purposefully broad so as to permit appropriate case-by-case flexibility"); see also Wernick v. Fed. Reserve Bank of N.Y., 91 F.3d 379, 385 (2d Cir. 1996) (noting that "[w]hether or not something constitutes a reasonable accommodation is necessarily fact-specific") (citation omitted).

135. Karlan & Rutherglen, *supra* note 11, at 39-40; see also Anita Silvers, *Reprising Women's Disability: Feminist Identity Strategy and Disability Rights*, 13 BERKELEY WOMEN'S L.J. 81, 114 (1998) (arguing that "[b]ecause physical or mental impairment can bar an individual from selecting the most common or popular mode for demonstrating her talents, ensuring that people with disabilities have fair opportunity to display their talents compels disability discrimination law to be inherently individualistic").

136. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (citation omitted); see also Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 445 (1986) (plurality opinion) (holding that "[a]ffirmative action] may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination").

other words, that the plaintiffs themselves have been discriminated against in order to seek affirmative action.¹³⁷

This kind of class-wide remedy is different from the type of individualized assessment that is part of the law of reasonable accommodation. In affirmative action cases, membership in the protected class is the only eligibility requirement. In reasonable accommodation cases, membership in the class is necessary (because a plaintiff must be disabled in order to have standing to sue under the ADA),¹³⁸ but it is not sufficient. Under reasonable accommodation doctrine, in order to qualify for the kind of preferential treatment that is often part of that doctrine,¹³⁹ the employee must first show that the employer's policies constitute particular barriers (whether tangible or intangible) that interfere with the ability of *that particular employee* to perform the essential functions of the job. This means that there will be other members of the protected class (i.e., other employees with disabilities) who, because of their different impairments, will not be negatively affected by the same practices of the same employer, and who will, as a result, not be entitled to the same kind of preferential treatment.¹⁴⁰

The crucial point is this: Even though the ADA often requires employers to provide preferential treatment of their employees with disabilities, the beneficiaries of such treatment are not fungible or interchangeable simply because they are members of the same protected class. Instead, reasonable accommodation doctrine requires a case-by-case analysis to determine whether the preferential treatment is both necessary and reasonable given an employer's particular employment practices and their effects on particular employees with disabilities.¹⁴¹

137. See *Sheet Metal*, 478 U.S. at 446-47 (plurality opinion); see also *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (noting that "courts may, in appropriate cases, provide relief under Title VII that benefits individuals who were not the actual victims of a defendant's discriminatory practices") (citing *Sheet Metal*, 478 U.S. 421). This is also the case in affirmative action programs voluntarily adopted by employers. See *Firefighters*, 478 U.S. at 516 (concluding that "[i]t is . . . clear that the voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination") (citing *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)).

It is interesting to note that, since Title VII protects all employees, regardless of their race or sex, from discrimination, it is possible for white males to challenge their employers' voluntarily adopted affirmative action programs. See *Johnson v. Santa Clara County*, 480 U.S. 616 (1987); *Weber*, 443 U.S. 193. The ADA, however, generally only allows disabled individuals to sue, which means that nondisabled employees do not have standing to challenge their employers' preferential treatment of employees with disabilities through reasonable accommodations. See 42 U.S.C. § 12112(a) (2000).

138. *Id.* § 12112(a). There are two exceptions to this general rule: (1) the ADA explicitly allows those who associate with individuals with disabilities to bring a discrimination claim based solely on that association, *id.* § 12112(b)(4) (2000), and (2) some courts have allowed nondisabled individuals to sue under the ADA's provision that limits the ability of employers to conduct medical inquiries and examinations. See, e.g., *Griffin v. Steeltek, Inc.*, 160 F.3d 591 (10th Cir. 1998). *But see* *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 561 (5th Cir. 1998) (holding that nondisabled individuals do not have standing to bring such claims).

139. See *supra* Part I.B.

140. Karlan and Rutherglen have called this type of legal entitlement a "personalized special treatment." Karlan & Rutherglen, *supra* note 11, at 14.

141. *Id.* at 15-16 (noting that accommodations under the ADA "cannot be accomplished by using a

The narrowing of the potential beneficiaries who are eligible for specific forms of preferential treatment under reasonable accommodation law addresses one of the principal criticisms of affirmative action, namely, that it provides a remedy to individuals who themselves may not have been the subject of discrimination.¹⁴² Critics of affirmative action have contended that it paints with too broad a brush because it improperly assumes that simply because an individual claimant is a member of a protected class, he or she has been disadvantaged sufficiently to merit preferential treatment. In this sense, affirmative action, it is argued, fails to account for the degree of variation within the protected class.¹⁴³ Reasonable accommodation law, by requiring individualized assessments that consider the particular circumstances of particular individuals, does account for variation within the protected class because it distinguishes between those employees with disabilities who confront specific workplace barriers that interfere with their ability to perform their jobs and those whose disabilities impose no similar limitations.¹⁴⁴

wholesale approach that treats all disabled individuals as fungible members of a protected class. Accommodation, in contrast to class-based affirmative action, thus occurs through a case-by-case adjustment of the individual and the job”).

It has also been pointed out that affirmative action programs primarily apply at the hiring stage. See Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1085 (2000); Karlan & Rutherglen, *supra* note 11, at 16-17. Although reasonable accommodation obligations under the ADA can apply at the hiring stage as well, see 42 U.S.C. §§ 12112(b)(6)-12112(b)(7) (2000), most accommodations take place after the employee is hired. See Karlan & Rutherglen, *supra* note 11, at 17. Under the ADA, employers and employees are under an obligation to engage in an interactive process in order to arrive at the accommodation that makes the most sense under the circumstances. See, e.g., *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315-17 (3d Cir. 1999); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1171-73 (10th Cir. 1999). As a result, “[s]uccessful accommodation often requires ongoing negotiation and cooperation between the company and the worker, in a process far more interactive than that involved in race- or sex-based affirmative action.” Karlan & Rutherglen, *supra* note 11, at 17.

142. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 408-09* (1992); see also ROBERT FULLINWIDER, *THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LEGAL ANALYSIS 55* (1980) (noting that “the most harmed by past employment discrimination are those Black men and women over fifty years of age” and arguing that “[p]referential hiring programs will have virtually no effect on these people at all”).

143. See, e.g., Lino Graglia, “Affirmative Action”: *Past, Present, and Future*, 22 OHIO N.U. L. REV. 1207, 1213 (1996) (arguing that “[r]ace cannot be used as a proxy for disadvantage because not all and not only blacks have suffered disadvantage”).

144. Kenneth Davis, in arguing that there are no significant differences between reasonable accommodation and affirmative action, has criticized the contention that the former is different from the latter because it calls for an individualized assessment. See Davis, *supra* note 100, at 521-22. Davis argues that affirmative action plans involving “[a]pprenticeship and training programs are examples of . . . individualized remedies.” *Id.* at 522. Those remedies, however, are not individualized in the sense that participants who benefit from the preferential treatment that is a component of them must show that they have been as individuals (as opposed to as members of a group) negatively affected by the employer’s practices. Perhaps for this reason, Davis adds that, because race-based stereotypes are so pervasive, no African American, regardless of wealth or stature in society, should be required to show individualized discrimination before benefiting from affirmative action programs. See *id.* Although I do not disagree with this position, the problem with it is that it does not address the objection raised by opponents of affirmative action plans that such plans treat members of the protected class as fungible. Such a criticism does not apply to reasonable accommodations under the ADA.

