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CASEY AND THE LITTLE LEAGUERS

Vicki J. Limas*

I. INTRODUCTION

The significant negative reaction to the outcome of *PGA Tour, Inc. v. Casey Martin*¹ illustrates the very attitudes and perceptions toward people with disabilities that Congress intended to combat through the Americans with Disabilities Act of 1990² (“the ADA” or “the Act”). The Court’s decision that PGA³ must allow Mr. Martin to ride a cart during the PGA Tour play evoked a “Chicken Little” response far exceeding the import of the decision. Over half of the readers responding to an Internet survey conducted by *Golf Digest* said they did not agree with the Court’s decision.⁴ *The Washington Times* columnist Suzanne Fields bemoaned a decline in “the morality of golf;”⁵ Sally Jenkins, in *The Washington Post*,

* Professor of Law and Associate Dean, The University of Tulsa College of Law. This paper was prepared for the Symposium, Practitioners’ Guide to the 2000-2001 Supreme Court Term, at The University of Tulsa on November 30, 2001. Many thanks to David R. Cordell of Connor & Winters, Tulsa, Oklahoma, for joining me in the oral presentation. (Which is say, analyses, opinions, and conclusions herein are entirely my doing; David cannot be blamed for any of them.)

1. 121 S. Ct. 1879 (2001).

2. 42 U.S.C. § 12101 (1994).

3. See generally W. Kent Davis, *Why is the PGA Teed Off at Casey Martin? An Example of How the Americans with Disabilities Act (ADA) Has Changed Sports Law*, 9 Marq. Sports L.J. 1, 27-31 (1998); *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 996 (9th Cir. 2000). The Ninth Circuit identified the defendant PGA Tour, Inc. as follows:

PGA is a non-profit association of professional golfers. It sponsors three competitive tours: (1) the PGA Tour, its most competitive tour, (2) the Nike Tour, one step down from the PGA Tour, and (3) the Senior PGA Tour, restricted to professional golfers age 50 and over. . . .

Id. at 996.

This article will refer to the entity PGA Tour, Inc. as “PGA.” “PGA Tour” will refer to the tournament.

4. *From the Gallery*, *Golf Digest* 19 (Sept. 1, 2001) (discussing a question posed in a survey conducted by *GolfDigest.com*). In response to the question, “Do you agree with the U.S. Supreme Court decision on Casey Martin?” 52.4% of respondents said no and 47.6% said yes. *Id.* at 19.

5. Suzanne Fields, *Advantages for the Disadvantaged; Supreme Court Lowers Standards*, *Wash. Times* A17 (June 4, 2001) (quoting Ben Hogan’s comment, “Overall, the moral standards of society have declined in recent years, . . . [b]ut the morality of golf hasn’t changed.”). Fields does not indicate the context of Hogan’s comment but said it was made “before the Supreme Court justices putted.” *Id.* at A17.

accused the Court of creating a new “constitutional right.”⁶ Jenkins predicted that “golf, and a number of other sports, stand to be fundamentally altered thanks to this decision.”⁷ Fields fiercely defended golf’s “traditions,” which, she boasted, “haven’t changed that much,”⁸ as opposed to, she said, baseball’s change in uniform colors and the American League pinch hitter rule, basketball’s three-point shots, tennis’ tie-breaker scoring, and football’s use of separate defensive and offensive teams.⁹ It is unclear whether Fields would consider the foregoing rule changes “fundamental alterations” to the respective games, but she apparently found use of a cart in the PGA Tour an affront to golf’s “traditions,” whatever they are.¹⁰ (Fortunately for the game, golf—and the PGA in particular—has forsaken one of its traditions: a whites-only rule.¹¹)

Despite Justice Scalia’s characterization of sports as “amusement,” as opposed to “productive activity,”¹² Americans take their sports—professional and amateur—very seriously.¹³ Critics of the decision, including Scalia, protest that the government, through the courts, has no business in American sporting events.¹⁴

Of the nine Supreme Court cases interpreting the ADA, this 7-2 decision in Martin’s favor is one of only three that have not sharply

6. Sally Jenkins, *A Good Walk is Truly Spoiled*, Wash. Post D01 (May 30, 2001).

7. Fields, *supra* n. 5, at A17.

8. *Id.*

9. *See id.*

10. *See id.* To be fair, many sports commentators applauded the decision. *E.g.* Dave Anderson, *Sports of the Times; The Cart Doesn’t Hit the Ball*, N.Y. Times D1 (May 30, 2001); Rich Brooks, *Objections to Disabled Golfer Just Aren’t Up to Par*, Sarasota Herald-Tribune BV1 (June 2, 2001); S. Scott Rohrer, *Martin Case is Victory for Human Decency, Special to The Washington Post*, Deseret News (Salt Lake City, Utah) AA08 (June 10, 2001); Bill Wallace, *Overreacting to Casey Martin’s Golf Cart*, Bridge News (June 12, 2001) (available in LEXIS, News library, ALLNWS file).

11. *See e.g.* Stanley Mosk, *My Shot; The Tour’s Fear of Carts is the Same Form of Bigotry that Caused the Caucasian-only Clause*, Sports Illustrated G46 (June 11, 2001). Mosk, a California State Supreme Court Justice, wrote:

I was thrilled by the Supreme Court’s decision . . . but disheartened by the reaction of Tour officials and players who fear that the Tour could be overrun by carts. The innate bigotry fueling their fears is the same bigotry that lay behind the Caucasian-only clause barring blacks from Tour events until 1961, when a fight that I had initiated forced the PGA of America to drop that offensive and illegal provision.

Id. at G46. *See generally* Davis, *supra* n. 3, at 29, for the proposition that, until 1975, no black players were invited to The Masters tournament.

12. *PGA Tour*, 121 S. Ct. at 1903 (Scalia, J., dissenting).

13. A disability law expert recently discussed how the media’s treatment of sports and entertainment figures has shaped the public’s awareness of disability issues. She notes the overall positive nature of the media’s coverage and its effect on public attitudes, but notes that reactions may not be so positive when issues involve “accommodation of the condition, particularly when the requested accommodation is excusing behavior, conduct, or performance.” Laura F. Rothstein, *Don’t Roll in My Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding of the Americans with Disabilities Act*, 19 Rev. Litig. 399, 422 (2000).

14. *See* Davis, *supra* n. 3, at 13-16.

divided the Court.¹⁵ Moreover, in this case, the Court acknowledged the ADA's "broad mandate"¹⁶ and the need to broadly interpret provisions concerning the Act's coverage to achieve Congress' "expansive purpose."¹⁷ As will be discussed, this "broad mandate" has not been consistently followed in the Court's previous interpretations of the scope of the ADA. The Court's inconsistency, as well as the severity of Martin's disability, provoked criticism that the decision was motivated by compassion rather than law;¹⁸ that, although Martin's condition is unfortunate, he is still "cheating" by using a cart and therefore taking advantage of the ADA.¹⁹ Fields stated, "[e]ven if Casey Martin were able to win a championship, it would be with an asterisk," characterizing the decision as "extended to designate special privileges for a professional golfer with a disability."²⁰ Justice Scalia in dissent opined that allowing Martin to use a cart "gives him a 'lucky' break every time he plays."²¹ Martin's "lucky break," however, is not any advantage he would receive from the ADA in actual tournament competition—the "lucky break" is the fact that the ADA enables Martin to compete at all.

15. Only two of the Court's ADA decisions were unanimous. *Cleveland v. Policy Mgt. Sys. Corp.*, 526 U.S. 795, 798 (1999) (holding that receipt of Social Security Disability Insurance benefits does not preclude suit under Title I of the ADA as long as the individual can explain the inconsistency in her statements regarding her ability to work); *Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 208 (1998) (holding that a state prison's refusal to admit a disabled prisoner to its boot camp program violated Title II of the ADA).

The other six cases were widely split. In its first opportunity, the Court broadly interpreted the ADA. *Bragdon v. Abbott*, 524 U.S. 624, 641-42 (1998). However, on a narrow 5-4 basis, the Court held that asymptomatic HIV infection is a disability under the ADA. *Id.* at 641-42. In the next term, the balance shifted to a constrained reading of the ADA. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), *Murphy v. United Parcel Service*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), all Title I employment cases, held 5-4 that disability must be determined by considering the impairment in its mitigated condition. For an analysis of the Court's reasoning in these four cases defining "disability," see Vicki J. Limas, *Of One-Legged Marathoners and Legally Blind Pilots: Disabling the ADA on a Case-by-Case Basis*, 35 *Tulsa L.J.* 505 (2000).

Concurrently with its decisions in the trilogy, a plurality of the Court held in *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 607 (1999), that Title II required a state to provide community-based treatment for mentally disabled individuals if resources were available after taking the needs of other mentally disabled individuals into account.

Finally, in *Board of Trustees v. Garrett*, 531 U.S. 356, 373-74 (2001), decided this term, the Court held 5-4 that the ADA did not abrogate states' sovereign immunity, and therefore states could not be sued by individuals for damages.

16. *PGA Tour*, 121 S. Ct. at 1889.

17. *Id.* at 1892.

18. *Id.* at 1898.

