Driving in the Fairway Incurs No Penalty*: *Martin v. PGA Tour, Inc.* and Discriminatory Boundaries in the Americans with Disabilities Act

Todd A. Hentges**

> Even if you aren't having an extra good day, always count your blessings. Be thankful you are able to be out on a beautiful course. Most people in the world don't have that opportunity.
>
> Fred Couples[1]

Introduction

It was predicted that by today's date Title III of the Americans with Disabilities Act of 1990[2] (ADA) would have created "more conflicts in implementation than any other aspect of the ADA."[3] Although this prediction has not come to pass,[4] more plaintiffs are seeking redress against places of public accommodation than ever before as awareness of the statute expands, and as judges broaden the definition of entities covered by the Act.[5]

---

* United States Golf Association Rule 27-1 provides that "[i]f a ball is lost . . . out of bounds, the player shall play a ball, *under penalty of one stroke*, as nearly as possible at the spot from which the original ball was last played." UNITED STATES GOLF ASSOCIATION, DECISIONS ON THE RULES OF GOLF 430 (1993). "'Out of bounds' is ground on which play is prohibited," and may be delineated by a line, a stake, or a fence. *See id.*

** J.D. expected 2000, University of Minnesota. B.A. 1997, San Diego State University. The author would like to thank Reneè Salazar for her structural insights, and Rebecca Hansen, Bryce Nixon and Sarah Bigler for their editorial assistance.

1. THE GOLFER'S BOOK OF WISDOM: COMMON SENSE AND UNCOMMON GENIUS FROM 101 GOLFING LEGENDS 127 (Criswell Freeman ed. 1995).

2. 42 U.S.C. §§ 12101-12213 (1994).

3. John W. Parry, *Public Accommodations Under the Americans with Disabilities Act: Nondiscrimination on the Basis of Disability*, MENTAL & PHYSICAL DISABILITY L. REP., JAN.-FEB. 1992, at 92.

4. *See infra* note 251 and accompanying text (discussing the relative scarcity of Title III suits to date in the Ninth Circuit).

5. Several circuits have expanded standing under Title III to plaintiffs seeking redress for discrimination in services, even though the plaintiffs never availed themselves of the covered entities' physical structures. *See, e.g.*, Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 19 (1st Cir. 1994) (stating

Casey Martin's suit against the Professional Golf Association Tour (PGA Tour) attempts to further expand and vitalize Title III of the ADA.[6] His prayer for relief asked for nothing more than access to the privilege of "opportunity" described by Fred Couples in the opening quote to this Article.[7] Access to such an opportunity, as stated in the preamble to the ADA, is the premise on which the ADA's prescriptions and mandates are based.[8]

---

that establishments of public accommodation are "not limited to actual physical structures"); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, 427 (D.N.H. 1996) (holding that the broad wording of Title III mandates extension of the chapter's coverage beyond mere access or availability of a good or service). *See also* World Ins. Co. v. Branch, 156 F.3d 1142, 1143 (11th Cir. 1998) (recognizing the scope of Title III as extending to insurance policies). *But see* Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997) (en banc) (construing Title III narrowly to encompass only goods and services that share some nexus with a covered entity), *cert. denied*, 118 S. Ct. 871 (1998).

6. Sections 12101 and 12102 of the ADA introduce the underlying precepts of the ADA and set out policy justifications that support the statute's enactment. Section 12101(a) lays out Congressional findings concerning the disabled, including the fact that "some 43,000,000 Americans have one or more physical or mental disabilities." 42 U.S.C. § 12101(a)(1) (1994). This introductory statement goes on to state that "historically, society has tended to isolate and segregate individuals with disabilities," and that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." 42 U.S.C. §§ 12101(a)(2), 12101(a)(4) (1994). Section 12101(b) states that the purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (1994). The language of Section 12101(b) also envisions "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2) (1994). The chapter, in order to impose the statute on the states, "invoke[s] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce." 42 U.S.C. § 12101(b)(4) (1994).

7. *See supra* note 1 and accompanying text.

8. *See* 42 U.S.C. § 12101(a)(5) (1994) (explaining that "individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities"); 42 U.S.C. § 12101(a)(8) (1994) (emphasizing that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity [and] full participation . . . for such individuals"); 42 U.S.C. § 12101(a)(9) (1994) (stressing that "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"). Congress also described the disabled as a "discrete and insular minority." 42 U.S.C. § 12101(a)(7) (1994). This language follows that of Justice Stone's famous statement in *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938). *See also* Robert J. Adelman, *Has Time Run Out for the NCAA? An Analysis of the NCAA as a Place of Public Accommodation*, 8 DEPAUL-LCA J. ART & ENT. L. 79, 89-90 (1997) (explaining the implications under the ADA of Congress's description of the disabled as a "*Carolene*" class). The ADA attempts to invoke and expand on

Martin deserves protection under the ADA because he suffers from an impairment that substantially limits his ability to perform a major life activity.[9] This disability derives from a venous malformation that curtails blood circulation in his lower right leg.[10] It limits Martin's ability to walk normal distances and

---

protections afforded "*Carolene*" classes by mirroring prior statutory language found in the Civil Rights Act of 1964, 42 U.S.C. § 2000 (1994 & Supp. III 1997), and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-7963 (1994 & Supp. III 1997).

9. The ADA provides that "[n]o individual shall be discriminated against on the basis of [a] 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." 42 U.S.C. § 12182(a) (1994). "Disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C. § 12102(2)(A) (1994). *See also infra* notes 151, 153 and accompanying text (discussing the ADA's definition of "disabled"). Once an individual is correctly described as "disabled" under the ADA's definition, then the protections of the ADA's enforceable chapters come into play. Title I deals with employment situations, *see* 42 U.S.C. §§ 12111-12117 (1994 & Supp. III 1997), Title II covers public services, *see* 42 U.S.C. §§ 12131-12134, 12141-12147 (1994 & Supp. III 1997), and Title III addresses public accommodations and services operated by private entities, *see* 42 U.S.C. §§ 12181-12189 (1994 & Supp. III 1997). Title IV covers telecommunications, *see* 47 U.S.C. § 225 (1994 & Supp. III 1997), and Title V contains "miscellaneous provisions," *see* 42 U.S.C. §§ 12201-12211 (1994 & Supp. III 1997). Title V's miscellaneous provisions address such issues as state immunity under the 11th amendment, *see* 42 U.S.C. § 12202, prohibitions against retaliation, *see* 42 U.S.C. § 12203, and the imposition of attorney's fees against the losing party, *see* 42 U.S.C. § 12205.

10. *See* Lisa Schnirring, *Casey Martin's Case: The Medical Story*, THE PHYSICIAN & SPORTSMEDICINE, April 1998, at 15. Martin's complaint alleged that he suffers from Klippel-Trenaunay-Weber Syndrome. *See* Martin v. PGA Tour, Inc. (Martin I), 984 F. Supp. 1320, 1322 (D. Or. 1998). The PGA Tour did not contest this allegation for purposes of summary judgment, *see id.*, but the court's opinion on the merits distinctly avoided mention of the alleged syndrome. *See* Martin v. PGA Tour, Inc. (Martin II), 994 F. Supp. 1242, 1244 (D. Or. 1998). A recent article discussing Martin's claimed disability sheds light on the court's pointed failure to mention the syndrome in its opinion on the merits:

> It has been widely reported that Martin has KT syndrome, a combined vascular disorder that is characterized by cutaneous capillary malformations (port-wine stain), bony and soft-tissue hypertrophy, and venous malformations. But of these three manifestations, Martin has only venous malformations .... Patients are considered to have KT syndrome if they have two of the three features ... [so] [i]t's acceptable to say [Martin] has a KT-like vascular anomaly, but he doesn't have KT syndrome.

Schnirring, *supra*, at 15 (citation and internal quotations omitted). Compare the court's opinion on the merits, which focused on Martin's personal condition, and not on the disease:

> [Martin's] medical records reflect a 25-year old male with a rare congenital vascular malformation of the right lower extremity which has led to, number one, chronic pain secondary to vascular engorgement and progressive loss of bone stock ... ; number two, a documented sleep disorder secondary to chronic pain which leads ... to an exhaustion syndrome; number three, the need to wear two compression stockings at all times; number four, it has resulted in marked muscular atrophy and

durations, and as a result, he requires the assistance of a motorized cart to compete.[11] Martin had enjoyed considerable success as a college and low-level tour golfer despite this impairment.[12] Now he wants to participate in PGA Tour-sponsored competitions. The PGA Tour, however, wants to deny him the assistance of a motorized golf cart, an accommodation to which other PGA Tour competitors do not have access.[13]

Martin's case, this Article proposes, is a strong one. He meets the statutory definition of disabled,[14] his proposed accommodation is not unreasonable[15] and allowing him the provision of a golf cart would not fundamentally alter PGA Tour competitions.[16] Martin also has popular sentiment on his side; his lawsuit, *Martin v. PGA Tour, Inc.*,[17] has received substantial media coverage, much of it positive.[18]

> weakness in the right calf; number five, it has affected his knee through multiple intra-articular bleeds, causing [painful] abnormalities . . . ; and number six, . . . it has resulted in a weakened tibia which is at risk for fracture and potential limb loss and/or serious post-fracture complications.

Martin II, 994 F. Supp. at 1244. The PGA Tour did not contest that Martin has a disability as defined by the ADA. *See id.*

11. *See Martin II*, 994 F. Supp. at 1249 (reviewing testimony of Dr. Jones, who stated that "[b]y August 1996 at the age of 24, Casey reported to me that he was having tremendous difficulty with ambulation . . . [and] great difficulty walking 18 holes of golf"). The court concluded that "Casey Martin cannot walk . . . [a golf] course, and only a cart will permit him to compete on the Nike Tour." *Id.* at 1250.

12. Martin was a teammate of Tiger Woods at Stanford University and in 1998 he finished 29th in Nike Tour earnings with $81,937. *See* Don Cronin, *For The Record*, USA TODAY, May 4, 1999, at 11C. Martin also won the Lakeland (Nike Tour) Open. *See id.* During his sophomore year at Stanford his team won the NCAA golf championship, *see* Tom Cunneff, *Great Golf 101*, GOLF MAG., September 1, 1998, at 86-87, and he recently "made some birdies and got in [Tiger Woods's] pocket," *see* Ron Sirak, *Els Limps Into U.S. Open, Martin Rolls In*, THE STATE JOURNAL-REGISTER, June 17, 1998, at M1 (internal quotations omitted). On October 25, 1999, Martin ended the Nike Tour in fourteenth place, earning the right to compete on the PGA Tour in the year 2000. *See* Associated Press, *It's Close, But Martin Gets PGA Card*, L.A. TIMES, Oct. 25, 1999, at D3.

13. *See infra* note 84 (describing the PGA Tour's "Local Rule" which requires that competitors walk the golf course during competition).

14. *See infra* Section IV.A.

15. *See infra* Section IV.C.

16. *See infra* Section IV.C.

17. Martin v. PGA Tour, Inc. (Martin I), 984 F. Supp. 1320 (D. Or. 1998) (opinion on motions for summary judgment); Martin v. PGA Tour, Inc. (Martin II), 994 F. Supp. 1242 (D. Or. 1998) (opinion after conclusion of bench trial).

18. A September 20, 1999 search of WESTLAW's *AllNews* database revealed more than 5,000 stories dealing with Casey Martin and his request for reasonable accommodation. In contrast, a search conducted the same day for a recently-decided case in the Northern District of Indiana, *Olinger v. United States Golf Ass'n.*, No. 3:98-CV-252RM, 1999 WL 454719 at *1 (N.D. Ind. 1999) (also dealing with a disabled golfer seeking the accommodation of a cart to compete in a professional tournament) revealed only 213 stories mentioning the plaintiff. The

The Ninth Circuit, however, charged with reviewing the PGA Tour's appeal, will likely ignore the ADA's remedial purpose and overturn the lower court's decision favoring Martin.[19] This is because legal analysis under current Supreme Court philosophy forces the conclusion that the area of competition maintained by the PGA Tour during a professional golf event cannot be construed as a place of public accommodation.[20]

This outcome, textualists will argue, is mandated not only by the plain language of the statute, but also by Department of Justice (DOJ) regulations implementing Title III of the ADA, to which courts must show deference.[21] Congress, on the other hand, intended that the ADA would eradicate any remaining vestiges of discrimination that persisted beyond the reach of the Rehabilitation Act.[22] To effectuate this broad-based remedial intent, barriers to entry for the disabled must be removed in all social arenas, including professional sports. Martin has the skills necessary to compete against the best players in golf.[23] This is exactly the situation that the ADA is designed to cover. When an individual is limited by a disability but is otherwise qualified, public policy mandates that accommodations be made to allow the disabled individual's participation.

Federal courts of appeal, however, forced to follow the Supreme Court's preference for textualist analysis, must show deference to a statute's plain language. The problem is that textualist adherence to plain language precludes courts from considering an older and perhaps more important Supreme Court canon—remedial statutes must be construed broadly.[24] By failing

---

Indiana court granted Olinger an injunction allowing the use of a cart prior to the 1998 qualifying rounds for the United States Open golf tournament. *See Olinger*, 1999 WL 454719, at *2. Martin's similar injunction was granted only a few months earlier, prior to the 1998 "Q-School" qualifying tournament for the PGA Tour. *See Martin II*, 994 F. Supp. at 1243.

19. *See infra* Part III.

20. *See infra* Part III.

21. *See infra* note 213 (discussing the appropriate level of deference to be given administrative agency regulations under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

22. *See supra* notes 6, 8 and accompanying text (describing the findings and purpose of the ADA as articulated by Congress). The text of the Rehabilitation Act may be found at 29 U.S.C. §§ 701-796 (1994 & Supp. III 1997).

23. *See supra* note 12 (mentioning some of Martin's past and current golfing successes).

24. *See* Owens v. Okure, 488 U.S. 235, 240 (1989) ("[A] simple, broad characterization of . . . claims best fits the statute's remedial purpose"); Ramsey v. Tacoma Land Co., 196 U.S. 360, 362 (1905) ("Obviously, in a remedial statute . . . , the term 'citizens' is to be considered as including state corporations, unless there

to broadly construe the ADA, textualism leads in Martin's case to both a spurious interpretation[25] and the reversal of clearly articulated congressional intent.[26]

Nonetheless, there are critics of a result favoring Martin. These individuals decry the remedial construction argument, proffering a "parade of horribles" (including wheelchairs rounding third base and basketball players "handicapped" by weights)[27] that shall certainly result from a decision that breaches the sanctity of professional sports's autonomy.[28] Perhaps the most persuasive of these slippery-slope arguments is one made in another context by science fiction author Kurt Vonnegut. In his satirical story *Harrison Bergeron*,[29] Vonnegut describes a future government of America that levels the playing field in almost every activity imaginable, imposing brain inhibitors on the intelligent, placing leg weights on top ballet dancers, and reducing the best boxers to the use of one hand.[30]

Such scenarios are not only fiction, but are also alarmist. Applying the ADA to professional sports merely requires that sports organizations make an individualized inquiry into the nature of the disability and the reasonableness of the

---

be something beyond the mere use of the word to indicate an intent on the part of Congress to exclude them."); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 159 (1819) (commenting that "[o]ur interpretation of [a last will and testament] ought, at least, to be as liberal as of a remedial statute"); *infra* note 183 (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1986) for the proposition that the disabled are entitled to far-ranging remedial acts).

25. Dean Roscoe Pound theorized that the "object of *genuine* interpretation is to discover the rule of law which the law-maker intended to establish; to discover the intention with which the law-maker made the rule, or the sense which he attached to the words wherein the rule is expressed." Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) (emphasis added). For Pound, specific intent exhumed is genuine interpretation; purposeful ignorance of legislative intent under the guise of strict adherence to a textualist interpretation would be an incorrect (spurious) application of judicial power. *See id.*

26. *See supra* notes 6, 8 and accompanying text (explaining the remedial nature of the ADA as articulated by Congress in the statute's findings and purpose).

27. *See* Trey Garrison, *Court in Casey Martin Golf Case 'Slices' Up the Constitution*, DALLAS BUS. J. Feb. 23, 1998 (visited October 21, 1999) <http://www.amcity.com/dallas/stories/1998/02/23/editorial2.html>.

28. The Libertarian Party has recently joined the "parade of horribles" side of the argument, stating that "[i]f you think that the government will stop with professional golf, you're probably protected by the ADA . . . because of your chronic case of gullibility." *Seen & Heard*, GOLF MAG. (Mike Purkey ed.), May 1998, at 41-42 (internal quotations omitted). The Libertarian Party queries: "Should Olympic figure skating be limited to athletic, lithe young women, . . . or should Roseanne Barr be allowed to compete—just to be fair?" *Id.* (internal quotations omitted).