2. *Substantive Cause of Action vs. Type of Remedy*

A second important difference between reasonable accommodation and affirmative action is that Congress, by mandating reasonable accommodations under the ADA, concluded that the failure by an employer to reasonably accommodate employees with disabilities is itself a form of discrimination.¹⁴⁵ In this way, the failure to reasonably accommodate constitutes a type of discrimination that is distinct from more traditional discrimination claims such as those involving disparate treatment or disparate impact. Under the ADA, then, the defendant's refusal to provide preferential treatment through a reasonable accommodation and the defendant's commission of the discriminatory act that imposes liability on it are one and the same. As a result, it is not possible to distinguish between a failure to provide the preferential treatment from the act (or, more accurately, the omission) that leads to a finding of discrimination.¹⁴⁶

To illustrate this point, we can return to one of the examples of reasonable accommodation discussed earlier. When an employee with a disability is legally entitled to a modified work schedule, that employee is entitled to a form of preferential treatment.¹⁴⁷ The failure by the employer to provide the preferential treatment constitutes discrimination once it is determined that the modified work schedule is a reasonable accommodation that does not constitute an undue hardship. In this type of case, it is impossible to separate the discrimination from the failure to provide the preferential treatment. The same applies to the other examples of preferential treatment that are part of reasonable accommodation law discussed in Part I.¹⁴⁸

While the failure to provide preferential treatment under the ADA can, in and of itself, constitute discrimination, Title VII explicitly states that the failure to "grant preferential treatment" is *not* a form of discrimination.¹⁴⁹ Affirmative action becomes part of a Title VII case, then, not as a category of substantive liability, but as a remedy after there has been an independent finding of discrimination.¹⁵⁰

The fact that, under the ADA, preferential treatment may be relevant to the substance of the discrimination claim, while preferential treatment under Title VII is a remedial matter, is important for two reasons. The first is that it shows differences in what Congress intended. Congress took a different approach in proscribing disability discrimination under the ADA than it did in proscribing race discrimination under Title VII. Under the former statute, Congress required employers to make changes in practices and policies as

145. 42 U.S.C. § 12112(b)(5)(A) (2000).

146. In most cases, an employer's failure to make a reasonable accommodation available to an employee with a disability entails a failure to change an existing practice in some way, thus constituting a form of omission on the part of the employer.

147. See *supra* notes 53-54 and accompanying text.

148. See *supra* notes 40-91 and accompanying text.

149. 42 U.S.C. § 2000e-2(j) (2000).

150. *Id.* § 2000e-5(g).

they relate to (some) disabled employees that they do not have to make vis-à-vis other employees in order to provide the former with an equal opportunity to compete in the workplace.¹⁵¹ As the Court in *U.S. Airways, Inc. v. Barnett* noted, “the Act specifies . . . that preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal.”¹⁵² In contrast, under Title VII, Congress explicitly stated that the failure to provide for preferential treatment is not a form of discrimination, though it did leave open the possibility of using affirmative action as a remedy for past discrimination.¹⁵³ Critics of preferential treatment, therefore, should be less skeptical of such treatment in the disability context than they are in the race context because only in the former did Congress, as the Court recognized in *Barnett*, equate the failure to provide such treatment with discrimination.¹⁵⁴

The second reason why the substantive cause of action (reasonable accommodation) vs. remedy (affirmative action) difference is important relates to what actually gets litigated in reasonable accommodation cases as

151. *Id.* §§ 12201-12213.

152. 535 U.S. 391, 397 (2002); *see also* Befort & Donesky, *supra* note 141, at 1084 (arguing that the differential treatment called for by the ADA is “statutorily authorized”).

153. *See supra* notes 149-50 and accompanying text. The Court has also held that Congress intended, when it enacted Title VII, to allow the voluntary adoption of affirmative action programs that are meant to address racial or gender imbalances in the workplace. *See Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 630 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979). It has been noted that voluntary affirmative action programs and disparate impact claims are different sides of the same coin. In the absence of affirmative action programs, in other words, an employer facing workplace racial or gender imbalances may be liable for discrimination under a theory of disparate impact. *See, e.g.,* Nickolai G. Levin, *Constitutional Statutory Synthesis*, 54 ALA. L. REV. 1281, 1355 (2003) (arguing that “voluntary affirmative action [has] served as a defense to disparate impact suits”). Regardless of the precise link between voluntary affirmative action programs and the need to avoid disparate impact claims, courts in voluntary affirmative action cases have understood affirmative action to be a type of remedy. *See Weber*, 443 U.S. at 208 (holding that voluntary affirmative action plan is under certain circumstances permissible in order to eliminate existing racial imbalances in the workplace); *see also* *Majeske v. City of Chicago*, 218 F.3d 816, 824 (7th Cir. 2000) (describing voluntary affirmative action program as a “remedy”).

154. Those who argue that the ADA does not require preferential treatment often point to one sentence in the statute’s legislative history to support their position. *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1181 n.1 (10th Cir. 1999) (Kelly, J., concurring in part and dissenting in part); Beale, *supra* note 38, at 823; O’Neil & Reiss, *supra* note 38, at 349. The sentence states that “the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.” H.R. Rep. No. 101-485, pt. 2, at 56 (1990); *see also* S. Rep. No. 101-116, at 26-27 (1989) (same). The sentence, however, does not support the proposition that preferential treatment is never allowed under the ADA for two related reasons. First, the statement is limited to applicants, and thus does not apply to accommodation cases involving reassignments, *Smith*, 180 F.3d at 1168, which are the ADA cases that are most frequently criticized by skeptics of preferential treatment. *See Beale, supra* note 38, at 821-26; O’Neil & Reiss, *supra* note 38, at 348-361. (The sentence in the legislative history has no bearing on reassignment cases because reassignment under the ADA is only available to current employees and never available to applicants. *See infra* note 176 and accompanying text.) Second, the sentence actually suggests that Congress *understood* the distinction between preferential treatment in the context of reasonable accommodation and preferential treatment in that of affirmative action. The sentence prohibits preferential treatment at the hiring stage *as it relates to the decision of whom to hire*. The sentence does not prohibit preferential treatment at the hiring stage as it relates to accommodations of disabled applicants during the application process. Nor does the sentence apply to the most common type of preferential treatment under the ADA, namely, accommodations of current employees. For further discussion of the distinction between pre-hiring and post-hiring stages, *see supra* note 141 and *infra* notes 206-07 and accompanying text.

opposed to in affirmative action cases. In the former, when an employer goes to court defending itself against an accommodation request, it is because it believes that the request is unreasonable (or constitutes an undue hardship). The employer argues, in other words, that it is legally entitled to maintain its current employment-related practice—without having to modify it in order to accommodate the plaintiff—that is the subject of the discrimination claim. It is always necessary in reasonable accommodation cases, then, to evaluate the merits of the employer's current practice that is the subject of the lawsuit. If it would be unreasonable (or an undue hardship) to ask the employer to modify that practice in order to accommodate the employee with a disability, then the employee is not entitled to preferential treatment. In this way, courts can evaluate the request for preferential treatment on the part of the plaintiff against the legitimacy of the practice that the employer argues it should be allowed to retain without modification.

