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MARK C. WEBERT

INTRODUCTION

Of all the personal narratives about individuals with disabilities and employment, one of the most revealing is that of the well-dressed business traveler, sitting in an airport in her wheelchair with a styrofoam cup full of coffee in her hand. Along comes another traveler, who smiles at her, and then drops a quarter into the cup. The story is hardly the most outrageous example of mistreatment of persons with disabilities. After all, the person dropping the quarter into the cup caused no physical harm beyond the splashing; in fact, he was motivated by human sympathy and genuinely wanted to help. More telling about the story is its illustration of the stereotyped assumption that a person with a disability in an airport is begging, not working, and needs a contribution (a very small one, in this case) to survive.

The prevalence of the assumption is not an insurmountable problem. As time goes on, if persons with disabilities are inte-

† © Mark Weber 1998. Professor, DePaul University College of Law. B.A. Columbia, 1975; J.D. Yale, 1978. I thank Martha Minow, Laura Rothstein, and Steven Greenberger for their comments on an early draft of this Article. I also thank my research assistants, Joel Dabisch, Lara Cleary, and Andrew Bryant.

1. The usage "people with disabilities" or "individual with a disability" may seem awkward at first, but it carries an important message of putting the person first and the disabling condition second. Accordingly, it is the usage embodied in the Americans with Disabilities Act and other recent statutes. See 42 U.S.C. § 12111(8) (1994); see also Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (1994). See generally ROLAND W. BURRIS, MANUAL OF STYLE FOR DEPICTING PERSONS WITH DISABILITIES 2 (State of Illinois, n.d.) (discussing terminology).


3. For more outrageous examples of mistreatment, see infra text accompanying notes 36-47.
Integrating into the working economy, the would-be patron will observe the difference and change attitudes. What is more vexing is that at present, for all too many persons with disabilities, the assumption is true. Persons with disabilities are not working in the numbers that they want to be, or in the numbers that reflect their representation in the national population. As a result, they are disproportionately poor and very much dependent on private and public subsidies.

Both discriminatory exclusion and limits on competitiveness stemming from disability itself prevent people with disabilities from working. Discrimination comes in the form of the stereotypes held by the donor of the quarter, and in other more and less subtle forms. Competitive limits consist of the difficulties that physical and mental disabilities impose on an individual vying for employment in the marketplace. Even without discrimination, persons who have impairments in their abilities to do major functions of life will be at a disadvantage selling their time to employers.

The purpose of this Article is to demonstrate the need for a national employment policy for persons with disabilities, and to sketch the outlines of such a policy. The need arises from poverty and unemployment caused by discrimination and competitive disadvantage. Existing legal remedies embodied in the Americans with Disabilities Act and other laws, though beneficial, do not eliminate the problem; despite existing education and training efforts, unemployment and poverty linger.

A more effective solution lies beyond the Americans with Disabilities Act. The remedy for continuing conscious and unconscious discrimination is to supplement existing nondiscrimination law with strengthened affirmative action obligations to hire and promote persons with disabilities, and to expand those obligations from federal agencies and contractors to the rest of American employers. Given the economic limits that disabilities impose, however, such measures will not be sufficient. The solution for competitive disadvantage is an even more ambitious program consisting of non-remedial employment setasides, first by government, but ultimately by all employers. Together these

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4. See infra text accompanying notes 18-20.
5. See infra text accompanying notes 16-17.
6. See infra text accompanying notes 36-54.
7. See infra text accompanying notes 56-57.
steps will constitute the beginnings of an effective national employment policy for persons with disabilities.

This Article brings together a number of the disparate strands in the legal literature on disability and develops several themes the literature has left unexplored and unconnected. Commentaries on the existing affirmative action provisions of the Rehabilitation Act are sparse, and do not consider the possibility of the extending the provisions to nonfederal employment. Comparative law sources note that European countries and Japan compel employers to hire specified percentages of persons with disabilities. Some of the authorities have suggested that a comparable American program would be desirable. Nevertheless, no source has fully examined the justifications for such a plan and answered the likely objections to it. For their part, the sources discussing the European quota programs do not draw any connections to existing American affirmative action provisions.

In the flush of excitement over the passage of the Americans with Disabilities Act, most commentators focused on the specific provisions of the Act; the topics of federal affirmative


action programs and setasides along European lines have been neglected. Nevertheless, even the most optimistic commentators on the new federal law tempered their enthusiasm with the recognition that its antidiscrimination measures would leave many persons with disabilities out of the work force and, consequently, out of most of economic life in America. 13 Similarly, prominent authorities on the Rehabilitation Act 14 have noted...
that even if that law were to be interpreted properly and enforced aggressively, huge gaps in employment and other aspects of economic participation would remain.15

Part I of this Article describes the unemployment and consequent poverty of the bulk of the population with disabilities. It traces the conditions to continuing discrimination—particularly unconscious discrimination and stereotypes—as well as to the competitive limits imposed by physical and mental impairments. Part II discusses the inadequacy of existing measures to improve the employment picture for persons with disabilities. Part III describes the role that affirmative action should play in combating discrimination, discussing the proper interpretation of existing affirmative action statutes and proposing steps to promote their enforceability and expansion to the parts of the national economy they do not now cover. Part IV addresses employment problems other than discrimination, proposing a regime of non-remedial setasides of jobs, by the national government, other governmental employers, and ultimately by private industry.

I. THE ECONOMIC EXCLUSION OF PERSONS WITH DISABILITIES

People with disabilities exist on the margins of American economic life, largely outside of the world of work and with little disposable income. Discrimination is to blame, but real limits on economic competitiveness play a role as well.

A. Poverty, Work, and People with Disabilities

People with disabilities are poor. Of adults with disabilities, fifty-nine percent live in households with earnings of $25,000 or less, while for adults without disabilities, less than forty percent do.16 The poverty rate for adults with disabilities is three times


15. See, e.g., Wegner, supra note 14. This commentary on section 504 notes that the law is multifaceted but concedes that even its diverse attacks on exclusion, denial of benefits, and discrimination, will not achieve functional equality for persons with disabilities in the spheres in which the law operates. The steps proposed in this Article recognize that reality.

16. Survey Shows Disabled Adults Still Earn Less, PORTLAND OREGONIAN, July 21,
that of the rest of the population. The explanation for the poverty is obvious: persons with disabilities are not employed. Only thirty-one percent of persons with disabilities age 16 to 64 work part- or full-time; this number has actually decreased since 1986.

People with disabilities want to work. A survey cited in the legislative history of the Americans with Disabilities Act reported that two-thirds of working age persons with disabilities who do not have jobs say that they want to work. A more recent survey by the Harris polling organization reported that of persons who identified themselves as having disabilities who were not working and were ages 16 to 64, seventy-nine percent said that they would prefer to be working.

The most obvious reason that people with disabilities need to work is the money. Although the Social Security Disability Insurance and Supplemental Security Income programs guarantee a subsistence income to persons with total, long-term disabilities, only employment gives individuals enough money to par-


17. Law Banning Job Bias Against Disabled Expected to Have a Significant Impact, STAR-TRIBUNE (Minneapolis-St.Paul), July 19, 1992, at 24A (citing data from the Disability Statistics Program, University of San Francisco; reporting poverty rate of 23% of adults with disabilities).

18. Steven A. Holmes, In 4 Years, Disabilities Act Hasn't Improved Jobs Rate, N.Y. TIMES, Oct. 23, 1994, at A22 (describing study by National Organization on Disabilities). Other sources report similar numbers. A sex-specific study found that between 1991 and 1993 the proportion of men with disabilities in the work force dropped from 34% to 30.2%. Daniel Seligman, More Unintended Consequences, FORTUNE, July 10, 1995, at 212 (reporting study conducted by Anthony Gamboa of Vocational Econometrics, Inc.). The employment of women with disabilities also declined, from 25.9% to 23.6%. James Lawless, Disabilities Act Marks Decline in Hiring Rate, THE PLAIN DEALER (Cleveland), May 1, 1995, at 2B (reporting same survey). The declines may or may not be meaningful. The population with disabilities is aging with the rest of the population, perhaps affecting workforce participation, and the economy in the early 1990s was difficult for persons with disabilities and without.


21. The principal sources of income for persons with disabilities who do not work are the Social Security Disability Insurance program, which provides an income based on prior earnings levels (and thus levels of payroll tax contributions) to persons with total disabilities expected to last a year or more. See 42 U.S.C. § 423 (1994). Persons who have not worked in covered employment for a sufficient time before becoming disabled may receive Supplemental Security Income (SSI), a flat amount now set at $484 per month if they meet the same disability and duration standards. See 42 U.S.C. § 1382
ticipate fully in the life of the community. Within the world of work, the monetary advantage lies with jobs from ordinary employers. Employment in the general workforce yields far greater monetary benefits than work in sheltered workshops, even when the additional costs of job-coaching or otherwise supporting the individual are subtracted from the worker’s salary.

Work, however, gives rewards beyond its wages. It brings the individual an identity, a niche in society, and sources of friendship and social support. Work contributes to self-esteem by conferring a sense of mastery over the environment and reaffirming to the worker that he or she is making a contribution to society. One’s sense of self-worth is enhanced by the knowledge that one has succeeded at work and by others’ recognition of that success. Work helps individuals order their lives; those who are chronically unemployed frequently experience attitudinal deterioration even when they have adequate economic resources.


22. The position has been advanced that welfare programs tend to trap individuals in a low-income underclass, and are therefore less desirable than measures that lead to integration into the work force. See David E. Bernstein, Roots of the Underclass: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation, 43 AM. U. L. REV. 85, 119-36 (1993) (discussing the effect of New Deal labor and welfare enactments on African-Americans).


25. SPECIAL TASK FORCE, SEC’Y OF HEALTH, EDUC. & WELFARE, WORK IN AMERICA 4 (1973) [hereinafter WORK IN AMERICA]

26. Id. at 4-5.

27. Id. at 5.

28. Id. at 7-9.
The presence of persons with disabilities in the workplace also benefits society as a whole. First, exposure to human beings who do not in all ways conform to the norm is crucial to dispelling myths about individuals with disabilities. Individuals who are not in the workplace and other places where people carry on business and recreational activities are not part of the consciousness of those who are there. In a real sense, people with disabilities who are not integrated into society are invisible to the rest of society. This invisibility fosters social attitudes of fear and condescension. Integration fosters realistic attitudes, demonstrating that persons with disabilities are not threatening, helpless, or evil. Society at large benefits when false fears die out and truth prevails.

Second, persons who are employed contribute to the social product of the economy and pay tax dollars into the treasury rather than drawing subsistence payments from the government or insurers. Although relief programs provide benefits that are much smaller than incomes from employment, their cost to society as a whole is huge. The cost of maintaining persons who are now thirty-five years old on Supplemental Security Income or Social Security Disability Insurance and associated medical and other benefits for the rest of their lives is slightly more than one trillion dollars. The government spends thirty billion dollars a year on these benefits; roughly the same amount is spent on medical assistance for persons with disabilities. After reciting these figures, an evaluation specialist for the United States De-

30. Id. at 71 (discussing RALPH ELLISON, INVISIBLE MAN (1952)).
31. See id. (discussing integration of children with disabilities into public school); see also Michael B. Laudor, Disability and Community: Modes of Exclusion, Norms of Inclusion, and the Americans with Disabilities Act of 1990, 43 SYRACUSE L. Rev. 929, 943 (1992) ("[T]he more the members of our American community see the disabled included among us, the closer we will get to the truly substantive change the ADA only begins to address."); Mark C. Weber, The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes, 24 U.C. Davis L. Rev. 349, 364 (1990) (discussing aspirations of framers of Education for All Handicapped Children Act); Daniel H. Melvin, Comment, The Desegregation of Children with Disabilities, 44 DePaul L. Rev. 599, 617 (1995) (same). Exposure to persons with disabilities in the workplace may also dispel myths about the reasonability of expecting persons with disabilities to have superhuman abilities to compensate for physical or mental impairments.
32. See Harlan Hahn, Equality and the Environment: The Interpretation of "Reasonable Accommodations" in the Americans with Disabilities Act, 17 J. Rehabilitation Adm. 101, 105 (1993) (describing an end to discrimination as the most cost-effective means of reducing public and private costs of disability).
33. Martin H. Gerry, supra note 11, at 89.
34. Id. at 92 (citing statistics from United States Social Security Administration).
partment of Health and Human Services concluded: "[I]t costs a lot of money to dribble out sub-poverty level benefits to a substantial number of people for a long period of time. Were we a private insurer, we would be . . . trying to reduce the likelihood of our having to spend all that money." Paid employment for individuals with disabilities is the solution.