29. *See* Kurt Vonnegut, Jr., *Harrison Bergeron*, *in* ANIMAL FARM AND RELATED READINGS (1997).

30. *See* Garrison, *supra* note 27. *See also* Vonnegut, *supra* note 29.

accommodation requested.[31] As with all ADA-covered entities, professional sports organizations would not be required to effect fundamental alterations or incur undue burdens in accommodating a disabled individual.[32] This Article argues, therefore, that Martin should be allowed "reasonable accommodation."

In general, the Article explores whether the ADA is appropriately applied to rules of professional sports. Part I addresses the specific holding and reasoning of the District of Oregon in *Martin v. PGA Tour, Inc.*[33] Part II examines *Olinger v. United States Golf Ass'n*,[34] a Northern District of Indiana case decided subsequent to *Martin* which comes to opposite conclusions.[35] Part III presents cases and principles that form the analytical underpinning of student-athlete ADA litigation with respect to athletics.[36] Part IV[37] anticipates a textualist-based resolution of the many issues raised by *Martin*, including a proposed construction of major life activities,[38] private club exceptions,[39] fundamental alterations[40] and places of public accommodation.[41] Part V concedes that under a narrow textualist interpretation the ADA might not apply to professional sports, but proposes that the more appropriate analysis favors construing the ADA broadly in order to implement its remedial purpose.[42] This Article concludes that Congress, in the absence of a remedial purpose interpretation by the court, must legislate so that disabled individuals are allowed to participate in the ADA's promise of equal opportunity.[43]

I. The District Court's Disposition of *Martin v. PGA Tour, Inc.*: The Little Remedial Purpose Engine That Could

Martin v. PGA Tour, Inc. is a case of first impression for the

31. *See infra* Part IV. (arguing in favor of Martin's request for accommodation).
32. *See infra* Part IV.
33. *See infra* notes 44-93 and accompanying text.
34. No. 3:98-CV-252RM, 1999 WL 454719 (N.D. Ind. 1999).
35. *See infra* notes 94-117 and accompanying text.
36. *See infra* notes 119119-136 and accompanying text.
37. *See infra* notes 137-217 and accompanying text.
38. *See infra* notes 141-165 and accompanying text.
39. *See infra* notes 166-182 and accompanying text.
40. *See infra* notes 183-202 and accompanying text.
41. *See infra* notes 203-217 and accompanying text.
42. *See infra* notes 218-276 and accompanying text.
43. *See infra* notes 277-284 and accompanying text.

Ninth Circuit.[44] The court will determine whether the ADA's prohibitions and mandates are properly applied to the rules of competition for professional sports. In other words, the Ninth Circuit must decide whether Congress, through the ADA, intended to regulate "inside the lines" of professional competition.[45] A decision favoring Martin could expand the scope of the ADA's coverage by embracing and enhancing the statute's remedial purpose.

Specifically, the Ninth Circuit will review the injunction granted to Martin under Title III of the ADA by the Federal District Court of Oregon. This injunction first allowed Martin the use of a cart for the third round of the 1997 PGA Tour Qualifying School.[46] On the PGA Tour's motion for summary judgment, the trial court found that the PGA Tour was a for-profit enterprise that operated a place of public accommodation and extended the injunction through the first two events of the PGA Tour-sponsored Nike Tour.[47] After a trial on the merits, the court held that Martin was disabled under the ADA,[48] and that providing him with a golf cart was a reasonable accommodation that did not alter a fundamental aspect of the PGA Tour's competitive rules.[49]

A. The District Court's Rulings on the Parties' Respective Motions for Summary Judgment

The PGA Tour's motion to dismiss was predicated on two legal theories. First, it claimed to be a private club, and therefore

---

44. There has, however, been at least one case resolved in favor of the athlete under an ADA claim in a lower court in the Ninth Circuit. *See* Schultz v. Hemet Youth Pony League, Inc., 943 F. Supp. 1222 (C.D. Cal. 1996) (holding that a young child disabled by cerebral palsy should be reasonably accommodated by being allowed to participate at a lower age group than that mandated by his date of birth).

45. Although the Ninth Circuit Court of Appeals recently heard the PGA Tour's appeal, it has yet to issue an opinion. The Department of Justice filed an amicus brief on behalf of Martin and the ADA, arguing that the government's ability to enforce the ADA could be threatened if the PGA Tour wins its appeal. The Department of Justice reasoned that walking has nothing to do with the skill it takes to execute golf shots during a competitive golf tournament and the mere fact that access is strictly controlled does not mean that a facility is not a place of public accommodation. *See* Michael Grunwald, *U.S. Launches Drive for Disabled Golfer*, WASH. POST, Aug. 19, 1998, at A2.

46. *See* Martin v. PGA Tour, Inc. (Martin I), 984 F. Supp. 1320, 1322 (D. Or. 1998).

47. *See id.* at 1323-27.

48. *See* Martin v. PGA Tour, Inc. (Martin II), 994 F. Supp. 1242, 1244 (D. Or. 1998).

49. *See id.* at 1253.

exempt from the ADA's coverage.[50] Failing that, the PGA Tour argued that it did not operate a place of public accommodation as envisioned by the ADA.[51] In response to the private club argument, the District Court found the PGA Tour operated as a "commercial enterprise."[52] This derived from the fact that the PGA Tour functioned as "an organization formed to promote and operate tournaments for the economic benefit of its members."[53] As a promoter and organizer, the PGA Tour is "part of the entertainment industry,"[54] and generates revenue for its members "in direct proportion to the public participation as spectators and viewers of the Tour's tournaments."[55]

The court reasoned that "the relatively small membership of the PGA Tour does not confer private status" when it selectivity is "counterbalanced with the [PGA] Tour's purpose."[56] This is because creating revenue for members "scarcely seems to qualify as the type of protect[ed] interest Congress had in mind" when it excluded private clubs from coverage under the ADA.[57] The court used for its analysis *United States v. Lansdowne Swim Club*[58] and the seven variables described therein that are "commonly weighed by the courts in determining whether an organization is a bona fide private club."[59] Factors that the court determined weighed against private club status included "genuine selectivity,"[60]

---

50. *See Martin I*, 984 F. Supp. at 1323.

51. *See id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1324. The court pointed out that the Seventh Circuit test focuses on the purpose of the membership, and not sheer numbers, to determine private standing under the Civil Rights Act. *See id.* The court then connected the Civil Rights Act to the case at hand, stating that "the ADA and the Civil Rights Act are interrelated in terms and application." *Id.*

57. *Id.* To support this proposition the court cited *Quijano v. University Fed. Credit Union*, 617 F.2d 129 (5th Cir. 1980), which found that a credit union, although non-profit, does not fall within the private club exception. *Quijano* looked to Webster's Third International Dictionary of the English Language to find that credit unions "exist for purely mercantile purposes and . . . are not clubs in any sense of the word." *Quijano*, 617 F.2d at 133 (quoted in *Martin I*, 984 F. Supp. at 1324).

58. 713 F. Supp. 785 (E.D. Pa. 1989).

59. *Martin I*, 984 F. Supp. at 1324. The *Lansdowne* test looks at the following factors: (1) genuine selectivity; (2) membership control; (3) history of organization; (4) use of facilities by nonmembers; (5) club's purpose; (6) whether club advertises for members; and (7) whether the club is nonprofit. *See id.* at 1324-25.

60. The court found this factor weighed against private status for the PGA Tour because eligibility requirements for membership on the Tour "are not designed to screen out members based upon social, moral, spiritual, or philosophical beliefs, or

"membership control,"[61] "use of facilities by nonmembers,"[62] the "club's purpose"[63] and "whether the club is nonprofit."[64] Factors the court found insignificant to the determination of private club status included "history of the organization"[65] and "whether the club advertises for members."[66] The court therefore concluded that

---

any other criteria used to protect freedom of association values which are at the core of the private club exemption." *Id.* at 1325 (citing *Quijano*, 617 F.2d 129; Welsh v. Boy Scouts of Am., 993 F.2d 1267 (7th Cir. 1993); United States v. Jordan, 302 F. Supp. 370, 376 (1969)). The court pointed out that although membership in the PGA Tour is "an extremely small percentage of those who participate in the sport at recreational or other non-professional levels, . . . selectivity is inherent to athletics, and does nothing to confer 'privacy' to the organizations to which professionals matriculate." *Id.* at 1325.

61. The court found this factor weighed against private status for the PGA Tour because "only four members of the policy board . . . are player directors," *id.* at 1325 n.4, and what little control over the organization this confers on the membership "does little to make it or keep it 'private.'" *Id.* at 1325. The court pointed out that members of the PGA Tour only have voting rights as to replacements for existing player-directors, with the slate of candidates chosen by the incumbent directors. *See id.* at 1325 n.4. But more to the point, according to the court, was that the membership ranks are both filled and vacated through performance on the golf course, and not by vote of the current members. *See id.* at 1325. The court cited *Jordan*, 302 F. Supp. at 375 for the proposition that "consideration is given to whether the existing members have any control over the admission of applicants for membership." *Martin I*, 984 F. Supp. at 1325.

62. The court found this factor "cuts against private club status" for the PGA Tour because of the "heavy reliance by the Tour on public participation for the purpose of generating revenue for the tour." *Martin I*, 984 F. Supp. at 1325. The court also mentioned that there are "numerous nonmembers who participate in the tournaments as vendors, reporters, score keepers, volunteers, and members of the gallery." *Id.* This aspect was not given as much weight as the PGA Tour's reliance on public participation as a revenue force, the latter of which is "of particular force." *Id.* The court cited for support *Smith v. YMCA*, 462 F.2d 634, 648 (5th Cir. 1972) and *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474 (E.D. Va. 1966). Both cases involved seemingly private clubs that generated substantial subsistence revenue from public revenue sources. *See Martin I*, 984 F. Supp. at 1325.

63. The court found this factor "weighs heavily against private club status" for the PGA Tour, relying without further elaboration on its earlier explanation of the PGA Tour's "mercantile purpose." *Martin I*, 984 F. Supp. at 1325.

64. The court found this factor, like the club's purpose, weighed against private status for the PGA Tour. The court labeled the Tour as "nonprofit" even though it found that "its fundamental purpose is to enhance profits for its members." *Martin I*, 984 F. Supp. at 1325.

65. The court found this factor insignificant to the determination of private status for the PGA Tour since "it clearly was not formed to evade the Civil Rights Act or ADA." *Id.* Central to the court's dismissal of this factor was that when an organization is not a "sham" it merely tells us that it "is 'bona fide,' but not that it is a 'private club.'" *Id.*

66. The court found this factor insignificant to the determination of private status for the PGA Tour since "[t]he Tour has no more need or incentive to advertise for golfers than do the Chicago Bulls for basketball players." *Id.* The court cited *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309 (4th Cir. 1980) for the idea that organizations which advertise and solicit new members cannot fit within the private club exception. This is because extensive media coverage of the PGA Tour

the PGA Tour was not an exempt private club, and moved to the PGA Tour's second argument, that it did not operate a place of public accommodation.

The court began by looking to the ADA and found "golf course" specifically listed as a place of "public accommodation."[67] It dismissed the PGA Tour's argument that only those areas accessible to the public should be subject to the ADA, since "many facilities that are classified as public accommodations are open only to specific invitees."[68] As justification for its holding the court reasoned that "people other than [the PGA's] own Tour members are . . . allowed within the boundary lines of play during its tournaments."[69] In addition, the PGA Tour's argument against public accommodation status could not be "reconciled with the inclusion of private schools, whose corridors, classrooms, and restrooms are clearly not accessible to the public, on the list of places of public accommodations."[70] The court therefore denied the PGA Tour's motion for summary judgment and allowed Martin's claims to go forward.[71]

---

has led to an existence "well known to even the most casual golfers and followers of sports." *Martin I*, 984 F. Supp. at 1325.

67. *See Martin I*, 984 F. Supp. at 1326; 42 U.S.C. § 12181(7)(L) (1994).

68. *Martin I*, 984 F. Supp. at 1327. The PGA Tour cited cases where "private facilities do not lose their exempt status on the private portions of its facilities simply by operating a discrete public accommodation area." *Id.* at 1326. Pointing to Major League Baseball as an example of this proposition, it argued that "the bleachers are subject to the ADA because that is where the public is seated, but the dugout is not because the public is not allowed to mingle with the players therein." *Id.* at 1327. The court rebutted this contention with several examples, including: the disabled manager of a team (an organization could not "refuse to construct a wheelchair ramp to the visitor's dugout to accommodate a disabled manager" on the opposing team); a private country club's day care center that is open to the public (the day care center may not "rope off a section for use only by the country club's members and be exempt from the ADA within those boundaries"); and a federal District of Oregon case, *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 758-59 (1997) (listing examples of facilities that while exclusive in invitation nonetheless operate places of public accommodation). *See Martin I*, 984 F. Supp. at 1327.

69. *Martin I*, 984 F. Supp. at 1327. The court's reasoning is emphasized by the example of a disabled caddy hired by a member-golfer. The court rhetorically asked, once the caddy "steps within the boundaries of the playing area of the golf course—a statutorily defined place of public accommodation—does he step outside the boundaries of the ADA simply because the public at large cannot join him there?" *Id.*

70. *Id.*

71. *See id.*

B. The District Court's Disposition of Martin's Claims on the Merits

After a bench trial, the court found that Martin fit the statutory definition of "disabled."[72] Because it had already found on motion for summary judgment that the PGA Tour was a covered entity, the court brushed aside the PGA Tour's reiteration of the argument that the ADA does not apply to professional golf,[73] and instead moved directly to the PGA Tour's defense, that allowing Martin the reasonable accommodation of a cart would constitute a "fundamental alteration" of the nature of professional golf.[74]

The first factor the court reviewed as integral to a "fundamental alteration" analysis was "reported cases wherein the ADA has been applied to sports programs."[75] The court pointed out that precedent concerning the ADA and athletics is sparse, and that determinations in this area are both inconsistent and closely tied to the facts at hand.[76] Nevertheless, the court distilled

---

72. *See* Martin v. PGA Tour, Inc. (Martin II), 994 F. Supp. 1242, 1243-44 (D. Or. 1998). The court explained that Title III demands that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." *Id.* at 1247. The court then quoted from the ADA's underlying motivations. *See id.* at 1247-48 (quoting Crowder v. Kitagawa, 81 F.3d 1480, 1483-84 (9th Cir. 1996) (noting that Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and that "Congress intended to protect disabled persons not just from intentional discrimination but also from thoughtlessness, indifference, and benign neglect")) (internal quotations omitted). The court discussed the ADA's definitions of "physical or mental impairment," *see Martin II*, 994 F. Supp. at 1248 (citing 28 C.F.R. § 36.104(1) (1998)) and "major life activity," *see Martin II*, 994 F. Supp. at 1248 (quoting 28 C.F.R. § 36.104(2) (1998)). The court also took the time to distinguish "[t]emporary, non-chronic impairments of short duration" from "disabilities." *Martin II*, 994 F. Supp. at 1248 (using factors from Title I of the ADA, which include the nature and severity of the impairment, the duration of the impairment, and the permanent or long-term impact). *See also* 29 C.F.R. § 1630.2(j)(2) (1997). This labored discussion of disability seems a bit nonsensical, since Martin's disability was not an issue at trial. For a detailed discussion of Martin's particular impairment, see *supra* note 10.

73. *See Martin II*, 994 F. Supp. at 1244.

74. *See id.*

75. *Id.* at 1245.

76. *See, e.g.*, McPherson v. Michigan High School Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997) (finding maximum age limit for high school athletics necessary, and an individual assessment of petitioner's ability relative to other participants too burdensome); Sandison v. Michigan High School Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995) (same); Pottgen v. Missouri State High School Activities Ass'n, 40 F.3d 926 (8th Cir. 1994) (same); Bowers v. NCAA, 974 F. Supp. 459 (D.N.J. 1997) (finding NCAA "core course" requirement essential, and noting that the NCAA rule already allows for an individual assessment of petitioner's relative abilities);

from these cases the principle that courts must examine "the purpose of each of the rules in question to determine if the requested modification was reasonable."[77]

The court noted as a second contributing factor that even though professional sports enjoy a higher profile and better competition than high school and collegiate level sports, "the analysis of the issues does not change from one level to the next."[78] This is because interscholastic "athletic associations have just as much interest in the equal application of their rules and the integrity of their games as do professionals."[79]

The final contributing factor was the ADA's failure to recognize a distinction between sports organizations and other entities. The court reasoned that "[b]usinesses and schools have rules governing their operations which are of equal importance (in their sphere) as the rules of sporting events."[80] Under the ADA, "[t]he key questions are the same: does the ADA apply, and may a *reasonable* modification be made to accommodate a disabled individual?"[81]

Applying these precedents and policies to the case at hand, the court found that accommodating Martin would not fundamentally alter the nature of professional competition.[82] This result was based in part on the plain language of the United States Golf Association's (USGA) Rules of Golf.[83] Examining the

---

Johnson v. Florida High School Activities Ass'n, 899 F. Supp. 579 (M.D. Fla. 1995), *vacated as moot* 102 F.3d 1172 (11th Cir. 1997) (finding high school age requirement necessary, but an individual assessment required); Dennin v. Connecticut Interscholastic Athletic Conference, 913 F. Supp. 663 (D. Conn. 1996), *vacated as moot* 94 F.3d 96 (2d Cir. 1996) (same).