In reasonable accommodation cases, then, it is the employer's current practices that are subject to litigation. The focus of court-mandated affirmative action cases can also be on current practices to the extent that the pervasive discrimination that makes affirmative action necessary is still present in the workplace. But the focus of most affirmative action cases is backward looking as courts try to determine whether the impact of *past* policies—what the Supreme Court has referred to as “the lingering effects of pervasive discrimination”—on current employees justifies the imposition of an affirmative action remedy.¹⁵⁵ Voluntary affirmative action cases also tend to look to an employer's past practices to determine whether the affirmative action plan in question is consistent with the goals of Title VII. As one court has put it, “[t]he purpose of race-conscious affirmative action must be to remedy the effects of *past* discrimination against a disadvantaged group that itself has been the victim of discrimination.”¹⁵⁶ Or, as another court has explained, affirmative action is improper if it does not have “the intention of remedying the results of any *prior* discrimination or identified underrepresentation of minorities.”¹⁵⁷

Given that the purpose of affirmative action is to remedy pervasive and systemic workplace imbalances in terms of minority representation, it is not surprising that affirmative action cases tend to focus on past policies to determine their effects on current employees. It is not necessary in such cases that the employer's *current* practices be discriminatory in order for affirmative action to be appropriate. In fact, the Supreme Court has made it clear

155. *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 445 (1986) (plurality opinion); see also DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* 244 (2d ed. 1998) (arguing that “the Supreme Court's willingness sometimes to allow affirmative action by state actors has been premised upon a backward-looking approach, justifying affirmative action as a remedy for past discrimination against African Americans”).

156. *Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 437 (10th Cir. 1990) (emphasis added).

157. *Taxman v. Bd. of Educ. of Township of Piscataway*, 91 F.3d 1547, 1550 (3d Cir. 1996) (emphasis added).

that in voluntary affirmative action cases, the affirmative action in question does not have to remedy specific and identifiable violations of Title VII (whether in the past or in the present).¹⁵⁸ The Court has explained that if such a link were required, there would be a disincentive on the part of employers to voluntarily adopt programs meant to address the underrepresentation of minorities in the workplace because they would first have to concede that they had violated the law.¹⁵⁹

In contrast to affirmative action cases, in reasonable accommodation disputes the employer's past practices are irrelevant. What matters (and what gets litigated) is the legitimacy of current employment practices to determine (1) whether they constitute specific barriers to performance for specific individuals with disabilities and (2) whether modifications of the practices, in order to accommodate those individuals, are reasonable.

The fact that in reasonable accommodation cases the employer's current practices must be found to be discriminatory before the kind of preferential treatment mandated by reasonable accommodation law becomes applicable addresses one of the possible criticisms that can be raised against preferential treatment in the context of civil rights, namely, that that treatment can go on for years after the discriminatory conduct (if there was such conduct at all)¹⁶⁰ on the part of the employer has ceased.¹⁶¹ This line of objection to affirmative action is not applicable to reasonable accommodation cases because in such cases there is no corresponding time gap between the discrimination and the preferential treatment required to address it. As already noted, the *failure* to provide the preferential treatment is itself the discriminatory act (or omission) on the part of the employer.

Reasonable accommodation law, then, does not require of an employer what affirmative action can require, namely, that it treat some current employees preferentially because of discriminatory policies (whether intentional or not) that it may have pursued in the past. The preferential treatment

158. See *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 630 (1987).

159. *Id.* at 630 n.8.

160. See *supra* notes 158-59 and accompanying text.

161. The Supreme Court has made it clear that voluntary affirmative action plans must be temporary in nature in order not to violate Title VII. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979) (noting that the affirmative action program in question "is a temporary measure [that] is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance"). The Court has also made the same point when assessing the constitutionality of affirmative action plans. See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2346 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989).

Kenneth Davis has argued that "[t]he duty of reasonable accommodation is arguably even broader than affirmative action because affirmative action plans, to be consistent with Title VII, must have a predetermined endpoint. By contrast, the statutory duty of reasonable accommodation never expires." See *Davis, supra* note 100, at 519-520 (citation omitted). Davis is correct in this assessment, but an important qualifier must be added, namely, that the duty of reasonable accommodation never expires *as long as the employee who is entitled to that accommodation needs the accommodation and remains on the job*. Just because an employer, in other words, is legally required to provide preferential treatment to one employee with a disability does not mean that all of the employer's disabled employees will be eligible for the same treatment. As already noted, the fact that reasonable accommodation law proceeds on a case-by-case basis limits the employer's preferential treatment obligations because it does not have to provide that treatment on a class-wide basis. See *supra* notes 133-44 and accompanying text.

that is sometimes at issue in reasonable accommodation cases is necessary in order to address present (or prospective) discrimination. Reasonable accommodation is not about providing preferential treatment in order to remedy past discrimination; instead, it can be about providing preferential treatment in order for the employer to *avoid* discriminating to begin with.

Critics of affirmative action like to refer to it as a type of reverse discrimination that benefits racial minorities at the expense of others.¹⁶² This is particularly problematic, critics argue, when there is no evidence that those who seek the benefits of affirmative action were themselves the victims of past discrimination.¹⁶³ This criticism is not applicable to reasonable accommodation cases because in those cases the preferential treatment required by law and the discriminatory conduct on the part of employers are directly linked. In reasonable accommodation cases, it is the employer's current practices that create (or contribute to the formation of) work-place barriers (both tangible and intangible) that interfere with equality of opportunity. Reasonable accommodation law requires employers to eliminate those barriers. And, as already noted, the elimination of those barriers sometimes requires that employers provide disabled employees with forms of treatment that the employers are not legally required to make available to nondisabled employees.¹⁶⁴

In short, the preferential treatment that often accompanies reasonable accommodations tailors that treatment to particular individuals rather than, as does affirmative action, to a class of individuals. In addition, the failure to provide preferential treatment in the context of reasonable accommodation law is itself discriminatory, while the preferential treatment in affirmative action cases is exclusively remedial in nature. This means that there is, in reasonable accommodation cases, a closer link between the preferential treatment requested and the discriminatory conduct on the part of employers than there is in affirmative action cases. These differences should make critics of preferential treatment less skeptical of that treatment in the context of disability than they are in that of race. As Congress recognized when it enacted the ADA,¹⁶⁵ and as the Court in *U.S. Airways, Inc. v. Barnett* concluded,¹⁶⁶ when employees ask that their employers reasonably accommodate their disabilities, they are simply (and only) asking that the employers not discriminate against them because of their disabilities. They are not, for the reasons here noted, asking for affirmative action as that term is legally understood in the context of race.

162. See EASTLAND, *supra* note 8, at 196 (arguing that “[p]referential treatment is never benign. Whoever would have been admitted to a school, or won the promotion or the contract, but for race, has suffered discrimination – and there is no good discrimination”).

163. See *supra* notes 142-43 and accompanying text.

164. See *supra* Part I.B.

165. See *supra* note 151 and accompanying text.

166. See 535 U.S. 391, 397 (2002).

C. *The Refusal to Reassign Cases*

The accommodation cases that are most frequently analogized to affirmative action by skeptics of preferential treatment are those that involve requests by employees with disabilities to be reassigned to other positions.¹⁶⁷ These cases usually proceed as follows: an employee with a disability can no longer perform the essential functions of his or her current job, even when accommodated by the employer. The employee then asks to be reassigned to a vacant position within the company. The employer refuses to do so either because the employer believes that there are other interested individuals who are more qualified,¹⁶⁸ or, as in *Barnett*, because there are other interested individuals who have greater seniority than the plaintiff.¹⁶⁹ The plaintiff then sues under the ADA arguing that the failure to reassign constitutes illegal discrimination.