19. Tim Rosaforte, *Casey's Last Stand*, *Golf Digest* 174 (May 1, 2001). Martin described the following encounter, which occurred at the Kemper Insurance Open in 2000:

I was playing very well going into the final round. I was on the 12th hole and the whole green was lined with people. I missed about a 20-foot putt and the crowd went, 'Ohhh!' Then some guy yells, 'Too bad, you cheater!'

Id. at 174.

20. Fields, *supra* n. 5, at A17. Casting aspersions on Martin's integrity, she also wrote, "Golf is a game about rules, personal honor, even self-imposed penalties which lend this particular sport a rigorous and ethical elegance. . . . Golf is about integrity." *Id.*

21. *PGA Tour*, 121 S. Ct. at 1903.

The following will discuss Martin's ADA claim and the Court's decision upholding his right to ride a cart in the PGA Tour because of his disability. It will counter arguments and criticisms that the ADA will change the nature of competitive sporting events. Even though the legal impact of the decision is quite limited, its social and cultural impact can be far-reaching.

II. CASEY MARTIN'S TITLE III CLAIM

Martin's claim presented three issues, the first of which was not contested: 1) whether Martin is "an individual with a disability" within the meaning of the ADA; 2) whether he falls within the protections of Title III with regard to his desire to play in the PGA Tour; and, if so, 3) whether allowing him to ride a cart in the tournament would "fundamentally alter the nature of" the PGA Tour, as that term is used in Title III.²²

Martin is undisputedly disabled within the meaning of the ADA.²³ He has suffered since birth from Klippel-Trenaunay-Weber Syndrome, "a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart."²⁴ The disease has atrophied Martin's right leg. The act of walking causes him "pain, fatigue, and anxiety"²⁵ and "significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required."²⁶

Notwithstanding his disability, no one seems to doubt that Martin has attained elite status as a golfer. By age fifteen, he had won

22. *Id.* at 1884.

23. The ADA defines "disability" as follows:

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1994).

24. *PGA Tour*, 121 S. Ct. at 1885.

25. *Id.*

26. *Id.* at 1886. See e.g. Rick Reilly, *On His Last Leg*, *Sports Illustrated* 102 (June 4, 2001). A reporter described the appearance of Martin's leg:

He showed me his leg in his room one night. I asked to see it, actually. He stood up, took off his pants and then the two nylon restraining stockings on his right leg that are supposed to keep down the swelling. What was underneath looked like a baseball bat somebody had used to hit a thousand rocks.

'Watch the blood drain into it,' he said. Over the next two minutes that bony stick of a leg started turning purple and globby and marbled right in front of my eyes, bloating to twice its diameter. Grotesque pools of blood gathered in his hip, knee, ankle. He let me run my hand gingerly along his shin, which felt like a long, fat sandwich bag filled with spaghetti and meatballs. It was fascinating, except I felt like throwing up.

Id. at 102.

seventeen junior events in his home state of Oregon; as a high school senior, he won the state championship.²⁷ His Stanford University golf team won the 1994 National Collegiate Athletic Association ("NCAA") championship.²⁸ In 1998 and 1999, he qualified for the Nike Tour; his 1999 performance qualified him for the 2000 PGA Tour.²⁹ Of the twenty-four events he entered in 1999, he "made the cut 13 times, and had 6 top-10 finishes, coming in second twice and third once."³⁰

Stanford University sought and received waivers for Martin from the Pacific 10 Conference and NCAA rules requiring players to walk and carry their clubs.³¹ The United States Golf Association ("USGA") voluntarily waived its no-cart rules for Martin in the U.S. Open and other USGA tournaments.³² Although Nike Tour and PGA Tour rules do not allow carts in the actual tournament, those rules do allow use of carts in tournament qualifying rounds, which Martin completed successfully.³³ In order to play the PGA Tour, Martin requested a waiver of the tournament walking rule, supported by medical documentation, but PGA summarily denied his request.³⁴ Martin had attained his status as a professional golfer using a cart, a fact that held no significance whatsoever until his attempt to play in the PGA Tour.

The Court focused on the remaining two issues of Martin's ADA case: whether he is entitled to the protection of Title III with regard to his desire to play in the PGA Tour; and, if so, whether use of a cart "would fundamentally alter the nature of" the PGA Tour.³⁵ Martin had prevailed on both issues in the district court and the Ninth Circuit.³⁶ However, another disabled golfer had lost in the Seventh Circuit in *Olinger v. United States Golf Association*.³⁷

27. *PGA Tour*, 121 S. Ct. at 1885.

28. *Id.*

29. *Id.* The district court explained the relationship among the various tours staged by PGA Tour:

The PGA Tour stages the PGA Tour, senior PGA Tour, the Nike Tour, and the Qualifying School Tournament. The Senior Tour is for PGA Tour golfers of 50+ years in age. The Qualifying School Tournament screens those who are competing for entry into the PGA Tour and Nike Tour. The PGA Tour admits the most skilled golfers; the Nike Tour admits those at the next highest level. . . .

Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1248 n. 9 (D. Ore. 1998).

30. *PGA Tour*, 121 S. Ct. at 1885.

31. *Id.* at 1886.

32. *See id.* However, like PGA, USGA resisted a similar request in *Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000); USGA prevailed in the Seventh Circuit. *See text accompanying infra* nn. 38-42.

33. *PGA Tour*, 121 S. Ct. at 1885. PGA Tour waived its walking rule in the third qualifying round of the Qualifying School Tournament ("Q-School") for all competitors. *Id.* at 1896 n. 49. *See discussion infra* Parts III & IV for a description of Nike and PGA Tour rules concerning use of carts and an explanation of "Q-School."

34. *PGA Tour*, 121 S. Ct. at 1886.

35. *Id.* at 1893.

36. *PGA Tour, Inc. v. Martin*, 204 F.3d 994 (9th Cir. 2000).

37. 205 F.3d 1001 (7th Cir. 2000).

Like Martin, Olinger was unquestionably disabled; a degenerative condition substantially limited his ability to walk.³⁸ The Seventh Circuit did not rule on the question of whether Title III covered the USGA.³⁹ It assumed coverage but ruled that USGA was not required to allow Olinger to use a golf cart in United States Open tournament qualifying rounds.⁴⁰ Use of a cart, the court held, would alter the fundamental nature of the tournament competition by altering the factors of "physical endurance and stamina" and uniformity of rules, which it found to be "integral parts of championship-level golf."⁴¹ Further, the court held, evaluation of requests to waive the walking rule would create an "unnecessary" administrative burden on USGA.⁴² With these two decisions as background, the Supreme Court took certiorari on the issues of coverage and liability.

III. TITLE III'S COVERAGE OF PGA AND CASEY MARTIN

Title III of the ADA prohibits discrimination against individuals with disabilities in the area of public accommodations. In the Court's words, Title III is part of the ADA's "sweeping purpose" to eliminate discrimination in "major areas of public life."⁴³ The ADA defines "public accommodations" by way of example, enumerating twelve categories of private entities as public accommodations, one of which expressly includes golf courses.⁴⁴

38. *Id.* at 1001.

39. *Id.* at 1005. USGA argued that as an organization, it did fall within one of twelve specific categories of private entities that qualify as a public accommodation under Title III.

40. *See id.*

41. *Id.* at 1006.

42. *Id.* at 1007.

43. *PGA Tour*, 121 S. Ct. at 1889. Discrimination in employment is covered by Title I, 42 U.S.C. §§ 12111-12117 (1994); discrimination in public services offered by state and local entities is covered by Title II, 42 U.S.C. §§ 12131-12165 (1994). Title III appears at 42 U.S.C. §§ 12181-12189 (1994).

44. *Id.* § 12181(7). These categories are as follows:

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer,

PGA did not deny its status as a public accommodation.⁴⁵ However, it argued that, although it leases golf courses for its tournaments, the tournament itself places the golf course into the category of “place of exhibition or entertainment.”⁴⁶ According to PGA, “it operates not a ‘golf course’ during its tournaments but a ‘place of exhibition or entertainment;” therefore players in its tournaments are hired entertainers rather than “clients or customers” of it or the golf courses it leases.⁴⁷ Thus, PGA turned the question of whether it was a public accommodation subject to Title III’s prohibitions into the question of whether Martin was an individual entitled to Title III’s protections.

Title III’s prohibitions are stated in a section titled “General rule:”

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.⁴⁸

The statute contains additional language construing the “general rule.” Under a subsection heading “General prohibitions,” the ADA prohibits public accommodations from excluding “an individual or class of individuals” from participation in the public accommodations’ offerings “on the basis of disability”: a public accommodation may not, “directly, or through contractual . . . or other arrangements”⁴⁹: (i) deny

pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment;

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Id.

45. PGA had argued in the lower courts that it was not a public accommodation. At trial, PGA argued that it was a “private club” exempt from coverage by § 12187 of Title III or, alternatively, that the area of play “behind the ropes” was not a public accommodation. It maintained the second argument at the appellate level but did not raise either before the Supreme Court. *PGA Tour*, 121 S. Ct. at 1890.

46. Title II, 42 U.S.C. § 12181(7)(C) (1994).

47. *PGA Tour*, 121 S. Ct. at 1891. Consequently, PGA concluded, the only portion of the ADA arguably relevant to the players-as-entertainers would be Title I prohibiting discrimination in employment. See 42 U.S.C. § 12111 *et seq.* (1994). The players would be independent contractors and therefore not “employees” covered by Title I, according to PGA. *PGA Tour*, 121 S. Ct. at 1891.