B. Reasons for Exclusion from Employment

What keeps people with disabilities out of the working economy is a combination of discrimination on the part of employers and difficulties with being fully competitive even when no discrimination takes place.

1. Discrimination. In employment, as in other fields of human endeavor, persons with disabilities have been the object of fear and hostility. In the first half of this century, with the Eugenics movement still strong, hospitals and doctors routinely denied children with severe disabilities necessary medical treatment, leaving them to die. More recently, people with disabilities have been kept from employment, recreation, transportation, and shopping, simply because they were different from others. Potential employers have more negative attitudes about persons with disabilities than about ethnic minorities, elderly job applicants, or ex-convicts. Some employer conduct is based on predictions that consumers harbor prejudice or stereotypes, but employers in fact possess less favorable attitudes about how consumers will react to employees with disabilities than the con-

35. Id.; see also Susan Harrigan, Welcome to Work, NEWSDAY (New York), July 26, 1992, at 68 (reporting estimate by Equal Employment Opportunity Commission that eliminating disability discrimination in employment would generate $386 million annually in decreased government support, productivity gains, and increased tax revenue).

36. A number of sources describe this condition at greater length. See Burgdorf, supra note 12, at 418; Cook, supra note 12, at 399-409; Tucker, supra note 12, at 924-26.

37. See Cook, supra note 12, at 403 n.74 (citing contemporary accounts from around the United States).


sumers themselves do.\textsuperscript{40} Prejudice starts at a young age.\textsuperscript{41} Attitudinal surveys show that children with disabilities are the least-liked and the lowest in social prestige among their classmates.\textsuperscript{42}

It was not until 1973 that the City of Chicago repealed its ordinance prohibiting persons who were “deformed” and “unsightly” from exposing themselves to public view on the streets.\textsuperscript{43} The spirit of the ordinance, however, lives on elsewhere. In the mass products liability trial concerning birth defects said to result from fetal exposure to the anti-nausea drug Bendectin, the judge excluded all plaintiffs with visible deformities from the courtroom, on the ground that their appearance might excite passions against the defendant.\textsuperscript{44} What Jacobus tenBroek termed “the right to live in the world” was thus taken away from human beings who suffered disabling injuries on the grounds that their very disabilities were too horrible to be on display.\textsuperscript{45} The essence of invidious discrimination is being treated worse than others because of a trait that one has no control over and that has no just relation to the entitlement at issue.\textsuperscript{46} Few things could be more unfair than being excluded

\textsuperscript{40} Alexander J. Bolla, Jr., \textit{Distributive Justice and the Physically Disabled: Myth and Reality}, 48 Mo. L. Rev. 983, 989 (1983) (reporting results of study of lawyer recruiters and potential clients about attitudes towards lawyers with disabilities).

\textsuperscript{41} For a parent of young children who watch televised cartoons, one of most striking facts about the “entertainment” is that every villain has a physical or mental disability or both. It is the way contemporary culture has of showing evil visually. In this regard, it is interesting to note that the hopelessly revisionist Disney movie of “The Hunchback of Notre Dame” retains the eponymous physical abnormality of the original character while rendering him suitably cuddly in other ways.

\textsuperscript{42} Paul Sale & Doris M. Carey, \textit{The Sociometric Status of Students with Disabilities in a Full-Inclusion School}, 62 \textit{Exceptional Children} 6, 16-17 (1995) (reporting results of study). Unfortunately, this conclusion applies even when the children have not been identified as eligible for special education services and even when the children are educated in regular education classrooms. \textit{Id.} at 17. Specific strategies are needed to draw children with disabilities and those without disabilities closer together. Carolyn S. Cooper & Mary A. McEvoy, \textit{Group Friendship Activities}, \textit{Teaching Exceptional Children}, Spring 1996, at 67.

\textsuperscript{43} \textit{CHICAGO, ILL, CODE} § 36-34 (1966) (repealed 1973) (cited in McCluskey, \textit{supra} note 14, at 863 n.8). There are numerous examples of private enterprises and government officials refusing to serve individuals because they felt the persons’ disabilities made their appearance upsetting to others. See, e.g., S. REP. No. 101-116, at 7 (1989) (refusal of private zoo to admit children with Down’s syndrome for fear of upsetting the animals; exclusion of children with cerebral palsy from school because the child’s appearance was said to have a “nauseating effect” on other children).

\textsuperscript{44} See In re Bendectin Litig., 857 F.2d 290 (6th Cir. 1988).


\textsuperscript{46} See Owen M. Fiss, \textit{A Theory of Fair Employment Laws}, 33 U. CHI. L. REV. 235,
from the judicial proceeding that could bring closure to a personal disaster on the ground that the disaster left one unfit to be in the presence of justice.\textsuperscript{47}

Not all disability discrimination is intentional. Much is the result of unconscious attitudes or unexamined stereotypes. Unintentional discrimination is pervasive.\textsuperscript{48} Stereotypes and prejudices grow easily in the absence of day-to-day contact with human beings who are different. Research shows that employers who have no employees with disabilities have more negative attitudes towards workers with disabilities than those who have moderate or large numbers.\textsuperscript{49} Many courts\textsuperscript{50} and commentators\textsuperscript{51} have observed that discrimination against persons with disabilities stems as much from ignorance, fear, or a misplaced concern for the persons’ well-being as from intentional discrimination.

Statistics about complaints filed with the Equal Employment Opportunity Commission support the inference that stereotypes now keep many individuals with disabilities out of the workplace. The vast bulk of complaints are filed by those who already are, or recently were, employed.\textsuperscript{52} The two forms of disability discrimination that lead the statistics are those related to back problems and mental health problems.\textsuperscript{53} Both forms of dis-

\textsuperscript{47} The plaintiffs were relegated to a separate room in the courthouse in which they could watch proceedings over closed-circuit television. In re Bendectin Litig., 857 F.2d at 296. A case affirming that parties should never be excluded from the trial because of physical abnormalities related to the litigation is Helminski v. Ayerst Laboratories, 766 F.2d 208, 217 (6th Cir. 1985).

\textsuperscript{48} Sara D. Watson, Applying Theory to Practice: A Prospective and Prescriptive Analysis of the Implementation of the Americans with Disabilities Act, 5 J. DISABILITY POL’Y STUD. 1, 7 (1994) (collecting and evaluating attitudinal studies).

\textsuperscript{49} Sharon E. Walters & Clara Mae Baker, Title I of the Americans with Disabilities Act: Employer and Recruiter Attitudes Toward Individuals with Disabilities, 20 J. REHABILITATION ADMIN. 15, 20 (1996) (contrasting score on test instrument of employer representatives with varying degrees of contact with employees with disabilities).

\textsuperscript{50} See, e.g., School Board v. Arline, 480 U.S. 273, 284 (1987) (referring to “society’s accumulated myths and fears about disability”); Alexander v. Choate, 469 U.S. 287, 295 (1985) (“Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference . . . .”); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981).

\textsuperscript{51} See, e.g., Rebell, supra note 14, at 1437, 1449; Garvey, supra note 12, at 582.

\textsuperscript{52} The majority of cases are discharge claims—35,350 claims since 1992, or 51.6%.

\textsuperscript{53} Back impairments are the most cited for the 1992-96 period, with 12,520 cases,
ability are ones that are frequently not visible when the employee is hired. More obvious forms of disability, such as mobility impairments, are far behind, an indication that the individuals never made it through the employer's door. This subtle discrimination will be difficult to overcome.

2. Limits on Economic Competitiveness. A disability means a limit on major life activity. Not all disabilities prevent persons from achieving full economic productivity, but most do. Bertrand Russell once observed that all human work consists of altering the position of matter relative to other matter, or directing other people to do so. Limits on the ability to move, to carry, to push, to pull, all make an individual less competitive than an individual who does not have those limits, as do any limits on mental or communicative powers that prevent an individual from being as effective as others in directing production processes. Although technological advances will provide more employment opportunities for persons with disabilities whose intelligence and education place them above or on a par with other persons, they will exacerbate the difficulties of those persons with limits on mental and some sensory capacities.

These facts bear out the proposition that disability is largely socially determined. In a society in which few could read and reading was unimportant to most economic activity, persons with dyslexia were not disabled. In some future society in which machines do all the physical labor, those with physical impairments will not have a disability. But in society as it is now constituted, either mental or physical disability makes a potential job candidate less desirable than a candidate who does

or 18.4% of the total. Emotional and psychiatric impairments are next, with 8536, or 12.6%. Neurological impairments are involved in 11.3% of cases, amounting to 7,712 instances. Equal Employment Opportunity Comm'n, Cumulative ADA Charge Data, July 26, 1992-June 30, 1996 (July 13, 1996) (on file with author).


56. The entire quotation is: "Work is of two kinds: first, altering the position of matter at or near the earth's surface relative to such other matter; second, telling other people to do so. The first is unpleasant and ill paid; the second pleasant and highly paid." Bertrand Russell, quoted in Matthew Parris, Call That Work? There Should Be a Law Against It, Political Sketch, The Times (London), Feb. 18, available in 1993 WL 10557188.

not have the disability, when all other characteristics of the applicants are the same.

II. THE INADEQUACY OF PRESENT EFFORTS TO COMBAT ECONOMIC EXCLUSION OF PERSONS WITH DISABILITIES

Neither existing antidiscrimination laws nor existing educational and training efforts have succeeded in bringing persons with disabilities into the economic mainstream. An examination of these measures shows that there is little reason to expect that they will be fully successful in that regard.

A. The Marginal Role of Antidiscrimination Measures

Commentators have praised the Americans with Disabilities Act for its bans on intentional discrimination, screening, segregation, and failure to provide reasonable accommodation. These praises, however, are merited only if the Americans with Disabilities Act is fully enforced as written. There remains the possibility that the Act will not be fully enforced. The Act requires employers to conduct themselves to the detriment of their economic self-interest. Unlike Title VII of the Civil Rights Act of 1964, which requires merely that employers behave rationally by hiring the candidate who can do the job most effectively and cheaply irrespective of race, religion, national origin or sex, the Americans with Disabilities Act requires employers to lay out greater costs for the group of workers it protects than for the individuals who are competing with them. The costs generally

58. Debate exists on this proposition, with some commentators claiming that the law against race and sex discrimination requires employers who would not otherwise do so to behave in their own best interest, against their irrational prejudices. See, e.g., John J. Donohue, Is Title VII Efficient?, 134 U. Pa. L. Rev. 1411 (1986) (noting temporal dynamics of the legislation). Others claim that employers who discriminate will eventually go out of business anyway, because of the economic irrationality of refusing to hire the best person irrespective of irrational considerations. See, e.g., Kenneth Arrow, The Theory of Discrimination, in DISCRIMINATION IN LABOR MARKETS 3, 10 (Orley Ashenfelter & Albert Rees eds., 1973). Some also argue that fear of unfounded charges of discrimination encourages irrational hiring decisions by employers who would otherwise hire the best candidate irrespective of race and sex. See, e.g., Richard Epstein, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 78 (1992). Still others note that a rational, unprejudiced employer might still have an incentive to discriminate because of irrational preferences on the part of consumers and co-workers, and that the law may have an effect by keeping employers from pandering to prejudices of others. See, e.g., Richard A. Posner, An Economic Analysis of Sex Discrimination Laws, 56 U. Chi. L. Rev. 1311, 1319 (1989).

59. Edward J. McGraw, Note, Compliance Costs of the Americans with Disabilities Act, 18 DEL. J. CORP. L. 521, 536 (1993) ("If the only difference between two applicants
are modest, but they do exist.

To change the calculus of employers' self-interest, managers will need to be convinced that the risks of liability outweigh the economic costs of compliance with the law. It is unclear whether and when awards of damages will create this shift. Some authorities have expressed pessimism about voluntary compliance with the Act, citing empirical evidence that neither employers nor persons with disabilities know about the legal standards, that some subgroups of persons with disabilities tend to be passive regarding legal rights matters, and that attitudinal change among employers takes time. Others have stressed that employers view the law favorably and are complying voluntarily, but these sources tend to draw from limited samples. Broader samplings reveal widespread ignorance of the law and the absence of expectations by employers that they will hire more employees with disabilities as a result of the Act. Statistical evidence on the success of the law to date re-

60. Peter D. Blanck, Communicating the Americans with Disabilities Act, Transcending Compliance: A Case Report on Sears, Roebuck & Co. 12 (1994) (reporting that of 456 accommodations for persons with disabilities at Sears, 69% had no cost and 28% cost less than $1000).