77. *Martin II*, 994 F. Supp. at 1246. The PGA Tour's position on the issue was that the court should examine whether the rule "defines who is eligible to compete or [whether it is] a rule which governs how the game is played" (a procedural versus a substantive distinction). *Id.* If the latter, then the rule cannot be modified "without working a fundamental alteration of the competition." *Id.*

78. *Id.*

79. *Id.* The court used the example that "if it is unreasonable to accommodate Casey Martin's disability with a cart at the PGA Tour level because of its rules of competition, it is equally unreasonable to so accommodate a similarly disabled golfer at the high school level if the same rules were applicable." *Id.*

80. *Id.* This led to an assertion by the court that "the disabled have just as much interest in being free from discrimination in the athletic world as they do in other aspects of everyday life." *Id.*

81. *Id.*

82. *See id.* at 1252.

83. *See id.* at 1252-53. The Rules of Golf are published independently by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of St. Andrews, Scotland (R&A). The Rules of Golf are general rules for all players, and not Rules of Competition, such as those used by the PGA Tour.

USGA Rules, the court placed great weight on the fact that no prohibition against carts was anywhere to be found.[84]

The court then discussed the issue of fatigue as a fundamental factor in professional golf, explaining that even with a cart, Martin incurs the same level of fatigue as, if not greater than, non-disabled golfers who are required to walk an entire eighteen-hole course.[85] The court discounted PGA Tour testimony offered by several high-profile players,[86] choosing instead to discuss at length the testimony offered by plaintiff's witness, Nike Tour Professional Eric Johnson.[87] Johnson testified that walking a golf course during competition is preferable, and involves little to no fatigue.[88] This echoed the testimony of plaintiff's expert witness, Dr. Gary Klug, who equated the nutritional energy expended in walking a golf course to "less than a Big Mac."[89]

Finally, the court proposed a hypothetical involving a blind golfer and several of the USGA rules in an attempt to determine whether the Rules of Golf could be subject to modification.[90] This hypothetical had little to do with PGA Tour Rules of Competition. The court found, however, that it undermined the position of the PGA Tour that an individualized assessment of the player's disability need not be undertaken when evaluating the reasonableness and potential burdens of accommodating a

---

84. The court did find, however, in Appendix I to the Rules of Golf, a proposed stipulation for those entities wishing to restrict competition to walking. *See id.* at 1249. The PGA Tour adopted such a stipulation, expressly restricting players to walking: "Players shall walk at all times during a stipulated round unless permitted to ride by the PGA Tour Rules Committee." *Id.* As the court pointed out, "[n]o waiver has ever been granted for individualized circumstances," and "when the walking rule has been waived, it has been waived for all competitors." *Id.*

85. *See id.* at 1249-51.

86. *See infra* note 195 (discussing players who testified for and against Martin).

87. *See Martin II*, 994 F. Supp. at 1251 nn.12-13.

88. *See id.* at 1250.

89. *Id.*

90. *See id.* at 1252. The court examined in detail Rule 6-4 of the Rules of Golf (addressing the role of the caddie: "[t]he player may have only one *caddie* at any one time, *under penalty of disqualification*"), Rule 8 (outlining what advice is allowed during the round of play: "'[a]dvice' is any counsel or suggestion which could influence a player in determining his play, the choice of a club or the method of making a *stroke*"), and Rule 8-1 (restricting players from offering advice to fellow competitors: "a player shall not give *advice* to anyone in the competition except his partner . . . [and] may ask for advice . . . from only his partner or either of their caddies"). *Id.* This hypothetical golfer would also be allowed modifications to the Rules of Golf under the explicit language of the United States Golf Association's pamphlet entitled, *A Modification of the Rules of Golf for Golfers with Disabilities*. *See id.* The pamphlet makes allowances for the hypothetical blind golfer, allowing her or him a "coach" in addition to the traditional caddie. *See id.* at 1252-53.

petitioner's request for a modification of rules.[91]

In closing its evaluation of Martin's prayer for relief on the merits, and as summation of the case, the court boldly announced that the PGA Tour's rules were "not so sacrosanct" as the PGA Tour might want to believe.[92] This led to the conclusion that the PGA Tour must allow Martin his accommodation since it would not work a fundamental alteration and "[t]he requested accommodation of a cart is eminently reasonable in light of Casey Martin's disability."[93]

II. Olinger v. United States Golf Ass'n

Ford Olinger, a disabled professional golfer seeking access to the prestigious United States Open Championship (U.S. Open), recently joined Martin's attempt to expand the scope of the ADA.[94] The Northern District of Indiana ruled after a two-day trial that the United States Golf Association (USGA) operates places of public accommodation and found that Olinger's request for the accommodation of a motorized cart was reasonable.[95] Contrary to *Martin*, however, the court held that modifying USGA rules to allow Olinger a cart would fundamentally alter the nature of USGA competition.[96] This Part explains the outcome of *Olinger*, looking specifically to the court's place of public accommodation and fundamental alteration analyses.[97]

A. The USGA and Places of Public Accommodation

There are many factual differences between Ford Olinger's situation and Casey Martin's. As the court noted, Martin's request for injunctive relief encompassed "a series of multi-level weekly tournaments," while Olinger sought access to a single event.[98]

---

91. *See id.* at 1253.

92. *Id.*

93. *Id.*

94. *See* Olinger v. United States Golf Ass'n, No. 3:98-CV-252RM, 1999 WL 454719, at *1 (N.D. Ind. 1999) (ruling after trial); Olinger v. United States Golf Ass'n, 52 F. Supp. 2d 947 (N.D. Ind. 1999) (ruling on in limine motion to exclude the testimony of the plaintiff's expert witness). References to the *Olinger* litigation will be to the ruling on the merits unless otherwise indicated.

95. *See Olinger*, 1999 WL 454719, at *6-*7.

96. *See id.* at *11. *See also id.* at *1 (stating the USGA "has persuaded the court that allowing the use of a golf cart would fundamentally alter the nature of this particular tournament, either by eliminating the uniformity of rules common to athletic events, or by changing the importance of a competitor's response to fatigue").

97. *See id.* at *3, *7.

98. *Id.* at *6 n.4.

Martin is a professional tournament golfer, while Olinger is a golf professional.[99] Furthermore, the parties in the two separate cases presented different evidence, leading to different records before the court.[100] The two cases merge, however, on the issue of whether a professional golf organization operates a place of public accommodation.

The court's analysis of the place of public accommodation issue began with the statute.[101] In deciding the question, the court took time to note that "Congress chose to list places, not events or activities, as public accommodation."[102] Conscious of this distinction, the court found that the USGA and the U.S. Open were not places, but events, and therefore were not directly subject to the ADA.[103]

The court went on, however, to determine that the USGA *operated* places of public accommodation.[104] The court based this determination on the fact that the USGA "restrict[ed] the normal operations" of its competitive events by "supervis[ing] the play, provid[ing] the rules, officiat[ing] the play, set[ting] up the golf course, and determin[ing] the groupings of the players and their tee times."[105]

The USGA's argument in response was that the area "inside the ropes" of the U.S. Open was outside the purview of the place of public accommodation language.[106] The court, however, refused to

---

99. *See* Martin v. PGA Tour, Inc. (Martin I), 984 F. Supp. 1320 (D. Or. 1998); *Olinger*, 1999 WL 454719, at *1; Nilon v. Philadelphia Section Prof'l Golfer's Ass'n, No. 79-3013, 1979 WL 1707 *4 (E.D. Pa. 1979) (taking judicial notice of the difference between a PGA Tour professional and a golf course professional).

100. *See Olinger*, 1999 WL 454719, at *6 n.4. This "different evidence" distinction is a direct reference to the court's evidentiary ruling that excluded the expert testimony of Dr. Gary Klug "for want of sufficient showing of reliability of underlying scientific principles." *Olinger*, 1999 WL 454719, at *6 n.4. *See also* Olinger v. United States Golf Ass'n, 52 F. Supp. 2d 947 (N.D. Ind. 1999) (ruling on defendant's in limine motion to exclude plaintiff's expert witness Dr. Gary Klug). The district court in *Martin* relied in significant part on the testimony of the same witness (Klug) that the *Olinger* court found unreliable. *See* Martin v. PGA Tour, Inc. (Martin II), 994 F. Supp. 1242, 1250 (D. Or. 1998).

101. *See Olinger*, 1999 WL 454719, at *2-*3 (citing 42 U.S.C. § 12181 (1994) and 28 C.F.R. § 36.104) (1998)).

102. *Id.* at *3.

103. *See id.* at *3-*4. The court reasoned by analysis to come to this conclusion, looking to other ADA cases involving Title III, and holding that "[t]he USGA, like the youth hockey league, the professional football league, and the Boy Scouts of America, is a membership organization and as such is not itself a place of public accommodation." *Id.* at *4.

104. *See id.*

105. *Id.*

106. *Id.* at *5.

recognize such a distinction, finding that the area of competition of the U.S. Open was no different in kind or in form from situations where student-athletes were protected by Title III.[107] In the student-athlete cases, the National Collegiate Athletic Association (NCAA) was found to exercise "enough control over the athletic facilities . . . to make the NCAA an operator of the facilities."[108] The court found it persuasive that the "athletes in th[o]se cases were the performers rather than the audience, just as the 6,881 golfers at the [U.S. Open] local qualifying events . . . were the performers."[109] Because the "NCAA cases did not find Title III limited by the roped-off, competitive portions of the field, court or pool," the court held that "nothing supports a finding that the USGA's barrier ropes limit Title III."[110]

B. The USGA and Fundamental Alterations

The court, in deciding the fundamental alteration issue, once again began with the text of the statute.[111] Noting the similarity between the Rehabilitation Act and ADA language, and recognizing the appropriateness of a parallel construction of the two Acts, the court implicitly distinguished *Martin*, holding that "[t]he proper inquiry . . . is not whether the requested accommodation would amount to a fundamental alteration in the game of golf . . . , but rather whether the requested accommodation would constitute 'a fundamental alteration in the nature of a program.'"[112]

---

107. *See id.* (citing Bowers v. NCAA, 9 F. Supp. 2d 460 (D.N.J. 1998); Tatum v. NCAA, 992 F. Supp. 1114 (E.D. Mo. 1998); Ganden v. NCAA, No. 96-C6953, 1996 WL 68000 (N.D. Ill. 1996); Butler v. NCAA, No. C96-1656D, 1996 WL 1058233 (W.D. Wash. 1996)).

108. *Olinger*, 1999 WL 454719, at *5.

109. *Id.*

110. *Id.* After examining the NCAA cases, the court noted that the USGA also advanced an argument that "organizers of championship-level competitions have the legal right to define the rules for that competition." *Id.* at *6. Here is where the Indiana court makes its only reference to the months-earlier *Martin v. PGA Tour, Inc.* decision, quoting it for the proposition that "the USGA's contention that it alone may set the rules is simply another version of its argument that the USGA is exempt from the provisions of the ADA, '[a]nd it is not.'" *Id.* (quoting Martin v. PGA Tour, Inc. (Martin II), 994 F. Supp. 1242, 1246 (D. Or. 1998)). It is the author's opinion that the *Olinger* court mentions the *Martin* decision only once, and then only for a bare assertion sans legal analysis, because of the convoluted and laborious nature of the Oregon court's attempt at unraveling the issues. Although the *Olinger* court arguably came to the wrong conclusion with regard to the fundamental alteration issue, *see infra* Part V.C., its opinion is without question an admirable explication of the issues.

111. *See id.* (citing 42 U.S.C. § 12182(b)(2) (1994)).

112. *Id.* at *7 (citation omitted). Compare *supra* notes 75-93 and accompanying

Looking to the several reasons offered by the USGA in support of their position, the court was persuaded first because "the use of a cart can provide a golfer with a competitive advantage over a golfer who walks,"[113] and second because "requir[ing] that someone be given the discretion to allow one competitor a potential advantage denied to others would fundamentally alter the nature of the competition."[114] The only way to eliminate this second concern would be to create a situation where all golfers must have the opportunity to ride, which would in turn "remove stamina . . . from the set of qualities designed to be tested in this competition."[115] Reasoning that the "set of tasks assigned to the competitor in the U.S. Open includes not merely striking a golf ball with precision, but doing so under greater than usual mental and physical stress,"[116] the court concluded that the "accommodation Mr. Olinger seeks, while reasonable in a general sense, would alter the fundamental nature of [U.S. Open] competition."[117]

III. Athletes, Athletics and the ADA

Although several spectators have requested that covered entities comply with the ADA's accessibility requirements with respect to *watching* professional sports,[118] Casey Martin and Ford Olinger are the only two athletes to claim that the ADA should apply to the *playing* of professional sports.[119] This Part explores cases in which amateur student-athletes have tried to use the ADA's broad mandates to gain access to interscholastic competition.[120] These student-athlete cases divide into two

---

text (discussing the *Martin* court's analysis of the fundamental alteration defense).

113. *Id.* at *8.

114. *Id.* at *10.

115. *Id.* Here again the court's analysis is in direct contrast to the *Martin* holding, an outcome that can be traced directly to the in limine exclusion of the plaintiff's expert witness. *See* Olinger v. United States Golf Ass'n, 52 F. Supp. 2d 947 (N.D. Ind. 1999).

116. *Olinger*, 1999 WL 454719, at *11.

117. *Id.*

118. *See, e.g.*, Stoutenborough v. NFL Inc., 59 F.3d 580 (6th Cir. 1995); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 759 (D. Or. 1997).

119. *See supra* Parts I. and II. (discussing *Martin* and *Olinger*, respectively).

120. Most suits arising under the ADA with regard to athletes have been brought either against a high school athletic association, *see, e.g.*, Frye v. Michigan High School Athletic Ass'n, 121 F.3d 708 (6th Cir. 1997); Johnson v. Florida High School Activities Ass'n, 102 F.3d 1172 (11th Cir. 1997); McPherson v. Michigan High School Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997); Sandison v. Michigan High School Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995); Pottgen v. Missouri State

groups. The first group of cases involves disqualification from participation based on eligibility requirements. The second group of cases covers disqualification from participation based on the threat of harm to the individual.[121]

A. Disqualification Based on a Physical or Mental Impairment

The typical scenario from the first group of cases involves an individual who is either denied eligibility because he or she exceeds the age requirement imposed on the sport,[122] or who is disqualified from competition because of academic ineligibility.[123] As the District Court in *Martin* pointed out, these cases vary widely in their resolutions.[124] Several avoid a ruling on appeal due to the lapse of a case or controversy.[125] Among those cases that do actually address the main issue, there is a conceptual division over whether interscholastic sports can constitute a protected activity. Some jurisdictions hold that interscholastic sports contribute substantially to the major life activity of education.[126] The other

---

High School Activities Ass'n, 40 F.3d 926 (8th Cir. 1994), or against the National Collegiate Athletic Association (NCAA), *see, e.g.*, Knapp v. Northwestern Univ., 101 F.3d 473 (7th Cir. 1996); Pahulu v. University of Kansas, 897 F. Supp. 1387 (D. Kan. 1995); Ganden v. NCAA, No. 96 C 6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996); Butler v. NCAA, No. C96-1656D, 1996 WL 1058233 (W.D. Wash. Nov. 8, 1996); Bowers v. NCAA, 974 F. Supp. 459 (D.N.J. 1997) (ruling on preliminary injunction). *See generally* Matthew J. Mitten, *Enhanced Risk of Harm to One's Self as a Justification for Exclusion from Athletics*, 8 MARQ. SPORTS L.J. 189 (1998) (discussing claims under the ADA with regard to high school and collegiate athletics); Adam A. Milani, *Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports*, 49 ALA. L. REV. 817 (1998) (same). *See also* Mark R. Freitas, *Applying the Rehabilitation Act and the Americans with Disabilities Act to Student-Athletes*, 5 SPORTS L.J. 139 (1998); Robert J. Adelman, *Has Time Run Out for the NCAA? An Analysis of the NCAA as a Place of Public Accommodation*, 8 DEPAUL-LCA J. ART & ENT. L. 79 (1997).