The text of the ADA lists "reassignment to a vacant position" as an example of a reasonable accommodation.¹⁷⁰ Plaintiffs in failure to reassign cases argue that as long as they are qualified for the new position, the employer has an obligation to reassign them.¹⁷¹ Employers often argue that the only obligation they have under the ADA is to *consider* the disabled employee for the new position; there is no obligation to reassign if there are other individuals who are either more qualified or more senior.¹⁷² Some employers (like the airline in *Barnett*) attempt to support their argument by contending that the employee seeking the reassignment is asking for affirmative action, which they contend is not required by the statute.¹⁷³ If an employer in a reassignment case succeeds in any of these arguments, then the employee, who is not qualified for the present position even when ac-

167. See *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000); *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995); see also *Befort & Donesky*, *supra* note 141, at 1048-49 (noting that "[n]egative affirmative action rhetoric has begun to creep into recent ADA decisions, particularly when the accommodation at issue is reassignment to a vacant position").

168. See *Humiston-Keeling*, 227 F.3d at 1026-27; *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1295-1300 (D.C. Cir. 1998).

169. See *Barnett*, 535 U.S. at 394.

170. 42 U.S.C. § 12111(9)(B) (2000).

171. See *Humiston-Keeling*, 227 F.3d at 1027; *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1015 (8th Cir. 2000).

172. See *Cravens*, 214 F.3d at 1018; *Thompson v. Dot Foods, Inc.*, 5 F. Supp. 2d 622, 627 (C.D. Ill. 1998); Brief for Appellee at 7, *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000) (No. 99-3281) [hereinafter *Appellee's Brief*].

In the Fifth Circuit, employers can argue that an employer does not even have an obligation to *consider* a reassignment. The Fifth Circuit has held that reassignment requests are akin to affirmative action and are therefore unreasonable as a matter of law. See *Foreman v. Babcock & Wilcox, Co.*, 117 F.3d 800, 810 (5th Cir. 1997) (quoting *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995)). The Fourth Circuit has held that an employee with a disability is not eligible for reassignment if he or she cannot perform the essential functions of the present job. *Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995) (citing *Guillot v. Garrett*, 970 F.2d 1320, 1326 (4th Cir. 1992)). Given that if an employee with a disability can perform the present job, he or she is not entitled to a reassignment, see *infra* note 177 and accompanying text, it also appears that reassignment is per se unreasonable in the Fourth Circuit.

173. See *Petitioner's Brief*, *supra* note 43, at 24-25; *Appellee's Brief*, *supra* note 172, at 37.

commodated, can be terminated without the employer incurring liability under the ADA.

In reassignment cases which involve the rights of a disabled employee pitted against the rights of more senior employees under a seniority system, the ruling in *Barnett* gives us guidance as to whether the former is entitled to a reassignment.¹⁷⁴ *Barnett*, however, addressed the seniority issue only, and thus did not address cases where the plaintiff, regardless of seniority, is less qualified than other individuals who are interested in the position.¹⁷⁵

Before I proceed to explain how the lower courts have dealt with these cases, it is important to note some clearly established doctrinal matters that limit the rights of employees with disabilities to be reassigned to a new position. First, the reassignment accommodation is available only to current employees; applicants may not avail themselves of this kind of accommodation.¹⁷⁶ Second, the reassignment obligation applies only if it is not possible to accommodate the employee with a disability in his or her current position.¹⁷⁷ Reassignment, therefore, “is an accommodation of last resort.”¹⁷⁸ Third, the position that is the subject of the transfer request must exist prior to the making of the request; the employer is not required to create a new position in order to accommodate the employee with a disability.¹⁷⁹ Fourth, as the statute itself states, the position must be *vacant*;¹⁸⁰ the employer is not required to “bump” another employee in order to accommodate the employee with a disability.¹⁸¹ Fifth, an employer is only required to reassign an eligible employee with a disability to an *equivalent* position; it is not required to transfer the employee if the reassignment would constitute a promotion.¹⁸² And finally, sixth, an employer does not have to reassign an employee with a disability if doing so would constitute an undue hardship.¹⁸³

Despite these limitations on the reassignment obligations of employers under the ADA, the circuits are split on whether the obligation requires employers to go beyond merely *considering* the employee with a disability for the new position. The leading opinion holding that the obligation entails not just consideration but the actual reassignment (as long as the employee with a disability is qualified for the new position) is the Tenth Circuit’s en banc

174. See *supra* notes 1-5 and accompanying text.

175. For an argument that the reasoning of *Barnett* supports the view that an employee with a disability should be reassigned even if it means that an employer has to make an exception to its neutral policy of assigning jobs to the most qualified individuals, see Jared Hager, Note, *Bowling for Certainty: Picking Up the Seven-Ten Split by Pinning Down the Reasonableness of Reassignment After Barnett*, 87 MINN. L. REV. 2063, 2090-2105 (2003).

176. *Cravens*, 214 F.3d at 1017; see also 29 C.F.R. § 1630.2(o) (2003).

177. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1170-71 (10th Cir. 1999).

178. *Cravens*, 214 F.3d at 1019.

179. *Id.*; *Smith*, 180 F.3d at 1174.

180. 42 U.S.C. § 12111(9)(B) (2000).

181. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1257 (11th Cir. 2001); *Smith*, 180 F.3d at 1168-69.

182. *Lucas*, 257 F.3d at 1257; *Smith*, 180 F.3d at 1176-77; 29 C.F.R. § 1630.2(o) (2003).

183. *Smith*, 180 F.3d at 1178.

ruling in *Smith v. Midland Brake, Inc.*¹⁸⁴ The *Smith* court found it relevant, in deciding whether the reassignment provision requires more than mere consideration, that another provision of the ADA prohibits discrimination on the basis of disability in hiring.¹⁸⁵ The court reasoned that regardless of “[w]hether the disabled person is an existing employee seeking reassignment or an outside job applicant, the company cannot . . . discriminate against the disabled individual on the basis of his or her disability.”¹⁸⁶ If the reassignment provision, therefore, only requires that the employer consider the disabled employee on an equal basis with all other applicants for the position, that provision “would add nothing to the obligation not to discriminate, and would thereby be redundant.”¹⁸⁷ The court also noted that the text of the statute only requires that the individual with a disability be qualified for the position in question; it does not require that the individual requesting the reassignment be the *best* qualified for the position.¹⁸⁸

The *Smith* court emphasized that the ADA includes within its definition of discrimination the failure to remove employment-related barriers that interfere with the ability of employees with disabilities to work.¹⁸⁹ If it is not possible through accommodations to remove those barriers as they relate to a disabled employee’s current position in ways that are reasonable and would not constitute an undue hardship on the employer, then, the court concluded, it is entirely consistent with the text and purpose of the statute to require reassignment of the employee to a vacant position for which he or she is qualified.¹⁹⁰ As the *Smith* court saw it, then, the reassignment provision imposes on employers a substantive obligation to reassign as opposed to merely a procedural one to consider the reassignment.¹⁹¹ If the disabled employee is qualified for the new position, and that position already exists and is vacant, then the employer has an obligation to reassign the employee even if there are other more qualified individuals who are interested in the same position.¹⁹²

It is, of course, the idea that the ADA might require an employer to choose an employee with a disability over other more qualified individuals

184. 180 F.3d 1154 (10th Cir. 1999). The plaintiff in *Smith* developed muscular injuries and chronic dermatitis as a result of working on the defendant’s assembly line. *Id.* at 1160. When the employer was unable to find a position within the assembly department that the plaintiff could perform given his ailments, he was fired. *Id.* For another decision holding that the obligation of employers to reassign their employees with disabilities entails more than mere consideration of such reassignment, see *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1304-05 (D.C. Cir. 1998). The EEOC has taken the same position. See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, in EEOC COMPLIANCE MANUAL (Oct. 2002) [hereinafter *Enforcement Guidance*], available at <http://www.eeoc.gov/policy/docs/accommodation.html>.