61. There are, however, some countervailing savings. For example, returning current workers to the job after disabling on-the-job injuries may drastically reduce workers' compensation costs. James G. Frierson, The Legality of Medical Exams and Health Histories of Current Employees Under the Americans with Disabilities Act, 17 J. Rehabilitation Admin. 83, 86 (1993) (describing $310,000 annual savings for one company and $4 million savings for another from programs of rapidly returning previously injured workers to the job with necessary accommodations). More importantly, the goal of the Americans with Disabilities Act is fair treatment, not a narrow cost-benefit analysis or efficiency as that term is applied in neoclassical economics. See Crespi, supra note 12, at 24-35.


63. Solomon, supra note 54, at 110-13 (reporting empirical study).

64. Paul Leung, Minorities with Disabilities and the Americans With Disabilities Act: A Promise Yet to Be Fulfilled, 17 J. Rehabilitation Admin. 92, 95-96 (1993)


66. See Blanck, supra note 60, at 6-7 (summary account of success in accommodating employees with disabilities at Sears, Roebuck).

mains equivocal.68

Stereotyping is particularly hard to overcome. Attitudes about disability and employment are notoriously difficult to change.69 Although law influences attitudes, the influence may take significant time to manifest itself in social conduct.70 If prejudices keep individuals with disabilities away from those without them, the very stereotypes that led to the exclusion are unlikely to be challenged.

Even if the Act is fully enforced, the beneficiaries will not be all persons with disabilities. They will be those persons whose work is superior to that of other job candidates once the reasonable accommodations have been put into place, or those who overcompensate for their disabilities or who do not really have disabilities but are merely perceived as disabled or stereotyped as disabled. The fact, however, is that a disability is a disability. It limits one's ability to do something important. Limits on workplace productivity are an inherent part of many disabling conditions.

For this reason, although the Americans with Disabilities Act can be expected to promote the employment and general integration of persons with disabilities, expectations should not be

68. See sources cited supra note 18. But see Great Lakes Disability and Business Technical Assistance Center, Employment Rate of People with Disabilities Increases Since Enactment of ADA, REGION V NEWS, Summer, 1996, at 1 (reporting studies by Census Bureau that show increases in employment of persons with severe disabilities from 1991 to 1994). A serious difficulty with resolving the questions about the effectiveness of the Americans with Disabilities Act is that surveys are often poorly designed, so that a person who is working is unlikely to designate himself or herself as a person with a disability. See Corinne Kirchner, Looking Under the Street Lamp: Inappropriate Uses of Measures Just Because They Are There, 7 J. DISABILITY POL'Y STUD. 77 (1996) (criticizing various studies of employment of people with disabilities).

69. See Casper, supra note 65, at 132 (describing continuing attitudinal barriers to hiring of persons with disabilities despite two years since passage of Americans with Disabilities Act); Bolla, supra note 40, at 990 (reporting government study concluding that aggressive action to enforce disability discrimination law may promote negative attitudes towards persons with disabilities); see also Watson, supra note 48, at 7 (“Ending discrimination against people with disabilities means proscribing deeply rooted and long-held fears about people with disabilities.”).

too high. The effect of the Act is marginal, in a rather literal sense of the term. Employers are still able to hire any employee without a disability who can do the essential functions of a job marginally better than a person with a disability can, as long as that person has received reasonable accommodations. If the law is followed, 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. Although the employer is not permitted to count the cost of the accommodation in considering the marginal superiority or inferiority of the job candidate with a disability, that candidate will still need to be superior to get the job.

B. Limits on the Potential of Education and Rehabilitation

Reformers once had hopes that education for persons with disabilities would pull them into the mainstream of American society, both by providing them the skills to succeed in the workplace and by exposing persons without disabilities to the reality that persons with disabilities are human beings who deserve full integration. In the nearly twenty years of legally mandated education for all children with disabilities, however,

71. Richard V. Burkhauser & Mary C. Daly, The Economic Consequences of Disability: A Comparison of German and American People with Disabilities, 5 J. DISABILITY POL’Y STUD. 25, (1994) (stating that longitudinal studies show that elimination of discrimination alone will not eliminate the income gap between those without and with disabilities); see also Steven A. Holmes, In Four Years, Disabilities Act Hasn’t Improved Jobs Rate, N.Y. TIMES, Oct. 23, 1994, at A18 (reporting continuing low employment rate of persons with disabilities).


73. S. REP. NO. 94-168, at 9 (1975) ("With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens."); Darvin L. Miller & Marilee A. Miller, The Handicapped Child’s Civil Right as it Relates to the “Least Restrictive Environment” and Appropriate Mainstreaming, 54 IND. L.J. 1, 12 (1979).


75. In 1975, Congress passed the Education for All Handicapped Children Act, guaranteeing children with disabilities in all participating states a free, appropriate public
reformers' expectations have diminished.

The Supreme Court was the first to prick the balloon. In Board of Education v. Rowley, the Court's first decision under the Education for All Handicapped Children Act of 1975, the Court read the Act's requirement that children with disabilities be afforded an "appropriate" education as guaranteeing nothing more than meaningful "access" to education. Educational programs would be approved if they conferred "some benefit"; they need not afford the child with a disability an opportunity to achieve as much of his or her potential as the child without disabilities would be permitted to achieve.

Although subsequent judicial decisions bolstered reformers' hopes, the reality of daily decision making under the special education laws should keep anyone from setting those hopes too high. School authorities tend to place a child into a disability category and adjust the expectations for the child's achievement accordingly, even though the federal law calls for an individual-

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76. 458 U.S. 176 (1982).
77. Id. at 189-90.
ized education for children with disabilities. Parents, for their part, are reluctant to confront school authorities and demand what their children need, or they are ground down by the system if they make the attempt.

Empirical evidence confirms this discouraging impression. Clearly, the educational state of children with disabilities is dramatically better than it was before the Education for All Handicapped Children Act. Equally clearly, students with disabilities have not made the educational gains that would enable large numbers to compete on an even plane for scarce employment opportunities. Students with disabilities have lower grades than those without disabilities; more than two-thirds of those who complete four years of high school fail one or more courses. A disproportionate share of students with disabilities drop out of high school; many of these students stay four or more years but fail to obtain enough credits to graduate. The proportion of individuals with disabilities who attend college is less than one-third of that of individuals who do not have disabilities. Limits on educational opportunity tend to apply to all disabilities, not just to mental retardation or other disabilities that might be expected to impose limits on success in school. Indeed, some stu-

60. William H. Clune & Mark H. Van Pelt, A Political Method of Evaluating the Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis, 48 LAW & CONTEMP. PROBS., 15, 53 (Winter 1985) (arguing that individual treatment does not occur and that it is too expensive and not appealing to bureaucratic decision makers, but arguing for additional monitoring to further it); see also Edna Mora Szynanski & Henry T. Trueba, Castification of People with Disabilities: Potential Disempowering Aspects of Classification in Disability Services, J. REHABILITATION, July, 1994, at 12, 16 (analyzing authorities on elementary and secondary special education and discussing college disability services).


62. This point cannot be overstated. Measured against the fundamental goal of getting basic educational services to children with disabilities, the Individuals with Disabilities Education Act has been an unqualified success. See Alan Gartner & Dorothy Kerner Lipsky, Beyond Special Education: Toward a Quality System for All Students, 57 HARV. EDUC. REV. 367, 371 (1987) (collecting statistical studies indicating that 650,000 more children with disabilities received educational services in 1985-86 than in 1974-75, before the law was enacted). The point is simply that the law should not be expected to eliminate the need for far more aggressive measures to integrate persons with disabilities into the working economy.


64. Id. at 2-9.

65. Id. at 3-18.

66. Engel, supra note 81, at 185 (citing study and interviews concerning children with mobility impairments); Theresa Glennon, Disabling Ambiguities: Confronting Barri-
students without disabilities have been harmed by being misclassified as children with disabilities and shunted into low-expectations programs in which they are segregated from other children. 87

Compounding this difficulty is the failure of employment services for adults with disabilities to reach those with the greatest need for them. The problem, frequently described as "creaming," is that rehabilitation services agencies, looking for quick success, tend to give services to those persons with disabilities who have the least severe problems, and hence are most likely to be able to move into competitive employment with the lowest expenditure of resources. 88 Although the solution that Congress has adopted—giving statutory priority to persons with severe disabilities—has promise, 89 the breadth of the definition of severe disability creates enough discretionary decision making that the legislative end may be frustrated. 90

The candidate with a disability must be superior to other candidates (once reasonable accommodations are provided) in order to get the job. But the road to superiority is difficult, with limited opportunities for training and education. Then the candidate must overcome subtle forms of discrimination as well as the underlying disability itself. Small wonder that so many persons with disabilities lack employment.


90. See 34 C.F.R. § 361.5 (1996) (defining severe impairments as serious limits to one or more functional capacities in terms of employability, whose vocational rehabilitation will take multiple services over an extended time, and who has one or more of 26 specified conditions or their equivalent). Evidence suggests that half of the states have not followed the modest requirements in the federal law to establish priorities for services, and that funding allows only seven percent of the persons potentially eligible for rehabilitation services to receive them. David S. Salkever, Access to Vocational Rehabilitation Services for Persons with Severe Disabilities, 5 J. DISABILITY POL'Y STUD. (citing General Accounting Office data).
III. THE ROLE OF AFFIRMATIVE ACTION IN COMBATING UNCONSCIOUS DISCRIMINATION AND STEREOTYPING

The exclusion from the workplace of persons with disabilities, and its likely intractability in the face of existing antidiscrimination measures, suggest that more aggressive efforts are needed. To succeed, the efforts will need to be directed against both of the problems that lead to economic exclusion: discrimination—especially unconscious discrimination—and the limits on competitiveness imposed by the disability itself. Only by addressing these problems will the United States move from a narrow policy likely to be effective only against certain kinds of discrimination to a true national employment policy for persons with disabilities. The first step, that of dealing with unconscious discrimination, entails the clarification and strengthening of affirmative action in employment for persons with disabilities.

A. The Analogy from Affirmative Action to Remedy Race Discrimination to Affirmative Action for Persons with Disabilities

Affirmative action is most familiar as a remedy for employment discrimination on grounds of race or sex. Some efforts placed under the rubric of affirmative action are modest and noncontroversial, such as expanding the pool of applicants for hiring and promotion by outreach efforts and reviewing ordinary employment qualifications to determine whether they are actually necessary for the performance of the job. In recent years, these efforts have frequently been reclassified as simple avoidance of disparate impact discrimination rather than affirmative action. The more controversial aspects of affirmative action are making radical changes in job qualification standards as well as setting numerical hiring or promotion goals for underrepresented groups and taking whatever steps are needed to


92. The relationship between the two ideas is close. Reducing artificial barriers to employment is in some respects an affirmative process and so has frequently been characterized as affirmative action. Moreover, more aggressive affirmative action, like the imposition of numerical goals, is a broad but effective tool to prevent the discriminatory impact of employment practices, such as a subjective evaluation of candidates, that may otherwise seem unobjectionable. See generally Alfred W. Blumrosen, Society in Transition IV: Affirmation of Affirmative Action Under the Civil Rights Act of 1991, 45 RUTGERS L. REV. 903, 908-09 & n.26 (1993) (describing the relation between the concepts and compiling authorities).
find qualified members of the groups to meet those goals.\textsuperscript{93}

Advocates of affirmative action advance two justifications for intrusive measures such as numerical targets. The first is that the employer or its industry has discriminated against the underrepresented group in the past. Since the particular victims are unlikely to be found or are no longer in a position to benefit from the relief, jobs for members of the same underrepresented group are the next best form of relief.\textsuperscript{94} An affirmative action plan, though frequently voluntary,\textsuperscript{95} carries a justification similar to that of the relief that courts provide when evidence at trial shows pervasive, long-term discrimination that has yielded dramatic underrepresentation of racial minorities or women.\textsuperscript{96}

The second justification for applying numerical systems is as a means of combating present-day unconscious, undetectable, or otherwise intractable discrimination.\textsuperscript{97} The affirmative action plan is designed to produce a workplace that is as it would be in the absence of discrimination.\textsuperscript{98} If there would be no reason to expect women or racial minorities to shun the employer or particular job classifications, or to fail to obtain the qualifications for the job, then the numbers in the job should be comparable to those in the relevant labor market.\textsuperscript{99} Numerical hiring targets force the employer to produce that result.