121. *See generally* Milani, *supra* note 120 (discussing judicial precedent and reasoning covering issues of disabled athletes and interscholastic sports).

122. *See, e.g.*, *Sandison*, 64 F.3d at 1026. For a detailed bibliography of cases involving high school athletes attempting to have their age-disqualified eligibility reinstated, see John E. Theuman, *Validity, Under Rehabilitation Act or Americans with Disabilities Act, of Rules or Laws Limiting Participation in Interscholastic Sports to Those Below Specified Age*, 143 A.L.R. Fed. 567 (1998).

123. *See, e.g.*, *Bowers*, 974 F. Supp. at 459.

124. *See supra* note 76 and accompanying text (describing the district court's characterization of cases dealing with athletes and the ADA, and citing examples).

125. *See, e.g.*, Johnson v. Florida High School Activities Ass'n, 102 F.3d 1172 (11th Cir. 1997); Dennin v. Connecticut Interscholastic Athletic Conference, 94 F.3d 96 (2d Cir. 1996); Jordan v. Indiana High School Athletic Ass'n, 16 F.3d 785 (7th Cir. 1994).

126. *See, e.g.*, Pahulu v. University of Kansas, 897 F. Supp. 1387 (D. Kan. 1995) (finding football a major life activity under the auspices of "learning"); *Sandison*,

jurisdictions disagree, finding that interscholastic sports cannot be considered a major life activity.[127] Although the split seems irreconcilable, the relevant issues are clear: (1) whether the sport itself is a major life activity; (2) whether the disabled student-athlete is discriminated against "by reason of" the disability; and (3) whether the student-athlete is "otherwise qualified" to participate in the athletic endeavor.[128]

B. Disqualification Based on Harm to One's Self

The typical scenario in the second group of student-athlete suits involves disabled athletes declared ineligible to participate based on the governing entity's fear that the individual will be exposed to harm.[129] While the regulations implementing the Rehabilitation Act prohibited discrimination against persons able to perform a function "without endangering the health and safety of the individual,"[130] the ADA drops the reference to self-harm and focuses exclusively on "threat[s] to the health or safety of other individuals."[131] This change in statutory language has led to a

---

863 F. Supp. at 489 (finding cross-country and track an "important and integral part of the education of plaintiffs"). This determination is typically arrived at by applying a subjective test that examines the sport from the viewpoint of the student and the role the sport plays in their own personal education process. *See generally* Milani, *supra* note 120, at 825-53 (describing differences in the courts's determination of "major life activity," and explaining the differences between subjective and objective analyses).

127. *See, e.g.*, Knapp v. Northwestern Univ., 101 F.3d 473 (7th Cir. 1996) (declining to "define the major life activity of learning in such a way that the [Rehabilitation] Act applies whenever someone wants to play intercollegiate athletics"). This determination is typically arrived at by applying an objective test that examines the sport from the viewpoint of education in general.

128. *See* Milani, *supra* note 120, at 817-60 (evaluating case law relevant to interscholastic athletes with physical or mental impairments).

129. *See, e.g.*, *Knapp*, 101 F.3d at 473; *Pahulu*, 897 F. Supp. at 1387. For an excellent overall discussion of the topic, *see* Mitten, *supra* note 120. *See also* Milani, *supra* note 120, at 890-906 (discussing disabled athletes and their exclusion from athletics based on harm to one's self).

130. 29 C.F.R. § 1613.702(f) (1998).

131. 42 U.S.C. § 12113 (1994). *See also* Mitten, *supra* note 120, at 205-08, 221-23; Milani, *supra* note 120, at 896-901. Further complicating the issue are the Equal Employment Opportunity Commission's regulations implementing the ADA which, following the language of the Rehabilitation Act, re-insert the reference to self-harm. *See* 29 C.F.R. § 1630.15(b)(2) (1998) (stating that employers may require that "an individual shall not pose a direct threat to the health or safety of the individual or others"). Because professional sports organizations generally do not receive federal funding, any claims by disabled professional athletes in this context would probably be brought under the ADA. *See* Mitten, *supra* note 120, at 217-23 (discussing the ADA and the potential rights of disabled professional athletes under its provisions with regard to harm to one's self).

split among the courts over interpretation.[132] The main issue, however, once an initial determination of disability has been made, remains constant—who should make an assessment of the risk to the individual?[133] To date, arguments answering this question propose one of three separate resolutions: (1) defer to the judgment of the team physician;[134] (2) defer to the judgment of the athlete;[135] or (3) conduct a de novo judicial review of the conflicting medical prognoses.[136]

IV. Wearing "Textualist-Colored Lenses" to View the ADA

When Congress first promulgated the ADA, commentators noted that the statute's expansive language was meeting significant judicial resistance.[137] Recently, however, a more liberal reading of the ADA's terms has found favor in certain jurisdictions.[138] But decisions that involve sports, as noted above,

---

132. *See generally* Mitten, *supra* note 120.

133. *See Knapp*, 101 F.3d at 483.

134. *See, e.g.*, School Bd. of Nassau County v. Arline, 480 U.S. 273, 285 (1986) (holding under the Rehabilitation Act that an exclusion may be based on "reasoned and medically sound judgments"); *Knapp*, 101 F.3d at 484-85 (finding the Rehabilitation Act to only require review of team physician's judgment for reasonableness and rationality). *See also* Mitten, *supra* note 120, at 215-17 (arguing that "[a]ll things considered, the team physician medical judgment model strikes the appropriate balance between an amateur athlete's interest in athletic participation and the team or athletic event sponsor's interest in protecting the health and safety of participants").

135. *See, e.g.*, Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980) (allowing wrestler's personal autonomy interest to prevail over school's paternalistic interest). *See also* Milani, *supra* note 120, at 890-906 (discussing cases covering exclusion based on "threat to self" and arguing that "[i]f the student-athlete can compete at the same level as his peers, a school has neither the duty nor the right to bar a student from playing once it is satisfied that he and his family know of the dangers involved and rationally reach a decision to continue playing") (internal citations omitted); Mitten, *supra* note 120, at 221-23 (proposing that for professional athletes it is proper to adopt "the athlete informed consent model . . . , which would enable a professional athlete to choose to participate, despite medical disqualification by a team physician, if other competent medical authority clears him or her to play").

136. *See, e.g.*, *Knapp*, 942 F. Supp. at 1191; Mitten, *supra* note 120, at 210 n.111 and accompanying text. *See also* Mitten, *supra* note 120, at 215-17 (examining the judicial/medical fact-finding model employed by the lower court in *Knapp*).

137. *See* Walter Olson, *Are Federal Judges Taming the ADA? Don't Count On It.*, REASON, May 1998. Judges initially refused to enforce the ADA expansively: "the broad protection promised by the ADA has been unfulfilled because of the narrow way that judges and employers have interpreted the law"; "Judges are holding plaintiffs up front to a very high standard"; "Recent court rulings have actually made it tougher for employees to claim discrimination by narrowing the definition of who is protected." *Id.*

138. *See id.* Several recent appellate decisions support this statement, including that of an IRS agent declared legally disabled although corrective lenses gave her

are limited in number and scope, and vary widely in their justifications and dispositions.[139] None deal with professional athletes and professional sports. A determination of the issues in *Martin v. PGA Tour, Inc.*, as intimated in the Introduction to this Article, will therefore likely accede to the modern Supreme Court's tendency to "textualize" rather than "remedialize" statutory interpretation.[140]

This Part looks to four major issues in *Martin v. PGA Tour, Inc.*, and applies modern Supreme Court precedent to their determination. Major life activities, private clubs, fundamental alterations and places of public accommodation will all be addressed. This exercise reveals the most probable position that the Ninth Circuit will take on appeal. Part V will immediately follow and refute such a limited analytical perspective.

A. Major Life Activities

The first major issue in applying the ADA to professional sports is a conceptual one—the proper relationship between athletics and major life activities.[141] The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities."[142] Courts have looked at the phrase in two separate ways with regard to sports, with one camp holding that "major life activity" is defined in terms of the individual, while the other camp evaluates "major life activity" in terms of the activity itself.[143] Although circuit courts are split in this regard, the Supreme Court's recent decision in *Bragdon v.*

20/20 vision, and that of a diabetic granted disabled status although medication could control the symptoms of his illness. *See id.* Such decisions, however, were recently limited by the Supreme Court's decision in *Sutton v. United Air Lines*, 19 S.Ct. 2139 (1999). *See infra* note 188 (describing the holding of *Sutton*, which required that courts examine plaintiffs in their "present" state).

139. *See supra* notes 119-136 and accompanying text.

140. There is a definite tension between textualist (language should be given its plain meaning) and purposivist (remedial statutes should be construed broadly) canons of construction. For a detailed explication of these types of head-butting canons and counter-canons of construction, see Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

141. *See supra* notes 126-127 and accompanying text (discussing the two opposing views of major life activity as courts have applied it to the sports context).

142. 42 U.S.C. § 12102 (1994).

143. An example of these two methods of determination would be the case where a high school student petitions the court for a variance to play baseball. Some courts will discuss whether high school athletics is properly described as part of the major life activity of "learning," while other courts look to whether the opportunity to participate in athletics itself is a "major life activity."

Abbott,[144] when extended to athletics, cleanly resolves the issue.

The Supreme Court in *Bragdon* addressed an asymptomatic HIV-positive woman's claim of discrimination within a "place of public accommodation."[145] A 5-4 majority of the Court,[146] in deciding whether the woman was "disabled" under the ADA, held that the human act of reproduction was a "major life activity" for this particular plaintiff.[147] The significant aspect of this holding, with relation to the dispute over "major life activities," was the Court's refusal to take into account the relationship between the major life activity and the relief sought.[148]

This refutes those decisions holding that athletics are *per se* excluded from the realm of major life activities,[149] because under *Bragdon* the court must determine whether an activity is "major" without regard to the public's access to the activity.[150] Under this analysis, Martin's impairment substantially limits his major life activity of walking,[151] and the fact that he is limited in playing professional golf is irrelevant. In other words, the relief sought is not disallowed by the fact that the forum within which the relief will be applied is not available to the average person.[152] This not only makes logical sense, but is also in accord with Title I

144. 524 U.S. 624, 118 S. Ct. 2196 (1998).

145. Specifically, a dentist's office. *See Bragdon*, 118 S. Ct. at 2199. *See also* 42 U.S.C. § 12181(7) (1994).

146. Justice Stevens writes separately in favor of affirming the appellate court's decision, but acquiesces to the Court's majority opinion commanding a remand to the appellate court for further findings. *See Bragdon*, 118 S. Ct. at 2213 (Stevens, J., concurring).

147. *See id.* at 2207.

148. *See id.*

149. *See supra* note 127 and accompanying text.

150. Such comparisons to other individuals and the general populace should therefore be confined to the analysis of whether the impaired major life activity is "substantially limited."

151. The ADA's regulations echo those of the Rehabilitation Act, providing a representative, though not exhaustive, list of major life activities such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working" that are covered under the language of the ADA. *Compare* 29 C.F.R. § 1630.2(i) (1998) *with* 28 C.F.R. § 41.31(b)(2) (1998) (using the same definition to describe what constitutes a major life activity).

152. The implication is that cases like *Pahulu v. University of Kansas*, 897 F. Supp. 1387 (D. Kan. 1995), which look to the positive impact of the sport on the athlete's ability to learn, are incorrect in their subjective analysis of the situation. A more appropriate approach, under the *Bragdon* standard, is to determine if the individual's disability (in Pahulu's case a learning disability) affects the major life activity of learning by itself, exclusive of the relief prayed for. Learning disabled students must therefore, by definition, be handicapped in the major life activity of learning.

provisions.[153]

With this in mind, the Ninth Circuit's determination of whether Martin is disabled rests on his having an impairment that substantially limits at least one of his major life activities. As the District Court correctly noted, Martin suffers from a physical impairment.[154] This impairment is neither intermittent nor ephemeral,[155] but is rather a permanent physical malformation with attendant chronic pain that will most likely result in amputation of Martin's lower right leg.[156] Under regulations implementing both the Rehabilitation Act[157] and the ADA,[158] any physiological disorder affecting the musculoskeletal system qualifies as an impairment.[159] Therefore, Martin's venous malformation qualifies as a physical impairment, and he is

---

153. Title I of the ADA prohibits discrimination in employment against any "qualified individual with a disability because of the disability of such individual in regard to the . . . terms, conditions and privileges of employment." 42 U.S.C. § 12112(a) (1994). The statute provides that "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, [and] job training" are covered by the section's language. *Id.* To determine the disabled status of an individual with regard to discrimination within the place of employment, courts may look to the major life activities such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1998). They are not limited to looking at the major life activity of working, even though working is the arena within which relief is being sought.

154. Martin v. PGA Tour, Inc. (Martin II), 994 F. Supp. 1242, 1248 (D. Or. 1998).

155. "Temporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities under the ADA." *Id.* (citing Sanders v. Arneson Prods., 91 F.3d 1351, 1354 (9th Cir. 1996)).

156. *See Martin II*, 994 F. Supp. at 1243-44.

157. *See* 28 C.F.R. § 41.31(b)(1) (1998). Discrimination against any "otherwise qualified individual" with a disability is generally prohibited by Section 504 of the Rehabilitation Act. To be "qualified," a handicapped person must meet "the essential eligibility requirements for the receipt of program services." 28 C.F.R. § 42.540(1)(2) (1998). As an attempt to extend the civil rights umbrella of protections to the disabled, its purview encompasses any "program or activity" receiving federal financial assistance. *See* 29 U.S.C. § 794(b) (1998). The statute defines "program or activity" as any "department, agency . . . or other instrumentality of a State." *Id.* The Supreme Court, in interpreting this language, held that the Rehabilitation Act guarantees "meaningful access" to programs or activities falling within the Act's statutory language: "[T]o assure meaningful access, reasonable accommodations in the . . . program or benefit [receiving Federal financial assistance] may have to be made." Alexander v. Choate, 469 U.S. 287, 301 (1985). The Rehabilitation Act may be used in the ADA context, since Congress, in enacting the ADA, specifically placed the newer and more expansive statute in congruence with the older Rehabilitation Act. *See* 42 U.S.C. § 12201(a) (1994). The ADA must therefore be read as providing "at least as much protection as . . . the regulations implementing the Rehabilitation Act." Bragdon v. Abbott, 524 U.S. 624, —, 118 S. Ct. 2196, 2202 (1998).

158. *See* 29 C.F.R. § 1630.2(h)(1) (1998).

159. *See Bragdon*, 118 S. Ct. at 2202.

properly considered disabled under the ADA.

The question remaining is whether Martin's physical impairment substantially limits the major life activity in question.[160] As the Supreme Court has said, "[t]he Act addresses substantial limitations on major life activities, not utter inabilities."[161] Although in *Bragdon* the chance of passing on the HIV virus to a child through the birth-process was as low as eight percent, this limitation was nonetheless deemed significant enough to constitute a substantial limitation.[162] Factors contributing to the Court's finding included potential added costs such as supplemental insurance, long-term health care and therapy.[163]

Martin's physical malformation has resulted in an impairment that substantially limits his ability to both work and walk. When Martin removes the two layers of compression stockings from his right leg, swelling and discoloration immediately result.[164] Furthermore, although not explicitly addressed by the trial court, it is easy to imagine that Martin has incurred significant financial burdens in the form of additional health and insurance expenses. Therefore, Martin's impairment substantially limits the major life activity of walking, and he qualifies as disabled under the ADA.[165]

---

160. *See id.* at 2205-06.