48. 42 U.S.C. § 12182(a) (1994).

49. *Id.* § 12182(b)(1)(A).

participation in its activities⁵⁰; (ii) provide unequal opportunity to participate in or benefit from its activities⁵¹; and (iii) provide separate benefits if such benefits are not “as effective” as those it provides to others.⁵² “Individual or class of individuals” as used in (i)-(iii) is defined as “clients or customers of the covered public accommodation that enters into the contractual . . . or other arrangement.”⁵³

A second subsection titled “Specific prohibitions” follows. That section, as its name implies, provides more specific examples of ways in which a public accommodation would discriminate under the ADA. These “specific prohibitions” generally have to do with the affirmative duty to accommodate individuals with disabilities, the duty at issue in *PGA Tour*. Following is the provision relevant to Martin’s case:

For purposes of subsection (a) of this section, discrimination includes—

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;⁵⁴

This subsection does not contain the language “individual or class of individuals” nor its definition, as did the “General prohibitions” subsection.

These two subsections illustrate the dual nature of the ADA’s protections. Unlike other anti-discrimination statutes, the ADA provides not only for “equal treatment,” but also “equal opportunity.” Other anti-discrimination statutes mandate equal treatment of individuals in protected classes as to all other individuals; one’s status as an individual in a protected class is deemed *irrelevant* to activities covered by the various statutes, and those laws impose no duty upon covered entities other than equal treatment.⁵⁵ But one’s disability may indeed be

50. *Id.* § 12182(b)(1)(A)(i).

51. *Id.* § 12182(b)(1)(A)(ii).

52. *Id.* § 12182(b)(1)(A)(iii).

53. *Id.* § 12182(b)(1)(A)(iv). The Court explained the relationship among clauses (i) through (iv) of the “general prohibitions” subsection:

Clauses (i) through (iii) of the subparagraph prohibit public accommodations from discriminating against a disabled ‘individual or class of individuals’ in certain ways either directly or indirectly through contractual arrangements with other entities. Those clauses make clear on the one hand that their prohibitions cannot be avoided by means of contract, while clause (iv) makes clear on the other hand that contractual relationships will not expand a public accommodation’s obligations under the subparagraph beyond its own clients or customers.

PGA Tour, 121 S. Ct. at 1891.

54. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

55. An exception is the duty of employers to accommodate the religious practices and

relevant to that person's ability to participate in areas of life such as education, employment, or activities and benefits offered by public accommodations.⁵⁶ That is why the ADA does not, in all cases, mandate equal treatment of disabled individuals as to non-disabled individuals. Equal treatment is required only if the individual can enjoy the activity at issue without any consideration at all of his or her disability. Otherwise, the ADA requires or permits differential treatment. The cornerstone of the ADA is "equal opportunity."⁵⁷

As the Court recognized in *PGA Tour*,⁵⁸ the ADA's dual protection arises from Congress' findings that people with disabilities face discrimination in the forms of, *inter alia*, "outright intentional exclusion" and "failure to make modifications to existing facilities and practices."⁵⁹ Title III's "General rule" prohibiting discrimination addresses equal treatment as well as equal opportunity.⁶⁰ Its "Specific prohibitions"

beliefs of employees or prospective employees under § 701(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994). That duty to accommodate is not onerous; an employer need only show the proposed accommodation would entail more than "a de minimis cost." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

56. See *e.g.* 42 U.S.C. § 12101(a) (1994). The congressional "Findings and Purposes" prefacing the ADA:

The Congress finds that—

...

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. . . .

Id.

57. See *id.* Congress' findings continue:

...

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. § 12101(a) (1994). See Michael J. Zimmer, Charles A. Sullivan, Richard F. Richards, & Deborah A. Calloway, *Cases and Materials on Employment Discrimination* 740-41 (5th ed., Aspen L. & Bus. 2000).

58. *PGA Tour*, 121 S. Ct. at 1889

59. 42 U.S.C. § 12101(5) (1994).

60. The "General prohibition" subsection includes the following relevant provisions:

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of disability or disabilities of such individual or class, . . . to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefits

It shall be discriminatory to afford an individual or class of individuals, on the

subsection, setting out the duty to accommodate individuals with disabilities, addresses the manner in which public accommodations must afford equal opportunities to those individuals so that they may “enjoy” that which is offered by the public accommodation.

As stated previously, PGA argued that it owed no duty to Martin under Title III because, as a player in the PGA Tour, Martin is an “entertainer,” not a “client or customer” of PGA or the golf course it leases. The latter, it argued, is the only class of disabled individuals protected by Title III. Under PGA’s interpretation of Title III, the “clients or customers” definition of “individual or class of individual” contained in the “General prohibitions” subsection governs the entire scope of Title III, including the “Special prohibitions” subsection that governs its duty to accommodate.

Although the “clients or customers” language of the “General prohibitions” subsection does not appear in the “Special prohibitions” subsection, the Court declined to address whether the language applies to the whole statute.⁶¹ Instead, it held that players in PGA tournaments are “clients or customers” of PGA. This conclusion was based on the public nature of PGA’s qualifying tournaments: one way of entering a Nike Tour or PGA Tour is through a “Q-School,” which is “a three-stage qualifying tournament.”⁶² Q-School, operated by PGA, is open to any member of the general public who can pay a \$3,000 entry fee and obtain recommendation letters from two Nike Tour or PGA Tour members.⁶³ PGA Tour players are “clients or customers” of PGA, the Court reasoned, because members of the general public may vie for the “privilege” (a term used in the “General prohibitions” subsection) of playing in its tournaments, just as members of the general public may enjoy the “privilege” of attending the tournaments as spectators (who are undisputably “clients or customers” of PGA).⁶⁴ In other words, because PGA’s tournaments are open to the public, they are public accommodations and entrants are “clients or customers.”

Justice Scalia, in a dissent joined by Justice Thomas, insisted that Martin did not fall within Title III’s protection of “clients or customers” of a public accommodation. Rather, Scalia asserted, Martin would be an independent contractor with PGA because he earns his living playing golf

basis of a disability or disabilities of such individual or class, . . . with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

42 U.S.C. § 12182(b)(1)(A) (1994) (emphasis added).

61. *PGA Tour*, 121 S. Ct. at 1891.

62. *Id.* at 1884. See Davis, *supra* n. 3, at 31 for a thorough description of PGA elimination tournaments and entry into the PGA Tour, the Nike Tour, and the Senior PGA Tour.

63. See *PGA Tour*, 121 S. Ct. at 1884.

64. *Id.* at 1892.

and is contractually entitled to a certain sum of money if he wins. Scalia analogized Martin's situation to that of a professional baseball player:

The PGA Tour is a professional sporting event, staged for the entertainment of a live and TV audience, the receipts from whom (the TV audience's admission price is paid by advertisers) pay the expenses of the tour, including the cash prizes for the winning golfers. The professional golfers on the tour are no more 'enjoying' (the statutory term) the entertainment that the tour provides, or the facilities of the golf courses on which it is held, than professional baseball players 'enjoy' the baseball games in which they play or the facilities of Yankee Stadium.⁶⁵

Scalia then analogized the Q-School to an audition for actors, tryouts for professional sports teams, or, oddly, a bar examination⁶⁶:

But the Q-School is no more a 'privilege' offered for the general public's 'enjoyment' than is the California Bar Exam. It is a competition for entry into the PGA Tour—an open tryout, no different in principle from open casting for a movie or stage production, or walk-on tryouts for other professional sports, such as baseball. . . . But the purpose of holding those tryouts is not to provide entertainment; it is to hire. . . .⁶⁷

Under Scalia's logic, once Martin made it through the PGA Tour qualifying tournaments in Q-School, his relationship with PGA changed because it then "hired" him as an independent contractor to play in the PGA Tour. With respect to the nature of Martin's "remuneration" from PGA, Scalia continued:

It makes not a bit of difference, insofar as their 'customer' status is concerned, that the remuneration for their performance (unlike most of the remuneration for ballplayers) is not fixed but contingent—viz., the purses for the winners in the various events, and the compensation from product endorsements that consistent winners are assured. The compensation of *many* independent contractors is contingent upon their success—real estate brokers, for example, or insurance salesmen.⁶⁸

Scalia's analogies fail by their own terms. Baseball players, as the majority pointed out, are clearly *employees* of their clubs or teams.⁶⁹

65. *Id.* at 1900.

66. Entities offering bar examinations, as well as other licensing or certifying examinations or courses, are covered by a separate provision of Title III mandating that they "offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." 42 U.S.C. § 12189 (1994). Scalia asserted that § 12189 "would have been unnecessary" if "open tryouts were 'privileges' under § 12182, and participants in the tryouts 'customers.'" *PGA Tour*, 121 S. Ct. at 1901 n. 1 (Scalia, J., dissenting). The duty imposed on such entities, however, is absolute; defenses are not available to show an accommodation is not feasible, as under Title III's "General rule" against discrimination and the provisions implementing it. 42 U.S.C. § 12189 (1994). (See *infra* n. 147 for a discussion of the ADA's defenses.) Presumably, that is why Congress gave these entities their own section in Title III.

67. *PGA Tour*, 121 S. Ct. at 1900-01.