\begin{footnotes}
\item[93] See, e.g., Terry Eastland, \textit{The Case Against Affirmative Action}, 34 WM. \& MARY L. REV. 33, 36-38 (1992) (objecting to affirmative action measures on the ground that they treat the races unequally, dividing society and detracting from merit-based rewards).
\item[94] See \textsc{Michael Rosenfeld}, \textit{Affirmative Action and Justice} 289-304 (1991) (discussing jurisprudential considerations with regard to remedial justifications for affirmative action measures).
\item[96] See, e.g., United States v. Paradise, 480 U.S. 149 (1987) (upholding remedial order with quotas for promotions as a remedy for pervasive discrimination); Local 28 Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (upholding court-ordered numerical goals imposed as a remedy for past discrimination when beneficiaries were not necessarily discriminated against).
\item[97] See, e.g., \textsc{Mary C. Daly}, \textit{Some Runs, Some Hits, Some Errors—Keeping Score in the Affirmative Action Ballpark} from Weber to Johnson, 30 B.C. L. REV. 1, 44 (1988) (discussing justifications for affirmative action based on societal discrimination).
\item[98] As has frequently been noted, the overriding goal of legal remedies is to put individuals in their positions they would occupy in the absence of wrongdoing. \textsc{Douglas Laycock}, \textit{Modern American Remedies} 14 (1985) (applying principle to compensatory damages).
\item[99] See \textsc{Alex M. Johnson, Jr.}, \textit{Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties}, 132 U. ILL. L. REV. 1043, 1050-54 (1993) (discussing argument with respect to college and professional school admissions).
\end{footnotes}
Both justifications for affirmative action apply to persons with disabilities. First, the legacy of discrimination against persons with disabilities is long and virulent; the discrimination has been illegal, depending on the employer, for as long as twenty-three years. Particular employers may or may not have paper records of excluding persons with disabilities. Exclusion is so pervasive, however, that records should not be expected to exist. Everyone knew that people who had physical or mental disabilities were not welcome, so none applied. One is reminded of the schoolmaster's explanation to Stephen Dedalus in *Ulysses* that the best means to avoid the scourge of anti-Semitism is to keep Jews from entering the country.

Second, unconscious and hidden discrimination against persons with disabilities is widespread. The attitudes that persons with disabilities are repugnant or evil are not overcome in a day. The widespread use of subjective decision making in hiring and promotion gives free rein to subtle and not-so-subtle prejudices against persons with disabilities.

Disability is different from race, of course, in that for many disabling conditions the disability is not a characteristic that is part of one's genetic code or one handed down from parent to child; nor is disability linked to the "peculiar institution" of chattel slavery. The need for affirmative efforts, however, still applies. In the first place, it is a remedy provided to the closest available group of persons for the wrongs suffered by others who are similar in a relevant respect. It is thus comparable to af-

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102. See supra text accompanying notes 48-51.

103. See supra text accompanying notes 36-47.

affirmative action in race contexts\textsuperscript{105} as well as to cy pres remedies in trust adjudication\textsuperscript{106} and their modern analogues in class actions when the actual persons who were harmed cannot be found.\textsuperscript{107}

Second, by guaranteeing that workers with disabilities are on the job, it alleviates the legacy of discrimination. The long period in which persons with disabilities have been excluded from the workplace affects the attitudes of personnel managers, supervisors, and co-workers, making it more difficult for a person with disabilities to make it inside the employer's doors, and, if there, to stay. When someone who has long been invisible suddenly materializes, others can be expected to act as though they have seen a ghost. Placing people with disabilities at the workplace breaks the pattern of exclusion.

Affirmative action on the basis of race has been the subject of immense controversy.\textsuperscript{108} Many find the use of racial classifications distasteful, and fear that continued classification of Americans on the ground of race will have lasting negative effects.\textsuperscript{109} They emphasize that racial classifications are properly suspect, because race rarely correlates to any characteristic that anyone

\textsuperscript{105} DOUGLAS LAYCOCK, supra note 98, at 793 (drawing comparison of remedies awarded to fluid class composed of next closest group of victims who could be identified with judicially ordered affirmative action).

\textsuperscript{106} See generally EDITH L. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 1 (1950) ("[Cy pres] is a saving device applied to charitable trusts so that when the precise intention of the settlor cannot be carried out his intention can be carried out as near as possible.").

\textsuperscript{107} See Daar v. Yellow Cab Co., 433 P.2d 732 (Cal. 1967) (consumer class action in which remedy was provided to closest identifiable group); see also Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1306 (9th Cir. 1990) (involving comparison to cy pres in the distribution of damages to a class).

\textsuperscript{108} Recent decisions on affirmative action in federal contracting, such as Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), and on the drawing of election districts, such as Bush v. Vera, 116 S. Ct. 1941 (1996), and Shaw v. Hunt, 116 S. Ct. 1894 (1996), have spawned intense debate by their suggestion that all uses of race by government be subject to strict scrutiny because of the perceived harmful effects of racial classifications. Cases barring the use of race in certain decisions concerning higher education have added to the controversy. See Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2580, 2581 (1996); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), amended on denial of reh'g, 46 F.3d 5 (4th Cir. 1994). California in 1996 adopted by initiative a constitutional provision barring the state from granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity or national origin. California Civil Rights Initiative, CAL CONST. art. 1, § 31(a). Although a district court entered a preliminary injunction against the provision's enforcement in Coalition for Economic Equality v. Wilson, the injunction was later vacated by the Ninth Circuit. Coalition for Economic Equality v. Wilson, 946 F. Supp. 1480 (N.D. Cal. 1996), rev'd 122 F.3d 692 (9th Cir. 1997), cert. denied, 118 S. Ct. 397 (1997).

\textsuperscript{109} See Adarand Constructors, Inc., 515 U.S. 200.
has any business considering in employment decisions or governmental choices.\textsuperscript{110} Supporters of affirmative action counter that there is no other effective mechanism to eliminate the effects of prior overt discrimination and current hidden discrimination.\textsuperscript{111} They argue that use of racial classifications in order to end racial subordination is not the same as using the classifications to perpetuate it.\textsuperscript{112}

Whatever one's position on this controversy might be, none of the arguments against affirmative action on the basis of race apply to affirmative action on the basis of disability. Ability classifications are unavoidable in the world of work, and do correlate to relevant job classifications. Disability classifications do not always carry stigma or set off alarms concerning invidious treatment: although government conduct has harmed those with disabilities in many instances, government has also established a long tradition of benign social welfare programs for those with disabilities.\textsuperscript{113} Finally, it is impossible to deny that for disability, if for no other characteristic, perfectly equal treatment can constitute discrimination.\textsuperscript{114} For example, a rule that all persons, whether blind or not, must take a written admissions test for law school is discriminatory. In the example, some unequal treatment for blind persons—use of braille or oral tests or another form of adaptation—is plainly required in order to avoid invidious discrimination. Once the need for different treatment is recognized, affirmative action for persons with disabilities emerges as one of many forms of different treatment that might be needed to achieve equality. By contrast, many critics of affirmative action on the basis of race declare that they would countenance no form of different treatment for different races, ever.\textsuperscript{115}


\textsuperscript{111} See Johnson, supra note 99, at 1043, 1054.


\textsuperscript{113} See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 444 (1986) (relying on history of benign governmental programs with developmental disability classifications to reject application of elevated scrutiny to them for Fourteenth Amendment equal protection analysis).


\textsuperscript{115} See Eastland, supra note 93, at 36-37.
As a statutory and constitutional matter, affirmative action on behalf of persons with disabilities is a much simpler question than affirmative action on behalf of racial minorities. Title VII of the Civil Rights Act of 1964 bars discrimination on account of race and sex irrespective of the race or sex of the person being discriminated against. Thus whites and males whose job opportunities have been diminished by affirmative action programs have been able to sue their employers under the statute.\(^{116}\) Similarly, the Constitution affords heightened scrutiny when anyone—of whatever race—is disadvantaged because of his or her color.\(^{117}\) By contrast, the Americans with Disabilities Act prohibits discrimination against qualified individuals with disabilities, conferring no enforceable obligations on employers or other covered entities to avoid discrimination against persons who do not have disabilities. Under constitutional principles, absence of disability is not a suspect classification,\(^{118}\) and no elevated scrutiny applies when a disadvantage is attached to that status.\(^{119}\)

**B. Distinguishing Affirmative Action from Reasonable Accommodation**

Affirmative action differs from reasonable accommodation in both degree and character. As for degree, the employer engaged in affirmative action must take extraordinary measures to eliminate barriers to employability, and must be willing to give significant accommodations that impose some degree of hardship.


\(^{117}\) Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that heightened constitutional scrutiny must be applied to federal program embodying presumptive preferences for racial minorities); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying heightened scrutiny to local government program with preferences for racial minorities).

\(^{118}\) See Jefferson v. Hackney, 406 U.S. 535 (1972) (upholding welfare statute that allowed payment of a higher percentage of need for persons with disabilities than for dependent-child families).

\(^{119}\) Similarly, the Court has not imposed elevated constitutional scrutiny on government decisions that confer disadvantage on persons with disabilities, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), although the Cleburne decision, which invalidated the denial of permission to operate a group home for persons with mental retardation, might be described as an instance of minimal scrutiny “with bite.” See Gerald Gunther, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972) (discussing cases in which the Court has applied rational-basis equal protection review in a rigorous manner to invalidate statutes). In Cleburne, the Court expressed concern that if legislation that classifies on the basis of mental retardation is subjected to intermediate or other elevated scrutiny, legislatures might not act at all, foregoing legislation that would benefit the class. *Cleburne*, 473 U.S. at 444.
on ordinary operations.\textsuperscript{120} By contrast, an employer providing reasonable accommodation for otherwise qualified persons with disabilities must modify rules, practices, and physical environments only up to the point where it begins to suffer from undue hardship.\textsuperscript{121}

The character of affirmative action also differs from that of reasonable accommodation. Reasonable accommodation makes the person without the disability the norm. The employer makes modest departures from the rules or the environment to accommodate the person who is considered different. This able-bodied orientation has two effects: identification of the person with a disability as different, and a corresponding limit on the steps that the employer must take to depart from the standard of nondisability.

The first effect is the "dilemma of difference" described by Professor Martha Minow,\textsuperscript{122} but it appears here in a particularly insoluble form: all efforts to benefit the person with a disability inevitably identify that person as different from everyone else. The effort to make the person equal contributes to the perception that the person is not. The second effect, the limit on reasonable accommodation, inheres in the term "reasonable" as well as in the idea that the necessary steps are merely an "accommodation" from the nondisabled norm. Reasonable accommodation does not require a reorienting of the world around the person with a disability or an attempt to make the environment confer an equal benefit on all persons.\textsuperscript{123} It stops at the point of that

\textsuperscript{120} See infra notes 130-41 and accompanying text.

\textsuperscript{121} The obligation imposed on covered employers by the Americans with Disabilities Act and section 504 of the Rehabilitation Act is to provide reasonable accommodation for the known disabilities of employees, up to the point where providing the accommodation produces undue hardship. See 42 U.S.C. § 12111(9) (1994) (Americans with Disabilities Act); 28 C.F.R. § 42.511 (1996) (Rehabilitation Act regulations). The standard is a flexible one depending on the needs of the employee and the capacities of the employer, though some accommodations are specified. See 42 U.S.C. § 12112(b)(5) (1994); 28 C.F.R. § 42.511(c) (1996). Significant commentary exists on the scope of the obligation. See, e.g., Crespi, supra note 12; Haggard, supra note 12; Mayerson, supra note 12; Wei-rich, supra note 12. For a history of the adoption of the Rehabilitation Act regulations that first embodied the reasonable accommodation obligation, see Timothy M. Cook, The Scope of the Right to Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws, 20 LOY. LA. L. REV. 1471, 1481-1503 (1987).

\textsuperscript{122} Martha Minow, Making ALL THE DIFFERENCE 19-48 (1990). Professor Minow's book describes the problem and suggests means to alleviate it while addressing the needs of individuals and groups that are socially characterized as different. See also McCluskey, supra note 14, at 871-72 (stating that accommodation standards use people without disabilities as the norm, placing a deviant status on persons with disabilities).

\textsuperscript{123} Compare Hahn, supra note 32, at 103 with Mark C. Weber, Comment on Hahn, Equality and the Environment: the Interpretation of "Reasonable Accommodations" in the
which can be done without undue financial hardship or basic changes in the operation of the enterprise.