185. *Smith*, 180 F.3d at 1164-65 (citing 42 U.S.C. § 12112(a) (2000)).

186. *Id.* at 1164.

187. *Id.* at 1165.

188. *Id.* at 1167-68 (citing 42 U.S.C. § 12112(b)(5)(A) (2000)).

189. *Id.* at 1161-68.

190. *Id.*

191. See *id.* at 1166-67.

192. *Id.* at 1169-70.

that smacks some of affirmative action. This is the way in which Judge Richard Posner saw the issue in *EEOC v. Humiston-Keeling, Inc.*¹⁹³ That case involved a request for reassignment by a disabled employee who was qualified for the new position, but who was not the most qualified in the pool of parties interested in the position.¹⁹⁴ The EEOC, consistently with its guidelines,¹⁹⁵ took the position that the defendant was required to reassign the disabled employee because she was qualified.¹⁹⁶ Judge Posner saw it differently. He argued that the EEOC's "interpretation requires employers to give bonus points to people with disabilities."¹⁹⁷ For Judge Posner, "[a] policy of giving the job to the best applicant is legitimate and nondiscriminatory. Decisions on the merits are not discriminatory."¹⁹⁸ What the EEOC argued for, Posner concluded, "is affirmative action with a vengeance. [It] is giving a job to someone solely on the basis of his status as a member of a statutorily protected group."¹⁹⁹

Judge Posner added that, even if the reassignment obligation under the ADA is limited to one of considering the disabled employee for the new position, there is nonetheless a meaningful benefit that accrues to that employee, and thus, the obligation is not, as the *Smith* court concluded, either redundant or meaningless.²⁰⁰ The reassignment provision, Judge Posner noted, makes clear to the employer that it cannot limit accommodations under the ADA to those that relate to the disabled employee's current position. Instead, the provision requires the employer to consider the feasibility of reassignment, "and if the reassignment is feasible and does not require the employer to turn away a superior applicant, the reassignment is mandatory."²⁰¹

The reassignment cases are the most difficult cases for those of us who argue that the preferential treatment required by reasonable accommodation law is different from the preferential treatment that is part of affirmative action plans. The reassignment cases, at first blush, would seem to raise the same concerns that trouble skeptics of preferential treatment in the workplace under the aegis of civil rights statutes, namely, those that arise from awarding job-related privileges and benefits on the basis of class membership at the expense of the interests of other equally or more qualified individuals. Upon further scrutiny, however, the arguments presented in the previous section as to the differences between reasonable accommodation and affirmative action are applicable to the reassignment cases.²⁰² The preferential treatment that is legally mandated in reassignment cases, like in

193. 227 F.3d 1024 (7th Cir. 2000).

194. *Id.* at 1027.

195. See *Enforcement Guidance*, *supra* note 184.

196. *Humiston-Keeling*, 227 F.3d at 1027-28.

197. *Id.* at 1027.

198. *Id.* at 1028.

199. *Id.* at 1029.

200. See *id.* at 1027-28.

201. *Id.*

202. See *supra* Part II.B.

other instances of preferential treatment in the context of reasonable accommodation,²⁰³ is determined by the circumstances of particular plaintiffs as they confront barriers created by the employer's practices.

Plaintiffs in reassignment cases do not argue, as Judge Posner suggests in *Humiston-Keeling*, that they are entitled to preferential treatment simply because they are members of a protected class, as they *could* argue in affirmative action cases.²⁰⁴ This is the case for two reasons. First, as already noted, the individual with a disability who requests a reassignment as a form of accommodation must be a current employee.²⁰⁵ Under the ADA, an applicant with a disability (i.e., an applicant who is a member of the same protected class as the current employee and who may even have the *same* disability), does not have the right to request that she be given a job for which she did not apply if she cannot perform the job to which she *did* apply even with reasonable accommodation.²⁰⁶ Although it is true that the applicant in such a case could simply turn around and apply for the other position, the employer would not have to hire the applicant if in fact there were other individuals interested in the position who were more qualified.²⁰⁷

Second, it is not just *any* current employee with a disability who is entitled to a reassignment. The employee must be someone who, *because of her disability*, cannot (1) perform the essential functions of her current job even if (2) she is reasonably accommodated by the employer.²⁰⁸ This limits considerably the members of the protected class who are entitled to be reassigned. This is not, in other words, a class-wide benefit (as is affirmative action), but is instead one available only to particular individuals who face particular obstacles in performing their current jobs because of their statutorily protected trait.

Furthermore, the reassignment that is at issue in these cases is necessary in order to address the particular employment-related barriers that prevent the disabled employee from continuing to work for his or her current employer. We should not forget that, in reassignment cases, it is the employers' own job-related practices and requirements, even if they are legitimate, that

203. See *supra* Part I.B.

204. See *supra* notes 136-37 and accompanying text

205. See *supra* note 176 and accompanying text

206. See *id.*

207. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1168 (10th Cir. 1999) (noting that "[w]e have no quarrel with the proposition that an employer, when confronted with two initial job applicants for a typing position, one of whom types 50 words a minute while the other types 75 words a minute, may hire the person with the higher typing speed, notwithstanding the fact that the slower typist has a disability"). Stephen Befort and Tracey Holmes Donesky emphasize the importance of the distinction between pre-hiring and post-hiring situations:

Reassignment operates only as a post-hire mechanism through which an employer may retain the services of a current employee with a disability. No other employee loses employment as a result of this job transfer. Affirmative action, in contrast, operates as a pre-hire formula that reserves employment opportunities for one group of applicants at the expense of another group of applicants.

Befort & Donesky, *supra* note 141, at 1085.

208. See *supra* notes 177-78 and accompanying text.

prevent the disabled employee who needs to be reassigned from continuing to work in his or her present position.²⁰⁹ This is a different situation than that found in many affirmative action cases; in the latter cases, as we have seen, the focus is on the need to rectify class-based imbalances in the workplace created by the employer's *past* practices.²¹⁰ In reassignment cases, as in other reasonable accommodation cases,²¹¹ therefore, there is a closer link (than there is in affirmative action cases) between the preferential treatment requested and the employer's *current* practices.