161. *Id.* at 2206. The Court also stated that "[w]hen significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." *Id.*

162. *See id.* As the court noted in its opinion, definitions of "disability" and "major life activity" are described in regulations promulgated by various federal agencies, *see, e.g.*, 45 C.F.R. § 84.3(j) (1998); 28 C.F.R. § 41.31(b) (1998), but "substantially limits" is not so easily defined. *See Bragdon*, 118 S. Ct. at 2205. Emphasizing the absence of regulations describing what constitutes a substantial limitation, the Court held that the ADA addresses "substantial disabilities," and not "utter disabilities." *See id.* at 2206. As illustration, the Court pointed out that "the disability definition does not turn on personal choice." *Id.* at 2207. When significant limitations result from the impairment, the definition is met "even if the difficulties are not insurmountable." *Id.* (The Court's evaluation of the term "substantial" is not revealed in quantifiable terms, but rather by somewhat circular reasoning—significant limitations are substantial limitations.). The Court then conclusively stated that plaintiff's disability fell within the ADA's guidelines. *See id.* The Chief Justice and Justices O'Connor, Scalia, and Thomas took umbrage at the majority's lack of analytic methodology in evaluating this final prong. *See id.* at 2215-16 (Rehnquist, C.J., and O'Connor, Scalia, and Thomas, JJ., dissenting). The dissent, however, offered no assistance, other than to state that plaintiff must show on the record that her "major life activity" has been "substantially limited." *See id.*

163. *See Bragdon*, 118 S. Ct. at 2215-16.

164. *See* Martin v. PGA Tour, Inc. (Martin II), 994 F. Supp. 1242, 1243-44 (D. Or. 1998).

165. Although not necessary under this analysis, because Martin is attempting

B. Private Club Exemptions

A second issue in the application of the ADA in the professional sports context is in the definition of "private club." Title III of the ADA, outlining public accommodations, defines the term with reference to the 1964 Civil Rights Act, which exempts places "not in fact open to the public."[166] Title I, which discusses employment, provides a little more direction, defining the term

---

to work as a professional golfer, the Ninth Circuit may examine whether the major life activity of working is substantially limited by Martin's impairment. From a public policy remedial purpose standpoint, the result should remain the same—even though Equal Employment Opportunity Commission Guidelines implementing Title I state that an individual is not substantially limited in working if she or he "is unable to perform a specialized job or profession requiring extraordinary skill, prowess, or talent." 29 C.F.R. § 1630, Appendix § 1630.2(j) (1998). This is because such a "[s]trict application of the 'substantially limits a major life activity' requirement can lead to the result that certain physically impaired athletes [like the blind or the deaf] are covered by the ADA, whereas, others [like Martin or the hypothetical pitcher below] are not." Mitten, *supra* note 120, at 219-20. The result should remain the same even though those same guidelines set an example of a non-covered disability with regard to professional sports: "a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball." 29 C.F.R. § 1630, Appendix § 1630.2(j). This is because "[t]here is no principled justification for protecting some physically impaired professional athletes under the ADA, but not others." Mitten, *supra* note 120, at 219-20. Finally, the result should remain the same even though Martin, much like the professional baseball player in the example, possesses a specialized skill. This is because for a professional athlete the "many long years of training and commitment constitute a major life activity." Mitten, *supra* note 120, at 219-20.

166. *See* 42 U.S.C. § 2000-a(e) (1994). Title III's exact language is that an exemption from coverage exists for "private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000-a(e))." 42 U.S.C. § 12187 (1994). Private clubs or establishments under Title II of the Civil Rights Act are exempt if they are "not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section." 42 U.S.C. § 2000-a(e). Subsection (b) applies the 1964 Act against establishments which serve the public and whose operations affect commerce, or whose discrimination and/or segregation of the disabled is supported by State action. *See* 42 U.S.C. § 2000-a(b) (1994). This list includes:

> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Id.

with reference to the tax code, which exempts "[c]lubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder."[167]

One of the first cases to address the private club exemption was the Supreme Court's *Moose Lodge No. 107 v. Irvis*.[168] Although the case turned on whether the grant of a liquor license gave the color of state action to an otherwise private entity, the court enumerated several factors that led to a determination of private club status.[169] These included well-defined membership requirements, private ownership of the facilities, the absence of public funding, exclusive admission to the grounds and exclusivity in conferring membership.[170]

Nearly a decade later, in *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*,[171] the Court reviewed a swimming pool association's claim of "private club" status in determining whether the plaintiff's civil rights had been violated. The Court denied an exemption for the pool association in part because membership decisions were racially motivated decisions thinly disguised as relying on geographic proximity to the pool and status as a homeowner.[172]

The Ninth Circuit uses similar factors to determine private status. Looking to EEOC Guidelines interpreting Title VII of the Civil Rights Act of 1964, the court recently articulated a "private

167. 26 U.S.C. § 501(c) (1999). The exact language of Title I exempts from coverage any "bona fide membership club (other than a labor organization) that is exempt from taxation under 501(c) of Title 26." 42 U.S.C. § 12111(5)(B)(ii) (1994). 26 U.S.C. § 501(c) enumerates 27 separate lists of exemptions describing entities that are not subject to federal taxation. The section addressing "bona fide membership clubs" defines said entities as "[c]lubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder." 26 U.S.C. § 501(c)(7) (1999). The tax code, interestingly, also exempts "professional football leagues . . . not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(6) (1999).

168. 407 U.S. 163 (1965).

169. *See id.* at 171.

170. *See id.* The private nature of the Moose Lodge was a fact stipulated by the parties, *see id.* at 179 n.1 (Douglas, J., dissenting), and the Court did not explore these "private club" elements in depth.

171. 410 U.S. 431 (1973).

172. *See id.* at 436-39. The association allowed membership privileges to every White person within the geographic area, subject to no restrictions save for a maximum number of members. *See id.* at 438.

membership club" test.[173] This test required proof that the entity "(1) is a club in the ordinary sense of the word, (2) is private, and (3) requires meaningful conditions of limited membership."[174] Factors to consider included non-profit goals, selective membership requirements based on personal qualifications, limited accessibility to club facilities and services, absence of paid or general advertising, and member control of the club and its assets.[175]

Under these precedents, and relying on the plain language of the statute, as opposed to remedial purpose interpretation, the PGA Tour must be considered a private club. First, the PGA Tour does not provide services to the public. It is a non-profit corporation that organizes professional sporting events. The competitors are independent contractors who win prize money supplied by independent corporate sponsors. A substantial portion of the sponsorship money is directed to charity. Second, membership in the organization is highly selective and based on quantifiable criteria that do not carry any indicia of discriminatory purpose. Third, the area of competition within which members compete is highly delineated and exclusive—the public is not allowed within the boundaries of play. Finally, the PGA Tour operates with minimal contribution from public-generated funds, and the monies collected do not inure to the benefit of any private shareholder.

The district court's holding that the PGA Tour cannot claim the private club exemption is suspect when viewed under the above textualist analysis.[176] One factor the lower court found weighed against private club status actually lends credence to the PGA Tour's exemption argument. The district court misapplied the *Landsdowne* "use of facilities by nonmembers" factor.[177] The district court's analysis relied on *Smith v. YMCA*,[178] which found that a YMCA that "enjoyed a substantial amount of revenue from

173. *See* Richard v. Friar's Club, 124 F.3d 212, No. 96-55614, 1997 WL 579146 (9th Cir. Sept. 18, 1997).

174. *Id.* at *1 (quoting 42 U.S.C. § 2000e(b)(2) (1989)).

175. *See id.*

176. Although the district court applied out-of-circuit precedent from another district court, *see supra* Part I.A. (discussing the *Martin* court's application of the *Landsdowne* factors), these *Landsdowne* factors echo those articulated by the Supreme Court and the Ninth Circuit.

177. *See* Martin v. PGA Tour, Inc. (Martin I), 984 F. Supp. 1320, 1325 (D. Or. 1998).

178. 462 F.2d 634 (5th Cir. 1972).

the general public" was not a private club.[179] The PGA Tour, however, does not allow non-members access to the area of competition. The area of revenue-generation on which the district court based its analysis is the same area that is unquestionably subject to the ADA.[180] Using this already compliant area to impose liability on a questionably covered and possibly exempt area is inappropriate.

Further supporting private club status for the PGA Tour is an exception to the private club exemption. The exception is made "to the extent that" the facilities of an exempt entity are made available to the public and affect interstate commerce.[181] Therefore, if the PGA Tour is an exempt entity, it must still comply with the ADA in whatever areas the public is given access. The inverse proposition supported by such language is that making a section of an exempt entity's facilities open to the public does not negate the exemption in full, but only to such an extent as is necessary to protect customers or patrons. The implications of imposing public accommodation status only on the area in fact open to the public will be further addressed under the place of public accommodation analysis in Part IV.D.[182]

C. Fundamental Alterations

Title III of the ADA allows covered entities a defense to claims of discrimination by disallowing modifications that would affect or "fundamentally alter" the nature of the goods or services provided.[183] It also provides that entities need not remove barriers

---

179. *See Martin I*, 984 F. Supp. at 1325 (discussing *Smith*, 462 F.2d at 648).

180. *See* 42 U.S.C. § 12181(7)(L) (1994) (enumerating a list of entities considered places of public accommodation, and specifically mentioning golf courses). If the disposition of *Martin* were predicated on the area outside the lines of competition, the result would be laughably easy, for the ADA demands that areas accessible to the public comply with its requirements.

181. *See* 42 U.S.C. § 2000-a(b) (1994).

182. *See infra* notes 203-217 and accompanying text.

183. *See* 42 U.S.C. § 12182(b)(2)(A)(ii) (1994) (stating that discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford . . . 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"). The Supreme Court has noted that the disabled are entitled to wide-sweeping and far-ranging remedial measures, even to the point of "affirmative" acts. *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1986) ("Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee."). Although *Arline* deals with the Rehabilitation Act, the ADA states that its prohibitions and mandates are to be read as giving the disabled no fewer protections than those afforded by the Rehabilitation Act. *See* 42 U.S.C. § 12201 (1994).

to access unless the change is "readily achievable," and that the provision of auxiliary aids or services is not required if doing so would create an "undue burden."[184] Crucial to an analysis of these terms is whether a modification is "reasonable." Although Title III does not define what modifications are reasonable nor what alterations are fundamental,[185] Title I sheds some light on the terminology, providing that discrimination includes the failure to provide a "reasonable accommodation" (defined as including the modification of equipment, devices, examinations, training materials or policies and other similar accommodations),[186] unless providing the accommodation would impose an "undue hardship

184. *See* 28 C.F.R. § 36.104 (1998) (defining readily achievable and undue burden); 28 C.F.R. § 36.302 (1998) (describing appropriate modifications in policies, practices or procedures, but declining to define fundamental alteration). Interestingly, although the regulations choose to define both "readily achievable" *and* "undue burden," the statute only defines the former. *See* 42 U.S.C. § 12181 (1994). In addition, even though the same factors are used to examine both terms, the regulations envision a lower standard of review for what is readily achievable (dealing with the removal of barriers) than for what constitutes an undue burden (dealing with the provision of auxiliary aids and services). *Compare* 42 U.S.C. § 12181(9) (1994) *and* 28 C.F.R. § 36.104 (defining readily achievable as "easily accomplishable and able to be carried out without *much* difficulty or expense") (emphasis added) *with* 28 C.F.R. § 36.104 (defining undue burden as involving "*significant* difficulty or expense") (emphasis added). "Significant" implies a lower standard than "substantial," but a higher standard than the somewhat intangible "much." Where fundamental alteration falls is difficult to determine. *See infra* note 185. *See also* DOJ Technical Assistance Manual for Title III, § III-4.3600 (1990) *available in* RUTH COLKER, THE LAW OF DISABILITY DISCRIMINATION HANDBOOK 375, 380, (2nd ed. 1999) ("[T]he undue burden standard . . . requires a greater level of effort by a public accommodation in providing auxiliary aids and services than does the readily achievable standard for removing barriers in existing facilities.").

185. Title III does not define "fundamental alteration," although the Title I equivalent of "undue hardship" covers any "action requiring significant difficulty or expense" when considered in light of the cost of the accommodation and the resources of the employer. 42 U.S.C. § 12111(10) (1994). The DOJ Technical Assistance Manual for Title III attempts to define fundamental alteration as "a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered." § III-4.3600.

186. *See* 42 U.S.C. § 12111(9) (1994). An employer that falls under the scope of Title I must make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such . . . accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A) (1994). "Reasonable accommodation" is defined to include making access available to all parts of the workplace, modifying job tasks or schedules, providing machinery, training materials, or interpreters, and "other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9). An "undue hardship" on the employer is described as "an action requiring significant difficulty or expense" when considered in light of the cost of the accommodation and the resources of the employer. 42 U.S.C. § 12111(10).

on the entity."[187]

The Supreme Court has spoken infrequently on Title III of the ADA.[188] The Court has, however, ruled on what may

187. *See* 42 U.S.C. § 12112(b)(5)(A). Part of the confusion stems from the statute's three different uses of the term "accommodation." First, an accommodation is a device designed to assist a disabled individual perform the essential functions of the position they hold or desire. *See* 42 U.S.C. § 12111(9). Second, an accommodation is a type of service or benefit provided to the public. *See* 42 U.S.C. § 12182(a) (1994) (using accommodation in a list with "goods, services, facilities, privileges, [and] advantages"). Third, a public accommodation is a place that is open to the public. *See* 42 U.S.C. § 12182(a) (using accommodation as part of the phrase "place of public accommodation"). Reasonable modification is in line with the first use of accommodation, in that it is a device designed to assist individuals to access the services or benefits of a place of public accommodation. A reasonable modification, therefore, under the interpretive canon of statutes *in pari materia*, should be construed under the same standard as reasonable accommodation. *See also* John W. Parry, *Public Accommodations Under the Americans with Disabilities Act: Nondiscrimination on the Basis of Disability*, MENTAL & PHYSICAL DISABILITY L. REP. 92, 92-93 (Jan./Feb. 1992) (explaining that Title III "in no way lessens the reach of existing federal laws or regulations").

188. The only Title III case to date in the Supreme Court is *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196 (1998). *Bragdon*, however, did not deal with any issues exclusive to Title III. The two holdings of the case were that HIV was an impairment that substantially limited the plaintiff's major life activity of reproduction, and that an entity claiming a direct threat defense must have a subjective belief, based on objective medical evidence, that a significant risk of harm exists. *See id.* at 2215-16. It would seem, however, that additional Supreme Court decisions on Title III will soon be forthcoming (including, possibly, *Martin*), as the Court began reviewing ADA issues in the summer of 1998. *See* Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998) (holding that the protections of Title II (public entities) applied to a state prison population) (decided June 15); *Bragdon*, 118 S. Ct. at 2196 (decided June 25). *See also* Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998) (construing a collective bargaining agreement arbitration clause and holding that the clause's general language did not preclude the plaintiff's federal suit) (decided November 16). In the summer of 1999, the Court added five more ADA decisions. In *Cleveland v. Policy Management Sys.*, 119 S. Ct. 1957 (1999), the Court wiped away a three-cornered circuit split on the issue of whether judicial estoppel applied to a plaintiff's inconsistent representations with respect to disabled status. The Court held that an individual's representations for the purpose of Social Security benefits are not a *per se* bar to recovery under the ADA, and do not even invoke a presumption against the plaintiff. *See id.* Instead, the plaintiff must carry a normal burden of production and persuasion, and must therefore explain away the inconsistent representations under a normal burden analysis. *See id.* This was the most liberal of the competing circuit positions, and, coincidentally, the one advocated by the Equal Employment Opportunity Commission (EEOC). *See id.* In *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999), the Court looked at whether the definition of disability should take mitigating measures into account. The Court, resolving a contentious circuit split, held that the ADA demands an individualized inquiry into the existence of a disability, and that the only way to effect such an inquiry is to consider an individual's mitigating measures. *See id.* Under this ruling, an individual with diabetes, or epilepsy, must be considered in his or her medicated state when determining whether he or she is disabled—the Court reasoned that to hold otherwise would be to create a situation where courts are predicting what an impairment "might do" to an individual were the individual

constitute a "reasonable accommodation" in other situations.[189] With regard to an employment claim, the Court in *School Board of Nassau County v. Arline*[190] said that courts must make "an individualized inquiry" into the facts to determine whether a proposed accommodation is reasonable.[191] It went on to state that an "accommodation is not reasonable if it either imposes undue financial and administrative burdens on a grantee, or requires a fundamental alteration in the nature of [the] program."[192] In another case, the Court noted that a disabled individual "must be provided with meaningful access to the benefit that the grantee offers," and that such access may mandate some "reasonable accommodations."[193] However, a "fundamental alteration in the nature of a program" is not required by any "statute or regulations" implementing the Act.[194]

The distillation of the *Arline* and *Choate* precedent leads to a

---

not using corrective measures. *See id.* Since the ADA demands an individualized, "present tense" inquiry, any supposition as to what the individual's disability "might be" when stripped of the mitigating measure is counter to the purpose of the ADA. *See id.* The Court applied similar reasoning to the particular facts of *Murphy v. United Parcel Serv.*, 119 S. Ct. 2133 (1999) and *Albertson's v. Kirkingburg*, 119 S. Ct. 2162 (1999), holding that the respective plaintiffs were not entitled to relief. The Court rounded out its summer of ADA review with a Title II decision. *See* Olmstead v. L.C., 119 S. Ct. 1131 (1999) (holding in the context of Title II that institutionalization of individuals with mental disabilities may, under some circumstances, rise to the level of discrimination).