68. *Id.* at 1900.

69. *Id.* at 1892. See Stephen B. Goldberg, Frank E. A. Sander, & Nancy H. Rogers,

They contract with a particular club (e.g., the New York Yankees to use Scalia's example) for a particular salary to play a particular number of games in a particular term. The club, in conjunction with its agreement with the American or National League, determines where players will play, when they will play, whom they will play, and whether they will play. Once the players' base salaries are fixed by a contract for a certain term, those salaries do not fluctuate depending on how well or poorly they play during that term (players may receive a contractual bonus for exemplary performance). And although the players agree to be bound by League rules (as an attorney is bound by the rules of a bar), they are not hired by the Leagues.

Nor is a PGA tournament player like an "actor" because he achieved a tournament slot through "Q-School." The golfer does not "audition" for a slot in the tournament; PGA does not select the tournament competitors as a theater selects actors. Rather, the golfer competes in a series of elimination tournaments to achieve a slot in the "elite" tournament, which is yet another competition. Anyone who can pay the entry fee and provide references may enter PGA's tournament elimination process. Progression through the elimination process into the elite tournaments does not change the entrants' relationship to PGA, the entity sponsoring the progressive tournaments.⁷⁰

Despite the fact that Martin may earn his living by playing golf, he is like the professional gambler, pool player, or chess player, not the professional ball player. He is no more an independent contractor of PGA than gamblers, pool players, or chess players are independent contractors of the venues where they gamble, shoot pool, or play chess. All enter games to test skill and luck against others (or against "the house," depending on the gambler's game). What makes them "professionals" is their ability to win money through skill and luck and live off those winnings. "Remuneration" is in the form of a prize or winnings, not a salary or commission. (To quote fictional pool player

Dispute Resolution: Negotiation, Mediation, and Other Processes 273-74 (3d ed., Aspen L. & Bus. 1999) (describing labor contracts and process to resolve salary disputes between major league baseball players and major league teams, their "employers").

70. The Ninth Circuit posed the following analogy:

If a stadium owner invited the public to compete in long distance races, and continued to run heats until only the ten best runners remained, the track would be no less a place of public accommodation when the final race was run. We see no justification in reason or in the statute to draw a line beyond which the performance of athletes becomes so excellent that a competition restricted to their level deprives its situs of the character of a public accommodation.

Martin v. PGA Tour, Inc., 204 F.3d 994, 999 (9th Cir. 2000). As stated above, PGA's argument in the Ninth Circuit focused on its own status as a public accommodation. But, the analogy fits the question PGA raised in the Supreme Court of the relationship between it and the players in its tournaments. The winners of elimination tournaments are no less members of the general public than when they started the elimination tournament process.

“Fast” Eddie Felson, “Money won is twice as sweet as money earned.”⁷¹) Like the others, Martin wins some and loses some.⁷² If he does not place among the “winners” in a professional golf tournament, he receives no reward for his efforts in that tournament. If he is very good (or “elite,” as PGA puts it), he can make a living from his winnings. If he is very good, he may also receive “remuneration” from contracts for product endorsements, but such contracts are not with PGA. Scalia’s analogy could not avoid the very terms that defeat it: he characterized professional golfers’ “remuneration” in the above-quoted passages as “prizes for the *winning golfers*” and “purses for the *winners*.”

The fact that a tournament player contracts with PGA to play a certain number of tournaments does not make him an independent contractor, as Scalia asserts.⁷³ Such an agreement is no different from a casino or lottery sponsor contracting with winners to publish their photographs for publicity designed to generate more participants and hence more income. True, the elite golfers are the “bread and butter” of professional golfing association tournaments; their presence draws the crowds, the commercial sponsors, and the income those entities provide. But the fact that PGA uses the players to draw the crowds—whether for one tournament or a specific number—does not make the players independent contractors who “sell” their golfing “services” to the golfing association. They are still competitors, just as they were when they entered Q-School.

The majority, the dissent, and even PGA agreed that PGA is a “public accommodation” under Title III when it stages a tournament. The majority found golfers in such tournaments to be “clients or customers” of the entity staging the tournament under Title III’s “general prohibitions” subsection. Having decided the threshold issue of coverage, the Court proceeded to determine whether use of a golf cart in the PGA Tour would “fundamentally alter the nature of” the tournament.

IV. THE FUNDAMENTAL NATURE OF THE PGA TOUR COMPETITION

As stated previously, Title III imposes an affirmative duty to accommodate individuals’ disabilities, as it defines “discrimination” to include

71. *The Color of Money* (Touchstone Pictures 1986) (motion picture).

72. Anderson, *supra* n. 10, at D1. Last season, Martin seemed to be losing more than winning:

Martin, who made the 36-hole cut in 14 of his 29 PGA Tour events last year for \$143,248 in prize money, has earned a career total of nearly \$400,000 on both Tours as well as substantial endorsement income. But this year on the Buy.com Tour, he has survived only four of eight cuts in collecting \$6,433; he missed the cut in two PGA Tour events.

Id.

73. *PGA Tour*, 121 S. Ct. at 1901 (Scalia, J., dissenting).

a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.⁷⁴

A public accommodation must modify its "policies, practices or procedures" in order to accommodate an individual with a disability when: 1) the requested modification is reasonable; 2) the requested modification is necessary for that individual; and 3) the requested modification does not fundamentally alter the nature of what is offered by the public accommodation.⁷⁵ There is no apparent priority among these requirements; an answer to either of the "reasonable" or "necessary" inquiries might obviate discussion of either of the others.⁷⁶ The plaintiff bears the burden of showing that the requested modification is reasonable and necessary.⁷⁷ By the terms of the statute, however, the "fundamental alteration" element is a defense that must be "demonstrated" by the entity that is a public accommodation.⁷⁸ PGA apparently conceded that its tournament walking rule is a "policy, practice, or procedure." It further conceded that allowing use of a cart would be a "reasonable modification" of the walking rule and that use of a cart would be "necessary" to enable Martin to play in its tournament.⁷⁹ However, PGA argued, and bore the burden of proving, that use of a cart "would fundamentally alter the nature of" its tournament.

PGA asserted that the walking rule is essential to the nature of its tournaments because walking injects the element of fatigue, which could adversely affect contestants' performance and hence the tournament's outcome.⁸⁰ In support of this argument at trial, PGA offered testimony of golfing greats Arnold Palmer, Jack Nicklaus, and Ken Venturi.⁸¹ The Court summarized their testimony as follows:

Arnold Palmer, Jack Nicklaus, and Ken Venturi explained that fatigue can be a critical factor in a tournament, particularly on the last day when

74. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

75. *PGA Tour*, 121 S. Ct. at 1893 n. 38.

76. *See id.* It might be that the "reasonable" requirement and the "not fundamentally alter" requirement would involve the same considerations. This frequently occurs in cases under Title I, which requires the plaintiff to show that a proposed workplace accommodation is "reasonable," but requires the defendant to show that the proposed accommodation would work an "undue hardship."

77. *See Johnson v. Gambrinus Co./Spoetzel Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997) (holding that the plaintiff bears the burden of proving that the requested modification was actually requested and that it is reasonable "in a general sense," which the court defined as "reasonable in the run of cases").

78. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

79. *PGA Tour*, 121 S. Ct. at 1893.

80. *Id.* at 1895.

81. *Id.* at 1886-87.

psychological pressure is at a maximum. Their testimony makes it clear that, in their view, permission to use a cart might well give some players a competitive advantage over other players who must walk.⁸²

(The Court noted that none of these players expressed an opinion on whether use of a cart would provide such an advantage for Martin.⁸³)

The Court described two ways in which PGA could show that a modification of its tournament rules would work a “fundamental alteration” to the tournament: first, the modification “might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally.”⁸⁴ The Court acknowledged that “the waiver of an essential rule of competition for anyone would fundamentally alter the nature of petitioner’s tournaments.”⁸⁵ An example of such a modification, the Court explained, might be a three-inch change in the diameter of the hole.⁸⁶

Alternatively, the modification might be “a less significant change that has only a peripheral impact on the game itself” but might “give a disabled player . . . an advantage over others”⁸⁷ and thus “fundamentally alter the character of the competition.”⁸⁸ Significantly, the Court ruled that the latter analysis must take into account the particular circumstances of the individual requesting the modification. Citing legislative history and its previous interpretations of the ADA,⁸⁹ the Court interpreted Title III’s “specific prohibition” of “failure to make reasonable modifications in policies, practices, or procedures”⁹⁰ to require “an individualized inquiry . . . to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.”⁹¹

Thus, in order to assess whether a requested modification would

82. *Id.* Although Tiger Woods did not participate in the hearing, he is quoted in the media as agreeing with these witnesses. See e.g. Jenkins, *supra* n. 6, at D01 (“Even Tiger Woods, who roomed with Casey Martin at Stanford, has said of the cart issue: ‘As a friend, I’d love to see him get a cart, but from a playing standpoint, is it an advantage? It probably is.’”).

83. *PGA Tour*, 121 S. Ct. at 1887. As a matter of fact, Mr. Nicklaus later said “in hindsight” that PGA should “grandfather” Martin in to the former rules so he could ride. Rosaforte, *supra* n. 13.

84. *Id.* at 1893.