Affirmative action, though still marking persons with disabilities as different, pushes past the limits of "reasonable" accommodation. The employer must do more than bend rules. Moreover, to the extent that the affirmative action efforts simply increase numbers of persons with disabilities at the job site, the viewpoint of supervisors and coworkers has to shift to one in which persons with disabilities are part of the working world. Necessity may cause further invention in job routines to allow workers with disabilities to succeed. Social perspectives may shift with the shift in the means of production.

Although mandatory accommodation that far exceeds reasonable standards or imposes an undue hardship might have some of the same effects as setasides or other measures traditionally associated with affirmative action, reasonable accommodation has both a different justification and a different effect than traditional affirmative action programs. Reasonable accommodations equalize the position of the person with the disability and the competitors for employment or other benefits. Unlike affirmative action, the reasonable accommodations are not necessarily remedial and do not specifically address the problem of unconscious discrimination.

The operation of the regime is also different. As noted, under a system of accommodations, the person with a disability must still demonstrate superiority under conventional measures (with the accommodation, of course) in order to get the job. Under a setaside designed to remedy prior discrimination or present unconscious discrimination, that is not necessarily the case. In order to meet a numerical goal, an employer can be required to take an individual who can do the job even if he or she is not the candidate it would otherwise choose.

Affirmative action obligations are not limitless. If affirmative action is conceived as a remedy for past or present discrimi-
nation, the nature of the violation should determine the scope of the remedy. For affirmative action programs involving job targets, the targets themselves act as a proxy for what the hiring rate would be under ideal conditions. It may be difficult to determine what the hiring rates for persons with disabilities would be in the absence of discrimination, but statistics about qualified individuals with disabilities in the local economy could form the starting point, just as they do in plans to remedy race and sex discrimination.

For efforts that do not entail numerical targets, other outside limits might apply. For example, in suits brought under the affirmative action provisions currently applicable to federal agencies, the court in granting relief is to take into account the cost and the availability of alternatives. Although the relief may exceed what would be required under the duty of reasonable accommodation, it would remain less than what would work severe economic harm on the employer.

C. Existing Affirmative Action Efforts for Persons with Disabilities

The provisions of federal legislation requiring affirmative action on behalf of persons with disabilities apply to employment in federal agencies and federal contractors. Sections 501 (federal agencies) and 503 (federal contractors) were part of the original nondiscrimination title of the Rehabilitation Act of 1973, which also includes section 504, a general prohibition of disability discrimination on the part of federal grantees. The original regulations promulgated under section 504 by what was then the United States Department of Health, Education and Welfare imposed an obligation on the grantees to afford reasonable accommodation in employment, while at the same time barring disparate treatment, unnecessary practices with a dispa-

125. See Swann v. Charlotte-Mecklenburg, 402 U.S. 1, 16 (1971) ("The nature of the violation determines the scope of the remedy.").

126. One commentator has argued that quota-type arrangements are undesirable, because there is no baseline measure of what participation persons with disabilities would have in the economy in the absence of discrimination. Michael A. Rebell, Structural Discrimination and the Rights of the Disabled, 74 Geo. L.J. 1435, 1456 (1986); see also Note, Evasiveness, supra note 14, at 1006-08 (emphasizing difficulty with determining what equal treatment entails with respect to hiring for persons with disabilities).

127. See Baker, supra note 9, at 822-26 (describing practical steps to determine goals based on characteristics of labor market and nature of jobs).

rate impact, and segregation.\textsuperscript{129}

Congress intended sections 501 and 503 to confer duties greater than section 504's reasonable accommodation duty on federal agencies and federal contractors. One important piece of evidence for this proposition is the passage of all of the sections at the same time. When Congress wanted to create a simple prohibition on discrimination, it knew how to do so: no individual "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . ."\textsuperscript{130} Congress used much different language in creating the affirmative action obligations of federal agencies:

Each department, agency, and instrumentality . . . in the executive branch shall . . . submit . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities . . . . Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met . . . . [S]uch plan [must] provide[] sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities . . . .\textsuperscript{131}

Congress did not even include federal agencies in the nondiscrimination provision of section 504 until 1978.\textsuperscript{132} But when the Congress did place federal instrumentalities under section 504 at that time, it left the affirmative action provision intact, even though the Department of Health, Education, and Welfare had adopted regulations explicitly prescribing reasonable accommodation duties as part of the nondiscrimination obligation for entities covered by section 504.\textsuperscript{133}

A basic principle of statutory construction is that every provision of a statute is to given some meaning; readings finding

\textsuperscript{129} 41 Fed. Reg. 29,548 (1976) (codified at 45 C.F.R. pt. 84 (1978)). For the tortuous history of these regulations, see Cook, supra note 121, at 1481-1503.

\textsuperscript{130} 29 U.S.C. § 794(a) (1994). The quoted language is from the current version of the statute, which is slightly different from that originally passed in 1973.

\textsuperscript{131} 29 U.S.C. § 791(b) (1994). Again, the present language of the provision is quoted. The language of section 503, dealing with government contractors is similar: "Any contract in excess of $10,000 entered into by any Federal department or agency . . . 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 . . . ." 29 U.S.C. § 793(a) (1994).

\textsuperscript{132} Pub. L. 95-602, title I, §§ 119, 122(d)(2), 92 Stat. 2982, 2987, Nov. 6, 1978. Some federal courts had questioned the existence of enforceable federal agency nondiscrimination obligations, spurring Congress to act. Tate, supra note 9, at 786 n. 21.

surplusage are to be avoided. To give the affirmative action provision meaning, it has to carry obligations different from the reasonable accommodation obligations of section 504. Significantly, it was in the same 1978 enactment that Congress explicitly provided that the affirmative action provision applicable to federal agencies would be enforceable in court under the same procedures as those used for Title VII of the Civil Rights Act of 1964. Thus at the same time Congress recognized the different, higher, obligations imposed on federal agencies and contractors, it made the higher obligations directly enforceable against the agencies.

A second persuasive piece of evidence is that when Congress passed the Americans with Disabilities Act, extending the reasonable accommodation duties imposed on federal grantees in the Rehabilitation Act to those parts of the United States economy not already covered, it again left the affirmative action language of sections 501 and 503 undisturbed. The Americans with Disabilities Act takes the language of the section 504 regulations and codifies the obligations against overt discrimination, disparate impact discrimination, segregation, and failure to provide reasonable accommodation found there. It does not, however, borrow the affirmative action language from sections 501 and 503, preserving a distinction between the more limited obligations of reasonable accommodation applicable to all employment and the greater obligations of affirmative action applicable to employment by federal agencies and contractors. The actions of Congress based on a given understanding of a law passed earlier lend force to that understanding of the earlier law's meaning.

134. See United States v. Menasche, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute[.]'" (quoting Inhabitants of Montclair Township v. Ramsdell, 107 U.S. 147, 152 (1883)).
137. See generally Cooper, supra note 12, at 1436-37. Cooper notes that because section 501 goes beyond both section 504's and the ADA's requirement of nondiscrimination to impose an affirmative action requirement on federal employers, federal employers clearly could be required under section 501 to make substantial modifications in their programs to ensure sufficient participation by individuals with disabilities.
138. One court applied this principle in the context of a Congressional understanding of the meaning of part of the Medicaid law, upon which a subsequently passed part of the law had apparently been premised: "Here we have Congress at its most authoritative, adding complex and sophisticated amendments to an already complex and sophisti-
A final indicator of congressional intent is a portion of the Rehabilitation Act Amendments of 1992 concerning section 504 and the employment title of the Americans with Disabilities Act. Although these amendments deal primarily with the federal-state vocational rehabilitation services program, they include a provision declaring standards used to determine whether an employment activity violates the Rehabilitation Act will be same as those for determining violations of the employment title of the Americans with Disabilities Act.\textsuperscript{139} The statute, however, explicitly excepts affirmative action complaints from the uniform standards.\textsuperscript{140} Congress thus recognized a uniform definition of reasonable accommodation and other duties found in the Rehabilitation Act and the Americans with Disabilities Act, but also recognized that more could be demanded of federal agencies and contractors under the affirmative action provisions.\textsuperscript{141}

Nevertheless, false uniformity of rules is a difficult temptation to resist, particularly for judges and regulators. Almost from the start, court decisions and regulations have tried to equate reasonable accommodation and affirmative action obligations, despite Congress' intentions. Illustrating this false equation is a government publication describing section 503 and 504. The pamphlet reads: "Section 503 calls for 'affirmative action.' Section 504 calls for 'non-discrimination.' In practicality, there's little difference in how they affect you in employment. . . . These . . . programs boil down to this fact: Employers covered by [either] of them no longer may screen out handicapped people simply because of their disabilities."\textsuperscript{142}


\textsuperscript{140.} Id. The statute provides:

The standards used to determine whether this section has been violated in a complaint alleging [nonaffirmative action] employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990, as such sections relate to employment.

\textsuperscript{141.} Subsequent legislative activity is reliably consulted in determining the proper meaning to be assigned unclear legislative provisions. See sources cited supra note 138.

bilities Act, following the regulations promulgated under section 504, defines screening as a component of prohibited discrimination under that statute. Affirmative action goes far beyond the obligation not to impose discriminatory screens.

The Equal Employment Opportunity Commission also appears to have missed the distinction. Its regulations promulgated pursuant to section 501 are essentially identical to the substantive provisions governing section 504. The regulations under section 503 are primarily procedural, but to the extent they have a substantive content, it resembles that of the section 504 rules. Since Congress did not amend section 504 to explicitly bar federal agencies from discriminating on the basis of disability until five years after section 501 passed, the regulators were apparently concerned with establishing a construction of section 501 that entailed a general nondiscrimination obligation, including the duty to provide reasonable accommodation. This preoccupation seems to have kept them from making the distinction between the lower obligations of accommodation under section 504 and the higher ones under section 501. In an early administrative decision, the agency nonetheless applied a high standard of accommodation to federal employers.

There is little excuse for the mistaken identity given the Supreme Court case law on section 504 of the Rehabilitation Act. The Supreme Court's first case under the section 504 spelled out the distinction between reasonable accommodation and affirmative action. *Southeastern Community College v. Davis* upheld a decision of a community college not to modify its nurses' training program to permit a student who was deaf to complete the clinical portion of the work. The Court noted that section 504 required some accommodations, but argued that the requested accommodation would amount to affirmative action, and that affirmative action was more than Congress wished to force upon states and localities. In making the argument, the Court contrasted the limited duty of reasonable accommodation with the greater, affirmative action obligations im-

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144. See 41 C.F.R. § 60-741.6(d) (1995) (reasonable accommodation provision).


147. Id. at 414.

148. Id. at 410-11. The Court did, however, distinguish the more limited obligations owed by grantees from the affirmative action obligations owed by federal agencies. Id.
posed on federal agencies by section 501. By using section 501 as a foil for section 504, the Court established that the accommodations required under section 501's affirmative action regime are greater than the reasonable accommodations required under section 504.

In 1985, in Alexander v. Choate, the Court responded to criticism of Davis's characterization of extensive accommodation efforts as “affirmative action.” The Court upheld an annual limit on days of Medicaid-covered hospitalization, which was said to have a greater negative impact on persons with disabilities than on persons without disabilities, and which lacked a justification to make it superior to other forms of budget control with a lesser impact. In discussing Davis's language about accommodations and affirmative action, the Court said that the case meant to exclude from the requirements of section 504 only fundamental alterations in programs. This interpretation left unchanged the basic reasoning of Davis that affirmative action obligations under section 501 carry an obligation to do more to accommodate individuals with disabilities than do the obligations of section 504.