189. These other contexts serve to illuminate the concept of "reasonable accommodation," including: that an interpretation of the Tax Reform Act of 1986 fresh start provision need not be a "microscopically fair [accommodation] . . . of the competing interests of fairness, administrability, and avoidance of abuse," Atlantic Mut. Ins. Co. v. Commissioner of Internal Revenue, 523 U.S. 382, 550 (1998); that the "authorization of religious discrimination with respect to nonreligious activities goes beyond reasonable accommodation," Corporation of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 343 (1987) (referencing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)); and that "an accommodation causes undue hardship whenever that accommodation results in more than a de minimus cost to the employer," Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).

190. 480 U.S. 273 (1986).

191. *See id. See also* Milani, *supra* note 120, at 869 (proposing that courts should follow *Johnson v. Florida High School Activities Ass'n*, 899 F. Supp. 579 (M.D. Fla. 1996) (arguing the courts should conduct an individualized inquiry to determine if waiving a rule causes a fundamental alteration to an interscholastic athletic program)).

192. *Arline*, 480 U.S. at 287 n.17 (internal quotations and citations omitted) (referring to 45 C.F.R. § 84.12(c) (1985) for a list of factors to consider).

193. Alexander v. Choate, 469 U.S. 287, 301 (1985) (discussing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)).

194. *Choate*, 469 U.S. at 300. The Court cited to 45 C.F.R. § 84 for examples of reasonable modifications, which included making building alterations to create access and giving time extensions for educational requirements. *See Choate*, 469 U.S. at 301 n.21.

two-part analysis. First, the proposed modification to the practice or policy (i.e. the accommodation) must be reasonable, and not impose an undue burden. Second, the proposed modification cannot work a fundamental alteration of the nature of the goods or program. Martin's proposed accommodation of a golf cart is reasonable and does not impose an undue burden. It does, however, work a fundamental alteration of the nature of professional competition. Golf, from its inception, has always required that its competitors walk the course.[195] PGA Tour rules require that competitors walk the course regardless of weather, injury or the number of holes traversed in a day of competition.[196] Furthermore, walking injects an element of fatigue into the competition.[197] If the fatigue element was absent, then every professional event would be a "silly season" "skills challenge."[198] Just as stores are not required to alter their inventory for disabled individuals,[199] book stores are not required to stock brailled books[200] and museums are not required to allow the touching of

---

195. See Martin v. PGA Tour, Inc. (Martin II), 994 F. Supp. 1242, 1250-52 (D. Or. 1998) (discussing the Rules of Golf and testimony for and against the PGA Tour's walking mandate). The idea that walking is an integral part of the game was a central aspect of the PGA Tour's argument against allowing Martin a cart. *See id.* Several storied players have spoken out on behalf of the PGA Tour in this regard, including Ken Venturi, Arnold Palmer, Paul Azinger and Tom Watson. *See* Craig Weber, *Pros Shouldn't Hold Golfer's Handicap Against Him*, THE STAR-LEDGER, June 25, 1998, *available in* 1998 WL 3426007. On Martin's behalf, arguing the opposite, sits one lonely Nike Tour player, Eric Johnson. *See Martin II*, 994 F. Supp. at 1251 nn.12-13. The United States Golf Association, which allowed Martin a cart for its U.S. Open, filed an amicus brief supporting the PGA Tour's position, much to Martin's dismay. *See* Harry Blauvelt, *Martin Disappointed by USGA Action*, USA TODAY, Aug. 26, 1998, at 12C.

196. *See Martin II*, 994 F. Supp. at 1249.

197. *See* Olinger v. United States Golf Ass'n, No. 3:98-CV-252RM, 1999 WL 454719 *1, *8-*9 (N.D. Ind. 1999) (finding fatigue a fundamental aspect of professional competition).

198. After the end of the regular PGA Tour season, several "made for television" events are scheduled by independent entities that feature high payouts and unusual formats. This two-month period is derisively referred to as the "silly season." *See, e.g.*, Dave Shelburne, *Prime-Time Golf Gets its Fair Share*, L.A. DAILY NEWS (August 4, 1999) (describing a television-created showdown between Tiger Woods and David Duval, the top two golfers in the world rankings, as a "get-rich opportunity similar to many events played during golf's post-[T]our 'silly season' from November to January"); Ron Sirak, *Silly Season I*, GOLFWEB, November 11, 1997 (visited October 12, 1999) <http://services.golfweb.com/library/sirak/golfnotes971111.html> (quoting golf professional Peter Jacobsen as saying that "Silly Season is a silly term created by a jealous media"). One of these "silly" events is a "skills challenge," where high-profile players pit their driving, iron, and putting skills against each other. This event does not involve walking as a condition of competition.

199. *See* 28 C.F.R. § 36.307(a) (1998).

200. *See* 28 C.F.R. Part 36 App. B. § 36.302 (1998).

artifacts,[201] professional golf is not required to accommodate an individual who cannot meet the essential physical requirements of professional competition.[202]

D. Places of Public Accommodation

A final issue in the ADA's application to professional sports is the definition of "places of public accommodation." The ADA defines the term to include places of exhibition or entertainment, places of public gathering, sales or rental establishments, places of public display or collection and places of exercise or recreation.[203]

---

201. *See id.*

202. Besides, how can one justify allowing an individual competitor the accommodation of a motorized cart when professional golfers are not even allowed the assistance of a towel on the ground to kneel on, for fear that they may be "building a stance?" *See* UNITED STATES GOLF ASSOCIATION, *supra* note *, at *Rule 13-3*, 162 ("A player is entitled to place his feet firmly in taking a stance, but he shall not build a stance."); *id.* at *Decision 13-3/2*, 180 ("Q[uestion]. A player's ball was under a tree in such a position that he found it expedient to play his next stroke while on his knees. Because the ground was wet, the player placed a towel on the ground at the spot where his knees would be situated so that the knees of his trousers would not get wet. He then knelt on the towel and played his stroke. Was the player subject to penalty under Rule 13-3 for building a stance? A[nswer]. Yes."). This actually happened to a PGA Tour competitor:

> Stadler won the 1982 Masters, but is perhaps best remembered for being disqualified in the 1987 San Diego Open because he kneeled on a towel to hit a ball from under a small pine tree on the 14th hole at Torrey Pines Golf Course. Stadler has the reputation of not being fussy about his appearance — "It's hard to dress this body" — but used the towel because the tournament was on TV and he was wearing light blue slacks and "didn't want to finish the round looking like a gardener." A television viewer in Iowa telephoned the tournament and said Stadler had violated the rule against "building a stance." Rules officials agreed and approached him after he had signed his scorecard. Because he had signed an incorrect card, he was disqualified. In 1995, Torrey Pines cut down the tree and gave Stadler the final whacks. "People still come up to me like it happened yesterday," he said.

Craig Smith, *Stadler Still Stands Out*, SEATTLE TIMES, July 25, 1999.

203. *See* 42 U.S.C. § 12182(a) (1994) (providing that "[n]o 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"). "Public accommodation" is defined as an entity whose operations affect commerce, and includes:

> (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

The Supreme Court's decision in *Heart of Atlanta Motel v. Irvis*[204] refers to the myriad reasons supporting a broad reading of "place of public accommodation" as described in the Civil Rights Act. Although the Court's opinion primarily explored the relationship between interstate commerce and the facility in question, it also affirmed the validity of a broad construction of the statute to combat discrimination.[205] When the Court subsequently revisited the "place of public accommodation" definition a few years later, it found that a place of recreation which served food to visitors fell within the Civil Rights Act.[206]

A recent decision in the Ninth Circuit is in accord with the Supreme Court's definition of the Civil Rights Act's "place of public accommodation." The Ninth Circuit in *Clegg v. Cult Awareness Network*[207] dealt directly with a membership organization and

---

service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, 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; and (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7) (1994). Compare the list of covered entities under the Civil Rights Act of 1964, *see supra* note 166 and accompanying text, specifically referred to by the ADA for methods of determining exempt status under Title III.

204. 379 U.S. 241 (1964).

205. *See id.*

206. *See* Daniel v. Paul, 395 U.S. 298 (1969). The entity in question, a privately owned recreational facility, attempted to hold itself out as a private club, even to the point of selling memberships to White visitors for twenty-five cents. The Court stated that there could be "no serious doubt that a substantial portion of the food served has moved in interstate commerce." *Id.* at 305. In addition, the snack bar's "status as a covered establishment automatically brings the entire . . . facility within the ambit of Title II" proscriptions. *Id.* As an alternative ground, the Court broadly read the statute to find the facility to be a place of public accommodation as a place of recreation. *See id.* at 307-08. The Court based this reading on the Civil Rights Act's broadly stated purpose of removing "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." *Id.* (citation omitted).

A recent Supreme Court decision passed up an excellent opportunity to speak on the subject of places of public accommodation, forsaking analysis and instead relying on the plain language of the statute to find that a dentist's office falls under the Title III of the ADA. *See* Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196 (1998). Although the Court's finding is unassailable, and obviously justified by explicit language in the ADA, the Court failed to provide any meaningful precedent for determining place of public accommodation status. *See id.*

207. 18 F.3d 752 (9th Cir. 1994). The court stated that reliance on plain meaning in the definition of place of public accommodation "is in full accord" with *Daniel*, 395 U.S. at 307-08, which holds the Civil Rights Act applicable in relation

pointed out that the Civil Rights Act operates against "places, lodgings, facilities and establishments open to the public."[208] This means that "place of public accommodation" language can apply to organizations only when they are "affiliated with a place open to the public and membership in the organization is a necessary predicate to use of the facility."[209] Therefore, both a textual analysis and Supreme Court precedent reveal that the PGA Tour's area of competition is not a place of public accommodation under both the plain language of the ADA and under the Department of Justice implementing regulations.

This is true even under the Supreme Court's broad construction of "place of public accommodation," because in those cases where the Court has held an entity is covered under the statutory language, the area found to be a place of public accommodation invariably served the public.[210] This "serve the public" limitation has led to a distinction in the Ninth Circuit between places of public accommodation and membership organizations under Title II of the Civil Rights Act.[211] Although the ADA extends its reach beyond that of the Civil Rights Act by adding the words "by any person who owns, leases (or leases to), or operates a place of public accommodation,"[212] the plain language of the ADA cannot reach the PGA Tour's area of competition, since it does not serve customers or clients within this restricted-access area.

Department of Justice regulations support this interpretation by specifically allowing for "mixed use" facilities.[213] "Mixed use"

---

to "facilities ostensibly open to the general public." Clegg. 18 F.3d at 755. See *also supra* note 206 and accompanying text.

208. *Clegg*, 18 F.3d at 756.

209. *Id.* The court referenced the plain language of the statute, and decided that "it is clear Congress' intent in enacting Title II was to provide a remedy only for discrimination occurring in facilities or establishments serving the public: to conclude otherwise would obfuscate the term "place" and render nugatory the examples Congress provides to illuminate the meaning of that term." *Id.* at 755. The court cited for support *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1269 (9th Cir. 1993) (demanding an "ordinary meaning" reading of the statute) and *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36 (1991) (stating that the "strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed") (internal quotations omitted).

210. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); *Daniel*, 395 U.S. at 298.

211. *See supra* Part IV.D (discussing the Ninth Circuit's construction of "place of public accommodation").

212. 42 U.S.C. § 12182(a) (1994).

213. 28 C.F.R. Pt. 36, App. B, § 36.104 (1998). The Ninth Circuit must defer to the regulations implementing the ADA. *See* Bragdon v. Abbott, 524 U.S. 624, —,

denotes facilities wherein a portion is a "public accommodation."[214] The regulations use as an example a private movie studio that makes tours available to the public.[215] Such an entity would be subject to the ADA only as to the area actually open to the public.[216] Inversely, a public accommodation may have within itself a section that remains an exempt area.[217] This construction of the ADA's language does not conflict with prior Supreme Court holdings because the Supreme Court has only applied the place of public accommodation language to areas actually serving the public. Supreme Court precedent and DOJ regulations, when taken together, lead to a determination that the PGA Tour operates a place of public accommodation with respect to those areas of the golf course to which the public is an invitee, but that the area of competition, where the public is neither invited nor allowed, remains a private enclave to which the ADA does not apply.

V. Removing Our Supreme Court-Supplied Textualist-Colored Lenses Brings to Light a More Appropriate Remedial Interpretation of the ADA

Part IV of this Article argued that under a narrow-visioned interpretation of Supreme Court precedent, the ADA's "place of public accommodation" language does not apply to professional sports. Concededly, when viewed in that harsh lighting, Martin's

---

118 S. Ct. 2196, 2207 (1998) (stating that although "[r]esponsibility for administering the Rehabilitation Act was not delegated to any single entity, . . . we need not pause to inquire whether this causes us to withhold deference to agency interpretations under Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). It is enough to observe that the well-reasoned views of the agencies implementing the statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'") (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944)).

214. *See* 28 C.F.R. Pt. 36, App. B, § 36.104.

215. *See id.* The regulations specifically explain the movie studio example thus:

> If a tour of a commercial facility that is not otherwise a place of public accommodation, such as . . . a movie studio production set, is open to the general public, the route followed by the tour must be operated in accordance with the rule's requirements for public accommodations. The place of public accommodation defined by the tour does not include those portions of the commercial facility that are merely viewed from the tour route.

Id. The Interpretive Guidance further explains that "in a large hotel that has a residential apartment wing, the residential wing would not be covered by the ADA." *Id.*

216. *See id.*

217. *See* Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 758-60 (D. Or. 1997).

case does seem to weaken significantly. The more appropriate analysis, however, favors effectuating congressional intent, which means construing the ADA broadly to implement its remedial purpose.

This Part responds to the major issues of *Martin v. PGA Tour, Inc.* that were addressed in Part IV, and applies a broad-based remedial purpose analysis to their resolution. This remedial purpose interpretation refutes Part IV's limited analytical perspective with regard to the construction of the private club exemption, the fundamental alteration defense, and the place of public accommodation definition. It does not succumb to the district court's sometimes haphazard method of review, but rather provides a reasoned interpretation that carries an implied argument in favor of shedding the textualist-colored lenses which the Supreme Court has worn in recent opinions.

A. Major Life Activities

Martin undisputedly qualifies as disabled under the ADA. Applying the Supreme Court's own statute-derived three-part test, Martin has an impairment that substantially limits a major life activity.[218] The Ninth Circuit agrees with the application of the Supreme Court test, as noted in its recent decision in *Mustafa v. Clark County School District.*[219] Although *Mustafa* dealt with the employment context, the court recognized that the disability test used in *Bragdon* applies to all five discrimination-prohibiting chapters of the ADA.[220] The circuit court therefore applied a three-pronged test that evaluated first whether the plaintiff was disabled, second whether a "major life activity" was affected, and third whether the limitation on the major life activity was substantial.[221] As noted in Part IV, Martin has a physical

218. *See Bragdon*, 118 S. Ct. at 2202. *See also* Sutton v. United Airlines, 119 S.Ct. 2139 (1999) (explaining in great detail the definition of disabled, but refusing in dicta to hold on the level of deference courts should show agency regulations implementing the ADA's definition, and questioning in an aside whether "working" can be reconciled conceptually with the balance of the enumerated life activities); *supra* note 188 (explaining 1999 Supreme Court decisions regarding the use of mitigating measures when determining disabled status).

219. 157 F.3d 1169, 1172 (9th Cir. 1998).

220. *See id.*

221. *See id.* Other Ninth Circuit decisions support the application of this test, although all deal with the employment context, and not with places of public accommodation. *See, e.g.*, Thompson v. Holy Family Hosp., 121 F.3d 537 (9th Cir. 1997) (holding a lifting restriction of 25 pounds was not severely debilitating enough to constitute a substantial limitation on a major life activity, since many health-related jobs remained available to plaintiff); Kirkingburg v. Albertson's,

impairment that substantially limits his major life activity of walking as compared to an average member of the general population.[222] He therefore meets the threshold requirement of disability as described by the ADA, and is entitled to its protections.