85. *Id.* at 1896.

86. *Id.* at 1893. Justice Scalia took the majority to task for the precision of this example. *Id.* at 1903 (Scalia, J., dissenting). Perhaps the majority meant simply to point out that any alteration of size or distance rules or regulations might constitute a fundamental alteration of the game.

87. *Id.*

88. *Id.*

89. See text accompanying *infra* nn. 168-71 for a discussion of this precedent.

90. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

91. *PGA Tour*, 121 S. Ct. at 1896 (citing S. Rpt. 101-116, at 61 and H.R. Rpt. 101-485, at 102).

cause a "fundamental alteration" under Title III, one would first look to whether the modification would alter an "essential aspect" of whatever is offered by the public accommodation in question. If answered affirmatively, the inquiry stops and the modification need not be provided. If, however, it is established that the modification does not alter an "essential aspect," then one must determine whether the modification would give the person requesting it an advantage over other participants, taking into account the particular circumstances of the person requesting the modification. A requested modification need not be provided if it would place the individual with a disability at a competitive advantage over others.

In analyzing the primary question of whether allowing Martin to use a cart would "alter an essential aspect of the game of golf," the Court first examined "the fundamental character" of that game.⁹² It found that "the use of carts is not itself inconsistent with the fundamental character of the game of golf."⁹³ It noted that *Rules of Golf* ("Rules"), written by the USGA and the Royal and Ancient Golf Club of Scotland, apply to the game wherever it is played throughout the world, whether by amateurs or professionals.⁹⁴ The Rules define the game of golf as follows: "The Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes in accordance with these rules."⁹⁵ This definition, the Court observed, does not encompass walking the golf course.⁹⁶ The Rules govern professional golfing tournaments, including those sponsored by PGA.⁹⁷ The Rules do not mandate walking the course.⁹⁸ Their only reference to walking appears in an appendix listing "optional" conditions"; that reference suggests language to be used if a competition *chooses* to impose a walking rule.⁹⁹

The Court further noted that two additional sets of rules governing PGA tournaments allow use of carts in certain circumstances. PGA's own *Conditions of Competition and Local Rules* ("hard card"),¹⁰⁰ which applies to professional tournaments,¹⁰¹ states: "Players shall walk at all times during a stipulated round unless permitted to ride by the PGA Tour Rules Committee."¹⁰² The PGA Tour and Nike Tour "hard cards"

92. *Id.* at 1893.

93. *Id.*

94. *Id.* at 1884.

95. *Id.* at 1894 (emphasis in original source quoted).

96. *Id.*

97. *PGA Tour*, 121 S. Ct. at 1894.

98. *Id.* at 1884-85.

99. *Id.* at 1885 n. 3 ("If it is desired to require players to walk in a competition, the following condition is suggested: 'Players shall walk at all times during a stipulated round.'").

100. *Id.* at 1885.

101. *Id.*

102. *Id.* at 1885 n. 4.

require walking in tournaments and the third qualifying round of Q-School, but carts may be used in the first two qualifying rounds of Q-School.¹⁰³ (Indeed, PGA waived the walking rule for all competitors when Martin made the third qualifying round.¹⁰⁴) The Senior PGA Tour tournament, on the other hand, permits use of carts throughout a tournament.¹⁰⁵ In addition, tournament players may receive a specific set of rules called *Notice to Competitors*, which covers conditions of individual tournaments.¹⁰⁶ Such notices have permitted use of carts under circumstances unique to a particular course, such as considerable distances between tees.¹⁰⁷ Finally, as further support for its conclusion that walking is not an essential aspect of the game of golf, the Court cited USGA's handicap system for amateur play, which does not take into account whether golfers ride or walk or whether they carry their own clubs.¹⁰⁸

PGA, however, argued that its tournament games differ from the game of golf "as it is generally played," even in other golf tournaments.¹⁰⁹ PGA Tour and Nike Tour tournaments, it asserted, involve "golf at the 'highest level,'" the goal of which "is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules."¹¹⁰ According to PGA, because fatigue caused by walking can be outcome-determinative, and therefore substantive, modification of that rule by allowing Martin to ride a cart would fundamentally alter the nature of its tournaments, "even if he were the only person in the world who has both the talent to compete in those elite events and a disability sufficiently serious that he cannot do so without using a cart."¹¹¹

The Court doubted the validity of PGA's distinction between play in its tournaments and that in other competitive golf games. First, it

103. *PGA Tour*, 121 S. Ct. at 1885, 1885 n. 4.

104. *Id.* at 1896 n. 49.

105. *Id.* at 1885.

106. *Id.*

107. *Id.*

108. *Id.* 1895 n. 44.

109. *PGA Tour*, 121 S. Ct. at 1895.

110. *Id.*

111. *Id.* at 1895. PGA's argument brings to mind the "sex-plus" theory arising in the context of sex discrimination in employment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994). Under that theory, an employer joins an ostensibly neutral characteristic with an employee's protected characteristic and claims the neutral characteristic is the basis of its employment decision, not the protected one. For example, the Court held in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (*per curiam*), that an employer discriminated on the basis of sex when it refused to hire women with preschool aged children, even though it hired other women who did not have young children. An employer is not permitted to take the age of children into account when hiring women if it does not do so when hiring men—a consideration not utilized when hiring men. Analogously, PGA attempted by way of a "golf-plus" characterization to distinguish ordinary "tournament golf" from "PGA Tour golf" to remove the latter from Title III scrutiny.

characterized PGA's asserted need for "identical substantive rules" as a "guarantee that all competitors will play under exactly the same conditions or that an individual's ability will be the sole determinant of the outcome."¹¹² Such a guarantee, the Court reasoned, is impossible in golf because outside factors such as weather may be outcome-determinative yet cannot be controlled and may thus cause different conditions among players in a single tournament.¹¹³ Moreover, the Court stated, an individual's ability can never be the sole determinant of his performance because chance often plays a role for better or worse.¹¹⁴ The Court's rationale on this point is not particularly persuasive, as neither PGA nor any other competition sponsor can devise rules to control factors that cannot be controlled, like weather or chance. Competition rules are devised to address factors affecting the competition that can be controlled.

However, even assuming a distinction between PGA Tour golf and non-PGA Tour golf, the Court credited the district court's finding that PGA failed to prove that fatigue caused by walking plays any significant role in elite tournament play.¹¹⁵ It noted testimony of a physiologist, an "expert on fatigue," indicating that physical fatigue caused by walking a golf course is insignificant to play, as the walk takes place over the five-hour duration of a tournament with rest and refreshment breaks.¹¹⁶ Rather, the expert testified, fatigue experienced by a tournament golfer is caused primarily by psychological factors of stress and motivation.¹¹⁷ Evidence showed that walking in tournaments actually reduces the effect of such factors.¹¹⁸

Having found that PGA failed to show that walking is an essential aspect of its elite tournaments, the Court turned to the question of whether granting Martin's request to use a cart would "fundamentally alter the character of the competition" by giving him an advantage over the other players.¹¹⁹ It held that PGA violated the ADA when it summarily denied Martin's request for a modification of the PGA Tour walking rule and failed to take his unique circumstances into account in determining whether that requested modification would fundamentally alter the nature of its tournament.¹²⁰

112. *PGA Tour*, 121 S. Ct. at 1895.

113. *Id.*

114. *Id.*

115. *Id.* at 1895-96.

116. *Id.* at 1896. Martin's expert witness testified that a tournament game consisted of walking five miles over five hours, with rest and refreshment, and an expenditure of "approximately 500 calories—nutritionally . . . less than a Big Mac." *Id.* (quoting *Martin v. PGA Tour, Inc.*, 994 F. Supp 1242, 1250 (D. Or. 1998)).

117. *Id.*

118. *PGA Tour*, 121 S. Ct. at 1896.

119. *Id.* at 1893.

120. *Id.* at 1896 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999)).

The Court credited the district court's "uncontested" finding that "Martin 'easily endures greater fatigue even with a cart than his able-bodied competitors do by walking.'"¹²¹ That finding was based on the following evidence: even using a cart, Martin walks more than 25 percent of an 18-hole round¹²²; the fatigue caused by his disability alone is "undeniably greater' than the fatigue his able-bodied competitors endure from walking the course"¹²³; and, while playing, Martin not only endures fatigue caused by the stress of competition but fatigue caused by "stress of pain and risk of serious injury" when he walks and gets in and out of a cart.¹²⁴ The Court thus concluded that "[t]he purpose of the walking rule is . . . not compromised in the slightest by allowing Martin to use a cart,"¹²⁵ so use of a cart would not give him an advantage over the other competitors. Thus, the Court held, Title III required PGA to waive its tournament walking rule for Martin and allow him to use a cart.¹²⁶

Finally, the Court rejected the "administrative burden" argument validated in *Olinger* as a means of proving "fundamental alteration."¹²⁷ It acknowledged "some administrative burdens on the operators of places of public accommodations"¹²⁸ but viewed such burdens as part and parcel of the ADA's mandate.¹²⁹ First, the Court rejected the notion that the burden would be onerous, citing evidence of only a "handful of requests" for modifications of competition rules.¹³⁰ Second, it noted that "nowhere . . . does Congress limit the reasonable modification requirement only to requests that are easy to evaluate."¹³¹ Most importantly, the Court concluded that Title III required public accommodations not only to give individualized consideration of requests for modifications, but also to "carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable."¹³² Indeed such a burden is precisely that required under the Court's two-pronged analysis of the "fundamental alteration" defense.¹³³

Again, Justices Scalia and Thomas dissented. Justice Scalia first attacked the majority's assumption that a court can presume to determine the "essential aspect of the game of golf" or any other game.¹³⁴

121. *Id.* at 1897 (quoting *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1252 (D. Or. 1998)).