I have attempted in this part of the Article to explain the differences between reasonable accommodation and affirmative action that should make critics of preferential treatment less skeptical of the former than they are of the latter. Before concluding this part, however, I want to emphasize again that by distinguishing reasonable accommodation from affirmative action, I do not mean to suggest that obligations on employers arising from the former are legitimate while those arising from the latter are not. Although the ultimate legitimacy of affirmative action plans is beyond the scope of this Article, I think it is entirely possible to view affirmative action as a legitimate means to the attainment of equal opportunity goals for racial minorities (and women), in the same way that the preferential treatment that is often part of reasonable accommodations is a legitimate means to the end of leveling the playing field between disabled and nondisabled employees.²¹²

209. If the employer's practices and requirements are legitimate and if it would be unreasonable to ask it to change them in order to accommodate an employee's disability, then the employer is not required to alter those practices and requirements. See 42 U.S.C. § 12112(b)(5)(A) (2000). This does not mean, however, that the employer should be exempted from any further obligations towards that employee. One of the reasons why, under certain circumstances, see *supra* notes 176-83 and accompanying text, it makes sense to impose on employers an obligation to reassign disabled employees when there is no equivalent obligation to reassign able-bodied employees is that the former have fewer options than the latter. This is the case because if a disabled employee, who is otherwise qualified for a reassignment, is turned down because she is not the *most* qualified, then she will no longer be able to work for the defendant. See, e.g., *EEOC v. Humiston-Keeling*, 227 F.3d 1024, 1026-27 (7th Cir. 2000). Under the ADA, in order for an employee to seek a reassignment as a form of accommodation, she must no longer be able to perform her current job. See *supra* notes 177-78 and accompanying text. This means that if the employee with a disability is not reassigned, she will be terminated. If an able-bodied employee, on the other hand, is turned down for a reassignment, she will be able to keep her current job. In the absence of a reassignment, in other words, the disabled employee would be out of a job, while the able-bodied employee would still have a job. This difference between the disabled and the able-bodied explains in part why the preferential treatment of the former is sometimes appropriate. The preferential treatment is sometimes necessary in order to mitigate some of the disadvantages faced by disabled individuals that are not faced by the able-bodied. For a discussion of why preferential treatment in the context of reasonable accommodations does not translate into unfair advantages for the disabled, see *supra* notes 58-75 and accompanying text.

210. See *supra* notes 155-59 and accompanying text.

211. See *supra* notes 160-64 and accompanying text.

212. "If differential and individualized treatment is necessary for the establishment of equal opportunity for people with disabilities, it may also be necessary for other groups, including women and minorities." See Diller, *supra* note 54, at 47; see also Karlan & Rutherglen, *supra* note 11, at 40-41 (arguing that "[t]he fact that traditional prohibitions on discrimination and innovative forms of affirmative action can coexist under the ADA suggests that the same may be true for employment discrimination law more generally"); Laura F. Rothstein, *The Affirmative Action Debate in Legal Education and the Legal Profession: Lessons from Disability Discrimination Law*, 2 J. GENDER RACE & JUST. 1, 14-32 (1998) (explaining how disability discrimination law can inform affirmative action debates).

III. EMBRACING PREFERENTIAL (OR DIFFERENTIAL) TREATMENT?

Despite the fact that, as noted in Part I, the Supreme Court has made it clear that preferential treatment is perfectly consistent with the way in which the ADA seeks to provide equality of opportunity for individuals with disabilities,²¹³ and that, as noted in Part II, there are significant differences between reasonable accommodation and affirmative action,²¹⁴ the controversy surrounding preferential treatment in our society is likely to continue to hinder efforts by disability rights advocates to promote the equality of individuals with disabilities. This presents advocates with a dilemma: should they come out of the closet, so to speak, by acknowledging and emphasizing the important role that preferential treatment legitimately plays in the law of reasonable accommodation? Or, alternatively, is it better to continue to downplay that role in the hope of avoiding the stigmatization that in our culture inevitably accompanies explicit requests for preferential treatment? I believe, as I will explain in this part of the Article, that the time has come for disability rights advocates to acknowledge and, when appropriate, emphasize the fact that equality of opportunity in the context of disability often requires preferential treatment.

Let me begin by addressing issues of terminology. From a strategic and political perspective, it is undoubtedly better for disability rights advocates to use the term "differential treatment" rather than "preferential treatment." The latter term is more stigmatizing than the former because it more easily evokes (1) the (as we have seen, incorrect) analogy to affirmative action and (2) the idea that disability rights are somehow "special rights."²¹⁵ I have primarily and purposefully used preferential treatment in this Article because, issues of stigma aside, I believe that that term more accurately captures what is sometimes required of employers in reasonable accommodation cases. As noted earlier, under the ADA, the obligation of employers

213. See *supra* notes 81-90 and accompanying text.

214. See *supra* Part II.B.

215. For an example of the stigma that plaintiffs in ADA cases sometimes face, see *Davoll v. Webb*, 194 F.3d 1116, 1136 (10th Cir. 1999). In *Davoll*, the plaintiffs in an ADA trial successfully asked the trial judge to prohibit the defendants from using terms such as "affirmative action," "special rights," and "preferences" in front of the jury. The judge, in granting the motion, explained that the "defendants are precluded from using such language because it would simply muddy the waters and obfuscate the issues, and its prejudicial effect might outweigh its probative value." *Id.* (citation omitted). The Court of Appeals concluded that any possible error committed by the trial judge in granting the motion was harmless because the defendants were nonetheless able to

invok[e] phrases almost identical to those prohibited, as well as other language that conveyed the same message. Throughout the trial, [the defendant] Denver's attorneys and witnesses discussed their reluctance to give "preferences," or jobs based "on status," and the importance of maintaining "a level playing field." Denver emphasized that plaintiffs wanted "better treatment," than others, and were "seeking . . . an advantage." In closing argument Denver explained "this case is about . . . the plaintiffs wanting an advantage with respect to a job in the City and County of Denver, and that . . . advantage is a disadvantage to the rest of the employees in the Career Service of the City and County of Denver."

Id. at 1137 (citations omitted). As this passage illustrates, it seems clear that the defendants in *Davoll* attempted to tar the plaintiff with the stigma of preferential treatment.

vis-à-vis employees with disabilities (1) to reassign them to vacant positions, (2) to redistribute some of their (marginal) job functions to other employees, and (3) to allow them to participate in modified work schedules, constitute instances of preferential treatment because employers do not owe similar obligations to their nondisabled employees.²¹⁶ The ultimate goal under disability discrimination law is to provide individuals with disabilities with equality of opportunity, but the attainment of that goal through reasonable accommodations often entails some form of preferential treatment.²¹⁷

The term “differential treatment” is less accurate than is “preferential treatment” in describing the obligation of employers to reasonably accommodate their employees with disabilities because to treat someone differently does not always entail treating them preferentially. The kind of paradigmatic discriminatory treatment that civil rights employment laws seek to prohibit, after all, are forms of *differential* treatment by employers of protected individuals. It is, for example, when an employer treats employees differently (by limiting opportunities or benefits) because of their status as racial minorities or women that Title VII is most clearly violated. Differential treatment, in other words, can mean treating someone less favorably *or* more favorably than others. Preferential treatment, on the other hand, can only mean a form of treatment that accords to some certain options or benefits (such as the opportunity to be reassigned to another position or to participate in a modified work schedule) that are not, as a legal matter, required to be offered to others.

Having said this, however, I recognize that the term “preferential treatment” may bring with it so much baggage that it may make sense, as a strategic and political matter, for disability rights supporters to use the term “differential treatment” instead. Although I will continue to use the former in this Article, some may feel more comfortable using the latter. It should be noted, for what it is worth, that the Supreme Court in *Barnett* treated the two terms interchangeably. Specifically, the Court stated that the ADA “requires the employer to treat an employee with a disability differently, *i.e.*, preferentially.”²¹⁸

One of the best ways of destigmatizing preferential treatment in the context of equality claims is through education. The public, as well as judges, need to be educated on the crucial role that preferential treatment can play in providing equality of opportunity to individuals with disabilities. We need to confront and challenge the commonly held view that “[a]s long as there is a perception that disabled people need preferential treatment, they can never truly be equal.”²¹⁹ We need, in other words, to shift our understanding of preferential treatment in disability discrimination law from one that renders such treatment as suspect to one that views it as legitimate

216. See *supra* notes 50-57 and accompanying text.

217. See *supra* Part I.B.

218. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002).