149. Id.
150. See id. at 411 (“A comparison of these provisions [sections 501 and 504] demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.”).
152. Id. at 309. However, the Court distinguished the adverse impact case it rejected from claims of adverse impact in areas such as architectural barriers, transportation, job qualification, and education. It recognized that section 504 reached adverse impacts in these areas. Id. at 295-99.
153. Id. at 300-01 & n.20. The Court further developed this reasoning in School Board v. Arline, 480 U.S. 273, 289 n.19 (1987), which distinguished the affirmative obligation to make reasonable accommodations from affirmative action as used in other contexts. See Cooper, supra note 12, at 1431-35 (explaining distinction).
154. See Tate, supra note 9, at 801-02. Tate explains:
Because the Court has . . . made clear that the federal employer's duty is greater than that of the grantee-employer, courts must set the test for the mandated “reasonable” accommodation under section 501 at a higher level of effort than that required under section 504. In the Court's words, the requisite level of change, adjustment, or modification can be “substantial” and might even involve “fundamental alteration[s].”
Id. (quoting Alexander v. Choate, 469 U.S. at 300 n.20).
155. In School Board v. Arline, 480 U.S. 273 (1987), a case holding that a school teacher with tuberculosis was covered by section 504, the Court played with Davis' language one more time, by calling the statute's requirement an “affirmative obligation to make a reasonable accommodation.” Id. at 289 n.19. The Court, however, did not retreat from the basic point that the affirmative action obligations of section 501 carry a more stringent duty of accommodation than the reasonable accommodation obligations of sec-
The better reasoned decisions of the lower courts hold federal agencies sued under section 501 to standards higher than the section 504 standards of reasonable accommodation. An example is Judge Pollak's decision in Taylor v. Garrett. In Taylor, the court found that a Navy rigger who because of a back injury could no longer do the essential functions of his original job could be entitled to reclassification into a permanent light-duty job, an accommodation the Navy had refused to provide. The court emphasized that section 501 places higher standards on a federal agency than section 504 places on a federal grantee. Looking to the Supreme Court precedent that contrasted section 504 and section 501 as well as to commentary on section 501, the court concluded that the elevated obligation imposed by section 501 could require an agency to consider an employee's fitness to perform jobs other than that which the employee previously occupied. The limit of required accommodation would be that a worker need not be placed in a position if the worker could not perform its essential functions; in the section 501 context, that would constitute undue hardship for the employer.

Some cases overturning agency or lower court decisions rejecting plaintiffs' requests for particular accommodations rely heavily on precedent from courts applying ordinary reasonable accommodation obligations, but they nonetheless state that an elevated duty to accommodate exists under section 501. Still
other courts reject requests for accommodations while nevertheless recognizing that federal agencies are under greater duties to accommodate by virtue of the affirmative action provision.\textsuperscript{163}

Unfortunately, other judicial opinions are hardly faithful in observing the distinction between affirmative action and reasonable accommodation obligations under existing law. One court\textsuperscript{164} has suggested that the sole difference between section 501 and 504 causes of action is that the burden of persuasion rests on the employer in an affirmative action case but on the employee with a reasonable accommodation case.\textsuperscript{165} This charges affirmative action with a meaning somewhat stronger than that of rea-

\textsuperscript{163}While acknowledging that section 501 places a higher standard of accommodation on a federal agency than that imposed on a federal grantee under section 504, the court in Davis v. United States Postal Service, 675 F. Supp. 225, 231, 234 (M.D. Pa. 1987), ruled that the statute did not require placement of a job applicant with a disability in a non-entry level post not open to him under an applicable collective bargaining agreement and regulations. In Dancy v. Tisch, 660 F. Supp. 1418, 1425 n.8 (D. Conn. 1987), the court recognized a distinction between affirmative action under section 501 and "evenhanded treatment" under section 504, but went on to rule that a person with achondroplastic dwarfism need not be provided the accommodations he requested to perform the job of postal distribution clerk. See id. at 1428.

Dancy v. Kline, No. 84 C 7369, 1987 U.S. Dist. LEXIS 2336, at *7 (N.D. Ill. Mar. 23, 1987) also recognized a greater accommodation duty for federal agencies, declaring that "with Section 791 Congress sought to impose a greater obligation on federal employers than that which is placed on recipients of federal funds through Section 794," though the court ultimately rejected the claim that the General Services Administration had a duty to reassign a law enforcement officer with disabling back pain to a light duty job. These rejections of particular accommodations do not undermine the central point that a federal agency is to held to a higher standard in providing accommodations than a federal grantee.

\textsuperscript{164} Overton v. Reilly, 977 F.2d 1190 (7th Cir. 1992) (leaving open whether affirmative action provision conferred additional obligations).

\textsuperscript{165} Id. at 1193. Later in the opinion, the court concedes that section 501 may impose greater substantive obligations than section 504 does, but states that it need not decide the issue. Id. at 1194.
sonable accommodation as the term has been interpreted by a few cases applying section 504, but it makes the term indistinguishable from reasonable accommodation as it is interpreted by other courts and as it is codified in Title I of the Americans with Disabilities Act, which places the burden on the employer. Making affirmative action overlap in this fashion is not true to the congressional intention to have affirmative action be a higher obligation than reasonable accommodation.

Even more erroneous in its approach is the recent decision Fedro v. Reno, in which the court, following the decisions of various cases interpreting section 504, ruled that the obligation of reasonable accommodation did not include the duty to place a former deputy marshal who had contacted hepatitis while on the job in an alternative position in which the risk of contamination of others from his blood would not be significant. The employee proposed that he be placed in a full-time job combining two part-time positions as a background investigator. The court conceded that the proposal was both feasible and cheaper to the government than providing workers compensation to the employee, but said there was no obligation to provide it. Judge Ilana Rovner protested in a partial dissent that the court was wrong to rely thoughtlessly on precedent under section 504 when section 501 affords federal employees "substantially greater rights." The duty under the law to become a model employer of persons with disabilities entails the obligation to make substantial changes and fundamental alterations in programs. Reassignment is part of the federal government's "affirmative obligation to expand the employment opportunities available" to workers with disabilities.

168. 42 U.S.C. § 12112(b)(5)(A) (1994) (defining discrimination as failing to make reasonable accommodations "unless such covered entity can demonstrate that the accommodation would impose an undue hardship ....").
169. 21 F.3d 1391 (7th Cir. 1994).
170. Id. at 1395.
171. Id. at 1394.
172. Id. at 1396.
173. Id. at 1398 (Rovner, J., dissenting).
174. Id.; cf. 29 C.F.R. § 1613.703 (stating that the federal government shall be the "model employer" of individuals with disabilities).
175. Id. at 1401 (Rovner, J., dissenting). The dissent also noted that the EEOC and other federal administrative authorities have taken the position that federal employers, under their section 501 obligations, must consider reassignment of employees unable to do their former jobs. Id. at 1399-1400 (Rovner, J., dissenting) (citing Ignacio v. United
The *Fedro* majority is not an isolated opinion. Other courts have also equated reasonable accommodation and affirmative action obligations, usually without any discussion whether the federal agency is under a higher standard. Some commentary interpreting this caselaw has similarly underplayed the difference between affirmative action under section 501 and reasonable accommodation.

D. **Strengthening Existing Affirmative Action Obligations**

Strengthening current affirmative action efforts will help American society address the problems of past and present disability discrimination, especially unconscious discrimination. The first step to strengthening existing affirmative action law is for courts in their decisions and the EEOC in its regulations to recognize the higher obligations that sections 501 and 503 impose on federal agencies and contractors. Courts need to appreciate the wisdom of cases such as *Taylor v. Garrett* and apply similar interpretations to section 501 cases coming before them.

The EEOC should take a page from the courts and replace its existing section 501 and 503 regulations with provisions that

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176. *See, e.g.*, *Barth v. Gelb*, 2 F.3d 1180 (D.C. Cir. 1993), *cert. denied sub nom.*, *Barth v. Duffy*, 511 U.S. 1030 (1994); *Langon v. Department of Health & Human Servs.*, 959 F.2d 1053 (D.C. Cir. 1992); *Johnston v. Horne*, 875 F.2d 1415 (9th Cir. 1989). It might be argued that the court in *Langon*, by reversing a decision rejecting the accommodation that a computer programmer with multiple sclerosis be permitted to work at home, was tacitly applying a higher standard than ordinary reasonable accommodation. Courts applying the reasonable accommodation duty in cases under section 504 have resisted forcing employers to allow employees to work out of their homes. *See, e.g.*, *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995); *Tyndall v. National Educ. Ctrs.*, Inc., 31 F.3d 209 (4th Cir. 1994).

177. *See Gray*, *supra* note 12, at 295 n.7 (expressing view that the antidiscrimination sections of the Rehabilitation Act are interchangeable). *But see Tate*, *supra* note 9, at 801-02 (contending that section 501 imposes higher accommodation duties on federal agencies); *see also Cooper*, *supra* note 12, at 1436-37 (arguing that section 501 goes beyond Section 504’s nondiscrimination requirement to impose an affirmative action requirement on federal employers).


179. The courts might adopt such an approach based on policy grounds rather than statutory ones, such as the idea that the government can more easily spread costs and may have economies of scale if it routinely makes accommodations not offered by other employers. *See Karlan & Rutherglen*, *supra* note 123, at 34.
recognize the elevated duties federal agencies and contractors are under.

As a second step, the language that the regulators adopt should more explicitly embrace numerical employment goals. In combating disability discrimination, as in combating discrimination based on race and sex, the one form of affirmative action that is most likely to be successful is the use of employment targets, both for entry-level jobs and promotions. Persons with disabilities cannot show their abilities unless they are present in the workplace. All the obvious ingredients for greater success in the workplace are already present: The Americans with Disabilities Act already requires employers to review job qualifications to eliminate those that discriminate against persons with disabilities; many employers say that they are engaging in outreach and recruitment activities; persons with disabilities want to work. Yet persons with disabilities are still not in jobs. To overcome the subtle and less-subtle discrimination that remains as a barrier, numerical targets are needed.

While goals and timetables have long been part of federal equal employment opportunity regulations promulgated under Title VII of the Civil Rights Act of 1964, which forbids racial, ethnic, religious, and sex discrimination, the regulations promulgated under section 501 have no comparable requirements and are all but identical to the nondiscrimination regulations promulgated under section 504. The section 503 regulations are almost totally procedural, dealing with complaint processing rather than with the actual content of what is required from federal contractors in the way of affirmative activity. Once again, goals and timetables escape mention. Regulations comparable to those that exist for Title VII should be adopted for sections 501 and 503.

Clear regulations requiring goals and timetables would strengthen federal affirmative action efforts. The adequacy of af-

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181. The relevant regulatory provision, 29 C.F.R. § 1608.4(c) (1996), provides that reasonable action taken to correct employment practices with discriminatory effects include "goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees."
183. 48 C.F.R. §§ 22.1400-.1408 (1996). See generally Baker, supra note 9, at 817-26 (proposing that federal contractors be required to adopt steps with regard to hiring of persons with disabilities comparable to affirmative action plans to combat race discrimination).
184. See sources cited supra note 183.
firmative action plans adopted by agencies and contractors could be measured against the steps called for in the goals and timetables regulations. Individuals suing in court or employers defending there could point to compliance or noncompliance with the standards. Of course, the standards must retain some flexibility for particular circumstances, but they need be no more vague than the ordinary standard of reasonable accommodation is. The elevated duty of reasonable accommodation that applies under the affirmative action obligation must also remain somewhat vague because of the variety of circumstances that both employees and employers may find themselves in.

A third step to enhance the enforceability of the affirmative action obligation that applies to federal contractors would be enacting a private right of action. Although the statute is phrased in mandatory terms, the present consensus of the courts is that it confers no right of action on which the aggrieved employee or job candidate can sue. Unlike its counterpart requiring affirmative action by federal agencies, section 501, the federal contractor provision is not included in the remedies section of Title V of the Rehabilitation Act. The legislative history of the 1992 Rehabilitation Act Amendments affirms the ability of individuals to sue to enforce section 504, the general nondiscrimination provision, against federal agencies, but does not extend the cause of action to persons suing contractors, leaving


186. 29 U.S.C. § 793 (1994) ("Any contract in excess of $10,000 . . . shall contain a provision requiring that [in employing persons to carry out such contract] the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities . . . .").


the employees of federal contractors without a remedy. A cause of action against federal contractors by their employees and applicants would create no more problems than does the parallel action that exists against the federal agencies. It would go far in alleviating the current situation in which the right to affirmative action efforts lacks any reliable remedy.190

E. Expanding Affirmative Action for Persons with Disabilities

While affirmative action should be strengthened where it currently applies, it should also be expanded to areas in which it does not. Unconscious discrimination and the legacy of past discriminatory practices are hardly unique to federal agencies and federal contractors. The two logical expansions of affirmative action for persons with disabilities are imposing the obligation on state and local governmental entities, and imposing the obligation on private employers.

1. Affirmative Action by State and Local Government. It would take only a slight modification of the existing statute to impose the same affirmative action obligations on state and local government that now apply to federal agencies. State and local government currently employ 15.5 million Americans, more workers than those employed in the manufacturing of durable goods and roughly twice the number of those employed in the manufacture of nondurable goods.191 Thus requiring states and localities to engage in affirmative action would have a significant impact on the employment of persons with disabilities. State and local governments are responsible for the legislation that has been most oppressive and discriminatory towards persons with disabilities.192 They continue to labor under the effects of past discriminatory practices;193 as is the case with other employers, their employment decisions are subject to unconscious

190. Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").