122. *Id.* at 1887 n. 17.

123. *Id.* at 1887.

124. *PGA Tour*, 121 S. Ct. at 1887.

125. *Id.* at 1897.

126. *Id.*

127. *Id.* at 1897-98.

128. *Id.*

129. *Id.* at 1898.

130. *PGA Tour*, 121 S. Ct. at 1897-98.

131. *Id.* at 1897 n. 53.

132. *Id.* at 1897-98.

133. *Id.* at 1893.

134. *Id.* at 1902 (Scalia, J., dissenting).

Scalia defined “essential” as “necessary to the achievement of a certain object.”¹³⁵ He characterized games as having “no object except amusement,” distinguishing them “from productive activity.”¹³⁶ Therefore, according to Scalia, because the only purpose of games is amusement, any rule of any game is “arbitrary” and peculiar to that game.¹³⁷ Under Scalia’s interpretation of Title III, the rules of competitive sporting events could never be subject to scrutiny because all rules are “essential” to their respective games and therefore cannot be modified without working a fundamental alteration to the game in question.¹³⁸ Furthermore, Scalia argued, because rules of games are arbitrary anyway, the game PGA offers in its elite tournaments need not entail the same rules as those used in other golf games.¹³⁹ According to Scalia,

Why cannot the PGA TOUR, if it wishes, promote a new game, with distinctive rules . . . ? If members of the public do not like the new rules—if they feel that these rules do not truly test the individual’s skill at ‘real golf’ . . . they can withdraw their patronage. *But the rules are the rules.* They are (as in all games) *entirely arbitrary*, and there is no basis on which anyone—not even the Supreme Court of the United States—can pronounce one or another of them to be ‘nonessential’ *if the rulemaker (here the PGA TOUR) deems it to be essential.*¹⁴⁰

Scalia’s “game theory” proves too much. By characterizing the “object” of all games as “amusement” subject to arbitrary rules, he would immunize all sports¹⁴¹ from Title III’s reach. As the majority pointed out, however, Congress could not have meant such a result, as Title III nowhere exempts “elite athletics” from the requirement that public accommodations make reasonable modifications.¹⁴²

Scalia next took issue with the Court’s holding that Title III’s requirement to accommodate individuals with disabilities must be determined on an individualized basis.¹⁴³ While he agreed that “*equal access*” to “competitive sporting events” is mandated by Title III, he distinguished “*equal access*” from an “*equal chance to win* competitive

135. *Id.* at 1903 (Scalia, J., dissenting).

136. *PGA Tour*, 121 S. Ct. at 1903 (Scalia, J., dissenting).

137. *Id.*

138. *See id.* at 1903 (Scalia, J., dissenting).

139. *Id.* at 1902.

140. *Id.* (emphasis added). By extension, Scalia’s view would take sports out of the reach of Title III’s counterpart, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, which prohibits public accommodations from discriminating on the basis of race, color, national origin, and religion. Indeed, one author has noted that the argument that a competitive sports organization can make up its own rules for competitions “was precisely the same justification that golf used to exclude blacks for so many years.” Davis, *supra* n. 3, at 34.

141. Scalia used the words “games” and “sports” interchangeably. *PGA Tour*, 121 S. Ct. at 1903 (Scalia, J., dissenting).

142. *Id.* at 1896. The Court further noted that Title III expressly exempts “private clubs or establishments” and “religious organizations or entities” from its coverage. *Id.* at 1897 n. 51.

143. *Id.* at 1903-04 (Scalia, J., dissenting).

sporting events.”¹⁴⁴ The latter, he asserted, is not mandated by the Act.¹⁴⁵

But the very nature of competitive sporting events invalidates that distinction: Presumably a competitive athlete, especially an “elite” athlete like Martin, enters a competitive sporting event in order to *compete*, i.e., to defeat others, to win.¹⁴⁶ Entering a competitive sporting event *means* getting a chance to win. Martin sought a chance to win the PGA Tour, but without a cart, he could not enter to get that chance. Without a cart, Martin had no “access” to the tournament, just as, without an elevator, someone in a wheelchair has no access to the upper floors of a building.

Scalia’s distinction between giving Martin “equal access” to the PGA Tour and giving him “an equal chance to win” the PGA Tour fails to account for the dual nature of the ADA’s protections, discussed above. His view of Title III’s purpose ignores the difference between the ADA and other federal anti-discrimination statutes. As discussed previously, “equal treatment,” which is required under other statutes, means that one is treated the same as others; i.e., one’s protected status is irrelevant to his or her ability to participate in covered activities.

The notion of equal treatment seems to be what Scalia meant by “equal access.” But, again, the ADA goes further: so that individuals with disabilities have the opportunities to enjoy statutorily covered activities, the ADA imposes an *affirmative duty* upon a covered entity to *accommodate the individuals’ disabilities; i.e., to treat such individuals differently* from those without disabilities. However, this duty is qualified. On the one hand, the statute requires the individual requesting the accommodation (i.e., requesting different treatment) to show that the accommodation is “reasonable” and “necessary.” On the other hand, the statute excuses entities from this duty if they can show the requested accommodation is not feasible for some reason as defined by the statute.¹⁴⁷ Such a defense is illustrated by this case, which

144. *Id.* at 1904 (Scalia, J., dissenting) (emphasis in original).

145. *Id.*

146. “To compete” is defined as, “to strive or contend with another or others, as for profit or a prize.” *The American Dictionary* 301 (2d ed. 1985).

147. The duty to accommodate and its defenses are embodied in Title I of the ADA governing treatment of disabled employees and applicants in language appropriate to the employment situation. Whereas Title III speaks of “reasonable” and “necessary” accommodations that do not “fundamentally alter the nature of” the activity offered by a public accommodation, Title I requires, *inter alia*, that a disabled individual be “qualified” and that an employer “reasonably accommodate” the individual’s disability unless the employer can show that such accommodation “would impose an undue hardship on the operation of the business” of the employer. 42 U.S.C. § 12112(b)(5)(A) (1994). A disabled individual is “qualified” if he or she “can perform the essential functions of the employment position that such individual holds or desires” “with or without reasonable accommodation.” *Id.* § 12111(8). In addition to the “undue hardship” defense, employers have no duty to accommodate if it can show that the individual with a disability “pose[s] a direct threat to the health or safety of other individuals in the workplace.” *Id.* § 12113(b).

required PGA to accommodate Martin's disability unless it could show that the accommodation would "fundamentally alter the nature of" its tournament. If PGA had made that showing, it would have had no duty to accommodate Martin's disability by allowing him to use a cart.

If Martin and PGA are covered by Title III, then the Act *requires* PGA to treat Martin differently because of his disability unless treating him differently would be unnecessary or unreasonable or would alter the fundamental nature of the PGA Tour. Giving him "equal access" to the Tour implies only equal treatment. Just as PGA cannot prevent Tiger Woods from entering—*i.e.*, gaining access—to the Tour on account of his race,¹⁴⁸ it cannot prevent Martin from entering the Tour because of his disability. Simply by entering the Tour, Woods has an "opportunity to win" the Tour. But Martin, because of his disability, does not have an "opportunity to win" the Tour even if he enters it; he and Woods do not have "equal opportunity." The ADA entitles Martin to this opportunity.¹⁴⁹

Scalia predicted that the Court's interpretation of the ADA as requiring individualized determinations of the effect of requested modifications on competitions will provide "a rich source of lucrative litigation."¹⁵⁰ He "envision[ed] parents of a Little League player with attention deficit disorder trying to convince a judge that their son's disability makes it at least 25% more difficult to hit a pitched ball," and requesting an "order giving the kid four strikes", unless, he added, the court determined "that, in baseball, three strikes are metaphysically necessary."¹⁵¹

Any decision recognizing a legal right will generate litigation asserting that right; motions to dismiss exist to eliminate groundless litigation. Scalia seemed to forget that two years ago the Court, with himself in a five-member majority, mandated individualized determinations of disability under the ADA, which will similarly generate increased litigation—although not from plaintiffs like Martin, but from

Title I further allows employers to utilize "selection criteria" that "screen out or tend to screen out" individuals with disabilities if the employer can show that the selection criteria are "job-related for the position in question" and "consistent with business necessity." *Id.* § 12112(b)(6).

Title II of the ADA, which governs services offered by state and local entities, provides a very limited "undue financial burden limitation" defense to lessen the requirements of entities providing "paratransit and other special transportation services." *Id.* § 12143(c)(4).

Of course, a great body of law has emerged under the ADA as to the meaning of the above-quoted terms.