219. Beale, *supra* note 38, at 831.

and necessary. One way of doing this is to make a positive case on behalf of preferential treatment by explaining the role that it plays in promoting equality of opportunity for individuals with disabilities.

In many ways, the Supreme Court's opinion in *Barnett* provides the best vehicle for making a positive case for preferential treatment in disability discrimination law. The Court in that case could have either side-stepped the preferential treatment issue altogether or used the plaintiff's request for preferential treatment (in asking for a work-related privilege that was in the past made available first to more senior employees) as a reason for denying the plaintiff's discrimination claim. But the Court did neither. Instead, it explicitly held that preferential treatment is a legitimate and necessary component of reasonable accommodation law.²²⁰

Disability rights advocates can use the reasoning of *Barnett* to make the case that preferential treatment is often required in order to provide individuals with disabilities with equality of opportunity. The attainment of equality under the ADA is more complicated than it is under, for example, Title VII. Under Title VII, the employer is asked to simply disregard the protected trait and to treat the employee with that trait in the same way that the employer treats all other employees. Title VII assumes, in other words, that the protected employee is *already* similarly situated to other employees. The ADA, on the other hand, recognizes that an accommodation is often required *in order* for an employee with a disability to be similarly situated to others. It is for this reason that the ADA sometimes requires preferential treatment of disabled employees as a way of providing them with meaningful equality of opportunity.²²¹

The preferential treatment required by the ADA does not translate into "special rights" for the disabled because it is a means to the attainment of the ultimate goal of equality of opportunity. That equality of opportunity already exists for able-bodied individuals because workplace practices are, as a matter of course, tailored to meet their needs and interests.²²² It is the needs of employees with disabilities that have traditionally been ignored by employers, and it is for that reason that the ADA requires employers to account for the disabilities of their employees in fashioning and implementing employment related policies. As I have argued throughout this Article, it is often impossible for an employer to account for disabilities (by accommodating them) without treating the individuals who have them preferentially when compared to nondisabled employees.

It is important, in explaining the legitimate and necessary role that preferential treatment can play in the promotion of equality for individuals with disabilities, to emphasize that the type of preferential treatment that can accompany reasonable accommodations does not translate into unfair advantages for individuals with disabilities. In many ways, this is the most

220. *Barnett*, 535 U.S. at 397.

221. *See supra* Part I.B.

222. *See supra* note 58 and accompanying text.

crucial argument to make because it goes to the core of the assumption that many in our society make when confronted with legally-mandated preferential treatment, namely, that if someone is receiving preferential treatment, it must be unfair to those who are not eligible for such treatment. As explained in Part I, that assumption does not apply to cases of reasonable accommodations for individuals with disabilities.²²³ The reality is that individuals with disabilities, in most instances, remain at a competitive disadvantage *even after* the preferential treatment (as reflected in reasonable accommodations) is implemented.²²⁴ Once again, the preferential treatment is necessary in order to mitigate the disadvantages and limitations that accompany disabilities. The preferential treatment that can be part of disability discrimination law does not create unfair advantages; instead, it lessens disadvantages for the disabled, making it more likely that they will have an equal opportunity to compete with their able-bodied peers.²²⁵

As the pre-*Barnett* preferential treatment case law illustrates, some judges have misunderstood the role that preferential treatment plays in the attainment of the ADA's objectives, equating such treatment with obligations that go beyond what the statute requires.²²⁶ Once again, *Barnett* provides an opportunity for plaintiffs' attorneys to begin the process of educating judges on this issue. The section of *Barnett* that discusses preferential treatment can be used by plaintiffs' attorneys not only to rebut arguments made by defendants linking particular requests for accommodations to (impermissible forms of) preferential treatment or affirmative action, but also to make a positive case for the legitimacy and necessity of preferential treatment as a means of promoting equality for individuals with disabilities in the workplace.

In making the argument for the legitimacy and necessity of preferential treatment under the ADA, it is also important to emphasize that there are significant limitations to what an employee with a disability is entitled to in terms of preferential treatment. When the preferential treatment, as reflected in a requested accommodation, would be unreasonable or an undue hardship or a direct threat, the employer will be able to turn down the request for preferential treatment without incurring ADA liability. The plaintiff in a preferential treatment case, in other words, will still have the burden to show that the requested accommodation is reasonable,²²⁷ and the defendant will still have available to it all of the traditional defenses (such as undue hardship and direct threat) that are available under the ADA.²²⁸ The crucial

223. See *supra* notes 59-76 and accompanying text.

224. See *id.*

225. See *id.*

226. See *supra* notes 36-38 and accompanying text.

227. Courts all agree that plaintiffs under the ADA bear the burden of showing that a requested accommodation is reasonable, though they disagree on whether the burden is one of production, see, e.g., *Walton v. Mental Health Ass'n*, 168 F.3d 661, 671 (3d Cir. 1999), or one of persuasion. See, e.g., *Hoskins v. Oakland County, Sheriff's Dep't*, 227 F.3d 719, 728 (6th Cir. 2000).

228. See 42 U.S.C. § 12112(b)(5)(A) (2000) (undue hardship); *id.* § 12113(b) (direct threat).

point, however, is this: The mere fact that the employee is asking for preferential treatment, as *Barnett* makes clear, does not by itself exempt the employer from its ADA obligations.²²⁹

There is initial evidence that *Barnett* is having a positive effect in muting the ability of defendants to rely on the “no preferential treatment” argument to escape liability under disability discrimination law. The best example of this so far is *Giebeler v. M & B Associates*, a Ninth Circuit case involving the Fair Housing Amendments Act (FHAA).²³⁰ The plaintiff in *Giebeler* had AIDS.²³¹ As a result of his disability, he lost his job.²³² As a result of losing his job, he was unable to satisfy the minimum financial qualifications to rent a particular apartment.²³³ The plaintiff’s mother, who could meet those qualifications, offered to rent the apartment for her son.²³⁴ The apartment owners rejected the lease application relying on their policy of not permitting cosigners to leases.²³⁵ When the plaintiff sued under the FHAA, the defendants noted that their policy of not accepting cosigners was neutral on its face in that it also affected the ability of nondisabled individuals of limited financial means to lease apartments.²³⁶ The defendants argued that the FHAA could not require an alteration to their neutral policy because such an alteration would inter alia “prefer disabled over nondisabled impecunious individuals.”²³⁷

The Ninth Circuit, relying extensively on *Barnett*, rejected the defendants’ argument.²³⁸ The court concluded that “*Barnett* holds that an accommodation may indeed result in a preference for disabled individuals over otherwise similarly situated nondisabled individuals.”²³⁹ The fact that the plaintiff’s requested accommodation, if legally mandated, would grant him a form of preferential treatment not available to similarly situated lease applicants did not mean that the accommodation was unreasonable.²⁴⁰

The positive result (from the perspective of plaintiffs) in *Giebeler* notwithstanding, plaintiffs (at least before *Barnett*) have been rather ineffective in responding to the objections of defendants that the requested accommodations are unreasonable because they constitute impermissible forms of affirmative action and preferential treatment. *EEOC v. Humiston-Keeling, Inc.*, discussed earlier, is a case in point.²⁴¹ In its brief to the Seventh Circuit, the EEOC argued that the defendant was obligated to reassign the em-

229. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002).