192. See supra notes 43-47 and accompanying text (describing discriminatory laws). This point is hardly surprising, for the states have had primary responsibility over most domestic policy for the bulk of United States history.

193. See Mikochik, supra note 12, at 624 n.33 (collecting authority from legislative history of the Americans with Disabilities Act regarding employment discrimination by states and localities).
or other undetectable discrimination. Accordingly, the same affirmative action requirements that apply to the federal government should apply to them. The adequacy of their efforts should be measured by the same standards, both with respect to the accommodation they offer and the goals and timetables they establish and fulfill.

The step proposed here is not without precedent. An affirmative action obligation applies to all state and local educational agencies that receive federal funding for special education of children with disabilities. The obligation extends to the employment of individuals with disabilities, and requires actions beyond what section 504 or the Americans with Disabilities Act would otherwise entail. This requirement has not given rise to widespread dissatisfaction or reports that it is not workable.

The measure would be well within congressional authority to enforce the Fourteenth Amendment to the United States Constitution. The Amendment compels states to provide the equal protection of the law to all persons within their jurisdiction; persons with disabilities receive the benefit of the equal protection clause, just as everyone else does. Congress has authority to enforce the Amendment with appropriate legislation. This power is exceedingly broad, and does not depend on any find-

196. The absence of difficulty may stem from the fact that the obligation is limited by the "otherwise qualified" standard. See Pandazides v. Virginia Bd. of Educ., 804 F. Supp. 794 (E.D. Va. 1992), rev'd on other grounds, 13 F.3d 823 (4th Cir. 1994) (finding special education teacher with record of learning disability not "otherwise qualified" for position). See generally supra text accompanying note 127 (discussing operation of "otherwise qualified" standard in affirmative action plans).
197. The courts that have considered the matter so far have ruled that the existing provisions of the Americans with Disabilities Act are constitutional with respect to the duties they impose on state and local government. See, e.g., Niece v. Fitzner, 941 F. Supp. 1497 (E.D. Mich. 1996); Armstrong v. Wilson, 942 F. Supp. 1252 (N.D. Cal. 1996).
198. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (finding that requiring group homes for mentally retarded persons to apply for and obtain a special use permit violates the equal protection clause).
200. As Professor Mikochik notes, "If federal power under the 14th amendment is broad enough to nullify state voter restrictions, ballot designations, and the form of local government itself, it is plainly sufficient to address discrimination in all positions of public employment." Mikochik, supra note 12, at 625-626 n.44 (citations omitted). The recent decision in City of Boerne v. Flores, 117 S. Ct. 2157 (1997) does not undermine this conclusion. In City of Boerne, the Court held that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4 (Supp. V 1993), exceeded congressional power to enforce the Fourteenth Amendment. RFRA prohibits states and localities from sub-
ing by the judiciary or another body that the evil proscribed by the legislation violates the Amendment.\textsuperscript{201} As previously noted, since the absence of disability is not a suspect classification, no heightened constitutional scrutiny applies.\textsuperscript{202} The Supreme Court has ruled that congressional action to enforce the Fourteenth Amendment is able to override any restrictions on federal court remedies that would otherwise apply under sovereign immunity principles embodied in the Eleventh Amendment.\textsuperscript{203}

2. Affirmative Action by Private Employers. Private employers, too, should be subject to affirmative action obligations.\textsuperscript{204} Congressional action to elevate the duty of reasonable substantially burdening a person's exercise of religion even unintentionally or by a rule of general application, unless the state or locality can show that the burden furthers a compelling government interest and is the least restrictive means to further that interest. \textit{City of Boerne}, 117 S. Ct. at 2162. The Court emphasized that RFRA was an attempt to interpret the First Amendment in a manner contrary to that which the Court had adopted in Employment Division v. Smith, 494 U.S. 872 (1990), which held that the First Amendment did not require government to show that laws of general applicability furthered such interests by the least restrictive means. \textit{Id.} at 2160-61. The Court reaffirmed, however, that Congress may enforce constitutional rights "even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the states.'" \textit{Id.} at 2163 (quoting \textit{Fitzpatrick v. Bitzer}, 427 U.S. 445, 455 (1976)). Imposing affirmative action obligations on state and local government does not enact a particular interpretation of the Equal Protection clause, much less an interpretation contrary to that adopted by the Supreme Court. On the contrary, affirmative action measures are means of enforcement of nondiscrimination obligations already binding on states and localities. The Court recognized an analogous distinction in \textit{City of Boerne} by contrasting RFRA with the Voting Rights Act of 1965, 42 U.S.C. § 1973b (1994), which enacts broad prophylactic measures against discrimination that compare closely to affirmative action in the context of employment. \textit{City of Boerne}, 117 S. Ct. 2169-70. As with the Voting Rights Act, and again in contrast to RFRA, the affirmative action obligations suggested in the text would be imposed against a background of pervasive intentional discrimination. \textit{Cf. id.} at 2171 (discussing impetus behind RFRA of combating alleged unintentional discrimination due to government action found permissible in Employment Dept. of Human Resources v. Smith, 494 U.S. 872 (1990)).


204. A subset of private employers that would be the very minimum that ought to be included in this regime consists of those employers that receive federal financial assistance, such as universities and federally funded nonprofit agencies. The government can place any conditions on receipt of funds that it chooses, so long as the conditions
accommodation and to impose goals and timetables would not be an easy political achievement, but the likelihood of success is fair. An exhaustive study of the legislative process that led to the Americans with Disabilities Act commented that the proponents of the law could have enacted a stricter law, given the high level of support that they had for the measure that passed. For advocates of disability rights, the Act is an example of compromising too easily. While the vagaries of congressional politics are beyond the scope of this paper, affirmative action measures are a worthy legislative goal.

The reason that affirmative action by private employers is worthy is the same reason that federal action is justified and states and localities’ obligations ought to be enhanced. Persons with disabilities need employment both from government and from the private sector to overcome poverty and integrate themselves into society as a whole. Private employers have been guilty of discriminating against persons with disabilities in the past, and they will continue to do so in subtle ways in the future unless more aggressive steps are taken.

Congress has the power to impose affirmative action obligations on private employers under its authority to regulate interstate commerce. While the power may not extend to some of the very smallest entities whose actions have no effect whatsoever on interstate economic activity, it is extremely broad with respect to any business conduct. It was broad enough to permit Congress to enact the Civil Rights Act of 1964, whose provisions cover employers with as few as fifteen employees, and which compels affirmative action under a variety of circum-

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206. See id. at 521.
207. See U.S. Const. art. I, § 8, cl. 3 (Commerce Clause).
208. But see Wickard v. Filburn, 317 U.S. 111 (1942) (finding that Congress could regulate the amount of wheat grown for home consumption on a farm under the Commerce Clause).
209. Significantly, United States v. Lopez, 514 U.S. 549 (1995), which found that a congressional enactment passed under Commerce Clause authority exceeded the power granted there, involved neither commercial activity nor a statutory requirement that the actor be engaged in interstate commerce. Id. at 1624.
stances. It would permit the legislation proposed here.

IV. BEYOND AFFIRMATIVE ACTION: NONREMEDIAL SETASIDES IN PUBLIC AND PRIVATE EMPLOYMENT

A strengthened regime of affirmative action would be effective at combating the conscious and unconscious discrimination that keeps qualified individuals with disabilities out of work and in poverty. But more than discrimination stands in the way of economic self-sufficiency for persons whose disabilities are real and severe, as opposed to perceived or mild. Many disabilities, particularly mobility limits and serious sensory deficits, do in fact make it more difficult for the persons with them to compete in the workplace. This does not make the individuals productively useless or unable to contribute economically. But it does mean that more than antidiscrimination efforts will be needed to achieve the employment of this group.

Nonremedial setasides are needed to make a significant impact on the employment of persons with more severe disabilities. Nonremedial setasides entail reserving a certain percentage of jobs, or of jobs within a given classification, for persons whose disabilities reach a defined level of severity. Setasides of this type go beyond affirmative action in degree, and are different in character. Even when affirmative action includes numerical targets for hiring, the plan remains a means to avoid discrimination, albeit by a somewhat wider berth than might be required by rules that lack the numerical goals. Nonremedial employment setasides are something more. At the risk of sounding facetious, the something might be termed "unreasonable accommodation," the limit of which goes beyond undue hardship to include hardship that, though real, is "due" in order to finally integrate persons with more severe disabilities into the American workplace.

212. Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (upholding the plan imposed by the district court). Although the constitutionality of this duty which might be subject to doubt with respect to race under recent cases challenging government affirmative action programs, for example Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), the heightened scrutiny that applies to racial classifications does not apply to disability cases, and so the proposal advanced here does not present the same problem. See supra text accompanying notes 118-19.

213. It is not argued here that the proposed steps will entirely eliminate the need for social insurance and welfare. See Matthew Diller, Entitlement and Exclusion: the Role of Disability in the Social Welfare System, 44 UCLA L. Rev. 361 (1996) and ten-Broek & Matson, supra note 24 for extensive discussions of the role of these measures in the reform of the law that affects people with disabilities.
A. Nonremedial Setasides in Federal Employment

Nothing would be more due than for the federal government, the "model employer" of persons with disabilities, 214 to adopt nonremedial setasides, reserving percentages of jobs for persons with serious disabilities. Persons with disabilities would contribute to the efforts of the government, while no longer requiring the welfare outlays that the federal government provides. No problem could be anticipated with the constitutionality of a law of this type. Minimal scrutiny applies to federal social and economic legislation, 215 and federal hiring can be used to serve any national priority Congress chooses.

B. Nonremedial Setasides in Employment by State and Local Governments Receiving Federal Funds

Next in line after federal government are state governmental agencies that receive federal money. These entities ought to join in the effort to bring persons with disabilities into the economic mainstream. Like the federal government, these governments will benefit by the product of the persons at work and by the reduction in the need for welfare assistance. Percentage setasides that would apply to the states would be modeled on those made applicable to the federal government. The size of the agency and the nature of its work would need to be considered in calibrating the obligation to be imposed.

Some doubts may be raised concerning the constitutionality of this measure. In *New York v. United States*, 216 the Supreme Court ruled that Congress could not impose obligations on state governments without their consent; the Commerce Clause of Article I and the Tenth Amendment forbid "commandeering" state governments for federal purposes. 217 To do so diminishes the accountability of federal and state decision making, for voters are unable to determine whether to blame their congressional or state representatives for bad legislative choices. 218

The *New York v. United States* Court, however, carefully distinguished conditional spending from direct imposition of duties. 219 In an unbroken line of cases from *Steward Machine Co. v.*

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214. 29 C.F.R. § 1614.203 (1996) (stating that the federal government shall be the "model employer" of individuals with disabilities); see also sources cited supra note 162.
217. *Id.* at 175-76.
218. *Id.* at 182-83.
219. *Id.* at 188; see also Printz v. United States, 117 S. Ct. 2365 (1997) (ruling that
Davis\textsuperscript{220} to \textit{South Dakota v. Dole},\textsuperscript{221} the Supreme Court has established that Congress may place conditions on funding that it provides to states.\textsuperscript{222}

Congress does not evade accountability when it employs conditional spending measures. The state or local official who is taken to task for following the federal directive can properly blame Congress, and Congress has no credible means for shifting the blame back to the states. Of course, state and local officials can be—and should be—taken to task for the decision they themselves make: to take the money under the federal conditions or to forego it.\textsuperscript{223}

Using the conditional spending power sidesteps the problems that might be present were Congress to impose setaside obligations on states and localities by fiat under Commerce Clause or Fourteenth Amendment authority. However, if nonremedial setaside requirements were imposed on private business, they could be imposed on state and local agencies that do not receive federal funding. \textit{New York v. United States} distinguished cases such as \textit{Garcia v. San Antonio Metropolitan Transit Authority},\textsuperscript{224} which upheld the application of minimum wage laws to state employees, on the grounds that rules that apply uniformly to both state governments and private businesses do not exceed Congress' Commerce Clause powers.\textsuperscript{225}

\section{Nonremedial Setasides in Private Employment}

It took nearly twenty years for the United States to impose the same disability discrimination provisions on private employers as it had imposed on public employers receiving federal

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Congress could not compel local law enforcement officers to conduct background checks on handgun purchasers).