B. Private Club Exemption

Integral to the determination of the PGA Tour's status as a private club are equally important facts that lead to diametrically opposed outcomes. On the one hand, the PGA Tour is a non-profit organization that generates many millions of dollars for charity. On the other hand, the PGA Tour is premised on generating substantial monies from sponsors for the benefit of its player-members. The purpose of the private club exemption, however, is to protect the freedom of private association amongst individuals. In accord with this concept is the ADA's focus on entities that affect interstate commerce and its refusal to impose its mandates on private individuals.[223] The PGA Tour cannot be described as a protected private association of individuals, and its operations ineluctably affect interstate commerce. Therefore, the PGA Tour cannot claim exemption as a private club.

The private club factors enumerated by the Supreme Court, when used to implement the purpose of the ADA as intended by Congress, support this determination. First, part of the revenue generated by the PGA Tour comes from public sources. Admission fees are charged for the privilege of viewing events from the grounds of the course itself, and the rights to televise individual events are sold to television studios for a hefty price.[224] Further income is generated from the sale of PGA Tour-licensed

---

Inc., 143 F.3d 1228 (9th Cir. 1997), *rev'd on other grounds*, 119 S. Ct. 2162 (1999) (finding an individual with limited vision in one eye substantially disabled in the major life activity of seeing under the ADA); Stratton v. Hawaii Elec. Light Co., 108 F.3d 339 (9th Cir. 1996) (finding relief under the ADA unavailable to disabled plaintiff because limitation was not substantial and many other fields of employment remained available to her).

222. *See supra* note 10 (elaborating on Martin's physical impairment).

223. *See* 42 U.S.C. § 12101(b)(4) (1994) (invoking the sweep of congressional authority, including the power to regulate commerce, in order to combat discrimination against the disabled).

224. *See, e.g.*, Earl Daniels, *Popular Moves for PGA Tour: Goal is to Keep Game Growing*, FLA-TIMES UNION, March 28, 1999, at C20 (commenting that the PGA Tour Championship received 12 hours of live coverage for the first two rounds of competition, an unprecedented amount, and noting that "[m]aximizing the PGA Tour's visibility via TV . . . is [one] mission of the PGA Tour").

merchandise.[225] Second, the PGA Tour does not stage its competitions on its own private facilities, exclusive of the public, but rather cooperates with existing golf courses, both public and private, in the presentation of events. Finally, participation in professional competitions is not restricted exclusively to members of the PGA Tour. To the contrary, all events allow the public onto the general grounds as spectators. All events allow the public to volunteer as marshals, and these marshals are allowed within the lines of competition. All events also allow non-members such as security personnel, photographers, and caddies within the lines of competition. Furthermore, all PGA Tour events allow non-member competitors, including foreign players, amateur players, and sponsor-invited players to compete side-by-side with PGA Tour members.[226]

The Ninth Circuit's articulation of the private club exemption further counsels against private club status for the PGA Tour. First, the PGA Tour advertises each individual competition both nationally and locally. It also invests substantial money into general advertising, most recently with its "these guys are good" media campaign.[227] Second, membership in the PGA Tour is not based on personal characteristics, but rather on various methods of skills evaluation, including finishing in the top fifteen on the money list of the Nike Tour and finishing in the top 35 of the PGA Tour Qualifying School.[228] Finally, the PGA Tour is not a club in the ordinary sense of the word. Black's Law Dictionary defines

---

225. *See* Daniels, *supra* note 224 (explaining that the PGA Tour plans to raise as much money as they can "through streams of revenue generated from media rights, golf tournaments, sponsorship deals and fees from the network of Tournament of Players Club courses and retail licensing agreements").

226. *See* Martin v. PGA Tour, Inc. (Martin I), 984 F. Supp. 1320, 1327 (D. Or. 1998).

227. The PGA Tour has invested substantial monies into this media campaign, recruiting big-name stars from other sports, and investing in high-tech special effects, in an effort to promote its competitions. Some recent television advertisements have shown Phil Mickelson chipping an alley-oop pass to Patrick Ewing in the final seconds of a basketball game and John Daly launching a pinch-hit home run in the final inning of a baseball game. Each advertisement ends with a nationally recognized star from the sport in question who exclaims "these guys are good!"

228. PGA Tour member-players can gain their "right" to play on the PGA Tour through several methods, but chiefly through a three-stage qualifying tournament. This tournament is both exacting and exhausting. Commonly referred to as "Q-school," it consists of a 72-hole first stage, a 72-hole second stage, and a 108-hole third stage. After surviving all fourteen of these 18-hole rounds, the lowest 35 finishers plus ties are given playing cards for the regular PGA Tour. The next 70 lowest scores receive playing cards for the PGA Tour-sponsored Nike Tour. *See Martin I*, 984 F. Supp. at 1321-22.

"club" to mean "a voluntary . . . association of persons for common purposes of a social, literary, investment, political nature, or the like[,] . . . especially one jointly supported and meeting periodically, and membership is usually conferred by ballot and carries [the] privilege of exclusive use of club quarters."[229] Membership in the PGA Tour is not conferred by member vote, does not presuppose meeting to advance a common purpose, and does not result in access to some hallowed hall of antiquity.[230] In addition, the purpose of becoming a member is to play golf, while the avowed purpose of the PGA Tour is the promotion of entertainment and revenue-generation.[231]

Other factors that detract from private club status for the PGA Tour include those articulated by the district court.[232] While it is true that the district court's evaluation of the *Lansdowne* factors is at times questionable,[233] it is, for the most part, a viable interpretation of the facts.[234] For example, the PGA Tour, although highly competitive, cannot be said to be socially selective. As the district court pointed out, the PGA Tour's eligibility requirements measure skills, not values protected under freedom of association.[235] If the PGA Tour's eligibility requirements made it an exempt private club, then any other entity with quantitative entrance requirements, like a university, would be so exempt. Such an outcome is contradicted by the explicit language of the ADA, which includes under its auspices any "undergraduate, or postgraduate private school, or other place of education."[236]

Another determinative factor examined by the district court that militates against private club status is the PGA Tour's mercantile purpose.[237] Analysis of the Title III exception is of little help, since it does not look to membership organizations or their purpose in applying the Civil Rights Act exemption, but rather to the goods, services, facilities, privileges, advantages or

229. BLACK'S LAW DICTIONARY 259 (6th ed. 1996).

230. *See supra* note 228 and accompanying text.

231. *See supra* notes 224-225 and accompanying text.

232. *See Martin I*, 984 F. Supp. at 1324-26.

233. *See supra* notes 177-180 and accompanying text (taking issue with the District Court's application of the "use of facilities by nonmembers" *Landsdowne* factor).

234. *See Martin I*, 984 F. Supp. at 1324-26.

235. *See id.* at 1324.

236. 42 U.S.C. § 12181(7)(J) (1994).

237. *See Martin I*, 984 F. Supp. at 1325. A less weighty, but nonetheless contributing factor against private club status examined by the district court was the fact that the PGA Tour has extremely limited membership representation in positions of executive authority. *See id.*

accommodations of the place of public accommodation.[238] For this reason, the private club exception to Title I is informative, in that it applies the exemption to a membership organization only when "no part of the net earnings . . . inures to the benefit of any private shareholder."[239] Although not shareholders, the player-members of the PGA Tour are independent contractors who financially benefit from the PGA Tour's efforts to promote, advertise and create revenue for its product.[240] As the District Court pointed out, "the nonprofit status of a corporation that exists to further the commercial interests of its members does not weigh in favor of exempt status."[241] This for-profit status in relationship to its members counsels that the PGA Tour does not meet the definition of an exempt entity.

Finally, the arenas within which the PGA Tour conducts its competitions are areas of public accommodation. The PGA Tour does not own the golf courses on which its members compete, but rather works in conjunction with existing course ownership to stage events. These courses are not only then opened to the public, but the public is also explicitly invited onto the grounds through national and local advertising. Whether the PGA Tour is a private club might therefore be moot, because even if it is a private club, operating a place of public accommodation makes it subject to the proscription against discrimination in Section 12182 of the ADA.[242]

C. Fundamental Alterations

The fundamental alteration defense is one way covered entities may escape otherwise prohibitive burdens associated with accommodating a disabled individual. Because fundamental alteration is nowhere defined under the ADA, construction of the term must rely on purpose, intent and case law. The Supreme Court has explained in the context of the Rehabilitation Act (from which the ADA borrows its terminology) that these remedial statutes seek to ensure "evenhanded treatment and the

238. *See* 42 U.S.C. § 12187 (1994); 42 U.S.C. § 2000-a(e) (1994); 42 U.S.C. § 2000-a(b) (1994).

239. 26 U.S.C. § 501(c) (1999).

240. *See Martin I*, 984 F. Supp. at 1325.

241. *Id.*

242. *See* 42 U.S.C. § 12182(a) (1994) ("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 *operates* a place of public accommodation.") (emphasis added).

opportunity for [disabled] individuals to participate in and benefit from" services, programs or activities offered by covered entities.[243] However, this does not require alteration of the benefit "simply to meet the reality that the [disabled] have greater medical needs."[244]

These statements support the idea that "courts must examine the proposed alternative [accommodation] in light of the purposes underlying the rule."[245] If the purpose of the walking requirement in the PGA Tour's rules is to inject fatigue into the competitive equation,[246] then the PGA Tour (or at this stage, the court) must conduct an individualized inquiry into the element of fatigue from Martin's perspective.[247] The district court did exactly that in finding that Martin experiences, even with the help of a cart, more fatigue than able-bodied professional golfers during a round of golf.[248] This factual finding, to which the Ninth Circuit must defer unless clearly erroneous,[249] calls for a determination that allowing Martin a golf cart is reasonable because it affords him no advantage and therefore does not frustrate the underlying purpose of the walking rule.

The Ninth Circuit has also recognized that the ADA does not define fundamental alterations and reasonable modifications, and that "[a]s a result, a body of case law, rapidly growing, has sprung up to provide further guidelines for the courts in this difficult area."[250] Although the Ninth Circuit has reviewed very few suits involving Title III,[251] the circuit's lower courts have recently begun

---

243. Alexander v. Choate, 469 U.S. 287, 288 (1985).

244. *Id.* at 303.

245. Milani, *supra* note 120, at 882.

246. *See* Martin v. PGA Tour, Inc. (Martin II), 994 F. Supp. 1242, 1250 (D. Or. 1998).

247. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2147 (1999) (holding "whether a person has a disability under the ADA is an individualized inquiry").

248. *See id.* at 1251-52.

249. *See* Pierce v. Underwood, 487 U.S. 552, 558 (1988).

250. Barnett v. U.S. Air, Inc., 157 F.3d 744, 748 (9th Cir. 1998).

251. According to the author's search of materials available in Westlaw, the Ninth Circuit over a two year period spanning 1997-98 reviewed 84 cases originally brought under the ADA, with 63 of them relating to employment discrimination under Title I. While 16 cases were reviewed with Title II public service claims, only five cases dealt with Title III place of public accommodation claims. All five of those cases were unpublished dispositions. Of those five, *Dowling v. MacMarin, Inc.*, 156 F.3d 1236, 1998 WL 398386 (9th Cir. 1998) was considered moot; *Sexton v. Otis College of Art & Design Board of Directors*, 129 F.3d 127, 1997 WL 697294 (9th Cir. 1997) was time-barred; *Haight v. Hawaii Pacific University*, 116 F.3d 484, 1997 WL 330835 (9th Cir. 1997) failed for failure to state an injury; *Scott v. Western State University College of Law*, 112 F.3d 517, 1997 WL 207599 (9th Cir. 1997) failed to state a claim for which relief was available; and *Norris v. Seattle University School of Law*, 112 F.3d 517, 1997 WL 205977 (9th Cir. 1997) failed to

to deal with this section of the ADA.[252] The sum result of this expanding pool of cases is that "whether a particular accommodation is reasonable depends on the circumstances of the individual case."[253]

Because this case law fails to answer the question with any clear legal guidelines, there can be no *per se* exclusion of a requested accommodation.[254] The PGA Tour, contrary to its argument, must therefore conduct an individualized inquiry into the reasonableness of Martin's suggested accommodation. Because the PGA Tour refused to make such an inquiry, it violated the proscription against discrimination by failing to make a reasonable modification to its policies and procedures. As a result, the PGA Tour's fundamental alteration defense cannot be advanced without first looking into the circumstances surrounding the requested modification, and it therefore must fail for lack of foundation.

A related issue is whether conducting an individualized examination of the proposed accommodation imposes an undue administrative burden on the reviewing entity.[255] An undue

---

properly allege facts supporting the claim of disability. None dealt with the definition of place of public accommodation or reasonable accommodation, other than to say that a university is a place of public accommodation as described in 42 U.S.C. § 12181(7)(j) (1994), and that any modification of a school's educational requirements to accommodate a disability would be a fundamental alteration of the school's services. *See Norris*, 1997 WL 205977 at *1; *Scott*, 1997 WL 207599 at *1 (citing 42 U.S.C. § 12182(b)(2)(A)(ii) (1994); Southeastern Community College v. Davis, 442 U.S. 397, 398-99 (1979)).

252. Most reported cases broaching the subject of Title III ADA claims in the Ninth Circuit's jurisdiction have proceeded no further than the district court level. *See, e.g.*, Botosan v. Fitzhugh, 13 F. Supp. 2d 1047 (S.D. Cal. 1998); Dunlap v. Association of Bay Area Gov'ts, 996 F. Supp. 962 (N.D. Cal. 1998); Chabner v. United of Omaha Life Ins. Co., 994 F. Supp. 1185 (N.D. Cal. 1998); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698 (D. Or. 1997); Cloutier v. Prudential Ins. Co. of Am., 964 F. Supp. 299 (N.D. Cal. 1997); Coalition of Montanans Concerned with Disabilities v. Gallatin Airport Auth., 957 F. Supp. 1166 (D. Mont. 1997); Boemio v. Love's Restaurant, 954 F. Supp. 204 (S.D. Cal. 1997); Delil v. El Torito Restaurants, Inc., No. C94-3900-CAL, 1996 WL 807395 (N.D. Cal. Dec. 2, 1996); Shultz v. Hemet Youth Pony League, Inc., 943 F. Supp. 1222 (C.D. Cal. 1996); Schaaf v. Association of Educ. Therapists, No. C 94-03315 CW, 1995 WL 381979 (N.D. Cal. June 13, 1995); Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439 (N.D. Cal. 1994); Pinnock v. International House of Pancakes Franchisee, 844 F. Supp. 574 (S.D. Cal. 1993).

253. *Barnett*, 157 F.3d at 748. *See also* Crowder v. Kitagawa, 81 F.3d 1480, 1486 (9th Cir. 1996) (stating that "the determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry").

254. *But cf. Barnett*, 157 F.3d at 748 (refusing, in a Title I case, to impose a *per se* rule with regard to reasonable accommodations and collective bargaining agreements, but also declining to require a "case-by-case" standard).

255. *See supra* note 192 and accompanying text; Milani, *supra* note 120, at 883-

burden is something requiring significant difficulty or expense when considered in light of the size of the entity, the extent of its resources, and the cost of the accommodation.[256] The PGA Tour, however, is an organization of considerable financial resources. The cost of a golf cart is a minimal imposition on those resources. In addition, the procedural burden of reviewing claims from disabled individuals would be less than significant, considering the small number of individuals who have developed abilities commensurate with successful competition in professional golf.[257] Therefore, the individualized assessment of a reasonable accommodation will create neither undue financial hardships nor undue administrative burdens for the PGA Tour, and Martin should be allowed the requested modification.

Assuming arguendo that the PGA Tour did conduct an individualized inquiry, and self-determined that modifying its rules to allow Martin the use of a cart would work a fundamental alteration of the essential nature of professional competition, its decision would nevertheless be subject to judicial review. Such review, when articulated in a manner that implements congressional intent and the remedial purpose of the ADA, further counsels that Martin's requested accommodation would not be "a modification that is so significant that it alters the fundamental nature of the goods, services, facilities, privileges, advantages, or accommodations offered."[258] To use the Supreme Court's own method of language interpretation, "fundamental" means "serving as, or being an essential part of, a foundation or basis."[259] "Essential" means either "absolutely necessary; indispensable," or "a basic or necessary element."[260] Walking a golf course is not a basic element necessary to the essential nature of professional golf. To the contrary, the PGA Tour itself allows the use of motorized carts on its own Senior Tour, and effectively requires

89.

256. *See* 42 U.S.C. § 12111(10) (1994).

257. *See* Milani, *supra* note 120, at 890 (stating, in the context of age-waiver petitions for high-school athletes, that even if the individualized review "were in some way burdensome, the procedure will apply only in narrow circumstances: when an athlete produces evidence that a physical or mental impairment caused the delay in his education. Accordingly, such a waiver procedure cannot be an undue burden because it will rarely occur.").