148. With apologies to Mr. Woods, there just aren't that many well-known golfers whom I can use to illustrate the point.

149. "As a society, we are so much better off with people like Casey Martin, who show us that heart is just as important as talent, who only want an opportunity to compete against the best in their professions." Michael Waterstone, *Let's be Reasonable Here: Why the ADA Will Not Ruin Professional Sports*, 2000 B.Y.U. L. Rev. 1489, 1489 (2000) (quoting Jim Abbott, *It's Easy to Accommodate*, *Golf World* 92 (Feb. 20, 1998)).

150. *PGA Tour*, 121 S. Ct. at 1903-04 (Scalia, J., dissenting).

151. *Id.* at 1904 (Scalia, J., dissenting).

defendants like PGA asserting that a plaintiff is not entitled to the ADA's protection. The Court has actually made it quite difficult for a plaintiff to prove disability. That, of course, was not a problem for Martin, but most impaired athletes are not like Martin, either because their impairments prevent them from competing at the level required by competitive sporting events, or because their impairments are not substantial enough to meet the ADA's threshold.

V. THE DIFFICULTY OF PROVING DISABILITY UNDER THE ADA

A significant hurdle for many persons asserting ADA claims is the threshold showing that they are "an individual with a disability." The ADA defines "disability" in a section preceding the individual titles that applies to all the titles. Individuals may be disabled in three distinct ways. The definition includes individuals who currently have a disability, who have had a disability in the past, and who are regarded by others as having a disability, even though they do not actually have a disability.¹⁵² The first form of disability is relevant to both Title III requirements of equal treatment and equal opportunity; the other two are relevant only to the requirement of equal treatment.¹⁵³ Title III requires public accommodations to give those who are currently disabled equal opportunity to enjoy the benefits they offer.

One who has a current "disability" under the ADA definition has "a physical or mental impairment that substantially limits one or more of the major life activities of that individual."¹⁵⁴ The ADA does not define the terms "physical or mental impairment," "substantially limits," or "major life activities." These terms are defined in regulations promulgated by the Equal Employment Opportunity Commission ("EEOC"),¹⁵⁵ which administers Title I; the same regulations were adopted by the Department of Justice ("DOJ"), the agency that interprets and enforces Title III.¹⁵⁶ The regulations define *physical or mental impairment* as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss" affecting a body system or "any mental or psychological disorder."¹⁵⁷ *Major life activities* are defined in

152. The definition of "disability" appears at 42 U.S.C. § 12102(2) (1994):

Disability. — The term "disability" means, with respect to an individual —

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

153. *Id.*

154. *Id.* at 12102(2)(A).

155. See 28 C.F.R. § 36.104(2) (2001); 29 C.F.R. § 1630.2(h) (2001).

156. Limas, *supra* n. 15, at 515 n. 60.

157. The definitions are as follows:

the regulations as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”¹⁵⁸ Finally, a physical or mental impairment *substantially limits* one in a major life activity if that person is unable to perform a major life activity or significantly restricted in a major life activity as compared to an average person.¹⁵⁹

The first Supreme Court case to interpret the ADA arose under Title III and addressed the meaning of “individual with a disability.”¹⁶⁰ In *Bragdon v. Abbott*,¹⁶¹ a 5-4 majority of the Court held that someone who is infected with the Human Immunodeficiency Virus but is asymptomatic is nonetheless an “individual with a disability.”¹⁶² In doing so, it broadly interpreted statutory definitions and regulations implementing them, using regulations and administrative guidance developed under both the ADA and the Rehabilitation Act of 1973,¹⁶³ the ADA’s predecessor, as well as cases that broadly interpreted the Rehabilitation Act. Those cases included *School Board of Nassau County v. Arline*,¹⁶⁴ in which the Court had interpreted the term “handicapped individual” under the Rehabilitation Act to include someone with a contagious disease.¹⁶⁵ In

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin, and endocrine; [or]

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

28 C.F.R. §§ 36.104(i)-(ii) (2001); 29 C.F.R. §§ 1630.2(h)(1)-(2) (2001).

158. 28 C.F.R. § 36.104(2) (2001); 29 C.F.R. § 1630.2(i) (2001).

159. 29 C.F.R. § 1630.2(j)(1)-(2) (2001). A person is “substantially limited in a major life activity” if he or she is

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Id. § 1630.2(j)(1). The regulations also state factors to be taken into account in determining whether someone is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

Id. § 1630.2(j)(2).

160. *Bragdon v. Abbott*, 524 U.S. 624 (1998).

161. *Id.*

162. *Id.* at 641. See 42 U.S.C. § 12102(2) (1994).

163. 29 U.S.C. § 701 *et seq.* (1994). The Rehabilitation Act applies to the federal government and entities receiving federal funds. *Id.* § 794.

164. 480 U.S. 273 (1987).

165. *Id.* at 289.

Arline, the Court had relied heavily on regulations implementing the Rehabilitation Act and legislative history indicating that the definition of "handicapped individual" should be broadly applied.¹⁶⁶ In *Bragdon*, the Court relied on the ADA's express statement that no interpretation of its provisions should "apply a lesser standard" than those applied under the Rehabilitation Act or its implementing regulations.¹⁶⁷

Yet a year later the Court ignored its Rehabilitation Act and ADA precedent, rejected administrative guidance, and interpreted "individual with a disability" narrowly to require that someone's disability status be determined taking mitigating or corrective measures into account.¹⁶⁸ That means that even though someone has a physical or mental impairment that substantially limits a major life activity of that person, if the person takes medicine or uses some other corrective measure to control the effects of the impairment, he or she would not likely be protected from discrimination because of that impairment. The Court considered three cases under Title I in which plaintiffs had been denied employment because of their impairments of myopia,¹⁶⁹ hypertension,¹⁷⁰ and monocular vision.¹⁷¹ *Sutton v. United Airlines*,¹⁷² involved sisters who were certified by the Federal Aviation Administration as commercial pilots but were rejected for employment as pilots by United Airlines under its rule that pilots have uncorrected vision no worse than 20/100.¹⁷³ In *Murphy v. United Parcel Service*,¹⁷⁴ and *Albertson's v. Kirkingburg*,¹⁷⁵ plaintiffs were denied mechanic and driver positions, respectively, because their uncorrected impairments did not qualify them for Department of Transportation (DOT) certification. *Kirkingburg* had been driving for a number of years, had an excellent record, and had obtained a waiver from the DOT of its vision requirements.¹⁷⁶

In these cases, the Court did not bar the ADA lawsuits because the plaintiffs were unqualified¹⁷⁷ for the positions; rather, it held that each of

166. *Id.* at 280 n. 5.

167. *Bragdon*, 524 U.S. at 631, 632 (citing 42 U.S.C. § 12201 (1994)). For a discussion of the reasoning of *Bragdon* and *Arline*, see *Limas*, *supra* n. 15, at 522-25, 535-37.

168. *Limas*, *supra* n. 15, at 525-539.

169. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 476 (1999).

170. *Murphy v. United Parcel Serv.*, 527 U.S. 516, 519 (1999).

171. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 559 (1999).

172. 527 U.S. 471 (1999).

173. *Id.* at 476.

174. *Murphy*, 527 U.S. at 520.

175. *Albertson's*, 527 U.S. at 560.

176. *Id.* at 558, 560.

177. In order to be protected from discrimination in the workplace under Title I, one must be "a qualified individual with a disability." That term is defined as "one who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (1994). Title I's "reasonable accommodation" requirement is the counterpart to Title III's "reasonable modification" requirement.

the plaintiffs was not disabled within the meaning of the ADA, which blocked any further inquiry on their claims.¹⁷⁸ Indeed, they may have been found not to be qualified. But the Court went out of its way to deprive access to the ADA altogether for these individuals with impairments that would have been substantially limiting in their life activities had the individuals not taken corrective measures.¹⁷⁹

The issue of determining whether an individual is disabled will likely have a greater impact on Title I cases than on Title II or III cases, as many accommodations under the latter titles are in the nature of modifications to public facilities that are not used exclusively by individuals with disabilities (e.g., buses with wheelchair lifts, ramps, elevators with braille numerals, crosswalk signs with audible signals). Individuals who require such modifications would undoubtedly pass the threshold test of disability. Requests for workplace accommodations under Title I, however, are usually made on an individual basis, and therefore the disability status of each person requesting an accommodation will be individually determined. However, with regard to the relatively few Title III cases in which a particular individual requests an accommodation, the threshold issue of disability will come into play.

VI. THE LEGAL EFFECTS OF THE DECISION

PGA Tour's reach is quite short. As just discussed, it adds nothing to the analysis of whether a would-be athlete who claims to be an individual with a disability is actually disabled under the ADA and therefore entitled to request a modification of competition rules.

The Court's analysis of Title III's "fundamental alteration" defense is very limited. It focuses exclusively on application to competitive sports, which provide a framework of rules within which athletes test physical performance. The Court's two-pronged test for analyzing whether a modification of a competition rule would work a "fundamental alteration" is of course highly factual, but not any more so than other factual determinations required by the ADA, such as Title I's "undue hardship" defense to a request for a workplace accommodation.¹⁸⁰ One author has already proposed some questions to aid this inquiry:

- (1) Does the rule involve a skill that an athlete in the particular sport trains to do?
- (2) Is this particular skill unique to an athlete in the sport, or is it a task that the general population can perform?
- (3) What is the link between success in the skill the rule tests for and success in the

178. *Albertson's*, 527 U.S. at 564; *Sutton*, 527 U.S. at 494.