220. 301 U.S. 548 (1937).
223. This is not to deny that the decision to forego the funding can be political suicide, or that the federal government might lack the courage to force the decision on fund recipients. Vice-President Lyndon Johnson once suggested withdrawing federal spending from states that disobeyed federal desegregation directives. President Kennedy, fearing such a measure would erode his base of support among southern Democrats, responded by sending Johnson on a goodwill tour of Scandinavia. \textit{TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63} 883-64 (1988).
money. The failure to cover private employment prevented meaningful progress from being made with respect to eliminating discrimination in the economy as a whole. In order to have a real policy of promoting employment for persons with disabilities, setasides would need to be extended to private employment, where new legislation should put them into place.\textsuperscript{226}

Much of the rest of the industrialized world imposes quotas on private industry to force businesses to hire persons with disabilities.\textsuperscript{227} Austria requires employers with twenty-five or more employees to hire at least one person certified as having a disability for each twenty-five employees.\textsuperscript{228} France makes firms with more than ten workers allocate ten percent of vacancies to persons with disabilities;\textsuperscript{229} employers with at least twenty workers must have full or part-time employees with disabilities totaling six percent of their workers.\textsuperscript{230} Germany has a six percent quota for hiring persons with severe disabilities, and imposes it on all public and private employers;\textsuperscript{231} those workers are specially protected against termination of employment once they have served a probationary period.\textsuperscript{232} Luxembourg forces employers with fifty or more employees to reserve two percent of staff positions for workers with disabilities.\textsuperscript{233}

In the Netherlands, companies negotiate their standards, but the government may compel the employment of between

\begin{itemize}
\item \textsuperscript{226} Again, a subset of private employers for whom the obligations might be more easily imposed are those that receive federal financial assistance. See supra note 204 and accompanying text.
\item \textsuperscript{227} These programs are effective in bringing persons with disabilities into the economic mainstream. In Germany, for example, the income of men with disabilities before tax and transfer payments is nearly ninety percent of that of men who do not have disabilities; in the United States, the comparable figure is forty percent. Burkhauser & Daly, supra note 71, at 45. The American number may be slightly exaggerated due to the prevalence of disability among persons who had previously had low incomes before they became disabled and due to the time-limited nature of some sources of support. \textit{Id}. In addition to the sources cited below, a useful survey of programs outside the United States is Neil Lunt & Patricia Thornton, Employment Policies for Disabled People: A Review of Legislation and Services in Fifteen Countries (1993).
\item \textsuperscript{228} World Health Organization, Is the Law Fair to the Disabled? A European Survey 17 (Genevieve Pinet ed. 1990) [hereinafter WHO].
\item \textsuperscript{229} \textit{Id}. at 84.
\item \textsuperscript{230} Eric A. Besner, Comment, Employment Legislation for Disabled Individuals, 16 COMP. LAB. L.J. 399, 403 (1995) (noting loopholes and underenforcement of quota).
\item \textsuperscript{231} \textit{Id}. at 403; see also Richard V. Burkhauser, Lessons from the West German Approach to Disability Policy, in Disability and Work, supra note 11, at 85.; Carol D. Rasnic, A Comparative Analysis of Federal Statutes for the Disabled Worker in the Federal Republic of Germany and the United States, 9 ARIZ. J. INT' L & COMP. L 283, 299 (1992).
\item \textsuperscript{232} WHO, supra note 228, at 128.
\item \textsuperscript{233} \textit{Id}. at 188.
\end{itemize}
three percent and seven percent persons with disabilities if a firm's voluntary performance is not satisfactory. In Spain, two percent of jobs are reserved for workers with disabilities in companies with more than fifty employees. The United Kingdom has a three percent quota for workers certified as having a disability for all employers with twenty or more workers. Japan has an employment quota for persons with disabilities of 1.5% for profit-making businesses and 1.8 to 1.9% for public entities and nonprofit organizations.

Some flexibility exists in most of these countries for firms to make payments to the government if they do not meet their quotas in a given month. In some countries, subsidies are available for specialized equipment or other additional costs of hiring persons with disabilities.

The presence of these programs elsewhere in the world proves a number of points about setaside programs for persons with disabilities. First and most obviously, placing such a system into effect in the United States will not cause us to suffer competitive disadvantage in the world economy. We would merely be doing what our competitors now do. We may lose some modest advantage we currently have, but other countries will not be able to gain any special edge over us. Moreover, strictly in monetary terms, we will gain the value of the product of the persons added to the workforce, their taxes, and the public savings from their decreased need for welfare assistance. Where appropriate, portions of these resources might be reallocated to enhance the competitiveness of businesses threatened by foreign competition.

Second, it is workable to shift the costs of employment of persons with disabilities to private employers. Placing the costs on the private sector spurs economic actors to develop the lowest cost means of accomplishing the job. Problems of defining

234. Id. at 208.
235. Id. at 259.
236. Id. at 331.
238. See WHO, supra note 228, at 17 (Austria), 128 (Germany; reporting $124 million in penalty payments in 1983); Cho, supra note 237, at 429 (Japan).
239. See WHO, supra note 228, at 84 (France), 129 (Germany), 188 (Luxembourg; salary supplement inversely related to marginal economic contribution); 271 (Sweden; applying subsidies and negotiated employment arrangements); see also Burkhauser, supra note 11, at 87 (discussing German wage subsidy for probationary period and payments for costs of job accommodations).
240. See C.E. FERGUSON & S. CHARLES MAURICE, ECONOMIC ANALYSIS 394 (rev. ed.
disability, financing costs, and policing compliance, though they may be quite real,\textsuperscript{241} have not proved severe enough to cause the European countries or Japan to abandon their initiatives.

Third, imposing the costs on business is legitimate, by the standards of global economic fairness. It might be argued that setaside programs for persons with disabilities are unfair to business by charging them the entire cost of fixing a social problem they did not create.\textsuperscript{242} However, the question of who bears the cost of disability is an open one. Majoritarian processes of government are right to modify existing entitlements when doing so will best accomplish social objectives,\textsuperscript{243} particularly in a situation such as this one in which the employers, by definition, have a monopoly on the scarce commodity of employment. The burden imposed is a measured one, and is likely to be kept modest both for political reasons and in order to allow the employers to stay profitably in business and thus provide the needed jobs.

All of this is not to argue that nonremedial setasides will solve the dilemma of difference by shifting the national view of what is disability and what is not.\textsuperscript{244} A workable program of setasides will need definitions of disability and will classify individuals accordingly. Employees without disabilities are highly likely to consider the individuals freshly hired to satisfy the quota as something other, and quite possibly something lesser, than themselves.

\textsuperscript{241} See Rebell, supra note 14, at 1456 (criticizing the use of numerical goals for hiring of persons with disabilities).

\textsuperscript{242} See Epstein, supra note 58, at 487-94 (also arguing against imposition of reasonable accommodation obligation without compensation); Carolyn L. Weaver, Incentives Versus Controls in Federal Disability Policy, in Disability & Work, supra note 11, at 3, 15.

\textsuperscript{243} It is erroneous to think that the existing distribution of social responsibilities is sacred, an unchangeable baseline. See Cass R. Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873 (1987) (contending that the failing of the pre-New Deal Supreme Court consisted not of judicial activism, but of the aggressive effort to maintain an existing baseline of rights and entitlements that favored certain economic actors). A fairer baseline would be equality of opportunity to succeed, regardless of physical or other conditions that one has no control over, with departures from the standard of equality only to provide necessary incentives to benefit the community as a whole. See John Rawls, A Theory of Justice 12-17 (1971) (explaining theory of justice as fairness based on initial position of equality); Gray, supra note 12, at 351 (comparing obligations of the Americans with Disabilities Act to those that might be applied under Rawls's equality-based theory); see also Bolla, supra note 40, at 983-87 (applying Rawls's ideas to disability discrimination law).

\textsuperscript{244} See generally sources cited supra note 122 (describing the idea of the dilemma of difference).
Two compensations will exist, however. The first is the sheer fact of exposure. Being exposed to the reality that persons with disabilities are in the world and part of it should, over time, bring changes in the way others view reality.245 The modifications in physical space and workplace routines that employers will find it economical to undertake should aid this process.

The second compensation is, frankly, compensation. Nothing so much affects one's acceptance by others as one's economic status,246 and although workers whose disabilities limit their marginal product will be at the lower end of the wage scale, they will be on a much higher economic plane than they are now. Workers whose disabilities are unrelated to success at work will gain entry-level jobs and the opportunity to prove themselves over time. The economic improvement should translate into improvement in how individuals are treated.

An additional objection to nonremedial setasides is that they will lead to featherbedding or make-work jobs that contribute little to the employer's product and provide no opportunity for advancement. But the economic incentive for employers is to gain whatever marginal contribution the employee can make, and not to leave the employee idle. Employers are the ones in the best position to determine exactly how to achieve the maximum benefit. Workers with more severe impairments may be limited in their opportunities to advance, but it is to be hoped that as workers with disabilities become more of an ordinary part of the work experience, those with the capacity to rise will do so. The employer will have the incentive to undertake changes in the work settings and practices so as to maximize the economic contribution of the workers who are there.

Commentators have proposed other strategies for enhancing the employment opportunities of persons with disabilities. Some propose full or partial subsidies for employers' voluntary modifications of workplaces and workplace routines.247 Tax incentives exist to defray some of the cost of accommodations,248 but with

245. See Laudor, supra note 12, at 943 (describing benefits of making persons with disabilities more visible in public settings).

246. WORK IN AMERICA, supra note 25, at 34-36.

247. See Sue A. Krenek, Beyond Reasonable Accommodation, 72 Tex. L. Rev. 1969, 2012-13 (1994) (proposing that the government pay for employee-specific accommodations in order to promote fairness and eliminate disincentives to hire the person needing the accommodation); see also Epstein, supra note 58, at 493 (proposing limited government funding for accommodations).

248. I.R.C. § 44 (1994) provides tax credits to small businesses for accommodation expenditures; 21,476 applications have been approved, for a total credit of $36.47 million. Tony Coelho, Employing People with Disabilities Makes Good Business Sense, Re-
all of today's competing demands for government aid, subsidies are unlikely to increase. Significantly, European countries, which typically tax citizens and businesses at a much higher rate than the United States does and spend proportionally more government money on social programs, impose the costs of employing persons with disabilities on employers. Subsidies are frequently present, but they defray only a fraction of the employers' costs.

As with nonremedial setasides to be applied to federal and state governmental agencies, regulations would need to embody flexibility and attention to the nature of the enterprise being regulated. In particular, the regulations would need to establish rating mechanisms for the severity of the disability of persons hired, to keep employers from creaming off persons with the least serious disabilities and counting them towards their setasides in a manner that is equal to that used for persons with much greater severity of disability.

Just as the Commerce Clause is the simplest ground on which to uphold the constitutionality of affirmative action efforts imposed on private employers, so to would it be for nonremedial setasides. The same principles would all apply, as would the basic principle that absence of disability is not a suspect classification triggering heightened scrutiny. Although not in the form of a tax, a regulation of the type proposed is not much different from a tax, or from minimum employee benefits such as family medical leave or minimum wage. Real costs are being placed on employers, but for a valid social goal. Real costs are already imposed on employers under the duty to provide reasonable accommodations, and although the proposed measure will entail greater costs, quotas along European models are not


249. See, e.g., sources cited supra notes 227-239 (describing European programs).

250. The severity of disability is rated for purposes of determining amounts of service-connected veterans' disability benefits and amounts of workers' compensation. See 38 U.S.C. § 1114 (1994) (establishing percentage ratings and benefits for wartime disability compensation for veterans). A similar plan could be put into place with respect to the obligations borne by employers. There might be disparity of hardship under such a plan, for companies whose product is intellectual might fill their quotas easily by hiring individuals with mobility impairments while manufacturing concerns may have a more difficult time. Adjustments could be made for these concerns in the administration of the plan.
high enough to produce serious economic discomfort for employers. Special hardship exceptions could be created were there a serious risk of this result.

CONCLUSION

The steps proposed in this Article represent the beginning of a true employment policy for persons with disabilities, as opposed to the present patchwork of antidiscrimination laws with limited affirmative action requirements, limited educational and rehabilitation services, and subsistence welfare. Proper interpretation and broader application of affirmative action efforts are needed to complete the work of eliminating discrimination and its effects, but nonremedial setasides will be needed to bring persons with disabilities into the working economy and out of poverty and dependency. The steps proposed here take persons with disabilities seriously as members and potential members of the working community.