258. DOJ Technical Assistance Manual for Title III, § III-4.3600 *available in* RUTH COLKER, THE LAW OF DISABILITY DISCRIMINATION HANDBOOK 375, 380, (2nd ed. 1999) (defining fundamental alteration).

259. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 776 (1996).

260. *Id.* at 663.

their use on its PGA Tour-owned golf courses.[261] In addition, golf by its very nature is scored by how many strokes are taken from the tee to the green, not by how long it takes to move from one shot to the next. Players are not penalized for taking an inordinate amount of time walking to their ball, or for getting there too quickly, but only for taking too much time once they have reached the ball's general location.[262] Walking, therefore, is not an essential, basic element necessary to professional golf, and Martin's proposed accommodation is not a fundamental alteration.

This conclusion is further bolstered by a variation of the district court's disabled golfer hypothetical.[263] First, would the PGA Tour exclude an otherwise capable professional golfer if the individual required the assistance of crutches to move about the golf course? Such an individual would still walk the course on her or his own two legs. Taking the hypothetical one step further, if this disabled individual later required the assistance of a wheelchair, but remained competitive at a professional level, would the PGA Tour refuse to allow her or him the opportunity to compete simply because the individual's method of ambulation no longer involved legs? Crutches and wheelchairs are methods of assistance in the major life activity of walking, just as a motorized golf cart is a method of assisting a disabled individual in the major life activity of walking. Allowing one method of assistance (crutches) necessarily demands the allowance of the others (wheelchairs and carts). Martin's requested accommodation is reasonable, does not impose an undue burden and does not fundamentally alter the essential nature of professional golf.

D. Places of Public Accommodation

The final issue related to the ADA and professional sports is in the definition of "places of public accommodation." Cases

---

261. *See Seen & Heard*, *supra* note 28, at 42 (noting that PGA Tour-owned Tournament Players Championship golf courses require that players may not carry their own bags, effectively resulting in a requirement that players rent a motorized cart of some form).

262. *See* UNITED STATES GOLF ASSOCIATION, *supra* note *, at *Rule 27*, 429 ("A ball is 'lost' if . . . [i]t is not found or identified as his by the player within five minutes after the player's side or his or their caddies have begun to search for it."). *But see id.* at *Rule 6-7*, 83 ("The player shall play without undue delay."). Players can be penalized for looking for a ball for more than five minutes, or for spending too much time to actually make the stroke. In both circumstances, the clock doesn't start ticking until the endeavor is started. Walking has no relationship to either activity.

263. *See supra* notes 90-91 and accompanying text (discussing the hypothetical advanced by the District Court in *Martin*).

construing the ADA and its place of public accommodation language are, however, rare occurrences in the appellate courts, and arguably serve to create a mere "result stare decisis," rather than the more binding "rule stare decisis."[264] This derives from a lack of rule-development in analyzing "place of public accommodation" and an emphasis on "I know it when I see it" analysis.[265] Such reasoning is readily apparent in recent determinations of "place of public accommodation" that are made by mere reference to the ADA's statutory language without engaging in further analysis.[266] The end product of these cases is a paucity of precedent in the field, which forces litigants to rely on reasoning through analogy to other statutes like the Rehabilitation Act and the Civil Rights Act.[267]

In the context of the Civil Rights Act, the Supreme Court recognized that a broad construction of remedial purpose statutes

---

264. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 691-92 (3d Cir. 1991) (citations omitted). The *Casey* court explained the distinction in detail:

> [Supreme Court opinions] usually include two major aspects. First, the Court provides the legal standard or test that is applicable to laws implicating a particular . . . provision. This is part of the reasoning of the decision, the ratio decidendi. Second, the Court applies that standard or test to the particular facts of the case that the Court is confronting—in other words, it reaches a specific result using the standard or test. As a lower court, we are bound by both the Supreme Court's choice of legal standard or test and by the result it reaches under the standard or test.... Our system of precedent or stare decisis is thus based on adherence to both the reasoning and result of a case, and not simply to the result alone. This distinguishes the American system of precedent, sometimes called "rule stare decisis," from the English system, which historically has been limited to following the results or disposition based on the facts of the case and thus referred to as "result stare decisis."

Id.

265. Witness the indubitable obscenity cases, originally relegated to judicial evaluation based on the quote referenced in the text. *See* Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced [as obscene]; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture in this case is not that.") (emphasis added).

266. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, —, 118 S. Ct. 2196, 2201 (1998) (stating only that "[t]he term public accommodation is defined to include the professional office of a health care provider") (internal quotations omitted); Scott v. Western State Univ. College of Law, 112 F.3d 517, 1997 WL 207599, at *1 (stating, without analysis, that "it is undisputed that [Washington State University] is a 'public accommodation' within the meaning of Title III of the ADA"); Norris v. Seattle Univ. Sch. of Law, 112 F.3d 517, 1997 WL 205977, at *1 (stating that Seattle University is "a public accommodation within the meaning of Title III of the ADA," but failing to further analyze the issue).

267. *See, e.g.*, Crowder v. Kitagawa, 81 F.3d 1480, 1485-86 (9th Cir. 1996) (looking to the Rehabilitation Act for guidance in construing the ADA with regard to state animal-quarantine laws).

(like the Civil Rights Act, the Rehabilitation Act and the ADA) is necessary to effectively combat discrimination. The plain language of the ADA, similar to the Civil Rights Act, reaches places of exhibition or entertainment, places of public gathering, sales or rental establishments, places of public display or collection and places of exercise or recreation.[268] The language of the ADA also consciously extends beyond the scope of the Civil Rights Act to include entities that lease or operate a place of public accommodation.[269] The language of the ADA is more expansive than that of the Civil Rights Act, and it therefore demands an even broader construction than that recognized by the Supreme Court in the context of the earlier Act.

The PGA Tour conducts professional golf competitions on the premises of ADA-covered golf courses. These golf courses, in conjunction with the PGA Tour, invite the public's attendance in exchange for an admission fee. The explicit language of the ADA covers this public presentation of a professional competition, since its description naturally falls under a "place of exhibition or entertainment." The PGA Tour may also be said to operate a "place of public gathering," and it arguably operates a place of "recreation." All three of these impose place of public accommodation status on the PGA Tour, and it therefore is subject to the ADA's prohibition against discrimination. This is an excellent example of a situation where plain language analysis dovetails with both congressional intent and statutory purpose. In such an instance, deference to the plain language without detailed analysis is appropriate.

---

268. *See* 42 U.S.C. § 12181(7) (1994). *Cf.* 42 U.S.C. § 2000-a(b) (1994) (defining "place of public accommodation" as any "establishment which provides lodging to transient guests," any "facility principally engaged in selling food for consumption on the premises," or any "place of exhibition or entertainment" whose "operations affect commerce" or are "supported by State action"). Examples in the Civil Rights Act include inns, hotels and motels, *see* 42 U.S.C. § 2000-a(b)(1) (1994), restaurants, cafeterias, lunchrooms, lunch counters and soda fountains, *see* 42 U.S.C. § 2000-a(b)(2) (1994), and motion picture houses, theaters, concert halls, sports arenas and stadiums, *see* 42 U.S.C. § 2000-a(b)(3) (1994). Also included is "any establishment which is physically located within the premises of any establishment otherwise covered." 42 U.S.C. § 2000-a(b)(4)(i) (1994). For the entire enumerated list see *supra* note 166.

269. *See* 42 U.S.C. § 12182(a) (1994) (stating that discrimination against disabled individuals is prohibited in "any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation"). *Cf.* 42 U.S.C. § 2000-a(a) (1994) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.").

The textualist reading of the Department of Justice (DOJ) regulations detailed in Part IV.D. suggested that the ADA envisions mixed-use facilities, like PGA Tour-operated golf courses, where sections of the facility would remain exempt from coverage. This argument is misleading. DOJ regulations suggest that exempt entities that open a small portion of their facilities to the public are subject to the ADA only in those areas. The regulations do not envision the inverse proposition that covered entities may establish a "safe harbor" of exempt area within a covered area, and a broad-based remedial purpose reading of the regulatory language cannot support such a proposition. This is because the inclusion of small areas of coverage within larger exempt areas furthers the purpose of the ADA by protecting the public from discrimination within areas to which they have access. The regulations do not speak to any exemptions, or "carve-outs," that would support the idea that an area from which the public is excluded within a covered facility is exempt from coverage. To read this into the regulations would confound the purpose of the ADA, which is to provide protection to disabled individuals, not to exclude private entities from coverage.

This conclusion is further bolstered by the ADA's Title III DOJ Technical Assistance Manual, which states that "[i]f patients receive medical services in the same building where the administrative offices are located, the entire building is a place of public accommodation, even if one or more floors are reserved for the exclusive use of employees."[270] The Civil Rights Act of 1964, from which the ADA borrows its terminology, and to which it refers for construction of remedies and exemptions, also supports this finding, as it explicitly covers "any establishment which is physically located within the premises of any establishment otherwise covered."[271] Golf courses are specifically covered as places of public accommodation in Section 12181 of the ADA.[272] The PGA Tour operates its professional competitions on Title III-covered golf courses, and invites the public onto the grounds. Even assuming that the area of competition is outside of the public purview, the entire area is subject to the ADA under the explicit

270. *See* ADA Title III DOJ Technical Assistance Manual III-1.2000, *available in* RUTH COLKER, THE LAW OF DISABILITY DISCRIMINATION HANDBOOK 375, 380, (2nd ed. 1999).

271. 42 U.S.C. § 2000-a(b)(4)(i) (1994).

272. *See* 42 U.S.C. § 12181(7)(L) (1994) (including "a gymnasium, heath spa, bowling alley, *golf course*, or other place of exercise or recreation" within the 12 broad categories of private entities encompassed in the definition of a place of public accommodation) (emphasis added).

language of both the DOJ (which promulgates regulations interpreting Title II and III of the ADA) and the Civil Rights Act (upon which the ADA bases its prohibitions).

Finally, the PGA Tour is not considered an "employer" under the ADA because its player-members are independent contractors.[273] It would negate the purpose and intent of the ADA to allow a private entity to evade coverage simply by making all its employees independent contractors. The ADA intends to cover any entity that employs individuals or owns, leases or operates a place of public accommodation. It goes so far as to encompass state governmental entities,[274] up to and including penal institutions.[275] Exemptions are few and far between, and are designed to be limited in scope. Despite any plain language textualist argument that would ignore congressional intent,[276] it is hard to fathom protecting federal government officials and appointees (Title V), the general public (Title III and Title II), prisoners (Title II) and employees (Title I) from discrimination, while refusing to protect individuals who make their living in a field that affects interstate commerce, simply because they are arbitrarily classified as independent contractors. Such a result is not only absurd, but is also unconscionable under the ADA's findings and purpose.

Conclusion

Congress, in the Absence of a Remedial Purpose Interpretation by the Courts, Must Legislate so that Disabled Athletes are Allowed to Participate in the ADA's Promise of Equal Opportunity

The privilege of "opportunity" alluded to by PGA Tour Member Fred Couples at the beginning of this Article is the right to compete as a professional golfer in PGA Tour-sponsored events.[277] This "right" is afforded to an elite few based on the ability to perform under pressure within a highly delineated yet arbitrarily marked area of competition.[278] The PGA Tour limits

273. Martin v. PGA Tour, Inc. (Martin I), 984 F. Supp. 1320, 1323 (D. Or. 1998).

274. *See generally* 42 U.S.C. §§ 12131-12150 (1994) (covering Public Services).

275. *See* Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998).

276. *See id.* at 206.

277. *See supra* note 1 and accompanying text.

278. Professional golf tournaments are conducted on both public golf courses and on private country club golf courses. These golf courses must meet the playing condition requirements of the PGA Tour (i.e. green speed, length of rough, hole distance, etc.). Prize money awarded to the players is generated from private

this "opportunity" to those individuals who can walk at least eighteen holes per day, six days per week, during each week of competition.[279] Recently, however, Casey Martin has challenged PGA Tour rules that require walking as an integral part of golf.

The district court ruled in favor of Martin, granting him an injunction that allows him the use of a motorized golf cart in PGA Tour competitions. The PGA Tour appealed the decision to the Ninth Circuit Court of Appeals. Under the current Supreme Court's direction, the Ninth Circuit will likely rule against Martin, favoring a narrow-visioned textualist analysis over a broad-based remedial purpose analysis. A foreshadowing of this outcome can be found in the Northern District of Indiana's *Olinger v. United States Golf Association.*[280] This Article, however, argues that remedial purpose should prevail.

A decision favoring Martin effectuates congressional intent and properly implements the remedial purpose of the ADA. Any decision favoring the PGA Tour will have succumbed to the textualist pressures of the current Supreme Court. The only proper resolution in the absence of a decision favoring Martin, and probably the only possible resolution under the Supreme Court's limitations, is for Congress to amend the language of the ADA to explicitly include professional sports. This is not an impossible task, but rather seems eminently reasonable in light of recent developments with regard to baseball's antitrust exemption.[281]

"sponsoring" entities, and not the PGA Tour. The golf course, as a place of competition, is itself open to public access, albeit under conditions of admission, and for a significant fee. The area of competition is marked off by ropes, and controlled by "marshals" (volunteers who contribute their time to the sponsoring entity, and in return get to stand with the players "inside the lines"). The public is denied access to this portion of the golf course. Typically, the ropes are attached to whatever obstacles exist along the rough parallel to the fairway of each hole (i.e. trees, shrubs, sprinkler control boxes, etc.), or to stakes placed in the ground. These ropes are usually placed ten to fifteen yards from the fairway, conforming roughly to the layout of the hole. *See generally* GEORGE PEPER, THE STORY OF GOLF (1999); CARL PAULSON & LOUIS H. JANDA, ROOKIE ON TOUR: THE EDUCATION OF A PGA GOLFER (1999); JOHN FEINSTEIN, A GOOD WALK SPOILED: DAYS AND NIGHTS ON THE PGA TOUR (1996).

279. Although a player-member need only compete in 15 events per year to maintain voting rights, the tournament season runs 10 months, from February to October, and membership renewal, absent certain exemptions, is based on winnings against the field. *See* Martin v. PGA Tour, Inc. (Martin I), 984 F. Supp. 1320, 1324-25 (D. Or. 1998). In other words, it behooves players to compete in more events rather than fewer, and stamina, both physical and mental, is often an issue for the players.

280. *See supra* notes 94-117 and accompanying text (discussing the *Olinger* decision).

281. *See* Associated Press, *Labor Antitrust Exemption Overturned* (visited October 28, 1998) <http://espn.sportszone.com/mlb/news/1998/981027/

Congress, after more than seventy-five years of inaction, overturned *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*[282] through explicit legislative action, making professional baseball vulnerable to antitrust sanctions.[283] This remedial event brought baseball back in line with all other professional sports, and properly implemented public policy disfavoring monopolies and restrictions on free trade.

And yet public policy that supports limiting restrictions of trade and disfavoring monopolies cannot be construed as more important than public policy that seeks the eradication of discrimination. As the district court correctly noted, professional sports organizations are "not so sacrosanct"[284] as to be above the law. To the contrary, they are subject to many federal statutes, including federal labor relations and antitrust laws.

The purpose and intent of the ADA demand that Martin be accommodated. It makes no difference to the language of the statute whether the judicial branch or the legislative branch implements its purpose. When a statute's purpose is as clear as the ADA's, textualist-related concerns of enhancing judicial economy and avoiding judicial legislating should acquiesce before the clearly articulated remedial nature of the statute.

Finally, Casey Martin is a consummate shot-maker with skills that rival those of PGA Tour members. Because PGA Tour rules effectively bar Martin from competing professionally *because of* his disability, not allowing him to compete in professional golf is to discriminate against him *because of* that disability. The Americans with Disabilities Act of 1990 prohibits such discrimination, and Martin should therefore be allowed his requested accommodation.

00905956.htm>. The bill that President Clinton signed into law only applies to labor relations, and therefore is limited in scope by its own language and by *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), which held that the NLRA takes precedence over antitrust laws. *See* Associated Press, *supra*.

282. 259 U.S. 200 (1922) (holding that baseball games are purely state affairs, are not engaged in interstate commerce, and are not subject to the antitrust acts); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (stating after thirty years of congressional inactivity, the courts must defer to stare decisis and ignore the fact that baseball is engaging in interstate commerce); Flood v. Kuhn, 407 U.S. 258 (1972) (pointing out that although baseball's exemption from is an aberration, the courts must defer to stare decisis and give effect to congressional inactivity).

283. *See* Associated Press, *supra* note 281 and accompanying text.

284. See Martin v. PGA Tour, Inc. (Martin II), 994 F. Supp. 1242, 1253 (D. Or. 1998).