179. See *Sutton*, 527 U.S. at 475 (both petitioners' uncorrected vision was 20/200 or worse); *Albertson's*, 527 U.S. at 559 (Kirkenburg's vision was 20/200 in his left eye).

180. See 42 U.S.C. § 12112(b)(5)(A) (1994) (setting out the defense); 42 U.S.C. § 12111(10) (1994) (defining "undue hardship" and setting out the many factors to be considered in determining whether undue hardship exists).

sport? (4) Would the rule modification place other athletes at a competitive disadvantage? (5) Why does the league have this rule? (6) Would the rule modification change the way the game is played for all participants?¹⁸¹

All questions except (4) go directly to the “essence of the competition” prong of the Court’s test, which the author characterizes as whether “the rule change would change the game into something it is not.”¹⁸² The Court’s analysis of “the essence of the game” implicitly considered many of those questions. The Court directly asked question (4) in the second prong of the “fundamental alteration” analysis, which determines whether modification of a “non-essential” rule would put others in the competition at a disadvantage.

The Court’s analysis of “fundamental alteration” in the Title III context will not be particularly helpful in the employment context. Unlike Martin’s situation, there will be cases in which the athlete is an employee of the sponsor of an athletic competition and is requesting accommodation to be able to play. The plaintiff’s burden of showing that a requested accommodation is “reasonable” has been stated similarly under both titles. Like the Title III plaintiff, the Title I plaintiff must show that the requested accommodation is “reasonable.”¹⁸³ As courts have interpreted both statutes, this burden is merely a facial showing. For example, the Tenth Circuit has described the Title I plaintiff’s burden of proving reasonableness as “a facial showing that accommodation is possible,” which shifts the burden to the employer to “show it is unable to provide accommodation.”¹⁸⁴ Similarly, the Fifth Circuit has characterized the “reasonable accommodation” element of the plaintiff’s case as “a *method of accommodation* that is reasonable in the run of cases.”¹⁸⁵ The Fifth Circuit later applied that standard to the Title III’s burden of showing reasonableness of a requested accommodation.¹⁸⁶

Courts interpreting Title I have not explicitly addressed whether a plaintiff must show that the requested accommodation is “necessary,”¹⁸⁷ as required under Title III, as Title I does not contain that language. Presumably that showing would be subsumed under the plaintiff’s prima

181. *Waterstone*, *supra* n. 149, at 1534.

182. *Id.*

183. See *Boykin v. ATC/VanCom of Colo., L.P.*, 247 F.3d 1061, 1064 (10th Cir. 2001).

184. *Id.*

185. *Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678, 683 (5th Cir. 1996) (quoting *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994)) (emphasis in original).

186. *Johnson v. Gambrinus Co./Spoetzel Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997).

187. Neither Title I’s definition of “qualified individual with a disability” nor its definition of “reasonable accommodation” use the word “necessary,” but a common-sense interpretation of the former term indicates that if an accommodation must be made that it is necessary. Title I defines “qualified individual with a disability” as “an individual with a disability, who with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(9) (1994) (emphasis added).

facie showing that the requested accommodation is reasonable.

The closest analogy in Title I to Title III's "fundamental alteration" defense appears in the plaintiff's showing that he or she is a qualified individual with a disability. As part of that showing, the plaintiff must show that he or she can perform *the essential functions of the job* in question.¹⁸⁸ Title I specifically states that the employer's judgment of the essential functions of a particular job shall be considered evidence of those functions, provided the employer prepares a written job description prior to advertising or interviewing for the job.¹⁸⁹ *PGA Tour's* analysis of "fundamental alteration," as discussed above, does not give as much deference to the public accommodation's judgment of whether a rule is essential to a competition.¹⁹⁰

Defenses under the two titles are also analyzed somewhat differently. As mentioned previously, "undue hardship" is an affirmative defense to a claim for accommodation under Title I.¹⁹¹ The statute defines "undue hardship" as "an action requiring significant difficulty or expense"¹⁹² and lists specific factors to be considered including, *inter alia*, cost to the employer, "effect on expenses and resources," and "impact on ability of other employees to perform their duties and the impact on the facility's ability to conduct business."¹⁹³ Administrative burden on the employer in implementing a requested accommodation has been considered under these factors.¹⁹⁴ However, as discussed previously, the Court in *PGA Tour* did not interpret Title III's "fundamental alteration" defense to encompass administrative burden on the public accommodation in implementing a requested accommodation.¹⁹⁵

Finally, Title I specifically considers whether the individual requesting an accommodation poses a "direct threat" to others. That term is defined in the statute as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."¹⁹⁶ It appears in the statute as a defense by providing that an employer can impose "qualification standards" requiring that "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."¹⁹⁷ Danger to health or safety has been considered under

188. *Id.*

189. *Id.*

190. See discussion *supra* Part VI.

191. 42 U.S.C. § 12112(b)(5)(A) (1994). See *supra* n. 147.

192. *Id.* at § 12111(10).

193. *Id.* at § 12111(10)(B).

194. See *e.g. Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 737 (D. Md. 1996) (citing the Equal Employment Opportunity Commission's Interpretive Guidance, 29 C.F.R. § 1630(p)).

195. *PGA Tour*, 121 S. Ct. at 1897-98. See discussion *supra* Part VI.

196. 42 U.S.C. § 12111(3) (1994).

197. *Id.* at § 12113(b).

Title III, though in the context of whether a requested modification is “reasonable.” In the context of scholastic athletics, courts have deferred to school officials’ proof that an impaired athlete would be placed at severe risk of personal harm by competing.¹⁹⁸ Courts interpreting the Title I “direct threat” defense are divided on whether that defense includes a consideration of the health and safety of the individual requesting the accommodation,¹⁹⁹ and the Supreme Court has taken *certiorari* on that issue for the 2001-2002 term.²⁰⁰

The most significant legal effect of *PGA Tour* is its exposure of organizations like the PGA to coverage by Title III. The Court has made clear that if a sponsor of a competitive event opens the competition to the general public it is a public accommodation governed by Title III. The Court has extended Title III’s definition of “public accommodation” beyond the notion of “places” having a physical location. Membership organizations such as Little League,²⁰¹ scouting, or other private sponsors of youth or adult activities will be covered, as long as they extend membership to the general public.²⁰² Title III would apply to marathon and parade sponsors as well.²⁰³

VII. THE SOCIAL AND CULTURAL EFFECTS OF THE DECISION

PGA Tour tells us that competitive sports are not immune from the requirements of the ADA. The very limited number of athletes with disabilities *who possess a sufficient level of skill to be competitive with their able-bodied peers* receive from the ADA only *an equal opportunity to compete*. Obviously, disability affects skill, as athletic skill is determined by physical and mental prowess. But if the athlete’s disability is irrelevant to the nature of the competition or can be accommodated

198. See e.g. *Knapp v. Northwestern U.*, 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997); *Pahulu v. U. of Kan.*, 101 F. Supp. 1387 (D. Kan. 1995).

199. Compare e.g. *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) with *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599 (9th Cir. 1999).

200. *Echazabal v. Cheron USA, Inc.*, 226 F.3d 1063 (9th Cir. 2000), *cert. granted*, 2001 U.S. LEXIS 9960 (Oct. 29, 2001).

201. Courts have treated this organization as a public accommodation. See Rothstein, *supra* n. 13, at 412 (citing *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342 (D. Ariz. 1992) and cases discussed in the media). These cases focused on safety issues.

202. In a 5-4 decision last term, the Court held, in *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000), that New Jersey’s public accommodations law prohibiting discrimination on the basis of sexual orientation, as applied to the Boy Scouts’ selection of its members, violated that organization’s First Amendment freedom of association right. Although the Court assumed that Boy Scouts was a public accommodation, it commented that New Jersey’s definition of that term “is extremely broad.” *Id.* at 658. It further cited four state supreme court cases and a Seventh Circuit case that all held the Boy Scouts not to be a public accommodation, noting that no jurisdiction other than New Jersey had held otherwise. *Id.* at 658 n. 3.

Even so, the Boy Scouts and similar organizations should be considered public accommodations under Title III under the Court’s analysis in *PGA Tour*, as those organizations admit members from the public at large.

203. See Rothstein, *supra* n. 13, at 411.

without *fundamentally altering* the competition, the athlete with a disability is entitled, like anyone else, to test his or her competitive *ability*.

PGA Tour sends a strong positive message, not just to individuals with disabilities but to the public at large. It reinforces the ADA's goal of mainstreaming individuals with disabilities into activities of the public at large with as few restrictions as possible.²⁰⁴ Such exposure to individuals with disabilities builds understanding of issues faced by those individuals and diffuses negative perceptions of the ADA.²⁰⁵ A disability expert recently stated: "If the ADA is to continue to receive favor and not risk congressional repeal or diminution, public support of the ADA will be important."²⁰⁶ Moreover, PGA Tour furthers Congress' broad goal of changing American society.

Because PGA Tour involved sports, its message will be heard, for "Americans understand the desire to participate in sports and to attend sports and entertainment events."²⁰⁷ The media will be the primary source of information and education about that message. The legal community, in turn, must be the primary source of information and education for the media and others who influence public opinion.

204. See *id.* at 404.

205. See *id.* at 401.

206. *Id.*

207. *Id.* at 434.