230. 343 F.3d 1143 (9th Cir. 2003).

231. *Id.* at 1145.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. See *id.* at 1148.

237. *Id.*

238. See *id.* at 1149-50.

239. *Id.* at 1150.

240. See *id.*

241. 227 F.3d 1024 (7th Cir. 2000). For a discussion of the case, see *supra* notes 193-211 and accompanying text.

ployee with a disability even if she was not the most qualified for the new position.²⁴² At no point in its principal brief did the EEOC use the terms “affirmative action” or “preferential treatment.”²⁴³ The defendant, however, argued that it was the “EEOC’s contention that the ADA is an affirmative action statute that mandates preference of disabled employees over all other employees.”²⁴⁴ Such a position, the defendant contended, was inconsistent with the intent of the ADA: “The intent [of the statute] was to ‘level the playing field,’ not to create preferences.”²⁴⁵ The EEOC in its reply brief disputed that its position amounted to a request for either affirmative action or preferential treatment.²⁴⁶ The reply brief then proceeded to point to the Tenth Circuit opinion in *Smith v. Midland Brake, Inc.*,²⁴⁷ which argued that the labeling of the reassignment accommodation as affirmative action is unhelpful.²⁴⁸ The EEOC’s reply brief did not, however, seek to distinguish reasonable accommodations from affirmative action, nor did it address the preferential treatment objection (other than to deny that it was asking for preferential treatment).²⁴⁹ If the EEOC had directly addressed the issue of preferential treatment—preferably, as I have argued in this Article, by acknowledging that it was in fact asking for preferential treatment and that such treatment (1) is entirely consistent with the ADA’s goals, (2) was intended by Congress, and (3) is different from affirmative action—then, at the very least, the court would have been required to consider more carefully whether the ADA sometimes requires preferential treatment, rather than concluding, as it did, that whenever a requested accommodation calls for preferential treatment, the accommodation is unreasonable as a matter of law.²⁵⁰ The EEOC, in other words, by denying the obvious, namely, that there is a type of preferential treatment at play when employees with disabilities must be given new positions even when they are not the most qualified for those positions, made it easier for the court to side with the defendant who argued that the ADA does not require *any* preferential treatment.²⁵¹

There is no question that there are risks associated with a strategic decision by disability rights advocates and litigators to embrace openly the need to treat individuals with disabilities preferentially in order to provide for equality of opportunity in the workplace. On the one hand, I suppose that

242. See Brief of Appellant at 38-42, *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000) (No. 99-3281).

243. See *id.*

244. See Appellee’s Brief, *supra* note 172, at 37.

245. *Id.* at 38.

246. See Reply Brief of Appellant at 19, *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000) (No. 99-3281) [hereinafter Reply Brief].

247. 180 F.3d 1154, 1167 (10th Cir. 1999).

248. See Reply Brief, *supra* note 246, at 20.

249. See *id.*

250. See *Humiston-Keeling*, 227 F.3d at 1027-29.

251. The Seventh Circuit’s conclusion that preferential treatment is never required under the ADA, of course, is no longer valid after the Supreme Court’s decision in *Barnett*. See *supra* notes 81-90 and accompanying text.

such a decision may (however unfairly) further stigmatize disability claimants with the taint of affirmative action and special rights, with obvious negative repercussions. On the other hand, it is difficult to imagine how judges, at least, could be interpreting the ADA any more narrowly than they have been over the last few years.²⁵² It seems to me that we now have the worst of both worlds: disability rights advocates and litigators seem timid about making a positive case for the legitimacy and necessity of preferential treatment for individuals with disabilities, while defendants are only too eager to make analogies between particular requests for accommodations and impermissible forms of preferential treatment or affirmative action.²⁵³ These analogies, in turn, find a receptive audience among judges who are skeptical of preferential treatment under the auspices of civil rights statutes. If the positive case is not made as to why preferential treatment is often legitimate and necessary in the context of disabilities and employment, then the concerns of those judges about the presumed incompatibility between preferential treatment and equality will be left unaddressed, to the continued detriment of plaintiffs.

In some ways, what I am ultimately suggesting is that the disability rights movement seek to destigmatize the term “preferential treatment” by appropriating it.²⁵⁴ This, it seems to me, is a better alternative to running away from the term; to run away allows opponents of disability rights, and defendants in ADA cases, to continue to argue incorrectly that disability discrimination law does not call for preferential treatment.

252. See sources cited *supra* note 92.

253. This is precisely what defendants argued in cases such as *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), see *supra* notes 40-91 and accompanying text; *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979), see *supra* notes 112-26 and accompanying text; *Giebeler v. M & B Assocs.*, 343 F.3d 1142 (9th Cir. 2003), see *supra* notes 230-40 and accompanying text; *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000), see *supra* notes 193-201 and accompanying text; and *Davoll v. Webb*, 194 F.3d 1116, 1136 (10th Cir. 1999), see *supra* note 215.

Raytheon Co. v. Hernandez, 124 S.Ct. 513 (2003), is yet another ADA case in which the defendant argued that the plaintiff was impermissibly requesting a form of preferential treatment. In *Raytheon*, the defendant allegedly refused to rehire a former employee because the latter had several years earlier resigned after engaging in illegal drug use. See *id.* at 515-17. The Ninth Circuit held that, after the plaintiff met his prima facie burden, the defendant failed to provide a nondiscriminatory reason for its refusal to rehire. See *Hernandez v. Hughes Missile Systems Co.*, 292 F.3d 1030, 1036 (9th Cir. 2002). The court reasoned that the employer's policy of not rehiring former employees who had engaged in misconduct, while neutral on its face, was unlawful as applied to individuals who have used drugs in the past and who have since been rehabilitated. See *id.* The defendant successfully petitioned the Supreme Court for review by framing the issue in the case as being “[w]hether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use.” See Writ of Certiorari, *Raytheon, Co. v. Hernandez*, No. 02-749 (emphasis added); see also Brief for Petitioner, *Raytheon Co. v. Hernandez*, No. 02-749, at 23 (arguing that the plaintiff “does not seek equal employment opportunities, but rather preferential treatment”) (internal quotations removed). The Supreme Court did not address the defendant's preferential treatment argument and instead remanded the case on the ground that the Ninth Circuit erroneously applied disparate impact doctrine when it should have applied disparate treatment law. See *Raytheon, Co.*, 124 S.Ct. at 520-21.

254. This effort would be roughly comparable to the decision by some gay rights proponents to destigmatize the pejorative term “queer” by using it themselves. See Lisa Duggan, *Making it Perfectly Queer*, in *SEX WARS* 155 (Lisa Duggan and Nan Hunter eds., 1995).

I believe the time has come for the disability rights movement to break the taboo that accompanies a discussion of preferential treatment in our society in matters of civil rights and equality. The movement should consider explicitly making the case, both inside and outside of courtrooms, that the basic equality goals of the ADA will remain unfulfilled unless we are willing to provide individuals with disabilities, when appropriate, with reasonable forms of preferential treatment. Such treatment is not inconsistent with equality of opportunity in the area of disability; instead, as I have tried to show in this Article, the former is a necessary means for the attainment of the latter.

